



Brief to the National Action Summit on Islamophobia

submitted by:

International Civil Liberties Monitoring Group

to:

National Action Summit on Islamophobia

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As a broad-based coalition deeply concerned by the impacts of Islamophobia and other forms of hate and racism in Canada, we are pleased to submit this brief to the National Action Summit on Islamophobia proposing ways the Canadian government can work to address and counter Islamophobia in our country.

Our coalition's focus is on the impacts of national security and anti-terrorism laws in Canada, and our country's role and actions post 9/11, throughout the so-called War on Terror, and the evolving views on terrorism, extremism and violence today.

We have documented, criticized and proposed solutions to the negative impacts that these laws have had on freedom of speech, association, religion and movement; on privacy; on levels of government surveillance; on the rule of law; on due process and access to justice; and on equality rights.

Throughout all this, we have also seen a deeply problematic and consistent problem of racial, religious and political profiling, abetted by the vague and overreaching definitions of terrorism and national security. Central to this has been the targeting of Muslims, Arabs, and those perceived to be Muslim, although it has also deeply impacted other communities, most notably Indigenous peoples as well as environmental and climate activists.

This undue focus on the so-called "Islamist" threat, espoused even by a former prime minister as being the "greatest" threat to Canada, has led to two decades of state-sanctioned, systemic racism against Muslims in Canada. This systemic racism has had a tangible, negative impact on Muslims living in Canada and around the world.

Much needs to be done to address individual acts of hatred and Islamophobia; however, the role of state systemic (and overtly) Islamophobia must also be clearly and immediately addressed. And while the response to "individual" vs. "systemic" Islamophobia may take different shapes, it is crucial to recognize how one supports the other. Decades of government agencies and officials framing Muslims in Canada and internationally as being the most direct threat to national security – despite a lack of evidence demonstrating that threat, and in ignorance of other more direct threats such as the horrific treatment of Indigenous peoples, the threat of climate change, and increasingly the threat of white supremacist violence – have fed the fears of the public, causing individuals to view their Muslim neighbours and colleagues with fear and suspicion.¹

While the colonial and racist origins² of national security in Canada have undoubtedly persisted into the present, it's important to be reminded that:

¹ "Islamophobia in Canada: Submission to the UN Special Rapporteur on Freedom of Religion or Belief" (30 Nov. 2020) International Civil Liberties Monitoring Group, Islamic Social Services Association, and Noor Cultural Centre. Online at: <https://www.ohchr.org/Documents/Issues/Religion/Islamophobia-AntiMuslim/Civil%20Society%20or%20Individuals/Noor-ICLMG-ISSA.pdf>

² Azeezah Kanji, "Always Already Suspicious: The Inherent Racism of National Security," transcript of presentation (Nov. 2017). Online at: <https://iclmg.ca/always-already-suspicious-the-inherent-racism-of-national-security-a-talk-by-azeezah-kanji/>; and Azeezah Kanji, "The coloniality of Canadian Islamophobia – and anti-Islamophobia" (2 July 2021) *Al Jazeera*. Online at: <https://www.aljazeera.com/opinions/2021/7/2/the-coloniality-of-canadian-islamophobia-and-anti>

1. Unconscious biases are real and pervasive, and as their name indicate, can escape detection among government officials,
2. Systemic racism is institutionalized, rendered invisible by seemingly neutral policies that disproportionately affect certain populations even if that is not clearly named, and
3. In Canadian law, discrimination is found in the outcome, and not the intent of our actions.

While the responsibility does not lie with the federal government alone – far from it – it plays a powerful role in perpetuating these beliefs, and can play an incredibly important role in countering them.

Over the past two decades, studies by academics and civil liberties organizations have repeatedly documented the disproportionate impact of national security measures on Muslim communities. Laws like the *Anti-Terrorism Act, 2015* and the *National Security Act, 2017* have expanded national security powers without adequate transparency and oversight, disproportionately threatening the fundamental rights and freedoms of Muslims.

