

**CONFRONTING (IN)SECURITY: FORGING  
LEGITIMATE APPROACHES TO SECURITY  
AND EXCLUSION IN MIGRATION LAW**

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A DISSERTATION SUBMITTED TO THE FACULTY OF GRADUATE STUDIES IN PARTIAL  
FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

GRADUATE PROGRAMME IN LAW  
OSGOODE HALL LAW SCHOOL, YORK UNIVERSITY  
TORONTO, ONTARIO

April, 2016

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## ABSTRACT

Perceived connections between security concerns and migration are a central preoccupation of our time. This dissertation explores how the preoccupation has played out in the Canadian context and asserts that a basic and common infirmity of administrative decision-making in this domain is a lack of justification. The dissertation commences by exploring foundational debates within immigration theory about borders, exclusion, the rule of law and the role of justification in decision-making in liberal democracies, particularly in times of perceived emergency. From there, the dissertation moves on to an exploration of immigration inadmissibility determinations in Canada, with particular attention to the emergence of security concerns as a primary ground of inadmissibility. Central to this exploration is a quantitative analysis of inadmissibility determinations rendered by the Immigration and Refugee Board of Canada, pursuant to s34 of the *Immigration and Refugee Protection Act* [IRPA].

The results of the quantitative analysis challenge the perception that migrants within Canada pose an exceptional security threat to the state, as the provisions related directly to Canadian national security and public safety have essentially never been invoked in s34 cases. Rather, the majority of those found inadmissible to Canada on security grounds tend to be asylum-seekers or Convention refugees from countries of the Global South that have undergone periods of domestic political turmoil. This fact raises important questions about the obligations of the Canadian state with respect to the principle of *non-refoulement*, obligations that can only be met, it is argued, through appropriately deliberative processes.

To help explain the results of the quantitative data and to identify ways of enhancing security-related decision making, the dissertation proceeds to a body of scholarship on international law that places the concerns of individuals from the Global South at the centre of its analysis. This approach – referred to as the Third World Approaches to International Law movement (TWAIL) – emphasizes the importance of history, context and individual experience when confronting legal domains, such as the security-inadmissibility context, that affect people from the Global South.

The dissertation then concludes by pairing the TWAIL analysis with an approach to administrative law that posits that legitimacy and justification in administrative decisions are contingent upon good faith exercises of dialogue between decision-makers and those who are affected by their decisions. In combining this approach to administrative law with TWAIL, the dissertation closes by putting forward a number of proposals for reform that would enhance the quality, justification and legitimacy of decisions in the security-inadmissibility context.

## **Dedication**

To my entire family, for their love, encouragement, gentle prodding and support on this journey.

To my three delightful daughters – Noa, Talia and Maya – without whom this dissertation would have been completed much sooner...but with infinitely less joy along the way.

And of course, to Carrie, my love.

## Acknowledgments

Writing a dissertation is, at once, a solitary and collective undertaking. In between my quiet early mornings of reading and writing, I greatly enjoyed getting to know and learning from my fellow graduate students and professors at Osgoode Hall Law School.

I owe a special debt of gratitude to my Supervisor, Sean Rehaag, whose steadfast support and helpful advice are reflected throughout this dissertation. I am similarly indebted to Anna Pratt and Lorne Sossin who served on my Dissertation Committee and provided incisive, challenging yet always supportive comments throughout the long process.

I also wish to acknowledge my Doctoral Examination Committee – Obiora Okafor, James Simeon and External Examiner François Crépeau, whose nuanced comments and questions were both thought-provoking and enriching.

My graduate studies were made possible by the generous financial assistance I received from the Social Sciences and Humanities Research Council of Canada, the Willard Z. Estey Fellowship and from York University. The support of these institutions meant that this intellectually enriching process did not become a financially impoverishing one, and for that I am profoundly grateful.

I am also grateful to my friends and colleagues in the practice of refugee law, whose dedication to their clients and to larger principles of justice is a constant source of inspiration.

I finally wish to thank the various individuals who agreed to be interviewed for the sake of this dissertation. Speaking out takes courage and it is my hope that your articulate voices are, at least to some small extent, reflected in the pages that follow.

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## INTRODUCTION

On a snowy day in February, 2010, Habtom Kibreab a young and well-liked refugee claimant living in Halifax, Nova Scotia walked to the woods in Clayton Park and took his life. He was scheduled for an interview the next day with the Canada Border Services Agency to discuss arrangements for his removal to Eritrea, where he firmly believed he would immediately be placed before a firing squad. In the days before his suicide, Canadian authorities had found Habtom to be inadmissible to Canada for his participation in an organization that sought Eritrea's liberation from what was universally recognized as a shockingly oppressive Ethiopian regime.

Almost three years later in December, 2012, Hossein Blujani, another young and by all accounts equally liked man walked to the railroad tracks near Vancouver's downtown eastside and also committed suicide. Despite what was described as Hossein's "compelling" and "credible" testimony about his coerced childhood recruitment into an Iranian opposition group and despite a finding by the United Nations High Commissioner for Refugees that he was a Convention refugee, the Canadian Immigration and Refugee Board found that he was a member of a terrorist organization and ordered him to be deported.

Hossein and Habtom were from different continents and they settled in opposite ends of their adopted country. In between these differences, however, their narratives followed remarkably similar, and similarly tragic, arcs. Both men came from fractured societies. Both experienced the dislocation of conflict and a palpable fear of persecution in their homelands. Both became associated with armed groups that sought to displace undemocratic and repressive regimes. Both men were survivors, having traversed thousands of kilometres, many countries and considerable danger to arrive in a place where they thought they would find peace and safety. But they were both mistaken. Upon arrival in Canada, Hossein and Habtom were flagged as potential security threats. They were interrogated and

cross-examined. Their past actions were scrutinized and while no allegations were ever made that either of them personally took part in activities giving rise to security concerns, both were ultimately deemed inadmissible to Canada because of their affiliations with their respective groups. Confronted with this reality, both Hossein and Habtom chose to take control of their demise, rather than ceding it to either their country of supposed refuge, or the despotic regimes to which they feared they would be returned.

Hossein and Habtom's stories are at the very heart of this dissertation, in which I examine perceived connections between migration and security, with particular reference to the Canadian legal landscape. In the pages that follow, I first examine the role of migration in Western states and trace the ways in which it has always occupied an exceptional legal category in liberal legal regimes. In doing so, I briefly descend into one of the central debates that has dominated discussions amongst migration scholars for the past thirty years – that is, whether acts of outsider exclusion are constitutive of or in conflict with liberal first principles. More specifically, I examine the work of Joseph Carens who has long argued that, from a moral perspective, most restrictions on the movement of peoples sit in tension with universalist liberal ideals of equality. I contrast Carens' position with the work of others, namely John Rawls and Michael Walzer, whose well-known ideas are premised on the notion of closed communities. Along the way, I also devote considerable attention to other scholars, most notably Seyla Benhabib and Catherine Dauvergne, both of whom have forged their own responses to the question of how liberal states respond to the rule of law challenges posed by non-citizens.

Moving on to the question of security, I next consider the scholarship of those who query whether, and how, rule of law principles can be upheld, particularly by administrative law bodies, in times of perceived emergency. Drawing on Catherine Dauvergne's observations about the securitization of migration, I then examine the

contributions of David Dyzenhaus, who recognizes that exceptional approaches to administrative law – that is, approaches that are inconsistent with important rule of law principles – exist, but rejects the notion that they are either necessary or ordained. The challenge, for Dyzenhaus, is in fact to banish such “grey holes”, as he calls them, from the legal order. Others, including Adrian Vermuele, insist that Dyzenhaus’ challenge is in fact a Sisyphean one, doomed to failure because administrative law, in its proximity and subordination to the executive, is always susceptible to raw expressions of executive power, particularly during periods of perceived exception.

I do not pretend to emerge from these debates having resolved them. While attracted to Caren’s application of liberal egalitarian principles to the realm of migration, there can be little debate that exclusionary impulses have defined liberal democracies, as they have virtually every other political tradition. While understanding the nature of the equality-exclusion debate is central to understanding immigration law, I extricate myself from the impasse of these competing views by noting that essentially all approaches view as permissible, and perhaps inevitable, the exclusion of those who threaten the security of the very community that they seek to join. And as the principal focus of this dissertation is not on migration itself, but rather on the intersections between migration and security, I note in this first chapter that any problems in the security domain are not necessarily with the concept of security itself, but with the decision-making processes carried out in its name.

With this in mind, in the second chapter I look to the example of Canadian migration law, its history of exclusion on various grounds and its growing concern with matters related to security. I refer to the current migration-security regime as a telling example of Dyzenhaus’ legal grey holes, given the extraordinary breadth of the security-inadmissibility apparatus. I also suggest that this grey hole is one of increasing concern given a surge in security cases over recent years. Moving from

the general to the particular, I then examine data that I have collected over the past four years on security related inadmissibility decisions rendered by the Immigration and Refugee Board of Canada. More specifically, I look at the decisions rendered by the Board pursuant to s34 of the *Immigration and Refugee Protection Act*,<sup>1</sup> which renders inadmissible those found to have engaged in espionage, subversion or terrorism, those found to be members of organizations that engage in such activities and those found to constitute a threat to Canadian security. While the numbers of security cases may not, at first blush, appear high, they are nevertheless significant when considering the stakes involved and the individual impacts that these proceedings have, as most troublingly illustrated by the experiences of Habtom and Hossein.

In analyzing the data, four important facts became apparent: 1) there has been a sharp increase in security-related inadmissibility cases over recent years; 2) the cases predominantly involve those who have asserted a fear of persecution in their countries of origin or have already been found to be Convention refugees; 3) the cases almost exclusively relate to individuals, like Habtom and Hossein, whose impugned activities involved membership in locally oriented struggles in the Third World, typically against oppressive regimes; and 4) no cases involved allegations of actual security threats *against* Canada. The analysis of the data in this chapter provides an empirical sketch of the problem that I seek to address in this dissertation. The problem, as I see it, relates to an overly expansive security regime that produces at best arbitrary, but at worst prejudicial outcomes against individuals from the developing world, most of whom assert a fear of persecution in their countries of origin. Given that Canada is a signatory to the Refugee Convention and further considering that the Canadian security scheme can result in the removal of Convention refugees, the importance of this topic comes into sharp focus, for it directly implicates one of Canada's core international human rights obligations. In

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<sup>1</sup> SC 2001, c 27 [IRPA].

the remainder of the dissertation, I explore two distinct areas of legal inquiry – emanating from international law and administrative law – that I argue could help to reconcile concerns over security with respect for the core rights of non-citizens.

Having empirically outlined how the security-inadmissibility process appears skewed against those who have taken part in discrete conflicts in the Global South, in the third chapter, I move on to examine the relevance of international law to inadmissibility determinations. In doing so, I assert that a reoriented conception of this area of law – more specifically, a Third World conception of international law – could assist decision-makers in separating legitimate security threats from those whose life circumstances merely situated them closely to armed conflicts. The burgeoning Third World Approaches to International Law (TWAIL) movement emphasises several themes that I argue would facilitate improved decision-making in the security sphere – these include a focus on historical processes, a related emphasis on context and an orientation towards examining the ways that law affects individual lives, particularly those from the Global South.

In the fourth, and final, substantive chapter of the dissertation I take a step away from international law and focus instead on domestic administrative law principles, with a view to understanding how the *process* of administrative discretion could help to implement some of the *substance* behind my earlier TWAIL critique of the inadmissibility regime. I do this by first examining applicable principles of administrative law, exploring the emergence of, and controversies surrounding, discretion as a key tool in the modern state. In short, these controversies revolve around the key question of whether discretion amounts to a lawless space in need of constant corralling by the judiciary, or whether it is an important regulatory feature of the administrative state, one that can bring nuance to the sometimes blunt force of the law.



Once again, I do not necessarily view it as my task to resolve this question. Referring back to the first chapter, I note that discretion will likely always factor into migration law, particularly on matters of security, which governments view as requiring wide latitude in confronting. If discretion is here to stay, the question becomes *how* it should be wielded and it is on this question that I devote considerable attention. I do this by exploring and applying the work of scholars who have articulated a conception of administrative discretion as a communicative process based on principles of dialogue. These scholars do not dispute that discretionary power emanates from the executive or question that there is frequently a considerable power imbalance in discretionary relationships. They suggest, however, that for discretionary decisions to be legitimate, they must be democratically legitimate. And democratic legitimacy, in turn, requires that those individuals who are affected by state decisions be afforded meaningful forms of engagement in the decision-making process. Bringing this back around to the security context, I first expose, in part through the narratives of individuals subject to the inadmissibility regime, how the current regime is one largely devoid of genuinely dialogical principles. The process in its current state is a classic example of a top-down projection of power over individual lives.

I then argue that a reformulated and dialogical approach to discretion in the security context would, by almost necessary implication, incorporate many of the TWAIL principles that I outlined in the previous chapter. In the process, I conclude, security-related decisions would shed much of their prejudice, replacing it instead with a nuance and legitimacy that they currently lack.

I view this dissertation as being situated in, and contributing to three distinct areas of legal inquiry. The first relates to the burgeoning literature on security and migration, specifically in the Canadian context. In the years since 2001, the

increased preoccupation with terrorism has been accompanied by a corresponding increase in commentary on the intersections between migration law and security.<sup>2</sup> In Canada, this commentary has tended to focus on either the security certificate regime created under the IRPA<sup>3</sup> or on the application of the exclusion clauses of the 1951 Refugee Convention to domestic refugee determination.<sup>4</sup> The security certificate regime engages extraordinary powers of detention and the use of secret evidence. It is a matter of serious concern for both academics and practitioners, particularly given the ways in which it defines the contours of state power at its outer limits. This said, while the constitutionality of the security certificate regime has been winding its way up and down the courts for over a decade, it has been applied to a mere five individuals since 2001 and has not been invoked since a

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<sup>2</sup> For an important recent contribution to this commentary, see the special issue of the Queen's Law Journal entitled "Crimmigration, Surveillance and Security Threats" edited by Sharryn J. Aiken, David Lyon and Malcolm Bruce Thorburn: (2014) 40 Queen's Law Journal 1. See also Idil Atak and François Crépeau, "National Security, Terrorism and the Securitisation of Migration" in Chetail, Vincent and Céline Bauloz, *Research Handbook on International Law and Migration* (London: Edward Elgar Publishing, 2014); Sharryn J. Aiken, "Of Gods and Monsters: National Security and Canadian Refugee Policy" (2001) 14 *Revue Québécoise de droit international* 1. See also François Crépeau & Delphine Nakache, *Controlling Irregular Migration in Canada - Reconciling Security Concerns with Human Rights Protection*, SSRN Scholarly Paper ID 1516626 and Philippe Bourbeau, *The Securitization of Migration* (New York: Routledge, 2011). For an important contribution rooted primarily in the realm of international political sociology, see Elspeth Guild, *Security and Migration in the 21st Century* (Cambridge: Polity, 2009).

<sup>3</sup> IRPA, ss 76-87.2. The security certificate process is invoked in relation to allegations of inadmissibility under ss34-37. It is not an entirely different inadmissibility regime, but rather engages a separate decision-making process in respect of inadmissibility cases deemed to be of particular concern from a national security perspective. For examples of the literature see: James Stribopoulos, "Charkaoui: Beyond Anti-Terrorism, Procedural Fairness, and Section 7 of the Charter" (2007) 16 *Const Forum* 15; Colleen Bell, "Subject to Exception: Security Certificates, National Security and Canada's Role in the War on Terror" (2006) 21 *Can J Law Soc* 63; Kent Roach, "Charkaoui and Bill C-3: Some Implications for Anti-Terrorism Policy and Dialogue between Courts and Legislatures" (2008) 42 *Supreme Court Law Review* 281; Hamish Stewart, "Is Indefinite Detention of Terrorist Suspects Really Constitutional?" (2005) 54 *Univ New Brunswick LJ* 235; Rob Aitken, "Notes on the Canadian exception: security certificates in critical context" (2008) 12:4 *Citizenship Studies* 381.

<sup>4</sup> *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS 189 [Refugee Convention]. See Asha Kaushal & Catherine Dauvergne, "The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions" (2011) 23:1 *Int J Refug Law* 54; James Simeon, "Complicity and Culpability and the Exclusion of Terrorists From Convention Refugee Status Post-9/11" (2010) 29 *Refugee Survey Quarterly* 104; Joseph Rikhof, "Complicity in International Criminal Law and Canadian Refugee Law" (2006) *J of Int'l Criminal Justice* 702; Pia Zambelli, "Problematic Trends in the Analysis of State Protection and Article 1F (a) Exclusion in Canadian Refugee Law" (2011) 23 *Int'l J of Refugee Law* 252.

certificate was issued against Adil Charkaoui in 2003. By contrast, and as we shall see in the second chapter, the security-related inadmissibility regime has been invoked with much greater, and increasing, frequency over the past decade. Yet despite this fact, it has remained almost entirely unscrutinised in the Canadian immigration law literature.

As I also demonstrate in chapter two, the lack of commentary on the application of the security-related inadmissibility scheme is of particular concern given the fact that the majority of individuals on whom it is brought to bear are those who have asserted a risk of persecution if removed from Canada. This is also the case for those who are subject to the Refugee Convention's exclusion clauses and it is for this reason that the existing commentary on these clauses is vitally important. But it is an essential feature of Canada's inadmissibility regime that those found to be inadmissible for, amongst other things, security reasons are deprived of the right to even assert a claim to refugee status.<sup>5</sup> Such being the case, the lack of any sustained legal analysis on the application of s34 of the IRPA represents a significant gap in the refugee law literature, one that this dissertation aims to fill.

The second contribution relates to international law and, specifically, to the call of TWAIL scholars to transpose TWAIL analyses into all areas in which the interests of Third World peoples and matters of international law intersect.<sup>6</sup> While there already exists an elucidating body of TWAIL scholarship on security, terrorism and international law<sup>7</sup> and on the international refugee law regime<sup>8</sup> there has been, to

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<sup>5</sup> Through the combined operation of ss 101(1)(f) and 104(1)(b) of the IRPA.

<sup>6</sup> See in particular, Makau Mutua, "What is TWAIL?" (2000) 94 Am. Soc'y Int'l L. Proc. 31 at 38, who argues that the reconstructive nature of TWAIL means that all processes (even ones seemingly related to domestic law) "that create, foster, legitimize, and maintain harmful hierarchies and oppressions must be revisited and changed." See also Karin Mickelson, "Taking Stock of TWAIL Histories" (2008) 10 Int Community Law Rev 355 at 357-358.

<sup>7</sup> Upendra Baxi, "The War on Terror and the War of Terror: Nomadic Multitudes, Aggressive Incumbents, and the New International Law - Prefatory Remarks on Two Wars" (2005) 43 Osgoode Hall Law J 7; Ikechi Mgbеoji, "The Bearded Bandit, the Outlaw Cop, and the Naked Emperor: Towards

my knowledge, no study that brings these areas together in the context of a particular immigration scheme. As I shall set out in the third chapter, an important aspect of the TWAIL agenda is to identify and expose structures that “marginalize and dominate” third world peoples.<sup>9</sup> Given my observation that the security-migration apparatus is one such structure, I view this dissertation as making a helpful contribution to this aspect of TWAIL’s normative agenda.

The final way in which I suggest that this dissertation contributes to ongoing legal debates relates to the unique vantage point provided by security-related decision-making on administrative law and, more specifically, on the rich body of literature on deliberative and dialogical approaches to administrative law. While this area of inquiry has a well-established pedigree, I argue in the fourth part of this dissertation that the security-migration nexus provides a particularly illuminating perspective on administrative law because of the strong executive impulse in this domain to engage in top-down exertions of state power. In proposing that dialogical decision-making approaches be adopted even in matters related to national security concerns, I seek to expand the scope of commentary on dialogue and legitimacy in discretionary decision-making.

In short, I view this examination of migration and security to be a worthy topic in itself, but also one that helps to illuminate other domains: the scope of refugee rights; the intersections between domestic and international law; the limits of executive authority and the content of decision-making in liberal democracies.

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a North-South (De)Construction of the Texts and Contexts of International Law’s (Dis)Engagement with Terrorism” (2005) 43 Osgoode Hall Law J 105.

<sup>8</sup> B.S. Chimni, “Reforming the International Refugee Regime: A Dialogic Model” (2001) 14:2 Journal of Refugee Studies 151.

<sup>9</sup> See the TWAIL vision statement, as reproduced in Karin Mickelson, “Taking Stock of TWAIL Histories,” *supra* note 6 at 357-8.

There are, of course, numerous other dimensions to this topic that are not addressed in this dissertation, perhaps most notably the roles played by both gender and race in conceptualizing security concerns and implementing border control.<sup>10</sup> As I discuss in Chapter Four, discretionary decision-making processes tend to reflect the social norms and values of the society from which they emanate and, consequently, they can also act as a conduit for the expression of discriminatory impulses. The security realm is certainly not immune to this reality, as is perhaps most articulately illustrated by the recent decision of the Canadian government to prioritize women, families and children over single men in the processing of Syrian overseas refugee resettlement applications.<sup>11</sup> There is, to be sure, much about both gender and race to unpack from this decision. However, in an effort to remain focused on the issues that I do explore in this project, I leave much of that unpacking for another day.

Before commencing, it is important to both situate myself in this research and comment on my methodological approach. Prior to my graduate work, I was (and remain) a lawyer with a practice dedicated to immigration and refugee law. Indeed, it was over the course of my practice that I and several colleagues began to notice an uptick in refugee cases that were suspended, and ultimately terminated, on grounds of security-related inadmissibility.

As advocates, we were troubled by these cases. We were prepared to address questions as to our clients' backgrounds in the context of their refugee cases and to confront allegations that they may be subject to one of the Refugee Convention's

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<sup>10</sup> For illuminating explorations of these domains, see for example Sherene Razack, ed., *Race, Space, and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines, 2002) and Alison Gerard and Sharon Pickering, "Gender, Securitization and Transit: Refugee Women and the Journey to the EU" (2014) 27 J of Refugee Studies 338.

<sup>11</sup> The Guardian, "Canada to turn away single men as part of Syrian refugee resettlement plan", *The Guardian* (23 November, 2015) online: Guardian <<http://www.theguardian.com>>.

exclusion clauses.<sup>12</sup> But this was something new, something that appeared to be an attempt by state authorities to circumvent the refugee claim process entirely.

Refugee law is an intimate and delicate area of practice, one that probes deeply into the lives of those who seek its protection. I came to know my clients and their families well and was, frankly, as mystified as they were when we received allegations that they were inadmissible on security grounds. I had represented other clients with profiles that were essentially identical to those who were now being streamed into the inadmissibility process, with no explanation as to why they were suddenly of concern. My mystification was soon replaced by a sense of foreboding, a feeling that a blunt instrument of state power was descending on my clients and that, given the breadth of the security provisions, there was very little that I could do, legally, for them. At the same time, I was contemplating a return to graduate work, and it seemed that unpacking the many layers of what I was observing in the security realm would make for a fascinating research project. In retrospect, I can identify four key objectives that have animated my research. My first objective was really a curiosity: that is, I wanted to find out whether my personal and anecdotal sense of an increase in security cases was borne out empirically. And if such was the case, a second and related objective was to examine on whom these cases were being brought and why. My third objective was, more generally, to explore the place of security concerns in immigration matters and to query whether what I perceived as the impersonal and heavy-handed nature of the inadmissibility regime is a necessary and justifiable reflection of post-9/11 security concerns. Finally, given the gaps in the literature to which I referred above, my fourth objective was to shed light on the inadmissibility regime and to illustrate how, despite its relative subtlety, it is an area as worthy of critical examination as

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<sup>12</sup> The Refugee Convention, *supra* note 4, has several exclusion clauses which were intended to serve as a closed list of grounds for which refugee claimants could be disqualified from protection, notwithstanding the fact that they may otherwise meet the refugee definition.

either the security certificate regime or the exclusion of refugees under the Refugee Convention.

I do not view this dissertation as an act of advocacy, though I certainly cannot pretend to have commenced it having shed my view that there is something troubling about how, and on whom, the security apparatus is applied. Rather, I consider my starting place as one informed by several years of a different sort of field research, research that took place in the day to day grind of a legal practice that was, for lack of a better phrase, ground zero of the security migration regime. By this I do not mean to suggest that my legal practice bore any direct connection to this research project, but rather, it provided me with a baseline of knowledge and an orientation toward the security regime that I have drawn upon throughout this project.

### *Methodology*

This base of experience and knowledge also informed the methodology that I chose to adopt in embarking on my research. While I sought to take a step back and look at some of the more theoretical debates that surround immigration and refugee law, the theory I explore is for a very particular purpose, one that is rooted in conversations about how law actually operates and how it may be reformed to operate differently.

As a result, while substantial components of this dissertation involve traditional doctrinal and theoretical approaches, I also look to both quantitative and qualitative research methods – the former in Chapter Two, the latter in Chapter Four – to assist in examining the anachronistic state of decision-making in immigration-security matters. It is my hope that this mixed methodological approach provides both a thorough and multi-faceted perspective on the Canadian security-inadmissibility regime.

### *The Quantitative Data*

As noted above, the quantitative aspect to this dissertation is based on numerous Access to Information Requests that I have submitted over the past four years. These range from several requests seeking data on numbers and various other data points related to security cases, to data on Ministerial waivers of inadmissibility, to training manuals and internal memoranda on the operation of s34 of the IRPA. As I set out in detail in the second chapter, the disclosure that I received came to several thousands of pages of information and it has been illuminating in several different ways. There is, however, one gap in the data that is important to consider. Inadmissibility determinations under s34 arise, for the most part, in one of two ways: they can be made by Citizenship and Immigration Canada officers to refuse status to foreign nationals, either in Canada or abroad, or they can be invoked to revoke any status that may already have been obtained. As I set out in greater detail in Chapter 2, these latter determinations are typically made by the Immigration and Refugee Board following a referral from the Canada Border Services Agency. For reasons related largely, in my view, to government obfuscation, this study is limited to the latter set of decisions on inadmissibility – those rendered by the Immigration and Refugee Board. The IRB responded to ATIP requests promptly and typically provided complete (if redacted) records related to the requested data. The response of Citizenship and Immigration Canada was profoundly different. My requests were first met with what I viewed as improper demands for what would amount to thousands of dollars of research time and database access fees. Upon challenging the imposition of these fees, I was informed that the request would be re-examined, which was followed by many months of delays. At one point I was informed that the data I requested could not be captured by CIC's databases and would, instead, require a manual review of every relevant file. Finally, I was instructed that my requests were being refused because the



information sought would be held on individual client files and was thus exempted from disclosure pursuant to s19(1) of the *Access to Information Act*.<sup>13</sup>

I have not stopped in my attempts to obtain this data, but for the purposes of this dissertation, I made the decision to confine my results to those provided by the Immigration and Refugee Board. While I would have preferred to incorporate CIC data into my research, I do not think that its absence affects the validity of the disclosure that has been provided. Beyond this, as I note in my conclusion, the lack of CIC data on security cases leaves open a further project in my research agenda.

### *The Qualitative Interviews*

Originally, my intention was to interview individuals from all sides of the security regime: CBSA officers, lawyers and individuals caught in the process. Through my connections in the field, I was able to conduct interviews with the latter two groups of individuals, but unfortunately I was unable to gain formal access to interview CBSA staff. While I have spoken informally with former CBSA officers, I was asked that comments made in those conversations not be incorporated into this research project. I have respected that request.<sup>14</sup>

My objectives in relation to the interviews that I did conduct were modest. It was not my intent with this dissertation to prepare a comprehensive qualitative research project. My goals, rather, were twofold: first, as noted in the literature on mixed methods research, combining personal narratives with quantitative data analysis can help to explain and interpret the findings of the latter in frequently

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<sup>13</sup> RSC, 1985, c A-1.

<sup>14</sup> I discuss at subsequent points in the dissertation the importance of examining institutions in context to understand the decisions they make. The literature on New Institutionalism is particularly interesting in this respect, see for instance, Mary Brinton and Victor Nee, *The New Institutionalism in Sociology* (New York: Russell Sage, 1990) and K O Hawkins, *Law as last resort: prosecution decision-making in a regulatory agency* (Oxford: Oxford University Press 2002).

articulate ways.<sup>15</sup> My second goal was related to my above observation that the migration-security apparatus in Canada has been under-reported in the literature. Part of the fallout of this under-reporting is that the voices of those individuals who must navigate the security-inadmissibility process have not been heard. I wanted to remedy this in some small way by carving out space for at least some of these individuals to both share their experience of the security regime and to articulate their observations of it. As I set out in Chapter Four, security decisions generally take the form of top-down expressions of state power that leave little to no room for the participation of those who become enmeshed in it. In conveying the experiences of these individuals, I also suggest that we might capture a glimpse of a more participatory approach, one that I contend would yield more legitimate results.

Seeking narrative voice as a supplementary way of understanding social forces has a long pedigree in qualitative research and, more specifically, in the multidisciplinary fields of forced migration research. As Eastmond notes,

In the field of forced migration, narratives have also been important to researchers, not seldom relied upon as the only means we have of knowing something about life in times and places to which we have little other access. With the more interpretive approach, narratives have become interesting also for what they can tell us about how people themselves, as 'experiencing subjects', make sense of violence and turbulent change.<sup>16</sup>

The interviews were open-ended and took the form of informal conversations. I had known a few of the participants as prior clients, or as colleagues, while others were unknown to me prior to this research. Some of the refugees who I interviewed were actively advocating their cases in the public sphere, while others were

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<sup>15</sup> Nataliya V Ivankova, John W Creswell & Sheldon L Stick, "Using Mixed-Methods Sequential Explanatory Design: From Theory to Practice" (2006) 18:1 *Field Methods* 3 at 10.

<sup>16</sup> Marita Eastmond, "Stories as Lived Experience: Narratives in Forced Migration Research" (2007) 20 *J Refug Stud* 248 at 249.

resigned to observing (and waiting) as their various applications and legal cases played out. That said, and as I describe in Chapter four, what all of the individuals had in common was a sense of surprise that their cases had taken this path, a corresponding notion that they were inaccurately described as posing a security threat and , as a consequence, a firm conviction that the system was acting unjustly on them.

While I view this mixed methodological approach as providing a well-rounded vantage point on the security regime, it is not without its limitations and my research should not be taken as either an exhaustive quantitative analysis or a devoted legal ethnography. It is, at root, a legal and theoretical exploration of the issues, but I contend that both the data I analyze and the stories I convey assist in interrogating the intersections between security and migration in this era.

# **CHAPTER ONE: IMMIGRATION, SECURITY AND INADMISSIBILITY IN LIBERAL STATES**

## 1.1 Introduction

The connection, or lack thereof, between security and migration is a central preoccupation of our time. In the pages that follow, I explore how this preoccupation has played out, with particular reference to the Canadian context, and more broadly, to examine what it reveals about administrative decision-making in liberal democracies and its interaction with international law.

I have already sketched out that my objective in this project is to explore the arbitrariness – or worse, the prejudice – that I suspect pervades decision-making in the migration-security realm. I further hypothesized in my brief introduction that alternative approaches to administrative decision-making, combined with a more nuanced understanding of international law might, taken together, provide both a procedural and normative basis for improving decision making in this area. For the present moment, however, I will for the most part leave aside these *responses* to the problem of migration and security and instead focus on the *nature* of the problem itself. What is migration and why is it viewed in exceptional terms by liberal democracies? Why is it that both law and decision-making in the migration realm appear to depart so palpably from basic rule of law principles? Correspondingly, what is the nature of a security threat and why are such threats similarly treated as representing an exception to the normal legal order?

In examining these questions, I argue that responding to concerns over migration and security in exceptional ways is not necessarily ordained and nor is it principled. While acknowledging that the very idea of the liberal state is intertwined with notions of insider and outsider, I argue that this fact does not, in itself, lead inexorably to the kinds of exceptional approaches to which migrants and perceived security threats are generally subjected. This is at least in part because of another set of principles that are equally woven into the fabric of liberal democracies – the cosmopolitan conception of the equal moral worth of all

individuals. Flowing from this principle, I will suggest that exclusion requires justification and justification, in turn, requires communicative processes of participation for immigrants and refugees. In the fourth chapter, I will explore one form that such communicative processes may take – that being an interpretation of administrative discretion as a mechanism for two-way dialogue between the state and those who are affected by its decisions.

In the coming chapters, I will also trace the increased use of security inadmissibility measures in Canada and elsewhere, to further explore the position of migrants who are perceived, or at least are labeled, as posing threats to security. In addition to exploring how administrative law could be reframed along dialogic lines, I also intend to explore whether different understandings of international law, particularly that which has emanated from the Third World Approaches to International Law school would similarly enhance the legitimacy of inadmissibility decisions. For now, however, I turn to an examination of the literature on the preliminary issues.

Before doing so, however, a brief disclaimer. Virtually all of the thinkers to whom I refer below are worthy of exploration in much greater detail than is possible here. The works of many of them could be (and have been) the subject of entire dissertations. My intent here is not to exhaustively detail the complex and multiple contours of their work, but rather, to tease out the ideas from each of them that I have found helpful in furthering my understanding of migration, security and the perceived intersections that tie them together.

## 1.2 Migration in Liberal States

The refugee should be considered for what he is, that is, nothing less than a border concept that radically calls into question the principles of the nation-state and, at the same time, helps clear the field for a no-longer-delayable renewal of categories.<sup>1</sup>

Giorgio Agamben places the refugee at the very centre of conversations about sovereignty, the nation state and legal order. Sovereignty, that is, the demarcation of sovereign territory and the corresponding demarcation of citizens and non-citizens is, after all, frequently viewed as the very concept that creates and perpetuates the notion of the refugee. And to the extent that the concept of the refugee, or to use broader language, the migrant, provides an illustration of an exception to the normal legal order, it also provides a window into the legal order itself. As we shall see in the coming pages, Agamben is not alone in identifying the migrant as both a subject of exceptional politics and a conceptual device with which to examine modern states. Almost thirty years ago, Peter Shuck observed the unique position of immigration within the larger (in this case, American) legal regime:

Immigration has long been a maverick, a wild card, in our public law. Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system. In a legal firmament transformed by revolutions in due process and equal protection doctrine and by a new conception of judicial role, immigration law remains the realm in which

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<sup>1</sup> Giorgio Agamben, "[We Refugees](http://www.egs.edu/faculty/giorgio-agamben/articles/we-refugees/)" *Symposium*. 1995, No. 49(2), Summer, Pages: 114-119, English, Translation by Michael Rocke. <http://www.egs.edu/faculty/giorgio-agamben/articles/we-refugees/> accessed 03 April 2012.

government authority is at the zenith, and individual entitlement is at the nadir.<sup>2</sup>

The string that ties together the bulk of the literature to which I will refer is the already apparent dichotomy between insider and outsider and the essential question posed by Schuck's observation of the maverick status of migration law; namely is this an innate and natural state of affairs in liberal democracies or, rather, a chosen course based on particular policy choices that could, with some degree of effort and will, be altered?

### ***1.2.1 Between a Locke and a Rawls Place –The Traditional view of Liberalism and Migration<sup>3</sup>***

People must recognize that they cannot make up for failing to regulate their numbers or to care for their land by conquest in war, or by migrating into another people's territory without their consent.<sup>4</sup>

It is, of course, trite to suggest that liberalism and its corresponding ideals of freedom and equality for all, is the dominant ideology of our time. Liberalism is a term with which one can play fast and loose, but for the time being I use it to denote an ideology that at least formally espouses universal notions of freedom, equality, basic human rights to life, liberty and property and the view that the rule of law should prevail over absolutism in government.

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<sup>2</sup> Peter H Schuck, "Transformation of Immigration Law, The" (1984) 84 Columbia Law Rev 1 at 85–86.

<sup>3</sup> I choose here to examine migration through the lens of liberal theory for three principal reasons: first, because at present it represents the mainstream and dominant strand of legal and political philosophy; second because as we shall see, it aspires to universalist notions of moral equality which make questions about inclusion and exclusion particularly interesting; and lastly because it is liberal democracies that, for the most part, drive the global migration law regime.

<sup>4</sup> John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 2001) [Rawls, "The Law of Peoples"] at 8.



Liberal theory has always confronted something of a paradox. On the one hand, liberal values are frequently described in universalist language, as above. The basic rights and liberties associated with liberalism are said to inhere in all people by mere virtue of their existence. Indeed, underpinning liberalism is a core assertion of the moral equality of all persons. Since the end of the Second World War, this notion of equality has also been promulgated on the international level, particularly in the language of universalist human rights instruments, which explicitly recognize that people, in addition to states, are the proper subjects of international law.

On the other hand, classical approaches to liberal theory have, from the outset, been based on a profound distinction between peoples; on a presupposition, that is, of a closed community within which principles of liberal justice may be elaborated. This is apparent in the writing of one of the earliest proponents of the liberal ethos, John Locke, who stated in his *Two Treatises of Government* that one of the principal concerns of government was to “secure the community from inroads and invasion.” Indeed, to Locke, those within the bounded liberal community were perfectly justified in viewing those on the outside as if they were still in a state of nature. This is not to say that Locke was against the naturalization of foreigners; indeed he viewed the addition of resourceful individuals to the community as providing almost unlimited benefit. The point is that he viewed questions of admission as being aside from notions of equality and entirely within the prerogative of the pre-defined community.<sup>5</sup>

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<sup>5</sup> John Locke, *Two Treatises of Government*, edited, with an introduction, By C.B. McPherson (Indianapolis and Cambridge: Hackett Pub., 1980) at 60, accessed at [http://epublish.biz/pdf/Two\\_Treatises\\_of\\_Government.pdf](http://epublish.biz/pdf/Two_Treatises_of_Government.pdf), on May 4, 2012. See also, Mark Goldie (ed). “For a General Naturalization,” in John Locke, *Political Essays*. (Cambridge: Cambridge UP, 1997) at 324.

As we shall see, the tension – between a theory that notionally aspires to treat all similarly, but implicitly draws distinctions between those on the inside and those on the outside – has been addressed in various ways.

As mentioned, one of the central notions of classical liberal theory is that the formation or definition of community is conceptually prior to conversations about the content of liberal ideas; the boundary of the community is already in place and questions of justice relate solely to those on the inside. Justice, in other words, is a relational concept – *justice as between whom* – and theories about justice can only take place once the “whom” is clearly defined. The rise of liberalism is closely tied with the rise of the modern nation state and classical liberal theorists often take the two as being inseparable: liberal conceptions of justice involve a social contract between individual *and state*. As such, the very notion of liberalism presupposes the existence of a defined, and to some closed, state. Dworkin’s frequently cited passage from *Law’s Empire* puts it most clearly:

We treat community as prior to justice and fairness in the sense that questions of justice and fairness are regarded as questions of what would be fair or just within a particular political group.<sup>6</sup>

But even more than Ronald Dworkin, it is John Rawls who is most commonly associated with confining theories of liberal justice to a closed system. Described as “arguably the greatest political philosopher of the twentieth century and the most important academic exponent of liberalism since John Stuart Mill,” Rawls was particularly vociferous in his insistence that one could not discuss liberal theory without starting from the position of a defined and relatively set group.<sup>7</sup> Rawls’ great insight, set out in detail in his seminal work, *A Theory of Justice*, is in developing the idea that the principles of justice are those everyone would accept

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<sup>6</sup> Ronald Dworkin, *Law’s Empire* (Cambridge: Belknap Press, 2001) at 208.

<sup>7</sup> Stephen Macedo, “What Self-Governing Peoples Owe to One Another: Universalism, Diversity, and the Law of Peoples” (2003) 72 *Fordham Law Rev* 1721 at 1722.

and agree to from a fair position.<sup>8</sup> He does this primarily through the use of a conceptual device in which all members of a given community are put in the same position, the original position, and are then left to determine the principles of justice on which to base membership in the group. The trick, however, is that these decisions on what is just must be made with incomplete information as to the position that any particular individual will come to occupy in the community; this is what Rawls terms the “veil of ignorance.”<sup>9</sup>

Behind the veil of ignorance, no one knows their social position, their wealth, their intelligence, their attraction or aversion to risk or even which generation they come from.<sup>10</sup> Indeed, essentially the only thing that those behind the veil of ignorance *do* know, according to Rawls, is that “*their society* is subject to the circumstances of justice and whatever this implies.”<sup>11</sup> For our purposes, the most important part of this passage is of course Rawls’ use of the words “their society,” for implicit in Rawls’ conception of the veil of ignorance is the assumption that those behind it also know that they are part of the same, closed collectivity. What emerges, Rawls theorizes, is something of a lowest common denominator approach to justice – not knowing what social position any one person will occupy, the group will arrive at a mode of social organization in which all members are treated as fairly as possible. More specifically, Rawls suggests that those placed behind the veil of ignorance, at least as he configures it, would arrive at two distinct yet related conclusions: first, each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others; and second, social and economic inequalities are permissible only to the extent they are of benefit to the least well off

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<sup>8</sup> John Rawls, *A Theory of Justice* (Cambridge: Belknap Press, 1971) at 12.

<sup>9</sup> *Ibid.*, at 136.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.* at 137, emphasis added.

members of the community; and tied to this, that offices and positions must be open to everyone under fair conditions of equal opportunity.<sup>12</sup>

But significant debate and critiques have arisen over the years as to precisely what information is placed behind the veil of ignorance because, in many respects, it is this consideration that determines the principles of justice that arise from it. And again, for our purposes, Rawls' most significant decision was to provide that those cast behind the veil would be aware that they are all members of the same community; Rawls opted, in other words, to remove the question of nationality from behind the veil of ignorance. This was no oversight on Rawls' part, it was integral to the project; it was in many senses *the* project – to explore how a closed group of individuals would come up with an idealized version of liberal justice. Rawls states,

I shall be satisfied if it is possible to formulate a reasonable conception of justice for the basic structure of society conceived for the time being as a closed system isolated from other societies.<sup>13</sup>

Beyond this, Rawls has little more to say in *A Theory of Justice* about the movement of people away from or into the bounded community of persons about which he theorizes. Later, in *The Law of Peoples*, which was essentially Rawls' effort to transpose his ideas about social justice onto the international plane, he expounds in some, albeit still limited detail on the place of migrants in his conception of justice.<sup>14</sup> In it, Rawls argues that boundaries, while often arbitrary in their origins, are nevertheless essential ingredients of a people's government and one of the key

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<sup>12</sup> These are famously referred to by Rawls as the two principles of justice, see *Ibid* at 60. The two principles have faced considerable criticism over the years, most notably and most recently by Amartya Sen whose pluralist approach rejects the "transcendental" nature of the principles. See Amartya Sen, *The Idea Of Justice* (Cambridge: Belknap Press, 2009).

<sup>13</sup> Rawls, *A Theory of Justice*, *supra* note 8, at 8.

<sup>14</sup> Rawls, *The Law of Peoples* *supra* note 4.

functions of government, as agent of a people, is to be the guardian of its territory.<sup>15</sup> Reiterating the idea that opens this chapter, Rawls goes on to suggest that peoples need to recognize that they cannot make up for their irresponsibility in caring for their territory “by conquest in war or by migrating into other people’s territory without their consent.”<sup>16</sup> Rawls also notes that peoples (those in migrant receiving states) have at least a “qualified right to limit immigration”.<sup>17</sup> These passages, which appear somewhat indifferent to the role that some peoples – some nations – have played in the degradation and suffering of others, flows directly from one of Rawls’ central and, to my mind, startlingly oversimplified, observations: that a country’s own political culture is the “crucial element” in determining how it will fair.<sup>18</sup>

Bad governments, that is, governments that persecute their people or that do not adequately provide for them, generate emigration. To Rawls, the response to this (rather narrowly construed) fact is *not* for good governments to open themselves up to immigration, but to recognize an obligation to provide institutional support for “burdened societies.”<sup>19</sup> To Rawls, migration is merely a symptom of larger institutional problems in burdened societies – fix the problems and the phenomenon of the movement of peoples will largely disappear: “The problem of immigration is not, then, simply left aside, but is eliminated as a serious problem in a realistic utopia.”<sup>20</sup>

This statement gets to the crux of Rawls’ view of migration – it is quite simply not a topic of concern to the discourse on liberal justice; on the contrary, it is a

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<sup>15</sup> *Ibid*, at 38-39. As shall be seen, while Rawls very purposefully uses the term “peoples” instead of “states,” his views on the governments formed by peoples aligns very closely with traditional notions of sovereignty under international law and particularly in the elevation of sovereign territories, rather than individuals as the basic building blocks of international relations.

<sup>16</sup> *Ibid*, at 39.

<sup>17</sup> *Ibid*, at 39, note 48.

<sup>18</sup> *Ibid*, at 117.

<sup>19</sup> *Ibid*, beginning at 105.

<sup>20</sup> *Ibid*, at 9.

distraction that disappears when the larger puzzle of achieving justice is solved. And this, in my view, reveals at least in part why the rights of migrants within liberal democracies are frequently viewed in exceptional terms.<sup>21</sup> That the migrant is not a participant in conversations about justice is deeply embedded in the ethos of the modern liberal state. The question is whether migrants are similarly extraneous to the very logic of the liberal state. The work of Rawls would seem to support this view. Others, however, have not been so quick to dismiss migration as a subject of concern for theories of liberal justice. I turn now to explore the insights of some of the theorists who have examined the question of migration in more detail.

### ***1.2.2 Responding to Rawls – Joseph Carens and Open Borders***

If people want to sign the social contract, they should be permitted to do so.<sup>22</sup>

Rawls has of course been immensely influential in developing liberal theories of justice and in the immigration sphere, scholars have responded to him in a number of different ways. One approach, most notably developed by Joseph Carens, is not to flatly reject the reductionism of Rawlsian thinking, but on the contrary, to expand the parameters of Rawls' original position to include all of humankind.<sup>23</sup> At the outset of his enormously provocative and influential article, "Aliens and Citizens: The Case for Open Borders," Carens articulates the traditional view of the relationship between migration and sovereignty. He states:

The power to admit or exclude aliens is inherent in sovereignty and essential for any political community.

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<sup>21</sup> This is not, of course, to suggest that migrants are not also subjected to exceptional approaches in "non-liberal" states, but I confine my comments here to liberal states that define themselves, at least formally, with universalist notions of justice and equality.

<sup>22</sup> Joseph H Carens, "Aliens and Citizens: The Case for Open Borders" (1987) 49:2 Rev Polit 251 at 251 [Carens, "Aliens and Citizens"].

<sup>23</sup> Carens certainly wasn't the first to put forth a global view of the original position. As Carens acknowledges, the most notable early proponent of such an alteration to Rawls' approach was Charles Beitz in *Political Theory and International Relations* (Princeton, NJ: Princeton University Press, 1979). Carens can be credited, however, with applying such an approach specifically to the question of global migration.

Every state has the legal and moral right to exercise that power in pursuit of its own national interest, even if that means denying entry to peaceful, needy foreigners. States may choose to be generous in admitting immigrants, but they are under no obligation to do so.<sup>24</sup>

In the next sentence, Carens boldly asserts that his aim is to “challenge that view.” While his focus is predominantly on Rawls, Carens develops his position by also referring to other streams of liberal theory, most notably utilitarianism and the theoretical approach proposed by Robert Nozick.<sup>25</sup> Carens’ claim is that each of these streams when applied to the topic of migration and followed through to their logical conclusions produces the same result: open borders and relatively free movement of peoples. Given the sharp distinctions between these theories in other areas, Carens concludes that their convergence on the topic of migration lends support to his argument.

At the outset, Carens rejects the proposition that the logic of liberalism is inherently and indivisibly connected to the concept of the bounded state. While liberalism may have emerged with the modern state, Carens disputes the assertion that liberal conceptions of justice can only take place within the framework of a closed society. He states:

Some may feel that I have wrenched these theories out of context. Each is rooted in the liberal tradition. Liberalism, it might be said, emerged with the modern state and presupposes it. Liberal theories were not designed to deal with questions about aliens. They assumed the context of the sovereign state. As a historical observation this has some truth, but it is not clear why it should have normative force. The same wrenching out of context complaint could as reasonably have been leveled at those who first constructed liberal

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<sup>24</sup> Carens, *Aliens and Citizens*, *supra* note 22 at 251.

<sup>25</sup> As was most clearly articulated in Nozick’s *Anarchy, State, and Utopia* (New York: Basic Books, 1974).

arguments for the extension of full citizenship to women and members of the working class. Liberal theories also assumed the right to exclude them.<sup>26</sup>

If a closed society is not the foundation on which liberalism rests, what then does it stand upon? To Carens, the answer to this question lies in the principles to which I earlier referred, specifically the foundational (and cosmopolitan) ideal of the equal moral worth of all persons. Closed communities are not prior to liberalism, Carens asserts, but what is prior, and what all liberal theories have in common, is the assumption of the equal moral worth of all individuals:

Each of these theories begins with some kind of assumption about the equal moral worth of individuals. In one way or another, each treats the individual as prior to the community.<sup>27</sup>

With this as a given, Carens sets out to consider how migration fits into the puzzle of liberal justice, and to do this, he incorporates a globalized version of Rawls' original position. He does this, in my view, for precisely the same reasons that Rawls himself first conceived of the original position as a strategy for moral reasoning. As noted by Carens, part of the appeal of the veil of ignorance to Rawls was that it stripped away "the effects of specific [and often arbitrary] contingencies which put men at odds," contingencies such as wealth or social status, and enabled one to think about how people would order themselves from a purely moral point of view.<sup>28</sup> In this sense, the veil of ignorance enables one to think about a topic without being biased by "self-interested or partisan considerations" and without allowing historical injustices (if any) to "warp our reflections."<sup>29</sup> And to Carens, citizenship status is the very definition of one of the arbitrary contingencies referred to by Rawls. Indeed, as Carens puts it,

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<sup>26</sup> Carens, *Aliens and Citizens*, *supra* note 22 at 265.

<sup>27</sup> *Ibid*, at 252.

<sup>28</sup> *Ibid*, at 255, citing Rawls, *A Theory of Justice*, *supra* note 8 at pp. 136, 72.

<sup>29</sup> *Ibid*.



Citizenship in Western liberal democracies is the modern equivalent of feudal privilege – an inherited status that greatly enhances one's life chances. Like feudal birthright privileges, restrictive citizenship is hard to justify when one thinks about it closely.<sup>30</sup>

With this in mind, Carens proceeds to his analysis assuming a global view of the original position. Those in the original position would not know their place of birth or their membership (i.e. citizenship) in one society or another. And it is from this position that Carens questions the liberal legitimacy of virtually all border restrictions. He does not suggest, however, that relatively autonomous states would be prohibited, but state sovereignty would be constrained by the principles of justice.<sup>31</sup> And because one approaches the veil of ignorance from the perspective of those who would be most disadvantaged by restrictions on liberty, i.e. the potential immigrant, Carens concludes that the right to migrate would be included as a basic liberty. To Carens, this liberty is really no different than the uncontroversial freedom that people possess to move to a different territory *within* their given state.<sup>32</sup>

In arriving at this conclusion, Carens addresses (and rejects) what he considers to be one of the few principled theoretical objections to open borders: the communitarian approach articulated by Michael Walzer. Walzer argues that people who, through a shared common history, have developed a distinctive culture and a common understanding about justice may justifiably restrict entry into their territory.<sup>33</sup> As with Rawls, Walzer presupposes that principles underlying distributive justice must be formulated within the context of particular (and closed) communities. Justice is an internal matter and as such questions of entry into the

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<sup>30</sup> *Ibid* at 252.

<sup>31</sup> *Ibid* at 258.

<sup>32</sup> *Ibid*.

<sup>33</sup> Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983).

political community are not particularly constrained by larger principles that transcend the community itself. Community is itself a good, a necessary ingredient in the aspiration for equality and as such, the exclusion of outsiders is justified by the right to self-determination.<sup>34</sup>

In rejecting this argument, Carens again refers to the open borders which surround cities, states and provinces. These smaller political units often contain a shared common history and frequently have profoundly distinctive cultures. And yet, these entities have no capacity to limit immigration, and indeed, are frequently sites of considerable influxes of people. Carens does not assert that such influxes have no impact on the character of the communities in which they take place, but suggests that, in the domestic context, mobility rights are viewed as taking priority. But this understates the point – Carens rightly asserts that restricting mobility rights *within* a political community is generally viewed as being anathema to the very concept of a free state.<sup>35</sup> This being the case, Carens questions the basis on which restrictions on freedom of movement across states can be justified. Adopting Walzer’s own logic, Carens suggests that finding such justification would require a stronger case for the “moral distinctiveness” of the nation-state as a form of community than that of the smaller political units that Walzer discusses. It is implicit in this suggestion, of course, that no such case can be made out.

Numerous other authors, both before and after Carens, have arrived at similar conclusions, questioning the legitimacy of liberal justifications for restrictive migration policies. In her work, Linda Bosniak directly confronts

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<sup>34</sup> This claim draws an interesting parallel to my larger dissertation in which I will explore the rights of states to render inadmissible those who themselves have participated in self-determination struggles. The issue then becomes whether states can legitimately exclude, on self-determination principles, those who have asserted their own right to self-determination and, as a result, have been forced to flee their respective states.

<sup>35</sup> Carens, *Aliens and Citizens*, *supra* note 22 at p. 267. This fact is clearly illustrated in constitutional mobility rights provisions, such as s6 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (UK) [*Charter*], c 11.

Rawlsian/Walzerian notions of bounded national identities and their claims to universalism that extend only so far as the border of the community. Describing such approaches to membership as being “hard on the outside, soft on the inside,” Bosniak sets out to establish that in a world of porous borders, the concept of citizenship is more complicated than the traditional approach would imply.<sup>36</sup>

Much earlier, Bruce Ackerman, provocatively asserted that “I cannot justify my power to exclude you without destroying my own claim to membership in an ideal liberal state.”<sup>37</sup> Philip Cole, meanwhile, has suggested that “liberal theory cannot provide a justification for membership control and remain a coherent political philosophy.”<sup>38</sup> And in another passage worth citing at length, Peter Schuck sums up what, in his estimation, a truly liberal approach to immigration would look like:

Liberalism has never satisfactorily answered these questions and probably never will. It regards any fixed or exclusive definition of community with profound suspicion. Indeed, in a truly liberal polity, it would be difficult to justify a restrictive immigration law or perhaps any immigration law at all. National barriers to movement would be anomalous. Criteria of inclusion and exclusion based upon accidents of birth, criteria that label some individuals as insiders and others as outsiders, would be odious. Wealth, security and freedom would not be allocated on such grounds, especially in a world in which the initial distribution of those goods is so unequal. Instead, individuals would remain free to come and go, to form attachments, and to make choices according to their own aspirations,

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<sup>36</sup> Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton, N.J.: Princeton UP, 2006) at 4. Bosniak goes on to refer to the migrant as illustrating the problem with the traditional liberal conception of the community; in some ways non-citizens living spatially within a community remain in many respects excluded outsiders: “the border effectively follows them inside.” In other respects, however, non-citizens in most liberal democracies are treated as “citizenship’s subjects.” The essential point is that the taken for granted notions of insider-outsider that lie at the core of classical liberal theory are, and probably always have been, problematic.

<sup>37</sup> Bruce Ackerman, *Social Justice in the Liberal State* (New Haven: Yale UP, 1980) at 93.

<sup>38</sup> Phillip Cole, *Philosophies of Exclusion: Liberal Political Theory and Immigration* (Edinburgh: Edinburgh UP, 2000) at 202.

consistent with the equal right of others to do likewise. No self-defining, self-limiting group could deny to non-members the individual freedom of action that liberalism distinctively celebrates.<sup>39</sup>

All of this being said, Carens does acknowledge one principal restriction to his open border proposition: a limitation that flows directly from Rawlsian theory, and which has direct bearing on the intersection between migration and security. According to Rawls, all liberties depend on public order and security, and as a consequence, any actions which may threaten public order and security may be prohibited.<sup>40</sup> Liberty, in other words, may be restricted for the sake of liberty. Carens applies this logic to the immigration context:

Suppose that unrestricted immigration would lead to chaos and the breakdown of order. Then all would be worse off in terms of their basic liberties. Even adopting the perspective of the worst-off and recognizing the priority of liberty, those in the original position would endorse restrictions on immigration in such circumstances. This would be a case of restricting liberty for the sake of liberty and every individual would agree to such restrictions even though, once the "veil of ignorance" was lifted, one might find that it was one's own freedom to immigrate which had been curtailed.<sup>41</sup>

Carens was explicit that, as national security is one form of public order, states are entirely justified in refusing entry to people whose goal is "the overthrow of just institutions."<sup>42</sup> Of relevance to our later discussion, it is interesting to note that Carens does not specify whether this national security exception would be

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<sup>39</sup> Schuck, *supra* note 15 at 85–86.

<sup>40</sup> Rawls, *A Theory of Justice*, *supra* note 8 at 212–213. It should be noted, however, that the tradeoff between public order and liberty is as old as liberalism itself. Much of Locke's *Second Treatise*, in fact, explores his view of the state of nature as being one of inherent insecurity; thus the role of civil government is explicitly to provide public order so that individual freedoms may be realized. I discuss this "classic tradeoff" in more detail in my discussion of Catherine Dauvergne, below.

<sup>41</sup> Carens, *Aliens and Citizens* *supra* note 22 at 259.

<sup>42</sup> *Ibid.*, at 260.

limited to those who seek only to overthrow institutions in the receiving state or, more generally, to those who may participate in such activities abroad but pose no threat to the country in which they seek entry. Given that the rationale of the restriction is the security of the receiving state, however, it can safely be assumed that Carens was only referring to the former scenario.

Both Carens and Rawls were clear, however, about the potential for abuse of the “public order exception” and emphasized the need for it to be narrowly construed; any such restriction, according to Carens, has to be minimally intrusive and based on “evidence and ways of reasoning acceptable to all.”<sup>43</sup> But what precisely does this mean? While the assertion that liberal states can limit immigration where there is evidence that a person may pose a threat to national security certainly appears both coherent and justified, upon closer analysis, it succumbs to some of the very criticisms that Carens levels at other border restrictions. That is, according to Carens, states are justified in excluding foreigners where there is evidence to suggest they *may* pose a threat to security.<sup>44</sup> But clearly citizens of those states, who may pose a similar threat, are not subject to any restrictions until they have actually committed, conspired to commit or attempted to commit a criminal act. There is of course a sharp distinction, a lack of equality if you will, between suspicion that someone may commit an act and prosecution for actual acts committed.

This fact is not lost on Carens, who refers to it as an asymmetry in the treatment between citizens and foreigners. It is curious, however, that even liberal egalitarian concepts of open borders are not immune to the tensions that arise in balancing sovereignty and individual liberty interests. This fact has also led some to question the coherence of the liberal egalitarian approach to immigration and, more broadly,

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<sup>43</sup> *Ibid*, citing Rawls, *A Theory of Justice*, *supra* note 8 at pp. 212.

<sup>44</sup> *Ibid* at 260. Carens further elaborates on the public order and national security restrictions to open borders in “Migration and Morality: A Liberal Egalitarian Perspective”, in B. Barry and R. Goodwin (eds.), *Free Movement: Ethical Issues in Transnational Migration of People and Money* (London: Harvester Wheatsheaf, 1992) at p. 28.

to question whether liberalism in any of its streams can rationally accommodate what I refer to here as the “membership/equality conundrum.”<sup>45</sup>

In much of his later work, Carens has attempted to address this conundrum and, more specifically, the question as to whether his open borders argument reveals “a deep moral problem with the exclusionary practices of liberal states or the limitations of abstract liberal theory.”<sup>46</sup> In the end, he concludes that the answer to this question is a little bit of both. This has led him into something of a “halfway house,” to use his words, somewhere in between the open borders approach and the more orthodox understandings of bounded liberal communities, albeit he remains much closer to the former than the latter. What he proposes, then, is:

a version of liberalism that takes rights seriously without making them absolute and that retains the fundamental liberal commitment to human freedom and equality, but is more pluralistic and open-ended in its understanding of the human good, and more sensitive to context and history.<sup>47</sup>

In the subtle softening of Carens’ position on open borders, one gets a sense of the state of paralysis that such an argument can lead us into. As he acknowledges, either the argument remains coherent and reveals in our current political arrangements a deep moral problem that will not, indeed cannot, foreseeably end *or*

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<sup>45</sup> See for example Phillip Cole, *Philosophies of Exclusion: Liberal Political Theory and Immigration*, supra note 37. On the latter point, see Catherine Dauvergne, “Beyond Justice: The Consequences of Liberalism for Immigration Law” (1997) 10 Can J Law Jurisprud 323. Others have opined, in direct contrast to Carens, that Rawlsian liberalism can rest comfortably on a closed borders formulation, see for example Donald Galloway, “Liberalism, Globalism, and Immigration” (1993) 18 Queen's LJ 266. To Galloway, justifying state control over immigration is not simply a convenient defence of the *status quo*, such control is in fact immanent to liberal theory. While it is impossible here to do justice to Galloway’s nuanced critique of Carens’ position, for present purposes, it is sufficient to note that even on his conception of a principled liberal rejection of open borders, there is a recognition that in certain circumstances, states will be compelled to allow entry to foreigners, see Galloway, above, at 298.

<sup>46</sup> Joseph H Carens, “A Reply to Meilaender: Reconsidering Open Borders” (1999) 33:4 Int Migr Rev 1082 at 1082.

<sup>47</sup> *Ibid* at 1083 and see Joseph Carens, *Culture, Citizenship, and Community* (Oxford: Clarendon, 2000).

it reveals the incapacity of liberal theory to contemplate questions of membership.<sup>48</sup> The challenge for many immigration law scholars is how to both acknowledge and move beyond this puzzling conundrum. Taking a minimal approach, I suggest that Carens' argument establishes that important liberty interests are invoked in matters involving migration. Even less radical interpretations of liberalism than that first put forward by Carens have to take seriously the moral (and, as a result, legal) claims of people who wish to join or remain in a political community. Exclusion may in many situations be appropriate, but it has to be justified. Others have formulated this proposition in the form of presumptions and burdens – because there is always a presumption against restricting the freedom of individuals, the burden is on those who would restrict movement to demonstrate that such limitations are justified.<sup>49</sup>

For the purposes of this dissertation, I intend to extricate myself from the theoretical quagmire outlined above by, for the most part, sidestepping it. I suggest that I can do this for two reasons, ones which would, I think, be acceptable to both Rawls and Carens and, consequently, to advocates of both closed and open borders. The first relates to my primary focus on issues of national security. As we have seen, while the open borders debate remains very much alive, it has become relatively uncontroversial that states may restrict access to those deemed to pose security threats.<sup>50</sup> As we wind our way through my analysis of inadmissibility, international and administrative law, I accept this premise, though devote considerable attention to interrogating *how* and *on whom* security-related decisions are made. The point for present purposes is that, at least as a lowest common denominator, states may legitimately restrict admission in order to preserve internal security.

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<sup>48</sup> *Ibid* at 1082.

<sup>49</sup> See for example Michael Dummett, *On Immigration and Refugees* (London: Routledge, 2001) at pp. 46-57 and Bas Schotel, *On the Right of Exclusion: Law, Ethics and Immigration Policy* (Oxon: GlassHouse, 2012).

<sup>50</sup> I say relatively here because, as described above, even Carens' modified open borders approach has been critiqued for its asymmetrical treatment of citizens and foreigners who pose threats to security.

At the same time, and as I shall set out in detail in the following chapter, the vast majority of security-related cases that I assess in this study involve asylum seekers or Convention refugees. Even on Rawls narrow conception of the place of migration in and across states, it is clear that legal obligations do arise in respect of individuals seeking refugee status. Some have argued that Rawls himself makes this admission when he acknowledges that the right of peoples to limit immigration is “qualified”.<sup>51</sup> But whether this is what Rawls meant or not, the fact of the matter is that states have willingly and voluntarily assumed obligations under the rubric of international refugee law. And if such is the case, if we can all agree in other words that states *may* limit migration on security grounds, but simultaneously bear some obligations toward the persecuted, then the analysis shifts to the question of decision-making and, ultimately, to the question of whether individual decisions on entry and removal are justified. Justification in liberal states, as I shall later argue, requires not only the participation of those affected by state decision-making, but also good faith dialogue. Dialogue and engaged deliberation also inform the writing of Seyla Benhabib and I turn now to explore her ideas on migration and democracy.

### ***1.2.3 Seyla Benhabib – Refugees, Community and Deliberative Democracy***

In her writing on migration, Seyla Benhabib frequently begins with the assertion that the movements of people have been ubiquitous throughout human history, and it can fairly be said that her critique of Rawls and other closed borders approaches flows directly from this point. Hers is a decidedly cosmopolitan conception of the relationship between the movement of peoples and state sovereignty which has, at

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<sup>51</sup> Rawls, *The Law of Peoples* *supra* note 4 at 39, note 48. See, for example, Caleb Yong, “Migration and Rawls’s Law of Peoples: Problems of Non-Ideal Theory” (15 August 2011), online: Academia.edu <http://academia.edu>. See also Donald Galloway, “Liberalism, Globalism, and Immigration”, *supra* note 45.



its roots, a deep connection to democratic theory and the Kantian principle of universal hospitality.<sup>52</sup>

At the outset, Benhabib identifies the membership/equality conundrum, carving out what is essentially a middling position. On the one hand she recognizes that political inclusion is the key to individual equality, but she also acknowledges the unsatisfactory alternative of completely open borders, or at least what is to her its necessary corollary, a global polity. In the end, however, Benhabib arrives at the conclusion that liberal democratic legitimacy demands that participatory mechanisms be instituted for non-citizens.

Benhabib takes as her starting point the Kantian (and deeply cosmopolitan) view that “if the actions of one can affect the actions of another, then we have an obligation to regulate our actions under a common law of freedom which respects our equality as moral agents.”<sup>53</sup> This said, Kant’s cosmopolitanism was deeply imbued with the existence of a global political order made up of states and he was both conscious and suspicious of the potentially homogenizing effects of a world polity. With respect to the movement of people, the tension between claims to universal moral equality and the existence of demarcated boundaries was resolved by the law of hospitality. As Benhabib notes, hospitality was not a question of philanthropy, but of right, flowing directly from principles of equality:

In other words, hospitality is not to be understood as a virtue of sociability, as the kindness and generosity one may show to strangers who come to one's land or who become dependent upon one's act of kindness through

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<sup>52</sup> This principle is one of the “Definitive Articles” which Kant asserted would provide both a cessation of hostilities and a foundation for perpetual peace: “The law of world citizenship shall be limited to conditions of universal hospitality.” See Immanuel Kant, *Toward Perpetual Peace: A Philosophical Sketch* (Ted Humphrey trans.) (Indianapolis: Hackett, 2003) 1795.

<sup>53</sup> Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (West Nyack NY: Cambridge UP, 2000 at 104) [Benhabib “Rights of Others”]. See also “The Law of Peoples, Distributive Justice, and Migrations” (2003) 72 *Fordham L Rev* 1761 at 1780. [Benhabib, “Law of Peoples”]

circumstances of nature or history; hospitality is a right which belongs to all human beings insofar as we view them as potential participants in a world republic.<sup>54</sup>

This said, the duty of hospitality was not an argument for open borders and Kant certainly did not contemplate it conveying the right of anyone to live anywhere for any length of time. What the duty granted, however, was the right of non-citizens to enter into a political community, the right not to be turned away if it would signify their destruction, the right to “associate” and, to extrapolate only somewhat, the right to be considered as a potential entrant into the polity. To Benhabib, then, the right of hospitality “occupies that space between human rights and civil rights” or put differently, between the rights enjoyed by all as individual moral agents and the rights that accrue specifically to citizens as members of republics.<sup>55</sup>

As noted above, Kant clearly qualified the right of sovereign states to turn foreigners away, particularly where to do so would cause that person’s destruction. Benhabib rightly points to this principle as being a precursor to the contemporary regime of international refugee protection and she sees the constraints that it places on sovereign states vis-à-vis the individual rights of non-citizens as a part of the “watershed” moment that Kant’s *Perpetual Peace* reflected. This moment marked the transition between two conceptions of sovereignty, between what she terms the old “Westphalian sovereignty” and the new “liberal international sovereignty”. In the classical Westphalian regime of sovereignty, Benhabib notes, states “enjoy ultimate authority over all objects and subjects” within their territory and they regarded “cross-border processes as a ‘private matter’ concerning only those immediately affected.”<sup>56</sup> By contrast, Benhabib continues,

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<sup>54</sup> Benhabib, *Rights of Others* at 26.

