

Transnational Human Rights Advocacy and the Judicial Review of Global Intelligence Agency Cooperation in Canada

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INTRODUCTION

It is axiomatic that the terrorist attacks of 9/11 contributed to fundamental revisions in thinking about how to address the threats posed by transnational terrorism. To be sure, international terrorism had been a subject of domestic and international concern since at least the 1960s. However, technological advances, changes in global power dynamics, the fall of the Soviet Union, the subsequent proliferation of nuclear, chemical, and biological weapons, greater mobility of people and material goods across borders, enhanced communicative capacities, and the aggravation of colonial and cold war-based regional conflicts have contributed to a fundamental change in the nature and gravity of terrorist threats.¹ By the 1990s, non-state terrorist groups had become extremely well-funded, well-resourced, and organized, while forces of globalization had enhanced their capacity to deploy these resources to inflict large-scale damage across great distances.

Despite these obvious developments, and the warnings issued by certain members of the intelligence community, Western governments did little to adapt intelligence agencies' policies, priorities, and practices. In fact, many governments cut funding during this period, contributing to internecine competition between agencies struggling to justify their existence in a post-Cold War world.² One of the 9/11 Commission's central conclusions on this point was that inefficiency, competition, and fragmentation within the intelligence community inhibited the American government's capacity to quickly identify and respond to the terrorist attacks of 9/11.³ Bob Rae made similar observations in his 2005 report on

¹ For a range of critical commentaries on the changing nature of terrorism in the post-Cold War era, see Gabe Mythen & Sandra Walklate, "Terrorism, Risk and International Security: The Perils of Asking 'What If?'" (2008) 39:2 Security Dialogue 221; Thomas Copeland, "Is the 'New Terrorism' Really New? An Analysis of the New Paradigm for Terrorism" (2001) J Conf Stud 7.

² Richard J Aldrich, "Beyond the Vigilant State: Globalisation and Intelligence" (2009) 35 Rev Int'l Stud 889.

³ Thomas H Kean et al, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, (Washington, DC: National Commission on Terrorist Attacks Upon the United States, 2004) at 401–06. See also Adam D Svendsen, "The Globalization of Intelligence Since 9/11: Frameworks and

the bombing of Air India Flight 182 in 1985, noting that competition between the then new Canadian Security Intelligence Service (CSIS) and the Royal Canadian Mounted Police (RCMP) obstructed the flow of essential intelligence to requisite departments, agencies, and front-line workers.⁴

Influenced by these sorts of observations, Canada's post-9/11 national security policy has been designed to facilitate the performance of three sometimes inconsistent functions. First, it has helped government construct a tightly integrated security system that is notionally organized and directed by a range of centralized political and bureaucratic bodies.⁵ A hallmark of this approach has been the blurring of functional differences among civilian, law-enforcement, and military intelligence agencies, accompanied by their aggregate linkages to Cabinet through such institutions as: a Cabinet Committee on National Security, which is chaired by the Prime Minister; a National Security Advisor to the Prime Minister, who is mandated to "improve co-ordination and integration of security efforts among governmental departments;"⁶ and, an "Integrated Terrorism Assessment Centre" (ITAC), which is located within Public Safety Canada and tasked with the intake, processing, and dissemination of intelligence from and to peripheral departments and agencies.⁷

Although in many ways successful, centralization has been limited by a second priority of post-9/11 national security policy—enhancing domestic intelligence agencies' integration into a plurality of poly-centric global intelligence networks. Of course, Canada has long been a member of various international intelligence regimes. However, post-9/11 global intelligence agency cooperation has followed the contours of multiple, informal "liaisons" with non-traditional allies, such as Pakistan, Morocco,

Operational Parameters" (2008) 21:1 Cambridge Rev Int'l Affairs 129; Michael Smith, "Intelligence-Sharing Failures Hamper War on Terrorism" (26 July 2005), online: Jane's Intelligence Review <<http://articles.janes.com>>.

⁴ Bob Rae, *Lessons to be Learned: The Report of the Honourable Bob Rae, Independent Advisor to the Minister of Public Safety and Emergency Preparedness, on Outstanding Questions with Respect to the Bombing of Air India Flight 182* (Ottawa: Air India Review Secretariat, 2005) at 16–17.

⁵ Government of Canada, *Securing an Open Society: Canada's National Security Policy* (April 2004), online: Privy Council Office <<http://www.pco-bcp.gc.ca>> at 9.

⁶ *Ibid.*

⁷ Government of Canada, *Integrated Terrorism Assessment Centre*, online: Government of Canada <<http://www.itac.gc.ca>>.

and Afghanistan;⁸ sometimes in ways that suggest the loss or absence of centralized political control. For example, Canadian intelligence and law-enforcement officers' seemingly unauthorized cooperation with United States and Syrian counterparts outside of the ambits of formal intelligence and diplomatic channels contributed to the detention, deportation, and torture of Canadian citizen Maher Arar in 2002–2003. A commission of inquiry concluded that Canadian agencies had facilitated grave human rights abuses by sharing false or grossly inaccurate intelligence in violation of clear domestic and international laws as well as a host of internal policies and guidelines.⁹ It also noted that these liaisons frustrated the Department of Foreign Affairs and International Trade's consular efforts to have Mr Arar repatriated. This may be viewed as part of a larger trend towards "transgovernmentalism," which describes formal and informal joint-governance initiatives between the functionally differentiated institutions of two or more governments, often with little input or oversight by non-participating institutions.¹⁰ In this example, the intelligence and diplomatic communities' performance of their respective roles and responsibilities vis-à-vis Syrian agencies frustrated the realization of common goals.

A third feature of post-9/11 national security law and policy in Canada has been the rhetorical use of emergency language to justify or rationalize heavy reliance on extraordinary measures, such as preventative detentions, intrusive surveillance, and extraordinary rendition.¹¹ Legal and political theorists have long noted how executive agencies employ national security rhetoric to rationalize extraordinary measures that operate outside the confines of pre-existing legal rules and/or enduring

⁸ Derek S Reveron, "Old Allies, New Friends: Intelligence-Sharing in the War on Terror" (2006) 50:3 *Orbis* 453.

⁹ I will provide a more detailed review of the circumstances and implications of this example below.

¹⁰ Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004); Anne-Marie Slaughter, "The Real New World Order" (1997) 76:5 *Foreign Affairs* 183; Kal Raustiala, "The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law" (2002) 43 *Va J Int'l L* 1; Robert O Keohane, & Joseph S Nye, "Transgovernmental Relations and International Organizations" (1974) 27:1 *World Politics* 39.

¹¹ For an excellent analysis of the nature and rhetorical uses of national security language, see Barry Buzan et al, *Security: A New Framework for Analysis* (Boulder: Lynne Rienner, 1998) at 21–47.

legal values.¹² Typically, invocations of exceptionality are persuasive because pre-existing rules have not been explicitly designed to address the novel and complex problems posed by public emergencies, or, because the government's political responsibilities to secure public safety and security may on occasion outweigh its duty to comply with clear but unduly restrictive laws.¹³ In such situations, legal institutions must decide whether a political community is indeed facing a public emergency and, if so, whether the extraordinary measures we have used to address this emergency are constitutionally permissible.

A core hypothesis of this paper is that the emergency-laden language of Canadian national security policy and our reliance on extraordinary measures has forced legal institutions, and particularly courts, to undergo a process of constitutional "learning." This learning process involves reflections on the following, non-exhaustive set of issues: did the terrorist attacks of 9/11 create an ongoing public emergency and, if so, what does this mean for the effectiveness or wisdom of "ordinary" regulatory and constitutional norms? Who is authorized to declare whether we are operating in an emergency and using what criteria? And, are select extraordinary measures justified (and according to whom and by what criteria)?

Constitutional learning has been facilitated by two, distinct resources: domestic normative resources and international and comparative law. The former includes any historical normative materials that have been used to regulate national security practices, including: statutory and regulatory law, policy, constitutional rules, principles, and values, the output of commissions of inquiry and Parliamentary committees, and the thick institutional histories of national security agencies, courts, and assorted oversight and review bodies. Partly because of the global dimensions of transnational terrorism and anti-terrorism,¹⁴ and partly due to broader fusions between domestic and international law intersections, legal institutions have supplemented these

¹² David Dyzenhaus, "The State of Emergency in Legal Theory" in Victor V Ramraj et al, eds, *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005) 65; Oren Gross, "Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?" (2003) 112 Yale LJ 1011.

¹³ For a good example of this line of reasoning, see Richard A Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (New York: Oxford University Press, 2006).

¹⁴ Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge: Cambridge University Press, 2011).

domestic resources with international and comparative legal perspectives. The Supreme Court of Canada, for instance, has regularly cited decisions by the Supreme Court of the United States, the United Kingdom House of Lords, the European Court of Human Rights, and other judicial bodies when reviewing the constitutionality of post-9/11 national security laws, policies, and practices. One of the appealing features of this practice is that judges and other decision-makers can test the practical and normative comparative merits of possible legal approaches in Canada by carefully reviewing the successes and failures of foreign normative frameworks designed to deal with similar problems. Taking things one step further, we might even suggest that global judicial networking is an appropriate response and normative counter-weight to global intelligence networks that can help us cultivate a “pan-constitutional law of human rights.”¹⁵

The purpose of this paper is to chart trajectories of courts’ learning about the constitutionality of global intelligence practices. My primary interest will be in whether, how, and why courts have used international and comparative human rights law to inform decisions about the legality of extraordinary measures related to global intelligence practices. Descriptively, I will argue that international and comparative human rights have played a modest role in contextualizing the problems posed by global intelligence agency cooperation as well as in motivating the Supreme Court to restructure the ways in which security intelligence is collected, shared, retained, and disclosed. I make a distinction, however, between international and comparative human rights perspectives, which are sourced in the typically critical views of “transnational human rights networks,”¹⁶ and international and comparative human rights case law, which has been somewhat “apologetic”¹⁷ and sourced in the positive law

¹⁵ Craig Scott & Phillip Alston, “Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney’s Legacy and Grootboom Promise” (2000) 16 SAJHR 206 at 213.

¹⁶ This term is borrowed from scholarship on the various formal and informal processes by which international law enters into and alters domestic law and life; see Hans Peter Schmitz, “Transnational Human Rights Networks: Significance and Challenges” in Robert A Denmark, ed, *The International Studies Encyclopedia* (Oxford: Wiley-Blackwell, 2010) 7189; Judith Goldstein & Robert O Keohane, eds, *Ideas and Foreign Policy* (Ithaca, NY: Cornell University Press, 1993); Martha Finnimore & Kathryn Sikkink, “International Norm Dynamics and Political Change” (1998) 52:4 Int’l Org 887; Thomas Risse et al, eds, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

¹⁷ Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2006).

produced by foreign and regional courts. I will argue that recent international and comparative human rights case law grants the executive too much discretion in defining states of emergency and that judicial reliance on such law is likely to facilitate the normalization of extraordinary practices. I accordingly suggest that it might be more fruitful for transnational human rights advocates to more fully exploit domestic experiences, institutional histories, and wisdom.

The paper is divided into three sections. In the first section, I will describe transformations in the organization and structure of intelligence practices and examine the human rights dimensions of using intelligence as secret evidence in legal proceedings. Second, I will reflect on how international and comparative human rights might help shore up semantic, functional, and jurisdictional deficiencies in Canadian regulatory and constitutional law. Focus will be placed on the role of transnational human rights advocates in facilitating the internalization of international and comparative human rights by judges and other authoritative decision-makers. Finally, I will use a case study on disclosure in security certificate proceedings to test the hypothesis that Canadian courts have used international and comparative human rights to better actualize autonomous legal values associated with human dignity and the rule of law. This case study will involve a loose comparative analysis of interconnected case law from Canadian courts, UK courts, and the European Court of Human Rights (ECtHR).

I. 9/11 AND THE HUMAN RIGHTS DIMENSIONS OF GLOBAL INTELLIGENCE AGENCY COOPERATION IN CANADA

The purpose of this section is to provide a rough empirical account of how processes of intelligence gathering and sharing in Canada have changed post-9/11. It will begin with a survey of Cabinet-led improvements to domestic intelligence agency cooperation, followed by a discussion of the nature and regulatory challenges posed by global intelligence agency cooperation. Particular attention will be paid to links between global intelligence practices and the experiences of Maher Arar. It will conclude with a look at the use of global intelligence as secret evidence in security certificate proceedings, which I connect to the experiences of Mr Arar and the practice of extraordinary rendition.

A. DOMESTIC INTELLIGENCE AGENCY COOPERATION

Historically, military and police agencies conducted the lion's share of Canada's intelligence work, growing in size, complexity, and political influence post-WWII.¹⁸ This remained the case until the early 1980s, when the RCMP's Security Service was investigated by the Royal Commission of Inquiry into Certain Activities of the RCMP (hereafter the Macdonald Commission) for engaging in a litany of illegal acts designed to curb radical Quebecois separatism and other supposed threats to national security.¹⁹ Among the recommendations of the MacDonald Commission was that the Security Service be dismantled and replaced with an entirely civilian intelligence agency trained in intelligence acquisition, processing, and analysis, regulated by robust legal frameworks, and submitted to strong, centralized oversight by political bodies.

In 1984, the government followed this recommendation, creating CSIS. Since then, CSIS has been the agency with primary responsibility for domestic security intelligence work, with the CSE remaining a primary source of foreign signals intelligence. One of the comparative virtues of a civilian intelligence service is that it is held to lower standard evidentiary, disclosure, and privacy standards than are law-enforcement agencies.²⁰ Whereas law-enforcement agencies must demonstrate the "credibly-based probability" of past or future criminal conduct in order to justify significant intrusions of privacy,²¹ CSIS must merely show reasonable suspicion that an individual or group is engaged in activities which pose a threat to Canadian national security.²² Similarly, CSIS has enjoyed wide discretion to deny to the public or affected individuals

¹⁸ Wesley K Wark, "Canada and the Intelligence Revolution" in Heike Bengert et al, eds, *Secret Intelligence in the Twentieth Century* (London: Frank Cass, 2003) 170.

¹⁹ The Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and Security Under the Law: Second Report* (Ottawa: Services Canada, 1981).

²⁰ *Atwal v Canada (Solicitor General)*, [1988] 1 FC 107 at 133–34; *Corporation of the Canadian Civil Liberties Association v Canada (AG)* (1992), 8 OR (3d) 289, 91 DLR (4th) 38 (Gen Div) at para 116. Part of the principle behind these cases is that information collected by CSIS is unlikely to be submitted as evidence against an accused in criminal trials, so affected persons' interest in liberty and privacy is lower.

²¹ Although the lower standard of "reasonable suspicion" justifies investigative stops and detentions, this does not expand powers of search and seizure beyond pat-downs to ensure the safety of officers and persons in the immediate area. *R v Mann*, [2004] 3 SCR 59; *R v Simpson*, [1993] 12 OR (3d) 182, 79 CCC (3d) 482.

