




Touching Torture with a Ten-Foot Pole: The Legality of Canada's Approach to National Security Information Sharing with Human Rights-Abusing States

Craig Forcese

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Abstract

In 2011, then-Public Safety Minister Vic Toews issued “ministerial directions” to Canada’s key security and intelligence agencies on “Information Sharing with Foreign Entities.” These directions permit information sharing in exigent circumstances, even where there is substantial risk of mistreatment of an individual. After a brief chorus of condemnation, the directions sank into relative obscurity while remaining part of Canada’s national security policy framework. This article aims to reignite discussion of these policies and their controversial content, relying in large measure on documents obtained by the author directly or through journalistic researchers under access to information law. First, I examine dilemmas raised when information is shared between human rights-observing and -abusing states and then focus on the legal parameters and policy context in which both “in-bound” and “out-bound” information sharing takes place. Next, I analyze the 2011 instruments and consider their legality under both international and domestic law. I conclude that the legality of these measures is doubtful in international law—at least in so far as out-bound information sharing is concerned—and that domestic criminal culpability and constitutional validity are very close questions.

Keywords

Torture (International law); Torture--Law and legislation; Human rights; Intelligence service--Law and legislation; Canada

Touching Torture with a Ten-Foot Pole: The Legality of Canada's Approach to National Security Information Sharing with Human Rights-Abusing States

CRAIG FORCESE*

In 2011, then-Public Safety Minister Vic Toews issued "ministerial directions" to Canada's key security and intelligence agencies on "Information Sharing with Foreign Entities." These directions permit information sharing in exigent circumstances, even where there is substantial risk of mistreatment of an individual. After a brief chorus of condemnation, the directions sank into relative obscurity while remaining part of Canada's national security policy framework. This article aims to reignite discussion of these policies and their controversial content, relying in large measure on documents obtained by the author directly or through journalistic researchers under access to information law. First, I examine dilemmas raised when information is shared between human rights-observing and -abusing states and then focus on the legal parameters and policy context in which both "in-bound" and "out-bound" information sharing takes place. Next, I analyze the 2011 instruments and consider their legality under both international and domestic law. I conclude that the legality of these measures is doubtful in international law—at least in so far as out-bound information sharing is concerned—and that domestic criminal culpability and constitutional validity are very close questions.

Vic Toews, qui était alors ministre de la Sécurité publique, a adressé en 2011 aux principaux organismes de sécurité et d'intelligence du Canada des « directives ministérielles » sur le « partage de l'information avec des entités étrangères ». Ces directives permettent en situation d'urgence de partager des renseignements même s'il existe un risque important qu'une personne subisse de mauvais traitements. Après un bref tollé de protestations, ces directives ont quitté le feu des projecteurs, mais demeurent néanmoins au cœur des

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politiques nationales de sécurité du Canada. Cet article cherche à ranimer le débat sur ces politiques et leur contenu controversé, s'appuyant en grande mesure sur des documents obtenus directement par l'auteur ou par l'intermédiaire de journalisme d'enquête grâce à la loi de l'accès à l'information. J'examine d'abord les dilemmes soulevés lorsque des renseignements sont partagés entre des pays soucieux des droits de la personne et d'autres qui ne le sont pas, puis je me penche sur les paramètres juridiques et le contexte politique dans lesquels prend place le partage de l'information dans un sens comme dans l'autre. J'analyse ensuite les directives de 2011 et m'interroge sur leur légalité en vertu des lois tant internationales que canadiennes. J'en conclus que la légalité de ces mesures est douteuse en vertu des lois internationales—du moins en ce qui a trait à la communication de renseignements vers l'étranger—et que la culpabilité criminelle et la validité constitutionnelle au pays sont très controversées.

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IN 2011, THEN-PUBLIC SAFETY MINISTER VIC TOEWS issued “ministerial directions” to the Canadian Security Intelligence Service (CSIS), the Royal Canadian Mounted Police (RCMP), and the Canada Border Services Agency (CBSA) on “Information Sharing with Foreign Entities.”¹ This innocuous title betrayed little of these administrative instruments’ actual content. The directions focused on information sharing “when doing so may give rise to a substantial risk of mistreatment of an individual.”² They were, in other words, new policies on the thorny issue of information sharing and torture, a subject that has galvanized Canadian court cases and has driven numerous high-profile public inquiries since 9/11. In contrast with the recommendations in some of these inquiries, the directions permitted information sharing that might induce (or be the product of) mistreatment. While they limited and controlled how that sharing might take place, they did not preclude it absolutely.

When acquired by journalist Jim Bronskill in 2012 under access to information law, the directions prompted a brief chorus of public condemnation. Subsequently, Professor Kent Roach penned a critical academic editorial on the topic in 2012³ and the Canadian Bar Association tabled a resolution condemning the measures in 2013.⁴ But, for the most part, the directions have sunk into relative obscurity, remaining part of Canada’s national security policy framework. And yet, in trying to walk the fine line between principle and realism in the administration of Canada’s approach to torture, the directions continue to raise pressing moral and legal questions.

This article aims to reignite discussion of these policies and their controversial content, relying in large measure on documents obtained by this author directly or through journalistic researchers under access to information law. Part I discusses the dilemmas raised when information is shared between human rights-observing and -abusing states. Part II examines the legal parameters within

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1. Then-Public Safety Minister Toews issued the CSIS Direction to CSIS on 28 July 2011, and to the RCMP and the CBSA on 9 September 2011. The directions were obtained by journalist Jim Bronskill under access law [on file with author] [“Ministerial Directions”]. These three agencies constitute Canada’s chief security and intelligence bodies. A fourth agency, Communications Security Establishment Canada (CSEC), may also be implicated in intelligence sharing of the sort discussed here. CSEC, however, is not an agency within the portfolio of the Minister of Public Safety and there is no public record on what policies, if any, govern information sharing and torture between CSEC and its partners.
 2. *Ibid.*
 3. Kent Roach, “The Dangerous Game of Complicity in Torture” (2012) 58:3-4 *Crim LQ* 303.
 4. Canadian Bar Association, *Ministerial Direction on Information Sharing with Foreign Entities*, Resolution 13-08-A (17-18 August 2013), online: <<http://www.cba.org/CBA/resolutions/pdf/13-08-A-ct.pdf>>.

which both “in-bound” and “out-bound” information sharing takes place and describes in detail past ministerial directions and CSIS operational policies on these questions. Finally, Part III analyzes the 2011 instruments and considers their legality under both international and domestic law.

I conclude that the legality of the measures is doubtful in international law—at least in so far as out-bound information sharing is concerned—and domestic criminal culpability and constitutional validity are very close questions. Even more perniciously, the directions operate in obscurity and there is no systematic way for those outside of the security sectors to unearth how they have been used, making a challenge to the policies extremely difficult.

I. DILEMMAS IN INTERNATIONAL INFORMATION SHARING

Unexpectedly, information sharing between states has been one of the most difficult legal and policy issues in the post-9/11 national security law environment. This issue figured prominently in the Maher Arar Commission of Inquiry’s key findings.⁵ There, the RCMP’s ill-considered provision of raw information to American authorities, along with sensationalist commentary on the putative affiliation with al-Qaeda of Mr. Arar and his wife Monia Mazigh, was the likely cause of Arar’s rendition to Syria, a state in which he was tortured.⁶

Although critical of the performance of the RCMP on the specifics of the Arar case, Inquiry Chair Justice O’Connor nevertheless underscored the importance of international information sharing to national security.⁷ As academic analysts have asserted, this practice permits the “acquisition of intelligence that is valuable to decision makers but otherwise unobtainable at an acceptable cost.”⁸ As such, it is particularly important for small countries that are able to use alliance relationships to tap into the intelligence capacities of larger states.

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

6. *Ibid.*

7. *Ibid.* at 22.

8. James Igoe Walsh, “Defection and Hierarchy in International Intelligence Sharing” (2007) 27:2 J Pub Pol’y 151 at 157. See also discussion in Craig Forcese, “The collateral casualties of collaboration: the consequences for civil and human rights of transnational intelligence sharing” in Hans Born, Ian Leigh & Aidan Wills, eds, *International Intelligence Cooperation and Accountability* (New York: Routledge, 2011) 72.

More than that, intelligence sharing in the anti-terrorism area now has an international legal imprimatur. In Resolution 1373 (2001), the United Nations (UN) Security Council employed its *UN Charter*⁹ Chapter VII powers to decide that all states must, among other things,

[t]ake the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information ... [and] [a]fford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings.¹⁰

As a result, information sharing is now a mandatory counterterrorism obligation. Nevertheless, there are countervailing human rights considerations. In Justice O'Connor's words, "the need to investigate terrorism and the need to comply with international conventions relating to terrorism do not in themselves justify the violation of human rights."¹¹

In practice, states have not found it simple to strike a balance between the need to share information and the obligation to manage the pernicious human rights impacts of that exchange. Speaking generally, the difficulties posed by this sort of inter-agency cooperation can be divided into those associated with in-bound intelligence sharing and those associated with out-bound exchanges. "In-bound" refers to circumstances in which Canadian officials obtain information from a foreign service. "Out-bound" is simply the inverse: the provision of information by Canadian government bodies to foreign interlocutors.

A. IN-BOUND INFORMATION SHARING

Information provided by a foreign government may be suspect on human rights grounds—most notably, it may have been secured through unpalatable methods such as torture and cruel, inhuman, or degrading (CID) treatment. For instance, in the Arar Inquiry, Justice O'Connor criticized CSIS for failing to assess the reliability of information extracted by Syrian authorities from Mr. Arar and for failing to warn other agencies when distributing that information that it could have been produced by torture. CSIS relied on this information at least twice, to Mr. Arar's detriment.¹²

9. *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7.

10. SC Res 1373, UNSCOR, 56th Sess, UN Doc S/RES/1373, (2001) 1 at para 2(b, f).

11. Arar Inquiry, *Analysis and Recommendations*, *supra* note 5 at 346.

12. *Ibid* at 198.

