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Opportunistic Rendition, Citizenship and the 'War on Terror'

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Abstract

This thesis is concerned with the experiences of Abdullah Almalki, Ahmad Elmaati, and Muayyed Nureddin, three Canadian citizens who were subjected to the experience of 'opportunistic rendition.' Through the actions and beliefs of officials responsible for national security matters, they became people "without the right to have rights," denied the protection of the law, because of their race, religion, and suspected ties to terrorist organizations.

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Introduction

In October 2003 Maher Arar returned to Canada, after enduring a year of detention and torture in the notorious *Far Falesteen* prison, operated by Syrian Military Intelligence. A year earlier, Mr. Arar, a dual national of Canada and Syria, was deported to Syria from the United States to be imprisoned and interrogated (i.e. tortured), a process known as extraordinary rendition. After months of public pressure, Prime Minister Paul Martin announced a commission of inquiry to determine the role of Canadian officials in Arar's deportation, detention, and torture [the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, hereinafter the Arar Inquiry]. The Arar Inquiry, headed by the Hon. Dennis O'Connor, Associate Chief Justice of Ontario, spanned two years, heard more than 85 witnesses, and produced a three-volume report, comprising fact-finding in the case of Mr. Arar, and policy recommendations.

Over the course of the Inquiry, three other Canadians came forward to report that they also had been detained and tortured in Syria (and in one case, Egypt). In his report, Commissioner O'Connor called for a second inquiry into the actions of Canadian officials in the cases of Abdullah Almalki, Ahmad Elmaati, and Muayyed Nureddin. The Commissioner noted that there were many similarities among the cases of Messrs. Arar. Almalki, Elmaati, and Nureddin: all were subjects of investigation by the Royal Canadian Mounted Police (RCMP) as part of Project A-O Canada, all were detained and tortured by Syrian Military Intelligence (SMI) at its *Far Falesteen* prison, and all were interrogated and tortured based on information originating in Canada (Report of the

Events Relating to Maher Arar: Analysis and Recommendations, hereinafter Arar Report: Analysis and Recommendations, 2006, p. 269, 276). However, unlike Mr. Arar, Messrs. Almalki, Elmaati, and Nureddin were not victims of extraordinary rendition, but opportunistic rendition. This means that Canadian security forces took advantage of Messrs. Almalki, Elmaati, and Nureddin travelling abroad by sharing information with foreign intelligence agencies, such as SMI, based on the assumption that they would be arrested, detained, and tortured. In the cases of Messrs. Arar, Almalki, and Elmaati, the Canadian Security and Intelligence Service (CSIS) and the RCMP tried to advance their investigations through sharing information with SMI, and even tried to interview Messrs. Almalki and Elmaati while they were detained in Syria and Egypt (Arar Report: Analysis and Recommendations, 2006, p. 269; Iacobucci Report, 2008, p. 142, 146-151 206-214, 272).

On December 11, 2006, the Hon. Frank Iacobucci, a retired Justice of the Supreme Court of Canada, was appointed to conduct an internal inquiry into the detention and torture of Messrs. Almalki, Elmaati, and Nureddin in Syria and Egypt. The purpose of the inquiry was to determine whether the actions of Canadian officials directly or indirectly contributed to the detention and torture of these men, and whether there were deficiencies in the provision of services by consular officials (Iacobucci Report, 2008, pp. 29-30). The inquiry was conducted privately, and neither Mr. Almalki, Mr. Elmaati, Mr. Nureddin, nor their counsel was allowed to participate.

Commissioner Iacobucci found that the actions of Canadian officials resulted indirectly in the detention of Messrs. Elmaati and Nureddin in Syria, although he was not able to determine whether the actions of Canadian officials contributed to Mr. Almalki's

detention in Syria (Iacobucci Report, 2008, p. 348-9, 399, 439-40). Commissioner Iacobucci concluded that the actions of Canadian officials indirectly resulted in the "mistreatment" of all three men (Iacobucci Report, 2008, p. 380, 409, 449). While Commissioner Iacobucci is critical of the actions of Canadian officials, specifically noting that Canadian officials were deficient in their decision to share sensitive and inaccurate information with foreign intelligence agencies, and to ignore the possibility of torture when sharing information with Syrian Military Intelligence when Messrs. Almalki and Elmaati were in custody, his findings attribute these actions to mistakes that occurred in a moment of perceived political crisis.

The arc traced by these events is central to my thesis. In the span of five years, Canadians learned the name of Maher Arar, came to understand the tragic and grotesque injustices inflicted on him through an exhaustive public inquiry that was harshly critical of federal government officials, learned that there were other Canadians whose experiences paralleled those of Mr. Arar, and saw the same government choose to create an internal inquiry, to which these individuals would have no access. The internal inquiry was to produce two reports, one to be made public and one to be submitted to the Cabinet. To the surprise of nobody who followed the process, the public report concluded, in part, that the Commissioner found "...no evidence that any of these [Canadian] officials were seeking to do anything other than carry out conscientiously the duties and responsibilities of the institutions of which they were a part (Iacobucci Report, 2008, p. 33)." In Commissioner Iacobucci's view, the culpability of Canadian officials was limited to regrettable but honest mistakes made in extraordinary circumstances.

This thesis advances a different perspective. It argues that Messrs. Almalki, Elmaati, and Nureddin lost the "right to have rights" - becoming *homines sacri* in the words of Giorgio Agamben - because of their race, religion, and suspected ties to terrorist organizations. According to my perspective, Messrs. Almalki, Elmaati, and Nureddin were the victims of the racism of government officials in Canada and elsewhere. They and unknown others, many of them Arab Muslim men, shared a novel fate. Through the actions and beliefs of officials responsible for national security matters, they became people "without the right to have rights." How and why this was possible in the cases of Abdullah Almalki, Ahmad Elmaati, and Muayyed Nureddin, and what their experiences signify are the central concerns of this thesis.

The thesis is organized into three chapters. The first chapter outlines the theoretical framework, bringing together some of the critical literature on citizenship, human rights, and Giorgio Agamben's theories of the *homo sacer* and the state of exception. I also examine racialized constructions of Canadian citizenship, and international prohibitions against torture as they relate to the 'war on terror.'

Chapter two is a discussion of epistemological and methodological issues, and the approach taken in conducting the research for the thesis. My epistemological and methodological framework is based in feminist standpoint approaches to knowledge and knowledge production, which emphasize the importance of building knowledge from the bottom up. I also describe the difficulties that I faced while conducting this research project. These difficulties include the ethical issues raised by working with research participants who are survivors of torture, and the challenges of researching a topic that has been subject to national security confidentiality.

In the third chapter, I explore how the experience of Messrs. Almalki, Elmaati, and Nureddin illuminate the frightening implications of the laws and procedures Canada has adopted to counter 'terrorist' threats to national security. This exploration is based on my interpretations of the words of Messrs. Almalki, Elmaati, and Nureddin, and my analysis of the Iacobucci Report, and related documents. In my view, the importance of my research and analysis is that it contributes to a critical understanding of the interrelationship of conceptions of the nation and national security, racialized conceptions of citizenship and human rights and the ugly fact that torture is seemingly ubiquitous, and even a tool of which Canadian officials avail themselves. Of course, my work can do little more than add incrementally to the scholarly examination of these issues, but every such effort is valuable. To paraphrase Santayana, if we do not understand the past, we are condemned to repeat it.

Chapter 1: Tenuous Citizenship and the 'War on Terror'

> ...a subject deprived of the rights of citizenship enters a suspended zone, neither living in the sense that a political animal lives, in community and bound by law, nor dead, and, therefore, outside the constituting condition of the rule of law.[1]

In the period immediately following the September 11, 2001 terrorist attacks on the United States, governments around the world implemented new anti-terrorism measures. In Canada, some of these measures, such as the 2001 *Anti-Terrorism Act* (ATA) and the use of security certificates have been criticized for removing constitutional and procedural protections for those who are suspected or accused of terrorism (Bell, 2006, p. 70; Forcese & Waldman, 2007; Macklem, Daniels & Roach, 2001). Arguing that they are necessary for the state to effectively protect its citizens, proponents of these policies construct an opposition between rights and security and suggest that the challenge of anti-terrorism policy is to find the correct balance between citizens' rights and the national security interest (Brysk, 2007, p. 1; Forcese & Waldman, 2007; Young, 2003). A more critical approach would begin with the following question: whose security? In other words, who counts as a citizen when it comes to matters of national security?

The purpose of this chapter is to provide an overview of the theoretical, conceptual, and legal frameworks that informed my analysis of the opportunistic

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[1] Judith Butler, *Precarious Life: The Powers of Mourning and Violence.* Verso, New York (2004), p. 67

rendition of Messrs. Abdullah Almalki, Ahmad Elmaati, and Muayyed Nureddin. In doing so, it attempts to address several related questions: What does it mean to be a citizen? Who is a Canadian citizen? How does the construction of Canadian citizenship intersect with issues of race and racism, particularly in the era of the 'war on terrorism?' And most importantly, how can we conceptualize the experiences of those who are legally citizens, but who are not protected by the rule of law?

This chapter advances the argument that the opportunistic rendition of Messrs. Almalki, Elmaati, and Nureddin was not random or accidental, but an expression of structural violence - in these cases, the outcome of the interlocking processes of securitization, racialization, and dehumanization (what Isin refers to as "technologies of citizenship"), that have placed Muslim and Arab Canadians at risk of racial profiling, surveillance, arbitrary detention, deportation, and torture. Through the creation of a group of pseudo-citizens denied the rights of full citizens because of their race, ethnicity, nationality, and/or religion, the Canadian government and security apparatus creates the conditions that enable extreme acts of state violence to occur.

This chapter is divided into five sections. In the first section, I discuss the limitations of liberal theories of citizenship, demonstrating how a rights-based approach cannot account for the existence of groups of pseudo-citizens. In the second section, I discuss the construction of Canadian citizenship in the context of the 'war on terror,' considering how this construction draws on preexisting racialized discourses of nationhood and national security. In the third section, I consider Hannah Arendt's arguments about the relationship between citizenship and human rights. In the fourth section, I provide an overview of Giorgio Agamben's theories of sovereignty, the homo

sacer, and the state of exception. In the fifth and final section, I discuss torture, citizenship, and the 'war on terror,' considering how individuals who are victims of opportunistic rendition can be seen as *homo sacer* – individuals who exist outside of the protection of the rule of law.

Citizenship

Citizenship is widely understood to be a legal status that defines membership in a particular political community. While this definition of citizenship is very straightforward, its simplicity is also misleading. In liberal democratic societies, this status is generally tied to a set of rights, obligations, and entitlements, making the question of who is a member of the political community a matter of "profound conflict in modern societies," as political and economic integration and mass migration have challenged the way we understand the relationship between nation, state, and citizen (Isin & Turner, 2007; Turner, 1997, p. 7).

The questions of who is included in the political community and what this inclusion means dominates contemporary debates about citizenship in popular discourses, as well as a number of academic disciplines, including sociology, political science, and law. However, as Yasmeen Abu-Laban and Linda Bosniak have pointed out, there is a gap between those who are concerned with citizenship as a formal legal status, particularly in terms of citizenship and migration, and those who are concerned with theories of citizenship that emphasize participation, identity, and inequality (Abu-Laban, 2000, p. 515; Bosniak, 2000, p. 963, 966). As Bosniak explains, this division is problematic for two reasons: first, because it enables scholars to "take the boundaries and

membership of the political community they are concerned with as given, without considering the logically prior questions of how those boundaries are established and enforced, and how that membership is constituted in the first place," and secondly, because in doing so, this division obscures the ways that "questions concerning citizenship's threshold and its substantive character are, in fact, deeply interwoven" (2000, p. 966-7).

Within a liberal framework, citizenship is supposed to be universal, meaning that all citizens are equal under the law, and all share the same rights and obligations regardless of individual or group differences. This understanding of citizenship has been challenged by critical scholars, who have argued that citizenship is not universal, as not all citizens have equal access to the rights, obligations, and entitlements of citizenship (Bakan & Stasiulis, 1997, 2005; Lister, 1997, 2003; Yuval-Davis, 1997). Others, such as Hannah Arendt, have challenged the very foundation of liberal rights-based citizenship, pointing out that while citizenship is a supposedly universal status, not all individuals are members of a political community, and therefore not all have access to the rights of citizenship.

Contemporary liberal conceptions of citizenship have been heavily influenced by T. H. Marshall's rights-based approach to citizenship, first articulated in his famous lecture "Citizenship and Social Class." Marshall defined citizenship as "full membership in the political community," (1950, p. 8). According to Marshall, to be a full member of the political community was to have access to three kinds of rights: civil, political, and social. These emerged in response to changing legal, political, and social circumstances in Britain, and were eventually institutionalized into what we would recognize as a

modern judicial and political system, as well as a welfare state (Turner, 1997, p. 11). Civil rights include individual freedoms, such as freedom of speech and religion, and the right to own property (Marshall, 1950, p. 10). Political rights refer to the ability to participate in the governance of the political community either "as a member of a body invested with political authority or as an elector of the members of such a body" (Ibid). Social rights include an entitlement to a minimum standard of living through some degree of income redistribution, public education, and universal education (Ibid).

Marshall was particularly concerned with social rights, as he identified a fundamental conflict between the formal equality guaranteed by citizenship and the material inequalities generated by capitalism. According to Marshall, social rights mitigated this tension, performing an important integrative function by minimizing class conflict. Through the provision of social rights such as welfare and access to education, Marshall argued that all citizens could "be admitted to a share in the social heritage, which in turn means a claim to be accepted as full members of the society [...] as citizens" (1950, p. 8).

There have been many critiques of Marshall's genealogy of citizenship (see for example, Bulmer & Rees, 1996). However, I will limit my discussion to two issues: first, the implication that citizenship rights are teleological and cumulative, and secondly, that citizenship can be usefully conceptualized as solely a formal legal status, without consideration of other aspects of citizenship (i.e. access to citizenship rights), or citizenship as a social identity.

Assuming that citizenship rights are intrinsically expansive, Marshall believed they would become more complete and would be extended to a growing number of

people, incorporating previously excluded groups into the political community. While Marshall acknowledged that there was no universal definition of citizenship, and therefore no universal set of citizenship rights, he argued that

> societies in which citizenship is a developing institution create an image of an ideal citizenship against which aspiration can be directed. The urge forward along the path thus plotted is an urge towards a fuller measure of equality, an enrichment of the stuff of which the status is made and increase in the number on whom this status is bestowed. (1950, p. 29)

Marshall's expansive vision of citizenship is problematic for two reasons. First, because it misses the way that the extension of citizenship rights to previously excluded groups has been fraught with tension between the universalizing aspects of citizenship and the particularities of those groups who have been incorporated as members of the political community. Whereas Marshall believed that class inequality was the most significant conflict within a political community, changing patterns of migration as well as the rise of identity-based political movements have challenged this assumption. Previously excluded or marginalized groups, such as women, racialized people, and indigenous peoples, have argued that the formal equality guaranteed by citizenship does not lead to substantive equality, and may, in fact, serve to entrench and legitimize inequality through the language of universality (Hunt & Purvis, 1999, p. 468; Young, 1989; Yuval-Davis, 1997).

Marshall's evolutionary understanding of citizenship also cannot account for the loss of rights that have accompanied the rise of neoliberalism, and the 'war on terror.' In the past two decades the post-war Keynesian welfare state has been dismantled as part of the global process of political and economic restructuring. The ascendance of

neoliberalism has significantly changed conceptions of citizenship, as social citizenship rights have disappeared, replaced by rugged individuals who are responsible for their own failures or successes (Brodie, 2002, p. 388). While a discussion of the effects of neoliberalism on citizenship is beyond the scope of this project, it is important to acknowledge how the "desocialization" of the political community into discrete economic units made up of individuals and families shows how tenuous citizenship rights can be (Ibid). Whereas previously, citizens of wealthy liberal democratic states had the right to expect some degree of support from the state, many of the programs and services that made up the social safety net have been clawed back or eliminated entirely, indicating the unwillingness of the state to address (even nominally) material inequality among citizens.