²² *Canadian Security Intelligence Services Act*, RSC, 1985, c C-23, s 12 [*CSIS Act*].

personal information collected during the course of its national security investigations.²³

CSIS' enabling legislation and policies underwent numerous changes to improve the regulation of its activities. First, the government created the Security Intelligence Review Committee (SIRC), which is an independent, external review body that reports to Parliament on the performance of CSIS.²⁴ Among other things, it is authorized to hear complaints against CSIS as well to review CSIS' activities.²⁵ SIRC's functions are supported by its entitlement to:

have access to any information under the control of the Service or of the Inspector General that relates to the performance of the duties and functions of the Committee and to receive from the Inspector General, Director and employees such information, reports and explanations as the Committee deems necessary for the performance of its duties and functions.²⁶

Second, Parliament included into the *CSIS Act* a requirement for CSIS officers to acquire judicial authorization for certain, intrusive investigative techniques, following "stringent criticism" of the original CSIS bill that was lacking in this respect.²⁷ Finally, perhaps anticipating *Charter* challenges that had succeeded in the context of law-enforcement officers' powers of search and seizure,²⁸ but most directly due to specific controversies and recurring criticisms regarding warrant applications and surveillance practices,²⁹ CSIS created and then revised an internal review process with respect to the use of intrusive investigative techniques.

²³ Sections 19 and 21 of the *Privacy Act* mandate heads of governmental institutions to refuse to disclose personal information that is received in confidence from foreign nations and permit them to refuse to disclose information the disclosure of which would, in their estimation, be injurious to, inter alia, counter-terrorist activities. *Privacy Act*, RSC 1985, c P-21. The constitutionality of these provisions was upheld in *Ruby v Canada (Solicitor General)*, [2002] 4 SCR 3. Similar provisions may be found in ss 13, 15, and 20 of the *Access to Information Act*, RSC, 1985, c A-1.

²⁴ The legislative framework for SIRC includes s 6 and ss 34-46 of the *CSIS Act*, *supra* note 22.

²⁵ For a full list of its powers and duties, see *CSIS Act*, *supra* note 22, s 38.

²⁶ *Ibid*, s 39.

²⁷ Ian Leigh, "Secret Proceedings in Canada" (1996) 34:1 Osgoode Hall LJ 113 at 133; *CSIS Act*, *supra* note 16, ss 21-28.

²⁸ *Hunter et al v Southam Inc*, [1984] 2 SCR 145; *R v Collins*, [1987] 1 SCR 265.

²⁹ Leigh, *supra* note 27 at 134.

Officers must secure permission from a Warrant Review Committee before applying to the Federal Court for a warrant permitting the use of designated investigative techniques.³⁰ However, these reviews only occur during the course of domestic intelligence activities; no similar reviews are required regarding the acquisition of intelligence received from foreign agencies. Officers must also seek approval from the Target Approval and Review Committee in order to target individuals (specified or otherwise) and organizations for investigation, using standards outlined in section 2 of the *CSIS Act*.³¹

Although dividing security intelligence and policing is sensible, many observers believed that functional distinctions of this sort were “artificial, and that in fact the lines between the two were frequently blurred.”³² In an attempt to remedy this problem, the RCMP and CSIS signed a Memorandum of Understanding in 1984 that outlined the conditions under which the agencies would share intelligence and other information.³³ However, this agreement had failed to ensure cooperation. For example, the Rae Report indicated that CSIS had deliberately failed to share essential information with the RCMP with respect to the Air India bombing and, what is more, it had even destroyed crucial pieces of evidence, pursuant to internal policy.³⁴

The government reduced incentives for competition post-9/11 by increasing funding and responsibilities to both agencies and by trying to engender parallel or cooperative (although not necessarily collaborative) national security investigations.³⁵ The creation of ITAC, the Cabinet Committee on National Security, and a National Security Advisor contribute to the realization of this latter objective. It is reasonable to

³⁰ Security Intelligence Review Committee, *Annual Report: 1987–88*, online: Government of Canada <<http://www.sirc-csars.gc.ca>>; House of Commons Special Committee on the Review of the *CSIS Act* and the *Security Offenses Act*, *In Flux but Not in Crisis* (Ottawa: House of Commons Publications Service, 1990) at 14.

³¹ Security Intelligence Review Committee, *Annual Report: 1986–87*, online: Government of Canada <<http://www.sirc-csars.gc.ca>> at 36.

³² Rae, *supra* note 4 at 12.

³³ *Ibid* at 12. CSIS is also authorized to disclose intelligence and other information to law-enforcement agencies for the purposes of facilitating an investigation and/or prosecution; see *CSIS Act*, *supra* note 22, s 19.

³⁴ Rae, *supra* note 4 at 16–17.

³⁵ *Securing an Open Society*, *supra* note 5 at 16–17; Martin Rudner, “The Globalization of Terrorism: Canada’s Intelligence Response to the Post-September 11 Threat Environment” (September 2002) *Canadian Issues* 24.

conclude that information exchange between CSIS and the RCMP has improved at least partly due to post-9/11 shifts in priorities. For example, in the aftermath of 9/11, CSIS and the RCMP were placed under enormous pressure to contribute to the identification of suspects and possible future attacks.³⁶ Lacking the capacity to conduct full and effective investigations on its own, and recognizing that the identification and capture of persons involved in the 9/11 attacks was largely a law-enforcement matter, CSIS transferred files on suspected terrorists of note to the RCMP, along with primary (though not exclusive) responsibility for future investigations.³⁷ However, since anti-terrorism is directed towards both the prevention and punishment of terrorist acts, CSIS and the RCMP agreed to coordinate their efforts. Coordination was facilitated through periodic briefings and meetings as well as the provision of situation reports.³⁸

At first glance, parallel investigations and enhanced cooperation between CSIS and the RCMP run counter to the fundamental recommendation of the MacDonald Commission, namely, to maintain clear separations between security intelligence work and policing.³⁹ In 2008, the Supreme Court of Canada noted that, the “division of work between CSIS and the RCMP in the investigation of terrorist activities is tending to become less clear than the authors of the (MacDonald) reports ... originally envisioned.”⁴⁰ This raises the question of whether we should revise the regulatory frameworks applicable to CSIS and the RCMP in the context of national security investigations.

On the one hand, CSIS’ increasing role in furnishing Crown prosecutors with evidence to be used in trials suggests that it should be subject to more exacting rules governing privacy and disclosure in the context of criminal investigations and prosecutions. It follows that cases such as *Atwal*, which perhaps were appropriate for a different time, should

³⁶ The 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* (18 December 2006), online: Canadian Heritage <http://www.pch.gc.ca/cs-kc/arar/Arar_e.pdf> [O’Connor Report] at 66.

³⁷ *Ibid* at 66–67.

³⁸ *Ibid* at 69.

³⁹ This, of course, is not a necessary consequence. On this point, see *R v Ahmad*, [2009] OJ No 6153. For a contrasting view and concern for maintaining clear functional distinctions, see the O’Connor Report, *supra* note 36 at 312–315.

⁴⁰ *Charkaoui v Canada (Citizenship and Immigration)* (2008), 294 DLR (4th) 478 [*Charkaoui II*] at para 26.

be reconsidered.⁴¹ In addition to its direct involvement in criminal investigations and prosecutions, CSIS has been the primary source of evidence used in security certificate proceedings.⁴² Security certificates are used to indefinitely detain and submit suspected terrorists to extended secret trials in their absence. If a judge finds the certificate to be reasonable, the government may deport named persons to face persecution and, in some instances, a substantial risk of torture or similar abuse. Although not formally criminal law proceedings, the Supreme Court of Canada has found that certificate proceedings are analogous to criminal prosecutions by virtue of the impacts they can have on an accused's dignity, life, liberty, and personal security.⁴³

On the other hand, the RCMP has assumed greater roles and responsibilities in national security investigations, yet it is not subject to review mechanisms similar to those applicable to CSIS. This is somewhat surprising, since review mechanisms applicable to CSIS were designed precisely to prevent the re-occurrence of rights abuses committed by RCMP officers during the course of security intelligence work. Further, the RCMP has only recently begun adequately training its officers in security intelligence work. As the O'Connor report amply conveyed, lack of training, minimal oversight and review, and pressure to produce results contributed to the sorts of illegalities and abuse of rights that led to the creation of CSIS in the first place.⁴⁴ If the RCMP is going to continue to engage in preventative national security investigations, there are good reasons to revise existing regulatory frameworks.

B. GLOBAL INTELLIGENCE AGENCY COOPERATION

Generally speaking, global intelligence agency coordination takes two forms: multilateral and bilateral.⁴⁵ Multilateral intelligence

⁴¹ These sorts of issues are being raised; see *Ahmad*, *supra* note 34; *R v Ahmad*, [2011] 1 SCR 110.

⁴² I will provide a more detailed overview of security certificates below.

⁴³ *Charkaoui v Canada (Citizenship and Immigration)*, [2007] 1 SCR 350 [*Charkaoui I*].

⁴⁴ O'Connor Report, *supra* note 36 at 23–25, 71–72, 107–11, 118, 323–24, 332–43.

⁴⁵ For excellent pieces on multilateral and bilateral intelligence networks, see Aldrich, *supra* note 2; Reveron, *supra* note 8; Adam D Svendsen, "Connecting Intelligence and Theory: Intelligence Liaison and International Relations" (2009) 24:5 *Intelligence & National Security* 700; Martin Rudner, "Hunters and Gatherers: The Intelligence Coalition Against Islamic Terrorism" (2004) 17:2 *International Journal of Intelligence*

frameworks are *formal* regimes that host long-term interactions between the intelligence agencies of more than two states. They are often codified, setting out a range of governing rules and principles relating to such matters as: burden sharing, technology sharing, targeting and coverage, operational collaboration, accessibility to intelligence assets, and wholesale intelligence sharing.⁴⁶ Multilateral arrangements provide a range of benefits, including the enhancement of trust, increases in collective strength and resilience, and more effective pursuit of common interests. Regular, policy-oriented interactions among leaders within the intelligence communities of participating states also contribute to long-range planning and priority-setting. Finally, as international legal institutions, networks structured within multilateral frameworks are more amenable to direction and control by heads of government and/or state and their representatives.

However, multilateral arrangements also carry a number of distinct disadvantages. First, the operation of formal institutional arrangements can be hindered by extraneous variables, including: the domestic laws and policies, of participating states; international dynamics and “regime collisions” (e.g. between the demands of various multilateral arrangements or between multilateral arrangements and international human rights);⁴⁷ and differences in the internal culture of participating intelligence agencies.⁴⁸ Second, although shrouded in secrecy, multilateral networks are designed to disseminate intelligence to a wide range of recipients, reducing individual intelligence agencies’ ability to control the precise locations to which that intelligence is sent. Shared intelligence may accordingly be kept generic and less useful, particularly with regards to ongoing operations.⁴⁹

While multilateral arrangements are useful in many respects, intelligence agencies often prefer a “well-cultivated and closely monitored

and Counterintelligence 193; Glen M Segell, “Intelligence Agency Relations Between the European Union and the US” (2004) 17:1 *Int’l J of Intelligence & Counterintelligence* 81; Stéphane Lefebvre, “The Difficulties and Dilemmas of International Intelligence Cooperation” (2003) 16:4 *Int’l J of Intelligence & Counterintelligence* 527.

⁴⁶ Rudner, *supra* note 45 at 195.

⁴⁷ Gunther Teubner & Andreas Fischer-Lescano, “Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law” (2004) 25:4 *Mich J Int’l L* 999.

⁴⁸ Lefebvre, *supra* note 45 at 529.

⁴⁹ Jennifer E Sims, “Foreign Intelligence Liaison: Devils, Deals, and Details” (2006) 19:2 *Int’l J of Intelligence & Counterintelligence* 195 at 202.

bilateral arrangement rather than exchanges within a group.”⁵⁰ Bilateral frameworks arise when intelligence agencies enter *ad hoc* relationships with agencies of a foreign country in relative autonomy from an overarching international legal framework.⁵¹ They can be agency-wide and formally structured pursuant to memorandums of understandings, or, they can be informal, consisting in undocumented understandings between individuals or sub-groups within two or more agencies.⁵² In either case, bilateral arrangements tend to be structured by the “third-party rule,” in which any intelligence or other information sent to a requesting agency may not be disclosed to a third-party without the sending agencies’ express authorization. This rule helps maintain the bilateral nature of the relationship and maintains trust.

It is often said that a defining feature of bilateral intelligence relationships is that they “operate within the framework of each partner’s foreign and domestic policies and legal systems” rather than an international regime *per se*.⁵³ Differences in domestic legal standards applicable within participating states can impede cooperation or, alternatively, it can force agencies to find ways around accountability mechanisms. These issues have arisen more frequently post-9/11, as Canadian, US, and European agencies increasingly rely on foreign intelligence produced by non-traditional partners with poor human rights records, such as Morocco, Syria, and Afghanistan.⁵⁴

Canada has asserted some level of control over bilateral arrangements by requiring that they be approved by high-ranking Cabinet Ministers.⁵⁵ Section 17 of the *CSIS Act*, for instance, requires that the Minister of Public Safety, after consulting the Minister of Foreign Affairs, to approve CSIS’ cooperation with a foreign state government or institution. The Minister will take into account the implications that

⁵⁰ *Ibid* at 202.

⁵¹ Rudner, *supra* note 45 at 213; Lefebvre, *supra* note 27 at 533; Sims, *supra* note 31.

⁵² Lefebvre, *supra* note 45 at 533.

⁵³ Rudner, *supra* note 45 at 214.

⁵⁴ Svendsen, *supra* note 3; Richard J Aldrich, “Global Intelligence Co-operation versus Accountability: New Facets to an Old Problem” (2009) 24:1 *Intelligence & National Security* 26; Chris Clough, “Quid Pro Quo: The Challenges of International Strategic Intelligence Cooperation” (2004) 17:4 *Int’l J of Intelligence & Counterintelligence* 601; Shlomo Shpiro, “Intelligence Services and Political Transformation in the Middle East,” (2004) 17:4 *Int’l J of Intelligence & Counterintelligence* 575.

⁵⁵ For CSIS and the RCMP, this is the Minister of Public Safety Canada and the Minister of Foreign Affairs and International Trade. See Lefebvre, *supra* note 45 at 535.

intelligence relationships will have on domestic law and policy, public confidence, as well as international legal obligations springing from multilateral arrangements and international human rights. Canadian agencies are also legally obligated to control the information they acquire through the course of their investigations. RCMP policy, for example, requires officers: to consider why a requesting agency wants information; to ensure that the uses to which that information will be put are consistent with Canadian law and policy; to screen information for reliability; to notify or acquire approval from senior officers in most cases; to ensure that disclosure of information complies with Canadian privacy laws; and, to attach caveats to released information outlining the uses to which that information may and may not be put.⁵⁶ CSIS is constrained by similar policies and is, as we have noted, subject to regular reviews by SIRC.

Despite these measures, the governance of global intelligence agency cooperation has proven to be exceedingly difficult within Canada. Much of this problem has to do with tensions between the centripetal force exerted by governmental structures, laws, and policies, and the centrifugal force exerted by globalized threat environments. On the one hand, the intelligence community is part of a consolidated national security framework notionally structured by constitutional norms. On the other hand, it has been asked to perform functions that require it to immerse itself in poly-centric, fluid, and largely informal networks which transcend Canadian jurisdiction. Intelligence officers and, presumably, Cabinet will sometimes act as though the exigencies of counter-terrorism require the prioritization of questionable bilateral arrangements over adherence to legal rules. In other words, the ends will be taken to justify the means- under certain circumstances.