<sup>55</sup> *Ibid*, at 27.

<sup>56</sup> *Ibid* at 40, citing David Held, *Law of States, Law of Peoples: Three Models of Sovereignty*, 8 *Legal Theory* 1, 5 (2002). See also, Benhabib, *The Law of Peoples*, *supra* note 53 at 1786.

[I]n conceptions of liberal international sovereignty, the formal equality of states is increasingly dependent upon their subscribing to common values and principles such as the observance of human rights and the rule of law and respect for democratic self-determination. Sovereignty no longer means ultimate and arbitrary authority; states who treat their citizens in violation of certain norms, who close borders, prevent freedoms of market, speech and association and the like are thought not to belong within a specific society of states or alliances; the anchoring of domestic principles and institutions in principles shared with others like oneself becomes crucial.<sup>57</sup>

In this observation we can see a cosmopolitan conception of migrant rights begin to percolate through the western legal paradigm. Over 200 years after Kant's death, Benhabib certainly goes much further than Kant did in characterizing states' ethical and legal obligations toward non-citizens, but the Kantian balance between democratic processes rooted in the state and obligations toward foreigners can still be discerned. While Kant recognized an early form of asylum and temporary rights of sojourn, he nevertheless kept one foot planted in Westphalian sovereignty, recognizing the legal prerogative of the state not to extend such temporary sojourn to full membership.

By contrast, Benhabib argues that the "right to membership of the temporary resident must be viewed as a human right, which can be justified along the principles of a universalistic morality."<sup>58</sup> The terms and conditions under which long term membership can be granted remain the prerogative of the state, but even this prerogative is subject to human rights constraints such as non-discrimination and the right of the immigrant to due process.<sup>59</sup> In the chapters that follow, I will attempt to illustrate how, over the past decade, security procedures have been

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<sup>57</sup> *Ibid* at 41.

<sup>58</sup> *Ibid* at 42.

<sup>59</sup> *Ibid* at pp 42-43. This balancing of sovereign interests and human rights is precisely what Benhabib considers to be the "paradox of democratic legitimacy."

applied to non-citizens in a manner that defies these constraints and has replaced them with virtually untrammelled expressions of sovereign power.

But what is the source of these rights to which Benhabib refers? As I alluded to above, Benhabib (unlike Carens and similar to Walzer) views the existence of some form of boundaries as constitutive of democratic communities. “We the people” refers to a particular community and not to all people in all places. And moments will arise when the will of the people, on questions of entry for example, may be legitimate, in a democratic sense, but unjust. At the same time, modern democracies act in the name of universal principles which must constantly be “reactualized and renegotiated” *within* actual polities as “democratic intentions.” This tension, between the prerogative of the democratic state and universal human rights, Benhabib terms “the paradox of democratic legitimacy.”<sup>60</sup>

In this context, conversations about membership in the *demos* are always “flanked” by human rights concerns on the one side and commitments to sovereignty on the other.<sup>61</sup> While this paradox is integral to democracies, Benhabib argues that questions of membership can be renegotiated and reiterated. This is because the principle of popular sovereignty – “that those who are subject to the law are also its authors” – is not necessarily anchored to territorial sovereignty. Benhabib observes in this regard:

While the *demos*, as the popular sovereign, must assert control over a specific territorial domain, it can also engage in reflexive acts of self-constitution, whereby the boundaries of the *demos* can be readjusted. The politics of membership in the age of the disaggregation of citizenship rights is about negotiating the complexities

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<sup>60</sup> *Ibid* at pp 43-48.

<sup>61</sup> *Ibid* at 47.

of full membership rights, democratic voice, and territorial residence.<sup>62</sup>

The disaggregation to which Benhabib refers has arisen from globalization processes which have both frayed and complicated traditional notions of political membership. Notwithstanding this fraying, or perhaps because of it, Benhabib argues that democracies need to engage in acts of reinvention with the recognition that in today's world, more than ever, actions taken within the state have effects that reverberate around the world. Unlike Rawls, and indeed unlike other cosmopolitan theorists, Benhabib further argues that a theory of international justice cannot be confined to notions of just distribution on a global scale, but must also incorporate notions of *just membership*. This does not necessarily call for a world with no borders, but rather, for a world of "porous" borders.<sup>63</sup> The concept of porous borders again represents Benhabib's attempt at a conceptual midway point between open borders and absolute state prerogative in respect of migration. It calls for an openness to varied forms of political membership, such as municipal voting rights for non-citizens, and for a recognition of peoples' fluid and multiple allegiances in a globalized world.

In addition to porous borders, just membership requires recognizing the moral claim of refugees to first admittance; and, in a nod to Hannah Arendt, "the vindication of the right of every human being 'to have rights,' that is, to be a legal person, entitled to certain inalienable rights, regardless of the status of their

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<sup>62</sup> *Ibid* at 48. Other democratic theorists take a different view of the constitution of the *demos*. Abizadeh, for instance, argues that the "demos of democratic theory is in principle unbounded, and the regime of boundary control must consequently be democratically justified to foreigners as well as to citizens." This unbounded view of the *demos* then requires that the coercive exercise of political power be democratically justified to all those over whom it is exercised – both insiders and outsiders. Justification, put simply, is owed to all those subject to state coercion, see Arash Abizadeh, "Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders" (2008) 36 *Political Theory* 37.

<sup>63</sup> Benhabib, *Rights of Others*, *supra* note 53 at 3, 211.

political membership.”<sup>64</sup> Inclusion, furthermore, must be accommodated by practices that are “non-discriminatory in scope, transparent in formulation and execution, and justiciable when violated by states and other state-like organs.”<sup>65</sup>

Building on these neo-Kantian, cosmopolitan ideals, Benhabib turns to discourse ethics to further elaborate her position on questions of inclusion. The foundational principle upon which discourse ethics is structured (and against which other principles must be tested) is described by Habermas as follows: “only those norms and normative institutional arrangements are valid which can be agreed to by all concerned under special argumentation situations named discourses.”<sup>66</sup>

This “metanorm,” as Benhabib calls it, is in turn built on the presupposition of principles of “universal moral respect” and “egalitarian reciprocity.” She explains:

Universal respect means that we recognize the rights of all beings capable of speech and action to be participants in the moral conversation; the principle of egalitarian reciprocity, interpreted within the confines of discourse ethics, stipulates that in discourses each should have the same rights to various speech acts, to initiate new topics, and to ask for *justification* of the presuppositions of the conversations.<sup>67</sup>

Since discourse theory begins from a universalist moral standpoint, Benhabib continues, it cannot limit the scope of the moral conversation only to those who reside within bounded political communities. The moral conversation, or in Habermasian terms, the opportunity for communicative action, must extend to every person who has interests and who may be affected by the actions of others. In another passage worth reproducing, Benhabib elaborates on this ethical position:

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<sup>64</sup> *Ibid*, at 3.

<sup>65</sup> *Ibid*.

<sup>66</sup> *Ibid*, citing Jürgen Habermas *Moral Consciousness and Communicative Action*. Trans. by Christian Lenhardt and Shierry Weber Nicholsen (Cambridge Ma.: MIT Press, 1983, trans. ed. 1990).

<sup>67</sup> *Ibid* at 13, emphasis added.

I have a moral obligation to justify my actions with reasons to this individual or to the representatives of this being. I respect the moral worth of the other by recognizing that I must provide them with a justification for my actions. We are all potential participants in such conversations of justification.<sup>68</sup>

In other words, moral beings capable of engaging in a dialogue have a fundamental right to justification where their freedoms are being restricted. And such restrictions may only be imposed through “reciprocally and generally justifiable norms which apply equally to all.”<sup>69</sup> And it is at this point that we can see a parallel to the conclusions that Carens has also arrived at in his more recent writing. First, there is something of a convergence between Carens’ later position on (mostly open) borders and Benhabib’s argument for porous borders. Both conclude that borders should be permeable, but that certain forms of exclusions are permitted. This said, *all* exclusions must be justified through respect for fundamental rights and through processes of communicative action, dialogue and engagement.

As I explore in detail in Chapter Three, one basis for exclusion that cannot be easily justified, but which appears common in the migration-security realm is a disproportionate preoccupation in designating as security threats those who seek admission from conflict zones in the Global South.

And as I shall further explore in Chapter Four, theoretical approaches emphasizing justification and communication have helped to inspire another body of literature emanating from law scholars and social scientists on the role of discretion in administrative law. Recognizing the fundamental nature of the rights

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<sup>68</sup> *Ibid* at 14.

<sup>69</sup> *Ibid* at 133. While this assertion is certainly debatable from either a legal realist or a Rawlsian perspective, one again, I do not need to resolve this debate here, given the fact that I deal primarily in this study with the rights of asylum seekers and refugees, to whom states have voluntarily assumed at least a modicum of legal responsibility.

frequently at stake in administrative proceedings, this literature calls for an approach to decision-making that has communicative processes at its core. In the end, I assert that in combining a view of immigration in which acts of exclusion require justification with an approach to administrative law in which justification is derived from dialogue, a model for decision-making in the immigration-security setting can be created that would enhance both the legitimacy and fairness of the process.

For the time being, however, I move on to a discussion of how the conundrum of liberal democracies – the membership/equality conundrum – is closely tied to exceptional approaches to the regulation of migration, particularly where elements of security are added to the mix.

### **1.3 The Exception and the Rule of Law in Immigration and Security**

In the preceding section, I attempted to briefly sketch out the difficulty that liberal democracies have in conceptualizing the place of migration. Continuing on with this theme, in this section I will explore how these difficulties have crystallized in particular ways. First, I will turn to Catherine Dauvergne and her ideas on the “making of illegality.” More specifically, I will look at how Dauvergne’s views on globalization and liberalism suggest that exceptional approaches to decision-making in immigration-security matters are an entrenched feature of liberal states. I will also explore her prescription for this diagnosis, which calls for extricating the rule of law from its domestic home, and placing it into the realm of the global.

Following this, I will conclude by examining (through the work of David Dyzenhaus and his foil on this issue - Adrian Vermuele) the intersections between the rule of law and exceptional approaches to legality in times of perceived emergency. Again, the discussion will explore the issue of whether exceptional approaches and unchecked executive action are indeed endemic to liberal states



and, more specifically, to administrative decision-making, with specific reference to the immigration realm.

### ***1.3.1 Catherine Dauvergne and the Making of Illegality***

In the twenty years since Joseph Carens wrote that birth in a prosperous state is the modern equivalent of feudal privilege, his statement has become truer than ever as it travels through time to the cusp of a postmodern world. This truth comes from the shifting nature of sovereignty under the pressures of globalization, and from the resulting transformation in migration laws that undercuts the individual equality of liberal legalism with a rigid hierarchy of entitlement.<sup>70</sup>

Catherine Dauvergne has written extensively on the question of migration and liberal democracies, but it is not this body of work that I intend to focus on at the moment.<sup>71</sup> Rather, I turn to her more recent work on globalization, migration and illegality, though it must be acknowledged that, for reasons I will touch upon below, this work flows directly from Dauvergne's earlier conclusions on migration and the liberal state.<sup>72</sup>

Before delving into Dauvergne's observations on the security-migration nexus, it is important to explain in some detail the larger context in which these observations take place. Like Benhabib and Carens, Dauvergne's viewpoint is a cosmopolitan one and she also begins with the reminder that migration has long been a ubiquitous social force. But whereas Benhabib explores the ways in which studies in migration yield interesting insights into contemporary liberal democracies, Dauvergne's project in *Making People Illegal* is to explore the connections, and the interstices, between migration, globalization and the rule of law.

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<sup>70</sup> Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge UP 2008) [Dauvergne, *Making People Illegal*] at p. 169.

<sup>71</sup> See for example, Catherine Dauvergne, "Amorality and Humanitarianism in Immigration Law" (1999) 37 *Osgoode Hall L.J.* 597 [Dauvergne, "Amorality"].

<sup>72</sup> Dauvergne, *Making People Illegal*, *supra* note 70.

Dauvergne's central argument is that, as states have ceded more and more control over domestic policy to globalization processes, they have increasingly turned to migration laws as a "last bastion" of sovereign control.<sup>73</sup> To Dauvergne, this effort on the part of states to exert control, in one of the few remaining areas where they can still do so, is revealed in several different sites of contact between insiders and outsiders. Much of her work in *Making People Illegal* is in examining these sites of contact (or "core samples" as she calls them), which include labor migration, refugee law, human trafficking and smuggling, national security, and the nature of citizenship. These core samples, Dauvergne suggests, provide interesting raw material with which to explore the contours of globalization and law. To Dauvergne, globalization and the resulting "push-back" of states in the area of migration are largely responsible for the recasting of migration as an act of illegality, criminality and deviance.

Another central theme in *Making People Illegal* is precisely what is implied in its title – the manufacturing of illegality through law. "However it is defined," Dauvergne rightly suggests, "illegality is a creation of the law."<sup>74</sup> It is not, of course, a novel proposition to suggest that the act of defining that which is legal also (and simultaneously) defines that which is illegal. Notwithstanding the fact that migration laws have always created insider/outsider distinctions, Dauvergne suggests that legislative changes and political machinations over the past two decades have created a sharp edge of illegality to these distinctions. For a legal scholar such as Dauvergne, then, the question that emerges is whether law itself can be mobilized to help alleviate this illegality.<sup>75</sup>

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<sup>73</sup> Dauvergne, *Making People Illegal*, *supra* note 70 at 2.

<sup>74</sup> *Ibid* at 12.

<sup>75</sup> *Ibid*, at 37.

Her response to this question is a qualified and tentative “yes” but only under certain conditions. At the outset, she strongly asserts that neither domestic nor formal international legal mechanisms are up to the task. Drawing on the work of De Sousa Santos (though substantially diverging from it), Dauvergne sets out two main conditions for the realization of law’s “emancipatory potential.” First, the rule of law needs to be “unhinged” from its domestic sources and replaced by a sort of transnational version of the rule of law that is rooted in the global. And by global, Dauvergne does not mean international legal treaties or anything of the kind, but rather, a rule of law that emerges from “an existent ethics of a community of law.”<sup>76</sup> And this leads to the second condition, which is that gains will only be made upon a “thick” conception of the rule of law; a conception, in other words, of a rule of law based on principles of equality, freedom and impartiality that is “imbued with process rights so strong they form a platform of human dignity at the core of the law itself...”<sup>77</sup> Dauvergne states:

Here the question is raised of the potential of a thick version of the rule of law overlapping the boundaries of national legal systems. In recent transformations of migration laws, this emerges in my view as the sole location for the emancipatory potential. As I illustrate... an assessment of any progressive potential of migration law is discouraging from the perspectives of international law (especially international human rights law) and domestic law. But almost in the spaces between these texts, there is the hint of something else. This is what is so intriguing about exploring the globalization of law in this context. If what can be glimpsed here is a thick and unhinged...rule of law, we are indeed on the cusp of a paradigmatic shift in thinking about the law. If what is making this possible is a “regardful community of law,” a new faith may emerge.

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<sup>76</sup> *Ibid* at pp 39-41.

<sup>77</sup> *Ibid* at 37, 40.

According to Dauvergne, it is really only through basic principles of law, unhinged from the distorting pressures of domestic legal contexts, that a substantial rethinking of the illegalization of migration can occur. A globally situated rule of law would proceed, for example, on the presumption that the law and the protections contained within it apply to all persons. In the exceptional realm of migration law, this would already indicate a paradigmatic shift. It would also imply that all persons, regardless of their immigration status, would be entitled to certain basic rights, such as the right to be heard, a meaningful system of review and, presumably, the right to receive reasons for decisions that may have a fundamental impact on one's rights. Foreshadowing what will become a central theme of this dissertation, what would be required, in other words, is a process of justification in which the persons affected by a given decision would be communicatively engaged in the process.

But more fundamentally, what is this version of the rule of law of which Dauvergne speaks? This is a matter of some opacity in *Making People Illegal* and Dauvergne has been critiqued for failing to specify with precision what she means by the term.<sup>78</sup> It is clear that Dauvergne is referring to something more substantive than the narrow set of procedural rights afforded the undocumented in many receiving states, but is she simply calling for more procedure, for more “law measured by volume,” as she puts it or is there something more radical in her approach?<sup>79</sup>

Notwithstanding this lack of clarity, Dauvergne's globalization/migration thesis is an intriguing one, in part because it flows naturally from our earlier discussion on the place of migration in liberal states. Unlike Carens, Dauvergne is largely on board with Rawls and Walzer in her diagnosis of the relationship between migration and

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<sup>78</sup> Sean Rehaag, Book Review of *Making People Illegal: What Globalization Means for Migration and Law* by Catherine Dauvergne (2008) 46 Osgoode Hall LJ 871 at 875.

<sup>79</sup> Dauvergne, *Making People Illegal*, *supra* note 70 at p. 37.

liberal states – in essence, there is no necessary relationship.<sup>80</sup> To Dauvergne, the liberal state may very well be built on the foundational presupposition that “the borders to the community are, or at least can morally be, closed.”<sup>81</sup> And if, as Walzer suggests, the question of membership is a *prior* ideal to those of justice or equality then it is membership itself that becomes the “primary good that a community bestows.”<sup>82</sup> Closure therefore is the presumed starting point and any openings remain the prerogative of the community, a prerogative that is mediated in today’s world through migration law, though crucially, the rule of law is also implicated:

In order for the community to operate against an assumption of closed borders, there must be a way of closing them, of identifying who has a right to cross them, and of providing for enforcement of their closure. Although ultimately the coercive power of the state provides these things, it is the rule of law that legitimates them and makes them part of the liberal state.<sup>83</sup>

The result is that, by necessary implication, people are ‘made’ illegal. This said, while Dauvergne may share the views of classical liberal theorists on these points, she likely differs with them greatly on the prescription that follows the diagnosis. This is because, unlike the majority of classical liberal theorists, Dauvergne appears normatively uncomfortable with her observations and so she traverses global legal and political developments in search of a new source of law that, to her mind, would produce better, more just results. As a mere extension of domestic priorities, Dauvergne rejects international law (with the possible exception of refugee law) as a site of progressive potential. And this is why, in the end, we arrive back at

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<sup>80</sup> See Catherine Dauvergne, “Beyond Justice: The Consequences of Liberalism for Immigration Law,” (1997), 10 *Canadian Journal of Law and Jurisprudence* 323; and Catherine Dauvergne, *Amorality*, *supra* note 71.

<sup>81</sup> Dauvergne, *Making People Illegal*, *supra* note 70 at 46.

<sup>82</sup> *Ibid*, citing Walzer, *supra* note 33.

<sup>83</sup> Dauvergne, *Making People Illegal*, *supra* note 70.

Dauvergne's call for an unhinging of the rule of law from its domestic base and a grafting of it onto an ethical (and ethereal) community of law.

With all of this in mind, I turn (at last) to Dauvergne's examination of the connections between security and migration, though to do so I remain within the realm of liberal theory for another couple of moments. While Dauvergne suggests that community is prior to individual rights, it is security, or at least a desire for it, that both precedes and inspires the creation of community in the first place. This is, after all, at the very core of the liberal bargain:

The classic bargain of the liberal state is that between the perils of individuated life without the protection of a collectivity on the one hand and loss of individual liberty to the state on the other. Whether this balance involves an abject state of nature and a Leviathan, a social contract, or an original position, its basic structure is the same. The fulcrum of this balance is security – staying safe is the reason for the trade, constituting a community is the result. As a central construct of the liberal state, this balancing act is replicated in diverse settings. Contemporary contestation of security and migration is a key illustration.<sup>84</sup>

Given her premise that security and (bounded) communities form two of the pillars of the modern liberal state, it is not surprising that Dauvergne begins her analysis of migration and security with the uncontroversial observation that the two have essentially always been paired together. Others have made, and provided a critique of, the same observation. Elspeth Guild, for example, suggests that undocumented migrants are deemed security threats not because they pose an individualized threat to citizens of the host country, but because “the remit of the state is reconfigured,” that is, migrants are deemed a threat because they call into question the sanctity of the state as the central superstructure organizing human

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<sup>84</sup> *Ibid* at 103.

relations.<sup>85</sup> It is also because migration and security are viewed as threats to the liberal way of being that state responses to them have tended towards the exceptional. Dauvergne continues:

In the migration realm, security is more easily understood in the terms of newer constructivist and critical scholarship that tell us that when something is a security issue, both threat and exceptional politics are to be expected. These newer understandings of security focus on how states, nations, peoples, or others come to understand something as an important threat to their existence or way of being. In response to this threat, they are then prepared to take actions that are in some way extraordinary, suspending, or circumventing what counts as “normal” decision making. “Normal” involves the rule of law; when one is jettisoned, the other often goes with it. This way of understanding security issues helps us make sense of reactions that would seem nonsensical without the elements of both threat and exception.<sup>86</sup>

It can fairly be said that one of Dauvergne’s central objectives in her writing on migration and security is to unsettle the relationship between the two. That she views the relationship between security and migration as tenuous is immediately apparent; the chapter on security begins with a description of the calls for immigration reform that followed the 2005 London terrorist bombings, notwithstanding the fact that it was British citizens, born and raised, who planned and executed the attacks. Dauvergne is certainly not alone in this endeavour. As noted above, Elspeth Guild devotes considerable attention to debunking the

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<sup>85</sup> Elspeth Guild, *Security and Migration in the 21st Century* (Cambridge: Polity, 2009) [Guild, Security and Migration] at 3.

<sup>86</sup> Dauvergne, *Making People Illegal*, *supra* note 70 at 94.

security-migration nexus in her work.<sup>87</sup> It is also central to the scholarship of Canadian scholar Sharryn Aiken, who notes that:

Numerous studies confirm that the overall impact of refugee flows on the crime rate and internal security of receiving countries tends to be misjudged and overestimated. In Canada refugees and immigrants are actually less likely to commit major crimes than the native-born, and are under-represented in the national prison population. Nevertheless, in both Canada and the United States, refugees and immigrants have been criminalized and "securitized" in efforts to assuage conditions of turmoil and anxiety.<sup>88</sup>

Notwithstanding the long, if dubious, pedigree of the security-migration nexus, Dauvergne points to an increasing tendency to cast migration as a security issue throughout the 1990's, followed by a profoundly sharpened focus on such tactics following the terrorist attacks on the United States in September, 2001. Dauvergne identifies three of the ways in which the immigration landscape has changed since 9/11. First, and most important for our purposes, Dauvergne rightly notes that the past decade has witnessed a dramatic increase in the use of discretionary measures that the executive has at its disposal to regulate migration.<sup>89</sup> Such measures provide the executive (often, but not always through decision-makers) a margin of manoeuvre within which to operate and are relatively manipulable because of the broad statutory language in which they are frequently couched.<sup>90</sup>

The consequence is that security measures can be quickly ratcheted up to respond to perceived threats, even in the absence of legislative change.<sup>91</sup> The

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<sup>87</sup> Guild, Security and Migration, *supra* note 85.

<sup>88</sup> Sharryn J Aiken, "Of Gods and Monsters: National Security and Canadian Refugee Policy" (2001) 14 *Rev Quebecoise Droit Int* 1 at 3.

<sup>89</sup> *Ibid* at 96.

<sup>90</sup> I borrow language here from the decision of the Supreme Court of Canada in *Baker v Canada (MCI)*, [1999] 2 S.C.R. 817, at para. 53.

<sup>91</sup> See below, Chapter 4, section 4.5.



concentration of power within the executive is a common, if not natural, tendency in times of danger – it represents a shift in the balance of the classic bargain referred to above – more security in the form of unchecked executive power, but less freedom. There has been an explosion of commentary on these exceptional approaches to decision-making in matters that touch on security and I will explore at least one stream of it in greater detail below, in the writing of David Dyzenhaus.

The second change that Dauvergne identifies is the creation of new specialized government agencies that have, as their very *raison d'être*, the security-migration nexus. As examples of this phenomenon, she points to the fact that the United States Immigration and Naturalization Service was “swallowed whole” by the Department of Homeland Security and the creation in Canada of the Canada Border Services Agency (CBSA), under the auspices of the Minister for Public Safety and Emergency Preparedness.<sup>92</sup>

In a very tangible way, these organizational changes serve to embed the connection between security, public safety and immigration. But the changes have much more than just a symbolic importance. As Dauvergne notes, they also have the effect of moving government decision-making on many immigration matters into an organizational structure with a “differing governing ethos” – an ethos, that is, of enforcement and security.<sup>93</sup> Agencies such as the CBSA do not foster inclusion; on the contrary, one might view inclusion as the very antithesis of their *raison d'être*. Where they are involved in decision-making, therefore, they operate within an organizational ethos in which removal is the end-game of immigration. They are, I

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<sup>92</sup> Dauvergne, *Making People Illegal*, *supra* note 70 at p.p. 96-97.

<sup>93</sup> *Ibid.* Once again, this observation is of central relevance to my further dissertation work, as the discretionary decisions to which I earlier referred are made by delegates of the minister with the enforcement mandate – The Minister of Public Safety and Emergency Preparedness.

think Dauvergne would agree, the embodiment of what she views as the liberal presumption against open borders.<sup>94</sup>

The final change that Dauvergne identifies is the increasing cooperation and information sharing amongst Western states in matters of both immigration control and security. In making this observation, Dauvergne relies heavily on the nascent security studies discipline, and particularly on the so-called “Copenhagen School,” which is commonly credited for coining the term “securitization.” The Copenhagen School espouses the idea that security is not an objective fact, but rather a “speech act” aimed at moving a topic away from the political (and the legal) and into the domain of the exceptional: “Traditionally, by saying ‘security,’ a state representative declares an emergency condition, thus claiming a right to use whatever means are necessary to block a threatening development.”<sup>95</sup> Dauvergne describes the approach as follows:

This [call for greater government intelligence gathering and information sharing] corresponds well with the Copenhagen School’s analysis of the “grammar” of a security speech act: a plot with an external threat, a point of no return, a possible way out. It is the notion of a way out that makes the speech act a call for securitization. This way out means that there is something that can address the threat provided the actors involved are willing to move beyond the limits of normal politics. Without the possibility of a way out,

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<sup>94</sup> The notion that the character, evolution and sociology of institutions play an important role in decision-making is well developed in the literature, particular that relating to New Institutionalism. See, for example, K O Hawkins, *Law as last resort: prosecution decision-making in a regulatory agency* (Oxford: Oxford University Press 2002); Mary Brinton and Victor Nee, *The New Institutionalism in Sociology* (New York: Russell Sage, 1990); and in the specific context of immigration law see Mariano-Florentino Cuéllar, “The Political Economies of Immigration Law” (2012) 2 UC Irvine LR 1. While exploring the sociology of the CBSA as a decision-making institution would certainly be illuminating, I do not explore it in detail here, primarily because of the difficulties in accessing institutional players that I earlier described.

<sup>95</sup> See Barry Buzan, Ole Waever and Jaap de Wilde, *Security: A New Framework for Analysis* (London: Boulder, 1998) at 21, 33 [Buzan, “Security”].

there is no securitization because there is no call to action.<sup>96</sup>

In further adopting and adapting the Copenhagen approach, Dauvergne next moves onto a phenomenon she terms “fact-resistance.”<sup>97</sup> She uses the term to indicate a state of being whereby once something (or someone) has been identified as a security threat and transported into the realm of the exceptional, facts take on an ever-diminishing importance. In the language of the Copenhagen School, this is an example of the “intersubjectivity” of the securitization process. As mentioned above, securitization in this approach is not a question of an objective threat, but nor is it merely a subjective perception of risk. It is, rather, a public act of acquiescence to the language of security.<sup>98</sup> Once something, such as migration, has successfully been cast as a security issue, fact-resistance kicks in, analysis stops, scrutiny turns off like a light, and exceptional expressions of executive power come in through the dark.

Closely connected to fact-resistance is the racialization and “othering” of the security setting. Dauvergne suggests that an image of “foreign-ness” is central to the security narrative; it provides a clear, if inaccurate, reason for attacks and provides the (at least illusory) comfort in knowing who the threats are.<sup>99</sup> One of the central findings of the empirical investigations that I have undertaken (outlined in detail in Chapter Two) is that while security-migration legislation is broad enough to capture enormous swaths of people from many (including Western) countries, the actual cohort of those subjected to inadmissibility determinations represents a far narrower set of countries. This fact would appear to bear out the “othering” process of which Dauvergne speaks.

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<sup>96</sup> Dauvergne, *Making People Illegal*, *supra* note 70 at 98, n. 16, citing Buzan, *Security*, *supra* note 94 at 33.

<sup>97</sup> Dauvergne, *Making People Illegal*, *supra* note 70 at 99.

<sup>98</sup> Buzan, *Security*, *supra* note 95 at 25.

<sup>99</sup> Dauvergne, *Making People Illegal*, *supra* note 70 at 101.

After reviewing the ways in which the migration-security nexus has played out in the jurisprudence of several states, Dauvergne moves on to several concluding observations, two of which are worth mentioning here. The first flows from another observation of the Copenhagen School, that the securitization of migration has become, in large measure, normalized, which in turn causes the exceptional approaches of the security setting to become normal. Channelling Giorgio Agamben, Dauvergne suggests that this state of exception means that it is “more and more normal to treat migration, particularly of asylum seekers, as a policing matter rather than a question of economic redistribution, social composition, or humanitarianism.”<sup>100</sup> And indeed, since *Making People Illegal* was published, we have seen, at least within the Canadian context, a striking increase in exceptional and enforcement-minded approaches to migration.

When the exceptional becomes normal and the normal exceptional, Agamben has (now famously) observed that examples of “bare life” can be expected to emerge.<sup>101</sup> While Agamben’s prototypical example of bare life is that which existed inside the concentration camps and his contemporary example is Guantánamo Bay, other less extreme examples of bare life can emerge from the exceptional practices of the executive, one of which, I assert, is the indefinite and potentially unwarranted state of limbo experienced by those labelled as security threats.<sup>102</sup>

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<sup>100</sup> *Ibid* at 113-114.

<sup>101</sup> See generally, Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford U.P., 1998); Giorgio Agamben, *State of Exception* (Chicago: U. Chicago P., 2005).

<sup>102</sup> As I believe will become apparent in the coming chapters, the near permanent state of limbo that arises for many refugees and asylum seekers subject to the security inadmissibility process results in precisely the kind of ‘bare life’ scenarios described by Agamben. One articulate illustration of this can be found in a report I co-authored for the Canadian Council for Refugees, *From Liberation to Limbo: A Report on the Impact of Immigration Security Inadmissibility Provisions on the Eritrean Communities in Canada, and Recommendations for Reform*, (Canadian Council for Refugees, 2010) accessed at <http://ccrweb.ca/en/liberation-limbo-0> on June 7, 2012.

The second of Dauvergne's concluding observations relates to the rule of law, and the marginalization of law, in the exceptional politics of security. Security politics, Dauvergne suggests, "thrive on exception, the defined antithesis of the rule of law."<sup>103</sup> Clearly Dauvergne is of the view that the pendulum has swung too far in the direction of security and that the classic tradeoff between rights and security needs to be recalibrated. The question is how to reel back the "jettisoned" rule of law and the answer, to Dauvergne, is to find its source in a location other than that which shed it in the first place – the state.

While I find much of value in Dauvergne's engaging analysis, I hesitate to accept entirely the determinism of her claims regarding the nature of the liberal state vis-à-vis outsiders. The empirical validity of her observations on the securitization of migration and the resort to exceptional policies is unassailable; and whether or not exclusion is inherent to liberal communities, they have certainly *acted* as if this were the case throughout much of recent history. This said, where I differ with Dauvergne is in the degree to which the exception is ordained. In this respect, I agree with Jeremy Webber who, in a critique of Agamben, provides:

Agamben's is not my argument. His theory carries with it a structural determinism that I do not accept, creating the reciprocal relation of exception and insider as universal, engrained within the logic of the state. In doing so it lets our governments off the hook. States do define themselves in significant measure through their policies on membership, including their immigration and refugee policies. But Agamben's presumption that the definition necessarily involves stark differentiation between those within the sphere of the state's concern and those without is excessively Manichean. Nor is it borne out in practice, where even those states that seek to establish hermetic boundaries find themselves drawn into broader spheres of interaction, many states interact more positively with their would-be entrants,

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<sup>103</sup> Dauvergne, *Making People Illegal*, *supra* note 70 at 115.

and within the Australian context in particular many individuals advocated a very different role for law. States sometimes do pursue policies that seek to establish their identity against a demonized and rigorously excluded other. If that is the aim, asylum seekers are easy targets, unable to fight back. States sometimes embrace executive action and dismantle legal constraints in their rush to confront that other. They embrace, in other words, both a Schmittian tendency to create clear enemies and a Schmittian constitutional ethos. But neither is necessary. Neither should be able to rely on our acquiescence.<sup>104</sup>

What resonates most to me about the above passage is Webber's refusal to accept the membership/equality conundrum as a stark either-or proposition, but rather as a site of tension and negotiation within the liberal state. President Barack Obama's recent decision to halt deportations of young, long term illegal residents is one, albeit minor, example of the nuance and complexity of executive action.<sup>105</sup> Dauvergne would likely suggest that this measure represents itself a legally exceptional measure intended to counteract the most troubling aspects of a legally exceptional immigration regime. While this may be true on some level, it is at the same time an expression of the view that at least some non-citizens have certain moral (if not legal) claims that are difficult to ignore.<sup>106</sup>

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<sup>104</sup> Jeremy Webber, "National Sovereignty, Migration and the Tenuous Hold of International Legality: The Resurfacing (and Resubmersion?) of Carl Schmitt" in Oliver Schmidtke (ed.) *Of States, Rights, and Social Closure: Governing Migration and Citizenship* (New York: Palgrave Macmillan, 2008) at p.p.69-70.

<sup>105</sup> Of interest, the issue of amnesty has recently been taken up by Joseph Carens, who argues that, even conceding that states have a right to control their borders, the right to deport those without status does not extend to long term residents who, by virtue of their social membership in the liberal community, have obtained a moral claim to stay: see Joseph Carens, *Immigrants and the Right to Stay* (Cambridge, Mass.: MIT Press, 2010).

<sup>106</sup> See Memorandum from Janet Napolitano, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (4 July, 2012), online: <<http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

There may always be a temptation for the executive to descend into the realm of the exceptional, but the descent can be averted and restraint is possible. David Dyzenhaus has wrestled precisely with these issues and I turn now to something of a debate between him and Harvard professor Adrian Vermeule on the role of law, administration and the judiciary in responding to exceptional executive action.

### ***1.3.2 Black and White and Read All Over – David Dyzenhaus and Legal Grey Holes***

What we have is the growth of governmental power, so that law becomes the vehicle by which the government delegates back to itself the power to make policy for which it will be accountable only at the next election. Rather than legislative supremacy, we have executive supremacy.<sup>107</sup>

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.<sup>108</sup>

I believe I am on firm ground in stating that both David Dyzenhaus and Catherine Dauvergne call for a legal regime based on a thicker version of the rule of law, and that judges have an important role to play in this project. This being said, they differ significantly on the avenues by which this version of the rule of law may

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<sup>107</sup> David Dyzenhaus, “Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security” (2003) 28 Aust J Leg Philos 1.

<sup>108</sup> Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) at 425.

come about. They have the same destination in mind, if you will, but they disagree fundamentally on the questions of where we are and how to get there.

As noted above, Dauvergne is of the view that matters of migration are beyond the borders of what the liberal state can contemplate. This being the case, any domestic conception of the rule of law cannot, at least in any sustained way, be counted upon to benefit non-citizens, particularly where matters of security are involved. As a result, Dauvergne argues that the rule of law must be extricated from its domestic source, and placed into the realm of a global community of law.

While Dyzenhaus does not focus on migration, he has written extensively about the rule of law, executive authority and administrative law and his views on these subjects can quite easily be grafted onto the migration context. In short, Dyzenhaus is *not* of the view that exceptional approaches are inherent to liberal states, but rather, where they arise, they represent “embedded mistakes” in the legal order.<sup>109</sup> The goal for Dyzenhaus then, is not to situate the rule of law elsewhere, but to use the law in an attempt to correct the mistake. In Dyzenhaus’ words, the aim is to “banish the exception from the legal order.”<sup>110</sup>

The last decade has witnessed a remarkable, if somewhat off-putting renaissance. Since the events of September 11, 2001, and more particularly since states responded to the terrorist attacks of that date, there has been a renewed interest in the writing of the Nazi legal theorist Carl Schmitt. The interest arises from Schmitt’s commentary on how states respond to perceived emergency situations and his views continue to be a polarizing phenomenon. In both “Schmitt

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<sup>109</sup> David Dyzenhaus, “Schmitt v. Dicey: Are States of Emergency inside or outside the Legal Order” (2005) 27 *Cardozo L Rev* 2005 at 2035 [Dyzenhaus, “Schmitt v. Dicey”], citing terminology developed by Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard UP, 1978) at 81, 121-22. See also David Dyzenhaus, *The Constitution of Law: Legality In a Time of Emergency* (New York: Cambridge UP, 2006) [Dyzenhaus, “Constitution of Law”].

<sup>110</sup> *Dyzenhaus, Schmitt v. Dicey, ibid* at 2029.



v. Dicey”, an article published in the *Cardozo Law Review*, and his later work, “The Constitution of Law: Legality In a Time of Emergency,” Dyzenhaus takes up the challenge of addressing and unseating the Schmittian perspective on legality in times of emergency. Schmitt’s perspective is neatly conveyed in what is undoubtedly the most cited line from his body of work: “Sovereign is he who decides on the exception.”<sup>111</sup> Shortly after this remark, Schmitt further elaborates on its meaning:

There exists no norm that is applicable to chaos. For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists...All law is “situational law.” The sovereign produces and guarantees the situation in its totality. He has the monopoly over this last decision. Therein resides the essence of the state’s sovereignty, which must be juristically defined correctly, not as the monopoly to coerce or to rule, but as the monopoly to decide. The exception reveals most clearly the essence of the state’s authority. The decision parts here from the legal norm, and (to formulate it paradoxically) authority proves that to produce law it need not be based on law.<sup>112</sup>

Perhaps the central idea in Schmitt’s writing is the inherent contradiction that he saw in the notion, common in constitutional democracies, that states of emergency – the suspension of law – can be brought about *by* law. To Schmitt, this view is not only something of a logical fallacy, but it also represents a fundamental misapprehension of the fact that political authority is not ultimately constituted by law; it is prior to law. The source of sovereign authority, in other words, comes from outside of the legal order.<sup>113</sup> Moreover, the legal order itself, or at least the

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<sup>111</sup> Carl Schmitt, *Political Theology: Four Chapters On The Concept Of Sovereignty* (George Schwab Trans., 1985) (1922) at 1.

<sup>112</sup> *Ibid* at 13.

<sup>113</sup> Dyzenhaus, *Schmitt v. Dicey*, *supra* note 109 at p. 2007. It is important to recall that Schmitt’s conception of the sovereign is, quite literally, “he who decides.” As this is the only important

application of it, is based on a sovereign decision and not on a legal norm. In this structure, argued Schmitt, the state retains the power necessary to act decisively in times of existential crisis, in part because it gets to decide when such crises arise and recede. Legal norms are well and good in normal times, but in emergencies, the sovereign must have the capacity to act in an unfettered manner and need not find authority to do so from the law. All law is situational law. More to the point, the *existence* of law is contingent on the will of the sovereign, for in times of emergency, the polity becomes a lawless space, a legal black hole, of which Guantanamo Bay is the most prominent current example.<sup>114</sup>

While Dyzenhaus takes issue with the term “black hole” – he prefers “a space beyond law” – he nevertheless coins a similar term to describe a parallel phenomenon, “legal grey holes.” Unlike legal black holes, which explicitly operate in a realm in which the rule of law is eviscerated, legal grey holes are much more common and they arise in subtler circumstances. A legal grey hole involves the use of a veneer of legality to cover over what is, in reality, a draconian act of executive power. Veneer is an apt analogy here, for the rule of law principles that are used to justify such grey holes are remarkably thin. In this scenario, it is not in fact rule *of* law that governs, but rather, rule *by* law. The difference, to Dyzenhaus, is crucial: “rule of law” is a substantive framework of norms that serve to constrain executive action. Rule by law, by contrast, implies a thin conception of the rule of law, one which permits grey holes to arise. Dyzenhaus describes grey holes in this way:

While it is relatively rare to find a position that articulates so stark a view, it is quite common to find positions that are comfortable with grey holes, as long as these are properly created. A grey hole is a legal

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definitional feature of the sovereign, it can take on many different forms: dictator, president and executive being the first to come to mind.

<sup>114</sup> In describing American responses to 9/11, Johan Steyn is generally thought to have coined the term “legal black hole,” see Johan Steyn, “Guantanamo Bay: The Legal Black Hole” (2004) 53 Int’l & Comp LQ 1.

space in which there are some legal constraints on executive action-it is not a lawless void-but the constraints are so insubstantial that they pretty well permit government to do as it pleases. And since such grey holes permit government to have its cake and eat it too, to seem to be governing not only by law but in accordance with the rule of law, they and their endorsement by judges and academics might be even more dangerous from the perspective of the substantive conception of the rule of law than true black holes.<sup>115</sup>

Dyzenhaus' description of the difference between black and grey holes is reminiscent of the way that many people describe the difference between Jim Crow era racial segregation and the lingering, though hidden from view racism that persists: less overt, but more insidious and probably harder to eliminate. In another passage worth citing directly, Dyzenhaus notes

Another way of making my point is to say that grey holes are more harmful to the rule of law than black holes. As I have indicated, a grey hole is a space in which the detainee has some procedural rights but not rights sufficient for him effectively to contest the executive's case for his detention. It is in substance a legal black hole, but it is worse because the procedural rights available to the detainee cloak the lack of substance. It is of course a delicate matter to decide when the blackness shades through grey into something that provides a detainee with adequate rule of law protection-when, that is, on the continuum of legality, the void ceases to be such. But for the moment I want simply to establish that minimalism is too close to the black hole end of the continuum for comfort. A little bit of legality can be more lethal to the rule of law than none.<sup>116</sup>

It is my suspicion that much of migration law in Western states, and particularly that which relates to security concerns, takes place within legal grey holes. Few

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<sup>115</sup> Dyzenhaus, *Schmitt v. Dickey*, *supra* note 109 at 2018.

<sup>116</sup> *Ibid* at 2026.

would argue that migrants within Western states have *no* legal rights. This said, the legal rights that are granted to non-citizens tilt to the thin end of the spectrum, often being confined to the most basic of procedural rights. And even these rights tend to be minimal: participatory rights are circumscribed, appellate rights are limited and access to legal representation is, at best, scattershot.

As with Jeremy Webber, Dyzenhaus does not deny that both black and grey legal holes can arise, but he does reject the notion, Schmitt's notion, that they are structurally determined. In doing so, he looks to the work of three of the most influential legal scholars of the past 100 years: A.V. Dicey's treatises on the rule of law, Lon Fuller's writing on the inner morality of law and Hans Kelsen's Identity Thesis: the thesis that the state is totally constituted by law.

According to Dyzenhaus, a (slightly modified) Diceyan conception of the rule of law responds directly to the two-pronged challenge posed by Schmitt – first, the courts must retain the authority to decide whether the government has a justified claim that there is an emergency; and second, the courts must also assess whether the actual responses to the emergency are legal.<sup>117</sup> In other words, Dyzenhaus argues that law must retain a role during exceptional times, and that the rule of law should be understood as “a rule of fundamental constitutional principles which protect individuals from arbitrary action by the state.”<sup>118</sup>

What about constitutionally authorized emergency clauses? Dyzenhaus suggests that the existence of such clauses is an unnecessary concession to Schmitt, even if one maintains that derogations from the rule of law under emergency situations

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<sup>117</sup> *Ibid*, at 2029.

<sup>118</sup> Dyzenhaus, *Constitution of Law*, supra note 109 at 2.

must be justified under a parallel legal order.<sup>119</sup> Indeed, at the very centre of Dyzenhaus' understanding of the rule of law is the notion that legal order is unitary, admitting of no parallel or exceptional circumstances. And this is where Dyzenhaus refers to Hans Kelsen's identity thesis:

According to that thesis, when a political entity acts outside of the law, its acts can no longer be attributed to the state and so they have no authority. Dicey, on my understanding, subscribes to the same thesis, and differs from Kelsen only in that he clearly takes the claim that the state is constituted by law to mean that the law that constitutes the state and its authority includes the principles of the rule of law. This has the result that a political entity acts as a state when and only when its acts comply with the rule of law. There will of course be thicker and thinner versions of the Identity Thesis, and Dicey's is much thicker, or more substantive, than Kelsen's.<sup>120</sup>

If Dicey and Kelsen help to establish that all executive actions, even those taken in the most dire of circumstances, must be subjected to the rule of law, it is Lon Fuller who assists Dyzenhaus in providing thick substantive content to those rule of law principles. To Fuller (and Dyzenhaus) the rule of law is more than mere compliance with whatever duly enacted positive laws there happen to be; in Dyzenhaus' words, this would be "rule by law." By contrast, the rule of law under Fullerian principles imposes substantive requirements on laws to be recognized as such; laws, in other words, must comport with a broader set of principles of legality, which Fuller set out in his seminal *The Morality of Law*.<sup>121</sup>

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<sup>119</sup> This is the "dualist" approach that Dyzenhaus associates with John Ferejohn and Pasquale Pasquino in "The Law of the Exception: A Typology of Emergency Powers (2004) 2 Int'l J Const L 210 at 239.

<sup>120</sup> Dyzenhaus, *Schmitt v. Dicey*, supra note 109 at 2010, citing Hans Kelsen, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law* translated by Stanley L. Paulson & Bonnie Litschewski-Paulson (Cambridge: Clarendon, 1992) at 97-106.

<sup>121</sup> Lon Fuller, *The Morality of Law*, revised ed. (New Haven: Yale University Press, 1969).

While beyond the scope of what I intend to undertake in this study, Fuller's principles of legality provide that laws must be: (1) sufficiently general; (2) publicly promulgated; (3) sufficiently prospective; (4) clear and intelligible; (5) free of contradiction; (6) sufficiently constant through time so that individuals can order their behavior accordingly; (7) not impossible to comply with; and (8) administered in a way sufficiently congruent with their wording so that individuals can abide by them. In the chapters that follow, I will seek to demonstrate that the security-migration scheme has failed to comply with these basic principles of legality, but for now I simply flag them as an integral part of Dyzenhaus' approach to banning exceptional practices from the legal order.

Another important principle that arises in Dyzenhaus' work is one that has woven itself throughout this brief review of the literature – that of justification. According to Dyzenhaus, a Diceyan interpretation of the rule of law, as applied to emergency situations, is sufficiently flexible to permit officials to respond to emergencies, but also requires them to “justify to an independent tribunal their decisions as both necessary and made in good faith.”<sup>122</sup> The tribunal proceedings must be independent and must take place on a full evidentiary record, and in proceedings involving a perceived security threat, the onus of establishing that an individual does pose such a threat must lie with the state. These measures, undertaken within the context of a robust conception of the rule of law, achieve a dual goal – they provide a statutory basis for official decisions and, perhaps more importantly, they ensure that decisions are made in a “spirit of legality.”<sup>123</sup>

The effect of this requirement for justification is that it provides decision-makers with a basis on which to evaluate the legitimacy of government action and

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<sup>122</sup> Dyzenhaus, *Schmitt v. Dicey*, *supra* note 109 at 2034.

<sup>123</sup> *Ibid* at 2034.

carries with it the potential to limit the harmful effects of legal grey holes. At the very least, it enables the judiciary to bring legal grey holes into the light of day:

And to the extent that holes created by statute are grey rather than black, judges, as long as they are not minimalists, can use the legal protections provided as a basis for trying to reduce official arbitrariness to the greatest extent possible. In doing so, they challenge the government either to make clearer its intention that detainees should be placed outside the protection of the law or to come up with some better way of fulfilling its claim to be committed to the rule of law.<sup>124</sup>

Elsewhere, Dyzenhaus has elaborated more fully on the role of justification in his conception of the rule of law, most notably in commenting on the work (both judicial and academic) of the late South African jurist Etienne Mureinik. Dyzenhaus, also a South African, was deeply influenced by Mureinik and, presumably, by the experience of growing up in a place defined by the most notorious of executive abuses. In adopting much of what Mureinik called for during Apartheid, Dyzenhaus argues that the “the constraints of legality are the constraints of adequate justification.”<sup>125</sup> The rule of law requires that public officials provide reasons for their actions, even during emergencies, and these reasons must be consistent with the fundamental principles of legal order.<sup>126</sup> Mureinik himself put it this way:

If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification - a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its

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<sup>124</sup> *Ibid* at 2034.

<sup>125</sup> David Dyzenhaus, “Law as Justification: Etienne Mureinik’s Conception of Legal Culture” (1998) 14 *South Afr J Hum Rights* 11 at 30.

<sup>126</sup> *Ibid* at 30.

command. The new order must be a community built on persuasion, not coercion.<sup>127</sup>

A culture of justification is a discursive culture, one based on the exchange of ideas, arguments and persuasions. In Chapter Four, I will elaborate on what this means in the migration-security context, but in brief, I suggest that a culture of justification requires that dialogue take place between government officials and those who are affected by their decisions. To borrow from Lorne Sossin, this in turn means that that such dialogue must take place in a manner in which all parties are “equally empowered to be persuasive,” so that decision-makers are motivated “by the force of a better argument,” rather than the whims of the executive.<sup>128</sup>

With this in mind, I now turn very briefly to criticism of Dyzenhaus’ approach, as articulated by Adrian Vermeule.

### ***1.3.3 Adrian Vermuele and Administrative Law – Inherently Schmittian?***

I look to the approach of Adrian Vermuele, not because I adopt it as my own, but because Vermuele responds to Dyzenhaus’ effort to “banish the exception from the legal order” in the specific context of administrative law, which is of course highly relevant to immigration matters. According to Vermuele, administrative law is structurally riddled with processes, practices and decisions that either explicitly or implicitly exempt the executive from legal constraints; that create, in other words, legal black and grey holes. These exceptional approaches cannot, realistically at least, be banished from administrative law as “they are necessarily built into its

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<sup>127</sup> *Ibid* at 11, citing E. Mureinik, “A Bridge to Where? Introducing the Interim Bill of Rights” (1994) 10 S Afr J on Hum Rts 31 at 32.

<sup>128</sup> Lorne Sossin, “The Politics of Discretion: Towards a Critical Theory of Public Administration” 36 Can Public Adm 364 at 379, citing Seyla Benhabib, *Critique, Norm and Utopia: A Study of the Foundations of Critical Theory* (New York: Columbia University Press, 1986) at 286.



fabric.”<sup>129</sup> This being the case, efforts to extend legality to eliminate these black and grey holes – what Dyzenhaus refers to as the rule of law project – are both impracticable and “hopelessly utopian.”<sup>130</sup>

Ironically, one person who may have agreed with Vermuele was the very person who Dyzenhaus enlists in support of his argument for the banning of the exception – A.V. Dicey. Dicey was notoriously suspicious of administrative law as a true form of law given its proximity to the executive, and while he certainly did not use the language of black and grey holes, his concern was clearly that such phenomena would arise under an administrative regime.<sup>131</sup>

Vermuele’s view of administrative law as inherently Schmittian is, in many respects, an empirical one. His conclusions rest on numerous examples in which legally exceptional approaches have been taken in the administrative realm, and takes these examples as proof-positive that such exceptions are inevitable. His proposition is essentially that because black and grey holes have existed, they must inevitably exist. The examples he provides of “law-free zones” and “sham review” are “themselves the facts to be established” and their mere existence is sufficient to establish that administrative law is “substantially Schmittian.”<sup>132</sup>

One of the main reasons why such exceptions have existed and always will exist is, according to Vermuele, because of the inherently unpredictable nature of

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<sup>129</sup> Adrian Vermeule, “Our Schmittian Administrative Law” (2008) 122 Harv L Rev 1096 at 1104.

<sup>130</sup> *Ibid* at 1097.

<sup>131</sup> Dyzenhaus explicitly contemplated this fact: “He [Dicey] thought that the administrative state is an affront to the rule of law precisely because a state in which officials are given vast discretionary powers to implement legislative programs necessarily places such officials beyond the reach of the rule of law. Put more generally, Dicey was deeply opposed to the administrative state.” (Dyzenhaus, Schmitt v. Dicey, *supra* note 109 at p.2034). This said, Dyzenhaus does not confront this potential contradiction in any significant detail. For further on Dicey and administrative law, see below at 4.2.1.

<sup>132</sup> Vermuele, Our Schmittian Administrative Law, *supra* note 129 at 1107.

emergency situations and the unwillingness of legislatures to bind the hands of the executive in responding to the unexpected. Vermeule states in this regard:

Emergencies cannot realistically be governed by ex ante, highly specified rules, but at most by vague ex post standards; it is beyond the institutional capacity of lawmakers to specify and allocate emergency powers in all future contingencies; practically speaking, legislators in particular will feel enormous pressure to create vague standards and escape hatches - for emergencies and otherwise - in the code of legal procedure that governs the mine run of ordinary cases in the administrative state, because legislators know they cannot subject the massively diverse body of administrative entities to tightly specified rules, and because they fear the consequences of lashing the executive too tightly to the mast in future emergencies. As we will see, all of these institutional features are central to our administrative law, and they create the preconditions for the emergence of the legal black holes and legal grey holes that are integral to its structure.<sup>133</sup>

As Scheureman intimates, however, the fact that law cannot necessarily predict the nature of undefined future emergencies does not mean it cannot govern them - indeed, this is the very point of the kind of common law constitutionalism proposed by Dyzenhaus.<sup>134</sup>

In addition to the fact that states seek to marginalize the courts in times of emergency by adding layers of exception to the laws they create, Vermeule also argues that the courts themselves want no part of emergency situations. They “dial down” the intensity of judicial review in times of emergency and in matters of national security and dial it back up again when the emergency has dissipated or on

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<sup>133</sup> *Ibid* at 1101.

<sup>134</sup> William E. Scheuerman, “Emergency Powers and the Rule of Law After 9/11” (2006), 14 J Pol Phil 61 at 65-66.

matters not touching on the security of the nation.<sup>135</sup> To Vermeule, the general parameters for judicial review, such as review for arbitrariness or capriciousness are adjustable in a manner that creates grey holes in exceptional times. These “adjustable parameters,” he continues are inherent to administrative law and they inevitably lead to judges applying different standards at different times. In developing this argument, Vermeule again points to examples (in this case jurisprudential ones) of exceptional practices as proof of his assertion. He sums up this prong of his argument as follows:

Nor do judges of any party or ideological bent want to extend legality so far, partly because they fear the responsibility of doing so, partly because they understand the limits of their own competence and fear that uninformed judicial meddling with the executive will have harmful consequences where national security is at stake, and partly because it has simply never been done before.<sup>136</sup>

There is no doubt some validity to Vermeule’s observations. Administrative law, and more acutely the realm of administrative discretion, both contemplate and permit exceptional approaches. And as Dauvergne has observed, the ratcheting up of both discretionary action and deference in the post-9/11 world have palpably contributed to the security climate in which we live. But again, the question is not whether this *is* the case, but whether this *should* be the case. Dyzenhaus, of course, would readily agree that exceptional practices exist and even that they have become endemic in matters of national security. But in this sense, I suggest that Vermeule overly focuses on the symptoms of our present system, without properly considering either Dyzenhaus’ diagnosis or his prescription for addressing a perceived excess of executive power. In the process, Vermeule confuses the aspirational with the utopian. Furthermore, while much of Vermeule’s argument

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<sup>135</sup> Vermeule, *Our Schmittian Administrative Law*, *supra* note 129 at 1118.

<sup>136</sup> *Ibid*, at 1133.

has the appearance of neutrality – he says that he takes no position on the question of whether legal black and grey holes are desirable – at other times, he clearly descends into normative arguments about their necessity.<sup>137</sup>

To his credit, Vermuele confines his arguments to the United States, given his quasi-empirical approach and his acknowledgment that all of the examples of legal exceptionalism to which he refers take place in the context of U.S. administrative law. This said, he strongly suggests that his observations are generalizable, and he does so for good reason. For if there are examples of administrative regimes that have not followed a Schmittian agenda, it undercuts, indeed refutes, his assertion that such an agenda is a patent inevitability. And if other jurisdictions are not Schmittian, there is no reason (aside perhaps from American exceptionalism) that the United States must be. This, in part, is where Vermeule’s argument comes short. In failing to refer to examples where a robust and thick conception of the rule of law has been utilized, some of which were discussed by both Dauvergne and Dyzenhaus, Vermuele comes across as wishing them away. But to the extent that they do exist, they undermine his assertion, not that grey holes exist, but that they *must* exist.

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<sup>137</sup> See for example the following passage at p.1133, where Vermuele appears to stake out both his neutrality and his normative position in the same paragraph:

However, the main point I want to suggest is not that black and grey holes are desirable; it is that they are inevitable. Black holes arise because legislators and executive officials will never agree to subject all executive action to thick legal standards, because the inevitability of changing circumstances and unforeseen circumstances means they could not do so even if they tried - one of Schmitt's points - and because the judges would not want them to do so in any event. There are too many domains affecting national security in which official opinion holds unanimously, across institutions and partisan lines and throughout the modern era, that executive action must proceed untrammled by even the threat of legal regulation and judicial review, no matter how deferential that review might be on the merits.

## **Conclusion**

In this somewhat brief theoretical exploration of themes related to borders, security, legality and the rule of law, I have attempted to outline some of the key debates that lie at the very root of immigration matters, particularly the subset of immigration decision-making that relates to questions of national security. One thread that has emerged over these pages and that will continue to be woven into this study is that of the importance of justification, discourse and dialogue between states and those affected by their decisions, including migrants. Justification is important to Carens, at least in his later work, and is central to that of Benhabib, Dauvergne and Dyzenhaus.

I turn now to a detailed exploration of security-migration decision-making in the context of Canadian law and to an empirical analysis of some of the problematic trends that I contend have emerged in recent years. As I do, however, it is important to keep in mind the contributions of the scholars that I have referred to in this chapter, as they provide an important theoretical context for the increasingly exclusionary nature of Canadian immigration law. The themes that I have described above also help to inform the subsequent chapters of this dissertation, in which I set out an argument that a Third World perspective on international law, paired with a dialogical approach to administrative law could foster decision-making in the migration-security context that complies with core rule of law principles, that takes seriously the lived experiences of those subject to security decisions and that is, in the end, both intelligible and justifiable.

## **CHAPTER TWO: SECURITY INADMISSIBILITY IN CANADA – A CASE STUDY**

## 2.1 Introduction

In this chapter, I set out how the security-migration nexus plays out, in practical terms, within the framework of immigration law. More particularly, using the example of the Canadian security-inadmissibility apparatus, I intend to explore how both legislative over-breadth and the discretionary decisions that undergird the security inadmissibility process give rise to situations reminiscent of Dyzenhaus' legal grey holes.

At the outset, I will provide a background to the current legislative framework, and then proceed to an analysis of the current law on security-inadmissibility, noting along the way its bearing on refugee protection and Canada's obligations under international law. I will also explore in some detail the jurisprudence as it has unfolded under the current inadmissibility regime and finally, I will turn to an empirical exploration of data that has been collected on inadmissibility decisions made over the past decade.

The vast breadth of the security-inadmissibility legislation will be immediately apparent in this analysis. The breadth of discretion afforded immigration officials should be equally apparent. More subtly, I contend that decisions on immigration security are suffused with a North-South chauvinism that, in combination with the breadth of both legislation and discretion, has yielded unfortunate results. More specifically, I intend to illustrate how the security-inadmissibility regime has come to be preoccupied with a very particular kind of individual, namely those with any perceptible association with armed conflict in the Global South. Such individuals, I further contend, seem to pose little actual concern to Canadian national security.

Ironically, however, for reasons which I elaborate upon below, I observe that this skewing of inadmissibility findings to those who have taken part in conflicts

emanating from the Global South has probably also played a role in preserving the law by concealing its plainly untenable reach.

The other irony to which I make reference is that, for those who flee conflict situations in the South, the law on inadmissibility effectively limits refugee protection to the archetypal victim – to those whose personal narrative discloses passivity in situations of repression, rather than to those who, often at greatest risk of persecution, have resorted to active resistance.

Liberal democracies (and indeed all states) reserve to themselves the authority to exclude from their midst those perceived to pose a threat to national security. As I described in the previous chapter, most commentators, even those advocating an open-borders approach, refrain from arguing that this authority should not exist. The issue becomes, therefore, *how* decisions about security and inadmissibility are made. In this chapter, I examine this question from the perspective of Canadian law, demonstrating how security matters are tilted toward those from the global south. In the chapter that follows, I will look at the same issues from the perspective of an academic movement that aims to place the interests of Third World peoples at the centre of processes that affect them. And finally, in the last chapter I will examine one aspect of the Canadian security regime – its reliance on administrative discretion – and argue that it, together with an infusion of Third World perspectives, could help to bring a sense of justification to a process currently defined by its absence. For now, however, I move on to an exploration of the Canadian security-inadmissibility regime.



# Many Shades of Black: A brief background to the security-migration nexus<sup>1</sup>

## 2.2.1 Introduction

In our previous discussion about Catherine Dauvergne and the making of illegality, recall that the links between migration and (in)security have a long pedigree. To borrow Dauvergne's words again, if security is the fulcrum of the balance between individual and community, it is perhaps inherent to any conversation about immigration, even if any actual connection between security threats and migration is of dubious empirical validity.<sup>2</sup> Indeed, it is almost trite to note that national security has always played a large role in immigration and refugee policy, but it is only relatively recently that scholars, practitioners and others have come to scrutinize the rationale underlying the connection.<sup>3</sup>

While the events of 9/11 exponentially intensified the attention paid to the security-migration nexus, as Audrey Macklin points out, terrorism provisions within immigration law were already commonplace. This was in contrast to the criminal law which, to that point, did not tend to identify terrorism as a distinct category of criminal act. To Macklin, the import of this approach to dealing with terrorism solely within the confines of immigration law was evident:

Locating terrorism exclusively in immigration legislation institutionalized in law the figure of the

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<sup>1</sup> The Raconteurs, "Many Shades of Black" from the album *Consolers of the Lonely*, released August 25, 2008.

<sup>2</sup> Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge UP 2008) [Dauvergne, "Making People Illegal"] at p. 103.

<sup>3</sup> Such commentators have observed that notions of security, particularly in relation to migration, are not so much about safety, per se, as they are about identity, group identity, and shared narratives about what constitutes the state – see for example Barry Buzan, Ole Waever and Jaap de Wilde, *Security: A New Framework for Analysis* (London: Boulder, 1998) at 120-121 [Buzan, "Security"].

immigrant as archetypal menace to the cultural, social, and political vitality of the nation. The myriad tropes of the foreign Other - as vector of disease, agent of subversion, corrupter of the moral order and debaser of the national identity - all trade on the exteriorization of threat and the foreigner as the embodiment of its infiltration. Canadian immigration history is replete with examples, ranging from the exclusion of racialized groups on grounds of inferiority and degeneracy, to the deportation of foreign-born labour and social activists in the inter-war years, to the persistent stereotype of immigrants as distinctively crime-prone. In this symbolic order, the border of the state is akin to the pores of the national corpus, and expelling the foreign body serves to restore the health of the nation.<sup>4</sup>

Some may balk at the imagery invoked by Macklin, but even the most cursory examination of the history of Canada's immigration-security provisions confirms its accuracy. It should also come as no surprise that immigration law has long provided the legal bulwark against perceived security threats, given the latent suspicion of foreigners as being the source of such threats and the stripped down set of procedural rights that accrue to non-citizens. This combination of factors - suspicion of foreigners and the ease with which they may be controlled in legal grey holes - has made immigration law the dominant site at which to address national security concerns. With this in mind, I turn now to a brief historical sketch of the intersections between national security and immigration in Canadian law.

### ***2.2.2 National Security in Canadian Immigration Law***

To the extent that immigration law demarcates the line between inclusion and exclusion, it also provides an interesting lens with which to examine societal views on migrants, migration and the threats they are often perceived to pose. It should come as no surprise that immigration laws have frequently engaged in the broad characterization of entire classes of people as being "undesirable" or

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<sup>4</sup> Audrey Macklin, "Borderline Security" in Ronald Daniels, Patrick Macklem and Kent Roach, eds. *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: UofT Press, 2001) at 392.

“unsuitable”. Immigration law has, for over a century, included “prohibited classes” of persons who were excluded because they were considered a danger to public health or safety.<sup>5</sup>

In 1919, the federal government amended the *Immigration Act*, for the first time adding provisions specifically related to national security concerns. The provisions prohibited from entrance into Canada those involved in subversive activities and espionage. The law provided in part:

3. No immigrant, passenger, or other person, unless he is a Canadian citizen, or has Canadian domicile, shall be permitted to enter or land in Canada, or in case of having landed in or entered Canada shall be permitted to remain therein, who belongs to any of the following classes, hereinafter called “prohibited classes”:

...

(n) Persons who believe in or advocate the overthrow by force or violence of the Government of Canada or of constituted law and authority, or who disbelieve in or are opposed to organized government, or who advocate the assassination of public officials, or who advocate or teach the unlawful destruction of property;

(o) Persons who are members of or affiliated with any organization entertaining or teaching disbelief in or opposition to organized government, or advocating or teaching the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers either of specific individuals or of officers generally, of the Government of Canada or of any other organized government, because of his or their official character, or advocating or teaching the unlawful destruction of property;

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<sup>5</sup> In 1910, the government introduced certain “prohibited classes” of immigrants, which included “idiots, imbeciles, feeble-minded persons, epileptics, insane persons, and persons who have been insane at any time previously” *Immigration Act*, SC 1910, c 27, s 3.

...

(q) Persons guilty of espionage with respect to His Majesty or any of His Majesty's allies;<sup>6</sup>

As Trebilcock and Kelley document, the 1919 Act also contained a provision authorizing the Cabinet to “prohibit any race, nationality, or class of immigrant by reason of 'economic, industrial, or other condition temporarily existing in Canada'; or because such immigrants were unsuitable, given the social, economic, and labour requirements of the country; or simply because of their 'peculiar habits, modes of life and methods of holding property' and their 'probable inability to become readily assimilated or assume the responsibilities and duties of Canadian citizenship within a reasonable time.’”<sup>7</sup> Trebilcock and Kelley further note that the Cabinet shortly thereafter invoked these new powers to prohibit the immigration of enemy aliens as well as several ethno-religious groups including Mennonites, Hutterites, and Doukhobors.<sup>8</sup>

The exclusionary provisions contained in the 1919 *Immigration Act* remained relatively static until 1952 when, amongst other things, the concept of subversion was introduced into the list of prohibited classes, as was, for the first time, provision for a discretionary Ministerial exemption of inadmissibility:

5. No person...shall be admitted to Canada if he is a member of any of the following classes of persons:

...

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<sup>6</sup> *An Act to Amend the Immigration Act*, SC 1919, c 25, ss 3, 3(n), 3(o), 3(q).

<sup>7</sup> Ninette Kelley and M. J. Trebilcock. *The Making of the Mosaic: A History of Canadian Immigration Policy*. 2nd ed. (Toronto; Buffalo: University of Toronto Press, 2010) at 187.

<sup>8</sup> *Ibid.* Ironically, given the discussion that will ensue below, Trebilcock and Kelley go on to observe that these groups were in all likelihood singled out for inadmissibility because of their *refusal* to take up arms in their respective countries during the First World War.

