

A Shared Struggle for Truth and Accountability

Canada, Europe and investigations into the detention and abuse of citizens abroad

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Lindsay Aagaard

Abstract

The post-9/11 environment, in which inter-state and inter-agency cooperation has at times been preferred to the detriment of the security and rights of individuals, is a context that Canada and many European nations share. This broad survey is intended to provide those interested in government investigations into the torture and detention of their citizens abroad with food for thought.

The Canadian experience reveals that there are costs associated with the involvement of state officials in the dubious treatment of citizens: costs for institutions, individuals and political parties. Furthermore, there is no doubt that investigations are an essential part of the accountability process and that setting up a process that is independent, public and effective is a significant challenge. The O'Connor and Iacobucci inquiries are important not just because of the themes we can extract from their findings – themes relating to the sharing of information, the training of officials, the provision of consular services and other issues found in the experiences of many different countries. They are also important because of the way they sought to balance the elements required for a legitimate and successful inquiry with the demands of national security confidentiality.



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This project assesses the relations between the European Union (EU) and Canada in the area of Justice and Home Affairs (JHA). It aims at facilitating a better understanding of the concepts, nature, implications and future prospects related to the Europeanization of JHA in the EU, as well as its role and dilemmas in the context of EU–Canada relations.

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CANADA, EUROPE AND INVESTIGATIONS INTO THE DETENTION AND ABUSE OF CITIZENS ABROAD

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LINDSAY AAGAARD*

1. Introduction

Overview

The Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar ('O'Connor inquiry') and the Internal Inquiry into the actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin ('Iacobucci inquiry') were established by the Canadian government to examine Canadian involvement in the detention and torture of four citizens abroad. These inquiries have been both lauded and criticised, and remain virtually unique among nations that – like Canada – are trying to come to terms with government complicity towards the mistreatment of its citizens.

At a time when different kinds of investigations are being conducted in several European countries, it can be instructive to review the Canadian experience with these two particular inquiries. As Kent Roach wrote in the context of the O'Connor inquiry, "the work of the Arar Commission is significant not only for Canada, but for all democracies that are dealing with vigorous whole government strategies to combat international terror".¹

Detail

First, this report explains the context in which these inquiries occurred. Both Canada and European nations are struggling with the pressure and desire to cooperate in an effective fight against terrorism, and have shown that in the process the rights of their citizens and the fundamental values central to these countries have not always been protected. Mr Arar, Mr Almalki, Mr Elmaati and Mr Nureddin are all victims of the actions of Canadian officials in the years following the 11 September 2001 attacks when an emphasis on cooperation and information sharing eclipsed the importance of the duty to protect the rights of Canadian citizens.

Second, it highlights some of the notable costs that have arisen throughout the inquiry process, which continue to grow. The facts revealed by the inquiries have come with heavy monetary, reputational and political costs.

Third, the report reviews the findings of the two inquiries. We can use the truth – the stories of the four Canadians – revealed by the inquiries to highlight themes that may arise in any country involved in the fight against terrorism. The inquiries fulfilled their respective mandates by examining the actions of Canadian officials and making, in the case of the O'Connor inquiry, significant and detailed policy recommendations. These findings laid forth a reliable and detailed account of what Mr Arar, Mr Almalki, Mr Elmaati and Mr Nureddin endured, and confirmed

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¹ Kent Roach, "Review and Oversight of National Security Activities and some Reflections on Canada's Arar Inquiry", (2007) 29:1, *Cardozo L Rev.* 53 at 58.

that they were all subjected to torture abroad. The findings of these inquiries are important to note, as they reveal in detail the serious consequences that can arise when international cooperation occurs to the detriment of the safety of individual citizens.

Fourth, there are several advantages and disadvantages of the commission of inquiry model, all of which should be considered when evaluating how best to hold governments to account for their actions in relation to the detention and mistreatment of their citizens. Of particular interest are the challenges faced by the two inquiries concerning claims of confidentiality for national security.

2. The story

The two inquiries at the centre of this paper were established by the Canadian government and charged with examining the events relating to the detention and mistreatment of four Canadian men. The first of these, the O'Connor inquiry, dealt with the experience of Mr Arar. The Iacobucci inquiry started immediately after the release of the first of Commissioner Dennis O'Connor's two reports, and focused on events surrounding the ordeals of Mr Almalki, Mr Elmaati and Mr Nureddin.

2.1 Personal stories

Mr Arar immigrated to Canada from Syria and became a Canadian citizen in 1991. He lived in Ottawa with his family, and worked as a wireless technology consultant. Mr Arar was detained in New York City in 2002 on his way back to Canada after a vacation, and was sent to Syria by American officials.

Mr Elmaati immigrated to Canada from Kuwait as a teenager and became a Canadian citizen in 1986. His father was born in Egypt, and as a result Mr Elmaati holds both Canadian and Egyptian citizenship. He worked as a truck driver, and married in Syria in April 2001. He was returning to Syria in November 2001 in order to legalise this marriage (it had been celebrated with only a traditional ceremony earlier in the year) when he was detained.

Mr Almalki immigrated to Canada from Syria when he was 16 years old and became a Canadian citizen in 1991. He and his wife lived in Ottawa with their children, and ran an electronics export business. Mr Almalki was travelling for business when he was detained in Syria in 2002.

Finally, Mr Nureddin was born in Iraq and he later immigrated to Canada and became a Canadian citizen. He worked as a geologist and lived in Ontario; he was detained while crossing into Syria from Iraq in late 2003.

2.2 Investigations

Before being detained overseas in Syria, all four men were 'known' to the Royal Canadian Mounted Police (RCMP) and the Canadian Security Intelligence Service (CSIS). Yet, it must be noted that the commissioners of both inquiries took great pains to emphasise that none of these men had ever been charged by Canadian authorities and many view the inquiries as having effectively cleared the names of these men.²

² See Kerry Pither, "The Shameful Truth", *Ottawa Citizen*, 23 October 2008 (retrieved from <http://www.canada.com/ottawacitizen/news/opinion/story.html?id=5d22c6c4-a088-4f71-bf48-6c4975eef481&p=2>); see also "Canada failed three citizens", editorial, *Toronto Star*, 22 October 2008 (retrieved from <http://www.thestar.com/comment/article/521536>); and Council on American-Islamic Relations Canada (CAIR-CAN), "Intervenors Call for Follow-Up Action on Iacobucci's Report", Press

Commissioner Frank Iacobucci explained that, prior to 9/11, CSIS had learned about the possibility that Mr Almalki, Mr Elmaati and Mr Nureddin “might have some knowledge of the threat to Canada and Canadian interests abroad”.³ After 9/11, these three men, as well as Mr Arar, became part of two RCMP investigations, ‘Project O’ and ‘Project A-O’.⁴ In the context of both Project O and Project A-O, the RCMP shared information – including information that was later determined to be unfounded, unfair, misleading and inaccurate⁵ – about these four men with other Canadian agencies and with American officials.

2.3 Detention chronology

Mr Elmaati arrived in Damascus on 12 November 2001 and was taken into custody. He was detained in the Palestinian branch of Syrian military intelligence until January 2002, when he was transferred to a prison in Egypt. Mr Almalki travelled to Syria and was detained in the Palestinian branch on 3 May 2002. Later that year, Mr Arar was detained in New York on 23 September 2002 and sent to Syria on 9 October 2002. Almost a year later, on 3 October 2003, Mr Arar was released from Syrian custody and travelled back to Canada. In December 2003, Mr Nureddin was detained in Syria. Shortly afterwards, on 11 January 2004, Mr Elmaati was released by Egyptian officials after more than two years in detention. Two days later, Mr Nureddin was released by Syrian officials after just over two months in jail. Finally, Mr Almalki was released in Syria on 10 March 2004 after almost two years in custody.

Release, CAIR–CAN, Ottawa, 24 October 2008 (retrieved from http://www.caircan.ca/print_itn_more.php?id=3006_0_2_0_C); and Irwin Cotler, “The Arar inquiry, what should happen now?”, *National Post*, 3 October 2006 (retrieved from <http://www.irwincotler.parl.gc.ca/detail.asp?lang=e&type=med&sid=1912>).

³ Internal Inquiry into the actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, “Internal Inquiry into the actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin”, Ottawa, 21 October 2008, p. 109, para. 2, p. 195, para. 2 and p. 253 para. 2 (retrieved from www.iacobucciinquiry.ca) (henceforth ‘Iacobucci’, 2008).

⁴ After being detained and questioned at the US–Canada border as a result of a TECS lookout (TECS refers to the Treasury Enforcement Communications System that is used by US Customs as well as other agencies), Mr Elmaati became known to the RCMP and CSIS and was later a focus of the Project O investigation that had started in late September 2001 (*ibid.*, p. 112, para. 13). Mr Almalki was a focus of the RCMP’s Project A-O investigation (Project A-O focused on Mr Almalki’s “alleged involvement with al-Qaeda”, *ibid.*, p. 19, para. 10) and Mr Arar became part of this investigation after he met with Mr Almalki at a restaurant (Commission of Inquiry into the Actions of Canadian Officials Relating to Maher Arar, *Report of the Events Relating to Maher Arar: Factual Background*, Vol. 1, Ottawa: Government of Canada Publications, 18 September 2006(a) (retrieved from http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/26.htm) (henceforth ‘O’Connor Factual Report’, 2006a). Mr Nureddin was suspected by the CSIS of acting as a financial courier for individuals believed to be supporting Islamic extremism and was of interest to the RCMP through the Project O investigation (see Iacobucci, 2008, p. 253, para. 3).

⁵ See for example the Commission of Inquiry into the Actions of Canadian Officials Relating to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations*, Ottawa: Government of Canada Publications, 18 September 2006(b), pp. 101, 104 and 113 (retrieved from http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/26.htm) (henceforth ‘O’Connor Analysis and Recommendations’, 2006b); see also Iacobucci (2008), pp. 349, 369, 375 and 400.

2.4 Treatment

Both commissioners determined that the men at the centre of their inquiries had been subject to torture, as defined by the accepted international definition of this abhorrent practice in the UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Commissioner O'Connor accepted the findings of Stephen Toope, who had been asked to report on Mr Arar's treatment while detained abroad, and who had found that Mr Arar had indeed been tortured.⁶ Mr Arar had been beaten over a period of two weeks, threatened with other forms of torture and kept in a small, dark and dirty cell, which "became a torture in its own right".⁷

Commissioner Iacobucci concluded that Mr Almalki, Mr Elmaati and Mr Nureddin had all endured treatment that amounted to torture, which aligned with Mr Toope's finding in the context of the O'Connor inquiry that the stories of these three men were credible.⁸ First, in Syrian detention, Mr Elmaati was insulted, punched, kicked and beaten with a black cable. He was held in a very small, dirty basement cell, with no heating in the middle of winter. Mr Elmaati was transferred to a prison in Egypt, where he was interrogated roughly, beaten and suffered what he considered the worst conditions of his entire ordeal at his second place of Egyptian detention, in Nasr City, where he was continuously handcuffed in a dark, dirty cell infested with rats and cockroaches. Second, Mr Almalki was insulted, physically abused, threatened and beaten with a black cable on the soles of his feet. He, like Mr Nureddin, was then made to stand up while cold water was poured on his feet and he was forced to run on the spot before the procedure was then repeated. He was held in a small, dirty, dark cell infested with insects and rats. He had two mouldy blankets, and the cell was freezing in winter and stifling hot in the summer months. Finally, Mr Nureddin was stripped, repeatedly beaten on his feet with black cable and endured other forms of physical and psychological abuse.

2.5 Inquiries

The O'Connor inquiry was established by Prime Minister Paul Martin by an Order-in-Council on 5 February 2004.⁹ It was set up as a public commission of inquiry and the Honourable Dennis O'Connor, Associate Chief Justice of Ontario, was named commissioner. A factual report was released in September 2006 and a second report containing specific policy recommendations was released in December 2006.

The Iacobucci inquiry was an internal inquiry into the actions of Canadian officials from three institutions (the RCMP, CSIS and Department of Foreign Affairs and International Trade or DFAIT) in relation to Mr Almalki, Mr Elmaati and Mr Nureddin.¹⁰ An Order-in-Council on 11

⁶ See the Commission of Inquiry into the Actions of Canadian Officials Relating to Maher Arar, *Report of Professor Stephen J. Toope, Fact Finder*, Ottawa, Government of Canada Publications, 14 October 2005, pp. 17 and 23 (retrieved from http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/26.htm) (henceforth 'Toope report', 2005); see also the O'Connor Analysis and Recommendations (2006b), p. 9.

⁷ O'Connor Analysis and Recommendations (2006b), p. 56.

⁸ Toope report (2005), p. 13.

⁹ Privy Council Office, Order appointing the Honourable Dennis R. O'Connor to investigate and report on the actions of Canadian officials in relation to Maher Arar, PC Number 2004-0048, Ottawa, 5 February 2004 (retrieved from <http://www.pco-bcp.gc.ca/OIC-DDC.asp?lang=eng&Page=secretariats&txtOICID=2004-0048&txtFromDate=&txtToDate=&txtPrecis=&txtDepartment=&txtAct=&txtChapterNo=&txtChapterYear=&txtBillNo=&rdoComingIntoForce=&DoSearch=Search+%2F+List&OICKey=61483>) (henceforth 'O'Connor Order-in-Council', 2004).

¹⁰ Iacobucci (2008), p. 34, para. 6.

December 2006 established the inquiry's terms of reference, and recently retired Supreme Court of Canada judge the Honourable Frank Iacobucci was named commissioner.¹¹ Unlike the O'Connor inquiry, however, the Iacobucci inquiry was an internal rather than public investigation. This was a decision made by the Conservative government under Mr Harper, and appears based on the recommendation made by Commissioner O'Connor that the cases of these three men be reviewed through an "independent and credible" but private process. Commissioner O'Connor had cautioned against setting up another full-scale public inquiry, given the "tortuous, time-consuming and expensive" ordeal that public inquiries can become when there are issues of national security to be considered and protected.¹² The Iacobucci report was released on 21 October 2008.

3. Context

3.1 Background on the Canadian agencies involved

There are many players in the Canadian national security and intelligence network, but three agencies were most central to the O'Connor and Iacobucci reports.¹³ First, the RCMP is Canada's national police service, and it has grown from an institution with 150 officers in 1873 to its present size of over 28,000 employees. The RCMP maintains responsibility for policing at the national, provincial and municipal levels. The RCMP is responsible for national security law enforcement. During the period throughout which Mr Arar, Mr Almalki, Mr Elmaati and Mr Nureddin were detained abroad, the RCMP's Criminal Intelligence Directorate was in charge of matters falling under the RCMP's national security mandate.¹⁴ The RCMP has been the focus of most of the recommendations in the O'Connor inquiry.

Second, CSIS is the Canadian civilian intelligence agency. CSIS investigates threats, analyses information, produces intelligence and "reports to and advises the government of Canada". CSIS characterises itself as a "proactive" organisation, in contrast with the "reactive" role played by law enforcement entities such as the RCMP.¹⁵ Third, the DFAIT is the federal government department charged with Canada's 'external affairs'. Among other responsibilities, DFAIT provides consular services to Canadians detained abroad.¹⁶

¹¹ Privy Council Office, Order appointing and directing The Hon. Frank Iacobucci to conduct an inquiry to be known as the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, PC Number 2006-1526, Ottawa, 11 December 2006 (retrieved from <http://www.pco-bcp.gc.ca/OIC-DDC.asp?lang=eng&Page=secretariats&txtOICID=2006-1526&txtFromDate=&txtToDate=&txtPrecis=&txtDepartment=&txtAct=&txtChapterNo=&txtChapterYe ar=&txtBillNo=&rdoComingIntoForce=&DoSearch=Search+%2F+List&OICKey=67759>) (henceforth 'Iacobucci Order-in-Council', 2006).

¹² O'Connor Analysis and Recommendations (2006b), pp. 277–78.

¹³ For instance, the Communications Security Establishment is responsible for the monitoring and collection of foreign signals intelligence.

¹⁴ See for example, Royal Canadian Mounted Police, "About the RCMP", RCMP, Ottawa, 15 July 2008 (retrieved from http://www.rcmp-grc.gc.ca/about/index_e.htm); see also Iacobucci (2008), p. 34, para. 8 and p. 73, para. 36.

¹⁵ Canadian Security Intelligence Service, "About CSIS", CSIS, Ottawa, 25 April 2008 (retrieved from <http://www.csis-scrs.gc.ca/bts/index-eng.asp>); see also Iacobucci (2008), p. 34, para. 7.

¹⁶ See Iacobucci (2008), p. 34, para. 9; see also Foreign Affairs and International Trade Canada (FAITC), "About the Department", FAITC, Ottawa, 6 November 2008 (retrieved from http://www.international.gc.ca/about-a_propos/index.aspx?menu_id=17&menu=L).