Similar criticisms were directed at Foreign Affairs and the RCMP,¹³ sparking Justice O'Connor's recommendation that "Canadian agencies should accept information from countries with questionable human rights records only after proper consideration of human rights implications. Information received from countries with questionable human rights records should be identified as such and proper steps should be taken to assess its reliability."¹⁴

Since the Arar matter, there have been a number of other controversies associated with in-bound intelligence. For example, individuals caught up in the related Almalki matter allege, among other things, that the RCMP characterized several Muslim Canadians as "Islamic extremist individuals" suspected of Al Qaeda affiliations and obtained search warrants on the basis of statements made by one of these individuals under torture in Syria.¹⁵

Evidence procured by torture has also been at issue in several of the controversial immigration "security certificate" cases. In 2010, for instance, the Federal Court concluded that there were reasonable grounds to believe that at least some of the information used by the government in the *Mahjoub* security certificate matter was obtained by a foreign service through use of torture.¹⁶

B. OUT-BOUND INFORMATION SHARING

The Arar Inquiry pointed to another troubling aspect of transnational information sharing: the inability to control information supplied by the Canadian government, once conveyed to a foreign agency. This issue also arose in the subsequent Iacobucci Inquiry, which examined the mistreatment of Abdullah Almalki, Ahmad Abou-Elmaati, and Muayyed Nureddin. There, Commissioner Iacobucci concluded that Canadian officials indirectly contributed to the maltreatment of these individuals in foreign custody when they shared information (especially suspected terrorist involvement) about the detainees and, in some cases, communicated suspicions in the form of efforts to interrogate the individuals or to have them questioned by the foreign officials.¹⁷

In the Arar case, the RCMP failed to abide by its own policy by not attaching caveats to the information provided to American authorities.¹⁸ Provisos that

13. *Ibid* at 34.

14. *Ibid* at 348.

15. *Almalki v Canada*, 2012 ONSC 3023 at para 6, 42 CPC (7th) 177.

16. *Mahjoub (Re)*, 2010 FC 787, 373 FTR 36 [*Mahjoub*].

17. *Internal Inquiry into the Actions of Canadian Officials in Relation Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* (Ottawa: Public Works and Government Services Canada, 2008).

18. Arar Inquiry, *Analysis and Recommendations*, *supra* note 5 at 339.

purport to exert what is known as “originator control”¹⁹ over information and limit the use to which the recipient agency can put the data are only a starting point. These caveats are effective only where foreign agencies choose to abide by them. Agencies may do so out of self-interest, fearing that a failure to honour these conditions will stall future information sharing. It seems unlikely, however, that a country with limited foreign intelligence capacities, such as Canada, would detect that tacit information sharing was in violation of these caveats. Further, information is inherently fungible, and can seep into decision making in ways that can never be traced. Caveats are not, in other words, a guarantor that information will be used properly.

In these circumstances, Canadian authorities may have to be circumspect in how they share information with problematic foreign agencies. The government, for instance, may have to withhold reliable information concerning the terrorist affiliations of a suspect in foreign custody if disclosure is likely to induce torture or other human rights abuses. In 2006, CSIS’s review body, the Security and Intelligence Review Committee (SIRC), expressed the concern that “even though CSIS was fully compliant in providing certain information to a foreign agency, this could have contributed to that agency’s decision to detain a Canadian citizen (who was also a CSIS target) upon arrival in that foreign country.”²⁰

SIRC also noted “that questions submitted by CSIS to this agency via a third party may have been used in interrogating a Canadian citizen in a manner that violated his human rights.”²¹

While not identified by SIRC, the person in question was almost certainly Maher Arar. SIRC recommended that CSIS “amend its policy governing the disclosure of information to foreign agencies, to include consideration of the human rights record of the country and possible abuses by its security or intelligence agencies” and that it “review its procedures so that the parameters and methods of exchange—as well as the Service’s expectations—are communicated to the foreign agency prior to entering into new foreign arrangements.”²² In the Arar Inquiry itself, Justice O’Connor concluded that

19. For a discussion of this concept and the related third party rule, see *Canada (Attorney General) v Khawaja*, 2007 FC 490 at para 139 *et seq.*, [2008] 1 FCR 547.

20. Security Intelligence Review Committee, *SIRC Annual Report 2005–2006: An Operational Review of the Canadian Security Intelligence Service* (Ottawa: Public Works and Government Services Canada, 2006) at 13.

21. *Ibid.*

22. *Ibid.* at 14.

[i]nformation should never be provided to a foreign country where there is a credible risk that it will cause or contribute to the use of torture. Policies should include specific directions aimed at eliminating any possible Canadian complicity in torture, avoiding the risk of other human rights abuses and ensuring accountability.²³

II. KEY LEGAL ISSUES IN INFORMATION SHARING

These information sharing controversies and discussions arise in a particular legal context. In some respects, the legal issues associated with in-bound information sharing are the simplest, although the moral dilemmas are most acute. In comparison, the legal rules governing out-bound transfers require especially careful parsing.

A. LAW AND IN-BOUND INFORMATION SHARING

1. TORTURE AS EVIDENCE

International law prohibits extreme forms of interrogation such as torture and cruel, inhuman, and degrading treatment. Two broadly ratified international treaties include a prohibition on both torture and CID treatment. The *International Covenant on Civil and Political Rights (ICCPR)* provides in Article 7 that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”²⁴ The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (“*Torture Convention*”)²⁵ includes more detailed prohibitions. As well as requiring states to criminalize torture and to bar CID treatment, the *Torture Convention* provides in Article 15 that “each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”²⁶

Article 15 is a sweeping ban. As the United Kingdom House of Lords ruled in *A v Secretary of State*, Article 15 “cannot possibly be read ... as intended to apply only in criminal proceedings. Nor can it be understood to differentiate between confessions and accusatory statements, or to apply only where the state in whose jurisdiction the proceedings are held has inflicted or been complicit

23. Arar Inquiry, *Analysis and Recommendations*, *supra* note 5 at 345.

24. *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 7, Can TS 1976 No 47 (entered into force 23 March 1976).

25. 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) [*Torture Convention*].

26. *Ibid*, art 15.

in the torture.²⁷ Tortured evidence is inadmissible in all legal proceedings, an approach also followed (for federal proceedings) in Canada's reception of the rule in section 269.1 of the *Criminal Code*.²⁸

Canada's immigration law goes one step further in limiting the sorts of evidence that may be deployed in immigration security certificates. Section 83(1.1) of the *Immigration and Refugee Protection Act*²⁹ affirms the *Criminal Code*'s prohibition on tortured evidence and extends it to information that is believed, on reasonable grounds, to have been obtained through the related concept of cruel, inhuman, or degrading treatment or punishment.

Even in the absence of these frank limitations, some tortured evidence would be excluded from Canadian civil or criminal court proceedings by simple common law limitations on the admissibility of confessions extracted from the accused through abusive tactics.³⁰ Similarly, the *Charter*³¹ supplements statutory law constraints on the use of evidence produced by torture. Section 7 of the *Charter* protects against deprivation of life, liberty and security of the person in violation of "fundamental justice."³² Section 11(d), moreover, guarantees a fair trial for those accused of an offence.³³ In *Hape*, the Supreme

27. *A v Secretary of State*, [2005] UKHL 71 at para 35, [2006] 2 AC 221, Lord Bingham of Cornhill [*A and others*].

28. RSC 1985, c C-46 [*Code*]. Section 269.1(1) of the *Code* states,

Every official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

29. SC 2001, c 27. For the leading case applying this provision, see *Mahjoub*, *supra* note 16, discussed further below.

30. See *R v Oickle*, 2000 SCC 38 at para 47, [2000] 2 SCR 3. There, Iacobucci J wrote for the majority,

The common law confessions rule is well-suited to protect against false confessions. While its overriding concern is with voluntariness, this concept overlaps with reliability. A confession that is not voluntary will often (though not always) be unreliable.

The issue of voluntary confessions has arisen in the terrorism context in Australia. See *e.g.* *R v Thomas*, [2006] VSCA 165, 14 VR 475 (dismissing a terrorism case on the basis of the inadmissibility of evidence obtained by interrogators while the suspect was incarcerated in Pakistan and where Australian officials suggested that the assistance of Australia could be procured only by cooperation).

31. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

32. *Ibid.*

33. *Ibid.*

Court of Canada (SCC) signalled clearly that torture evidence would violate these constitutional standards.³⁴

2. TORTURE AND OPERATIONAL INTELLIGENCE

All of these rules have one thing in common: they relate to the use of information in a judicial or quasi-judicial setting. They are silent on using information in a purely operational environment. Manfred Nowak, the former UN Special Rapporteur on torture and co-author of the leading treatise on the *Torture Convention*, concludes that Article 15 of the *Torture Convention* does not apply to operational use of tainted information: “It would indeed be unreasonable to require the police to check the possible use of torture by foreign intelligence agencies before exercising their duty to prevent terrorist or other attacks and to protect the lives of human beings being endangered.”³⁵ Such use would not be carried out

in the *framework of any proceedings* envisaged by Article 15. The phrase ‘evidence in any proceedings’ only refers to the assessment of evidence before a judicial or administrative authority acting in accordance with certain rules of taking evidence laid down in the respective (*criminal, civil or administrative*) procedural code.³⁶

In the result, the law in this area may leave open an “operational” versus “adjudicative” distinction regarding the use to which tortured information may be put.

This is a view sometimes advanced by government figures. In the United Kingdom, then-Home Secretary Charles Clarke concluded that the *A and others* decision described in Part II(A)(1), above, “held it was perfectly lawful for such information to be relied on operationally, and also by the home secretary in making executive decisions.”³⁷ In fact, two law lords in *A and others* addressed the

34. *R v Hape*, 2007 SCC 26 at para 109, 2 SCR 292 [*Hape*].

35. Manfred Nowak & Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford: Oxford University Press, 2008) at 531.

36. *Ibid* at 531-32 [emphasis in original].

37. Charles Clarke, “I welcome the ban on evidence gained through torture,” *The Guardian* (13 December 2005), online: <<http://www.theguardian.com/politics/2005/dec/13/terrorism.world>>.

issue, suggesting that the executive could (and, in one law lord's view, must) use even tainted information to stave off danger to public safety.³⁸

Within Canada itself, a CSIS lawyer sparked controversy in March 2009 testimony before a parliamentary committee with the following statement: "do we use information that comes from torture [supplied by foreign agencies]? And the answer is that we only do so if lives are at stake."³⁹ There were, the witness continued, "occasional, unusual, almost once-in-a-lifetime situations when that kind of information can be of value to the national security of the country."⁴⁰

Subsequently, on 5 May 2010, a second CSIS witness told another parliamentary committee that it was possible that some information supplied by Afghan security services to CSIS was the product of torture, which should result in the information then being flagged and corroborating evidence being sought.⁴¹ For both witnesses, tortured information could serve as the basis for operational actions, albeit with prudential controls such as corroboration. Asked in testimony what would happen were it not possible to corroborate tainted information, the May 2010 CSIS witness observed: "I think the average Canadian would not accept that its intelligence service do nothing and let Canadian military or civilians be killed because we did nothing."⁴²

These comments raise pointed dilemmas, now familiar to most who have followed the debates over torture, intelligence sharing, and terrorism since 9/11. As is common practice in such discussions, the dilemma is made most

38. See *A and others*, *supra* note 27 (raising a ticking time bomb scenario, Lord Nicholls of Birkenhead indicated that "the government cannot be expected to close its eyes to this information at the price of endangering the lives of its own citizens. Moral repugnance to torture does not require this" at paras 68-69). Lord Brown observed:

Generally speaking it is accepted that the executive may make use of all information it acquires: both coerced statements and whatever fruits they are found to bear. Not merely, indeed, is the executive *entitled* to make use of this information; to my mind it is *bound* to do so. It has a prime responsibility to safeguard the security of the state and would be failing in its duty if it ignores whatever it may learn or fails to follow it up. Of course it must do nothing to promote torture. It must not enlist torturers to its aid (rendition being perhaps the most extreme example of this). But nor need it sever relations even with those states whose interrogation practices are of most concern (*ibid* at para 161 [emphasis in original]).