(l) persons who are or have been, at any time before or after the commencement of this Act, members of or associated with any 'organization, group or body of any kind concerning which there are reasonable grounds for believing that it promotes or advocates or at the time of such membership or association promoted or advocated subversion by force or other means of democratic government, institutions or processes, as they are understood in Canada, except persons who satisfy the Minister that they have ceased to be members of or associated with such organizations, groups or bodies and whose admission would not be detrimental to the security of Canada.<sup>9</sup>

Over the next 25 years, there were considerable policy debates over the “modernization” of the immigration program, debates that included deliberation over national security and, for the first time, responding to terrorism.<sup>10</sup> While the *Immigration Act, 1976* made no explicit reference to terrorism, the inadmissibility provisions on espionage and subversion were supplemented to include a new ground of inadmissibility related to potential acts of violence. It is interesting to note, however, that the new provision only related to anticipated future acts of violence against persons *in* Canada. Paragraph 19(1)(g) of the *Immigration Act, 1976* provided:

19. (1) No person shall be granted admission who is a member of any of the following classes:

...

(g) persons who there are reasonable grounds to believe will engage in acts of violence that would or might endanger the lives or safety of persons in Canada or are members of or are likely to

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<sup>9</sup> *Immigration Act*, SC 1952, c 42, ss 5, 5(l), consolidation in *Immigration Act*, RSC 1952, c 325.

<sup>10</sup> See Canada, Minister of Manpower and Immigration, *White Paper on Immigration*, (Ottawa: Queen's Printer, 1967) [White Paper] and Canada, Minister of Manpower and Immigration, *A report of the Canadian immigration and population study: The Immigration Program*, (Ottawa: Information Canada, 1974) at 37-49.

participate in the unlawful activities of an organization that is likely to engage in such acts of violence;<sup>11</sup>

Further changes to immigration legislation in 1992 led to the first explicit reference to admissibility by reason of terrorist activity. In the 1992 legislation, s 19 of the *Immigration Act* was amended to create a category of inadmissibility for those who will or had, on a reasonable grounds to believe standard, engaged in terrorism.<sup>12</sup> The changes also rendered inadmissible those found to be members of organizations that will engage, or have engaged, in terrorism.<sup>13</sup>

In 2002, the *Immigration and Refugee Protection Act*<sup>14</sup> came into force. In the IRPA, the various grounds of inadmissibility were segregated into their own respective sections, as follows:

- Section 34 – Security
- Section 35 – Human or international human rights violations
- Section 36 – Criminality
- Section 37 – Organized criminality
- Section 38 – Health Grounds
- Section 39 – Financial reasons
- Section 40 – Misrepresentation

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<sup>11</sup> *Immigration Act, 1976*, SC 1976-77, c 52.

<sup>12</sup> *Immigration Act*, RSC 1985, c I-2, ss 19(1)(e)(iii), 19(1)(f)(ii), as amended by *An Act to Amend the Immigration Act and other Acts as a Consequence Thereof*, SC 1992, c 49, s 11. The reasonable grounds to believe standard, which remains applicable to inadmissibility decisions, appears to have first been introduced in the 1952 *Immigration Act*, *supra* note 7 at s 5(1)(m).

<sup>13</sup> *Ibid* at ss 19(1)(e)(iv)(C) and 19(1)(f)(iii)(B).

<sup>14</sup> SC 2001, c. 27 [“IRPA”]. The IRPA came into force roughly nine months after the events of September 11, 2001. While much of the Act had been drafted before the attacks and already reflected a recalibration of immigration law towards a greater emphasis on security, the events of 9/11 resulted in several amendments which further entrenched security interests in the final text of the legislation.

Sections 34, 35 and 37 were also accompanied by their own Ministerial relief provisions, granting the Minister the (non-delegable) discretionary authority to essentially waive inadmissibility on the basis that the person's presence in Canada would not be detrimental to the national interest. Section 34 provided:

**34. (1)** A permanent resident or a foreign national is inadmissible on security grounds for

(a) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;

(b) engaging in or instigating the subversion by force of any government;

(c) engaging in terrorism;

(d) being a danger to the security of Canada;

(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or

(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c).

(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.

Also of note, the IRPA implemented a subtle but important change in the treatment of refugee claimants found to be inadmissible for, amongst other things, security reasons. Under the previous iterations of the *Immigration Act* refugee claimants thought to pose a threat to security would be deemed ineligible to pursue their claims if two conditions were met: first they had to be found by an adjudicator to be a person described in the security-admissibility provision; and second, the

Minister would have to prepare a report indicating that she or he was of the opinion that it would be contrary to public interest to have the claim determined.<sup>15</sup> Under the IRPA, the second condition was eliminated, such that a finding of inadmissibility for security grounds now results in automatic ineligibility to make a refugee claim.<sup>16</sup> Claims that have already been initiated will be suspended pending an inadmissibility hearing and, if the person is found to be inadmissible, the claim will be terminated.<sup>17</sup>

In many ways, the IRPA came to reflect and emphasize growing concerns over public safety, border integrity and security. In an early decision considering the shift in orientation contained within the new legislation, the Supreme Court of Canada noted:

The objectives as expressed in the *IRPA* indicate an intent to prioritize security. . . . Viewed collectively, the objectives of the *IRPA* and its provisions concerning permanent residents, communicate a strong desire to treat criminals and security threats less leniently than under the former Act.<sup>18</sup>

In perhaps the clearest indication of the increased emphasis on security, in the years immediately following 9/11, the government created an entirely new federal department – the Department of Public Safety and Emergency Preparedness – whose sole mandate was to coordinate the activities of the various security-related agencies that were placed under its control, including the newly formed Canada Border Services Agency (CBSA).<sup>19</sup> Under the auspices of the CBSA, the government

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<sup>15</sup> *Immigration Act, 1985*, *supra* note 12 at s 46.01(1)(e)(ii).

<sup>16</sup> IRPA, *supra* note 14, s 101(1)(f)

<sup>17</sup> *Ibid*, s 103(1)(a) and s 104(2)(a). It should be noted that, the termination of an individual's refugee claim does not result in their immediate or automatic removal. Such individuals may still access a circumscribed "Pre-Removal Risk Assessment" pursuant to s112 of the IRPA [PRRA]. If such individuals are found to be at risk, they may obtain a temporary stay of removal.

<sup>18</sup> *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, at para 10.

<sup>19</sup> See the *Department of Public Safety and Emergency Preparedness Act*, SC 2005, c 10 and the *Canada Border Services Agency Act*, SC 2005, c 38.



created an “Immigration Intelligence Branch” to enhance security screening for persons suspected of terrorism, organized crime and war crimes or crimes against humanity. The government also intensified the screening of visa applicants abroad and began a front-end security screening process for all inland refugee claimants immediately after a claim is made. These and other changes were discussed in a comprehensive 2004 statement of the Federal Government’s national security policy. The report, which articulated the country’s core national security interests and proposed a “framework for addressing threats to Canadians”, focused on three particular concerns: protecting Canada and Canadians at home and abroad, ensuring Canada was not a base for threats to its allies, and contributing to international security.<sup>20</sup> The report further revealed a new weapon in the immigration-security arsenal – the deploying of “migration integrity officers” around the world to prevent illegal migration and block security threats before they arrive in Canada. The report claimed that, over the previous six years, these officers had stopped more than 40,000 people with improper documents from boarding planes bound for North America.<sup>21</sup>

As I noted earlier, the symbolic *and* substantive importance of bringing significant aspects of immigration decision-making into an organizational matrix dominated by national security concerns cannot be overstated. Symbolically, the move helped to embed the connection between security, public safety and immigration. Substantively, the move handed discretionary decision-making authority over many immigration-related matters to an organizational structure with a “governing ethos” of enforcement and security.<sup>22</sup> This is not a particularly controversial view - as former Deputy Minister of Citizenship and Immigration Peter Harder recently noted, there is now a “total preoccupation” with border security,

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<sup>20</sup> Canada, Privy Council Office, *Securing an Open Society: Canada’s National Security Policy*, (2004), online: Privy Council Office [www.pco-bcp.gc.ca](http://www.pco-bcp.gc.ca) at vii, 5-6.

<sup>21</sup> *Ibid*, at 42.

<sup>22</sup> Dauvergne, *Making People Illegal*, *supra* note 2 at pp 96-97.

and while there used to be a balance between the imperatives of compassion and enforcement, that balance has been jettisoned in the organizational culture that has been cultivated at CBSA.<sup>23</sup>

Among the many changes brought about with the creation of the Department of Public Safety and Emergency Preparedness was a transfer of authority to the public safety Minister of several aspects of the security-inadmissibility process. Subsection 4(2) of the IRPA now provides:

(2) The Minister of Public Safety and Emergency Preparedness is responsible for the administration of this Act as it relates to

(a) examinations at ports of entry;

(b) the enforcement of this Act, including arrest, detention and removal;

(c) the establishment of policies respecting the enforcement of this Act and inadmissibility on grounds of security, organized criminality or violating human or international rights; or

(d) determinations under any of subsections 34(2), 35(2) and 37(2).<sup>24</sup>

The scheme of the IRPA is such that, if an officer suspects that an individual is inadmissible, he or she *may* write a report outlining the perceived inadmissibility, pursuant to s 44(1) of the Act. That report is then referred to a Minister's Delegate who, pursuant to s 44(2) of the IRPA *may* then refer the matter to the Immigration Division of the Immigration and Refugee Board (IRB) for an admissibility hearing. The result of section 4 of the IRPA, above, is that in cases involving security, organized criminality or human or international rights violations, it is the CBSA that

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<sup>23</sup> See Debra Black, "Canada's immigration system lacks heart, critics say", *The Toronto Star* (28 June 2013) online: The Toronto Star < <http://www.thestar.com>>.

<sup>24</sup> IRPA, *supra* note 14.

has responsibility for the discretionary s 44 tasks of identifying and referring cases of suspected inadmissibility to the IRB.

Further changes to the security-inadmissibility scheme were brought about with the recent promulgation of the *Faster Removal of Foreign Criminals Act*.<sup>25</sup> This Act, which received Royal Assent in June, 2013, implemented several changes to the inadmissibility regime under the IRPA, three of which are directly related to the security provisions under s 34. First, the FRFCA segregated s 34(1)(a) into two different sections, the first changing the espionage provision such that it will now only lead to an inadmissibility finding if the acts of espionage in question are “contrary to Canada’s interests”, while the second preserved and moved the pre-existing subversion prohibition into a new provision – s 34(1)(b.1).<sup>26</sup>

Second, the FRFCA repealed the Ministerial exemption of inadmissibility located at s 34(2) of the IRPA (as well as identical Ministerial exemptions under sections 35 and 37), and relocated a blanket exemption clause for all three sections under a newly created, and narrowly defined, s 42.1.<sup>27</sup>

Finally, but perhaps most importantly, the FRFCA amended s 25 of the IRPA, which provides for general discretionary exemptions from the requirements of the Act on humanitarian and compassionate grounds, eliminating access to this provision for those found inadmissible under sections 34, 35 and 37.<sup>28</sup>

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<sup>25</sup> SC 2013, c 16 [FRFCA].

<sup>26</sup> FRFCA, s 13.

<sup>27</sup> *Ibid* at s 18. While the wording of the relief provision is similar to the former s 34(2), the amendment also contains a virtually incomprehensible interpretive clause which seemingly limits the scope of the term “national interest” to matters related to national security, see the new s 42.1(3), discussed in greater detail below.

<sup>28</sup> *Ibid* at ss 9, 10.

The evolution of Canadian immigration-security legislation culminates (at least for now) with the recent passage of changes to Canadian citizenship law.<sup>29</sup> The changes now permit the government to commence citizenship revocation processes against dual national Canadian citizens who have, *inter alia*, been convicted of terrorism-related offences, either in Canada or abroad.<sup>30</sup>

This has been a relatively cursory exploration of the history of the legislative intersections in Canada between immigration and security. It is sufficient, however, to make some broad observations. While provisions related to national security have always been broadly framed, earlier legislation tended to be oriented to other forms of inadmissibility. The 1910 *Immigration Act*, for example, contained a list of 21 different “prohibited classes,” the majority of which related to mental health bars,<sup>31</sup> physical health bars<sup>32</sup> or socio-economic bars<sup>33</sup>. While many of the above categories continue to exist, albeit in more benignly worded language, the scope of security related inadmissibility has clearly expanded.<sup>34</sup>

This having been said, it would appear that the far more profound changes that have taken place in the migration-security sphere are not those related to the legislation itself, but to the bureaucratic infrastructure that surrounds it. Immigration law has always broadly defined entire categories of persons as being either undesirable or dangerous. The difference is that, by transferring

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<sup>29</sup> *Strengthening Canadian Citizenship Act*, SC 2014, c 22.

<sup>30</sup> *Ibid*, at s 10(2)(b). The Act was widely criticized and is already subject to constitutional challenge, see Debra Black “Court challenge slams new Citizenship Act as ‘anti-Canadian’”, *Toronto Star* (20 August 2015) online: <http://thestar.com>.

<sup>31</sup> “Idiots, imbeciles, feeble minded persons,” those with “constitutional psychopathic inferiority” and alcoholics, see *Immigration Act, 1910*, *supra* note 5 at ss 3(a), (k), (l).

<sup>32</sup> Those with tuberculosis or any other “loathsome disease” and those who were “dumb, blind, or otherwise physically defective,” *Ibid*, at s 3(b), (c).

<sup>33</sup> Prostitutes and pimps, “professional” beggars or vagrants, the indebted, those likely to become a public charge and “illiterates,” *Ibid*, at s 3(e), (f), (g), (h), (j), (m).

<sup>34</sup> One can point to several examples of the expanded scope of more recent security provisions. These include: 1) the inclusion of terrorism grounds; 2) the addition of a subversion provision that applies to *any* government, as opposed to a democratic government; 3) the shift away from provisions that refer to the security of Canada and toward security concerns more generally.

responsibility for administering the inadmissibility provisions to an institution with a narrow enforcement mandate, increasing the capacity of the authorities to identify and remove inadmissible persons has become a clear priority.

This is demonstrated perhaps most articulately by reference to recent staffing trends within the federal government. According to the Parliamentary Budget Office, staffing at the Canada Border Services Agency increased, in absolute terms, more than any other government agency or department between 2005 and 2012. In total, the Agency grew by 5200 employees, or 54.6 percent in those years. Additionally, the Canadian Security Establishment, which handles various intelligence services grew by 42 percent, while FINTRAC — the Financial Transactions and Reports Analysis Centre of Canada which, amongst other things, tracks suspected terrorist financing, increased staffing levels by 88 percent. At the same time, however, staff levels at Citizenship and Immigration, decreased by 8.3 percent.<sup>35</sup>

The creation of the Canada Border Services Agency and its rapid expansion is very much in keeping with the commentary, referred to above, on the securitization of immigration regulation. It is also in keeping with the expanded use of security inadmissibility provisions to exclude non-citizens, particularly refugee claimants, from obtaining status in Canada, a topic to which I will turn further on in this chapter. First, however, I provide a detailed exploration of the security-inadmissibility provisions in Canadian law, together with an analysis of the jurisprudence that has interpreted it.

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<sup>35</sup> Parliamentary Budget Officer, *Federal Employee Classification Dataset* (2013) online: Parliamentary Budget Officer < <http://www.pbo-dpb.gc.ca/en/>>, reported in “Budget watchdog data shows bureaucracy grew under Harper”, Canadian Press (29 June 2013) online: CBC News < <http://www.cbc.ca/news/>>.

## **2.3 Casting the Dragnet – Canadian Law and Jurisprudence on Security Inadmissibility**

### ***2.3.1 Introduction***

As I set out above, the main security related inadmissibility provision in Canadian law renders inadmissible not just those thought to pose a security threat to Canada, but a significantly broader ambit of individuals.<sup>36</sup> In the pages that follow, I will explore some of the principal themes that have emerged in the jurisprudence on s 34 of the IRPA over the past decade.

### ***2.3.2 The Evidentiary standard***

Section 33 of the IRPA sets out an overarching interpretive clause in respect of sections 34-37:

33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.

As such, inadmissibility under s 34 of the IRPA is made out where the Minister establishes that there are reasonable grounds to believe that the individual

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<sup>36</sup> For ease of reference, s 34 of the IRPA provides:

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for

- (a) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;
- (b) engaging in or instigating the subversion by force of any government;
- (b.1) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;
- (c) engaging in terrorism;
- (d) being a danger to the security of Canada;
- (e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or
- (f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).

concerned has engaged or will engage in the kinds of activities enumerated in the provision. In *Mugesera*, the Supreme Court affirmed that the reasonable grounds standard applies solely to facts and requires more than suspicion, but less than the civil standard of balance of probabilities. In essence, the court concluded, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information.<sup>37</sup>

This interpretation was consistent with the oft-cited earlier decision of the Federal Court of Appeal in *Chiau*, wherein the court stated:

As for whether there were “reasonable grounds” for the officer’s belief, I agree with the Trial Judge’s definition of “reasonable grounds” as a standard of proof that, while falling short of a balance of probabilities, nonetheless connotes “a bona fide belief in a serious possibility based on credible evidence.”<sup>38</sup>

### **2.3.3 Sections 34(1)(a) and (b) Espionage and Subversion of Governments**

While, as noted above, the *Faster Removal of Foreign Criminals Act* has bifurcated s 34(1)(a) of the IRPA into two sections, separating the concepts of “espionage” and “subversion”, jurisprudential interpretation of the terms has arisen more or less in tandem, and so I consider them together here, notwithstanding the recent legislative changes. I also include in this analysis paragraph 34(1)(b), as it too relates to the meaning of “subversion”.

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<sup>37</sup> *Mugesera v Canada (MCI)*, 2005 SCC 40, para 114

<sup>38</sup> *Chiau v Canada (MCI)* [2001] 2 FC 297, para 30. In my review of all Immigration Division decisions on s 34, elaborated upon below, I observed that it was this passage, more than any other, that was relied upon by the board in setting out the applicable evidentiary standard. This is perhaps because the applicable immigration manual used by CBSA officers in evaluating inadmissibility incorporates the “bona fide belief in a serious possibility” language utilized by the Federal Court of Appeal in *Chiau* – see Canada, Citizenship and Immigration Canada, “ENF 2 Evaluating Inadmissibility” (2009) online: Citizenship and Immigration Canada <http://www.cic.gc.ca>.

The term “subversion” in the immigration context has been considered somewhat sparingly and never with appellate finality. In an early analysis, the Federal Court in *Shandi* provided the following analysis of the term, interpreting it in strikingly broad terms:

Espionage and subversion are not limited to the actual act but to be engaged in these activities the words envisage participation by one who assists or facilitates the objective as one who commits the actus reus. Any act that is intended to contribute to the process of overthrowing a government is a subversive act. It perplexes me that so much has been written about subversion, or that the word should not be used because it runs contrary to a person's rights under the *Charter* to be a dissident. Certainly CSIS investigators must be aware of the difference (which may not always have been the case), but subversive acts are not difficult to distinguish from acts of protest that should not be subject to investigations. For example, if funds are raised or guns sent to the I.R.A. from Canada, is that not clearly subversion? However, vocal comment or written treaties on the “Struggle” are clearly protected under the *Charter*. Examples of subversive acts are difficult to find.<sup>39</sup>

The courts soon pulled back from this rather simplistic view of subversion, noting in *Al Yamani* that the terminology used by Justice Cullen in *Shandi* was “remarkably broad” and would encompass virtually any form of non-violent, lawful political opposition.<sup>40</sup>

In *Al Yamani I*, the applicant challenged the constitutionality of the use of the term subversion as it appeared in the former *Immigration Act*, arguing that his removal under the applicable security certificate scheme would constitute a deprivation of his liberty in a manner that was not in accordance with the principles

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<sup>39</sup> *Shandi (Re)* (1992), 51 F.T.R. 252, at para 17

<sup>40</sup> *Al Yamani v Canada (MCI)*, [2000] 3 FC 433, para 49 [Al Yamani I]



of fundamental justice and was therefore a violation of s 7 of the Canadian *Charter of Rights and Freedoms*.<sup>41</sup> Specifically, he argued that the use of the term “subversion” had little definable meaning, was overly broad and unconstitutionally vague. In taking into account the variable meanings ascribed to the term, including the earlier analysis of Justice Cullen in *Shandi*, the court agreed that previous interpretation of subversion provided no means by which to distinguish it from lawful dissent and that the use of the term “subversion” in the *Act* was unconstitutionally vague in that it was “...incapable of framing the legal debate in any meaningful manner or structuring discretion in any way.”<sup>42</sup>

Having so concluded, however, the court took the rare measure of concluding that the otherwise unconstitutionally broad use of the term subversion was saved under section 1 of the *Charter* as its use could be demonstrably justified in a free and democratic society. It should be noted that earlier jurisprudence (not cited by the court in *Al Yamani I*) had found that infringements of section 7 will typically only be saved by the constitutional override of section 1 in situations “arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like...”<sup>43</sup> By finding that the infringing use of the term “subversion” in the *Immigration Act* was saved by section 1, the court thus firmly, if perhaps unwittingly, equated the objective of identifying those who have engaged in subversion with the seemingly more “exceptional” conditions listed above.

The analysis undertaken by the court under s 1 of the *Charter* is interesting from an immigration perspective because it required, in a legal setting, precisely the kind of insider/outsider balancing that moral philosophers (Carens), immigration scholars (Dauvergne) and liberal theorists (Rawls) all discuss from the confines of

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<sup>41</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

<sup>42</sup> *Al Yamani I*, *supra* note 40, at para 62, citing *R v Morales* [1992] 3 S.C.R. 711.

<sup>43</sup> *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 518.

the academy. The s 1 analysis involves a very practical contemplation of the membership/equality conundrum; that is, a balancing of state (and collective) interests in security (and exclusion) with the individual liberty interests of non-citizens. The court in *Al Yamani I* clearly indicated that for individuals suspected of having participated in the subversion of foreign governments, the rights of the latter should give way to the interests of the former.

Shortly after the decision in *Al Yamani I*, the Federal Court of Appeal in *Qu* explored the meaning of subversion and espionage against a "democratic government, institution or process," as it appeared at section 19(1)(f) of the *Immigration Act*, the predecessor to section 34(1)(a).<sup>44</sup> The case involved a Chinese Master's student at Concordia University in Montreal who participated in the activities of a student group that, amongst other things, engaged in human rights and pro-democracy work. The student passed along information about the activities of the group to the Chinese Embassy in Ottawa, which came to the attention of a visa officer after the student had applied for Canadian permanent residence. As a result, the visa officer refused the student's application on the basis that he had engaged in acts of espionage and/or subversion against a democratic government, institution or process. On judicial review of that decision, the Federal Court found that while there was no doubt that the appellant had engaged in espionage or subversion, it could not conclude that the student group he was trying to subvert was a democratic government, institution or process.

The applications judge reviewed the jurisprudence and legislation on the meaning of the terms espionage and subversion and concluded as follows:

"Espionage" is simply a method of information gathering--by spying, by acting in a covert way. Its use in the analogous term "industrial espionage" conveys

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<sup>44</sup> *Qu v Canada (MCI)*, 2001 FCA 399.

the essence of the matter -- information gathering surreptitiously.

"Subversion" connotes accomplishing change by illicit means or for improper purposes related to an organisation.<sup>45</sup>

The applications judge further defined "democratic government" in terms of political governance, as a system by which citizens govern themselves and in which elected representatives make laws; the executive branch administers those laws and is responsible for the way it does so.

On appeal, the Court of Appeal did not question the Trial Division's understanding of the terms espionage or subversion, but concluded that the applications judge had adopted an overly narrow definition of the "fabric" of democratic governments, institutions or processes. In overturning the decision of the Trial Division, the court found that the applications judge had erred in interpreting the expression "democratic government, institutions or processes" to be restricted to institutions and processes involving political, state-based governance.<sup>46</sup> The expression also encompasses, the court continued, institutions and processes which although non-governmental, are integral to the democratic fabric of Canada. Later, the court provided its own broader definition of the provision, finding that it merely invokes a "structured group of individuals established in accordance with democratic principles with preset goals and objectives who are engaged in lawful activities of a political, religious, social or economic nature."<sup>47</sup>

While few would deny that non-governmental organizations can play an essential role in the "fabric" of democracy, the open-ended and extremely broad

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<sup>45</sup> *Qu v Canada (MCI)*, [2000] 4 FC 71 (T.D.) at paras 48-49.

<sup>46</sup> *Qu v Canada (MCI)*, 2001 FCA 399 at para 35.

<sup>47</sup> *Ibid* at para 50.

interpretation of democratic institutions in the security-inadmissibility context means that “subversion” of virtually any organization with a democratic operating structure – from chess clubs to Chinese dissident groups – could, notionally at least, lead to a finding of inadmissibility. What this means, of course, is that immense discretionary power is placed in the hands of first-level decision makers to distinguish between the disgruntled member of a local cultural organization and the sleeper agent who foments subversion of a foreign government. The expansive scope of judicial interpretation of s 34, together with the correspondingly vast discretionary powers conferred on decision-makers, is, as we shall see, a theme to which we will repeatedly return.

Recall that under the security inadmissibility regime, there are two separate grounds of inadmissibility in relation to subversion, which are, in a sense, mirror images of each other. The first, discussed above, renders inadmissible those who have engaged in *any* form of subversion against a democratic government, while the second establishes inadmissibility only for those who have engaged in subversion by force, but as against *any* form of government.

In the case of *Oremade*,<sup>48</sup> the court considered whether a 'bloodless coup' amounts to subversion by force. The applicant, a former Nigerian army officer, was found to have engaged in the subversion by force of the Nigerian government because of his participation in the planning of a coup which never took place and which was planned to be brought about without the use of military force.

A central issue on judicial review of the finding of inadmissibility was whether, for the purposes of s 34(1)(b) of the IRPA, the individual concerned need have formed the intention of actually using force in subverting a government. The court concluded that while the intention of an individual alleged to have taken part in the

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<sup>48</sup> *Oremade v Canada (MCI)*, 2005 FC 1077 (Oremade I).

subversion by force of a government is a relevant consideration, so too is the perception of others as to whether the subversion may be supported by the threat of force. To the extent that the tribunal had found that the issue of intention was irrelevant, the court found that it had erred and ordered a new hearing. However, in further finding that s 34(1)(b) is not confined to the actual use of force, the court noted:

However, this intent to subvert by force is not to be measured solely from the subjective perspective of the Applicant. It may well be that there was a hope or expectation that the coup would be bloodless but it is also reasonable for persons on the street to assume upon seeing armed soldiers occupying lands and buildings that force could or would be used if thought necessary.

I agree with the IAD's conclusion that the term "by force" is not simply the equivalent of "by violence". "By force" includes coercion or compulsion by violent means, coercion or compulsion by threats to use violent means, and, I would add, reasonably perceived potential for the use of coercion by violent means.<sup>49</sup>

It is important to take a step back for a moment to consider some of the implications of the above passage. In it, we can observe a tendency, common in immigration-security matters, to graft criminal law principles onto what Legomsky refers to as the procedurally stripped-down "civil regulatory model of immigration law."<sup>50</sup> While the *Oremade* case incorporates the criminal law concept of intent into

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<sup>49</sup> *Ibid* at para 27. Because the Federal Court concluded that the tribunal had erred in its finding that the applicant's non-violent intentions were irrelevant, the matter was sent back to a differently constituted Immigration Appeal Division member, who confirmed the board's earlier finding. This finding was later upheld by the Federal Court: *Oremade v Canada (MCI)*, 2006 FC 1189 (*Oremade II*). In that decision, the court referred approvingly with the rationale of the earlier *Oremade* decision, and further confirmed that s 34(1)(b) applies to subversion by force as against *all* governments, even despotic ones: see para 12. Later, in *Suleyman v Canada (MCI)*, 2008 FC 780, the court again found that the question as to whether the use of force may be justified as a last resort against tyranny is essentially irrelevant to the analysis of subversion under s 34(1)(b).

<sup>50</sup> Stephen H Legomsky, "The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms" (2007) 28 *Immigr Natly Law Rev* 679 at 682. See also Pratt's discussion of the

the analysis of subversion, a measure that would generally be thought to increase the legal protections afforded non-citizens, it does so in the context of a low threshold of proof and in a manner that essentially hollows it of any meaning. By expanding the meaning of subversion by force to include the “reasonably perceived potential for the use of coercion by violent means”, the court casually broke the link, essential in criminal law, between the accused’s actions and intentions and replaced it with a subjective (“perceived”) and conditional (“potential”) standard, to be assessed from the perspective of, well, that is left unsaid. Is it the reasonably perceived potential for the use of force from the perspective of the despotic ruler? Or is it the perspective of the general populace that is most relevant? Or is it simply an assessment to be made from the perspective of the immigration officer? We are left to wonder, but it is no surprise that on rehearing the matter based on the guidance of the Federal Court, the tribunal again found Mr. Oremade to be inadmissible, nor that this decision was subsequently upheld on judicial review.<sup>51</sup>

In another theme to which we will repeatedly return in this discussion, the court in *Oremade* recognized (and sidestepped) the vast and potentially overreaching scope of s 34:

There is no doubt that paragraph 34(1)(b), had it been in force at the relevant times, could have had potentially startling impact on historical, and even contemporary figures. Arguably such revered and diverse figures as George Washington, Eamon De Valera, Menachem Begin and Nelson Mandela might be deemed inadmissible to

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concept of ‘immigration penalty,’ most notably in “Immigration Penalty and the Crime-Security Nexus: The Case of Tran Trong Nghi Nguyen” in Karim Ismaili, et al (eds), *Canadian Criminal Justice Policy: A Contemporary Reader* (Oxford: Oxford UP, 2012) at 276 and “Wanted by the CBSA” in Deborah Brock, et al (eds) *Criminalization, Representation, Regulation: Thinking Differently About Crime* (Toronto: UofT Press, 2014) at 286-7.

<sup>51</sup> Following *Oremade*, the Minister has attempted to expand the scope of subversion even further, arguing (unsuccessfully) in *Minister of Public Safety v X* (2010), A3-00236 (Immigration and Refugee Board) [“IRB”], for example, that subversion equals merely opposition.

Canada. With respect, the sweep of paragraph 34(1)(b) is not particularly relevant to this applicant.<sup>52</sup>

As in numerous other decisions, the court noted firstly that Parliament clearly intended the provision to have the broad sweep it describes and then concluded that it does not lead to “unreasonable” or “ludicrous” results because of the availability of the Ministerial override found at s 34(2) of the IRPA.<sup>53</sup> As we shall see in the coming pages, however, while the intentional overbreadth of s 34(1) has remained intact, the scope of the override provision designed to rectify this overbreadth has been narrowed.

In considering the ambit of sections 34(1)(a) and (b), it should be noted that the court has also on occasion emphasized that first-level decisions must set out with some specificity the alleged acts of subversion or espionage and the individual's involvement in them. In *Alemu*,<sup>54</sup> the court found that for decisions under s 34(1)(a), an officer must engage in a two-step analysis, first to determine whether the government, institution or process spied against or subverted should be considered a democratic one. Second, the act of espionage or subversion should be specified to make the reasons intelligible. Under s 34(1)(b), the analysis is “less demanding,” since engaging in or instituting the subversion by force of any government does not require an evaluation of the democratic quality of the government subverted.<sup>55</sup> This said, a decision-maker rendering a decision under this provision must nevertheless specifically identify how the individual concerned is alleged to have engaged in subversion.

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<sup>52</sup> *Oremade I, supra*, note 48 at para 17.

<sup>53</sup> Now s 42.1 of the IRPA, *ibid* at para 18.

<sup>54</sup> *Alemu v Canada* (MCI), 2004 FC 997.

<sup>55</sup> *Ibid*, at para 31. See also the discussion below at section 3.2.4 on *Najafi v Canada (MPSEP)*, 2013 FC 876 [Najafi], *affm'd* 2014 FCA 262.

### 2.3.4 Section 34(1)(c): Terrorism

As with many other terms incorporated into the text of s 34, the IRPA provides no definition of terrorism and for years it seemed the Federal Courts were hesitant to provide any definitional form to the term, preferring to determine on a case by case basis whether inadmissibility findings appeared reasonable on the facts.<sup>56</sup> The hesitancy on the part of the courts to define terrorism stemmed from the inherently variable and political meaning of the term, but it did come to be defined in international law, most particularly in the *International Convention for the Suppression of the Financing of Terrorism*.<sup>57</sup>

This *Convention* provides both a "functional" and a "stipulative" definition of terrorism. The functional definition includes an annexed list of treaties which relate to acts considered to be terrorist in nature, while the stipulative definition provides a more general description of the kinds of acts which may constitute terrorist activity. Article 2(b) of the *Convention* sets out the stipulative definition:

Any ... act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

In *Suresh*,<sup>58</sup> the Supreme Court adopted the view that the term terrorism could be legally defined, if not exhaustively, at least sufficiently to set the proper boundaries for legal adjudication. In finding that the term is subject to intelligible definition, its use in the former *Immigration Act* was found not to be unconstitutionally vague and did not violate the Charter. The court stated:

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<sup>56</sup> See for example *Re Baroud*, (1995), 98 F.T.R. 99 (T.D.).

<sup>57</sup> GA Res 54/109, Dec. 9, 1999.

<sup>58</sup> *Suresh v Canada* (MCI), 2002 SCC 1 (Suresh I).



In our view, it may safely be concluded, following the International Convention for the Suppression of the Financing of Terrorism, that "terrorism" in s. 19 of the Act includes any "act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act". This definition catches the essence of what the world understands by "terrorism". Particular cases on the fringes of terrorist activity will inevitably provoke disagreement. Parliament is not prevented from adopting more detailed or different definitions of terrorism. The issue here is whether the term as used in the *Immigration Act* is sufficiently certain to be workable, fair and constitutional. We believe that it is.<sup>59</sup>

In addition, s 83.01 of the Canadian *Criminal Code* now contains a definition of terrorist activity and s 14 of the *Immigration and Refugee Protection Regulations* dovetails with the *Code* by providing that the findings of fact set out in a criminal proceeding regarding terrorism are to be considered conclusive findings of fact by decision-makers in the context of s 34 inadmissibility proceedings. It is notable that the definition of terrorism elaborated in the *Code* includes acts which cause property damage, provided that the other essential elements of a terrorist act are present.

Following on the heels of the *Suresh I* decision, the Federal Court in *Fuentes*,<sup>60</sup> overturned the decision of an adjudicator, in part based on the fact that the adjudicator's interpretation of the meaning of terrorism did not coincide with the Supreme Court's emphasis on the targeting of civilians as a pre-condition to a

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<sup>59</sup> *Ibid* at para 98.

<sup>60</sup> *Fuentes v Canada (MCI)*, [2003] 4 F.C. 249.

terrorist act. Similarly, in *Zarrin*,<sup>61</sup> the court overturned another decision, because it did not coincide with the clear guidance provided by the Supreme Court as to the meaning of terrorism. The court noted:

In my view, pursuant to the Supreme Court of Canada's decision in *Suresh*, as well as the recent decision of this court, *Fuentes*, the respondent's department now has judicial guidance, including particular criteria, that should be used in determining whether an organization is indeed one that engages or engaged in terrorism. Such reasoning should have formed part of the officer's decision. [citations omitted]

Since the decision of the Supreme Court in *Suresh I*, cases considering the issue of terrorism under s 34 tend to focus on whether decision makers: a) adequately set out their understanding of the meaning of the term terrorism; and b) adequately apply this understanding to specific events or incidents, in which the individual concerned is alleged to be implicated. In *Jalil*,<sup>62</sup> the court held that the assessment of whether there are reasonable grounds to believe that an organization has engaged in acts of terrorism involves a two-step analysis. The first step involves a factual determination of whether there are reasonable grounds to believe that the organization in question committed the acts of violence attributed to it. At the second step of the analysis, a determination is made as to whether those acts constitute acts of terrorism. The officer must provide the definition of terrorism relied upon and explain how the listed acts meet that definition.

In *Naeem*,<sup>63</sup> the Federal Court emphasized the need to properly and explicitly characterize the acts in question as terrorism, noting that "[a]cts such as kidnapping, assault and murder are undoubtedly criminal, but are not necessarily acts of terrorism. It was incumbent on the officer to explain why she viewed them to

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<sup>61</sup> *Zarrin v Canada (MCI)*, 2004 FC 332, para 14.

<sup>62</sup> *Jalil v Canada (MCI)*, 2007 FC 568.

<sup>63</sup> *Naeem v Canada (MCI)*, 2007 FC 123.

be terrorist acts.”<sup>64</sup> On this note, it is interesting, if not surprising, that the definition of terrorism provided by Citizenship and Immigration Canada in its manual for decision-makers on inadmissibility is at the broader end of the spectrum established internationally and in the jurisprudence, and, as with the Criminal Code of Canada, is not confined to acts carried out against civilians. The Manual states:

“terrorism” relates to activities directed toward or in support of the threat or use of acts of violence against persons or property for the purposes of achieving a political objective; an act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population or to compel a government or an international organization to do or to abstain from doing any act.<sup>65</sup>

Following *Suresh I*, the jurisprudence on terrorism under s 34(1)(c) has focused almost entirely on determining whether first-level decisions have complied with an almost checklist-like approach to considering the “who”, “what”, “when”, “why” and “where” of alleged terrorist acts. In other words, in the immigration context, the courts have not substantively revisited the lawfulness of the terrorism provision, but as we shall also see, the focus in the jurisprudence under 34(1)(c) has arisen almost entirely within the context of allegations of membership in a terrorist organization pursuant to s 34(1)(f) of the IRPA, rather than the actual commission of terrorist acts. It is perhaps for this reason that the substantive jurisprudence on terrorism under s 34(1)(c) has been sparse.

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<sup>64</sup> *Ibid*, at para 46.

<sup>65</sup> Canada, Citizenship and Immigration Canada, ENF 1 “Inadmissibility” (2008) online: Citizenship and Immigration Canada: [www.cic.gc.ca](http://www.cic.gc.ca) at 9.

### ***2.3.5 Sections 34(1)(d) and (e): Danger to the Security of Canada or Danger to Persons in Canada***

In *Suresh I*, the Supreme Court also considered whether the term 'danger to the security of Canada' was unconstitutionally vague. In finding that the term was not overly vague, the court found that the term must be given a broad interpretation. Recognizing that the term is difficult to define, is largely context-specific and is "political in a general sense," the court found that a broad and flexible approach is required, combined with a highly deferential standard of judicial review. Provided the Minister is able to point to some evidence that reasonably supports a finding of danger to the security of Canada, the courts should not interfere with the Minister's decision.<sup>66</sup>

In noting the serious consequences attached to deportation, the court also cautioned that, to survive constitutional scrutiny a threat to the security of Canada must be a serious one and in providing guidance to first-level decision-makers, the court provided the following broad definition of the term:

These considerations lead us to conclude that a person constitutes a "danger to the security of Canada" if he or she poses a serious threat to the security of Canada, whether direct or indirect, and bearing in mind the fact that the security of one country is often dependent on the security of other nations. The threat must be "serious", in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible.<sup>67</sup>

Since *Suresh*, however, s 34(1)(d) has remained a rarely invoked provision and consideration of the term "danger to the security of Canada" has been almost entirely confined to a small number of individuals subject to Canada's national

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<sup>66</sup> *Suresh I*, *supra* note 58 at para 85.

<sup>67</sup> *Ibid* at para 90.

security certificate regime and to the usage of the term under s 115 of the IRPA, regarding the removal of Convention refugees.<sup>68</sup> Section 34(1)(e) of the IRPA, which creates a further ground of inadmissibility for those “engaging in acts of violence that would or might endanger the lives or safety of persons in Canada,” has been invoked even less frequently and has received essentially no jurisprudential analysis.

### **2.3.6 Section 34(1)(f): Membership**

Section 34(1)(f) of the Act creates a further ground of inadmissibility for those who have not personally committed proscribed acts, but who are, or have been members in an organization that has engaged, or will engage in the acts referred to in sections 34(1)(a)-(c). This membership category has proven to be the most commonly invoked, hotly contested and controversial security provision. An analysis of inadmissibility under s 34(1)(f) involves two separate assessments. First, the decision-maker must determine whether there are reasonable grounds to believe that the organization in question engages, has engaged or will engage in acts referred to in s 34(1)(a)-(c). Second, the decision-maker must consider whether the individual in question is (or was) a member of such an organization, once again on the reasonable grounds to believe standard set out at section 33 of the IRPA.

The courts have repeatedly adopted a broad interpretation of the meaning of membership as it appears in s 34(1)(f). The rationale for such a broad and unrestricted definition relates, at least in part, to the importance of protecting the Canadian public from perceived security threats and to the difficulties associated with defining membership in what are often loosely-structured and informal organizations. In an oft-cited passage, future Supreme Court Justice Rothstein (then of the Federal Court) framed the issue of membership in the following terms:

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<sup>68</sup> See for example, *Canada (MCI) v Harkat*, 2014 SCC 37; *Almrei (Re)*, 2009 FC 3; *Zündel, Re*, 2005 FC 295; *Mahjoub v Canada (Citizenship and Immigration)*, 2007 FC 171; *Jaballah v Canada (MCI)*, 2006 FCA 179; *Nagalingam v Canada (MCI)*, 2008 FCA 153.

The provisions deal with subversion and terrorism. The context in immigration legislation is public safety and national security, the most serious concerns of government. It is trite to say that terrorist organizations do not issue membership cards. There is no formal test for membership and members are not therefore easily identifiable...I think it is obvious that Parliament intended the term "member" to be given an unrestricted and broad interpretation.<sup>69</sup>

Similarly, in another *Suresh* decision, the Federal Court rejected the applicant's argument that he was not a member of a terrorist organization because he had not taken a membership oath. Essentially, the court found that, as the applicant had participated in other activities that could be considered indicia of membership, he was lawfully considered a member for the purposes of determining admissibility. The court noted:

I am satisfied that one can reasonably conclude that an individual is a "member" of an organization if one devotes one's full time to the organization or almost one's full time, if one is associated with members of the organization and if one collects funds for the organization. This is the case of Suresh. He is known to the leadership of the LTTE and has continual contacts with them. Whether he took an oath administered by the LTTE or not or whether he carries with him a cyanide tablet is immaterial. An oath may be required today for a person who joins the LTTE for the purpose of "fighting" for the LTTE with guns and ammunition but one can still be considered a member without taking an oath or carrying on his or her person a cyanide tablet.

Membership cannot and should not be narrowly interpreted when it involves the issue of Canada's national security. Membership also does not only refer to persons who have engaged or who might engage in terrorist activities.<sup>70</sup>

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<sup>69</sup> *Singh v Canada (MCI)* (1998), 151 F.T.R. 101 (T.D.) at para 52.

<sup>70</sup> *Suresh v Canada (MCI)*, 1997 CanLII 5797, at paras 21-22 (*Suresh II*).

At roughly the same time, the court in *Chiau* found that neither actual or formal membership nor active participation in unlawful acts is required to establish membership for the purpose of s 34(1)(f).<sup>71</sup>

Following these decisions, the jurisprudence came to incorporate an exceptionally broad approach to considering membership, detaching it entirely from any temporal connection to proscribed activity and providing little by way of detailed analysis as to what an “unrestricted and broad” interpretation of membership should mean.<sup>72</sup> As the Federal Court noted in *Ugbazghi*, “subsection 34(1) was intended to cast a wide net in order to capture a broad range of conduct that is inimical to Canada’s interests.”<sup>73</sup>

As noted, beyond the fact that membership in proscribed organizations should be given a broad interpretation, the courts also found that the term should not be bound by any temporal limitations. Thus in *Al Yamani*, the court found that even if an organization had not engaged in terrorist acts over the course of an individual's membership, if the organization later turned to violence the individual may be found to be inadmissible.<sup>74</sup> Justice Snider of the Federal Court stated in this regard:

Quite simply, and contrary to the arguments made by Mr. Al Yamani, there is no temporal component to the analysis in s. 34(1)(f). If there are reasonable grounds to believe that an organization engages today in acts of terrorism, engaged in acts of terrorism in the past or will engage in acts of terrorism in the future, the organization meets the test set out in s. 34(1)(f). There is no need for the Board to examine whether the

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<sup>71</sup> *Chiau v Canada (MCI)*, [1998] 2 FC 642 (TD), affm'd on other grounds, *Chiau*, *supra* note 38.

<sup>72</sup> For but a few examples, see *Gebreab v Canada (MCI)*, 2009 FC 1213, affm'd 2010 FCA 274; *Kanendra v Canada (MCI)*, 2005 FC 923; *Qureshi v Canada (MCI)*, 2009 FC 7; *Kozonguizi v Canada (MCI)*, 2010 FC 308.

<sup>73</sup> *Ugbazghi v Canada (MPSEP)*, 2008 FC 694 at para 47.

<sup>74</sup> *Al Yamani*, 2006 FC 1457 [Al Yamani II].

organization has stopped its terrorist acts or whether there was a period of time when it did not carry out any terrorist acts.

Membership by the individual in the organization is similarly without temporal restrictions. The question is whether the person is or has been a member of that organization. There need not be a matching of the person's active membership to when the organization carried out its terrorist acts.<sup>75</sup>

While this result may have appeared harsh, the Justice concluded that the exemption clause under (the then) s 34(2) of the IRPA allowed the Minister to excuse from inadmissibility those whose membership in a terrorist organization may have been innocent. The assertion that there is no temporal dimension to the security-inadmissibility analysis has been the prevailing wisdom in the jurisprudence for several years<sup>76</sup> and, at least for now, remains good, if not unquestioned, law.<sup>77</sup> The result, at times, borders on the bizarre. It means that past

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<sup>75</sup> *Ibid*, at paras 11-12.

<sup>76</sup> *Gebreab v Canada (MCI)*, 2009 FC 1213, affm'd 2010 FCA 274: the s 34(1)(f) analysis requires no "matching up" of periods of membership with periods of proscribed activity; *Tjiueza v Canada (MCI)*, 2009 FC 1260 confirming that s 34(1)(f) applies if (in that case) subversion by force occurred prior to, during, or even after an individual ceases to be a member; *Monge Contreras v Canada (MCI)*, 2010 FC 246 reiterating that inadmissibility may arise, on the reasonable grounds to believe standard, for future acts of terrorism that an organization may carry out.

<sup>77</sup> Recently in *El Warfalli v Canada (MPSEP)*, 2013 FC 612, the Federal Court expressed some misgivings about the notion that the timing of an individual's membership in an organization is entirely irrelevant to the s 34(1) analysis. The applicant was a Libyan physician who worked for a Saudi charitable organization in Bosnia in the mid-1990s. Several years after he left the organization, the UN placed the Bosnian branch of the organization on a terror watch list because of events that took place after the applicant had left the organization. This later led to a finding that the applicant, who had been found to be a Convention refugee in Canada, was inadmissible to Canada pursuant to s 34(1)(f) of the IRPA. In what may prove to be a shift from the *Al Yamani II* line of jurisprudence, the court concluded that it was an error for the board to have found the applicant inadmissible for membership in a terrorist organization when the organization had not taken part in any terror-related activities until after the applicant had left it. Justice Mandamin found in this respect (at para. 62):

The difficulty arising from the Board's interpretation of s. 34(1)(f) is to associate individuals with future terrorism retroactively to the period of their membership, without any regard to honest and lawful participation at the time of the membership. In effect, any permanent resident or foreign national who is a member of any



membership in an organization that has never engaged in proscribed activity, but takes up such activity after the period of membership has ended results in inadmissibility. It similarly means that membership in an organization that, at virtually any period in history, engaged in subversion or that committed even a single act of terrorism can result in an inadmissibility finding, even if that organization disavowed the use of violence decades before the individual in question became a member.

Also in contrast to other contexts, the courts in security-inadmissibility proceedings have rejected arguments that minors should be exempt from inadmissibility for membership in terrorist/subversive organizations. In *Poshteh*, the Federal Court of Appeal upheld a finding of inadmissibility despite the fact that the appellant was a minor at all relevant times of his (informal) membership in an Iranian group known as the MEK. The court noted that the IRPA specifically bars inadmissibility findings against minors who have committed criminal offences and have been convicted under Canada's *Youth Criminal Justice Act*. The lack of any similar reference to minors in the security context suggested to the court that no categorical distinction was to be made between adults and minors. Rather, the court found that an individual's status as a minor is "simply a further consideration"

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organization, by this interpretation of s. 34(1)(f), has a Sword of Damocles suspended indefinitely over his or her head should the organization they once had been a member [of] become engaged in terrorist activities in the future.

In considering the wording of s.34(1)(f), which clearly contains a future component to it (will engage in terrorism), the court found that the reasonable grounds to believe standard must be considered from the time at which an individual was a member. This approach, Justice Mandamin concluded, provides for a nexus between membership and future organizational activity associated with terrorism. It provides for the requisite national security and public safety objectives. Importantly, it does not include within s 34(1)(f) individuals who are themselves innocent of the conduct of the organization in the future : para. 78.

to be made in the individualized assessment of membership made under s 34(1)(f).<sup>78</sup>

Furthermore, flowing from the Supreme Court of Canada's decision in *Suresh I*, the Minister has argued that even non-voluntary acts, i.e. those made under coercion or duress, are sufficient to attract liability under s 34(1)(f) if the acts themselves constitute membership under the broad and unrestricted definition of the term. In such situations, the Minister has contended, the involuntariness of the individual's actions is only relevant to an application for relief of inadmissibility under s 34(2) (now s 42.1) of the IRPA.<sup>79</sup>

Beyond the broad statutory language and expansive jurisprudence associated with the definition of membership under s 34(1)(f), it is also of note that the mere fact of employing membership as a form of proscribed activity is viewed in other (even immigration) contexts as a legally and empirically dubious proposition. Imposing sanctions against individuals for membership in an organization is typically a form of third party liability. It is not the membership, *per se*, that is of concern, but rather the criminal actions of other members of that collectivity that give rise to liability. However, in international criminal law and the law of refugee exclusion mere membership in an organization that has committed international crimes is never sufficient in and of itself to attract legal liability.<sup>80</sup> Beyond membership, there must be some evidence that the individual contributed, not just

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<sup>78</sup> *Poshteh v Canada (MCI)*, 2005 FCA 85 [Poshteh] at para 45.

<sup>79</sup> See *Minister of Public Safety and Emergency Preparedness v. X*, Immigration and Refugee Board, Immigration Division, ID File No. B0-00824 (April 14, 2011) at para 29, citing *Suresh I*, supra note 55 at para 110 and *Canada (MPSEP) v Agraira*, 2011 FCA 103 at para 64, affm'd (on other grounds), 2013 SCC 36.

<sup>80</sup> For a recent, comprehensive review of developments in the law of complicity vis-à-vis both international criminal law and refugee law, see *Ezokola v Canada (MCI)*, 2013 SCC 40; *R (JS) v Secretary of State for the Home Department* [2010] UKSC 15 at 42-44 and 55; *Xu Sheng Gao v. United States Attorney General*, 500 F.3d 93 (2007) and *Attorney-General (Minister of Immigration) v. Tamil X* [2010] NZSC 107 at paras 58-70.

to the organization itself, but to the criminal purpose of the organization to attract some form of liability.<sup>81</sup>

Imposing consequences for membership alone amounts to a form of absolute liability that requires, in some senses, neither *actus reus*, nor *mens rea* in any unlawful activity. While this approach may appear unproblematic when considering organizations with, in the language of Canadian refugee law, a “limited and brutal purpose,” the reality is that the vast majority of organizations implicated in allegations of terrorism and subversion are multifaceted organizations with a myriad of distinct purposes, some social, some humanitarian, some political and some violent. Membership alone in a death squad may well give rise to legitimate concerns, but the moral implications of membership in large and varied organizations are infinitely more complex. It is for this reason that the Supreme Court of Canada recently affirmed in *Ezokola* that any analysis of complicity in international crimes cannot result in the exclusion of refugee claimants for mere membership *or* for a failure to dissociate from a multi-faceted organization which has committed war crimes.<sup>82</sup> Rather, the evidence must indicate that, beyond membership, the individual has made a substantial contribution not simply to the organization, but to the criminal element within the organization. The Supreme Court stated in *Ezokola*:

In sum, the foregoing approaches to complicity all require a nexus between the individual and the group’s crime or criminal purpose. An individual can be complicit without being present at the crime and without physically contributing to the crime. However, the UNHCR has explained, and other states parties have recognized, that to be excluded from the definition of refugee protection, there must be evidence that the

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<sup>81</sup> *Ezokola, ibid*, at paras 8, 29, 36.

<sup>82</sup> *Ezokola, ibid*, at para 74.

individual knowingly made at least a significant contribution to the group's crime or criminal purpose.<sup>83</sup>

The recent findings of appellate courts around the world on the application of the exclusion clauses to those accused of international crimes<sup>84</sup> all flow more or less directly from a surge of developments on the issue of complicity in international criminal law. These developments, tied to the *ad hoc* war crimes tribunals for Rwanda and Yugoslavia, the promulgation of the *Rome Statute*<sup>85</sup> and the creation of the International Criminal Court, provide varying analyses as to when third parties will be found responsible for international crimes, but they all coalesce around the consensus that mere association is not sufficient to ground liability. There is agreement, in other words, that individuals are simply not responsible for the crimes of others by sole virtue of their common membership in a given collective. It is not a particularly controversial assertion to suggest, therefore, that the security-inadmissibility regime is a clear outlier in the manner in which it attributes both responsibility and legal consequence to those deemed to belong to organizations that have engaged in terrorism or subversion.

Following on the heels of the *Ezokola* decision, one Federal Court justice raised the question as to whether the Supreme Court's analysis of complicity in the context of the Refugee Convention could find application to the question of membership under s 34 of the IRPA. In *Joseph*, Justice O'Reilly stated:

In my view, while *Ezokola* dealt with the issue of exclusion from refugee protection, the Court's concern that individuals should not be found complicit in wrongful conduct based merely on their association with a group engaged in international crimes logically extends to the issue of inadmissibility. At a minimum, to exclude a person from refugee protection there must be

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<sup>83</sup> *Ibid* at para 77.

<sup>84</sup> *Supra* note 80.

<sup>85</sup> *Rome Statute of the International Criminal Court*, UN Doc A/CONF.183/9, July 17, 1998, art 25.

proof that the person knowingly or recklessly contributed in a significant way to the group's crimes or criminal purposes (at para 68). Similarly, it seems to me that to find a person inadmissible to Canada based on his or her association with a particular terrorist group, there must be evidence that the person had more than indirect contact with that group.<sup>86</sup>

These obiter comments opened the door to more fulsome arguments in subsequent cases on the implications of the *Ezokola* decision on the membership analysis conducted under s 34.<sup>87</sup> The door was soon closed. Other justices on the Federal Court disagreed with the stance of Justice O'Reilly in *Joseph*, concluding that the *Ezokola* complicity analysis was essentially irrelevant to the assessment of membership under s 34. And in *Kanagendren*, the Federal Court of Appeal unambiguously endorsed this view.<sup>88</sup> More specifically, the court found that while the *Ezokola* decision does have direct bearing on the interpretation of inadmissibility under s 35(1) of the IRPA, the same cannot be said for the interpretation of s 34(1)(f), which neither requires nor contemplates a complicity analysis in the context of determining membership.<sup>89</sup> In arriving at this conclusion, the court acknowledged that the other provisions of s 34 related to the actual commission of acts could engage a consideration of complicity, but as I shall illustrate below, this is of little practical effect as the vast majority of s34 cases involve allegations of inadmissibility based on membership.<sup>90</sup>

The use of membership alone as a basis for inadmissibility exponentially increases the scope of the security regime. As indicated, it captures not only the perpetrators of international crimes, and not only those who have furthered the

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<sup>86</sup> *Joseph v Canada (MCI)*, 2013 FC 1101, para 14.

<sup>87</sup> See *Kanagendren v Canada (MCI)*, 2014 FC 384, affm'd 2015 FCA 86; *Nassereddine v Canada (MCI)*, 2014 FC 85; *Haqi v Canada (MCI)*, 2014 FC 1167.

<sup>88</sup> *Kanagendren v Canada (MCI)*, 2015 FCA 86.

<sup>89</sup> *Ibid* at para 22.

<sup>90</sup> *Ibid* at para 25.

illicit goals of subversive or terrorist organizations, but also a broad swath of individuals whose relationship to such organizations is both marginal and innocuous. As noted above, when combined with the broad definitions of terrorism and subversion, the reach of the security-inadmissibility regime metastasizes, extending to an ambit of individuals who most would agree are of no concern from a national-security perspective.

To again borrow the words of Peter Shuck, it also makes the realm of security-inadmissibility something of a maverick even within the larger maverick of immigration law, “radically insulated and divergent from those fundamental norms...that animate the rest of our legal system.”<sup>91</sup> Or, to channel Dyzenhaus once more, the striking breadth of the security inadmissibility regime, together with the steadfast refusal of the courts to reign it in, has given rise to a gaping legal grey hole. Recall for a moment what Dyzenhaus’ means by the term. Legal grey holes arise in situations where “there are some legal constraints on executive action...but the constraints are so insubstantial that they pretty well permit government to do as it pleases.”<sup>92</sup> In other words, legal grey holes exist within legal domains, but are governed by a razor thin conception of the rule of law that confers virtually unlimited authority on the executive.

The incontrovertible fact of the security-inadmissibility regime is that it doesn’t just capture those who have taken part in unlawful coups d’etat and terrorism, and it is not even limited to “George Washington, Eamon De Valera, Menachem Begin and Nelson Mandela,” to refer back to the decision of the Federal Court in *Oremade I*. Notionally at least, the scope of s34 extends to any present, former or future member of the militaries of, for example, the United States, Great Britain, Italy, Russia, France, Australia and Poland, all of which have engaged in the subversion by

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<sup>91</sup> Peter H Schuck, “The Transformation of Immigration Law” (1984) 84 Colum L Rev 1 at 1.

<sup>92</sup> David Dyzenhaus, “Schmitt v. Dicey: Are States of Emergency inside or outside the Legal Order” (2005) 27 Cardozo Law Rev 2005 at 2018.

force of governments; to anyone affiliated with the current ANC government in South Africa; to every Russian former member of the Communist Party; and the list goes on, almost *ad infinitum*. In other words, the security-inadmissibility regime more or less permits the government to “do as it pleases” in the precise manner described by Dyzenhaus. The reality of course is that s34 is not generally applied to such individuals and this fact, combined with an examination of the kinds of persons who *are* subjected to s34 proceedings, lies at the very core of this dissertation.

Of all the jurisprudence on the application of s34(1)(f), perhaps no case highlights its anachronistic nature more than that which arose around a planned visit to Canada of British Member of Parliament George Galloway. In 2010, the controversial Galloway was invited to Canada to speak about his spearheading of aid caravans to the Gaza Strip. As a citizen of a visa-exempt country, Galloway was not required to obtain an entrance visa prior to entering Canada, but some two weeks before his planned visit, Galloway was informed that a preliminary assessment had been conducted in relation to his admissibility to Canada. The assessment suggested that he might be inadmissible under s 34 of the IRPA because of his donations to the Hamas-led government of the Gaza Strip. At the same time, however, it was abundantly clear from the record that the only reason why the admissibility assessment was conducted in the first place was at the instigation of political officials in the Minister of Citizenship's office.

As a result of the assessment, Galloway cancelled his planned trip and instead addressed his audiences by way of a video link. Galloway, together with the organizations and individuals who had invited him then sought judicial review of the “decision” that had been communicated to him.<sup>93</sup> Leave was granted in respect of the judicial review, but the application was ultimately dismissed on the basis that

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<sup>93</sup> *Toronto Coalition to Stop the War, et al v Canada (MPSEP)*, 2010 FC 957 [“*Toronto Coalition to Stop the War*”].

the correspondence to Mr. Galloway was not a decision subject to judicial review. Despite this finding, the court proceeded to conduct a review of the preliminary admissibility assessment, in the event that it had erred in finding that it was not a reviewable decision. In this respect, the court noted that it was "clear that the efforts to keep Mr. Galloway out of the country had more to do with antipathy to his political views than with any real concern that he had engaged in terrorism or was a member of a terrorist organization."<sup>94</sup> In addition, the individuals who had initiated the effort to find Mr. Galloway inadmissible appeared to have given "no consideration...to the interests of those Canadians who wished to hear Mr. Galloway speak, or the values of freedom of expression and association enshrined in the *Charter*..."<sup>95</sup>

In considering the inadmissibility assessment on its merits, the court further concluded that there was insufficient evidence to support a finding that Galloway was a *de facto* member of a terrorist organization or had engaged in acts of terrorism. It was, therefore, unreasonable for the Minister to rely on those grounds to deem him inadmissible to Canada. In particular, the court noted that the donations made by Mr. Galloway were clearly for humanitarian purposes and, as such, were not sufficient to bring him under the rubric of inadmissibility under s.34 of the IRPA. While donations to a government led by an organization such as Hamas *may* be sufficient to ground an inadmissibility finding, the intention behind the donations was found (at least in *this case*) to be a relevant factor that was not considered in the assessment. In this regard, the court noted:

The Court is not so naïve as to believe that Hamas is above taking advantage of the goodwill of others who contribute funds to them for humanitarian reasons. To suggest, however, that contributions to Hamas for such purposes makes the donor a party to any terrorist

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<sup>94</sup> *Ibid*, at para 8.

<sup>95</sup> *Ibid*.



crimes committed by the organization goes beyond the parliamentary intent and the legislative language. The purpose to which the funds are donated must be to enhance the ability of the organization to facilitate or carry out a terrorist activity. Absent such a purpose, the mere assertion that material support was provided to such an organization is not sufficient. To hold otherwise could ensnare innocent Canadians who make donations to organizations they believe, in good faith, to be engaged in humanitarian works.<sup>96</sup>

The *Toronto Coalition to Stop the War* case is instructive on a number of levels. First, as I shall illustrate below, it is one of the very few s34 security cases involving an individual from a “Western” country and it is, of course, notable that the inadmissible conduct in question relates to support for an organization (albeit one designated as engaging in terrorism) from the Global South. Second, the somewhat embarrassing facts that came to light in the course of the litigation in the case reveal both: a) the vulnerability of the s 34 process to executive manipulation; and b) the central role that discretion plays in the determination as to who will, and who will not become subject to s34 proceedings.

### ***2.3.7 Ministerial waivers of inadmissibility – Section 42.1 (Formerly Section 34(2))***

As noted above, persons who would otherwise be inadmissible to Canada pursuant to s 34(1) of the IRPA may nevertheless be permitted to enter (or remain in) the country if the Minister concludes that their presence in Canada would not be detrimental to the national interest.<sup>97</sup> The existence of an exemption clause has

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<sup>96</sup> *Ibid*, at para 110

<sup>97</sup> See s 42.1 of the IRPA. The relevant Minister is the Minister of Public Safety and Emergency Preparedness and the decision-making authority is non-delegable: see s 6(3) of the IRPA . These national interest decisions have repeatedly been found to be highly discretionary in nature, in part owing to the national security concerns involved and the Minister’s relative expertise in this area: see *Miller v Canada (Solicitor General)*, 2006 FC 912, [2006] F.C.J. No. 1164, at para. 42; and *Al Yamani v Canada (MPSEP)*, 2007 FC 381 at paras. 38-39; *Tameh v Canada (MPSEP)*, 2008 FC 884 at paras. 34-36.

both protected the security provisions from constitutional scrutiny and justified a broad interpretation of inadmissibility under s 34(1).

In *Suresh I*, the Supreme Court of Canada upheld what was essentially the predecessor to s 34(1) in the former *Immigration Act*, at least in part because of the existence of a national interest exemption clause. The court stated:

We believe that it was not the intention of Parliament to include in the s.19 class of suspect persons those who innocently contribute to or become members of terrorist organizations. This is supported by the provision found at the end of s. 19, which exempts from the s. 19 classes "persons who have satisfied the Minister that their admission would not be detrimental to the national interest". Section 19 must therefore be read as permitting a refugee to establish that his or her continued residence in Canada will not be detrimental to Canada, notwithstanding proof that the person is associated with or is a member of a terrorist organization. This permits a refugee to establish that the alleged association with the terrorist group was innocent. In such case, the Minister, exercising her discretion constitutionally, would find that the refugee does not fall within the targeted s. 19 class of persons eligible for deportation on national security grounds.<sup>98</sup>

This passage has been cited by the lower courts in rejecting arguments that s 34(1)(f) violates constitutionally protected equality rights, liberty interests and rights to freedom of expression.<sup>99</sup> The availability of an exemption has also provided perhaps the single greatest justification for the expansive interpretation of s 34(1) with the courts adopting the view that the security provisions are to be read as an integrated whole with the national interest waiver always running in the background to remedy any injustices that may arise as a result of an overly broad

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<sup>98</sup> *Suresh I*, *supra* note 58, at para 110.

<sup>99</sup> See *Al Yamani II*, *supra* note 74 at paras 41-57.

approach to the s 34(1) process.<sup>100</sup> In theory, this may be an understandable assertion; the empirical reality, as I shall set out below, tells a starkly different story.

In any event, because the prevailing view was that the national interest waiver constituted a safeguard against a (potentially) overbroad security provision, it too was implemented broadly, taking into consideration a wide range of factors. The Minister's role was not to reassess the s 34(1) decision, but was rather aimed at determining, notwithstanding an applicant's inadmissibility under s 34(1), whether it would be detrimental to the national interest for that person to remain in Canada. This being the case, the assumption for many years was that the national interest determination needed to take into consideration several factors, including any evidence that: a) contextualized the facts underlying the individual's inadmissibility finding; b) established that the individual no longer posed a threat to national security or public safety; and c) demonstrated that the person has contributed productively to Canadian society.<sup>101</sup> The relevant Citizenship and Immigration training manual, until recently, set out the following relevant considerations:

- Will the applicant's entry into Canada be offensive to the Canadian public?
- Have all ties with the regime/organization been completely severed?
- Is there any indication that the applicant might be benefiting from assets obtained while a member of the organization?

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<sup>100</sup> *Singh*, *supra* note 69 at paras 49-52. In 1992, officials with what was then known as the Department of Employment and Immigration testified before a parliamentary committee that the intent in drafting the national interest exemption (then found at subparagraph 19(1)(f)(iii)(B) of the *Immigration Act*, RSC 1985 c29 was to "define broadly with a discretion" to exclude from inadmissibility those whose presence in Canada, in the Minister's opinion, would not be detrimental to the national interest, see *Singh*, *supra* note 69 at para 50.

<sup>101</sup> See for example *Momenzadeh v Canada (MPSEP)*, 2008 FC 884 and (yet) another decision concerning the Palestinian Issam Al Yamani: *Al Yamani v Canada (MPSEP)*, 2007 FC 381 (*Al Yamani III*).

- Is there any indication that the applicant may be benefiting from previous membership in the regime/organization?
- Has the person adopted the democratic values of Canadian society?<sup>102</sup>

This prevailing view about the scope of the national interest waiver was shared by the courts, immigration counsel and the Minister until a somewhat bizarre sequence of events commenced with the decision of the Federal Court of Appeal in *Agraira*.<sup>103</sup> Muhsen Agraira was a citizen of Libya who claimed to fear persecution in that country because of his participation in the Libyan National Salvation Front (LNSF), an anti-Gadaffi (and CIA backed) organization that, at some points, was also alleged to be aligned with Libyan Islamic opposition groups, who in turn were thought to have links to Al Qaeda. The Immigration and Refugee Board disbelieved his story and rejected his claim to refugee status, largely on credibility grounds. Later, Mr. Agraira married a Canadian citizen who attempted to sponsor him for permanent residence. The application was refused under s 34(1)(f) of the IRPA, somewhat ironically, on the basis of Mr. Agraira's affiliation with the LNSF. Agraira then submitted a request for Ministerial relief which was also eventually refused, the refusal decision consisting entirely of the following:

After having reviewed and considered the material and evidence submitted in its entirety as well as specifically considering these issues:

- The applicant offered contradictory and inconsistent accounts of his involvement with the Libyan National Salvation Front (LNSF).