The Report of the Royal Commission into the Activities of Canadian Officials Regarding Maher Arar (hereafter the O'Connor Commission/Report) illustrates these tensions well. As the public's most comprehensive source of information on global intelligence agency cooperation, the O'Connor Report was concerned with Canada's role in the US' decision to detain and then deport Canadian citizen Maher Arar to Syria in 2002, where he was tortured for almost one year. The Commission found that the US had falsely identified Mr Arar as a terrorist threat on the basis of inaccurate and misleading intelligence provided by the RCMP. In particular, the RCMP ignored policies governing information exchange by transferring, in bulk format, entire files to US

⁵⁶ O'Connor Report, *supra* note 36 at 22–23, 103–08.

authorities without: scrutinizing information for reliability; informing superior officers; or, ensuring that they would not be put to uses contrary to Canadian law and policy.⁵⁷ Perhaps the most serious of these omissions were the failures to screen information for reliability and to assume that no caveats needed to be attached to ensure that the information would not be circulated to third-parties.⁵⁸ Together, these omissions resulted in Syria receiving highly inaccurate information from American authorities that implied Canada was indifferent to, if not fully supportive of, Mr Arar's deportation.

The Commission concluded that breach of official law and policy was the result of a number of factors, including tremendous political pressure applied by the US and Canadian governments, lack of training for new counter-terrorism officers, and poor internal leadership, communication, and supervision. The Commission also concluded that Canadian authorities at the very least inadvertently facilitated the torture of Mr Arar as well as Abdullah Almalki, another Canadian citizen detained in Syria, by sending Syria questions to be asked of the latter that implicated the former.⁵⁹ These questions were sent despite knowledge of Syria's human rights record and of the likelihood that each man was being or would be tortured.⁶⁰ Although not directly mentioned in the report, it is possible that Canada was engaging in what has been called "extraordinary rendition" or "torture by proxy," whereby persons are illegally removed to foreign countries to be tortured, largely to produce actionable intelligence.⁶¹ There is considerable evidence that Canadian intelligence agencies have worked with the US in precisely this way with respect to Ahmad El- Maati, Almalki, and others.⁶²

One way of understanding the regulatory challenges posed by

⁵⁷ *Ibid* at 23–24.

⁵⁸ The O'Connor Commission received conflicting testimony from investigating, managing, and supervising officers concerning whether unrestricted information exchange was a matter of mistaken assumptions about the requirements of policy or conscious decision to establish alternative, informal policies with respect to the Canadian-US intelligence relationship; *ibid* at 109–11.

⁵⁹ *Ibid* at 206–07.

⁶⁰ *Ibid* at 179–81.

⁶¹ All Party Parliamentary Group on Extraordinary Rendition, *Briefing: Torture by Proxy: International Law Applicable to 'Extraordinary Renditions'* (December 2005), online: Centre for Human Rights and Global Justice <<http://www.chrgj.org>>.

⁶² Stephen Grey, *Ghost Plane: The True Story of the CIA Torture Program* (New York: St Martin's Press, 2006).

global intelligence agency cooperation is through the concept of transgovernmentalism. Transgovernmentalism describes the formation of joint-governance initiatives between the functionally differentiated institutions of two or more governments, often with little input or oversight by non-participating institutions. Transgovernmental networks are forged by groups of persons who have expertise over problems faced by two or more states, share core normative beliefs and commitments, and have direct and sustained contact with authoritative decision-makers. This transnational community condenses and translates high volumes of technical information into manageable form relevant to the making of political choices. The more frequently experts from one jurisdiction interact with experts from another jurisdiction, the more they will come to share certain beliefs, values, identities, interests, and judgments. Insofar as experts systematically influence decision-making within their respective jurisdictions, the policies or practices of those jurisdictions will converge.

Useful as transgovernmentalism may be as a heuristic device, we must be careful not to overstate the “loss-of-sovereignty” argument. The growth of transgovernmental linkages has occurred at the same time as Cabinet has asserted greater control over intelligence practices. The intelligence community’s rise in influence accordingly cuts both ways; intelligence processes are structured by domestic policy preferences at the same time as political decisions are formed and shaped by global intelligence. Moreover, changes to the nature and organization of intelligence practices have hardly occurred independently of Parliamentary or judicial involvement. As we will shortly see, Parliament has passed several pieces of national security legislation that have facilitated the intelligence community’s expanding influence. At the same time, Parliamentary committees have in some instances been highly critical of national security law and policy, issuing a number of recommendations to improve rights respect and the rule of law.⁶³ It is generally true democratic values such as the rule of law, respect for rights, accountability, and transparency have been affected by global intelligence

⁶³ Parliament, Government of Canada, *Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the Anti-terrorism Act* (Ottawa: Special Senate Committee on the Anti-terrorism Act, 2007); Parliament, Government of Canada, *Rights, Limits, Security: A Comprehensive Review of the Anti-terrorism Act and Related Issues* (Ottawa: Standing Committee Public Safety and National Security, 2007); Parliament, Government of Canada, *Detention Centres and Security Certificates* (Ottawa: House of Commons Standing Committee on Citizenship and Immigration, 2007).

agency cooperation. However, it is dangerous to suggest that global intelligence networks are inherently ungovernable.

C. GLOBAL INTELLIGENCE PRACTICES AND EXTRAORDINARY MEASURES: THE CASE OF SECURITY CERTIFICATES

Security certificates are a good example of the problems posed by global intelligence agency cooperation. In existence since 1976, the security certificate regime was reformulated in the 1990s and then again just prior to 9/11. Certificates are currently issued under the joint powers of the Ministers of Citizenship and Immigration and of Public Safety⁶⁴ (“the Ministers”) and are issued against permanent residents and foreign nationals the Ministers allege are inadmissible to Canada on the grounds of security, the violation of human or international rights, and engagement in serious criminality or organized crime.⁶⁵ Once issued, certificates authorize the detention of non-citizens pending a review of the reasonableness of the certificate by a Federal Court judge. Judges are required to order the continuation of a detention unless they are satisfied that the conditional release of a detainee would not be injurious to national security or endanger the safety of any person or that the detainee would be unlikely to fail to appear at a proceeding or for removal.⁶⁶

If a certificate is ultimately found to be reasonable, it stands as conclusive proof that the person named in it is inadmissible and becomes an effective removal order.⁶⁷ However, during the course of reviews on the reasonableness of certificates, a named person may apply to the Minister of Citizenship and Immigration for protection as a refugee or person in need of protection.⁶⁸ In the event that the application is successful, the Ministers still may issue a danger opinion,⁶⁹ enabling them to deport persons to face the substantial risk of persecution (which is

⁶⁴ The Minister of Public Safety (formerly the Minister of Public Safety and Emergency Preparedness) replaced the Solicitor General in this capacity in 2005. See *Immigration and Refugee Protection Act*, RSC 2001, c 27, s 4.

⁶⁵ *Ibid*, s 77(1).

⁶⁶ *Ibid*, s 82(5).

⁶⁷ *Ibid*, s 80.

⁶⁸ *Ibid*, s 112.

⁶⁹ *Ibid*, s 115(2)(b).

consistent with international law)⁷⁰ and, in exceptional circumstances, torture and similar abuses (which is inconsistent with international law).⁷¹

Overseen jointly by the Ministers of Citizenship and Immigration and of Public Safety, the certificate regime is one of the means by which domestic and global intelligence is put to practical use. Working under the direction of the Minister of Public Safety, CSIS provides the bulk of information and other evidence used in support of certificates. This evidence is collected pursuant to ongoing domestic investigations as well as from foreign sources. Given named persons' countries of origin, significant volumes of foreign intelligence come from non-traditional intelligence partners, such as Morocco, Syria, Egypt, and Algeria. These global linkages presage named persons' physical removal to these countries in order to face arrests, detentions, and possibly prosecutions, highlighting functional similarities between certificate and extradition proceedings.⁷² In these ways, certificates protect Canadian national security and, by denying safe haven to alleged terrorists, discharge our international legal obligation to "cooperate on administrative and judicial matters to prevent (and punish) the commission of terrorist acts" regardless of where they might have occurred.⁷³

Since most of the evidence supporting the Ministers' allegations is derived from security intelligence, much of it is not disclosed to named persons or their legal counsel. In fact, until very recently, Parliament had granted the Ministers unfettered discretion to decide what information would be disclosed even to reviewing judges.⁷⁴ This discretion authorized

⁷⁰ *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, Can TS 1969 No 6 (entered into force 22 April 1954, accession by Canada 2 September 1969), arts 1(F), 33.

⁷¹ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, Can TS 1987 No 36 (entered into force 26 June 1987), arts 2, 3, 16; *Conclusions and Recommendations of the Committee against Torture: Canada*, UN CAT, 34th Sess, UN Doc CAT/C/CR/34/CAN (July 2005) at para 6(a); *Suresh v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3 at paras 59–75.

⁷² Graham Hudson, "The Administration of Justice? Certificate Proceedings, *Charkaoui II*, and the Value of Disclosure" (2010) 48:1 Alb L Rev 195.

⁷³ SC Res 1373, UNSC, 4385 Mtg, UN Doc S/RES/1373 (2001); SC Res 1540, UNSC, 4956 Mtg, UN Doc S/RES/1540 (2004); SC Res 1624, UNSC, 5261 Mtg, UN Doc S/RES/1624 (2005).

⁷⁴ The Supreme Court removed this discretionary authority in 2008, requiring Ministers to disclose all information on file relevant to named persons. Reviewing judges then

the Ministers to withhold exculpatory evidence, such that a judge might only see materials that supported the reasonableness of a certificate. For reasons not directly related to certificate proceedings, CSIS had adopted the policy of destroying its operational notes that were, in its estimation, no longer “strictly necessary” from the standpoint of ongoing investigations.⁷⁵ These notes included originals of interviews with named persons and intelligence received from foreign countries. This policy contributed to the absence of full disclosure, if even to reviewing judges.

Security certificates raise issues that are strikingly similar to those identified by the O’Connor Commission. For example, in May, 2003, the Ministers issued a certificate against Adil Charkaoui, a Moroccan-born permanent resident. At this point, several proceedings commenced regarding the reasonableness of the certificate and Mr Charkaoui’s detention. On the advice of his counsel, Mr Charkaoui requested that proceedings be postponed and, in July, he unsuccessfully applied to the Minister of Citizenship and Immigration for protection as a refugee or person in need of protection, pursuant to provisions governing pre-removal risk assessments.⁷⁶ At the time, applications for protection had the effect of suspending the review of the reasonableness of the certificate.⁷⁷ Mr Charkaoui’s application for protection was refused on August 6, 2004 and, on November 9, 2004, Noel J scheduled the resumption of the review of the reasonableness of the certificate for February 21, 2005. However, upon hearing that Moroccan authorities had recently issued a warrant for Mr Charkaoui’s arrest, Noel J ordered that the Minister of Citizenship and Immigration reconsider Mr Charkaoui’s request for protection. While this had the effect of suspending the resumption of the review of the *reasonableness* of the certificate scheduled for February, Noel J properly proceeded to schedule a fourth detention review hearing for January 10, 2005.

However, on January 5, 2005, the Ministers disclosed to a reviewing judge a summary of two interviews which were held between Mr Charkaoui and CSIS on January 31 and February 2, 2002. Although CSIS had this summary in its possession in 2002, it failed to provide it to the Ministers both prior to their decision to issue the security certificate

possess the power to order disclosure of this information to named persons; *Charkaoui II*, *supra* note 40.

⁷⁵ *Supra* note 22, s 12.

⁷⁶ *Supra* note 64, ss 112–16.

⁷⁷ *Ibid* s 79.

and immediately after the commencement of proceedings. The Ministers claimed that the document “had not been produced because of an oversight.”⁷⁸ They also asserted that the original interviews could not be disclosed because they had been destroyed consistent with CSIS policy. A summary of the interviews was passed to the court and Mr Charkaoui *in lieu* of the originals.

At the same time, the Ministers submitted additional evidence that they had recently received from the Moroccan government. This evidence stated that: Moroccan authorities had identified Mr Charkaoui as a member of the Groupe Islamique Combattant Marocain (GICM): that the GICM is linked to al-Qaeda and is allegedly responsible for terrorist attacks in Casablanca and Madrid, on May 16, 2003 and March 11, 2004, respectively; that Mr Charkaoui took educational and theological training in Afghanistan in 1998; that Mr Charkaoui was identified by the emir of the GICM; that Mr Charkaoui set up funds to support international terrorist cells; and, that Mr Charkaoui sent funds and resources directly to the GICM.⁷⁹ As a result of these allegations, Moroccan authorities had issued an arrest warrant against Mr Charkaoui and were anxious to have him returned to their jurisdiction.

There are two interrelated normative issues at play here. First, there are issues concerning the norms that apply to the receipt, retention, and disclosure of information, particularly when Canadian agencies interact with countries that have poor human rights records. In Mr Charkaoui’s case, CSIS worked closely with Morocco, a country long recognized to engage in torture and other human rights abuses, particularly when dealing with alleged terrorists.⁸⁰ There is no evidence to suggest that CSIS made efforts to ensure that the investigative techniques used to generate evidence against Mr Charkaoui consisted with international or Canadian law or was credible.⁸¹ In fact, at the time, CSIS

⁷⁸ *Charkaoui II*, *supra* note 40 at para 8.

⁷⁹ *Charkaoui (Re)* (2005), FC 149 at para 27.

⁸⁰ Human Rights Watch, “Human Rights at a Crossroads” (October 2004), online: Human Rights Watch <<http://www.hrw.org>>; Human Rights Committee, *Concluding observations of the Human Rights Committee: Morocco*, UN Doc CCPR/CO/82/MAR1, 82nd Sess (1 December 2004) at paras 10, 14m, 15–17, 19–21. For a more recent report, see Amnesty International, *Report: State of the World’s Human Rights* (2009), online: Amnesty International <<http://report2009.amnesty.org>>.

⁸¹ The dangers of this are in some respects mitigated by the inadmissibility into certificate proceedings of information believed on reasonable grounds to have been acquired through the use of torture or similar abuse; see the *Immigration and Refugee*

was under no serious obligation to do so.

Second, there are serious issues about the treatment Mr Charkaoui would receive if deported to Morocco. Given Morocco's human rights record, implicating Mr Charkaoui in terrorism and attempting to deport him exposed him to the substantial risk of torture or similar abuse. Canada is internationally obligated to never deport a person to face the substantial risk of torture, even if such persons pose a national security risk. Generally speaking, Parliament has implemented this international obligation, but has made an exception in the case of persons named in a valid certificate.⁸² The Supreme Court, meanwhile, has refused to give full effect to international human rights in this regard, ruling in *Suresh v Canada* that the executive may, in "exceptional circumstances," deport persons to face the substantial risk of torture.⁸³ In the absence of meaningful disclosure and adversarial challenge in certificate proceedings,⁸⁴ the government runs the risk of exposing potentially innocent persons to face torture on the basis of misinformation and circumstantial evidence, much as American authorities had done to Mr Arar in the context of US immigration law.

