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Canada - US Information Sharing and the Case of Maher Arar

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Introduction. This article discusses the controversy related to the detention and rendition by US authorities of Maher Arar, a Canadian citizen. The Arar case is particularly significant because of the intense publicity, debate, and mobilization that it has engendered in Canada. This case illustrates problems posed by the expectations and practices of information sharing in Canada – US security cooperation.

Maher Arar holds dual Canadian-Syrian citizenship. In September 2002, he was detained by American authorities in New York, while traveling back to Canada from Tunisia. US officials questioned Arar on suspected, but never proven, links to Al-Qaeda and then deported him to Syria. Arar was returned to Canada from Syria in late 2003. A public outcry about Arar's rendition eventually led to the formation of an official Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. In September 2006, Justice Dennis O'Connor, who headed the inquiry, ruled that there was no evidence that Arar was ever linked to extremist groups or was a threat to Canada's national security. He faulted Canadian, Syrian and American agencies and called upon the Canadian government to lodge a formal complaint with the American authorities on the issue. On January 26, 2007, Canadian Prime Minister Stephen Harper issued a formal apology to Maher Arar while announcing that he will receive C\$12.5 million in compensation. In line with the recommendations of the Arar Commission, the Canadian government has filed protests with the US and Syria about Arar's treatment. With the help of New York-based The Center for Constitutional Rights, Arar also filed a lawsuit against the US government.¹

Arar's case has led to some tension between the US and Canada. The Canadian government has requested that Arar be removed from the US terrorist watch list. US authorities have not acceded to this, arguing that the decision to keep Arar on the US watch list is "appropriate" and based on independent information collected by American agencies.² Canadian authorities have also been unhappy with the reluctance of the Americans to share information on the case with them, a point raised by the Arar Report.³ The case could have a significant impact on the nature and extent of Canada – US cooperation on counterterrorism efforts.

The American practice of extraordinary rendition has generated significant domestic and international contro-

versy. It has come under particular scrutiny from some of the closest allies of the United States, including European countries and Canada. In general, the practice of *extradition* is a formal, legal process through which a person suspected of involvement in illegal activities, including terrorism, can be transferred from one country to another. Extraordinary or *irregular rendition* refers to the extrajudicial transfer of persons. It occurs when one country apprehends a person and then transfers him to a third country. Under such circumstances, the detainee usually does not have access to the judicial system of the state which apprehended and transferred him. This practice has become particularly controversial because of allegations that the US government has participated in the transfer of terrorism suspects to countries (such as Syria) that are known to use torture. Arguably, various international treaties and conventions, such as the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Geneva Conventions, prohibit, or greatly restrict, extraordinary rendition. On the other hand, some have argued that exceptions do exist to this prohibition. The current US administration has conceded that it has rendered suspects to countries that are known to practice torture; it, has however, denied the allegation that it has sent the suspects for the purpose of torture.⁴ Some of the debate around the Arar case involves the issue of extraordinary rendition. However, as discussed below, other significant issues in Canada – US intelligence cooperation have also been highlighted.

The primary source of information for this article is the Arar Commission.⁵ The Commission was established in early 2004 to undertake two primary tasks. First, Justice O'Connor would investigate the actions of Canadian officials in relation to Arar's detention and deportation. Second, because the Royal Canadian Mounted Police (RCMP) was the primary agency involved in this case, he would make recommendations on a review mechanism for its activities with respect to national security. In other words, there was a factual component to the investigation, as well as a long-term policy dimension. The Commission released its findings between September and December 2006. It should be noted that the Arar Commission invited the governments of the United States, Jordan and Syria to participate in the hearings; but all three parties declined. The findings of the Report are based on

the testimonies and written evidence of Canadians involved or familiar with the case.

The Surveillance, Detention, and Rendition of Maher Arar. Soon after the attacks of 9/11, Canadian and American law enforcement and security authorities met in order to generate greater cooperation in anti-terrorism activities. Canadian agencies were asked to investigate individuals in Canada who allegedly had ties to suspected terrorists. In early October 2001, the RCMP began investigating Abdullah Almalki, who was believed to be connected to Al-Qaeda. Arar entered the RCMP's investigations on October 12, 2002, when he was witnessed meeting Almalki in Ottawa.

Maher Arar was born in Syria and arrived in Canada on September 1, 1987. He obtained his Canadian citizenship on September 28, 1995. Arar holds a graduate degree in telecommunications and was employed as a communications engineer with The MathWorks, Inc., in Natick, Massachusetts. He had both an American and a Canadian social security number and was a frequent traveler between the two countries. After he was seen meeting Almalki, Canadian authorities put him under occasional surveillance and financial scrutiny. They also contacted U.S. Customs, the U.S. Immigration and Naturalization Service (INS) and the FBI about him.

