TSAS

canadian network for research on terrorism, security and society

Working Paper Series

No. 16-02

March 2016

Impromptu Initiative: Security Certificates and Scale

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The Canadian Network for Research on Terrorism, Security, and Society

TSAS is supported as a national strategic initiative funded by **SSHRC** and **Public Safety Canada**, along with the following departments of the federal government:

- Royal Canadian Mounted Police
- Canadian Security Intelligence Service
- Immigration, Refugees, and Citizenship Canada
- Correctional Services Canada
- Defence Research and Development Canada
- Global Affiars Canada
- Security Intelligence Review Committee
- Office of the Communications Security Establishmnet Commissioner

TSAS also receives financial support from several Canadian universities, including the University of British Columbia and the University of Waterloo.

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Introduction

Methodology

This paper is part of on an ongoing project that investigates the Canadian Security Certificate Initiative through interviews and document analysis. At the time of writing, twenty interviews were carried out with individuals involved in varying capacities with the Security Certificate Initiative at different times. Interview respondents included: five individuals acting as open counsel; two individuals acting as special advocates; two individuals who have acted as both open counsel and special advocates; one member of the judiciary; six individuals working the area of human rights, advocacy, and/or as community activists; two legal scholars; and one journalist who has extensively covered national security issues. Additionally, a representative of the Canada Border Services Agency (CBSA) was interviewed, and a representative of Canadian Security and Intelligence Service (CSIS) responded to some general questions in writing; specific questions could not be addressed due to "ongoing litigation." Representatives from Citizenship and Immigration Canada (CIC) and Public Safety Canada declined interviews because of "ongoing litigation." Correctional Service Canada (CSC) declined an interview because the CBSA was the detaining authority at the Kingston Immigration Holding Centre. No responses were received from the provincial detention centres involved in the immigration detention for these cases.

Interviews for this project were open in structure with the respondents being told to speak to what they believe is important. The questions posed to respondents obviously vary somewhat based on their work with regards to the Security Certificate Initiative. Each interview opened with questions about how the respondent is, and became, involved with the Security Certificate Initiative and what their experience has been. The questions that followed asked about: the respondent's experience within Canadian (or International) legal systems and how the Security Certificate Initiative is similar or dissimilar; what the respondent believes is, and is not, working under the Security Certificate Initiative; and what changes could be made and what should remain in place under the Security Certificate Initiative. Questions were also posed about poli-

cies, regulations, and legislation that may apply to the respondent's work, as well as what their experience and interactions have been with regards to following such government guidelines. Further, questions were posed about characterizing the individuals who have been "caught up" under the Security Certificate Initiative. Finally, respondents were given the opportunity to add anything that they felt was not covered by the interview questions.

Some key themes that emerged from the interviews include concerns with the use of intelligence as evidence and the pre-emptive nature of the Security Certificate Initiative with regards to rights. Nearly all respondents expressed unease over the secrecy of the Security Certificate Initiative proceedings. Most respondents provided an evaluation of the Security Certificate Initiative without being directly asked. These evaluations varied significantly: some respondents were staunchly opposed to the system, while others believed it has become "workable" over time as a result of the introduction of special advocates. A prominent perspective among lawyers interviewed was that they are doing their best to work within an "imperfect" system. Notably, despite acknowledgement that Security Certificates are an immigration initiative, there was a significant amount of "slippage" into criminal justice terminology.

Literature Review

There is a significant amount of literature on the Security Certificate Initiative that addresses the legal dimensions of the cases. This working paper has the specific intention of attempting to provide a perspective aside from the legal process in an attempt to work towards bridging the legal and societal consequences of the Security Certificate Initiative. This is done through use of a sociological approach that offers a new framing of some of the issues. This is not meant to neglect the incredibly important legal work and analysis that has been done over the years and continues to be carried out. This paper includes limited engagement with the legal intricacies of the Security Certificate Initiative by providing footnotes for some of the legal literature where applicable, but this is a very small portion of what is available.

Much of the sociological literature that exists on the Security Certificate Initiative uses Ag-

amben's (2005) idea of the "State of Exception"[1] and the (1995) idea of *homo sacer*.[2] There are mixed ideas on the utility of Agamben's theories. Selby (2007: 331) suggests that Foucault did not engage with Agamben's work because Agamben focuses on "situations of coercive and totalitarian control" whereas Foucault shows interest "in power relations which operated within the contest of, and through, freedom." Foucault's concentration on power, based on his own definition, requires a potential for resistance. Neal (2006) echoes a concern with Agamben's exceptionalism, suggesting that Foucault's "archaeological" methodology is a more fitting approach for looking at exceptional practices. Bell (2011: 137) argues otherwise, suggesting that Agamben's theory of sovereignty leaves room for challenging its violence, exclusion, and political inclusion. It provides an opportunity to move beyond a sovereign society. The emphasis on freedom also comes through in Bell (2006), in the suggestion that there are limits on liberal freedom due to modern state power. This working paper is situated amidst these stances, taking ideas from both Agamben and Foucault through acknowledgment of the Security Certificate Initiative being considered "exceptional" by some individuals and through engagement with governmentality.[3]