II. REGULATING GLOBAL INTELLIGENCE AGENCY COOPERATION: INTERNATIONAL AND COMPARATIVE HUMAN RIGHTS AND DOMESTIC CHANGE

In many ways, the legal dilemmas posed by post-9/11 intelligence practices are not new. Legal and political theorists have long observed that law loses its effectiveness during times of real or perceived crisis, as executive agencies employ extraordinary measures that are not, strictly speaking, justified by or sourced in pre-existing law.⁸⁵ The legitimacy of these measures tends to be tested against political standards and, more practically, the successful invocation of national security rhetoric and the exploitation of legal ambiguities or "indeterminacy."

Protection Act, *supra* note 64, s 83(1.1). Intelligence received through less egregious but still unlawful techniques, however, is still admissible.

⁸² *IRPA*, *supra* note 64, s 115.

⁸³ *Suresh*, *supra* note 71 at paras 59–75.

⁸⁴ Significant improvements have been made in this regard such as through the incorporation of a "special advocate" regime into *IRPA*. I will review the nature and quality of this regime below.

⁸⁵ Dyzenhaus, *supra* note 12; Gross, *supra* note 12.

Legal indeterminacy describes the inability of law—no matter how clearly and definitely it may be described—to determine a unique solution to any legal problem.⁸⁶ It is caused in part by the dynamic and open-textured nature of legal texts, which yield a plurality of possible conclusions depending on how one interprets and arranges legal and factual premises. We can adopt a range of theoretical and normative stances on legal indeterminacy. Critical observers insist that judicial decisions are typically based on political or ideological assumptions that reinforce relations of domination, which results in a virtual collapse of the law/politics distinction.⁸⁷ More optimistic observers would counter that indeterminacy provides judges an opportunity to use various moral, ethical, and other non-state normative frameworks to enhance the “congruence” of state law and ambient social values, practices, and expectations.⁸⁸ In the former instance, judges use the values and beliefs of executive officials and other state authorities as bases of a decision, while in the latter instance they use the values and beliefs of non-state discursive communities. Implied in the optimistic view is that legal interaction is concerned with generating understanding and that judges will use their interpretive freedom to steer law towards the protection and promotion of values associated with human dignity.

In normal situations, either of these perspectives is tenable. In times of emergency, however, critical perspectives may seem more attractive. This may be because an emergency poses novel and complex problems the solutions to which lawmakers have not yet contemplated. Until such time as legal institutions produce workable laws, executive agencies have to base their decisions on non-legal criteria more germane to their areas of expertise. Alternatively, there may be definite rules

⁸⁶ The problem of normative indeterminacy was perhaps most famously iterated by such legal realists as: Oliver Wendell Holmes Jr, “The Path of the Law” (1897) 10 Harv L Rev 457; Herman Oliphant, “A Return to Stare Decisis” (1928) 14 ABA J 71; Underhill Moore & Theodore Hope, “An Institutional Approach to the Law of Commercial Banking” (1929) 38:6 Yale LJ 703; Karl Llewellyn, “A Realistic Jurisprudence: The Next Step” (1930) 30 Colum L Rev 431; Karl Llewellyn, “Some Realism about Realism: Responding to Dean Pound” (1931) 44 Harv L Rev 1222; Edward S Robinson, “Law: An Unscientific Discipline” (1934) 44 Yale LJ 235.

⁸⁷ David Kairys, “Law and Politics” (1984) 52 Geo Wash L Rev 243.

⁸⁸ Stephen J Toope & Jutta Brunnee “International Law and Constructivism: Elements of an Interactional Theory of International Law” (2000) 39:19 Colum J Transnat’l L 19 at 49; Gerald J Postema, “Implicit Law” (1994) 13 Law & Phil 361; Friedrich V Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989).

pertinent to an emergency situation, but the executive may consider these rules to be inappropriate or impractical under the circumstances. Using the rhetoric of national security, executive official will try to push the boundaries of law to rationalize actions that, in normal situations, might seem illegal or at least politically unpalatable. This practice is exemplified in Deputy Assistant Attorney General James Yoo and Assistant Attorney General Jay Bybee's attempt to expansively interpret the legal meaning of "torture" to help legitimize questionable interrogation techniques during the United States' "War on Terror."⁸⁹

Of course, parliament and the judiciary still have a role to play in times of crisis. In particular, they must decide how to react to invocations of exceptionality and the deployment of extraordinary measures.⁹⁰ Parliament, for example, could amend ordinary, statutory law to more expressly prohibit or, alternatively, to legalize extraordinary actions *post-facto*. In the former case, one would rightly question the efficacy of these rules; would they lead to changes in executive conduct or stand, at best, as symbolic affirmations of the rule of law?⁹¹ In the latter instance, one should query whether the normalcy provided by law rationalizes practices that run counter to enduring legal values, such as human rights and the rule of law.⁹² Emergency situations can pose a stark choice between upholding the symbolic value of law and promulgating rules that may mask "substantial damage to the rule of law" but which at least are comparatively effective.⁹³

These are the sorts of considerations Canadian courts have made when reviewing the constitutionality of national security law, policy, and practices. Of course, constitutional norms are as indeterminate as are any other legal norms. But courts seem to have filled in logical and semantic gaps in constitutional texts by relying on international and comparative human rights, suggesting that an optimistic perspective on how judges can and do exploit indeterminacy is still worth defending. Indeed, international and comparative human rights can help constrain the

⁸⁹ William Ranney Levi, "Interrogation's Law" (2009) 118 Yale LJ 1434.

⁹⁰ John Ferejohn & Pasquale Pasquino, "The Law of Exception: A Typology of Emergency Powers" (2004) 2 Int'l J Const L 210.

⁹¹ Even if purely symbolic, there may be value in defending the rule of law; see David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Oxford: Clarendon Press, 1991).

⁹² Gross, *supra* note 12 at 66.

⁹³ Dyzenhaus, *supra* note 12 at 72.

projection of political and ideological power by providing a set of clear, definitive criteria concerning when and by what procedures human rights may be limited for reasons of national security. Legal definitions of and justifications for torture, for instance, will typically require one to reference international legal texts the meaning of which is clarified by multiple interpretive bodies, such as the Committee Against Torture. Excessive or bad faith deviations from these meanings will render one's interpretations less persuasive.

No more determinate than other legal norms, international and comparative human right texts nonetheless stand as relatively stable clusters of meaning that, when connected to each other, help triangulate points of common or shared meanings. This is to say that they help facilitate and constrain the interpretation of legal concepts and values that are collectively constructed by diverse discursive communities. Integration in formal and informal institutions of legal interpretation can also enhance Canadian judges' willingness and capacity to effectively scrutinize national security rhetoric. "Transjudicial"⁹⁴ linkages with international and foreign courts can bolster judges' sense of common purpose or identity as guardians of a global rule of law.

A. INTERNATIONAL AND COMPARATIVE HUMAN RIGHTS, CANADIAN COURTS, AND CONSTITUTIONAL LEARNING

International and comparative human rights have inherent appeal when reflecting on the legality of extraordinary measures linked to global intelligence agency cooperation. First and foremost, international and comparative human rights help us challenge the government's invocation of exceptionality. International human rights documents, for instance, contain clear criteria concerning when and by what procedures human rights may be limited in order to contend with a crisis. Article 4(1) of the *International Covenant on Civil and Political Rights* provides a typical example:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required

⁹⁴ Anne-Marie Slaughter, "A Typology of Transjudicial Communication," in Thomas Franck & Gregory H Fox, eds, *International Law Decisions in National Courts* (Irrington, NY: Transnational Publishers, 1996) 37.

by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.⁹⁵

These sorts of provisions require governments to expressly and officially declare a state of emergency and impose limits on what kinds of extraordinary measures may be taken. In addition to ensuring that rights limitations are proportionate to the harm being avoided, there are absolute bars on derogations from certain rights, including rights to equality and non-discrimination, to life, and to be free from torture or similar abuses.⁹⁶

Second, treaty bodies and international courts are empowered to comment upon whether extraordinary measures are justified. The work of these and other discursive communities can help us fill in legal gaps by concretizing and specifying human rights norms in the context of public emergencies. This helps compensate for legal indeterminacy, lending Parliament and judges a rich array of normative materials upon which to rely when faced with novel and complex legal problems. Indeed, human rights-based discursive communities have on a number of occasions commented directly on how Canada's role in global intelligence agency cooperation has affected its human rights record and how national security and human rights may be more effectively balanced.⁹⁷

Finally, since our constitution is as indeterminate as any other legal text, international and comparative human rights can help judges identify, interpret, and apply enduring legal values in novel contexts. More precisely, international and comparative human rights help jurists: attain a deeper knowledge of the global and multicultural contexts of Canadian law; draw out the full range of meanings latent within *Charter* provisions; and, integrate Canadian law with international and cognate

⁹⁵ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976).

⁹⁶ *Ibid.*, art 4(2)

⁹⁷ International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (Geneva, Switzerland: International Commission of Jurists, 2009) at 67–73; Human Rights Committee, *Concluding Observations of the Human Rights Committee: Canada*, UN Doc CCPR/Can/Co/5, 85th Sess (20 April 2006) at paras 14–16; Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture: Canada*, CAT/C/CR/34/Can, 34th Sess (7 July 2005) at para 4.

foreign legal orders.⁹⁸

To be clear, reliance on international and comparative human rights does not require judges to transplant “outside” legal rules directly into Canadian law. Instead, it helps place an issue in its proper, global context and facilitates and constrains the interpretation of domestic legal texts that are conceptually, historically, and institutionally connected to international and foreign laws. On this point, it should be recognized that the drafters of the *Charter* relied extensively on international and comparative human rights when filling in the content of *Charter* provisions.⁹⁹ And, of course, we are parties to a wide range of binding international human rights treaties and are obligated to give treaty norms domestic legal effect.

Thus, the interpretive use of international and comparative human rights does not mean that these norms serve as trumps over domestic policy preferences or necessarily override laws sourced in the Canadian constitution.... It is to say simply that the principles contained within the *Charter*, international human rights documents, and the constitutions of foreign (liberal) democracies are similar in kind, even though the rules and decisions through which these principles are actualized vary across jurisdictions. Insofar as the *Charter* codifies global or autonomous legal principles, judicial consideration of international and comparative human rights is best seen as an exercise in analogical reasoning;¹⁰⁰ judges rely on the historical experiences of others who have applied similar principles to similar problems when appraising proposed solutions at home....

It is also important to remember that Canadian law and policy has already been indelibly shaped by external legal, political, and social

⁹⁸ Karen Knop, “Here and There: International Law in Domestic Courts” (2000) 32 *NYUJ Int’l L & Pol* 501; Hugh Kindred “Making International Agreements and Making Them Work Within a Multicultural Federal State: The Experience of Canada,” in Stephen Tierney, ed, *Multiculturalism and the Canadian Constitution* (Vancouver: The University of British Columbia Press, 2007); Reem Bahdi “Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts” (2006) 34:3 *Geo Wash Int’l L Rev* 555; Mayo Moran, “Authority, Influence and Persuasion: *Baker*, Charter Values and the Puzzle of Method,” in David Dyzenhaus, ed, *The Unity of Public Law* (Oxford: Hart Publishing, 2004); Stephen J Toope & Jutta Brunnee, “A Hesitant Embrace: Baker and the Application of International Law by Canadian Courts” in David Dyzenhaus, ed, *The Unity of Public Law* (Oxford: Hart Publishing, 2004) at 357.

⁹⁹ Anne F Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992) at 62–63.

¹⁰⁰ For a similar argument, see Toope & Brunnee, *supra* note 88 at 56.

forces, not the least because of the formation of decidedly unrepresentative transgovernmental links such as those characteristic of global intelligence networks. Transjudicialism helps judges respond to fundamental shifts in the organization and structure of government and to reflect the increasingly global and multicultural character of Canadian society. International and comparative human rights are especially useful in the context of national security because they can “track” global intelligence networks and protect the well-being of non-citizens in ways individual domestic legal orders do not. If taken seriously, this overarching normative order can be used to fill the cracks that lie between traditionally self-enclosed domestic legal orders, shoring up clear democratic deficits in decision-making about global intelligence practices.

Finally, a human rights perspective is closely linked to the notion of “human security,” which situates individual persons and communities in place of states as the referents of security discourse.¹⁰¹ This shift in language alters the purchase of securitizing rhetoric, which ordinarily depoliticizes executive action and insulates intelligence activities from political or legal contestation. If successfully invoked, human rights language can improve judges’ willingness to constrain executive discretion concerning such issues as whether we are operating in an exceptional moment and, if so, what extraordinary measures are justified.

In sum, international and comparative human rights offer a measure of continuity necessary for navigating through changing regulatory environments, while also providing a package of language and norms suitable for regulating the global scope of contemporary intelligence practices. Functionally, they enable domestic interpretive communities to contend with legal indeterminacy in exceptional moments, offering a plurality of legal rules, principles, and standards appropriate to the judicial review of national security law and policy. Rhetorically, they strengthen jurists’ position vis-à-vis an executive that is used to deference in matters of national security, helping ensure that legal indeterminacy is used to protect and promote human rights rather than to rationalize relations of domination. Conceptually, international and comparative human rights resonate with autonomous legal values fundamental to the Canadian constitutional order, rendering judicial

¹⁰¹ Buzan et al, *supra* note 11; Commission on Human Security, *Human Security Now* (New York: United Nations, 2002); Keith Krause & Michael C Williams, “Broadening the Agenda of Security Studies: Politics and Methods” (1996) 40:2 *Mershon Int’l Stud Rev* 229.

reliance on them both sensible and justifiable. But what are the processes through which international and comparative human rights find their way into Canadian law and how precisely might they assist in regulating global intelligence agency cooperation?

B. TRANSNATIONAL HUMAN RIGHTS ADVOCACY AND NORM-INTERNALIZATION

Fittingly, international and comparative human rights find their way into Canadian law and society in much the same way foreign intelligence does; through global networking initiatives. Just as intelligence agencies have adapted to globalization by forming strong institutional linkages with foreign and international agencies, so too have human rights advocates adapted to global intelligence cooperation by integrating themselves within transnational human rights networks. Constituted by sets of shared values and principles associated with human dignity, transnational human rights networks collect, store, and disseminate knowledge that advocates may use to clarify the ends towards which they are working and precisely how a desired legal decision will help realize those ends. Transnational human rights networks also help advocates create, access, and share knowledge concerning: trends in thinking (e.g. scholarship, Parliamentary debates, etc.) and decision-making (e.g. case law, legislation, policy, etc.) about an issue; social, political, and economic factors that have historically influenced decision-making in this issue-area; and, how to launch effective advocacy campaigns across legal, social, and political platforms.¹⁰²

Legal in orientation, transnational human rights advocacy requires intellectual skills beyond those associated with traditional lawyering and adjudication.¹⁰³ Parsing through statutes and case law remains important, but empirical, social science methods are necessary in order to adequately

¹⁰² Theories of transnational human rights advocacy owe much to the pioneering work of Myres S McDougal, Harold D Lasswell, and W Michael Reisman. See W Michael Reisman et al, "The New Haven School: A Brief Introduction" (2007) 32:2 *Yale J Int'l L* 575; Harold D Lasswell & Myres S McDougal, "Jurisprudence in Policy-Oriented Perspective" (1966–67) 19:3 *Fla L Rev* 486; Myres S McDougal & Harold D Lasswell, "The Identification and Appraisal of Diverse Systems of Public Order" (1959) 53:1 *AJIL* 1.

