Droits et Démocratie
Rights & Democracy

Centre international des droits de la personne et du développement démocratique
International Centre for Human Rights and Democratic Development

Rights & Democracy

Special Senate Committee on the Anti-Terrorism Act

Integrating Democratic Safeguards and Human Rights in Canadian Anti-Terrorism Law and Practice

Presentation of Jean-Louis Roy
President

Ottawa
16 May 2005

Background on Rights & Democracy

Rights & Democracy (International Centre for Human Rights and Democratic Development) is an independent Canadian institution created by an Act of Parliament. It has an international mandate to promote, advocate and defend human rights and democratic development at the international level as set out in the International Bill of Rights. In cooperation with civil society and governments in Canada and abroad, Rights & Democracy initiates and supports programmes to strengthen laws and democratic institutions, principally in developing countries.

Rights & Democracy has been engaged in monitoring the effects of national security laws on civil liberties and human rights for nearly a decade. Following the events of September 11, 2001, Rights & Democracy has tried to ensure that civil liberties and human rights were not unnecessarily compromised in the proliferation of national security laws and anti-terrorism measures.

Rights & Democracy's programme on human rights, democracy and security is focussed on the following objectives:

- to enhance public awareness on this issue through publications, seminars and on-going advocacy in cooperation with civil society organizations and governments; and
- to strengthen the capacity of organizations at the national, regional and international levels who focus on this issue from a human rights and democracy perspective.

Highlights of our efforts in this domain include:

- The organization of a Think Tank on "Promoting Human Rights and Democracy in the Context of Terrorism" in May 2002;
- The establishment, together with other Canadian organizations, of the International Civil Liberties Monitoring Group, a coalition made up of NGOs, churches, unions, environmental and civil rights advocates, faith groups, and organizations representing immigrant and refugee communities in Canada.
- Advocacy at the annual session of the United Nations Commission on Human Rights on the need for the establishment of effective international mechanisms to monitor the compatibility of domestic counter-terrorism measures with international norms and human rights standards.
- The raising of awareness on the sale of Canadian security and surveillance technology to China and its negative impact on human rights.
- Participation in an international civil society campaign against mass surveillance.
- Publication of a report entitled "Canadian Democracy at the Crossroads: The Need for Coherence and Accountability in Counter-Terrorism Policy and Practice" by Iris Almeida and Mark Porret.

Further information about Rights & Democracy and our activities is available in English and French at www.dd-rd.ca.

Introduction

Thank you for the invitation to appear before the Senate Special Committee on the Anti-terrorism Act to discuss one of the most important challenges that Canada and the international community is facing: how do we take the threat of terrorism seriously without undermining the foundations of democracy and reducing human rights and civil liberties to a meaningless rhetoric?

I think we would be presumptuous to try and give a definitive answer to this question. Terrorism was not invented on September 11th and it is not going to be solved by the end of this study. Recently, as it created a working group on security, the French government estimated that we will live with the terrorist preoccupation for two or three generations. While I hope this is not true, I also realize that it will take a long time for us to fully comprehend and adequately address the complex root causes and stealthy manifestations of terrorism. Therefore, as we gather to review a specific piece of Canadian legislation—or rather an interconnected series of laws, amendments and policies—it is important that we take a broad and long-term view of the issues before us.

In my submission, I do not have time to deal with all the important dimensions of this review. I will focus on a few critical issues and will present to you Rights & Democracy's main recommendations for the Committee's report.

First, I will underline the fact that there is an important international dimension to the review of Canada's anti-terrorism law and policy. I will argue that we cannot review our *Anti-terrorism Act*, nor implement our national security policy, in an isolated bubble. Furthermore, as our human rights concerns and obligations are international in scope, our so-called "balanced approach" must extend beyond our borders.

Second, I will question whether we have adequate mechanisms to analyze the threat environment on an on-going basis. We cannot properly measure the adequacy and effectiveness of our anti-terrorism legislation and policy—as well as our investments in

new security mechanisms, technologies and forces—unless we have reliable information, intelligence and analysis about the threat environment in Canada, at the continental level and internationally. To the greatest extent possible, this information should be made available to Parliament and reported to the public. This is important in terms of democratic accountability and debate. It is also important for us to assess how we can, eventually, scale-back parts of the security apparatus that are no longer necessary.