The literature on the Security Certificate Initiative and exceptionalism has a large range of focus. Authors such as Larsen and Piché (2009; 2007) and Larsen (2008a; 2008b) importantly address the Kingston Immigration Holding Centre as an entrenchment of, or a contribution to, the normalization of the exception. They note the reversal of sovereign decisions and attribute multi-agency work to a single authority (Larsen and Piché 2009; 2007; Larsen 2008a; 2008b). However, their strong use of Agamben's sovereign presents a state-centric argument. It is not the traditional security approach that Peoples and Vaughan-Williams (2010) warn against, but it does seem to anthropomorphize the state.

Larsen (2008b: 33) takes a less state-centric approach to examining security certificates and the Kingston Immigration Holding Centre by emphasizing multi-agency coordination and suggesting that future research should have a broad focus on securitization practices and their

1 Under the "State of Exception" democratic states take on characteristics of totalitarianism through the extension of state power. This extension is supposed to be provisional and temporary, but Agamben (2003) argues that it becomes the government norm.

2 Agamben (1995) writes of "bare life" that sovereign power strips of political existence leaving some individuals excluded from everything other than living itself.

3 Gregory (2007) engages with both Agamben and Foucault in order to provide a thorough consideration of detention "camps" such as the naval base in Guantánamo Bay, Abu Ghraib, and Auschwitz.

relationship to individuals, institutions, and everyday practice. Oriola (2009) examines how the invocation of emergency practices affects individuals differently based on their citizenship, generating "alien" justice. This is similar to Larsen (2008b) who notes problems with providing different rights to citizens and non-citizens. Using both Agamben's state of exception and Foucault's biopolitics, French (2007) considers the Canadian national security policy and its effects on racial fissures within society. Similarly, Aitken (2008) considers the governing of racialized bodies, invoking critical security studies to deepen and complicate discussion of the exception by using the idea of a "legal complex." This approach breaks down the exception as a formal legal device into a connected network or apparatus.

Theory of the Impromptu Initiative:

Scale: the level upon which government operates

According to Miller and Rose (2008), government is the "conduct of conduct" and when the focus of government becomes the problematization of the governing itself (when the *conduct* of conduct becomes the object of government), it fosters new solutions. Governmentality literature suggests that security apparatuses, such as the Security Certificate Initiative, are made up of three aspects: logics,[4] techniques,[5] and subjects[6] (see also Walters 2012; Dean 2010; Miller and Rose 2008). Following the governmentality framework, techniques of government work to govern conduct through exercising power; techniques refer to the mechanisms through which authorities guide conduct (Dean 2010; Foucault 2004; Miller and Rose 2008; Walters 2012). An attempt at conducting conduct can fix one problem, but can cause or indicate a problem for another "level" of governing. Valverde (2010) provides the example of a private security guard who secures a building but displaces crime (the problem) to another place; with the Security Certificate Initiative, the absence of "evidence" that can be disclosed publicly indicates "national security" concerns and shifts to an area of law that did not have significant precedent in Canada. To ensure its own existence and expansion, government depends on congenital failure. The court

4 For Valverde (2010a: 9) the logic of a project includes the rationale and objectives, as well as the discourse and ethical justifications.
5 Valverde (2010a) also uses the term "technique" to refer to the measures or actions taken to secure.
6 The subjects of security apparatuses are those individuals that the security project is aimed at.

challenges and changes that have been made to certificate legislation reflect ongoing problematization and a reworking of the associated practices of the Security Certificate Initiative as a technique of government.

This paper makes use of Valverde's (2010) concept of scope, as an explanation of the conflict under the Security Certificate Initiative. This particular approach attempts to avoid a static theory noting that as context changes so do applicable examples and descriptions (Valverde 2015). Scope is made up of the two concepts of scale, the "how" of governance, and jurisdiction, the "who" of governance. The focus of this paper is on scale; this is not to prioritize scale over jurisdiction, but done in the interest of article length and depth of analysis. Some criminal and immigration logics and techniques effectively shift scales and are incorporated into national security initiatives, but some do not shift effectively, as evident in successful legislative challenges.[7] The trouble is that the differences in scale and jurisdiction are not evident unless there is a conflict between agencies; government officials view certificates as an exceptional measure (though allowed within legislation) while legal practitioners propose its incompatibility in terms of ideas of justice that the Criminal Justice and Immigration Systems of Canada stand for. As Valverde (2010) suggests, it is not until there are disputes that the differences of scale are noticed.