39. Canada, Standing Committee on Public Safety and National Security, *Evidence*, 40th Parl, 2nd Sess, No 13 (31 March 2009) at 14 (Geoffrey O'Brian).

40. *Ibid* at 17.

41. Canada, Standing Committee on Public Safety and National Security, *Evidence*, 40th Parl, 3rd Sess, No 8 (5 May 2010) (Michel Colombe).

42. *Ibid* at 1715.

acute through a hypothetical, in this case one drawn from the actual 1985 Air India bombing.

On 22 June 1985, a CSIS officer receives a telex from a liaison with the Indian police that, summarized to its essence, reads: “We have a member of a Sikh militant group in our custody and we’ve given him our usual treatment and he’s told us there is a bomb in the baggage of Air India Flight 182, scheduled for departure soon from Vancouver.” The officer knows and is right that torture is practiced by the Indian police of the era and that the “usual treatment” in this missive is a euphemism for torture. Question: Should the officer tip off the RCMP and airport security officials so that the latter may conduct a renewed baggage search for Air India Flight 182?

If the officer does provide this notice, then there is use of or reliance on the tortured intelligence, but of a very different sort than, for example, its use in a judicial proceeding. Reliance in the airport scenario does not itself impair (in any meaningful way) the rights or liberties of a person on the basis of tortured evidence. In these circumstances, and given the opportunity cost of not using the information (possible death, injury, and political fall-out from these events), the absolutist view on non-use risks prioritizing the prohibition on torture over the right to life.

Critics contend that “ticking time bomb”-type scenarios of this sort do not happen. They are probably mostly right when referring to the sort of extreme ticking time bomb scenarios portrayed on television. But intelligence insiders do occasionally insist that tainted information can point to actual peril, a claim that makes it difficult to counter an imbalance of information.⁴³ Put another way, one cannot reasonably deny the possibility that information might be received in exigent circumstances.

Critics also contend that any reliance (of whatever sort) on torture amounts to tacit acceptance of the practice and is morally wrong (even when it is not technically illegal). The International Commission of Jurists’ Eminent Panel on Terrorism, Counter-Terrorism and Human Rights put it this way:

This differentiation between the use of information obtained by torture and other cruel, inhuman or degrading treatment, for “legal” and for “operational” purposes is problematic for several reasons. It undermines the absolute prohibition on torture which entails a continuum of obligations – not to torture, not to acquiesce in tor-

43. Debate over this matter is legion, especially in relation to the United State’s use of “waterboarding” during the Bush administration. See Peter Baker, “Banned Techniques Yielded ‘High Value Information,’ Memo Says,” *The New York Times* (21 April 2009), online: <<http://www.nytimes.com/2009/04/22/us/politics/22blair.html>>.

ture, and not to validate the results of torture and other cruel, inhuman or degrading treatment. Secondly, it suggests a water-tight distinction between “legal” and “operational” use which is probably illusory, and certainly the Panel was supplied with examples where information was supposedly sought on operational grounds, but subsequently relied upon in legal proceedings that followed. Thirdly, States have publicly claimed that they are entitled to rely on information that has been derived from the illegal practices of others; in so doing they become “consumers” of torture and implicitly legitimise, and indeed encourage, such practices by creating a “market” for the resultant intelligence. In the language of criminal law, States are “aiding and abetting” serious human rights violations by others.⁴⁴

Likewise, the UN Special Rapporteur on human rights and counter-terrorism urged in 2009 that “[s]tates must not aid or assist in the commission of acts of torture, or recognize such practices as lawful, including by relying on intelligence information obtained through torture. States must introduce safeguards preventing intelligence agencies from making use of such intelligence.”⁴⁵

It is indisputable that such aiding of torture can occur. As some of the controversies described in Part I, above, demonstrate, states may induce torture through tacit or even active encouragement, or through out-bound information or queries that draw the attention of foreign torturers. This sort of activity arguably violates the bar of complicity with torture found in the *Torture Convention*, as discussed further in Part III, below.

It is less clear, however, that entirely passive receipt of shared intelligence can be analogized properly to a “marketplace” and that this marketplace amounts to complicity. This analogy assumes that a “supplier” is enticed to torture, not by its own security preoccupation, but to please the state to which the information is supplied. Ultimately, whether this desire to please arises is an unanswerable question, but there is no reason to believe that pleasing foreigners is a dominant or even common reason for torture.

It is worth pondering a counterfactual: In the event that Canadian authorities meticulously observe an absolute ban on operational use of in-bound torture intelligence, would the Indian police in the hypothetical above stop torturing? At least in the context of the 1985 case study, the answer is almost certainly “no”—Indian domestic security and political preoccupations, and not some misguided effort to cater to perceived Canadian interests, likely animate the maltreatment.

44. *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counterterrorism and Human Rights* (Geneva: International Commission of Jurists, 2009) at 85.

45. Martin Scheinin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UNGAOR, 10th Sess, UN DOC A/HRC/10/3, (2009) at para 53.

Whether or not Canadian authorities tip off airport security on the strength of the Indian intelligence changes nothing.

A further objection to the operational use of torture information—voiced by critics from civil society and occasionally the security services—is that such intelligence is inherently unreliable and thus a poor (and indeed counter-productive) source on which to base action.⁴⁶ Since those subjected to torture will say anything to stop the pain, torture produces “false positives”—data that turn out to be without merit. These false positives in turn consume scarce investigative resources by leading investigators down dead ends, or they skew intelligence assessments where they are deployed in support of conclusions.⁴⁷ This too is a persuasive critique, but it is tempting to treat it as an absolute. Not every action in response to unreliable information is necessarily counter-productive. For instance, redoing a search of baggage on Flight 182 might not fall into this category of “resource intensive.”

All of this is to say that the debate about operational use of in-bound intelligence that may be the product of torture is no simple issue, and people of

46. See *e.g.* Duncan Gardham, “Torture is not wrong, it just doesn’t work, says former interrogator,” *The Telegraph* (28 October 2011), online: <<http://www.telegraph.co.uk/comment/8833108/Torture-is-not-wrong-it-just-doesnt-work-says-former-interrogator.html>>.

47. See *e.g.* US, Department of the Army, *Human Intelligence Collector Operations* (FM 2-22.3) (Washington, DC: Government Printing Office, 2006) at 5-21, online: Department of the Army <<http://fas.org/irp/doddir/army/fm2-22-3.pdf>>. As stated in this field manual,

use of torture is not only illegal but also it is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the HUMINT collector wants to hear.

utmost good faith may reasonably differ on the issue. It also seems clear from the discussion above that the law provides no clear guidance on the proper standard.⁴⁸

B. LAW AND OUT-BOUND INFORMATION SHARING

Out-bound information sharing raises very different legal issues. There is, for instance, no express limitation on such sharing in the *Torture Convention*. At the same time, Article 4 of the *Torture Convention* might apply to the provision of information that induces torture: “Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes *complicity or participation in torture*.”⁴⁹

In the right circumstances, the sharing of information might amount to complicity or participation in torture and violate this criminal standard. “Complicity” and “participation” are not defined terms in the *Torture Convention*. Indeed, there is little in the drafting history of the *Torture Convention* that lends precision to these concepts. Most attention to these concepts during the drafting was seemingly focused on whether complicity was broad enough to cover concealment of torture after the fact.⁵⁰

48. These sorts of considerations prompted the following compromise in the *Ottawa Principles on Anti-terrorism and Human Rights*, a set of guidelines formulated by civil society and academic participants at a 2006 conference:

4.3.2

Information, data, or intelligence that has been obtained through torture or cruel, inhuman or degrading treatment or punishment may not be used as a basis for

- a. the deprivation of liberty;
- b. the transfer, through any means, of an individual from the custody of one state to another;
- c. the designation of an individual as a person of interest, a security threat or a terrorist or by any other description purporting to link that individual to terrorist activities; or
- d. the deprivation of any other internationally protected human right.

See *Ottawa Principles on Anti-terrorism and Human Rights* (Ottawa: University of Ottawa Faculty of Law, 2006) at 19, online: <<http://aix1.uottawa.ca/~cforcese/hrat/principles.pdf>>. Principle 4.3.2 bars in-bound use where that use itself is then associated with the impairment of rights and interests. Put another way, there can be no fruit from the poisoned tree, if that fruit is a disadvantage visited on a person.

49. *Torture Convention*, *supra* note 25, art 4 [emphasis added].

50. Nowak & McArthur, *supra* note 35 at 238.

Logically, however, complicity and participation include a range of inchoate or near inchoate crimes—that is, crimes that precede the actual infliction of harm. The UN Committee Against Torture (Committee)—the treaty body charged with administration of the *Torture Convention*—has posed questions of state parties concerning their criminalization of complicity and participation. In 2010, Canada responded by pointing to provisions in the *Criminal Code* that deem an individual a party to a crime, such as counselling and aiding and abetting.⁵¹

The offence of aiding and abetting also exists in international criminal law. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has treated aiding and abetting as part of customary international law⁵² and has described its elements as follows:

(i) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime.

...

(ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist [in] the commission of the specific crime of the principal.⁵³

The Appeals Chamber of the ICTY recently affirmed that the first requirement does not require that the accused specifically direct assistance to the criminal conduct per se. Instead, “under customary international law, the actus reus of aiding and abetting ‘consists of practical assistance, encouragement, or moral support which has a *substantial effect on the perpetration of the crime*.’”⁵⁴ In relation to the second requirement, “knowledge on the part of the aider and

51. Canadian Heritage, *Review of Canada's Sixth Report on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2012) at para 173, online:

<http://www.pch.gc.ca/DAMAssetPub/DAM-drtPrs-humRts/STAGING/texte-text/writtenResponseToCATLOI-Final-ForSubmission-May2012_1363340887503_eng.PDF?WT.contentAuthority=3.1>.