Third, I will challenge the adequacy of our current democratic oversight mechanisms, as well as the internal checks and balances for our new security-related agencies, mechanisms and procedures. Overall, democratic oversight is not nearly as integrated and comprehensive as is the new security apparatus. Rather, it appears scattered and incoherent. We must strengthen our democratic oversight mechanisms and internal checks and balances in order to protect civil liberties and prevent the human rights abuses that undermine our social fabric, weaken public confidence in our democratic institutions, and damage our international reputation.

Fourth, I would like to address the issue of racial profiling. From a human rights perspective, equality and non-discrimination are fundamental principles. Although it is difficult to study and quantify racism, I believe that this has the potential to be one of the most serious indirect consequences of our anti-terrorism efforts. To date, our efforts to ensure that racism does not permeate our anti-terrorist practices appear to be mostly rhetorical. If we truly value human rights, we must be much more focused on concrete policies, as well as specific education and training techniques, to combat racism and preserve our values of equality, non-discrimination and multiculturalism.

Finally, I will make some specific recommendations to the Committee, which I hope will assist your further deliberations and inform your final report.

At the outset of this presentation, I would like to make the following over-arching point about human rights. When it comes to discussions about human rights and security or anti-terrorism, it is common to frame the issue as a question of balance. While I am glad

that the issue of human rights is being raised, I nonetheless believe that this conceptualization is problematic for a number of reasons that I have outlined in a presentation I made in May 2004 and which is included in your binders at Tab 2.

Instead of talking about **balancing** human rights and security as if they were separate and distinct issues, I believe that it is more fruitful to talk about **bridging** human rights and security.

As you know, security is a human right and respect for human rights is the foundation of security. By allowing human rights and security to be balanced, opposed and divided, we run the peril that both will be conquered. We may find ourselves with no security and no rights.

If we probe the "balancing" metaphor, I am concerned that our efforts in the field of human rights since September 11th are quite imbalanced in comparison with our security efforts. This is the case in terms of our financial investments, our coordination efforts, our new political and administrative structures, and our multilateral activity. We may have a balanced rhetoric about human rights and security, but that there is little balance at the operational level. Our challenge is therefore to find practical and concrete ways to bridge or integrate human rights and civil liberties into the new security systems and structures so that these principles and obligations are operationalised.

Most importantly, an integrated approach to human rights and security or anti-terrorism has the best chances of preventing the human rights violations that are so damaging to individuals, the fabric of our society and the foundations of our democracy. Also by bridging human rights and security, there is an opportunity to gather the energies of the human rights community with those of the security and intelligence communities and focus them on the common goal of safeguarding Canadians.

1. The international dimension of Canada's anti-terrorism law and policy

In preparation for this presentation, I have read the prior proceedings of this Committee with great interest. You have heard from a wide range of high calibre witnesses—from Cabinet Ministers to senior civil servants, from security experts to lawyers and professors—and have had a chance to debate many of the legal, political, financial, administrative and ethical dimensions of the issue that confronts us. The complexity of the debate is multiplied by the fact that security and anti-terrorism have important international and comparative dimensions that cannot be ignored.

In the aftermath of September 11th, nearly every government reacted quickly to the shocking events of New York, Washington and Pennsylvania with new anti-terrorism legislation and policies. Given the resolutions of the United Nations' Security Council, as well as the pressures from the United States' administration and frightened civilian populations, such reactions were understandable. However, only in recent months have we started to re-evaluate our initial reactions, re-calibrate our security strategies and tactics, and scrutinize the level of return on the massive investments we have made.

To help us grapple with the issues of anti-terrorism, we now have the benefit of important judicial decisions from the Supreme and Federal Courts of Canada, the British House of Lords, as well as the U.S. Supreme Court. And there will certainly be more judicial decisions to come that will enlighten us. We have the analysis of the 9/11 Commission and we can expect further serious and comprehensive reports of other legislative commissions and committees. The anti-terrorism laws of other countries, including the U.S. *Patriot Act*, also contain mandatory review and sunset clauses and we can expect that there will be revisions similar to that which brings us together today.