The understanding that certificates constitute a network of illegality is important when considering how they overlap with and diverge from criminal and immigration processes. The tension between the Security Certificate Initiative and conventional justice systems highlights concern with limiting government and executive power. From a governmentality point of view, this paper considers certificates not as a problem of legality, but rather a problem of the scalar dimensions of security governance. The problem of scale is a variable element of government. Scale influences governmental logics and techniques and also allows for an analysis of actors that function in disparate spaces and communicate in different dialects. Scale explains and accounts for the conflict among stakeholders such as lawyers, judges, CSIS agents, and government employees. These actors do not discuss the Security Certificate Initiative within the same framework because each focuses on a different component (Valverde 2010). How conflicts are resolved pro-

7 Hudson (2010: 129) provides a consideration of decisions that indicate "…that certificate proceedings are analogous to criminal proceedings..." and how procedural fairness has slowly been incorporated into the Security Certificate Initiative.

vides an explanation of how the Security Certificate Initiative works in relation to the Criminal Justice and Immigration Systems. The Security Certificate Initiative has the same purpose as the Criminal Justice System in terms of the threats to society it tries to mitigate and the Immigration System as it aims to manage non-citizens.

The cases against "named persons" are made up of intelligence-led suspicion that does not constitute evidence as understood in rule-of-law-abiding criminal and immigration proceedings. This paper suggests that: (1) acting upon information, rather than evidence, can only be done at certain scales and is characteristic of a response to non-events, rather than actual offences; (2) the subjectivity of individuals as refugee and terrorist makes the rationality of the Security Certificate Initiative difficult to discern; and (3) detention and deportation measures taken under the Security Certificate Initiative defy the typical logic of such practices. Certificates reflect a tendency to secure against what has not yet happened (Anderson (2013); Anderson and Adey (2012); Massumi (2007); and Morrissey (2011)). Seemingly, certificates are based on events that have not taken place; the named persons pose a threat for "something" that could happen in the future. The inability to criminally prosecute in cases of "non-events" is due to rule of law standards that require previously outlined acts be carried out and evidentiary standards be met. Further, justifying typically criminal practices of detention is challenging in non-criminal cases, though the literature points to the increasing use and usefulness of immigration detention. Finally, the act of deporting the threat is in conflict with ideas of punitive justice that are expected for terrorist actions.

Overview: Certificates

Certificates are orders issued against non-citizens for the purpose of having them deported on grounds of national security inadmissibility. The legislation was initially developed under the Immigration Act (1976) and now exists under the Immigration and Refugee Protection Act (IRPA) (2001). The certificate process has been in place since 1978, with the first certificate being issued in 1991. Public Safety Canada's website states that twenty-seven certificates have been

issued since 1991. Despite what some literature and media reports reflect, certificates were not created as a post-9/11 security techniques to combat terrorism.[8] The numbers indicate that they have not been heavily relied upon post 9/11, though authors such as Roach (2011) suggest that immigration law in general is a main antiterrorism tool in Canada. This is due in part to the more recent development of criminal legislation such as the Anti-Terrorism Act (ATA) of 2001, which society is deliberating over. Proceedings in the ATA are applicable to both Canadian citizens and non-citizens. According to Public Safety Canada, the certificate process is an immigration proceeding with the objective of removing non-Canadians who have no legal right to be in Canada and who pose a serious threat to Canada and Canadians. The specific concern is with "security, violating human or international rights, serious criminality or organized criminality" (IRPA 2001 Division 9, 77(1)). The assertion that certificates are for individuals who have no legal right to be in Canada is problematic, as many of those named in security certificates had legal status within Canada prior to the issuance of the certificate; further disconcerting is multiple named persons holding legal status as refugees.

The CBSA issues the certificates that are co-signed by the Minister of Citizenship and Immigration, and the Minister of Public Safety. Certificates are a technique deployed to designate non-citizens "inadmissible," resulting in their immediate detainment in a criminal or immigration facility. A Federal Court judge reviews the detention with only a summary of the case available to the named person and their "open" counsel. A 2007 decision from the Supreme Court of Canada (Charkaoui I) ruled that some components of the certificate process were unconstitutional and gave the government one year to rectify the issues.[9] This resulted in the introduction of "special advocates," lawyers who are able to see the secret intelligence, but are unable to communicate freely with the named person or the open counsel once they have seen the secret information. Special advocates operate under circumstances that are unprecedented for lawyers making the Security Certificate Initiative a bricolage of sorts.[10] Some respondents noted that they are

8 Whitaker (2002: 30) argues that refugee policy in Canada was framed as a national security issue prior to September 11, 2001, suggesting that "September 11 simply accelerated a process already well in place but not fully up to speed."

9 For an in-depth consideration of the legal aspects of the government's response to the Security Certificate Initiative being ruled unconstitutional (Bill C-3) see Forcese and Waldman (2008).

10 Deleuze and Guattari (1983) explain bricolage as a piecing together of a process using unconventional and improvised practices and borrowed tools.

allowed communication without judicial leave after viewing the secret information on criminal cases that involve national security information. These same lawyers are not trusted to communicate while in the role of a special advocate.