The laws and policies have resulted in the criminalization and surveillance of Muslim communities in Canada, including:

1. Disproportionate prosecutions:

A comprehensive 2019 study of all terrorism prosecutions in Canada since 2001 found that 98% were against Muslims or defendants linked to Muslim groups; the vast majority did not involve any executed act of violence.³ Pre-criminal measures imposing behavioural restrictions, such as “terrorism peace bonds,” have also been overwhelmingly applied against Muslims.⁴

2. Discrimination and profiling in immigration:

Security certificates and security inadmissibility have both been used to restrict access to Canada, to deport, and even imprison Muslims who are alleged – under broad and often secret “evidence” – of being linked to terrorism. Some of these individuals face deportation to torture and experience terrible living situations in Canada, including both draconian release conditions and detention, all without charge, trial or conviction.

3. Targeting via the Terrorist Entities List:

While presented as an impartial tool, the vast majority of groups placed on the Terrorist Entities List have been Islamic or Arab-linked entities. Only since 2018 have a small number of white supremacist groups been added – all while listing more entities linked to “Islamist” terrorism. This perpetuates the discriminatorily Muslim-centric focus of

³ Michael Nesbitt, “An Empirical Study of Terrorism Charges and Terrorism Trials in Canada between September 2001 and September 2018” (2019) *Criminal Law Quarterly*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3325956.

⁴ Fahad Ahmad and Jeffrey Monaghan, “From Probabilities to Possibilities: Terrorism Peace Bonds, Pre-Emptive Security, and Modulations of Criminal Law” (2020) 74 *Crime, Law, and Social Change* 341.

Canadian anti-terrorism in general, and the listing procedure in particular, despite the far greater toll inflicted by White supremacist and right-wing actors within Canada. The listing of organizations like the Proud Boys alongside Palestinian and Kashmiri groups – as well as charities like IRFAN, proscribed for donating medical equipment to the Gaza Strip – conflates groups originating under or responding to long-term military occupation, with White supremacists and neo-Nazis, all under the rubric of a broad and inconsistent concept of “terrorism.”

Furthermore, Canada’s terrorist listing procedure is seriously flawed: the imposition of serious financial and possibly criminal consequences on the basis of unaccountable executive listing decisions; the use of secret evidence; the likelihood of false positives; and the absence of adequate avenues for challenging listings and obtaining redress. This is exacerbated by the seizure of assets, making legal counsel difficult if not impossible to retain. The fact that this blunt and flawed instrument is used mostly against groups associated with Islam, is a clear indication of its Islamophobic impact.⁵

4. Racial profiling at the border and while traveling, including the Passenger Protect Program (No Fly List):

ICLMG and others have widely documented the racial and religious profiling of Muslims while traveling to, from and even within Canada. In 2014, ICLMG published the *Report of the Information Clearinghouse on Border Controls and Infringements to Travellers’ Rights*, documenting widespread incidences of racial profiling at Canada’s borders and airports based on national security and anti-terrorism suspicions, the vast majority being Muslim individuals.⁶ More recently, Nagra and Maurutto have documented the impacts of no-fly lists on Canadian Muslims, finding “the Canadian no-fly list targets Muslim communities, restricts mobility, separates individuals from family and friends, diminishes professional and economic opportunities, and stigmatizes those labelled a security risk,” and concluding that “no-fly lists erode fundamental aspects of justice, and reproduce racial hierarchies.”⁷

5. The prejudiced targeting of Muslim charities:

Two new reports, one from the National Council of Canadian Muslims and the Institute for Islamic Studies at the University of Toronto, and another from the ICLMG, demonstrate how the Canada Revenue Agency targets Muslim charities for review and audit based on unsupported suspicions of engaging in terrorist financing. This has led to the penalization and even revocation of leading Muslim charities in Canada, often on untested and weak allegations of engagement in terrorist financing. According to

⁵ Azeezah Kanji, Tim McSorley et al., “Open Letter To Federal Leaders: Do Not Expand Anti-Terrorism Laws In The Name Of Anti-Racism,” (22 Feb. 2021) International Civil Liberties Monitoring Group. Online at: <https://iclmg.ca/letter-federal-leaders-terrorist-entities-list>