Marshall's teleological theory of rights has also been challenged by the rollback of civil rights in many liberal democracies following the September 11, 2001 terrorist attacks. Anti-terrorism legislation such as the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act* (commonly known as the *Patriot Act*), and the *Anti-Terrorism Act* in Canada have removed constitutional and procedural protections previously taken for granted, such as the use of preventative arrest in the case of those suspected of participating in terrorist activity in Canada, and provisions that significantly expanded the scope of wiretapping and other forms of surveillance of by U.S. authorities.[2]

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[2] The *Anti-Terrorism Act* introduced provisions into the *Criminal Code* that allow for preventative arrests. Under section 83.3 of the *Criminal Code*, a peace officer (subject to the consent of the Attorney General) who "believes on reasonable grounds that a terrorist activity will be carried out; and suspects on reasonable grounds that the imposition of a recognizance with conditions on a person, or the arrest of a person, is necessary to

The second critique of Marshall's conception of citizenship I will discuss is his focus on citizenship solely as a legal status. Marshall's understanding of citizenship is one that is tied to a bounded political community, as his concern with the tension between citizenship and class inequality is tied to a nation-building project. However, as a number of critics have pointed out, Marshall never asks the question of *who* is included within this political community (Isin & Tuner, 2007, p. 8; Turner, 1997, p. 13). Marshall's definition of citizenship assumes an ethnically, culturally, religiously, and linguistically homogenous political community, as he argues that "citizenship requires a bond of a different kind, a direct sense of community membership based on loyalty to a civilization which is a common possession" (1950, p. 26). As Hunt and Purvis point out, to speak of a common civilization raises several important questions: "Common' for whom? 'Civilized' by whose standards? And possessed by whom?" (1999, p. 458). Furthermore, as multiple citizenship has become more common, Marshall's assumption of "loyalty" to a common civilization is increasingly problematic.

A more useful way of conceptualizing citizenship must take into account citizenship as both a formal legal identity (i.e., who is a member of the political community, and how are the legal boundaries of this community established and maintained), as well as citizenship as it is "practiced" (Bosniak, 2000, p. 966). Citizenship is not a static or ahistorical category, but one that is constantly contested, negotiated, and reconstructed within specific social, political, and economic relations and

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prevent the carrying out of the terrorist activity," may arrest this person without a warrant, and detain them until they are taken before a provincial court judge (*Criminal Code*, 1985, 83.3). Relevant changes to US wiretapping and surveillance policies and procedures can be found in Title II of the *Patriot Act* (Enhanced Surveillance Procedures).

discourses (Bakan & Stasiulis, 1997, p. 117). These discourses create what Benedict Anderson calls an "imagined community" – an understanding of the nation as a unified group of people (citizens), living within territorial boundaries (Anderson, 1991). This means that membership in the political community is inherently unstable, as differences between those who are included (citizens), and those who are not "emerge simultaneously, defined and re-defined according to a dynamic process of struggle and negotiation," even though they may be experienced as inherent or natural by both citizens and non-citizens (Bakan & Stasiulis, 1997, pp. 119, Yuval-Davis, 1997, p. 11).

Isin argues that a more critical way of conceptualizing citizenship moves away from the idea that citizenship is unitary, suggesting that we should consider "otherness as a condition of citizenship" (Isin, 2002, p. 4). Isin sees citizenship as the product of the struggles for rights and recognition described by Bakan and Stasiulis, and argues that

> citizenship and alterity always emerged simultaneously in a dialogical manner and constituted each other. Women were not simply excluded from ancient Greek citizenship, but were constituted as its others as an immanent group of citizens. Similarly, slaves were not simply excluded from citizenship, but made citizenship possible by their very formation. The alterity of citizenship, therefore, does not preexist, but is constituted by it. (Isin, 2002, p. 4)

Isin argues that throughout history, citizens and their Others have been constituted through "an unstable combination of solidaristic, agonistic, and alienating strategies and technologies of citizenship," including "stigmatization, marginalization, heroization, ritualization, racialization, professionalization, universalization, confraternization and mediatization" (2002, p. ix). These strategies and technologies of citizenship constitute citizens "as those who manage to inculcate virtues through others, strangers and

outsiders," – that is, those who do not possess the qualities necessary for membership in the political community (Ibid).

Isin's argument for otherness as a condition of citizenship allows for a more nuanced understanding of the relationship between the citizen and the non-citizen, as unlike the "logic of exclusion" that "would have us believe in zero-sum, discrete, and binary groups, the logics of alterity assume overlapping, fluid, contingent, dynamic, and reversible boundaries and positions" (2002, p. 30). This means that instead of presupposing a fixed relationship between the citizen and the non-citizen, this approach allows for consideration of how this relationship varies according to particular social, political, and economic circumstances. This approach also allows for the possibility of complex relationships of inequality among groups of citizens, thus putting into question the liberal universal ideal of citizenship.

Canadian Citizenship and the 'War on Terror'

Isin's observations about the relationship between citizenship and alterity can be usefully applied to constructions of Canadian citizenship, illustrating how the concept of the Canadian citizen has been constituted in relation to its Others, namely First Nations peoples and immigrants. While a detailed historical discussion of the construction of Canadian national identity and citizenship is beyond the scope of this chapter, it is important to consider its historical dimensions, as it provides the necessary context for understanding how current social identities and relations have emerged from specific historical, material, and ideological relationships. This context allows us to see how

contemporary discourses that constitute specific racialized groups as threats to Canadian security draw on preexisting constructions of Canadian citizenship and nationhood.

The Canadian nation-building project has always been tied to historically specific constructions of race, class, gender, religions, and other social identities, privileging those individuals who most closely approximate the standards of the "ideal" citizen. Considering the relationship between Canadian citizenship and alterity, one can observe the importance of Canada's history as a settler society, wherein notions of ideal citizenship were tied to

> British imperial philosophical ideas about the appropriate character, physical stock, and behaviour of settler women and men. Such nation-building discourses were imbued with Eurocentric, gendered, and class standards about what constituted "civilization" against which every potential group of immigrants was measured and ranked (Stasiulis, 1997, p. 144).

These standards were institutionalized in the *Indian Act* and immigration policy that attempted to limit membership in the political community to those who met particular criteria of race, class, gender, religion, and ethnicity. For example, the Canadian government explicitly restricted immigration on the basis of race, ethnicity, and national origin until 1967, distinguishing between "preferred" and "non-preferred" races, making occasional exceptions when business interests won out over desires for racial purity (Jhappan & Staiuslis, 1995, p. 97-99).[3] However, even as the Canadian government has

[3] However, these groups, such as the Chinese men who were recruited to build the Canadian Pacific Railway in the early 1880s, were excluded from Canadian citizenship. Not only were they exploited, performing difficult and dangerous work for very low pay, they were forbidden to bring their families to Canada in order to prevent the growth of the Asian population and discourage the establishment of permanent settlements (Stasiulis, 1997, p. 147). After the railway was complete, the government passed the

pursued an official policy of multiculturalism and removed explicitly racialized criteria from Canadian immigration policy, whiteness and Anglo-Canadian culture form the "core" of Canadian national identity, "unmarked, yet dominant" (Mackey, 2002, p. 2).

The "whiteness" of Canadian national identity was strongly reasserted in the months following the 9/11 attacks. This identity was tied to notions of a "clash of civilizations," wherein Europe and European settler colonies (broadly defined as "the West), were understood to be under attack by Islam and Muslims (Abu-Laban, 2002, p. 461; Arat-Koc, 2005, p. 33). In countries with sizeable Muslim populations, such as Canada, the United States, and Australia, this reconfiguration of identity along civilizational lines "in effect jettisoned those of Arab and Muslim background from their place in Western nations and 'Western civilization' and made precarious the belonging and political citizenship of many other Canadians of colour" (Arat-Koc, 2005, p. 34).

The notion of a "clash of civilizations," first articulated by Orientalist historian Bernard Lewis in his article "The Roots of Muslim Rage," and later popularized by Samuel Huntington, is premised on the idea that future global conflicts will not be fought between ideological blocs (as in the Cold War), but between broadly defined civilizations. Both Lewis and Huntington are particularly concerned with a "clash" between Islam and the West. Using the language of "us" and "them," Lewis explains this clash as "the perhaps irrational but surely historic reaction of an ancient rival against our Judeo-Christian heritage, our secular present, and the worldwide expansion of both" (1990, n. p.). Here, modernity and secularism are defined as uniquely Western, alien to

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Chinese Immigration Act (1885), imposing a head tax on all Chinese immigrants entering Canada, effectively barring further Chinese immigration (Ibid).

Islam and Muslims (furthermore, Muslims and Islam are by definition excluded from the West). Building on Lewis' arguments about the historical rivalry between Western and Islamic 'civilizations,' Huntington asserts that the "centuries –old military interaction between the West and Islam is unlikely to decline," which is of particular concern given Islam's "bloody borders" (1993, n. p.).

The rhetoric of a 'clash of civilizations' has been used to justify the abrogation of the rights of Muslim and Arab people. In Canada, the United States, and elsewhere, Arab and Muslim people have been represented and perceived as 'threats' to the political and social security of the West.[4] Arab and Muslim people, specifically Arab and Muslim men, have been targeted by various national security policies and procedures, including racial profiling, intrusive surveillance, security certificates, arbitrary arrest and detention, and rendition.

These examples illustrate the abrogation of citizenship rights experienced by Arab and Muslim people in Canada following the 9/11 attacks. While any abrogation of rights

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[4] While it would be inaccurate to suggest that the responses of Canada, the United States, and European countries to the 9/11 attacks was identical, there are notable similarities. The American response, characterized by the *Patriot Act*, and the wars in Afghanistan and Iraq, was certainly the most extreme. However, the willingness of American allies, such as Canada, the UK, and other European countries to engage in the war in Afghanistan is a significant example of similar state responses to the 'war on terror.' Other similarities include legislative responses (see, for example, the use of control orders in the UK and the use of security certificates in Canada), as well as political and social responses that have labeled particular racialized groups as potential 'terrorists,' and reopened debates about international migration, multiculturalism, and the meaning of citizenship. Amongst the most widespread of these debates concerns issues of multiculturalism and reasonable accommodation – specifically, whether it is acceptable for Muslim women to publicly wear the *hijab*, *niqab*, or *burqa*. I would argue that this debate, which has taken place in the UK, France, Belgium, the United States, and Canada is an example of a metaphorical 'closing of borders' to exclude those individuals and groups who do not fit a narrow and racialized definition of what it means to be a citizen in a Western country.

is cause for concern, what is most disturbing about the post-9/11 context is the state's total abandonment of particular individuals including Messrs. Almalki, Elmaati, and Nureddin. In the following section, I will turn to the work of Hannah Arendt to further explore the implications of this abandonment.

Citizenship and Human Rights

In her essay "The End of the Nation-State and the Decline of the Rights of Man," Hannah Arendt argued that access to rights is tenuous, dependent on the ability and willingness of a nation-state to guarantee them. Written only a few years after the Second World War, the essay is a response to the Holocaust and the millions of displaced persons in Europe. Arendt uses these examples as the foundation of her critique of the ideology of human rights, arguing that rights that are supposed to be inherent and universal are neither, as they are tied to membership in a political community. As Arendt explains,

> The conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships – except that they were still human. The world found nothing sacred in the abstract nakedness of being human. (1994, p. 299)

In this passage, Arendt is referring to the human rights tradition, although, as Gershon Shafir points out, citizenship and human rights interacted in important ways (2004, p. 11). The human rights tradition is premised on the idea that all human beings are endowed with rights on the basis of their humanity, regardless of their connection to any nation-state (Basok, Ilcan & Noonan, 2006, p. 267; Isin & Turner, 2007, p. 12; Shafir, 2004, p. 13). Although the idea of "rights" is often used to refer interchangeably to

citizenship rights and human rights, there is a significant difference between the two traditions. Citizenship rights are by their nature exclusive, applying only to members of a particular political community, while human rights are innate. However, as Arendt points out, although human rights posits an abstract human being who exists outside of the legal order of the nation-state system, such rights are implicitly tied to institutions of citizenship and sovereignty (1994, p. 290-1).

Arendt uses the example of stateless people to illustrate the failure of human rights to protect. Referring to "the trinity of state – people – territory," she argues that the paradox of human rights became apparent only when there were a significant number of stateless people with no government to protect their basic rights (Arendt, 1994, p. 292). Those who were stateless were also rightless, cast out of the entire "family of nations," and therefore any possibility of political subjectivity - what Arendt referred to as the "right to have rights" (1994, p. 293, 296-7). To live outside the realm of the citizen is to lead an "unqualified existence," to become a literal outlaw, or what Arendt terms a "legal freak" (p. 278, 301). She argues that this status has very serious implications, pointing out that the Nazis routinely denationalized Jewish people before they were deported to concentration camps (Arendt, 1994, p. 280, 296). As she explains, "a condition of complete rightlessness was created before [their] right to live was challenged" (1994, p. 296). Arendt is careful to note that this problem is not the result of tyranny or 'backwardness,' but rather the byproduct of a global system of nation-states in which to legally exist and have access to rights, one must be a citizen (1994, p. 297).

As discussed in the previous section with respect to liberal conceptions of citizenship, Arendt's formulation of "the trinity of state-people-territory" is complicated

by the recognition that access to the rights and obligations of citizenship is not universally enjoyed by all citizens. In order to adequately theorize the situation of individuals who are legally citizens but who lack access to citizenship rights, it is necessary to turn to the work of Giorgio Agamben.

The *Homo Sacer* and the State of Exception: Citizenship and the 'War on Terror'

There are two concepts that are central to Giorgio Agamben's theory of sovereignty: the *homo sacer* and the state of exception. The *homo sacer* is a person who can be killed with impunity since he is excluded from the rule of law (1998, p. 8, 73). However, this exclusion is simultaneously an inclusion, as the *homo sacer* remains in relation to the law (Agamben, 1998, p. 28). Interestingly, this simultaneous inclusion in and exclusion from the law is mirrored by the sovereign (Agamben, 1998, p. 100). Agamben draws on Carl Schmitt's definition of the sovereign as the one who has the ability to suspend the rule of law, thus creating a state of exception (1998, p. 17, 2005, p. 1).

Agamben's theory of sovereignty seeks an intersection between Foucault's theory of biopolitics—defined as the incorporation of the processes of biological life into the regulation and governance of populations—with more conventional juridico-institutional understandings of sovereign power (Agamben, 1998, p. 6). Foucault argues that the incorporation of biological life into the political sphere marks the beginning of the modern era (2003, p. 242). He calls this new "technology of power" biopower, as it is a form of power "applied not to man-as-body but to the living man, to man-as-living being" (Ibid). Foucault contrasts the classical theory of sovereignty with that of

biopolitical sovereignty. Though the older idea holds that the sovereign has the power over the life and death of its subjects, Foucault points out that in fact, the sovereign can kill people, but not give them life (2003, p. 240). The biopolitical sovereign, in contrast, has the power to "make live and let die" (2003, p. 241).

Whereas Foucault argues that incorporation of biological life into the political sphere marked the beginning of the modern era, Agamben locates the emergence of biopolitics in the creation of sovereign power, arguing that

> the decisive fact [of modernity] is that, together with the process by which the exception everywhere becomes the rule, the realm of bare life – which is originally situated at the margins of the political order – gradually begins to coincide with the political realm, and exclusion and inclusion, outside and inside, *bios* and *zoē*, right and fact enter into a zone of irreducible indistinction. (1998, p. 9)

By amending Foucault's theory of biopolitics to consider the relationship between bare life and citizenship, Agamben complicates the distinction between bare life (*zoē*) and political life (*bios*), arguing that it is no longer meaningful, as bare life has entered the realm of the political. Thus Foucault's theory must be modified "to consider how bare life coincides with the political" (Nyers, 2006, p. 39).

Bare life has a unique relationship to sovereign power because "bare life has the peculiar privilege of being that whose exclusion founds the city of men" (Agamben, 1998, p. 7). In other words, the very possibility of political life and subjectivity is created through the creation of a population (bare life) that is considered to be unworthy or incapable of membership in a political community. However, through this exclusion, bare life remains in relation to the political community, a relationship that Agamben refers to as "inclusive exclusion," or the "relation of ban," a relationship reminiscent of Isin's

argument about citizenship and alterity (1998, p. 28). The banned individual is not "simply set outside the law ... but rather abandoned by it...exposed and threatened on the threshold in which life and law, outside and inside, become indistinguishable" (Ibid).