At the international level, there is also the work of the United Nations, particularly the Security Council's Counter-Terrorism Committee. It is interesting to note that the Counter-Terrorism Committee is increasingly taking human rights concerns into account in its resolutions and there is an effort to create operational links to the UN Office of the

High Commissioner for Human Rights. Furthermore, important work is being carried out by regional institutions, including the European Court of Human Rights and the Inter-American human rights institutions. The analysis and jurisprudence of these multilateral organizations should inform our review of Canada's anti-terrorism legislation and policy.[1]

I am underlining the on-going work of other important democracies and key multilateral organizations for three reasons.

Canada should be engaged in international debate and review about anti-terrorism legislation, policy and best-practices

Firstly, I would like to introduce one of our principal recommendations to the Special Senate Committee that there must be an on-going review mechanism for Canada's anti-terrorism legislation and policy. While I appreciate the efforts of our Parliament and government to take a balanced approach as it introduced Bill C-36 and the National Security Policy, it is simply premature for us to declare that we have got the balance absolutely right.

The international community will continue to struggle with this issue for many years to come and we must not cut ourselves off from these critical debates, analyses and judgments. We can anticipate that there will be important procedural and administrative lessons to learn, for example, about preventative arrest, security certificates and the proper use of personal information. We can anticipate that there will be research about the use of racial profiling and forms of training to prevent its noxious effects. We can anticipate court decisions that will affirm our fundamental democratic values and human rights and delineate their scope and content in the context of specific anti-terrorism practices.

[1] The Office of the High Commissioner for Human Rights is compiling a "Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights while Countering Terrorism" that summarizes key principles for the interpretation of counter-terrorism legislation in conformity with international human rights law. See: http://www.ohchr.org/english/about/publications/docs/digest.doc. **A copy of this Digest is included at Tab "4".**

Canada must give itself on-going review mechanisms to benefit from the international lessons and best practices—or conversely to learn from the mistakes of others—rather than isolate ourselves in our own legislative and policy bubble.

Canada must be aware of the gaps in the international anti-terrorism framework

The second reason that I refer to the international dimension of the current study is that, since September 11th, we have seen a patchwork of new anti-terrorism legislation at the national level, a patchwork that currently leaves many gaps. In the worst cases, these gaps might be described as legal black-holes or grey-zones—such as Guantanamo Bay—where individuals are categorized in such a manner to be denied the rights and due process that would be given to a full citizen.

For example, in previous testimony, you have heard government lawyers explain such a distinction in reference to the Canadian security certificates, rationalizing that particular process because the individuals targeted are immigrants who want to stay in Canada rather than Canadians. I will discuss the security certificate process in more detail later, but the immediate point is that Canada must respect and reinforce international human rights, humanitarian and refugee law, which are the norms and standards that fill the gaps between national anti-terrorism laws and help delineate the limits for creating various categories of human beings, all of whom are supposed to be equal in dignity and rights.

Therefore, not only must international human rights standards be a measure for our own anti-terrorism legislation and policy, but they are also the fundamental reference for us to understand how our anti-terrorism legislation and policy interacts with that of other nations—especially those nations to whom we might extradite individuals at the risk of harassment, torture and even the death penalty. If we truly have a balanced approach to anti-terrorism, our concern for human rights must also follow our concern for security at the international level. A truly balanced or, better yet, an integrated approach does not stop at our borders nor turn a blind eye to non-Canadians.

Canada must respect its international human rights obligations

This brings me to the third point that I would like to make about the international dimension of our review of Canada's anti-terrorism legislation. As I reviewed the transcripts of your previous witnesses, I was struck how Bill C-36 was justified in international terms.

Important witnesses referred to Bill C-36 as the continuity of Canada's work at the United Nations on a dozen anti-terrorism conventions that we have signed—but not ratified—prior to September 11th, as well as the fulfilment of our obligations to the Security Council afterwards. However, I did not notice any mention of our international obligations relating to the human rights treaties that Canada have signed and ratified prior to September 11th, which contain important principles for our so-called balanced approach. Of particular relevance are the *International Covenant on Civil and Political Rights* and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment*.