⁶ International Civil Liberties Monitoring Group, “Report of the Information Clearinghouse on Border Controls and Infringements to Travellers’ Rights” (2014), online at: <https://iclmg.ca/wp-content/uploads/2014/03/R-Clearinghouse-border-controls.pdf>

⁷ Baljit Nagra and Paula Maurutto, “No-Fly Lists, National Security and Race: The Experiences of Canadian Muslims” (2020) 60(3) *British Journal of Criminology*, [10.1093/bjc/azz066](https://doi.org/10.1093/bjc/azz066).

ICLMG's research, the vast majority of charities that have faced revocation through this process are Muslim charities, raising questions of profiling and prejudiced targeting in the CRA's efforts to counter terrorist financing.⁸

6. Information sharing and complicity in mistreatment abroad:

Canada's weak rules on information sharing with foreign agencies has led to the detention, mistreatment and torture of primarily Muslim men in foreign countries. Canadian intelligence agencies have also taken advantage of unlawful detention to question Canadians, when doing so at home would not have been possible. While new rules have been put in place on information sharing and foreign mistreatment, a recently released report from NSIRA shows significant gaps and inconsistencies across departments that raise important questions.⁹

7. Harassment of Muslim students on campus:

Concerns around CSIS and the RCMP approaching Muslim students on campus have widely been reported, causing fear and suspicion. "In many cases, the interactions have led executives or members to leave the organization over concerns about repercussions for their future careers," reported the CBC.¹⁰ This has also led to the creation of a hotline at the University of Toronto's Institute of Islamic Studies in partnership with the Canadian Muslim Lawyers Association and the National Council of Canadian Muslims.

The repercussions of these laws and activities are real and devastating:

- Maher Arar: rendered by the United States to Syria and tortured, based on false information shared by Canadian officials.
- Abdullah Almalki, Ahmad El Maati & Muayyed Nureddin: Arrested abroad, all three ended up in Syrian prisons where they were also tortured, again based on false information shared by Canadian officials.
- Omar Khadr: A child soldier captured by US forces in Afghanistan, detained and tortured in Guantanamo Bay. While there, he was questioned by CSIS agents.
- Aboufian Abdelrazik: Harassed by CSIS in Canada, he was arrested at their request by Sudanese agents while visiting his sick mother. While detained, he was mistreated and tortured, and following his release was blocked from returning to Canada until a federal court judge ordered the government to act.
- Hassan Diab: Canadian professor accused on weak evidence of bombing a synagogue in France in 1980. It has been revealed that Canadian officials did not reveal exculpatory

⁸ Anver Emon and Nadian Hasan, "Under Layered Suspicion" (2021), *NCCM and Institute of Islamic Studies*, online at: <https://www.layeredsuspicion.ca/>; and Tim McSorley, "The CRA's Prejudiced Audits" (2021), *ICLMG*, online at: <https://www.iclmg.ca/prejudiced-audits>.

⁹ National Security and Intelligence Review Agency, "Review Of Departmental Implementation Of The Avoiding Complicity In Mistreatment By Foreign Entities Act For 2019" (16 Dec. 2020) *Government of Canada*. Online at: https://www.nsira-ossnr.gc.ca/wp-content/uploads/2021/05/NSIRA_Review_2020-03-1.pdf

¹⁰ Shanifa Nasser, "When CSIS comes knocking: Amid reports of Muslim students contacted by spy agency, hotline aims to help" (7 August 2019), *CBC News*. Online at: <https://www.cbc.ca/news/canada/toronto/csis-students-university-muslim-campus-1.5229670>

evidence at extradition, leading to three years in prison in France without charge or trial. He was eventually released due to both a lack of incriminating evidence, as well as the existence of exculpatory evidence that places him in Lebanon at the time of the bombing. France has continued to pursue the case, and the federal government has failed to commit to no new extradition of Dr. Diab to France, despite the grave problems with how French authorities have conducted this case.

