

# PROTECTION CHARTER

## Principles to Guide Canadian Law and Policy Reform Towards Stronger and More Effective Canadian Government Action to Defend the Rights of Canadian Citizens and Individuals with Close Canadian Connections

A growing number of individuals with strong ties to Canada face human rights violations in foreign countries.



In an increasingly inter-connected world Canadians travel, conduct business, study, work overseas, volunteer, pursue trade, live out their retirement, work as journalists and visit family in virtually every corner of the world. That degree of international engagement is an inescapable global reality in today's world and is certainly in Canada's interests.

In that ever-smaller world, a small but growing number of Canadian citizens, permanent residents of Canada and other individuals with close Canadian connections face the risk of serious human rights violations in foreign countries. The violations include arbitrary arrest, unlawful imprisonment, torture and ill-treatment, the death penalty, unfair trials and discrimination. The risk is elevated for individuals who possess dual or multiple nationalities in addition to their Canadian citizenship and who often find that other governments refuse to recognize their Canadian nationality.

Some cases have received strong support at senior political levels, others virtually none. Some have been complicated or undermined by the fact that Canadian security or law enforcement agencies have been involved and even complicit. In some instances the Canadian government's response has appeared to be tempered because of close economic, strategic or political ties with the foreign government in question; other times Canadian options have been limited because relations with the foreign government are strained. There is a growing perception that some Canadians who face human rights violations abroad receive less political support than others might, because of their personal, family, political or religious background.

Most recently the case of Mohamed Fahmy, wrongfully imprisoned in Egypt because of his work as a journalist, has brought into sharp focus the urgent need to reform and strengthen the laws, policies and practices that guide Canadian government action in such cases. The Canadian government frequently failed to press hard on Mohamed Fahmy's behalf and to raise his case at senior levels, meaning his detention was prolonged and delays in ensuring he received necessary medical treatment while in prison have resulted in a permanent disability in his arm.

The need for reform is urgent because while Mohamed Fahmy is now safely back in Canada, in countries around the world other individuals remain wrongly imprisoned, face the possibility of execution, have been and may again be tortured, or are at risk of other human rights violations at this very time.

This Charter is being offered as an appeal to the Canadian government to commit to a reform process over the course of 2016 that will change practices, revise policies and amend laws as needed; all with an eye to strengthening Canadian efforts to protect Canadian citizens, permanent residents and individuals with close Canadian connections from serious human rights violations in other countries.

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## 1 Enshrine the right to consular assistance and equal treatment in Canadian law

No Canadian statute expressly obligates the government to provide consular assistance to Canadians, even when facing human rights violations abroad. The provision of consular assistance is instead discretionary, left to the Minister of Foreign Affairs to take up if and as he or she wishes. Lawyers have turned to time-consuming Charter arguments to frame government obligations in this area. It is time to enshrine the right to receive consular assistance and the obligation to provide it in Canadian law.

Furthermore, right or wrong, perceptions have grown over the years that some Canadians experiencing human rights violations abroad receive greater, more immediate and higher-level consular assistance from the government than others. It leaves a sense of discrimination and double-standards. Canadian law should clearly establish that all Canadians will be treated equally in the provision of consular assistance.

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## 2 Develop transparent criteria to guide consular assistance

The sense of arbitrariness about the level of consular assistance provided to Canadians experiencing human rights violations abroad is all the greater given the lack of clarity as to how decisions are made about tactics to be pursued and services to be offered. When will a Minister take up a case? When and how will families be informed of key developments? When and in what manner will government work closely with lawyers and civil society groups? When and to what extent will the government speak out publicly about a case? How best to ensure individuals in prison receive medical treatment and legal representation? Transparent guidelines would help dispel concern that cases are handled inconsistently.

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## 3 Protecting Canadian journalists abroad

The world has witnessed increasing attacks on press freedom through the imprisonment, torture and murder of journalists and photojournalists. Canadian journalists are not immune from such attacks as witnessed by the death of Zahra Kazemi at the hands of Iranian state security interrogators and the 438 day imprisonment of Mohamed Fahmy by Egyptian authorities. The Canadian Government should put in place mechanisms to support and protect journalists and staff from false imprisonment and abuse at the hands of foreign states. That support should include elaborating and enforcing a safety and security code for media organizations employing Canadians abroad or broadcasting in Canada.

