

# Transjudicial Conversations about Security and Human Rights

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Audrey Macklin

## Abstract

Citation by one national court of another state's jurisprudence or legislation has attracted much attention recently, especially in relation to the interpretation and application of constitutional and international human rights norms. Commentators document these practices, judges extol or deride them, and academics theorise about them. A commonly shared assumption is that the comparative undertakings are accurate and systematic, if superficial. Tracking judgments from the European Court of Human Rights and the Supreme Court of Canada across a series of cases dealing with non-citizens and national security reveals that courts not only circulate practices and legal arguments between jurisdictions, they also circulate – perhaps inadvertently – misrepresentations of practices, and remain strategically deaf to dissonant arguments. Scholarly accounts of transjudicial communication that claim to document the emergence of a systematic pattern of judicial behaviour across jurisdictions should take these practices seriously and avoid the temptation to dismiss them as mere aberrations.



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

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# TRANSNATIONAL JUDICIAL CONVERSATIONS ABOUT SECURITY AND HUMAN RIGHTS

*CEPS Special Report/March 2009*

AUDREY MACKLIN\*

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## 1. Introduction

Human rights jurisprudence in the post 9/11 era provides a handy frequency for tuning into transjurisdictional conversations between national and supranational courts. The stark challenges to the rule of law posed by counter-terrorism initiatives have dislodged North American, European, Australian and New Zealand judges from the more comfortable task of refining existing rights protection regimes within their respective constitutional frameworks. Issues that would have scarcely been debatable two decades ago – including freedom from torture, secret trials, and indefinite detention – have moved from the margins to the centre of legal debate. The role of the judiciary as conscience and constraint on the exercise of power by democratically elected officials has simultaneously grown more salient and more controversial.

Given this shifting legal landscape, many courts look to the dicta of other courts and to the practices of other states to draw inspiration, guidance, and both positive and negative examples. References by one court to another jurisdiction may relate to the interpretation of analogous constitutional provisions, the approach by another court to an international legal norm binding in both states, or an alternative legislative model that responds to a government's legal claim that no viable alternative exists to the rights-restricting course of action it has taken.<sup>1</sup>

Scholars evaluate this general trend differently. Some hail it as the establishment of an epistemic community promoting a globalised rule of law through a converging elaboration of fundamental human rights norms. Others caution against judicial borrowings that tend to be unreflective, haphazard, self-serving, and insufficiently attentive to legal context and culture. To the bemusement – and amusement – of outside observers, some US jurists and scholars are locked in a peculiarly instrumental battle that pits exceptionalists against imperialists. The former abjure the importation of any foreign influence into US courtrooms that might corrupt American judicial reasoning. The latter counter that the capacity of the United States to exert influence around the world through the force of its jurisprudence is jeopardised by the diminishing regard by other courts for decisions by US courts. This, they believe, is driven by petulance at US courts' lack of reciprocity. In other words, US courts should cite foreign judgments more often so that foreign courts will pay more attention to US jurisprudence.<sup>2</sup>

In the specific domain of counter-terrorism and national security, at least one additional incentive exists for the sharing of ideas between courts. Global networks of government actors are busy cooperating, collaborating, and exploiting opportunities for transnational coordination

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<sup>1</sup> The literature on this topic is voluminous. See, generally, Christopher McCrudden (2000), "A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights", *Oxford Journal of Legal Studies*, 20, p. 499; René Provost (2008), "Judging in Splendid Isolation", *American Journal of Comparative Law*, 56, p. 125; Ann-Marie Slaughter (2003), "A Global Community of Courts", *Harvard International Law Journal*, 44, p. 191.

<sup>2</sup> For a popular summary of the US debate, see Adam Liptak (2008), "US Court, a Longtime Beacon, Now Guiding Fewer Nations", *New York Times*, 18 September, A1.

through joint or coordinated military, intelligence, surveillance, transport, communication, financial and law enforcement activities. US legal scholar Ann-Marie Slaughter draws attention to the operation of these global governance networks post-9/11 as follows:

Consider the examples simply in the wake of 11 September. The Bush administration immediately set about assembling an ‘ad hoc coalition’ of states to aid in the war on terrorism. Public attention focused on military cooperation, but the networks of financial regulators working to identify and freeze terrorist assets, of law enforcement officials sharing vital information on terrorist suspects, and of intelligence operatives working to pre-empt the next attack have been equally important. Indeed, the leading expert in the ‘new security’ of borders and container bombs insists that the domestic agencies responsible for customs, food safety and regulation of all kinds must extend their reach abroad, through reorganisation and much closer cooperation with their foreign counterparts. And after the US concluded that it did not have authority under international law to interdict a shipment of missiles from North Korea to Yemen, it turned to national law enforcement authorities to coordinate the extraterritorial enforcement of their national criminal laws. Networked threats require a networked response.<sup>3</sup>

One of most striking features of the post-9/11 legal environment is the mobilisation of international institutions in the service of bringing direct pressure to bear on states to adopt counter-terrorism policies, practices and laws. Beginning with Security Council Resolution 1373 and radiating downwards through the United Nations bureaucracy and outwards to national and supranational bodies, evidence of Slaughter’s networked response appears abundant. However, if she is correct that global terrorism constitutes a “networked threat” requiring a “networked response” by states, perhaps states’ responses warrant “networked scrutiny” by courts. After all, extraordinary rendition, ghost prisons, and the exploitation of Guantánamo Bay’s anomalous legal status arguably illustrate the ugly and extralegal underside of inter-state cooperation and coordination.

Beyond these specific uses of extraterritoriality, states have certainly looked to one another in devising mechanisms for dealing with security risks that deviate from human rights protections that have been more or less taken for granted in the criminal sphere for decades.

In the face of these developments, international law scholar Eyal Benvenisti identifies an emerging “transnational coalition of national courts” that is actively resisting both the attempt by governments to constrain judicial authority to review the legality of executive action, and challenging the balance between liberty and security struck by governments through the various counter-terrorism measures. According to Benvenisti, national courts cross-reference policies and practices of other states against those of their own government, with a view to determining which measures are least restrictive of human rights. They also consult shared international norms (and interpretations of those norms) in their assessment of the legality of domestic law. Benvenisti advances the counterintuitive hypothesis that co-ordinated deployment of these strategies actually gives national courts more space and legitimacy to challenge executive action. In his view, a co-ordination of outcomes across jurisdictions provides a response to the claim that any individual national court risks turning their states into “a haven for terrorists”

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<sup>3</sup> Anne-Marie Slaughter (2004), “Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks”, *Government and Opposition*, 39, pp. 159-190. See also Eyal Benvenisti (2008), “United We Stand: National Courts Reviewing Counterterrorism Measures”, in Andrea Bianchi and Alexis Keller (eds), *Counterterrorism: Democracy’s Challenge*, Oxford: Hart Publishing, pp. 26-27 (<http://ssrn.com/abstract=965638>).

through its invalidation of a given law, and may also “thwart international pressure on their governments not to comply with the courts’ rulings”.<sup>4</sup>

The objective of this essay is to narrate an episodic exchange of communication between the Supreme Court of Canada and the European Court of Human Rights (with interventions by UK House of Lords) in relation to a central component of the domestic legal regime of dealing with non-citizens who allegedly pose a threat to national security. I do not contend that this episode is representative of how courts engage in comparative or international legal analysis in general or in the field of counter-terrorism in particular. However, I do argue that tracing the progress of this strand of counter-terrorism jurisprudence suggests that Benvenisti’s otherwise excellent account, while attractive and perhaps cogent as a general theory, makes two assumptions that seem unwarranted, at least in the context of Canada-EU dialogue. First, he supposes that courts accurately represent the practices of other states. Secondly, he presumes some consistent and principled rationale animating the choice to cite and engage with the practices or jurisprudence of other jurisdictions in this field. At the same time, Benvenisti’s explanation of the legitimating function of relying on another state’s practice may assist in understanding certain legal and policy outcomes.