- No Fly List Kids: Children as young as a few years old have been flagged as being on the “No Fly List” despite their age. While this affected people of all ages, and from various communities, its primary impact has been on Muslim individuals, unable to fly in safety out of fear of delays, detention, or even arrest both in Canada and internationally. While efforts have been made to resolve the issue of “false positives”, concerns about the list itself, who is listed, and the disproportionate impact on Muslims remain.
- Secret trial five: Adil Charkaoui, Hassan Almrei, Mahmoud Jaballah, Mohamed Harkat and Mohammad Mahjoub all spent years in prison, and experienced extreme release conditions, without being charged with a crime while under security certificates. Mr. Harkat and Mr. Mahjoub continue to fight against their security certificates and their deportation to Algeria and Egypt, respectively, where they both face threats of persecution, mistreatment and even torture.
- Canadians detained in NE Syria: Approximately 40 Canadians remain detained indefinitely in dangerous conditions in camps and prisons in North Eastern Syria, accused of participating in or supporting Daesh. However, none have faced charges or trial, and the number include more than 20 children. Canada has refused to proactively work to repatriate them to Canada, despite it being demonstrated on multiple occasions that repatriations can be carried out safely.

It is no mistake that this list is nearly completely comprised of Muslims, or people assumed to be Muslim, as well as primarily men. This is the legacy of Canada’s anti-terrorism policies and activities: the systemic profiling and criminalization of people of the Muslim faith.

If the federal government truly wishes to address Islamophobia, it is urgent that it reconsiders and moves away from the disastrous policies of the “War on Terror.”

Efforts to expand the definition of terrorism or the use of its tools to other groups, or to “refocus” Canada’s anti-terrorism approach, will unfortunately not lead to the necessary changes. It is imperative to forego the entire framework of anti-terrorism and to rescind rights-violating laws because of problems inherent to the vague and politically malleable nature of “terrorism.”

The definition itself of “terrorism” is subject to controversy. It is almost impossible to reach consensus on it precisely because to say that some crimes are terrorist acts and some not is to make a judgment about the motive behind a crime. And that judgment will necessarily depend on the social, racial, religious, political or historical perspective of the people making the judgment. Using motive in this manner, as an essential element in defining and identifying a crime, is foreign to criminal law, humanitarian law, and the law regarding crimes against humanity.

It is, therefore, never possible to create a definition of “terrorism” that is not either over-inclusive or under-inclusive. It can be over-inclusive in that it captures ordinary crimes, civil disobedience,

or the justified use of force and self-defence against oppressive governments and occupations. It can be under-inclusive in that it excludes serious crimes and attacks against civilians that ought logically to be included, but are not, on purely political grounds. It will therefore always be vulnerable to problems such as racial, religious and political profiling, including perpetuating systemic Islamophobia.

Instead, what is needed is greater transparency and accountability, as well as concrete legislative reform, anti-racist education and cultural changes.

First, in regards to transparency and accountability:

1. Collection of disaggregated race-based data

In 2011, the Canadian Human Rights Commission called for the collection and analysis of disaggregated racial data in Canada's national security activities to be able to establish their impact on various communities. This demand has never been met, despite other sectors recognizing the importance and need to collect and analyze this type of data in order to better understand impacts on racialized and other communities. While there is ample evidence from other studies and reviews about the disproportionate impact of national security laws on Muslims in Canada and their contribution to Islamophobia, this collection and analysis would still provide valuable information.

2. Resources and reforms for review and oversight agencies

The federal government has brought in new review and oversight bodies since 2018, including the National Security and Intelligence Committee of Parliamentarians, the National Security and Intelligence Review Agency and the Intelligence Commissioner, and has recognized the importance of the Privacy Commissioner in national security review as well. However, strengthening in four ways could help root out structural Islamophobia:

- a. The government must create a dedicated review body for the Canada Border Services Agency; allow for national security related issues to be referred to NSIRA; and create an independent mechanism allowing the public to file complaints regarding CBSA's conduct.
- b. The federal government must expand the mandate of NSIRA to accept complaints regarding, at a minimum, departments that interact with the public regarding national security, including Global Affairs, CBSA and the CRA.
- c. Commensurate with these additional review powers and bodies, the government must increase the resources provided to these bodies, and evaluate the adequacy of these resources on a regular and ongoing basis.