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<sup>102</sup> Canada, Department of Citizenship and Immigration, *ENF 2 - Evaluating Inadmissibility*, (2009) online: Citizenship and Immigration Canada [www.cic.gc.ca](http://www.cic.gc.ca) at para 13.6; also found at Canada, Department of Citizenship and Immigration, *IP 10 Refusal of National Security Cases\Processing of National Interest Requests Guidelines* (2009) online: Citizenship and Immigration Canada [www.cic.gc.ca](http://www.cic.gc.ca) at Appendix D. Note, however, that due to subsequent jurisprudential events discussed below and legislative changes, these sections of the immigration manuals have been expunged.

<sup>103</sup> *Canada (MPSEP) v Agraira*, 2011 FCA 103.

- There is clear evidence that the LNSF is a group that has engaged in terrorism and has used terrorist violence in attempts to overthrow a government.
- There is evidence that LNSF has been aligned at various times with Libyan Islamic opposition groups that have links to Al-Qaeda.
- It is difficult to believe that the applicant, who in interviews with officials indicated at one point that he belonged to a “cell” of the LNSF which operated to recruit and raise funds for LNSF, was unaware of the LNSF’s previous activity.

It is not in the national interest to admit individuals who have had sustained contact with known terrorist and/or terrorist-connected organizations. Ministerial relief is denied.<sup>104</sup>

On judicial review of this decision, the Federal Court found that the Minister's decision "turned on the simplistic view that the presence in Canada of someone who at some time in the past may have belonged to a terrorist organization abroad can never be in the national interest of Canada."<sup>105</sup> The court criticized the circular reasoning of the Minister, which amounted to a finding that an individual who commits an act described in s 34(1) cannot secure Ministerial discretion because he committed the very act that confers jurisdiction on the Minister to exercise discretion under then s 34(2). This analysis, the court concluded, renders the exercise of Ministerial discretion in these cases meaningless. In granting the application for judicial review, the court certified a question of general importance for consideration by the Federal Court of Appeal,<sup>106</sup> which had earlier been certified

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<sup>104</sup> *Ibid* at para 20.

<sup>105</sup> *Agraira v Canada (MPSEP)*, 2009 FC 1302, para. 27, citing *Kanaan v Canada (MPSEP)*, 2008 FC 241, para 8.

<sup>106</sup> Immigration matters that come before the Federal Courts in Canada are subject to a unique set of procedural measures, all aimed at circumscribing appeal rights. Interlocutory matters may not be

in a different case, that of *Abdella*, 2009 FC 1199. The certified question sought to clarify the specificity with which the Minister was required to refer to and consider the broad factors for Ministerial relief set out in the relevant guidelines and referred to above.<sup>107</sup>

On appeal by the Minister, the Federal Court of Appeal rendered a decision in the Minister's favour, but based on reasons that had not been raised by either of the parties. At the outset of its decision, the court noted this was the first case to come before it on the topic of Ministerial relief since the promulgation of the IRPA and, more importantly, since the subsequent transfer of responsibility for rendering relief decisions from the Minister of Citizenship and Immigration to the Minister of Public Safety and Emergency Preparedness. The court found both the increased emphasis on security under the IRPA and the transfer of decision making authority to the Minister of Public Safety to be relevant in determining the function and nature of the relief provision. The court emphasized that the burden in ministerial relief cases is squarely on the applicant, and that *the* overriding consideration for the Minister to consider is that of public safety. Other factors, such as those listed in the immigration manual and factors related to the personal situation of the applicant were found by the court to be not particularly relevant to relief applications and, the court concluded, are more appropriately raised in an application to the Minister of Citizenship and Immigration for humanitarian and compassionate relief under s 25 of the IRPA. In response to the argument that the decision under appeal simply

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appealed and for any final decision to be appealed, the applications judge who presides over the case must state and certify a question of general importance: see s 74(d) of the IRPA. While clearly outside the scope of this work, an appellate regime in which a first instance judge is tasked with determining *whether* his/her own decision may be appealed is itself a startling example of the exceptional or "maverick" status of immigration law in the larger legal order.

<sup>107</sup> The specific question was this:

When determining a ss. 34(2) application, must the Minister of Public Safety consider any specific factors in assessing whether a foreign national's presence in Canada would be contrary to the national interest? Specifically, must the Minister consider the five factors listed in the Appendix D of IP10?

reiterated the original inadmissibility determination, rendering the relief provision redundant, the court found that such provisions still have a role, but ostensibly only when membership in a proscribed organization was innocent or unknowing.<sup>108</sup>

This interpretation of the role of the Ministerial relief provision in the statutory scheme of the IRPA appeared to come as a surprise to all parties. It explicitly rejected the approach taken by the Minister himself (as articulated in the immigration manuals) and provided a striking illustration of the securitization of immigration decision-making. Above I spoke of the important symbolism attached to the shift of certain immigration matters to an agency responsible for enforcement and security. The Federal Court of Appeal's decision in *Agraira*, however, went far beyond symbolism, adding interpretive meaning to the shift in a manner that not even the Minister of Public Safety had contemplated.

The Court of Appeal's decision in *Agraira* raised another interesting question as to whether the narrowed threshold for obtaining Ministerial relief would actually (if unintentionally) become easier to meet, given that the only relevant factor in considering whether to grant Ministerial relief now appeared to be that of public safety. Put another way, if the sole criterion on Ministerial relief applications was now public safety, would an individual necessarily qualify for relief if it were established that he/she posed no threat to Canadian society? This was the implied finding of the Federal Court in *Khalil*,<sup>109</sup> a case that arose shortly after the Court of Appeal's decision in *Agraira*. As a result, the government quickly introduced the amended version of the national interest exemption, now found at s 42.1 of the IRPA, which appears to both codify the Federal Court of Appeal's interpretation of the national interest exemption and simultaneously to retreat from its unanticipated

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<sup>108</sup> *Agraira*, *supra* note 103 at paras 61-65.

<sup>109</sup> *Khalil v Canada (MPSEP)*, 2011 FC 1332.

consequences. The result borders on the unintelligible; s42.1(3) of the IRPA now states:

In determining whether to make a declaration, the Minister may only take into account national security and public safety considerations, but, in his or her analysis, is not limited to considering the danger that the foreign national presents to the public or the security of Canada.<sup>110</sup>

The meaning of this provision is, on its face, difficult to discern, but read in context, it appears to be aimed at prohibiting applicants from raising humanitarian and compassionate considerations in a Ministerial relief application, while preserving the ability of the Minister to deny applications of individuals who clearly do not pose a threat to national security. As noted above, the Federal Court of Appeal found that the personal circumstances of an applicant for Ministerial relief, i.e. factors not directly related to public safety or security, were more appropriately considered under the separate humanitarian and compassionate decision-making process established under s 25 of the IRPA. Of interest, however, is that, as noted above, another significant change brought about by the *Faster Removal of Foreign Criminals Act* was the *elimination* of access to s 25 for those found to be inadmissible pursuant to, amongst other provisions, s 34.<sup>111</sup> That which the court giveth, the government taketh away.

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<sup>110</sup> FRFCA, *supra* note 22 at s 18

<sup>111</sup> *Ibid* at s 9, 10. The newly amended s 25(1) of the IRPA states:

25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning



In yet a further wrinkle, the day after the FRFCA came into force, the Supreme Court of Canada issued its decision in the appeal of the *Agraira* case, and while it ultimately upheld the Minister's refusal to grant relief, it also overturned the Federal Court of Appeal's holding on the narrow scope of the (now repealed) relief provision.<sup>112</sup> The court questioned the reasoning of the Federal Court of Appeal on the significance of the transfer of responsibility for Ministerial relief applications from the Minister of Citizenship and Immigration to the Public Safety Minister. In rejecting the view that the transfer essentially eliminated all concerns other than those related to national security in determining national interest waivers, the court found that incorporating a transfer of Ministerial responsibility into an analysis of statutory meaning would represent a new and "perplexing" principle of interpretation.<sup>113</sup> The court also made reference to the key concern of the Federal Court, namely that an interpretation of the waiver provision that focuses *only* on security renders it entirely illusory for those already found inadmissible for security concerns. At the very least, such an approach would make it categorically impossible for individuals found inadmissible under certain categories of s 34(1) to obtain relief, leading the court to conclude that this was an "absurd interpretation which must be avoided."<sup>114</sup> What remains to be seen, however, is how the new s 42.1 will be interpreted, given that it codifies into law the *precise* absurdity referred to by the Supreme Court.

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the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

<sup>112</sup> *Agraira v Canada (MPSEP)* 2013 SCC 36 [Agraira SCC].

<sup>113</sup> *Ibid* at para 74.

<sup>114</sup> *Ibid* at para 83.

In any event, the (curiously-timed) result of the Court’s decision is, at least on this point, relatively moot, given the changed wording of the Ministerial relief provision and the now explicitly narrow scope provided under s 42.1(3). What is not moot, however, is the actual bulk of the court’s decision which, as with a surfeit of recent Supreme Court jurisprudence, transcended the substantive issues on appeal and became something of a meditation on judicial deference and administrative action.<sup>115</sup>

While the Supreme Court in *Agraira* acknowledged that it was not able to “determine with finality” the actual reasoning of the Minister, it looked instead at the reasons that *could* have been offered for the Minister's decision.<sup>116</sup> In embarking on this search for a possible rationale, the court found that, implicit in the Minister's brief decision, was an interpretation of the national interest that related “predominantly to national security and public safety, but does not exclude the other important considerations outlined in the Guidelines or any analogous considerations.”<sup>117</sup> The court then noted that the Minister was entitled to deference in regard to this attributed interpretation and concluded that the decision was reasonable.

An analysis of the increased emphasis on deference emanating from the Supreme Court of Canada is, at least for present purposes, outside the scope of this discussion. This said, as we move on to an analysis of decisions made under both s 34(1) and the national interest exemption, it is important to recall that, increasingly,

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<sup>115</sup> See for example: *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471 [Mowat]; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [Newfoundland Nurses]; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 [Alberta Teachers]; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160 [Smith] and *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 SCR 364 [Halifax].

<sup>116</sup> *Agraira* SCC, supra note 98 at para 58, citing *Alberta Teachers*, *Ibid*.

<sup>117</sup> *Ibid* at paras 63-64.

these decisions will be the final word on whether a person is or is not deemed an inadmissible security threat. In the exceptional realm of the security-migration nexus, which combines high stakes rights interests and low-grade procedural protections, the retreat of the court is of concern, calling to mind the now infamous (and lamentable) words of the United States Supreme Court in the *Chinese exclusion case*:

If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects...[and in such cases] its determination is conclusive upon the judiciary."<sup>118</sup>

Before turning to the empirical data, however, I turn now to a brief exploration of the human rights principles at stake in these proceedings to illustrate why these decisions matter so profoundly to those subject to them.

### ***2.3.8 Why Inadmissibility Matters: Section 34 and Refugee Status***

As I have discussed above, immigration has historically, and persistently, been viewed as a matter of the receiving state's prerogative. Countries may, at least in theory, legitimately choose who to admit and how narrowly or broadly to exclude those who have taken part in foreign conflicts. The commonly accepted exception to state discretion regarding admission is in the area of asylum where the majority of states have agreed to limit their sovereignty to allow those at risk of persecution in their respective countries of origin the *right* to assert a claim for asylum and to receive protection from persecution.<sup>119</sup>

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<sup>118</sup> Per Justice Field in the *Chinese Exclusion Case*, 130 U.S. 581 (1889).

<sup>119</sup> See the *United Nations Convention Relating to the Status of Refugees*, 189 UNTS 150, entered into force April 22, 1954, [*Refugee Convention*], but even before the *Refugee Convention* came into

The obligation not to return refugees to persecution, the principle of *non-refoulement*, is firmly entrenched in international discourse and has become, at least according to some commentators a *jus cogens* principle of international law, from which no derogation is permitted.<sup>120</sup> Recognizing the limits to state's willingness to accede to this regime, the drafters of the *Refugee Convention* incorporated into it exceptions – known as the exclusion clauses – for those involved in: i) war crimes, crimes against peace and crimes against humanity; ii) serious non-political crimes; and iii) acts “contrary to the purposes and principles of the United Nations.”<sup>121</sup> The *Refugee Convention* also contains provisions for national security during times of exception, most notably the following:

#### Article 9

##### Provisional Measures

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

#### Article 32

##### Expulsion

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existence, the inalienable right to be free of persecution was entrenched in the *Universal Declaration of Human Rights*, GA Res 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810, 1948, Article 14 of which provides that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution...”

<sup>120</sup> See for example J. Allain, “The *Jus Cogens* Nature of *Non-Refoulement*”, 13 *Int’l J Refugee Law* (2001) 533-558; A. Farmer, “*Non-Refoulement* and *Jus Cogens*: Limiting Anti-Terror Measures that Threaten Refugee Protection”, 23 *Georgetown Imm LJ*, (2008) 2-43. The assertion, however, is controversial, with other commentators (and several courts) maintaining that *non-refoulement* remains a norm of customary international law which has not attained *jus cogens* status.

<sup>121</sup> *Refugee Convention*, *supra* note 119, respectively Articles 1F(a), (b) and (c).

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

...

### Article 33

#### Prohibition of expulsion or return (“refoulement”)

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.<sup>122</sup>

In Canada, the exclusion clauses of the *Refugee Convention* have been directly incorporated into the IRPA.<sup>123</sup> Sitting parallel to these clauses, however, is the inadmissibility regime, which in certain circumstances, bars individuals from consideration as to whether or not he/she *is* a Convention refugee, let alone from the protections that are afforded same. Pursuant to s 100 of the IRPA, consideration as to whether an individual meets the threshold criteria for eligibility to initiate a refugee claim is suspended if an officer has exercised her/his discretion to refer the individual for an admissibility hearing. Section 103 of the IRPA provides for the suspension of an already existing refugee claim if an officer later refers the matter to an inadmissibility hearing. Section 101 of the IRPA clarifies that, upon a finding of inadmissibility for, amongst other things, national security, a refugee claim is

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<sup>122</sup> *Refugee Convention*, supra note 119.

<sup>123</sup> IRPA, supra note 14 at s 98.

ineligible for consideration, while section 104 sets out the notice process associated with the termination of a claim. Finally, s 112 of the IRPA bars consideration as to whether or not an individual who is inadmissible for, amongst other things, national security grounds, will face persecution in the Pre-Removal Risk Assessment process, which is intended to provide a final risk screening for those subject to removal. However, largely to ensure compliance with the *Convention Against Torture*, such individuals are entitled to a consideration as to whether their removal will subject them personally to a risk of torture, a risk to their life or to a risk of cruel and unusual treatment or punishment.<sup>124</sup> For perceived security threats, even this scaled-down risk assessment is subject to a balancing process, wherein an official of the Public Safety department determines whether an individual's application should be refused, notwithstanding any risks, because of the "nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada."<sup>125</sup> Finally, to make matters completely clear, the IRPA also explicitly states at s 115(2) that Canada's commitment to the principle of *non-refoulement* does not apply to those found inadmissible on grounds of, amongst other categories, security if, in the opinion of the Public Safety Minister, the person should not be allowed to remain in Canada "on the basis of the nature and severity of acts committed or of danger to the security of Canada."

All of this is a rather technical way of illustrating the high stakes process associated with Canada's security-inadmissibility regime. It charts a course of removal for those deemed threats, circumventing entirely the refugee protection process, while maintaining minimal protections only for those at risk of the most severe forms of harm if removed. To be sure, not all persons who are subject to the security-inadmissibility regime are Convention refugees or even assert a risk of harm if removed from Canada. As we shall see below however, refugee claimants,

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<sup>124</sup> IRPA, *supra* note 14 at s 112(3) and s 113.

<sup>125</sup> *Ibid* at s 113(d)(ii).

Convention refugees and permanent residents who had previously been found to be refugees make up the vast majority of s 34 cases, at least for those that have arisen in Canada over the past decade.<sup>126</sup> When this fact is combined with the vast breadth of the security-inadmissibility regime what comes into focus is not only a legal process defined by legal grey holes, but one that has the potential to expose significant numbers of individuals to a palpable risk of harm.

## **2.4 Feeling Insecure: Data on Security and Inadmissibility in Canada**

Democracy don't rule the world,  
You'd better get that in your head;  
This world is ruled by violence,  
But I guess that's better left unsaid.<sup>127</sup>

### **2.4.1 Introduction**

The extraordinary reach of the Canadian security-inadmissibility regime raises a panoply of interesting questions. Given the notional reality that the security provisions capture broad swaths of the populations of many countries, decisions are clearly made by immigration and public safety officials about what constitutes a security threat; about categories of persons who may be of concern and, on the flipside, about which cases warrant the discretionary turn of a blind eye.

Recall that security inadmissibility cases are generally initiated in Canada by immigration or public safety officials through the process set out at s 44 of the IRPA. This process involves two separate discretionary decisions. First, if an officer suspects that an individual is inadmissible, he or she *may* write a report outlining the perceived inadmissibility, pursuant to s 44(1) of the Act. That report is then

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<sup>126</sup> In making this claim, I don't mean to minimize the impact that the security-inadmissibility process can bring to bear on those who make no claim to personal risk in their country of origin. The effect of an inadmissibility finding, particularly one related to allegations of terrorism and/or security, can be profound. The process can lead to stigma, isolation, bars on the ability to work and permanent separation from immediate family.

<sup>127</sup> Bob Dylan, "Union Sundown" from the album *Infidels*, released October, 1983.

referred to a Minister's Delegate who, pursuant to s 44(2) of the IRPA, *may* then refer the matter to the Immigration Division of the Immigration and Refugee Board (IRB) for an admissibility hearing. The admissibility hearing is a quasi-judicial, adversarial process involving a civil servant decision-maker, a counsel for the Minister of Public Safety and counsel for the individual alleged to be inadmissible (if they choose, and are able, to exercise their right to counsel).

In this chapter, I assess and analyze the outcomes of decisions from the Immigration Division on security-inadmissibility cases arising under s 34 of the IRPA.<sup>128</sup> The Immigration Division decisions provide interesting information in their own right, but because the cases that come before it are initiated through the discretionary decision-making process of the Public Safety Minister, they also provide insight into the concerns and priorities of the Federal government in the security-migration regime. The initial questions I sought to address in analyzing these cases were basic ones, including:

- Who is being referred for admissibility hearings under s 34?
- From what countries are individuals referred for inadmissibility hearings?
- Why, i.e. under which particular head of inadmissibility under s34, are individuals referred for inadmissibility hearings?
- Since the outset of the IRPA, are there any trends in the number of referred cases?

Before I turn to a description of the methodology that I have used in analyzing these cases, I should provide a brief note of disclosure. My interest in looking at

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<sup>128</sup> Note that s 34 decisions are not *only* rendered by the Immigration Division. Overseas immigration applications and in-Canada applications for permanent residence (in certain situations) are determined by immigration officers and, in the course of their determination, they may find (generally in conjunction with a centralized national security intelligence unit) that a person is inadmissible under s 34. Access to Information Requests have also been submitted in respect of these decisions but, to date, they have not been fulfilled.



these cases arose, at least in part, from my legal practice and my representation of individuals who were referred for security-related inadmissibility hearings. My anecdotal sense, from both my own experience, and from talking with other lawyers, was that such hearings were increasing in frequency and that they were becoming something of a preferred method for addressing individuals of particular backgrounds, as opposed to addressing them through the exclusion clauses associated with the refugee process. These views were based on more than mere speculation, but at the same time, they were not based on any empirical data, a problem that this study seeks to address. To my knowledge, no empirical studies on the application of s 34 have been conducted. While the data collected in relation to this aspect of this project cannot answer all of the questions that arise, it does provide interesting insights into the security-migration regime under s 34 of the IRPA.

#### ***2.4.2 Methodology***

Immigration Division (ID) decisions are only sporadically published in online legal databases, such as the open-access CanLII database and other fee-based services such as LexisNexis and Westlaw. To obtain a full record of ID decisions on national security, therefore, Access to Information Requests were submitted seeking disclosure of all decisions issued by the ID related to admissibility hearings conducted under the provisions of s 34(1) of the IRPA from the date of enactment of the IRPA (June 28, 2002). An initial request provided data on 158 cases, to December, 2011.<sup>129</sup> A follow-up Access to Information Request yielded 37 further

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<sup>129</sup> Immigration and Refugee Board, Access to Information (ATIP) Request #A-2011-00094 (10 April 2012). I am very grateful to Professor Sharryn Aiken of Queen's University who was able to fund the fulfilling of this access request and to lawyer Catherine Bruce, who joined in the submission of the request to assist her in preparing a challenge to the provisions of s 34(1). The disclosed material is all on file with the author.

cases, updated to May, 2013.<sup>130</sup> A total of 195 decisions, amounting to over 3700 pages of reasons have now been disclosed.<sup>131</sup>

As I set out above, the existence of a national interest exemption clause is commonly referred to, by both the courts and the Public Safety Minister alike, as a legal justification for the extraordinary reach of the security-inadmissibility provisions. In order to assess the empirical validity of this assertion, further information was obtained on decisions rendered by the Public Safety Minister under the national interest exemption found, until recently, at s 34(2) of the IRPA.<sup>132</sup>

Following disclosure of the 195 s 34 cases, the next stage in the analysis was to manually review them, coding various categories of information in each decision,<sup>133</sup> including the following:

- Year of decision
- Country of origin of the person concerned (PC)
- Name of person<sup>134</sup>
- IRB File Number and Location (Toronto, Vancouver, Montreal)

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<sup>130</sup> ATIP Request #A-2013-00352 (10 October 2013).

<sup>131</sup> Though disclosure of the cases was provided in full, redactions were made to many of the decisions, typically because the proceedings were held *in camera*. The redactions did not, however, prevent the collection of the relevant data for this study.

<sup>132</sup> This data was initially obtained by lawyer Chantal Desloges, pursuant to Access to Information Request #A-2011-00189 (11 May 2011), in relation to a challenge to the constitutionality of another national interest exemption clause, this one dealing with organized criminality under (then) s 37(2) of the IRPA. This request was updated by way of a separate request by the author: A-2013-02797 (25 June 2013).

<sup>133</sup> Not all of the categories coded will be directly used in this study. The coding process is a relatively laborious one, and in the interests of efficiency it made sense to review the decisions once, even if not all of the below categories are relevant for present purposes.

<sup>134</sup> Immigration Division hearings are public proceedings, except, pursuant to s 166(c.1) of the IRPA, which provides that proceedings before the Division must be held in the absence of the public if they concern a person who is the subject of a proceeding before the Refugee Protection Division or the Refugee Appeal Division that is pending or who has made an application for protection to the Minister that is pending. As a high percentage of s 34 inadmissibility cases involve refugee claimants, or persons already found to be Convention refugees, the names of many of the individuals were withheld. Furthermore, to protect the privacy of all of the persons whose cases were disclosed, I will refer to all cases by file number, rather than by name, even where it has been disclosed.

- Specific s 34 allegations (34(1)(a)-(f) – espionage, subversion, terrorism, etc.)
- PC’s alleged organizational affiliation
- Organization type (as characterized in the decision, i.e. government agency, political movement, separatist movement, etc.)
- Outcome
- Refugee Claimant (i.e. has the person initiated a refugee claim, been found to be a Convention refugee or become a permanent resident following a successful refugee claim)<sup>135</sup>
- Identity of the Board Member
- Counsel (and indicates where individual was unrepresented)
- Information regarding judicial review<sup>136</sup>

### ***2.4.3 A Steady Rise: Section 34 cases by year***

While the overall number of inadmissibility cases may, at first glance, appear small, two factors are important to consider. First, as discussed above, the consequences of a finding of security-inadmissibility are profound, most notably because they include the possibility of removing individuals to known risks of persecution. And beyond the individual rights at stake, Canada’s record of compliance with international human rights norms is also clearly implicated in the security-inadmissibility process. Less than 200 prisoners remain imprisoned at

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<sup>135</sup> This coding category was determined in a couple of different ways. First, as mentioned above, given that Immigration Division decisions are to be held in public, except in relation to matters involving refugee claimants, the withholding of names in ATIA disclosure decisions was in itself a strong indicator that the person concerned had made a refugee claim. The stronger indicator, however, was typically provided in the content of the decisions themselves which virtually always provide at least an outline of the individual’s circumstances, including whether they have made a refugee claim.

<sup>136</sup> As I shall set out in greater detail below, for individuals found to be inadmissible to Canada under s 34, the only means of challenging the inadmissibility decision is by way of an application for judicial review at the Federal Court. Furthermore, immigration matters at the Federal Court are subject to a leave requirement in order to obtain judicial review, a process which has long been criticized, see Sean Rehaag, “Judicial Review of Refugee Determinations: The Luck of the Draw?” (2012) 38:1 Queen’s LJ [Rehaag, the Luck of the Draw].

Guantanamo Bay, Cuba, yet notwithstanding this relatively small number of remaining prisoners, their ongoing detention remains a significant human rights and public policy issue in the United States. Second, as illustrated below, while modest, the number of cases determined by the Immigration Division under s 34 has been steadily increasing in virtually every year since 2002, from only two cases in that year to an average of over 30 cases per year from 2010-2012. This increase was most notable between 2008 and 2009 when the number of cases more than doubled from previous years.

What is also notable for these years is that, while the numbers of inadmissibility cases steadily rose, the number of refugee claimants (who, as will be set out below, make up a large proportion of the s 34 cases before the ID) sharply declined, from almost 44,000 cases in 2001, to less than 20,000 per year in more recent years.<sup>137</sup> The number of claims has continued to diminish following the major overhauls to the refugee determination system that have occurred since 2011, to the point that they are now at “historical lows.”<sup>138</sup> As such, the increase in security-related inadmissibility cases does not appear to be attributable to any increases generally in the pool of individuals from whom inadmissibility concerns typically arise.

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<sup>137</sup> Canada, Parliament of Canada, *Canada's Inland Refugee Protection System*, (2008) online: Parliament of Canada <http://www.parl.gc.ca/content/lop/researchpublications/bp185-e.htm#C-Pushpanathan> at Appendix A and Canada, Immigration and Refugee Board, *Refugee Claims - Statistics, Trends and Projections*, (2013) online Immigration and Refugee Board <http://www.irb-cisr.gc.ca/Eng/RefClaDem/Pages/RefClaDemStat.aspx>.

<sup>138</sup> Canada, Citizenship and Immigration, *Annual Report to Parliament on Immigration*, (2014) online: <http://www.cic.gc.ca/english/pdf/pub/annual-report-2014.pdf> at 9.

*Table 1: Number of s 34 cases per year (2002-2011)*

Year	No. of Cases
2002	2
2003	8
2004	10
2005	13
2006	8
2007	13
2008	12
2009	26
2010	32
2011	34
2012	27
2013*	10
TOTAL (2002-2012)	195

\* Incomplete year

#### ***2.4.4 Inadmissibility by Country of Origin***

The disclosed cases reveal an interesting, if not entirely surprising, concentration on a relatively small number of countries. Of the 195 cases, slightly more than half are represented by just four countries: Sri Lanka, Pakistan, India and Iran. Furthermore, roughly 96% (187) of the cases involved individuals from countries of the Global South, with the lone exceptions coming from the former Soviet Bloc (alleged KGB and Stasi operatives), the former Yugoslavia (a single case from Macedonia), Spain (alleged Basque separatists) and a single case from the United States (alleged membership in the Earth Liberation Front).

It is also not surprising that the vast majority of cases involve nationals of countries that have experienced protracted situations of violence and conflict, but it is notable that the majority of these conflicts are entirely internal in nature, from the civil wars of Sri Lanka and Colombia, to liberation movements in Eritrea, Namibia and Sudan.

Finally, it is notable that, because of the atemporal nature of the s 34 analysis, inadmissibility proceedings in respect of several countries arise, not because of the current situation, but because of historic, and long since passed, conflicts.<sup>139</sup>

*Table 2(a): Section 34 cases by country of origin (2002-2013) (sorted by number of cases)*

Countries	Number of cases
Sri Lanka	45
Pakistan	30
India*	16
Iran**	16
Nigeria	13
El Salvador	8
Ethiopia	7
Colombia	6
Lebanon	6
Sudan	6
Eritrea	5

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<sup>139</sup> El Salvador, Eritrea and some of the Iranian cases are three examples.

Palestinian territories	4
Afghanistan	3
Democratic Republic of Congo	3
Russia	3
Iraq	2
Namibia	2
Spain	2
Turkey	2
Angola	1
Bangladesh	1
Cameroon	1
China	1
German Democratic Republic (East Germany)	1
Jordan	1
Liberia	1
Libya	1
Macedonia	1
Mongolia	1
Niger	1
Not stated	1
Peru	1
Philippines	1
Tunisia	1
United States	1
Total	195
Total No. of Countries	34

*Table 2(b): Section 34 cases by country of origin (2002-2013) (sorted alphabetically by country)*

Countries	Number of cases
Afghanistan	3
Angola	1
Bangladesh	1
Cameroon	1
China	1
Colombia	6
Democratic Republic of Congo	3
El Salvador	8
Eritrea	5
Ethiopia	7
German Democratic Republic (East Germany)	1
India*	16
Iran**	16
Iraq	2
Jordan	1
Lebanon	6
Liberia	1
Libya	1
Macedonia	1
Mongolia	1



Namibia	2
Niger	1
Nigeria	13
Not stated	1
Pakistan	30
Palestinian territories	4
Peru	1
Philippines	1
Russia	3
Spain	2
Sri Lanka	45
Sudan	6
Tunisia	1
Turkey	2
United States	1
Total	195
Total No. of Countries	34

\* One case involved a national of India, but the allegations against him were in respect of espionage in Pakistan.

\*\* One case involved a dual national of the Netherlands and Iran, but the allegations against the individual were in respect of membership in the Iranian MEK organization.

#### ***2.4.5 Distribution of s 34(1) inadmissibility findings by paragraph***

Given that persons can be found inadmissible under s 34(1) for a broad range of activity, the Immigration Division decisions were also coded according to the

specific ground(s) of inadmissibility that arose in each case.<sup>140</sup> Two interesting and distinct facts emerged from the data when approached from the perspective of the alleged grounds of inadmissibility. First, there is a striking reliance on membership as the primary or sole ground of inadmissibility. Of the 195 cases, only *two* cases did *not* raise membership as at least one of the grounds of inadmissibility.<sup>141</sup> A few other cases, six in total, raised membership as a ground of inadmissibility, but also alleged that the individual in question had been directly involved in espionage, subversion or terrorism.<sup>142</sup> This leaves a remainder of 186 cases that were determined on the basis of membership. Because the membership allegations can only be brought forward in conjunction with an allegation that the organization in question has engaged in the acts set out at s 34(1)(a), (b) or (c), the membership cases can take on several different forms.<sup>143</sup> The essential point, however, is that over 95% of security cases before the Immigration Division were decided on the basis of membership in an organization, rather than on allegations of direct involvement in subversion, espionage or terrorism. What is fascinating about those few cases that involve allegations of direct involvement in the acts described at s 34(1)(a)-(c) is that the majority of them (five out of 9) involved individuals from the Global North. Recall from above, that there were only a total of seven individuals in the disclosed materials who originated from Northern countries.

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<sup>140</sup> The coding process in this respect was somewhat challenging, given that the provisions can be overlapping and many cases involved multiple allegations. Allegations in relation to membership under s 34(1)(f), furthermore, can only be made by way of further reference to the *other* ground of inadmissibility that is alleged to have been carried out by the organization in question. Finally, there are cases in the disclosure that do not clearly articulate the particular ground of inadmissibility on which it relied.

<sup>141</sup> See *Minister of Public Safety v X* (2009), A8-01297 (IRB) and *Minister of Public Safety v X* (2004), A4-00251 (IRB), both on file with the author.

<sup>142</sup> *Minister of Public Safety v X* (2008), A5-01959 (IRB); *Minister of Public Safety v X* (2005), A4-00550 (IRB); *Minister of Public Safety v X* (2006), A4-00778 (IRB), *Minister of Public Safety v X* (2009), A9-00033 (IRB); and *Minister of Public Safety v X* (2008), A7-00636 (IRB).

<sup>143</sup> For example, a clear majority of the membership cases (113) were based on allegations that the organization in question had engaged in acts of terrorism alone. 13 cases alleged that the organization in question had committed acts listed at s 34(1)(a), (b) and (c), while 35 cases involved allegations that the organization had engaged in acts listed at s 34(1)(b) and (c).

Second, and perhaps more striking, is that the two provisions that relate directly to Canadian security – s 34(1)(d) and 34(1)(e) – have been essentially unused since the IRPA came into effect over a decade ago. Specifically, s 34(1)(d) (being a danger to the security of Canada) was raised in only one case, and in that matter the Immigration Division rejected the Minister’s allegations.<sup>144</sup> To date, s 34(1)(e) (engaging in acts of violence that would or might endanger the lives or safety of persons in Canada) does not appear to have ever been invoked in proceedings before the Immigration Division.

#### ***2.4.6 Organizations that give rise to inadmissibility under s 34(1)(f)***

Keeping in mind that virtually all security-inadmissibility cases relate to membership in organizations, the organizational affiliation of the individual concerned in each case was recorded. While it is beyond the scope of this study to engage in a detailed analysis of the nature of these organizations, it can be said that the vast majority of them are political in nature and that their objectives are relatively narrowly construed to political change within the nation state in which they act. Some are strictly political in nature, advocating (often with violence) a sharp or radical political change in their country. Others seek to achieve political change, but are more properly construed as either separatist or liberation movements. Regardless of how these organizations are characterized, however, virtually all of them tended to have local aims, centred around destabilizing the (often repressive) regimes within their respective countries.

It is also notable, given prevailing views about the sources of insecurity in the contemporary world, that only nine cases, or less than 5% of the total, were organizations with a strong religious orientation.<sup>145</sup>

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<sup>144</sup> Minister of Public Safety v X (2009), A8-01297 (IRB).

<sup>145</sup> Several of these organizations have multiple agendas, for example, Hamas in the Palestinian territories, Amal in Lebanon and Al-Haramain, which has operated in several countries.

Consistent with the fact that certain countries of origin were highly represented in the data set, a few organizations from those countries also appeared very frequently. 21 cases involved allegations of inadmissibility for membership in the Pakistani Muttahida Qaumi Movement (MQM – formerly known as the Muhajir Qaumi Movement). Nine cases related to membership in the Iranian Mojahedin-e-Khalq (MEK) organization, while 42 cases involved the Sri Lankan Liberation Tigers of Tamil Eelam (LTTE).

It is also notable, though again not surprising, that several of the groups were ostensibly advocating for the protection of human rights and democratic values and were supported in their objectives by the West. The Iraqi Patriotic Union of Kurdistan, for example, was founded and led by the current U.S. backed President of Iraq, Jalal Talabani. Similarly, the Angolan UNITA organization was actively supported by the United States in the drawn out Angolan civil war and both the Eritrean ELF and EPLF groups were commonly recognized as engaging in a justified struggle for political independence from almost unspeakably repressive Ethiopian regimes, as was most clearly illustrated in Eritrea’s admission into the United Nations, an initiative that was sponsored by both Canada and the United States.<sup>146</sup> Overall, what emerges from the data is that, while many of the groups under scrutiny have engaged in various degrees of political violence, they have tended to do so in the context of discrete civil conflicts, often involving repressive and violent ruling regimes.

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<sup>146</sup> Angus Grant, Catherine Bruce & Catherine Reynolds, “Out of the Fire and into the Pot: The Eritrean Liberation Movement, the Right to Self-Determination and the Over-Breadth of North American Immigration Security Provisions” (2010) 25 Georgetown Imm Law J 859 at 870.

Table 3: Section 34 cases by country of origin and organization (2002-2013)

Countries	Number of cases	Organizations (No. of Cases)*
Afghanistan	3	Muslim World League (1), Mujahadeen (1), Taliban (1)
Angola	1	União Nacional para a Independência Total de Angola ( <b>UNITA</b> ) (1)
Bangladesh	1	Bangladesh Freedom Party (1)
Cameroon	1	South Cameroon Youth League ( <b>SCYL</b> ) (1)
China	1	East Turkestan Liberation Organization ( <b>ETLO</b> ) (1)
Colombia	6	<i>Fuerzas Armadas Revolucionarias de Colombia</i> ( <b>FARC</b> ) (3), <i>Autodefensas Unidas de Colombia</i> ( <b>AUC</b> ) (2), M19 (1)
Democratic Republic of Congo	3	Alliance of Democratic Forces for the Liberation of Congo ( <b>AFDL</b> ) (1), Movement for the Liberation of Congo ( <b>MLC</b> ) (2)
El Salvador	8	Farabundo Martí National Liberation Front ( <b>FMLN</b> ) (8)
Eritrea	5	Eritrean Liberation Fron ( <b>ELF</b> ) (4), Eritrean People's Liberation Front ( <b>EPLF</b> ) (1)
Ethiopia	7	Ethiopian People's Revolutionary Party ( <b>EPRP</b> ) (4), Ethiopian People's Revolutionary Democratic Front ( <b>EPRDF</b> ) (1), Oromo Liberation Front ( <b>OLF</b> ) (1), Eritrean People's Patriotic Front/Coalition for Unity and Democracy ( <b>EPPF/CUD</b> ) (1)
German Democratic Republic (East Germany)	1	Ministry for State Security ( <b>STASI</b> ) (1)
India	16	Bhindranwala Tigers Force of Khalistan ( <b>BTF</b> ) (2), <i>All India Sikh Students Federation/International Sikh Youth Federation</i> ( <b>AISSF/ISYF</b> ) (9), Babbar Khalsa ( <b>BKI</b> ) (2), Khalistan Liberation Force ( <b>KLF</b> ) (1)
Iran	16	Mojahedin-e-Khalq ( <b>MEK</b> ) (9), Fedayan-e Khalq (1),

		Basji Forces (2), Mahdaviyat (1); Komala (1) , National Council of Resistance of Iran ( <b>NCRI</b> ) (1), Kurdish Democratic Party of Iran ( <b>KDPI</b> ) (1)
Iraq	2	Patriotic Union of Kurdistan ( <b>PUK</b> ) (2)
Jordan	1	Arab Liberation Front (1)
Lebanon	6	Popular Front for the Liberation of Palestine ( <b>PFLP</b> ) (1), Palestine Liberation Organization ( <b>PLO</b> )(1), Amal Movement (2), Hezbollah (1), Syrian Social Nationalist Party in Lebanon ( <b>SSNP</b> ) (1)
Liberia	1	National Patriotic Front of Liberia ( <b>NPFL</b> ) (1)
Libya	1	Al-Haramain (1)
Macedonia	1	Albanian National Army (1)
Mongolia	1	Government Intelligence Agency (1)
Namibia	2	Caprivi Liberation Army (1), Caprivi Liberation Movement (1)
Niger	1	Movement of Niger. For Justice (1)
Nigeria	13	Movement for the Advancement of Democracy ( <b>MAD</b> ) (1), Oodua Peoples Congress ( <b>OPC</b> )(1); Niger Delta Force (1); Niger Delta Vigilantes (1); Movement for the Actualization of the Sovereign State of Biafra ( <b>MASSOB</b> ) (7)
Not stated	1	Redacted
Pakistan	30	Muttahida Qaumi Movement ( <b>MQM</b> ) (21); Jammu Kashmir Liberation Front ( <b>JKLF</b> ) (4); Imamia Students Organization ( <b>ISO</b> ) (2); Sipah-e-Sahaba Pakistan ( <b>SSP</b> ) (2); The <i>Pakistan Muslim League</i> ( <b>PML</b> )(1)
Palestinian territories	4	Popular Front for the Liberation of Palestine ( <b>PFLP</b> ) (2);

		Palestine Liberation Organization ( <b>PLO</b> )(1); Hamis (1)
Peru	1	Shining Path (1)
Philippines	1	New People's Army ( <b>NPA</b> ) (1)
Russia	3	KGB (3)
Spain	2	Euskadi Ta Askatasuna ( <b>ETA</b> ) (2)
Sri Lanka	45	Liberation Tigers of Tamil Eelam ( <b>LTTE</b> ) (41); Tamil National Alliance ( <b>TNA</b> ) (2); World Tamil Movement ( <b>WTM</b> ) (1)**; Tamil Rehabilitation Organization ( <b>TRO</b> ) (1)
Sudan	6	Sudan Liberation Movement ( <b>SLM</b> ) (2); Sudan People's Liberation Army ( <b>SPLA</b> ) (1); Justice & Equality (2); Beja Congress (1)
Tunisia	1	Democratic Constitutional Rally ( <b>RCD</b> ) (1)
Turkey	2	Halkin Demokrasi Partisi, ( <b>HADEP</b> ) (1); Kurdistan Worker's Party ( <b>PKK</b> ) (1)
United States	1	Earth Liberation Front (1)
	195	

\* Organizational information may be redacted from record, so when added together may not total the sum in the previous column

\*\* TNA and WTM both found to have links to LTTE

#### ***2.4.7 Status of those subject to admissibility hearings***

In the pages above, I have indicated that the majority of persons subject to inadmissibility proceedings under s 34 are either recognized Convention refugees, or individuals who are in the process of making a refugee claim, having asserted a risk of persecution if returned to their country of origin. While it was impossible to determine the status of each person referred for an admissibility hearing with total

precision, the data certainly confirms that a vast majority of these individuals have engaged in the refugee process. Twenty six of the cases involved persons who had already been found to be Convention refugees. Eight cases involved persons who had already been denied refugee status. It appears that there were only seven cases involving individuals who had never made a refugee claim, compared with 131 cases in which the individuals had made a refugee claim and were still at some stage in the refugee claim process. There were, finally, 23 cases in which it could not be known whether the individual had made a refugee claim, although several of them had had their inadmissibility determined *in camera*, which, as noted above, strongly suggests that they had initiated a refugee claim. Even using a conservative approach, taking into consideration only those known cases in which the persons concerned had either initiated a refugee claim or had been found to be a refugee, 157 cases, or 81% of the dataset involved persons who asserted that they would be at risk of persecution if removed from Canada.

#### ***2.4.8 Inadmissibility Rates***

The data was also coded with respect to outcome. In essence, there are really only two options available to the Division in reaching a conclusion in each case. On the reasonable grounds to believe standard, the Division must simply determine whether the individual is admissible or inadmissible under s 34. If it finds the person inadmissible, the Division must issue a deportation order.<sup>147</sup> If it concludes that the allegations against the person have not been made out, it must conclude as such and the person maintains the status that he or she had prior to the inadmissibility hearing. There is no discretion and there are no further remedies available to the Division.

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<sup>147</sup> See sections 45(d) of the IRPA, *supra* note 14 and 229(1)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.



Overall, when the Minister refers a matter to the Immigration Division for an admissibility hearing under s 34, the referral is found to be well-founded (on the reasonable grounds to believe standard) and a deportation order is issued in roughly 67% of cases. In 33% of cases, then, the referral is found to be without merit and the person retains whatever status he/she had prior to the commencement of the proceedings.

*Table 4: Section 34 cases by outcome*

<b>Year</b>	<b>No. of Cases</b>	<b>Admissible (%)</b>	<b>Inadmissible (%)</b>
2002	2	1 (50%)	1 (50%)
2003	8	4 (50%)	4 (50%)
2004	10	6 (60%)	4 (40%)
2005	13	6 (46%)	7 (54%)
2006	8	2 (25%)	6 (75%)
2007	13	3 (23%)	10 (77%)
2008	12	3 (25%)	9 (75%)
2009	26	6 (23%)	20 (77%)
2010	32	6 (19%)	26 (81%)
2011	34	18 (53%)	16(47%)
2012	27	6 (22%)	21 (78%)
2013	10	4 (40%)	6 (60%)
<b>TOTAL (2002-2013)</b>	<b>195</b>	<b>65 (33.3%)</b>	<b>130 (66.6%)</b>

Two facts are of note in looking at the data from the perspective of outcomes. First, after an initial few years in which the inadmissibility rate hovered around the fifty percent mark (albeit over a small sample size) the rate jumped up to the mid-seventy percent range for the next several years. While it is perhaps impossible to establish with certainty the cause of this increase in inadmissibility findings, it is

notable that this timeframe coincides precisely with several oft-cited Federal Court and Federal Court of Appeal decisions that asserted the breadth with which s 34 is to be interpreted.<sup>148</sup>

Second, the inadmissibility rate for 2011 sharply dropped, from an average rate of 78% for the preceding 5 years to 47% in 2011. This drop is almost certainly attributable to the government's response to the arrival of the *MV Sun Sea* vessel in 2010, which carried with it 492 Tamil asylum seekers.<sup>149</sup> 18 of the 34 cases for 2011 were former *Sun Sea* passengers, only a third of whom (six) were found to be inadmissible. When the 2011 figures are examined with these cases adjusted out of the mix, the inadmissibility rate for the year closely resembles that of previous years (75%). What is fascinating about the *Sun Sea* cases and what likely explains the low success rate on the part of the CBSA in bringing these cases forward for admissibility hearings is the aggressiveness with which officers were instructed to approach them; what is interesting, in other words, is the narrowing of officers' discretion as to whether there were reasonable grounds to believe that the *Sun Sea* asylum seekers were inadmissible under s 34. Recall that in 2009 another migrant vessel, the *MV Ocean Lady* arrived in Canada carrying 76 Tamil asylum seekers.<sup>150</sup> In response to this arrival, and after intelligence reports indicated that the *Sun Sea* was in transit to Canada, a senior CBSA official drafted a memorandum entitled *Marine Migrants: Program Strategy for the Next Arrival* that was intended to outline CBSA strategy for responding to the next mass arrival of asylum seekers by boat. In addition to noting that CBSA would take "maximum advantage" of detention as an "effective tool against those who circumvent immigration processes," the report also advised that CBSA would be "aggressive" in bringing admissibility hearings forward

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<sup>148</sup> See most notably *Poshteh*, *supra* note 78; *Al Yamani II*, *supra* note 74, but also *Ugbazghi*, *supra* note 73; and *Kanendra*, *supra* note 72.

<sup>149</sup> "Documents: The Sun Sea Investigation", The National Post (13 February 2011) online: National Post [www.nationalpost.com](http://www.nationalpost.com).

<sup>150</sup> Petti Fong, "76 illegal migrants found on ship seized off B.C.", *The Toronto Star* (18 October 2009).

against many of the *Sun Sea* passengers.<sup>151</sup> In keeping with this memorandum, the CBSA have dealt with the *Sun Sea* passengers with unusual zealousness, resulting in the referral of many admissibility cases to the Immigration Division that appear to have had little merit.

#### ***2.4.9 Appeals and Judicial Review***

Another example of the “maverick” status of immigration law is the asymmetry in appeal rights granted to the Minister, as compared to those found to be inadmissible for security purposes. Pursuant to s 63(5) of the IRPA, the Minister has access to a full, fact-based administrative appeal of Immigration Division decisions to the Immigration Appeal Division of the IRB. Judicial review may also be sought from a decision of the IAD. Persons found to be inadmissible under s 34 (and those described by section 35, a subset of s 36 and s 37) are, by contrast, precluded from appealing to the IAD and must rely solely on the more circumscribed judicial review process.<sup>152</sup> In April, 2014, a further Access to Information Request provided data on appeal and judicial review outcomes of the previously disclosed s 34 Immigration Division decisions.<sup>153</sup> The ATIP response provided data indicating that some sort of review (either Ministerial appeal to the IAD and/or judicial review) was sought in 79 cases.

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<sup>151</sup> Obtained pursuant to Access to Information Request No. A-2013-03486(10 September 2013). Disclosed material was obtained by the Canadian Council for Refugees and is on file with the author.

<sup>152</sup> Which is itself set out at s 72 of the IRPA. The differences between an appeal to the IAD and judicial review are myriad. To cite but two of them: i) IAD parties may adduce new evidence, whereas judicial review proceedings are based solely on the record before the Immigration Division; and ii) the IAD may substitute its own decision upon hearing the appeal and either granting it and issuing the applicable removal order, or dismiss it and uphold the Immigration Division decision. The Federal Court’s jurisdiction is generally confined to remitting successful applications back to the Immigration Division for reconsideration.

<sup>153</sup> Immigration and Refugee Board, ATIP request # A-2013-01798 (9 April, 2014). Because of disclosure delays, this request related to the slightly more limited dataset initially disclosed under ATIP request # 2011-00094 and thus relates to 158 decisions rather than the full dataset of 195 cases. The Access to Information response provided data on several different possible outcomes: Minister’s Appeals to the IAD; judicial review leave applications (of both the Minister, from the IAD and of inadmissible individuals); and judicial review decisions, upon leave being granted.

The overall success rate for inadmissible persons seeking leave and judicial review of Immigration Division decisions was low. While the vast majority of Federal Court decisions (on both leave and judicial review) related to individual (rather than Ministerial) applications, in only 3 of 56 applications were individuals successful in having Immigration Division decisions quashed.<sup>154</sup> By contrast, in 19 appeals determined on their merits by the Immigration Appeal Division, the Minister's appeal was granted in 12 cases. Appeals were dismissed for lack of jurisdiction in the remaining four cases.<sup>155</sup> Of the cases decided on the merits, then, the Minister was successful in over 63% of cases.

The low success rates of individuals seeking review of their inadmissible status comes as no surprise; the Federal Court is generally deferential of IRB decisions<sup>156</sup> and as I outlined above, the broad interpretation of the security provision has been endorsed (and to a significant extent developed) by the courts themselves. Put simply, if there is a problem with the overreach of s34, the problem does not lie in the decision-making of the Immigration Division, but in the exceptionally broad wording of s34 and, as I argue in the final part of this study, in a misuse of administrative discretion. In the absence of their own discretionary powers, decisions of the Immigration Division involve a somewhat mechanical application of law to fact, and given that many if not most individuals fleeing conflict zones may come under the notional rubric of s34, it is of little surprise that the Division's decisions in these cases are by and large found to be reasonable. With this in mind, I turn briefly to an area of decision-making that *does* involve a large measure of

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<sup>154</sup> In two other cases, IAD decisions granting Ministerial appeals were overturned by the court: see *PS v Canada (MCI)*, 2014 FC 168 and *B074 v Canada (MCI)*, 2013 FC 1146. There was one further application in which an inadmissible individual prevailed: in *Canada (MCI) v Qureshi*, 2007 FC 1049, the Minister unsuccessfully sought judicial review of an appeal that the IAD had earlier dismissed.

<sup>155</sup> I presume these were situations in which individual applicants sought to appeal Immigration Division decisions, rather than seeking relief from the Federal Court.

<sup>156</sup> In the context of the Refugee Protection Division of the IRB, see Rehaag, *The Luck of the Draw*, *supra* note 136 at 9.

discretion – that being the Ministerial waiver of inadmissibility located at s42.1 of the IRPA.

#### **2.4.10 Section 34(2) (now 42.1) exemptions**

As I have mentioned above, the existence of a discretionary Ministerial exemption from the application of s 34 has been at once a recognition of its broad application and a constitutional salve to its potential overbreadth. For years, however, it has been viewed by refugee advocates as a largely illusory mechanism, in part because it was seen as being virtually impossible to convince a political figure (the Public Safety Minister) to sign off on a waiver of inadmissibility for someone already found to be a security threat.

The process also came to be viewed as a hollow one because it has been mired in delays, the length of which would likely be viewed as unconstitutional in virtually any other context.<sup>157</sup> Recent data from access to information requests tend to confirm these views.<sup>158</sup> In the almost eleven years between 2002 and the first half of 2013, 293 applications for relief were submitted under s 34(2) and over that period of time, only 95 decisions were made, many of which related to applications submitted under the regime that preceded the IRPA.<sup>159</sup> On average, then, the Public Safety Minister issues roughly 8 decisions on s 34(2) applications per year. With a current (though constantly increasing) backlog of 223 applications, this means that the timeframe for determining the pending applications is just under 28 years and

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<sup>157</sup> Indeed, in the context of Canadian criminal trials (in which the rights at stake are similar to those associated with immigration proceedings, particularly those involving refugees) accused individuals have a constitutionally entrenched right to a trial within a reasonable time – see s 11(b) of the *Canadian Charter of Rights and Freedoms*. While there is no rigid formula for determining whether a delay has become unreasonable, as we shall see below, the timeframes for obtaining a decision under s 34(2) are completely outside the range of periods considered to be unreasonable in the criminal context, see for example *R. v. Azkov*, [1990] 2 SCR 119, 1990 CanLII 45 (SCC).

<sup>158</sup> Access to Information Request #A-2011-00189 (11 May 2011); Access to information request A-2013-02797 (25 June 2013), both on file with the author.

<sup>159</sup> Access to Information Request #A-2011-00189 (11 May 2011).

individual applications can take upwards of a decade to complete.<sup>160</sup> Furthermore, while the government previously held permanent residence applications in abeyance pending the outcome of Ministerial relief applications, a change in policy implemented in 2013 ended this practice. The impact of this change in policy has had immediate effect, resulting in the refusal of permanent residence applications of numerous Convention refugees and an ensuing risk of removal.<sup>161</sup>

Given the stigma associated with security-related inadmissibility, given the omnipresent spectre of removal and family separation, and finally, given that those found inadmissible are ineligible for healthcare coverage and frequently cannot work, the situation is a virtual archetype of the “justice delayed is justice denied” axiom.

#### ***2.4.11 Further Observations and Analysis***

Numerous conclusions can be drawn from the above data, some of them tentatively, given the relatively small cohort of cases, but others with confidence. First, security-related inadmissibility is an increasingly utilized tool for Canadian public safety officials. Second, and perhaps most strikingly, these security cases are overwhelmingly based on membership in groups perceived as having taken part in violence, rather than allegations of actual participation or complicity in violence.

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<sup>160</sup> *Ibid.* The 28 year figure was derived by simply dividing the total number of outstanding applications by the average number of decisions rendered per year. This assumes that the rate at which the Minister renders decisions on Ministerial relief will remain constant. The assertion that applications can take over a decade to be determined is borne out by the data released, but was also related to me by various refugee lawyers. It confirms my own experience in representing clients who have submitted these applications. The delays in decision-making have also been documented in *mandamus* applications that have been brought before the Federal Court, see for example: *Sencio Hechavarría v Canada (PSEP)*, 2010 FC 767; *John Doe v Canada (MCI)*, 2006 FC 535.

<sup>161</sup> This information was shared with me by several lawyers, who unexpectedly received a spate of refused permanent residence applications for their Convention refugee clients. See Canada, Citizenship and Immigration “Operational Bulletin 524”, on file with the author. The question as to whether those who had submitted permanent residence applications prior to the change in policy had a legitimate expectation that such applications would be held in abeyance pending the outcome of their Ministerial relief applications was considered (and rejected) in *Omer v Canada (MCI)*, 2015 FC 494.

This focus on membership cases, furthermore, would appear to have arisen as a result of the “broad and unrestricted” interpretation of the term, as has been developed in the jurisprudence. This interpretation is essentially *sui generis* to the inadmissibility context and stands in direct contrast to other immigration contexts where membership, in and of itself, is never seen as being sufficient on its own to attract sanction. In the wide-open realm of security-inadmissibility, the data demonstrates that membership is the ultimate catch-all.

Indeed, over the course of the period under study, the cases on inadmissibility directly reflect the ever-increasing, court-mandated scope of membership. Consider, for example, the following statement from the Immigration Division *prior* to the Federal Court decision in *Al Yamani II* which found the definition of membership under s 34 to have unlimited temporal application:

The JKLF did engage in terrorist activities in Indian-held Kashmir, but at a time that pre-dated Mr. Syed's membership in the organization. There is no evidence before me that the JKLF committed terrorist acts in Indian-held Kashmir after April 1993 or before December 1995, the time period during which Mr. Syed was a member.

...

I consider the time period during which the activities of the organization are relevant to be that time during which Mr. Syed was learning about the organization and was a member of the organization. I have concluded that *IRPA* cannot intend that a person can be held responsible for the conduct of an organization after the person has severed their membership or association with that organization. Similarly, if a person becomes a member of an organization which has substantially changed in nature and character, that person could not reasonably be held responsible for activities undertaken by the organization before the person's membership. In other words, to be found inadmissible I consider a person would have to have been a member while the organization was engaged in terrorism. To

find otherwise would not be in accordance with the stated objectives provided in section 3 of *IRPA*. I do not see how a person who was a member of an organization at a time that organization was not engaged in terrorist activity could be said, on the basis solely of membership and nothing more, to threaten the security of Canadians, or to generally be a security risk.<sup>162</sup>

Now, compare this statement to the following passage from an Immigration Division decision that post-dated the *Al Yamani* decision:

The other factor that is important in looking at your membership is that according to the case of *Aliamani* [sic] there is no temporal component to my analysis. It's irrelevant that the period of your membership in the EPRP did not coincide with the terrorism and subversion by force that the EPRP committed. When I say it's irrelevant I mean it's irrelevant in my analysis. Or course, in reality it's relevant but in terms of paragraph 34(1)(f) of the *Immigration and Refugee Protection Act* the case law says it's irrelevant. There is no temporal component.

This passage reveals, not surprisingly, the trickle down influence of the Federal Court's broad interpretation of membership. But more interestingly, it also appears to reveal a sense in the decision-maker that the *law* related to membership has been ruptured from the *reality* of what, presumably, the member understands to be the "everyday" meaning of the term. It seems, in other words, that the decision-maker recognized a tension between the legal consequences he felt obliged to impose in the circumstances and the absence of morally sanctionable conduct on the part of the individual. Without making too much of this small passage, the rupture between law and "reality" recognized by the member reveals something profound about the place of legality in the immigration realm and represents a clear, if unintentional articulation of Dyznehaus' legal grey holes.

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<sup>162</sup> *Minister of Citizenship and Immigration v X* (2005), A4-00685 (IRB).



Another related observation that can be made from the data is that, contrary to the primary legal justification for the broad scope of s 34(1), the provision has rarely been invoked in relation to any kind of actualized concern over Canadian security. As noted above, in a passage routinely cited by the Immigration Division the Federal Court in *Suresh II* articulated the justification for the breadth of s 34 by reference to Canadian security: “[m]embership cannot and should not be narrowly interpreted when it involves the issue of Canada's national security.”<sup>163</sup> So far as it goes, this justification is one on which there is a reasonably broad consensus. Recall that even most open, or “porous” border advocates recognize the legitimacy of inherent limitations on migration for those who present some kind of threat to the liberal legal order of the host country. It should also be acknowledged that Canadian courts have (not unreasonably) suggested that domestic security concerns, broadly construed, may also incorporate threats to international security. As the Supreme Court noted in *Suresh I*:

These considerations lead us to conclude that a person constitutes a “danger to the security of Canada” if he or she poses a serious threat to the security of Canada, whether direct or indirect, and bearing in mind the fact that the security of one country is often dependent on the security of other nations. The threat must be “serious”, in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible.<sup>164</sup>

The data suggests, however, that s 34 cases rarely invoke, at least explicitly, the security of Canada, even under this broad interpretation of the term. This is of course most clearly articulated by the fact that the provisions built into s 34 (sections 34(1)(d) and (e)) that relate directly to Canadian security are essentially

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<sup>163</sup> *Suresh II*, *supra* note 70 at para 22.

<sup>164</sup> *Suresh I*, *supra* note 58 at para 90.

never invoked. Those implicated on the other grounds, furthermore, were generally individuals with (often tenuous) affiliations to inward-looking and parochial organizations whose aims tend to be localized political change, often in the context of repressive state regimes. This fact should not be taken as a defence of, or justification for, the violent means adopted by some of these organizations, but it should inspire reflection as to the classes of persons who are subjected to security-inadmissibility procedures and those for whom a blind eye seems to be turned. Why is it, for example, that membership in the obscure Namibian Caprivi Liberation Movement<sup>165</sup> is of greater concern, from a Canadian security perspective, than membership in the United States military? It is a firmly established fact that both organizations have engaged in the subversion of governments, and yet nominal membership in the “CLM” triggers inadmissibility procedures, while senior command control in U.S. military units directly involved in government subversion does not appear to raise any concern.

This asymmetry in the application of the law is concerning. It may very well offend the guarantee against nationality-based discrimination found in the *Canadian Charter of Rights and Freedoms*,<sup>166</sup> but on a more basic level it also calls into question the integrity of the legal regime. It is, after all, a basic principle of legality that laws should be implemented as promulgated and that it must be capable of guiding the behaviour of its subjects.<sup>167</sup>

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<sup>165</sup> *Minister of Citizenship and Immigration v X* (2009), A8-02764 (IRB).

<sup>166</sup> *Supra* note 41, s15, which guarantees all persons equal treatment under the law without discrimination on the basis of, amongst other things, national or ethnic origin.

<sup>167</sup> See generally Joseph Raz, *The Authority of Law* (Oxford: Clarendon P., 1979) and Lon Fuller, *The Morality of Law* (New Haven: Yale U.P., 1969).

## **Conclusion**

If it is true, as Bob Dylan suggests, that “Democracy don't rule the world” but that it is rather “ruled by violence” the question for our purposes is why some violence is disregarded by immigration inadmissibility proceedings, while other forms of resistance attract sanction. The answer, I argue in the coming chapters, lies in a certain kind of chauvinism toward the Global South, in a disregard for the role of Western democracies in the conflicts of the South and in a failure, I contend, to view immigration law through the prism of those in the South who have been forced to flee from upheaval. The solution, I later argue, lies in a reformulated view of administrative discretion in inadmissibility matters, one that incorporates as integral components both a dialogical approach to decision-making and a sensitive understanding of Third World perspectives on conflict, the use of force and the movement of peoples.

**CHAPTER THREE: RETHINKING SECURITY FROM  
THE OUTSIDE IN: MIGRATION, INTERNATIONAL  
LAW AND THE THIRD WORLD**

### 3.1 Introduction

Thus far, we have situated the place that immigration occupies in liberal theory and examined how the immigration-security regime identifies and excludes those alleged to have participated in subversion, espionage and terrorism. We have also witnessed how the broad language of the security regime seems to be used to capture not all of those described in the words of the legislation, but rather *particular* kinds of individuals from *particular* parts of the world who have engaged in *particular* kinds of activities. With this in mind, I now move to an examination as to *why* this might be the case; about why it is, in other words, that so much of Canada's immigration-security apparatus appears to be directed toward those who have taken part in relatively obscure and decidedly localized Southern conflicts. To understand why it is that people originating from the Global South seem to be disproportionately targeted for exclusion under the immigration-security regime, I turn to an approach to the study of law, specifically international law, which places the Global South at the very centre of its analysis.

I begin this chapter by describing the somewhat uneasy relationship between domestic migration control and international law, which I then follow with an explanation as to how decision-making in the immigration-security regime directly, if sometimes unwittingly, implicates several key areas of concern to international law. These include, but are not necessarily limited to, the principles of self-determination and territorial contiguity, the use of force, international human rights norms and the international refugee law principle of *non-refoulement*. Immigration decision-making is, to be sure, a domestic, state-based practice – indeed there are ways in which it is an exceedingly inward-looking process. This said, decisions about who may enter a state and who may legitimately be excluded from it are equally about the nexus between the domestic and the international, and it is these points of contact and intersection that I highlight in this section. In addition, I demonstrate how the lack of a nuanced and explicit engagement with international law has led to the arbitrariness of immigration-security decisions explored in the previous chapter.

With this in mind, however, in the next section I acknowledge that even a more fulsome understanding of the place of international law in the migration-security regime does not fully capture, or adequately explain, why decision-making in this area remains fixated on individuals from the Global South. In short, I argue, mere knowledge of international law will not be sufficient to ensure that balance is brought to migration-security decision making. In addition to a more 'nuanced and explicit' engagement with international law, I contend that decisions in this realm must also be suffused with an understanding of the history and context from which those typically found to be inadmissible come.

To do this, I turn to the writing of several individuals who, to varying degrees, self-identify as scholars of the Third World Approaches to International Law (TWAIL) movement. I commence, not surprisingly, by describing the TWAIL approach, tracing its history and contributions to our understanding of international law. I then look to a TWAIL perspective on those areas particularly relevant to the immigration-security regime, such as subversion, terrorism and self-determination. From this vantage point, I look to a number of specific examples of cases, within the Canadian context, that illustrate both the problems that arise when immigration law is applied in a vacuum, devoid of the context of subaltern realities, and the potential that a TWAILian perspective may bring to the process.

### **3.2 Immigration and International Law**

Laws defining and enforcing borders lie, by their very nature, at the intersection between the domestic and international. At the same time, regulating inflows of people has always been characterized as a matter of pure state prerogative and states remain profoundly reticent to cede control over their immigration programs to anything resembling an international legal regime. Immigration, to many, is one of the clearest expressions of sovereignty and it therefore remains sacrosanct as a matter of internal state discretion, except to the extent that international law may reinforce this notion. The (misplaced) perception amongst many Northern states that they bear the brunt of

immigrant, and particularly refugee, inflows, together with the fact that international legal frameworks cannot take root without the acquiescence of such states means that an international and binding regime for immigration, as opposed to border control, has never gained traction.<sup>1</sup>

However, there are ways, albeit tentative ones, in which domestic immigration law recognizes at least the relevance of international norms to its processes and the language of international law can, not infrequently, be found in immigration decision-making. Below I sketch out three distinct ways in which international legal norms interact with domestic immigration law in Canada: 1) they inform the interpretation of domestic law; 2) international law is, in certain circumscribed categories, directly incorporated into domestic law; and 3) migration law has become a key cite for interpreting the content of international human rights norms.

### ***3.2.1 International law as interpretive guide***

In Canada, the *Immigration and Refugee Protection Act* makes reference to international law, specifically international human rights instruments, requiring that the *Act* be interpreted in a manner that is consistent with it.<sup>2</sup> As a dualist country, however, the hard edge of international law is not realized in Canada without direct and explicit incorporation into Canadian law.<sup>3</sup> This said, the degree to which domestic immigration and refugee law implicates international law and international legal obligations has been the subject of considerable judicial commentary, most notably perhaps in the seminal decision

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<sup>1</sup> Though several have proposed such an international regulatory regime, particularly liberal economists, see for example Howard F Chang, "The Economics of International Labor Migration and the Case for Global Distributive Justice in Liberal Political Theory" (2008) 41 *Cornell Int Law J* 14.

<sup>2</sup> See *Immigration and Refugee Protection Act (IRPA)*, s 3(3):

This Act is to be construed and applied in a manner that...

(f) complies with international human rights instruments to which Canada is signatory.

<sup>3</sup> For an overview of the monist and dualist modes of incorporating international law domestically, see J.H. Currie, *Public International Law* (Toronto: Irwin Law, 2001) at 199-201. See also Jutta Brunnee & Stephen J Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) 40 *Canadian Yearbook of Intl Law* 3 at 21. Also found in David Dyzenhaus, ed., *The Unity of Public Law* (Portland, Oregon: Hart Publishing, 2004) at 357 [Brunnée and Toope, "Hesitant Embrace"].

of the Supreme Court of Canada in *Baker*.<sup>4</sup> In *Baker*, the court adopted the principle first established elsewhere that international human rights law represents, at the very least, a key body of content with which to identify, interpret and resolve ambiguity in domestic legislation.<sup>5</sup> The court in *Baker* also noted that international human rights norms have a “critical influence” on the interpretation of the rights included in the *Canadian Charter of Rights and Freedoms*, including the scope and applicability of such rights to non-citizens.<sup>6</sup>

Mavis Baker was a Jamaican woman who entered Canada on a visitor's visa in 1981 at the age of twenty-six. She worked as a live-in domestic worker for eleven years, during which time she gave birth to four children who were, by virtue of their birth in Canada, Canadian citizens. She applied for permanent residency on humanitarian and compassionate grounds, based on the hardship she would endure if forced to return to Jamaica, given her current need for psychological care and on the impact that her departure would have on her Canadian-born children. A senior immigration officer refused the application, stating that there were insufficient humanitarian and compassionate reasons to warrant an exemption to the general rule that applications for permanent residency be processed outside Canada. On judicial review to the Federal Court, Baker argued that, as a signatory to the *International Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, Canada was obliged to make the consideration of the best interests of her children a primary consideration and that the responsible officer had not fulfilled this obligation. The court dismissed this argument, but did certify the following question of general importance: “Given that the *Immigration Act* does not expressly incorporate the language of Canada’s international obligations with respect to the *International Convention on the Rights of the Child*, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under s. 114(2) of

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<sup>4</sup> [1999] 2 SCR 817 [Baker].