## 2. The Stakes

Reaction to the events of 9/11 quickly exposed states’ frustration with the apparent inadequacy of existing legal regimes in categorising and containing the emergent figure of the global terrorist. International humanitarian law was pressed into service through the rhetorical invocation of the ‘war on terror’; penal law was revised to define and criminalise terrorism; and migration law was deployed to repel the non-citizen terrorist by ejecting him from the territory.

Yet each of these stratagems proved inadequate to the task assigned to it by political actors. The ‘war on terror’ metaphor has been strained well beyond its breaking point, and the fiasco of Guantánamo Bay instantiates that collapse. The criminal law in common law jurisdictions veers dangerously toward the creation of a status offence – the existential crime of ‘being’ a terrorist. Still, the entrenched procedural and evidentiary protections available to the accused prove difficult to circumvent, even in the name of national security confidentiality. Thus, criminal prosecutions for terrorism are seldom pursued. Immigration law – the least versatile and least apt of these legal instruments – frequently emerges as the first and last resort of most states.

Immigration law is least versatile because it applies only to non-citizens. Notably, the UK has attempted to finesse this limitation by amending nationality law to permit revocation of UK nationality from dual citizens in order to bring their legal status into alignment with the normative disavowal of the citizenship of so-called ‘home-grown’ terrorists.<sup>5</sup> These citizens thereby become the objects of exile, albeit under the formal guise of deportation.

Migration law is least apt for resolving global terrorist threats because its remedy – transfer from the territory of one state to another – presumes the very parochialism that global terrorism ostensibly renders dangerously obsolete. That is not to deny that terrorism has a migration aspect, but rather to dispute the assumption that terrorism is a problem that migration law can solve. If terrorism indeed transcends borders, deportation merely displaces the problem, and may even enable its practitioners to advance their reprehensible agenda from elsewhere.

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<sup>4</sup> Benvenisti, “United We Stand”, p. 32.

<sup>5</sup> See Audrey Macklin, “The Securitization of Dual Citizenship” in Thomas Faist and Peter Kivisto, (eds.) *Dual Citizenship in Global Perspective: From Unitary to Multiple Citizenship*, Basingstoke: Palgrave Macmillan, 2007, 46, at 60-61.

Given these apparent disadvantages, why the resort to migration regulation as the favoured response? As a branch of administrative law dealing with a literally disenfranchised group (non-citizens), courts have historically permitted legislators to do to non-citizens under the rubric of immigration law what would have been unthinkable to an accused person under criminal law. Deportation is insistently characterised as something other (and lesser) than punishment; thus, the procedural, evidentiary and even carceral protections guaranteed under common law and constitutional law in the criminal context are denied or circumvented in immigration law. Put bluntly, the operating assumption of the state is that it is easier to deport than to prosecute. Immigration law thus emerges as the first resort of states looking to rid themselves of troublesome people who happen to be foreigners.

One cannot but suspect a certain disingenuousness about what states of the global North really seek to achieve through deeming non-citizens as security risks for the purposes of deportation. Can it really be that in the post-9/11 climate, these states are indifferent as to what the state of citizenship does with or to a deportee who is handed over to authorities with the label ‘terrorist’ virtually stamped on his forehead? In principle, the consequences of expulsion consist of the following: the alleged terrorist walks free and unmolested by authorities of the receiving state; the person is arrested and tried according to law for some terrorism-related offence allegedly committed in the receiving state; or, he is taken into detention as a putative terrorist and – and what? Interrogated, tortured, detained indefinitely – or simply ‘disappeared’?

### 3. The Cases

Four cases form the primary material for analysis: *Chahal v. United Kingdom*<sup>6</sup>, *Suresh v. Canada*,<sup>7</sup> *Saadi v. Italy*<sup>8</sup> and *Charkaoui v. Canada*.<sup>9</sup> The timing of these cases in relation to world events is noteworthy: *Chahal* was argued and decided under the European Convention on the Promotion of Human Rights and Fundamental Freedoms (European Convention) by the European Court of Human Rights in 1996. *Suresh* was argued before the Supreme Court of Canada in May 2001, but the judgment was released in January 2002. *Charkaoui* and *Saadi* date from 2007 and 2008 respectively.

Although arising in different states, the context is roughly similar across jurisdictions: the executive identifies a non-citizen as a risk to national security. He is taken into detention where he remains, usually for years. An administrative process, sometimes subject to judicial supervision, reviews the determination of the executive according to a deferential standard and/or a standard of proof lower than that required for a criminal conviction. The ability of the person concerned to participate in the process, to know the case against him, to be represented by counsel, and to challenge the evidence against him, are each restricted on grounds of national security confidentiality. If the designation of the person as a risk to national security is upheld, he becomes deportable, at least in principle. At this point, Canadian and European jurisprudence diverge on the issue of whether deportation of a non-citizen to a place where he faces a substantial risk of torture always and necessarily violates fundamental human rights.

In Canada, the foundational human rights instrument is the Canadian Charter of Rights and Freedoms. Although many other rights (equality, freedom from cruel and unusual treatment, right against arbitrary detention) are implicated, most of the jurisprudential heavy lifting with respect both to process and deportation is performed by section 7, which declares that “everyone

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<sup>6</sup> *Chahal v. United Kingdom*, (1996) 23 CHRR 413.

<sup>7</sup> *Suresh v. Canada*, [2002] 1 SCR 3.

<sup>8</sup> *Saadi v. Italy*, Application No. 37201/06, 28 February 2008 (Grand Chamber).

<sup>9</sup> *Charkaoui v. Canada* [2007] 1 SCR 350.

has the right to live, liberty and security of the person, and the right not to be deprived thereof except in accordance with fundamental justice". The European Convention deals with the procedural dimensions as potential infringements of the right against arbitrary detention (Article 5(1) and 5(4)), while the decision to deport is analysed in terms of Article 3's protection against torture or inhuman or degrading treatment or punishment.

