The Justice for Mohamed Harkat Committee urgently calls upon parliament to immediately repeal sections 34 and 77 to 85 of the Immigration and Refugee Protection Act, as well as all secret proceedings contained in the Anti-Terrorism Act (ATA), including the revisions to section 38 of the Canada Evidence Act.

We further call upon the Minister of Public Safety and the Minister of Immigration for:

- A withdrawal of the currently issued illegal certificates without delay, through the use of their power under administrative law, and also by virtue of articles 25 and 34 (2) of the Immigration and Refugee Protection Act;
- The immediate and unconditional release of the detainees currently in jail and under house arrest, or their fair trial under the pre-ATA criminal code if any evidence actually exists against them;
- An end to all deportation proceedings against all currently held under security certificates;
- The cessation of any and all practices of deporting, or seeking to deport, people to countries where they will be, or may reasonably expect to be, submitted to imprisonment, torture or death; and,
- The closing of the Kingston Immigration Holding Centre.

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Justice for Mohamed Harkat Committee

FACT SHEET

THE SUPREME COURT RULING ON SECURITY CERTIFICATES

On February 23, 2007, the Supreme Court of Canada ruled unanimously that Security Certificates are unconstitutional in three respects:

- The use of secret evidence, with no access or recourse by the detained or their lawyers, is an abrogation of the Canadian Charter of Rights and Freedoms;
- The differential treatment of refugees from that of immigrants is also unfair under the Charter;
- The detention could be considered arbitrary under the Charter if no regular review is conducted.

The finding has been welcomed by human rights advocates.

However, although the court granted the government a year to develop an alternative, it remains unjust, and an affront to their basic human rights, to make the detainees – those in jail and those under house arrest or on bail – wait a year for release or a fair trial. It took Parliament only a month or so to adopt sweeping anti-terrorism legislation in late 2001. It is surely reasonable to demand immediate action by Parliament to stop the Charter violations created by the unconstitutional Security Cert-ificates.

Meanwhile, the human rights violations inherent in the security certificate process, now recognized in part by the Supreme Court of Canada, continue in other aspects of Canadian law. In particular we are concerned that sections of the Immigration Act and sections of the Anti-Terrorism Act also contain provisions for secret proceedings.

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Attempts by Government and some civil society groups to spin the Supreme Court decision as essentially upholding the Security Certificate process are misleading: The Court ruled the process unconstitutional. Also, media accounts that assert that the court suggested adopting a Special Advocate model along the lines of the one in use in the UK are inaccurate, since the court's ruling also acknowledged criticism of such models.

DEPORTATION TO TORTURE

On the specific subject of deportation to torture, the Justice for Mohamed Harkat Committee notes that the ruling was silent. This matter will come before the court later this year as an appeal is being brought forward.

In the particular case of Mohamed Harkat, recent information about the human rights situation in Algeria make it clearer than ever that his deportation to that country would be to send him to torture. Such an act constitutes the severest possible case of punishment without due process, since Harkat has committed no crime and has never been charged with anything. We expect Parliament to take pre-emptive action on this matter because it is an urgent matter of human rights in Canada.

"SPECIAL ADVOCATE": NO SOLUTION TO SECURITY CERTIFICATES HUMAN RIGHTS VIOLATIONS

The Justice for Mohamed Harkat Committee categorically rejects Special Advocate or Amicus Curiae models, such as the "SIAC model" (from the UK), and any similar models, as completely inadequate solutions to a human rights crisis, and in some ways worse than the current situation because of the legitimizing effect such a process would undoubtedly have in the eyes of government and the public.