<sup>5</sup> *Ibid*, at para 70, following *Tavita v. Minister of Immigration*, [1994] 2 NZLR 257 (CA), at p 266; *Vishaka v. Rajasthan*, [1997] 3 LRC 361 (SC India).

<sup>6</sup> *Ibid*, citing *Slaight Communications Inc. v Davidson*, [1989] 1 S.C.R. 1038; *R v Keegstra*, [1990] 3 S.C.R. 697.



the *Immigration Act*?”<sup>7</sup> The Court of Appeal upheld the lower court decision, finding that the best interests of the children need not be given primacy in assessing such an application. On further appeal, the Supreme Court of Canada recognized that the law, as constructed, did not mean that the *Convention on the Rights of the Child* and the affected children’s best interests were determinative<sup>8</sup> of an application for permanent residence on humanitarian and compassionate grounds, but Canada’s signing of the Convention was an important interpretive factor in determining how such applications are to be determined:

[F]or the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children’s best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children’s best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children’s interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada’s humanitarian and compassionate tradition and the Minister’s guidelines, the decision will be unreasonable.<sup>9</sup>

Of interest, while the minority judgment adopted the bulk of Justice Claire L’Heureux Dube’s majority reasoning in *Baker*, it dissented on the question of the application of international law to domestic decision-making, finding that the primacy accorded to children’s considerations under the *Convention on the Rights of the Child* was “irrelevant unless and until such provisions are the subject of legislation enacted by Parliament.”<sup>10</sup>

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<sup>7</sup> The Canadian approach to judicial review and appeals of immigration matters provides an articulate example of how such matters are dealt with in legally exceptional ways – applications for judicial review of immigration decisions are subject to a leave requirement, while appeals are barred unless the judge who determines the judicial review certifies a question of general importance: see IRPA s 74(d). Challenges to this *sui generis* appellate structure have not been successful: see *Huynh v Canada*, [1996] 2 F.C. 976, leave to appeal to the Supreme Court of Canada dismissed, [1996] SCCA No. 311.

<sup>8</sup> For further on this, see also *Legault v Canada (MCI)*, 2002 FCA 125.

<sup>9</sup> *Baker*, *supra* note 4 at para 75.

<sup>10</sup> *Ibid* at para 81.

The *Immigration and Refugee Protection Act*, which was passed into law in 2002, and the corresponding requirement that the *Act* be interpreted in a manner that complies with international human rights instruments, codified and arguably expanded the majority ruling in *Baker*, making international human rights requirements the lynchpin in resolving ambiguity in the IRPA. This said, judicial decision-making on the relationship between domestic and international law has remained somewhat inconsistent, at times treating the latter simply as one part of the interpretive matrix to be considered, while at other times presuming it to be determinative, unless the international source is patently inconsistent with the statutory text.<sup>11</sup>

The Federal Court of Appeal leaned towards this latter approach in the case of *de Guzman*, which involved a challenge to a regulation that permanently bars the sponsorship of any family member who has not been listed on a permanent resident's own immigration application. The appellant argued, *inter alia*, that this provision offended the guarantees to non-interference with family life, as enumerated in both the *International Covenant on Civil and Political Rights* and the *Convention on the Rights of the Child*. Noting the mandatory language of s3(3)(f) of the IRPA, the court asserted that decision-makers are to attribute more than mere persuasive or contextual significance to relevant international human rights instruments in the interpretation of the *Act*.<sup>12</sup> Indeed, the court concluded that the jurisprudence, together with the plain words of s3(3)(f) signify that the IRPA is to be interpreted *and* applied consistently with Canada's international human rights obligations, unless, on the modern approach to statutory interpretation, this is impossible.<sup>13</sup> In other words, because the international human rights instruments on which the appellant relied in *de Guzman* create binding legal obligations, s3(3)(f) makes them "determinative of the meaning of the IRPA, in the absence of a clearly expressed legislative intention to the contrary."<sup>14</sup> In a neat judicial sleight of hand, however, the court further reasoned that the

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<sup>11</sup> Brunnée and Toope, *Hesitant Embrace*, *supra* note 3 at 6-7.

<sup>12</sup> *de Guzman v Canada (MCI)*, 2005 FCA 436 at para 75.

<sup>13</sup> *Ibid* at para 83.

<sup>14</sup> *Ibid* at para 108.

impugned regulation was not to be examined in isolation, but in the context of the entire legislative regime. Considering that the regime provides the Minister of Citizenship and Immigration with the discretionary capacity to override on humanitarian and compassionate grounds any decision that may offend Canada's international legal obligations, the court concluded that the regulation does not make the IRPA non-compliant with Canada's obligations under international law. More of course could be said about the soundness of this reasoning, but for the sake of my argument, the court's conclusions on the merits are not as important as the emphasis it placed on integrating international legal obligations with the domestic sphere of Canadian immigration decision-making.

The same can be said for the decision of the Federal Court of Appeal in *Okoloubu*, in which the court held that immigration officers deciding cases on humanitarian and compassionate grounds must bear in mind not only the values enshrined in Canada's *Charter of Rights and Freedoms*, but also those found in the *International Covenant on Civil and Political Rights*.<sup>15</sup> The court then went on to enumerate various provisions of the ICCPR – the principles of non-interference in family life (Article 17), the importance of a family unit and protection thereof by society and the state (Article 23), as well as children's rights (Article 24) – as being amongst those interests that the officer must have in mind when dealing with an application for permanent residence on humanitarian and compassionate grounds. Citing another decision – *Thiara* – the court nevertheless concluded that s3(3)(f) of the IRPA does not require that an officer exercising discretion under the *Act* “specifically refer to and analyze the international human rights instruments to which Canada is signatory. It is sufficient if the officer addresses the substance of the issues raised.”<sup>16</sup> What this means remains somewhat unclear, but one would at least presume that if officers are required to “bear in mind” international human rights law in considering the applications that come before them, their decisions must also be consistent

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<sup>15</sup> *Okoloubu v Canada (MCI)*, 2008 FCA 326 at paras 49-50.

<sup>16</sup> *Ibid* at para 50, citing *Thiara v Canada (MCI)*, 2008 FCA 151, at para 9.

with this body of law or provide compelling reasons based on domestic law for departing from it.<sup>17</sup>

More recently, in a number of cases primarily involving two migrant ships that arrived in Canada in October, 2009 and August, 2010, the courts have examined the intersections between the IRPA's organized criminality inadmissibility provisions, its criminal sanctions and international instruments on the smuggling of persons, specifically the *United Nations Convention against Transnational Organized Crime* and a protocol to that Convention, the *Protocol against the Smuggling of Migrants by Land, Sea and Air*.<sup>18</sup> The arrival of these migrant ships – the *MV Ocean Lady* and the *MV Sun Sea* – was clearly viewed by the government as a profound threat to the integrity of Canada's borders and the Canada Border Services Agency (CBSA) responded to the arrivals forcefully through detention, criminal prosecutions and inadmissibility proceedings.<sup>19</sup> In an interesting and ill-fated twist to the story, prior to the departure of the *MV Sun Sea* for Canada, the ship's Thai crew refused to go ahead with the voyage and left the boat. The organizers of the smuggling operation, alleged to be members of the militant Liberation Tigers of Tamil Eelam (LTTE) group, nevertheless commenced the journey and in so doing recruited some of the asylum seeker passengers to help along the way. Following their arrival (and

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<sup>17</sup> This interpretation would also seem consistent with statements from the Supreme Court of Canada that the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified: see *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, para 70.

<sup>18</sup> Jointly passed by U.N. General Assembly resolution A/RES/55/25 of 15 November 2000 and ratified by Canada in May, 2002, referred to hereafter, respectively, as UNCTOC and the Smuggling Protocol.

<sup>19</sup> Both ships carried Tamil asylum seekers fleeing the ongoing, post-civil war violence in Sri Lanka. The initial arrival of the *MV Ocean Lady* was a relatively modest smuggling operation, carrying aboard 76 passengers. The *MV Sun Sea* carried 492 passengers. In a memorandum drafted days before the arrival of the *MV Sun Sea*, the Director General for Post-Border Programs for CBSA noted that “[d]etention is an effective tool against those who circumvent immigration processes” and that the agency would be “aggressive in building evidence and arguing for inadmissibility.” In contrast to the normally non-adversarial nature of refugee proceedings, the memo further outlined that the agency would be active in trying to oppose the refugee claims of all *Sun Sea* arrivals. The Director stated: “In terms of the approach for refugee determination hearings, they will be dealt with aggressively as well. The CBSA will advise the IRB that it intends to intervene in each case, however, the IRB's current 84% acceptance rate will be a challenge.” Memorandum obtained through Access to Information Request A-2013-03486(10 September 2013), provided to the Canadian Council for Refugees and on file with the author. See also above discussion at Chapter 2, note 151 and accompanying text.

detention) in Canada, several of the asylum seekers who had helped out with the voyage, including some who had merely cooked aboard the ship, were referred to the Immigration Division of the Immigration and Refugee Board for an admissibility hearing, based on the premise that in assisting the smuggling operation, they had engaged in the transnational crime of people smuggling, as set out at s 37(1)(b) of the IRPA. The Immigration Division consistently affirmed the allegations of the CBSA in these cases, finding the asylum seekers inadmissible under s 37, which has the effect of terminating their claims to refugee status.<sup>20</sup>

Meanwhile, the suspected masterminds of the *MV Ocean Lady* operation were criminally prosecuted under s 117 of the IRPA on charges attracting a fine of up to \$1,000,000 and, potentially, to life imprisonment.<sup>21</sup>

Prior to the commencement of the trial in the criminal prosecutions, the four co-accused applied for an order declaring that s 117 of the IRPA infringes s 7 of the *Charter*. At the heart of the application, the accused argued that the provision was unconstitutionally overbroad in that it criminalizes a broader range of activities, including humanitarian refugee assistance and assistance of family members, than was intended to be caught by the provision.

The trial judge accepted that s 117 was overly broad, based in part on the narrower scope of the Smuggling Protocol and on the Refugee Convention, which specifically prohibits prosecution for illegal entry. The court noted that the Smuggling Protocol, unlike the IRPA provision, specifically limits the ambit of what is considered to be smuggling activity to those actions undertaken for some form of profit or personal gain. The means

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<sup>20</sup> Pursuant to sections 101(1)(f) and 104(2)(a) of the IRPA. See for example: *Canada (PSEP) v. X*, 2011 CanLII 93842 (CA IRB); *X (Re)*, 2011 CanLII 86097 (CA IRB); *X (Re)*, 2012 CanLII 95162 (CA IRB); *Canada (PSEP) v X*, 2012 CanLII 93972 (CA IRB).

<sup>21</sup> Since (and in response to) the arrival of these migrant ships, s117 of the IRPA was amended to include mandatory minimum sentences, in addition to the already existing possibility of life imprisonment. The minimum sentences are three, five and ten years, depending on the number of persons smuggled, on whether the accused smuggler endangered any lives or harmed anyone, and on whether the offence was for profit, or was for the benefit of, at the direction of or in association with a criminal organization or terrorist group.

chosen to achieve the legitimate state objective of combating human smuggling therefore captured a broader range of conduct, and persons, than is necessary and, as such, s.117 was found to violate the *Charter* and was therefore of no force or effect.<sup>22</sup> On appeal to the British Columbia Court of Appeal, the Crown was permitted to substantially recast its argument regarding the objectives of the anti-smuggling provision. Rather than merely fulfilling its international obligation to combat human smuggling, the Crown argued that the true objective of s 117 was to “prevent individuals from arranging the unlawful entry of others into Canada, thereby securing the secondary goals of enforcing Canadian sovereignty; maintaining the integrity of Canada’s immigration and refugee regime; protecting the health, safety, and security of Canadians; and promoting international justice and security.”<sup>23</sup> The Court of Appeal accepted this expanded articulation of the provision’s objective, which led to the unsurprising conclusion that s 117 is not overly broad. The court accepted, in other words, that the aim of Canada’s anti-smuggling provision is equally to prevent parents from bringing their children into Canada as it is to prevent profiteering people smuggling who organize large scale boat arrivals.<sup>24</sup> Nevertheless, in arriving at this conclusion, the court paid considerable attention to both the Refugee Convention and the Smuggling Protocol.<sup>25</sup>

Both before and after the British Columbia trial court’s decision in *Appulonappa*, the Federal Courts were considering judicial reviews and appeals of the Immigration Division decisions on the application of s 37 to the asylum seekers who participated in the *MV Sun Sea* operation.<sup>26</sup> In two consolidated appellate decisions, the Federal Court of Appeal upheld the findings of the Immigration Division, distinguishing the *Appulonappa* trial decision and concluding that Canada had legitimately decided to incorporate a definition of people smuggling that was broader than that which was required under its international

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<sup>22</sup> *R v Appulonappa*, 2013 BCSC 31

<sup>23</sup> *R v Appulonappa*, 2014 BCCA 163 at para 5.

<sup>24</sup> *Ibid* at paras 114, 120-146.

<sup>25</sup> *Ibid* at paras 121-140.

<sup>26</sup> *B306 v Canada (PSEP)*, 2012 FC 1282; *B010 v Canada (MCI)*, 2012 FC 569; *S. C. v Canada (PSEP)*, 2013 FC 491; *J.P. v Canada (PSEP)*, 2012 FC 1466; *Sivagnanasingam v Canada (PSEP)*, 2013 FC 604; *B006 v Canada (MCI)*, 2013 FC 1033; *B072 v Canada (MCI)*, 2012 FC 899.

obligations.<sup>27</sup> Leave to appeal both these decisions and the *Appulonappa* decision was granted by the Supreme Court of Canada and the matters were heard together in early 2015.<sup>28</sup>

Once again, however, the ultimate conclusions reached by Canadian courts in these decisions is ancillary to my larger point, which is that domestic law is presumed to conform with international law and the latter has become an important interpretive mechanism by which Canadian decision-makers determine the substantive content of domestic immigration and refugee law.<sup>29</sup>

### ***3.2.2 International law as directly incorporated into Canadian immigration law***

The second and most obvious way in which international law is embedded in Canadian immigration decision-making is by direct incorporation of key elements of two particular international treaties – the *Convention Related to the Status of Refugees* and the *Convention Against Torture* – into Canadian law.<sup>30</sup> Little need be said of the relevance of international law to these aspects of Canadian domestic immigration law – in short, Canada’s international legal obligations to, amongst other things, recognize *Convention* refugees and prohibit the expulsion of anyone to torture have been fully integrated into Canadian law. That Canada has elevated the status of these international norms to the level

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<sup>27</sup> *B010 v Canada (MCI)*, 2013 FCA 87; *Canada (PPSEP) v JP*, 2013 FCA 262.

<sup>28</sup> *JP et al v Minister of Public Safety and Emergency Preparedness*, SCC Court File Nos.35688, 35685, 35677, 35958, 35388.

<sup>29</sup> See R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed.) (Markham: Butterworths, 2002), at 422; Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003) on the incorporation of customary international where it is not expressly contradicted by domestic legislation. For further jurisprudence on the role of international law in interpreting domestic legislation, see *Slaight Communications Inc. v Davidson*, [1989] 1 S.C.R. 1038; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Suresh v Canada (MCI)*, 2002 SCC 1 [Suresh]; *United States v Burns*, [2001] 1 S.C.R. 283; *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, [2004] 1 S.C.R. 76.

<sup>30</sup> *United Nations Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, entered into force for Canada on June 4, 1969: [1969] Can TS. No. 6 and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1465 UNTS 85, entered into force for Canada on July 24, 1987: [1987] Can TS No 36. These instruments are referred to hereinafter as the “Refugee Convention” and the “CAT”, respectively. Key provisions of both the Refugee Convention and the CAT are incorporated into sections 96-98 of the IRPA and are reproduced in a Schedule to the Act.

of binding domestic law is not surprising, given that the prohibition on *refoulement* to persecution has taken on quasi-*jus cogens* status<sup>31</sup> and the prohibition on the return to torture is fully recognized as a *jus cogens*, or peremptory norm, from which no derogation is permitted.<sup>32</sup> As a result, international legal interpretations of these human rights doctrines are frequently relied upon; the views of international monitoring bodies are often treated as persuasive, if not determinative, and the United Nations High Commissioner for Refugees periodically intervenes directly in Canadian cases implicating key parts of the Refugee Convention.<sup>33</sup> This latter point illustrates, perhaps more articulately than anything else, the uniquely interwoven nature of immigration regulation and international law in this area. Indeed, there is essentially no other context in which a United Nations organization intervenes in litigation in individual domestic cases, albeit those with a larger precedent-setting possibility, to ensure compliance with an international treaty. Of course the fact that Canada has incorporated its commitment to these international agreements into domestic law does not mean that its interpretation of its obligations is always consistent with international law doctrine or with the positions of United Nations agencies. There are, for example, numerous instances in which Canadian policy and jurisprudence have run directly contrary to the position of the UNHCR on the proper interpretation of the Refugee Convention.<sup>34</sup>

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<sup>31</sup> Jean Allain, "The *jus cogens* nature of non-*refoulement*" (2001) 13:4 Int J Refug Law 533.

<sup>32</sup> See for example *Prosecutor v Furundzija*, Case No. IT-95-17/1, Trial Chamber Judgment, 10 Dec 1998 at paras 153-157. This said, in the context of previous legislation which had not incorporated the CAT, the Supreme Court of Canada in *Suresh*, *supra* note 29 considered at length the nature of Canada's obligations when considering the deportation of an individual to the likelihood of torture. And while the court accepted the non-derogable nature of the prohibition on torture, it also found (possibly in the still-proximate aftershock of 9/11) that the "jurisprudence does not suggest that Canada may never deport a person to face treatment elsewhere that would be unconstitutional if imposed by Canada directly, on Canadian soil: para 58.

<sup>33</sup> Most recently in two cases involving the exclusion clauses of the Convention: see *Ezokola v Canada (MCI)*, 2013 SCC 40, UNHCR amicus factum available online: <http://www.refworld.org/docid/50ebcf272.html> and *Hernandez Febles v Canada (MCI)*, 2014 SCC 68, heard before the Supreme Court March 25, 2013, UNHCR amicus factum available online: <http://www.refworld.org/publisher.UNHCR.AMICUS..532019774.0.html>.

<sup>34</sup> See, most recently, the decision of the Supreme Court of Canada in *Hernandez Febles*, *ibid*. For a fascinating account of international law and domestic interpretation and compliance, see Jutta Brunnée, and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge, New York: Cambridge University Press, 2010) at 114-121.



### 3.2.3 Migration law as key cite for interpreting international human rights norms

Finally, there is another, almost inverse way in which migration law implicates international norms and that is by directly influencing, through litigation, the interpretation and therefore the content of international law. Indeed, in recent years migration law has proven to be a key cite for the interpretation of countries' international human rights obligations. Given the nascent and still relatively non-enforceable nature of international human rights law, there remains a relatively small body of international authority on the interpretation of various instruments. This being the case, the interpretive process in relation to these instruments has fallen, in some significant measure, to domestic courts. One example of this phenomenon arises from the exclusion clause found at Article 1F(a) of the Refugee Convention, which excludes from refugee protection those believed to have "committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes." Domestic courts, in interpreting this provision, must therefore determine the meaning of the clause within the scheme of the Refugee Convention, but in giving it definitional form, must also look to other international instruments that refer to the prescribed crimes.

In recent years, appellate courts in several countries have considered the application of Article 1F(a) of the Refugee Convention, and in so doing, they have also been compelled to consider and shed light on recent developments in international criminal law, most particularly, the *Rome Statute of the International Criminal Court*<sup>35</sup> and the jurisprudence of both the ICC and the *ad hoc* tribunals for the former Yugoslavia and Rwanda.<sup>36</sup> Moreover, the influence that the decisions may have is not confined to domestic

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<sup>35</sup> *Rome Statute of the International Criminal Court*, A/CONF. 183/9, 17 July 1998 (as amended) [*Rome Statute*]. The International Criminal may hereafter be referred to as the "ICC".

<sup>36</sup> See for example, the decisions of appellate and Supreme Courts in the United Kingdom: *R (JS) v Secretary of State for the Home Department* [2010] UKSC 15; New Zealand: *Attorney-General (Minister of Immigration) v Tamil X* [2010] NZSC 107; Canada: *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40; France: CE, 14 juin 2010, No 320630 (Conseil d'État); and Australia: *SHCB V. Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 308.

refugee law, but also may have an impact on international refugee law, international criminal law and international humanitarian law. Indeed, the *Rome Statute* specifically contemplates that the ICC may take into consideration domestic law on relevant issues.<sup>37</sup> In its own interventions before state courts, furthermore, the UNHCR frequently relies upon national decisions that it views as being consistent with the *Refugee Convention*.<sup>38</sup>

Additionally, domestic courts and tribunals are frequently influential in the development of jurisprudence in other states. This “transnational judicial conversation” is particularly influential in the domain of refugee law, where it has led to a “rich comparative jurisprudence” concerning the key principles of international law relative to refugees.<sup>39</sup> In these ways, domestic immigration law can be viewed as playing a role in the dialogical nature of developments in international law, both taking instruction from international norms, but also transmitting its own interpretation of such norms back out into the international sphere.

Once again, for our purposes, what is important is to recognize that, despite the dogged provincialism of immigration law in certain respects, it also remains intimately connected with international law. To further, and more specifically, elaborate on the point, I now turn to the ways in which immigration decision-making in the security context also engages international law.

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<sup>37</sup> Albeit, as a matter of secondary preference to international authority: see Article 21(1)(c) of the *Rome Statute*.

<sup>38</sup> See, for example, its amicus factum in intervening in the Ezokola case, *supra* note 33.

<sup>39</sup> James C. Hathaway & Michelle Foster, *The Law of Refugee Status 2d ed* (Cambridge: Cambridge University Press, 2014) [Hathaway and Foster, “Law of Refugee Status”] at 5, which proposes, in part, a greater penetration of transnational dialogue and cooperation in domestic refugee law jurisprudence. For a contrasting view from within the European context, see Guy Goodwin Gill and Helene Lambert, eds, *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge: Cambridge UP, 2010).

### ***3.2.4 Immigration, Security and International Law***

As with the other aspects of immigration and refugee law referred to above, decision-makers in the immigration-security arena also regularly engage, albeit sometimes unwittingly, in both the discourse and content of international law. Given the extraordinary breadth of the security provision, decision-making in the field touches on a number of different themes, many of which have a corresponding plane internationally. In the previous chapter, I discussed the various grounds on which security cases are brought: subversion, terrorism, membership, etc. Below I revisit some of these grounds, and the legal issues that arise from them, to cast further light on their international dimensions; more specifically I look at the intersections between allegations of subversion and terrorism and a response to these allegations, based on the right of self-determination at international law.

#### *Subversion*

Recall that an individual who has engaged in the subversion by force of any government is inadmissible to Canada pursuant to s34(1)(b) of the IRPA. Recall further that a significant percentage of Canadian security cases arise under s34(1)(b) and that the majority of these cases relate to individuals found to be members of secessionist, anti-colonial or liberation movements.

Subversion as a specific term of art in Canadian security law does not appear to have a parallel existence under international legal doctrine. That said, the acts to which it refers – the undermining, often by illicit means and with force, of a government – are at the very core of international law as it has developed over the past 60 years. Given that states comprise the basic building blocks of international law, it is not surprising that numerous international instruments place enormous emphasis on national stability (frequently referred to as ‘territorial integrity’), and contain corresponding prohibitions on the use of force. The cornerstone of this emphasis on peace and stability is the *United Nations Charter* itself, which provides at Article 2(4):

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.<sup>40</sup>

Not surprisingly, however, international law admits of certain exceptions to this general prohibition on armed aggression, specifically contemplating rules of engagement and situations in which the use of force may be justified. Indeed the exceptions to the norm of territorial integrity have coalesced into an entire field of international law known, some say perversely, as the law of armed conflict, which includes as a subset international humanitarian law. The most notable expressions of this area of international law are the four Geneva Conventions of 1949<sup>41</sup> and their two additional protocols of 1977: Additional Protocol I<sup>42</sup> and Additional Protocol II.<sup>43</sup>

On the surface these provisions would appear to apply solely to states *vis-à-vis* their relations with other states and to have, as a consequence, little to do with the kinds of intra-state conflicts in which liberation movements have typically engaged. And for a time, this was arguably true, however, Additional Protocol I to the Conventions broadens the application of the various provisions to certain classes of individuals associated with purely domestic conflicts. More specifically, Article 1(4) of Additional Protocol I provides:

The situations referred to in the preceding paragraph [which tie the Protocol into the larger Geneva Conventions] include armed conflicts in which peoples are fighting against colonial

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<sup>40</sup> *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI (U.N. Charter), Art 2(4).

<sup>41</sup> 1949 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva Convention No. I), 12 August 1949, 75 UNTS 31; 1949 *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (Geneva Convention No. II), 12 August 1949, 75 UNTS 85; 1949 *Geneva Convention Relative to the Treatment of Prisoners of War* (Geneva Convention No. III), 12 August 1949, 75 UNTS 135; 1949 *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva Convention No. IV), 12 August 1949, 75 UNTS 287.

<sup>42</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Protocol I), 8 June 1977, 1125 UNTS 3.

<sup>43</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II), 8 June 1977, 1125 UNTS 609. The Conventions and Additional Protocols were both incorporated into Canadian law by the Geneva Conventions Act, RSC 1985, c G-3.

domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

The implications of this provision have been much debated, but in broad terms an individual may obtain the right under international law to participate in a purely internal conflict where two conditions are met: first, the armed conflict must be one in which “peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination;” and second, the individual must be a member of an “armed force” of a party to the armed conflict. These requirements are rich in both meaning and controversy, but it is clear that, at a minimum, Article 1(4) brings internal conflicts of a particular character into the purview of international law.

Determining *which* internal armed conflicts may be justified under international law – in other words, determining which conflicts are composed of “peoples” fighting against “colonial domination,” “alien occupation” and against “racist regimes” in the exercise of “self-determination” – is an immensely complex and fraught task, but the same of course could be said of purely international conflicts. Both involve entrenched interests, highly politicized contexts and competing interpretations of history. The point to recall for our purposes is that individuals who have participated in, and fled from, situations involving the subversion of a government may often stake the claim that their actions are entirely within the bounds of what is permitted at international law.<sup>44</sup>

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<sup>44</sup> And as I shall further set out below, many organizations that have been implicated in security inadmissibility matters have made this precise argument: the Democratic Party of Iranian Kurdistan (KDPI); the Eritrean Liberation Front (ELF) and the Angolan União Nacional para a Independencia Total de Angola (UNITA), to name a few.

In response, one might ask whether the possible justification of an armed act of subversion under international law is at all relevant to domestic questions of admission and admissibility. The answer to this (as I have mentioned and will mention again), is that in a legislative landscape as amorphous as the security context, *something* has to inform decision-making if it is to maintain any semblance of consistency and coherence; if it is to maintain, in other words, adherence to the rule of law.<sup>45</sup> Immigration decision-makers are called upon, in a very tangible way, to assess the character of situations of armed conflict and to preside over their lawfulness. Given that liberation struggles for self-determination are, in other contexts, clearly in the dominion of international law, it seems only logical to assess them from the international perspective.

### *Terrorism*

As with subversion, the data on Immigration and Refugee Board decisions illustrates that a high percentage of cases in the security area relate to allegations of membership in terrorist organizations. Decision-makers therefore frequently have to grapple with what has long been, both domestically and internationally, a vexing legal issue – that being the definition of a terrorist act. As I have noted earlier, while terrorism as a concept is relevant to several provisions of the *Immigration and Refugee Protection Act*, it provides no definition of the term. This being the case, the Immigration Division tends to rely on the decision of the Supreme Court of Canada in *Suresh*<sup>46</sup> as a starting point for working through the meaning of the term and how it plays out in particular situations. Manickavasagam Suresh, a Sri Lankan citizen of Tamil descent entered Canada in 1990 and was found to be a Convention refugee. He later applied for permanent residence in Canada, but the application was not finalized because, under processes associated with the former *Immigration Act*, the Solicitor General of Canada and the Minister of Citizenship and

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<sup>45</sup> By ‘rule of law’, I refer again here to the term in the substantive, Fullerian sense, as a set of principles that impose substantive requirements on laws to be recognized as such. This would include the requirement that laws, and the application of them, be clear and intelligible, be prospective in nature and be consistently applied.

<sup>46</sup> *Suresh*, *supra* note 29.

Immigration commenced proceedings to deport him on security grounds. More specifically, Canada alleged that Mr. Suresh was a member of the Liberation Tigers of Tamil Eelam (LTTE), an organization alleged to have funding networks in Canada and to have committed terrorist activity in Sri Lanka. While the courts noted that the LTTE was engaged in a protracted rebellion against the democratically elected government of Sri Lanka, it also acknowledged that atrocities were commonplace on both sides of the struggle.<sup>47</sup> It was also firmly established in the evidence that the use of torture by the security forces was widespread, particularly against persons suspected of membership in the LTTE.

As a result of Suresh's perceived leadership role in the LTTE and the World Tamil Movement, an alleged front organization for the LTTE, the government commenced the somewhat Byzantine process for removing Suresh, given his status as a Convention refugee. This culminated in the issuance of a Ministerial "opinion" (the term used in the legislation), that Suresh constituted a danger to the security of Canada and should be deported. Suresh challenged the decision, arguing, *inter alia*, that the terms "danger to the security of Canada" and "terrorism" were unconstitutionally vague. The decision of the Supreme Court of Canada in the matter represented a somewhat tepid victory for refugee advocates. The court determined that, informed by the non-derogable nature of the *Convention Against Torture*, the Canadian *Charter* "generally" prohibits the deportation of an individual to torture.<sup>48</sup> The court also found that while the legislative framework for the removal of Convention refugees was constitutional, the procedures followed to carry out the deportation of Mr. Suresh did not comply with the *Charter* in so far as they failed to provide him with adequate disclosure of the case that needed to be met.

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<sup>47</sup> *Ibid*, at para 10.

<sup>48</sup> *Ibid*, at paras 76, 78. Of interest here, of course, is the use of the word "generally" which clearly leaves open the possibility that the courts would uphold the removal of an individual to a known risk of torture in certain extraordinary, if unspecified, circumstances. On this point, the timing of the *Suresh* appeal is also perhaps noteworthy; the appeal hearing was heard in May, 2001 just before the 9/11 terrorist attacks in New York and Washington, but the decision was not released some until four months after the attacks, in January 2002.

The court further found that, despite difficulties providing definitional form to the term “terrorism” it was not unconstitutionally vague. In a passage worth citing at some length, the court first noted:

One searches in vain for an authoritative definition of “terrorism”. The *Immigration Act* does not define the term. Further, there is no single definition that is accepted internationally. The absence of an authoritative definition means that, at least at the margins, “the term is open to politicized manipulation, conjecture, and polemical interpretation”...

Even amongst those who agree on the definition of the term, there is considerable disagreement as to whom the term should be attached...Perhaps the most striking example of the politicized nature of the term is that Nelson Mandela’s African National Congress was, during the apartheid era, routinely labelled a terrorist organization, not only by the South African government but by much of the international community.<sup>49</sup>

Yet, having said this and more regarding the elusive nature of the meaning of “terrorism”, the court found itself unpersuaded that the term was so unsettled that it could not “set the proper boundaries of legal adjudication.”<sup>50</sup> This finding was premised on an emerging consensus in international law as to an acceptable definition of the term, based largely on a two-pronged approach to the definition found in the *International Convention for the Suppression of the Financing of Terrorism*.<sup>51</sup> The first, or “functional”, approach is to simply incorporate certain activities already proscribed in other international instruments, described in an Annex to the Convention.<sup>52</sup> The second, or “stipulative”, approach is to provide an actual definition of terrorist activity, as follows:

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<sup>49</sup> *Ibid*, at paras 94-95, citing the factum of the intervener, Canadian Arab Federation.

<sup>50</sup> *Ibid* at para 96.

<sup>51</sup> 9 December 1999, GA Res. 54/109 [ICSFT].

<sup>52</sup> These are: 1) *Convention for the Suppression of Unlawful Seizure of Aircraft*, 16 December, 1970, 860 UNTS 105, entered into force Oct. 14, 1971; 2) *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 974 UNTS 178, entered into force January 26, 1973; 3) *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 10 March, 1988, 1678 UNTS 221, entered into force March 1, 1992; 4) *Convention on the Physical Protection of Nuclear Material*, IAEA-INF/CIRC/274, Entered into force 8 February, 1987; 5) *Convention on the Prevention and Punishment of Crimes against Internationally*



Any . . . act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.<sup>53</sup>

While the court in *Suresh* acknowledged that “particular cases on the fringes of terrorist activity will inevitably provoke disagreement,” it directly adopted the above definition of “terrorism,” and found that the use of the term in immigration legislation was “sufficiently certain to be workable, fair and constitutional.”<sup>54</sup>

As mentioned above, in my review of security-related decisions, I have found that the Immigration Division tends to provide a relatively shorthand analysis of its understanding of terrorism, relying on the *Suresh* decision and its incorporation of the various international instruments that help to delineate the meaning of terrorist activity. There is, in other words, a relatively unbroken line connecting international legal principles on terrorism and decision-making on immigration security matters in the domestic sphere. Once again, for our purposes, the essential point is that, like subversion, there is a clear nexus between the domestic task of determining whether an individual has engaged in terrorism and international law.

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*Protected Persons, including Diplomatic Agents*, 14 December, 1973, GA Res 3166, UN Doc A/Res/3166 (XXXVIII) (1974), entered into force 20 February 1977; 6) *International Convention against the Taking of Hostages*, G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/46 (1979), entered into force June 3, 1983; 7) *International Convention for the Suppression of Terrorist Bombings*, 15 December, 1997, GA Res. 164, U.N. GAOR, 52nd Sess., Supp. No. 49, at 389, U.N. Doc. A/52/49 (1998), entered into force May 23, 2001; 8) *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf*, 10 March 1988, 1678 UNTS 304; and 9) *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 24 February 1988, UNTS 1990, entered into force 6 August 1989.

<sup>53</sup> *Supra* note 38, at Article 2(1)(b).

<sup>54</sup> *Suresh*, *supra* note 29 at para 98.

## *Self-Determination*

Above I have discussed the two primary grounds for inadmissibility and their connections to international law. The grounds are also connected with each other in that a large number of inadmissibility cases are brought forward on allegations of membership in organizations that have engaged in both subversion and terrorism. As with most situations of political conflict, however, subversive acts and acts of alleged terror do not tend to be the ends themselves, but are rather the means by which to attain a different end. For national liberation movements, this end is virtually always related to the concept of self-determination.<sup>55</sup> Because self-determination lies at the core of so many inadmissibility cases, because it is so misunderstood, and because many lawyers argue that a greater understanding of it will lead to better decision-making, I devote considerable attention here to the concept, its historical roots, its recent history and its place in the security inadmissibility process.

As a principle of international law, self-determination occupies an ambivalent position that is at once widely recognized and hotly contested, and yet it remains rather poorly understood.<sup>56</sup> Its roots can be traced to Enlightenment thinkers, not necessarily in its international dimension, but in connoting personal autonomy and, collectively, the right to participate in the idea of democratic self-government. Self-determination flows naturally from the Kantian notion of the capacity of individuals to “translate their arbitrary impulses and desires into action through rational thought that defines their juridical

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<sup>55</sup> Allen Buchanan, *Justice, Legitimacy, and Self-determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2003) [Buchanan, “Justice, Legitimacy and Self-determination”].

<sup>56</sup> Edward M Morgan, “The Imagery and Meaning of Self-Determination” (1987) 20 N Y Univ J Int Law Polit 355 [Morgan, “Imagery”] at 355. Indeed, of the inadmissibility decisions canvassed in the previous chapter, a sizeable majority related, in some form or another, to organizations that have asserted as their core objective principles of self-determination. These organizations include narrowly-focused liberation and separatist movements such as those of the Liberation Tigers of Tamil Eelam in Sri Lanka, Sikh nationalist movements in India and independence movements in countries such as Eritrea and Sudan, but also movements that espoused a more politically-oriented set of objectives, such as the Farabundo Martí National Liberation Front (FMLN) in El Salvador.

existence as holders of legal right.”<sup>57</sup> Autonomy and the capacity to reason – individual self-determination – give rise, by virtue of their universality, to notions of essential equality and a shared ability to refrain from “egotistical” impositions on others.<sup>58</sup> The seismic changes of the following 200 years resulted in the transposition of this classic Enlightenment notion of individual autonomy onto the national and international planes, frequently fixing discussions about rights to the state-based contexts through which they were to be realized.

By the First World War, the notion of national self-determination, or a self-determination of peoples, had embedded itself into official discourse and (in a sign of what would become its highly contentious nature) was equally endorsed by Woodrow Wilson and Vladimir Lenin’s Bolsheviks, albeit for very different reasons.<sup>59</sup> Self-determination was characterized by Wilson as the mechanism by which to deal with the fallout of the disintegration of the Austro-Hungarian and Ottoman empires and his infamous “Fourteen Points” statement was suffused with self-determination principles. Even at the time, however, there was concern over the ways in which self-determination could become more disruptive than ameliorative in the process of dealing with the West’s unsettled boundaries. One of the concerns was that the concept could “get into the wrong hands”, as articulated by Wilson’s Secretary of State Robert Lansing, who wrote:

The more I think about the President’s declaration as to the right of ‘self-determination,’ the more convinced I am of the danger of putting such ideas into the minds of certain races. It is bound to be the basis of impossible demands on the Peace Congress and create trouble in many lands...Will it not breed discontent, disorder and rebellion?...The phrase is simply loaded with dynamite.<sup>60</sup>

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<sup>57</sup> *Ibid*, at 357.

<sup>58</sup> *Ibid*.

<sup>59</sup> See generally, Elie Kedourie, *Nationalism* (London: Hutchinson, 1961) and, specifically, Hurst Hannum, *Autonomy, Sovereignty, and Self-determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990) [Hannum, *Autonomy*] at 27-28.

<sup>60</sup> Robert Lansing, *The Peace Negotiations: A Personal Narrative* (Boston: Houghton Mifflin Co., 1921) at 97-98, cited also in Morton Halperin and David Scheffer, *Self-Determination in the New World Order* (Washington:

For his part, Lenin viewed self-determination through the lens of class struggle and while there is no particular philosophical affinity between communism and self-determination, he recognized the right of peoples to secede from “oppressor nations”:

The right of nations to self-determination implies exclusively the right to independence in the political sense, the right to free political separation from the oppressor nation. Specifically, this demand for political democracy implies complete freedom to agitate for secession and for a referendum on secession by the seceding nation. This demand, therefore, is not the equivalent of a demand for separation, fragmentation and the formation of small states. It implies only a consistent expression of struggle against all national oppression.<sup>61</sup>

Without endorsing the rather odious statement of Secretary of State Lansing, he was prescient in forecasting the complexities associated with Wilson’s conception of self-determination. Nevertheless, with the next wave of geopolitical turmoil following the Second World War, the principles first elaborated 25 years earlier became enshrined in the founding instrument of the United Nations and acquired, at least notionally, the status of a binding rule of international law. Article 1(2) of the United Nations Charter provides:

The Purposes of the United Nations are:

...

To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace...<sup>62</sup>

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Carnegie Foundation, 1992) at 17 and wrongfully attributed to Secretary of State Stanton in Buchanan, Justice, Legitimacy and Self-determination, *supra* note 55 at 332.

<sup>61</sup> V.I. Lenin, *Questions of National Policy and Proletarian Internationalism* (Moscow: Foreign Languages Publishing House, 1950) at 138-9.

<sup>62</sup> U.N. Charter, *supra* note 40, Art. 1(2).

The same guarantee of the right to self-determination of peoples was later included in the first articles of *both* the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.<sup>63</sup>

While these documents clearly underscored the centrality of self-determination in contemporary international legal discourse, they did little to shed light on the actual meaning of the term. Most importantly, the U.N. Charter was silent on the very nub of the problem, which relates not to the meaning of self-determination, per se, but to the question of who are the “peoples” that are entitled to it. As mentioned earlier, the right of a non-state entity to engage in activities – in the name of self-determination – that threaten national borders has always sat uneasily with the concomitant principle of territorial integrity but in the post-war period, self-determination was repeatedly endorsed by U.N. bodies, primarily in association with the decolonization movement.<sup>64</sup> The 1960 *Declaration on the Granting of Independence to Colonial Countries and Peoples*<sup>65</sup> strongly affirmed the right of self-determination for all those subject to “alien subjugation, domination and exploitation” and further prohibited “all armed action or repressive measures” directed against dependent peoples in order to enable them to exercise peacefully and freely their right to “complete independence.”<sup>66</sup> It must be noted, however, that even within this widely supported Declaration (it was passed by a vote of 89-0, with 9 notable, i.e. colonial-power, abstentions) the spectre of territorial integrity was ever-present. Article 6 of the Declaration affirmed:

Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is

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<sup>63</sup> G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 (ICCPR); GA res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, UN Doc A/6316 (1966), 993 UNTS 3, *entered into force* Jan. 3, 1976 (ICESCR).

<sup>64</sup> C. Quaye, *Liberation Struggles in International Law* (Philadelphia: Temple UP, 1991) [Quaye, *Liberation Struggles*] at 214-215 and Hannum, *Autonomy*, *supra* note 51 at 33.

<sup>65</sup> GA Res. 1514 (XV) U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684, at 67 (Dec.14, 1960) [1960 Declaration].

<sup>66</sup> *Ibid*, at articles 1, 2 and 4.

incompatible with the purposes and principles of the Charter of the United Nations.

Beyond the inherent limitations (if not contradictions) posed by the self-determination/territorial integrity dynamic, there were also those who argued that self-determination, at least in the sense that it was adopted by the United Nations, was limited to the decolonization context.<sup>67</sup> This view was undermined, however, in another UN declaration, the inelegantly worded *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, which is the most recent and perhaps influential statement from the U.N. on self-determination.<sup>68</sup> The Friendly Relations Declaration, while again affirming the principle of territorial integrity, asserted that the right to self-determination applies to any people subject to alien subjugation, domination and exploitation and prohibited states from engaging in any forcible action which deprives peoples of their right to self-determination and freedom and independence. In a subtle, but important gesture, the Convention also affords to peoples who meet with resistance to their assertion of self-determination the right to seek and to receive support in accordance with the purposes and principles of the Charter.<sup>69</sup>

The Friendly Relations doctrine further provided that the principles elucidated in it constituted “basic principles of international law” and its affirmation of a right to self-determination led commentators to conclude that, even in its disputed and ambiguous form, it has clearly become a *jus cogens* principle of international law.<sup>70</sup> And while there were still claims that the concept had limited application – that the terms “alien subjugation, domination and exploitation” were still merely shorthand for colonization – an

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<sup>67</sup> See for example, R. Emerson, “Self-Determination” 65 Proc American Soc Int’l Law 459 at 464-466.

<sup>68</sup> GA Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc A/8028, at 123-24 (Oct. 24, 1970) [Friendly Relations Declaration].

<sup>69</sup> Friendly Relations Declaration, *ibid*, at Preamble.

<sup>70</sup> Antonio Cassese, *Self-determination of peoples : a legal reappraisal* (Cambridge: Cambridge UP, 1995) [Cassese, Self-determination of peoples] at 171-172.

increasingly critical mass of commentators expressed the view that this language did not limit the right of self-determination so narrowly.<sup>71</sup>

Liberation movements were by no means oblivious to these developments in international law. In fact, many of the movements that have given rise to inadmissibility findings for its members have actively made the argument that their actions fall within the ambit of international humanitarian law.<sup>72</sup> And for what it is worth, the international community has frequently agreed. In one UN resolution, for example, the General Assembly of the United Nations stated in respect of Namibia:

*Reaffirming* its full support for the armed struggle of the Namibian people under the leadership of the South West Africa People's Organization...

4. Reaffirms the inalienable right of the people of Namibia to self-determination, freedom, and national independence in a united Namibia...and the legitimacy of their struggle by any

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<sup>71</sup> Thomas M. Franck, *The Power of Legitimacy among Nations* (Oxford: Oxford UP, 1990) at 153-174; Martti Koskenniemi, "National Self-Determination Today: Problems of Legal Theory and Practice" (1994) 43 Int Comp Law Q 241[Koskenniemi, Self-Determination Today] at 247-248 and Quaye, *Liberation Struggles at 212-223*. Support for this view came in part from the broader wording of the Additional Protocol to the Geneva Conventions, *supra* note 35, which provided (at Art.1(4)) that it applied to situations in which "peoples are fighting against colonial domination and alien occupation *and* against racist regimes in the exercise of their right of self-determination." Koskenniemi notes in this regard: "The definition...is not limited to a Third World context but seems to cover all situations where a foreign minority imposes its rule on the majority. It is not difficult to extend this sense to any situation where an ethnic group becomes the object of human rights abuses or at least a denial of equal rights."

<sup>72</sup> In December, 1975, for instance, the Eritrean Liberation Front and the Eritrean People's Liberation Front issued a statement that it would respect international humanitarian law. A similar declaration was made by the Angolan União Nacional para a Independencia Total de Angola (UNITA) in 1980. In the early 1980's, with the adoption of the Additional Protocols, several movements made more formal declarations. In a 1981 declaration, for example, the Namibian South West Africa People's Organization (SWAPO) stated:

It is the conviction of SWAPO that fundamental rules protecting the dignity of all human beings must be upheld at all times. Therefore, and purely for humanitarian reasons, SWAPO declares hereby that in the conduct of the struggle for self-determination, it intends to respect and be guided by the rules of the four Geneva Conventions of 12 August 1949 for the protection of the victims of armed conflicts and the 1977 additional Protocol relating to the protection of victims of international armed conflicts (Protocol I).

See Churchill Ewumbue-Monono, "Respect for international humanitarian law by armed non-state actors in Africa" (2006) 88 Int'l Review of the Red Cross 864 at 906-907.

means at their disposal, including armed struggle against the illegal occupation of their territory by South Africa...<sup>73</sup>

There have also been situations in which the use of force in the pursuit of self-determination has been retrospectively found to be justified by the international community following a negotiated secessionist process, such as happened in Eritrea.<sup>74</sup>

What to make then of the clearly ambivalent place of self-determination at international law? One view is that while the use of force by liberation movements may not be explicitly permitted, it is also not prohibited. In the words of Cassese, while liberation movements do not have a legal “*right*” to resort to the use of force, they may have a “*legal licence*” to do so.<sup>75</sup> The Cassese argument underscores that liberation movements cannot be held responsible for international wrongdoings in relation to their legitimate use of force when their actions are in compliance with the laws of armed conflict and are in response to the “forcibl[e] deni[al]” of self-determination.<sup>76</sup>

Some commentators have gone further, suggesting that the right to self-determination has evolved to incorporate secession rights in a process that has literally transformed international law. Tappe notes in this regard:

The evidence, which includes recent successful secession movements, international declarations, and a reading of current scholarly literature, suggests that international law is in a process of metamorphosis, characterized by a slow acceptance of some right of self-determination in the form of secession, both in textual and customary forms.<sup>77</sup>

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<sup>73</sup> *Question of Namibia*, 12 December, 1979, GA Res A/34/92/G.

<sup>74</sup> Inge V. Porter, “Two Case Studies in Self-Determination: The Rock and the Bailiwick” (2003) 4 *San Diego Int’l Law Journal* 339 at 355, n.119.

<sup>75</sup> Cassese, *Self-determination of peoples*, supra note 70 at 154-155. This passage is based on previously coauthored work, see A. Grant, C. Bruce and C. Reynolds, “Out of the Fire and into the Pot: The Eritrean Liberation Movement, the Right to Self-Determination and the Over-Breadth of North American Immigration Security Provisions” (2010) 25 *Georgetown Imm LJ* 859. [Grant, Bruce and Reynolds, “Out of the Fire”] at 875.

<sup>76</sup> *Ibid.*

<sup>77</sup> Trent N. Tappe, “Chechnya and the State of Self-Determination in a Breakaway Region of the Former Soviet Union: Evaluating the Legitimacy of Secessionist Claims” (1995) 34 *Colum. J. Transnat’l L*, 255, 258-59.



Perhaps the clearest example of the view that self-determination may permit a limited right to engage in secessionist armed struggle, however, also involves the Namibian movement to free itself from South African rule. In its last opinion on the Namibian situation, the International Court of Justice acknowledged that the exercise of the substantive right to self-determination may legitimately involve the use of violence. In a particularly strong concurring opinion, Justice Ammoun openly questioned whether the legitimate right to self-determination could ever have been obtained “if it had not been for the heroic fight of peoples aspiring with all their hearts after freedom and independence?”<sup>78</sup> In further citing Ammoun, Klabbers goes on to note that “[t]he right to self-determination, having been written ‘with the blood of the peoples,’ was thus conceived as an enforceable, tangible right.”<sup>79</sup>

But as is so often the case, Klabbers too steps back from unqualified assertions as to the right to use force in pursuit of the right to self-determination, preferring instead to characterize the right as a seemingly much more innocuous one, that being the right for peoples “to be taken seriously.”<sup>80</sup> He does so for much the same reason that every U.N. pronouncement on self-determination is also accompanied by a corresponding affirmation of the principle of territorial integrity – which gets back to its potentially explosive character. As Koskeniemmi puts it, self-determination has always been something of a two-headed monster, simultaneously affirming the nation state as the basic recognizing principle on which international law is built, while also creating the context and, some say, the legal right for peoples (however defined) to undermine, challenge and secede from existing states.<sup>81</sup> This “revolutionary” sense of self-determination has the potential to turn international law on its head, with the result that secessionism can be explained as

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<sup>78</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16 (21 June) [Namibia Opinion] at 74, as cited in Jan Klabbers, “The Right to be Taken Seriously: Self-Determination in International Law” (2006) 28 *Human Rights Quarterly* 186 [Klabbers, “The Right to be Taken Seriously”] at 192.

<sup>79</sup> *Namibia Opinion* at 74, as cited in Klabbers, *The Right to be Taken Seriously* at 192.

<sup>80</sup> Klabbers, *The Right to be Taken Seriously* at 202.

<sup>81</sup> Koskeniemmi, *Self-Determination Today*, *supra* note 71 at 245-246.

“compliance-and opposing it as an international crime or possibly a breach of a peremptory norm of international law.”<sup>82</sup>

Any in-depth examination of self-determination reveals the accuracy of Koskeniemmi’s observation – claims to self-determination have taken on a number of different guises, but they generally seek to harness (or create) feelings of communal authenticity with objectives that are decidedly statist in nature. Decolonization efforts did not recreate pre-colonial political units, but ‘modern’ nation states, recognized internationally as equal players on the world stage.<sup>83</sup> Modern liberation efforts have thus always been about international law and it is for this reason that they frequently sought to justify their actions within the nascent language of the post-war normative universe.<sup>84</sup> At the same time, it is self-apparent that many, if not most self-determination claims have been disputed on the basis that they violate the rights of a differently defined, but overlapping group of people, or as Koskeniemmi states: another authentic “self-determination unit”. The result of this dichotomous nature of self-determination is all but intractable; one group’s national aspirations are generally characterized as inherently repressive of the other’s.<sup>85</sup>

In the end, the indeterminacy of self-determination and its inherent connection to often competing political struggles leads Koskeniemmi to the conclusion that it provides

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<sup>82</sup> *Ibid* at 241.

<sup>83</sup> Which is not to say, of course, that states did not exist in colonized areas before colonization, only that the liberation struggles tended to respond to the “erasure” of pre-existing statehoods by mapping themselves onto the normative order of the new international law, see Obiora Chinedu Okafor, “After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa” (2000) 41 *Harv Int Law J* 503 [Okafor, “After Martyrdom”] at 504, 513.

<sup>84</sup> Koskeniemmi elaborates on this point in *Self-Determination Today*, *supra* note 71 at 256:

Decolonisation was not accompanied by a challenge to statehood. The self-determination it strived for was of the *gesellschaftlich* and not of the *gemeinschaftlich* type. The call for authentic communal attachment was an ingredient in it but did not determine its essence or its consequences. The attempt to create a “modern” developed State after the European model was always a stronger legitimating force.

<sup>85</sup> The Balkan example immediately comes to mind here, particularly given the sizeable minority populations (Serbs in Croatia and Croats in Serbia, for example) of minority groups in each of the states of the former Yugoslavia.

little by way of substantive legal guarantees. Similar to Klabbers' 'right to be taken seriously', however, Koskeniemi suggests that self-determination rights may offer something in the nature of procedures for what he terms "acceptable *ad hoc* adjustments," in responding to international conflicts over competing self-determination claims.<sup>86</sup>

Much more could be said about the paradox of self-determination in international law, but suffice to say that in spite of it, or perhaps because of it, immigration lawyers in both the United States and Canada have recently grasped onto it as one possible means by which to challenge the perceived overreach of the security and inadmissibility regime.<sup>87</sup> In one recent Canadian case, for example, a former member of the Kurdish Democratic Party of Iran (KDPI) – Behzad Najafi – argued that he should not have been found inadmissible for engaging in the subversion by force of the Iranian regime because the acts of aggression committed by the KDPI were authorized by international law as a justifiable use of force by a repressed people in furtherance of its right to self-determination.<sup>88</sup> Given the express requirement referred to above that the IRPA be interpreted in accordance with international law, Najafi argued that inadmissibility determinations should not be based on a use of force that is recognized internationally as legitimate.<sup>89</sup> In support of his position, Najafi adduced affidavits from two international law experts, one of whom suggested that the actions of the KDPI were at least notionally justified under international law, while the other more provocatively asserted that Canada would be in violation of its international obligations if it were to "give support to the unlawful denial [of the right to self-determination] by [another] state."<sup>90</sup> Without explicitly rejecting the opinions posited by

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<sup>86</sup> Koskeniemi, *Self-Determination Today*, *supra* note 71 at 265-266.

<sup>87</sup> Grant, *Bruce and Reynolds Out of the Fire*, *supra* note 75.

<sup>88</sup> *Najafi v Canada (MPSEP)*, 2013 FC 876 [Najafi], *affm'd* 2014 FCA 262.

<sup>89</sup> *Ibid* at para 4, citing s3(3)(f) of the IRPA, *supra* note 2. Similar arguments have been made in a number of other cases, see for example: *Hagos v Canada (Citizenship and Immigration)*, 2011 FC 1214 [Hagos]; *Canada (Public Safety and Emergency Preparedness) v. X*, 2008 CanLII 76254 (CA IRB), *Joseph v Canada (Citizenship and Immigration)*, 2013 FC 1101; *Yamani v Canada (MPSEP)*, 2006 FC 1457 [Yamani]; *Khalil v Canada (MPSEP)*, 2011 FC 1332; *Suresh v Canada (Citizenship and Immigration)*, (1999) 173 FTR 1; *FH-T, v. Holder*, 723 F.3d 833 (7<sup>th</sup> Cir, 2013).

<sup>90</sup> *Najafi*, *supra* note 88 at para 76. The experts who provided the affidavits were Professors Craig Forcese and René Provost.

the experts, the Federal Court in *Najafi* summarily rejected their applicability to the security context:

Professor Provost constructs an additional argument based on the lack of explicit prohibition of the use of force in pursuit of the right of self-determination in international law. However, it is self-evident that a lack of prohibition of the use of force is not the same as a recognized and established positive right that should inform Canadian domestic law. I would additionally note that the applicability of such a norm to Canada, even if it were clearly established, would be uncertain, as, on at least one occasion, Canada has voted against a United Nations General Assembly Resolution that sought to more explicitly recognize the right of peoples to pursue self-determination (see UN General Assembly Resolution A/RES/37/43, “Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights”).<sup>91</sup>

In *Hagos*, the court similarly sidestepped the argument that Mr. Hagos’ participation in the Eritrean liberation movement should not have led to an inadmissibility finding because of its justification under international law. This argument, the court concluded, was more relevant to the question of whether Mr. Hagos was deserving of a Ministerial waiver under (the then) s 34(2) of the IRPA, rather than the question of first instance inadmissibility.<sup>92</sup> A similar finding was made in *Yamani*.<sup>93</sup>

It is plainly apparent from these cases that while arguments justifying the use of force in the name of self-determination have some normative force internationally, they have not, at least to date, gained any traction in the context of domestic immigration-security proceedings. At best, it would seem that justifications for the use of force are

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<sup>91</sup> *Ibid* at para 78. Note that the reference to UNGA A/Res/37/43 is perhaps somewhat misleading as it was a frequently reiterated resolution that, amongst other things, strongly and specifically condemned the state of Israel, which was the more likely reason for the Canadian vote against it than any general pronouncements on the status of self-determination at international law.

<sup>92</sup> *Hagos*, *supra* note 89 at para 65.

<sup>93</sup> *Yamani*, *supra* note 89 at paras 41-46.

viewed as something akin to defences to admissibility to be considered on a case by case basis at the Ministerial waiver stage. Earlier I have discussed the illusory nature of the waiver process, given its political nature, its narrow scope and the extraordinarily long wait times for decisions. The discomfort that the courts have had in incorporating self-determination principles to the security setting is almost assuredly related to its ambivalent position in international law, but is also likely due to the asymmetry between the language of self-determination internationally, and the language of subversion and terrorism domestically. It is also due, however, to the *sui generis* use of the term 'membership' under domestic immigration-security law, a topic to which I now briefly return.

### *Membership*

In the preceding pages, we have discussed the phenomena of subversion, terrorism and self-determination and their connections to both migration security decision-making and international law. What does not appear to be connected to international law, or any other body of law for that matter, is the concept of membership, as it appears in s34(1)(f) of the IRPA. Recall that virtually all inadmissibility claims are advanced on this ground, but what is it precisely? Unlike terrorism and subversion, membership as a concept cannot be construed as malfeasance in itself and does not lead to inadmissibility – the question is always *membership in what?* To the extent that membership, as it is contemplated in s34, is necessarily tied to the other grounds of inadmissibility, it is not so much a crime, but a mode of commission. And as a mode of commission, membership is, as noted above, *sui generis*. I do not intend here to reiterate the concerns referred to in the previous chapter on the concept of membership and its absolute liability characteristics; what is sufficient for present purposes is to point out that it is *not* a concept of any importance to international law. Recall, for example, that liability for the worst kinds of international crimes is never assessed internationally based on mere membership, but rather on some closer indicia of connection to the crimes in question.

This leaves the law of security inadmissibility in an anachronistic position: it adjudges behaviour based partly on international legal concepts (terrorism and subversion), yet it departs from international law at perhaps the most critical juncture – the point at which individual responsibility for violating these concepts must be determined. Indeed, there is something patently contradictory in finding that an individual has violated a principle of international law with an approach to culpability that international law has emphatically rejected. The fact of course remains that countries are *generally* free to determine whatever criteria they choose to inform questions of admission, be they fully consistent with international legal principles or in direct conflict with them. For example, while it may seem wrong for a country to prohibit immigrants based on their affiliation with a separatist movement whose actions are fully authorized under international law, few would claim that this is legally or jurisdictionally problematic, so long as it remains compliant with domestic law. It is considerably more complex, however, when we consider the situation of those who assert that they will be persecuted if returned to their country of origin. In this situation, the receiving state has bound itself to comply with international protection principles, subject only to a closed list of exclusions that themselves take meaning from international law.<sup>94</sup> When a country excludes a broader ambit of persons than that which is contemplated internationally, based on a theory of personal responsibility that is inconsistent with international norms, the fissures inherent in the approach begin to emerge. Such is the case with Canada’s inadmissibility regime, particularly when one considers that, at least in the security context, the majority of cases involve those who have asserted a claim to refugee protection.

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<sup>94</sup> For example, Article 1F(a) of the Refugee Convention permits exclusion only where there are serious reasons for considering that the individual seeking protection “has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.” To be clear, many countries, including Canada, have incorporated “complementary protection” regimes that provide protection against removal, even in the case of inadmissible persons. While such mechanisms generally protect against removal to torture, other forms of inhumane treatment and death, they are frequently narrower in scope than the protections provided by the Refugee Convention. As such, these regimes clearly contemplate removal of individuals who may be subjected to persecutory treatment, if not other forms of mistreatment contemplated under the complementary protection provisions. In the Canadian context, see s 97 of the IRPA and, more generally, see Hathaway and Foster, *Law of Refugee Status*, *supra* note 39 at 2.

The question then is, would the simple recalibration of security inadmissibility proceedings away from membership and toward internationally accepted modes of liability bring coherence to the regime? The simple answer to this question is that it probably would. It would focus the security-admissibility analysis on action rather than association and would tend to limit inadmissibility in the security realm to those with some actual connection to the perpetration of proscribed acts. It would bring internal consistency to the provision and align it with international instruments aimed at global security. The less simple answer is that such an approach would still not address the preoccupation (discussed empirically in the previous chapter) with Southern disputes, and the indeterminacy of self-determination movements. To help with this, I now turn to a different approach to international law – the TWAIL approach – to explore whether it could facilitate an improved approach to decision-making in the migration-security matrix.

### **3.3 TWAIL Mix: Adding a Third World, International Law Perspective to the Immigration-Security Setting**

What struck Zerai on October 3<sup>rd</sup> was the boat's proximity to land. The drowning of hundreds of people less than a kilometre from Lampedusa seemed like a manifestation of Europe's approach to African migration – a hardening of its borders coupled with a disturbing indifference to life. He told an Italian news service that the deaths were "*the fruit of a sick relationship between the north and the south of the world...*"<sup>95</sup>

We have now observed that the migration-security nexus combines a fixation on individuals who have had some involvement in discrete Southern conflicts with a partial adherence to international legal principles on security, terrorism and individual responsibility. While Canada has departed from international law in important ways, neither Canadian courts, nor international fora have determined that the Canadian approach to immigration security is *in violation* of international law. Put differently,

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<sup>95</sup> Mattathias Schwartz, "The Anchor", *New Yorker* (April 21, 2014) 76 at 78. [Emphasis added]

international law does not prohibit a country from identifying a more expansive cohort of individuals for security-related immigration proceedings than would ever be of interest under international criminal law or international humanitarian law. This flows naturally from the fact that questions of admission in immigration matters remain largely within the purview of states, except in so far as they may have implications on compliance with the Refugee Convention. There is simply no requirement that national security provisions be consistent with parallel regimes internationally. International law is therefore unlikely, on its own, to be a corrective to the overbreadth of immigration-security regimes or to the skewing of such regimes toward individuals from the Global South.

Taking this as a point of departure, I now turn to an exploration of how a more nuanced and Southern-focused incorporation of international law may help to pivot immigration decision-making in a more principled direction. While I do not argue that such an approach could realistically transform the normative landscape in which such decision-making takes place, I do suggest that absorbing the lessons that TWAIL can teach could help to both rationalize and improve security processes.

I begin this section with an overview of TWAIL – its origins, its multiple perspectives and its unifying themes. I will explore how TWAIL scholars have interpreted processes of decolonization and conflict, processes which have directly led to the fleeing of individuals from the Global South and to the application of security measures against those same individuals in countries such as Canada. I will examine how TWAIL scholars have sought to grapple with the difficult questions posed by assertions of self-determination, allegations of terrorism and the upheaval of populations. Finally, I will attempt to apply a TWAIL perspective on the security-inadmissibility regime in an effort to demonstrate how it could focus attention on criteria that are currently ignored and, as a consequence, improve outcomes in this area.<sup>96</sup>

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<sup>96</sup> At this point, I should situate myself within this analysis. As will become evident below, an important component of the TWAIL *raison d'être* is to give voice to Southern perspectives through the work of



### **3.3.1 Third World Approaches to International Law – An Overview**

#### *i) Old Words, New Forms: The use of “Third World” terminology in TWAIL commentary*

It is perhaps important to begin this exploration with a note on terminology – a note warranted because of the relatively common view that the term “Third World” is both unhelpful and obsolete. Formally, of course, the term dates back to the Cold War as a reference to countries that were not aligned with either the Western “First World” or the Communist “Second World” but it has also become synonymous with formerly colonized states and the poverty that has pervaded them. The meaning of the term has extended far beyond mere geopolitical descriptor, becoming absorbed into the West’s “imagined geographies” of the colonized Global South, saturated with undifferentiated connotations of poverty, barbarianism and backwardness.<sup>97</sup> Of course “Global South”, as a more recent term used to describe what is essentially the same geographical space as the “Third World”, is similarly subject to appropriation and this fact perhaps speaks to the enduring use of the term by TWAIL scholars, who are acutely aware of its historically contingent origins and limited descriptive value. Indeed, as we shall see in the coming pages, awareness of the contingency of historical accounts is central to TWAIL and in holding on to the term “Third World,” TWAIL and other scholars have injected into it a normativity that it has not always possessed. As Cedric Grant has noted,

[T]he Third World, as an analytical concept, is likely to retain its usefulness so long as the world continues to be riven by serious economic and political disparities. The end of the Cold War has not been accompanied by a fundamental alteration in the international economic system. This system is still rooted in the relationships of the colonial age and biased in favour of the developed countries of the North. Similarly, the new

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academics and international lawyers from the Global South. I am neither an academic nor an international lawyer from the Global South. This said, another objective of TWAIL is to see that it becomes embedded in the larger discourse on international law and other areas that “create, foster, legitimize, and maintain harmful hierarchies” along global lines: see Makau Mutua, “What is TWAIL” (2000) 94 Am. Soc’y Int’l L. Proc. 31 [Mutua, “What is TWAIL”] at 38. It is in this spirit that I take up the challenge to bring a TWAIL analysis to the realm of immigration and security.

<sup>97</sup> The term “imagined geographies” is Edward Said’s, first coined in *Orientalism* (New York: Pantheon, 1978), to describe Foucauldian discourses that differentiated the West from the rest of the world.

political dispensation has not steered international relations in the direction of greater democratization. The global changes taking place give even greater influence to a few major and wealthy developed powers of the world. Moreover, despite the end of the Cold War, the majority of the world's people still face the basic problem of survival, of defending human dignity against the pressure of want, and of increasing the opportunities for freedom for themselves as individuals and as members of a community. *In these circumstances, the existence of the Third World is based not so much on shared memories and common aspirations as on a sense of what is equitable and just. For so long as inequity in international relations exists there will be differing perspectives on, and interpretations of, economic and social reality between the wealthy and the poor, between the powerful and the weak.*<sup>98</sup>

As such, TWAIL has consciously held on to the “Third World” terminology, for as Mickelson notes,

The characterization that is utilized...sees the Third World as occupying a historically constituted, alternative and oppositional stance within the international system. The “Third World” terminology itself may appear out-of-date, but its very contingency, involving an insistence on history and continuity, may in fact be one of its strengths.<sup>99</sup>

Furthermore, Okafor notes that those who question the existence of a cohesive “Third World” as a helpful analytical construct tend not live there, and while there certainly are valid points to be made, he suggests that the whole argument is “wrongly framed”:

What is important is the existence of a group of states and populations that have tended to *self-identify* as such-coalescing around a historical and continuing experience of subordination

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<sup>98</sup> Cedric Grant, “Equity in International Relations: A Third World Perspective” (1995) 71 Int'l Affairs 567 at 569-70. [emphasis added]

<sup>99</sup> Karin Mickelson, “Rhetoric and Rage: Third World Voices in International Legal Discourse” (1997) 16 Wis Int Law J 353 [Mickelson, “Rhetoric”] at 360. For further self-reflection on the continuing use of “Third World” in TWAIL analysis, see Antony Anghie, “International Law in a Time of Change: Should International Law Lead or Follow” (2010) 26 Am Univ Int Law Rev 1315 [Anghie, “International Law in a Time of Change”] at 1360.

at the global level that they feel they share-not the existence and validity of an unproblematic monolithic third-world category.

It is on the basis of this self-identification and shared experience that TWAIL scholars construct their work and it is from this perspective that I too set out to explore the TWAIL contribution.