The Arar case, the situations in Guantanamo Bay and the Abu Ghraib prison—and the ensuing public reactions and even terrorist reprisals—show us the limits of how far we can push the security agenda without respect for human rights.

Human rights should not be seen as inflexible obstacles to effective intelligence, police and military action. The doctrine and jurisprudence of human rights, as it relates to emergency and security measures, has always contained an allowance for restricting some rights and freedoms in order to protect society, to preserve its institutions and to overcome emergencies in the perspective of the long-term realization of rights and freedoms. In international law, this concept can be traced back to Article 29(2) of the *Universal Declaration of Human Rights*;[2] but takes its specific form in Article 4 of the

[2] "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and

International Covenant on Civil and Political Rights.[3] This provision—along with other important international instruments—helps us define the core of human rights, those rights upon which there are no compromise, no trades, because these define the essential fabric of our democratic societies. Once we begin rationalizing small encroachments on the right to life—and its adjunct *habeus corpus*—and freedom from torture, then the credibility and justice of our cause crumble.

The universality of all human rights is our conviction. Non-derogation from human rights is the norm. But we recognize that derogation is permissible in emergency situations, within the context of the rule of law and within the parameters of legality, necessity, proportionality, temporality and non-discrimination.

I acknowledge that Canada's *Anti-terrorism Act* is not, strictly speaking, emergency legislation. However, as legislation that was enacted quickly in a climate of international crisis, some of the considerations mentioned above should also inform this review. To my mind, the well-established principles relating to Article 4 of the *International Covenant on Civil and Political Rights*—such as necessity, proportionality, temporality and non-discrimination—underline the importance of an on-going review mechanism to evaluate how our anti-terrorism law and practice is being implemented and what adjustments and refinements should be made over time.[4]

---

freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

[3] Article 4(1) In times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required 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. Article 4(2) No derogation from articles 6 (the right to life), 7 (freedom from torture), 8 (freedom from slavery or servitude), 11 (freedom from imprisonment for failure to pay a debt), 15 (freedom from retroactive penal laws), 16 (right to be recognized as a person before the law) and 18 (freedom of thought, conscience and religion) may be made under this provision.

[4] The United Nations Human Rights Committee has issued its General Commentary No. 29 in July 2001 that provides further guidance about the interpretation of Article 4 of the *International Covenant on Civil and Political Rights.*

2. Comprehensive and periodic assessment of threats

From the foregoing, we understand that the exceptional security measures are meant to be limited in time. While Canadians are willing to sacrifice some of their conveniences in the name of security, they are not willing to permanently sacrifice their rights. The expectation, supported by international law, is that we will re-evaluate and re-calibrate our security measures as the threat environment evolves.

But on what basis do we evaluate the threat environment? Given the sensationalism of the media, as well as the communications efforts of the current American administration, do we have adequate mechanisms to provide a credible assessment and analysis of the terrorist risk to Canadians?

In this regard, an important step was taken by the creation of the Integrated Threat Assessment Centre (ITAC) in 2004. From the information available, ITAC will help ensure that information from different sources—both nationally and internationally—is analysed and communicated within the various governmental departments, security and police agencies.

The circulation of information between security agencies is important, especially given the assessment that the information to prevent the September 11th attacks was available, but not acted upon. The following comment, from the New York Times of April 19th, 2004, should give us pause to reflect: "The attacks of September 11th seemed to come in a stunning burst from nowhere. But now … the lengthy documentary records make it clear that prediction of an attack by Al Qaida had been communicated directly to the highest level of government."

It would appear, then, that the human factor—a certain bureaucratic blindless and territoriality and a lack of political control or will—may be as much responsible for September 11th as the fundamental inadequacy of the security measures in place. The obligations of States for security existed prior to September 11th; perhaps the tragedy

could have been avoided had those obligations had been fulfilled. We cannot ignore the fact that even the best systems are not foolproof and that the most impressive technological wizardry is no substitute for human vigilance.