Certificates are used in cases where full disclosure of information to the certificate subject and their lawyer would endanger the safety of a person or national security; a similar less-rigorous inadmissibility decision is possible under Sections 86 and 87 of IRPA. A certificate expedites the removal process and is meant to make deportation immediate and permanently bans re-entry into Canada. According to the legislation, individuals do have a right to appeal the deportation decision. Information on Public Safety Canada's website suggests that appeal processes merely delay removal proceedings and do not actually prevent deportation. However, security certificates have been quashed by judges and withdrawn by the government. The imminence of deportation under the Security Certificate Initiative is not as fixed as the government portrays.

National Security: Logic, Subjects, and Technique

Logic: The non-event

Massumi (2009; 2015) makes noteworthy arguments regarding pre-emption that pertain to the Security Certificate Initiative in Canada. One suggestion is that a negative can never be proven (Massumi 2009: 158). Regardless of intelligence, an imminent plot that does not occur can never have its outcome known. This idea is important to maintaining the legitimacy of the Security Certificate Initiative and demonstrates the scale of the problem of national security. Using a genealogical approach, Collier and Lakoff (2008) examine "distributed preparedness" which *manages the consequences* of catastrophic threats rather than preventing them. Collier and Lakoff (2008: 26) express that measures such as extrajudicial detention are not based on distributed preparedness, highlighting the transparency and communication that are necessary for distributed preparedness. The temporal nature of the Security Certificate Initiative as pre-event in nature reflects its logic of prevention. However, carrying out prevention through deportation was seen by some respondents as an unreasoned response to terrorism.

The Canadian Government suggests that the detention and deportation under the Security Certificate Initiative is preventative, however as Massumi (2009; 2015) suggests, such approaches to security can disrupt other systems. The disruption may have a more significant impact than the security that is achieved. This is especially true considering the multi-agency involvement within the Security Certificate Initiative. Certificates require the coordination of CSIS, CBSA, CSC, CIC, Department of Justice (DOJ), Immigration and Refugee Board, and Public Safety Canada, in addition to provincial detention facilities. Once in the courts, open counsel, special advocates, and judges, are involved in addition to counsel for the above-mentioned agencies. This creates hurdles with regards to coordinating actions and expectations within the Security Certificate Initiative. Such impromptu proceedings contribute to the efficacy and objectives of certificates being hindered.

Interviews with lawyers working in varying capacities under the Security Certificate Initiative showed that this process is not carefully planned in practice. One respondent characterized it as being "unduly complex" another referred to the proceedings as *sui generis*, meaning it is "of its own kind." What should be simple and necessary practices such as the provision of documents are subject to motions to decide whether the State or open counsel had to file first; in criminal proceedings the State provides its case and the defense responds. Additionally, members of the judiciary struggle with the system not being fully adversarial, while many respondents noted the "inequality of arms" within the proceedings. This is not to say that individuals do not know their roles and responsibilities, but prior to the 2007 Charkaoui ruling Section 7, 9, and 10 Charter rights were not extended to named persons. There was a lack of clarity with regards to which rights the named person was entitled to and what CSIS was obligated to disclose. This is somewhat worked out in within the 2008 Charkaoui ruling with further standards remaining unresolved until the 2014 Harkat ruling. A new certificate has not been adjudicated since the 2014 ruling so it is unclear how the newest precedents will be implemented.

The objective of the certificate system is to expeditiously deport named persons, but the rationale for the secretive process is the protection of national security information. The introduction of special advocates one year after the 2007 Charkaoui ruling set in place a new Depart-

ment of Justice program: special advocates are individuals who are expected to protect the rights of named persons without having a solicitor-client relationship or unfettered communication. The inability to communicate with the named person and their counsel once they have seen the closed information without judicial leave causes special advocates to need new tactics to represent the interests of named persons; for instance, gathering an exhaustive biography prior to seeing the closed material. Only with the 2014 Harkat ruling has granting judicial leave for communication between the special advocate and open counsel become the rule. One respondent explained the Special Advocate Program as a "teething process" for CSIS and State lawyers because certificate proceedings were not adversarial in nature prior to the introduction of special advocates. Some respondents still hold that the special advocate is not an acceptable replacement for one's own lawyer. Respondents pointed out that there are two strategies that special advocates use: one is to push as much privileged information as possible into open court, and the other is to challenge the information in closed proceedings. The rationale of protecting national security leads to a working out of new processes and justifications for compromised rights within the Security Certificate Initiative.