### **3.1 The process: national security confidentiality versus the right to know and respond to the case against you**

Karamjit Singh Chahal, originally from India, lived in the UK on an indefinite leave to remain. In 1985 and 1986, he was detained but released without charge under the Prevention of Terrorism Act 1984 for his activities in connection with the International Sikh Youth Federation (ISYF). In 1986, he was convicted and served a nine-month prison sentence for assault charges arising out of a *mêlée* outside a Sikh temple in London.<sup>10</sup> On 16 August 1990, Chahal was taken into detention for purposes of deportation. The Home Secretary had decided that "his continued presence in the United Kingdom was inconducive to the public good for reasons of national security and other reasons of a political nature, namely the international fight against terrorism".<sup>11</sup> The ordinary right of appeal against a deportation order was abrogated where the order is based on national security. Instead, the affected person could make oral or written representations to an independent, three-member, security-cleared quasi-judicial advisory panel composed of a High Court judge, a former president of the Immigration Appeal Tribunal, and a person experienced in analysing intelligence. The Home Secretary had to disclose the evidence upon which he based his decision to the advisory panel, but retained sole authority to decide what evidence and sources would be disclosed to Chahal. Nor would Chahal be entitled to representation by legal counsel, or to know the the advisory panel's non-binding recommendation to the Home Secretary regarding deportation. The Home Secretary affirmed his initial decision to deport Chahal, and advised Chahal that the Indian government had assured the Home Secretary that Chahal "would enjoy the same legal protection as any other Indian citizen, and that he would have no reason to expect to suffer mistreatment of any kind at the hands of the Indian authorities".<sup>12</sup>

Judicial review by the High Court and the Court of Appeal were dismissed. Lord Justice Nolan's ruling anticipates the Supreme Court of Canada's judgment in *Suresh* by holding that:

there may very well be occasions when the individual poses such a threat to this country and its inhabitants that considerations of his personal safety and well-being become virtually irrelevant. Nevertheless one would expect that the Secretary of State would balance the risks to this country against the risks to the individual, albeit that the scales might properly be weighted in favour of the former.<sup>13</sup>

The muted concern expressed by the English Court of Appeal about the weighing of national security against torture was voiced against a background of limited judicial authority to actually supervise the Home Secretary's balancing exercise. The courts did not have access to the classified information upon which the Home Secretary made his decision. The English courts more or less conceded rather than contested this obstacle by admitting that judicial scrutiny

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<sup>10</sup> In 1992, those convictions were quashed by the Court of Appeal (Criminal Division). Chahal, para. 39.

<sup>11</sup> Chahal, para. 25. Chahal thereupon made an unsuccessful bid for asylum.

<sup>12</sup> Quoted in Chahal, para. 37.

<sup>13</sup> Quoted in Chahal, para. 41.

“may be defective or incomplete if all the relevant facts are not before the court”<sup>14</sup> but that, “in any event, the judicial process is unsuitable for reaching decisions on national security”.<sup>15</sup>

By the time the case reached the Grand Chamber of the European Court of Human Rights, Chahal had been in detention for about six years. The process by which he was determined to constitute a security threat (including his lengthy detention), and the decision to deport were each subject to scrutiny.

The tension between protection of national security confidentiality and the right to know the case against you (*audi alteram partem*) was and remains a recurring feature of migration regimes across jurisdictions. A breach of procedural fairness strikes at the core of the rule of law’s commitment to fair trial. The ECtHR clearly struggled with the absence of disclosure to Chahal of the evidence supporting the terrorism allegations against him, while acknowledging both the exigencies of national security confidentiality and the ECtHR’s institutional responsibility to extend a margin of appreciation to individual states’ policy responses.

The ECtHR turned to submissions made by a group of human rights NGO intervenors<sup>16</sup> about a Canadian process that, in principle, mediated the tension between confidentiality and disclosure in a preferable manner. Apparently basing their description on the intervenors’ submission, the ECtHR depicted the Canadian system in the following terms:

Under the Canadian Immigration Act 1976 (as amended by the Immigration Act 1988), a Federal Court judge holds an *in camera* hearing of all the evidence, at which the applicant is provided with a statement summarising, as far as possible, the case against him or her and has the right to be represented and to call evidence. The confidentiality of security material is maintained by requiring such evidence to be examined in the absence of both the applicant and his or her representative. However, in these circumstances, their place is taken by a security-cleared counsel instructed by the court, who cross-examines the witnesses and generally assists the court to test the strength of the State’s case. A summary of the evidence obtained by this procedure, with necessary deletions, is given to the applicant.<sup>17</sup>

This Canadian model offered the ECtHR something that, in the lexicon of Canadian constitutional jurisprudence, constituted a less restrictive alternative to the UK’s rights-infringing practice: “This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice”.<sup>18</sup> One can recognise in the ECtHR’s account of the Canadian practice a template for the Special Advocate model adopted by the United Kingdom in response to Chahal, as set out in the Special Immigration Appeals Commission Act 1997.<sup>19</sup>

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<sup>14</sup> Quoted in Chahal, para. 41.

<sup>15</sup> These comments should be read against the more recent boldness of the House of Lords in applying the European Convention on Human Rights protections incorporated into UK law via the Human Rights Act. See, e.g. *Secretary of State for the Home Department v. Rehman*, [2001] 3 W.L.R. 877; *A. and others v. Secretary of State for the Home Department: X & Anor v. Secretary of State for Home Department (Belmarsh I)* [2005] 2 AC 68 (House of Lords).

<sup>16</sup> Amnesty International, Liberty, the Advice on Individual Rights in Europe Centre and the Joint Council for the Rights of Immigrants.

<sup>17</sup> Chahal, para. 144.

<sup>18</sup> Chahal, para. 131.

<sup>19</sup> Special Immigration Appeals Commission Act 1997 (UK) 1997, c. 68.



This citation of the Canadian model as a factor in the Chahal decision, followed by the adoption of a similar approach by the UK might offer a salutary illustration of a transnational governance network with synergistic judicial and policy components, but for one detail: the Canadian model described in Chahal did not exist. No Federal Court judge ever performed the function ascribed to it by the ECtHR. Or, to be more accurate, the process that bore most similarity to what the ECtHR summarises was performed at the time by the Security Intelligence Review Committee (SIRC), a body tasked with overseeing the operation of the Canadian Security Intelligence Service (CSIS).<sup>20</sup> The SIRC was staffed by security-cleared Governor-in-Council appointees who were regarded as prominent individuals, at least some of whom had direct past experience in matters of security and intelligence.

In the mid-1990s, if the Minister of Immigration and the Solicitor General of Canada formed the opinion based on intelligence and/or law enforcement data that a permanent resident (roughly equivalent to a non-citizen with ‘indefinite leave to remain’) posed a threat to national security, a report would be issued to SIRC. SIRC would then investigate the report and provide Cabinet with a reasoned conclusion about “whether or not a [security] certificate should be issued”. A security certificate declared an individual to be a threat to national security or public safety, operated as a non-appealable deportation order, and circumscribed the scope and capacity of the Federal Court to judicially review the legality of the deportation.<sup>21</sup>

The SIRC operated at arms-length from CSIS, which typically generated the information upon which the report was based. SIRC did possess statutory authority to access the information upon which the government relied in issuing its report, and to subpoena witnesses and documents. On its own initiative, SIRC devised an adversarial adjudication process for investigating and assessing the credibility of the report issued to it. A key feature of the process was the mechanism for ensuring that the evidence relied upon by government was subject to rigorous scrutiny and cross-examination, without thereby placing national security in jeopardy. The solution was to engage security-cleared SIRC counsel who, in effect, fulfilled some of the tasks that counsel for the affected party was precluded from performing because of national security confidentiality.<sup>22</sup> Much of the hearings before SIRC are conducted in camera and in the absence of the named person or his counsel. The role of SIRC counsel as not-quite-surrogate advocate for the affected party became salient in this context.