The "inclusive exclusion" that characterizes sovereign power produces bare life in the form of the *homo sacer* – literally, sacred man - a person who can be killed with impunity (Agamben, 1998, p. 82-3). The *homo sacer* is "abandoned" by law, relegated to the zone of indistinction that characterizes the sovereign exception. The most extreme form of the sovereign exception is the camp, a space created when the state of exception becomes the norm (1998, p. 168-9). A state of exception refers to the extension of government powers during a time of political crisis in which governments abrogate individual rights in the name of security. According to Agamben, the state of exception is difficult to define, "given its position at the limit between politics and law" (2005, p. 1). It is a legal measure that is invoked in a moment of perceived political crisis, but it cannot be understood in juridical terms: it "appears as a legal form of what cannot have legal form," namely the suspension of the rule of law through the law itself in the form of martial law or "full powers" (Ibid).

A state of exception can be characterized by the collapse of the distinctions between executive, legislative, and judicial powers (2005, p. 7). Agamben contends that states of exception have a tendency to become permanent, allowing for a gradual convergence with totalitarianism, and "for the physical elimination not only of political adversaries but of entire categories of citizens who for some reason cannot be integrated into the political system" (2005, p. 2, 6).

Agamben has argued that the war on terror is a seemingly permanent global state of exception (2005, p. 2). Following the September 2001 attacks, many of the civil and political rights and liberties guaranteed by liberal democracies were suspended in order to protect citizens from further attacks. Agamben sees this encroachment on the principles that (supposedly) underpin liberal democracy as evidence of the convergence of democracy and totalitarianism, arguing that the state of exception "tends increasingly to appear as the dominant paradigm of government in contemporary politics" (2005, p. 2, 6). In the name of fighting terrorism, states and their security agencies and armed forces increasingly operate outside the law, ignoring domestic legal principles such as *habeas corpus* and international covenants such as the Geneva Conventions.

Agamben's theory of the *homo sacer* and the state of exception provide an important analysis of the relationship between state power and biological life, but it does not explain how state power is used to manage particular populations through the exclusion of some people from the category of humanity (Butler, 2004, p. 68). This ontological exclusion from humanity is clearly racialized, a fact that is reflected amongst those who inhabit contemporary camps, such as the detention camp at Guantánamo Bay and Abu Ghraib. However, despite Agamben's lack of consideration of the ways that state power operates through axes of oppression like race, class, and gender, his theory provides valuable insight into understanding how a state of exception allows for the abrogation of citizenship rights, creating the conditions of possibility that facilitate rights violations such as opportunistic rendition and torture.

Torture, Citizenship, and *Homo Sacer*

Following the 9/11 attacks, debates about the use of torture as a means of obtaining intelligence became part of mainstream public and academic discourses (see for example, Alter, 2001; Bowden, 2003; Dershowitz, 2002; Elshtain, 2003; Hoffman, 2002; Ignatieff, 2004). Perhaps the most well-known and vocal proponent of the use of torture has been Alan Dershowitz, a professor at Harvard Law School. In his 2002 book *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*, Dershowitz notes that "before September 11, 2001, no one thought the issue of torture would ever reemerge as a topic of serious debate in this country [the United States]" (2002, p. 134). Dershowitz goes on to discuss the use of torture as a means of preventing acts of terrorism, suggesting that since torture is likely to be used against terrorist suspects, it should be legal in some circumstances. He uses the law school hypothetical of the "ticking time bomb scenario" - a thought experiment that is often used to debate whether the torture can ever be justified. In this hypothetical scenario, an individual is suspected of having knowledge of an imminent terrorist attack that will kill thousands of people. The question raised is whether it is acceptable to torture this individual so that he or she will disclose information needed to prevent the attack. Dershowitz argues that

> The real issue, therefore, is not whether some torture would or would not be used in the ticking bomb case – it would. The question is whether it would be done openly, pursuant to a previously established legal procedure, or whether it would be done secretly, in violation of existing law. (2002, p. 151)

Dershowitz proposes a system of torture warrants that would allow for judicial warrants for nonlethal torture in cases where there is compelling evidence that the individual in

question has information required to prevent an imminent terrorist attack (2002, p. 158-9). According to Dershowitz, such a system is preferable, as it will better protect the rights of suspects and decrease the level of physical violence used against them (2002, p. 158-9).

Two key points must be raised in response to Dershowtiz's argument. First, the prohibition against torture is a peremptory norm in international law, meaning torture is banned in all circumstances, including the ticking bomb scenario used by Dershowitz and other proponents of the use of torture. Secondly, the ticking bomb scenario is used to convince people that torture should be permissible under some circumstances, normalizing its practice by literally creating a new legal norm, thus contributing to the conditions of possibility that allow for the torture of suspected 'terrorists,' at Guantánamo Bay, Abu Ghraib, and elsewhere. As Jeremy Waldron says the ticking bomb is an effective rhetorical strategy for convincing people that an absolute prohibition on torture is misguided, as

> How could anyone object to the use of torture if it were dedicated specifically to saving thousands of lives in a case like this? [...] The answer it is supposed to elicit is that torture can never be entirely out of the question, if the facts are clear and the stakes are high enough. (2005, p. 1714)

As effective as this rhetorical strategy is, Waldron points out, Dershowitz's use of this scenario to promote the use of so-called "torture warrants," is only one example of legal and political discourse and context that offers the conditions of possibility for the torture of prisoners by the United States (Waldron, 2005, p. 1683).

Despite the absolute ban on the practice of torture, it occurs in democratic countries on a regular basis. While it may be tempting to believe that torture is something

that only happens in countries that do not respect human rights, or, perhaps, in democratic countries in extreme situations, the use of torture by domestic police forces and correctional officers in countries including Canada, the United Kingdom and the United States is so widespread and well-documented as to make this position, at best, naïve (Davis, 2005, p. 49-50; Parry, 2005, p. 521; Puar, 2007, p. 79; Razack, 2004, 2008, p. 78; Rejali, 2003, p. 157). However, as Waldron points out, "what is remarkable is not that torture is *used*, but it (or something very close to it) is being *defended*," indicating the normalization of torture in the post-9/11 era (2005, p. 1684).

Torture and the Law

The most commonly used definition of torture (and the definition used by the Iacobucci Inquiry), is found in the *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (UNCAT) (1984), which defines torture as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[5]

[5]While this is the most commonly used definition, it has been criticized by some because it defines torture as an act that can only be performed by an agent of the state or an individual who has been otherwise authorized to act in an official capacity. Although torture is most commonly used to extract information and as a tool of political intimidation, this definition of torture excludes a number of practices that are

Torture is prohibited in all circumstances by UNCAT and a number of other international conventions, including the *Geneva Conventions*, the *Universal Declaration of Human Rights* (1948), the *International Covenant on Civil and Political Rights* (1966),the *Convention Relating to the Status of Refugees* (1969), the *Convention on the Rights of the Child* (1989), and the *Rome Statute of the International Criminal Court* (1998). More importantly, the prohibition against torture is a peremptory norm or *jus cogens*. As the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia in 1991 explained in the case of *Prosecutor v. Anto Furunzija* (1998)

> ...the jus cogens nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate. (at para. 154)

According to international law as set out in Article 53 of the *Vienna Convention on the Law of Treaties* (1969), peremptory norms such as the prohibition against torture are irreversible according to international law, as set out in Article 53 of the *Vienna Convention on the Law of Treaties* (1969), which states that

> a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is

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recognizably torture, including religiously sanctioned punishments, such as stoning (Mossallanejed, 2005, p. 31-2; Rejali, 2007, p. 37). Some feminists have also argued that this definition is flawed because it excludes torture practiced in the private sphere, such as domestic violence (Charlesworth, 1995; Copelon, 1994).

> permitted and which can be modified only by a subsequent norm of general international law having the same character.[6]

In Canada, the use of torture is prohibited by a number of domestic statutes, including the *Canadian Charter of Rights and Freedoms,* the *Criminal Code* and the *Crimes Against Humanity and War Crimes Act* (2000).[7] While there exists very little jurisprudence on the issue of torture, the Supreme Court of Canada's ruling in the case of *Suresh v. Canada* is significant, as it is the only Canadian case that addresses the prohibition against torture as a peremptory norm. Manickavasagam Suresh, a Convention refugee from Sri Lanka, was to be deported by the Canadian government after applying for landed immigrant status. According to CSIS, Mr. Suresh was a member of the Liberation Tigers of Tamil Eelam (LTTE), considered by the Canadian and Sri Lankan governments to be a terrorist organization. Mr. Suresh appealed the deportation decision on a number of grounds, the most significant being that he faced a significant risk of torture if deported to Sri Lanka.

The Supreme Court found that Mr. Suresh was entitled to a new deportation hearing on the basis that "deportation to face torture is generally unconstitutional and that some of the procedures followed in Suresh's case did not meet the required constitutional standards" (at para. 1). The Court considered the matter of deporting to torture from the perspective of both domestic and international law and, citing the prohibition of torture in

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[6] See also *R. v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex p Pinochet* [1999] UKHL 17.

[7] In Canada, the use of torture is prohibited under section 12 of the *Canadian Charter of Rights and Freedoms*, where it states that "everyone has the right not to be subjected to cruel and unusual treatment or punishment," and section 291 of the Criminal Code. The *Crimes Against Humanity and War Crimes Act* (2000) provides for the prosecution of any individual in Canada for any offence stated under the act, including genocide, war crimes, and crimes against humanity, wherever the offence occurred.

the *Criminal Code* as well as sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*, concluded that such deportation violates the principles of fundamental justice, that is, the principles that underpin the Canadian legal system (Suresh at para. 50 -58).[8]

In the Suresh decision, the Court also considered the international context, specifically, whether the prohibition against torture is a peremptory norm. Noting that while it could not "pronounce on the status of the prohibition of torture in international law," the Court recognized torture as "an emerging, if not established peremptory norm...that cannot be easily derogated from," even where national security is at issue (Suresh at para. 65, 75). It concluded that "generally to deport a refugee, where there are grounds to believe that this would subject the refugee to a substantial risk of torture would unconstitutionally violate the Charter's s. 7 guarantee of life, liberty, and security of the person," but also indicated that there might be exceptional cases in which such a deportation might be justified under the balance test (Suresh at para. 129).[9] Thus, while the Court's decision can be seen as a victory for Mr. Suresh, it raises troubling questions about Canada's commitment to human rights, specifically the right of individuals to be free from torture. Through their determination that the rights of an individual to be free from torture must be balanced against the national security interest, the Court opens the

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[8] Section 7 of the *Charter* states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Section 12 states: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

[9] As explained in the Suresh decision: "Deportation to torture, for example, requires us to consider a variety of factors, including the circumstances or conditions of the potential deportee, the danger that the deportee presents to Canadians or Canada's national security, and the threat of terrorism to Canada. In contexts in which the most the most significant considerations are general ones, it is likely that the balance will be struck the same way in most cases. It would be impossible to say in advance, however, that the balance will necessarily be struck in the same way in every case" (Suresh v. Canada at para. 45).

door to the possibility that some people are less deserving of the protection of the state than others.

Torture and Citizenship

What unites the practice of torture by police and correctional officers and the torture of suspected 'terrorists' is that both are forms of state violence directed at individuals and groups who are vulnerable because of their race, ethnicity, religion, political beliefs, and/or because of the crimes they are suspected or accused of committing. Whether torture is committed against prisoners or suspected 'terrorists,' the effects are the same: distinctions are drawn between those who are considered worthy of rights--generally citizens--and those who are not.[10] Indeed, despite the provisions against torture in the Criminal Code, the *Crimes Against Humanity and War Crimes Act,* UNCAT, the Geneva Conventions, the *International Covenant on Civil and Political Rights*, the Refugee Convention and the *Rome Statute of the International Criminal* Court regarding responsibility for conspiracy to commit, or failure to prevent torture, the norm of state behaviour in the post-9/11 era seems to be one of non-responsibility for non-citizens coupled with a wilful blindness toward those whose citizenship credentials are tainted by their race, religion, or multiple citizenships.

The use of torture to distinguish between citizens and non-citizens dates as far back as the ancient republics, where torture was exclusively practiced on non-citizens

[10] While prisoners technically remain citizens, they do not have access to many citizenship rights, most obviously, the rights of liberty and freedom of mobility. Depending on the laws of the state in which they are citizens and the nature of their crime, they may also be permanently disenfranchised, as is the case for those convicted of felonies in the United States (Stern, 2002).

such as slaves, foreigners, and 'barbarians,' while Greek and Roman citizens were entitled to more humane punishments (McCoy, 2006, p. 16; Rejali, 2003, p. 159; Rejali, 2007, p. 56). However, the lines between these categories were not fixed, creating anxiety about how to distinguish between citizens and slaves. Torture was one method to resolve this anxiety:

> As an instrument of demarcation, it [torture] delineates the boundary between slave and free, between the untouchable bodies of free citizens and the torturable bodies of slaves. The ambiguity of slave status, the difficulty of sustaining an absolute sense of differences, is addressed through this practice of the state, which carves the line between slave and free on the bodies of the unfree. (duBois, 1991, p. 63, as cited in Rejali, 2003, p. 159)

Another example of the use of torture to distinguish between citizens and slaves can be found in the American slave trade, where patterns of scarification were used to mark an individual as 'property,' allowing others to "read" their bodies (Rejali, 2003, p. 159; 2007, p. 56-7). In a related example, Angela Davis identifies lynching as an example of a practice that "defined its victims as beyond the possibility of citizenship" (2005, p. 53). Noting that while the victims of lynching in the American South were technically American citizens, Davis argues that "lynching was one of the ways that the impossibility of equal citizenship was reinforced," as lynching, like torture, was a form of state-sanctioned violence that demonstrated and reinforced that particular groups were not protected by the state and the rule of law (Ibid).[11]

[11] Although Davis acknowledges that lynching was "extralegal," her contention is that "although the participants were not direct representatives of the state in carrying out these lynchings, they considered themselves to be doing the work of the state" (Davis, 2005, p. 53).

Most modern forms of torture do not leave permanent marks, a shift that Darius Rejali attributes to the institutionalization of human rights discourses through conventions, treaties, and laws that prohibit torture, combined with increased monitoring of human rights abuses (2003, p. 153-4). Despite this shift, torture retains the function of distinguishing between citizens and outsiders, as well as creating and enforcing gradations of citizenship (Rejali, 2003, p. 159; Rejali, 2007, p. 57-8). In some cases, the use of "stealth torture" (torture that does not leave permanent marks), may even sharpen this distinction, as complainants may be not be believed, and the absence of physical evidence lets torturers deny their actions (Rejali, 2003, p. 166). Stealth torture techniques like electrical shocks may not leave physical evidence of any kind, even for medical professionals who specialize in identifying and treating torture victims (Rejali, 2007, p. 405, 443). This is especially troubling for marginalized groups, who are least likely to be believed, for example, refugee claimants who cannot offer physical proof of their persecution (Parry, 2005, p. 521; Rejali, 2003, p. 158).

In the context of the 'war on terror,' democratic governments including the United States have used a number of stealth torture techniques to interrogate 'terrorist' suspects. What is most interesting about this practice is that no one denies that these acts have occurred - the use of sleep deprivation, constant noise, and water boarding by the United States at Guantánamo Bay and other detention centres has been widely reported (Borger, 2004; Dodd, 2005; Eggen & Smith, 2004; Gregory, 2006, p. 416; Hersh, 2004; Johnston, Lewis, & Risen, 2004; Mintz & White, 2004).[12] In fact, the use of these

[12]Amnesty International, *USA: Pattern of Brutality and Cruelty – War Crimes at Abu Ghraib*, 2004; Center for Constitutional Rights, *Report on Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantánamo Bay, Cuba,* 2006. Human Rights

methods has been defended by a number of American legal scholars such as Jay Bybee and John Yoo who were connected to the Bush government. Bybee has argued that these acts did not constitute actual torture, while Yoo has argued that Taliban and al-Qaeda prisoners are not protected by the *Geneva Conventions*, including the prohibitions against torture and cruel interrogation (see *Memorandum from the Office of the Assistant Attorney General for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S. C. §§ 2340-2340A*, 2002 [known as the *Bybee Memorandum*], and *Memorandum for William J. Haynes II, General Counsel, Department of Defense, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees*).