Though relationships vary among cases, one respondent stated that "The saving grace of these proceedings, from my perspective, has been that degree of collegiality that we have been able to maintain throughout." According to this respondent there were significant challenges associated with working out early cases and the proceedings went as well as they did as a result of "genuine goodwill on both sides of the aisle." However, with some other cases a general distrust of special advocates seems to have been characteristic; some open counsel do not trust that special advocates are working in the best interest of the named person, though this likely stems from a general distrust of the system.[11] Additionally, there is distrust on behalf of CSIS that special advocates do not acknowledge the importance of keeping information classified or are incapable of censoring themselves appropriately; one respondent noted that these concerns are entirely "impressionistic, rather than actually concrete." The reliance on intelligence, rather than evidence, is a key component for the rationalization of guarded procedures and the justification

11 For a consideration of the constitutional issues of solicitor-client relationships under the Security Certificate Initiative see Code and Roach (2006).

for compromises being made on rights for named persons. Communication is a significant theme within interviews with many respondents disagreeing with the ban on communication for the special advocates. Though the 2014 Harkat ruling has altered the precedent around communication, how this will work in any future cases is unknown.

Subjects: Population and Individual

The rescaling of logic and techniques indicates the emergence of the national security offender. The national security offender does not have evidence against them for a conventionally defined offence and is a new problem to be governed. According to the genealogical approach, governing apparatuses are constantly changing, undergoing processes of hybridization as old forms of governing merge with new ones and new problems form out of conflict (Dean 2010; Foucault 2007a; Miller and Rose 2008; Walters 2012). Both criminal and immigrant offenders exist within systems that subscribe to the rule of law and include many mechanisms such as clearly outlined offences (not just being a threat) and previously determined penalties logically based on an offence. The Security Certificate Initiative suggests a national security offence and a national security offender: the national security offence does not have to have taken place nor have public indication of its inevitability; the national security offender is not privy to the case against them and is deprived of the opportunity to provide a full and fair defense.

In spite of some disciplinary mechanisms being part of the Security Certificate Initiative, the government rationale for detention is prevention rather than regulating behaviour. The small number of security certificates complicates the argument that they are a biopolitical technique because large populations are not being directly managed. However, the entire population of non-citizens is being indirectly managed by the Canadian Government through their vulnerability to national security measures. There is evidence of profiling within the Security Certificate Initiative, yet it is not a mass phenomenon such as Japanese-Canadian internment during World War II. Dating back to 1991, the Security Certificate Initiative responds to an evolving threat based on whatever national security concerns are most prominent at the time. Many respondents

note 9/11 as a pivotal event for the most recently contested certificates of five Muslim men.[12] Additionally, the symbolic nature of the Security Certificate Initiative is noted; the state asserts its omnipotence through these proceedings and these publicized cases are an example to would-be terrorists. Multiple respondents note that the difference between certificates and Section 86 or 87 proceedings is spectacle. Further, one reason cited for maintaining the certificates is that named persons who "beat" their certificate will be glorified by "wannabe" terrorists.

Of significance to governmentality is biopolitics as a technique for managing populations. Use of statistics and risk allows for power that differs from a disciplinary technique of individualization and separation. Biopower does not make use of purely structural techniques as discipline does, but utilizes knowledge and information in order to manage populations. Because biopolitics does not depend on what is fixed spatially and temporally, it has much more flexibility in managing large and mobile populations. As Rygiel (2010: 92) suggests, globalization processes have impacted the state's ability to manage territory and influenced the shift from the "territorial state" model to the "population state" model; it is necessary to note that these models coexist, functioning alongside each other and sometimes in a hybrid manner. Relevant to this project is Rygiel's (2010) argument of citizenship as biopolitics; in this discussion, political subjectivity and rights are presented as a strategy of governing. It is my suggestion that the symbolic nature of the Security Certificate Initiative is currently a method of governing the male Muslim non-citizen population. One reason that information remains secret is that it may give away CSIS tactics for surveilling and gathering intelligence; secret information ensures that individuals and populations will remain unaware when they are a target of an investigation. The targeting of a specific population makes them fearful and vulnerable to state power (Rygiel 2010).

An ongoing issue with the cases is the amenability of national security offenders to "evidence." This is largely a problem of how CSIS gathers and retains intelligence in a way that does not work for the adversarial process. This connects with the problem of pursing a non-offender. Intelligence does not hold up as evidence of wrongdoing and is merely information from which is contrived the potential and future actions of a subject. Multiple respondents note how CSIS

12 Earlier security certificate cases have been hard fought by dedicated lawyers, but have not received the same public attention. For a consideration of some of the early legal intricacies and challenges of these cases see Aiken (2001).

does not expect or intend to end up in court and were not pleased with having to take the stand; CSIS does not have a law enforcement mandate and this is apparent in court. The legal course that the Security Certificate Initiative took left CSIS unprepared to have anything that resembles what is typically understood as evidence. This form of information characterizes named persons as targets of investigations, though what CSIS produces are criminal intelligence reports. The CSIS mandate does not lend itself to immigration proceedings or open court in general.