52. See e.g. *Prosecutor v Anto Furundžija*, IT-95-17/1-T, Trial Judgment (10 December 1998) at para 191 *et seq* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) [*Furundžija*], online: <<http://www.icty.org>>.

53. *Prosecutor v Mitar Vasiljević*, IT-98-32-A, Judgment (25 February 2004) at para 102 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: <<http://www.icty.org>>.

54. *Prosecutor v Nikola Šainović*, IT-05-87-A, Judgment (23 January 2014) at para 1649 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) [*Šainović*] (emphasis added), online: <<http://www.icty.org>>.

abettor that his or her acts assist in the commission of the principal perpetrator's crime suffices for the *mens rea* requirement of this mode of participation."⁵⁵ Further,

it is not necessary that the aider and abettor ... know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.⁵⁶

This concept has obvious application to out-bound intelligence sharing. If an intelligence service notifies a partner agency with a history of torture that "person of interest X is believed to be affiliated with Al Qaeda and is arriving at your airport on the following flight," this then has a "substantial effect" on the occurrence of any torture that may follow. The person is on the torturing agency's radar and in its clutches because of the information sharing. This fact, coupled with knowledge of the torturing service's propensities and the probability of torture, may constitute the international crime of aiding and abetting.

Culpability under Canadian law for the same offence would likely require something more. Section 269.1 of the *Criminal Code* makes torture a crime.⁵⁷ Meanwhile, the aiding and abetting offence in the *Criminal Code* reads:

Every one is a party to an offence who

- a. actually commits it;
- b. does or omits to do anything for the purpose of aiding any person to commit it; or
- c. abets any person in committing it.⁵⁸

Aiding means "to assist or help the actor" while abetting includes "encouraging, instigating, promoting or procuring the crime to be committed."⁵⁹

In terms of the mental element, the reference to "purpose" in section 21(b) of the *Criminal Code* could suggest that the accused must desire the ultimate outcome. This is not, however, the approach adopted by the SCC. Instead, purpose is equated with intent, and it "does not require that the accused actively

55. *Prosecutor v Tihomir Blaškić*, IT-95-14-A, Judgment (29 July 2004) at para 49 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) [*Blaškić*], online: <<http://www.icty.org>>. The *Blaškić* position on *mens rea* was recently reaffirmed in *Šainović*, *supra* note 54.

56. *Ibid* at para 50 (quoting *Furundžija*, *supra* note 52 at para 246).

57. *Supra* note 28.

58. *Ibid*, s 21(1).

59. *R v Briscoe*, 2010 SCC 13 at para 14, [2010] 1 SCR 411 [*Briscoe*].

view the commission of the offence he or she is aiding as desirable in and of itself.”⁶⁰ The Ontario Court of Appeal has subsequently held that the normal meaning of the words “purpose” and “intend” “suggests that a person must subjectively advert to a specific objective and that he or she, therefore, must have knowledge of the facts that constitute that objective.”⁶¹ The SCC has described this knowledge requirement as “*knowledge* of the perpetrator’s intention to commit the crime.”⁶² This threshold may be reached on a willful blindness theory—that is, the suspicion of an accused is “aroused to the point where he or she sees the need to make further inquiries,” but instead he or she “*deliberately chooses* not to make those inquiries.”⁶³

More than knowledge, the accused must intend that his or her actions aid or encourage the perpetrator: the assistance must be provided “with the intention of helping a principal to commit the offence.”⁶⁴ Mere knowledge of the perpetrator’s criminal acts or propensities may prompt a legitimate inference that the accused intended to assist, but knowledge alone is not enough: “while knowledge can found an inference of intention, it alone cannot constitute the requisite *mens rea*.”⁶⁵ Thus, in the scenario described above, domestic culpability arises only where intelligence is shared by the Canadian agency with its foreign interlocutor with the intent of producing the resulting torture.

C. PAST POLICY RESPONSES

As discussed above, international and Canadian law limits, but does not fully eliminate, the use of information acquired through mistreatment. Security service rules have also attempted to grapple with this problem for more than a decade. Because most of these policies are confidential, and often protected under the government’s information security rules, it is not possible to provide a full portrait of their sweep and evolution. Many of these policies have, however, been released to this author or others through access to information law.

60. *R v Hibbert*, [1995] 2 SCR 973 at paras 31, 39, 40, 99, CCC (3d) 193 [*Hibbert*]; *Briscoe*, *supra* note 59 at para 16.

61. *R v Heldson*, 2007 ONCA 54 at para 28, 84 OR (3d) 544 [*Heldson*]. The Court of Appeal in *Heldson* treated aiding and abetting identically, despite the fact that only “aiding” includes a reference to “purpose.” See also *R v Almarales*, 2008 ONCA 692, 237 CCC (3d) 148 [*Almarales*]; *R v Dooley*, 2009 ONCA 910 at para 118, 249 CCC (3d) 449 (repeating that identical treatment).

62. *Briscoe*, *supra* note 59 at para 18 [emphasis in original].

63. *Ibid* at para 21 [emphasis in original].

64. *Almarales*, *supra* note 61 at para 66.

65. *R v Palombi*, 2007 ONCA 486 at paras 18-19, 222 CCC (3d) 528.

1. MINISTERIAL DIRECTIONS

By an access request dated 2012, this author received (often redacted) copies of ministerial directions (sometimes also referred to as “ministerial directives”) issued by the Minister of Public Safety (and that official’s predecessor) to both the RCMP (1950 forward) and CSIS (1984 forward). With several exceptions, the following discussion focuses on these ministerial directions. In their contemporary guise, these directions are issued by the Minister of Public Safety under provisions in both the *CSIS Act* and *RCMP Act*, which empower the head of these agencies to control and manage their services, but “under the direction of the Minister.”⁶⁶ The directions are binding administrative instruments, and their issuance is an act of discretion by the Minister.⁶⁷

The compilation of documents released by the government in response to my access request was incomplete, due to omissions or redactions.⁶⁸ However, it is possible to piece together an imperfect sense of the trajectory of these policies.

66. *Royal Canadian Mounted Police Act*, RSC 1985, c R-10, s 5 [*RCMP Act*]; *Canadian Security Intelligence Service Act*, RSC 1985, c C-23, s 6 [*CSIS Act*].

67. Section 6(2) of the *CSIS Act* expressly empowers the Minister to issue written directions to the Director. These directions are then exempt from the *Statutory Instruments Act*. *Ibid*; *Statutory Instruments Act*, RSC 1985, c S-22. The Minister’s authority to issue directions to the RCMP is less emphatic. One of the released documents is an undated instrument entitled “The Directives System” and outlines the then-Solicitor General’s competency and powers to issue ministerial directives under the *RCMP Act* (s 5 specifies that the RCMP commissioner acts “under the direction of the Minister”). *Supra* note 66. “The Directives System” then observes that “[i]t is left to the direction of the Commissioner [of the RCMP] to incorporate the standards of the Directives in appropriate RCMP operational or administrative policies...” and to “ensure the conformity of Force policies, procedures and methods to these Directives.” See “The Directives System” [nd] at paras 4.1-4.2 [on file with author]. Notably, the 2011 direction to the RCMP invokes s 5 of the *RCMP Act* as the basis for the instrument. Also of note: the more recent *Department of Public Safety and Emergency Preparedness Act*, SC 2005, c 10, charges the Minister of Public Safety with coordinating the activities of the RCMP, CBSA, and CSIS, among others (s 5) and specifies that the Minister may implement “policies” relating to public safety and “facilitate the sharing of information, where authorized, to promote public safety objectives” (s 6).

68. For instance, CSIS’s review body, the Security Intelligence Review Committee, discusses ministerial directions in its annual reports, which were not released to this author under the access request. These include the 1996-97 ministerial direction on “information management.” See Security Intelligence Review Committee, *Annual Report 1996-1997*, (Ottawa: Public Works and Government Services Canada, 2009), online: <<http://www.sirc-csars.gc.ca/anrran/1996-1997/sc03-eng.html>>.

Early instruments deal with police assistance to foreign nations in the form of policy training, consultative, and investigative assistance.⁶⁹ Another instrument on “RCMP law enforcement agreements” with, among others, foreign agencies, specifies that “[w]ith respect to the disclosure of personal information, the provisions of the Privacy Act shall be respected.”⁷⁰ A 2002 instrument on the same topic replaces earlier versions and is silent on disclosure or information sharing.⁷¹

There is, therefore, no evidence of any ministerial direction on torture and information sharing prior to 2003—that is, prior to the period in which the question became controversial in the wake of the Maher Arar incident. A 2003 ministerial direction governing RCMP foreign intelligence and security cooperation practices specifies that these arrangements “may be established and maintained as long as they remain compatible with Canada’s foreign policy,” including consideration of the foreign entity’s “respect for democratic or human rights.”⁷² These arrangements must “respect applicable laws and practices relating to the disclosure of personal information.”⁷³

The closest equivalent document issued to CSIS and available to this author is entitled “Minister Direction for Operations.” It requires CSIS to “ensure adequate and consistent handling of information about Canadians when collecting, storing, sharing, and disclosing information”⁷⁴ and requires arrangements with domestic and foreign partners to “establish their purpose and obligations, including the application of privacy ... legislation.”⁷⁵

Since this document, released under access law, is undated and deeply redacted, it is unclear whether this direction is the one described in the annual reports of the Security Intelligence Review Committee (SIRC).⁷⁶ Specifically, in 2000–2001, SIRC reported that the previous “hodgepodge” of ministerial directions had been replaced with a single instrument “covering the entirety of

69. Ministerial Directive on Police Assistance to Foreign Nations [nd] [on file with author].

This instrument predates at least 1994, since the document refers to “External Affairs,” a department whose name was changed to Foreign Affairs and International Affairs in 1993.

70. Ministerial Directive on RCMP Law Enforcement Agreements [nd] at para 4.5 [on file with author] (structured and styled like directives from the mid-1980s).

71. Ministerial Directive on RCMP Agreements (2002) [on file with author].

72. Canada, Department of Public Safety and Emergency Preparedness, *National Security Related Arrangements and Cooperation* (2003) at para D (released under the *Access to Information Act*, RSC 1985, c A-1) [on file with author] [PSEP, *National Security*].

73. *Ibid.*

74. *Ministerial Direction on Operations* [nd], Annex A [on file with author].

75. *Ibid.*, Annex D.