One task for the SIRC counsel was to obtain as comprehensive a summary of the case as possible for the person concerned and his counsel. The natural predilection of CSIS (like all intelligence agencies) was to strenuously resist disclosure to the maximum extent. SIRC counsel

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<sup>20</sup> The following description of the SIRC in the period prior to 2002 is drawn from the following sources: Murray Rankin (1989-90), “The Security Intelligence Review Committee: Reconciling National Security with Procedural Fairness”, *Canadian Journal of Administrative Law and Practice*, 3, p. 173; Rayner Thwaites (2004), “Deportation on National Security Grounds Within a Culture of Justification”, LLM Thesis, University of Toronto, unpublished, Appendix 1; Craig Forcese & Lorne Waldman (2007), “Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom and New Zealand on the Use of Special Advocates in National Security Proceedings”, August, pp. 5-14 (<http://aix1.uottawa.ca/~cforcese/other/sastudy.pdf>).

<sup>21</sup> Until 1988, the SIRC process was available to any non-citizen. After 1988 (and at the time Chahal was heard and decided), the SIRC review did not apply to non-citizens without permanent resident status. In those cases, the two Ministers would sign a security certificate deeming the person to constitute a danger to national security, and the certificate would go directly to review by a Federal Court judge without any prior scrutiny comparable to the SIRC process:

<sup>22</sup> SIRC employed in-house counsel, but where particularly aggressive cross-examination of government witnesses was deemed necessary, SIRC could engage outside counsel (with appropriate security clearance) to avoid any apprehension of bias on the part of SIRC toward CSIS.

would negotiate disclosure with CSIS from a position of expertise, and test CSIS to ensure that non-disclosure to the person concerned and his counsel in each instance was specifically justified and warranted. The SIRC Rules of Procedure (devised by SIRC) granted SIRC discretion “in balancing the requirements of preventing threats to the security of Canada and providing fairness to the person affected to determine if the facts of the case justify that the substance of the representations made by one party should be disclosed to one or more of the other parties.”<sup>23</sup> In practice, consultation with the CSIS director, combined with negotiation and the search for consensus on disclosure of information to the named person and his counsel seem to have permitted the attainment of a *modus vivendi* with respect to disclosure of information to the affected party and his counsel.<sup>24</sup>

The second critical function performed by SIRC counsel was to cross-examine CSIS and other government officials in the course of *in camera* hearings (where the person concerned and his counsel were excluded) in order to test the quality of the evidence against the named person. A former SIRC counsel advisor described his role as follows:

The Committee’s counsel is instructed to cross-examine witnesses for the [Canadian Security Intelligence] Service with as much vigour as one would expect from the complainant’s counsel. Having been present during the unfolding of the complainant’s case, the Committee counsel is able to pursue the same line of questions. In addition, however, since Committee counsel has the requisite security clearance and has had the opportunity to review files not available to the complainant’s counsel, he or she is also able to explore issues and particulars that would be unknown to the complainant’s counsel.<sup>25</sup>

While SIRC counsel were emphatically not in a solicitor-client relationship with the named person, they could and did meet with that individual and his counsel before and after they were apprised of confidential, inculpatory information from the government. Obviously, SIRC counsel must be vigilant not to reveal (even inadvertently) any secret information. According to Forcese and Waldman, “[e]ven with this restriction, one of SIRC’s outside counsel told us that this questioning, done in an oblique manner to avoid involuntary disclosures of secret information, is central in unearthing potentially exculpatory information and observed that some cases at least have turned on information obtained from the named person in this manner.”<sup>26</sup>

This truncated summary suffices to demonstrate the inaccuracy of the portrait painted of the Canadian practice by the Chahal court. It also indicates the similarity between the SIRC committee process and the special advocate model ultimately introduced in the UK. However, Canada’s 2001 Immigration and Refugee Protection Act, passed in the wake of 9/11, abolished SIRC’s authority to review the designation of permanent residents as threats to national security. Instead, the Ministers could sign a security certificate, the named person would be detained, and the Federal Court would eventually review the security certificate on a standard of reasonableness. Non-citizens no longer had the benefit of the SIRC committee’s scrutiny of the government’s case, and were left only with the less scrupulous and more secretive Federal Court review.

The Federal Court review virtually required the judge to conduct an *in camera* (secret) hearing in the absence of the named person or his counsel. The judge would authorise a summary of

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<sup>23</sup> SIRC, Rules of Procedure of the Security Intelligence Review Committee in Relation to its Function under Paragraph 38(C) of the *Canadian Security Intelligence Service Act*, para. 46(2)(a).

<sup>24</sup> Under s. 38 of the Canada Evidence Act,

<sup>25</sup> Rankin, *supra* note 20 at 184.

<sup>26</sup> Forcese & Waldman, *supra* note 20 at 9.

facts to be disclosed to the person named in the certificate, and that would be all the information available to the named person and his counsel. Without an analogue to SIRC counsel in the room, it fell to the Federal Court judge to test the quality of the evidence against the person named in the security certificate. Anecdotally, immigration lawyers familiar with both systems indicated that judges of the Federal Court were relatively inexpert and more deferential to the government in comparison to SIRC with respect to matters deemed subject to national security confidentiality. The summaries made available to the named person were, in practice, prepared by the government and approved by the judge, meaning that they contained only the information that the government wished to disclose.

This was the legal scheme in effect at the time of the Supreme Court of Canada's 2007 judgment in *Charkaoui*. By this point, the Supreme Court of Canada had already declared in *Suresh* that deportation to torture was generally prohibited under s. 7 of the Charter, except in unspecified exceptional circumstances. The process by which persons named in security certificates were detained without review, and the Federal Court's review of the reasonableness of the security certificate itself, were subject to constitutional challenge. The Supreme Court of Canada judgment deflected consideration of the legislative and empirical reality that the Immigration and Refugee Protection Act permitted indefinite detention. The Supreme Court of Canada did confront other issues, including the breach of fundamental justice entailed by judicial review of the security certificate, wherein a Federal Court judge was authorised to rely upon evidence withheld from the named person which, in the opinion of the judge, was relevant but should not be disclosed because it might be injurious to national security or to the safety of any person. It was the sole responsibility of the judge to test the credibility of the secret evidence on his or her own, by putting questions to government counsel and witnesses. This task was wholly incongruous with the traditional role of the neutral and passive judge in the common law world, as Federal Court Justice Hugessen lamented in a speech excerpted in the *Charkaoui* judgment:

We do not like this process of having to sit alone hearing only one part, and looking at the materials produced by only one party...

If there is one thing that I learned in my practice at the Bar, and I have managed to retain it through all these years, it is that good cross-examination requires really careful preparation and a good knowledge of your case. And by definition, judges do not do that. ... we do not have any knowledge except what is given to us and when it is only given to us by one party we are not well suited to test the materials that are put before us.<sup>27</sup>

The Supreme Court of Canada ultimately validates the apprehensions of Justice Hugessen about the inadequacy of the existing scheme:

Under IRPA's certificate scheme, the named person may be deprived of access to or all of the information put against him or her, which would deny the person the ability to know the case to meet. Without this information, the named person may not be in a position to contradict errors, identify omissions, challenge the credibility of informants or refute false allegations. This problem is serious in itself. It also underlies the concerns, discussed above, about the independence and impartiality of the designated judge, and the ability of the judge to make a decision based on the facts and law ...

