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Editorial

The Dangerous Game of Complicity in Torture

On July 28, 2011, Minister of Public Safety Vic Toews authorized that Canadian Security Intelligence Service (CSIS) in “exceptional cases” to send information to foreign entities even if there was a substantial risk that it would result in torture or cruel, degrading and inhumane treatment. Revelations of this directive come on the heels of earlier reports that in 2010 the Minister has authorized CSIS to use information in exceptional cases that was believed to be obtained through torture.

The 2011 directive raises the question of whether we have learned anything from the Arar and Iacobucci inquiries held into the torture of Canadians held abroad and also what sort of legal advice that the Minister of Public Safety is receiving or perhaps ignoring.

The directive — written in Ottawa’s Orwellian language where torture become mistreatment — pays lip service to some of the recommendations of the Arar Commission. The Director of CSIS will now have to consider the views of the Department of Foreign Affairs (and any other agency) before sending information to Syria or some other foreign country that tortures those believed to be a security threat.

There are references in the directive to Canada’s international and *Criminal Code* obligations not be complicit or participate in torture in the directive, but no real substantive engagement with those obligations. It would be interesting to see the legal advice behind this directive, but unlike the American torture memos, the Canadian government is not likely to waive solicitor-and-client privilege.

It is tempting to blame Canada’s descent from a respected leader on human rights to a nation associated with torture even as the U.S. repudiates torture on Mr. Toews and his government, but the story is actually more complex.

Canada went offside on torture immediately after 9/11 when the Supreme Court in *Suresh v. Canada (Minister of Citizenship and*

Immigration), [2002] 1 S.C.R. 3, accepted that while torture is never justified under international law, it might in “exceptional circumstances” be justified under the Charter. The so-called *Suresh* exception has received much international criticism and was tellingly rejected when the European Court of Human Rights was urged to accept it.

The *Suresh* decision is not, however, the only Canadian judicial decision that seems willing to condone torture by foreign allies in the name of security. In 2008, the Federal Court of Appeal ruled in *Amnesty International Canada v. Canadian Forces (Defence Staff, Chief)* (2009), 305 D.L.R. (4th) 741 (F.C.A.), leave to appeal to S.C.C. refused [2009] 1 S.C.R. v, that it would not apply the Charter even if Canadian Forces handed off Afghan detainees to torture. The Court of Appeal reasoned that the Charter would not apply because the detainees are not Canadian citizens even though the Charter is applied extra-territorially in order to protect Canada’s international human rights obligations which include its obligations not to be complicit in the torture of anyone, not just Canadian citizens.

There are echoes of these regrettable decisions in the July 2011 directive both in the explicit reference to exceptional circumstances and the implicit idea of running the risk of contributing to the torture of non-Canadian citizens in order to advance Canada’s security interests.

Canadian courts have refused to apply the *Suresh* exception for deportation to torture, but the government has held this argument in reserve in the security certificate cases. Courts have also deferred to Ministerial determinations of whether there is a substantial risk of torture. In one case, the Minister’s delegate said that a suspected Sikh terrorist could be deported to India without a substantial torture risk and he was deported. The UN’s Committee Against Torture, however, held Canada had breached the torture convention. *Sogi v. Canada* U.N. Doc. CAT/C/39/D/297/2006; Decision on Communication No. 297/2006 November 16, 2007, at para. 10.10.

To its credit, Canada appointed two inquiries into whether Canadian officials were complicit in the torture of Maher Arar, Abdullah Almalki and Ahmad Elmaati. The inquiries found disturbing practices of Canadian agencies sending questions for Syrian intelligence to ask Canadians detained in the torture chambers of Damascus. The Arar inquiry called on all Canadian agencies to re-evaluate their policies on information sharing.

The July 2011 directive is not what reformers had in mind. Some may believe that Canada should not ignore intelligence about a possible bombing in Canada because it was obtained by torture. The July 2011 directive makes clear that in such situations, the priority will be Canadian security while it also requires CSIS to take reasonable measures to ensure

that it does not condone or promote the torture and also note reliability concerns about the intelligence.

But the July 2011 directive goes far beyond so-called protective uses of intelligence obtained through torture and contemplates that CSIS can send information to foreign agencies even in the face of a substantial risk that those agencies will use the information to capture and torture terrorist suspects.

The directive simply directs the Director of CSIS to balance Canada's security interests against the risk of torture. But the government has an incentive to prefer security over human rights especially in cases where it can deny direct knowledge or participation in torture and where those who may be tortured are not Canadian citizens.

There is danger that the sharing of information in such circumstances may aid and abet torture. The directive notes that under s. 269.1 of the Code torture is a crime and that laws against conspiracy, counseling and aiding and abetting torture apply even if the actual act of torture is committed outside Canada. But the directive seems oblivious to the risk that it may authorize information sharing that may result in Canadian participation in torture.

The most relevant offence is aiding and abetting torture. Section 269.1(3) clearly states that superior orders or the exceptional circumstances/emergency/security threat referred to in the July 2011 directive is not a defence to a torture charge. This provision still reflects the international law consensus about torture and not the departures from it contemplated in the Suresh and Afghan detainee cases.

Could the Director of CSIS or the Minister of Public Safety be guilty of aiding and abetting torture if they authorize sending information about a terrorist suspect to a foreign country such as Syria that tortures such suspects? In order to be guilty of aiding and abetting torture, the information sharing must (1) know or be wilfully blind or deliberately ignorant that torture will occur and (2) intend to assist in the torture.

The Supreme Court's decision in *R. v. Hibbert*, [1995] 2 S.C.R. 973, makes clear that it is not necessary to show that the accused desired torture to take place. The Court's decision in *R. v. Briscoe*, [2010] 1 S.C.R. 411, at para. 18, suggests that the accused need not share in the intent of the principal offender to commit the offence but must intend to assist in the commission of torture. It may be that in many cases there would be a reasonable doubt about the latter intent, but the minimal standards of the Code are no way to make policy about complicity in torture.

The July 2011 directive contemplates that Canada can still send information to foreign entities even though they know it will likely result in torture. But the Minister of Public Safety may not even risk criminal liability should the Director of CSIS exercise his discretion not to inform

the Minister. The directive also fails to require the Director to notify the Security Intelligence Review Committee (SIRC) after the fact that the service has triggered its exceptional circumstances provisions on torture.

Remember SIRC? They are the watchdog of CSIS. They had better be on their toes given this directive. Alas, the government has rejected both the Arar Commission's and SIRC's own recommendation that SIRC needs more powers to follow the information sharing trail in the post 9/11 environment. Moreover, SIRC has been without a permanent head since the resignation of Dr. Arthur Porter in November, 2011.

The July 2011 directive reflects the realpolitik that intelligence about terrorism can come from countries with poor human rights records and that Canada as a net importer of intelligence is under pressure to share information about terrorist threats and not always in strong position to restrict what allies do with our intelligence or ask them exactly how it was obtained.

But the directive plays a dangerous game. CSIS officials and their lawyers must be alive to the dangers of complicity in torture including even possible criminal liability. SIRC should learn and carefully review when the exceptional circumstances in this directive are triggered and intelligence mixes with the brutal practices of torture or cruel and degrading treatment.

Canadians should ask themselves whether we have really internalized the lessons of the Maher Arar, Abdullah Almalki and Ahmad Elmaati cases where Canadian information sharing contributed to torture. Canada was ahead of the curve in confronting those cases. Unfortunately, the July 2011 directive is a large step backwards and towards repeated complicity in torture.

K.R.