76. The May 2010 letter to Richard Fadden, described in Part III(A), below, references a “2008 Ministerial Direction on Operations.” See *infra* note 88.

CSIS operations.”⁷⁷ Among other things, that document included requirements that “the human rights record of the country or agency concerned . . . be assessed” and “weighed in any decision to enter into a co-operative relationship.”⁷⁸ Likewise, “the applicable laws of Canada must be respected and the arrangement must be compatible with Canada’s foreign policy.”⁷⁹

In May 2009, the Minister of Public Safety issued a more specific ministerial direction on CSIS information sharing with foreign agencies. This document provided:

so as to avoid any complicity in the use of torture, CSIS is directed to

- not knowingly rely upon information which is derived from the use of torture, and to have in place reasonable and appropriate measures to identify information that is likely to have been derived from the use of torture; [and]
- take all other reasonable measures to reduce the risk that any action on the part of the Service might promote or condone, or be seen to promote or condone the use of torture, including, where appropriate, the seeking of assurances when sharing information with foreign agencies.⁸⁰

77. Security Intelligence Review Committee, *SIRC Report 2000-2001: An Operational Audit of the Canadian Security Intelligence Service* (Ottawa: Public Works and Government Services Canada, 2001) at 4, 8.

78. *Ibid* at 5.

79. *Ibid* at 5, 7. SIRC’s annual reports since 2001 also include brief mentions of other policies contained in this or other instruments. See Security Intelligence Review Committee, *Annual Report 2010-2011: Checks and Balances* (Ottawa: Public Works and Government Services Canada, 2011) at 22 (a ministerial direction dealing with foreign agencies and human rights); Security Intelligence Review Committee, *SIRC Annual Report 2006-2007* (Ottawa: Public Works and Government Services Canada, 2007) at 15 (a ministerial direction dealing with segregation of security screening information from the Service’s other information holdings); Security Intelligence Review Committee, *SIRC Annual Report 2004-2005* (Ottawa: Public Works and Government Services Canada, 2005) at 53 (a ministerial direction on “National Requirements for Security Intelligence”). The 2007-2008 report mentions several policies: a ministerial direction dealing with cooperation with foreign security and intelligence organizations, a ministerial direction dealing with investigations into sensitive sectors (academic, political, media, religious, trade union), and a ministerial direction dealing with foreign agencies and human rights. See Security Intelligence Review Committee, *SIRC Annual Report 2007-2008* (Ottawa: Public Works and Government Services Canada, 2008) at 6, 13, 24.

80. Ministerial Direction to the Director Canadian Security Intelligence Service: Information Sharing with Foreign Agencies [nd] [on file with author] (may date from or around November 2008) [“2009 Ministerial Direction”]. See discussion in the Canadian Security Intelligence Service, *Public Report 2008-2009* (Ottawa: Public Works and Government Services Canada, 2009) at 28.

2. CSIS OPERATIONAL POLICIES

This author has also obtained redacted copies of CSIS's operational policies designed to implement these ministerial directions. By 2002, CSIS was apparently to complete a review of the foreign agency's human rights record in assessing potential new foreign arrangements, pursuant to the 2001 Ministerial Direction on CSIS Operations. According to CSIS operational policies, "if there are allegations of human rights abuses, the Service always ensures to use a cautious approach when liaising with the foreign agency and closely scrutinizes the content of the information provided to, or obtained from, the foreign agency" either "in an effort to *avoid instances* where the security intelligence information exchanged with the latter is used in the commission of acts which would be regarded as human rights violations" or "to *ensure* none of the security intelligence information exchanged with the latter is used in the commission of acts which would be regarded as human rights violations."⁸¹

In a directive issued in November 2008, the CSIS Deputy Director of Operations described the then-extant CSIS policy on information sharing with agencies possessing poor human rights records. Among other things, that directive provides:

when sharing, seeking or accepting information from a foreign agency, employees must consider the record of that agency or the country, in regard to its use of mistreatment to collect information. In this respect, employees will be expected to be familiar with human rights (HR) agency and country profiles.⁸²

Depending on this assessment, the Service employee must follow a process of approval prior to using or sharing the information. With respect to out-bound information sharing, the risk of maltreatment might be mitigated by use of a caveat. A sample CSIS caveat was also released under the access request and reads:

Our service is aware that your organization might be in possession of threat related information on Canadian citizen (name of individual). As we believe (name of individual) will be present in your country, our Service recognizes the sovereign right of your government to undertake reasonable measures under the law to ensure your public safety. Should you deem some form of legal action against (name of individual) is warranted, our Service trusts that (name of individual) will be fairly treated within the accepted norms of international Conventions, that he is accorded due process under law and afforded access to Canadian diplomatic personnel if re-

81. CSIS, *OPS-402 Section 17 Arrangements with Foreign Governments and Institutions* (28 January 2002 [on file with author] [emphasis added]). Despite its date, this policy was apparently still in operation on 6 June 2005.

82. CSIS, *DDO Directive on Information Sharing with Agencies with Poor Human Rights Records* (19 November 2008) at 2 [on file with author].

quested. Furthermore, should you be in possession of any information that originated from our service regarding (name of individual), we ask that this information not be used to support (name of individual)'s detention or prosecution without prior formal consultation with our service.⁸³

The 2008 policy also makes clear, however, that with proper approval, information could be shared, even if the substantial risk of mistreatment could not be eliminated or significantly mitigated by a caveat.⁸⁴ Further information on what might guide such a decision is redacted from the document.

Various accountability bodies have questioned the effectiveness of these operational policies. In its 2004–2005 annual report, the Security Intelligence Review Committee doubted CSIS could meet the human rights standards expressed in its 2002 policy.⁸⁵ The Federal Court raised equally pressing concerns in relation to the 2008 policy. In *Mahjoub*, Justice Blais observed that

[t]he Service appears to rely on the experience of their employees to assess and ... [filter] information that is from a country or agency with a questionable human rights record. There is no evidence that employees, trained in the art of intelligence collection, have specific expertise in assessing whether information comes from torture or not. ... It is also clear from the record that the Service does not have the

83. [On file with author].

84. Press coverage of documents with a similar content has also been obtained by the media reporting on this topic. See *e.g.* Jim Bronskill, "Public Security: CSIS would use tips gained through torture," *The Globe and Mail* (13 September 2010) A4.

85. SIRC reported in its 2004–05 annual report that at least one of the CSIS foreign arrangements that it audited "did not provide an adequate analysis of potential human rights issues." See Security Intelligence Review Committee, *SIRC Annual Report 2004–2005: An Operational Review of the Canadian Security Intelligence Service* (Ottawa: Public Works and Government Services Canada, 2005) at 35. Further, SIRC objected to CSIS's claim that it "ensures" that information exchanged is not the cause or product of human rights abuses:

First, the use of the term "ensure" implies that CSIS will make certain that the information shared does not lead to—or result from—acts that could be regarded as human rights violations. However, the Committee concluded that CSIS was not in a position to provide such an absolute assurance. ... Second, while CSIS is cautious when sharing information with foreign agencies, it cannot determine in all cases how that information is used by the recipient agency. Similarly, the Service is rarely in a position to determine how information received from a foreign agency was obtained. As [former CSIS director] Mr. Elcock stated to the O'Connor [Arar] Commission, when it comes to information that may have been the product of torture, "the reality is in most cases we would have no knowledge that it was derived from torture. You may suspect that it was derived from torture, but that is about as far as one will get in most circumstances" (*ibid* at 25).

means to independently investigate whether the information is obtained from torture. Indeed, the evidence of [senior CSIS officer] Mr. Vrbanac suggests that the Service is ill equipped to conduct an inquiry into the provenance of information to ensure that it is not from torture.⁸⁶

In the result, the Service's approach was "insufficient to ensure that all the information obtained from countries with a poor human rights record meets the admissibility criteria" of the immigration security certificate law, mentioned above.⁸⁷

III. THE 2011 MINISTERIAL DIRECTIONS AND THEIR LEGALITY

A. BACKGROUND

The policies governing CSIS (and RCMP and now Canada Border Services Agency) information sharing have evolved since 2010, in a manner that seems to acknowledge more overtly a willingness to share information in exigent circumstances, even at the risk of torture.

On 7 December 2010, then-Minister of Public Safety Toews wrote a letter to then-CSIS Director Richard Fadden. In that letter, Toews observed:

the number one national security priority of the Government of Canada has been, and will remain for the foreseeable future, the fight against terrorism. In this context, it is critical that information be shared quickly and widely among those with the mandate and responsibility to disrupt serious threats before they materialize.⁸⁸

The Minister characterized his letter as further guidance on the May 2009 ministerial directive, reiterated his expectation that CSIS must "always ensure that its actions do not appear to condone the torture or mistreatment of any individual, and that its interactions with foreign agencies accord with this principle," and then added a new admonishment:

In exceptional circumstances where there exists a threat to human life or public safety, urgent operational imperatives may require CSIS to discharge its responsibility to share the most complete information available at the time with relevant

86. *Mahjoub*, *supra* note 16 at paras 92-93.

87. *Ibid* at para 95.

88. Letter from Vic Toews, Minister of Public Safety, to Richard Fadden, CSIS Director (7 December 2010) [on file with author].

authorities, including information based on intelligence provided by foreign agencies that may have been derived from the use of torture or mistreatment. In such rare circumstances, it is understood that it may not always be possible to determine how a foreign agency obtained the information that may be relevant to addressing a threat. It is also understood that ignoring such information solely because of its source would represent an unacceptable risk to public safety.⁸⁹

The document was an evident partial re-think of torture and in-bound (but not out-bound) intelligence sharing. The letter also promised a new directive on the topic, then under development. The promised ministerial directive, issued in July 2011, provided a new guidance document for CSIS. The Minister subsequently issued essentially identical directions to the RCMP and the CBSA. The new directives are an expression of what appears to be a whole-of-government framework for “addressing risks of mistreatment in sharing information with foreign entities.”⁹⁰

B. THE 2011 MINISTERIAL DIRECTIONS

The 2011 ministerial directions seem to be the most detailed treatment of information sharing and torture issued to date.⁹¹ They begin with a section on “Canada’s legal obligations,” and go on to define several key terms, establish “information sharing principles,” and provide a road map for approving both in-bound and out-bound information sharing “when there is a substantial risk of mistreatment in sharing information.”⁹²

Having acknowledged the international, statutory, and constitutional prohibitions on torture discussed above, the instruments define “mistreatment” to include both torture and CID treatment or punishment. “Substantial risk” of such treatment means a “personal, present and foreseeable risk of mistreatment” that is “real and must be based on something more than mere theory or speculation” that typically arises when “it is more likely than not that there will be mistreatment.”⁹³ The latter test is not, however, to be “applied rigidly because

89. *Ibid.*

90. *Framework for Addressing Risks of Mistreatment in Sharing Information with Foreign Entities* (25 June 2010) [on file with author]. This document seems to be directed to the entire Canadian security and intelligence community, including the Department of National Defence.