¹⁰³ Myres S McDougal et al, "World Constitutive Process Authoritative Decision" (1967) 19:3 *J Legal Edu* 253; Harold D Lasswell & Myres S McDougal, "Legal Education and Public Policy" (1943) 52:2 *Yale LJ* 203.

appreciate the full context within which legal problems occur and to competently assess the comparative merits and probable success of certain advocacy campaigns. This interdisciplinary approach calls for collaboration among lawyers, academics, social scientists, activists, all of whom try to raise human rights consciousness among judges, legislators, and other authoritative decision-makers.¹⁰⁴

Transnational human rights networks and global intelligence networks share a number of important similarities and differences. First, transnational human rights networks perform a distinctive *intelligence* function, raising government officials' consciousness of how global intelligence practices affect beneficiaries of human rights. Human rights advocates in foreign countries, for instance, inform Canadian advocates about local realities, the occurrence of human rights abuses, and perhaps even details about Canada's foreign operations. This information can be put on record, helping judges better appreciate the full nature of a legal problem. Meanwhile, international and comparative human rights inform Canadian decision-makers about how other jurisdictions have responded to similar or identical legal issues and the extents to which these approaches have or have not been successful. Facts and normative insight can fuel regulatory innovations, improve the quality of judgment, and, more firmly integrate Canadian, international, and foreign legal orders in ways that are commensurate with integrated intelligence networks.

Transnational human rights networks and global intelligence networks are functionally similar in these regards. In each case, Canadian actors have recognized the need to assume greater global roles and responsibilities and to use the knowledge, experiences, and values of outsiders to improve the quality of their work. Each network is also conceptually distinct from formal governmental structures, although functionally they interlock with them at various points. However, the intelligence community and human rights networks differ insofar as the latter devote their energies to penetrating exclusive channels of authoritative decision making, whereas the former are already firmly planted in the core of government.

Working from the periphery, one of transnational human rights advocates' primary objectives is to persuade decision-makers to

¹⁰⁴ Harold Hongju Koh, "Is There a 'New' New Haven School of International Law?" (2007) 32 Yale LJ 559; Harold Hongju Koh, "Transnational Legal Process" (1996) 75 Neb L Rev 181 [*Transnational*].

“internalize” international and comparative human rights.¹⁰⁵ Norm-internalization describes the transformation of an international legal rule from an inert logical proposition that wafts down from higher authorities, to something that forms part of one’s internal value set. Norms may be, and often are, expressed in terms of rules, but they are at root something inseparable from the *attitudes* that their subjects hold towards them. The very existence of a norm depends on the fact that people observe them. Rules, by contrast, may be analytically separated from the social context within which they operate, viewed simply in terms of their logical or semantic components. Norm-internalization accordingly describes the processes by which persons with a formal international legal obligation to promote and protect human rights take that obligation to be a *moral* reason for acting in one way and not another.

In the case of the judiciary, norm-internalization would lead to the issuance of a judgment that gives domestic legal effect to a person’s internationally-protected human right. For example, international human rights impose an explicit and absolute prohibition on the deportation of non-citizens to face the substantial risk of torture or similar abuse. The text of the *Charter* does not explicitly impose such an obligation (although it does protect life, liberty, and security of the person, among other rights) while Canadian immigration and refugee law has long denied this human right to persons who are deemed to be threats to national security. Norm-internalization would describe a situation where the values underpinning the international human right against torture influenced a judge to interpret the *Charter* in such a way as to prevent the government absolutely from deporting persons to face torture.

Norm-internalization occurs in three distinct stages.¹⁰⁶ First, human rights advocates and the intelligence community *interact* in official settings, such as before a judge, Parliamentary body, and/or Royal commission. Interactions initially involve the identification of collective problems, desires, interests, or goals, such as the need to balance effective intelligence work with human rights. Crucially, interactions unfold simultaneously across multiple fora. For instance, well before initiating constitutional litigation, transnational human rights advocates may present arguments in front of a commission of inquiry or Parliamentary

¹⁰⁵ *Transnational*, *supra* note 104 at 204; Harold Hongju Koh, “Internalization Through Socialization” (2005) 54 *Duke LJ* 975.

¹⁰⁶ Harold Hongju Koh, “Bringing International Law Home” (1998) 35 *Hous L Rev* 623 at 626.

committee, with the aim of saturating discourse with preferred values, and perspectives. Interactions may have also occurred in international fora, such as in front of treaty bodies. By the time adjudicative proceedings begin, participants will have had experience with trends in thinking about an issue and the opportunity to frame the terms of future debate.

Second, participants share in the argumentative enunciation, interpretation, and/or application of a rule or principle to the identified problem. At this stage, participants will invoke norms and recommend solutions. Given the global dimensions of contemporary intelligence practices, these norms and solutions will usually be linked to international and foreign law. The government will typically cite binding international counter-terrorism treaties, multilateral or bilateral frameworks, and principles of international relations in support of its position, while transnational human rights networks will rely on international and comparative human rights law in support of theirs. However, for rhetorical reasons, participants will generally rely predominantly on domestic materials when concerned with constitutional issues.

Finally, a decision-maker will internalize favoured norms into her internal value-set, making it a moral reason for deciding one way rather than another. A judge who is persuaded by transnational human rights advocate makes the well-being of identified or even hypothetical persons a reason for imposing a legal duty on the intelligence community to engage or to cease engaging in certain activities. By contrast, a judge who is persuaded by the government will make the postulated public interest in global intelligence practices a reason for legitimizing impugned conduct. The moral elements of this reasoning will typically find expression in the government's ethical duty to protect peace, order, and good government.

C. GIVING DOMESTIC LEGAL EFFECT TO INTERNATIONAL AND COMPARATIVE HUMAN RIGHTS: COUNTER-INFLUENCES

A number of counter-influences impede the internalization of international and comparative human rights. First, judges have long been reluctant to rely on international law as bases of judgment, largely because there is an assumed conflict between principles of respect for

international law and principles of respect for constitutional supremacy.¹⁰⁷ Much has to do with more basic assumptions about how international and domestic law is or ought to be produced. Traditional doctrine has it that the executive branch of the federal government has exclusive authority to negotiate and sign international treaties, while the legislatures possess the exclusive authority to alter domestic rights and obligations.¹⁰⁸ While courts should do what they can to discharge international legal obligations, they must also respect counter-veiling constitutional values touching on federalism and Parliamentary sovereignty. Otherwise, the Canadian government could bypass constitutional limits on its power, producing domestic law simply by entering into international agreements.

Judges have accordingly tried to separate the powers of the three branches of government with respect to international law/domestic law intersections, even though the separation of powers thesis does not sit comfortably with Westminster-style governance. In the context of the law of reception, though, the executive negotiates and signs treaties, Parliament implements them, and courts assume the residual task of interpreting implementing legislation so as to give effect to underlying treaties.¹⁰⁹ This approach is clearly inhospitable to transnational human rights advocacy, which is directed towards enhancing the ease with which judges may rely on international and comparative law as well as towards using such law to assist in reviews of the substantive merits of validly enacted law. Tasks of this nature require the judiciary to participate in the production of law as much as in its interpretation, undercutting formalist and decidedly misleading divisions of labour among the three branches of government.

¹⁰⁷ Graham Hudson, "Neither Here Nor There: The (Non-)Impact of International Law on Judicial Reasoning in Canada and South Africa" (2008) Can JL & Jur 321; Ronald St John MacDonald, "International Treaty Law and the Domestic Law of Canada" (1975) 2 Dal LJ 307.

¹⁰⁸ *AG (Canada) v AG (Ontario)*, [1937] 1 DLR 673 (JCPC) at 679.

¹⁰⁹ *Re Arrow River and Tributaries Slide and Boom Co v Pigeon Timber Co*, [1932] 2 DLR 250 (SCC); *In the Matter of a Reference as to the Powers of the Corporation of the City of Ottawa and the Corporation of the Village of Rockcliffe Park to Levy Rates on Foreign Legations and High Commissioner's Residences*, [1943] SCR 208; *Daniels v R*, [1968] SCR 517; *R v Zingre*, [1981] 2 SCR 392; *National Corn Growers Association v Canada (Import Tribunal)*, [1990] 2 SCR 1324; *Ordon Estate v Grail*, [1998] 3 SCR 437; *Pushpanathan v Canada (Minister of Citizenship and Immigration)* (1988), 160 DLR (4th) 193 (SCC); *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817; *R v Sharpe*, [2001] 1 SCR 45; *114957 Canada Ltee (Spraytech, Societe d'arrosage) v Town of Hudson* [2001] 2 SCR 241.

Traditional doctrine has recently been supplemented with a more modern approach rooted in the *Charter*. In 1987, Dickson CJ stated that:

The various sources of international human rights law—declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms—must, in my opinion, be relevant and persuasive sources for interpretation of the Charter’s provisions.... In particular, the similarity between the policies and provisions of the Charter and those of international human rights documents attaches considerable relevance to interpretations of those documents by adjudicative bodies, in much the same way that decisions of the United States courts under the Bill of Rights, or decisions of the courts of other jurisdictions are relevant and may be persuasive...

The content of Canada’s international human rights obligations is, in my view, an important indicia of the meaning of “the full benefit of the Charter’s protection.” I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.¹¹⁰

This “relevant and persuasive” doctrine permits (but does not require) judges to use both international and comparative human rights as interpretive aids when determining the content, scope, and applicability of *Charter* rights. Underscoring the ethos of transnational human rights advocacy, it directs judges to use international and comparative human rights towards the end of: attaining a deeper appreciation for the meaning latent in the *Charter’s* provisions; to improve judgment by making it more responsive to the global and multicultural context of Canadian law; and, to enhance unity or interactions among Canadian, international, and foreign democratic legal orders. This doctrine is also useful because it maximizes the applicability of international and comparative human rights in the context of constitutional adjudication. Judges may use such law to inform their reviews of the merits of national security law and policy, enabling it to scrutinize the activities of both the executive and Parliament.

Of course, doctrine does not always count for much. What counts are judges’ attitudes towards international law and the issue at hand;

¹¹⁰ *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 348–49.

doctrine can always be made to suit these attitudes, but fixed beliefs and values are not easily shaken. It is simply never clear whether or how international and comparative human rights will be used. Reviewing *Charter* jurisprudence, some argue that the impact of international human rights on Canadian law depends “on the proclivities of a result-oriented decision-maker rather than their inherent usefulness to the interpretive problem at hand” and that the Supreme Court considers “international law where it is supportive of a predetermined conclusion but ignores it when it is not.”¹¹¹ Others note that there are few examples where international and comparative human rights have played a significant role in the determination of a *Charter* case and that their application is “often quite perfunctory.”¹¹²

It is also worth noting that judicial openness to international and foreign law can enhance the domestic influence of global counter-terrorism law and policy, further entrenching global intelligence practices. Canada is party to a wide range of international treaties obligating it to participate in protecting international security and countering terrorism. Post-9/11 UN Security Council resolutions impose more specific obligations to share information and intelligence with partner states. And of course, multilateral intelligence frameworks are part of international legal regimes that judges can and should consider. There is a risk that judges’ openness to international and foreign law can help normalize rather than constrain extraordinary practices linked to global intelligence agency cooperation.

III. TOWARDS A PAN-CONSTITUTIONAL LAW ON HUMAN RIGHTS? GLOBAL INTELLIGENCE, NATIONAL SECURITY PROCEEDINGS, AND DISCLOSURE IN COMPARATIVE CONSTITUTIONAL PERSPECTIVE

Although in existence since 1976, certificates nonetheless have an extraordinary quality in terms of both procedure (e.g. lack of disclosure and adversarial challenge,) and substance (e.g. discrimination against non-citizens and/or Arab-Muslims, indefinite detentions, deportation to face torture, etc.). They have become a conspicuous cornerstone of an alternate legal order that facilitates and, to a lesser extent, constrains

¹¹¹ Bayefsky, *supra* note 99 at 89, 95.

¹¹² William A Schabas, *International Human Rights Law and the Canadian Charter*, 2nd ed (Scarborough: Carswell, 1996) at 47, 233; Gibran Van Ert, *Using International Law in Canadian Courts* (The Hague: Kluwer Law International, 2002) at 255–64.

executive discretion over matters of national security. The utility of certificate proceedings in the context of anti-terrorism depends on global intelligence cooperation, both in terms of evidence to be used against named persons as well as in terms of the prospective receipt of actionable intelligence from the countries to which named persons are deported; possibly as a result of torture. In many of these areas, legal rules have been designed to enhance executive discretion and to expedite the review of executive decision-making.

For these reasons, security certificates strike at the heart of the problems raised by post-9/11 intelligence practices and bear a concerning similarity to the practices leading to the extraordinary rendition of Mr Arar and other Canadians. In this section, I will examine how engagement with international and comparative human rights during *Charter* reviews of certificate provisions and practices have helped courts “learn” to better regulate aspects of global intelligence agency cooperation. This will include an appraisal of whether international and comparative perspectives have helped protect and promote human rights in this context or, alternatively, whether they have helped normalize what are in many respects extraordinary measures.

A. NATIONAL SECURITY CONFIDENTIALITY AND INTERNATIONAL AND COMPARATIVE HUMAN RIGHTS IN THE FEDERAL COURT (OF APPEAL) OF CANADA

As mentioned, security certificate provisions facilitate executive discretion over the identification, detention, and deportation of suspected terrorists. The procedural and substantive rules that have constrained the exercise of this discretion have changed considerably since 1976. In their original form, certificate proceedings were overseen by the Security Intelligence Review Committee; an independent body of national security experts mandated to review CSIS). Decisions about the issuance of a certificate were, of course, made by the government, but SIRC and its legal counsel scrutinized and challenged the government’s allegations, issuing a recommendation about whether a certificate should be issued.¹¹³

¹¹³ For a comprehensive treatment of the SIRC regime and its functions in the context of security certificates, see Rankin, Murray, “The Security Intelligence Review Committee: Reconciling National Security with Procedural Fairness” (1990) 3 CJALP 173.

SIRC's recommendations and the government's decision to issue a certificate were subject to judicial review by the Federal Court.¹¹⁴

Similar to contemporary proceedings, SIRC-based proceedings were often conducted in the absence of affected persons, who were also denied access to confidential information. However, SIRC and its legal counsel claimed the authority to access all information on the government's file relevant to a certificate, to subpoena witnesses, and to communicate with affected persons throughout the course of proceedings. Legal counsel consisted primarily of in-house counsel and SIRC "legal agents" whose primary role was to ensure "SIRC's fair conduct of an investigation."¹¹⁵ However, outside counsel could be employed to help with workload or to engage in aggressive cross-examinations that may call SIRC's impartiality into doubt were it conducted by in-house counsel.¹¹⁶ Although time-consuming, this process helped balance national security confidentiality with meaningful procedural fairness, disclosure, and adversarial challenge.

Over the course of the mid-1990s, Parliament gradually eased SIRC out of this role, replacing it with the Federal Court. Just prior to 9/11, Parliament granted the Federal Court exclusive responsibility for reviewing the reasonableness of all certificates and certificate-based detentions. Parliament instructed judges to: conduct proceedings "as informally and expeditiously" as possible; to receive into evidence anything that, in their opinion, is reliable and appropriate, even if it is inadmissible in a court of law; and, to base their decisions on that evidence.¹¹⁷ At the request of the Ministers, judges are required to hear evidence in the absence of the public, the named person, and his/her counsel, if they are satisfied that the disclosure of such evidence *could* be injurious to national security or the safety of any person.¹¹⁸

The Federal Court's enhanced role implied that executive discretion was being made subject to greater review, particularly since the

¹¹⁴ *Al Yamani v Canada (Solicitor General)*, [1995] FCJ No 1453 (FCTD); *Moumdjian v Canada (Security Intelligence Review Committee)*, [1999] FCJ No 1160 (FCA).