*ii) TWAIL in Two Parts: A Brief History*

TWAIL is both new and not new. That is to say, criticisms and perspectives on international law have long emanated from Southern or subaltern voices, but it is only more recently that efforts have been made to consolidate such voices into a more formalized, if not homogenous, school of thought, network and movement.<sup>100</sup> As Okafor points out, the pedigree of TWAIL is "part of a long tradition of critical internationalism. Its intellectual and inspirational roots stretch all the way back to the Afro-Asian anti-colonial struggles of the 1940's- 1960's, and even before that to the Latin American de-colonization movements."<sup>101</sup> In the main, however, TWAIL is a response to the decolonization processes that swept the globe in the decades immediately following World War II.<sup>102</sup> It is, at least in part, reactive to the international legal order that emerged in the post-war era, viewing it as a new kind of "imperial project" that has solidified Western hegemony and helped to perpetuate global inequality over this period.<sup>103</sup>

Some scholars – most notably Antony Anghie and B.S. Chimni – have loosely categorized the recent history of Southern scholarship on international law into two

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<sup>100</sup> The use of the terms "school of thought", "network" and "movement" is deliberate, for as we shall see TWAIL is, in many respects, all three.

<sup>101</sup> O. C. Okafor, "Newness, Imperialism, and International Legal Reform in our Time: A TWAIL Perspective" (2005) 43 *Osgoode Hall L. J.* 171 [Okafor, "Newness"] at 177.

<sup>102</sup> Mutua, *What is TWAIL*, *supra* note 96 at 31.

<sup>103</sup> *Ibid.*

discrete, if not airtight, phases which they label TWAIL I and TWAIL II.<sup>104</sup> TWAIL I, a retrospective label, refers to the scholarship of writers in the period during and immediately following decolonisation, while TWAIL II is used to describe more recent approaches, including those that self-consciously identify themselves as part of a TWAIL approach. Anghie and Chimni are also quick to point out the limitations of a binary approach to tracing TWAIL history, but nevertheless find it conceptually useful in tracing the evolution of analysis in the area, an evolution that is intimately connected to the disappointing historical arc that has followed decolonization.

## TWAIL I

Early writing on international law from a Southern perspective was largely preoccupied with documenting the Eurocentrism of international law; it asserted that pre-colonial non-European states were not “strangers to the idea of international law,” and sought to expose how the Western tradition of international law was implicated in the violence committed against the colonized world. It specifically interrogated the ways in which international law both allowed for and justified colonial rule by excluding non-European states from sovereignty and authorized spectacularly brutal acts of conquest in the colonized world.<sup>105</sup>

Given that the deprivation of sovereignty for colonized countries was identified as a defining characteristic of 19<sup>th</sup> and early 20<sup>th</sup> century international law, it is no surprise that early TWAIL thinkers were preoccupied with Third World nationalism, liberation and self-determination and sought to solidify through international law the political gains made

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<sup>104</sup> Antony Anghie & B S Chimni, “Third World Approaches to International Law and Individual Responsibility in Internal Conflicts” (2003) 2 *Chin J Int Law* 77 [Anghie and Chimni, “Third World Approaches”] at 79, also published as Antony Anghie and B.S. Chimni, “Third World Approaches to International Law and Individual Responsibility in Internal Conflict”, in: Steven R. Ratner and Anne-Marie Slaughter (eds.), *The Methods of International Law* (Buffalo: W.S. Hein, 2004) pp. 185-210.

<sup>105</sup> *Ibid* at 80-82.

through decolonization. The following statement of Tieya is thus emblematic of the early TWAIL position:

The road to sovereignty for Third World nations was not an easy one. For most of them, independence came only after bitter struggle. For this reason, sovereignty is considered sacred and inviolable. Its preservation is the focal point of all their activities. It is only by tenaciously upholding sovereignty that the new nations can preserve real self-government; protect their legitimate rights and interests on the basis of equality; eliminate colonial oppression and exploitation; and avoid having to suffer from them again.<sup>106</sup>

In this approach, one can see both an embrace of a reformed version of international law and a desire for the newly formed states of the decolonized world to be embraced by it. As Anghie notes, TWAIL commentary really began with an “attempt on the part of the new states, those that recently acquired independence, to transform the system of international law and turn it into one that reflected the aspirations and interests of the peoples of the Third World.”<sup>107</sup> To this end, as Anghie and Chimni note, Third World international law scholars were aligned with diplomatic efforts to ensure that United Nations resolutions reflected the interests of the newly decolonized nations, both in terms of support for ongoing liberation struggles and recognition of the sovereign equality of the newly formed states. Early TWAIL scholars also concerned themselves with efforts to overhaul economic structures that so clearly delivered advantage to the wealthy countries of the world and contributed to the subjugation of the newly independent states.<sup>108</sup>

## TWAIL II

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<sup>106</sup> Wang Tieya, “The Third World and International Law” in *The Structure And Process of International Law: Essays In Legal Philosophy, Doctrine and Theory* (Boston: Martinus Nijhoff, 1983) at 969, as cited in Mickelson, Rhetoric, *supra* note 99 at note 26.

<sup>107</sup> Anghie, *International Law in a Time of Change*, *supra* note 99 at 1360.

<sup>108</sup> Anghie and Chimni, *Third World Approaches*, *supra* note 104 at 82.

TWAIL II is, at least in some respects, a response to the abject failure of the global political order to alleviate the daily misery of much of the world's population. It has been described as a subsequent generation of TWAIL scholarship rather than a repudiation of TWAIL I writing, though it would be wrong to suggest that the two are always mutually compatible. Just as younger generations contest, often with good reason, the ideas of their parents, so too has recent TWAIL scholarship questioned earlier Southern commentary on international law, all the while recognizing its organic connection to it.

TWAIL II scholarship also reflects, and reflects back, developments in postmodern thinking and critical approaches to law that have surfaced over the past two decades, but more importantly, it calls for new and distinct modes of thought, from a Southern perspective, on the structures and methodologies of the international legal order.<sup>109</sup> The current network of scholars exploring Third World modes of thought about international law can be traced back, at least formally, to a 1997 conference at Harvard University that produced a vision statement detailing some of the key areas of inquiry and objectives. The statement reads in part:

We are a network of scholars engaged in international legal studies, and particularly interested in the challenges and opportunities facing 'third world' peoples in the new world order. We understand the historical scope and agenda of the dominant voice of international law scholarship as having participated in, and legitimated global processes of marginalization and domination that impact on the lives and struggles of third world peoples.

Members of this network may not agree on the content, direction and strategies of third world approaches to international law. Our network, however, is grounded in the united recognition that we need democratization of international legal scholarship in at least two senses: (i) first, we need to context international law's privileging of European and North American voices by providing institutional and

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<sup>109</sup> Obiora Chinedu Okafor, "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both" (2008) 10 Int Community Law Rev 371 [Okafor, "Critical Third World Approaches"].

imaginative opportunities for participation from the third world; and (ii) second, we need to formulate a substantive critique of the politics and scholarship of mainstream international law to the extent that it has helped reproduce structures that marginalize and dominate third world peoples.

Thus we are crucially interested in formulating and disseminating critical approaches to the relationships of power that constitute, and are constituted **by**, the current world order. In addition, we appreciate the need to understand and engage previous and prevailing trends in third world scholarship in international law.<sup>110</sup>

While TWAIL scholarship has since been refined and applied as a methodological lens to a panoply of topics,<sup>111</sup> the first observation made in the vision statement – that international law is not merely agnostic to “global processes of marginalization” but is directly implicated in them remains a unifying theme of the network. It is a theme that revisits earlier legal writing on colonialism, recasting it not as a regrettable chapter of international legal history, but as central to its very formation.<sup>112</sup> In a relatively recent work, Al Attar and Thompson describe this unifying theme in the following way:

TWAIL is an alternative narrative of international law that has developed in opposition to the realities of domination and subordination prevalent in the international legal apparatus. A fundamentally counter-hegemonic movement, TWAIL is united in its rejection of what its champions regard as an unjust relationship between the Third World and international law.<sup>113</sup>

Similarly, Eslava and Pahuja describe the common frame of reference used by TWAIL scholars as follows:

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<sup>110</sup> As quoted in Karin Mickelson, “Taking Stock of TWAIL Histories” (2008) 10 Int Community Law Rev 355 [Mickelson, “Taking Stock”] at 357-358.

<sup>111</sup> Which include: international human rights law, international environmental law, the law of intellectual property, international trade law, international development and, of note for our purposes, the war on terrorism, international criminal law and questions of sovereignty and self-determination.

<sup>112</sup> Anghie and Chimni, *Third World Approaches*, *supra* note 104 at 84.

<sup>113</sup> Mohsen al Attar & Rebekah Thompson, “How the Multi-Level Democratisation of International Law-Making Can Effect Popular Aspirations towards Self-Determination” (2011) 3 Trade Law Dev 65 [al Attar and Thompson, “Democratisation of International Law”] at 67.

Although there is arguably no single theoretical approach which unites TWAIL scholars, they share both a sensibility, and a political orientation. TWAIL is therefore...defined by a commonality of concerns. Those concerns centre around attempting to attune the operation of International law to those sites and subjects that have traditionally been positioned as the 'others of international law'.<sup>114</sup>

Despite many differences, other common themes have also emerged. These include, in Mickelson's words:

- an emphasis on interconnectedness of subject areas, illustrated by an unwillingness to draw rigid boundaries between various areas of the law (such as economics, human rights, or the environment).
- an emphasis on considerations of morality, ethics and justice; in other words, an unwillingness to separate law from wider concerns or to define law in a narrow 'legalistic' fashion.
- an emphasis on history, typified by an unwillingness to look at any problem as ahistorical or to separate law from the historical context within which it developed.<sup>115</sup>

To this list, I would add another common register of TWAIL scholars, that being a desire to change the frame of international law from one that looks almost exclusively at states as the relevant legal actors to one that also looks to localities and the lived experience of individuals in trying to think through how international law should be confronted and changed. It is for this reason that some newer generation TWAIL scholars have called for TWAIL to engage more explicitly with legal ethnography – to map out how international law works in the realm of the quotidian and mundane.<sup>116</sup> As is I hope apparent, these themes are all of relevance to the context of migration and security and so I turn now to delve into each of them in greater detail. Before I do, however, a brief disclaimer: over the past twenty years, a great deal has been written on, and through,

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<sup>114</sup> Luis Eslava & Sundhya Pahuja, "Between Resistance and Reform: TWAIL and the Universality of International Law" (2011) 3 Trade Law Dev 103 [Eslava and Pahuja, "Between Resistance"] at 104.

<sup>115</sup> Mickelson, Rhetoric, *supra* note 99 at 397.

<sup>116</sup> Eslava and Pahuja, Between Resistance, *supra* note 114 at 126.



TWAIL methodologies. In the pages that follow, I do not pretend to provide an exhaustive review of the entire movement, but rather, to tap into a variety of themes that, to me, bear particular relevance to the larger project of exploring immigration and inadmissibility.

### *iii) TWAIL Themes*

#### **Emphasis on History**

"The most serious blow suffered by the colonized is being removed from history and from the community. Colonization usurps any free role in either war or peace, every decision contributing to his destiny and that of the world, and all cultural and social responsibility."

Albert Memmi, *The Colonizer and the Colonized*

To briefly revisit the meaning of the term "Third World," there are those who suggest that it "does not have a nature; it has a history."<sup>117</sup> And to a significant extent, the TWAIL endeavour is to explore, on its own terms, the interplay between this history and the development of international law. As noted above, earlier Third World critics of international law set out to establish, through detailed historical accounts, the various and complex international laws of pre-colonial states.<sup>118</sup> More recent TWAIL scholarship has sought to question – and oppose – the mainstream view that colonialism was a discrete, almost incidental or aberrational feature of international law.<sup>119</sup> This is strikingly apparent in the work of Antony Anghie who, in Gathii's words, established that the doctrines of international law were "constructed around a series of contrasting national identities, races, and languages with European ones at the apex. Hence, international law was less

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<sup>117</sup> Mickelson, Rhetoric, *supra* note 99 at 409, citing José Ortega y Gasset, *History as a system and other essays toward a philosophy of history* (New York: Norton, 1961).

<sup>118</sup> See for example, T.O. Elias, *Africa and the Development of International Law*. (Leiden: A. W. Sijthoff, 1972) and R. P. Anand, *Confrontation or Cooperation?: International Law and the Developing Countries* (Boston: Martinus Nijhoff, 1987).

<sup>119</sup> For an elucidating dialogue on this issue, see James Thuo Gathii, "Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy" (1999) 98 Mich Law Rev 1996 [Gathii, "Decentering"], followed by Brad Roth, "Government Illegitimacy and Neocolonialism: Response to Review by James Thuo Gathii" (1999) 98 Mich Law Rev 2056, which is in turn followed by James Thuo Gathii, "Rejoinder: TWAILing International Law" (1999) 98 Mich Law Rev 2066 [Gathii, "Rejoinder"].

about how order was created among sovereign states than how it managed order among entities of completely different cultural systems.”<sup>120</sup>

It is, of course, important to underscore that TWAIL is not simply concerned with history *per se*, but with particular histories or, better put, with exploring histories from a globalized, and in some cases, decidedly Third World perspective. It is, at least in part, TWAIL’s “methodological insistence” on a globalized historical account that gives it its perspective on international legal discourse and enables it to uncover the troubling normativity of many aspects of international law.<sup>121</sup> It is also through detailed historical analysis and connecting this analysis with the contemporary plight of the majority world that TWAIL scholars obtain a vantage point on the ongoing nature of subjugation and inequality. This is readily apparent, for example, in Okafor’s “After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa,” in which he explores how international law was a participant in the “erasure and (de)legitimization” of African statehood and compellingly traces these processes of erasure to the serious and ongoing state-building problems that African states continue to face.<sup>122</sup>

There is, at least to some, a danger in fastening upon the ongoing influence of colonial forces on the contemporary world and that danger lies in creating an almost paralytic sense of historical determinism, succumbing to what Aijaz Ahmad has phrased the “infinite aftermath” of the post-colonial era.<sup>123</sup> For Ahmad, at least in the Indian context, to distil the consequences of colonialism, separated from precolonial conditions and now after over a half-century of postcolonial history is too complex a task to be worthwhile.<sup>124</sup>

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<sup>120</sup> Gathii, *decentering*, *ibid*, at 2021, citing Antony Anghie, “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law” (1999) 40 *Harv. Int’l LJ* [Anghie, “Finding the Peripheries”], but see also Antony Anghie, “Francisco de Vitoria and the Colonial Origins of International Law” (1996) 5 *Soc. & Legal Stud.* 321 [Anghie, “Vitoria”].

<sup>121</sup> Okafor, *Critical Third World Approaches*, *supra* note 109 at 377 and Okafor, *Newness*, *supra* note 101.

<sup>122</sup> Okafor, *After Martyrdom*, *supra* note 83 at 504.

<sup>123</sup> Aijaz Ahmad, *The Politics of Literary Postcoloniality*, (1995) 36 *Race and Class* 3 at 7.

<sup>124</sup> *Ibid*. It should be noted, however, that Ahmad’s commentary comes from the fields of literary and political theory; he was not referring explicitly to law, which has its own distinct relationship with history.

My sense, however, is that TWAIL scholars for the most part avoid the pitfalls of Ahmad's "infinite aftermath" by refraining from sweeping statements about the ongoing reverberations of colonialism 50 years after the last formal vestiges of it disappeared and by rather drawing careful connections between colonial rule and the structures that continue to hold significant sway in international law.

To TWAIL scholars, the fact of Western dominance and the projection of its laws onto the global plane simply cannot be divorced from its intimate corollary, the subjugation and exploitation of Southern lands and people. TWAIL, in other words, is as much about coming to terms with the provenance of Western dominance as it about giving voice to Southern perspectives. They are, in fact, two sides of the same coin. In Mickelson's words,

An equally important theme, however, is the extent to which the colonial encounter also constituted the First World. There is an insistence in all of these writers on seeing how the Third World, its resources and peoples, were harnessed in the drive to create the modern Western industrialized state--and thus played an essential role in the achievement of Western privilege. This is a move from seeing the Third World as essentially marginal within the international system to seeing it as an integral part of that system.<sup>125</sup>

Another, somewhat unrelated implication of TWAIL's insistence on revealing untold histories is to call into question universals - not universals *per se*, as the strong normative strain that runs throughout TWAIL embraces certain unifying goals - but rather the flawed universals that emerge from the partial telling of a story. Identifying the contingent nature of the Western metanarrative is almost ubiquitous in TWAIL writing, but from it also springs a guarded optimism - an optimism borne of the notion that more inclusive universals can be found and that that which is need not have been, and need not be in the future. Eslava and Pahuja refer to TWAIL's unifying objectives as a kind of "open

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<sup>125</sup> Mickelson, *Rhetoric*, *supra* note 99 at 403.

universality” that requires a “commitment to constantly re-engage with the promise(s) of international law.” In seeking out universality, however, “certainty should give way to dialectics, and affirmation to multiple assertions.” And in thinking about universals, the authors underscore the importance of viewing international law as a “set of concrete practices that express themselves in the material world, as well as about international law as a normative or ideological project.”<sup>126</sup>

This brings us to another key feature of TWAIL scholarship, which is that despite its observation that colonialism is essentially immanent in international law and despite being deeply critical of the ways in which international law operates to the detriment of maligned peoples, it remains committed to the *idea* of international law, albeit of a reinvented kind. Anghie and Chimni articulate the reasons for this ongoing commitment to the project of international law as being twofold: first, they suggest that TWAIL scholars continue to believe in the “transformative potential of international law and in the ideal of law as a means of constraining power.” TWAIL scholars recognize the role that power continues to play in international relations, but they steadfastly hold on to the view that this is not, at least by definition, ordained. And while the power of a good, historically-based argument will not necessarily “control action,” it can in many instances prevail.<sup>127</sup> Second, and more pragmatically, Anghie and Chimni suggest that even though TWAIL arguments may not prevail when pitted against the raw power of international relations, the alternative to engagement with international law – call it critical disengagement – is a luxury the Third World cannot afford. They note:

[T]here are dangers in conceding the entire arena of international law to other methodologies and actors in the aspiration to find a more powerful discourse which would render injustice with such clarity and persuasion that it would compel the changes in international relations which TWAIL seeks. To the extent that CLS suggests this course of action, it runs the risk of merely supporting, if not furthering the status

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<sup>126</sup> Eslava & Pahuja, *Between Resistance* *supra* note 114 at 122.

<sup>127</sup> Anghie & Chimni, *Third World Approaches* *supra* note 104 at 101.

quo...TWAIL simply cannot afford this because international law has now become an extraordinarily powerful language in which to frame problems, suggest fault and responsibility, propose solutions and remedies. International law rules matter and must be taken seriously. It is not simply a distinctive style of argumentation but has serious consequences for how ordinary people live.<sup>128</sup>

In this statement, we see a clear if somewhat ambivalent point of intersection between TWAIL and other critical approaches to legal theory, a topic to which I will return below. For the moment, however, it is simply important to recognize the various ways in which TWAIL scholars have marshalled history to expose the injustice of international law and to remake it from a globalized perspective.

### **Emphasis on Lived Experience**

Perhaps the area in which TWAIL II differs most from TWAIL I, and perhaps its most radical departure from mainstream international law lies in its insistence on looking at the situation of individuals in thinking through the legitimacy of international law and international legal principles. TWAIL I scholars understandably focused much of their attention on condemning mainstream international law's embrace of colonialism and on advocating for the recognition and equal treatment of the nascent states of the decolonized world. But the truth is, for a whole myriad of reasons – some of which are tied directly to international law, some less so – many of these states have fared poorly over the past 40-50 years and the majority of people in these countries have borne the brunt of this poor showing. As such, TWAIL II, interrogates the actions of nation states – of both the First and Third World – to address the very basic deprivations that continue to plague much of the global population.

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<sup>128</sup> *Ibid.*

But beyond this, and much more profoundly, TWAIL II scholars also question the basic legitimacy of states as constituting the *sole* relevant actors in the formation and enforcement of international law. The state, as Gathii succinctly notes, is not a “neutral or even universal ideal.”<sup>129</sup> And while there is a general truth to this assertion, it is particularly resonant to the situation of Third World states, many of which were created either arbitrarily, or worse, with the specific aim of combining what had previously been distinct polities. As Okafor notes, the illegitimacy of many Third World states “has derived...from their lack of affinity with constituent sub-state groups and their origins as external impositions rather than organic entities created through an internal process of consensus-building.”<sup>130</sup> As such, many TWAIL scholars look to other entities – social movements, global civil society organizations and “transnational advocacy networks to name a few – in exploring the impact of international law on the people of the Global South and to propose alternatives. The TWAIL emphasis on lived experience is, not surprisingly, derived from an acute sense of both the historical degradation of people during colonialism *and* the widespread betrayal of these same people under many states of the decolonized world. As Chimni and Anghie note:

For TWAIL scholars, international law makes sense only in the context of the lived history of the peoples of the Third World. Two important characteristics of TWAIL thinking emerge from this. First, the experience of colonialism and neo-colonialism has made Third World peoples acutely sensitive to power relations among states and to the ways in which any proposed international rule or institution will actually affect the distribution of power between states and peoples. Second, it is the actualized experience of these peoples and not merely that of states which represent them in international fora, that is the interpretive prism through which rules of international law are to be evaluated.<sup>131</sup>

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<sup>129</sup> Gathii, *Decentering*, *supra* note 119 at 2047.

<sup>130</sup> Okafor, *After Martyrdom*, *supra* note 83 at 387.

<sup>131</sup> Anghie & Chimni, *Third World Approaches*, *supra* note 104 at 78.

Many have written about the all-too-common post-colonial reality whereby nationalist elites of the colonized world simply stepped into the place of the former colonial masters, replacing the domination of colonialism with the despotism of the new Third World. From Fanon's *Wretched of the Earth*, to Naipaul's *Mimic Men* to the work of Homi Bhabha and Edward Said, the tendency of Third World states and statesmen (for the vast majority have been men) to replicate, or "mimic" the structures of the colonial world has been both long and well-documented.<sup>132</sup> TWAIL scholars incorporate these observations into the realm of law which is, at least in part, what gives rise to their emphasis on lived experience. But to state it this way is too simple, for recent TWAIL commentary also (and often simultaneously) recognizes that there are situations that continue to call for the support of Third World states *as* states in the ongoing evolution of international law. This ambivalence is, I believe, what Antony Anghie was referring to when he stated the following in his Grotius lecture:

For all of us, however, the dualities of TWAIL present an ongoing challenge. We are for Third World sovereignty and yet also against it; sometimes for human rights and sometimes critical of human rights; for international law at times, and suspicious of it at others. The enduring riddle we confront is how to formulate a position that is neither imperial, on one hand, nor narrowly nationalistic on the other. Both imperialism and the pathologies of the post-colonial state have caused immense suffering to the peoples of the Third World. The challenge for TWAIL is to articulate an alternative to these two very powerful realities.<sup>133</sup>

Focusing on the experience of Third World peoples as the "interpretive prism" through which to examine international law means, above all, listening to their "resistance"

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<sup>132</sup> Franz Fanon, *The Wretched of the Earth* (New York: Grove Press, 1968); V.S. Naipaul, *The Mimic Men* (London: Deutsch, 1967); Homi Bhabha, *The Location of Culture* (London, New York: Routledge, 1994); Edward Said, *Culture and Imperialism* (New York: Vintage, 1993). Edward Said on Fanon (at 273):

Fanon was the first major theorist of anti-imperialism to realize that orthodox nationalism followed along the same track hewn out by imperialism, which while it appeared to be conceding authority to the nationalist bourgeoisie was really extending its hegemony.

<sup>133</sup> Anghie, *International Law in a Time of Change*, *supra* note 99 at 1366.

to, or acceptance of, international rules and practices” and taking these reactions as “strong evidence of the justice or injustice of those rules and practices.”<sup>134</sup> It also means that a contextualized process must be used in assessing the actions of individuals engaged in political conflict in the Third World, one that does not merely attribute responsibility for the conflict because of an individual’s proximity to it.

Again, however, we must avoid a superficial reading of TWAIL scholarship because to state that TWAIL supports looking at international law through the lens of individual experience could be interpreted simply as an endorsement of a rights-based approach to international law. As Anghie’s above statement suggests, however, it is not. There is by now a relatively fulsome and varied body of TWAIL scholarship on human rights and international law and, to come back to a word used frequently in this chapter, its stance on the liberal rights agenda may best be described as ambivalent. On the one hand, there is the view that international human rights norms are fundamentally similar to other areas of international law in that they are constituted by an ethnocentric and deeply colonial view of the world that invariably, if subtly, places Western countries and peoples at the top of a hierarchy and Third World peoples at the bottom.<sup>135</sup> Citing the example of the former Yugoslavia and the ease with which claims to self-determination, human rights and liberty were manipulated by parties to atrocities, Gathii argues that these “abstract but cherished principles are not necessarily emancipatory” and that “viewing them as antidotes to the violence of ethnicity and illiberal nationalism only downplays the tragic role they have at times been mobilized to serve.”<sup>136</sup> Recognizing this fact, Gathii continues, makes it easier to “drop the presumption that international law and norms act in the ‘interests of human rights, democracy and the people, while local institutions, actors or cultures are seen as posing a threat to these values.’”<sup>137</sup> Note the conditional nature of Gathii’s statement,

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<sup>134</sup> Anghie & Chimni, *Third World Approaches*, *supra* note 104 at 78.

<sup>135</sup> This view is perhaps most forcefully made by Makau Mutua in Makau Mutua, “Savages, Victims, and Saviors: The Metaphor of Human Rights” (2001) 42 *Harv Int Law J* 201 [Mutua, *Savages, Victims and Saviors*].

<sup>136</sup> Gathii, *Decentering*, *supra* note 119 at 2048.

<sup>137</sup> *Ibid*, citing Anne Orford, “Locating the International: Military and Monetary Interventions after the Cold War” (1997) 38 *Harv Int’l L J* 443.



questioning the *presumption* that international law protects the interests of Third World peoples. This is not to say that it never acts in their interests, but it is meant to question the sanctity of the view that international human rights law is inherently protective of the people of the Global South. And if this is the case, the solution to Third World problems is not, as is frequently presumed by international lawyers, ‘more law,’ but a different conception of law: one that recognizes its emancipatory potential for individuals, but also scrutinizes its relationship with power and its claims to universality. Anghie and Chimni note that TWAIL II scholars:

...have examined whether and how international human rights norms may be used to protect Third World peoples against the state and other international actors. By simultaneously examining the Third World state critically and recognizing the possibility of using international law to promote the interests of Third World peoples, these TWAIL II positions on international human rights law differ from either mainstream or critical Northern views on human rights as well as from the views of Third World states themselves. One of the major difficulties confronting TWAIL scholars arises precisely because it is sometimes through supporting the Third World state and at others, by critiquing it, that the interests of Third World peoples may be advanced.<sup>138</sup>

While not directly associated with TWAIL scholarship, many TWAIL scholars have looked to the work of legal sociologist Boaventura de Sousa Santos to help sort through the complex relationships between global justice, individual rights and an international law dominated by neoliberalism. First, Santos argues that there are essentially two forms of globalization: neoliberal globalization and what he calls “counter-hegemonic globalization,” the latter having arisen in parallel, and in opposition, to the former.<sup>139</sup> Counter-hegemonic globalization he defines as the “vast set of networks, initiatives, organizations, and movements that fight against the economic, social, and political outcomes of hegemonic globalization, challenge the conceptions of world development underlying the latter, and

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<sup>138</sup> Anghie & Chimni, *Third World Approaches*, *supra* note 104 at 83.

<sup>139</sup> Boaventura de Sousa Santos, *Toward a New Legal Common Sense* (London: Butterworths, 2002).

propose alternative conceptions.”<sup>140</sup> Second, Santos argues that from this parallel process of globalization, a new form of cosmopolitan engagement has also emerged, what he terms a “subaltern cosmopolitan politics and legality.”<sup>141</sup>

This new cosmopolitanism, which Santos views as being most clearly illustrated in the proceedings of the World Social Forum, remains closely connected with the localized struggles of individuals in the Global South, but is able to project those struggles onto different planes: international, local, transnational, state. As is evident from the very label Santos uses to describe this form of cosmopolitanism, it also rejects legal and political distinctions, viewing the struggles of Third World peoples as being primarily political in nature but containing important legal components.<sup>142</sup>

Building on Santos’ conception of a ‘counter-hegemonic globalization’ and on the work of those who call for a globalized parliamentary system,<sup>143</sup> Attar and Thompson suggest that injecting the rule of law and popular participation into international law-making is central to the TWAIL project and its aims of alleviating global inequality.<sup>144</sup> And in this view, we interestingly come back around to the work of Catherine Dauvergne and her parallel call for the “unhinging” of the rule of law from its domestic moorings in dealing with the securitization of international migration.<sup>145</sup> While I will return to this connection between TWAIL and migration below, for now I simply refer to the rule of law issue as a further indication of the emphasis that TWAIL places on the connection between

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<sup>140</sup> See the more recent Boaventura De Sousa-Santos, “Beyond Neoliberal Governance” in Boaventura De Sousa-Santos & Cesar A. Rodriguez-Garavito eds., *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge UP, 2005) at 29.

<sup>141</sup> *Ibid* at 30.

<sup>142</sup> *Ibid* at 61.

<sup>143</sup> See for example Richard Falk & Andrew Strauss, “Toward Global Parliament” (2001) 80(1) *Foreign Aff* 212.

<sup>144</sup> al Attar and Thompson, *Democratisation of International Law*, *supra* note 113.

<sup>145</sup> Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge UP 2008) at 37-41. It is not surprising that Dauvergne’s call for an unhinged and ‘thick’ conception of the rule of law and al Attar and Thompson’s TWAILian call for the democratization of international law both rely, at least to an extent, on Santos and his conception of the emancipatory potential of law.

international law and the lived experience of Third World peoples. Now, however, I turn to another central organizing principle of TWAIL scholarship – its openness to, and indeed its focus on looking to the scholarship of other domains to help inform its positions on international law.

### **TWAIL as Interdisciplinary Normative Project**

From the outset, TWAIL II scholarship has been explicit about the need to take into consideration multiple narratives to demonstrate the ways in which international law has contributed to, and reflects contemporary problems in the Third World. This broad approach, this “unwillingness to draw rigid boundaries” occurs both within and outside what is typically viewed as legal scholarship.<sup>146</sup> And in this, we can glimpse both the purpose and the method of TWAIL. Its purpose is an unashamedly normative one – to expose the ideology and injustice of the current international legal order *and* to (sometimes radically) ameliorate it by proposing alternative and more globally participatory conceptions of international law. Its method, or at least one of its methods, is to use the various analytical tools at its disposal – from across a number of disciplines and schools of thought – to achieve its purposes.

Within the law, TWAIL is frequently described as sharing characteristics with the various critical approaches that have emerged over the past twenty five or so years, specifically feminist legal studies, critical legal studies and its international corollary, New Approaches to International Law (NAIL). While TWAIL certainly shares features with these other critical legal approaches, many TWAIL scholars have deliberately distinguished the TWAIL approach. As I described above, TWAIL generally accepts the view – one central to critical perspectives – that language and legal reasoning are both indeterminate and deeply intertwined with power. TWAIL recognizes that international law is both a product and producer of an ideology that favours the powerful and it therefore questions international

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<sup>146</sup> Mickelson, *Rhetoric and Rage*, *supra* note 99 at 397.

law's particular claims to universality. TWAIL openly rejects assertions of the neutrality of international law, frequently framing its primary task as being the exposition of international law's historically contingent and highly subjective nature.<sup>147</sup> As such, TWAIL also rejects many of the rhetorical flourishes that are frequently used to describe the current international legal order – language which tends to characterize international law as a kind of pre-ordained and idealized panacea that, through mere adherence to it, can solve all problems.<sup>148</sup>

At the same time, TWAIL scholars tend to reject, categorically, the sense of paralysis and nihilism that is often associated with critical approaches, although it should be acknowledged that TWAIL has itself been subject to precisely this kind of criticism.<sup>149</sup> Recall the words of Anghie and Chimni, recognizing that law, with all of its imperfections, its subjectivity and its tendency to reflect the views of the powerful also has the unique capacity, rarely fully realized, to constrain power and is therefore not a domain that the Global South can afford to cede. This belief in the potential of law, together with its focus on individual experience and case study clearly distinguish TWAIL from other critical perspectives, notwithstanding their somewhat common genealogy.

Beyond the strict domain of law, TWAIL also draws from the field of post-colonial studies. As Mickelson notes,

It is essential to bear in mind that the Third World approach to international law must be seen as lying at the intersection of two different discourses. One is the discourse of traditional

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<sup>147</sup> Andrew F Sunter, "TWAIL as Naturalized Epistemological Inquiry" (2007) 20 Can J Law Jurisprud 475 at 485.

<sup>148</sup> This language is most commonly utilized in the realm of international human rights law, to the consternation of TWAIL scholars, as most notably articulated by Mutua in *Savages, Victims and Saviors*, *supra* note 135.

<sup>149</sup> See for example Jose Alvarez, "My Summer Vacation Part II: Revisiting TWAIL in Paris" online: <http://opiniojuris.org/2010/09/28/my-summer-vacation-part-iii-revisiting-twail-in-paris/>. James Thuo Gathii responded forcefully to Alvarez' implication that TWAIL veers toward the nihilistic in James Thuo Gathii, "TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography" (2011) 3 Trade Law Dev 26 at 42-46.

international law and international legal scholarship. Here, it is part of the story of the development of international law. The other discourse is that of decolonization: the **full**, broad panoramic view of a history of oppression and transformation. Here, it can be seen as a part of the story of anti-colonial and post-colonial struggle. In some ways, a Third World approach to international law is the untold part of both these stories; that which has remained somewhat marginal, while not entirely overlooked.<sup>150</sup>

TWAIL's affiliation with post-colonial studies is closely related to its relationship with the work of historians, which I have described above, but it builds on these historical accounts to expose the ways in which the reverberations of the colonial encounter continue to be felt – politically, economically and culturally. It should be noted that post-colonial studies is itself a heterogeneous field of inquiry, but generally speaking it concerns itself with the politics of knowledge and knowledge creation inherent in colonial and neo-colonial encounters. It does this through various methods and in a number of ways, employing elements of anthropology, sociology, human geography and critical theory. Within post-colonial studies, TWAIL is frequently described as sharing both a lineage and an evolution with the subaltern studies collective, which, as Eslava and Pahuja observe, has followed a similar narrative arc as that described by Chimni and Anghie in their description of the shift from TWAIL I to TWAIL II. That is, subaltern studies began as an effort to write the histories of Third World peoples into official accounts, but evolved into a far more critical analysis of “the colonial and post-colonial production of knowledge,” just as TWAIL evolved from an exercise of claiming international law for colonized peoples to the more critical writings of TWAIL II on the immanent nature of colonialism within the basic structures of our current international legal regime.<sup>151</sup> And to Mickelson, these TWAIL II

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<sup>150</sup> Mickelson, *Rhetoric and Rage*, *supra* note 99 at 361-362.

<sup>151</sup> Eslava & Pahuja, *Between Resistance* *supra* note 114 at 117, citing Ranajit Guha, *A Subaltern Studies Reader, 1986-1995* (Minneapolis: University of Minnesota Press, 1997); Ranajit Guha & Gayatri Chakravorty Spivak eds., *Selected Subaltern Studies* (Oxford: Oxford UP, 1988); Chaturvedi, Vinayak, *Mapping Subaltern Studies and the Postcolonial* (London, New York: Verso, 2000) and Okafor, Newness, *supra* note 101. Not cited by Eslava and Pahuja, but also illuminating on this point, see Diane Otto, “Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference” (1996) 5 *Social and Legal Studies* 337.

insights into the nature of international law are explicitly derived from taking into consideration multiple (previously ignored) narratives:

In terms of legal doctrine itself, the Third World approach expands the debate about particular legal issues or areas by forcing a confrontation with the full panoply of historical, political, economic and cultural debates which surround them, and thus offers an enriched understanding of the discipline as a whole.<sup>152</sup>

Other TWAIL scholars, however, do not resort (at least explicitly) to the theoretical offerings of the subaltern studies collective, but look to other thematic domains such as Women Studies and Feminist Legal Theory, Environmental Studies and Economics. Employing the TWAIL prism in each of these domains helps to reveal the myriad ways in which international law and regulation penetrate the lives of Third World Peoples.<sup>153</sup> Common to all of these approaches, however, is a desire to situate law in the context of a global regime that continues to be dominated by power and imposition. And in this we also see the strongly normative strain that runs through virtually all TWAIL scholarship. It's recourse to other domains and disciplines flows from a common purpose, that being a

shared ethical commitment to the intellectual and practical struggle to expose, reform, or even retrench those features of the international legal system that help create or maintain the generally unequal, unfair, or unjust global order. They accomplish this through a commitment to centre the rest rather than merely the west, thereby taking the lives and

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<sup>152</sup> Mickelson, Rhetoric and Rage *supra* note 99 at 414.

<sup>153</sup> For but a few examples, see Vasuki Nesiah, "The Ground Beneath Her Feet: TWAIL Feminisms" in Antony Anghie, et al eds., *The Third World and International Order* (Leiden, Boston: Martinus Nijhoff, 2003) [Anghie et al, International Order] at 133; B. Baruah, "Human Capabilities and Gender Justice: A South Asian Perspective" in Anghie et al, International Order at 19; Sara L. Seck, "Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations" (2011) 3 Trade Law Dev 164; Karin Mickelson "Competing Narratives of Justice in North-South Environmental Relations: The Case of Ozone Layer Depletion" in Jonas Ebbesson & Phoebe Okowa, eds., *Environmental Law and Justice in Context* (Cambridge: Cambridge UP, 2009) pp. 297-315; M. Sornarajah, "Mutations of Neo-Liberalism in International Investment Law" (2011) 3 Trade Law Dev 203; Jalia Kangave, "Taxing' TWAIL: A Preliminary Inquiry into TWAIL's Application to the Taxation of Foreign Direct Investment" (2008) 10 Int'l Comm Law Rev 389.

experiences of those who have self-identified as Third World much more seriously than has generally been the case.<sup>154</sup>

The normative, “avowedly political” goal of TWAIL lies, then, in exposing (and proposing alternatives to) the normativity of the current international legal regime.<sup>155</sup> The ways in which TWAIL seeks to reveal international law’s lack of neutrality vary across platforms, disciplines and perspectives, but as a common objective, it seeks to peel back the layers of international law to reveal its normative stance toward the Global South, exposing the myth of neutrality in a manner reminiscent of Anatole France’s famous words: “In its majestic equality, the [international] law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread.”<sup>156</sup>

That questions of morality should guide legal analysis is of course not unique to TWAIL. It is, as Mickelson notes, the “defining characteristic” of natural law and the irony of TWAIL’s embrace of this quintessentially Western view of the law is not lost on TWAIL scholars.<sup>157</sup> But what TWAIL scholars tend to propose is a new kind of normativity – one that is globally representative and that therefore gives rise to a tentative, yet more legitimate universality. Such representative universality then justifies an international legal order, albeit one of a profoundly different character. Thus, to Mutua, TWAIL is a “*reconstructive movement* that seeks a new compact of international law,” requiring a broad, multileveled consideration of all “factors that create, foster, legitimize, and maintain harmful hierarchies.”<sup>158</sup>

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<sup>154</sup> Okafor, Newness, *supra* note 101 at 176-177.

<sup>155</sup> Eslava & Pahuja, *Between Resistance* *supra* note 114 at 109.

<sup>156</sup> Anatole France, *The Red Lily*, online: Project Gutenberg <<http://www.gutenberg.org/files/3922/3922-h/3922-h.htm>>.

<sup>157</sup> Mickelson, *Rhetoric and Rage* *supra* note 99 at 405. Indeed, in his important analysis of the 16<sup>th</sup> century Spanish philosopher and jurist Francisco De Vitoria, Anghie reveals how it was De Vitoria’s approach to natural law that encouraged and justified the violence of the colonial encounter that was to follow, see Antony Anghie, *Vitoria*, *supra* note 120.

<sup>158</sup> Mutua, *What is Twail?*, *supra* note 96 at 38.

As I shall set out in greater detail below, the immigration-security regime, at least in its current form, can be viewed as a site of false neutrality and “harmful hierarchies,” particularly in respect of its treatment of people from the Global South. It is for this reason that I find TWAIL to be a useful prism through which to examine the regime, which I turn to now.

### **3.4 TWAILing Immigration and Security**

We are now at the point where we can take the principles of TWAIL discussed above and apply them to the situation of immigration decision-making in the security context. Bearing in mind the principles we explored in the first chapter, this involves a reconsideration of immigration from the outside in, as I title this chapter, or to be more specific, a rethinking of how security is used as a basis for exclusion in immigration and refugee law. I explore these issues through four overarching considerations:

- a) Historicizing and contextualizing Refugee Production and Border Control
- b) Centring the Refugee – Individualized decision-making in immigration and security
- c) Interrogating Security
- d) Replacing Political Power with the Rule of Law in Immigration Decision-Making

I suggest that examining immigration and security through TWAIL inflected categories could help accomplish a number of objectives. First, it could help to inculcate in decision-makers a sense of connection between the geopolitical forces that create refugees and Western states’ connection to those forces. Second, it could encourage a culture of discourse in assessing the security claims that arise in refugee matters. And finally, in focusing on the situation of individuals as players in the geopolitical events that create refugees, a TWAIL approach would help to focus the process not on those with loose affiliations to any given faction in a historically complex realm of social upheaval, but to those who have actually played a role in the commission of acts that have harmed people.



This, I argue, is a key component of a globalized understanding of the rule of law. Accomplishing all of these objectives, I conclude, will bring a more nuanced approach to the blunt force that defines current security concerns; it will enhance a broadly-defined conception of security and will refocus the security analysis on the plight of individuals caught in the machinery of armed conflict.

### ***3.4.1 Historicizing and Contextualizing Refugee Production and Border Control***

#### *The Original Forced Migration – Indigenous Peoples and European Settlement*

Any historicized account of immigration in North America must begin, if not end with the first influx of individuals to the original polities of the continent – that of its indigenous peoples. Of course, this is often done with superficial platitudes, but I believe it is an important starting point, one that sets the discursive trajectory away from an unwarranted nativism, for lack of a better word, and toward a recognition of the role that immigration has *always* played in post-contact North America. It also happens to coincide with the TWAIL notion that the law is embodied by the colonial encounter. For what is colonialism, one may ask, other than a sort of ‘forced migration’ of a different kind? Law was used to justify the Europeans’ migration into indigenous lands, forays that became incursions when the intrepid explorers were met with resistance. This was described by Anghie in his examination of Vitoria, who viewed rights to travel into the lands of others much like Kant (as I described in the first chapter), as a natural law of man: “it was permissible from the beginning of the world (when everything was in common) for any one to set forth and travel wheresoever he would.”<sup>159</sup> Indians, for what it was worth, were also imbued with this right, but this was a particularly pernicious form of equality, for as Anghie notes,

While appearing to promote notions of equality and reciprocity between the Indians and the Spanish, Vitoria’s scheme finally

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<sup>159</sup> Anghie, Vitoria *supra* note 120 at 326, citing Francisco de Vitoria, *De Indis et de ivre Belli Relectiones* (Washington DC: The Carnegie Institute, 1917) at 151.

endorses and legitimizes endless Spanish incursions into Indian society. Vitoria's apparently innocuous enunciation of a right to 'travel' and 'sojourn' extends finally to the creation of a comprehensive, indeed inescapable, system of norms which is inevitably violated by the Indians. For example, Vitoria asserts that 'to keep certain people out of the city or province as being enemies, or to expel them when already there, are acts of war'. Thus any Indian attempt to resist Spanish penetration would amount to an act of war which would justify Spanish retaliation. Each encounter between the Spanish and the Indians therefore entitles the Spanish to 'defend' themselves against Indian aggression and, in so doing, expand Spanish territory.<sup>160</sup>

With this actualized threat of foreign invasion, one could hardly have begrudged Indigenous peoples had *they* implemented an expansive security scheme of their own. But this was not, for the most part, what transpired.<sup>161</sup> To be certain, there was resistance to European incursions, but whether through conquest or commerce, the slow trickle of European colonists to North America in the 16<sup>th</sup> and 17<sup>th</sup> centuries was followed by a steady stream of arrivals, which in turn led to large influxes of immigrant populations over the past 150 years. This, together with the decimating effects of diseases introduced by the European newcomers, created the conditions for a profound reconception of the North American continent as a settler society.<sup>162</sup> The point for our purposes is that sitting behind and buttressing European expansion of its North American colonies was a bedrock of justification – philosophical, religious and ultimately legal – that set the stage for large scale and largely unimpeded displacement of indigenous peoples and colonization of the

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<sup>160</sup> *Ibid.*

<sup>161</sup> Jeremy Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples" (1995) 33 Osgoode Hall Law J 623 at pp 632-635.

<sup>162</sup> Sherene Razack, ed., *Race, Space, and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines, 2002) at pp 1-4. See also Catherine Dauvergne, "The End of Settler Societies and the New Politics of Immigration" (Federation for the Humanities and Social Sciences Big Ideas Lecture Series, delivered at Brock University, May 28, 2014, online: <http://www.fondationtrudeau.ca/en/themes/publications/end-settler-societies-and-new-politics-immigration> [Dauvergne, the End of Settler Societies]).

continent. The ensuing societies viewed immigration as a necessary aspect of the nation building exercise and adopted mythologies about the taming of harsh and savage lands.<sup>163</sup>

And as time passes and the indigenous society takes on an ever diminished role in the national psyche, settlers “become the original inhabitants and the group most entitled to the fruits of citizenship.”<sup>164</sup> One such “fruit” includes the authority of contemporary society to control entry into the formerly ‘open’ spaces of the nation in a manner that the initial settlers never experienced. To Dauvergne, North America, together with New Zealand and Australia, are experiencing the end of settler society, as it is slowly replaced by a new nativism that leads naturally, if not inexorably, toward a restrictive and unwelcoming immigration politics.<sup>165</sup>

As we move on in our discussion on TWAIL and what it might have to say about immigration and refugee law, it is important to think back to Vitoria and to the original legal justifications for the traversing of borders into lands that were inhabited and governed by others. Imagine a contemporary global order, for example, in which the Western world’s restrictive migration policies would be viewed themselves as acts of aggression, contrary to principles of natural law. I say nothing further on this issue, but from this vantage point, let us move forward to the contemporary world of migration and border control. While I do not intend here to engage in a comprehensive history of modern migration, it is essential to highlight a couple of historical strands in understanding the security-migration regime.

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<sup>163</sup> Razack, *ibid.*

<sup>164</sup> Razack, *ibid* at 2.

<sup>165</sup> Dauvergne, “The End of Settler Societies”, *supra* note 162.

*Borders and Nations – The Decolonized Nation-State and Refugee Production*

The first strand is about borders themselves. TWAIL scholars, particularly Okafor, have had much to say about the borders of the contemporary post-colonial world, noting that there is nothing ‘natural’ about them; they are historically contingent manifestations of power that have directly, in many instances, led to conflict. It is an uncontroversial fact that many of the borders of the colonized world were, at best arbitrary. At worst, they were the opposite of arbitrary, representing deliberate attempts to “paper-over” indigenous statehoods to create powerful, but internally illegitimate centralized states.<sup>166</sup>

In the post-colonial era, these historical facts created immense challenges, for as Okafor notes:

As heirs to the colonial legacy, these leaders faced the crucial question of what to do with Africa's inherited colonial borders. Because the borders were mostly arbitrary, they had forcibly aggregated diverse pre-colonial polities into single political units. All too often these borders also resulted in the division of one cohesive group among two or more of the new states.<sup>167</sup>

While it is an interesting historical phenomenon that the states, as drawn up, have remained relatively unchanged, Okafor remarks on how the external stability of the states has not been mirrored internally:

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<sup>166</sup> Okafor, *After Martyrdom*, *supra* note 83. In tracing the historical illegitimacy of many (African) states, Okafor is careful not to engage in nostalgia for a mythical pre-colonial African statehood. On the contrary, he refers to the violent and expansionist agendas of certain African states that preceded colonial rule and to the ongoing impact that *they* have had on contemporary geopolitical problems in Africa. Nevertheless, he concludes:

While its violent nature was not excusable, the campaign had been part of a very slowly evolving process of state-building that was rooted in the internal dynamics of African politics. It thus had a better chance of allowing slow-paced formation of less deeply fragmented states much as European states formed (at p.507).

<sup>167</sup> *Ibid* at 512. See also Makau wa Mutua, “Why Redraw the Map of Africa: A Moral and Legal Inquiry” (1995) 16 *Mich J Int'l L* 1113 [Mutua, *Why Redraw the Map of Africa*].

As African and international studies literature has much celebrated, this historic approach to the boundaries question dramatically and almost totally eliminated inter-state conflict in Africa. Despite this remarkable record, however, the post-colonial African state has faced internal crises virtually since the very moment of its independence. By the end of the 1960s, when the euphoria of independence had subsided, the little legitimacy that the new states had secured from the deeply embedded commonality of the anti-colonial struggle had already begun to fade. For many African states, the moment of independence was also a moment of crisis because the post-colonial state was a direct successor and inheritor of the colonial state.<sup>168</sup>

The illegitimacy of many post-colonial borders, combined with the iron rule of the “mimic men” who steadfastly insisted on maintaining them has been a potent and violent combination. It is of no surprise that from these historical phenomena there have arisen various efforts to recalibrate Africa’s geopolitical reality – some extremely violent, some less so; some involving secessionist desires to revamp borders, others remaining entirely domestic affairs.

International law, according to Okafor, has played a key role in this “coercive nation-building” process because it prioritizes external state-recognition processes over internal processes that would tend to yield more subjectively legitimate state structures. This approach, Okafor concludes, has been successful in creating states “in the European nation-state image, but in almost complete disregard for the input of the cohesive groups who inhabit the territory of each of these states.”<sup>169</sup> The pride of place that international law gave to external recognition in the decolonized world led directly to efforts to repress questions of internal legitimacy, but has not generally been able to extinguish them, which has frequently led to violence.

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<sup>168</sup> Okafor, *After Martyrdom*, *supra* note 83 at 513.

<sup>169</sup> *Ibid* at 522.

International law also encouraged the homogenization of colonial populations based on the Western ideal (at least one that was pervasive throughout the decolonization period) of a unitary and unfragmented nation-state dominated by a centralized government structure.<sup>170</sup> This has led directly to the widespread and frequently violent repression of minority groups by states, much of which has been provided cover by international law and its emphasis on the sanctity of the state, regardless of its internal legitimacy. And while there have been examples of successful “nation-building,” the results in many countries have ranged from dismal to cataclysmic.

Layered on top of all of this was the Cold War, which served to prop up nationalist (and often violent) regimes along ideological lines and repress legitimate exercises of self-determination. One of the defining features of the post-Cold War period – most visible in the states of the former Yugoslavia – has been the collapse of such regimes and the renewed assertion of independence movements.<sup>171</sup>

And throughout this long period of upheaval spanning colonial rule and post-colonial, Cold War inflected nationalism, civilians have frequently borne the brunt of conflict. There is obviously no justification for this, but understanding the nature of post-colonial conflict cannot begin or end with broad and undifferentiated statements about the nature of violence in the Third World. Rather, such violence is part of a historical continuum that in some instances may have preceded colonial rule, but in virtually all of them was exacerbated by it. The colonial state was defined by violence and coercion. TWAIL scholars have gone to significant lengths to demonstrate how such structures of violence and coercion have been replicated in the post-colonial state, with the complicity of Western-based international law. At times the coercion of the colonized world (and the

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<sup>170</sup> *Ibid* at 523 and Mutua, *Why Redraw the Map of Africa*, *supra* note 167 at 1151.

<sup>171</sup> The success of the Eritrean independence movement, shortly after the collapse of the Soviet Union was perhaps the clearest example of this fact in the developing world, but the creation of Southern Sudan several years later is another.

post-colonial one that replaced it) was met with resistance, a resistance that has also veered in many cases toward the violent.

Violence and coercion. External recognition amidst internal illegitimacy. Repression and resistance. These are dangerous binaries and it is of no surprise that they have produced many, if not most of the world's refugees. Indeed, inscribed in the lives of many refugees, one can frequently trace a historical path from colonial rule, to the creation of arbitrarily demarcated nation-states, to repression and resistance within those states, to the need to flee. In this context, one can hardly cast aspersions on forced migrants for questioning, in the act of fleeing and the desire for safety, the legitimacy of the borders of our world – both those that imprisoned them in their home countries and those that they must traverse in search of sanctuary.<sup>172</sup>

In situations of pervasive violence and abject oppression, one must also hesitate to cast broad judgment on the actions of those who have taken a stand. Even in mainstream conceptions of international law, harm to civilians has never been used as the sole arbiter in determining whether the use of force is justified.<sup>173</sup> And yet, as I have described earlier, this is precisely what the blunt tool of the security-inadmissibility regime does, essentially rendering inadmissible (at least in principle) *anyone* who has had *any* affiliation with an organization that has *ever* itself been affiliated with violence. It is an explicitly anti-

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<sup>172</sup> As immigration-security matters tend to involve individuals who have fled political conflict, I focus here on the ways in which international law has historically facilitated such conflict. An equally interesting TWAAIL analysis could be made of the ways in which international law, and particularly the rulemaking of international financial institutions has contributed to economic circumstances that have also fuelled international migration – on a TWAAILIAN view of international financial institutions and international trade law, see M. Sornarajah, "The Case against a Regime for International Investment Law" in Leon Trakman (Ed.), *Regionalism in International Investment Law* (Oxford: Oxford University Press, 2013); M. Sornarajah, "Mutations of Neo-Liberalism in International Investment Law" (2011) 3 Trade, Law and Int'l Dev 203.

<sup>173</sup> To provide a recent example: in his acceptance speech for the Nobel Peace Prize, President Barack Obama devoted considerable attention to justifications for the use of force, noting that during World War II more civilians died than soldiers and specifically endorsing principles of "just war" theory, suggesting that war is "justified only when certain conditions were met: if it is waged as a last resort or in self-defense; if the force used is proportional; and if, *whenever possible*, civilians are spared from violence." See Barack Obama, Remarks by the President at the Acceptance of the Nobel Peace Prize (Dec. 10, 2009) online: <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>. [Emphasis added]

contextual approach, imposing judgment on those that it captures in a way that is entirely removed from their understanding of the historical reality of their places of origin. This is why Salvadoran journalists who merely connected their Western colleagues to FMLN operatives, why those who donated pittances to Eritrean humanitarian efforts and why Iranians who opposed the current regime, amongst many others, are all so equally bewildered to be found security threats to Canada.

What the historically-situated TWAIL approach delivers in the immigration context is a sense of interconnectedness, of shared moral responsibility and historical nuance in understanding the geopolitical forces that have given rise to conflict and the global movement of peoples.<sup>174</sup> This is, in my view, a crucial framing gesture in thinking about forced migration and the responsibility of Western countries towards refugees from conflict zones – a responsibility that, on a strictly numerical basis, they have demonstrably failed to take seriously.<sup>175</sup> Infusing a TWAILian sense of history into the security process would help to ameliorate the disjuncture between the application of the security provisions and the histories of those seeking to migrate to Canada. It would also encourage a critical engagement with the irrationality and bias of the current regime, calling out the hypocrisy

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<sup>174</sup> One may ask at this point whether TWAIL principles inevitably lead to an ‘open borders’ conception of immigration law, which is to say, to the end of immigration law as it is presently conceived. While relatively little has been written about TWAIL and migration, the commentary that does exist suggests a less radical orientation. For example, B.S. Chimni argues for a fundamental revamping of the international refugee protection regime that would prioritize global dialogue over unilateral action, but does not suggest that states cede their right to determine questions of admission, see B.S. Chimni, “Reforming the International Refugee Regime: A Dialogic Model” (2001) 14 J Refug Stud 151. This makes sense. Recall the profound, yet ultimately practical, approach generally adopted by TWAIL scholars who do not tend to call for the dismantling of Westphalian sovereignty, but instead advocate a more subtle recalibration and democratization of international law. As I have stated before in other contexts, this is not a question that I need resolve here, given my focus on security, for I do not believe that any element of TWAIL scholarship would suggest an open borders approach in respect of those who have either participated in atrocities in the Global South, or who pose a legitimate security threat to the host country.

<sup>175</sup> Any cursory glance at refugee-related statistics confirms this, and the disparity in refugee reception rates between countries of the South and Northern industrialized states is only growing. According to the UNHCR, the proportion of the world’s refugees being resettled or hosted in developed regions has diminished in the face of massive surges in displacement to the countries of developing regions. The most recent UNHCR statistical update provides: “At the end of 2013, developing regions hosted 10.1 million or 86 per cent of the world’s refugees, the highest value for the past 22 years. The Least Developed Countries alone provided asylum to 2.8 million refugees or 24 per cent of the global total.” See *War’s Human Cost: UNHCR Global Trends 2013* (2013) online: UNHCR <http://www.unhcr.org/5399a14f9.html> at 16-17.



of its preoccupation with Southern conflicts and the corresponding blind eye it turns to conflicts in which Western countries have engaged.

As I have outlined above, the security process employs a healthy dose of discretion on the part of immigration and enforcement officers. In this context, injecting a TWAILian sense of history into the process would lead to decisions that, I believe, more aptly reflect our opinions about moral responsibility for conflict and would lead to more intelligent decisions as to who actually constitutes a threat to national security, even on a broad definition of the term. It is also, I suggest, not as abstract as it may at first appear. As I shall set out in greater detail below and in the next chapter, where officers in administrative regimes exercise discretion, they do so based on guidelines, directions and institutional cultures, which are in turn guided by particular normative orientations. Importing a TWAILian pedagogy into this orientation would, I believe, yield tangible results. It would encourage officers to focus, not on historical conflicts *per se*, but on the larger context surrounding such conflicts. Most importantly, it would focus the officer's attention on the *particular* role that the individual whose fate he/she must determine has played in the unfolding of political conflict.

#### *History and Memory: Recalling Immigration History as Exclusionary Policy*

In the previous chapter I provided a brief historical account of Canadian security and inadmissibility provisions, a history that appears, today, to be more or less appalling. Former inadmissibility regimes were explicitly racialized and sought to exclude particular classes of individuals as “undesirables”. Such exclusion lay at the foundation of immigration policy, which itself was viewed as a bedrock of sovereignty. And while today's inadmissibility provisions may appear more facially neutral, the undeniable discrepancy in their application as between people from the North and South calls this apparent neutrality into question. As several TWAIL scholars have noted, another principal aspiration of

TWAIL is to uncover the subtle normativity of apparently neutral provisions that tend to disproportionately prejudice Third World peoples.<sup>176</sup>

The (mis)use of contemporary security provisions appears to be a prime example of precisely this kind of false neutrality. While in the past questions of admission were strictly the domain of national prerogative, this is no longer the case, at least in respect of international obligations toward refugees. And this is the hook on which TWAIL grasps hold. Refugee protection has become a core domain of international law and so, to the extent that national policies on immigration may impact upon these international obligations, a TWAILian perspective on histories of exclusion is important to consider. And just as TWAIL narratives have tended to reveal how colonial structures have been replicated in the post-colonial state, so too it would appear have the tendencies toward racialized exclusion in immigration law been replicated in the operation of contemporary security provisions. The point, ultimately, is that any historical perspective on Canadian immigration-security concerns, would tend to encourage a critical engagement with its present, particularly in the current climate of almost overwhelming preoccupation with security, a preoccupation that is almost entirely directed at individuals from the Global South.

### ***3.4.2 Centring the Refugee - Individualized decision-making in immigration and security***

As noted above, TWAIL scholars have demonstrated the various ways in which both the colonial state and its post-colonial successor have failed the people of the Global South. This fact is perhaps most graphically manifested in the lives of refugees who, by definition, have experienced an almost total disregard for their most basic of rights. The failures of

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<sup>176</sup> Okafor, Newness, *supra* note 101 at 178, citing Muthucumaraswamy Sornarajah, "The Asian Perspective to International Law in the Age of Globalization" (2001) 5 S.J.I.C.L. 284 at 285. See also, Chikeziri Sam Igwe, *Dehumanising International Law or Responding to a New Reality?: A Critical Analysis of Post-9/11 Suggested Changes to the Laws of War* (PhD Dissertation, York University, 2009) at 32 [unpublished].

the past 50 or so years have led TWAIL scholars to argue that any reformulated approach to international law must subordinate the interests of the powerful to the concerns of Third World peoples and that their “resistance to, or acceptance of, international rules and practices which affect their lives offers strong evidence of the justice or injustice of those rules and practices.”<sup>177</sup>

At this point, it is important to recall that in security cases, immigration enforcement officers make determinations that are typically in the domain of international law: the use of force and its justification, assertions of self-determination, allegations of subversion, espionage and terror. We must also recall that the empirical evidence suggests that, notwithstanding the immense breadth of the security provisions, those caught by them tend overwhelmingly to be from the Global South, in respect of relatively contained Southern conflicts.

While enforcement officers generally have some basic familiarity with the international legal principles that undergird their decisions, I contend that they also need to be imbued with the contexts and historicism proposed by TWAIL scholars *and* by an emphasis on understanding how these larger themes map onto the individuals whose lives are, in some sense, in their hands. Decision-making in the migration-security matrix is an archetypal example of raw state power, as exerted over individual lives – a power that confers on officers the right to characterize and objectify those subject to it. And while such decision-making in the current Canadian regime is, in the formal sense, individualized, in that an individual decision is made in every case, the data suggests that such decisions are based, at best, on notions of collective responsibility, operationalized through the “membership” rubric of s.34(1) of the IRPA. The result, I contend, is a skewed sense as to who constitutes a security threat, based in large measure on the “imaginative geographies” of the Global South as a single place of undifferentiated violence and savagery.<sup>178</sup>

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<sup>177</sup> Anghie & Chimni, *Third World Approaches*, *supra* note 104 at 78.

<sup>178</sup> Again, the reference is to Said, *Orientalism*, *supra* note 97 .

A TWAIL approach to the security-migration question would dispel such imaginative geographies, recognizing that the mere fact of coming from a conflict zone or even taking a position in a conflict does not, in itself, say anything about security or individual moral or criminal responsibility. A quick and simple example can, I think, help to illustrate the point. Think for a moment at how the current security regime would have operated had it been in effect in the period 1935-1945.<sup>179</sup> Of course it would have captured Nazi war criminals and any members (and many supporters) of the Nazi party. It would *equally*, however, have captured anyone who supported armed resistance to the Nazis. The immoral equality with which the security regime would have operated could be averted, however, by requiring immigration officers to engage in individualized decision-making based on context, based on an informed engagement with relevant historical forces and based on a meaningful inquiry into the actions of those who came before them. In this thought experiment, it is easy to recognize that the difficulty of segregating Nazis from resisters would provide no justification for excluding everyone from obtaining asylum. It is also easy to recognize that immigration matters take place in a normative universe and that decision-makers must, in some senses, descend into the fray to make decisions that make sense to our own legal and moral framework. Finally, this example demonstrates that the mere fact of “taking sides” in a conflict, even an immensely bloody one in which many civilians are killed, is not generally enough to inform coherent judgment in security matters.

To close the bracket on this example, I do not suggest that the task of looking into the (often grainy) past of those who flee situations of conflict in search of asylum is an easy one. What I propose is that however murky a situation of political conflict may appear, decisions on security cannot be based on that murkiness or on a removed position of

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<sup>179</sup> The immigration regime that *was* in place at the time has been the subject of extensive criticism, both for its propensity to allow Nazi war criminals to resettle in Canada and its “None is Too Many” approach to Jewish refugees. The reference is, of course, to Abella and Troper, *None Is Too Many* (Toronto: Lester & Orpen Dennys 1983).

unprincipled neutrality. And while sorting through the various (and there are often *many*) players in a conflict can be immensely complex, what is not so complex, I argue is the task of evaluating the specific acts of individuals who have fled such conflict.

Emphasizing contextualized histories and a willingness to engage with difficult normative questions in assessing the justice of a given situation are, as noted above, both important TWAIL principles. I suggest that these principles should be deployed to help individualize the migration-security process and that doing so would: i) improve the consistency and fairness of decision-making in this area; ii) diminish the sense that the security regime operates arbitrarily; and iii) focus the analysis on those who have actually committed the kinds of crimes intended to be caught by the security process. A TWAIL approach to considering security would largely abandon membership (and its attribution of collective responsibility) as a category of inadmissibility and would instead encourage an approach similar to that used for determining exclusion under the Refugee Convention. That is, in considering admissibility, officers should examine whether those seeking admission (from *all* countries) have personally contributed in a meaningful way to the commission of proscribed acts.<sup>180</sup>

In the short to medium term, it is unlikely that the governments of Western countries will change legislation in a manner that could be construed as narrowing security considerations. As such, I imagine that membership, as a category of inadmissibility, will remain on the books for the foreseeable future. In the absence of formal legislative change,

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<sup>180</sup> A TWAIL approach on this issue would see no principled basis for applying membership-based security criteria to *either* immigrants or refugees. This is primarily because a TWAIL perspective would also recognize that the reasons that animate individuals to leave their homelands to immigrate to other places are often just as connected to inequality in the international order as are those forced to flee as refugees. A TWAIL perspective would query the distinction between refugee and migration rubrics in the first place, interrogating the circumscribed nature of the refugee definition and highlighting the often just as compelling situation of so-called 'economic migrants.' The plight of these individuals may not amount to persecution, but may be just as compelling as those of refugees and just as relevant to the TWAIL account of global inequity. That said, I maintain the focus here on refugees both because this represents the majority of individuals caught domestically by the security regime and because of the interlocking international legal obligations that accrue to refugees, further to the Refugee Convention and the Convention Against Torture.

however, decision-makers maintain a discretion as to whether to proceed with admissibility determinations. I suggest (and explore further below) that in the domain of this administrative discretion, meaningful if not transformative change is possible through exposing decision-makers to a TWAILian pedagogy aimed at individualizing the process and attenuating its troubling outcomes.<sup>181</sup> Such an approach would not only seek to imbue decision-makers with a deeper understanding of international law, but would attempt to do so from the perspectives of those most commonly subject to security proceedings – individuals from the Global South. The approach would encourage an openness to grappling with the complexities and injustices of the global political order and foster an individualized approach, all with a view to understanding how the actions of the individuals subject to security processes fit into the larger context of conflict in the Global South.

### ***3.4.3 Interrogating Security and Terrorism***

There is a small but important body of TWAIL scholarship on security and terrorism in the post 9/11 era and the “new normativity”<sup>182</sup> that it has unleashed, much of which is relevant to our present context. As a deconstructionist movement, the first task for TWAIL scholars has generally been to unpack the meaning of the term “terrorism”, as it has been used (and overused) in recent years. They point to the long history of political violence amongst state and non-state groups and respectfully question the “newness” of the geopolitical order that gave rise to the “war on terror”.

Ikechi Mgbeoji, for example, points to the fact that international law has failed to provide a coherent definition of terrorism and suggests that this failure has had profound

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<sup>181</sup> I do not intend here to explicate a detailed description of how a TWAIL pedagogy would operate in this setting, but rely on the basic contours of an approach to TWAIL pedagogy within law schools, as proposed by Mohsen Al Attar and Vernon Ivan Tava, *TWAIL Pedagogy - Legal Education for Emancipation*, SSRN Scholarly Paper ID 1438325 (Rochester, NY: Social Science Research Network, 2009) [Al Attar and Tava “TWAIL Pedagogy”].

<sup>182</sup> Upendra Baxi, “War on Terror and the War of Terror: Nomadic Multitudes, Aggressive Incumbents, and the New International Law - Prefatory Remarks on Two Wars” (2005) 43 *Osgoode Hall Law J* 7 Baxi, “War on Terror”] at 34.

implications on the rule of law.<sup>183</sup> How can the crime of terrorism be applied in a consistent and lawful manner, Mgbeoji asks, if we cannot derive a common understanding of the term, let alone any coherent criteria for establishing guilt under it?<sup>184</sup>

For Mgbeoji, the failure to define the law in respect of terrorism has rendered it little more than a tool of the powerful and suggests that only through a “rigorous and dispassionate examination of what constitutes terror can modern international lawyers and international institutions escape...blinding rhetoric and righteous nationalistic indignation.”<sup>185</sup> The lack of definition has created a “propagandistic narrative,” Mgbeoji continues, that virtually always favors those in power, rendering law little more than the will of the sovereign.<sup>186</sup> The pervasiveness of this narrative – one which constantly posits and reinforces notions of insecurity – results in the installation of the exception as the rule, the diminution of rights and the wholesale labelling of entire categories of individuals as security threats.