3.2 The post-9/11 environment

The terrorist attacks on the World Trade Centre and the Pentagon on 11 September 2001 marked the largest terrorist event on American soil. In the days that followed, in addition to mourning the 24 Canadians who died in the attacks, Canada joined many other nations in launching a new era of national, continental and global security policy.

After the events of 9/11, Canada saw “a greater emphasis on matters of national security and public safety within government”.¹⁷ An Ad Hoc Committee of Ministers on Public Security and Anti-Terrorism was established by Prime Minister Jean Chretien to review all policies and legislation and facilitate adjustment to the “new realities” of a post-9/11 security landscape.¹⁸ Canada’s legislative response to terrorism was overhauled.¹⁹ There were also “unprecedented” demands placed on Canadian officials and the workloads of those in the national security and intelligence fields.²⁰ Consequently, the responsibilities of Canadian agencies underwent some change. Certain CSIS resources were soon exhausted by investigative demands, which necessitated increased assistance from law enforcement agencies. In an extensive transfer of investigatory responsibility, the primary responsibility for several national security investigations was moved from CSIS to the RCMP – including responsibility for the investigations in which Mr Arar and Mr Almaliki were implicated.²¹

Furthermore, although “a ‘go it alone’ approach to counterterrorism was never an option for Canada”,²² information sharing and cooperation with domestic and international agencies took on new importance and precedence after 9/11.²³ There was American-led pressure on CSIS and the RCMP for “maximum” cooperation, collaboration and information sharing.²⁴ Commissioner O’Connor quoted Jack Hooper, former assistant director of operations for CSIS, who testified that “[c]ompromising al-Qaeda operations requires an unprecedented level...of cooperation between police, law enforcement, immigration officials and the like, not just domestically, but internationally as well”.²⁵

One of the key elements of the government’s Anti-Terrorism Plan immediately after the attacks was to work with the international community, and among the initiatives advanced by a \$280 million infusion were technology and equipment upgrades to facilitate coordinated domestic and international law enforcement responses.²⁶ For the RCMP in particular, 9/11 led to a “shaper

¹⁷ Commission of Inquiry into the Actions of Canadian Officials Relating to Maher Arar, *A New Review Mechanism for the RCMP’s National Security Activities*, Ottawa, Government of Canada Publications, 12 December 2006, p. 23 (retrieved from http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/26.htm) (henceforth ‘O’Connor Policy Report’, 2006c).

¹⁸ Iacobucci (2008), p. 94, para. 117.

¹⁹ See the comprehensive legislative overview in the O’Connor Policy Report (2006c), p. 55.

²⁰ Iacobucci (2008), p. 34, para. 10.

²¹ *Ibid.*, p. 94 paras. 118 and 122, p. 95, para. 124.

²² David A. Charters, “(Un)peaceable Kingdom?”, *IRPP Policy Matters*, Vol. 9, No. 4, 2008, p. 37.

²³ See for example the O’Connor Policy Report (2006c), p. 73.

²⁴ Iacobucci (2008), p. 93, paras. 115–117.

²⁵ O’Connor Analysis and Recommendations (2006b), p. 102.

²⁶ Iacobucci (2008), p. 94 para. 117; the document referenced by Iacobucci is Foreign Affairs and International Trade Canada (FAITC), “Backgrounder, Canada’s Actions against Terrorism since September 11, 2001”, FAITC, Ottawa, 7 February 2003 (retrieved from <http://www.dfait-maeci.gc.ca/anti-terrorism/Canadaactions-en.asp>). In addition, the Smart Border Declaration and accompanying Action Plan were agreed by the US and Canada in December 2001, and involved details on the extensive sharing

focus” on cooperation, integration and information sharing among domestic agencies and with foreign agencies.²⁷

While Canada was struggling with how to protect itself and contribute to the protection of its allies, so were many European countries. The renewed emphasis on cooperation is far from exclusive to Canada and it remains a dominant feature of the entire international effort to counter terrorism. For instance, UN Security Council Resolution 1373, adopted after 9/11, specifically calls for international cooperation.²⁸ The invocation of Art. 5 of the North Atlantic Treaty by NATO was a display of solidarity and cooperation, as was the agreement among NATO members to take measures “individually and collectively, to expand the options available in the campaign against terrorism”.²⁹ The EU Counter-Terrorism Strategy adopted in December 2005 states that one of the ways in which the EU can add value to the counter-terrorism efforts is by “working with others beyond the EU, particularly the UN, other international organisations and key third countries, to deepen the international consensus, build capacity and strengthen cooperation to counter terrorism”.³⁰ As Susie Alegre writes, the fight against terrorism has been a “main driver” behind the external cooperation seen in the EU on justice and home affairs issues.³¹

3.3 Cooperation at the expense of human rights

The years since 9/11 have been marked by inter-state and inter-agency cooperation, but also by concerns that this cooperation has been carried out at the expense of the security and rights of individuals. Canada and several European nations share certain unacceptable defects in their fight against terrorism, where the treatment of their citizens – and others – appears to run counter to domestic responsibilities and international human rights obligations.³² It is in this post-9/11 landscape that the men at the centre of the two Canadian inquiries became wrapped up in national security investigations and in this environment that they were detained and tortured in foreign countries.

of information that would occur between the two countries. This includes the sharing of advance passenger information and passenger name records (O’Connor Policy Report, 2006c, p. 76).

²⁷ O’Connor Policy Report (2006c), p. 73.

²⁸ UN Security Council, “Security Council Unanimously Adopts Wide-Ranging Anti-Terrorism Resolutions: Calls for Suppressing Financing, Improving International Cooperation”, Press Release, SC/7158, UN Security Council, New York (retrieved from <http://www.un.org/News/Press/docs/2001/sc7158.doc.htm>).

²⁹ For further discussion on Art. V and these measures, see Council of Europe Parliamentary Assembly (PACE), *Secret detentions and illegal transfers of detainees involving Council of Europe member states: Second report*, Explanatory Memorandum, PACE Doc. 11302 Rev., Committee on Legal Affairs and Human Rights, Rapporteur: Dick Marty, Strasbourg, 11 June 2007, pp. 18–20 (henceforth ‘Marty’, 2007).

³⁰ Council of the European Union, European Union Counter Terrorism Strategy, 14469/4/05, REV 4, Brussels, 30 November 2005, p. 4 (retrieved from <http://register.consilium.europa.eu/pdf/en/05/st14/st14469-re04.en05.pdf>).

³¹ Susie Alegre, *The EU’s External Cooperation in Criminal Justice and Counter-terrorism: An assessment of the human rights implications with a particular focus on cooperation with Canada*, CEPS Special Report, CEPS, Brussels, September 2008 (retrieved from http://www.ceps.be/Article.php?article_id=16).

³² Amnesty International, “Casesheets: Amnesty International is highlighting the following cases for membership action”, Amnesty International, London, June 2008(a).

Both Canada and European nations have been criticised heavily for too often letting what should be strict adherence to the rule of law and the principles of fundamental human rights fall aside in the fight against terrorism. As Judith Tóth writes, the excesses of this fight have “produced a serious and ‘dangerous erosion of human rights and fundamental freedoms’ – which Kofi Annan expressed as a major concern”.³³ There are grave apprehensions that cooperation among nations and agencies has occurred without regard for what Irwin Cotler has referred to as the “dual human rights dimension” of the human security principle.³⁴ That is, just as terrorism must be fought in order to protect our individual and collective rights,³⁵ so too must “the enactment, enforcement and application of anti-terrorism law...always comport with the rule of law”.³⁶ Likewise, Amnesty International Canada has called any debate about a choice between security or human rights a “false” debate, for “human rights will always be precarious if security is not assured, and security will inevitably be tenuous at best if not firmly grounded in human rights”.³⁷

Cooperation in investigations can take many forms, but that which has raised the most concerns in the inquiries has been the sharing of information. Commissioners O’Connor and Iacobucci both emphasised that international cooperation in the fight against terrorism is essential and is not in itself a practice to be condemned. Too often, however, this cooperation has occurred in a deeply flawed manner.³⁸ The inquiries pointed to numerous instances of cooperation between foreign and domestic agencies that contributed to the detention and torture of these four men.

This state of affairs appears to illustrate what Reg Whitaker has referred to as “the Canadian dilemma in antiterrorist cooperation”: the fight against terrorism requires close cooperation among allies, but “the unilateralist approach of the Bush administration – not to speak of

³³ See Judith Tóth, “EU Member States’ Complicity in Extraordinary Renditions”, in Elspeth Guild and Florian Geyer (eds), *Security versus Justice?*, Hampshire: Ashgate Publishing Ltd, 2008, pp. 71–90 and 75; see also William P. Pope, “Remarks to the House International Relations Committee, Subcommittee on Europe and on International Terrorism, Nonproliferation and Human Rights”, Washington, D.C., 14 September 2004 (retrieved from <http://www.state.gov/s/ct/rls/rm/2004/36239.htm>).

³⁴ “Simply put, in the course of promoting and protecting human security we cannot undermine our individual and collective human rights, which are constituent elements of that human security itself” (Irwin Cotler, “From Professor to Justice Minister: Charter Rights and Anti-Terrorism”, *Policy Options*, November 2007, p. 72, retrieved from <http://www.irpp.org/po/archive/nov07/cotler.pdf>).

³⁵ “The challenge for democracies in the battle against terrorism is not whether to respond, but rather how to do so” according to Iacobucci and Arbour in *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248 at para. 5; see also the opening statement of Commissioner Iacobucci’s report: “at its core, [the] Inquiry involves the appropriate response of our democracy in Canada to the pernicious phenomenon of terrorism, and ensuring that, in protecting the security of our country, we respect the human rights and freedoms that so many have fought to achieve” (Iacobucci, 2008).

³⁶ Cotler (2007).

³⁷ Amnesty International, *Restoring his Rights, Addressing the Wrongs: Amnesty International’s Closing Submissions to the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*, Amnesty International, London, 10 September 2005, pp. 4–5 (retrieved from http://www.amnesty.ca/human_rights_issues/maher_arar_overview.php). “In my view the protection of fundamental human rights is every bit as important as the preservation of national security cited by President Bush; indeed I hold these two objectives to be complementary, mutually reinforcing and in no way contradictory” (Marty, 2007, p. 10).

³⁸ Roach (2007), p. 56.

Congress under either Republican or Democratic majorities – and its stated philosophy of ‘fighting fire with fire’, entails the risk that cooperation might undermine Canadian sovereignty and the rights of Canadian citizens”.³⁹

Moreover, the Canadian dilemma is also a European dilemma. There are numerous examples among European countries where amidst the desire for cooperation in an effective fight against global terrorism, international human rights obligations have not been respected.⁴⁰ We know that Europe has been home to secret CIA prisons in Poland and Romania.⁴¹ European nations permitted their territory to form part of CIA “rendition circuits”,⁴² and have “taken advantage” of extraordinary renditions and unlawful detentions by sending security personnel to interrogate unlawfully detained individuals and by receiving information gleaned from these detainees.⁴³ As Dick Marty, rapporteur with the Council of Europe Parliamentary Assembly (PACE), wrote in 2006, the approach taken by the American government with respect to detention is “utterly alien to the European tradition and sensibility”.⁴⁴

Within the post-9/11 context, with the attendant emphasis on information sharing and cooperation, states must work to ensure that in this fight, the freedoms of their citizens are respected and obligations met. And it becomes necessary, when that dual human rights dimension has not been respected, for states to find a way to respond appropriately: the truth must be made public, there must be accountability for mistakes made and there must be reparation made to those who have suffered. The Canadian inquiries at the centre of this paper reflect one way in which a state may react to charges that it has been complicit in the mistreatment of its citizens and that it has failed to adequately protect them.

4. The cost of contribution

Before turning to the findings of the inquiries and the commission of inquiry model itself, this section of the paper seeks to explore some of the costs incurred as a result of Canada’s contribution to the ordeals suffered by Mr Arar, Mr Almalki, Mr Elmaati and Mr Nureddin. Three categories of costs are outlined below: monetary costs, reputational costs and political costs.

It should be said at the outset that these costs are secondary to the price that Mr Arar, Mr Almalki, Mr Elmaati and Mr Nureddin have already paid for the mistakes of Canadian officials. These four men endured multiple forms of torture, humiliation and terror in Syrian – and in the case of Mr Elmaati, Egyptian – custody. They still suffer the psychological and physical effects

³⁹ Reg Whitaker, “Arar: The Affair, the Inquiry, the Aftermath”, *IRPP Policy Matters*, Vol. 9, No. 1, 2008, p. 26.

⁴⁰ See section 6 of this paper on investigations.

⁴¹ Tóth (2008), p. 71; see also Council of Europe Parliamentary Assembly (PACE), *Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states*, Report, PACE Doc. 10957, Committee on Legal Affairs and Human Rights, Rapporteur: Dick Marty, Strasbourg, 12 June 2006, p. 4 (henceforth ‘Marty’, 2006).

⁴² Marty (2007), para. 41.

⁴³ Florian Geyer, *Fruit of the Poisonous Tree: Member States’ Indirect Use of Extraordinary Rendition and the EU Counter-Terrorism Strategy*, CEPS Working Document No. 263, CEPS, Brussels, April 2007, pp. 2–4 (retrieved from http://www.ceps.be/Article.php?article_id=16).

⁴⁴ Marty (2006), p. 8.

of this treatment and they are all still fighting what is surely a disheartening battle to hold all those responsible for their mistreatment to account.⁴⁵

Nevertheless, as Commissioner Iacobucci writes in the commissioner's statement that opens the Iacobucci report, mistakes made in the course of the fight against terrorism can have "serious consequences not only for individuals affected but also for our institutions and our collective faith in our institutions". This statement draws our attention to just one of the multiple costs of Canadian complicity and more generally to the far-reaching consequences of the government mistakes exposed by both inquiries.

4.1 Monetary cost

The most easily quantifiable cost of the actions of Canadian officials is the monetary cost. First, these actions have necessitated two costly public inquiries. In addition to the individual budget of each inquiry, there are also associated costs throughout the government for items such as government counsel. For the O'Connor inquiry, this pushed the final cost to over \$20 million. Although the final figures for the Iacobucci inquiry (in particular those from 31 March 2008 to the present) have not been determined, to date the inquiry has cost a minimum of \$6 million.⁴⁶ This is a very conservative figure, which does not include the cost incurred to the government for government lawyers and other departmental expenses.

Another significant monetary cost is the payment of compensation to the individuals wrongfully detained and mistreated. This could arise in the context of civil litigation or through 'voluntary' payments by the government to individuals. For instance, Mr Arar was paid \$10.5 million by the Harper government in January 2007, and we have yet to see if payment will be made to Mr Almalki, Mr Elmaati or Mr Nureddin.

4.2 Reputational cost

4.2.1 Individual reputation

Although inquiries are not used to make determinations of civil or criminal culpability, it is undoubted that they have the possibility to severely tarnish the reputations of the individuals involved.⁴⁷ Indeed, although neither inquiry had the mandate to investigate the actions of

⁴⁵ Toope report (2005), pp. 19–22.

⁴⁶ See "Arar Inquiry cost \$23M and growing, gov't says", *CTV.ca* 26 February 2005 (retrieved from http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20050226/arar_inquirycosts_20050225?s_name=&no_ads). The total expenditure of the Iacobucci inquiry for the fiscal year of 31 March 2007–31 March 2008 was \$5,108,642 (Receiver General for Canada, *2008 Public Accounts of Canada, Volume III, Additional Information and Analysis*, Ottawa: Government of Canada Publications, 2008(b), p. 267 (retrieved from <http://www.tpsgc-pwgsc.gc.ca/recgen/txt/72-eng.html>). The Iacobucci inquiry also spent \$455,000 on funding for interveners and participants during this period, and it is unclear if this amount was included in the "total expenditure" figure noted above (Receiver General for Canada, *2008 Public Accounts of Canada, Volume II, Details of Expenses and Revenues*, Ottawa: Government of Canada Publications, 2008(a), p. 431 (retrieved from <http://www.tpsgc-pwgsc.gc.ca/recgen/txt/72-eng.html>). The total expenditure of the Iacobucci Inquiry for the fiscal year of 31 March 2006–31 March 2007 was \$900,000 (Receiver General for Canada, *2007 Public Accounts of Canada, Volume III, Additional Information and Analysis*, Ottawa: Government of Canada Publications, 2007, p. 266 (retrieved from http://epe.lac-bac.gc.ca/100/201/301/public_accounts_can/2007/P51-1-2007-3E.pdf)).