Therefore, as we work to have an integrated approach to threat assessment, we must ensure that the bureaucratic structures and agencies we create remain strictly focussed on the task at hand. In all domains, we must guard against bureaucratic self-perpetuation; but, this is a particular risk in an area such as anti-terrorism, where the threat is so vague and pervasive. In this regard, I underline the necessity for us to progress on the definition of terrorism—both with respect to Canada's legislation and jurisprudence, as well as in international law.

I have two specific concerns about how we analyse the threat environment:

Firstly, that the threat assessments are subject to critical analysis and review by public authorities outside the security and police establishment. Given the large amounts of financial and other resources that we are investing in anti-terrorism structures, there should be scrutiny on a periodic basis to determine whether these investments are justified by and are effectively targeted at the evolving threat environment. Not only must we consider the human rights effects of security measures in terms of proportionality, necessity and non-discrimination, but we also must weigh their effectiveness against their cost.

For example, the Auditor-General's report of 2004 provided useful public information about the state of our security systems and the effective use of their resources. Given the rapid evolution of Canada's security apparatus, this sort of audit should be carried out regularly. Ultimately, information about the overall threat environment must be made available to Parliament and the public. Without such information, we cannot have an informed democratic debate about one of the most pressing and complex issues of our time.

Secondly, in an era of integrated threat assessments at the national and international levels, information will undoubtedly circulate between agencies and across borders. This raises significant privacy concerns about whether information collected for one purpose will be used without consent for another purpose, as well as the probability that our personal information—potentially including ethnic, financial and consumer profiles—will be compiled in massive databases. This is especially troubling when we consider new technologies such as biometrics and facial recognition systems.

As privacy is one of the hallmarks of democracy, we should ensure that there are adequate checks and balances on the personal information that circulates in our new integrated security apparatus. For example, could someone from the Privacy Commissioner's office be included in the work of the Integrated Threat Assessment Centre? While acknowledging the critical necessity for intelligence in the struggle against terrorism, we also need measures to preserve public confidence in how this information is screened, shared and used.

3. Strengthened democratic oversight and meaningful checks and balances

As we confront the question of how to **bridge** security and human rights, we must assess the tools at our disposal, both for the preservation of security as well as for the promotion and protection of human rights. Of central importance is an analysis of the oversight mechanisms and internal checks and balances that can serve to ensure that human rights are integral to security policies. Hopefully, we may be entering a new phase in the "war on terrorism," in which governments will be forced to take more seriously democratic oversight and protection of human rights in order to enhance the credibility and effectiveness of their security policies and apparatus.

As I have previously mentioned, despite the comforting rhetoric about balancing security and human rights, up until this point our investments in new, improved and effective security measures (to meet the current threats to security) far outweigh our investments in new, improved and effective human rights mechanisms (to meet the current threats to

human rights). When there is such an asymmetry in these investments, we must ask ourselves whether human rights are truly valued?

We committed $7.7 billion to improving our security after September 11th. In addition, the Prime Minister announced $690 million in additional national and international initiatives as part of Canada's National Security Policy. As you know, the key focus was on greater coordination between the numerous agencies and departments involved in national and international security, especially through the creation of a new Department of Public Safety and Emergency Preparedness; a Cabinet Committee on Security, Public Health and Emergencies; a National Security Advisor to the Prime Minister; an expert National Security Advisory Council; and, an Integrated Threat Assessment Centre. Moreover, new agencies and investments were announced to improve intelligence; emergency planning and management; public health; transport security; border security; and, international security.

The National Security Policy also contained reassuring statements, such as "we also need to ensure that there are effective mechanisms for oversight and review so that, in protecting an open society, we do not inadvertently erode the very liberties and values we are determined to uphold." In concrete terms, the notion of democratic oversight is to be operationalized through mechanisms like the Cross-Cultural Roundtable on Security, the National Security Committee of Parliamentarians and the government's commitment to the legislative review of the *Anti-Terrorism Act* and the mandate given to the Honourable Justice Dennis O'Connor to advise the government about creating an arms-length review mechanism for the RCMP's national security activities.

But will these oversight mechanisms be effective? And are they sufficient?