¹¹⁵ Craig Forcese & Lorne Waldman, "Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom, and New Zealand on the Use of 'Special Advocates' in National Security Proceedings" (2007), online: Social Science Research Network <<http://ssrn.com/abstract=1623509>> at 9.

¹¹⁶ *Ibid* at 8.

¹¹⁷ *IRPA*, *supra* note 64, ss 83(a)(h)-(i).

¹¹⁸ *Ibid*, s 83(c).

court's judgments are legally binding while SIRC's views were merely advisory. However, the Federal Court was not expressly granted, nor did it assume, many of the powers that SIRC had assumed. This is to say that the court did not appoint *amicus curae* to access secret evidence, subpoena witnesses, attend at secret hearings to advocate on named persons behalf, or communicate with named persons throughout a proceeding.

Shortly after 9/11, transnational human rights challenged the constitutionality of certificate provisions on the grounds that they undermined named persons' section 7 rights to a fair trial (among other *Charter* rights). In making these claims, advocates relied on a mixture of historical and international and comparative law arguments. Historical perspectives included criminal law principles regarding disclosure, procedural fairness, and adversarial challenge, the proven merits of the SIRC system in balancing national security confidentiality and rights, and other, similar institutional arrangements, such as that adopted by the O'Connor Commission. International and comparative legal perspectives were rooted primarily in UK and ECtHR jurisprudence concerning the legality of national security-based deportation proceedings similar in kind to certificate proceedings.

Transnational human rights advocates' primary rhetorical strategy was to analogize the 9/11 certificate regime with a similar UK regime that the ECtHR had found to be incompatible with the *European Convention on Human Rights* (ECHR) in its 1996 judgment, *Chahal v The United Kingdom*.¹¹⁹ Similar to security certificates, the UK regime granted the executive extensive discretion to deport non-citizens that it believed threatened national security. The UK's system similarly allowed the government to base its decisions about deportation on secret evidence the reliability and sufficiency of which was not subject to independent review or adversarial challenge. The government did allow affected persons to appeal decisions to a special "advisory panel," which was chaired by a judge and a senior immigration official.¹²⁰ However, the panel was only authorized to issue advisory opinions about the merits of decisions, and typically used a low standard of review. Although given an opportunity to make representations, to call witnesses, and assistance from "a friend" during advisory proceedings, deportees were not entitled: to legal

¹¹⁹ [1996] ECHR 54.

¹²⁰ *Ibid* at paras 29–32, 60.

representation; to access any representations made about him by others; or, to know what advice the panel gave to the government.

One of the ECtHR's primary concerns was that persons subject to this system would face the substantial risk of torture or similar abuse if deported after having been labeled national security risks. After clarifying that the UK may not under any circumstances deport persons to face torture,¹²¹ the ECtHR held that the use of confidential evidence in the absence of meaningful adversarial challenge violated Article 5(4) of the ECHR.¹²² Interestingly, the ECtHR relied on the then-operative SIRC system to demonstrate that an alternative, less restrictive process could have been used in the UK.¹²³ While conscious of the necessity of secrecy in national security proceedings, the ECtHR demanded that there be an adjudicative framework sufficiently distanced from the executive, capable of ensuring that investigations and decisions were made fairly, and empowered to provide remedies for human rights abuses.

In response, the UK introduced a Special Immigration Appeals Commission (SIAC), which it loosely modeled after the SIRC system. Positively, it provided persons facing deportation for reasons of national security with security-cleared special advocates mandated to represent their interests during secret hearings. However, the UK omitted many features characteristic of the SIRC system from the SIAC model. First, special advocates were not authorized to subpoena documents and witnesses, whereas SIRC had access to all information on file relevant to a case. UK special advocates have been restricted to the use of information the government has prepared for the SIAC, much of which we might expect would not be exculpatory in nature.

Second, the UK prohibited special advocates from communicating with detainees after having accessed classified documents, whereas SIRC counsel possessed the power to communicate with named persons throughout the entirety of proceedings. This power was an essential part of the SIRC regime, as it enabled secret counsel and named persons to clarify misunderstandings, expose circumstantial evidence, and modify legal strategies. Third, UK special advocates were denied adequate resources and administrative support and prohibited from networking with other advocates. Finally, the SIAC was composed of

¹²¹ *Ibid* at paras 95–107.

¹²² *Ibid* at paras 124–33.

¹²³ *Ibid* at para 144.

judges as well as immigration officials, whereas SIRC was staffed entirely by laypeople with expertise in national security, intelligence, and human rights. While advantageous in some respects, the inclusion of the judiciary has led to power struggles between legal and national security experts, with one well-respected expert having resigned as a result.¹²⁴

Drawing attention to these well-documented shortcomings,¹²⁵ transnational human rights advocates analogized the 9/11 certificate regime to the UK's pre-*Chahal* deportation model, highlighting that we were dismantling rights protections at the same time as the UK was adding them. Yet, the UK's SIAC model was still lacking in important respects and, at the time *Charkaoui I* was decided by the Federal Court, it was not clear whether it was wholly compatible with the ECHR. International and comparative human rights were useful, but the SIRC regime stood as the best model against which the 9/11 certificate regime could be compared.

The Federal Court was not persuaded by human rights advocates' historical and comparative law arguments, ruling that reviewing judges in Canada were capable of effectively deciding on the basis of the facts and law in relative autonomy from executive interference.¹²⁶ Although not clearly stated, this position depended on a distinction between the formal, legislative and the informal, discretionary features of the certificate regime. Formally, the 9/11 certificate regime more closely resembled the UK's advisory panel than the SIRC model (or even the SIAC model), as the Federal Court neither was expressly granted nor claimed those powers that had enabled SIRC and its counsel to effectively perform an adversarial role. If the UK's advisory system fell well below international human rights standards, it would seem that the 9/11 certificate regime would fail these same standards. Looking beyond legislative language, however, the Federal Court asserted that reviewing judges possessed the legal expertise, requisite experience with security intelligence matters, and will to rigorously challenge government lawyers and witnesses. This

¹²⁴ Brian Barder, "On SIAC" (2004) 26:6 London Rev Books 40.

¹²⁵ *Supra* note 115. United Kingdom, House of Commons and House of Lords, Joint Committee on Human Rights, "Review of Counter-terrorism Powers, Eighteenth Report of Session 2003–2004" HL 158, HC 173 (4 August 2004) at para 40; United Kingdom, House of Commons, Constitutional Affairs Committee, "The Operation of the Special Immigration Appeals Commission and the use of Special Advocates—Seventh Report of Session 2004–2005" (2005), online: UK Parliament <<http://www.publications.parliament.uk>>.

¹²⁶ *Charkaoui (Re)*, [2004] 3 FCR 32; *Charkaoui (Re)*, 2004 FCA 421.

informal or discretionary dimension was, in the court's view, sufficient to bring the certificate regime into conformity with constitutional values associated with human dignity and the rule of law.

B. NATIONAL SECURITY CONFIDENTIALITY AND INTERNATIONAL AND COMPARATIVE HUMAN RIGHTS IN THE SUPREME COURT OF CANADA

On appeal, the Supreme Court overruled aspects of these decisions, holding that reviewing judges were not fully positioned to decide on the basis of the facts or law and, accordingly, that certificate provisions unjustifiably infringed named persons' section 7 right to a fair trial.¹²⁷ Initially at issue was whether section 7 principles germane to criminal law should be applied to certificate proceedings which, to recall, are formally a part of immigration and refugee law. The government argued that Parliament should be held to low constitutional standards in the design of certificate proceedings because these proceedings are administrative in nature and because non-citizens do not enjoy an unqualified right to remain in Canada; arguments that had proven to be highly persuasive in the past.¹²⁸

Transnational human rights advocates responded that immigration and refugee law had effectively been subsumed within an alternative legal system rooted within global counter-terrorism law and policy. Although historically concerned with deportation, certificates were now performing functions akin to extradition, namely, to expose alleged terrorists to arrest, prosecution, and/or torture abroad. Again invoking analogical reasoning, advocates noted that the ECtHR ruled in *Chahal* that the severe impacts national security-based deportations have on individual rights require higher procedural and substantive rights.

Historically, courts have sided with the government and Parliament on these issues. In *Chiarelli*, for example, the Supreme Court upheld the constitutionality of the SIRC system largely on the basis that certificate proceedings are administrative in nature and that non-citizens do not possess an unqualified right to enter and remain in Canada.¹²⁹

¹²⁷ *Charkaoui I*, *supra* note 43.

¹²⁸ *Dehghani v Canada (Minister of Employment and Immigration)*, [1993] 1 SCR 1053 at 1077. For critical commentary on this point, see Hamish Stewart, "Is Indefinite Detention of Terrorist Suspects Really Constitutional?" (2005) 54 UNBLJ 235.

¹²⁹ *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711.

However, this trend in legal reasoning was refracted when issues were viewed through four factual and normative lenses.

First, the court was conscious of the changing nature of security intelligence practices. It was acutely aware that persons named in certificates post-9/11 have all immigrated to Canada from countries with poor human rights records and with which Canada has only recently forged lasting bilateral intelligence relations e.g. Morocco, Algeria, Egypt, Syria, etc. The Court was accordingly alive to the human rights dimensions of global intelligence networks involving non-traditional partners and of the risks named persons would face if deported. Legal counsel was also careful to remind the court of Canada's international human rights obligations to not, under any circumstances, return persons to face torture; a norm that the Court had partially internalized in *Suresh v Canada*.

Second, the court was conscious of international and foreign trends towards providing enhanced protection to non-citizens in the context of national security-based detention and deportation proceedings. The United States Supreme Court had recently affirmed that non-citizens detained in Guantanamo Bay possess the constitutional right to *habeas corpus*.¹³⁰ The UK House of Lords had similarly ruled in *Re A and Others* that the UK's version of security certificates unjustifiably discriminated against non-citizens. In *Silvenko v Latvia*, the ECtHR expressed a willingness to submit states to fairly exacting review of decisions to deport persons for posing a threat to national security.¹³¹ These decisions made it difficult for the Supreme Court of Canada to uncritically accept that non-citizens do not deserve robust procedural protections during national security-based detention and deportation proceedings.

Third, the Court's reasoning was influenced by the factual and normative findings of the O'Connor Report. This report exhaustively detailed shifting global contexts, the Canadian government's increasing reliance on, or complicity in extraordinary rendition, and definite human rights abuses caused by intelligence agencies' circulation of misinformation. The Court saw clear connections among security certificates, extraordinary rendition, and the perils of under-regulated intelligence practices, rooting each within the darker sides of global

¹³⁰ *Rasul v Bush*, 542 US 466 (2004); *Zadvydas v Davis*, 533 US 678 (2001).

¹³¹ No 48321/99, [2003] ECHR.

counter-terrorism law and policy. Quoting the Commission's report, the Court expressed concern that the unfettered circulation of misinformation and the absence of adequate review and accountability mechanisms with respect to security intelligence practices may have negative effects on the integrity of immigration and refugee law, not to mention the rights of named persons.¹³² Crucially, analogies between Arar's experience and certificates were not obstructed by the fact that named persons are not Canadian citizens, underscoring the influence of international human rights, where such distinctions have little relevance. The overall thrust of the Court's reasoning was that the government was using comparatively lax evidentiary standards characteristic of immigration and refugee law to shield it from more demanding standards characteristic of criminal and extradition proceedings. Insofar as the court had already analogized the former with the latter, it was concerned that unchecked national security confidentiality would restrict "the ability of courts to guarantee individual rights."¹³³

Finally, the Court was wary of the language of exceptionality laden in post-9/11 national security rhetoric. It noted that the nature of terrorism is indeed such that the "executive branch of government may be required to act quickly, without recourse, at least in the first instance, to the judicial procedures normally required for the deprivation of liberty or security of the person."¹³⁴ Speaking to the ability of the law to guide decision-making of this nature, the Court added that, if the exigencies of counter-terrorism "makes it impossible to adhere to the principles of fundamental justice in their usual form, adequate substitutes may be found."¹³⁵

This last dimension of the judgment offers a refreshing point of contrast to lower courts' internalization of *Rehman*. The Court seemed to be stating that, even in exceptional moments, there is a law/politics distinction and that indeterminate law can and should be infused with moral and ethical perspectives that challenge relations of domination. It did not, however, pronounce on the issue of whether the attacks of 9/11 have created an ongoing public emergency. As we have seen, even international human rights allow for the limitation of rights to contend with public emergencies that threaten the life of a nation. The *Charter*

¹³² *Charkaoui I*, *supra* note 43 at para 26.

¹³³ *Ibid* at para 26.

¹³⁴ *Ibid* at para 24.

¹³⁵ *Ibid* at para 23.

similarly authorizes the imposition of such reasonable limits on guaranteed rights as can be “demonstrably justified in a free and democratic society.”¹³⁶

It is here one might have expected the court to rely on international and comparative human rights. In *Re A and Others*, for instance, the UK House of Lords approached the questions of whether the threat of transnational terrorism 9/11 stands as a public emergency and what criteria judges should use in deciding about the legality of extraordinary measures. It began by stating that “the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself,” and incompatible with excessive deference to executive decision-making.¹³⁷ However, it went on to say that the UK government was justified in treating the mere threat of a terrorist attack post-9/11 as a public “emergency threatening the life of the nation.”¹³⁸ On the strength of this factual finding, the court ruled that derogations from the ECHR in which persons can be indefinitely detained on the strength of undisclosed evidence is justified.

The finding that the mere threat of transnational terrorism constitutes a permanent or ongoing public emergency does not sit well with the views of most human rights-based discursive communities.¹³⁹ The prevailing view among non-state or at least non-judicial discursive communities is that emergencies are temporary events that have threatened or are imminently about to threaten the life of a nation and should be invoked sparingly. Derogations from human rights are, in kind,

¹³⁶ *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11, s 1.

¹³⁷ *A v Secretary of State for Home Department (Re A)* [2004] UKHL 56, [2005] 2 AC 68 at para 42.

¹³⁸ *Ibid* at para 118. This decision was released before the July 7, 2005 London Bombings.

¹³⁹ Alvaro Gil-Robles, *Report of Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his Visit to the United Kingdom* (June 2005) CommDH 6/8 at paras 5–8; Council of Europe, Committee of Ministers, *Human Rights and the Fight Against Terrorism: The Council of Europe Guidelines* (Strasbourg: Council of Europe Publishing, 2005); The United Nations Committee on the Elimination of All Forms of Racial Discrimination, “Concluding Observations: United Kingdom,” CERD/C/63/CO/11, 10 December 2003 at para 17; Council of Europe Parliamentary Assembly Resolution 1271, “Combating Terrorism and Respect for Human Rights” (2002) at paras 9, 12(v); United Nations Human Rights Committee, “General Comment No 29 on Article 4 of the ICCPR” CCPR/C/21/Rev1/Add11, 31 August 2001 at para 2.

to be temporary in nature and necessary in order for a state to restore order. Extraordinary measures cannot, in other words, be used indefinitely, but must be carefully tailored to respond to a specific threat and then be dismantled. The purpose of imposing temporal restrictions on the invocation of emergencies is therefore to guard against the gradual ratcheting down of rights and the normalization of practices that should be used sparingly and at the utmost end of need.