⁴⁷ See for instance, *Benou v. Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, [1997] 2 F.C. 527, para. 23. Quoted with approval in

specific persons, the O'Connor and Iacobucci inquiries delivered reports with a level of detail sufficient to negatively affect the reputations of several individuals.⁴⁸ For example, Mr Arar's lawyer in New York prior to his detention, Amal Oummih, made a mistake concerning a phone message and as a result was not present at her client's deportation hearing.⁴⁹ Léo Martel, the Canadian consul in Syria, discussed in a memorandum after Mr Arar's release concerns that Mr Arar would "go public" with allegations of torture, while erroneously stating that Mr Arar had not told him he had been mistreated.⁵⁰ Staff Sergeant Callaghan with the RCMP admitted to thinking the suggestion that they ask the Syrians not to torture Mr Almalki when sending them questions was "off the wall absurd".⁵¹

Perhaps the individual who received the most scorn for his actions was Franco Pillarella, Canada's ambassador to Syria from 27 July 2000 to 31 July 2003. During his tenure in Damascus, Mr Arar, Mr Almalki and Mr Elmaati were detained and tortured in Syria. At the O'Connor inquiry, he defended both his reluctance to conclude that torture was a risk for Mr Arar as well as his assertion that he was not aware of human rights violations in Syria at the time. In the view of Paul Heinbecker, Canada's former ambassador to the UN, Mr Pillarella's assertions put the Department of Foreign Affairs and the entire Canadian Foreign Service in a bad light.⁵² Mr Pillarella became ambassador to Romania after leaving Syria, a post that he no longer retains. It does not appear that Mr Pillarella has received another diplomatic posting.

Former RCMP Commissioner Giuliano Zaccardelli is another individual whose personal reputation has been sullied by what was revealed in the inquiries. Mr Zaccardelli, who was the RCMP's top ranking official throughout the period during which Mr Arar, Mr Almalki, Mr Elmaati and Mr Nureddin were detained overseas, resigned from his position as commissioner in early December 2006. He resigned after giving conflicting testimony before the federal Public Safety Parliamentary Committee: he testified first that he *had* been informed of the fact that the RCMP had provided incorrect information about Mr Arar to the Americans as early as 2002 and that attempts had been made to correct that information. Later, however, he testified that he had not learned of this RCMP mistake until the release of Commissioner O'Connor's first report in September 2006.⁵³

After Mr Zaccardelli's resignation, Lorne Waldman (Mr Arar's lawyer at the time) remarked, "accountability starts at the top", and as one member of Parliament succinctly put it, "it's a

Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System), [1997] 3 S.C.R. 440, para. 34.

⁴⁸ Iacobucci (2008), p. 42, para. 7, p. 336 para. 13, p. 340 para. 29.

⁴⁹ O'Connor Factual Report (2006a), pp. 199–200.

⁵⁰ O'Connor Analysis and Recommendations (2006b), p. 253.

⁵¹ Iacobucci (2008), p. 224 para. 128.

⁵² See "Sharp Rebuke for Ambassador over Arar Comments", *CBCnews.ca*, 17 June 2005 (retrieved from <http://www.cbc.ca/news/story/2005/06/16/arar050616.html>).

⁵³ See Parliament of Canada, Standing Committee on Public Safety and National Security, Evidence, 39th Parliament, 1st Session, Ottawa, 5 December 2006 (retrieved from <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2565738&Language=E&Mode=1&Parl=39&Ses=1>); see also Audrey Macklin, "From Cooperation, to Complicity, to Compensation: The War on Terror, Extraordinary Rendition, and the Cost of Torture", *European Journal of Migration and Law*, Vol. 10, No. 1, 2008, p. 17; and "RCMP's embattled chief quits over Arar testimony", *CBCnews.ca*, 6 December 2006 (retrieved from <http://www.cbc.ca/canada/story/2006/12/06/zaccardelli.html>).

start”.⁵⁴ Mr Waldman also added that accountability at the top levels should not be where accountability stops.⁵⁵ Nevertheless, a loss of reputation is perhaps all that has been suffered by those who had a role in the mistakes made throughout the RCMP, CSIS and DFAIT: there have been no disciplinary or other measures taken against Canadian officials, and in fact some of those involved have been promoted.⁵⁶

Inquiries can also have an effect on the reputations of the victims of the government action under investigation. Sometimes this effect can be positive, although in other instances it is less clear. For instance, the O’Connor inquiry has helped to “clear” Mr Arar’s name, as Mr Arar had hoped it would.⁵⁷ Commissioner O’Connor was able to state “categorically” that there was no evidence of Mr Arar’s guilt whatsoever.⁵⁸ As Commissioner O’Connor wrote, “[t]he disturbing part of all this is that it took a public inquiry to set the record straight”.⁵⁹ The O’Connor inquiry also revealed the reputation-damaging government leaks concerning Mr Arar and his wife as being unfair, false and malicious. Moreover, soon after the release of the reports, Mr Arar received an apology and compensation from the federal government.

Still, this type of exoneration is not always possible in the context of a commission of inquiry that is not explicitly designed to examine the actions of the victims, and we have the Iacobucci inquiry to illustrate this side of the coin. Commissioner Iacobucci noted that the inquiry over which he presided was not a commission of inquiry into the actions of the three men involved. He did emphasise that these men were not charged with anything, that his repetition of the allegations made against these men should not be taken as a substantiation of those allegations and that they are presumed innocent of any wrongdoing in accordance with the principles of law and fundamental fairness. Even so, this no doubt fell short of what these men would have hoped for in their efforts to clear their names.⁶⁰

⁵⁴ See “RCMP’s Zaccardelli resigns over Arar testimony”, *CTV.ca*, 6 December 2006 (retrieved from http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20061205/arar_zaccardelli_061206?s_name=&no_ads).

⁵⁵ Scott Deveau, “Zaccardelli resigns as RCMP chief”, *globeandmail.com*, 6 December 2006 (retrieved from <http://www.theglobeandmail.com/servlet/story/RTGAM.20061206.wrcmp1206/BNStory/Front/home>).

⁵⁶ Alex Neve, Khaled Mouammar, Sameer Zuberi, Faisal Kutty, Nehal Bhuta and Warren Allmand, “Time for justice on rights abuses”, *Toronto Star*, 18 November 2008 (retrieved from <http://www.thestar.com/printArticle/538854>) (henceforth Neve et al., 2008, ‘joint letter’). Moreover, Whitaker adds that “[e]very officer who could have been the source of the leaks [about Mr Arar and his family] has subsequently been promoted or otherwise rewarded for his service” (Whitaker, 2008, p. 24).

⁵⁷ O’Connor Analysis and Recommendations (2006b), p. 59.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*, p. 62.

⁶⁰ See Iacobucci (2008), p. 43, para. 10, p. 44, para. 13 and p. 44, para. 12. In their final joint submission to the Iacobucci inquiry, the counsel for the three men and several interveners reiterated that there was nothing the men would like more than to clear their names, but the process adopted by the inquiry did not allow them to effectively do so (Internal Inquiry into the actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, Submissions of the Applicants, Ahmad Abou-Elmaati, Muayyed Nureddin, Abdullah Almalki, Canadian Council for American Islamic Relations, Canadian Muslim Civil Liberties Association and Canadian Arab Federation, Ottawa, 16 October 2007, para. 8 (retrieved from www.iacobucciinquiry.ca) (henceforth ‘October Submission of the Applicants’, 2007).

4.2.2 Institutional reputation

The actions of the RCMP, CSIS and DFAIT officials in relation to Mr Arar, Mr Almalki, Mr Elmaati and Mr Nureddin give great cause for concern, and hence they cannot but diminish the reputation of these institutions in the eyes of Canadians.⁶¹ These inquiries told the stories of these four men and laid out for the public in great detail how Canadian officials contributed to their abuse abroad.⁶² The findings of the inquiries revealed unacceptable practices within these Canadian agencies, and Commissioner O'Connor's recommendations relating to these institutions were buttressed by a wealth of detailed evidence. Many Canadians would have been surprised to learn that existing policies surrounding caveats and the transmission of information were not followed by the RCMP, and they were no doubt shocked to learn about the lack of training given to members of the Foreign Service working in countries with suspect human rights records. These are the easy, 'take-away' elements from the inquiries that can leave a lasting and damning mark on the reputations of the Canadian agencies in the minds of Canadians. As such, although inquiries play a crucial role in the restoration of public faith in the government and its institutions,⁶³ and although inquiries can point the way forward by providing concrete steps towards improving the status quo, they also have the effect of highlighting the current deficiencies.

The government's own concerns about the conduct of these agencies were made plain by the establishment of the inquiries in the first place. For instance, the mandate of the O'Connor inquiry was not only to look into the conduct of Canadian officials with respect to Mr Arar, but also to make policy recommendations about an independent review mechanism for the RCMP's national security activities.⁶⁴ Thus from the outset of the O'Connor inquiry, it was clear that there were recognised problems within the RCMP that needed to be addressed.

It appears that the reputation of the RCMP in particular has been affected. The many revelations contained in Commissioner O'Connor's two reports mark the starting point of what has become a deeper investigation into several aspects of Canada's main law enforcement agency. In March 2007, the Harper government launched an independent investigation into allegations of suspect hiring practices, pension fraud and an internal cover-up within the RCMP.⁶⁵ Leading up to this investigation, one of the RCMP officers testifying before a parliamentary committee looking into the matter stated that: "every core value and rule of ethical conduct that I held to be true and dear as a rank-and-file member of the RCMP has been decimated and defiled by employees at the highest levels of the RCMP". In response to the concerns raised by the independent

⁶¹ In remarking that the first objective of a new RCMP review mechanism should be to ensure that national security activities comply with Canadian law and values, O'Connor noted that this objective is essential to engender public trust and confidence (O'Connor Policy Report, 2006c, p. 464).

⁶² Although the Iacobucci inquiry was conducted away from the public eye to an overwhelming degree, a public version of the report was issued. Even assuming facts are omitted from the public version that would affect Canadians' confidence in their institutions, what was in the public report was certainly enough to do so.

⁶³ This point in particular is discussed further in the final section of this paper, where the benefits of the commission of inquiry model are discussed.

⁶⁴ This policy review process involved the examination of "the entire field of security policy and practice" (Whitaker, 2008, p. 28).

⁶⁵ See Public Safety Canada, "RCMP Pension and Insurance Plan Investigation", Public Safety Canada, Ottawa, 13 March 2008(a) (retrieved from <http://www.publicsafety.gc.ca/rcmppension-retraitegrc/iircmp-grc-en.asp#bk>); see also Kady O'Malley and Chris Selley, "RCMP Scandal Deepens", *Macleans.ca*, 29 March 2007 (retrieved from <http://www.macleans.ca/canada/national/article.jsp?content=20070329-091523-3204#3>).

investigation, the government then set up a task force to examine the need for changes in the governance and culture of the RCMP, with a report released at the end of 2007.⁶⁶ The recommendations in this report have yet to be taken up by the government, but could be something that the recently re-elected Harper administration will be forced to address.

The RCMP was not the only agency towards which recommendations were directed: the O'Connor inquiry also highlighted problems with the status quo pertaining to interagency communication, accountability and the general policies of CSIS and DFAIT. David Charters has recently written that the history of the Canadian response to terrorist incidents prior to 9/11 “does not give much cause for confidence” in the ability of the Canadian players to integrate as necessary. As he writes, “[a] host of incidents, from the October Crisis to the bus hijacking, highlighted gaps, lack of preparedness and poor cooperation among levels of government and policing and security agencies that need to work together”.⁶⁷ Ultimately, and at the very least, the inquiries have left Canadians with the impression that the institutions leading the fight against terrorism were uncoordinated and ill equipped, and unable to carry out their responsibilities without serious mistakes.

4.2.3 National reputation

The O'Connor and Iacobucci inquiries have served to add Canada's mistreatment of its own citizens in the post-9/11 environment to the list of issues that temper Canada's esteem and reputation, both internationally and at home. Canada does have a generally positive reputation for the protection of human rights, equality and tolerance, and deservedly so.⁶⁸ Yet, this reputation is far from unshakable: it has been weakened by the numerous instances where Canada has not applied the principles of basic human rights in its policies and actions in the past,⁶⁹ as well as by recent events for which Canada has been taken to task at the international level.⁷⁰ And now, the actions of Canadian officials in the cases of Mr Arar, Mr Almalki, Mr

⁶⁶ Task Force on Governance and Cultural Change in the RCMP, *Rebuilding the Trust*, Ottawa: Government of Canada Publications, December 2007 (retrieved from www.publicsafety.gc.ca/rcmp-grc/fl/Task_Force_Report-English.pdf).

⁶⁷ Charters (2008), p. 38.

⁶⁸ See for example, Parliament of Canada, Senate Standing Committee on Human Rights, “Promises to Keep: Implementing Canada's Human Rights Obligations”, Ottawa, December 2001 (retrieved from <http://www.parl.gc.ca/37/1/parlbus/commbus/senate/Com-e/huma-e/rep-e/rep02dec01-e.htm>); for general information and reports, see the “Canada” homepage on the website of the Office of the High Commissioner for Human Rights, Geneva (retrieved from www.ohchr.org/EN/countries/ENACARegion/Pages/CAIndex.aspx).

⁶⁹ As Kent Roach writes, “it is healthy for Canadians to debate recent anti-terrorism measures with an acute awareness of our failures in the past” (Kent Roach, “Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism” (2002) 47 McGill LJ 894–947 at 940–41). For example, since the beginning of the 20th century, Canada has imposed head taxes on immigrants of certain ethnicities, turned away Jews fleeing the Holocaust in Europe, allowed the forced sterilisation of disabled women, and run a residential school system for aboriginal children as part of a policy of assimilation that was rife with abuse.

⁷⁰ See Alegre (2008), p. 12; see also Amnesty International (Canada), *Canada and the International Protection of Human Rights*, Amnesty International, Ottawa, December 2007(b) (retrieved from http://www.amnesty.ca/amnestynews/upload/Human_Rights_Agenda_2007.pdf). As Alex Neve of Amnesty International (Canada) has said, some of the Canadian government's recent positions on human rights issues are undermining its past leadership role in this area. Canada was taken to task in a December 2007 Amnesty International report for issues such as the government's opposition to a declaration on the rights of indigenous peoples, the failure of the government to oppose the death penalty in all cases and for all Canadian citizens, and for generally wavering in “strengthening the UN human rights system”

Elmaati and Mr Nureddin will be forever attached to Canada's track record on human rights, further attenuating Canada's reputation as a leader in the advancement of a global human rights agenda.

Compensation and reparations have not been made to Mr Almalki, Mr Elmaati or Mr Nureddin, and the Canadian public currently has little evidence of any progress on the implementation the O'Connor inquiry's extensive recommendations.⁷¹ Without the full and transparent implementation of these recommendations, can there be any meaningful promise that other Canadians will not be mistreated and detained abroad as a result of the institutional weaknesses revealed by the inquiries? As was stated by the *Globe and Mail* editorial after the release of the Iacobucci report, it would not be surprising to those already familiar with Mr Arar's story that "Canada was willing to sell out its citizens of Arab descent who fell under suspicion during the tense months after Sept. 11, 2001".⁷² At present, there seems little assurance available to the public that Canada could not "sell out" its citizens again.

It remains that at a minimum, even if prompt action is taken immediately to implement all the required recommendations and overhauls highlighted by the inquiry process, even if all reparations are made and even if no other Canadian suffers the fate that Mr Arar, Mr Almalki, Mr Elmaati and Mr Nureddin did, these inquiries reveal that Canada has joined the legion of other countries that have engaged in dubious practices at the expense of the rights of their citizens in the post-9/11 environment.⁷³

4.3 Political cost

The inquiries have forced both the Liberal Party of Canada and the Conservative Party of Canada – the two most widely and consistently supported parties in the country – to pay a political cost. As Audrey Macklin writes, "Mr Arar's ordeal quickly elicited equal shares of sympathy toward him and doubt about the integrity of the Canadian government's conduct".⁷⁴ This doubt attaches not only to the institutions involved and to Canada's reputation as a nation, but also to the reputation of the political actors and parties under whose watch the mistakes occurred.

It was under a Liberal government (first under Prime Minister Jean Chretien and then under Prime Minister Paul Martin between 3 December 2003 and June 2006) that all four men were

(Amnesty International (Canada), "Canada's position as a global human rights champion slipping, says Amnesty International", Press Release, 10 December 2007(a) (retrieved from http://www.amnesty.ca/resource_centre/news/view.php?load=arcview&article=4140&c=Resource+Centre+News)).

⁷¹ Minister Day has stated that almost all the recommendations have been implemented. There is no further detail available on this implementation, however. See Public Safety Canada, "The Government of Canada Releases the Iacobucci Internal Inquiry Report", Press Release, Public Safety Canada, Ottawa, 21 October 2008(b) (retrieved from <http://www.publicsafety.gc.ca/media/nr/2008/nr20081021-eng.aspx>).

⁷² See "Canada's pattern of complicity", editorial, *Globe and Mail*, 21 October 2008 (retrieved from <http://www.theglobeandmail.com/servlet/story/RTGAM.20081021.weiacobucci22/BNSStory/specialComment/home>). This editorial also states that the government's actions have now become part of the historical record.