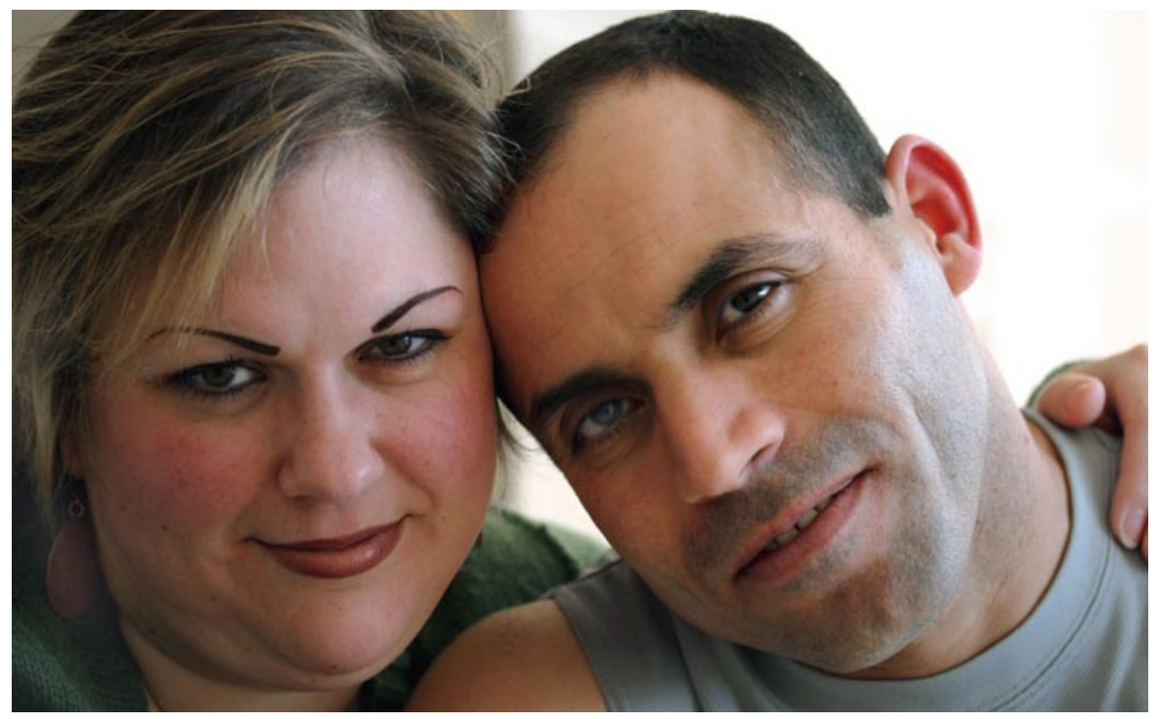
The best possible alternative for Parliament to adopt would involve considering such cases under the criminal code. Although our position is consistent with the Supreme Court's ruling, (especially its analysis based on rights under Section 7 and Section 1 of the Charter), Parliament may not decide to take the just path. In particular the government may opt to create a special advocate system. While this may sound good, in reality it is a cosmetic solution to a fundamental problem.

WHAT IS A SPECIAL ADVOCATE?

A "special advocate" is a person appointed by a court or a government, whose job is to represent the interests of the detained in the review of secret evidence and in closed evidentiary hearings to which the detained and their lawyers do not have access. This process has come under criticism by human rights groups when it has been used in other contexts. In the words of Ian McDonald, a former Special Advocate in the UK who resigned over the unfairness of the process:
... I was giving legitimacy to a system which in conscience I thought was completely contrary to all the kinds of traditions of, a) fairness, and b) the fact that ever since Magna Carta, we don't imprison people unless they've had a proper trial.... You're simply doing it on the basis of intelligence reports you've had which in turn will be based on assessments made about the risks that these people may pose but without ever attempting to turn the information and suspicions you have into the kind of evidence which you could then put before a court.

WOULDN'T A SPECIAL ADVOCATE BE BETTER THAN NOTHING?

The following list of questions make it clear that such a model would be fundamentally flawed. Is the advocate:

- present for all secret or ex parte proceedings?
- completely impartial and viewed as such, i.e. not previously involved in deporting people, not appointed or approved by CSIS, etc.?
- trained and/or has expertise in security issues?
- able to consult with the detained before, during, and/or after secret evidence is heard?
- able to recommend or require that certain evidence be made accessible to the detained and/or public?
- able to access resources and access to assistants and experts to help him or her prepare for the case (This was recommended by Commons Committee in U.K.)?
- working within a process free of the taint of bias, i.e. is the presiding judge or government appointee also impartial, etc.?

In all likelihood any new legislation tabled by this government will reflect a negative response to most, if not all, of these variables. Any special advocate process which is not impartial and viewed as such, in which the appointee is somehow beholden to CSIS, is untrained, has little or no access to the detained, has no powers to release evidence, has no resources, and/or is constrained by other problems with the process, will merely replicate the same problems as already exist. Even the ideal advocate model would still restrict the detained from directly facing their accusers. Additionally, implementing such a process would merely allow Government to claim it has complied with human rights requirements while actually allowing the problems to continue unabated. Many would see the issue as resolved, leaving the detainees, all now detained without charge for periods ranging from 3 to 8 years, still detained, and still with their rights and liberties severely curtailed or eliminated.