This thesis is specifically concerned with the Canadian security apparatus' practice of opportunistic rendition by the Canadian security apparatus to detain and torture suspected 'terrorists.' The term rendition refers to the apprehension of an individual in one country for the purpose of transferring him or her to another country, usually to face criminal prosecution (Grey, 2007, p. 38; Mayer, 2005; Parry, 2005, p. 526). However, in the context of the 'war on terror,' the term has been generally applied to the practice of extraordinary rendition – the U.S. authorities' extrajudicial apprehension and transfer of a prisoner to secret locations for the purpose of interrogation. As in the case of Maher Arar, suspects are transferred to countries like Syria where torture is routinely practiced for the purposes of collecting intelligence (Neve, 2007, p. 121; Parry, 2005, p. 527).

Watch, *By the Numbers: Findings of the Detainee Abuse and Accountability Project*, 2006.

Opportunistic rendition is similar to extraordinary rendition, as it is an example of democratic governments "outsourcing torture" to countries such as Syria and Egypt (Mayer, 2005). However, opportunistic rendition differs from extraordinary rendition in that the individuals who are rendered are not apprehended by American, or, in the cases of Messrs. Almalki, Elmaati, and Nureddin, Canadian authorities, in order to be transferred to another country for interrogation. Instead, of apprehending and transferring the individuals in question, countries such as Canada "take opportunities as they present themselves to employ the 'expertise' of foreign security agencies," by sharing intelligence and information such as travel itineraries with countries such as Syria (Ross & Stasiulis, 2006, p. 342).

The use of extraordinary and opportunistic rendition exemplifies the use of stealth torture techniques by democratic governments, since by ensuring that torture takes place far away and at the hands of other governments, they can distance themselves from the practice and deny any complicity. However, in the cases of Messrs. Almalki, Elmaati, and Nureddin, the provision of faulty intelligence that labelled these individuals as terrorists linked to al Qaeda, as well as information such as travel itineraries, leave little doubt about CSIS and the RCMP's intentions.

Torture and the Production of *Homo Sacer*

The concept of the *homo sacer* is useful for considering the experiences of those who have been tortured. As discussed above, torture is prohibited in all circumstances, and therefore, by default, those torturers operate outside the law and their victims exist outside the law, making them vulnerable to state violence. Often marginalized because of

their status as homeless, migrants, prisoners, or individuals living in states where torture is routinely and openly practiced, victims of torture have been failed by legal protections against torture and generally do not have legal recourse.

Returning to the distinction between *bios* and *zoe*, Aristotle argues that while all animals have voices (*phone*) and can express pleasure and pain, speech (*logos*), is a uniquely human ability (Nyers, 2006, p. 38). The human capacity for expressing concepts such as justice and injustice, good and evil, is what makes humans political subjects (Ibid). In her classic work on torture, *The Body in Pain: The Making and Unmaking of the World*, Elaine Scarry argues that intense pain wipes out an individual's sense of self and the world as well as his or her capacity for speech:

> It is the intense pain that destroys a person's self and world, a destruction experienced spatially as either the contraction of the universe down to the immediate vicinity of the body or as the body swelling to fill the entire universe. Intense pain is also language destroying: as the contexts of one's world disintegrates, so the context of one's language disintegrates...(1985, p. 35)

Victims of torture are reduced to "biopoliticized bare life," unprotected by conventions against torture and the global human rights regime (Gregory, 2006, p. 415). Those who are tortured are incapable of the reasoned speech required of politically qualified life (Ibid). In Hannah Arendt's terms, victims of torture are people who have lost the "right to have rights" (1994, p. 288).

Messrs. Almalki, Elmaati, and Nureddin are examples of individuals who lost the "right to have rights" because of their race, religion, and suspected ties to terrorist organizations. Their experiences are illustrative of the consequences of being "abandoned by the law" (Agamben, 1998, p. 28). These individuals, all Canadian

citizens, were excluded from the protection of the Canadian government and lost access to the most fundamental human right – the right to be free from torture (as well as citizenship rights like the right to consular services). The loss of the right to be free from torture represents the dissolution of the guarantees of the Charter and the whole edifice of international human rights and humanitarian law, as the reiteration of the prohibition on torture is so pervasive in these bodies of legal thought as to suggest that compromise on this issue is tantamount to ripping out the keystone of the post-WWII human rights regimes (the legitimatory foundation of the post-WWII international legal order).

Conclusion

Agamben's theories of *the homo sacer* and the state of exception speak to the challenge of conceptualizing the existence of people, like Abdullah Almalki, Ahmed Elmaati, and Muayyed Nureddin, who are legally citizens but do not have access to all the rights of citizenship – namely, the protection of the state. As Hannah Arendt points out, without the protection of the state, individuals do not enjoy human rights that are supposed to be universal, including the right to be free from torture. Thus, individuals who are not protected by a state are vulnerable to violence; they are *homo sacer*, and they can be killed with impunity.

The existence of individuals constituted as *homo sacer* is an indication of what Agamben calls a state of exception, the period when political crisis is used to extend government powers and undermine the rule of law. Opportunistic and extraordinary rendition undermines not only domestic legal systems but the entire foundation of international humanitarian and human rights law. The decision of supposedly democratic

governments like Canada and the United States to ignore one of the most fundamental precepts of this international legal order creates the conditions of possibility that allow abuses to go unchecked.

The theoretical perspectives advanced in this chapter provide a necessary corrective to liberal theories of universal, undifferentiated citizenship, as well as insights into the use of opportunistic rendition and torture in the cases of Messrs. Almalki, Elmaati, and Nureddin. The following chapters build on these theoretical foundations, exploring the personal and political implications of Messrs. Almalki, Elmaati, and Nureddin's experiences of opportunistic rendition, and the Canadian government's response through the Iacobucci Inquiry and Report.

Chapter 2: Epistemological Considerations and Methods

My goal in writing about the tenuousness of citizenship for Muslim people in Canada is to explore and analyze the processes by which particular individuals come to be constituted as non-citizens, outside the rule of law. Using the experiences of Messrs. Almalki, Elmaati, and Nureddin provided an opportunity to illustrate the human consequences of practices such as opportunistic rendition, and demonstrate how these practices are tied to broader discourses of citizenship, nationhood, and security. Such an examination requires epistemological and methodological tools that provide an analytical framework for conceptualizing intersecting oppressions of race, class, and gender as they intertwine with issues such as citizenship, rights, and security.

This chapter is divided into three sections. In the first section, I explain my epistemological framework, looking specifically at the contributions of feminist standpoint and intersectional theorists. In the second section, I discuss the research methods I used to collect and analyze my data. Finally, I discuss the challenges I faced in conducting this research.

Epistemology: Power and Knowledge

My epistemological framework is grounded in feminist standpoint approaches knowledge and knowledge production. Feminist approaches understand knowledge as socially constructed and inherently political, reflecting historically constituted relations of

inequality and domination. Through their critique of positivism and the scientific method as the only legitimate models of inquiry, feminist theorists have interrogated many of the "taken-for-granted" assumptions about what constitutes knowledge, how knowledge is produced, and who can be a "knower" (Harding, 1987, p. 3; Harding, 2004, p. 3-6; Smith, 1987, 1990, 1999). These frameworks emphasize the importance of reflexivity on the part of the researcher and concern for the political and ethical implications of the research project, ensuring that research contributes to a broader struggle for social justice (Brookes & Hesse-Biber, 2007, p. 4-5; Kincheloe & McLaren, 2005).

By reconceptualizing knowledge production as a social activity that is embedded within particular political, economic, and cultural contexts, feminist approaches to knowledge production challenge the idea that research is capable of producing universal or objective truths. Drawing attention to the power relations that underpin claims to objectivity and universality, standpoint theorists have argued that "objective knowledge" reflects the interpretations and interests of dominant groups, as well as the social positioning of the researcher (Harding, 2004, p. 4-5; Hesse-Biber & Piatelli, 2007a, p. 143; Hill Collins, 2000; Smith, 1987, p. 2-3). The exclusion and distortion of the voices and knowledge of marginalized people is not just a reflection of the bias of individual scholars or bad research, but of "conceptual frameworks themselves [that] promoted historically distinctive institutional and cultural interests and concerns, which ensured that the knowledge produced through them was always socially situated" (Harding, 2004, p. 4-5).

Standpoint theorists have attempted to address the exclusion of marginalized people by using personal experience as a "point of entry" into knowledge production.

Standpoint theorists begin from three key assumptions. The first is that social relations shape what people know about themselves and the rest of the world. The second assumption is that in a hierarchical society, this will result in different understandings of how society is organized. The third is that the perceptions of the dominant classes are normalized, and perpetuated through "hierarchical structures and institutions ...that solidify and disseminate their continued power as natural, inevitable, and desirable" (Harding, 2007, p. 50). To address these issues, standpoint theory builds knowledge from the bottom up, beginning with people's concrete experiences and integrating that knowledge into struggles for social justice (Brooks, 2007, p. 55; Harding, 2007, p. 51). Standpoint theorists use the experience and knowledge of marginalized people to expose how power operates from situated and partial perspectives (Naples, 2003, p. 69).

In writing about the experiences of marginalized people as a way of exposing structural violence, I am guided by the work of Paul Farmer and Sheri Stone-Mediatore. Both Farmer and Stone-Mediatore have written about the importance of personal experience and storytelling in the production of critical knowledge, while also offering an important critique of standpoint theories. As Stone-Mediatore has pointed out, standpoint theorists have advocated beginning from the lives of oppressed people, but have not always addressed the ways that "the viewpoints of people who have been the most socially and culturally marginalized are not presented in 'theories,' in the standard sense of the term," particularly when these individuals are "excluded from official knowledge-producing institutions or when they attempt to articulate experiences that have been systematically suppressed in ruling discourses and ignored by official research

institutions, academic theorizing and professional norms that tend to obscure and distort their experiences" (2003, p. 163).

Stone-Mediatore argues for the importance of narrating personal experience through storytelling, noting that storytelling can allow for the reclamation and revaluing of subjugated knowledges, and the recognition of the agency and resistance of marginalized people (2003, p. 152). Paul Farmer makes a related point, arguing for the importance of using biography to make sense of structural violence, as the realities of extreme suffering cannot be conveyed through facts and figures (2005, p. 40-1). This dynamic is highlighted by contemporary debates about the use of torture as a method of interrogation, in which victims of torture are considered in the most abstract terms (see Alter, 2001; Bowden, 2003; Bybee, 2002; Dershowitz, 2002; Elshtain, 2003; Ignatieff, 2004). While proponents of torture as a method of intelligence gathering may recognize torture as a human rights violation, it is questionable whether they regard the victims of torture as fully human – at best, they are willing to disregard the rights of potential 'terrorists' in the name of security.

The dehumanization of victims of torture is also present in other media representations, including those that are ostensibly sympathetic. The most obvious example of this phenomenon was the decision to publish photographs of prisoners being tortured at Abu Ghraib. While many have argued that publishing these photographs was necessary to convey the severity of the abuses to "the public," the decision to publish these photographs without the consent of the individuals depicted raises serious questions about the agency accorded to victims of torture, and the willingness of people on all sides of the political spectrum to use victims of torture to advance their own political agendas.

By centering the experiences of Messrs. Almalki, Elmaati, and Nureddin, and ensuring they had some control over their words by providing them with an opportunity to edit the interview transcripts, I sought to avoid this exploitative dynamic.

Both Farmer and Stone-Mediatore emphasize the importance of placing these stories within a broader political, economic, and social context. For example, in his book *Pathologies of Power: Health, Human Rights, and the New War on the Poor*, Farmer tells the story of Chouchou Louis, a young Haitian man who was tortured and murdered by the Haitian military. Farmer argues that ChouChou Louis was targeted by the military because he was a young, poor, rural Haitian man (2005, p. 38). While individual stories may "reveal suffering, they tell us what happens to one or many people; but to explain suffering one must embed individual biography in the larger matrix of culture, history, and political economy" (Farmer, 2005, p. 41). Through their emphasis on personal experience as a tool for exposing and explaining oppression and structural violence, Farmer and Stone-Mediatore illustrate how to avoid the tendency of standpoint and intersectional analysis to remain at an individual level of abstraction (Yuval-Davis, 2006, p. 197).

Farmer and Stone-Mediatore's insights were especially useful when analyzing the data I collected from my interviews with Messrs. Almalki, Elmaati, and Nureddin, and my reading of the Iacobucci Report and related documents. Not only do the stories and experiences shared by Messrs. Almalki, Elmaati, and Nureddin diverge from the 'official' version of the events surrounding their detention and torture, they also challenge official discourses of equality, multiculturalism, and Canadian national identity. As my discussion of the Iacobucci Inquiry and Report in the following chapter illustrates,

Messrs. Almalki, Elmaati, and Nureddin have been excluded from the processes of official knowledge production, and their experiences have been distorted in an effort to obfuscate the circumstances of their detention and torture.

In order to develop a more accurate understanding of the political, economic, and social context of the detention and torture of Messrs. Almalki, Elmaati, and Nureddin, I have used an intersectional analysis of power to provide a theoretical framework for understanding how different axes of oppression, such as race, gender, class, and sexuality structure people's lives. Intersectionality, a theoretical paradigm developed by Black and anti-racist feminists such as Patricia Hill Collins, bell hooks, Kimberlé Crenshaw, and Nira Yuval-Davis, is a way of conceptualizing multiple and mutually constituting forms of oppression. As a theoretical paradigm, intersectionality destabilizes naturalized social divisions such as race, gender, class, and disability, illustrating how they intersect with each other in particular historical and social contexts without attributing primacy to any one set of relations or reifying existing categories (Anthias and Yuval-Davis, 1983, p. 68). The relationship between these social divisions can be described as a "matrix of oppression," in which individuals may be simultaneously part of dominant and subordinated groups (Hill Collins, 2000, p. 18; Yuval-Davis, 2006, p. 198).

Using an intersectional analysis of power was necessary for this project in order to understand how Canadian citizenship is racialized and gendered, particularly in the context of the 'war on terror,' where the terrorist 'threat' is embodied as a Muslim man of Arab descent. An intersectional approach allows for the recognition that the citizenship rights of these individuals are particularly tenuous. However, intersectionality does more than just allowing the researcher to note multiple aspects of oppression. Intersectionality

also provides the researcher with a set of questions to consider during all aspects of the research process, as it does not presuppose a particular set of relations between different axes of oppression.

An intersectional analysis of power was also important in terms of my own reflexivity as a researcher, considering how power is exercised throughout the research process. In considering the questions of what can be known, how we can know it, and who can be a knowing subject, researchers must be aware of the ways in which our own perceptions are mediated by their social location and experiences. We must also be aware of the ways in which structural inequalities of race, class, and gender shape the relationships between the researcher, research participants, the research process, and the final product (Hesse-Biber & Piatelli, 2007b, p. 496).

In pursuing this research project, I had to consider how my own social location and experiences shaped my own perceptions and assumptions, as well as my relationship with research participants. Although I approached this project from an anti-oppressive framework that included an intersectional analysis of power, the reality of living in a white supremacist and Eurocentric society makes it impossible to avoid learning racist and Eurocentric ways of thinking and being in the world. Using an intersectional analysis of power provided some methodological safeguards, as it required me to constantly interrogate my own assumptions, and how they were reflected in the questions I was asking (and not asking), as well as my interpretation of the data that I collected.

Methods

Interviews

I conducted semi-structured, in-person interviews with Abdullah Almalki, Ahmad Elmaati, and Muayyed Nureddin in April 2009. First, I made contact with potential participants. In the case of Mr. Almalki, I was able to contact him directly through e-mail, as he has his own website with an e-mail address specifically for interview requests. I e-mailed Mr. Almalki to introduce myself, explain my research project, and ask if he would be interested in participating (see Appendix A for a copy of my letter of information and consent form). Mr. Almalki agreed to the interview and invited me to attend a speech he would be giving at Carleton University. Hearing Mr. Almalki speak about his experiences before our interview gave me a sense of what areas he was comfortable talking about, and allowed me to introduce myself before we arranged our interview.

I was wary of attempting to make direct contact with Messrs. Elmaati and Nureddin, as they have largely chosen to remain outside of the public eye. Instead, I made enquiries about potential interviews through their lawyer, Barbara Jackman, with whom I was previously acquainted. I hoped that by establishing contact through their lawyer – someone they trust, and who knew me, I would be able to establish some trust and legitimacy. In my e-mails to Ms Jackman, I explained my research project, and included some sample questions from my interview guide. After a lengthy e-mail exchange, we were able to arrange for the interviews to take place at her office in Toronto in mid-April, 2009.