Although perhaps unsurprising in light of the July 7, 2005 London bombings, the ECtHR sided with the House of Lords in its 2009 judgment on *Re A and Others*. The ECtHR stated in unequivocal terms that certain international human rights may be derogated from in order to contend with an emergency that is neither immanent nor immediately manifest.¹⁴⁰ Since the facts and issues of this case arose prior to the London bombings, this argument (expressly) states that a public emergency can be initiated by the mere threat of a transnational terrorist attack and the gravity of harm that would follow should the government fail to act. Some measure of support was found in the fact that “case-law has never, to date, explicitly incorporated the requirement that the emergency be temporary”¹⁴¹ and that “national authorities enjoy a wide margin of appreciation ... in assessing whether the life of their nation is threatened by a public emergency.”¹⁴² Still, this statement does not account for the pervasive view among human rights discursive communities, constructed out of experience as well as moral considerations, that the protection and promotion of human rights requires the imposition of temporal restrictions on invocations of emergencies and the use of extraordinary measures. Granting the executive a “wide margin of appreciation” with regards to identifying and defining emergencies contributes to the legitimization of extraordinary measures that may be used indefinitely.

It is perhaps a good thing, then, that the Supreme Court of Canada did not directly consider available international and comparative human rights on this point when deciding whether section 7 infringements caused by the certificate regime could be justified under section 1 of the *Charter*. It instead began by exploring received wisdom about how to balance national security confidentiality and individual rights in Canadian contexts, paying special regard to the old SIRC system and the procedures adopted by the O'Connor Commission. The SIRC system was an obvious

¹⁴⁰ *A and Others v the United Kingdom*, [2009] ECHR 301 at paras 178–80.

¹⁴¹ *Ibid* at para 178.

¹⁴² *Ibid* at para 180.

candidate for consideration, but also problematic given that parliament deliberately dismantled it. The O'Connor Commission was an important additional resource since it was styled after the SIRC system, was successful in balancing national security confidentiality and disclosure in a more contemporary context, and had generated significant public awareness around these issues. It would be worth briefly reviewing the insights offered by the O'Connor Commission's approach to national security confidentiality.

The O'Connor Commission used two security-cleared legal counsel (Ronald Atkey and Paul Cavalluzzo) to attend at *in camera* proceedings in which privileged information was examined. Commissioner O'Connor's original plan was to examine evidence in these closed proceedings and then make available such information as could safely be disclosed to Mr Arar and others who attended at open hearings. This would have given Mr Arar and others the opportunity to challenge the government, thereby producing a better factual record. However, this plan was stonewalled when the government began claiming exceedingly broad NSC and applying to the Federal Court under section 38 of the *Canada Evidence Act*¹⁴³ to prohibit the Commission from disclosing information. These tactics would have forced the Commission to delay its investigation in order to fight NSC challenges in court. Commissioner O'Connor responded by continuing closed proceedings without disclosing any information, with a view towards contending with all of the governments NSC claims once the Commission finished its inquiry. This meant that Mr Arar, his legal counsel, and other interested parties were unable to cross-examine government witnesses or effectively challenge the government's position during open hearings. To compensate for this, Commissioner O'Connor authorized Mr Atkey and Cavalluzzo to adopt an assertive, adversarial role, pressing government witnesses on their testimony and on the strength and sufficiency of their evidence.

It is reasonable to say that we possess a wealth of experience, institutional frameworks, and received wisdom concerning how to effectively protect the integrity of legal proceedings touching on matters of national security. Despite the availability of these resources, the Court chose to review the UK's SIAC model as a possible alternative to the impugned certificate provisions. It expressly recognized the deficiencies of the SIAC system as highlighted within successive UK Parliamentary reports, the perspectives of human rights organizations, and UK special

¹⁴³ RSC 1985, c C-5, 2001, c 41.

advocates themselves.¹⁴⁴ The Court went on to note, however, that some members of SIAC have “commented favourably on the assistance provided by special advocates.”¹⁴⁵

There are two implications associated with the Court’s choice to cite the strengths of the UK system while minimizing its well-documented flaws. First, international human rights against which the UK model runs have no binding force on Canada and so they are norms our government may, but is not obligated to, respect. It is indeed true that the pronouncements of the ECtHR and the norms of the ECHR are not binding on Canada. However, we are bound to respect the *International Convention Relating to the Status of Refugees* and the *International Convention Against Torture*; two sources of law that formed part of the principled base upon which the ECtHR rested its ruling in *Chahal*. Insofar as the UK’s system and security certificates have analogous effects on affected persons, its failure to adequately protect international human rights that are binding on Canada is highly relevant. The demerits of the SIAC system were especially glaring relative to Canadian alternatives that have proven to be enormously effective at balancing national security confidentiality with rights. This exemplifies that successfully persuading a court to rely on international and comparative human rights can have unpredictable and possibly self-defeating consequences.

Second, the Court tried to obscure the failings of the SIAC system by suggesting that the opinions of the English judiciary on the matter are more informative or authoritative than those of non-state actors. The critical views of civil society groups and special advocates themselves were apparently less legal than moral or political in nature, and so did not stand up nearly as well as relevant and persuasive sources of insight. There was a clear selection bias at play in terms of which discursive communities the Court was willing to engage with. This underscores the normative pitfalls associated with transjudicialism, which may tend less towards the emergence of a global rule of law than the replication and expansion of well-engrained ideologies; an observation that is consistent with a critical view of legal indeterminacy, most especially in the context of real or perceived crises. It also reinforces the difficulties transnational human rights advocates face in penetrating channels of authoritative decision-making. Although successful in many ways, the perspectives of

¹⁴⁴ *Charkaoui I*, *supra* note 43 at para 83.

¹⁴⁵ *Ibid* at para 84.

non-state discursive communities carry considerably less weight than those of even foreign state actors.

In any event, the government amended certificate provisions in the image of the UK's SIAC system, failing to expressly include many of the features that made the SIRC system and the O'Connor Commission effective. Positively, it authorized security-cleared special advocates to represent named persons during secret proceedings, to access classified evidence, and to challenge that evidence as well as applications for non-disclosure.¹⁴⁶ It also reinforced reviewing judges' discretionary authority to make use of SIRC-style powers on a case-by-case basis.¹⁴⁷ However, the value of disclosure has been only partially realized, as special advocates are not expressly empowered to subpoena documents or witnesses and were expressly forbidden from communicating with named persons or their counsel about any matter whatsoever after having accessed classified evidence, unless authorized to do so by reviewing judges.¹⁴⁸ It is unclear how often this occurs.

C. APPRAISING THE IMPACTS OF INTERNATIONAL AND COMPARATIVE HUMAN RIGHTS: CURRENT TRENDS AND FUTURE TRAJECTORIES

On the whole, international and comparative human rights were relevant but decidedly capricious features of *Charkaoui I*. Transnational human rights advocates effectively used them to frame certificates as extraordinary measures; this was no small feat considering certificates have been staples of immigration and refugee law since 1976. This rhetorical success was made possible by the arguments and social science data collected by various discursive communities that describe the human rights dimensions of global intelligence agency cooperation and that associate certificate proceedings with extradition and, more debatably, extraordinary rendition. Advocates were able to arrange this information to cast certificates as keystones, not in immigration and refugee law *per se*, but in a functionally differentiated national security framework that facilitates, but does not adequately constrain, executive discretion. This motivated the court to reconsider the constitutional dimensions of

¹⁴⁶ *IRPA*, *supra* note 64, ss 85.1(1)(2), 85.2.

¹⁴⁷ *Ibid*, ss 85.2(c), 85.4(2)(3), 85.5.

¹⁴⁸ *Ibid*, ss 85.4(2)(3), 85.5.

certificates and ultimately to compel parliament to find alternative approaches that better protect human rights.

However, international and comparative human rights had the contrary effect during the court's section 1 analysis. The court's proposition that the SIAC system would likely pass constitutional muster if incorporated into Canada ignored the received wisdom of various discursive communities and downplayed the viability of domestic approaches taken by SIRC and the O'Connor Commission. This made it easier for parliament to make the bare minimum of changes and to reject domestic frameworks with a proven record of effectiveness. All this occurred without the court explicitly referencing recent and somewhat alarming comparative human rights case law, whereby the House of Lords held that judges reviewing national security practices should defer to the UK government with regards to whether the perpetual *threat* of transnational terrorism stands as a public emergency warranting the indefinite use of extraordinary measures.

Still, the perspectives of human rights-based discursive communities help us appraise the strengths and weaknesses of judgments about the legality of extraordinary measures. In particular, we can criticize judgments for deviating in marked and substantial ways from shared understandings concerning what is a public emergency, who ought to decide if there is an emergency and in consideration of what criteria, and whether extraordinary measures that limit human rights are justified (and for how long). Critics would reply that this is a hollow victory, as criticisms will ultimately be ineffective and purely symbolic. However, there is some evidence to suggest that courts have been and will continue to strive towards imposing more meaningful constraints on executive discretion post-*Charkaoui I*. Relevantly, these improvements have been made with virtually no direct reference to international and comparative human rights.

In the 2008 case of *Charkaoui II*, transnational human rights advocates shifted gears and challenged the constitutionality of executive policies and practices, rather than of legislative provisions. Since the Supreme Court had found that certificate proceedings are analogous to criminal proceedings, and since CSIS provides the bulk of evidence used in certificate proceedings, it follows that CSIS is performing or facilitating the performance of law-enforcement functions. Transnational human rights advocates argued precisely this point, concluding that CSIS should be held to evidentiary standards analogous to those binding on law

enforcement agencies. In particular, it should be obligated to retain and disclose to reviewing judges and special advocates operational notes regarding a person named in a certificate. An obligation of this nature would enhance the truth-seeking function of the court by improving special advocates' capacity to rigorously challenge the government's allegations and claims for non-disclosure.

This position arguably stood as a second attempt to infuse some of the features of the SIRC system into certificate proceedings, including SIRC counsel's ability to access secret information regardless of whether or not it was used in support of the government's allegations. The strategy seems to have worked. The Supreme Court sided with human rights advocates and required CSIS and the Ministers to disclose to the court and special advocates all information on file regarding a person named in a certificate. In justifying this unprecedented decision, the Court spent considerable time outlining the changing nature and global context of security intelligence work. It noted that CSIS has increasingly been co-operating with the RCMP in the investigation of threats to national security. Noting that the "activities of the RCMP and those of CSIS have in some respects been converging," and given that the information which CSIS collects and distributes may be used in criminal proceedings, the court found it necessary to revise the long-standing assumption that "CSIS cannot be subject to the same duties as a police force."¹⁴⁹ The Court also noted that heightened duties of information retention are essential to improving the quality of Ministerial decision-making prior to the commencement of certificate proceedings, stating that:

The submission of operational notes to the ministers and to the designated judge may be necessary to ensure that a complete and objective version of the facts is available to those responsible for issuing and reviewing the certificate. The retention and accessibility of this information is of particular importance where the person named in the certificate and his or her counsel will often have access only to summaries or truncated versions of the intelligence because of problems connected with the handling of information by intelligence agencies. In addition, the destruction of information may sometimes hinder the ability of designated judges to effectively perform the critical role, delegated to them by law, of assessing the

¹⁴⁹ *Charkaoui II*, *supra* note 40 at para 29.

reasonableness of security certificates, reviewing applications for release by named persons and protecting their fundamental rights.¹⁵⁰

Shortly thereafter, the court cited a decision by SIRC, noting that CSIS' policy of destroying operational notes has been a source of "long-running concern" and that "complainants frequently allege that the investigator's report of their interview is not accurate: that their answers are incomplete, or have been distorted or taken out of context."¹⁵¹ The Court also cited the O'Connor Report, which stated that "the need for accuracy and precision when sharing information, particularly written information in terrorist investigations, cannot be overstated."¹⁵² In order to facilitate judicial and public scrutiny of security intelligence practices and, more fundamentally, the truth-seeking function of the Federal Court, the Supreme Court ruled that CSIS is generally obligated to retain its operational notes in much the same way as are the police.¹⁵³

The Court then imposed upon the Ministers an obligation to disclose to reviewing judges all relevant information in their possession, irrespective of whether that information is inculpatory or exculpatory and of whether or not they intend to submit the information as evidence.¹⁵⁴ Although obligations of this nature have historically been reserved for Crown prosecutors,¹⁵⁵ the Court repeated that certificates are analogous to criminal proceedings insofar as they: require indefinite detentions; expose persons to severe deprivations of life, liberty, and personal security; and, are presided over by judges rather than administrative tribunals.

The imposition of *Charkaoui II* disclosure achieves similar objectives as granting special advocates the power to subpoena documents, with some important differences. To recall, SIRC assumed these powers as part of its broader institutional powers, while the Supreme Court declined to force their inclusion in amended certificate provisions in *Charkaoui I*. In *Charkaoui II*, it indirectly enhanced special advocates' performance capacity by requiring the government to provide much of

¹⁵⁰ *Ibid* at para 42.

¹⁵¹ *Bhupinder S Liddar v Deputy Head of the Department of Foreign Affairs and International Trade and Canadian Security Intelligence Service*, File No 1170/LIDD/04, June 7, 2005 at para 72.

¹⁵² O'Connor Report, *supra* note 36 at 11.

¹⁵³ *R v La*, [1997] 2 SCR 680.

¹⁵⁴ *Charkaoui II*, *supra* note 40 at paras 2, 56.

¹⁵⁵ *R v Stinchcombe*, [1991] 3 SCR 326.

this sort of information to reviewing judges and special advocates as a matter of course. Expanded disclosure has had significant effects on certificate proceedings. It contributed the quashing of the certificate issued against Mr Charkaoui and Mr Almei in late 2009.¹⁵⁶ Shortly following *Charkaoui II*, the government was ordered to disclose 2000 documents containing at least 8000 pages of information relevant to Mohamed Harkat.¹⁵⁷ Initially, the Ministers had redacted significant portions of this information based on their considerations of relevance and NSC. On March 12, 2009, the Federal Court lifted most redactions made to 67 contested documents,¹⁵⁸ although it has generally been respectful of national security confidentiality with respect to human source intelligence, as is standard practice in the criminal law context.¹⁵⁹ It is fair to say that the government has successfully forestalled a judicial reading-in of an analog to SIRC counsel's power to subpoena witnesses, but disclosure of documents has certainly exposed the government to greater adversarial challenge.

The precise scope of disclosure obligations has been a contested issue, most especially as regards what information may be safely disclosed directly to named persons. Ordinarily, named persons are only entitled to information (in full or summary form) that informs them of the case *against* them.¹⁶⁰ *Charkaoui II* disclosure requires all information regarding a named person to be submitted to reviewing judges and special advocates, regardless of whether it supports the Ministers allegations. The latter body of evidence is far broader in scope than is the former. In Fall, 2009, the Ministers tried to appeal a Federal Court ruling on the grounds that a reviewing judge, Tremblay-Lamer J, had inappropriately ordered the disclosure of information directly to Mr Charkaoui.¹⁶¹ The Ministers insisted that that the contested evidence could not be disclosed without compromising national security or the safety of any person. Tremblay-Lamer J. nonetheless ordered that it be disclosed and to further submit, during closed hearings, original copies of CSIS' operational notes

¹⁵⁶ *Charkaoui (Re)* (2009), FC 1030; *Almei (Re)* (2009), FC 1263.