Ultimately, the judge may have to consider information that is not included in the summary [provided to the named person]. In the result, the judge may be required to decide the case, wholly or in part, on the basis of information that the named person

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<sup>27</sup> J. Hugessen, quoted in *Charkaoui* at para. 36.

and his or her counsel never see. The named person may know nothing of the case to meet, and although technically afforded an opportunity to be heard, may be left in a position of having no idea as to what needs to be said.<sup>28</sup>

As in *Chahal*, the availability of less restrictive alternatives to the breach of fundamental justice entailed by the existing scheme played a significant role in leading the Supreme Court of Canada to the conclusion that the *status quo* was not “demonstrably justified in a free and democratic society”.<sup>29</sup> Justification requires that the objective sought by the rights infringement is “pressing and substantial” and the means of achieving it are proportional to the objective. The Supreme Court of Canada had little difficulty declaring that the “protection of Canada’s national security and related intelligence sources undoubtedly constitutes a pressing and substantial objective”.<sup>30</sup> Its attention turned quickly to surveying other less restrictive options, including the SIRC process described above that was restricted to permanent residents in 1988 and then abolished altogether in 2001. Notably, the Supreme Court of Canada’s account did not advert to the practice by SIRC counsel of meeting with and interviewing the person concerned before and after counsel viewed secret evidence.<sup>31</sup> The Supreme Court of Canada also cited the example of “special counsel” to the Commission of Inquiry in the Actions of Canadian Officials in Relation to Maher Arar (Arar Inquiry).<sup>32</sup> According to the Supreme Court of Canada, the role of this special security-cleared counsel was to “act as *amicus curiae* on confidentiality applications” where the Commission was struggling to balance disclosure to the person concerned and to the public against national security confidentiality.<sup>33</sup> While technically accurate, the Supreme Court effectively overstated the very limited role of this security-cleared counsel, while failing to mention the far more important role played by general counsel to the Arar Commission, who acted rather more like SIRC counsel. That is to say, Arar Commission counsel were privy to information that was ultimately not disclosed to Mr. Arar or to other witnesses by reason of national security confidentiality, but nevertheless were able to meet with Arar, put questions to him, glean avenues of inquiry, and formulate bases upon which to test the government’s evidence, without divulging the content of the secret information.

Finally, the Supreme Court of Canada refers to the UK Special Advocate model. The Court traces the influence of the mis-described Canadian process on the UK system, remarking that the European Court in *Chahal* was “perhaps referring to the procedure developed by SIRC”.<sup>34</sup> Among the features of the UK Special Advocate model identified by the Supreme Court of Canada, particular attention is drawn to the provision prohibiting the special advocate from communicating with the person concerned after seeing the protected information, unless the special advocate seeks permission from the Special Immigration Appeals Commission (SIAC), and the Secretary of State has an opportunity to object to the proposed communication before SIAC decides.<sup>35</sup>

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<sup>28</sup> Charkaoui, at paras. 54-55.

<sup>29</sup> Section 1 of the Canadian Charter of Rights and Freedoms provides that the right and freedoms set out in the Charter are “subject to such reasonable limitations as are demonstrably justified in a free and democratic society”.

<sup>30</sup> Charkaoui, at para. 68.

<sup>31</sup> The Court’s account is at Charkaoui, at paras. 71-76.

<sup>32</sup> For critical reviews and analyses of the Arar Inquiry, see Audrey Macklin, Kent Roach, Reg Whitaker and Lindsay Aargard.

<sup>33</sup> Charkaoui, para. 79.

<sup>34</sup> Charkaoui, para. 80.

<sup>35</sup> Charkaoui, paras 80-81.

The Supreme Court of Canada cites the positive academic reception to the special advocate model, while noting that the system has also been subject to criticism for the barriers to communication with the person concerned or his counsel, the inability of special advocates to call witnesses, and the lack of resourcing.<sup>36</sup> Despite these apparent weaknesses, the Supreme Court of Canada concludes by invoking SIAC's own favourable commentary on the contribution of special advocates to its own successful operation. It even chided the Canadian government for not explaining to the Court why the drafters of the impugned Canadian legislation "did not provide for special counsel . . . [as] is presently done in the United Kingdom."<sup>37</sup> Among the 'less restrictive' alternatives canvassed by the Supreme Court of Canada, the UK scheme impaired the rights of the person concerned more than the others, which were domestic and outside the courtroom context. Yet, I would suggest that a fair reading of the judgment conveys the impression that the Supreme Court of Canada was signalling its advance approbation *not* of the available option that impaired rights the least, but rather the most restrictive of those alternatives. This would seem to validate Benvenisti's hypothesis that judges in one jurisdiction look for 'political cover' when striking down domestic legislation by pointing to less restrictive laws in another jurisdiction: if the Supreme Court of Canada endorsed existing UK practice, it could not be accused of making Canada a uniquely attractive haven for terrorists. However, the outcome also hints at the erosion of the principle that violations of rights be justified as the least restrictive possible.

Presented with a declaration of unconstitutionality from the Supreme Court of Canada, plus a survey of less intrusive alternatives, the Canadian government ultimately and predictably responded by introducing legislation that more or less replicated the salient features of the UK special advocate model.

By the time the Canadian special advocate legislation (Bill C-3) was introduced in mid-October 2007, UK special advocate system had been 'road tested' more extensively and scrutinised more carefully against this experience. In July 2007, the UK House of Commons and House of Lords Joint Committee on Human Rights (Nineteenth Report) issued its latest report on, inter alia, the special advocate system. The Committee interviewed four special advocates about their experience. The Joint Committee described their evidence as "most disquieting".<sup>38</sup> The major flaws identified by the special advocates were first, government resistance to full disclosure to the special advocate of the entire file (including both inculpatory and exculpatory information) and second, the practical inability of special advocates to consult and question the person concerned after the special advocate viewed the secret evidence.<sup>39</sup> Both of these constraints limited the ability of the person subject to a control order to know the case against him and to respond to it. The Joint Committee discussed at length the impediments that the existing regime erected to a fair hearing for the person named in control order.<sup>40</sup> It concluded as follows:

After listening to the evidence of the Special Advocates, we found it hard not to reach for well worn descriptions of it as "Kafkaesque" or like the Star Chamber. The Special Advocates agreed when it was put to them that, in light of the concerns they had raised, "the public should be left in absolutely no doubt that what is happening ... has absolutely nothing to do with the traditions of adversarial justice as we have come to

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<sup>36</sup> Charkaoui, para. 83.

<sup>37</sup> Charkaoui, para. 84.

<sup>38</sup> UK House of Commons and House of Lords Joint Committee on Human Rights, Nineteenth Report, 16 July 2007, para. 192, <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/157/15709.htm>.

<sup>39</sup> The low standard of proof applied by SIAC was also identified as a significant concern, though this is not distinctive to a special advocate model.