I had intended for the interviews to be relatively informal. I had prepared a short list of questions organized around the themes that I wanted to explore, and I had hoped that the interviews would unfold into a more natural conversation (for my list of interview questions, please see Appendix B). Although this strategy was successful during my interview with Mr. Almalki, it became apparent in my interviews with Messrs. Elmaati and Nureddin that I had underestimated their discomfort with the interview process. I had anticipated that the interviews might be stressful for research participants – on top of the normal anxiety about being interviewed by a stranger, there were a number of other factors at play, the most obvious being the personal and traumatic nature of the topic. While I purposefully avoided questions about their experiences of detention and torture, directing the conversation to themes such as citizenship, racial profiling, and the Iacobucci Inquiry, there was always a shared sense of why we were talking in the first place. This was expressed in a variety of ways, including oblique references to "what happened to me" or "my experiences in Syria."

Following the completion of the interviews in Toronto, I returned to Ottawa and transcribed the interviews. I provided copies to the participants, as agreed in the consent form. I provided the transcripts with the understanding that they had control over their words, and that they were welcome to edit the transcript or withdraw from the research project altogether. The last was particularly important for a number of reasons, most obviously the private and painful nature of the subject matter. Other considerations were the anonymous media leaks by government officials representing Messrs. Almalki and Elmaati as terrorists and the further trauma for Messrs. Almalki, Elmaati, and Nureddin

of being excluded from the Iacobucci Inquiry, which they described as "a continuation of the psychological torture we experienced overseas" (Almalki, et al., October 16, 2008).

Analysis of Legal Documents and Other Secondary Sources

One of the difficulties of researching very recent events is that there are few secondary sources. In researching the detention and torture of Abdullah Almalki, Ahmad Elmaati, and Muayyed Nureddin and the Iacobucci Inquiry, I was largely dependent on the Iacobucci Report itself. Not only is there no scholarly material yet about the Inquiry, but as it was largely conducted behind closed doors, it received very little media attention, and the report was released with very little fanfare. Whenever possible, I relied on the words of Messrs. Almalki, Elmaati, and Nureddin during the interviews I conducted, as well as Kerry Pither's book *Dark Days: The Story of Four Canadians Tortured in the Name of Fighting Terror.*

Dark Days proved to be an invaluable resource, as Ms Pither has been involved in the issue of the Canadian government's complicity in torture as both a journalist and an activist since the early days of Maher Arar's incarceration in Syria (Pither, 2008, p. xvii). Pither's book, which is based on five years of interviews with Messrs. Almalki, Elmaati, Nureddin, and Arar, and their families, was an excellent source of data, and an extremely useful reference for details about the experiences of the research participants (Pither, 2008, p. xviii).

Other useful sources of information included the R*eport of the Events Relating to Maher Arar* (hereinafter, the Arar Report), transcripts from the *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* (hereinafter the Arar

Inquiry), and the various legal documents available on the Iacobucci Inquiry's website. The Arar Report provided an exhaustive overview of the workings of CSIS and the RCMP in the post-9/11 environment, particularly in relation to practices of information sharing with foreign intelligence agencies. While the legal documents available on the Inquiry website, including applications for standing, and submissions by the Participants and Intervenors, do not appear in my thesis, they filled in many of the gaps left by the Iacobucci Report.

Challenges

In pursuing this project, I encountered a number of challenges – the most significant being the ethical and logistical issues of conducting interviews with research participants who are not only survivors of torture, but who have also not been officially "cleared" of connections to terrorism. Many critical researchers are familiar with Laura Nader's adage "Don't study the poor and powerless because everything you say about them will be used against them" (as cited in Bourgois, 2003, p. 18). Keeping these words in mind, I had to consider the potential impact of this project on participants who, in addition to living with the racist assumption that Muslim people threaten Canadian national security (an assumption that *de facto* excludes Muslims from Canadian society), continue to live under the shadow of public allegations of being "terrorists."

Interviewing survivors of torture was a daunting prospect for a beginning researcher. Through my research on torture, I had gained some appreciation for the life-long impact it has on survivors. From reading secondary sources, such as Kerry Pither's book *Dark Days*, I knew that all three of the men that I wanted to interview were

struggling with the physical and psychological scars of torture, including post-traumatic stress disorder (PTSD) (Pither, 2008, p. 384-8).

Addressing these issues required a great deal of discussion with my supervisor, reflection, and planning. Deciding on which areas to address in interviews, how to handle the possibility of triggering painful memories, and how to ensure that participants had control over their words were all issues that needed to be addressed. My supervisor and I discussed these issues and decided that one way to mitigate these risks was to avoid asking direct questions about Messrs. Almalki, Elmaati, and Nureddin's experiences of detention and torture. As an inexperienced researcher, with no training or experience in crisis intervention, I was concerned about my ability to recognize signs of distress, and respond appropriately. Accordingly, I kept the questions focused on the personal and political implications of their experiences, hoping that by limiting the line of questioning in this way, I would avoid triggering painful memories.

I had not considered the other ways that PTSD could affect the interview process. While I do not and cannot know all of the ways that PTSD affected the interviews, there were some explicit instances where symptoms of PTSD were apparent. For example, one of the symptoms of PTSD is difficulty in concentrating. Although this was not an issue during the actual interviews, two of the three individuals that I interviewed indicated that they needed help reading the information and consent forms, and would not be able to read and edit the transcripts of the interviews that I had committed to providing. While this problem was relatively easy to resolve, as we read the forms together, and arranged for the forms and the transcripts to be reviewed by a trusted third party, it demonstrates the challenges of interviewing people who have been traumatized.

The fact that Messrs. Almalki, Elmaati, and Nureddin have not been officially "cleared" of being "terrorists," was another constraint on the interview process. While none of these men has ever been charged with a crime, let alone convicted, their lives are restricted in many ways. This was reflected during the interviews, particularly when discussing the Canadian state and security apparatus. During these parts of the interviews, all of the research participants discussed their love for Canada, their pride in being Canadian citizens, and differentiated between the actions of a few "bad apples" who were responsible for their detention and torture, and CSIS and the RCMP as institutions. These remarks often contradicted other statements made over the course of the interview about racial profiling, Islamophobia, and the unexceptionality of their experiences. In pointing out these discrepancies, I do not mean to imply that Messrs. Almalki, Elmaati, and Nureddin were lying, but instead to illustrate how unsubstantiated suspicions of terrorism act as form of social control, requiring demonstrations of loyalty to the state.

Logistical Challenges

One of the most significant challenges that I faced while conducting this research project was the secrecy surrounding issues of national security, including the government's imposition of national security confidentiality over the overwhelming majority of the Iacobucci Inquiry. The Iacobucci Inquiry was conducted almost entirely in secret--with no evidence and only a few transcripts--available to the public. As discussed in the following chapter, claims of national security confidentiality are highly politicized, and have been used to hide embarrassing or damaging information from the public (Arar Inquiry: Analysis and Recommendations, 2006, p. 277). Although the

secrecy of the inquiry imposed significant limitations on my research, it is also a large part of my findings, as will be discussed in the following chapter.

While the Iacobucci Report lays out the events leading up to and during the detention and torture of Messrs. Almalki, Elmaati, and Nureddin, neither the documents and interviews used as evidence nor the transcripts are available to the public, or to Messrs. Almalki, Elmaati, and Nureddin and their counsel. This is especially frustrating because the public version of the Iacobucci Report (there is a second report that contains information that has been designated by the government as "potentially injurious" to international relations, national defence, or national security) contains very little information of analytical value. As will be discussed in the following chapter, the limitations imposed on the inquiry by the government in the Terms of Reference ensured that the inquiry would be little more than a fact-finding exercise, conducted in secret. The result is a document that provides little more than an official account of what happened to Messrs. Almalki, Elmaati, and Nureddin, absent any evidence, including the testimony of those who were directly involved.

The extreme secrecy under which the Iacobucci Inquiry was held required me to move away from my original research plan, which involved using data collected from the interviews and the Iacobucci Report, as well as anti-terrorism legislation and practices, to illustrate the process by which people become *homo sacer*.

Conclusion

The findings presented in the following chapter are my own. Although I have endeavoured to accurately reflect the voices of Messrs. Almalki, Elmaati, and Nureddin, I

know that as a researcher, I am embedded in the same set of social relations as the research participants. I have proceeded with this research knowing I bring my own set of assumptions and experiences to the research process, and cannot claim to be "objective." Further, my commitment to anti-oppressive principles and critical knowledge production informs my belief that objectivity is impossible when researching issues related to social injustice.

I believe that every research project is a learning experience for the researcher. While this particular research project had more than its share of challenges, I learned a great deal from my conversations with Messrs. Almalki, Elmaati, and Nureddin, who generously shared their thoughts with me.

Chapter 3: Findings

> If prisoners are reduced to bare life through torture, violently cast into a world beyond language, then the act of remembering their trauma is infinitely fragile and in its potentiality, profoundly political. For the attempt to give voice to their physical pain gives the lie to those who would ventriloquize its infliction as "intelligence gathering."[1]

This chapter will be divided into four sections. In the first section, I will provide an outline of the data that I collected from my analysis of the Iacobucci Report . I will begin with an overview of the events that led to the creation of the Iacobucci Inquiry, followed by a summary of the events that befell Messrs. Almalki, Elmaati, and Nureddin, and a brief discussion of Commissioner Iacobucci's findings. In the second section, I will discuss why Messrs. Almalki, Elmaati, and Nureddin can be characterized as *homines sacri*. In the third, I will discuss the Iacobucci Inquiry in greater detail, discussing how the inquiry functioned to produce an official narrative that reinforces commonly held ideas about Canadian citizenship and identity. In the final section, I will use the data collected from my interviews with Messrs. Almalki, Elmaati, and Nureddin to illustrate the effects of the abrogation of their citizenship rights, showing what it means to exist outside of the law.

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[1] Derek Gregory, "The Black Flag: Guantanamo Bay and the Space of Exception," *Geografiska Annaler, Series B: Human Geography 88 no.* 4 (2006), 417.

The Iacobucci Inquiry

The *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* (henceforth, the Iacobucci Inquiry), was called on December 11, 2006 in order to investigate Canadian involvement in the detention and torture in Syria and Egypt of Abdullah Almalki, Ahmad Elmaati, and Muayyed Nureddin. The inquiry was called based on the recommendation of Justice Dennis O'Connor, Commissioner of the *Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*, who noted:

> There are a number of similarities in the cases of Messrs. Arar, Almalki and El Maati. All three are Muslim Canadian men and all were linked in some way with the Project A-O Canada investigation. All three ended up being imprisoned in Syria by the Syrian Military Intelligence (SMI) at its Palestine Branch at a time when they were being investigated by Project A-O Canada. Professor Toope concluded that all three had been interrogated and tortured while in Syria and that the interrogations had been based on information that originated in Canada. In each case, it was contended that the RCMP and CSIS had sought to advance their investigations through communication with the SMI. All three men said that the RCMP and CSIS had impeded efforts to obtain their release. Finally, each of them maintained that he had been the subject of improper leaks to the media. (Arar Report, Analysis and Recommendations, 2006, p. 269)

The Commissioner also noted that the experiences of Muayyed Nureddin had many similarities to those of Messrs. Arar, Almalki, and Elmaati, as he too was a Muslim Canadian, investigated by Project A-O Canada, who had been tortured by Syrian Military Intelligence at its Palestine Branch (Arar Report, Analysis and Recommendations, 2006, p. 276).

The original purpose of the RCMP's Project A-O Canada investigation, which began on October 5, 2001, was to investigate the activities of Abdullah Almalki, although it later evolved to include other persons of interest, including Mr. Arar, Mr. Elmaati, and Mr. Nureddin (Arar Report, 2006, p. 16, 30, 51; Iacobucci Report, 2008, p. 97). The primary alleged priority of Project A-O Canada was the prevention of another attack against the United States or other countries including Canada (Arar Report, 2006, p. 17, Iacobucci Report, 2008, p. 97). The second alleged priority of the investigation was to collect intelligence about potential threats to Canadian security, and finally, to prosecute those individuals who had been identified as 'terrorists' (Arar Report, 2006, p. 17; Iacobucci Report, 2008, p. 97). This was a marked departure from regular RCMP investigations, where the priority is collecting evidence that can lead to successful prosecution (Ibid).

In his Analysis and Recommendations, Justice O'Connor provided the rationale for the Iacobucci Inquiry. Commenting on the "troubling questions about what role Canadian officials may have played in the events that befell [Messrs. Almalki, Elmaati, and Nureddin]," Justice O'Connor recommended that their cases be reviewed "through an independent and credible process" (Analysis and Recommendations, 2006 p. 276, 278). However, citing the difficulties faced by the Arar Inquiry, Justice O'Connor stated that in cases like these, where national security confidentiality is a major factor, the public inquiry process can be a "torturous, time-consuming and expensive exercise," (Analysis and Recommendations, 2006, p. 277). Justice O'Connor suggested that "these types of cases are likely to occur from time to time, and it is not practical or realistic to respond by calling a public inquiry each time" (Analysis and Recommendations, 2006, p. 278). In

accordance with Justice O'Connor's suggestion that a public inquiry was not appropriate, the Terms of Reference specified that the inquiry was to be conducted largely in private (P.C. 2006-1526, p. 2).

The mandate of the Iacobucci Inquiry was to determine the following:

> (i) whether the detention of Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin in Syria or Egypt resulted, directly or indirectly, from actions of Canadian officials, particularly in relation to the sharing of information with foreign countries and, if so, whether those actions were deficient in the circumstances;
> (ii) whether there were deficiencies in the actions taken by Canadian officials to provide consular services to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin while they were detained in Syria or Egypt; and
> (iii) whether any mistreatment of Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin in Syria or Egypt resulted, directly or indirectly, from actions of Canadian officials, particularly in relation to the sharing of information with foreign countries and, if so, whether those actions were deficient in the circumstances. (Iacobucci Report, 2008, p. 41)

Abdullah Almalki

Mr. Almalki, a dual citizen of Syria and Canada, was detained at the airport in Damascus on May 3, 2002. Mr. Almalki was travelling to Syria from Malaysia to visit his sick grandmother (Iacobucci Report, 2008, p. 297).[2] Mr. Almalki was taken to the

[2] With the exception of some factual details, where I have cited the Iacobucci Report in my synopsis of the cases, I am citing the chapters of the Report that are summaries of information provided by the individual in question during interviews conducted by Commissioner Iacobucci, Inquiry counsel, and Professor Peter Burns. At points, the narratives included in these chapters diverge sharply from the official account produced by Commissioner Iacobucci. Based on my conversation with Mr. Almalki regarding the contents of the report, I am satisfied that these narratives reflect what was actually said by

notorious *Far Falesteen* (Palestine Branch) Prison, where he was detained for 482 days (Iacobucci Report, 2008, p. 310). During that time, Mr. Almalki was detained in inhumane conditions, living in solitary confinement in a "grave-like cell" (Chronology: Abdullah Almalki, p. 32). While detained at *Far Falesteen*, Mr. Almalki was severely tortured (Chronology: Abdullah Almalki, p.12-5, 20-1, 37; Iacobucci Report, 2008, p. 300-05; Pither, 2008, p. 117-121; Toope Report, 2005, p. 797-803). Mr. Almalki was accused of selling equipment to the Taliban and al-Qaeda, and of being "Osama bin Laden's right-hand man" (Chronology: Abdullah Almalki, p. 13-4; Iacobucci Report, 2008, p. 300, Pither, 2008, p. 118-120, 221).

During the Arar and Iacobucci Inquiries, it was revealed that some of the questions Mr. Almalki was asked by his Syrian torturers had been delivered to Syrian Military Intelligence by a Canadian consular official on behalf of the RCMP (Arar Report, 2006, p. 206-214, 272; Iacobucci Report, 2008, p. 221-234). While he was imprisoned in Syria, Mr. Almalki did not receive a single consular visit, although Canadian officials were aware that he was being detained (Iacobucci Report, 2008, p. 398). Mr. Almalki was released from prison on March 10, 2004, after almost two years in detention (Iacobucci Report, 2008, p. 320-22). He has never been charged with a crime.