Named persons receive a very serious designation according to carelessly crafted parameters. The "reasonable belief" standard of the certificate regime is far from the criminal standard of "proof beyond a reasonable doubt." This standard lacks the rigorousness expected of a justice system. One respondent suggested that, "The standard of proof in these immigration cases is virtually meaningless: sort of a hunch, maybe, I guess so. I mean it's a very very low, almost supercilious standard." Another respondent noted the general difference between criminal and immigration subjects where the former is a rights-holder and the latter is a supplicant. Named persons who contest their certificate lack the rights of those charged with a crime and are earnestly requesting that the Canadian Government not deport them to potentially dire circumstances while being characterized as hardened terrorists. The Security Certificate Initiative generates a new type of subjectivity through invoking national security concerns.

The inadmissibility designation creates a population of individuals with precarious subjectivity nationally and internationally. Upon return to their country of origin these individuals may face charges and their treatment depends on the national regime. Some countries still have laws in place that make it illegal for citizens to leave the country without permission; refugees who have tried to flee oppressive conditions and are removed from Canada may be doubly maltreated upon their return. It is worth noting that named persons have valid concerns that being labeled a terrorist threat to Canada will create especially adverse circumstances upon their return to their country of citizenship. Especially post-9/11, coming down hard on terrorism is a beneficial diplomatic stance for governments.

Technique: measures or actions taken to secure

For Foucault (2007b), different techniques of governance function on their own scale allowing them to address their spatially confined problem, for example resource distribution within a city. Techniques can be "scaled up" and included in new apparatuses, but this opens up potential conflicts. The Security Certificate Initiative is a problem of governing because conventional criminal and immigration techniques do not work at the scale of national security; governing bodies attempt to transpose techniques between scales, but there is irreconcilability. Valverde (2015: 52) suggests that "In general, governing capacities and resources can always be flexibly re-assembled or shifted to another scale in such a way as to create assemblages of recycled governing techniques and capacities that serve novel purposes."[13]

Through the Security Certificate Initiative, detention and deportation are aimed at individuals that have not been formally charged with criminal offences nor immigration status offences; named persons have typically had legal status in Canada. The most recent certificates have been issued against individuals accused of terrorist connections, but applying the label of "terrorist" is precarious as they are not facing formal charges of terrorism. A shift in the security environment is evident in that legal recourse available in the criminal and immigration systems is no longer thought to be enough to manage the capacities of the (unknown) threat. The logics and practices of dealing with crime and migration require a shift of scale to address national security concerns.

One problem with the Security Certificate Initiative is how the techniques of detention/containment and deportation shift between scales and work in harmony or in conflict with one another. Normal practices that are well-established in the conventional criminal and immigration proceedings are used within the Security Certificate Initiative, but are operating at different levels of (il)legality. Some shift scales easily while others generate conflict. Such conflict reflects government as a "congenitally failing operation" and fosters new strategies to think about problems in relation to scale (Miller and Rose 2008). The designation of "inadmissibility" is an acceptable legal tool for the state, however the lack of conventional "evidence" for the inadmissible designa-

13 Valverde (2015: 57, 78) notes the differences between ideas of chronotopes (time-space) through scale and Foucault's theory of governmentality, but I engage with both in an attempt to explain why conflict arises and why conflict is acceptable to/for governance.

tion makes indefinite detention problematic at a Constitutional and human rights level.

The creation of the Kingston Immigration Holding Centre resolved the legal concerns of indefinitely housing not-charged, not-convicted individuals in provincial detention facilities designated for criminal offenders serving less than two years. The four men held at the Kingston Immigration Holding Centre were eventually released on conditions that reflect what are typically understood as bail and house arrest. The appropriation of containment techniques from the criminal justice system for use in immigration proceedings that lack evidence of wrongdoing is concerning. The named persons released from the Kingston Immigration Holding Centre face restrictions that are harsher than those applied to individuals charged and/or convicted of very serious criminal offences. The stringent release conditions have slowly been eased, but whether this is a result of court challenges or organic risk reassessment is not completely clear. The court challenges to implement less restrictive release conditions have been lengthy and required significant work and resources from both lawyers and advocates against certificates.

Risk logic suggests that dangerous offenders be incapacitated and prevented from committing harmful acts. Risk assessments involve factors of magnitude and likelihood. An individual that is a threat to national security is assumed to be at risk for committing an act that is especially significant in magnitude; it affects the entire national population. Affecting a single victim is undesirable but is lower in magnitude than a breach of national security, though theft and murder differ in magnitude even at the individual level. The magnitude of a national security risk suggests that any individual who is at risk for causing such catastrophe be incapacitated to the best of the government's ability. It is understood that house arrest, even with strict conditions, is reserved for low risk offenders, not individuals who threaten an entire nation. The detention that occurs under the Security Certificate Initiative is a departure from conventional risk logic in that national security offenders are released from detention facilities.