<sup>40</sup> See Joint Committee, Nineteenth Report, paras. 195-209.

understand them in the British legal system." Indeed, we were left with the very strong feeling that this is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is very much against basic notions of fair play as the lay public would understand them.<sup>41</sup>

In light of the serious concerns harboured by the Joint Committee, their report urged that the UK government impose a clear and verifiable statutory obligation on the Secretary of State for the Home Department to "provide a statement of the gist of the closed material" and to permit the SIAC or a Court to balance the public interest in non-disclosure against the interests of justice in deciding whether material ought to be disclosed. The Joint Committee also recommended, subject to appropriate guidance and safeguards, "relaxation of the current prohibition on any communication between the special advocate and the person concerned or their legal representative after the special advocate has seen the closed material." Ironically, the Joint Committee drew support for this latter proposal from the similar suggestion made in February 2007 (prior to the Supreme Court of Canada judgment in *Charkaoui*) by a Special Senate Committee of the Canadian Parliament on the Canadian Anti-Terrorism Act.<sup>42</sup>

Despite the analysis, critique and recommendations regarding the special advocate system contained in the July 2007 Joint Committee Nineteenth Report, on 22 October 2007 the Canadian government introduced Bill C-3, An Act to amend the Immigration and Refugee Protection Act (certificates and special advocates). The legislation mimicked the salient features of the UK special advocate regime that had been excoriated by the Joint Committee. On 31 October 2007, about a week after the first reading of Bill C-3 in the Canadian House of Commons, the UK House of Lords released *Secretary of State for the Home Department v. MB (FC)*.<sup>43</sup> The House of Lords upheld the control order regime against challenge under the Human Rights Act. Although the Law Lords managed to reiterate the erroneous depiction of the Canadian scheme as described in *Chahal*,<sup>44</sup> they also commented in their course of judgment on the potential deficiencies of the special advocate system in the UK. For instance, Lord Bingham of Cornwall specifically drew attention to the detrimental impact of the special advocate's practical inability to consult with the person concerned after viewing the secret evidence:

In any ordinary case, a client instructs his advocate what his defence is to the charges made against him, briefs the advocate on the weaknesses and vulnerability of the adverse witnesses, and indicates what evidence is available by way of rebuttal. This is a process which it may be impossible to adopt if the controlled person does not know the allegations made against him and cannot therefore give meaningful instructions, and the special advocate, once he knows what the allegations are, cannot tell the controlled person or seek instructions without permission, which in practice (as I understand) is not given. "Grave disadvantage" is not, I think, an exaggerated description of the controlled person's position where such circumstances obtain. ...[T]he task of the court in any given case is to decide, looking at the process as a whole, whether a procedure has been used which involved significant injustice to the controlled person.<sup>45</sup>

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<sup>41</sup> Joint Committee, Nineteenth Report, para. 210

<sup>42</sup> *Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the Anti-Terrorism Act*, February 2007, at pp. 35-36 and 42.

<sup>43</sup> [2007] UKHL 46.

<sup>44</sup> See, e.g. para. 35 (per Lord Bingham), paras. 51-54 (per Lord Hoffman), para. 81 (per Lord Carswell).

<sup>45</sup> MB at para. 35. See also paras. 64-66 (per Baroness Hale: "I do not think that we can be confident that Strasbourg would hold that every control order hearing in which the special advocate procedure had been used ...would be sufficient to comply with article 6 [of the ECtHR].... There is ample evidence from

Similarly, Baroness Hale identified the lack of disclosure and prohibition on communication as barriers to a fair process, and the need for vigilance in challenging the government's tendency to over-claim the need for secrecy in terrorism-related cases:

Both judge and special advocates will have stringently to test the material which remains closed. All must be alive to the possibility that material could be redacted or gisted in such a way as to enable the special advocates to seek the client's instructions upon it. All must be alive to the possibility that the special advocates be given leave to ask specific and carefully tailored questions of the client. Although not expressly provided for in [legislation], the special advocate should be able to call or have called witnesses to rebut the closed material.<sup>46</sup>

Notwithstanding the deficiencies in the actual operation of the special advocate model as described in the Joint Committee Nineteenth Report, and the reservations expressed by the House of Lords in MB, Canada's Bill C-3 survived two more readings in Parliament, and review by the House of Commons Standing Committee on Public Safety and National Security. It was passed into law without substantial amendment in February 2008.<sup>47</sup> Like its UK counterpart, it does not impose on the government a duty of full disclosure to the special advocate, and it severely impedes the ability of the special advocate to meet with the person named in the security certificate.<sup>48</sup>

To recap: In 1996, the European Court of Human Rights ruled in *Chahal* that the UK system for designating non-citizens as security threats violated basic rights to procedural fairness enshrined in the European Convention on Human Rights. In coming to this conclusion, the ECtHR commended as an alternative a Canadian model that did not exist and had never existed. The closest proxy was a process before an administrative body (SIRC) that exercised only a recommending function, and operated at a stage prior to the issuance a security certificate that was ultimately reviewable before the Federal Court. The Federal Court process was and remained intensely secretive, provided very little disclosure to the person named in the security certificate or his counsel, involved no special counsel, and effectively relied on the judge to test and assess the need for disclosure and the veracity of the government's evidence.

Following *Chahal*, the UK instituted a special advocate model predicated on the non-existent Canadian precedent. The UK model was arguably inferior to the actually existing SIRC process, but in 2001, that SIRC process was abolished anyway, leaving only the Federal Court review. In 2006, that Federal Court review of security certificates was successfully challenged. The Supreme Court of Canada struck it down as a violation of fundamental justice under the Canadian Charter of Rights and Freedoms, for many of the same reasons that the UK process was found wanting a decade earlier in the *Chahal* decision. In the course of coming to their conclusion, the Supreme Court of Canada commended as an alternative the UK special advocate model.

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elsewhere of a tendency to over-claim the need for secrecy in terrorism cases ... All must be alive to the possibility that the special advocates be given leave to ask specific and carefully tailored questions of the client. Although not expressly provided for in [the special advocate legislation], the special advocate should be able to call or have called witnesses to rebut the closed material. The nature of the case may be such that the client does not need to know all the details of the evidence in order to make an effective challenge".) The MB case was heard just prior to the release of the Joint Committee Nineteenth Report.

<sup>46</sup> MB at para. 66.

<sup>47</sup> The legislation was incorporated into the Immigration and Refugee Protection Act, 2001, c. 27, ss. 76-87.2

<sup>48</sup> Immigration and Refugee Protection Act, s. 85.4

Meanwhile, that UK special advocate process was coming under severe criticism by the Joint Committee on Human Rights, and the House of Lords subsequently expressed similar, though more muted, reservations about it. Nevertheless, the Canadian government's response to the Supreme Court's decision in *Charkaoui* was to adopt the UK model. And that is what Canada has today: a special advocate scheme that mimics a deficient UK model that is itself a copy of a non-existent Canadian precedent. One might describe this outcome as the production of a jurisprudential simulacrum: the manufacture of a real copy of a fictitious original.

### 3.2 The substance: deportation to torture

The conversation between the European Court of Human Rights, Canada and, to an extent, the UK House of Lords about the process might best be characterised as a transatlantic recirculation of misinformation. The substantive issue that travels along with the procedural one is, of course, the legality of deporting a non-citizen designated a security risk to a country where he faces a substantial risk of torture. Given that the prohibition on deportation to torture is explicitly and categorically prohibited under Article 3 of the United Nations Convention Against Torture, one might have expected reliance on this common text to signal, in Benvenisti's words, a judicial "readiness to cooperate", and insurance against "the future retreat of one of [the national courts] from the shared interpretation".<sup>49</sup> Yet despite international and comparative allies, the Supreme Court of Canada was manifestly unwilling to play on the team.