Ahmad Elmaati

Ahmad Elmaati, who was travelling to Syria to get married, was detained at the Damascus airport on November 12, 2001. Mr. Elmaati was taken to the *Far Falesteen*

Messrs. Almalki, Elmaati, and Nureddin (A. Almalki, interview, April 7, 2009). Other details have been taken from chronologies prepared by counsel for Mr. Almalki and Mr. Elmaati, and Kerry Pither's book *Dark Days: The Story of Four Canadians Tortured in the Name of Fighting Terror.*

Prison, where he was tortured and detained in inhumane and degrading conditions (Chronology: Ahmad Elmaati, p. 7-10; Iacobucci Report, 2008, p. 269-277; Pither, 2008, p. 71-5; Toope Report, 2005, p. 795-6). In January of 2002, Mr. Elmaati, a dual Canadian-Egyptian citizen, was transferred to an Egyptian prison, where he was again subjected to torture (Chronology: Ahmad Elmaati, p. 14-6, 18-9; Iacobucci Report, 2008, p. 277-293; Pither, 2008, p. 100-1, 149, 50, 158-61, 238-42).

In August of 2002, Mr. Elmaati received his first consular visit at Tora Prison in Egypt (Iacobucci Report, 2008, p. 287). During this visit, Mr. Elmaati informed the Canadian consul that he had been tortured and had given a false confession (Ibid).

Accused of plotting to blow up the U.S. Embassy in Ottawa, Mr. Elmaati falsely confessed to a plot to blow up the Parliament buildings (Chronology: Ahmad Elmaati, p. 9; Iacobucci Report, 2008, p. 271-273). CSIS sent questions to Syrian authorities to be asked of Mr. Elmaati on two separate occasions, and the RCMP attempted to interview Mr. Elmaati about his 'terrorist activities' after he had informed the Canadian consul that he had been tortured (Iacobucci Report, 2008, p. 132, 142, 146-151, 288).

Mr. Elmaati was released in January of 2004, after spending more than two years in prison, mostly in solitary confinement (Chronology: Ahmad Elmaati, p. 28; Iacobucci Report, 2008, p. 294; Pither, 2008, p. 321). He has never been charged with any crime. During the Iacobucci Inquiry, it was revealed that information from his confession under torture was used to obtain warrants that were used to search the home of Abdullah Almalki as well as the homes of Mr. Elmaati's family in Canada (Iacobucci Report, 2008, p. 138; Pither, 2008, p. 85-7).

In a supplemental report, released in February 2010, Commissioner Iacobucci released new information that indicated that CSIS' correspondence with the Egyptian authorities and travel to Egypt in order to obtain information about Mr. Elmaati "likely contributed indirectly to Mr. Elmaati's mistreatment in Egypt" (Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin: Supplement to Public Report" [hereinafter "Supplemental Report'], 2010, p. 11). This supplemental report was released following lengthy negotiations between Commissioner Iacobucci and the Canadian government, which had originally objected to the release of this material on the grounds of national security confidentiality. Although the release of the supplemental report is significant in that it further implicates CSIS in Mr. Elmaati's torture and illustrates the government's use of national security confidentiality to avoid releasing damaging information, it does not alter Commissioner Iacobucci's findings.

Muayyed Nureddin

On December 11, 2003, Muayyed Nureddin was returning to Canada following a visit with his family in Iraq when he was detained at the Iraqi-Syrian border – approximately one month after Maher Arar publicly announced that he had been tortured in Syria (Iacobucci Report, 2008, p. 324). Mr. Nureddin, an Iraqi refugee, had been visiting his family in Kirkuk – the third visit to his family since he fled Iraq in 1991 (previous visits had taken place in those parts of Iraq under Kurdish control) (Pither, 2008, p. 326, 330). Mr. Nureddin was taken to the *Far Falesteen* Prison, where he was

held in inhumane conditions and tortured (Iacobucci Report, 2008, p. 324-8, Pither, 2008, p. 338-344).

Mr. Nureddin was suspected of having connections with al Qaeda and of having acted as a courier in a money transfer to the *Ansar al Islam* (AAI) in Iraq.[3] These suspicions were shared by CSIS with a number of foreign intelligence agencies, including the United States (Iacobucci Report, 2008, p. 253). The RCMP had also shared information about Mr. Nureddin with foreign intelligence agencies, describing him to the United States as a suspected "financial courier for people believed to be supporters of Islamic extremism" (Iacobucci Report, 2008, p. 254). The Iacobucci Inquiry also found that prior to Mr. Nureddin's trip to Iraq, CSIS and the RCMP had provided a number of foreign intelligence agencies with his travel itinerary, advising these agencies that he was involved in "Islamic extremist causes" and suspected of being a courier for AAI (Iacobucci Report, 2008, p. 256-7).

Messrs. Almalki, Elmaati, and Nureddin as *Homines Sacri*

The cases of Messrs. Almalki, Elmaati, and Nureddin illustrate that in the post-9/11 environment, those suspected of being 'terrorists,' no longer have access to all the rights of citizenship, including the protection of the state. As discussed in chapter one, those who lack the protection of a state become *homines sacri* – individuals who, as they exist outside of any political community, are excluded from the law's protection. Messrs. Almalki, Elmaati, and Nureddin can be characterized as having been *homines sacri* for

[3] The organization *Ansar al Islam* is among the Currently Listed Entities defined by the government of Canada as terrorist organizations. (http://www.publicsafety.gc.ca/prg/ns/le/cle-eng.aspx)

two reasons. First, through the actions of Canadian officials, they were excluded from the protection of the Canadian state, creating the conditions of possibility of their detention and torture. This is especially significant, as torture is prohibited in all circumstances under international humanitarian and human rights law.

The second reason for considering them as having been *homines sacri* is found in the circumstances under which they were excluded – a presumed state of emergency (or exception) following the 9/11 attacks on the United States. As will be discussed later in this chapter, the post-9/11 environment is invoked by Commissioner Iacobucci to explain the actions of Canadian officials, which he characterizes as mistakes made in a highly stressful situation. The experiences of Messrs. Almalki, Elmaati, and Nureddin exemplify Giorgio Agamben's comments that characterize the 'war on terror' as a seemingly permanent state of exception that enables states to abrogate the rights of individuals in the name of national security. For example, Mr. Almalki explained how because he was suspected of being a 'terrorist,' investigators bypassed normal standards of investigation and existing regulations on information sharing to achieve their investigative aims, a process that he described as

> ...intentionally finding loopholes in the law, or trying to circumvent the law in order to achieve [their] tunnel vision view in certain investigations ... Tunnel vision – usually, you know, they start an investigation, and they decide on a certain output, and all the work they basically want to channel I to achieve that. And anything that would not support that assumption, that assertion, they drop it and don't pay attention to it. Which I know in my case was the case when they interviewed people, they heard things that wouldn't support their assumptions or their conclusions, they didn't want to hear. But when you see that their assumptions and their conclusions, you know – The conclusions should be at the end of the investigation. But when you have the assumptions and the conclusion done

> before even the investigation even starts, that is even scarier. We see that they not only made the assumptions and reached their conclusions within the agency, but they transmitted it to a multitude of national agencies, before even their investigation started. They sent the information to Syria on October 4. They sent information to a good number of countries on October 2. And then they started their investigation on October 5. How credible are these assertions and these conclusions when they haven't even launched their investigation? (A. Almalki, interview, April 7, 2009)

Mr. Almalki is referring to a fax sent on October 2, 2001 by the RCMP to RCMP liaison officers in Rome, New Delhi, London, Berlin and Paris that described Mr. Almalki and Mr. Elmaati as associates of al-Qaeda (Iacobucci Report, 2008, p. 113, 194). On October 4, 2001, the RCMP liaison officer in Rome sent letters to foreign intelligence agencies in a number of countries, including Syria and Egypt, that described Mr. Almalki and Mr. Elmaati as "imminent threat[s] to the public safety and security of Canada" (Iacobucci Report, 2008, p. 350, 400).

The secrecy of the Iacobucci Inquiry makes it impossible to know exactly why Messrs. Almalki, Elmaati, and Nureddin were targeted: however, a brief glance at the biographical details of the three men reveals elements that might have made them persons of interest following the 9/11 attacks. All three are devout Muslim men who immigrated to Canada from the Middle East. Mr. Almalki spent time working in Peshawar, Pakistan for Human Concern International, under the management of Ahmad Said Khadr (a suspected terrorist killed in Pakistan, and the father of Omar Khadr, who is detained at Guantanamo Bay) (Pither, 2008, p. 49). Mr. Elmaati fought with the *mujahadeen* in Afghanistan and took five hours of flying lessons, hoping to became an air-taxi pilot (A. Elmaati, interview, April 17, 2009; Pither, 2008, p. 8). Mr. Elmaati's brother, Amr

Elmaati is thought to be a member of al-Qaeda, and has appeared on the television show *America's Most Wanted* (Chronology: Ahmad Elmaati, p. 23-4). Mr. Nureddin was the principal of the Salaheddin Islamic Centre's elementary school, a position formerly held by Mahmoud Jaballah, who was named on a security certificate in 2001 and detained until April of 2007 (he has since been released on bail) (Pither, 2008, p. 332; "Terror suspect Jaballah to be released," 2007, n. p.).

These biographical details are significant because in the post-9/11 context, they "tainted" the citizenship credentials of Messrs. Almalki, Elmaati, and Nureddin, providing justification (however flimsy) for what amounts to, at the very least, the failure of the Canadian state to protect three citizens from torture.

The Iacobucci Inquiry and the Production of 'Official Truth'

Inquiries play an important but largely unexamined role in the Canadian political system, acting as a process to publicly address allegations of wrongdoing by public officials (Macklin, 2008, p. 21). According to the *Inquiries Act*, the government may call an inquiry to investigate "any matter connected with the good government of Canada or the conduct of any part of the public business thereof" (*Inquiries Act*, s. 2). While it is the government that calls a commission of inquiry, commissions operate at arm's length from the government, ostensibly allowing for independence on the part of the commissioner. Judges are often appointed as commissioners to add to the perception of legitimacy and independence from the government (Macklin, 2008, p. 21).

The primary purpose of commissions of inquiry is to engage in public fact-finding – as Audrey Macklin explains, "in a commission of inquiry, conducting fact-finding in

public is both means and end" (2008, p. 21). Macklin argues that it is because of this public process that commissions of inquiry are seen as legitimate avenues for investigating social problems, citing Cory J in the case of *Phillips v. Nova Scotia*:

> One of the primary functions of public inquiries is fact-finding. They are often convened in the wake of public shock, horror, disillusionment, or skepticism, in order to uncover "the truth." ... In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem... Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole. (*Phillips v. Nova Scotia*, 1995, as cited in Macklin, 2008, p. 21-2)

As this section will demonstrate, the utility of public inquiries in uncovering "the truth" is debatable. And given the perceived legitimacy of commissions of inquiry, it is important to consider their power to construct official narratives that reinforce hegemonic national identities and obfuscate alternative accounts.

Commissions of inquiry are quasi-judicial proceedings and as such, are not bound by the same legal strictures as a court of law. While a commissioner can compel the production of documents or the testimony of witnesses, they cannot make any determination of criminal or civil liability, impose punishment, or order compensation (Macklin, 2008, p. 21). Nor are commissions of inquiry adversarial processes in which various parties attempt to convince the commissioner of their version of the truth. However, commissions of inquiry maintain many of the trappings of a court of law: the commissioner is often a member of the judiciary, participants and Intervenors are represented by lawyers, and there is a standard of evidence that is comparable to that of a court of law.

This is particularly significant in the case of the Iacobucci Inquiry, as these judicial trappings provided a veneer of legitimacy to what was an extremely flawed process. The Iacobucci Inquiry was unique in that it was held almost entirely behind closed doors. Not only was the Inquiry itself conducted almost completely in secret, but the government also ensured that it had complete control over what information was released to the public. The Order in Council establishing the Iacobucci Inquiry specifies that the Commissioner may "adopt any procedures and methods that he considers expedient for the proper conduct of the Inquiry, while taking all steps necessary to ensure that the Inquiry is conducted in private" (P.C. 2006-1526, 2006, p. 2). The Order directs

> the Commissioner, in conducting the Inquiry, to take all steps necessary to prevent the disclosure of information to persons or bodies other than the Government of Canada that, if it were disclosed to those persons or bodies, would be injurious to international relations, national defence, national security, or the conduct of any investigation or proceeding, if the information, in the opinion of any of the following persons, falls into that category: (i) the Commissioner, or (ii) the Minister responsible for the department or government institutions in which the information was produced or, if not produced by the government, in which it was first received (P. C. 2006-1526, 2006, p. 3)

In other words, not only has a process that is intended to be public been made private, but the Commissioner does not have the discretion to determine what information can be shared with the public. As Audrey Macklin points out, "for practical purposes, this furnishes the government with a veto over public disclosure during the course of the inquiry" (2008, p. 29). Finally, the Commissioner is also instructed to produce two reports – one for the public, and one for the government. The information made available in the public report is also subject to the discretion of both the Commissioner and the

responsible Minister (P. C. 2006-1526, 2006, p. 4). This means that despite the premise of separation between the government and commissions of inquiry, the Iacobucci Inquiry was in fact controlled by the government that it was supposed to be investigating (albeit a different part of that government).

An examination of the groundwork laid out in the Terms of Reference makes the government's intentions clear. By calling an inquiry into the detention and torture of Messrs. Almalki, Elmaati, and Nureddin, the government appears to be addressing the very serious concerns raised by the Arar Inquiry. However, by holding the inquiry in secret and ensuring that the government had full control over what information was released to the public, the government, at the same time, was undertaking the construction of an official narrative that obfuscates the racism embedded in notions of Canadian citizenship and identity, and the potential effects that this racism has on individuals, as in the example of the detention and torture of Messrs. Almalki, Elmaati, and Nureddin.

The decision to conduct a private inquiry was extremely controversial, and was perceived by both Participants and Intervenors in the Inquiry as an attempt by the government to control the process in order to avoid government embarrassment (A. Almalki, interview, April 7, 2009; Clark, 2009; Duffy, 2007; A. Elmaati, interview, April 17, 2009; M. Nureddin, interview, April 16, 2009; Walkom, 2007). The decision to hold the inquiry behind closed doors also raised many questions about the integrity and fairness of a secret investigation, especially in light of the government's "overclaiming" of national security confidentiality (NSC) during the Arar Inquiry.[4] In his Report, Justice

[4] National security confidentiality is defined under section 38 of the Canada Evidence

O'Connor remarked on the use of NSC claims over "vitally important and potentially embarrassing documents" (Analysis and Recommendations, 2006, p. 303, 310).

This concern was shared by Messrs. Almalki, Elmaati, and Nureddin. Ahmad Elmaati explained that he believed that the secrecy of the Iacobucci Inquiry should be seen as an extension of the government's use of NSC claims during the Arar Inquiry to avoid accountability:

> ...this was a very dangerous precedent, it set a very dangerous precedent. In the future, like something like that – these CSIS and RCMP will do whatever they want to do, and if an inquiry is called, called on, they will get away from – with whatever they did, you know. I believe the national security claim that the government called whenever – during the Arar Inquiry, it was mainly to cover their back, you know. It was not a real security issue. (A. Elmaati, interview, April 17, 2009)

Mr. Almalki went further in his criticism of the decision to conduct a private inquiry, noting that the complicity of the government precludes them from designing a fair process:

> If it's not a public inquiry then it's something that's not, you know, that's not very well established in Canadian law. And the process wasn't established, and someone needed to design it. And the government designed it to suit them...the government cannot design a process because they have a conflict of interest...they're complicit. ...So wouldn't they design a process that would suit them, that would make their defense easier in the lawsuit? That would make their defense easier in the inquiry? And you know, can cover up

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Act, which limits the dissemination of information that is deemed to be "potentially injurious" to international relations, national defence, or national security, or "sensitive information," meaning "information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard" (Canada Evidence Act, s. 38).