⁷³ Beyond what occurred in relation to Mr Arar, Mr Almalki, Mr Elmaati and Mr Nureddin, there is the more systemic 'backlash' experienced by Muslims and those of Arab origin in Canada, a phenomenon that reveals racism and prejudice within Canadian society. See Faisal Bhabha, "The Chill Sets In: National Security and the Decline of Equality Rights in Canada" (2005) 54 *University of New Brunswick LJ* 191 at 195.

⁷⁴ Macklin (2008), p. 14.

detained and tortured. Mr Chretien initially refused to call an inquiry, a decision that Mr Martin reversed when he launched the O'Connor inquiry shortly after taking office. Consequently, when it comes to probing the actions of political actors in the post-9/11 environment and during the detention and mistreatment of Mr Arar, Mr Almalki, Mr Elmaati and Mr Nureddin, it is members of the former Liberal government who are called into question. Former Foreign Affairs Minister Bill Graham, for example, became involved in trying to secure Mr Arar's release. Although he was found to have firmly articulated to the Syrians that the government wanted Mr Arar returned to Canada,⁷⁵ he and the government have nonetheless been criticised for not acting fast enough and for making inaccurate statements about Mr Arar's detention.⁷⁶ Of course, Mr Chretien's assertion that an inquiry was not necessary and that the internal review process of the RCMP would be sufficient has been proven completely wrong. Moreover, the first part of the O'Connor inquiry took place while a Liberal government was in power, and it was under this Liberal government that the O'Connor inquiry struggled against extensive claims of confidentiality for national security, which threatened to delay and encumber the work of the inquiry.⁷⁷

A Conservative government under Mr Harper took office in January 2006, and it was under this administration (recently re-elected in October 2008) that the O'Connor reports were released and the Iacobucci inquiry launched. It was Mr Harper who apologised to Mr Arar and gave him monetary compensation. As Maria Koblanck Della Santina has noted, Mr Harper did not shy from taking political advantage of the fact that Mr Arar's torture had occurred while a Liberal government had been in power, referring to as much in the apology itself.⁷⁸ This apology was welcomed by Mr Arar and noted internationally as a commendable step. Dick Marty wrote in his 2007 report for PACE (the 'Marty report') that the apology and compensation offered to Mr Arar were both "ethical and responsible".⁷⁹ Part of the nature of political costs is that the success experienced by one party is automatically a cost to another; as such, Mr Harper's apology exacerbated the political cost to the Liberal Party.

Yet, the Conservative government is also paying a political price in relation to the inquiries as well. First, there has been a lack of public action with respect to the recommendations made by Commissioner O'Connor. In his apology to Mr Arar, Mr Harper pledged that the Conservative government would do "everything in its power" to ensure that the issues raised by the inquiry were addressed, and he agreed to act on all recommendations.⁸⁰ Upon the completion of the Iacobucci inquiry, the minister for public safety stated that the government undertook immediate action to implement Commissioner O'Connor's recommendations and that such implementation was "almost complete".⁸¹ Details on this implementation are not available, however, and as

⁷⁵ O'Connor Analysis and Recommendations (2006b), p. 38.

⁷⁶ Minister Graham said on 14 August 2003 that Arar had had an independent consular visit, which was untrue. O'Connor concluded that the minister had not been fully or properly briefed (*ibid.*, p. 44).

⁷⁷ See Whitaker (2008), pp. 12–13; see also the O'Connor Analysis and Recommendations (2006b), pp. 295 and 299.

⁷⁸ "Although the events leading up to this terrible ordeal happened under the previous government", notes the statement (Office of the Prime Minister of Canada, "Prime Minister releases letter of apology to Maher Arar and his family and announces completion of mediation process", Press Release, Ottawa, 26 January 2008 (retrieved from <http://pm.gc.ca/eng/media.asp?id=1509>)). See also Maria Koblanck Della Santina, "Special Delivery – The Multilateral Politics of Extraordinary Rendition", 2009 (forthcoming).

⁷⁹ See "Harper's apology 'means the world': Arar", *CBCnews.ca*, 26 January 2007 (retrieved from <http://www.cbc.ca/canada/story/2007/01/26/harper-apology.html>); see also Marty (2007), p. 6.

⁸⁰ Whitaker (2008), p. 20.

⁸¹ See the Public Safety Canada (2008b) press release of 21 October.

recently noted by Amnesty International Canada, the Canadian Muslim Civil Liberties Association and Human Rights Watch, action is still desperately needed in the areas of redress, accountability, reform, leadership and global action.⁸²

As Whitaker (2008) argues, among the other responses for which Canadians continue to wait is further information on the source of the government leaks that sought to discredit Mr Arar and his wife. These leaks were committed with an “intention to smear the reputation of a man who had been kidnapped and tortured, partially as a result of the very actions of those doing the leaking...Such behaviour is odious by any reasonable standard of decency.”⁸³ Although the leaks occurred under the previous Liberal government, the burden of following up on unacceptable conduct has fallen on the current administration. The call for action falls on the government of the day; the work of the inquiry ends when the report is submitted and the action is left to the political actors.⁸⁴

Second, it is since the Conservative government has come into power that both inquiries have grappled with claims of confidentiality for national security. In particular, this government made it clear in the mandate it gave the Iacobucci inquiry that the proceedings were to be conducted away from the public view. The Iacobucci inquiry lead counsel explained that “the terms of reference basically say, ‘Do this in private unless there’s a very, very compelling reason for having parts of it in public’”.⁸⁵ This limited mandate has generated much debate, and the very private nature of the inquiry was contested by Mr Almalki, Mr Elmaati, Mr Nureddin and most interveners, in part based on the constitutional principle of openness and the need to inspire public confidence through a transparent, public process.⁸⁶

Moreover, it is while the Harper government has been in office that litigation over the redacted portions of Commissioner O’Connor’s final reports has occurred.⁸⁷ In the end, the Federal Court ordered the release of approximately two-thirds of the information the government had erroneously concluded should be kept confidential. When this information was released, it was revealed for example that CSIS had known of the risk of torture that Mr Arar faced immediately after his rendition, as it was a recognised “trend” of the FBI and CIA to render individuals to countries to be questioned in a “firm manner”.⁸⁸ As Macklin (2008) concludes, the attempt “to conceal what could only be characterised as politically embarrassing information under the cloak

⁸² See the joint letter by Neve et al. (2008), *supra* note 56.

⁸³ Whitaker (2008), p. 23.

⁸⁴ Dennis R. O’Connor and Freya Kristjanson, “Some Observations on Public Inquiries”, speech delivered at the Canadian Institute for the Administration of Justice Annual Conference, Halifax, Nova Scotia, 10 October 2007 (retrieved from <http://www.ontariocourts.on.ca/coa/en/ps/speeches/publicinquiries.htm>).

⁸⁵ Andrew Mayeda, “Lawyer demands Iacobucci inquiry be open to public”, *canada.com*, 17 February 2007 (retrieved from <http://www.canada.com/topics/news/story.html?id=aee21c0e-1a42-4420-a8a8-9913f917296c>).

⁸⁶ Iacobucci (2008), Appendix C.

⁸⁷ What Commissioner O’Connor referred to as “overly broad” national security confidentiality claims, A&R, 304.

⁸⁸ Commission of Inquiry into the Actions of Canadian Officials Relating to Maher Arar, *Addendum: Disclosure of information authorized by the Federal Court of Canada in accordance with Sections 38.04 and 38.06 of the Canada Evidence Act*, Ottawa: Government of Canada Publications, 2006(d), p. 245 (retrieved from http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/26.htm); Macklin (2008), p. 26.

of national security confidentiality elicited scathing criticism”.⁸⁹ Indeed, the use of national security claims in this way “demeans legitimate uses of secrecy”.⁹⁰

The tendency for governments to invoke ‘state secrecy’ to the detriment of adequate investigation has been deplored by Amnesty International and recently by Mr Marty during his testimony in Italy about the kidnapping of an Italian citizen by American and Italian officials. Although he commented that at least in the Italian trials the perpetrators were being brought before the judicial process, he argued that the Italian government was preventing the process from proceeding by invoking state secrecy “not...to protect secrets – because the facts in question are largely known – but rather to protect the civil servants and politicians responsible for these abuses”.⁹¹

4.4 Conclusions on costs

It may seem that, on the one hand, these categories of costs are related to and aggravated by the inquiry process itself. It would indeed be cheaper in all respects *not* to hold inquiries, public or otherwise, or any other thorough form of investigation since investigation appears only to add to the monetary, reputational and political costs of government missteps. Nevertheless, although costs are revealed and solidified during the inquiry process, these costs were not ‘caused’ by the inquiries themselves; rather, they were caused by the various actions of Canadian officials. These costs were incurred when the damage was initially perpetrated, not at the moment the inquiries were called or when they concluded. That is, the reputation of Canada, its institutions and certain individuals were tarnished when officials contributed to the mistreatment and detention of Canadian citizens in Syrian jails; the political cost was incurred when there was hesitation about initiating an inquiry, through unnecessary claims of censorship, and it is indeed still accumulating through continued neglect of Commissioner’s O’Connor’s policy recommendations. It was government action of all sorts that created or necessitated these costs, not the inquiries themselves.

Moreover, costs notwithstanding, an inquiry should be viewed as a useful method through which policy-makers and leaders can learn how mistakes occurred and how to avoid them in the future. Although inquiries may increase costs by opening a window on certain government actions, thorough investigations can also help the state mitigate some of the costs endured. For instance, the calling of these inquiries was, at a minimum, an acknowledgment that the public and the government had to find out what had happened to Mr Arar, Mr Almalki, Mr Elmaati and Mr Nureddin, and what role Canadian officials had played in their ordeals. This basic acknowledgment of a problem and a public pronouncement of a desire to fix it is an essential first step.⁹² Public inquiries in particular also help aid the restoration of the reputations of institutions and governments. As Justice Peter Cory wrote in an important piece of litigation involving a public inquiry, “[i]n times of public questioning, stress and concern [public inquiries] provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at

⁸⁹ See Macklin (2008); see also Whitaker (2008), p. 14.

⁹⁰ Whitaker (2008).

⁹¹ Council of Europe, “Dick Marty testifying at the Abu Omar trial in Milan: ‘Let justice take its course!’”, Press Release, Council of Europe, Strasbourg, 6 November 2008 (retrieved from <http://assembly.coe.int/ASP/Press/StopPressView.asp?ID=2095>).

⁹² Although, again, as noted, this is not enough in the longer term if recommendations are not followed and lessons not learned.

resolving the problem”.⁹³ Commissions of inquiry are costly, but these costs are the by-product of a process that plays a vital role along the path to proper accountability and resolution.

5. Findings

5.1 Summary of the findings of the O’Connor inquiry

The O’Connor inquiry was a public inquiry mandated to accomplish two broad tasks. First, the inquiry was instructed to investigate into and report on the actions of Canadian officials in relation to Mr Arar. This investigation and report was to have specific regard for Mr Arar’s detention by US officials in the US, his deportation to Jordan and Syria, his treatment in Syria, his eventual return to Canada and any other circumstance directly related to Mr Arar that Commissioner O’Connor considered relevant to fulfilling the mandate given to him. Second, Commissioner O’Connor was directed to make policy recommendations about the creation of a review mechanism for the RCMP’s national security activities.⁹⁴ The report on the events relating to Mr Arar was released on 18 September 2006 and the report on the RCMP review mechanism was released on 12 December 2006. Some of the specific findings of the O’Connor inquiry are presented below.

5.1.1 Finding: Mr Arar’s reputation

The inquiry was not intended to be an inquiry into whether Mr Arar had committed any offence. Nonetheless, Commissioner O’Connor was conscious of the obvious impact the inquiry would have on Mr Arar’s reputation. Although acknowledging the difficulty of “proving a negative”, Commissioner O’Connor was able “to say categorically that there is no evidence to indicate that Mr Arar has committed any offence or that his activities constitute a threat to the security of Canada”.⁹⁵

Furthermore, Commissioner O’Connor also accepted the findings of a report released by Stephen Toope in October 2005, who concluded that Mr Arar had been tortured while imprisoned in Syria, thereby confirming what Mr Arar had been saying since his release.⁹⁶ The inquiry also condemned government leaks that had occurred after Mr Arar’s return to Canada and even during the inquiry itself. These leaks strove to cast doubt upon Mr Arar’s story while protecting the government and its officials,⁹⁷ and the inquiry revealed these leaks for the deliberate, misleading and disturbing acts that they were.⁹⁸

5.1.2 Finding: Information sharing

The inquiry found that the RCMP shared information with the American authorities about Mr Arar before he was sent to Syria, and that this information was often imprecise, unfair and

⁹³ The author would like to thank Nigel Marshman for stressing the importance of this point (telephone interview with Nigel Marshman, former Commission Counsel with the Commission of Inquiry into the Actions of Canadian Officials Relating to Maher Arar, Ottawa, 15 December 2008). See also the case *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, para. 62.

⁹⁴ O’Connor Analysis and Recommendations (2006b), p. 10.

⁹⁵ *Ibid.*, p. 59.

⁹⁶ *Ibid.*, p. 188; see also the Toope report (2005), p. 19.

⁹⁷ See also Macklin (2008), p. 16.

⁹⁸ O’Connor Analysis and Recommendations (2006b), pp. 255 and 260.

inaccurate. Moreover, in what Commissioner O'Connor refers to as "alarming" practices, this information was shared in a manner contrary to RCMP policy and contrary to the intentions of senior RCMP officials who had not intended that existing RCMP policy be put aside.⁹⁹ More specifically, the information provided to the American authorities had not been screened for relevance, reliability or personal information, thus contravening internal RCMP policy. The RCMP was also found to have broken its own policy by not attaching caveats to information sent about Mr Arar, which typically stipulate how the information can be used. Commissioner O'Connor held that this increased the risk that the information would be used for purposes of which the RCMP would not approve. In what Commissioner O'Connor referred to as the "most serious incident" of information sharing in contravention of existing RCMP practices, the entire investigative database for Project A-O was supplied to US authorities without screening or caveats.¹⁰⁰

Furthermore, the RCMP also requested that Canadian and US authorities add Mr Arar's name and that of his wife Monia Mazigh to border lookout systems.¹⁰¹ Commissioner O'Connor found that the RCMP had no basis for its description of Mr Arar and Ms Mazigh in the American request as "Islamic [e]xtremist individuals", and that there was no basis for the "terrorism" lookout requested of the Canadian border authorities.¹⁰² Commissioner O'Connor notes numerous other instances where inaccurate and unfair information was shared with the Americans, such as the RCMP's assertion that Mr Arar had refused to be interviewed when in fact Mr Arar had agreed to the interview and had merely asked for certain conditions to be respected. Overall, it was revealed that the RCMP had provided information about Mr Arar had been inaccurate, overstated his importance in RCMP investigations and portrayed him in an "unduly negative fashion". Crucially, it was held to be likely that US authorities had relied on information given to them by the RCMP when making the decision to detain and question Mr Arar in New York and to deport Mr Arar to Syria.¹⁰³

5.1.3 Finding: Other actions during Mr Arar's detention in Syria

Some of the other actions on the part of Canadian officials from DFAIT, CSIS and the RCMP during Mr Arar's detention in Syria raised serious concerns and were found to have had an effect on the length of time it took to get Mr Arar released. For instance, it was noted at several points in Commissioner O'Connor's first report that the three Canadian agencies had failed to work together to win Mr Arar's release. As Macklin (2008) writes, the agencies "could not even agree to ask Syria to release and return Mr Arar to Canada".¹⁰⁴ By the time a letter from the prime minister was eventually sent to Syria expressing Canada's desire to have Mr Arar returned, months had passed since Canadian authorities had first decided that there should be an official reply to Syrian assertions that not all agencies in Canada (specifically, CSIS) desired Mr Arar's return.

⁹⁹ Ibid., pp. 24, 77, 110 and 130.

¹⁰⁰ Ibid., pp. 24 and 100–01; see also pp. 114–15 for a list of inaccuracies.

¹⁰¹ Ibid., pp. 13 and 19. Of the Americans, the RCMP requested that Mr Arar and his wife be placed in the US Customs' Treasury Enforcement Communications System (TECS). Domestically, the RCMP requested that what is now the Canada Border Services Agency place 'terrorism' lookouts for Mr Arar and his wife.

¹⁰² Ibid.

¹⁰³ Ibid., p. 140.

¹⁰⁴ Macklin (2008), p. 16.

There are also specific instances where the actions of the three agencies appeared to work counter to efforts to win Mr Arar's release. For example, DFAIT, specifically former Ambassador Pillerella, distributed the summary of information gleaned from Mr Arar's interrogation by Syrian officials to CSIS and the RCMP without noting that the statement was probably a product of torture. CSIS was also found to have received information from Syrian intelligence officials without adequately assessing its reliability on the basis that it could have been the product of torture. Furthermore, during the time of Mr Arar's detention, the RCMP sent questions to Syrian intelligence officials for Mr Almalki (who was also being held in Syria), which likely sent signals to Syrian intelligence officials that Mr Arar was considered a serious threat.