The European Court of Human Rights first confronted this question in *Chahal* in 1996, concluding that Article 3 of the European Convention's absolute prohibition on torture, inhuman or degrading treatment or punishment encompassed deportation by a state party to a non-state party where the person faced a substantial risk of torture. Although Article 3 of the European Convention does not expressly address deportation, the ECtHR interpreted in conformity with the CAT provision. In 2001, the Supreme Court of Canada in *Suresh* addressed the same issue. The unanimous judgment affirmed that Canada is a party to the Convention Against Torture (CAT), and that Article 3 of CAT categorically prohibits deportation to torture, the Supreme Court unaccountably drew the inference that international law merely counselled but did not mandate a congruent interpretation of section 7 of the Charter: "This suggests that, *barring extraordinary circumstances*, deportation to torture will *generally* violate the principles of fundamental justice protected by s. 7 of the Charter" (emphasis added).<sup>50</sup> The Supreme Court offers neither a jurisprudential nor normative basis in international law or, for that matter, in Canadian constitutional law, for these qualifications on the absolute prohibition on deportation to torture.<sup>51</sup>

The Court does quote approvingly from the judgments of Lords Steyn and Hoffman in *Re Rehman*, in which the Law Lords indicate that a decision to deport must be done on a case-by-case basis, taking into account the prejudice to national security and the likely consequences of deportation to the person concerned.<sup>52</sup> While these quotes might appear to endorse a case-by-

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<sup>49</sup> Eyal Benvenisti (2008), "Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts", *American Journal of International Law*, 102, p. 18 (<http://ssrn.com/abstract=1007453>). Benvenisti acknowledges that implementation of a shared international norm in the domestic arena is not unproblematic, but also admits that court can also draw on a medley of tactics to overcome the hurdles if they so choose.

<sup>50</sup> *Suresh*, para. 76.

<sup>51</sup> See, further, Rayner Thwaites, in *Canada-EU Security Relations: The Other Transatlantic* Mark B. Salter ed. forthcoming.,

<sup>52</sup> *Suresh*, para. 77, quoting *Rehman*, per Lord Hoffman, at para. 56 and Lord Slynn of Hadley, at para. 16.



case balancing of national security against torture, Lord Hoffman makes it amply clear elsewhere in his judgment (in a passage not quoted by the Supreme Court of Canada) that he considers the UK bound by the ruling in *Chahal*:

The European jurisprudence makes it clear that whether deportation is in the interests of national security is irrelevant to rights under article 3. If there is a danger of torture, the Government must find some other way of dealing with a threat to national security. Whether a sufficient risk exists is a question of evaluation and prediction based on evidence. In answering such a question, the executive enjoys no constitutional prerogative.<sup>53</sup>

Although the Supreme Court of Canada does not misquote the Law Lords in a manner comparable to the way in which the European Court of Human Rights in *Chahal* misrepresented the Canadian system, it is arguable that the Supreme Court in *Suresh* engaged in precisely the sort of tactical ‘cherry picking’ that critics of judicial comparativism deplore. To the extent that it uses selective quotations from the Law Lords to insinuate that the Supreme Court of Canada is not alone among its judicial colleagues in other democracies in balancing national security against torture, the Supreme Court communicates a message that can most charitably be described as ambiguous.

The Supreme Court also declined to elaborate on what might constitute exceptional circumstances. The government of Canada, however, has subsequently argued that exceptional circumstances obtain in each security certificate case involving potential deportation to a country that routinely engages in torture.<sup>54</sup>

Several EU member state governments, along with the Canadian government have devoted considerable energy to securing diplomatic assurances from countries that engage in torture that these same states will not torture the particular individual who is the subject of the assurance. The objective is to reduce the risk of torture from ‘substantial’ to some lesser, legally acceptable, likelihood of torture. For EU governments, this would enable member states to deport non-citizen security risks without breaching Article 3 of the European Convention. For the Canadian government, diplomatic assurances offer an alternative justification for deportation, alongside the assertion of ‘exceptional circumstances’ warranting return to torture.

In the wake of the *Suresh* decision, several European governments seized the opportunity presented by the Supreme Court of Canada to insist that *Chahal* ought to be reconsidered in light of the ‘new reality’ of the post-9/11 world. These states contended that the European Court of Human Rights ought to abandon its absolutist position and adopt the balancing approach of the Supreme Court of Canada, whereby the danger to national security posed by the presence of the non-citizen would be balanced against the harm of torture to that person if deported. Between 2006 and 2007, several states petitioned the European Court of Human Rights to revisit *Chahal*, and human rights organisations intervened in opposition. The parties and the interveners were clearly aware of *Suresh*, and included reference to the judgment in their submissions in *Ramzy*.... The Court ultimately replied with its decision in *Saadi v. Italy*, in which it emphatically upheld the absolute prohibition under Article 3 on return to torture, and amplified its scepticism about the reliability of diplomatic assurances.

The legality of deporting a person to face a substantial risk of torture presents itself as an unalloyed normative question. The answer does not depend on empirical data or the weighing of evidence: one may assume that the non-citizen constitutes a danger to national security and that the risk of torture is substantial. Unlike the process questions discussed above, it does not

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<sup>53</sup> *Rehman*, para. 54

<sup>54</sup> See Rayner Thwaites, *supra* note 51.

engage problems of institutional design or selection from a range of policy choices. Nor does it seem affected by the particularities of embedded political, institutional or legal cultures. Indeed, since all European Union member states as well as Canada are bound by the United Nations Convention Against Torture, which absolutely prohibits deportation to torture, there exists an even greater opportunity for judicial dialogue organised around a common norm. As such, the legality of deportation to torture would seem better-suited than the procedural issues – if not ideally suited – to a comparative engagement with ideas and argumentation across jurisdictions.

Historical and contemporary precedent invites situating the deportation of security threats somewhere between two existing and illicit state practices, namely disguised extradition and rendition. Deportation of alleged terrorists cannot be assimilated to either, but shares certain features in common with both. Disguised extradition is a familiar and long-standing device used by states to dispatch non-citizens who are suspected of crimes abroad to a country with which the sending state does not have an extradition treaty, and/or whose justice systems would not withstand even the limited judicial review that is usually required as a precondition to extraditing a fugitive. Extraordinary rendition is the notorious post-9/11 United States practice of illegally, forcibly and extrajudicially transporting individuals suspected of terrorist links to states where the detainees will likely be subject to interrogation through cruel, inhuman or degrading treatment or torture.

In many instances where states seek to deport alleged terrorist threats, the human rights record of the receiving country is infamous for documented practices of abuse and denial of basic human rights, including cruel, inhuman, degrading treatment or torture, thereby making the link between deportation and rendition.

In some cases, conduct in the country of citizenship is at least one factor leading to the identification of a non-citizen as a security threat, making the analogy to disguised extradition relevant. This was the case in *Saadi*, a Tunisian national living in Italy who was tried in Italy for conspiracy to commit acts of terror-related violence, but also tried, convicted and sentenced in absentia to 20 years imprisonment by a Tunisian military court “for membership of a terrorist organisation acting abroad in peacetime and for incitement to terrorism”. Tunisia, however, did not seek to extradite Saadi.