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## 4 Actively defend Canadian nationality

In a context of dual or multiple nationalities, Canadian efforts to provide assistance are frequently dismissed or ignored by governments that refuse to recognize an individual's Canadian citizenship. While that poses challenges to Canadian efforts to advocate on behalf of someone experiencing human rights violations it should never serve as an excuse for taking no action or for lesser effort being expended. Canadian citizenship must be defended even when foreign states refuse to recognize it.

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## 5 Do not allow unjust foreign laws or practices to deter Canadian action

Canadian officials should never allow foreign laws or decisions to thwart meaningful and appropriate action to defend the rights of Canadians, in accordance with Canadian law. A blatantly unfair trial should not deter Canadian advocacy. An objectionable court-imposed travel ban should not serve as a reason not to provide a Canadian citizen with a Canadian passport to which they are otherwise entitled.

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## 6 Establish an independent office for review of consular assistance

It has proven very difficult to raise questions about the level and nature of consular assistance provided to Canadians, in large part because there is no legal duty to provide consular support and information about what services are being provided and advocacy efforts being pursued are protected by privacy and access to information laws. It makes it impossible to resolve concerns, for instance, that an individual may be receiving less assistance because of political, trade or other considerations. An independent officer of Parliament reporting through the Minister of Foreign Affairs such as a Commissioner of Consular Affairs should be established to ensure full compliance with the obligation to provide non-discriminatory consular assistance. The mandate of such an office should include advocating on behalf of citizens and informing Canadians of government efforts to assist them.

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## 7 Consistent support for death penalty clemency

A particular concern has arisen in recent years about inconsistency in Canada's approach to seeking clemency on behalf of Canadians who are sentenced to death in foreign countries. Canadian policy has evolved from seeking clemency in all cases; to seeking clemency only in countries that are not democratic and do not follow the rule of law; to now seeking clemency on a case by case basis. Canada is a firmly abolitionist country and that must be reflected in our approach to clemency. Canadian policy must clearly establish that Canada will actively seek clemency on behalf of all Canadians sentenced to death in any country.

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## 8 Institute review and oversight of Canadian national security agencies

It has come to light through judicial inquiries and court rulings that in some cases Canadian law enforcement and security agencies have played a role in the human rights violations experienced by Canadians in other countries. This is particularly so in national security cases. There have been repeated calls, recommendations and proposals for strengthened review and oversight of national security agencies, including from the Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar, to guard against that possibility. Establishing comprehensive, expert, independent and coordinated national security review and oversight must be prioritized. Among other considerations, the review and oversight process must ensure that racial profiling of Canadians visiting, living or working abroad does not occur.

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## 9 Ongoing concerns after release: access to justice and freedom of movement

Concerns often continue after someone is released from prison. In particular, access to justice must be a key component of Canada's approach to supporting citizens and other individuals with close Canadian connections who experience serious human rights violations in other countries. Human rights violations are fueled by impunity. Survivors of human rights violations and the families of victims have a right to pursue justice for the abuses they have endured. Canada's State Immunity Act presently does not allow lawsuits to be brought against foreign governments in Canadian courts for human rights violations that occur outside of Canada. The Act must be amended to open up the possibility of legal action against foreign government officials for serious human rights abuses.

Another key concern arises when individuals have been included on Canadian or US "no-fly" lists and may require government help in having that rectified so that they are able to travel freely after release.

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## 10 Ratify the Optional Protocol to the Convention against Torture

Torture continues at alarming rates around the world because of the secrecy that protects torturers. The United Nations has adopted an important treaty, the Optional Protocol to the Convention against Torture, which seeks to prevent torture through a system of prison inspections that expose the conditions that lead to torture. Canadians imprisoned abroad, like anyone held in foreign prisons, would be better protected from torture if the Optional Protocol was widely supported. But less than one-half of world governments have signed on. Canada should be pressing for scrutiny of foreign jails through the Optional Protocol. But we can only urge other governments to sign up if we do so ourselves.