91. “Ministerial Directions,” *supra* note 1.

92. *Ibid.*

93. *Ibid.*

in some cases, particularly where the risk is of severe harm, the 'substantial risk' standard may be satisfied at a lower level of probability."⁹⁴

The information sharing principles applicable to CSIS, RCMP, and CBSA include an obligation to avoid "complicity in mistreatment by foreign entities" as well as a requirement to assess the accuracy and reliability of information received from partner agencies. Approvals for information sharing are to be indexed by the level of risk of mistreatment.

1. OUT-BOUND RULES

Where the risk of sending or soliciting information from a foreign entity is substantial, *and* it is unclear whether the risk can be mitigated by caveats and assurances, the CSIS director, the RCMP commissioner, or the CBSA president decide on the information sharing. These officials consider a list of factors in arriving at their decisions, including the national security interest, the basis for believing a substantial risk exists, measures to mitigate that risk, and the views of other departments, including Foreign Affairs.⁹⁵ The matter may also be referred to the minister. The minister or the director "shall authorize the sharing of information with the foreign entity only in accordance with" the direction and "Canada's legal obligations."⁹⁶

2. IN-BOUND RULES

The 2011 directions then reiterate the core of the 2010 letter on use of in-bound information, noting that in exceptional circumstances CSIS, RCMP, and CBSA will share information from foreign entities that likely stems from mistreatment: "When there is a serious risk of loss of life, injury, or substantial damage or destruction of property, CSIS [RCMP, or CBSA] will make the protection of life and property its priority."⁹⁷ As a prudential safeguard, "[m]easures will also be taken to ensure that the information which may have been derived through mistreatment is accurately described, and that its reliability is properly characterized. Caveats will be imposed on information shared with both domestic and foreign recipients to restrict their use of information, as appropriate."⁹⁸

94. *Ibid.*

95. *Ibid.*

96. *Ibid.*

97. *Ibid.*

98. *Ibid.*

C. LEGALITY OF THE 2011 MINISTERIAL DIRECTIONS

When reported by the press in 2012, the new directions elicited a hostile reception from opposition politicians and the human rights and legal communities.⁹⁹ The 2011 directions represent a shift in emphasis from their closest predecessors. The 2009 ministerial direction, for example, seems to bar use of in-bound torture information: CSIS is not to “knowingly rely upon information which is derived from the use of torture,” and there is no emphatic instruction allowing out-bound sharing that might contribute to torture.¹⁰⁰ At the same time, it is also clear that CSIS operational policies implementing the 2011 directions have overpromised by asserting unverifiable and implausible guarantees that shared information is not the product, or a contributing cause, of torture, and have also held the door open to information sharing even in the face of substantial risk of mistreatment.

The 2011 directions may be an honest rendition of longstanding government practice in at least some agencies, consolidating more tacit and less regimented practices into a single code of conduct for the three key security and intelligence services within the Minister of Public Safety’s portfolio. At their core, the directions provide a high-level system of approval for in-bound or out-bound information sharing tied to torture, where the stakes are high enough. In this respect, they satisfy some of the expectations announced in 2010 by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. In that expert’s compilation of human rights good practices for intelligence services while countering terrorism, he calls for a solid legal grounding for intelligence exchanges, complete with approval processes and safeguards.¹⁰¹ In this respect, the ministerial directions seem to constitute an improvement. Still, as discussed below, UN experts have raised doubts about the legality of directions that open the door (at least in principle) to information sharing where there is substantial risk of mistreatment.

99. See *e.g.* Jim Bronskill, “CSIS can share info despite ‘substantial’ torture risk,” *Toronto Star* (2 March 2012), online: < http://www.thestar.com/news/canada/2012/03/02/csis_can_share_info_despite_substantial_torture_risk.html>; Jordan Press, “Torture risk ‘must be real,’ directive says; Government on defensive over information-sharing edict,” *The Ottawa Citizen* (3 March 2012) A3; Kent Roach, “Canada plays a dangerous game,” *The Ottawa Citizen* (7 March 2012) A13; Kent Roach, “The Dangerous Game of Complicity in Torture” (2012) 58:3-4 *Crim LQ* 303. More recently, the direction was condemned by a resolution adopted by council at the 2013 Canadian Bar Association meeting. See *supra* note 4.

100. “2009 Ministerial Direction,” *supra* note 80.

101. Martin Scheinin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UNGAOR, 14th Sess, UN DOC A/HRC/14/46, (2010) at paras 45 *et seq.*

To be clear, the directives do not oblige out-bound harm-inducing information sharing to counter national security threats. Rather, they establish a protocol for approving such risky sharing. They open the door without necessarily requiring anyone to walk through it. Everything turns, therefore, on how these directions have been used.

Unfortunately, there is precisely no information on government decision-making under the directions. This author filed access to information requests in the spring of 2013 asking for information on the question, but had received no substantive response by the date of this writing. Given the reach of national security-related exemptions and exceptions in the *Access to Information Act*,¹⁰² it is unlikely much will be disclosed. This is unfortunate, because how the directions are used is material to the question of their legality. Nevertheless, it is possible to consider the legality of the 2011 directions, on their face.

1. INTERNATIONAL LEGALITY

As the discussion thus far suggests, distinctions must be drawn between in-bound and out-bound information sharing. In-bound information sharing is subject to Article 15 of the *Torture Convention*, which precludes the use of torture-induced information as evidence in proceedings. Both in-bound and out-bound information sharing are governed by the requirement that states criminalize “complicity and participation” in torture.

As discussed in Part II(B), above, “complicity” in international criminal law may be best captured by the concept of “aiding and abetting.” The latter is a sweeping concept in international criminal law, possibly reaching conduct in which, for example, a Canadian agency with knowledge of a foreign service’s torturing propensities tips off that foreign partner to the presence of a person. This tip off then facilitates that person’s detention and maltreatment.

Notably, a pressing national security motivation for this kind of information sharing is entirely irrelevant. The *Torture Convention* states unequivocally that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.”¹⁰³ Complicity in torture could not, therefore, reasonably be forgiven for these sorts of motivations.

102. *Supra* note 72.

103. *Torture Convention*, *supra* note 25, art 2.

Outside of an armed conflict situation,¹⁰⁴ there is presently no venue in which an international prosecution of a Canadian government official complicit in torture could occur. That, of course, does not change the illegality of the action, or obviate Canada's state responsibility under the *Torture Convention* were these events to arise. Indeed, in its June 2012 concluding observations issued in response to Canada's periodic report on its *Torture Convention* compliance, the UN Committee Against Torture observed as follows:

While taking note of the State party's national security priorities, the Committee expresses its serious concern about the Ministerial Direction to the Canadian Security Intelligence Service (CSIS), which could result in violations of article 15 of the Convention in the sense that it allows intelligence information that may have been derived through mistreatment by foreign States to be used within Canada; and allows CSIS to share information with foreign agencies even when doing so poses a serious risk of torture, in exceptional cases involving threats to public safety, in contravention to recommendation 14 from the Arar Inquiry (arts. 2, 10, 15 and 16).

The Committee recommends that the State party modify the Ministerial Direction to CSIS to bring it in line with Canada's obligations under the Convention. The State party should strengthen its provision of training on the absolute prohibition of torture in the context of the activities of intelligence services.¹⁰⁵

The Committee adverts to the possibility of non-compliance raised by the ministerial direction, not to the inevitability that it will be used. In that respect, the Committee operated in the same factual vacuum as did the author of this article. However, in the event the directive was used to share information in the manner feared, it seems clear from its language that the Committee would consider Canada in non-compliance with its *Torture Convention* obligations. It is not entirely clear what legal construal of the *Torture Convention* would support that conclusion. As is typical, the Committee is opaque in its legal reasoning.

In respect to out-bound use, the Committee does not expressly cite any relevant *Torture Convention* rule. As noted, however, "complicity" would be

104. Under the *Rome Statute*, which establishes the International Criminal Court (ICC), simple torture is not a crime over which that court has jurisdiction. However, torture and more indirect forms of participation in torture may be "war crimes" if they arise in an armed conflict situation. Note, however, that the *Rome Statute* standard for aiding and abetting in prosecutions brought to the ICC is "purpose," which is a different standard from the "knowledge" requirement that likely exists in customary international law. See *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90, art 25(3)(c), [2002] ATS 15 (entered into force 1 July 2002).

105. *Concluding observations of the Committee against Torture: Canada*, UNCAT, 48th Sess, UN Doc CAT/C/CAN/CO/6, (2012) at para 17.

the most likely legal basis for the Committee's condemnation of Canada. For in-bound information sharing, the Committee invokes Article 15 of the *Torture Convention* but does not distinguish between evidentiary and operational use of intelligence. It may be that the Committee does not agree that such a distinction is defensible, giving rise to an expansive reading of the language in Article 15. As the discussion above suggests, such a conclusion would be inconsistent with those of Nowak, who is the former UN Special Rapporteur on torture and co-author on the leading treatise on the *Torture Convention*.

2. DOMESTIC LEGALITY

1. CRIMINAL LAW

The *Torture Convention* obligations have been received into Canadian criminal law. As described above, torture is a crime in Canada, as is aiding and abetting torture. However, the reach of Canada's aiding and abetting provision appears less sweeping than its international analogue. Mere knowledge is not enough to satisfy the *mens rea* requirement. There must also be intent to help the torturer commit the offence. There is nothing on the face of the 2011 ministerial direction that connotes such intent—indeed, the directive contains language condemning torture. It is therefore difficult to see how information sharing done with the intent of inducing torture would be compliant with the directive, and would be anything other than aberrant and patently criminal activity.

Still, there are other criminal offences that might (at least theoretically) come into play where information is shared with knowledge of the likely consequences of information sharing. Criminal negligence causing bodily harm, for instance, carries a possible sentence of ten years.¹⁰⁶ Criminal negligence is an act or omission that “shows wanton or reckless disregard for the lives or safety of other persons.”¹⁰⁷ Wanton means “‘heedlessly’ ... ‘ungoverned’ and ‘undisciplined’ ... or an ‘unrestrained disregard for the consequences,’” while “‘reckless’ means ‘heedless of consequences, headlong, [and] irresponsible.’”¹⁰⁸ Wanton and reckless behaviour arises where there is a “marked and substantial departure” from the norm.¹⁰⁹

While the jurisprudence is less than crystal clear, the test for the mental element of criminal negligence requires a court to “consider whether the accused

106. *Code*, *supra* note 28, s 221.