5.1.4 Overarching themes

The findings of the O'Connor inquiry are captured in three large volumes and they go through the events and actions of Canadian officials in meticulous detail. In addition to the specific findings outlined above, certain themes can be extracted from the findings that contribute to a broader understanding of the climate and practices that led to Mr Arar's detention and torture. It could be suggested that these themes reflect challenges and difficulties common to many countries that are struggling to deal with the threat of terrorism.

The lack of accuracy and precision in the sharing of information

Although the sharing of information was highlighted as one of the likely contributing factors to Mr Arar's detention and mistreatment in Syria, Commissioner O'Connor notes that information *should* be shared among law enforcement agencies in different countries. This information must only be shared in a suitably "principled and consistent" manner, however.¹⁰⁵ Time and again, Commissioner O'Connor emphasises the problem of the imprecise, inaccurate information that was used and shared by Canadian officials.¹⁰⁶ This was a practice for which Commissioner O'Connor said there was no excuse.¹⁰⁷ The nature of the intelligence-gathering process is one whereby "every bit of information" should be shared because "it might turn out to be the missing piece of the puzzle".¹⁰⁸ Still, as was demonstrated in the case of Mr Arar, every little bit of *faulty* information may pose a risk to an individual, even if the pieces may seem small and insignificant in isolation.

'Mixed signals' and the weight of labels

Commissioner O'Connor notes numerous times that the labels attached to individuals, such as those given to Mr Arar, have a way of "sticking" and creating dangerous misperceptions.¹⁰⁹ These labels send signals to other countries about how the individual is perceived by their home country. Labels are sometimes overt and deliberately placed by the home country, such as the label of "Islamic [e]xtremist" attached to Mr Arar and his wife by the RCMP.¹¹⁰ On the other

¹⁰⁵ O'Connor Analysis and Recommendations (2006b), pp. 333, 22 and 102.

¹⁰⁶ For instance, *ibid.*, p. 83; see also Roach (2007), p. 56.

¹⁰⁷ O'Connor Analysis and Recommendations (2006b), p. 26. As O'Connor wrote, "[t]he need for accuracy and precision when sharing information [on] terrorist investigations cannot be overstated. This is especially so when the information is contained in a document that, rightly or wrongly, carries an air of authority" (p. 25; see also pp. 32, 239, 254 and 255).

¹⁰⁸ *Ibid.*, pp. 124 and 145.

¹⁰⁹ More specifically, labels such as those attached to Mr Arar by the RCMP in its border lookout requests – see note 101 *supra*. See also *ibid.*, pp. 19 and 83.

¹¹⁰ *Ibid.*, pp. 20 and 337.

hand, labels may also be accumulated or implied by the actions of state officials. For instance, Commissioner O'Connor writes that the provision of questions for Mr Almalki (who officials associated with Mr Arar) by the RCMP to Syrian intelligence officials, through the Canadian ambassador himself, likely sent the signal that Mr Almalki's detention was approved of, and therefore put Mr Arar at greater risk. Moreover, Commissioner O'Connor expressed some concern at the visit the CSIS made to Syria to meet with Syrian intelligence officials while Mr Arar was being detained in Syria (as well as Mr Almalki), a country with a suspect human rights record, as it is important that Canada not appear to encourage or condone abuse of human rights.¹¹¹

Interagency cooperation

Just as international cooperation and information sharing are necessary features of the fight against terrorism, so too is proper cooperation among domestic agencies. Moreover, this inter-agency cooperation is crucial to ensuring a coherent domestic approach able to prevent the mistreatment of citizens.¹¹² Commissioner O'Connor found that throughout the period Mr Arar was held in New York by American officials, during which time the RCMP supplied information to American officials, the RCMP was not made aware of the possibility that the Americans were considering sending Mr Arar to Syria until several days after consular officials with DFAIT were informed of this possibility by Mr Arar's brother and Mr Arar himself.¹¹³ DFAIT and RCMP were both dealing directly with US authorities at the same time, without the benefit of the information the other agency had.¹¹⁴

A further example of information breakdown is found in the instance when then-Foreign Minister Bill Graham was not informed of the working assumption of the director general of the Consular Affairs Bureau that Mr Arar had been tortured during his initial period of interrogation in Syria. As Commissioner O'Connor wrote, "that led to an undesirable situation: the Canadian minister responsible for managing Mr Arar's situation while he was detained in Syria was not properly informed of what should have been viewed as a critically important element".¹¹⁵

Training and awareness

It is clear that better policies for dealing with countries with suspect human rights records, as well as better training for agency employees, are essential. Commissioner O'Connor found that RCMP investigators on Project A-O lacked training and experience in national security investigations and in how to address the various issues (such as human rights and cultural sensitivity issues) that could arise.¹¹⁶ Especially given this situation, Commissioner O'Connor argues that senior RCMP officials needed to have exerted better oversight than they did.

Commissioner O'Connor also raised concerns about training provided to Canadian consular officials. For instance, the Canadian consul in Syria who met with Mr Arar several times throughout his imprisonment had no training in observing the signs of torture.¹¹⁷ Although there were indications in Mr Arar's first interview that all was not well, this concern was not noted by

¹¹¹ Ibid., pp. 35 and 348.

¹¹² See for instance Whitaker (2008), p. 17.

¹¹³ O'Connor Analysis and Recommendations (2006b), pp. 30 and 151.

¹¹⁴ Ibid., p. 31.

¹¹⁵ Ibid., pp. 192, 194 and 195.

¹¹⁶ Ibid., p. 17.

¹¹⁷ Ibid., p. 185.

the Canadian consul in any meaningful way.¹¹⁸ Furthermore, despite widely acknowledged concerns about Syria's treatment of prisoners and DFAIT's own reports, the Canadian ambassador to Syria was *not* operating under a "working assumption" that Mr Arar had been tortured,¹¹⁹ although some other DFAIT officials were.¹²⁰

5.1.5 Recommendations

Out of the O'Connor inquiry came two sets of recommendations: first, recommendations associated with the findings with respect to Mr Arar and the actions of Canadian officials; second, policy recommendations specifically made about the new review and oversight mechanism for the RCMP. Note that there were no recommendations made by the Iacobucci inquiry, in accordance with its mandate.¹²¹

From the factual review process

Most of the recommendations at the end of the factual inquiry involve, as Whitaker (2008) writes, formalising and increasing the precision of existing policy.¹²² After all, one of the key problems in the agencies was not necessarily the lack of policy surrounding the investigation into which Mr Arar figured, but the failure to follow existing policy.

The 23 recommendations resulting from the factual inquiry included suggestions for the formalising of mandate and inter-agency agreements in national security investigations and for the training and oversight of RCMP officers, while encouraging information sharing between domestic and international agencies provided that important policies and protocols are followed (Recommendations 1-7). The recommendations emphasised the need for all agencies to ensure the accuracy and reliability of properly screened information, and the importance of written caveats (Recommendations 8-9).

The recommendations also suggested that formal complaints should be lodged when information shared with foreign agencies has been improperly used (Recommendation 12), and that policies should be developed to ensure a coordinated response in the event that a Canadian is detained abroad "in connection with terrorism-related activity" (Recommendation 16). The recommendations highlighted the need for better communication among domestic agencies, such as through the dissemination of DFAIT's annual reports on the human rights records of various countries (Recommendation 13). The recommendations addressed the need for better training of officials (Recommendations 17 and 20) and the problems encountered in the Arar case concerning detainee privacy rights (Recommendation 18). Moreover, policies should be established in relation to information sharing with countries with dubious human rights records, in order to prevent Canadian complicity in the torture of those abroad (Recommendations 14-15) and to prevent investigations from being carried out on the basis of racial, ethnic or religious profiling (Recommendation 19).

¹¹⁸ Ibid., p. 33.

¹¹⁹ Ibid., pp. 34 and 191.

¹²⁰ See, in contrast, DFAIT's own reports in *ibid.*, pp. 181–82 and 191.

¹²¹ As explained by Iacobucci inquiry lead counsel John Laskin (John B. Laskin and John Terry, "By the Book", letter to the editor, *Globe and Mail*, 24 October 2008 (retrieved from http://www.theglobeandmail.com/servlet/Page/document/v5/content/subscribe?user_URL=http://www.theglobeandmail.com%2Fservlet%2Fstory%2FLAC.20081024.COLETTTS24-12%2FTPStory%&ord=627467&brand=theglobeandmail&force_login=true).

¹²² See Whitaker (2008), p. 19. Whitaker's paper provides an excellent overview of the recommendations, as does Roach (2007).

Finally, the recommendations stemming from the factual inquiry suggested new policy be formulated with respect to border lookouts (Recommendation 21), that formal objections be registered with the US and Syria with respect to Mr Arar’s treatment (Recommendation 22) and that Mr Arar be compensated and given a formal apology (Recommendation 23).¹²³

From the policy review process

The policy review process, the second part of the inquiry, was designed to focus on establishing a new review and oversight mechanism for the RCMP, and continued in some sense from the recommendation in the factual report that “the RCMP’s information-sharing practices and arrangements should be subject to review by an independent, arms-length review body” (Recommendation 10). Commissioner O’Connor proposed the creation of the Independent Complaints and National Security Review Agency (ICRA): an independent, arms-length mechanism for both the review and the handling of complaints.¹²⁴ ICRA would be given substantial investigatory powers¹²⁵ and be able to conduct self-initiated reviews, investigate and report on complaints, conduct “joint” reviews alongside other review bodies and launch an investigation on ministerial request.¹²⁶

Commissioner O’Connor also recommended independent reviews be conducted of the national security activities of various Canadian departments,¹²⁷ and that “statutory gateways” be created to facilitate cooperation and exchange of information among the various review agencies.¹²⁸

This new review process is designed to do several things: to review the RCMP’s national security practices for compliance with the law and fundamental values,¹²⁹ to foster accountability to the government and at the same time to facilitate the government’s accountability for the RCMP,¹³⁰ to foster the RCMP’s accountability to the public, and to inspire public trust and confidence in the RCMP.¹³¹ These goals go hand-in-hand with a fourth objective of a review mechanism: to ensure that any review instrument would not impair national security.¹³² An understanding of the need for adequate review in a sensitive national security context can be seen in Recommendation 5g, where the ICRA complaints process is intended to be open and transparent, but may be conducted in private if necessary.

5.2 Summary of the findings of the Iacobucci inquiry

The Iacobucci inquiry was charged with determining whether the detention or mistreatment of Mr Almalki, Mr Elmaati or Mr Nureddin was the result of the actions of Canadian officials. In particular, the commissioner was directed to inquire into the action of sharing information with foreign countries. Furthermore, Commissioner Iacobucci was directed to determine whether, if the actions of Canadian officials were found to have contributed in some manner to the detention or mistreatment of these three men, those actions were deficient in the circumstances. Finally,

¹²³ See also the summary in Whitaker (2008), pp. 18–20.

¹²⁴ O’Connor Policy Report (2006c) pp. 503 and 505; see also Whitaker (2008), p. 33.

¹²⁵ O’Connor Policy Report (2006c), p. 531.

¹²⁶ *Ibid.*, pp. 516, 524, 527 and 529.

¹²⁷ *Ibid.*, pp. 558 and 573.

¹²⁸ *Ibid.*, pp. 580; see also Whitaker (2008), p. 34.

¹²⁹ O’Connor Policy Report (2006c), p. 464.

¹³⁰ *Ibid.*, p. 468.

¹³¹ *Ibid.*, p. 469.

¹³² *Ibid.*, pp. 472–73.

the inquiry was directed to determine whether the actions undertaken by Canadian officials to provide consular services to these the men during their detention was deficient in the circumstances.¹³³

To make these determinations, Commissioner Iacobucci used the following tests. First, the commissioner asked “whether, on a consideration of all of the evidence and the rational inferences to be drawn from it, the actions can be said to have likely contributed to the detention or mistreatment of the individual concerned”.¹³⁴ Second, in determining whether the actions of Canadian officials or the provision of consular services were deficient in the circumstances, the commissioner defined “deficient” conduct as “conduct falling short of a norm”.¹³⁵ Commissioner Iacobucci’s findings are presented below.

5.2.1 Finding: Canadian officials’ contribution to detention

It was found that Canadian officials had contributed indirectly to the detention of Mr Elmaati and Mr Nureddin in Syria. More specifically, this contribution had resulted from the sharing of information, which was judged deficient conduct in the circumstances, in both cases.¹³⁶ As Commissioner Iacobucci wrote about the case of Mr Elmaati, “officials should have considered that describing a dual Egyptian-Canadian citizen as an imminent threat in a communication to Syrian and Egyptian police might expose that individual to the risk of being detained and mistreated in those countries if he were to travel there”.¹³⁷ Commissioner Iacobucci noted that he was unable to determine whether Canadian officials had contributed indirectly to the detention of Mr Almalki based on the evidence he had before him during the inquiry.

5.2.2 Finding: Torture

Commissioner Iacobucci received submissions on whether his terms of reference required him to determine whether Mr Almalki, Mr Elmaati and Mr Nureddin had been subject to torture.¹³⁸ He determined that he was mandated to examine this issue. He found that Mr Almalki and Mr Nureddin had suffered torture while detained in Syria, and that Mr Elmaati had been tortured in both Syria and Egypt. In coming to this conclusion, Commissioner Iacobucci was able to use evidence from the Toope report (which contained information obtained from Mr Toope’s interviews with all three men), although he also conducted an independent examination into this issue, using his own interviews with the men and advice from experts on torture and its effects.¹³⁹

5.2.3 Finding: Canadian officials’ contribution to mistreatment

Canadian officials contributed indirectly to the mistreatment (which itself amounted to torture) of Mr Elmaati in Syria and Egypt, and to the mistreatment of Mr Almalki and Mr Nureddin in Syria. The actions of Canadian officials in these respects were judged deficient in the circumstances.

¹³³ Iacobucci (2008), p. 29, para.1.

¹³⁴ Ibid., p. 35, paras. 12–13.

¹³⁵ Ibid.

¹³⁶ In the case of Mr Nureddin, the sharing of Mr Nureddin’s travel itinerary was not judged an action deficient in the circumstances (ibid., p. 39, para. 29).

¹³⁷ Ibid., p. 351, paras. 17–20.

¹³⁸ Ibid., p. 53, para. 9, for example.

¹³⁹ Ibid., p. 57, para. 27.

5.2.4 Finding: Canadian officials' provision of consular services

Canadian officials' provision of consular services to Mr Elmaati and Mr Almalki was deficient in the circumstances, in a number of respects.

5.2.5 Overarching themes

As was the case with the findings of the O'Connor inquiry, several broad themes can be taken from the Iacobucci inquiry's report.

Information sharing and cooperation

The Iacobucci report is replete with instances where Canadian officials shared information and cooperated with foreign agencies, and where these actions contributed to the mistreatment or detention of the three Canadian men. For example, CSIS sent questions to Syria to be asked of Mr Elmaati and the RCMP sent questions to Syria to be asked of Mr Almalki.¹⁴⁰ The RCMP shared information about Mr Elmaati while he was in Egypt and attempted to interview him,¹⁴¹ and both CSIS and the RCMP were found to have shared information with foreign agencies that indirectly contributed to Mr Nureddin's detention.¹⁴² Commissioner Iacobucci also found that the RCMP had failed to attach caveats to Mr Elmaati's flight itinerary before sharing it with American officials.¹⁴³ Furthermore, Commissioner Iacobucci found CSIS's approach to the labelling of individuals in communications with foreign agencies inadequate and that this inadequate practice put the labelled person at risk.¹⁴⁴

Deficient consular services

The provision of consular services was a particular focus of the Iacobucci inquiry, and one area where Canadian actions were found to be deficient with respect to the help provided to Mr Almalki and Mr Elmaati. It was found that Canadian DFAIT officials did not do enough to locate Mr Elmaati after he was originally detained in Syria nor when he was later transferred to Egypt,¹⁴⁵ nor did they act promptly when learning of Mr Almalki's detention.¹⁴⁶ Furthermore, DFAIT disclosed information collected during consular visits to Mr Elmaati and Mr Almalki to other Canadian officials when it should not have.¹⁴⁷ Commissioner Iacobucci also found that the failure of other Canadian officials, those with the RCMP, CSIS and DFAIT's foreign intelligence branch, to inform DFAIT's consular division that Mr Elmaati had been detained in Syria contributed to the mistreatment of Mr Elmaati.¹⁴⁸

Poor training

As had been revealed in the O'Connor inquiry, the Iacobucci inquiry found that DFAIT consular staff were unable to assess properly whether Mr Elmaati had been mistreated.¹⁴⁹ Moreover, there

¹⁴⁰ Ibid., p. 38, para. 25.