This raises a series of questions about which we must think carefully as we pass into the implementation stage of the National Security Policy.

At the outset, we must note that many of these oversight mechanisms have barely been created, if at all. The Cross-Cultural Roundtable had its first meeting in March 2005. The National Security Committee of Parliamentarians has not yet been created. Justice O'Connor has not yet finished his inquiry and released his final report regarding an oversight mechanism for the RCMP. Of all the oversight measures enumerated in the National Security Policy, the review conducted by this Special Senate Committee and the companion review in the House of Commons are the most substantial to date.

This raises an important point about how binding democratic oversight mechanisms are that are founded upon policy and not upon law. The fact that a specific timeframe for the review of Bill C-36 was included in the legislation has had an effect. For those oversight mechanisms that are based on the National Security Policy, we may ask whether they will effective if there is a change of government and new Ministers of Justice and Public Safety and Emergency Preparedness are appointed? More importantly, will these mechanisms be effective if—heaven forbid—there is another serious terrorist attack on our continent?

We must also inquire about how close to the top-secret centres of the new integrated security structures are these review and oversight mechanisms located? Or are they located on the periphery of real decision-making? For example, with respect to some of the privacy issues we raised above, do the provincial and federal privacy commissioners have the mandates and powers required to exercise real oversight?

Furthermore, will those responsible for democratic oversight have full access to information? To whom will they report, how often and in how much detail? In this regard, concerns have been raised about the adequacy of Justice Canada's annual reports on the application of the *Anti-Terrorism Act*.[5]

[5] See, *inter alia*, the report of the International Civil Liberties Monitoring Group, "*In the Shadow of the Law,"* (May 14, 2003).

Will our oversight mechanisms be given a proactive role in the design and implementation of security processes in order to prevent violations of our rights and freedoms? Or will they function as an afterthought and address violations after they have occurred?

Consider the mandate given to Justice O'Connor to advise the government about the creation of a review mechanism for the RCMP. While the eventual creation of such a mechanism is surely desirable, the broader mandate of Justice O'Connor—to investigate the serious allegations of racial profiling, deportation and torture of Mr. Maher Arar—underscores the importance of integrating checks and balances within our security policies from the outset and not as an afterthought. It is important that we invest in preventing abuses. Not only is this right in principle, it will save Canadian taxpayers from costly inquiries and court proceedings.

Furthermore, in the meantime, we should be concerned about the relatively unsupervised conduct of the RCMP. We must recall the January 2004 report of Shirley Heafey, Chair of the Commission for Public Complaints against the RCMP, in which she raised a number of issues about the lack of an oversight mechanism for the RCMP in the post-September 11th security legislation. Again, we return to the mandate of Justice O'Connor in the context of the Arar inquiry. However, as we all know, public inquiries take a significant amount of time—perhaps years—during which we lack the oversight mechanisms in which the public may have confidence.

These are the sorts of gaps that occur when we do not integrate concern for human rights into national security measures at the outset. All too often, we strengthen checks and balances after the violations have occurred and after the damage to individuals and our society has been done.

Another issue that we cannot ignore is the fragile oversight that we have regarding possible deportations related to the security certificate system. We have heard testimony from government officials that affirms that it is the responsibility of Foreign Affairs

Canada to get some form of diplomatic assurances that deported individuals are not subject to torture or other human rights violations. As a recent report by Human Rights Watch documents, this is an extremely problematic practice to which many governments are resorting in the "war on terrorism."[6] Can we be confident in the sincerity of these assurances, especially in countries where torture and degrading treatment in prisons is the norm? Can we be confident of Canada's diplomatic weight to protect an individual if more powerful countries put pressure on a government to extract information? As I have stated above, we must ensure that our concern for human rights extends beyond our borders and to non-Canadian citizens. When it comes to States within with there is a real and credible risk of torture, we must uphold international law obligations and prohibit the transfer of individuals. Even in the most "exceptional circumstances," there are other solutions to break the impasse between holding an individual indefinitely in custody and putting them at risk of torture. On the one hand, if interrogations are absolutely necessary, they can be carried out on Canadian soil with the supervision of Canadian officials. On the other hand, if the evidence that justifies detention is insufficient but suspicion remains, the individual can be released subject to certain conditions.