The second component of risk assessment is the likelihood that the individual will commit the act and this is determined through statistical analysis. This analysis considers the individual's past actions against those of others who have done the same thing and what future action was

carried out. The evidence against national security offenders is pre-emptive—the non-event. Risk assessment based on what has not happened defies risk's logic of predicting future behaviour based on past actions. The situation of national security offenders is not explicitly reflected in the risk literature despite the need to mitigate any risk named persons may pose.

Ball, Huff, and Lilly (1988) examine house arrest policies as a correctional alternative in multiple American states. They provide an introduction laying out the historical progression of house arrest as a strategy, pointing out that it reduces the emphasis of institutional confinement on rehabilitation. As a technique for managing a socially problematic population, home confinement satisfies both calls for retribution and concerns regarding the harshness of institutional confinement, and addresses the significant cost of imprisonment (Bagaric 2002; Keay 2000). The Security Certificate Initiative makes electronic supervision of individuals not charged, convicted, or sentenced possible; however, it does not follow the appropriate process of criminal justice-based "home confinement," making it different even from pretrial programs as Maxfield and Baumer (1990) and Baumer, Maxfield, and Mendelsohn (1993) discuss.

Review of the literature suggests that home confinement should be used for individuals for whom incapacitation is not a concern and that it should be limited to short sentences. Neither the assessment of being low risk nor the short-term sentence directly applies to named persons. Rather named persons are assessed as national security risks (a risk that has a different kind of calculation) and detention is indefinite. This difference in the way risk is calculated is relevant to my argument as it suggests the existence of a new temporal and spatial scale. In a situation as serious as national security and terrorism the expectation is that individuals would be detained with the highest level of supervision; this made the grounds of a maximum security prison an appropriate place geographically for the Kingston Immigration Holding Centre, though problematic legally and jurisdictionally. Under the Security Certificate Initiative institutional confinement is scaled down and home detention is scaled up, but there is conflict evident in court challenges of the CBSA-monitored conditions of release. The Security Certificate Initiative operating on a new scale was not set to accommodate such criminal justice practices under administrative law.

Feeley and Simon (1992) cite that parole and probation are justified as a means of reintegration, but with New Penology are understood as cost-effective long-term management of dangerous populations. Here recidivism is understood as the measure of successful population management, rather than system failure. The appropriate population is managed when high-risk members are moved to more intense custodial controls. The contemporary concern with management is evident in the execution of provincial Electronic Supervision Programs. The development of techniques to monitor individuals has vastly changed the supervisory roles, and clientele, of parole and probation officers. The ability of 24-hour monitoring allows for conditional sentencing. With technological advances, many more individuals are released into the community and monitored electronically, rather than being detained in institutions. No breeches were documented for the named persons despite the stern conditions and diligent monitoring by CBSA officials. Following the above logic, this indicates that this is not a population that requires such close managing. The level of risk that named persons pose is considered within multiple court documents; possible innocence aside, whether these individuals are the ultimate terrorist sleeper cell or have become obsolete to their network is the concern for the government.

Though Mazey (2002) attempts to distinguish between rehabilitation and punitive measures, this is an ill-defined area. Mazey (2002) emphasizes appropriate supervisory resources in an examination of court cases that consider conditional sentences and house arrest. The home detention literature stresses the importance of resources such as electronic monitoring with regard to appropriate levels of supervision. The concern of expense with mass use cannot be directly applied to the Security Certificate Initiative as the conditions of release for the detainees are stricter and seemingly individualized. Monitoring for named persons on release includes measures such as Global Positioning System (GPS) ankle bracelets, indoor and outdoor camera surveillance, telephone and mail intercepts, constant supervision, and eyes-on surveillance for outings. Such conditions can only be justified as preventative under the Security Certificate Initiative, but seem punitive. Stringent release conditions are a point of concern for Gibbs and King (2003) with regards to oppressive surveillance impacting the families of those being monitored; Martinovic (2010) similarly documents multiple studies on the strain felt by those subject to home detention

as well as their co-habitants. The effects of the release conditions on named person Mohammad Mahjoub's family were so significant he voluntarily returned to the Kingston Immigration Holding Centre. Mohamed Harkat's wife likens herself to a jailer having had to constantly supervise her husband at home in accordance with CBSA release conditions.

As a part of population management, aggregates with particular risks may be kept separate from those with differing levels of risk. Previously, criminal and migration detention were separate systems that managed different populations in different facilities. According to Bosworth (2011), the separation of criminal and migrant processes is diminishing in England and Wales. Similar trends are reflected in the cases of four named persons initially being held in provincial criminal custodial facilities for a lengthy period of time prior to being transferred to immigration holding on the grounds of a federal penitentiary. This also reflects what Aas (2011) sees as evidence of the blurring of boundaries that create the "crimmigrant other" and is similar in consequence to what Mainwaring (2012a) views as detention being used politically to construct an advantageous scenario for government. Anti-immigrant practices that create the statuses of immigrant and "other" leave entire populations vulnerable to detention and deportation. Immigration detention is meant to be short-term holding that leads to release (on conditions) or deportation. The presumed short-term stays do not require the same programming and support that prisons offer. However, administrative problems in carrying out removal orders make for lengthy stays. Individuals who experience extended stays in short-term holding do not have access to resources and programming that convicted criminal populations do.