¹⁵⁷ *Harkat (Re)*, (2009) FC 340 at para 7.

¹⁵⁸ *Ibid* at para 9.

¹⁵⁹ *Harkat (Re)* (2009), FC 204; *R v Leipert*, [1997] 1 SCR 281; *Bisaillon v Keable*, [1983] 2 SCR 60; *Canada (Solicitor General) v Royal Commission (Health Records)*, [1981] 2 SCR 494; *Marks v Beyfus* (1890), 25 QBD 494.

¹⁶⁰ *IRPA*, *supra* note 64, s 83(1)(e).

¹⁶¹ *Charkaoui (Re)*, *supra* note 156.

pertaining to this evidence. Tremblay-Lamer J then indicated that she would forward to Mr Charkaoui summaries of these originals and associated information, and would include details the Minister had insisted could not be safely disclosed.

Disputing the factual question of whether or not this information could safely be disclosed, the Ministers invoked s. 83(1)(j) of IRPA, which reads:

the judge shall not base a decision on information or other evidence provided by the Minister, and shall return it to the Minister, if the judge determines that it is not relevant or if the Minister withdraws it.

By withdrawing key evidence, the Ministers deprived the court of its authority to compel the disclosure of the contested information to Mr Charkaoui, either in full or in summary form. Of course, by withdrawing all of this information, the Ministers lacked evidence sufficient to support the reasonableness of Mr Charkaoui's certificate; a fact which they expressly admitted.¹⁶² It seems that this move was designed to invite the Federal Court of Appeal to intervene on their behalf.

In the absence of supporting evidence, Tremblay-Lamer J ruled that there were no statutory bases for the certificate; it was null, void, and *ultra vires* the authority of the Ministers. She based this judgment on section 77(2) of IRPA, which requires the Ministers to "file with the Court the information and other evidence on which the certificate is based." The withdrawal of supporting evidence rendered impossible a review of the reasonableness of the certificate, and so it had, in Tremblay-Lamer J's estimation, to be quashed. Tremblay-Lamer J proceeded to deny the Ministers' request to have certified questions for the Federal Court of Appeal, holding that there were no questions of general importance raised in this case. She had, in her view, appropriately applied the criteria laid down in *Charkaoui II*, finding as a matter of fact that certain evidence could safely be disclosed to Mr Charkaoui.

Generally speaking, special advocates with whom I have spoken have been satisfied with the extent of the government's disclosure. Notwithstanding one concerning instance of non-compliance,¹⁶³ the Ministers have complied with their disclosure obligations. Special

¹⁶² *Ibid* at paras 16, 43.

¹⁶³ *Harkat (Re)* (2009), FC 533.

advocates have indicated, however, that their performance capacity continues to be delimited by strict bans on communication with named persons throughout the entirety of proceedings. This problem is exacerbated by the fact that IRPA stipulates that the Ministers, and not judges, are to provide named persons with a summary of the evidence against them when certificates are initially filed with the court.¹⁶⁴ This means that when a named person first communicates with his or her special advocate, they must rely on the Minister's unilateral appraisals of what is and is not protected by national security confidentiality. By the time courts exercise their authority to subsequently order disclosure or independently compile additional summaries, special advocates are likely to have already accessed classified information and will not be able to receive further instruction or insights from named persons.

Similar practices have been upheld as compatible with international human rights by UK courts as well as the ECtHR. In *Re A and Others*, the ECtHR was asked to decide, *inter alia*, if the UK's reliance on closed materials during SIAC proceedings contravened Article 5(4) of the ECHR, which states:

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Notwithstanding that the SIAC system was designed to comply with *Chahal*, associated legislation omitted numerous procedural safeguards and did not expressly grant special advocates important powers. Among the omitted powers, it will be recalled, is the ability to communicate with alleged terrorists throughout the entirety of proceedings; a power essential to challenge the credibility and sufficiency of circumstantial evidence, to design legal strategies, and clarify certain facts. It was suggested that, absent this power, special advocates could only perform their roles effectively if alleged terrorists are well enough informed at the outset of proceedings to engage in meaningful discussion. The problem, in other words, could be resolved, either, by ensuring that enough information is disclosed to detainees early enough that they can meaningfully communicate with special advocates or, enabling detainees and special advocates to converse throughout the course of proceedings.

¹⁶⁴ IRPA, *supra* note 64, s 77(2).

As noted above, the ECtHR had already decided in this case that the mere threat of transnational terrorism stands as a public emergency in the UK and that a “margin of appreciation” should be granted to the executive over the necessity of extraordinary measures. Following suit, it ruled that the SIAC regime was, in principle, consistent with the ECHR, adding that SIAC is “a fully independent court,” is “best placed to ensure that no material ... (is) unnecessarily withheld” and that special advocates “provide an important, additional safeguard” in these respects.¹⁶⁵ It recognized, however, that the disclosure of information at the outset of proceedings is not always sufficient and that, when the executive fails to make adequate disclosure, the integrity of the proceeding is called into question.¹⁶⁶ This, however, is a matter to be decided on a case-by-case basis and so does not require legislative amendments.

Pursuant to the UK *Human Rights Act*, the House of Lords are legally obligated to give effect to the ECtHR’s judgments. However, in the follow-up House of Lords case of *Secretary of State for the Home Department v AF*,¹⁶⁷ some judges were reluctant to comply with the ECtHR’s judgment, considering it to be an excessive intrusion into executive discretion and state sovereignty. Lord Hoffman was particularly strong in his criticisms of the ECtHR, stating that he thought it was “wrong” and that its ruling may well “destroy the system of control orders.”¹⁶⁸ This decidedly reactive viewpoint failed to appreciate that the ECtHR had, both, endorsed the government’s invocation of a state of emergency (contrary to the preponderance of opinion among non-judicial authorities), and, found the SIAC system cohered with *Chahal* (even though it is widely known to be woefully inadequate in key respects). In fact, the ECtHR could have easily addressed issues of procedural unfairness by requiring the UK Parliament to legislatively authorize ongoing communication between special advocates and detainees. The ECtHR chose not to take this route, leaving it to SIAC to ensure that detainees have enough information to give effective instructions to their special advocates.

In any event, the House of Lords accommodated divergent views on this matter by reading down the impugned provisions rather than declaring them to be invalid. This gave trial judges the responsibility to

¹⁶⁵ *Re A and Others*, *supra* note 117 at para 219.

¹⁶⁶ *Ibid* at para 220.

¹⁶⁷ [2009] UKHL 28.

¹⁶⁸ *Ibid* at para 70.

decide on a case-by-case basis whether proceedings have been fair. The upshot of the ECtHR and House of Lords' rulings is two-fold. First, they sustain the language of the *Prevention of Terrorism Act, 2005*,¹⁶⁹ which in turn strongly implies that rights-infringements are by and large rare or the product of circumstance rather than parliamentary intent. This is especially problematic given the fact that UK special advocates, parliamentary committees, and human rights organizations have repeatedly stressed the serious difficulties posed by parliament's express prohibition of ongoing communications between special advocates and detainees; parliament has hardly been inadvertent to human rights infringements, even if they occur on a case-by-case basis.

Second, these rulings perpetuate the assumption that the judiciary is the best available vanguard against rights abuses. For its part, the ECtHR has repeatedly misrecognized the administrative nature of the SIRC system, falsely stating that SIRC was a judicial rather than an administrative body. The ECtHR's unwillingness to force improvements in special advocates' powers is partly due to unwarranted assumptions about the capacity, and willingness, of judges on the SIAC to hold the executive to high standards. The House of Lords similarly expects lower court judges to compensate for questionable statutory provisions and omissions. Although there have been appreciable improvements of late, we should be mindful of courts' historically poor track record in holding the executive to account in matters of national security.

These developments are mirrored to some extent in Canada. Current certificate provisions have been designed to replicate the SIAC system, with legislators having consciously denied SAs the formal and informal powers possessed by SIRC and its counsel. *Charkaoui II* provides special advocates with some of these powers as a consequence of requiring the government to disclose to reviewing judges and special advocates all information regarding a named person. But the Supreme Court has consistently refused to force parliament to adopt a specific legislative framework. It has, however, helped expand reviewing judges' discretionary power (and willingness to exercise it) and, consequently, helped constrain executive discretion over matters of disclosure, whether someone is a national security threat, and what can legally be done about it. The ECtHR and the UK House of Lords have adopted a similar, discretion-oriented approach. They have each ruled that SIAC legislation is lawful, but that errors in judicial or executive discretionary decision-

¹⁶⁹ UK 2005, c 2.

making may render particular proceedings procedurally unfair. It is hard to see how international and comparative human rights case law can advance the effort to force further legislative amendments in Canada, if this remains a goal of transnational human rights advocates dissatisfied with Parliament's response to the Charkaoui decisions. At best, one might hope for renewed emphasis on the need for full disclosure at the outset of proceedings and perhaps more vigilant judicial review of the adequacy of initial summaries.

CONCLUSION

Global intelligence agency cooperation poses a wide range of novel and complex regulatory challenges. On the one hand, global intelligence networks are transnational, hosting interactions among a plurality of state and non-state actors who interact in public and private as well domestic and international contexts. The global scale of contemporary intelligence practices transcends the jurisdictional reach of Canadian law and has required us to integrate ourselves into various bilateral and multi-lateral regimes, often with little to no involvement of representative and judicial institutions. For some, the transnational and executive-led qualities of global intelligence networks render them inherently ungovernable. On the other hand, national security rhetoric and invocations of exceptionality support reliance on extraordinary measures that do not sit comfortably alongside autonomous legal values, such as the rule of law and respect for rights. During moments of real or perceived crisis, the tendency is for executive officials to claim deference over the identification of security threats and the design, operation, and justifiability of extraordinary measures. Depending on their will and/or practical capacities, legal institutions' role in constraining the arbitrary exercise of executive power may be reduced by invocations of exceptionality. Critics argue that legislatures and courts will tend to defer to the executive in times of crises, while optimists argue that they simply have to find more creative ways of protecting human rights.

There are, of course, many sites within which the dynamics of global intelligence agency cooperation could be explored. I have approached them from the context of certificate proceedings. This approach has emphasized a few trends, including: the growing role of security intelligence as evidence in legal proceedings; the association between global intelligence practices and the human rights of migrants, refugees, and Canadian citizens; the fraying of functional boundaries

between security intelligence work and policing; the impact of international law and relations on Canadian national security law and policy; and, the role of the judiciary in constraining executive discretion over the identification and treatment of security threats. These issues point to a slow and painful process of learning about the constitutional dimensions of global intelligence practices as they intersect with various legal fields, including immigration and refugee law, criminal law, extradition, and privacy.

As one of the most conspicuous fields of contestation post-9/11, certificate proceedings offer insights into the trajectory and fruits of constitutional learning. Judicial reasoning has been facilitated and constrained by two, distinct sources of knowledge: domestic experience and international and comparative human rights. The former includes statutory and regulatory frameworks (contemporary and historical), constitutional rules, principles, and values, the output of commissions of inquiry and parliamentary committees, and the thick institutional histories of national security agencies, courts, and assorted oversight and review bodies. The latter includes the perspectives of various discursive communities, including international human rights treaty monitoring and standard-setting bodies, foreign courts, tribunals, and legislative bodies, transnational human rights networks, and regional courts, such as the ECtHR.

One might think that international and comparative human rights would be a natural resource, given the global scope of contemporary intelligence practices and the extraordinary qualities of certificate proceedings. They have indeed played a modest role in contextualizing the problems posed by global intelligence agency cooperation as well as in motivating the Supreme Court to restructure the ways in which security intelligence is collected, shared, retained, and disclosed. The social science data produced concerning the changing nature of security intelligence practices and the human rights implications of post-9/11 national security law and policy persuaded the Supreme Court that security certificates, staples of immigration and refugee law since 1976, had assumed extraordinary qualities that carried them beyond the ambits of law.

However, international and foreign case law was then used to offer an alternative that only partially actualized important legal values. Parliament responded with legislation that failed to expressly provide special advocates with powers considered indispensable in alternative,

domestic regimes that have a proven track record of effectively balancing national security and human rights. Added to this, recent international and foreign case law dealing with analogous legislation in the UK has stood for the dubious proposition that public emergencies need not be temporary and that extraordinary measures therefore may be used indefinitely. International and comparative human rights are supposed to facilitate constitutional learning by providing clear and definite criteria concerning when there is a public emergency as well as whether and how rights may be limited. There are certainly clusters of understandings shared by non-judicial discursive communities that would support this function, but transjudicialism has tended to prioritize the divergent and arguably apologetic opinions of courts over the perspectives of non-state discursive communities with expertise in human rights.¹⁷⁰ Still, shared understandings held by non-state human rights communities establish cores of meaning that help us appraise the quality of judicial, legislative, and executive decisions about states of emergency.

Given recent international and foreign jurisprudence, it might be more fruitful for transnational human rights advocates to more fully exploit domestic experiences, institutional histories, and other received wisdom. This approach met with considerable success in *Charkaoui II*, where the Supreme Court largely ignored international and comparative human rights and focused instead on how to apply longstanding criminal law principles concerning disclosure to CSIS.¹⁷¹ Subsequent Federal Court decisions are similar in these respects. Interpreting and applying

¹⁷⁰ This can lead to positive results, such as in *Canada (Justice) v Khadr*, [2008] 2 SCR 125, where the Supreme Court of Canada ruled that Canada violated international human rights by interviewing a Canadian citizen detained in Guantanamo Bay. This finding was supported by its interpretation of the four *Geneva Conventions of 1949* as well as recent Supreme Court of the United States decisions whereby military commissions established to try detainees at Guantanamo Bay were expressly held to be inconsistent with international human rights (*Hamdan v Rumsfeld*, 126 S Ct 2749 (2006); *Rasul v Bush*, *supra* note 130). The Supreme Court of Canada found that Canadian officials' participation in processes associated with these military commission violate Canada's international legal obligations, and, that this legal consequence was enough to activate the extra-territorial application of section 7 of the *Charter*. It then ordered the disclosure of records of interviews held between Mr Khadr and Canadian agencies and any information sent to the United States as a direct result of the interviews.

¹⁷¹ This decision is not without its negative effects. Kent Roach has observed that *Charkaoui II* disclosure, which requires CSIS to retain personal information indefinitely, may violate privacy rights. See Kent Roach, "When Secret Intelligence Becomes Evidence: Some Implications of *Khadr* and *Charkaoui II*" (2009) 47 Sup Ct L Rev 147.

domestic norms, reviewing (and appellate) judges have helped construct a markedly improved certificate regime that, though imperfect, imposes serious constraints on executive discretion. Valid critical perspectives notwithstanding, one could be forgiven for optimistically regarding the quashing of certificates against Mr Charkaoui and Mr Almrei as well as the Federal Court's spirited application of *Charkaoui II* disclosure as indicative of a hopefully long-lasting judicial willingness to more rigorously review executive claims of secrecy.