3. Binding recommendations and clear accountability

Allow review bodies to make binding recommendations and mandate agencies to proactively present clear, public reports on responses to review body recommendations.

Currently, it is too easy for agencies to accept, but then ignore or implement in incomplete ways the recommendations of review bodies, with little accountability, follow-up, or consequences.

There are also at least three concrete policy and legislative changes the federal government could make:

1. First, it must put an end to rights-violating anti-terrorism laws that can be and have been used in ways which target and profile the Muslim community. This includes the Terrorist Entities List, the Passenger Protect Program/Safe Air Travel Act (the No-Fly List), and security certificates. Instead, other criminal code provisions that are not based on the use of secret evidence or selective definitions of terrorism can be used to prosecute individuals who present a threat to the safety of people in Canada. We would also argue that investment in social resources, anti-poverty, and education programs, including anti-racism programs within and outside the government, would present positive approaches to ensuring a safer and more secure society for all.
2. The federal government must put an end to the prejudiced and targeted audits of Muslim charities under the guise of combatting terrorist financing in the charitable sector. The government's activities in this area, particularly carried out by the Review and Analysis Division and guided by the unsubstantiated 2015 National Risk Assessment, have resulted in the profiling of the Muslim community and have perpetuated systemic Islamophobia. Current audits must be suspended, current practices must be independently investigated, policy and laws must be reformed, and new directives must be put in place.
3. As with current conversations around the role of law enforcement in society, the same questions must be posed to Canada's national security and intelligence agencies. The government must re-examine and re-allocate resources away from a national security response to responses that promote mental and physical health and well-being and combat exclusion, prejudices, discrimination, and poverty.

Another area where the government could take significant action to break from systemic Islamophobia is on individual cases. While action on cases would not undo the whole system, it can demonstrate and make clear a change in approach and a concrete willingness to move forward. These would include:

1. Lifting the last two security certificates and deportation proceedings faced by Mohamed Harkat and Mohammad Mahjoub.
2. Resolve the case of Abousfian Abdelrazik and apologize for the Canadian government's role in his mistreatment.
3. Take action to safely repatriate all Canadians currently detained in North Eastern Syria.
4. Call on the French government to end all proceedings against Dr. Hassan Diab and commit to no new extradition.

Doing all of this can have a significant impact on reducing state-sponsored Islamophobia.

Finally, we must address the issue of how to counter individual acts of Islamophobia. Taking action on systemic issues of Islamophobia is one important approach, and it will undoubtedly have an impact on the acts of individuals as the actions of our governments are an important source of influence on the population. Canada must lead by example. We must also consider Canada's approach to individual acts of hate, and particularly instances of violence by white supremacists and other hate-based groups.

It is clearly urgent that the government act, especially given that the two most violent attacks in recent Canadian history have been on Canadian Muslims.

However, we are concerned that the approach be based on Canada's current counter-terrorism framework and anti-terrorism laws. For all the reasons listed above, Canada's approach to anti-terrorism has served to entrench and worsen systemic and overt Islamophobia in our country. While expanding those same practices to combat acts of violence committed by white supremacists can be seen as justified and even effective in the short-term, in the long-run it serves to further entrench these laws. While they may be used in a way seen as positive at the moment, it serves to justify their past and future use, including in ways that racially profile, criminalize and persecute Muslims.¹¹

What legal reforms are needed to combat white supremacist violence requires and deserves a longer discussion. However, we would propose for now that the federal government focus on using areas of the *Criminal Code* that can be used to combat violent and illegal acts towards Muslims but that are not predicated on rights-violating approaches such as the use of secret evidence, expanded state surveillance, subjective and secretive border controls, or anti-terrorism laws based on this framework, such as the Terrorist Entities List, the Passenger Protect Program (No Fly List) and security certificates.