On September 26, 2002, while passing through John F. Kennedy International Airport in New York on his way to Canada, Arar was detained by American officials. On October 7, 2002, the Regional Director of the INS issued an order finding Arar to be a member of Al-Qaeda and directing his removal from the United States. He was then flown to Jordan and eventually taken to Syria, where he was imprisoned for almost a year. He returned to Canada after his release on October 5, 2003.

Based on evidence provided by Arar and extensive testimony by human-rights experts, the Arar Report concluded that Arar was tortured during his imprisonment in Syria. In addition, the Commission concluded that there was no evidence to suggest that Arar's activities constituted a threat to the security of Canada. The report noted that he was never charged with any offence in Canada, the United States or Syria. Arar appeared to be, for the duration of the RCMP's investigations, a "person of interest" (someone whose role and complicity is not clear), rather than someone about whom criminal evidence is being collected. In sum, despite the absence of

any clear or substantive evidence linking Arar to illegal activities, he was incarcerated and tortured for over a year on suspected terrorist links.

Information Sharing between the US and Canada. The Arar Report investigates, in detail, the circumstances leading to Arar's detention and rendition. It concludes that, contrary to comments made by American officials, Canadian officials were not involved with Arar's detention and rendition. At the same time, the information provided by the RCMP did play a critical role in the decisions made by American authorities. Justice O'Connor was particularly concerned about this and recommended changes to the information sharing process to prevent a recurrence of this situation.

Justice O'Connor was particularly critical of the fact that the RCMP made several inaccurate and baseless statements about Arar and his wife to the American authorities. This included alleging, without supporting evidence, that they were linked to Al-Qaeda. Several other problems were also found in the processes governing Canadian cooperation with the

US. First, information was shared without attaching written caveats, in contravention of conventional RCMP policy. The absence of caveats could increase the risk that the information would be used by the receiving party for purposes that violates Canadian practices or values. The rendition of a Canadian citizen to Syria without the approval of Canadian authorities was just such a situation. Second, in April

2002, the Canadian authorities provided American agencies with its entire investigative database, in the form of three compact discs, without screening the information beforehand or attaching written caveats. This, too, was faulted by the Arar Commission.

Justice O'Connor believes that these errors were committed because the officers assigned to the counter-terrorism investigations had inadequate training. While he believes that prompt information sharing and other forms of transnational cooperation were, and continue to be, crucially important; so is proper training and due diligence.⁶ The Report acknowledges that information sharing across countries is necessary in order to deal with transnational organizations such as Al-Qaeda. At the same time, such cooperation must include a great deal of circumspection and careful consideration of the use to which the information will be put. For example, information shared with an agency or country that is known to

... I strongly endorse the importance of information sharing. Sharing information across borders is essential for protecting Canada's national security interests, in that it allows more complete and accurate assessments of threats to our security... However, information must be shared in a principled and responsible manner. (Arar Report, p. 22)

use torture, such as Syria, might affect Canada's commitment to the global prevention of torture. The Justice also expressed concern about possible Canadian involvement in the American policy of rendition, a practice to which Canada seems opposed.

The Report makes some key recommendations to correct the mistakes made by Canadian authorities in the Arar case. These recommendations are relevant to information sharing between Canada and the US in both directions. First, written protocols that clarify the process of cross-border information sharing are necessary to ensure greater accountability. Implicit or verbal agreements with foreign agencies should be avoided. Second, cooperative arrangements should be subject to periodic review to ensure prompt attention to problems such as those that arose during the Arar case. In addition, sensitivity to cultural and human rights issues should be an essential component of training in national security matters, particularly in relation to Muslim and Arab communities. It is possible that the need to formulate and follow protocol was minimized in the post-9/11 crisis mode. Future cross-border information sharing should be predicated upon clear procedural guidelines.

The treatment to which Arar was subjected in Syria was of particular concern to the Commission. Justice O'Connor was categorical in stating that the use of torture "can never be legally justified."⁷ It is worth noting that Canada is one of the leading advocates of the International Criminal Court, and is a signatory to several international treaties prohibiting the use of torture, including the Universal Declaration of Human Rights, the Geneva Conventions, the United Nations Torture Declaration and the Convention Against Torture. In addition, the Canadian Charter of Rights and Freedoms clearly rejects the use of torture. O'Connor believes that information should not be shared with a foreign country if there is a credible risk that it will cause or contribute to the use of torture. Information sharing policies should include specific directions aimed at eliminating any possible Canadian complicity in torture, avoiding the risk of other human rights abuses and ensuring accountability.