TWAIL scholars, however, are not alone in pointing to the amorphous nature of “terrorism” and the troubling manner in which it has been deployed. Recall, as but one example, the words of the Supreme Court of Canada in the *Suresh* decision: “[o]ne searches in vain for an authoritative definition of ‘terrorism’” and acknowledging that the absence of such definition renders it particularly vulnerable to “politicized manipulation, conjecture, and polemical interpretation.”<sup>187</sup> Where I suggest a TWAIL approach would part ways with

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<sup>183</sup> Ikechi Mgbeoji, “The Bearded Bandit, the Outlaw Cop, and the Naked Emperor: Towards a North-South (De)Construction of the Texts and Contexts of International Law’s (Dis)Engagement with Terrorism” (2005) 43 Osgoode Hall Law J 105 at 113. Mgbeoji notes (at 109) that efforts to define terrorism have resulted in “twenty-two categories of international crimes of terrorism, representing over three hundred international instruments enacted between 1815 and 1992. Yet, none of the international instruments offer a generic definition. Ironically, states strongly disagree on how to define the term and who should be identified as a terrorist.”

<sup>184</sup> *Ibid*, at 113.

<sup>185</sup> *Ibid*, at 111.

<sup>186</sup> *Ibid* at 111, citing Christopher Blakesley, (book review) *State Support of International Terrorism: Legal, Political, and Economic Dimensions* by John Murphy (1992) 86 A.J.I.L. 428 at 429-30.

<sup>187</sup> *Suresh*, *supra* note 29 at paras 94-95. The court’s brief review of the literature shed further light on its recognition that the term “terrorism” can be viewed as essentially meaningless:

the views of the Court is in the Justices' conclusion that, notwithstanding the above, a sufficiently workable definition of "terrorism" could be incorporated into the procedurally stripped down realm of security decision-making and still comply with the rule of law.

Another TWAIL insight into the discourse on terrorism involves the questioning of an international legal regime that frequently turns a blind-eye to civilian death when

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One searches in vain for an authoritative definition of "terrorism". The *Immigration Act* does not define the term. Further, there is no single definition that is accepted internationally. The absence of an authoritative definition means that, at least at the margins, "the term is open to politicized manipulation, conjecture, and polemical interpretation": factum of the intervener Canadian Arab Federation ("CAF"), at para. 8; see also W. R. Farrell, *The U.S. Government Response to Terrorism: In Search of an Effective Strategy* (1982), at p. 6 ("The term [terrorism] is somewhat 'Humpty Dumpty' — anything we choose it to be"); O. Schachter, "The Extraterritorial Use of Force Against Terrorist Bases" (1989), 11 *Houston J. Int'l L.* 309, at p. 309 ("[n]o single inclusive definition of international terrorism has been accepted by the United Nations or in a generally accepted multilateral treaty"); G. Levitt, "Is 'Terrorism' Worth Defining?" (1986), 13 *Ohio N.U. L. Rev.* 97, at p. 97 ("The search for a legal definition of terrorism in some ways resembles the quest for the Holy Grail"); C. C. Joyner, "Offshore Maritime Terrorism: International Implications and the Legal Response" (1983), 36 *Naval War C. Rev.* 16, at p. 20 (terrorism's "exact status under international law remains open to conjecture and polemical interpretation"); and J. B. Bell, *A Time of Terror: How Democratic Societies Respond to Revolutionary Violence* (1978), at p. x ("The very word [terrorism] becomes a litmus test for dearly held beliefs, so that a brief conversation on terrorist matters with almost anyone reveals a special world view, an interpretation of the nature of man, and a glimpse into a desired future.")

Even amongst those who agree on the definition of the term, there is considerable disagreement as to whom the term should be attached: see, e.g., I. M. Porras, "On Terrorism: Reflections on Violence and the Outlaw" (1994), *Utah L. Rev.* 119, at p. 124 (noting the general view that "terrorism" is poorly defined but stating that "[w]ith 'terrorism' . . . everyone means the same thing. What changes is not the meaning of the word, but rather the groups and activities that each person would include or exclude from the list"); D. Kash, "Abductions of Terrorists in International Airspace and on the High Seas" (1993), 8 *Fla. J. Int'l L.* 65, at p. 72 ("[A]n act that one state considers terrorism, another may consider as a valid exercise of resistance"). Perhaps the most striking example of the politicized nature of the term is that Nelson Mandela's African National Congress was, during the apartheid era, routinely labelled a terrorist organization, not only by the South African government but by much of the international community.



caused by state actors, but vilifies non-state movements that may have a valid justice aim, but who similarly resort to violence. Above I described TWAIL's acknowledgment that many Third World states have devolved into highly repressive places. What I did not describe is that many of these states justify their repression internationally by suggesting that they are merely defending themselves against terrorism.<sup>188</sup> The point here is not to justify the targeting of civilians, but to expose the asymmetry of the regime and its problematic consequences. Baxi notes in this regard:

But at no stage does "state terrorism" emerge as a figuration of thought in the evolution of the genres of the international law of war and humanitarian law, the customary and conventional right to self-defence, and the limits of conduct of belligerent or military occupation. Unsurprisingly, the term "state terrorism" is, as yet, not a term of art in either international law diction or the United Nations' official epistemology; at best some communities of human rights activists use it.<sup>189</sup>

This privileging of state over non-state violence is sewn into the very fabric of international law, for as Anghie notes, Grotius himself was so preoccupied with order and stability on the state level that he refused to recognize any right of people to rebel against tyranny, even when that tyranny took on the form of brutalizing slavery.<sup>190</sup> And while, as noted above, various international instruments now specifically authorize peoples' resistance to tyranny, the residue of state privilege persists. The problem with this privileging is that, as TWAIL scholars have observed, in many (though certainly not all) conflicts in the Global South, it is the non-state groups that have the clearer claim to moral legitimacy than their state-based adversary. In this context, the labelling, stigmatizing and vilifying of non-state actors as "terrorists" simply tells a skewed version of the story, Nelson Mandela's example being clearly the most revealing example.

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<sup>188</sup> The most recent example likely comes from Syria, where President Bashar al-Assad has essentially labelled all of those in opposition to him as terrorists. Interestingly, Canadian immigration law would tend to agree with Assad, as anyone engaged in the Syrian uprising would, at least on paper, be inadmissible on security grounds.

<sup>189</sup> Baxi, *War on Terror*, *supra* note 182 at 24.

<sup>190</sup> Anghie, *International Law in a Time of Change*, *supra* note 99 at 1322, citing Hersch Lauterpacht, "The Grotian Tradition in International Law" (1946) *Brit YB INT'L L* 1 at 43-44.

All of this is highly germane to the immigration-security context. If allegations of terror need to be addressed critically because they may be laden with assumptions, half-truths and political agendas, than this is particularly the case in immigration proceedings defined by low burdens of proof and relaxed standards of evidence. And yet, I suggest that in the hyper-securitized contemporary context, in fact, the opposite has happened such that essentially *any* conflict that has resulted in *any* civilian casualties is considered terrorist in nature, thereby justifying the exclusion of *anyone* with any proximity to it.

Virginia Held has suggested that “all terrorism is awful, just as all war is awful” and that the difference between the two cannot lie merely in the targeting of civilians because they are targeted in both, though far more civilians have died in wars than in terrorist attacks.<sup>191</sup> A TWAIIian approach to migration and security would accord with this view, recognizing the dynamics of power that frequently drive the distinction between “just” wars and terrorist acts. As in our World War II example, a TWAIIian approach would recognize that allegations of terrorism in a context of larger state violence doesn’t actually say very much about either “security” or about the justice of a particular outcome. When we pull back the distinction between state violence and terror, what is revealed is a more complex and far less Manichean context in which it would be simply inappropriate to impose harsh legal consequences on the sole basis of association. Rather, as Baxi notes, “context sensitive distinctions ought to guide our reflexive labours,” distinctions that seek to separate those who have personally contributed to the hardship and suffering of Third World peoples from those who are, at root, simply fleeing such hardship.<sup>192</sup> In their work on assessing individual criminal responsibility, Anghie and Chimni demonstrate for us one important way that decision-makers can arrive at context sensitive distinctions. They propose that, as much as possible (and recognizing the complexities) the views of the people from the state in which alleged crimes took place, should help guide the

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<sup>191</sup> Virginia Held, *How Terrorism is Wrong: Morality and Political Violence* (New York: Oxford UP, 2011) at 23.

<sup>192</sup> Baxi, *War on Terror*, *supra* note 182 at 18.

determination of individual responsibility.<sup>193</sup> Would, for example, the majority of El Salvadorans view a journalist with loose connections to the FMLN as a terrorist? Given that the FMLN is now the democratically elected ruling party in the country, the answer would likely be no. Would an Eritrean who, in 1977, donated the equivalent of \$20 to the liberation movement for humanitarian aid be viewed in Eritrea (or Ethiopia for that matter) as a terrorist? Again, the answer appears clear.

Is violence ever justifiable? That is perhaps one of the most vexing questions one can ask. Its answer ultimately lies not within the domain of law, but rather in the realms of moral philosophy, perhaps politics and, for some, religion. What is *not* justifiable, and what I contend a TWAILian approach would help avoid, is the reductionist labelling of individuals as terrorists in situations that cry out for a careful consideration of context, history, justice and individual intent.

#### ***3.4.4 Replacing Political Power with the Rule of Law***

One of the many paradoxes of TWAIL is this: in its call for a reinvention of international law, it essentially seeks the global entrenchment of values strongly associated with the West, most notably democracy and the rule of law. Its insistence on injecting participatory approaches into international law could be construed, in point of fact, as a simple call for the transposition of social democratic values onto the international level. And this is why TWAIL is frequently referred to – in the same breath – as both reformist and radical. It is reformist because what it calls for internationally is something that many people take for granted domestically – equality amongst parties, meaningful discourse and curbs on raw expressions of power. It is radical because such principles remain in disturbingly short supply in international legal and political orders.

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<sup>193</sup> Anghie & Chimni, *Third World Approaches*, *supra* note 104 at 95.

One example of TWAIL's call for an internationalized rule of law lies in its insistence that any engagement with the global legal/political order must be undertaken objectively and consistently. Anghie and Chimni refer to the failure on the part of the International Criminal Tribunal for the Former Yugoslavia (ICTY) to fully investigate and prosecute allegations of war crimes related to the NATO campaign of (allegedly indiscriminate) airstrikes as evidence of the selectivity of international law; a selectivity that tends to privilege the people and actions of the West.<sup>194</sup> So it is in the security-inadmissibility regime, where, for example, those who have engaged in Western acts of subversion are, quite literally, *never* subjected to admissibility proceedings notwithstanding the fact that the law makes no distinction between these acts and ones committed in the Global South, which are frequently the subject of admissibility hearings.

This leads me to anticipate one possible reaction to my position, which is that my critique of the current immigration-security regime and my suggestion that the breadth of the security net be reconsidered would both weaken security and “go easy” on Southern despots and war criminals. My response is that, in fact, the opposite would be the case. First, encouraging consistency in the application of the law is hardly a controversial view, but is rather central to the most basic principles of legality.<sup>195</sup> Second, suggesting that those who flee disputes should be treated individually and on the basis of their own actions is not the same as proposing impunity; to the contrary what I am proposing is merely a more nuanced approach to the question of who constitutes a security threat, taking into full consideration the fractured worlds from which people flee. This, I suggest, would only help to focus and refine questions of security, taking it away from the realm of top-down assertion of power (where I suggest it currently resides) and into the realm of law.<sup>196</sup> In the process, I suggest, the security process would shed its peculiar preoccupation with

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<sup>194</sup> *Ibid* at 91-92.

<sup>195</sup> Lon Fuller, *The Morality of Law*, revised ed. (New Haven: Yale University Press, 1969) at 39. Of note, the consistent application of the law is also considered an important, if frequently unfollowed, principle of international law: see for example Hans Kelsen, *Principles of International Law* (New York : Rinehart, 1952) (New York : Holt, Rinehart & Winston, 1966) (Clark, New Jersey : Lawbook Exchange, 2003).

<sup>196</sup> Again, I refer to “law” here in the Fullerian sense, see note 45, above, and accompanying text, in addition to Section 1.3.2, above.

those who have fled internal disputes in the global south and focus instead on those who genuinely pose a threat to Canadian and international security.

It is not, in my view, a coincidence that states tend to view both immigration and international relations through political, rather than legal lenses. They are, in some senses mirror images of each other – the one projecting out, the other reflecting in – both helping to define national sovereignty. What Western states have failed to recognize however, is the interconnectedness of the two. They have failed to recognize that the histories of colonization, the generations of subjugation and the decades of using international law as thin cover for political power have had their consequences, one of which is the arrival on their shores of those who have fled the ensuing fallout. I suggest that the rule of law has a role to play in both international and immigration law. Ironically, introducing it into the former would diminish many of the pressures on the latter.

## **Conclusion**

*“Tra il dire e il fare c’è in mezzo il mare,”* she remarked. Between words and deeds there is a sea.<sup>197</sup>

Immigration law and international law are intimately connected. Immigration decision-making is necessarily influenced by international legal principles and both domains are closely linked to notions of national sovereignty and autonomy. In the preceding pages I have described a Third World approach that seeks to transform the global order by questioning the historical legitimacy of international law and replacing it with a new normative order, one that places the interests of individuals into the analysis and is based on discursive and participatory interactions between all parties. From this vantage point, I sought to illustrate how transposing TWAIL onto the migration-security realm would focus the process on the actions rather than the associations of individuals

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<sup>197</sup> Schwartz, *supra* note 95 at 85.

and bring to it a coherence and fairness that it currently lacks. With this in mind, I turn to similar conversations from the realm of administrative law – about dialogue, participation and the rule of law – and examine how a progressive interpretation of administrative discretion could help turn words into deeds and contribute to a more coherent and justified approach to security matters.

**CHAPTER FOUR: DISCRETIONARY DECISION-MAKING  
AND DIALOGUE IN IMMIGRATION AND SECURITY:  
FORGING LEGITIMACY**

## Introduction

In the previous chapter, I discussed the intersections between immigration and international law and argued that applying a TWAIL lens to security matters could help bring them into closer conformity with basic principles of legality. In this chapter, I focus on a domestic domain – that of administrative discretion – within which, I suggest, TWAIL principles could be deployed. What I hope to illustrate in the process is that a conception of discretion in security matters as a dialogical and participatory space that situates those affected by administrative decisions at the centre of the process is perfectly suited to, and perhaps even requires, a consideration of TWAIL principles. I argue that pairing TWAIL with this discursive approach to administrative decision-making could accomplish the (modest) project of bringing security laws, even in their current state, into closer conformity with basic principles of legality.

This approach is consistent with TWAIL's radical, yet ultimately reformist agenda of working within the law to cultivate an approach to decision-making that is both cognizant of, and sensitive to the experiences of those from the global south. Recognizing that discretion is not, in itself, an inherently benevolent decision-making mechanism, I nevertheless argue that it is inevitable and that its existence provides an opportunity for the consideration of Southern perspectives in a manner that could materially affect outcomes for those unnecessarily caught in the security-inadmissibility apparatus. Infusing TWAIL perspectives into administrative discretion in the security sphere does not ultimately challenge the exclusionary nature of state security practices, but it does require that such practices be carried out in nuanced and coherent ways that are reflective of Southern realities.

My project here, if it is not already apparent, is an unapologetically normative one. I am of the view that discretionary authority that affects the very right of individuals to seek asylum from persecution, such as that related to security



measures, needs to be interpreted narrowly, individually and in context. I am comforted in taking this position by the view offered by some, and with which I agree, that questions about public administration are almost inherently tinged by politics. This is because, as Sossin notes, administration itself “is not and has never been a science - it is and has always been normative.”<sup>1</sup>

I also acknowledge in the following pages that discretion is both inevitable and potentially, but not necessarily, helpful in this normative agenda. It is unrealistic in the fortress-like mentality of contemporary Western states to suggest that security measures – in the form of the ‘laws on the books’ – be relaxed or that the executive handcuff itself from a relatively wide degree of latitude in matters of security. The only place where more nuanced, fair and coherent outcomes can be realized, then, is in the spaces left open by an otherwise overly broad security regime; in other words, in the realm of discretion. The only way for discretion’s potential to be realized, I contend, is through a reconfiguration of *who* makes such decisions and a reconception of *how* they are made, elevating the perspectives of those who are subject to them and recognizing that such individuals need to be *listened* to in order to properly assess both their desire and eligibility for admission. To help illustrate these points, I refer toward the end of this chapter to several conversations I have had with inadmissible persons and with the lawyers who represent them. Before getting to their stories, however, it is important to first back up a few paces and sketch out a brief history of discretion, a topic to which I now turn.

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<sup>1</sup> Lorne Sossin, “From Neutrality to Compassion: The Place of Civil Service Values and Legal Norms in the Exercise of Administrative Discretion” (2005) 55 Univ Tor Law J [Sossin, Neutrality to Compassion] 427 at 428.

## **Discretion and the law as dramatic foils: A brief history**

The interplay between discretionary decision-making and the rule of law goes to the very core of administrative law – it raises questions about the role of the executive and the independence of tribunals, and more fundamentally, about the place of law within the administrative state. As David Strauss has noted, “[t]he dilemma of rules and discretion is ancient and intractable, and it is ubiquitous in the law.” Discretion means many different things in many different contexts. In the words of Richard Lempert, the discretion that law grants “may be examined as a quality of rules, as a quality of behavior, or as a sense that people have of their freedom to act.”<sup>2</sup> In this chapter, I predominantly refer to discretion in terms of the role it plays in legal landscapes, while recognizing that many of the problems associated with discretion are not created by law, and cannot be corrected by law alone. This type of formal legal discretion, as Sossin and Pratt observe, “arises when an official is empowered to exercise public authority and afforded scope to decide how that authority should be exercised in particular circumstances.”<sup>3</sup> Such discretion, which usually finds its genesis in permissive statutory language, thus involves the granting of a power to choose between options, but “within a context set by law.”<sup>4</sup> Discretion in this sense may thus be viewed as freedom and constraint, both rooted in the law.<sup>5</sup>

### ***4.2.1 Discretion, the will of the Sovereign and the rule of law***

Conversations about the role that discretion plays in administrative decision-making have been around as long as administrative decision-making itself. These conversations have evolved in fascinating ways over the years, tracking a larger and

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<sup>2</sup> Richard Lempert, “Discretion in a Behavioural Perspective: The Case of a Public Housing Eviction Board”, in K. Hawkins, ed., *The Uses of Discretion* (Oxford: Clarendon Press, 1992) [Hawkins, *The Uses of Discretion*] at 185.

<sup>3</sup> Anna Pratt & Lorne Sossin, “A Brief Introduction of the Puzzle of Discretion,” (2009) 24 *Can JL & Soc* 301.

<sup>4</sup> Lempert, *supra* note 2, at 186.

<sup>5</sup> *Ibid.*

more general commentary about the rise of the modern administrative state. Many scholars from the first part of the last century, most notably A.V. Dicey, viewed unfettered discretion as being anathema to the rule of law and an exercise of executive (or sovereign) power that needed to be constrained by the judiciary. As Cartier notes, citing Willis, this view may at least in part be attributed to the institutional memory of the judiciary on the role that it had played in defending the commons against the tyranny of the king.<sup>6</sup> Others situate the views of Dicey and others within the *laissez faire* liberal economic model that prevailed at the time: governments should do little and what they do should be subject to review by the courts and the courts alone.

Regardless of its historical antecedents, this view of administrative discretion construed it as a threat to liberty and a vehicle for the expression of arbitrary executive power. Adherents to this school of thought were highly skeptical of the capacity of administrative agencies to compose themselves and to behave in a manner that comported with the rule of law, unless closely leashed by the courts. Indeed, to Dicey and others, this had to be the case since the very concept of law was inextricably linked to the judiciary.<sup>7</sup>

#### ***4.2.2 Discretion and the imperatives of the administrative state***

Later, with the rise of the welfare state, executive action and the discretion through which it was channeled came to be viewed with less suspicion. On the contrary, discretion in the nascent administrative state was seen as a key mechanism for ameliorating inequality and addressing broad policy goals in the public interest. Thus a generation of administrative law scholars shifted their focus

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<sup>6</sup> Genevieve Cartier, “Administrative Discretion as Dialogue: A Response to John Willis (or: from Theology to Secularization)” (2005) 55 Univ Tor Law J 629 [Cartier Discretion as Dialogue].

<sup>7</sup> A.V. Dicey, *The Law of the Constitution* (London: Macmillan, 1885), 10th ed., 1959, E. C. S. Wade, editor (repr. 1965) at 40. Dicey could not have been more explicit on this point – he defined law simply as “any rule which will be enforced by the courts...”

away from shielding individuals from the excesses of the state, and instead embraced the value of broad discretionary latitude in the promulgation of public policy.

In Canada, John Willis is frequently credited with leading the charge away from Dicey's inherently suspicious approach to administrative discretion. For Willis, the first stage in the analysis was to acknowledge the reality, indeed the centrality, of the administrative framework in the modern state. Given this reality, Willis reasoned, the most important task is to fit the administrative realm into our constitutional structure. This, Willis continued, was best achieved through a functional approach to determining both "who is best fitted to exercise a discretion" and "to what extent and by what type of persons shall the exercise of the discretion be supervised."<sup>8</sup> Willis emphatically believed that in the administrative realm, the executive was more suitably fitted to exercise this discretion. Indeed, to Willis, discretion was a central feature of administrative action, one that had to exist essentially outside the realm of law, or perhaps more to the point, outside the gnarled grasp of the judiciary.

And just as Dicey's approach can be situated within the larger economic and political ideologies that prevailed at the time, so too can the approach which followed it. In the decades following World War I there emerged a strong belief in both the obligation and capacity of government to address all social problems. This approach was intimately tied to a growing faith in science and the capacity of experts to bring science and scientific reasoning to virtually every aspect of life, and governance was no exception to this. Writing in the *Yale Law Journal* in 1937, Robert Cooper observed,

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<sup>8</sup> Cartier, *Discretion as Dialogue*, *supra* note 6 at 632, citing John Willis, "Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional" (1935) 1 *U Toronto LJ* 53, at 59.

The administration of general legislation by technical experts, skilled and trained in specialized fields, is "the contemporary answer to the challenge to bridge the gap between popular government and scientific government."<sup>9</sup>

And to a very significant extent, this approach made sense at the time. Governance was becoming a vastly more complicated endeavour and it was increasingly clear that neither the legislature, the executive, nor in particular the courts, had the scientific or technical capacity to define policy and make decisions in key areas of government regulation. The complexity in these areas was instead navigated through the creation of bodies such as security and exchange commissions, labour relations boards and other regulatory bodies populated by experts in their respective fields.

While administrative regulation certainly existed before this era, its prominence as an integral component of the political landscape can certainly be traced back to this period. Indeed, to some, administrative governance was the defining feature of the era. In commenting on the shift towards the administrative, Roscoe Pound, while Dean of Harvard Law School, observed, "as the eighteenth and the forepart of the nineteenth century relied upon the legislature and the last half of the nineteenth century relied upon the courts, the twentieth century is no less clearly relying upon administration."<sup>10</sup>

Most commentators tended to recognize, begrudgingly perhaps, that administrative discretion had to be subjected to some minimal form of judicial scrutiny, but the encroachment of the court into the administrative arena was viewed with criticism bordering on hostility. Willis wrote of it being "confining and

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<sup>9</sup> Robert M Cooper, "Administrative Justice and the Role of Discretion" (1937) 47 Yale L J 577 at 583, citing Dickinson, J. "Judicial Control of Official Discretion" (1928) 22 AM. Pol. Sci. Rev., 275 at 277.

<sup>10</sup> R. Pound, "The Administrative Application of Legal Standards" (1919) 44 A.B.A. Report 445, at 446.

inadequate” to look at the administrative process from the viewpoint of the sporadic court cases on judicial control, particularly given its fixation on “that slippery eel, the rule of law.”<sup>11</sup> Or as Cooper put it,

No adequate reason has ever been advanced to explain why judges, apart from their individual capacities, are the “only suitable custodians of administrative honor and decorum” or “by what strange process...judges become more trustworthy than” administrative officials.” It is hardly reasonable to assume that a judiciary, completely untrained in the problems of public administration, is more capable or more likely to reach proper results than experienced administrators selected primarily for their specialized knowledge, technical competence, and thorough familiarity with the intricacies of modern governmental policies.”<sup>12</sup>

And what of the rights of individuals under the scientific administration of the modern state? The preoccupation of Dicey was all but abandoned on the premise that the public good was the paramount concern:

In a certain sense the recent tendency to invest administrative agencies with a discretionary authority

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<sup>11</sup> John Willis, “The McRuer Report: Lawyers’ Values and Civil Servants’ Values” (1968) 18 Univ Tor Law J 351 at 355-356 [Willis, McRuer Report].

<sup>12</sup> Cooper, *supra* note 9 at 595. Cooper later describes judicial and other intervention as almost inherently distorting of the administrative project:

[T]he primary purpose of investing the instruments of administration with a discretionary authority was to place the enforcement of legislative policies in the hands of officials who presumably possess a technical competence and specialized knowledge in their particular fields of governmental activity. In this respect the exercise of discretion is synonymous with the operation of a scientific government. Consequently, the efficiency of administration in performing its functions is reduced to the extent that its operations are controlled by external force which does not possess this indispensable degree of specialized ability. Whether the discretionary function is subject to a supervisory control by the judiciary or by any other non-expert body, the ultimate result is a perversion of the entire process of administration.

is a belated recognition of the paramountcy of the public over private interests. To this extent the principles of public law repudiate the older theory that administrative justice must be meted out in accordance with the traditions of the common law, for in view of the present responsibilities of the modern State the rights and interests of the private citizen can no longer be placed above or on an equal basis with the privileges and interests of government. The sound exercise of discretionary authority is the answer to the demand that administration be accorded a freedom to determine what the national interest requires in any situation within its control.<sup>13</sup>

The scientific rationalism and open-ended faith in public administration that dominated this view is replete with criticism of liberal legality which, the argument went, not only skewed the fair and efficient running of government, but also underestimated the built-in safeguards of "fairminded civil servants, a vigilant press, and a 'watch that government' atmosphere in the general public."<sup>14</sup>

#### ***4.2.3 Where law ends: discretion or tyranny?***

If the middle part of the century was something of a science experiment in technocratic discretionary decision-making, it can fairly be said that its underlying hypothesis was first, or at least most notably, questioned with the publishing of K.C. Davis' *Discretionary Justice: A Preliminary Inquiry* in 1969.<sup>15</sup> Davis argued that the administrative system, such as it was at the time, was riddled with examples of discretion gone wrong. Davis focused primarily on the discretionary powers of police and prosecutors, noting that they were amongst the most important policy makers in society and yet their decisions were inherently vulnerable to arbitrariness and were entirely beyond the scope of judicial or other review. The

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<sup>13</sup> Cooper, *supra* note 9 at 588.

<sup>14</sup> Willis, McRuer Report, *supra* note 11 at 353.

<sup>15</sup> K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge, LA: LSU Press, 1969) [K.C. Davis, *Discretionary Justice*].

book was not, however, confined to the broad discretion found in the criminal justice system. Indeed, Davis pointed to myriad examples of unfettered discretion within the administrative state that were essentially beyond the power of law to control.

But Davis was no Dicey. He recognized both the inevitability of discretion and the central role that it had come to play in the modern state. Indeed, Davis commences *Discretionary Justice* by referring to the Lockean axiom that “where law ends tyranny begins,” but suggests that, in reality, where law ends *discretion* begins and that this discretion may mean “either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness.”<sup>16</sup> I shall return below to this idea of the normative character of discretion, but for now the point is simply Davis’ recognition of its ubiquity in the modern state. What Davis lamented was the proliferation of what he termed unnecessary discretionary power and the lack of structure and checks applied to those remaining areas of discretion deemed necessary. Properly conceived, however, Davis appreciated the potential of discretion to tailor justice to the inherently unpredictable circumstances of the individual. Indeed in many circumstances, Davis acknowledged, the mechanical application of a rule with no recourse to discretion results in injustice. For as Edward Chase noted in an early review of *Discretionary Justice*, “[t]he necessity of discretion is a manifestation of our condition as limited, thoroughly historical beings. No rules or principles laid down yesterday or today can hope to foresee, much less control and regularize, the profusion of event and personality which tomorrow will thrust upon us. We cannot divine, much less subdue, the future. Some discretion...is necessary, always.”<sup>17</sup>

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<sup>16</sup> *Ibid* at 3. Davis appears to wrongfully attribute the axiom to William Pitt, though it seems that it first appeared in Locke’s “Of Tyranny” in Book II, § 202 of Chap. XVIII of the *Two Treatises of Government*.

<sup>17</sup> Edward Chase, *Discretionary Justice: A Preliminary Inquiry* (book review) (1969) 44 *Tulane Law Rev* 649.



To Davis what was needed, and what administrative bodies were to strive for, was individualized justice; that is, justice that to the “appropriate extent” was tailored to the needs of the individual, which could only be accomplished through the proper balance of rules and discretion.<sup>18</sup> Writing of Davis in 1979, Harry Arthurs posed the dilemma in these terms:

What, then, is the proper relationship between law and discretion? Davis defines the problem as finding “the optimum point on the rule-to-discretion scale,” a task which is said to be inevitable because “[e]very rule involves some discretion and every discretion involves some limitation.”<sup>19</sup>

The problem, to Davis, was not with discretion itself, but with the abuse of discretion, which was avoidable through confining it to necessary contexts, through structuring the manner in which it is exercised and by ‘checking’ it through a variety of oversight mechanisms. Approached in this way, Davis suggested that discretion could be transformed from a mechanism of arbitrary state power to a facilitator of the kind of bespoke justice that he envisioned.

Central to Davis’ conception of how discretion should be structured was the idea of openness, both to the individuals who are the subjects of administrative proceedings and to the larger public. As we shall see in the coming pages, the aspiration that discretion be conceived of as a space for dialogue is predicated on, and to some small extent, owes its existence to this call for openness in the realm of administrative action. The call for openness and fairness toward those affected by administrative decisions can also be discerned from the evolution of jurisprudence on discretion, a topic to which I turn below.

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<sup>18</sup> K.C. Davis, *Discretionary Justice*, *supra* note 15, at 19.

<sup>19</sup> H W Arthurs, “Rethinking Administrative Law: A Slightly Dicey Business” (1979) 17 *Osgoode Hall Law J* 2 at 25.

Before doing so, however, two further points should be made. The first relates to the difficulty in devising any unifying theory of discretionary decision-making. The difficulty lies, at least in part, in the breadth and diversity of the endeavour itself. It is trite, of course, that administrative law governs everything from broad and relatively esoteric policy propagating bodies to highly adversarial and curial-type adjudicating tribunals. Supreme Court of Canada Justice Louis Lebel described the large tent of administrative law in the following, amusing way: “[N]ot all administrative bodies are the same. Indeed, this is an understatement. At first glance, labour boards, police commissions, and milk control boards may seem to have about as much in common as assembly lines, cops, and cows!”<sup>20</sup>

To some extent at least, differing opinions on the topic of discretion seem to turn on which end of the administrative law spectrum is most prominent in the mind of the commentator. If, in one’s mind’s eye, administrative law consists primarily of an array of policy-setting experts seeking to bring order to the complexity of the modern state, a relatively permissive approach to the question of discretion makes sense. Those, on the other hand, who begin from the position that administrative law is primarily a kind of ‘court-lite’ that adjudicates the fundamental rights of individuals, are more likely to emphasize the need for tight judicial constraint over discretion. Harlow and Rawlings label this the “model of law-model of government” distinction.<sup>21</sup> In defining this distinction, Cartier notes:

A model of law defines administrative law as a set of rules and principles designed to *control* the administrative state. It focuses on the ability of courts to control administrative exercises of power and to protect individual liberty. By contrast, a model of government views administrative law as *facilitating* government action and promoting the public interest.<sup>22</sup>

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<sup>20</sup> *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307, 2000 SCC 44 at para 158.

<sup>21</sup> See Carol Harlow & Richard Rawlings, *Law and Administration*, 2d ed. (London: Butterworths, 1997) at 69ff.

<sup>22</sup> Cartier, *supra* note 6 at 638, emphasis in original.

This dichotomy can be observed throughout the commentary on discretion. It influenced Dicey's critique of discretion and in turn coloured Cooper and Willis' criticism of Dicey; it inspired Davis' *cri de coeur* against unfettered discretion and finally it influenced subsequent criticism of Davis.<sup>23</sup>

Second, it is a mistake to look at the evolution of commentary on administrative discretion, as superficially described above, as being defined by a series of discrete periods. Dicey had his successors, and his views can still be discerned in some of the more interventionist judgments that emanate from the courts. The contributions of Willis and others similarly continue to reverberate throughout the administrative law world, as do those who have swung the pendulum back towards a more rights-based orientation.

#### ***4.2.4 Discretion and Canadian law in three parts: Roncarelli, Nicholson and Baker***

While it is well beyond the scope or ambition of this chapter to trace Canadian jurisprudential history on discretion in administrative law, it is important to provide a brief sense of this history to both elaborate on the relationship between discretion and law and to outline the role of the courts in creating the conditions for a dialogical approach to administrative decision-making.

#### *Roncarelli v. Duplessis*<sup>24</sup>

A decade before the publication of Davis' *Discretionary Justice*, the decision of the Supreme Court of Canada in *Roncarelli v. Duplessis* marked a shift, if not a sea

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<sup>23</sup> The most notable perhaps being that of D.J. Galligan, see *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986) [Galligan, Discretionary Powers] at 110.

<sup>24</sup> [1959] S.C.R. 121 [*Roncarelli*].

change, between the previous era of “untrammelled” administrative discretion and an emerging focus on individual rights and judicial oversight. While there remains debate as to the degree to which discretion has become “trammelled” in the post-*Roncarelli* era, it is certainly clear that the Court’s decision marked an important development.<sup>25</sup>

The case involved a decision by then-Quebec premier Maurice Duplessis to revoke the liquor licence of Frank Roncarelli for reasons related to his faith as a Jehovah’s Witness and, more specifically, because Roncarelli frequently provided bail for fellow members of his faith who were being arrested for handing out Jehovah’s Witness literature, a practice which irked the local city prosecutor.<sup>26</sup> The liquor licence revocation eventually caused Roncarelli to close down his restaurant and he sued for damages. He prevailed at trial, but that decision was overturned on appeal to the Court of Queen’s Bench.

In a 6-to-3 decision, the Supreme Court of Canada reinstated the trial decision, concluding that Duplessis had wrongfully caused the revocation of Roncarelli’s liquor licence and increased the damages owing to him. While three separate set of reasons were provided by the majority, it is really only the decision of one judge – Justice Rand – whose reasons called into question the conception of discretionary power as constituting an area of non-justiciable executive prerogative.

Justice Rand notably pointed out that, even where broad statutory discretion is conferred on government officials, their decisions must nevertheless conform to the statutory purpose that gives rise to their authority. No legislative act, Justice Rand continued, can “be taken to contemplate an unlimited arbitrary power exercisable

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<sup>25</sup> See for example Lorne Sossin, “The Unfinished Project of *Roncarelli v. Duplessis*: Justiciability, Discretion, and the Limits of the Rule of Law” (2010) 55 McGill L J 662.

<sup>26</sup> Of interest, the arrests were carried out under a local ordinance which, after the licence cancellation, but before the Supreme Court’s decision in *Roncarelli*, was declared unconstitutional – see *Saumar v The City of Quebec*, [1953] 2 SCR 299.

for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute.”<sup>27</sup> Therefore even where seemingly unfettered discretion is conferred upon state officials, there is always an implied limit on its exercise, a limit that is demarcated by the purpose of the statutory framework involved *and* by the interests of individuals subject to that framework.<sup>28</sup> Discretion, to put it differently, “necessarily implies good faith in discharging public duty.”<sup>29</sup>

The limits on discretionary power, Justice Rand concluded, were disregarded in the revocation of Roncarelli’s liquor licence for reasons “totally irrelevant” to the sale of liquor, but rather because of unrelated activities – those related to his religion – that he had an absolute right to engage in.

Justice Rand’s effort to define the outer limits of discretionary power, together with his emphasis on good faith decision-making in matters affecting individual rights did not instantly transform administrative law, but they did represent a first crack in the wall that had previously sealed off discretionary decision-making from judicial oversight. The jurisprudence that followed *Roncarelli* remained largely deferential of discretionary decisions but the shift in judicial orientation was notable – it was no longer to be assumed that discretionary power was a lawless space, entirely immune from the judiciary. At the very least, the courts began to ask tentative questions about whether obligations related to fair procedures, if not substantive outcomes, had been met in the discretionary domain.

*Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*<sup>30</sup>

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<sup>27</sup> *Roncarelli*, *supra* note 24 at 140.

<sup>28</sup> *Ibid* at 141.

<sup>29</sup> *Ibid*.

<sup>30</sup> [1979] S.C.R. 311 [Nicholson].

This distinction between process and substance has preoccupied legal scholars, if not always the courts, for decades, particularly in the wake of the decision of the Supreme Court of Canada in *Baker*, discussed at greater length below. Years prior to *Baker*, however, the Supreme Court first determined in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police* that the fulcrum on which procedural obligations rest is not a rigid classification of the decision-making setting (i.e. judicial, quasi-judicial or discretionary) but is determined, rather, by the rights at stake.

Nicholson was a police officer who, after 15 months of employment for the county of Haldimand, was terminated without an opportunity to be heard and without any reason given. The employer claimed that as Nicholson was still within an 18 month probationary period created by the *Ontario Police Act*, he was essentially an office holder “at pleasure” and his termination disclosed no grounds for review. Nicholson argued that he had a common law right to be treated fairly and be notified of the reasons for his termination. A majority of the Supreme Court ultimately agreed, finding that the proliferation of administrative action into virtually every area of life meant that the simple classification of a decision as being discretionary was no longer sufficient in determining whether the common law duty to act fairly arose. Rather, the consequences of the administrative action for the individual subject to such action were to be considered in determining the content of the duty of fairness in a given setting:

What rightly lies behind this emergence is the realization that the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those

adversely affected, regardless of the classification of the function in question...<sup>31</sup>

As Cartier rightly notes, the effect of the court's decision in *Nicholson* was to continue the process, started in *Roncarelli*, of softening the judicial interpretation of discretion from that of a pure top-down expression of state power to a process that includes and must take into consideration the interests of those affected by such decisions.<sup>32</sup> And as many scholars have further pointed out, this process of centring individual interests in discretionary decision-making reached its apex in *Baker*, a decision to which I now turn.

*Baker v Canada (Minister of Citizenship and Immigration)*<sup>33</sup>

The decision of Justice Claire L'Heureux Dubé in *Baker v Canada (Minister of Citizenship and Immigration)* was seminal for a variety of reasons and it marked an important evolutionary moment in both the characterization and the content of public law in Canada. The decision is multifaceted, but here I focus on the way in which it profoundly called into question distinctions that had previously been assumed – distinctions between law and discretion and between procedure and substance.<sup>34</sup> Breaking down these distinctions carries with it the potential to reformulate administrative law by recognizing that discretionary decisions are more than mere exercises of executive power and by affirming that the interests of those subject to administrative decisions matter, while simultaneously recognizing the imperatives of the administrative state. Cartier describes this as the potential to reconceive discretion as a process of dialogue rather than an exercise in top-down

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<sup>31</sup> *Ibid* at 325, citing, Mullan, *Fairness: The New Natural Justice* (1975), 25 Univ of Tor LJ 281.

<sup>32</sup> Genevieve Cartier, *supra* note 6 at 642.

<sup>33</sup> *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [Baker].

<sup>34</sup> *Ibid* at para. 54 and see generally, David Dyzenhaus & Evan Fox-Decent, "Rethinking the Process/Substance Distinction: Baker v Canada" (2001) 51 Univ Tor Law J 193 [Dyzenhaus & Fox-Decent, "Rethinking"].

exertions of state power. And it is precisely a reconception along these lines that I contend below should also emerge in the immigration-security setting.

The facts in *Baker* have been recounted dozens of times, and so I restate them here only briefly. Mavis Baker was a Jamaican citizen who had resided in Canada for several years and who had four Canadian-born children. She herself had no legal status in Canada and was eventually ordered deported. In order to avoid deportation, she submitted an application for permanent residence on humanitarian and compassionate (H&C) grounds. The application was refused and Ms. Baker challenged the refusal, arguing, amongst other things, that the refusal was unlawful because the immigration officer had failed to adequately consider the best interests of her children.

In the decision of the majority in *Baker*, Justice L'Heureux Dubé characterized discretion in the following terms:

[T]he concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries.<sup>35</sup>

Justice L'Heureux Dube noted that, to that point, courts tended to hold a “dualistic” view of administrative decision-making; that is, there was a distinction, a dualism, between jurisdictional issues (over which the courts presided) and non-jurisdictional issues such as policy-making and discretionary decision-making (over which government tribunals held expertise). *Baker* appeared to fundamentally question this dualism by concluding that virtually all decisions contain within them a measure of discretion and to this extent, the courts had to determine the

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<sup>35</sup> *Baker*, *supra* note 33 at para 52.



appropriate level of scrutiny they should apply in reviewing substantive aspects of discretionary decisions.<sup>36</sup>

The questioning of the law-discretion distinction was a profound change, most notably because it cleared the path to a substantive review of discretionary decisions based on the reasonableness standard. Thus notwithstanding the “choice of options” granted to decision-makers, and the deference that will be afforded the choices made, discretionary decisions could be reviewed for their substantive reasonableness, based on several factors:

However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law...in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms*...<sup>37</sup>

To the court in *Baker*, judicial review is not limited to merely defining the legal limits of discretion, but much more fundamentally, it may delve directly into the decision to determine its reasonableness. And reasonableness in this context means that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*. This is perhaps the most important insight of the *Baker* decision – the insight that Dyzenhaus and Fox-Decent refer to as the “principle of legality.” That is, the idea that “legal principles, of which the duty of fairness is an important example, control the spaces in which both the judgment of administrative tribunals and the exercise of discretion take place.”<sup>38</sup>

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<sup>36</sup> A determination that they should make through what was then termed the “pragmatic and functional” approach: *Baker*, *supra* note 33 at para 55.

<sup>37</sup> *Ibid*, at para. 53, citations omitted.

<sup>38</sup> Dyzenhaus and Fox-Decent, *Rethinking*, *supra* note 34 at 218.

In then assessing, substantively of course, whether or not the officer's decision to refuse Baker's application was reasonable, Justice L'Heureux Dubé looked at whether or not it adhered to the values underlying the grant of discretion. The grant of discretion was, in this case, inseparable from the humanitarian and compassionate nature of the application, and required as such, that officers approach the matter in a humanitarian and compassionate manner. The values underlying the grant of discretion were also found to lie in general statements found within the *Immigration Act*, in international law and in soft law Ministerial Guidelines meant to assist officers in their discretionary deliberations. In taking these factors into consideration, Justice L'Heureux Dubé concluded that the officer's decision was inconsistent with the values underlying the grant of discretion primarily because the officer failed to give sufficient consideration and weight to the best interests of Baker's children.<sup>39</sup>

The *Baker* decision has had a profound impact, not necessarily on H&C application outcomes, but on the manner in which immigration officers are expected to exercise their discretion (particularly in cases involving the interests of children) and on the openness of lower courts to consider whether officers have meaningfully engaged with the evidence put before them. The willingness of the court in *Baker* to peer into the substantive reasonableness of the immigration officer's decision carved out a dialogical space between applicant and decision-maker that does not dictate outcomes, but does frame the process in a way that gives voice to the perspective of H&C applicants. As we shall see in the coming pages, however, the *Baker* decision represents a clear high water mark in the court's willingness to engage substantively in administrative decisions and has come to sit in sharp contrast to the court's approach to cases involving migration and security. Before

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<sup>39</sup> The court also found that the comments of one of the officers involved in the case gave rise to a reasonable apprehension of bias, which itself warranted granting the appeal.

exploring this issue, however, I delve a little more deeply into a central issue at play in the *Baker* decision – that is, the precise nature of the relationship between law and discretion.

### **Debunking the Law-Discretion Binary**

As can be seen from the above, in the evolution of the administrative state, discretion and law have frequently been cast as dramatic foils, the presence of one signifying the absence of the other. As I further alluded to above, this dynamic finds its origin in the move toward modern governance in which constraining state power by law was viewed, for better or worse, as the antidote to the discretionary whims of the sovereign. While this idea of the discretion-law dichotomy has taken on a modern form under liberal democracies, it has been around since antiquity, for as Aristotle noted,

Rightly constituted laws should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement.<sup>40</sup>

The most cited contemporary articulation of this view is that of Dworkin, who described discretion as being like the hole in a doughnut, as something that does not exist, in other words, “except as an area left open by a surrounding belt of restriction.”<sup>41</sup> Traditional debates about discretion, such as those outlined above, start from Dworkin’s assumption – that there is a negative correlation between law and discretion – but disagree on the question of whether, on this understanding, discretion is a good thing.

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<sup>40</sup> Aristotle, E. Barker (trans), *The Politics*, book III, (New York: Oxford UP, 1998) at 112.

<sup>41</sup> R. Dworkin, Ronald, *Taking Rights Seriously* (Cambridge, Mass: Harvard UP, 1977), at 31.

In recent years, several scholars, mostly from the social sciences, have reformulated the law/discretion binary, suggesting that the concepts exist not in opposition to each other, but as parallel expressions of government power. Seen in this light, the existence of discretion is not merely a “residual category of law,” but is rather an essential component of liberal governance that may either ameliorate or exacerbate law’s exclusionary tendencies, depending on the circumstances of the particular case.<sup>42</sup>

Discretion, to such scholars, is both ubiquitous and inevitable and is best understood not as a threat to the rule of law, but as a central process by which legal abstraction is translated into concrete reality by legal actors.<sup>43</sup> This interpretive exercise is inevitable because of the indeterminacy of language, the infinite variety of circumstances in which law must operate and the (sometimes intentional) ambiguity of legislative intent.<sup>44</sup> In this context, the primary contribution of the social sciences has been to point out that the exercise of discretion is influenced by a range of factors outside the law itself. This is not to suggest that law is irrelevant; it *will* generally impose a Dworkinian-like framework upon discretionary decisions, but within that superstructure, social and organizational factors often play a far more immediate and meaningful role in influencing discretionary decisions.<sup>45</sup> Rather than the hole in the doughnut, consider for a moment another analogy. Imagine the lives of two ants living inside a matchbox and the extent to which their

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<sup>42</sup> See generally, Anna Pratt, *Securing Borders: Detention and Deportation in Canada*, (Vancouver: UBC Press, 2005) [Pratt, *Securing Borders*] at 57.

<sup>43</sup> Keith Hawkins, “The Uses of Discretion: Perspectives from Law and Social Science” in Hawkins, *The Uses of Discretion*, *supra* note 2 at 11.

<sup>44</sup> Galligan, *Discretionary Powers*, *supra* note 23 at 1.

<sup>45</sup> This would include various soft law instruments – bureaucratic guidelines, policies and the like – but would certainly not be limited to them. It would also include any number of larger sociological norms: on the influence of soft law, see Lorne Sossin & Charles Smith, “Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government” (2003) 40 *Alberta Law Review* 867. On other factors see for example MP Baumgartner, “The Myth of Discretion” in Hawkins, *The Uses of Discretion*, *supra* note 2 [Baumgartner, *The Myth of Discretion*] at 129 (on discretion and discrimination) and Richard Lempert, “Discretion in a Behavioural Perspective: The Case of a Public Housing Eviction Board” *supra* note 2 (on discretion and behavioural factors).

lives are constrained, determined and influenced by the four walls of that box. Now move those ants into a football stadium and consider the role that the stadium plays in their lives. To be sure it encloses them and frames, in some very general way, the outer parameters of their experience, but for such ants, a panoply of other factors will become far more relevant to their existence. This is one observation of recent scholarship; law provides some outer scope of meaning, but for many decision-makers and for the individuals subject to discretionary decisions, other factors are far more immediate.

The suggestion that a variety of non-legal factors is central to discretionary decision-making is not, however, to suggest that such decisions are arbitrary. In fact, social scientists frequently argue the opposite; that discretionary decision-making is highly predictable, but not by recourse to legal doctrine. Discretion is not, from this perspective, an amorphous zone of unpredictable administrative action but is rather a domain of social organizing as amenable to scrutiny as any other.<sup>46</sup> Indeed, the “social context” of administrative matters – influenced by various factors including the patterned forms of behaviour and social backgrounds of decision-makers and the perceived “respectability” and social status of the parties – often provides a very clear picture of why discretionary decisions are made.<sup>47</sup> Baumgartner goes on to explain the implications of this view of discretion:

All of this requires not only a new conception of discretion, but also a new appreciation of its consequences. The traditional view that saw discretionary decision-making as a very personal, situational, and idiosyncratic affair implied an image of random judgment in which the fate of all citizens alike hinged on largely unknowable factors. Uncertainty of outcomes fell equitably across the citizenry some people – perhaps many people – might end up being

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<sup>46</sup> Geneviève Bouchard & Barbara Wake Carroll, “Policy-making and administrative discretion: The case of immigration in Canada” (2002) 45 *Canadian Public Administration* 239.

<sup>47</sup> Baumgartner, *The Myth of Discretion*, *supra* note 45 at 130-1.

treated more favorably than stipulated by the written law, but for reasons of chance, emotion, or caprice that no one could take for granted and that might as well have worked against them or on behalf of someone else. The sociological reality of discretion reveals something quite different. How individuals fare in the legal system turns out not to be mysterious, and, what is more, not random. People enter the legal process with very different prospects, depending upon their own social characteristics as well as those of their opponents, supporters, and the officials who deal with them. Officials may answer to the dictates of their conscience, but their conscience consistently comes to different conclusions depending on the social circumstances of the case. Left to their own devices, agents of the law routinely favor some sorts of people over others. Discretion, in practice, amounts to what is commonly known as discrimination.<sup>48</sup>

In the context of immigration enforcement, Pratt comes to much the same conclusion, albeit from a distinct theoretical perspective, calling out the fallacy of the autonomous, free-thinking decision-maker and illustrating how discretionary power “facilitates the translation of shifting societal anxieties and priorities into exclusionary immigration law and policy.”<sup>49</sup> In arriving at this conclusion, Pratt traces the unseemly history of decision-making concerning archetypal ‘undesirable immigrants’ from previous preoccupations over race, religion and morality to contemporary fixations on criminality and security.<sup>50</sup> Also, with the shift in decision-making authority to border security agencies, it seems clear that the

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<sup>48</sup> *Ibid* at 157.

<sup>49</sup> Anna Pratt, “Dunking the Doughnut: Discretionary Power, Law and the Administration of the Canadian Immigration Act” (1999) 8:2 *Social and Legal Studies* 199 at 200.

<sup>50</sup> Pratt, *Securing Borders*, *supra* note 42 73-91. Pratt further suggests that in recent years, the concept of national security has considerably expanded, encapsulating concerns over certain forms of criminality and organized criminality to form a ‘crime-security’ nexus that significantly blurs the lines between criminal justice and immigration. See “Wanted by the CBSA” in Deborah Brock, et al (eds) *Criminalization, Representation, Regulation: Thinking Differently About Crime* (Toronto: UofT Press, 2014) and “Immigration Penalty and the Crime-Security Nexus: The Case of Tran Trong Nghi Nguyen” in Karim Ismaili, et al (eds), *Canadian Criminal Justice Policy: A Contemporary Reader* (Oxford: Oxford UP, 2012).

decisions they make are not merely a translation of social concerns about security, terrorism and risk, but a reflection of a metastasized and, in many cases, distorted version of them.

But to suggest that administrative discretion frequently acts as a conduit for the expression of social prejudices is not, at least for many social scientists, to call for more law. On the contrary, the understanding of law and discretion as complementary components in an overarching regulatory scheme suggests that the layering on of more law would not alter its fundamental nature. Criticism of particular forms of discretion should also not be understood as criticism of its essential quality because, to many, it does not have an essential quality, at least not in the normative sense. To borrow Willis' colourful metaphor, it is not just the rule of law, but also administrative discretion that is a 'slippery eel', a shapeshifter, capable of both jealously protecting executive control and dispensing individual justice, frequently at the same time. Within Canadian immigration law one can readily see both forms of discretion in action – the Minister always possesses discretion to exempt individuals from the hard application of the IRPA on humanitarian and compassionate grounds where such application would result in unusual hardship.<sup>51</sup> Elsewhere, the IRPA provides the Minister with extraordinarily broad discretion to restrict the rights of asylum seekers by designating their arrival as "irregular".<sup>52</sup> Within the same legislation we see the two faces of discretion in action – discretion as a quality of mercy and as a repository of executive authority. Both forms of discretion, however, reinforce the notion that the power to decide resides with the sovereign, which in turn leads to the observation that law and

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<sup>51</sup> IRPA, s 25(1). As I note in the pages that follow, however, this discretion in the specific context of the IRPA's security provisions was recently circumscribed by the *Faster Removal of Foreign Criminals Act*, SC 2013, c 16 [FRFCA], s 9.

<sup>52</sup> IRPA, s 20.1.

discretion are not truly oppositional, but “mutually constitutive” pieces to the puzzle of state power.<sup>53</sup>

The ubiquity of discretion in the modern state, together with a recognition of its normative neutrality have lead many scholars to avoid sweeping claims about how and when it should be deployed, but to seek instead to understand it in the particular contexts in which it is wielded. As Pratt further explains:

To view discretion as a form of power promises to provide a way out of the dichotomous impasse imposed by the law/discretion binary. This view encourages different questions about discretion. Rather than asking why it is used, how it can be eliminated, curtailed or expanded, made more fair or just, the guiding question becomes how does this power *work* in specific empirical contexts? What are its practical purposes and effects? What are the historically specific discourses that inflect and justify its use? What social, political, legal, and economic preoccupations and processes influence its operations? What organizational and institutional networks, channels, and techniques are at play?<sup>54</sup>

In other words, the challenge posed by recent scholarship on discretion is not to eliminate it, as Dicey would have done, and nor is it to eliminate law’s encroachment on administration, as Willis would have had it, but to examine, closely and with nuance, the expressions of discretion in particular circumstances. Going beyond this, Handler calls not only for administrative action to be examined in context, but for it to be thought about creatively and with an awareness that there is a moral dimension to discretion – namely, as I have previously described, that those who are

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<sup>53</sup> Pratt, *Securing Borders*, *supra* note 42 at 57, citing Peter Fitzpatrick, *The Mythology of Modern Law*, (London & New York: Routledge, 1992).

<sup>54</sup> Pratt, *Securing Borders*, *supra* note 42 at 72.



subject to decisions have a moral right to participate in them, if not dictate their results.<sup>55</sup>

In the pages that follow, I take up Pratt and Handler's challenge to think about discretion in context, creatively and from a dialogical perspective and consider the possibilities and implications of dialogical approaches in the top-down world of immigration-security decision-making. In doing so, I readily acknowledge many of the claims that I have superficially outlined above concerning the law-discretion dichotomy. Such claims have profoundly amplified the conversation about administrative action but they do not, to me, suggest that law has no role to play. In the following sections, I examine the extent to which law can help to carve out the conditions in which a new and more positive conception of discretion may take root.

### **Discretion, democracy and communication: Discretion as dialogue**

As noted above, the traditional debates over discretion have tended to be preoccupied with its relationship to law and, more specifically, with the extent to which legal standards should constrain its exercise. As Pratt and Sossin point out, this process of narrowing the scope of discretion has given rise to a wave of scholarship on discretion as a mechanism for dialogue, democratization, and the enhancement of human dignity.<sup>56</sup> These contributions have come both from legal scholars and from social scientists, who have in recent years paid increased attention to the place of discretion within public policy. In the words of Cartier, new approaches to discretion tend to emphasize a "bottom up" analysis, starting from

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<sup>55</sup> Joel F Handler, "Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community" (1987) 35 UCLA Law Rev 999 [Handler, Dependent People] at 1076 and Joel Handler, "Discretion: Power, Quiescence, and Trust" [Handler, Power, Quiescence, and Trust] in Hawkins, *The Uses of Discretion*, *supra* note 2 at 334.

<sup>56</sup> Pratt and Sossin, *A Brief Introduction of the Puzzle of Discretion*, *supra*, note 3 at 303.

the individual affected by decision-making and moving out from there. This approach, Cartier observes, was essentially set in motion by the concern expressed by Justice Rand in *Roncarelli* for the perspective of the individual.<sup>57</sup>

According to Cartier, the *Baker* understanding of the rule of law in discretionary decision-making further paved the way for a substantive understanding of administrative law, based on what she terms “discretion as dialogue.”<sup>58</sup> This term is derived in no small measure from the work of Sossin and Handler, who also call for a conception of administrative discretion based on good faith processes of communication between decision-makers and those affected by the decisions. In developing their theories on discretion, these authors in turn look to principles of democratic governance, cooperative procedure and communicative action to undertake the ambitious project of “transforming citizenry from the object to the subject of government...”<sup>59</sup>

While calls for injecting administrative discretion with communicative processes are not entirely new, they have not generally prevailed, in part Sossin argues, because of the commonly made distinction between politics and discretion. In the political realm, dialogue is associated with democracy and is consequently expected. In the bureaucratic realm, which is, at least in theory, simply an ‘in the trenches’ actualization of political will, there is no such association, and dialogue is frequently viewed with suspicion. Sossin notes

That administrators do or should act out of a sincere belief in what is good and just, and that such a belief should be developed out of dialogue with groups

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<sup>57</sup> Cartier, *Discretion as Dialogue*, *supra* note 6 at 639.

<sup>58</sup> Genevieve Cartier, *Discretion as Dialogue*, *supra* note 6; see also Genevieve Cartier, “Reconceiving Discretion: From Discretion as Power to Discretion as Dialogue”, PhD Dissertation, University of Toronto, 2004 [Cartier Dissertation].

<sup>59</sup> L. Sossin “The Politics of Discretion: Toward a Critical Theory of Public Administration” (1993) 36 *Can. Pub. Admin.* 364 [Sossin, *Politics of Discretion*] at 365; J.F. Handler, *The Conditions of Discretion-Autonomy, Community, Bureaucracy* (New York: Russell Sage Foundation, 1986).

affected by those actions, rarely has played a role in these analyses.<sup>60</sup>

For Sossin, the key to providing a normative justification for bureaucratic decision-making comes from questioning the distinction between administration and politics. On this view, the relationship between law and discretion is not merely a “particular form of authority” but is rather a “potential forum for politics.”<sup>61</sup>

As noted, in Cartier’s view, discretion as dialogue calls for a “bottom-up” approach to discretionary decision-making, rather than traditional approaches which view discretion from the top-down, as “one way projections of state authority.” In her 2004 PhD dissertation, Cartier set out her view of dialogic discretion as follows:

The central argument of my thesis is that administrative discretion must be approached from a bottom-up perspective and conceived as a "dialogue" between the individual affected by the decision and the public authority making that decision. This notion of "discretion as dialogue" is different from what I term "discretion as power", that is, discretion exercised from a top-down perspective or as a "one-way projection of authority" where discretionary powers were seen as "direct descendants of what were once considered to be unreviewable or unjusticiable executive prerogatives..."

The "dialogue" that is implied in my conception of discretion is not just procedural fairness. Procedural fairness creates spaces, venues for communication, while dialogue relates to the *content* of that communication. Dialogue consists of a meaningful exchange between the decision maker endowed with discretionary powers and the individual affected by the decision. Meaningful exchange requires that participants to the dialogue have the ability to put

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<sup>60</sup> Sossin, *Politics of Discretion*, *ibid* at 377.

<sup>61</sup> Lorne Sossin, “Redistributing Democracy: An Inquiry into Authority, Discretion and the Possibility of Engagement in the Welfare State” (1994) 26 *Ott Law Rev* 1 [Sossin, *Redistributing Democracy*].

themselves in the shoes of the other participants, to understand their perspective and to contribute to the making of a decision that is both responsive to the substance of the exchange and in line with legislative intent and public interest. Therefore, to view discretion as a dialogue requires that discretion be both exercised at the close of a meaningful and authentic communication between the parties involved, and justified in the light of the content of that communication. Stated differently, the discretionary decision is justified if it is a genuine reflection of the dialogue that took place. Dialogue is not merely explanatory: it affects the outcome in that it conditions the justification of the decision. It does not always or even often guarantee any particular outcome, but guarantees a *justified* outcome.<sup>62</sup>

As mentioned, Cartier's call for a view of discretion based on dialogue borrows from, and has much in common with Sossin's conception of communicative discretionary decision-making; the one real distinction, she asserts, is that she would apply her approach to all discretionary decision-making, rather than to the narrower subset of decisions contemplated by Sossin involving vulnerable individuals.<sup>63</sup>

Rather than focusing on the strictly legal project of confining and controlling bureaucratic discretion (a project that has only achieved a modicum of success in improving the situation of the disempowered), Sossin argues that it is necessary to "seek new ways of legitimating bureaucracy as an independent political institution."<sup>64</sup> The way to do this, Sossin asserts, is through a process of engagement imbued with dialogue between those who make decisions and those who are affected by them. Sossin grafts Habermas' theory of communicative action onto the

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<sup>62</sup> Cartier Dissertation, *supra* note 58 at 9.

<sup>63</sup> Cartier Dissertation, *supra* note 58 at 312. While Sossin clearly focuses on developing a theory of discretion that takes into account the vulnerable, it would appear less clear that he would limit his call for legitimating discretionary decision-making to situations involving vulnerable persons.

<sup>64</sup> Sossin, The Politics of Discretion, *supra* note 59 at 365.

administrative sphere in order to address a deficit of legitimacy that the administrative realm has always confronted in relation to both the judiciary and representative officials.<sup>65</sup> Referring to Habermas, Sossin suggests that legitimacy arises “in earnest” only from practical discourse and not merely from public acquiescence.<sup>66</sup>

Sossin further argues that a discursive conception of administrative law based on mutual engagement is meant not only to create spaces for dialogue, but also to create a situation of interdependence between decision-makers and those affected by discretionary decisions.<sup>67</sup> It is, Sossin continues, only through such a process of engagement that a truly democratic form of administrative discretion can be salvaged. He states:

What I term the "theory of engagement" focuses legal and political discourse on the content of discretion rather than its jurisdictional boundaries, in the hope of fostering a discursive space for reflecting on the nature, scope and purposes of administrative judgments. To the degree that this would enmesh a more diverse set of interests in the administrative process, and a principle of interdependence and mutuality in administrative relations, I believe it would counter the alienation which has become synonymous with how we think of "bureaucracy" in the welfare state.<sup>68</sup>

The need for such discourse is based at least in part on the notion that the legitimacy of democratic administration rests with its ability to empower people “to be persuasive, and have equal access to the resources needed to convey argument.”<sup>69</sup> I do not suggest here that the democratic obligation to confer discursive tools exists at large, but rather, that it arises in the sense contemplated by

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<sup>65</sup> *Ibid*, at 382-383.

<sup>66</sup> *Ibid*, at 382

<sup>67</sup> Sossin, *Redistributing Democracy supra* note 61 at 4.

<sup>68</sup> *Ibid*.

<sup>69</sup> Sossin, *The Politics of Discretion, supra* note 59, at 379.

scholars such as Benhabib and Abizadeh, when and on whom the state aims to exercise its coercive power.<sup>70</sup> This is particularly clear in the cases of Convention refugees and individuals seeking refugee protection who, at least potentially, possess rights against removal. In these circumstances, I assert that the legitimacy of democratic administration does require discursive and participatory approaches. To Handler, facilitating this ‘power to be persuasive’ is the central feature in overcoming the failure of adversarial approaches in addressing the needs of the powerless. He notes:

Discretion contemplates a conversation within a normative framework, but dependent people – the poor, minorities, the uneducated, and unsophisticated – are often at a serious disadvantage. They lack the information, the skills, and the power to persuade. The official has the unfair advantage.<sup>71</sup>

To Handler, then, it is not merely dialogue that is required, but dialogue within a certain context; that is, a cooperative context free of the strictures of the liberal adversarial model. Handler, like Sossin, speaks to the importance of fostering an interdependent approach to discretionary decision-making, an approach that cannot arise in an adversarial system fixated with procedural over substantive fairness concerns. He notes:

These limitations should not be surprising. Lawyers especially put too much faith in the relevance and durability of process, but process is always molded by substantive events...The task is to discover the conditions which will facilitate the creation and nurturing of empowerment in discretionary dependent

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<sup>70</sup> See Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (West Nyack NY: Cambridge UP, 2000) at 47-48 and Arash Abizadeh, “Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders” (2008) 36 *Political Theory* 37, both discussed in Chapter One, notes 60-62 and accompanying text.

<sup>71</sup> J. Handler, Power, Quiescence, and Trust, *supra* note 55 at 333.

relationships, not to search for some magical procedural formula.<sup>72</sup>

Handler and Sossin also argue for the need to move beyond the idea of the administrative decision-maker as an almost infallible source of technical expertise. Indeed, to Sossin (again channeling Habermas) the predominance of the technocratic decision-maker whose decisions are based solely on a detached view of instrumental reason is in large measure responsible for the disengagement of individuals from the public sphere. Instead, Sossin calls for a different approach, an approach based on dialogue and “communicative rationality” to create the conditions for “intersubjectivity.” And it is through such an approach, the argument continues, that individuals subject to administrative discretion become, in a sense, the subjects of democratic discourse, rather than mere “objects to be administered.”<sup>73</sup>

The objectification of those subject to administrative decisions is also of concern to Cartier, who sees top-down expressions of discretion as having created a significant legitimacy gap in administrative law. This gap can only be bridged, she suggests, by recognizing that grants of discretion must be consistent not only with the specific expression of legislative intent that creates them, but also with the core democratic values that undergird the broader legal system. Viewed from this perspective, discretionary decisions can only make a claim on legitimacy if they are made at the end of a process of meaningful engagement with the persons affected by those decisions. This idea of discretionary decision-making as a location for the expression of democratic values is important because of the breadth and importance of administrative law in modern democracies and because access points for democratic participation in decision-making are extremely limited. Injecting democratic values into discretionary decision-making would therefore bring

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<sup>72</sup> *Ibid*, at 354.

<sup>73</sup> Sossin, *Politics of Discretion*, *supra* note 59 at 375.

democratic legitimacy to such decisions. In this sense, it would also turn the traditional Diceyan view of discretion entirely on its head, transforming it from a threat to democratic principles into a process that actively improves the democratic nature of administrative decision making.<sup>74</sup>

Despite what appear to be the profound changes proposed by Handler, Sossin and Cartier in the way administrative discretion is conceived, none of these commentators suggest that discretion should be eliminated or that it should be entirely detached from law. First, both Handler and Sossin point to the above-discussed ubiquity of discretion and recognize that its existence is not, in itself, a normative issue. The goal is not to eliminate discretion, but, as Cartier notes, is rather to reconceive of it as a potential tool to help achieve the goals of a very particular legal order – one that “enhances the autonomy, dignity, and responsibility of the participants.”<sup>75</sup>

This project of reconceiving discretion as a location for democratic engagement preserves an important role for law, recognizing that it can help to create the conditions for dialogue to flourish, even if it cannot bring it about on its own. Put differently, I do not take it as the position of those who advocate a dialogical approach to administrative discretion that we return to the pre-*Roncarelli* era of unchecked administrative power. Nor do they argue against the use of law to clearly define, and narrow, the scope of discretion in particular contexts. They do not, in other words, celebrate the existence of discretion *per se*, but argue that where it exists, and it will always exist, it ought to be wielded in a particular way, respectful of basic values of democratic accountability and justification. This then brings us back around to the role of law and the courts, which have increasingly in the years

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<sup>74</sup> Cartier, Discretion as Dialogue, *supra* note 6 at 652.