> their complicity? Well, they designed the inquiry. (A. Almalki, interview, April 7, 2009)

Comparing the secrecy of the Iacobucci Inquiry with the use of security certificates under the Immigration and Refugee Protection Act, Mr. Almalki went on to say:

> But this is how it is in Syria. This is how they do an investigation in Syria. They have government investigations on the government and surprisingly they always come up in the government's favour. And no one knows what happened during these investigations. Are we going in that same direction? From what I've seen in Syria? Yes. The courts system we have here – When we have judges who they accept, and government arguing, and judges accepting that even sometimes the accusation can't be told [to] the person, the evidence against the person can't be public, that the person is very limited in being able to defend themselves. Well how does this differ from the condemned court [Syria's Supreme State Security Court]? (A. Almalki, interview, April 7, 2009)

Mr. Almalki's comparison of the Canadian response to the 'war on terrorism' with the Syrian authoritarian military regime draws attention to what Agamben has called "a threshold of indeterminacy between democracy and absolutism," as the state of exception becomes the "dominant paradigm of government in contemporary politics" (Agamben, 2005, p. 2, 3).

In an editorial published in *The Ottawa Citizen* shortly before the Iacobucci Report was released, Messrs. Almalki, Elmaati, and Nureddin repudiated the inquiry, stating that:

> Being shut out of this process is a continuation of the psychological torture we experienced overseas. We feel just as powerless now as we did in Egypt and Syria because every attempt we have made to open up the inquiry, to participate in the questioning of witnesses, to propose witnesses, to examine the 35, 000 pages of documents that have apparently been seen, and to ascertain why this happened to us and what role Canadian officials played, has

> been shut down in a manner more befitting the dictatorships where we were tortured than the democracy Canada is supposed to be. The Iacobucci Inquiry has only heard one side of the story – the government's – and the only requests to hear from us have been selective and token. ...We were given no disclosure of the government's evidence, and similarly could not testify before "our" inquiry. That we were made voiceless, deprived of the opportunity to tell our story, has been for us one of the grave injustices of this process. (Almalki, Elmaati, & Nureddin, October 16, 2007, n.p)

The exclusion of Messrs. Almalki, Elmaati, and Nureddin from the Iacobucci Inquiry exemplifies the subject/object divide between *homo sacer* and citizen. While Messrs. Almalki, Elmaati, and Nureddin remain the subjects of torture and abuse, they cease to be effective legal subjects. The law no longer interpellates them as subjects, but reduces them to the status of objects to be acted upon. By characterizing the Iacobucci Inquiry as an illegitimate process because of its secrecy and their inability to participate fully, Messrs. Almalki, Elmaati, and Nureddin challenge this division, and the government's attempts to render them voiceless in the name of national security.

The exclusion of Messrs. Almalki, Elmaati, and Nureddin from the Iacobucci Inquiry highlights another feature of the *homo sacer*. The *homo sacer* is excluded from the political community, meaning that they are excluded from political and legal subjectivity. Returning to the importance of speech in distinguishing between *bios* (political life) and *zoé* (bare life) discussed in chapter one, we can understand the exclusion of Messrs. Almalki, Elmaati, and Nureddin from the inquiry as part of the lingering effects of the exception. In the case of the Iacobucci Inquiry, Messrs. Almalki, Elmaati, and Nureddin are denied the status of legal and political subjects – that is, they are denied the status of citizens.

Commissioner Iacobucci's Findings: The Production of an 'Official Narrative'

In accordance with the Terms of Reference, Commissioner Iacobucci made findings on three issues: whether the detention of Messrs. Almalki, Elmaati and Nureddin resulted directly or indirectly from the actions of Canadian officials, whether there were deficiencies in the actions of Canadian officials to provide consular services to Messrs. Almalki, Elmaati, and Nureddin, and whether any "mistreatment" they experienced resulted directly or indirectly from the actions of Canadian officials (P. C. 2006 -1526, 2006, p. 1-2). In each instance, Commissioner Iacobucci was to determine "whether these actions were deficient in the circumstances" (Ibid).

In chapter ten of the Report, Commissioner Iacobucci explains how he interpreted the Terms of Reference to develop tests for assessing the actions of Canadian officials. He noted that his factual determinations, and therefore his assessment of the actions of Canadian officials, were limited by the refusal of the governments of Syria, Egypt, Malaysia, or the United States to participate in the inquiry (Iacobucci Report, 2008, p. 334). The lack of evidence from other countries about the actions of Canadian officials made it impossible to reconstruct the sequence of events that led to the detention and mistreatment of Messrs. Almalki, Elmaati, and Nureddin (Iacobucci Report, 2008, p. 335). Despite this limitation, Commissioner Iacobucci interpreted the Terms of Reference

> as mandating me to determine the relationship between the detention or mistreatment of Mr. Almalki, Mr. Elmaati or Mr. Nureddin and the actions of Canadian officials by assessing whether, considering all of the evidence and the rational inferences to be drawn from it, actions of Canadian officials can be said to have likely contributed to the detention or mistreatment. (Iacobucci Report, 2008, p. 338)

In the case of Mr. Almalki, Commissioner Iacobucci was not able to determine whether the actions of Canadian officials contributed to Mr. Almalki's detention in Syria (Iacobucci Report, 2008, p. 399). However, he concluded that the actions of Canadian officials "likely contributed to, and therefore resulted indirectly in, mistreatment of Mr. Almalki in Syria" (Iacobucci Report, 2008, p. 409). Commissioner Iacobucci also found that the Canadian government had been deficient in the provision of consular services to Mr. Almalki (Iacobucci Report, 2008, p. 421-435).

In the case of Mr. Elmaati, Commissioner Iacobucci found that the actions of Canadian officials resulted indirectly in Mr. Elmaati's detention in Syria (Iacobucci Report, p. 348-9). He did not find that the actions of Canadian officials resulted in Mr. Elmaati's detention in Egypt (Iacobucci Report, 2008, p. 357). Commissioner Iacobucci found that Canadian officials were indirectly responsible for Mr. Elmaati's mistreatment in Syria and Egypt, and that there were deficiencies in the provision of consular services (Iacobucci Report, 2008, p. 380-395).

In the case of Mr. Nureddin, Commissioner Iacobucci found that the actions of Canadian officials resulted indirectly in Mr. Nureddin's detention and mistreatment in Syria (Iacobucci Report, 2008, p. 439-40, 449). He also determined that there were no deficiencies in the provision of consular services to Mr. Nureddin (Iacobucci Report, 2008, p. 454).

Most importantly, Commissioner Iacobucci determined that all three men had been tortured, and that in each case, the actions of Canadian officials indirectly contributed to their detention and/or mistreatment (Iacobucci Report, 2008, p. 358-9, 405-7, 446-8). It is important to note that the definition of "mistreatment" adopted by

Commissioner Iacobucci includes not only torture as defined by UNCAT, but also "any treatment that is arbitrary or discriminatory or resulted in physical or psychological harm, as well as denial of properly entitled assistance and other forms of treatment that would normally be included in the meaning of mistreatment" (Ruling on Terms of Reference and Procedure, at para. 63).

On February 23, 2010, Commissioner Iacobucci released a supplemental report, containing information that he had wanted to include in the original report released in October 2008, but that had been excluded based on the government's concerns about national security confidentiality (Supplemental Report, 2010, p. 3). As mentioned, the supplemental report contains information regarding CSIS' correspondence with the Egyptian authorities and their trip to Egypt to obtain information about Mr. Elmaati. In the report, Commissioner Iacobucci stated that CSIS' actions "likely contributed indirectly to Mr. Elmaati's mistreatment in Egypt," and found that CSIS "was deficient in the circumstances" (Supplemental Report, 2010, p. 11).

The Iacobucci Report establishes the official narrative of the detention and torture of Abdullah Almalki, Ahmad Elmaati, and Muayyed Nureddin. This narrative is effectively summed up in the Commissioner's Statement at beginning of the Iacobucci Report. Commissioner Iacobucci begins the report by saying that

> ...respect for rights and freedoms is a constraint on a democracy that terrorists do not share. Indeed by their very actions they repudiate these rights and freedoms. For the terrorist, the end justifies the means. A democracy, however, must justify the means to any end – including in this case, its response to terrorism. Canada must choose means to deal with terrorism that are governed by the rule of law and respect for our cherished values of freedom and due process. This is a balance that is easy to describe but difficult to attain. However, difficulty of achievement

> cannot be an excuse for not trying to achieve that equilibrium. (Iacobucci Report, 2008, n. p.)

From the outset, the Commissioner establishes the narrative framework of the Report: Canada is a democracy that respects rights and freedoms, and it is threatened by terrorists who do not share these values. This narrative is based on a number of assumptions. First, that there is indeed a significant terrorist threat against Canada, requiring exceptional government powers to defend the nation. Second, that there is a strict and easily made distinction between "terrorists" who "repudiate" the rights of freedom and due process and legitimate political subjects. We are to understand that Canada is a society bound by the rule of law and human rights, even against the excesses of "terrorists,' who are by definition, excluded from the Canadian political community.

The Commissioner continues:

> It seems inevitable, in the struggle against terrorism, that mistakes of various kinds will be made. This is unfortunate: mistakes can carry serious consequences not only for individuals affected but also for our institutions and our collective faith in our institutions. But we should be very grateful to the many men and women who as Canadian officials must daily confront the challenges discussed in this report, and exercise their best judgment to try to attain the delicate balance that both protects our democracy and preserves and enhances our fundamental freedoms. (Iacobucci Report, 2008, n. p.)

It is here that the second component of the narrative framework becomes clear – the detention and torture of Messrs. Almalki, Elmaati, and Nureddin must be understood as mistakes in the 'war on terror.' These mistakes, including improper information sharing that described Messrs. Almalki and Elmaati as "imminent threats to the security of Canada," sending questions to Syrian Military Intelligence to be asked of Messrs.

Almalki and Elmaati despite a reasonable risk that they would be tortured, are unfortunate, but inevitable. While there is an acknowledgement that these mistakes "can carry serious consequences" for the individuals affected, including detention and torture, we are clearly meant to understand that the real damage is to "our institutions and our collective faith in our institutions" (Iacobucci Report, 2008, n.p.).

The Iacobucci Inquiry and Report must be understood within the context of Canadian responses to the 'war on terror.' As discussed in chapter one, these responses reflect racialized anxieties about citizenship and security. By placing the Iacobucci Inquiry and the resulting findings in this context, it is possible to understand the role that the inquiry has played in the construction of Canadian national identity during a period of perceived crisis. While the Iacobucci Report is critical of the actions of Canadian officials, specifically noting that Canadian officials were deficient in sharing sensitive (and inaccurate) information with foreign regimes and in ignoring the possibility of torture, Commissioner Iacobucci's findings attribute these actions to individual and institutional mistakes that must be understood within the context of the post-9/11 environment. In so doing, the Iacobucci Report produces an official narrative that reinforces national mythologies of Canada as a liberal, multicultural nation that respects human rights and the rule of law by excluding the voices of Messrs. Almalki, Elmaati, and Nureddin.

It is also important to consider how the Iacobucci Report changes the story of the experiences of Messrs. Almalki, Elmaati, and Nureddin from one about real people who were tortured into an abstract legal exercise. The purpose of this exercise is not to determine the guilt or innocence of Messrs. Almalki, Elmaati, and Nureddin – a process

that would entail full disclosure on the part of the government, or to assign culpability, as in the case of a criminal or civil proceeding. In this way, the Iacobucci Commission and Report ensures that there is no place for the consideration of the damage inflicted by torture, not only on Messrs. Almalki, Elmaati, and Nureddin, but on their families and broader communities.

What Does it Mean to Exist Outside of the Law?

In this section, I will explore Messrs. Almalki, Elmaati, and Nureddin's experiences of attenuated and precarious citizenship, using data collected from the interviews to illustrate the effects of the exclusion of marginalized individuals and groups from the protection of the rule of law. It is noteworthy that all three men connected their experiences of attenuated and precarious citizenship to their experiences of detention and torture. Citizenship is widely conceived as formal membership in a political community, a status that entitles individual citizens to specific rights and obligations. It is generally considered a universal status, meaning that all citizens are supposed to be treated equally under the law, regardless of gender, sexuality, class, race, or religion. However, as discussed in chapter one, citizenship has never been a truly universal status, and has, in fact, been used to reinforce and reproduce existing inequalities. Furthermore, as demonstrated by the decline of the welfare state, and the rollback of civil liberties since the beginning of the 'war on terror,' citizenship rights are tenuous, dependent on the willingness of a state to honour them.

As discussed in the previous chapter, my interviews with Messrs. Almalki, Elmaati, and Nureddin largely focused on the personal and political implications of their

experiences, avoiding discussions of their experiences of detention and torture. The most prominent theme of all three interviews was Messrs. Almalki, Elmaati, and Nureddin's dissatisfaction with the flawed process of the Iacobucci Inquiry, specifically their exclusion from the inquiry and the secrecy with which it was conducted. They expressed the belief that the secrecy of the Iacobucci Inquiry was used by the Canadian government to avoid public embarrassment and accountability for the actions of Canadian officials from DFAIT, CSIS, and the RCMP. For example, Muayyed Nureddin explained that the secrecy of the Iacobucci Inquiry illustrated that the government had 'learned' from the Arar Inquiry:

> I think the Arar case, like, damaged their reputation, and showed the public that Arar is innocent...and they did what they did. And they knew that Arar was innocent. And then they learned, the government learned from [the] Arar Inquiry, I think, so they didn't get us to participate, they didn't call for a public inquiry, to prevent what damages will effect the – like with the Arar Inquiry. (M. Nureddin, interview, April 16, 2009)

As Mr. Nureddin points out, the revelations of the Arar Inquiry were extremely embarrassing to the Canadian government, and were widely reported in Canadian and international media. This can be compared to the Iacobucci Inquiry, which received relatively little media coverage, considering both the seriousness of the allegations and its relationship to the Arar Inquiry.

By holding the inquiry in private, the Canadian government ensured that it had a great deal of control over the narrative that was released to the public. During our interview, Ahmad Elmaati addressed this issue, and expressed concern that the process used by Commissioner Iacobucci would be used in future by the Canadian government to cover up its complicity in human rights violations:

> So, I was really frustrated, and this was a very dangerous precedent, it set a very dangerous precedent. In the future, like something like that...these CSIS and RCMP will do whatever they want to do, and then if an inquiry is called on, they will get away from...with whatever they did, you know. It was mainly to cover their back, you know. It [the secrecy] was not a real security issue. So, I was very frustrated with the Iacobucci Report. (A. Elmaati, interview, April 17, 2009)

While all three men felt somewhat vindicated because Commissioner Iacobucci determined that they were tortured, this was tempered by his refusal to clear their names or connection to terrorism, as Justice O'Connor did in the case of Maher Arar:

> And this was a special point for me – why haven't [they] cleared our names if there is nothing? We are not in jail, and we not outside the jail. Like, we are in the middle, they put us in the middle. And I'm not satisfied with this. (M. Nureddin, interview, April 16, 2009)

Mr. Nureddin's comment is significant because it highlights the limitations of the Iacobucci Inquiry. As discussed previously, the purpose of a commission of inquiry is not to determine the guilt or innocence of any party. However, while Messrs. Almalki, Elmaati, and Nureddin have never been charged with a crime, they were labelled as terrorist suspects by the Canadian government. Unlike someone who has been charged with a criminal offense, they are not able to know the case against them, or respond to the evidence. The combination of guilt by innuendo and the lack of due process provided by the Iacobucci Inquiry has resulted in Messrs. Almalki, Elmaati, and Nureddin living with the taint of being suspected 'terrorists,' which has significant implications on their lives and the lives of their families.