¹⁴¹ Ibid., p. 36, para. 19.

¹⁴² Ibid., p. 39, para. 29.

¹⁴³ Ibid., p. 255, para. 33.

¹⁴⁴ Ibid., p. 352, para. 24.

¹⁴⁵ Ibid., p. 37, para. 20 and p. 133, para. 99.

¹⁴⁶ Ibid., p. 38, para. 26.

¹⁴⁷ Ibid., p. 37, para. 20 and p. 38 para. 26.

¹⁴⁸ Ibid., p. 361, para. 53.

¹⁴⁹ Ibid., p. 37, para. 20.

was no protocol in place for dealing with allegations of torture or policies requiring consular officials to request private meetings with the detained citizen.¹⁵⁰

In relation to CSIS, Commissioner Iacobucci repeated what had been found in the O'Connor inquiry: there was no one within CSIS who was trained in assessing whether certain information or intelligence was the product of torture.¹⁵¹

Furthermore, it was found that the RCMP should have taken into consideration, as directed by internal policy, the human rights record of Syria when providing information to Syrian officials about Mr Almalki. As Commissioner Iacobucci wrote, “[RCMP] Officials should have considered that describing a dual Syrian-Canadian citizen as an ‘imminent threat’ in a communication to Syrian police might expose that individual to the risk of being detained and mistreated in Syria if he were to travel there”.¹⁵² As further illustration of insufficient training and awareness on the part of the RCMP, one RCMP official recalled that when discussing whether or not to send questions to the Syrians to be posed to Mr Almalki, he thought a DFAIT official’s suggestion that sending the questions could put Mr Almalki at risk of torture was “off the wall absurd” and that communicating that concern to the Syrians would be a “slap in the face”.¹⁵³

5.3 From the two inquiries: A summary of the actions of Canadian officials

5.3.1 What Canadian officials were found to have done

The O'Connor and Iacobucci inquiries serve to draw our attention to instances where Canadian officials have played a role; however, that role was ultimately defined by the inquiries into the detention and mistreatment of four Canadian citizens. In summary, between the findings of both inquiries, Canadian officials were found to have contributed to the detention and torture of these men, to have offered deficient consular services and to have breached internal agency protocol. Furthermore, significant problems were found with the status quo pertaining to inter-agency communication and cooperation, training, policy, accountability and oversight, with agencies often acting without sufficient regard to their own policies or reports. It is true that with the exception of the government leaks concerning Mr Arar, the inquiries did not find that officials’ actions had been malicious or necessarily deliberate. Nevertheless, the net effect of the actions of Canadian officials was that the rights and security of Canadian citizens in the most vulnerable of positions were not given full protection.

5.3.2 Harmful cooperation

Of particular note are the instances where the problematic actions of Canadian officials were undertaken in the spirit of cooperation with other states. As discussed above in section 3 on context, the environment in which the actions of the Canadian officials occurred was one familiar to European nations as well as to Canada, and one in which cooperation among agencies moved to the forefront.¹⁵⁴ “There was intense pressure on intelligence and law enforcement agencies, including CSIS and the RCMP, to cooperate and share information with foreign

¹⁵⁰ Ibid., p. 159, para. 214 and p. 165, para. 237.

¹⁵¹ Ibid., p. 127, para. 73.

¹⁵² Ibid., p. 400, para. 14.

¹⁵³ Ibid., p. 224.

¹⁵⁴ Ibid., p. 34; see also the O'Connor Policy Report (2006c), p. 55.

agencies, particularly those of the United States”, wrote Commissioner Iacobucci.¹⁵⁵ It is within this context that established policies fell by the wayside and some existing practices proved severely deficient.¹⁵⁶

At times the preference for cooperation over a strenuous safeguarding of the rights of the Canadian detainees is stark: for example, the RCMP did not consider the issue of whether sharing Mr Elmaati’s itinerary would cause him to be detained, because at the time the primary concern of the RCMP was the threat to the US.¹⁵⁷ Another instance of the careful way in which cooperation was facilitated, to the proven detriment of the Canadian citizens involved is in the submission of questions to the Syrian authorities. The practice of sending questions to a foreign agency for use in the questioning of Canadian citizens held abroad is an example of cooperation and one that – in different circumstances – may not be cause for criticism.¹⁵⁸

In these circumstances, however, the provision of questions to the Syrian authorities contributed to the mistreatment of Mr Almalki and Mr Elmaati, and sent the wrong signal to Syrian officials with respect to Mr Arar. This is a clear case of cooperation being preferred above the need to ensure the security of Canadian citizens held abroad. In January 2003, when both Mr Arar and Mr Almalki were held in Syria, Ambassador Pillerella passed on to Syrian intelligence officials, through Consul Leo Martel, questions provided by the RCMP to be asked of Mr Almalki. He decided that it was appropriate to send these questions given that he did not think the Syrians would mistreat “another” Canadian and given the spirit of “extraordinary unprecedented cooperation” that the Syrians had displayed with respect to Mr Arar.¹⁵⁹ Yet, Commissioner Iacobucci found that the sending of these questions had contributed indirectly to the mistreatment of Mr Almalki in Syria.¹⁶⁰ Canadian officials were aware of the risk that this created for Mr Almalki,¹⁶¹ and as Commissioner Iacobucci writes, “where officials determine that a proposed action is likely to result in a particular outcome, and that outcome materialises, I believe it is reasonable to infer, in the absence of evidence to the contrary, that the action resulted, at least indirectly, in the outcome”.¹⁶²

Moreover, the provision of these questions for Mr Almalki hindered Mr Arar’s much sought-after release. Although the Canadian ambassador was found by Commissioner O’Connor to have exercised good judgment in not wanting to provoke Syrian officials, who were providing “unprecedented” consular access to Mr Arar,¹⁶³ the provision of questions for Mr Almalki went

¹⁵⁵ Iacobucci (2008), p. 34.

¹⁵⁶ For instance, as was discovered in the inquiries, there were shifts in practices after 9/11 – sometimes formal, sometimes not – at agencies such as the RCMP and CSIS. The inquiries revealed an understanding among some RCMP employees working on national security issues that the usual precautions pertaining to the dissemination of information were no longer applicable post-9/11. A DFAIT employee and case management officer with the Consular Affairs Bureau in the Middle East testified at the Iacobucci inquiry that whereas before 9/11 information gathered from individuals at consular meetings would be kept confidential, after 9/11 this information was more widely disseminated within DFAIT (*ibid.*, pp. 92–93 para. 113 and p. 82, para. 77).

¹⁵⁷ *Ibid.*, p. 123 para. 58.

¹⁵⁸ This could be the case if, for instance, there are not concerns about the lawful nature of the detention, the risk of mistreatment or respect for fundamental human rights of the detainee.

¹⁵⁹ O’Connor Analysis and Recommendations (2006b), pp. 211–12.

¹⁶⁰ Iacobucci (2008), p. 411.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ O’Connor Analysis and Recommendations (2006b), p. 43.

beyond what good judgment would have necessitated and could have led the Syrians to believe that the RCMP considered Mr Arar to be a serious threat.¹⁶⁴

The practice of sending questions to foreign agencies also had a negative effect on Mr Elmaati. In this case, CSIS sent questions to a foreign agency that were then to be sent on to Syria and asked of Mr Elmaati. CSIS's explanation for this course of action was that they wanted to test the accuracy of the information contained in the alleged confession Mr Elmaati had made while in Syrian custody, but Commissioner Iacobucci found that this action contributed to the mistreatment of Mr Elmaati while in Syria. He writes that "it is reasonable to infer that Mr Elmaati's mistreatment by Syrian officials resulted indirectly, at least in part, from sending questions to be asked of Mr Elmaati by Syrian officials".¹⁶⁵ They would have likely viewed the receipt of questions from the Canadians as a 'green light' to continue their treatment and detention of Mr Elmaati, and thus the actions of Canadian official amounted to deficient conduct.

The sending of questions abroad seems in the same problematic vein as the actions of some European officials (specifically from the UK and Germany) as well as those from Turkey who visited detainees in questionable detention situations to conduct interrogations.¹⁶⁶ Florian Geyer condemns this practice as "hardly legal or justifiable", and writes that the only acceptable role officials should play in visiting detainees is to provide assistance or to help build their case against their unlawful detention or extraordinary rendition.¹⁶⁷

5.3.3 Consular services

The provision of consular services should be flagged as a state obligation necessarily implicated in allegations of mistreatment of a state's citizens abroad. The provision of consular services is an important tool available to a state to ensure the rights of its citizens are protected, and fits alongside the obligations related to the prevention of and protection from torture. The provision of proper consular services can be complicated by dual citizenship, and although DFAIT's policy is to not provide consular services to citizens "in the country of their nationality if that country does not recognize the prisoner's Canadian citizenship", it was also acknowledged by Canadian officials that dual nationality should not affect the "intensity of activity" that the case of a dual citizen receives.¹⁶⁸

The provision of consular services is further complicated by the necessary reliance on the judgment of consular officials who work in what are potentially extremely sensitive and serious situations. During the O'Connor inquiry, one Canadian official stated that the "extraordinary" consular access Canadian officials had to Mr Arar in Syria could be attributed at least partly to the good working relationship between Ambassador Pillarella and the head of Syrian intelligence, General Hassan Khalil.¹⁶⁹ Still, it was also in this "extraordinary" cooperative context that Ambassador Pillarella passed along the RCMP questions to be asked of Mr Almalki.

¹⁶⁴ Commissioner O'Connor concluded that the provision of the questions for Mr Almalki "had the potential to create an impression in the Syrians' minds of mixed messages from Canada regarding what should happen with respect to Mr Arar", since a link between Mr Almalki and Mr Arar was known, and that "there was a risk that Syrian intelligence officials would conclude that the RCMP considered Mr Arar to be a serious threat" (ibid., pp. 211–12).

¹⁶⁵ Iacobucci (2008), p. 363.

¹⁶⁶ Geyer (2007), p. 2.

¹⁶⁷ Ibid., p. 10.

¹⁶⁸ Iacobucci (2008), p. 91, para. 108.

¹⁶⁹ Ibid., p. 215, paras. 91–92.

In addition, it is imperative that states follow up when other nations have breached their obligations concerning consular assistance. For instance, in the case of Mr Arar, it was found that American officials might not have fulfilled their obligations under the Vienna Convention on Consular Services by failing to contact the Canadian consulate in New York after Mr Arar had requested consular assistance.¹⁷⁰ A Canadian official testifying before the O'Connor inquiry indicated that the obligation to inform a detainee of his right to consular services and to facilitate such services without delay has been a "problem area" when dealing with American officials since 9/11.¹⁷¹

5.3.4 The human rights duality in anti-terrorism practices

Both inquiries recognised that there is a need to better balance the necessary inter-agency and inter-state cooperation with the requirements of Canadian law and fundamental values. In other words, both inquiries reveal a failure on the part of Canadian officials to respect the dual human rights aspects as required in Canada's anti-terrorism response.¹⁷² On the one hand, information sharing is an essential part of the investigative process.¹⁷³ In explaining the importance of information sharing between agencies and countries, O'Connor wrote that information sharing has become more important since 9/11, and that there is no room for "stand-alone" or isolated investigations into terrorist activities.¹⁷⁴

At the same time, it is also clear that policy-makers need to be cognisant of the reality that information shared by Canada can have an effect beyond Canada's control and of the limits of Canadian law to ensure that the information is used in a manner consistent with the Constitution.¹⁷⁵ Diplomatic assurances or those requested by individual agencies have proven time and again to be neither effective nor sufficient: Mr Arar's torture in Syria, for instance, occurred "despite an assurance to the contrary".¹⁷⁶ Commissioner O'Connor looked to the decision of the Supreme Court of Canada in the *Suresh* case, where the court "emphasized that while powerful tools are needed to effectively meet the threat of terrorism, it would be too great a price if terrorism were defeated at the cost of sacrificing our commitment to the values that are fundamental to our society – liberty, the rule of law and the principles of fundamental justice".¹⁷⁷

¹⁷⁰ O'Connor Analysis and Recommendations (2006b), p. 172.

¹⁷¹ See the O'Connor Factual Report (2006a), p. 219, footnote 303.

¹⁷² Cotler (2007).

¹⁷³ Iacobucci (2008), p. 253, para. 24.

¹⁷⁴ O'Connor Analysis and Recommendations (2006b), p. 102; O'Connor Policy Report (2006c), p. 431.

¹⁷⁵ O'Connor Policy Report (2006c), p. 431.

¹⁷⁶ See for instance Iacobucci (2008), p. 445, para. 31; see also European Parliament, *Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI))*, Doc. No. A6-0020/2007, Temporary Committee on the alleged use of European countries by the CIS for the transportation and illegal detention of prisoners, Rapporteur: Giovanni Claudio Fava, 30 January 2007, p. 4, para. G (henceforth 'Fava report'); and O'Connor Analysis and Recommendations (2006b), p. 176, footnote 19.

¹⁷⁷ See the O'Connor Policy Report (2006c), pp. 464–65. The *Suresh* decision is not without controversy, for its failure to prohibit deportation to torture in all circumstances – see Rayner Thwaites, "Removable aliens?: Canada's position on indefinite immigration detention in comparative perspective", 2009 (forthcoming).

6. Investigations

6.1 European investigations

Before looking at the commission of inquiry model that Canada used with the O'Connor and Iacobucci inquiries, it is useful to keep in mind some of the ways in which European governments have investigated the actions of their officials in relation to the mistreatment of European citizens. Since 2005, when the news of possible secret detention facilities in Europe became widely publicised, there have been extensive investigations conducted by non-state bodies. The Council of Europe's Committee on Legal Affairs and Human Rights appointed Dick Marty as rapporteur on this issue, and his report was released on 12 June 2006. The European Parliament established a Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, whose rapporteur Giovanni Claudio Fava released his report in January 2007 (the 'Fava report'). Both reports found that several European governments cooperated with CIA rendition flights and secret detention facilities. Amnesty International has also been highly critical of the lack of action – and the complicity – on the part of European nations concerning the unlawful detention and torture of citizens in foreign countries.¹⁷⁸

6.1.1 Cases

As the two reports make clear, European countries appear to have cooperated with rendition flights,¹⁷⁹ hosted secret detention facilities¹⁸⁰ and seen their citizens or residents detained and mistreated abroad.¹⁸¹ Some of the more notorious cases were highlighted in the two reports.

For instance, Abu Omar, a man who had been granted asylum by Italy, was abducted in Milan with the help of Italian officials and transferred to Egypt for detention and torture. Charges have been levelled against Italian and American officials as a result.¹⁸² Italian citizen Abou Elkassim Britel was also detained abroad, but no charges resulted from the Italian investigation into this case.¹⁸³ The Fava report notes that at least four UK residents were rendered to facilities including Guantanamo Bay, and in at least two instances the detention may have resulted from the provision of false information by UK officials.¹⁸⁴ The Fava report also commented on the cases of German citizens Khaled El-Masri and Mohammed Zammar, as well as German residents Abdel-Halim Khafagy and Murat Kurnaz, and notes evidence of German government involvement in the detention and mistreatment of these men.¹⁸⁵

Two men applying for asylum in Sweden were expelled from the country with only diplomatic assurances that the men would be treated in accordance with international law. Sweden's conduct in this affair has been criticised by the UN Human Rights Committee, which found that Sweden had violated the UN Convention against Torture.¹⁸⁶ Furthermore, in Bosnia and

¹⁷⁸ Amnesty International, *State of Denial: Europe's role in Rendition and Secret Detention*, London: Amnesty International Publications, 2008(b).

¹⁷⁹ These include, for example, Ireland, Switzerland, Spain, Portugal, Greece, Cyprus, Belgium and the Former Yugoslav Republic of Macedonia.

¹⁸⁰ For instance, Poland and Romania did so – see the Fava report (European Parliament, 2007), para. 149.

¹⁸¹ Examples here include Sweden, Germany, Italy, the UK, Turkey, Bosnia and Herzegovina.

¹⁸² See the Fava report (European Parliament, 2007), paras. 50–51.

¹⁸³ *Ibid.*, para. 62.

¹⁸⁴ *Ibid.*, paras. 69–70.

¹⁸⁵ *Ibid.*, paras. 82–92.

¹⁸⁶ *Ibid.*, para. 100.