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## 11 Develop an inter-governmental network

Very often Canada's political clout in advocating on behalf of a Canadian citizen experiencing human rights violations abroad is limited. Canada does not have the geopolitical clout of larger nations. Our relations with the particular country may be strained or we may even have cut diplomatic ties. Inevitably the need to work with other nations arises, encouraging governments that may have closer ties with the country involved to provide assistance. Rather than continue to scramble to find those allies after the fact it would be wise for Canada to lead an effort to develop an informal network of governments ready to assist each other with consular cases when the need arises.

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## 12 Establish guidelines for permanent residents and others with Canadian connections

Not all cases of concern for Canadians involve individuals who are Canadian citizens. Frequently the men and women experiencing human rights violations abroad are Canadian permanent residents or have important connections to the country through close relatives who are citizens or permanent residents. Often those individuals have no closer connection to any other foreign government than they do with Canada and therefore understandably look to Canada for assistance.

When approached about such cases Canadian officials generally respond indicating that there is nothing that the government can do because the individual is not a Canadian citizen. Nonetheless some of those cases do then get taken up by the government in various ways. There is a need for guidelines that clearly establish that the Canadian government will take up cases of non-citizens with close Canadian connections and laying out the factors and circumstances that will ensure a consistent approach.

## ENDORSEMENTS

### Former detainees and relatives of current detainees

- Mohamed Fahmy, detained in Egypt 2013-2015
- Kamila Telendibayeva, spouse of Huseyin Celil, detained in Uzbekistan and China 2006-present
- Said Maktal, cousin of Bashir Makhtal, detained in Kenya and Ethiopia 2007-present
- Ensaf Haidar, permanent resident, spouse of Raif Badawi, detained in Saudi Arabia 2012-present, sentenced to 1,000 lashes
- Maryam Malekpour, sister of Saeed Malekpour, detained in Iran 2008-present
- Arash and Parastoo Azizi, children of Mostafa Azizi, permanent resident, detained in Iran 2015-present
- Naser al-Raas, detained in Bahrain 2011 and 2012
- Maher Arar, detained in US and Syria 2002-2003
- Abdullah Almalki, detained in Syria 2002-2004
- Ahmad Abou-Elmaati, detained in Syria and Egypt 2001-2004
- Muayyed Nureddin, detained in Syria 2003-2004
- Benamar Benatta, detained in the United States 2001-2006
- Sarah and Ahmed Attia, family of Khaled Al-Qazzaz, permanent resident, detained in or barred from leaving Egypt 2013-present
- Marina Nemat, detained in Iran 1982-1984
- Hamid Ghasemi-Shall, detained in Iran 2008-2013
- Fabien Kalala, detained in Democratic Republic of Congo in 2011

### Civil society groups

- Amnesty International Canada (English Branch)
- Amnistie internationale Canada francophone
- British Columbia Civil Liberties Associations
- Canadian Arab Institute

- Canadian Civil Liberties Association
- Canadian Ethnic Media Association
- Canadian Journalists for Free Expression
- Canadian Somali Congress
- Canadian Tamil Congress
- Council to Protect Canadians Abroad
- Fahmy Foundation
- International Civil Liberties Monitoring Group
- International Commission of Jurists Canada
- National Council of Canadian Muslims
- Uyghur Canadian Society

### Lawyers and former diplomats

- Gary Caroline, Lawyer
- Paul Cavalluzzo, Lawyer
- Paul Champ, Lawyer
- Dennis Edney, Lawyer
- Marlys Edwardh, Lawyer
- Joanna Gisalson, Lawyer
- Barbara Jackman, Lawyer
- Francois Larocque, Lawyer
- James Lockyer, Lawyer
- Chris MacLeod, Lawyer
- Gar Pardy, former Director General of Consular Affairs
- Owen Rees, Lawyer
- Paul Schabas, Lawyer
- Phil Tunley, Lawyer
- Lorne Waldman, Lawyer
- Nathan Whitling, Lawyer