Even where we have created oversight mechanisms, we need to inquire about how well they are funded and how well they are staffed?

These are not idle concerns. In the National Security Policy, new agencies with security agendas were attributed specific and significant budgets, whereas oversight mechanisms are not attributed any specific dollars or cents. Existing security agencies such as CSIS have seen dramatic budget increases (+30%) while existing human rights mechanisms that play useful educational, training and watchdog roles—such as our provincial and federal human rights and privacy commissions[7]—have not benefited from such significant cash infusions. If and when a Parliamentary oversight mechanism is created,

---

[6] Human Rights Watch, "Still at Risk: Diplomatic Assurances No Safeguard Against Torture," April 2005, Vol. 17, No. 4(D).

[7] In this regard, an interesting example is the Ontario Human Rights Commission that recently completed an Inquiry Report on racial profiling entitled, "*Paying the Price: the Human Cost of Racial Profiling*" that outlines the serious consequences of this practice, including its alienating effect on individuals, its divisive effect on communities and the creation of mistrust in our institutions.

one of its functions should be to review the budgets attributed to security and those attributed to human rights.

These questions may help us think about investing in prevention by creating substantive and integrated oversight mechanisms now as we review our anti-terrorist legislation and policy. We have the opportunity to strengthen these mechanisms and entrench them in law. If the government believes it is not appropriate to entrench oversight mechanisms in law, it should bear the onus of justifying it.

For instance, we believe that it would be useful to have high-level positions created for human rights experts within all the new security-related agencies, including the Department of Public Safety and Emergency Preparedness and alongside the National Security Advisor to the Prime Minister.

We also believe that there should be substantial provisions to ensure that human rights training is given to the intelligence, police and military officers—as well as the sub-contractors—who will enforce our anti-terrorism legislation and policies. In this regard, we believe that the expertise of existing human rights institutions with a mandate for human rights education, such as our provincial and Canadian human rights commissions, should be validated and their role in our society reinforced. These are some of the elements of the exemplary national security practice that Canada should implement.

Finally, I would like to comment on the judicial oversight of our anti-terrorism legislation. It is true that the court system has a general oversight role related to many of the concerns discussed above. However, we also know—as this Committee has previously noted—that judges are not altogether comfortable with some of the new procedures that are being created. Judges are used to a full, open and adversarial exchange of arguments as a method for determining the "truth"; they are unfamiliar and uncomfortable with secret proceedings based on partial disclosure and with a limited role for the adversarial probing of evidence.

We also know the limitations of courts as an oversight mechanism. They are expensive, complicated and slow-moving. There may be economic, sociological and other access barriers to some individuals and groups who might be affected by anti-terrorism legislation. Therefore, while the courts must unquestionably remain the ultimate arbiters of our anti-terrorism legislation, we must also create tailored oversight mechanisms and operational checks and balances for our security apparatus.

Ultimately, just as we are creating linkages between security agencies to maximize the comprehensiveness and effectiveness of their joint efforts, we also need to create similar linkages between new democratic oversight mechanism and existing ones to ensure the comprehensiveness and effectiveness of human rights mechanism. Ideally, these linkages would be supported at the highest levels of government and Parliament. We applaud the eventual creation of a Parliamentary oversight committee with full security clearance. It should have a comprehensive mandate to review all the operational aspects of our anti-terrorism law and policy on an on-going basis.

4. Racial profiling is also a threat to Canadian society

Finally, I would like to address the issue of racial profiling. From a human rights perspective, equality and non-discrimination are fundamental principles. Although it is difficult to study and quantify racism, I believe that this has the potential to be one of the most serious indirect consequences of our anti-terrorism efforts.

To date, our efforts to ensure that racism does not permeate our anti-terrorist practices appear to be mostly rhetorical. The Cross-Cultural Roundtable is only beginning its work. There are alarming reports—from lawyers, ethnic community leaders and provincial human rights commissions—about intimidation and discrimination. Previous witnesses at this Committee did not give convincing answers about training of security officers to counteract racial profiling.