Citing that deportation raises questions about commitment to various human rights and that the inability to deport demonstrates state impotence, Bosworth (2011) notes a tension where state power exists in the ability to indefinitely detain. And importantly, once detained, an immigrant is always deportable. This parallels an argument that de Genova (2007) makes with regards to "voluntary departure" upon detention no longer being an option for those detained in connection with terrorism post-9/11. Suspicion is all that is required for this type of detention that creates the vulnerable and exploitable status of being "deportable." The only safeguards that exist for individuals subject to deportation are human rights conventions that require understanding,

resources, activation, and state willingness to participate. In addition to international bodies vying for protection of individual rights, there exist bodies such as the United Nations Security Council that passed a post-9/11 resolution requiring member states to pass laws to address terrorism. As Mainwaring (2012b) suggests, states may knowingly create and uphold laws that contravene protections put in place by higher courts. For example, the fundamental human right to not be deported to torture is not absolutely protected within Canadian law as a result of the Suresh decision (Diab 2008: 57). This right is balanced with national security interests. The designation of an individual as "inadmissible" allows even Convention refugees to be removed from Canada to probable torture.

The ultimate objective of the Security Certificate Initiative is the deportation of the threat. A question that goes along with this strategy is how the relocation of an individual outside of Canadian territory, and consequently the close supervision of Canadian authorities, generates security for Canada and Canadians. I posed this question in interviews with individuals working under the Security Certificate Initiative and respondents were unsure of the rationale for such measures. It is a risk assessment that the government makes and its efficacy is questionable. One respondent suggested that certificates are effective as a "disruptive" technique, but another noted that if an individual is a threat, they will likely continue to be one even if relocated to another country. If named persons are terrorists, they should face charges and be held accountable in criminal court. Surveillance (until a criminal charge can be laid), followed by a criminal charge, is a more rational and effective approach and is within the realm of acceptable state powers.

Conclusion

Understanding the combined nature of institutions, power, population, and technique as a machine, Miller and Rose (2008: 71) suggest that "programmes complexify the real, so solutions for one programme tend to be problems for another." Similar to Massumi's spillover effect, this is evident under the Security Certificate Initiative. Most obvious is the fact that security certificate processes as national security programming conflict with rights and justice. Each adjustment of the Security Certificate Initiative causes an unplanned ramification due to conflicting logics

and techniques. This is evident in the slow unraveling of what is meant to be detention prior to an expedited deportation: what was meant to be an expedited deportation order now results in indefinite detention; detention times exceeding two years in provincial facilities led to the creation of the Kingston Immigration Holding Centre; and the indefinite detention solidified by the Kingston Immigration Holding Centre led to illogical house arrest. The outcomes of this up- and down-scaling is a system that has left individuals caught up in ongoing court challenges with undefined futures. Some respondents felt that now that the Security Certificate Initiative has been "worked out," and the role of special advocate has been incorporated, the process would go much more smoothly if a new certificate is issued. But as some respondents noted, this working out has been done on the backs of individuals who have had their certificates dropped or quashed. Further, the government objectives of the Security Certificate Initiative as an anti-terrorist measure are left largely unfulfilled as dropped and quashed certificates indicate.

It must be noted that despite the many remaining concerns surrounding the Security Certificate Initiative, a great deal of positive progress has been made. Many dedicated lawyers and advocates continue to spend a great deal of time doing work such as writing submissions and conducting studies to advise the government,[14] in addition to working tirelessly on the individual cases. Without such work and concern, the initiative would not have introduced protections such as the special advocates, who contribute to the fairness of the current procedure. Further, the courts continue to rely on individuals dedicated to studying law to offer insight into past and future decisions.

Though no certificates have been issued recently, it is important to consider the Security Certificate Initiative as a possible measure against suspected terrorists. Bill C-51, passed in May of 2015, includes amendments to Division 9 that reduce the powers of special advocates. These amendments indicate that this legislation is still viable according to the Canadian Government. Extended government secrecy, evident in the Combatting Terrorism Act (2013) and increased use of IRPA Section 86 and 87 proceedings, indicate an ever growing concern with national security. The Security Certificate Initiative formalizes the use of special advocates and *amicus curiae*

14 See Forcese and Waldman (2007) for a thorough consideration of how Canada's Special Advocate Program compares internationally.

in proceedings that involve secret information and consequently regularizes the use of secret information in both criminal and immigration proceedings. Increased government concern with home-grown terrorism indicates an evolution of the terrorist threat. Despite the changing threat, studying the Security Certificate Initiative provides insight into what does, and does not work, in the fight against terrorism.

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