Herzegovina, six men (four of whom were citizens and two of whom were residents) became victims of extraordinary rendition and they were eventually flown to detention in Guantanamo Bay.¹⁸⁷

6.1.2 Legal obligations

While finalising his report, Mr Marty requested that the European Commission for Democracy through Law (the ‘Venice Commission’) provide his committee with an opinion on the legality of secret detention centres in European nations and the obligations European nations have with respect to the use of their jurisdiction for the transport of detainees. In their detailed opinion, the Venice Commission advised among other things that cooperation with secret detention facilities engages the responsibilities of European nations under the European Convention on Human Rights. Furthermore, the transfer of prisoners through a European nation’s territory or airspace triggers that nation’s obligation to ensure that the detainee does not face the risk of torture and to prevent possible mistreatment.¹⁸⁸

Moreover, individuals such as Thomas Hammarberg (the Council of Europe’s commissioner for human rights) and Mr Fava have stressed that European nations have an obligation, at a minimum, to investigate their potential human rights violations.¹⁸⁹ Mr Hammarberg has called on European nations to fulfil their obligations under the European Convention on Human Rights and to ensure that “the full truth about European cooperation with the secret detention and unlawful rendition programmes” is exposed.¹⁹⁰

6.1.3 Investigations

For the most part, the investigations that have taken place in European countries have focused on allegations of cooperation with CIA-led rendition and unlawful detention practices. Investigations in various forms have been started and some completed, although there has been much criticism about the way in which several European states have used claims of

¹⁸⁷ Ibid., paras. 141–42.

¹⁸⁸ Council of Europe, European Commission for Democracy through Law (Venice Commission), Opinion on the International Legal Obligations of the Council of Europe Member States in Respect of Secret Detention Facilities and State Transport of Prisoners, Opinion No. 363/2005, Council of Europe, Strasbourg, 17 March 2006, para. 159(b)(h) and (i) (retrieved from [http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)009-e.asp](http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp)).

¹⁸⁹ This is an obligation contained in the European Convention on Human Rights as well as numerous other sources. The International Commission of Jurists cites the following sources for the assertion that international obligations require thorough investigation of credible human rights violations: Art. 12 CAT; Art. 2(3) ICCPR; HRC General Comment No. 6 on Art. 6 ICCPR, HRI/GEN/1/Rev. para.4; *Rodriguez v Uruguay*, CCPR/C/51/D/322/1988; *Almeida de Quinteros v Uruguay*, CCPR/C/19/D/1981; ECtHR, *Aksoy v Turkey* (1997) 23 EHRR 553; *Ilhan v Turkey*, Application No. 22277/93, 27 June 2000. See International Commission of Jurists, “ICJ Submission to the Universal Periodic Review of the Former Yugoslav Republic of Macedonia”, ICJ, Geneva, November 2008(b), p. 5, footnote 27 (retrieved from <http://www.icj.org/IMG/MacedoniaUPRfinal.pdf>).

¹⁹⁰ Thomas Hammarberg, *Human Rights in Europe: No Grounds for Complacency, Viewpoints by the Council of Europe Commissioner for Human Rights*, Council of Europe, Strasbourg, April 2008, pp. 37–40 (retrieved from http://www.coe.int/t/commissioner/Viewpoints/publication_EN.pdf); see also the Fava report (European Parliament, 2007), para. 186; and Tarik Abdel-Monem, “Precedent of the European Convention on Human Rights to the CIA’s High Value Detainees Program In and Out of Europe”, (2007) 31:1 Suffolk Transnational L Rev. 46–73 at 72.

confidentiality for national security to hamper investigations.¹⁹¹ In addition, there has been very little acknowledgment of government involvement in the rendition programme.¹⁹²

Romania established an inquiry committee into the alleged secret detention facilities on its territory, an inquiry that has been criticised for the narrow scope of its investigation and for the fact that the final report was almost entirely private.¹⁹³ What is more, the report “categorically” denied the possibility of secret detention facilities in Romania, a conclusion that Mr Fava could not agree with given that no definitive evidence has been put forward to contradict the evidence of such facilities.¹⁹⁴ Despite the finding of Mr Marty that CIA detention facilities have existed in both Romania and Poland,¹⁹⁵ Poland maintains that such allegations are false and in any case have been adequately investigated. Still, as the International Commission of Jurists argues, the Polish government has not made the report of its investigation public and has not addressed the allegations that it permitted CIA rendition flights to stop in its territory.¹⁹⁶

In Sweden, the Parliamentary Ombudsman investigated the cases of Ahmed Agiza and Mohammed El Zari. Mr Agiza has been awarded compensation, although the Swedish government has not accepted responsibility for the suffering Mr Agiza endured. The Swedish government’s handling of this investigation has been criticised by the UN Committee against Torture¹⁹⁷ and the Human Rights Committee in *Alzery v. Sweden*.¹⁹⁸ The International Commission of Jurists was also sharply critical of the Swedish government for not instituting criminal investigations.¹⁹⁹

¹⁹¹ See the *State of Denial* report by Amnesty International (2008b), p. 26. Dick Marty was recently quoted in a Council of Europe press release (2008):

As in the US and Germany, the doctrine of ‘state secrecy’ has been invoked by the Italian government to try and block the judicial procedures aiming to establish the truth about serious human rights violations committed under its responsibility. This is unacceptable and unworthy of a state governed by law. Let justice take its course!...State secrecy is not being invoked to protect secrets – because the facts in question are largely known – but rather to protect the civil servants and politicians responsible for these abuses.

¹⁹² See the European Parliament Resolution of 6 July 2006 on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, 2006/2027(INI), P6_TA(2006)0316, Strasbourg, para. 143 (retrieved from <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0316+0+DOC+XML+V0//EN>).

¹⁹³ See the Fava report (European Parliament, 2007), para. 159.

¹⁹⁴ *Ibid.*, at para. 164.

¹⁹⁵ Marty (2007), “Summary”, para. 11.

¹⁹⁶ The International Commission of Jurists deplored the failure of a recent Human Rights Council working group to recommend that Poland establish an independent inquiry into these alleged human rights violations (International Commission of Jurists, “Universal Periodic Review of Poland: ICJ urges complete response to questions on secret detentions and on renditions of terrorism suspects”, Press Release, ICJ, Geneva, 17 April 2008(d) (retrieved from <http://www.icj.org/IMG/ICJ-PR-Poland-UPR-final.pdf>)). See also the Fava report (European Parliament, 2007), paras. 167 and 176.

¹⁹⁷ See Swedish Helsinki Committee for Human Rights (SHC.SE), “Compensation for Ahmed Agiza – But Only Part Way”, Press Release, SHC.SE, Stockholm, 6 October 2008 (retrieved from <http://www.shc.se/en/4/110/1324/>); see also Hammarberg (2008).

¹⁹⁸ International Commission of Jurists, “Submission to the Committee against Torture on the Fifth Periodic Report of Sweden”, ICJ, Geneva, 2008(c) (retrieved from http://www.icj.org/IMG/CAT_sweden.pdf).

¹⁹⁹ *Ibid.*

In Italy, there are ongoing prosecutions of some of the individuals involved in the kidnapping and rendition of Abu Omar, including over 20 Americans.²⁰⁰ Mr Marty called the investigation into the events surrounding Mr Omar's abduction a "remarkably competent and independent investigation".²⁰¹ This prosecution remains one of the few that has occurred in nations alleged to have cooperated in the mistreatment of their citizens.²⁰² Even so, the Italian prosecution was postponed in early December 2008 to allow the Constitutional Court to rule on the government's bid to prevent secret agents from testifying.²⁰³

A German parliamentary committee of inquiry is currently investigating Germany's role in the cases of rendition and mistreatment of Mr Kurnaz, Mr Zammar and Mr Masri. The effectiveness of the inquiry has been questioned, however, after the invocation of "state secrecy" by the government in order to limit the material available to the inquiry.²⁰⁴ There have also been investigations launched by German prosecutors and arrest warrants issued for CIA officials involved in the Masri case,²⁰⁵ but the prosecution has "run into the sand", in the words of Mr Marty, and the extradition of those under warrant is not being sought.²⁰⁶

In Spain, it has been reported that in 2002 the government granted permission to the US authorities to use Spain for the stopovers of flights taking prisoners to Cuba, ostensibly in cases of emergency only. The current government claims it had no knowledge of this practice, and said it would launch an internal investigation.²⁰⁷ This is in addition to judicial inquiries underway, such as the one launched by police in Majorca in 2005.²⁰⁸

Both Macedonia and the UK also used investigatory models within their parliamentary systems: a Macedonian parliamentary committee examined the Macedonian government's involvement in the rendition of Mr Masri and concluded that security services had acted within their authority throughout. The International Commission of Jurists has nonetheless criticised the government's

²⁰⁰ The request for extradition to Italy of the American suspects has been refused by the US. See Louis Fischer, "Extraordinary Rendition: The Price of Secrecy", (2008) 57 *American University L Rev.* 1405 at 1435; see also Marty (2007), para. 316.

²⁰¹ Marty (2006), para. 231.

²⁰² See the joint letter by Neve et al. (2008), *supra* note 56; see also the *State of Denial* report by Amnesty International (2008b), p. 27.

²⁰³ See "Italy: CIA Rendition Trial Postponed Pending Secrecy Ruling", *adnkronos international*, 3 December 2008 (retrieved from <http://www.adnkronos.com/AKI/English/Security/?id=3.0.2779504103>). Previous difficulties during the prosecution, caused by government reluctance, are noted by Dick Marty in Marty (2006), para. 231.

²⁰⁴ Marty (2007), para. 310.

²⁰⁵ See Craig Whitlock, "Europeans Probe Secret CIA Flights", *washingtonpost.com*, 17 November 2005 (retrieved from <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/16/AR2005111602198.html>); see also Fischer (2008), p. 1435.

²⁰⁶ See the Council of Europe (2008) press release.

²⁰⁷ See Statewatch, "Damning evidence surfaces of Aznar government collusion in Guantánamo flights", Statewatch Observatory on "Rendition", Statewatch, London, 4 December 2008 (retrieved from <http://www.statewatch.org/rendition/rendition.html>); see also Fiona Govan, "Spain 'Authorized' CIA rendition flights", *telegraph.co.uk*, 1 December 2008 (retrieved from <http://www.telegraph.co.uk/news/worldnews/europe/spain/3538908/Spain-authorized-CIA-rendition-flights.html>).

²⁰⁸ See Stephen Grey and Renwick McLean, "Spain Examines 'Rendition' Flights", *International Herald Tribune*, 14 November 2005 (retrieved from <http://www.iht.com/articles/2005/11/14/news/spain.php>); see also International Commission of Jurists, "Human Rights Committee Consideration of the 5th Periodic Report of Spain International Commission of Jurists Submission on list of issues", ICJ, Geneva, 2008(a) (retrieved from <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/ICJSpain93.pdf>).

failure to initiate a truly independent and thorough review of the matter, and agreed with the finding of the Marty report that the parliamentary investigation had been inadequate.²⁰⁹

In the UK, an All Party Parliamentary Group on Extraordinary Rendition and the Intelligence and Security Committee have investigated aspects of the UK government's involvement in extraordinary renditions. The British government admitted in early 2008 that it had allowed CIA rendition flights to pass through UK jurisdictions, despite multiple previous denials.²¹⁰ Subsequently, the 2007 *Human Rights Annual Report* of the House of Commons Foreign Affairs Committee has recommended that the government demand more answers from the US on the details of these flights.²¹¹

6.2 The Canadian commissions of inquiry

With the European context in mind, we can now turn to the more technical details of the two Canadian inquiries. These two inquiries and the commission of inquiry model in general provide much opportunity for debate and discussion concerning the virtues of and problems with commissions of inquiry. This section attempts to survey of some of the complex issues that can arise in investigations like those carried out by Commissioners O'Connor and Iacobucci, especially when issues of national security confidentiality are present.

Despite different mandates and structures, both the O'Connor and Iacobucci inquiries were commissions of inquiry. Both were launched by the Canadian government and both were empowered to conduct independent, thorough investigations. Macklin (2008) has described inquiries as lying "somewhere between the internal government investigation and the trial".²¹² Commissions of inquiry are investigative tools that have often been used in Canada: including provincial commissions, there have been over 400 since confederation in 1867.²¹³ Commissions are appointed through a cabinet order and report to the government. They can take many different forms:²¹⁴ they may have a single or multiple commissioners; they may be public or private; they may have a mandate to find facts, make recommendations or both; and given the flexibility commissioners typically have in establishing procedures and rules, inquiries can generally be set up to suit to the task at hand. In addition, based on the legislative framework surrounding inquiries in Canada, commissioners have the power to compel participation and the turning over of documentation.²¹⁵

²⁰⁹ International Commission of Jurists (2008b).

²¹⁰ See "Gulp! Britain backtracks, admits US rendition flights", *neurope.eu*, 25 February 2008 (retrieved from <http://www.neurope.eu/articles/83093.php>).

²¹¹ UK Parliament, House of Commons Foreign Affairs Committee, *Ninth Report: Human Rights Annual Report 2007*, Session 2007–08, London, 20 July 2008, p. 23 para. 47 (retrieved from <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmfaff/533/53302.htm>).

²¹² Macklin (2008), p. 21.

²¹³ John H. Gomery, "The Pros and Cons of Commissions of Inquiry", (2006) McGill LJ 783 at 786–87.

²¹⁴ Gus Van Harten, "Truth before Punishment: A Defence of Public Inquiries", (2003) 29 Queen's LJ 242 at 246.

²¹⁵ The speech written by O'Connor and Kristjanson (2007) provides an excellent overview of many of the issues discussed here. See also Macklin (2008), p. 21 and Gomery (2006), p. 786. In addition, see for example, s. 4 of the Inquiries Act, R.S., 1985, c. I-11. These powers can be limited by national security concerns, in the terms of reference and through s. 38 of the Canada Evidence Act, R.S., 1985, c. C-5.

6.2.1 Benefits

The experiences of the O'Connor and Iacobucci inquiries illustrate some of the advantages of using the inquiry system. First, inquiries can be more flexible in structure than a trial, which can be helpful in a number of respects.²¹⁶ For instance, inquiries may proceed in instances where trials may not get off the ground: the lack of information from the US, Egypt, Syria and Malaysia constrained the findings in the Iacobucci inquiry, but the commissioner was not hamstrung by this lack of cooperation and was still able to proceed and make important findings.²¹⁷ Furthermore, this flexibility allows commissioners to adapt certain procedures as required by the case at hand. For instance, as Macklin (2008) notes, lawyers working for the O'Connor inquiry were entrusted with the job of testing the evidence given by the government at *in camera* hearings where Mr Arar and his counsel were not present.²¹⁸ Without this cross-examination, Commissioner O'Connor states that he would not have been able to report with confidence.²¹⁹

Second, inquiries are an opportunity to benefit from the experience of many talented individuals. To begin with, experienced judges – sitting or retired – can be used as commissioners. As Roach (2008) notes, the contribution made to the review process by judges in Canada is a noteworthy aspect of the Canadian experience.²²⁰ Both Justice O'Connor and Justice Iacobucci are highly respected individuals, which helps inspire confidence and authority in their respective inquiries. Justice O'Connor had previously acted as a commissioner on another high profile inquiry, and he has been praised for his “skill, wisdom and tact”.²²¹ Nigel Marshman, former commission counsel on the O'Connor inquiry, emphasises that the courage and persistence with which Commissioner O'Connor handled the difficult claims of national security confidentiality was essential to the effectiveness of that inquiry.²²²

In addition, inquiries are able to draw on the expertise of many experts and as such have made significant contributions of important original, primary research that “adds to both scholarship and public enlightenment”.²²³ This aspect was particularly evident in the O'Connor inquiry, where the policy review included a survey of national security history and competencies in Canada.²²⁴ The involvement of highly regarded and experienced individuals also lends

²¹⁶ O'Connor and Kristjanson (2007).

²¹⁷ Iacobucci (2008), pp. 339–40.

²¹⁸ See Macklin (2008), pp. 25 and 30; see also the O'Connor Analysis and Recommendations (2006b), pp. 291–93. As discussed further below, however, the potential flexibility allowed to commissions of inquiry goes only as far as the commission's governing mandate allows. All possible flexibility can be of little help in relation to certain national security confidentiality concerns. Nor is this a one-size-fits-all technique, as lawyers for Mr Almalki, Mr Elmaati and Mr Nureddin demonstrated at the Iacobucci inquiry (October Submission of the Applicants, 2007, paras. 11–12).

²¹⁹ “When I reflect on the nature of the issues raised by the mandate for the Inquiry and the type of evidence I heard, I recognize that I could not have reported with confidence if the witnesses heard *in camera* had not been cross-examined” (O'Connor Analysis and Recommendations, 2006b, p. 292).

²²⁰ Roach (2007), p. 65.

²²¹ Gomery (2006), p. 793.

²²² Derived from the interview with Nigel Marshman, *supra* note 93.

²²³ Whitaker (2008), p. 28.