107. *Ibid*, s 219.

108. *R v JL*, [2006] 206 OAC 205 at para 19, 204 CCC (3d) 324, citing *R v Menezes*, [2002] OTC 118 at para 72, 50 CR (5th) 343 (Ont Sup Ct J) [citations omitted].

109. *R v JF*, 2008 SCC 60 at paras 9, 16, [2008] 3 SCR 215.

either adverted to the risk involved and disregarded it, or failed to direct his or her mind to the risk and the need to take care at all. In most cases, the mental element can be inferred from the accused's conduct or omission."¹¹⁰ It would be no answer to a charge of criminal negligence that the harm was visited on the victim overseas. An act conducted in Canada with consequences that befall an individual outside of Canada nevertheless lies within the criminal jurisdiction of Canadian courts.¹¹¹

At one level, application of the 2011 ministerial directives directly as intended constitutes a step-by-step path to culpability for criminal negligence causing bodily harm. That is, the directive anticipates the possibility of out-bound information sharing even in the face of an *express* realization of a "personal, present and foreseeable risk of mistreatment" that is "real and ... based on something more than mere theory or speculation."¹¹² A real risk is, in other words, discounted. If sharing is authorized "heedless of these consequences," a plausible case exists that this is reckless behaviour.

Obviously, this is not the typical criminal negligence case involving, for example, a car crash characterized by a marked departure from the conduct of the reasonable automobile driver. Instead, at issue is the novel question of whether criminal negligence can arise through the execution of a government policy that is causally linked to (an internationally condemned) harm inflicted by a third party on an individual.

It is not clear how a court would decide this question. As already noted, however, information sharing done despite the very real prospect of maltreatment would clearly deviate dramatically from the standards articulated by the Arar Commission. It would also depart from what the UN Committee Against Torture sees as Canada's international human rights obligations. As I argue below, it is also conduct that I believe to be inconsistent with constitutional expectations. In these respects, application of the policy may be described as a marked departure from such standards as do exist, a conclusion that would ground a claim of criminal negligence.

The countervailing national security imperative driving the information sharing does not change this fact, although it might be the basis for a defence.

110. *R v MR*, 2011 ONCA 190 at para 30, 275 CCC (3d) 45.

111. *R v Libman*, [1985] 2 SCR 178 at para 74, 21 DLR (4th) 174 [*Libman*] (describing a "real and substantial link" test for jurisdiction in a criminal case: "all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada").

112. "Ministerial Directions," *supra* note 1.

The common law defence of “necessity” is the most likely suspect, albeit a concept rarely available in practice. Necessity is an excuse (although not an *ex ante* justification) for noncompliance with the criminal law “in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience.”¹¹³ Compliance with the law must also be “demonstrably impossible.”¹¹⁴ Finally, there must be “proportionality between the harm inflicted and the harm avoided.”¹¹⁵

Notably, the defence is available “in urgent situations of clear and imminent peril,”¹¹⁶ and the Supreme Court has frowned on efforts to justify a premeditated plan on a necessity basis.¹¹⁷ The ministerial directive cannot, therefore, itself be envisaged as a standing defence to criminal culpability. For one thing, the directive does not purport to provide this cover—indeed, it specifies that information sharing should be compliant with the law. For another, there is no support for the notion that criminal culpability can be waived by executive fiat, and without a statutory exemption.

It is conceivable, however, that an actual *use* of the policy might meet the strict requirements of necessity, on the specific facts relating to this use. Emergencies may arise. Still, the actions of the official charged with the offence would be gauged on an objective standard¹¹⁸—was, in fact, compliance with the law impossible and was the harm at issue proportionate to the torture inflicted on the victim? The defendant must place sufficient evidence before the court raising the issue, after which the Crown must demonstrate the inapplicability of the concept beyond a reasonable doubt.¹¹⁹

This is a modest burden on the defendant. However, given the nature of the matters at hand, evidence supporting the defendant’s position will almost certainly be highly sensitive, and of a sort the government is loath to disclose in open court. Put another way, it may be difficult for a defendant to table evidence sufficient to meet even a limited threshold.

This criminal law discussion is entirely speculative, of course. Indeed, it raises the somewhat unworldly prospect of police investigating police or security services, followed by the Crown prosecuting its agents, all for applying a direction imposed by a political minister. At the very least, however, this analysis points to

113. *R v Perka*, [1984] 2 SCR 232 at 248, 13 DLR (4th) 1 [*Perka*].

114. *Ibid* at 251.

115. *R v Latimer*, 2001 SCC 1 at para 28, [2001] 1 SCR 3.

116. *Perka*, *supra* note 113 at 251.

117. *R v Campbell*, [1999] 1 SCR 565 at paras 40-41, 171 DLR (4th) 193.

118. *Hibbert*, *supra* note 60 para 57; *R v Ryan*, 2013 SCC 3 at para 74, [2013] 1 SCR 14.

119. *Perka*, *supra* note 113.

the conundrums that use of the policy might create, and the risks imposed on those who follow the policy.

II. CONSTITUTIONAL LAW

The constitutional question is equally complex. The issue boils down, first, to the applicability of the *Charter* to conduct under the ministerial directions and, second, to the precise scope of the *Charter* right in question.

III. CHARTER APPLICABILITY

The *Charter* prohibits torture by barring cruel and unusual treatment or punishment, a category in which torture falls.¹²⁰ Moreover, as already noted, a section 7 “security of the person” interest is triggered by the administration of torture. This includes torture inflicted on a victim by a foreign government. As the SCC observed in *Suresh*:

the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government’s participation and the deprivation ultimately effected. ... At least where Canada’s participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada’s participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else’s hand.¹²¹

Suresh, and an earlier case standing for similar principles in the death penalty context,¹²² involved potential victims in the custody of Canada facing removal to jurisdictions where they might be harmed. The 2011 ministerial directives at issue in this article raise a different situation: the flow of information that induces mistreatment of a victim in (or who then falls into) foreign custody. A first issue in deciding the relevance of the *Charter* is, therefore, whether it matters where the victim is at the time the government sets in motion the events that lead to his or her mistreatment.

In this regard, the Court in *Suresh* did not limit the *Charter*-triggering “causal connection” analysis to circumstances in which the victim (and not just information) moves across borders. There is therefore no reason in principle to view the causal doctrine as confined to immigration or other removals of persons from Canada. In *Bedford*, the SCC held that “[a] sufficient causal connection

120. *Suresh v Canada*, 2002 SCC 1 at para 51, [2002] 1 SCR 3 [*Suresh*].

121. *Ibid* at para 54.

122. *United States of America v Burns*, 2001 SCC 7, [2001] 1 SCR 283.

standard does not require that the impugned [Canadian] government action or law be the only or the dominant cause of the prejudice suffered by the claimant.”¹²³ The Court then followed this decision in *Kazemi*, where the issue was whether a bar on suing a torturing state in Canadian court amounted to a section 7 violation. On the issue of causality, the Court held “for the purpose of engaging s. 7, the fact that the foreign state caused the original violence would not necessarily diminish the role of the Canadian state in impeding the healing of Canadian victims of torture or their family members.”¹²⁴

The extension of this logic to out-bound information sharing is a modest step. In relation to the 2011 ministerial directive, the harm-initiating conduct (information sharing or the authorization for such sharing) is itself undertaken in Canada, and the fact that the injury manifests overseas should not somehow sanitize the government’s action. That approach would also be consistent with criminal law approaches to transnational jurisdiction where elements of the wrong straddle borders.¹²⁵

From this perspective, there is nothing extraterritorial about the application of the *Charter*—it is applied to conduct in Canada, undertaken by the Canadian government or its agents. However, even if these events were perceived as extraterritorial in reach, the SCC’s dicta in *Hape* and *Khadr* suggest that the *Charter* does attach to extraterritorial conduct where Canada’s international human rights obligations are also in play.¹²⁶ As noted above, the UN Committee Against Torture is persuaded that the ministerial directive is governed by Canada’s *Torture Convention* obligations, regardless of where victims may be located. This may not be a definitive conclusion. It does, however, stand to reason that Canada cannot disregard its international human rights obligations by arguing that the torturer with whom it is “complicit” acts outside of Canada.

There is a perplexing line of Federal Court jurisprudence that purports to limit the extraterritorial reach of the *Charter* to circumstances where the harm is

123. *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 76, [2013] 3 SCR 1101.

124. *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at para 133, 375 DLR (4th) 519.

125. *Libman*, *supra* note 111.

126. *Hape*, *supra* note 34 (concerning whether Canadian police need to observe *Charter* obligations while operating abroad and concluding that the *Charter* will not reach this conduct unless officers were “participating in activities that, though authorized by the laws of another state, would cause Canada to be in violation of its international obligations in respect of human rights” at para 90); *Canada (Justice) v Khadr*, 2008 SCC 28, [2008] 2 SCR 125 [*Khadr*] (“[t]he principles of international law and comity of nations, which normally require that Canadian officials operating abroad comply with local law, do not extend to participation in processes that violate Canada’s international human rights obligations” at para 2).

visited on a Canadian citizen.¹²⁷ There is reason to doubt this particular construal of the *Charter's* reach. Although the facts in *Khadr* involve a Canadian citizen detained overseas, and the SCC does mention this, there is no clear citizenship limiter in the Court's jurisprudence. Indeed, it would be impossible to reconcile such a limiter with the Court's admonishment that the *Charter* incorporates Canada's international human rights obligations. The nationality of victims of human rights abuses does not determine the reach of international human rights law. Further, the Federal Court cases involve (at least in part) conduct by Canadian officials physically located overseas. This fact should distinguish those cases from circumstances where officials execute a policy *in Canada* whose consequences are then aimed across borders.

Still, the Federal Court in *Slahi* suggested that section 7 of the *Charter* would not apply in circumstances where a foreign national was detained by a foreign government in an internationally wrongful manner because of information provided by and from Canada, unless it could also be shown that Canada participated in the actual detention "contrary to its international law obligation."¹²⁸ The SCC has so far declined to pronounce on these issues and will at some juncture need to decide whether it really meant what it said in identifying international human rights law as the index of Canada's extraterritorial obligations. Affirming that position hardly opens the floodgates—Canada's international human rights obligations do not themselves have endless extraterritorial reach.¹²⁹

For the purposes of this article, however, the situation raised in *Slahi* should be distinguished from that prompted by the 2011 ministerial directives and their application. Detention is not a wrongful act *per se*—the nature and circumstances of the detention are what matters in deciding lawfulness. In comparison, torture is an inherent wrong in *every* circumstance, and, more than that, international law requires the criminalization and prosecution of complicity in torture. If Canada's sharing of information amounts to complicity—a serious prospect as measured against the sweeping aiding and abetting concept in customary international law—then by definition Canada is actively participating in the international wrong. The Federal Court's condition that Canadians participate in the actual wrong that is in violation of Canada's international obligations is thereby satisfied.