If we truly value human rights, we must be much more focused on concrete policies to combat racism and preserve fundamental values equality, non-discrimination and multiculturalism. Training on human rights and anti-discrimination for police, security and immigration agents should be a top priority. This training should also be mandatory for sub-contractors throughout the security system. Public complaints procedures should be reviewed—and their existence publicized—so that police, security and immigration agents can be held accountable for discriminatory practices. Again, the eventual Parliamentary oversight committee should have a mandate to review the adequacy of our training and education efforts to counteract racism.

A related issue is the potential for de-registration of charities under the *Charities Registration (Security Information) Act*. We must be careful to establish a fair, transparent, reviewable and manageable process that balances the need to prevent the financing of terrorist activities with the need to encourage the charitable activities of Canadian individuals and groups. Of concern is the potential that legitimate charities engaged in difficult countries—where international solidarity is the most needed—will likely have the most difficulty with the system.

Conclusion and recommendations

In conclusion, I would like to underline the necessity of an integrated approach to human rights and anti-terrorism. I urge the Special Senate Committee to think creatively and concretely about ways to bridge human rights and security at the operational level, rather than merely upholding a balanced rhetoric about human rights and security. Most importantly, this requires an investment of financial and human resources in democratic oversight for and internal checks and balances within security agencies and structures.

I also urge the Committee to take a broad and long-term view of this issue and include an international and comparative analysis in its final report and recommendations. Our concerns go far beyond the specific provisions of the *Anti-terrorism Act* to how the

tentacles of this legislation—and all the consequential enactments and policies—are playing out in our society.

We must reaffirm the foundations of democracy, including respect for human rights and the rule of law. The most important issue of our time is not simply countering terrorism, but rather eradicating terrorism through the expansion of democracy, human rights and the rule of law. While we must protect Canadians against the manifestations of terrorism, we must also concentrate our efforts and resources at the root causes that allow terrorism to spread, including underdevelopment, poverty and illiteracy.

Therefore, Rights & Democracy recommends that the Special Senate Committee:

1) Ensure that the *Anti-terrorism Act* and related legislation be subject to an on-going Parliamentary review process every two years. In carrying out these successive reviews, Parliament must bear in mind the principles of necessity, proportionality, temporality and non-discrimination with a view to eliminating parts of our anti-terrorism legislation that is obsolete or redundant with respect to regular criminal law.

2) Ensure that the current review, as well as future reviews of our anti-terrorism law and practice, includes Canada's international human rights obligations, as well as the best practices of other democracies and the analyses of multilateral organizations.

3) Ensure that Parliament has full access to all information that it needs to analyze the evolving threat environment from a Canadian perspective and evaluate whether the focus of existing security agencies needs to be adjusted and whether the level of investment continues to be justified. Granting security clearance to a special Parliamentary oversight committee can balance the need for oversight with the need for secrecy. Nonetheless, Parliament should make public reports about the evolving threat environment and its assessment of the work of our security apparatus.

4) Ensure that privacy rights are respected and strictly limit the sharing and compilation of personal information.

5) Ensure that democratic oversight mechanisms, as well as internal checks and balances, apply to all security agencies and structures. To the extent possible, these oversight mechanisms and processes should be entrenched in legislation and not merely policy. The totality of new and existing oversight mechanisms should be coordinated and integrated at the highest levels of government. More comprehensive annual reports regarding the implementation of Canada's anti-terrorism law and policies should be made public.

6) Ensure that systematic, concrete and effective actions are taken to safeguard against racial profiling and combat racism in the conduct of anti-terrorism efforts. Training of police, security and immigration agents is a high priority, as well as permanent public education efforts. Given Canada's heritage in creating a relatively tolerant society, the government should be called upon to redouble its efforts and launch a national campaign against racism focusing particularly on youth.

7) Ensure that due process, transparency and meaningful review mechanisms exist for the *Charities Registration (Security Information) Act* and that it is applied in a non-discriminatory manner. The application of this law must not produce a chilling effect on Canadians' international and humanitarian engagement in the most difficult countries, which also contributes to the struggle against terrorism.