²²⁴ For example, a list of experts used by Iacobucci includes

Professor Peter Burns of the University of British Columbia, the former Chair of the United Nations Committee against Torture, who provided advice concerning matters relating to mistreatment and possible torture; Paul Heinbecker, former Canadian Ambassador and Permanent Representative to the United Nations and former Ambassador to Germany, who

credibility to the process. For instance, Commissioner O'Connor retained Reid Morden, former director of CSIS and a top public servant with the Department of Foreign Affairs to assist in decisions relating to the public disclosure of information.²²⁵ Moreover, during inquiries, many different parties may become participants or interveners and crucially receive funding to facilitate their participation.²²⁶

Third, if conducted and structured properly, inquiries can minimise the duplication of work on related subjects. For instance, Commissioner Iacobucci was able to use the evidence and findings of the O'Connor inquiry where appropriate. The Iacobucci inquiry also benefited from some of the guidance created on the issue of national security confidentiality through the litigation that occurred at the end of the O'Connor inquiry. The government had wanted to redact certain portions of Commissioner O'Connor's reports for national security reasons, a decision that Commissioner O'Connor disagreed with.²²⁷ The dispute was resolved in Federal Court, and the public judgment contained an analysis of the test to be employed in such a determination under the Canada Evidence Act, which Commissioner Iacobucci took under advisement in his own determinations.²²⁸ Furthermore, the Iacobucci and O'Connor inquiries can be placed alongside the Major inquiry, the latter having examined the circumstances surrounding the bombing of Air India flight 182 (which killed all 392 onboard) and made findings and recommendations pertaining to law enforcement and intelligence gathering in Canada.²²⁹ All three inquiries dealt with security issues, but in different ways according to their mandates. As Whitaker (2008) writes, the Iacobucci inquiry had a limited scope, the Air India inquiry focused on events that occurred over 20 years ago and the O'Connor inquiry "point[ed] one way forward".²³⁰ Yet these three inquiries, in addition to the review and studies done in the past couple of years relating specifically to the RCMP,²³¹ provide any government with a will to act with a wealth of information on Canada's national security practices, past and present.

Finally, a thorough, legitimate, fair investigation can go a long way to restoring public faith in government and its institutions. As asserted above in section 4 on costs, the reputation of the

is the Director of the Laurier Centre for Global Relations, and Distinguished Fellow, International Relations, at the independent research Centre for International Governance Innovation, and who provided advice on certain DFAIT- and national security-related matters; Raymond Protti, a former Director of the Canadian Security Intelligence Service, who provided advice on certain national security-related matters; and Dr. Lisa Ramshaw of the Centre for Addiction and Mental Health in Toronto, a forensic psychiatrist who provided advice concerning certain medical information that the Inquiry obtained relating to Mr Almalki, Mr Elmaati and Mr Nureddin. (Iacobucci, 2008, p. 51, para. 1)

See also the discussion in Whitaker (2008), p. 27.

²²⁵ The author would like to thank Nigel Marshman for drawing attention to this point (in the interview with Nigel Marshman, *supra* note 93). See also the O'Connor Analysis and Recommendations (2006b), p. 301.

²²⁶ See Iacobucci (2008), p. 30 para. 5 and pp. 51–52, para. 3 (for distinctions among interveners, those with a concern about the subject matter of the inquiry and whose participation could provide assistance to the inquiry and participants, and those with substantial and direct interest in the content of the inquiry).

²²⁷ The dispute was over approximately 1,500 words (*Canada (Attorney General) v. Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar*, 2007 FC 766 at para. 13).

²²⁸ Iacobucci (2008), p. 59, para. 36.

²²⁹ For more information, see the website for the Commission of Inquiry into the Investigation of the Bombing of Air India flight 182 (<http://www.majorcomm.ca>).

²³⁰ Whitaker (2008), p. 38.

²³¹ See Public Safety Canada (2008a), *supra* note 65 and the Task Force on Governance and Cultural Change in the RCMP (2007), *supra* note 66.

country and its institutions has suffered as a result of what was learned about the treatment of Mr Arar, Mr Almalki, Mr Elmaati and Mr Nureddin. When commissions of inquiry are conducted in public, they are, as Macklin (2008) writes, both a “means and end”; they advance “the principles that justice must not only be done, but must be *seen* to be done”.²³² Inquiries that are not conducted in public and which release more limited public findings run the risk of not fulfilling this important function.²³³

6.2.2 Challenges

First, one of the largest challenges faced by the two inquiries pertains to the difficulties posed by claims of national security confidentiality. The challenge of dealing with evidence that the government insists should be assessed in private is one about which Macklin (2008) has written “besets virtually all post-9/11 legal and quasi-legal processes involving issues of terrorism and national security”.²³⁴ Although the Canadian inquiries demonstrate that national security concerns should not be an excuse for declining to investigate,²³⁵ both inquiries have grappled with the same challenges faced by many European investigations in determining how to fulfil their mandates in the face of concerns about confidentiality for national security.²³⁶

How governments choose to deal with the problem of sensitive information in the inquiry context has an effect on the overall efficacy of the inquiry itself. In his first report, Commissioner O’Connor recounted his experience in the Walkerton inquiry, and stated that in order for an inquiry to be effective, it should possess several essential qualities, including publicity and transparency.²³⁷ Yet, during inquiries where concerns about national security confidentiality are a reality (which can lead to *in camera* meetings, redacted reports or predominantly private proceedings), it becomes especially difficult – if not impossible – to ensure these characteristics are present.

Both inquiries developed practices and procedures to help them deal with evidence that the government insisted be kept secret. Commissioner O’Connor released two versions of the factual report, but the one released to the public – even before the litigation on national security claims – contained over 99% of the information contained in the confidential report.²³⁸ He gave extensive consideration to the issue of national security claims, and Rules of Procedure and Practice were developed for dealing with evidence over which the government claimed national security confidentiality.²³⁹ As was mentioned, Commission counsel was used for cross-examinations during *in camera* meetings, which Commissioner O’Connor writes assists in addressing some of

²³² Derived from Macklin (2008), p. 21 and also the interview with Nigel Marshman, *supra* note 93.

²³³ On this point, we can easily contrast the public nature of the O’Connor inquiry with the internal nature of the Iacobucci inquiry.

²³⁴ More specifically, Macklin notes that the challenge is as follows: “[H]ow can one fairly assess evidence divulged *in camera* that is not disclosed to the person most affected or subject to cross-examination by counsel for that person?” (Macklin, 2008, p. 24).

²³⁵ Marty (2007), para. 329.

²³⁶ For instance, in Germany and Italy – see Marty (2007), para. 5. The Fava report was also explicit in its recommendation that the results of government investigations should be made public (European Parliament, 2007, para. 185).

²³⁷ See Iacobucci (2008), pp. 334–35, paras. 6–7; see also the O’Connor Analysis and Recommendations (2006b), p. 282.

²³⁸ See the case *Canada (Attorney General) v. Commission of Inquiry*, *supra* note 227, para. 13.

²³⁹ *Ibid.*, paras. 10–11 and 27. This is the public version of the judgment, which is separate from an *ex parte* (*in camera*) decision that applied the principles enunciated in the public judgment to the facts of the case.

the “understandable” concerns of affected individuals and the public about the use of *in camera* meetings.²⁴⁰ Under the rules, Commissioner O’Connor also appointed an *amicus curiae* to test the government’s assertions of national security confidentiality.²⁴¹ Still, very telling of the difficulties presented by the claims of national security confidentiality and the hindrance these can cause was Commissioner O’Connor’s recommendation that the cases of Mr Almalki, Mr Elmaati and Mr Nureddin be examined, but that the required inquiry be internal rather than public.²⁴²

The Iacobucci inquiry has been the recipient of some harsh criticism in relation to the way it handled issues of national security confidentiality. Rules of Procedure and Practice were adopted,²⁴³ and two reports were released – one for the government and one for public disclosure that has approximately 20% fewer words.²⁴⁴ The Iacobucci inquiry was intended to be an internal inquiry, however, and so from its inception the public and participants were less informed of the proceedings and testimony than had been the case in the public O’Connor inquiry. Commissioner Iacobucci was specifically directed in the terms of reference to “take all steps necessary to ensure that the inquiry is conducted in private” except where public hearings were required for the fulfilment of his mandate.²⁴⁵ The British Columbia Civil Liberties Association was harshly critical of the predominantly private proceedings, believing that a secret process is fundamentally “at odds” with the “truth-seeking function of public inquiries”.²⁴⁶ The British Columbia Civil Liberties Association ultimately withdrew from the inquiry, citing its concern that continued participation as an intervener would contribute to the establishment of a “dangerous precedent” of closed-door inquiries.²⁴⁷

Moreover, counsel for Mr Almalki, Mr Elmaati Mr Nureddin and several interveners fundamentally disagreed with what they argued was an over-restrictive interpretation of the mandate by the Iacobucci inquiry.²⁴⁸ Indeed, one of the consequences of the restrictive approach of an ‘internal’ inquiry is that the three men ostensibly at the centre of the inquiries were greatly limited in their ability to participate. They argued that their ability to meet with the Commission counsel who would be questioning witnesses *in camera* – a process that was used in the O’Connor inquiry – was of little use to them, given the real lack of information available on these witnesses.²⁴⁹ This is a problem familiar to some European states, and Amnesty

²⁴⁰ O’Connor Analysis and Recommendations (2006b), p. 293.

²⁴¹ *Ibid.*, pp. 277–78.

²⁴² Iacobucci interpreted O’Connor’s words as suggesting that when national security issues are involved, internal inquiries can be more appropriate than public inquiries, which can prove “complicated, unduly protracted and expensive” (Iacobucci, 2008, p. 30, para. 3).

²⁴³ *Ibid.*, p. 31, para. 5.

²⁴⁴ *Ibid.*, p. 60, para. 41.

²⁴⁵ See the Iacobucci Order-in-Council (2006).

²⁴⁶ British Columbia Civil Liberties Association (BCCLA), “Civil Rights Group Withdraws from Inquiry due to Concerns Over Secrecy of the Proceedings”, Press Release, BCCLA, Vancouver, 11 December 2007 (retrieved from <http://www.bccla.org/pressreleases/07Iacobuccinews.pdf>).

²⁴⁷ *Ibid.* This problem arose in the O’Connor inquiry as well, where Mr Arar was unable to participate in the *in camera* meetings because of his lack of appropriate security clearance (O’Connor Analysis and Recommendations, 2006b, pp. 285–86).

²⁴⁸ See the October Submission of the Applicants (2007); see also BCCLA (2006).

²⁴⁹ October Submission of the Applications (2007), paras. 13 and 17.

International has criticised some European investigations for not allowing the victims or non-governmental organisations to make submissions.²⁵⁰

Second, commissions of inquiries can be misused as political tools. Inquiries are many things: powerful instruments backed by legislation, budgets and pledges of cooperation; a means of generating useful research and recommendations after long and thoughtful study; and a way of providing for public participation and disclosure.²⁵¹ At the same time, they also have the potential for misuse as one of the many political tools at a government's disposal. That is, launching a commission of inquiry can be used as an example of 'action' on the part of a government, when in reality the commission is merely the opening act if any institutional or policy reform is required. The work of inquiries can carry great credibility, but it would be a mistake to view this work – the reports and the investigation process itself – as the end of the process. As Commissioner O'Connor remarked recently, the role of commissioners and of inquiries stops when the report has been issued.²⁵² The implementation of policy recommendations is part of the political process and must be taken up by government. As Macklin (2008) has written in relation to the O'Connor inquiry:

It seems ironic that the government of Canada appointed a public inquiry, only to cast a wide and heavy blanket of national security confidentiality over the process...A more cynical interpretation would be that the government was content to give the appearance of openness by appointing a public inquiry, while zealously pursuing the objective of minimizing disclosure through the legal position adopted by counsel during the inquiry itself.²⁵³

By appointing a public inquiry, a government is able temporarily to remove a difficult issue from its own agenda while appearing to take action.²⁵⁴

Third, although inquiries have the benefit of some procedural flexibility, the work of inquiries can nevertheless be hampered by a lack of cooperation from foreign governments. Inquiries in Canada have important powers to compel cooperation, but they remain dependent upon voluntary cooperation when it comes to information from foreign governments. This can have a detrimental effect on what inquiries are able to accomplish, as ultimately anything less than full and complete information will naturally limit the reach of an investigation.

For example, Commissioner O'Connor was unable to draw a conclusion about whether the TECS²⁵⁵ lookout request made by the RCMP had actually contributed to Mr Arar's deportation because information from the Americans had not been forthcoming.²⁵⁶ Furthermore, Commissioner Iacobucci was unable to reach a finding as to whether Canadian officials had contributed to Mr Almalki's detention in Syria – as he had found had been the case with Mr Elmaati and Mr Nureddin – in "large part" because the governments of the US, Syria and Malaysia had not cooperated with the inquiry.²⁵⁷ Although the RCMP had provided information

²⁵⁰ See the *State of Denial* report by Amnesty International (2008b), p. 27.

²⁵¹ "[P]ublic inquiries present a wonderful vehicle for broad public involvement and participation in issues of public policy. Indeed, I think this is one the great strengths of the inquiry process" (O'Connor and Kristjanson, 2007).

²⁵² *Ibid.*

²⁵³ Macklin (2008), p. 25.

²⁵⁴ Robert Centa and Patrick Macklem, "Securing Accountability through Commissions of Inquiry: A Role for the Law Commission of Canada" (2001) 39 *Osgoode Hall LJ* 117 at 128.

²⁵⁵ TECS refers to Treasury Enforcement Communications System used by US Customs.

²⁵⁶ O'Connor Analysis and Recommendations (2006b), p. 14.

²⁵⁷ Iacobucci (2008), p. 37, para. 21 and p. 399, para. 6.

to Syria stating that Mr Almalki was an “imminent threat” and although Commissioner Iacobucci found that this information was inaccurate, inflammatory and shared without proper consideration of the consequences for Mr Almalki,²⁵⁸ that was not enough. Owing to absent information from foreign governments, the information before the inquiry did not meet the threshold required for a finding that the Canadian officials had contributed to Mr Almalki’s detention.

The lack of openness from foreign governments in the inquiry process is something that has been noted with great frustration by individuals such as Mr Marty and Mr Fava, as well as by Amnesty International. For instance, the lack of cooperation on the part of the Polish government meant that Mr Fava’s committee was unable to find the evidence necessary to state conclusively that an illegal detention centre was operating in Poland.²⁵⁹ The lack of cooperation from American authorities and those in the Former Yugoslav Republic of Macedonia has also hampered the work of prosecutors in Germany.²⁶⁰ Ultimately, inquiries are only as effective as the information they are able to use.

Consequently, when investigating cases involving multiple states, commissions of inquiry can be left in a position in which the cooperation of other states is crucial and yet impossible to demand.

7. Conclusions

This broad survey has aimed at providing those interested in government investigations into the torture and detention of their citizens abroad with some useful background. The post-9/11 environment, in which inter-state and inter-agency cooperation has at times been preferred to the detriment of the security and rights of individuals, is a context that Canada and many European nations share.

The Canadian experience reveals that there are costs associated with the involvement of state officials in the dubious treatment of citizens: costs for institutions, individuals and political parties. Furthermore, there is no doubt that investigations are an essential part of the accountability process, and that setting up a process that is independent, public and effective is a significant challenge. The O’Connor and Iacobucci inquiries are important not just because of the themes we can extract from their findings – themes relating to the sharing of information, the training of officials, the provision of consular services and other issues found in the experiences of many different countries. They are also important because of the way they sought to balance the elements required for a legitimate and successful inquiry with the demands of confidentiality for national security.

²⁵⁸ Ibid., p. 400, paras. 10–14. Syria was the only government to respond, and did so in August 2008 by requesting further information on Mr Almalki, Mr Elmaati and Mr Nureddin. Commissioner Iacobucci proceeded with the final stages of the inquiry at that point, believing that the cooperation requested would not follow (ibid., p. 31, para. 5 and p. 334, para. 6).

²⁵⁹ See the *State of Denial* report by Amnesty International (2008b), p. 7; see also Marty (2007), para. 3.

²⁶⁰ Marty (2007), para. 312. It must be kept in mind, however, that lack of cooperation from other countries may be far from the sole reason an investigation is unable to get the information it requires to carry out a thorough job. For example, the US has indicated that it will not comply with subpoenas issued to its citizens by Italian officials (see the *State of Denial* report by Amnesty International, 2008b, p. 29) and the Italian government itself has tried to prevent the trial of 33 defendants in the case concerning the abduction of Abu Omar (Marty, 2007, para. 320).

It must also be remembered that investigations are only one step in the accountability process. Recommendations and findings must be acted upon and proper redress made. In the European context, Amnesty International has pointed out that “the findings and recommendations of the investigations have been met with almost total silence and denial of responsibility”.²⁶¹ Although the Canadian government has apologised to Mr Arar, atonement has not been made to Mr Almalki, Mr Elmaati or Mr Nureddin. Both Canadian inquiries pointed out substantial flaws in practice and policy, and there is no shortage of guidance for any government willing to act. The current Conservative government has promised action, and Canadians are waiting for concrete details on implementation. And it remains that there is no excuse, not even that of national security confidentiality, for governments in Europe or Canada that fail to seek truth, accountability and reform.

²⁶¹ See the *State of Denial* report by Amnesty International (2008b), p. 9.

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