Messrs. Almalki, Elmaati, and Nureddin also discussed the long-term personal effects of their detention and torture, including physical and mental health issues, unemployment, inability to travel outside of Canada, and disrupted relationships:

> Well, it – there's huge effects on my life. In different ways. Like, during, like when I was detained, I was, I was in the midst of planning for my future life. Like, as a family. Like, I was in the process of establishing my own family. Getting married, - Unfortunately, they ruined the whole plan, you know. And I think it's very, quite in detail in my chronology that what happened to me have scared my in-laws and my expected wife, and I don't blame them. So they ruined my life. That part. And my health is deteriorating. I've made several operations on my knee and my back. And I was diagnosed with PTSD, which is something I never heard about before. I feel very stressed out, you know (A. Elmaati, interview, April 17, 2009)

Mr. Nureddin shared similar details, discussing how he could not visit his elderly mother in Iraq, and was unable to work:

> Well it affected my life in many ways. Like, first, travelling. My mother and my family, I want to see them, and they want to see me. But still, I can't travel to see them because of the risk. And I am afraid that what's happened will happen again, because still I haven't heard from the Canadian government any guarantee that this will not happen again. My mother is getting elderly, and so is my father, but my mother is very sick. And weekly, I call them, and they call me. She wants to see me, and she always says, "For the last chance, I want to see you." But still, I can't travel. And, the next one, starting your own business. Now, I can't start my own business. I'm not working. I'm on ODSP [Ontario Disability Support Program] because of what happened. And if you had seen my record before, for more than ten years I was working, I supported my own family, and I support myself. And I studied at Centennial College, computer programming and analysis (M. Nureddin, interview, April 16, 2009)

Another important issue that was addressed during the interviews was the effects of torture and detention on individuals, their families, and their broader communities – an

issue that was conspicuously absent from the Iacobucci Report. The physical and emotional effects of detention and torture are not limited to Messrs. Almalki, Elmaati, and Nureddin. Each explained the impact of their experiences on their parents, siblings, spouses, and children (of the three, only Mr. Almalki is married and has children), including post-traumatic stress disorder, health problems, difficulties bonding with children, and limitations on travel:

> Other than professional life, there are all the psychological impacts. I mean, the family knew what happens in Syria. So, it's not something that they have no clue – oh, the Syrians, they treat prisoners very well. They knew how they treat prisoners … Anyone who lives in Syria I guess in the 1970s and 1980s, they heard a lot of the beating and torture, the disappearances … They were always afraid of these things. And the simplest way to put it – my mother and my father – My mother, before going to Syria, I used to walk with her sometimes here and people used to think she was my wife. And I don't think people can make that mistake again. I mean, she is like twenty years older than she is right now. These two years when I saw her initially, and when I saw her when I came out – totally physically, the way she looked, just twenty years older. And the same thing with my father. My father when I was detained, he was in his late 70s. He was very energetic. He would walk for very good distances. Climb up the stairs, climb down the stairs. You know, no problems. When I was released, he would up the stairs, and I would walk behind him, afraid that he would fall down. You know, just his balance – My mother actually did fall down. You know, just his balance – My mother actually did fall down, and just gets dizzy and falls down. And has lost consciousness and fallen down. Got high blood pressure. Got multiple medical conditions. So it affected them tremendously. It just, and it affected them financially as well. So not only medical, physical, and psychological, but also financial. When my brother all of a sudden all of his contracts mysteriously disappeared, and then I guess he didn't known that they thought his company was my company, so you know they started really attacking his company. But they, you know, they destroyed his financial life for three years … he didn't have a job. My other brother because he couldn't go to the States as well,

> he was very limited in his ability, especially the companies he worked with, companies he worked with for many years. Cisco for example, they are based in the States. How could you go say, "Well, I want to work with you again," – he was at a director level – "But I can't go to your head office." So, a lot of problems over these two, three years when I was detained. (A. Almalki, interview, April 7, 2009)

Ahmad Elmaati also reported that his family members experienced long-term physical and mental health problems as a result of his detention and torture. He also noted that his sister, who lives in Egypt, believes that she is being watched by Egyptian security forces and lives in fear of reprisals:

> Well, the effect was huge. I mean, my entire family, my very close family, it was very huge...especially my mother, my father, and my sister. Even my brother, although I haven't heard from him in over ten years. So the effect was severe. Ultra severe. My mother has quite so hard time. She's experiencing lots of medical problems. High high blood pressure. Lots of other...emotional scars, and...she's, like, very irritated, and she's like – She hasn't seen a psychiatrist, but I would assume she have PTSD, like post-traumatic stress, I think, because she's very stressed. She's not being – she's not able to go freely to visit her family, especially in Syria, like she can't go in Syria. She is very afraid for her life. And even in Egypt. Last year she went there, and she was questioned by State Security. Like, she was called and investigated. So this is my mother. And my sister who moved from here after 9/11 for fear of reprisal for herself and her family. Especially her young kids. Also, is, she thinks that she is living under surveillance, and constant fear from, like, State Security in Egypt, for reprisal, because of my case, you know? And my father is, whenever he travels, you know, he is being stopped at the border. In Canada, or wherever he goes, when he goes out or comes in. Being questioned: where you been? How long have you been? And stuff like that. So, the effect on my family was huge, huge. Yes (A. Elmaati, interview, April 17, 2009)

These effects extend beyond individuals and their families, contributing to a climate of fear among Muslim and Arab Canadians who have witnessed the potential consequences of being suspected of being a 'terrorist.' This point was addressed by Mr. Elmaati, who discussed the isolation and depression that he has struggled with since his return from Egypt:

> ...if you are labelled as a terrorist or something like that happened to you, between, like, amongst your community, you are as if you are a diseased person. Like if you have some kind of disease, you know. People tend to keep away from you. And I don't blame them, you know. This is part of what they call guilty with association: "Oh this guy is a suspected terrorist, and he's seen with this guy, or he met this guy in the mosque, so the other guy is also a suspected terrorist." ... So with my community, I don't know anybody that I used to know before. No one wants to interact with me – I don't blame them. So, this created some sort of, you know, problem with me that I tend to sit at home all the time. I tend not to see anybody. I'm not interested. Like, there is no joy, enjoyment in life like I used to have before. (A. Elmaati, interview, April 17, 2009)

Mr. Almalki explained that he believed that Canadian security forces intended to instil fear in Muslim and Arab communities:

> So people then have that fear, and with these actions, and when people start seeing that someone can be targeted without evidence, and can be really screwed up, I mean, you deal with them outside the law. Yes, we're pretty good, you know, we have the luxury of having laws that have to be respected in Canada, well, but, you know, you can set them up to be detained outside, and be outside the law. And its scarier when you see that these same governments and agencies that people fled from, you know, a lot of people here in Canada are coming from the Middle East. .... At the same time, I think the police; they wanted to instil this mentality. Police meaning policing agencies, CSIS, and RCMP – wanted to enforce these ideas because ... it's interesting when, you know, I'll be somewhere, and some

> people come and speak with me, and I remember one guy one time told me, you know, he told me what happened with him with the police. He said, "I never told this to anyone for three years, except you." He's terrified to say to anyone. They terrified his wife, his kids. You know, they knock at 3 o'clock in the morning, just because, "Oh, we want to interview you." At 3 o'clock in the morning? Another person came and told me, he said when I was in jail and Maher was in jail, they came to and interviewed him, and he said, "Well, you need a lawyer." And they said, "You know what's happening to Maher and Abdullah, so do you want to talk ... or you know what's happening to them." Well, what does that mean for someone who is a refugee from the Middle East? Who doesn't even have citizenship? (A. Almalki, interview, April 7, 2009)

The ongoing, long-term effects of the detention and torture of Messrs. Almalki, Elmaati, and Nureddin are significant because they demonstrate that even though they have been released from prison and returned to Canada, Messrs. Almalki, Elmaati, and Nureddin remain in a kind of permanent limbo. As the data collected from my interviews with Messrs. Almalki, Elmaati, and Nureddin demonstrates, the impact of their detention and torture extends to their families and broader communities, sending a clear message about the willingness of the Canadian state to uphold the fundamental rights of Muslim and Arab Canadians. While clearly no longer homo sacer in the extreme form that character takes, this does speak volumes as to how the exception has ripple effects through particular racialized communities.

Ostracized by their communities, unable to travel, and excluded from the economic sphere by virtue of being labelled suspected 'terrorists,' the experiences of Messrs. Almalki, Elmaati, and Nureddin illustrate how the lingering effects of the exception on Messrs. Almalki, Elmaati, and Nureddin, as well as their families, friends,

and acquaintances, and serve as a constant reminder of the tenuousness of their citizenship.

Conclusion

In this chapter, I have used the data collected from my interviews with Messrs. Almalki, Elmaati, and Nureddin, as well as my analysis of the Iacobucci Report, to show how those suspected of being 'terrorists' have been excluded from the protection of the Canadian state. By demonstrating why Messrs. Almalki, Elmaati, and Nureddin can be characterized as *homines sacri*, I have attempted to illustrate the importance of the theoretical perspectives explored in Chapter One. These theoretical perspectives, articulated by Giorgio Agamben, Hannah Arendt, and others can be used to explain the use of opportunistic rendition by the Canadian security forces against Messrs. Almalki, Elmaati, and Nureddin. By explaining the existence of individuals who are citizens, but who have been abandoned by the state, these theories can provide insight into the consequences of both the abrogation of citizenship rights and the undermining of the international human rights regime that have characterized the 'war on terror.'

As this chapter has demonstrated, the Iacobucci Inquiry was not an attempt at public fact-finding, but a way for the Canadian government to give an appearance of accountability, while ensuring there were no significant consequences for Canadian officials who were involved (however indirectly) in the detention and torture of Messrs. Almalki, Elmaati, and Nureddin. The perverse irony of the Iacobucci Inquiry was that far from providing a forum for public fact-finding and accountability, the inquiry in fact sustained the exclusion of Messrs. Almalki, Elmaati, and Nureddin from political and

legal subjectivity. In this sense, Messrs. Almalki, Elmaati, and Nureddin could be understood as legal 'objects,' beyond the law, and beyond its powers of 'hearing' the other. As Hannah Arendt argued, to exist outside the boundaries of the law means that one has lost the "right to have rights," leaving no space for the articulation of claims against the offences to one's humanity.

The experiences of Messrs. Almalki, Elmaati, and Nureddin, and the impact of these experiences on their friends, families, and communities highlights the lasting effects of being excluded from the protection of the law. These lasting effects serve as a constant reminder of the tenuousness of the citizenship of particular racialized communities in Canada.

Conclusion

> "...I would still count my blessings that thousands of people went through what I went through, and they are still languishing in graves underground, you know. Still 'til now. For nothing they did, I'm 100% sure. But they are, as they say, collateral damage, and bystanders. And, they will never, I think, get any justice" (A. Elmaati, interview, April 17, 2009)

The goal of this thesis was to explore how three Canadian citizens – Abdullah Almalki, Ahmad Elmaati, and Muayyed Nureddin – became the victims of opportunistic rendition and were denied access to the most basic rights accorded to citizens. I began this thesis with a critical discussion of liberal conceptions of citizenship, considering the works of T. H. Marshall, Engin Isin, Hannah Arendt, and others. Beginning from that the rights-based approach to citizenship espoused by T. H. Marshall and others is inadequate; I argued that access to the rights and obligations of citizenship is highly differentiated on the basis of race, religion, class, gender, and other social identities.

In the era of the 'war on terror,' access to the rights and obligations of citizenship has become even more sharply differentiated, as concerns about national security have been used to justify the abrogation of citizenship rights through anti-terrorism measures. While legislation such as the *Anti-Terrorism Act* abrogates the rights of all citizens, it is clear that some groups of citizens have been targeted through racial profiling, intrusive surveillance, and arbitrary detention, in effect, creating populations of tenuous citizens.

These populations are particularly precarious, when considered in terms of the undermining of the rule of law, which has also characterized the 'war on terror.'

Giorgio Agamben's theories of the *homo sacer* and the state of exception provide a framework for understanding how three Canadian citizens came to exist outside the protection of the law. Fearing another terrorist attack in the wake of 9/11, investigators bypassed the normal standards of investigation, violating the rights of Messrs. Almalki, Elmaati, and Nureddin. Messrs. Almalki, Elmaati, and Nureddin were wrongly characterized as "imminent threat[s] to the public safety and security of Canada," by the RCMP, who shared this information with foreign intelligence agencies, including Syrian Military Intelligence (Iacobucci Report, 2008, p. 350, 400). CSIS and the RCMP continued to share information with Syrian Military Intelligence, including travel itineraries, knowing that Messrs. Almalki, Elmaati, and Nureddin would be passing through Syria, and ignoring the risk of torture.

Through the actions of CSIS and the RCMP, Messrs. Almalki, Elmaati, and Nureddin were excluded from the protection of the law, creating the conditions of possibility for their detention and torture. Their rights were ignored in the name of national security, as Canadian officials believed that abrogating their rights was justified in presumed state of emergency.

In examining the experiences of Messrs. Almalki, Elmaati, and Nureddin I want to highlight the construction of an official narrative that an official narrative that absolves the government of wrongdoing, and obscures how access to the rights of citizenship and the protection of the law are racialized. In his report, Commissioner Iacobucci attributed the detention and torture of Messrs. Almalki, Elmaati, and Nureddin to individual

mistakes. I would argue that these "mistakes" must be contextualized as part of a larger pattern of abuses committed by CSIS and the RCMP against Muslim and Arab people in Canada. These abuses have damaged the "collective faith" of Canadians in these institutions. In the past year, the Canadian government and security apparatus, especially CSIS, have come under intense scrutiny from the Federal Courts, human rights organizations, and the media, as a result of a number of high-profile cases demonstrating the Government f Canada's apparent disregard for the rights of Arab and Muslim Canadians. The Canadian government has been rebuked by the Federal Court for its failure to act to ensure the return of two Muslim Canadians suspected of links to terrorism to Canada - Abousifian Abdelrazik, who returned to Canada from Sudan in 2009, and Omar Khadr, who remains incarcerated at Guantanamo Bay. CSIS has also been chastised by the Federal Court for withholding information in the cases of Mohamed Harkat and Hassan Almrei, two individuals named on security certificates under the *Immigration and Refugee Protection Act.* To understand these actions as individual mistakes is even more difficult when placed within a global perspective that connects these events with the wars in Iraq and Afghanistan, the plight of the detainees of Guantanamo Bay, and the abuses at Abu Ghraib.

In addition to drawing attention to the domestic and global context of the experiences of Messrs. Almalki, Elmaati, and Nureddin, this thesis attempts to make a contribution to the growing body of literature that seeks to provide a coherent response to the abuses of the 'war on terror' by applying the theoretical perspectives of Giorgio Agamben and others. As discussed in chapter two, this was a challenging project. The logistical challenges of researching events where most of the information is subject to

claims of national security confidentiality were frustrating, and forced me to re-evaluate the direction of this project.

My research also left me with me with many more questions that it answered, providing some directions for future research. Of primary importance is the issue of the lingering residue of the exception. As my thesis has demonstrated, even though Messrs. Almalki, Elmaati, and Nureddin cannot properly be termed *homines sacri* since their release from prison and return to Canada, their lives are circumscribed as they live under the shadow of being suspected of connections to terrorism. Given the seeming regularity of these kinds of cases in the post-9/11 era, further examination is warranted.

Appendix A: Consent Form

Carleton
UNIVERSITY
Canada's Capital University

I (the research participant) agree to participate in a research project on citizenship, human rights, and national security in Canada.

I understand that:

My participation consists of an interview, to last approximately one – two hours.

I am not required to answer any questions I do not want to answer, and may end the interview at any time.

I may withdraw from the research project at any time by contacting the researcher using the contact information listed below, and may request that interview materials be excluded from the research project, or destroyed.

The interview will be electronically recorded to facilitate the writing of a transcript. The only people who will listen to this tape include the researcher and her supervisor.

That I will be provided with a copy of the transcript, and will have two weeks to read the transcript and make any additions, corrections, or deletions.

All participants in this study will be identified. I have the right to ask that certain (or all) comments be unattributed.

This research will be presented in the form of a Masters thesis. I have the right to request a copy of the completed thesis.

I will not directly benefit from participating in this study.

This project was reviewed by and has received ethics clearance by the Carleton University Research Ethics Committee. Should I have any questions or concerns about your involvement in the study, I may contact the Research Ethics Committee (REC) Chair, and/or the researcher' supervisor using the contact information listed below.

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I, _____ have read the letter of recruitment and the consent form and understand that I am participating in a research project. I voluntarily agree to participate.

☐ I consent to an electronic audio recording of the interview.

☐ I do not consent to an electronic audio recording of the interview.

Appendix B: Interview Guide

1. Would you like to share with me what inspired you to come to this country?
2. Prior to your experiences in Syria, what was your understanding of Canadian values? Has this understanding changed?
3. At that time, what was your understanding of what it means to be a Canadian citizen? Has this understanding changed? If so, how?
4. What do you want people to know about what happened to you?
5. How have your experiences affected your family?
6. Could you tell me about the Iacobucci Inquiry? Were you satisfied with the inquiry process, and Justice Iacobucci's report?
7. Do you think that the Canadian government and Canadian security forces (the Royal Canadian Mounted Police, the Canadian Security and Intelligence Service) protects all citizens equally?
8. How has your community's attitudes changed regarding the police/RCMP and CSIS?
9. How would you like the Canadian government to deal with issues of national security?

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