Two significant differences between rendition and deportation of security risks warrant a mention. First, in Canada and the European Union, deportation of security risks follows some type of legal procedure and in that sense is not extrajudicial. Secondly, rendition to torture is occasionally rationalised by resort to the specious claim that interrogation under conditions of brutality will yield the disclosure of vital information that will somehow aid in the ‘war on terror’ and save innocent lives. Without in any way validating this pernicious and untenable claim, it is worth noting that those who defend the deportation of alleged security threats to face a substantial risk of torture do not even purport to instrumentalise the possible torture of the deportee. Sending states are not looking to extract more information from the person concerned by delivering him to torture. They just want to dispose of him. They cannot claim that no alternative to deportation exists. After all, solutions must be found for citizens who pose the same level of risk, because they cannot be exiled (unless – perhaps – they hold citizenship elsewhere). Whatever weight one attaches to ‘diplomatic assurances’ from the receiving state that the deportee will not be tortured, it is indisputable that the risk of torture under these circumstances exceeds the risk of torture if the person is not deported at all.<sup>55</sup>

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<sup>55</sup> Both the Supreme Court of Canada in *Suresh*, and the ECtHR in *Chahal and Saadi*, expressed considerable scepticism about the reliability of diplomatic assurances. In *Saadi*, the ECtHR even disputed that the assurance from Tunisia constituted an undertaking not to subject Saadi to torture. *Suresh*, paras. 124-5, *Chahal*, para. 105, *Saadi*, paras. 147-149.

Put simply, the rationale for deportation to face a risk of torture rests on the tacit claim that state sovereignty resides in the absolute right to exclude the non-citizen.<sup>56</sup> This commitment to sovereignty as the power to exclude is remarkably intransigent and resilient, and in certain respects has survived the remarkable lowering of borders for citizens of member states of the European Union.<sup>57</sup> It should not be overlooked that the deferral of the power to exclude from the national to the supranational level represents a contractual agreement between sovereign states, not an agreement between individuals and states, nor a recognition of an individual human right. The right of a state to exclude the non-citizen remains, but the citizen has been redefined as a third-country national, or a non-EU citizen.

From this statist perspective, the vindication of the sovereign right to exclude the non-EU citizen demands the subordination of the human right to be free from torture. Once one concedes that similarly risky citizens cannot be exiled, there is nothing on the other side of the balance capable of outweighing the harm of torture, except the brute fact of non-citizenship. In this sense, what is ultimately at stake in the debate around the deportability of non-citizens alleged under immigration law to constitute threats to national security is ultimately the equality of non-citizens *qua* human. Indeed, the House of Lords judgment in *A (FC) and others (FC) v. Secretary of State for the Home Department (The Belmarsh Case)* brilliantly lays bare the iniquity of discrimination on the basis of citizenship for purposes of indefinite detention.<sup>58</sup> Perhaps because the unconditional right to enter and remain is the distinguishing entitlement of citizens, and the absolute right of states to expel non-citizens stands as its putative obverse, courts have tended to avoid confronting the existential and moral inequality of non-citizens that subvenes an executive-driven (as opposed to criminal) process for designating a non-citizen a risk to national security for purposes of deporting him to a country where he may face a risk of torture.

What is stunning about the conflicting judgments from the Supreme Court of Canada in *Suresh* and the European Court of Human Rights in *Chahal* and *Saadi* concerning deportation to torture is not what each court says about the other, but rather what the courts do not say. They do not say anything. *Suresh* does not refer to *Chahal*. *Saadi* does not refer to *Suresh*.

It is inconceivable that either court was unaware to the decision of the other. The Supreme Court of Canada in *Suresh* does cite Article 3 of the European Convention when listing the many multilateral instruments prohibiting torture. The European Court of Human Rights in *Saadi* re-considers (and rejects again) the notion of a balancing test that is central to the Supreme Court of Canada's decision in *Suresh*. Yet neither court is willing to explicitly engage with the other's reasoning *qua* judgment of another court.

With respect to deportation to torture, the ECtHR in *Saadi* simply reaffirmed its judgment in *Chahal*:

Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule .... It must therefore reaffirm the principle stated in the *Chahal* judgment that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine

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<sup>56</sup> Cf. Rayner Thwaites, *supra* note 51.

<sup>57</sup> The apparent encroachments on this principle, whether in the form of the refugee protection or family unity, are notable for the policy backlashes in the form of heightened restrictions on initial access to territory.

<sup>58</sup> [2004] UKHL 56. See, e.g. paras. 45-73, per Lord Bingham of Cornhill.

whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State. In that connection, the conduct of the person concerned, however undesirable or dangerous, cannot be taken into account...<sup>59</sup>.

The sharpest rebuke of the position advanced by the governments (especially that of the UK as intervener), came from the concurring opinion of Judge Zupančič. His remarks chime with the anti-discrimination rationale propounded by the UK House Lords in *Belmarsh*, and indirectly expose the unarticulated conception of the non-citizen that underwrites the Supreme Court of Canada's willingness to countenance (even hypothetically) his delivery to torture. Judge Zupančič states that the only way to avoid the logical necessity flowing from the "categorical imperative protecting the rights of the individual" would be "to maintain that such individuals do not deserve human rights ... because they are less human".<sup>60</sup>

#### 4. Conclusion

What lessons might one draw from this reading of European and Canadian judgments? The errors of commission manifested by the distorted portrayal of the Canadian process for designating non-citizens as security threats seem matched by the errors of omission arising from the refusal of the Supreme Court of Canada and the European Court of Human Rights to engage one another on the issue of deportation to torture. In the first instance, one can trace the tangible effects of the misrepresentation on the evolution of policy outcomes: the endorsement by one court of another state's practice as a less restrictive alternative to the status quo becomes the minimum benchmark for subsequent policy.

Providing an accurate description of the practice in question seems like a relatively undemanding standard for courts to meet, insofar as it does not call for a translation across legal orders of a distinct and internally complex matrix of doctrine or jurisprudence. In the second instance, one might simply observe that when courts decline to engage with the reasoning of other courts on normative questions that are eminently portable across jurisdictions, one cannot but question the authenticity of a commitment to the project of transnational judicial cooperation, and the motivation that animates any particular comparative exercise. Perhaps courts are content to borrow analyses that arrive at the same destination the court is already heading towards, but precluded by a certain judicial courtesy from openly engaging with and criticising oppositional reasoning of other courts. In other words, maybe courts have elevated to an informal rule of judicial interaction that familiar admonition of mothers around the world: "if you can't say anything nice, don't say anything at all."<sup>61</sup> While this may be a fine and honourable adage for guiding daily conduct, it poses the obvious hazard of warping and truncating any meaningful comparative exercise.

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<sup>59</sup> Chahal, para. 80.

<sup>60</sup> Saadi, para. 2.

<sup>61</sup> The UK House of Lords clearly wrestled with this in *R. v. Secretary of State for the Home Department ex parte Adam & Aitseguer*, [2001] 1 All ER 593. At issue were conflicting interpretations of the United Nations Convention Relating to the Status of Refugees in relation to non-state actors as agents of persecution. While the House of Lords was evidently reluctant to criticise the restrictive interpretations adopted by French and German courts at the time, Lord Steyn (along with Lord Hobhouse) finally declared in rather bald terms that "there can only be one true meaning" of an international treaty. The Law Lords' interpretation was correct, and the German and French courts were wrong. In a subsequent decision, however, the House of Lords were at pains to minimise the practical impact of conflicting interpretations on the fate of the individual asylum seeker before them. *Regina v Secretary of State for The Home Department, ex parte Thangarasa & Yogathas*, [2002] UKHL 36.

Is there something specific about the national security context that explains the disquieting features of the cases examined here? Are courts more careful, or nuanced, or principled when making forays into comparative analysis in other domains of law? While my intuition inclines me toward scepticism, a proper answer requires further inquiry. More specifically, it requires accurate and principled comparative research.

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