Another major concern of the Arar Report was the impact of Canada – US cooperation on Canadian privacy laws. Justice O'Connor noted at several points in the Report that the RCMP provided information to American authorities that did not comply with Canadian policies on sharing information and screening processes. In particular, the Report was concerned with the Canadian authorities' decision to provide the Americans with its entire database of investigations. The Report emphasizes the fact that need for security cooperation must be counterbalanced with the importance to protecting the privacy of Canadian citizens. Justice O'Connor recommended that

security personnel be trained in information sharing practices and be told that these processes should comply with privacy laws.

Policy implications. The Arar case has significant policy implications, both specific to Canada – US relations and to the broader issue of transnational cooperation in security. The Arar Report underlines the importance of continued close cooperation between the US and Canada in counterterrorism efforts. Justice O'Connor cites the findings of both the American 9/11 Report and the Canadian report on the Air India bombing in 1985 to support this view.⁸ Both documents stress the need for intelligence sharing in security matters. Productive cooperation is reflected in the Integrated Border Enforcement Teams (IBETs), which enable the RCMP, Canada Border Services, Citizenship and Immigration Canada, U.S. Customs and Border Protection, the U.S. Coast Guard and U.S. Immigration and Customs Enforcement to work together.

The cooperative and interdependent dimensions of Canada – US relations do not, however, mitigate the concerns that arose out of the Arar case. The Report is critical of the way in which the Americans treated Arar. In addition, Canadians are unhappy with the reluctance of the American to cooperate with the Canadian inquiry into the case. Justice O'Connor and the RCMP seem strongly opposed to the practice of extraordinary rendition, an opinion that is likely shared by many Canadians.

Justice O'Connor notes that, since the Arar case, the RCMP has developed a greater sensitivity to, and awareness, of the risks to Canadians accused of links to Al-Qaeda when they are in the United States. It is not clear how, specifically, this sensitivity and awareness has translated to actual action. Nonetheless, it is likely that Canadian authorities will in the future be far more cautious in cooperating with the US in investigating Canadian citizens.

Do these developments indicate reluctance, in the future, to engage in bilateral security cooperation? The answer to this question would be "no." Canada and the US both recognize that intelligence sharing is necessary for effective counterterrorism activities. The Arar case demonstrates, however, that cooperation and coordination, even between close allies, can create tension points. This is because one party may engage in actions that compromise the laws, practices and protocols of the other. As the Arar Commission points out, such situations point to the need for checks and procedures to monitor information exchange and use. At the same time, oversight protocols should not undermine expediency and effectiveness in the overall effort. Many experts endorse the suggestion that the need for efficiency in intelligence sharing must be balanced with a continuing em-

phasis on following established procedures.⁹ Achieving such a balance is challenging, but necessary. One suggestion has been the creation of a bilateral organization, consisting of officials from both countries, which would oversee intelligence and information sharing.¹⁰ Under the doctrine of sovereignty, it is certainly the right of both countries to refrain from sharing information that pertains to national security or the privacy of citizens. Shared security goals, however, necessitate close collaboration in the development and exchange of intelligence. Officials in both countries need to develop better practices and institutions to achieve this goal.

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Endnotes

1. The Canadian Broadcasting Corporation provides a detailed time line on the case. See <http://www.cbc.ca/news/background/arar/>
2. <http://www.cbc.ca/news/background/arar/Chertoff-Gonzales-letter-to-Day.pdf>
3. See Canadian Broadcasting Corporation, 2006. "Arar Report Puts US 'Rendition' Policy Into Spotlight." Accessible at <http://www.cbc.ca/canada/story/2006/09/20/arar-reaction.html>
4. In April 2006, the Congressional Research Service released a report for the United States Congress entitled "Renditions: Constraints Imposed by Laws on Torture." See <http://www.fas.org/sgp/crs/natsec/RL32890.pdf>
5. The full version of the report can be found at <http://www.ararcommission.ca>. Unless otherwise noted, information provided in this report is gleaned from the Commission's findings.
6. Note that Justice O'Connor was also critical of internal decisions and actions made by Canadian officials. For example, the report says that Canadian authorities leaked confidential and sometimes inaccurate information about the case to the media in order to discredit Arar and protect government interests.
7. Note that the use of torture in efforts to combat terrorism has been subject to some debate and contention in the United States. O'Connor's report has no such equivocation on the issue.
8. The 9/11 Commission Report is available at <http://www.9-11commission.gov/>. The Air India Report is available at http://www.publicsafety.gc.ca/prg/ns/airs/_fl/rep1-en.pdf
9. http://www.wilsoncenter.org/topics/pubs/Canada_6.pdf
10. <http://www.ifpa.org/confwrkshp/canadawrkshp/wrkshp.htm>