127. *Amnesty International Canada v Canada (Canadian Forces)*, 2008 FCA 401, 305 DLR (4th) 741; *Slahi v. Canada (Minister of Justice)*, 2009 FCA 259, 394 NR 352.

128. *Slahi v Canada*, 2009 FC 160 at para 52, 186 CRR (2d) 160, *aff'd* (without mention of this issue) 2009 FCA 259, 394 NR 352.

129. For discussion, see Craig Forcese, *National Security Law* (Toronto: Irwin Law, 2008) at 28 *et seq.*

In sum, it would be implausible to conclude that the government has a *Charter* carte-blanche to share information in knowledge of likely torture so long as only foreigners (and not Canadians) are then harmed in foreign facilities. It is hard to see how such a jurisdictional exclusion could possibly be treated as anything other than an arbitrary construal of the *Charter*, unmooring it from international law.

IV. CHARTER REQUIREMENTS

The constitutionality question is not answered by simply asserting that the *Charter* applies. A second issue is whether a court would exonerate particular decisions to share information on the basis of an attenuated reading of the actual, substantive section 7 requirements, or under exigent circumstances pursuant to section 1 of the *Charter*. In *Suresh* itself, the SCC declined to

exclude the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the *Charter* or under s. 1. (A violation of s. 7 will be saved by s. 1 “only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like”...). ... We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture. However, as the matter is one of balance, precise prediction is elusive. The ambit of an exceptional discretion to deport to torture, if any, must await future cases.¹³⁰

This “*Suresh* exception” is irreconcilable with the relevant international obligations, which (as the Court acknowledged) reject “deportation to torture, even where national security interests are at stake.”¹³¹ Still, this language of “exceptional conditions” may have been the inspiration for the potentially permissive position on information sharing taken in the 2011 ministerial direction.

However, the persistence of the *Suresh* exception as good law may be doubted. For one thing, the SCC has since been clear in (reasserting) that international law provides the standard against which *Charter* rights are to be measured.¹³² If it

130. *Suresh*, *supra* note 120 at para 78.

131. *Ibid* at para 75.

132. This approach was first raised in *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 at para 23, 59 DLR (4th) 416. It has been resuscitated by *Hape* and other cases, such as *Divito v Canada (Public Safety and Emergency Preparedness)*. See *Hape*, *supra* note 34 (“[i]n interpreting the scope of application of the *Charter*, the courts should seek to ensure compliance with Canada’s binding obligations under international law where the express words are capable of supporting such a construction” at para 56); *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at para 25, 3 SCR 157 (describing international human rights treaties as the minimum level of protection in interpreting *Charter* rights, in that case, under s 6 of the *Charter*).

means what it says, the SCC has therefore already tacitly closed the door on the *Suresh* exception in the context of removals to torture. As already noted, the bar in international law on removals to torture is absolute.

Likewise, it is entirely undecided whether (by analogy) a *Suresh*-style exception extends to section 7 of the *Charter* when the provision is triggered not by a removal but by other circumstances. Certainly, in *Khadr*, the SCC did not imagine a *Suresh*-style exceptional justification limiting the reach of section 7 in the name of national security. Instead, the Court held that section 7 applied to “Canadian officials when they participated in the Guantanamo Bay process by handing over the fruits of [their] interviews with Mr. Khadr.”¹³³ These *Khadr* facts are much closer to the issues raised by the 2011 ministerial directions than are those in *Suresh*. There is little reason, therefore, to assume that what the SCC said in *Suresh*, in relation to immigration removals, is pertinent to the question of section 7 and its application to information sharing that induces foreign maltreatment.

It is also notable that since *Suresh*, the Court has held that section 7 *Charter* rights are to be sternly defended and not tempered by an internal balancing. Courts are to consider any deviation from section 7 under section 1 of the *Charter*. This holding, issued in *Charkaoui*,¹³⁴ concerns the procedural aspect of section 7, but there is no reason to assume that the SCC would apply a different standard in the application of section 7 substantive entitlements of fundamental justice.

As a practical matter, a decision to share information would now be examined under the Court’s approach to judicial review that fuses section 1 *Charter* analysis with the administrative standard of review. In the wake of *Doré*,¹³⁵ the section 1 analysis in relation to discretionary executive action amounts to a consideration of “reasonableness.” In deciding that matter, everything would turn on the facts—was the national security objective motivating the sharing of information with a torturing agency so pressing as to be proportionate with the right violated?¹³⁶

133. *Khadr*, *supra* note 126 at para 28, 31.

134. *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at paras 22-23, [2007] 1 SCR 350.

135. *Doré v Barreau Québec*, 2012 SCC 12, [2012] 1 SCR 395.

136. *Ibid* at para 57. Abella J, for the Court, insisted that

[o]n judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play.

It would presumably be the government's burden to answer that question, something that might prove awkward given that evidence supporting the government's contentions may be of a highly sensitive nature. Indeed, the government might prefer to lose the constitutional case than disclose confidential information intended to protect national security. More than that, we have not yet had a recent case in which the Court was obliged to contemplate whether the "section 1/reasonableness" approach set out in *Doré* can be applied in any real way to forgive a *Charter* violation that reflects a non-derogable and absolute international human rights norm (in this case, the prohibition on torture).

All of this is to say that the sharing of information where there is a risk of overseas torture is constitutionally doubtful and, for practical purposes, difficult to defend.

IV. CONCLUSION

The 2011 ministerial directions clearly represent a change in official positions from those articulated in the aftermath of the Arar matter. Indeed, as the UN Committee Against Torture has observed, the directions are impossible to reconcile with the recommendations of the Arar Inquiry itself. On the other hand, the directions may be a more honest and forthright expression of the operational policies in fact employed by, at the very least, CSIS. CSIS policies have made exaggerated claims in terms of guarding against information sharing tied to torture, while at the same time holding the door open to such information sharing.

While the new approach is more transparent than are its predecessors, this does not exonerate its content. To summarize the chief conclusions of the article: There is a plausible legal basis to distinguish between evidentiary and operational use of in-bound information tied to torture. Moral arguments on this issue are pressing and difficult to resolve. It is, however, likely an overreach to ascribe a prohibition on operational use to Article 15 of the *Torture Convention*, or to characterize passive consumption of such information by a receiving agency as "complicity" under that treaty.

On the other hand, the complicity concept in the *Torture Convention* plausibly overlaps with the concept of "aiding and abetting" that international criminal tribunals have regarded as part of customary international law. If so, then use of the directives to justify out-bound information sharing, in knowledge of the likelihood of torture, may give rise to international criminal culpability and trigger Canada's own state responsibility for internationally wrongful conduct.

At the same time, Canada's own "aiding and abetting" concept appears to have a different reach and to require a more emphatic intent to assist a torturer. In these circumstances, it is difficult to see how a domestic criminal prosecution for aiding and abetting torture could be mounted against (proper) uses of the directives. Criminal negligence for bodily injury may, however, be another story, and a concerted application of the 2011 directives by an official within Canada would seem to fit the elements of that crime. If so, an accused would likely need to resort to a defence of necessity, pointing to national security exigencies. Marshalling even the modest evidence needed to invoke that defence might, however, run up against the state's interest in protecting its secrets.

There is also an obvious *Charter* issue raised by the directives. Whether the application of section 7 of the *Charter* to use of the directive would be stymied by preoccupations with extraterritoriality might depend, in one theory, on how a court construes past precedent like *Suresh* and recognizes the territorial nexus between use of the policy and Canada. On another theory, a court would need to grapple with the confounding jurisprudence on the extraterritorial reach of the *Charter*, and the possible argument that the *Charter* does not reach harm done to foreigners in foreign lands, even when compounded by Canadian conduct.

If the territoriality issues were, however, overcome, it is difficult to see how the government could convert *Suresh* and its language of "exceptional conditions" into a limitation on the substantive reach of section 7. Put simply, the SCC has progressed in its treatment of the *Charter*, and now is more earnest in treating compliance with international law as the baseline construal of the *Charter*. Put another way, behaviour that violates the *Torture Convention* now seems unlikely to pass muster under the *Charter*. Even if courts were prepared to exonerate the government under section 1 of the *Charter* for exigent circumstances, having to prove that exigency would oblige the government to table evidence that it would almost certainly wish to retain as confidential.

These conclusions represent the limit of what can be said based on the information now available. Exactly how the directives will be used in practice remains entirely unclear, and definitive conclusions on their legality will depend on those facts. Sadly, those data will be hard to come by. It is not likely that the government will announce its use of the policy or willingly release information on such use under access law. In the result, a challenge to the policy would require a frank challenge to the directions themselves without evidence of their use, something that would make the applicant's case more difficult.

As the 2013 Canadian Bar Association resolution protesting the directions noted: "decisions to share information pursuant to the Direction tend to elude

judicial review and public oversight due to the circumstances in which they are made.”¹³⁷ At some level, that is perhaps the most pernicious aspect of a policy articulated not in legislation with reporting obligations, but in the form of executive fiat. Put simply, the public will not know what the state is doing unless and until a scandal arises, similar to the one that engulfed Maher Arar. Until then, the public must depend on executive good faith and the operations of accountability bodies with limited resources and capacities (and in some eyes, credibility), like the Security Intelligence Review Committee.

Absolute bans on information sharing may be unrealistic, but they are easy to implement. If the government wishes to nuance its approach, it should also layer on equivalent procedural distinctions, including periodic public reporting on the number of times the directions have been deployed and mandatory provision of details to SIRC each time they are.¹³⁸ Otherwise, in the hothouse of inside-government thinking, dissenting views may be lost, and the 2011 directions’ willingness to touch torture with a ten-foot pole may produce even shorter poles in time.

137. *Resolution 13-08-A* (CBA, 2013), online: <<http://www.cba.org/CBA/resolutions/pdf/13-08-A-ct.pdf>>.

138. Kent Roach has also made this point. See Kent Roach, “The Dangerous Game of Complicity in Torture” (2012) 58:3-4 *Crim LQ* 303 at 306.