While we will be exploring this issue further in a forthcoming discussion paper, some of these areas include:

- S. 2: the broad definition of offence-related property¹² (including property located outside Canada) as well as, with respect to such property, the provisions on search warrant (487 (1) c.1)), the forfeiture of offence-related property (even if located abroad (490.1)),

¹¹ For more on the concerns regarding using anti-terrorism laws to address the threat from white supremacist and hate-based violence, see Kent Roach, "Counterterrorism and the Challenge of Terrorism From the Far Right," *Common Law Review* 1-8, 2020. Online: <https://doi.org/10.1177/1473779520975121>.

¹² *property* includes

- (a) real and personal property of every description and deeds and instruments relating to or evidencing the title or right to property, or giving a right to recover or receive money or goods,
- (b) property originally in the possession or under the control of any person, and any property into or for which it has been converted or exchanged and anything acquired at any time by the conversion or exchange,

offence-related property means any property, within or outside Canada,

- (a) by means or in respect of which an indictable offence under this Act or the Corruption of Foreign Public Officials Act is committed,
- (b) that is used in any manner in connection with the commission of such an offence, or
- (c) that is intended to be used for committing such an offence;

voidable transfers (490.3), and also restrain orders of the offence-related property (490.8);

- S. 17: removal of “compulsion” as a defence for certain offences, including piracy, causing bodily harm, kidnapping, hostage-taking, etc.;
- S. 21: participation in an offence by persons who aid or abet, conspiracy;
- S. 22: participation by persons who counsel the commission of an offence;
- S. 23: accessory after the fact;
- S. 264.1: uttering threats;
- S.s 269 and 222: unlawfully causing bodily harm or death;
- S. 279 and 279.1: kidnapping and hostage taking;
- S. 319: hate propaganda;
- S. 372: conveying false messages to alarm;
- S. 430(2): mischief that causes actual danger to people’s lives, subject to life imprisonment;
- S. 465: conspiracy;
- S. 495: the power of peace officers to arrest without warrant, where there are reasonable grounds to believe that the accused has committed or is about to commit an offence;
- S. 718.2 (a) i): a provision that aggravates a sentence when a hate motive is proven. Therefore, the court must then consider the hateful motives and can thus increase the sentence.¹³
- S.s 264 (1) to 269: criminal harassment, uttering threats, assault, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm;
- S. 319: hate propaganda. One could consider specific provisions in the Criminal Code allowing a judge to freeze the assets of any group engaged in incitement to hatred.

¹³ S. 718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
 - (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor,

Also, while the present definition of a criminal organization (gang) cannot currently be useful against far-right extremist groups, provisions of the *Criminal Code* before 2001 that are still in force, and particularly those relating to various forms of complicity (Ss 21 to 24 and S. 465), are sufficient to prosecute members of such groups who participate in the commission of crimes.¹⁴

It should also be noted that the financing of a crime constitutes aid punishable by the same sanction as the principal perpetrator of the offence.

More measures to address hate, prejudices, racism and Islamophobia on a larger scale – through anti-racist education programs for all levels of government, media and the general public, support for cultural and artistic initiatives that showcase Muslims’ diverse experiences and points of view – and more support in general for all struggling people to help foster a better and more harmonious society for all, are paramount. The details of these programs are outside our mandate but we support their creation wholeheartedly.

Thank you for considering our proposals. Should you have further questions, we would be happy to discuss and expand on them.

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¹⁴ Canadian Association of University Teachers (CAUT), “Submission to the House of Common, Subcommittee on public safety and national security, regarding the *Anti Terrorism Act*,” February 28, 2005, at 28, citing Kent Roach, “The New Terrorism Offences and the Criminal Law”, in Ronald J. Daniels, Patrick Macklem and Kent Roach, eds., *The Security of Freedom* (Toronto: University of Toronto Press, 2001).