<sup>75</sup> Cartier dissertation, *supra* note 58 at 310, citing Lorne Sossin, “The Criminalization and Administration of the Homeless: Notes on the Possibilities and Limits of Bureaucratic Engagement” (1996) 22 N. Y. U. Rev. L. & Soc. Change 623 at 669.



since *Baker* understood their role in reviewing administrative decisions as one that searches for justification. Indeed, in the years since the decision of the Supreme Court of Canada's decision in *Dunsmuir*, the very definition of a reasonable decision has come to mean one that is justified, transparent and intelligible.<sup>76</sup> A reasonable decision, Cartier suggests, is not simply one that is bounded by the law, but is also one that is justified because it arises from a genuine process of participation.<sup>77</sup> In this way, hinging discretion to dialogue can serve to fill the spaces left open by law with deliberative democratic principles. Law and legal rights on this view do not end conversations related to public decisions, they begin them.

If law can help to encourage a dialogical approach to discretion but is not on its own sufficient, the question is what more is needed to bring this approach about. The answer, in short, is the reform, and in some cases the transformation, of public service agencies. Again building on Habermas, Handler calls for legal institutions in the welfare state to alter their self-image from ones based on legal abstraction and the perception of individuals as objects to be legally administered, to bodies that facilitate communicative action to accomplish particular goals.<sup>78</sup> This can only happen, Handler continues, through both will and trust, not simply on the part of administrative agencies, but also on the part of those subject to their decisions. The "foundational condition of dialogism," Handler notes, "lies in the predisposition of the parties—they must want to and be able to enter into a conversation."<sup>79</sup> Grounding Handler's analysis are three separate case-studies – informed consent in medical ethics, special education, and community care for the elderly poor – in which he views dialogical approaches as having taken root. This said, Handler readily accepts that this dialogical approach has not typically defined administrative agencies, particularly in contexts involving power imbalances between the parties.

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<sup>76</sup> *Dunsmuir v New Brunswick (Board of Management)* 2008 SCC 9 at para 47.

<sup>77</sup> Genevieve Cartier, *Discretion as Dialogue*, *supra* note 6 at 652-3.

<sup>78</sup> Handler, *Dependent People*, *supra* note 55 at 1045.

<sup>79</sup> *Ibid* at 1093.

He also recognizes the role that ideology plays in social relations and that a “monologue by the powerful to the powerless” has typified administrative action far more than any principle of dialogue.<sup>80</sup>

Nonetheless, Handler implicitly questions the historical determinism of critical legal studies and the nihilistic conclusions it tends to draw. Drawing from a wide-range of sources and from various disciplines, he instead puts forward a conception of administrative relations based on communitarian feminist values with the ideals of trust and good will at its very centre. With dialogism as a “regulative ideal,”<sup>81</sup> Handler then considers how it could become embedded in public institutions. In this, he sees a role for law, as noted above, but focuses on the role of professional norms and “practice ideologies.”<sup>82</sup> These ideologies arise, in some measure, because of the latitude provided to administrative agencies to determine how, and in many circumstances, upon whom, to do their work. The choices made by these agencies, or in Hasenfeld’s words, the “technologies” they choose to employ, are of fundamental importance in determining how the organization will operate and interact with its clients. The choices are, furthermore, frequently moral ones – in Handler’s words:

Clients are vested with moral and cultural values that define their status vis-a-vis the agency. Personal characteristics are not only "objective"; they are also statements about social and moral status. The organization's pattern of intervention is crucially shaped by the staff's moral evaluation of the client. ...The moral system incorporated in the technology encompasses, either explicitly or implicitly, a conception of human nature that provides the moral justification for the agency...

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<sup>80</sup> *Ibid* at 1074-5, citing Terry Eagleton’s critique of hermeneutics in *Literary Theory: An Introduction* (Minneapolis, Univ of Minnesota Press, 1983) at 73.

<sup>81</sup> A term he borrows from Richard Bernstein in *Beyond Objectivism and Relativism: Science, Hermeneutics, and Praxis* (Philadelphia: University of Pennsylvania Press, 1983) at 163.

<sup>82</sup> Another borrowed term, this from Yeheskel Hasenfeld, *Human Service Organizations* (Englewood Cliffs, N.J.: Prentice-Hall, 1983) at 118-119.

...At the same time, the technology of human service organizations is indeterminate. This indeterminacy places human service organization practitioners in a dilemma – they have to respond to people and meet their needs. Even though the available technologies are uncertain, they have to develop a coherent set of beliefs upon which to base their actions. They respond to these dilemmas, says Hasenfeld, by adopting "*practice ideologies*."<sup>83</sup>

Handler then goes on to examine *how* the pre-conditions for dialogue – good will and trust – can be fostered, suggesting key and interrelated areas in need of reform: professional norms, client empowerment and fostering a positive approach toward discretion.<sup>84</sup> The first area is easily described, if less easily accomplished: dialogism must become a central tenet of the professional norms and ideologies that guide agencies' front line work.<sup>85</sup> Handler recognizes that in his case-studies, dialogism was consistent with professional norms, and that this will certainly not always be the case. To illustrate that collaborative administrative norms can prevail, he then moves on to a somewhat surprising source: historical scholarship on American social welfare agencies from the New Deal era.<sup>86</sup> The professional norms that emerged from these agencies embraced interdependence, dialogue and recourse to legal rights, not for their own sake, but as a means to facilitate conversation.<sup>87</sup> Handler goes on to note that "the enforcement of rights helped people to define and effectuate their goals and to foster a general sense of self-respect and autonomy. Clients were to be made to feel comfortable and treated with respect. *They were presumed to be*

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<sup>83</sup> Handler, *Dependant People supra* note 55 at 1053-4, citing Yeheskel Hasenfeld, *ibid* at 118-119.

<sup>84</sup> Handler, *Dependant People supra* note 55 at 1094-1113.

<sup>85</sup> *Ibid* at 1094.

<sup>86</sup> More specifically, to the work of William Simon, see "Legality, Bureaucracy, and the Class in the Welfare System" (1983) 92 Yale LJ 1198; "The Invention and Reinvention of Welfare Rights" (1985) 44 Maryland L Rev 1 and "Rights and Redistribution in the Welfare System" (1986) 38 Stan L Rev 1431.

<sup>87</sup> Handler, *Dependant People supra* note 55 at 1096.

*eligible.*”<sup>88</sup> As we shall see below, this presumption of eligibility is highly relevant to the determination of status in immigration and refugee law.

Sossin also discusses the importance of professional norms – in his terms “civil service values” – and their ability to elaborate on, rather than simply implement important legal norms.<sup>89</sup> Central to Sossin’s approach is the fundamentally important premise that civil servants owe duties beyond those owed to the government of the day, but also ultimately to the public.<sup>90</sup> In this sense, Sossin continues,

while administrative decision makers take on their authority through statutory provisions, civil service values may extend *beyond* the content and purpose of particular decision making powers - these can be expressed as simply as that all civil servants have a mandate to 'act in the public interest' and to 'uphold the rule of law.'<sup>91</sup>

The primary mechanism by which administration is able to comply with this larger conception of its duties is through the civil service value of neutrality. Sossin then goes on to demonstrate how this value of neutrality can itself lead to the elaboration of legal norms such as independence, fairness, and trust.<sup>92</sup> Of interest for our purposes, Sossin examines this interplay between law and administration in the context of humanitarian decision-making under immigration legislation. Elsewhere, Sossin has explicitly criticized the formalist legal frameworks imposed in this same decision-making context as thwarting an approach that would foster

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<sup>88</sup> *Ibid.*

<sup>89</sup> Sossin, *Neutrality to Compassion*, *supra* note 1.

<sup>90</sup> *Ibid* at 430. I do not think that Sossin is referring here to an unbounded sense of the term ‘public’ or suggesting that civil servants owe duties to all persons around the world. I do, however, believe that Sossin would accept that such duties do extend to the class of persons most relevant to our conversation: individuals within Canada who face coercive state action and who have asserted a fear of persecution as a consequence of such action. See the discussion of Benhabib and Abizadeh, above at note 70 and accompanying text.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid* at 431.

“intimate” or genuinely communicative relationships.<sup>93</sup> Once again, the language of law, rights and judicial review are not entirely rejected, but Sossin points once more to the obligations of the civil service to the public, and particularly to the vulnerable, as providing a potentially more fruitful approach to realizing meaningful forms of fairness, impartiality and reasonableness in administrative decision-making. Here, Sossin refers to fiduciary relationships and specifically to the jurisprudence on fiduciary duties owed by the Crown to aboriginal peoples. While quick to acknowledge that administrative law in respect of the vulnerable cannot solely be viewed through the lens of fiduciary relationships, what I believe Sossin suggests is that public obligations toward individuals should not be an either-or proposition; there is a spectrum of obligations that may arise and civil servants’ relationships with the vulnerable ought to be mapped toward the fiduciary end of that spectrum.<sup>94</sup>

As with Handler, the goal of this approach to administrative decision-making is to foster relationships between the civil service and those subject to their decisions, not of dependence, but of mutual trust and interdependence. For powerful private actors, this relationship is easily achieved – oil extraction, for example, is subject to a series of regulatory approvals and the oil industry does not appear to have difficulty in obtaining a meaningful and interdependent process of dialogue in relation to these administrative decisions. Civil service obligations toward the powerless, however, may require an entirely different operational approach. The point is not that vulnerable parties should get “special benefits” but that in dealing with individuals who do not possess the resources to be persuasive, different approaches may be needed to ensure fairness. Put simply “acting fairly, impartially and

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<sup>93</sup> Lorne Sossin, “An Intimate Approach to Fairness, Impartiality and Reasonableness in Administrative Law” (2001) 27 *Queens Law J* 809 [Sossin, Intimate Approach to Fairness].

<sup>94</sup> *Ibid* at 853. Sossin refers here to the decision of the Supreme Court of Canada in *Baker* and its specific invocation of an immigration officer’s duty of compassion, a duty which includes an obligation to consider the best interests of the children affected by his or her exercise of discretion.

reasonably toward vulnerable parties may require additional considerations than those same standards require in other contexts.”<sup>95</sup>

Ultimately, the aim of interdependent administrative law relationships is, in Sossin’s words, “to shift our focus from the form to the substance of participatory rights,” and in this sense, it is not dissimilar from the “thick” conception of the rule of law that I earlier described.<sup>96</sup> Sossin continues,

In other words, an intimate approach asks: What would administrative decision-making look like if citizens and bureaucrats had a genuine opportunity to know each other outside the limitations of legal strictures? What if all important exercises of administrative discretion were purposive, disclosing not just the scope of the discretion, but the social, economic, moral, political, remedial and policy goals that the statutory power was intended to further?

What if the obligation to provide reasons meant the actual reasons for a decision, not just reasons which meet the applicable legal standard? What if decision-makers had a chance to know the people whose lives they shape, rather than the pieces and fragments of those lives which appear in application forms and case files?<sup>97</sup>

These questions articulately express the aspirations of an engaged and dialogical approach to administrative decision-making, aspirations that Sossin suggests may be achieved not simply out of good will, but from what he refers to as a progression of regulatory devices, the first (and perhaps most important) stage of which would involve an elaboration of the mutual expectations of decision-makers and affected

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<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid* at 854. While Sossin uses the term ‘citizen’ here, I believe he would extend the scope of his analysis to include those who have asserted a legal right to stay within the state and have engaged with the bureaucracy for this purpose, such as Convention refugees. Once again, the key for triggering administrative obligations is defined by the asserted rights of the individuals and the spectre of coercive state action.

parties, but would also include internal review mechanisms aimed not at supplanting legal rights, but at “suffusing” them with meaning. Ultimately, Sossin notes, “while it is important for affected parties to possess the right to be heard...it is more important to develop the capacity for those parties and decision-makers to listen to each other.”<sup>98</sup>

This distinction between the easily conferred, but far too hollow “right to be heard,” and what I like to call the “right to be *listened to*” gets to the nub of much of the criticism of administrative decision-making and its relation to law.<sup>99</sup> The question that remains for our purposes, and the topic to which I now turn, is whether an approach to administrative decision-making as dialogue is possible in the immigration-security context. This context, perhaps more than any other, is defined by top-down expressions of state power and an extremely vulnerable group of individuals over whom decisions are made. Thinking through a dialogical approach to discretion in this area is interesting because, to my mind, it puts the principles and theory that underpin the approach to the ultimate stress test.

### **Discretion, Security and Inadmissibility**

“What we have is the growth of governmental power, so that law becomes the vehicle by which the government delegates back to itself the power to make policy for which it will be accountable only at the next election. Rather than legislative supremacy, we have executive supremacy.”<sup>100</sup>

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<sup>98</sup> *Ibid*, at 854-5.

<sup>99</sup> The right to be heard – otherwise known as the *Audi alteram partem* doctrine – is, of course, a basic principle of fundamental justice, one guaranteed by most legal systems, including Canada under both common law principles and s 7 of the *Charter*. In *Singh v. Canada (MEI)*, [1985] 1 SCR 177 [Singh, 1985], this right was recognized in the context of the right of refugee claimants to a full and fair hearing of their claims to refugee status. When I point to a ‘right to be listened to,’ I simply refer to a thick, or substantive understanding of the right to be heard, one which encourages good faith engagement between decision-maker and those affected by their decisions.

<sup>100</sup> David Dyzenhaus, “Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security” (2003) 28 *Austl J Leg Phil* 1 at 21.

For administrative law scholars interested in national security issues, the past decade has been a fascinating period. On the one hand, this period has been witness to a clear shift in the courts' view of discretion and the deference it should be afforded in fashioning just decisions on fundamental issues.<sup>101</sup> The increasingly sparing use of the correctness standard is a clear example of this shift.<sup>102</sup> At the same time, however, the post 9-11 era has seen an explosion in raw expressions of executive power, applied against individuals in a manner that would have made Kenneth Culp Davis shudder. In many ways, national security cases in the immigration context represent the antithesis of a dialogic approach to discretionary decision-making.

As I outlined above in Chapter One, Catherine Dauvergne sees a close relationship between the discretionary spaces within law and securitization. To Dauvergne, the bedrock of discretionary mechanisms that undergird immigration law is a reflection of one of her central claims - that the basic questions of admission and exclusion that form migration law are themselves constitutive of the liberal state.<sup>103</sup> Discretion, in this view, is a contemporary iteration of the supremacy of sovereign power on questions of admission, a holdover (at least in common law states) from the period when questions of entry were firmly a matter of royal prerogative.<sup>104</sup> And it is precisely because this is the case that discretion can be

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<sup>101</sup> See for example *Doré v. Barreau du Québec*, 2012 SCC 12, in which the Supreme Court of Canada found that the standard of review of administrative decisions relating to an individual's *Charter* rights is "reasonableness".

<sup>102</sup> See *Alberta (Information & Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 for a recent review of the few remaining circumstances in which the correctness standard is still said to apply.

<sup>103</sup> Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge UP 2008) at 94-96 and Catherine Dauvergne, "Security and Migration Law in the Less Brave New World" (2007) 16 *Social and Legal Studies* 533 at 540-1. See also above, at Section 1.3.1.

<sup>104</sup> *Ibid.*



manipulated in times of perceived exception, ramping up its exclusionary tendencies. Dauvergne continues:

All of these factors result in a legal structure which is highly malleable and closely tied to shifting political winds. It has the appearance of law, but is changed so rapidly (either through amendment or policy shift) that its adherence to rule of law principles has been easily suspect. Some of the best evidence of this malleability is provided by the shifts in migration law provisions in prosperous Western states following the events of September 2001. Many of these shifts were accomplished without any change in the law, it was rather discretionary practices, already permissible, that were used to achieve significant alterations in the effect of the law.<sup>105</sup>

It is for this reason that the national security debate, pitting as it does core liberty interests against equally core state interests in determining admission, represents something of a stress test for democratic and dialogic approaches to administrative discretion. In the pages that follow, I examine the existence of discretion in national security matters and describe the various ways in which it (not surprisingly) lacks most, if not all dialogical properties. Discretion in this context looks far more like Dyzenhaus' grey holes, than a domain of reciprocal communicative relationships. While acknowledging the strong incentive on the part of the executive to consolidate control over this domain, I nevertheless assert that certain changes are possible that would enhance both the democratic nature and the quality of decision-making in this area.

#### ***4.5.1 Locating Discretion in National Security Cases***

As mentioned earlier, section 44 of the *Immigration and Refugee Protection Act* provides a double-dip of discretion in determining whether to proceed with the inadmissibility process. For ease of reference, the provision states:

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<sup>105</sup> *Ibid.*

44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible *may* prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

(2) If the Minister is of the opinion that the report is well-founded, the Minister *may* refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

The first discretionary decision is made by an officer, the second by the Minister (in reality a Minister's Delegate).<sup>106</sup> It is also important to recall here the amorphous, but undeniably low threshold required to trigger the s 44 process. Section 33 of the IRPA mandates this threshold, providing that the facts that constitute inadmissibility under sections 34 to 37 include facts "for which there are reasonable grounds to believe that they have occurred, are occurring or may occur."<sup>107</sup>

In the national security context, then, an officer (and subsequently a Minister's delegate) must only have reasonable grounds to believe that an individual is described in s 34 of the IRPA in order to initiate the inadmissibility process.<sup>108</sup>

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<sup>106</sup> It also should be noted that this discretionary triggering process for admissibility determinations applies to more than just national security concerns, which are set out at s.34 of the IRPA, but also for example to admissibility arising from potential human rights violations (s.35), criminality (s.36) and organized criminality (s.37).

<sup>107</sup> IRPA, s 33.

<sup>108</sup> Again, for ease of reference, s 34 states:

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for (a) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;

As we explored above, the breadth of the s 34 inadmissibility provision is striking. It extends well beyond those who pose a threat to Canadian security, capturing within its net anyone who has engaged in espionage against a democratic government and any person who has engaged in the subversion by force of *any* government. Most strikingly, the provision also captures anyone who has been a member of an organization that has undertaken these kinds of activities, regardless of one's personal involvement in them.

In most cases, after a report under s 44 is written, it is referred to the quasi-judicial Immigration Division of the Immigration and Refugee Board for a hearing. The Immigration Division then renders a decision based on the same inadmissibility criteria. But it is significant to note that, unlike in the referral process, the Immigration Division possesses no discretionary powers. If it concludes that an individual is described by s34 of the IRPA, it must issue the applicable deportation order. It is thus an ironic, but perhaps unsurprising feature of the inadmissibility context that the location of discretion (the s44 process) is without independence and the location of independence (the IRB) is without discretion.

Additionally, built into the process is yet another site of discretion contained at s 42.1 of the IRPA, which provides that the matters referred to in, amongst other provisions, s 34(1) will not render a person inadmissible if, in a separate application, that person satisfies the Minister that their presence in Canada “is not contrary to the national interest.”<sup>109</sup>

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- (b) engaging in or instigating the subversion by force of any government;
  - (c) engaging in terrorism;
  - (d) being a danger to the security of Canada;
  - (e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or
  - (f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c).

<sup>109</sup> *Ibid*, s.42.1.

As I discussed in Chapter Two, the jurisprudence on inadmissibility determinations has endorsed an extremely broad approach to determining who may be subject to a discretionary report under s 44. Recall that, pursuant to s 33 of the IRPA, the courts have repeatedly found that there is no temporal limitation to inadmissibility determinations under s 34.<sup>110</sup> In other words, inadmissibility findings may arise in relation to membership in an organization that once engaged in subversion by force of a government, but has long since disavowed the use of violence. Inadmissibility could also arise where an officer finds there are reasonable grounds to believe that an organization *will*, at some point in the future, engage in the use of force. In the former scenario, an individual is inadmissible under s 34, even if she joined the organization long after it renounced the use of force.<sup>111</sup> In the latter scenario, it would not seem to matter if the individual severed her ties with an organization before it took up subversive activities.<sup>112</sup>

Recall also that officers are not particularly constrained from exercising their discretion to allege inadmissibility in relation to acts committed by individuals while they were still children. While noting that there is some sliding scale of moral responsibility for acts committed by minors, the courts have nevertheless upheld inadmissibility findings against them.<sup>113</sup>

There are several other examples of the role that the courts have played in authorizing an extremely broad understanding of the discretion exercised under sections 34/44 of the IRPA, but I will refer here to only one more: the meaning of the term “membership.” The jurisprudence on the meaning of membership endorses (not inappropriately) the fact that it can take on myriad forms, particularly

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<sup>110</sup> *Al Yamani v Canada (MCI)*, 2006 FC 1457 at paras 11-12.

<sup>111</sup> *Gebreab v Canada (MPSEP)*, 2010 FCA 274.

<sup>112</sup> *Al Yamani v Canada (MPSEP)*, 2006 FC 1457.

<sup>113</sup> *Poshteh v Canada (MPSEP)*, 2005 FCA 85.

in the amorphous structure of terrorist organizations. To reiterate the oft-cited passage from the Federal Court in *Singh*, Justice Rothstein (as he then was) characterized the membership issue as follows:

The provisions deal with subversion and terrorism. The context in immigration legislation is public safety and national security, the most serious concerns of government. It is trite to say that terrorist organizations do not issue membership cards. There is no formal test for membership and members are not therefore easily identifiable...I think it is obvious that Parliament intended the term "member" to be given an *unrestricted and broad interpretation*.<sup>114</sup>

In addition to authorizing a virtually limitless scope of discretion with respect to concepts such as membership, as I shall explore below, the courts have provided very little guidance in the security context as to *how* that broad discretion should be exercised.

The final locus of discretion that requires mention is one that no longer exists. As I set out above, discretion can equally be construed (and used) as a tool for excusing individuals from the overly harsh consequences of inflexible laws and, contrastingly, as a repository of state power that facilitates unilateral action. In immigration law, the most obvious way in which individuals seek to access the former, 'emancipatory' nature of discretion is through an application for relief on humanitarian and compassionate grounds, pursuant to s 25 of the IRPA. Until recently, this was an option available to those found inadmissible under s34 of the IRPA and it was viewed as a particularly important one because of the perceived overbreadth of s 34 and the futility of the Ministerial waiver provision. With the passage of the *Faster Removal of Foreign Criminals Act*<sup>115</sup> in 2013, the government

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<sup>114</sup> *Singh v Canada (MCI)*, (1998), 151 F.T.R. 101, 1998 CanLII 8281 (FC) at para. 52, emphasis added.

<sup>115</sup> FRFCA, *supra* note 51 at s 9.

eliminated this option entirely, excluding from the ambit of s 25 any individual found inadmissible under sections 34, 35 and 37 of the IRPA.

All that remains in the discretionary realm, then, is the broad power to initiate proceedings under s.44 and the circumscribed and rarely invoked authority to relieve individuals from inadmissibility under s42.1.

#### **4.5.2 *Diminishing Baker: Suresh, Agraira and Discretion in Security Cases***

Following the promising approach taken by the Supreme Court in *Baker*, the first indication that things are simply different in the security field arose in the decision of the court in *Suresh*.<sup>116</sup> At first blush, the Supreme Court's decision in that case appears to contain strong language about the substantive protection of core human rights values. On closer inspection, however, the differences between the court's approach in *Baker* and *Suresh* become readily apparent. Such differences, I suggest, reflect the view that some forms of executive power should remain relatively immune to substantive judicial control.<sup>117</sup>

Recall that in *Suresh*, the Immigration and Refugee Board had found Mr. Suresh, a Sri Lankan Tamil, to face a well-founded fear of persecution in Sri Lanka should he be returned to that country. He was consequently found to be a Convention refugee and later applied for permanent residence. Over the course of this application, Citizenship and Immigration Canada (CIC) received a report from the Canadian Security Intelligence Service (CSIS) indicating that Suresh had been a member and fundraiser for the Liberation Tigers of Tamil Eelam (LTTE), an organization alleged to have been involved in terrorist activities in Sri Lanka. As a result of this report, the Minister of Citizenship and Immigration formed the opinion

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<sup>116</sup> *Suresh v Canada (MCI)*, 2002 SCC 1, discussed above at Section 2.3.4.

<sup>117</sup> Cartier dissertation, *supra* note 58 at p.267.

that Suresh constituted a danger to the security of Canada and ordered him to be deported, notwithstanding his Convention refugee status. Suresh unsuccessfully challenged the decision that he posed a security threat in the Federal Court and the Federal Court of Appeal, on the basis that the procedures set out in the legislation exposed him to the risk that he would be deported to torture, contrary to both the Canadian *Charter of Rights and Freedoms* and the *Convention Against Torture*.

In granting Suresh's appeal, the Supreme Court upheld the constitutionality of the impugned provisions, but concluded that the procedural safeguards chosen to ensure that he was not deported to torture were inadequate. At the same time, however, the court did not foreclose the possibility that s 7 of the *Charter* could in rare circumstances permit deportation to torture. The court also considered the expansive scope of s 19 of the former *Immigration Act*, the predecessor to s 34, and concluded that its breadth was justified, in part, because of the availability of a discretionary Ministerial exemption mechanism, the predecessor to the current s 42.1 of the IRPA. In an important passage, the court noted:

We believe that it was not the intention of Parliament to include in the s. 19 class of suspect persons those who innocently contribute to or become members of terrorist organizations. This is supported by the provision found at the end of s. 19, which exempts from the s. 19 classes "persons who have satisfied the Minister that their admission would not be detrimental to the national interest". Section 19 must therefore be read as permitting a refugee to establish that his or her continued residence in Canada will not be detrimental to Canada, notwithstanding proof that the person is associated with or is a member of a terrorist organization. This permits a refugee to establish that the alleged association with the terrorist group was innocent. In such case, the Minister, exercising her discretion constitutionally, would find that the refugee

does not fall within the targeted s. 19 class of persons eligible for deportation on national security grounds.<sup>118</sup>

While not admitting as much, the court in *Suresh* also clearly backed away from the approach adopted by Justice L’Heureux Dube in *Baker* on the substantive review of discretionary decision-making, at least in the context of national security. Indeed, the court affirmed the almost unfettered discretion of the executive to weigh the relevant factors in determining what constitutes a threat to national security, limiting the role of the courts to ensuring that the relevant factors were indeed taken into account.<sup>119</sup> Dyzenhaus’ observation in this regard is apposite:

Suresh largely pays lip service to Baker on review of substance, since it diminishes scrutiny of substance to a check list of factors which the minister has to take into account, and it restores in all but name the distinction between review of administrative interpretation of the law and review of discretion.<sup>120</sup>

In *Baker* it was the willingness of the court to engage in substantive review of the weighing of factors that created the conditions for a communicative approach to decision-making, at least in respect of humanitarian and compassionate applications. While the court in *Suresh* recognized the need for a relatively robust set of procedural protections in the context of national security, its refusal to engage substantively in the weighing of relevant factors affirmed the sense that dialogue in the national security context is not required. And as we shall see, this sense has only been reinforced in the years since the *Suresh* decision.

In Chapter 2, I discussed at some length the extremely deferential approach of the courts in reviewing security decisions, including those related to Ministerial

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<sup>118</sup> *Suresh*, *supra* note 116 at para 110.

<sup>119</sup> David Dyzenhaus, “Constituting the Rule of Law: Fundamental Values in Administrative Law” (2001) 27 *Queens Law J* 504 at 506. See also Cartier Dissertation, *supra* note 58 at 268.

<sup>120</sup> *Ibid*, at 507.



discretion, most notably, the decision of the Supreme Court of Canada in *Agraira v Canada*.<sup>121</sup> While I do not intend to revisit these decisions in detail, it is important to glimpse back at the *Agraira* decision in the present context to illustrate the ways in which the courts have, in my view, declined to foster dialogue in national security cases. Recall that in *Agraira*, the appellant sought a discretionary waiver of a finding of inadmissibility that arose because of his affiliation with the anti-Ghaddafi Libyan National Salvation Front (LNSF). The Minister's response to the waiver request was summarily dismissive. In refusing to exercise his discretion, the Minister determined that "It is not in the national interest to admit individuals who have had sustained contact with known terrorist and/or terrorist-connected organizations."<sup>122</sup> The rationale of the Minister effectively renders the exemption clause redundant: the applicant required Ministerial relief because he was inadmissible and the Minister's responded by refusing the application based on the very inadmissibility from which relief was sought. Recall further that the Supreme Court ultimately upheld the Minister's decision even though it readily admitted that it could not determine, at least with finality, the actual reasoning of the Minister in rejecting the waiver request.<sup>123</sup> Instead, the court attributed to the Minister an interpretation of the national interest exemption that admittedly included a humanitarian and compassionate dimension, but one virtually devoid of tangible or enforceable meaning.<sup>124</sup> In concluding as it did, the court gave short shrift, in my view, to the principles of justification, transparency and intelligibility and radically departed from its *Baker*-era emphasis on substantive reasonableness. Importantly,

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<sup>121</sup> *Agraira v Canada (MPSEP)*, 2013 SCC 36.

<sup>122</sup> *Ibid* at para 13.

<sup>123</sup> *Ibid* at para 58 and see above discussion in Section 2.3.7.

<sup>124</sup> The Supreme Court's finding that humanitarian and compassionate considerations were relevant to the Ministerial relief provision, and had adequately been considered in the case at bar, became more or less moot with the passage of the *Faster Removal of Foreign Criminals Act*, *supra* note 51, which formally eliminated humanitarian and compassionate considerations from the national interest determination and barred inadmissible persons from the general H&C provision found at s 25 of the IRPA. The FRFCA came into force on June 19, 2013. The Supreme Court's decision was released on June 20, 2013.

it also hollowed out the very same provision that, as noted above, it had relied upon in *Suresh* to uphold the breadth of immigration law's security provisions.

#### **4.5.3 Discretion and the Power Not to Act**

It is clear that immigration officers (and Minister's delegates) have been granted broad discretionary authority to determine who may be inadmissible under s.34(1) of the IRPA, and that the courts have been loathe to interfere with such determinations. It is, however, interesting (if not surprising) that the discretionary authority of officers to *not* initiate inadmissibility proceedings has been narrowly interpreted by both the courts and the soft law instruments meant to assist officers. In *Cha*, a case involving allegations of criminal, rather than security inadmissibility, the court recognized that the use of the word *may* in s.44 of the IRPA created a band of discretion within which officers could consider inadmissibility cases, but at the same time, the court found that the discretion to refrain from initiating proceedings was exceedingly narrow. Most notably, the court found that it was not open to the Minister's delegate (in respect of the s 44(2) determination) to consider either the nature of the allegations against the individual or other details regarding his personal circumstances.<sup>125</sup>

The relevant immigration manual contains language that similarly emphasizes the narrowness of officers' discretion to forego admissibility proceedings. It states:

The fact that officers have the discretionary power to decide whether or not to write an inadmissibility report does not mean that they can disregard the fact that someone is, or may be, inadmissible ...

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<sup>125</sup> *Canada (MPSEP) v Cha*, 2006 FCA 126. *Cha* was a case that arose in relation to the criminal inadmissibility provisions of the IRPA (s 36), rather than the national security context. While there are some differences in the way that the two types of inadmissibility cases are handled, the point made in *Cha* essentially holds true for cases under s 34: the discretion to refrain from initiating proceedings against someone who is caught by the broad statutory language is narrow.

Rather, this discretion gives officers flexibility in managing cases where no removal order will be sought, or where the circumstances are such that the objectives of the Act may or will be achieved without the need to write a formal inadmissibility report under the provisions of A44(1).<sup>126</sup>

In his study of immigration enforcement at the United States-Mexico border, Josiah Heyman notes that the power not to act reveals as much about discretion as more formal decisions to initiate enforcement action.<sup>127</sup> In their work on front-line, or “street-level” bureaucrats, Hawkins and Lipsky have also commented on the central importance of early decisions not to take action.<sup>128</sup> The subtlety of non-action can make it difficult to assess in any quantifiable way, but the essential point to recall is that a decision not to act is a decision nonetheless, one that is often deeply revealing about power, privilege and the operating assumptions that guide the decision-making body.

Commencing with Pratt’s emphasis on risk as a central organizing premise of contemporary border enforcement, Heyman focuses on the inverse but equally important role of trust in guiding front-line decisions about admission. Trust is particularly important in examining border decisions because of the large number of decisions that must be made every day and because most of those who formally approach borders are granted admission. In this context, the grouping of individuals into groups deemed trustworthy is common. Heyman notes:

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<sup>126</sup> Citizenship and Immigration Canada. Manual ENF 5 “Writing 44(1) Reports” (20 August, 2013) online: <http://www.cic.gc.ca/english/resources/manuals/>.

<sup>127</sup> Josiah Heyman, “Trust, Privilege, and Discretion in the Governance of the US Borderlands with Mexico” (2009) 24 Can J Law Soc 367 [Heyman, Trust, Privilege and Discretion].

<sup>128</sup> See respectively, Keith Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (Oxford: Oxford University Press, 2002); and Michael Lipsky’s seminal *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* (New York: Russell Sage, 1980). Observations about police work and the decisions made by officers to refrain from invoking the law have been made for some time, see for example Joseph Goldstein, “Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice” (1960) 69 Yale Law Journal 543.

The existence of non-acts is best seen, in the places I will discuss, in the "sorting" of individuals as members of assumed social groups.' Sorting is central to border policing because officers in this region (which is not just the literal boundary but, rather, a deep layer of inhabited territory) confront not a well-defined set of individuals but, rather, a complex web of people flowing throughout a variegated space of ordinary activities. Officers, faced with so many people and activities that they could be acting on, sort individuals into categories: riskier actors who are worth additional action (questioning, request for identification, search, initial detention)-versus actors who are trustworthy and are thus not acted on any further.<sup>129</sup>

Heyman's reasoning can be directly transposed to the context of decision-making under s 34 of the IRPA. Contrary to the apparent view of the courts and, to some extent, contrary to the soft-law manuals that guide officers' actions, discretionary decisions not to invoke s 34 proceedings are made constantly, if often unconsciously. This is directly revealed by the striking breadth of the provision which, as I have noted above, unambiguously captures large numbers of individuals, as contrasted by the relatively few cases under this provision that are actually initiated. Recall, for example, that the wording of the relevant inadmissibility provisions renders any member of the United States military or intelligence agencies inadmissible to Canada. Recall further that a plain reading of the provision also leads, quite inexorably, to the conclusion that any member of the Democratic and Republican parties in the U.S., or for that matter, the Labour Party in Britain would also be inadmissible.<sup>130</sup>

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<sup>129</sup> Heyman, Trust, Privilege and Discretion, *supra* note 127 at 369.

<sup>130</sup> As noted in Chapter Two, this was recognized by the Federal Court in *Oremade v Canada (MCI)*, 2005 FC 1077, most explicitly in the court's suggestion in that case (at para 17) that George Washington, Eamon De Valera, Menachem Begin and Nelson Mandela all could be deemed inadmissible to Canada.

But of course, inadmissibility proceedings do not typically occur against such individuals. Instead, as I sought to illustrate in Chapter Two, border security officials seem to have engaged in the kind of grouping that Heyman describes – focusing their attention under s 34 on those who have any kind of affiliation with subversive movements from the Global South, while turning a relatively blind eye to those who may similarly meet the definition of subversion from Western countries.

Viewed from a TWAILian perspective, these discretionary decisions not to act are born of, and serve to reinforce, the power and prestige of individuals from the West at the expense of those from the Global South, whose struggles and actions are subjected to an undeniably closer degree of scrutiny. And as Heyman observed from the United States-Mexico border, this privileging of those deemed trustworthy provides an important illustration of the “invisible power” of those who benefit from non-action, whose daily comings and goings across borders are rarely subjected to the kinds of “delays and indignities” that others frequently experience.<sup>131</sup>

#### ***4.5.4 The Consequences and Shortcomings of Monologue: Documenting the experiences of inadmissible persons***

The immigration-security context reveals the limitations – both moral and conceptual – of discretionary decisions that are dominated by one-way expressions of executive power. These decisions are defined by an institutional predisposition toward unilateralism; little or no advanced notice is provided to individuals subject to them, notwithstanding the factual complexities on which they are based and the profound implications that they may have.<sup>132</sup>

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<sup>131</sup> Heyman, Trust, Privilege and Discretion, *supra* note 127 at 370.

<sup>132</sup> The *Immigration and Refugee Protection Act* distinguishes between foreign nationals, citizens and permanent residents. Foreign nationals include visitors, those without any formal status and, notably, refugee claimants. In *Hernandez v Canada (MCI)*, 2005 FC 429, the court recognized an obligation to at least inform permanent residents of s 44 proceedings, but it remains to be seen whether this obligation also extends to foreign nationals. In *Awed v Canada (MCI)*, 2006 FC 469, for example, the court found that an officer erred in failing to notify the applicant of the s 44 process, but

As I described at the outset of this dissertation, in seeking to provide a multi-faceted perspective on the Canadian security-inadmissibility apparatus, I interviewed several individuals who have become enmeshed in s34 proceedings. I did not seek to conduct an exhaustive number of interviews, nor to engage in a sustained legal ethnography. My objectives, rather, were first to layer personal narratives over the quantitative data that I outlined in Chapter Two in an effort to bring some of the conclusions drawn in that chapter into sharp relief.<sup>133</sup> The second, and equally important objective, was to create a space, modest though it is, for the voices of inadmissible persons to be heard. Put in a different way, my aim in speaking with such individuals was to employ in the *research process* a dialogue that I suggest is lacking in the *legal processes* used to make security-related decisions. Over the coming pages, I weave into the analysis some of the perspectives of these individuals in the hope that, in so doing, we might capture a glimpse of a more participatory approach to decision-making, one that I contend would yield more legitimate results.<sup>134</sup>

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nevertheless denied judicial review on the basis that the error would likely have had any appreciable impact on the proceedings.

<sup>133</sup> Nataliya Ivankova, John W Creswell & Sheldon L Stick, "Using Mixed-Methods Sequential Explanatory Design: From Theory to Practice" (2006) 18:1 Field Methods 3 at 10.

<sup>134</sup> In total, I conducted interviews with nine individuals over the span of roughly one year, though I spoke with numerous other individuals who were uncomfortable commenting publicly on their cases, even with the assurances of anonymity that were outlined to them. Once again, I make no claims that the experiences of this small group of individuals are necessarily representative of all of those subjected to the security-inadmissibility regime. Rather, I provide their perspectives for the reasons outlined above and to demonstrate how at least some individuals have experienced the top-down security regime. I met the individuals with whom I spoke in a number of different ways. As I mention below, a couple of the individuals were former clients. Some were clients of lawyer colleagues, while I was put in touch with others through refugee advocacy networks. I should acknowledge that over the course of this dissertation I did not speak with many individuals for whom discretion was exercised *not* to commence inadmissibility proceedings. The reason for this is simple: these acts of discretion are generally invisible; people do not necessarily know when they have benefitted from positive acts of discretion in the s 44 process. There is one exception to this – the experience of K.G. – whose story I describe below.

First, however, recall that for those seeking protection in Canada, the initiation of admissibility proceedings means an automatic suspension and possible termination of the refugee claim process.<sup>135</sup> Recall further from Chapter Two that the clear majority of individuals subjected to inadmissibility proceedings are refugees or refugee claimants. The law does not require advanced notice of a section 44 report for claimants and there is no formal process for responding to it. Claimants simply receive notice that their claim has been suspended pending an admissibility hearing. If, following the admissibility hearing, the allegations against the individual are upheld, the refugee claim is terminated.<sup>136</sup> For many refugee claimants that I have spoken with, the process was dizzying; one moment they were awaiting the adjudication of their refugee claims, hopeful of their new and safe future in Canada, the next their claims were terminated and they were labelled as security threats. After experiencing tremendous hardship on their journey, a legal channel once seemingly open, is unceremoniously closed.<sup>137</sup>

Take, for example, the situation of A.K., a former client, whom I interviewed for the purposes of this study in November, 2013.<sup>138</sup> A national of Eritrea, he arrived in Canada with his wife and six children from Saudi Arabia where he and his wife had lived in exile for the previous thirty years, and where all of his children were born. The danger he and his family face in Eritrea – one of the worst human rights offenders in the world – is palpable and they were tired of living at risk of removal in Saudi Arabia, which essentially bars all foreigners from obtaining permanent residence. A.K. and his family were initially granted refugee status by the Immigration and Refugee Board. That decision was subsequently overturned by the Federal Court and, days prior to the rehearing of their claims, the Minister of Public

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<sup>135</sup> See IRPA s 103(1).

<sup>136</sup> IRPA s 104.

<sup>137</sup> The situation could not be more reminiscent of Kafka. As the doorkeeper in *The Trial* says to the countryman: “No one but you could gain admittance through this door [into the Law], since this door was intended for you. I am now going to shut it.” Franz Kafka, *The Trial*, (New York: Vintage Books ed., 1969) at 269.

<sup>138</sup> Interview with A.K. November 5, 2013.

Safety provided notice that the hearing was suspended as A.K. had been referred to the Immigration Division of the Immigration and Refugee Board for an admissibility hearing under s 34 in relation to small donations he had made, in 1977, to the Eritrean Liberation Front (ELF).

A.K. did not deny having made the donations – they in fact formed the basis of his claim to be at risk in Eritrea – but he asserted from the outset that the donations had been for humanitarian purposes as the ELF had been providing *de facto* social services to Eritreans for several years in the 1970s as a result of a brutal state crackdown on Eritreans by the authoritarian Ethiopian regime that controlled Eritrea at that time. Because A.K. did not deny that he had made the donations in question and because there was evidence of rights violations committed by the ELF, the outcome of his admissibility hearing was a foregone conclusion – he was found to be inadmissible and his refugee claim was therefore terminated.<sup>139</sup> Where discretion had existed – in the writing of the s 44 report, prior to the referral of the matter to the Immigration Division – it was exercised before A.K. even knew about it. As A.K. told me,

As long as my family is safe they can do whatever they like with me. I just wish that I could have told my story at the right time, then they would see I am a peaceful man. I have never held a gun, I would probably hurt myself if I did hold one.<sup>140</sup>

The tension between a broad grant of discretion to find individuals inadmissible and a poorly communicated discretion to waive or overlook inadmissibility has led to numerous decisions that are at best awkward, and at worst perverse. And as I sought to reveal quantitatively in Chapter Two, this top-down approach to section

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<sup>139</sup> Recall that the decision of the Immigration Division is not discretionary – its responsibility is entirely confined to the often mechanical process of determining whether the facts alleged amount to inadmissibility. The points of discretion come before, in the s 44 process, and after in the Ministerial relief process under s 42.1.

<sup>140</sup> *Ibid.*



34 decision-making is no theoretical matter. It has affected hundreds of individuals – from numerous African National Congress members who have been summarily denied visas under section 34<sup>141</sup> to numerous others engaged in similarly sympathetic movements, the flaws inherent in a one-way process of discretionary decision-making have been exposed.

Another example of the shortcomings of monologue was provided to me by A.M., an Iranian individual found to be inadmissible in relation to his passing affiliation with the Iranian opposition group the Mojahedin-e-Khalq (MEK), who told me:

For them [CBSA] to say that I am a threat just means that they did not speak to me, get to know me. You know I would love for someone to do some surveillance on me, then they would see what I do. I married a Catholic woman, my kids go to Catholic schools. I don't even spend time with Persians. I know that culture, I wanted to learn about other cultures."<sup>142</sup>

It is telling that individuals subject to the inadmissibility regime are left wishing for surveillance as a means of conveying their case. While I contend below that we can aim higher than employing surveillance to assess inadmissibility, it is not difficult to understand A.M.'s perspective. Embedded within it is an assertion not only that he has nothing to hide, but that any detailed inquiry into who he actually is would reveal that he should not be subject to security measures. More subtly, I suggest that what is discernible in A.M.'s statement is a desire to communicate, even if unwittingly, with those who hold the power to make decisions that will profoundly alter his life.

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<sup>141</sup> See for example Matthew Little, "Anti-apartheid heroes denied visa to Canada", *The Epoch Times* (28 Feb. 2012), online: Epoch Times <http://www.theepochtimes.com/n2/canada/anti-apartheid-heroes-denied-visas-to-canada-197204.html>.

<sup>142</sup> Interview with A.M. March 10, 2013.

More broadly, what was apparent in the views of all of the individuals with whom I spoke was a respectful disagreement with the process used by CBSA and an unwavering belief that things would have been different had they genuinely been listened to in the discretionary decision-making process. No one with whom I spoke questioned either the authority or the responsibility of the Canadian government to inquire into their backgrounds. Similarly, no one questioned the authority of the government to impose consequences on those who either engaged in human rights abuses or truly constituted a threat to the security of Canada. What was questioned by all, however, was the legitimacy of decisions to find them inadmissible when there seems to have been open acknowledgment that they have neither engaged in human rights violations, nor constitute a security threat. It is this perverse situation that is so fundamentally troubling to these individuals. Another individual, J.G., made precisely this point to me in describing his dismay at being found inadmissible for his involvement as a young student with El Salvador's FMLN, a leftist opposition movement at the time, but now that country's ruling party. When I spoke with J.G. he had been living in Canada for over 17 years, but had spent the previous year in sanctuary in a church as he struggled to avoid deportation. Recognizing the inconsistency with which section 34 allegations appear to be brought and the seeming absurdity of declaring him inadmissible for his involvement in El Salvador's ruling party, J.G. told me: "If the law is going to be applied fairly it should be applied equally to everybody...I have not committed any wrongdoing and they even recognize that and they are basically punishing me harsher than a criminal..."<sup>143</sup> J.G. also lamented the unwillingness of CBSA to genuinely listen to his story and, more generally, the collective inability of immigrants to assert their rights because of the powerlessness of their situation:

The thing is that the law as it is being interpreted and applied by CBSA officers is totally unfair and many immigrants basically we don't have the means to fight

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<sup>143</sup> Interview with J.G., May 6, 2014.

against it. It is frustrating because we try to explain the situation and what happens is that many other immigrants are in the same situation because they don't have an understanding of the system they feel fear to come forward and fight against it...This is a fight that has to be done legally, but also using political means. That's how I feel about this, it is violating the rights of my family and I am very strong on saying that, and that is probably why they want me out of Canada. I speak too much, but either I fight or I am deported and separated from my family. I don't have any other options.<sup>144</sup>

In this statement we can see J.G.'s hope for a substantively positive outcome in his case, but once again, we can also discern a strong desire simply to be heard. But as J.G. has experienced, such is not the current reality and the experiences of those with whom I have spoken tend to confirm my suggestion that decision-making in the immigration-security context represents the antithesis of a dialogic approach to administrative discretion. Far from placing the individual affected by security decisions at the centre of the process, such individuals are frequently informed of the decision only once it has been made. There are also indications, the most notable example of which arose in the Galloway case, that the administration of the inadmissibility provisions is not immune to overt executive influence.<sup>145</sup>

In Chapter Two, I outlined some of the problematic trends that have arisen in relation to decision-making under section 34. These problems, together with the extreme delays in attending to s 34 cases, have had wrenching consequences on those subject to them. First, many individuals with whom I spoke lived in constant

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<sup>144</sup> Ibid.

<sup>145</sup> Galloway sought judicial review of the notice that he received alerting him to the fact that he may have been found inadmissible if he were to have approached the Canadian border. The record in respect of the judicial review proceedings revealed direct involvement of the office of the Minister of Citizenship and Immigration in the determination as to how to respond to Galloway's proposed visit. See *Toronto Coalition to Stop the War v Canada (MPSEP)*, 2010 FC 957.

fear that they would be permanently separated from their families. As another individual, J.M. told me:

The trauma this will cause on my family is the most complicated, my wife will have a choice, stay here with the kids or come with me...The kids are not going, they cannot go back to my country, this is the hard thing...<sup>146</sup>

A.K. spoke similarly of the wrenching hardship that the inadmissibility process – now entering its eighth year – has had on him and his family:

Headache, stress, very stressful. First of all, reporting every month for years for, you know, what did I do? Secondly, I don't have rights, renewing the work permit all my life. Also in general, the papers itself, now and then, is [just causing] stress by itself, it's not easy that's why I go so many times to my family doctor...but the main thing now is my mother, that is the worst, I don't like my mother to cry...She is waiting until now, but still whenever I [talk to her] she cries.<sup>147</sup>

In a passage worth reproducing in its entirety, a refugee lawyer with whom I spoke described the experience of her clients similarly:

The way in which Canada's inadmissibility provisions are applied makes me so angry. The vast majority of the clients that I have represented are not terrorists; they are heroes. They risked their lives trying to bring justice, democracy and the rule of law to countries governed by tyrannical rulers responsible for massive human rights violations. Not a single one of the clients I have represented ever used arms. Every one of the clients I have represented abhors violence, and never has, and never would, sanction the use of violence against civilians. That said, all of my clients believe that the use of arms is justified to overthrow tyrannical regimes, when all attempts at a peaceful resolution have

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<sup>146</sup> Interview with J.M. March 28, 2014.

<sup>147</sup> Interview with A.K. November 5, 2013.

failed. These are views that are shared by most Canadians: Canada is not, after all, a pacifist country. So why are my clients being labelled as terrorist, while Canadian soldiers who have fought in Afghanistan are called heroes? What kind of hypocrisy is this?

The effect of being labelled as a terrorist, or a security risk to Canada, especially in the post 9/11 world is profound. Many of my clients arrived in Canada seeking safety because they were persecuted simply for trying to improve the human rights situation in their homelands. For these people, many of whom have already experienced torture, to be subjected to an unwarranted admissibility process is almost unbearably difficult. It is stigmatizing. It labels people with terms that are completely contrary to how they view themselves, and how they ought to be viewed. It is degrading and humiliating.

Beyond the shame and the degradation inherent in being labelled as a terrorist, security inadmissibility findings have other devastating consequences. Many of my clients had to flee from their countries suddenly, and were forced to leave their spouse and minor children behind. An inadmissibility determination prevents my clients from ever sponsoring their families to come to Canada. The result is that minor children are indefinitely separated from one of their parents, parents from their children, and spouses from each other.

Most of my clients are stunned by the treatment that they have received at the hands of the Canadian government. They believed Canada to be a beacon of fairness and tolerance, a country where human rights are upheld, and a country devoid of racism. That is why they sought refuge here. The shattering of this image is profoundly disturbing for them. As their representative, I struggle myself when trying to explain a system which is as indefensible to me as it is to my clients.<sup>148</sup>

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<sup>148</sup> Interview with lawyer H.D., April, 2015.

In the pages that follow, I contend that the legitimacy that inadmissibility decisions currently lack, and the often unnecessary hardship that they impose, can be largely remedied by embracing dialogue.

### **Discretion, Dialogue and the Security Regime**

Before making the case for injecting dialogue into the decision-making process in national security cases, I should perhaps reiterate and clarify precisely my starting position. Recall that at the outset of this dissertation, I suggested that regardless of the merits of Carens' open-borders approach, it is commonly accepted that states have, at the very least, the authority to restrict entry in situations involving public safety and security.<sup>149</sup> At the same time, however, international law creates obligations towards those within a country's jurisdiction who have asserted a right to remain because of a risk of persecution, subject once more to certain security based exclusions.<sup>150</sup> There is, then, conceptual symmetry between states' baseline authority to exclude and the limitations on its corresponding obligation to admit. There is also broad theoretical and practical consensus as to the legitimacy of these binary propositions. But the consensus only holds so far as the exclusions on security grounds accord with those permitted at international law. It disappears, in other words, when a country adopts an approach to security that effectively excludes a broader ambit of individuals than is contemplated at international law.

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<sup>149</sup> As was explicitly acknowledged by Carens himself, see Carens, "Aliens and Citizens: The Case for Open Borders" (1987) 49:2 Rev Polit 251 at 258-9 and see the discussion above at Chapter 1, notes 42-44 and accompanying text. I note that in much of Carens' later work, he too has simply decided to move beyond the impasse created by the open borders debate, and has instead focused on the legitimacy of state removal practices in particular contexts, see for example, *Immigrants and the Right to Stay*, (Cambridge, MA: MIT Press, 2010).

<sup>150</sup> Most notably, those found in the *Convention Relating to the Status of Refugees*, Can. TS 1969 No. 6, Article 1F, entered into force April 22, 1954, entered into force for Canada September 2, 1969 and the *Protocol relating to the Status of Refugees*, 606 UNTS 267, entered into force October 4, 1967, entered into force in Canada June 4, 1969 ["Refugee Convention"] at Articles 32 and 33.

Within this broad framework, countries have to create procedures for determining who may legitimately be excluded for security reasons and who should be permitted to remain, at least in so far as their claim to refugee status is well-founded. The Refugee Convention requires that these procedures accord with “due process of law.”<sup>151</sup> In Canada, furthermore, the jurisprudence has clearly established that refugee claimants are entitled to the protections of s.7 of the *Charter* in the determination of their rights under the Convention.<sup>152</sup> These facts, taken together with the consequences of removal and the state coercion implicit in deportation, create the conditions for a thick conception of procedural rights, one that I argue is best actualized through dialogue.

There are two questions that may fairly be posed at this point. The first relates to Canada’s Pre-Removal Risk (PRRA) program, which guarantees that persons – even security threats – will not be removed to torture or to a risk to their life or a risk of cruel and unusual treatment or punishment.<sup>153</sup> Why, the question goes, does this program not provide sufficient protection for at-risk individuals? My response is that there is neither conceptual nor pragmatic synonymy between the rights of refugee claimants under the Refugee Convention<sup>154</sup> and those granted to persons under s97 of the IRPA. First, protection against persecution and the PRRA protections are not the same and to suggest otherwise is to read redundancy into sections 96 and 97 of the IRPA. Persecution is a broader concept than the forms of mistreatment protected by the PRRA. Consider the common situation of a political activist in a repressive country who faces not extreme sanction, but repeated and

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<sup>151</sup> Refugee Convention, Article 32(2).

<sup>152</sup> See *Singh*, 1985, *supra* note 99, in which the Supreme Court concluded that refugee claimants are entitled to fundamental justice in the determination of their claims to refugee status and that the principles of fundamental justice include, at a minimum, the notion of procedural fairness.

<sup>153</sup> See s 97 of the IRPA. Of note, for those found to be inadmissible for, *inter alia*, security reasons, a finding of risk under s 97 results in a temporary stay of removal that may be revoked whenever the situation of risk has diminished, see the combined effect of sections 112(3), 114(1)(b) and 114(2) of the IRPA. In short, then, protection afforded under these provisions is temporary; there is no path to permanent residency for such individuals.

<sup>154</sup> As incorporated into Canadian law by s 96 of the IRPA.

withering arrests and detentions as a result of her political activity. She is not tortured during these detentions, nor is she detained for lengthy periods of time, but she is conveyed an ominous and threatening message about her ability to participate in political life, one that clearly infringes core liberty interests. This mistreatment is a textbook example of persecution and yet, it does not generally meet the threshold for protection under s97 of the IRPA. Or consider the situation of an individual who is subjected to systemic discrimination in his country of origin because of his ethnicity. The discrimination is pervasive; the individual was forced out of school before he learned to read, he cannot find work, which makes it almost impossible to provide food and shelter for his family. Once again, such individuals are clearly entitled to protection under the Refugee Convention definition of persecution, but would receive no corresponding protection from deportation under s97 of the IRPA.

These facts are further exacerbated by the fact that Canadian courts have incorporated a stricter legal test for the granting of protection under the PRRA regime than applies to claims to refugee protection.<sup>155</sup> Finally, those subject to protection under s97 of the IRPA do not benefit, as do refugees under international refugee law, from the expectation that they be naturalized.<sup>156</sup> The reality, as illustrated by several of the individuals with whom I spoke, is that if they are lucky and receive a positive risk assessment under s97, they then enter into a period of indefinite limbo with no assurances that they will be permitted to work, to receive healthcare or other social services and with the spectre of removal constantly hanging over their heads. In these circumstances, the suggestion that Canada's pre-

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<sup>155</sup> The test utilized under s96 of the IRPA involves a determination as to whether there is a "reasonable chance" that the refugee claimant will face persecution if returned to their country of origin, while applicants under s97 of the IRPA must establish the risks they face on the higher balance of probabilities standard. See, respectively, *Adjei v Canada (Minister of Employment & Immigration)*, [1989] 2 FC 680 and *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1.

<sup>156</sup> See Article 34 of the Refugee Convention, *supra* note 150.



removal screening measures are a reasonable facsimile for Canada's international obligations toward refugees is simply inaccurate.

The second question relates to the fact that the inadmissibility cases that I have examined over the course of my research have all arisen following an oral hearing by an independent, quasi-judicial tribunal. What clearer expression of administrative dialogue, one may ask, can there be than this? My answer to this question touches upon the location of discretion within the decision-making scheme under the IRPA. I do not deny that the hearing that takes place into inadmissibility at the IRB has, in the formal sense, all the appearance of a dialogical process. As I have discussed, the problem is that there is no discretion at this stage in the process, which is instead defined by the mechanical application of a set of facts to an exceptionally broad set of inadmissibility criteria. Where discretion does exist – at the s44 report-writing stage of the process – there is little concern for procedural fairness and correspondingly no requirement to engage in dialogue. The administrative dissonance that flows from this scheme frames the discretionary process as a one way process of executive decision-making and completely undermines the value of any dialogue that takes place in the tribunal process that follows. It is, in the end, precisely the kind of situation contemplated by Dyzenhaus as a legal grey hole. The scheme maintains the optics of legality, but upon peeling back the layers, we see that optics can be deceiving and compliance with a substantive interpretation of fairness principles is illusory.

I should also at this point clarify and qualify my starting position on what dialogue can accomplish in an administrative regime: I do not believe that dialogue is in itself a panacea and I do not believe that it can cure bad laws. A benevolent dictator is a dictator nonetheless, even if he takes into consideration the views of those over whom he lords power. Similarly, a law that provides no tangible meaning to those who will be subject to it is flawed, even if those charged with administering the law do so in deliberative and dialogical ways. Consider a law that

stated: “The Minister can remove any non-citizen for any reason, upon taking into consideration the non-citizen’s perspective.” It is doubtful that such a law would comply with even the most basic principles of legality, even though it does require some form of dialogue.<sup>157</sup>

In the inadmissibility context, it is similarly doubtful that the breadth of s 34 complies with Fullerian principles. As I set out in Chapter Two, the provision is unpredictable, unwieldy and subject to whimsy, manipulation and retroactive effect. As I further set out in Chapter Three, section 34 has been utilized in alarmingly asymmetrical ways, almost entirely against those from the Global South. This being the case, one may question why I have devoted such attention to the exercise of discretion under s 34, if the provision itself is of questionable legitimacy. The answer to this question lies mainly in the nature of security concerns in the contemporary world. To be clear, it is my view that there are concerns with the law such as it is, or at the very least, with the interpretation of s 34 that has emanated from the courts. But that does not end the analysis. In the present context, security laws are universally cast in broad strokes. There are no exceptions. To my knowledge, no country in the world is without a broadly cast provision in its immigration statutes related to national security and/or public order.<sup>158</sup> I do not suggest that the particulars of a given law are unimportant, or that the ability to make inadmissibility findings should be unconstrained by law. The point, however, is that states will likely always reserve to themselves the right to make decisions related to security and insist on some considerable degree of latitude, some discretion, in making those decisions. As such, the question of discretion is likely to remain ubiquitous. And if this is the case, the question as to *how* discretion is wielded comes back into focus.

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<sup>157</sup> For example, those expounded by Lon Fuller in *The Morality of Law*, revised ed. (New Haven: Yale University Press, 1969) at 39, as described above in Chapter One.

<sup>158</sup> As but a few examples, see s 10(d) and 73(b) of the Norwegian *Immigration Act* (2008); Chapter 5, s 1 of the Swedish *Aliens Act* (2005); and s 202 of the Australian *Migration Act* (1958).

#### **4.6.1 Why Dialogue?**

The case for dialogue in the context of security decision-making can be made with relative brevity given the ground that we have already covered. Recall that the principal rationale for dialogical approaches is that in democratic states, the legitimacy of coercive state action is tied to, and contingent upon, the extent to which it reflects democratic values. Central to these values and to a substantive understanding of the rule of law are principles of communication and participation, particularly in relation to those who are directly and meaningfully affected by the particular state acts in question. These are central concerns to many of the scholars with whom I have engaged over the course of this project – from Carens, Benhabib and Dauvergne in Chapter One, to Sossin, Handler and Cartier in the present chapter.

The goal of discretionary decision-making in democratic states is, therefore, to exercise public authority in a manner that is democratically legitimate or as Cartier puts it, to develop modes of decision-making that are authoritative, rather than authoritarian.<sup>159</sup> In the security context, those who are implicated in state decisions are deeply affected by them. These are not minor decisions; they are ones of almost indescribable importance to those subject to them. In the section above, I referred to some of the consequences that individuals have experienced in seeking to navigate the security regime: they are wrenching, invasive and frequently permanent. They include the possibility of permanent separation of families, removal to persecution and deprivations of rights within Canada related to work, access to social services and healthcare. They have, in other words, a direct and coercive impact on rights – life, liberty, security of the person – that are at the very

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<sup>159</sup> Genevieve Cartier, *Discretion as Dialogue*, *supra* note 6 at 646, citing Joseph Vining, *The Authoritative and the Authoritarian* (Chicago: University of Chicago Press, 1986).

foundation of liberal democracies. Just as the relative importance of a decision to the individual affects the content of the duty of fairness, so too should it heighten expectations over dialogue.<sup>160</sup> Democratic values do not necessarily dictate that I have a right to engage in dialogue with the parking enforcement officer who tickets my car, but they *do* require that I be given participatory agency over administrative decisions – i.e. removal to political persecution – that may be anathema to those very values.

Furthermore, the only factor that could conceivably be viewed as justifying a more unilateral approach – that these cases involve potentially existential threats to the state – is simply not borne out by the empirical evidence referred to in Part Two, above. Recall that virtually no cases brought under s 34 actually relate to individuals who are even alleged to constitute a threat to Canadian national security.

Finally, security decisions, particularly those related to lower level participants in discrete, localized contexts, generally depend on information and disclosure from the individual concerned. Given the breadth of the security provisions, context and motive are important factors in determining whether to proceed with inadmissibility allegations. Take the example that we referred to above of British M.P. George Galloway. As I described above, Mr. Galloway was alleged to be inadmissible in relation to his donations to the governing authority in the Gaza Strip, which is dominated by the Hamas group. Hamas was and remains a listed terrorist entity. While it is not difficult to make a connection between that government authority and terrorist acts, Galloway asserted, and it was not disputed, that his donation was used to buy incubators and pediatric dialysis units for a Gaza

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<sup>160</sup> See *Baker*, *supra* note 33 at para 25; *Canada (Attorney General) v. Mavi*, [2011] 2 SCR 504 at para 42.

hospital.<sup>161</sup> This is, one would imagine, highly relevant to the determination as to whether Mr. Galloway constituted a threat to Canadian security and yet it was information that only could have emanated from him. As a relatively privileged individual, Mr. Galloway was able to convey this information to Canadian authorities, not because the process required any process of dialogue, but because he had ready access to legal counsel and the media.

Another example of the importance of dialogue arises in the case of A.K. One of the consequences of the inadmissibility decision made against him is that he has to report regularly to a Canada Border Services office to confirm his address. A.K. reported to me that his frequent trips to the CBSA office were generally pleasant, that the people there had gotten to know him and treated him well. After some time, one CBSA officer admitted to A.K. that his situation was not fair. As A.K. told me:

He [the officer] said that I did not deserve this and I should not be considered as inadmissible. He saw I was just a family man, trying to work for my kids. He saw I am peaceful. He knew I had another application [for Ministerial relief] and wished to me good luck.

Unfortunately this CBSA officer is not the one who will make the decisions that will fundamentally alter A.K.'s life. Those officers continue to go about their work with the remoteness, alienation and objectification that Sossin laments as having "impoverished administrative law."<sup>162</sup> A.K.'s relationship, his "intimacy," with the reporting officers, on the other hand, is precisely what Sossin contemplates when he calls for an inclusion of the "personal dimension" in administrative relationships.<sup>163</sup>

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<sup>161</sup> *Toronto Coalition to Stop the War v Canada (MPSEP)*, *supra* note 145 at para 18.

<sup>162</sup> Sossin, *Intimate Approach to Fairness*, *supra* note 93 at 811.

<sup>163</sup> *Ibid.*

The resulting relationship, even in this highly stigmatized security context, proved to be one “capable of engendering mutual respect and trust.”<sup>164</sup>

Those who suggest that dialogical processes can help to legitimate administrative decisions do not tend to limit or qualify the contexts in which dialogue could be introduced. As was illustrated by A.K.’s experience, I contend that there is little principled reason why those subject to immigration-security measures should not be afforded a meaningful opportunity to communicate with those whose discretionary decisions are so important to them. I similarly do not see it as particularly onerous to require of immigration decision-makers that their decisions clearly reflect the content of that dialogue. With this in mind, I turn now to what I consider to be some of the preconditions for dialogical principles to take root in the migration-security context.

#### ***4.6.2 Demystifying Security***

Assuming that security provisions are likely to remain broadly cast, subject to discretionary exemption processes, demystifying and destigmatizing security inquiries is an important first step to fostering dialogue. In other words, decision-makers must recognize that a necessary corollary to an expansive security regime is the reality that those caught by the regime are not necessarily a threat. Rather, those notionally described by the security provisions are simply those for whom dialogue must commence in earnest. This need for further dialogue, however, should not be viewed as displacing a presumption of eligibility. Handler describes the importance of this presumption in his discussion of New Deal social agencies,<sup>165</sup> but it also finds application in the immigration context, where jurisprudence has firmly established that the stories of refugee claimants are presumed to be true,

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<sup>164</sup> *Ibid.*

<sup>165</sup> Handler, *Dependent People*, *supra* note 55 at 1096.

absent clear and articulable reasons for questioning their truthfulness.<sup>166</sup> The presumption of admissibility is crucial as it represents a distillation of the trust that many commentators suggest is at the very foundation of dialogical approaches.<sup>167</sup> It is also central to destigmatizing those subject to security measures as it requires that decision-makers refrain from making judgments about the moral character of individuals, at least until they have listened to their story from their perspective.

This calls to mind the situation of another person with whom I spoke. K.G., also from Eritrea, was accepted by Canada as a Convention refugee in the early 2000's following which his application for permanent residence floundered. He was notified that there were concerns in relation to his admissibility to Canada and for years he was really provided no further information. His application was neither accepted nor rejected and he lived in a constant state of anxiety that he would be returned to Eritrea, a country that he had not been to since he was a minor, as he had spent many years in the United States before coming to Canada. Finally, he was notified by Citizenship and Immigration Canada that he *might* be considered inadmissible in relation to nominal donations that he had made while in the United States to another Eritrean political party, and he was given the opportunity to both make submissions and appear for an interview. Following the interview – and a full decade after arriving in Canada – it was determined that K.G. was *not* inadmissible. His application for permanent residence was later accepted and he eventually became a Canadian citizen. As K.G. sees it, getting the chance to meet with the individuals who were deciding his case was crucial. He told me:

This all took too long. Too long. All they had to do was to meet me to know that I am not a political person and that I was always just trying to do the right thing for my country. They asked lots of questions, lots about individuals who I never heard of. I told them honestly,

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<sup>166</sup> *Maldonado v Canada (MEI)*, [1980] 2 F.C 302 (C.A.) at 305.

<sup>167</sup> Handler, *Dependent People*, *supra* note 55 at 1076, citing Annete Baier, “Trust and Antitrust” (1986) 96 *Ethics* 231; and generally Handler, *Power, Quiescence and Trust*, *supra* note 55.

“I don’t know these people, I have never heard of them” and they could tell that I was telling the truth. Once they talked to me they see that I believe in all these things, peace and democracy and freedom of religion and all these other things. They see that I am just like them.<sup>168</sup>

K.G.’s story illustrates, all too belatedly, the benefit of dialogue and the changed course that discretionary matters can take when individuals are given the power to persuade. K.G.’s case need not have been accepted. He did contribute to and join a political party that could be construed as having taken part in activities described under s 34 of the IRPA. But when given the opportunity to converse with those who possessed the discretion to decide his case, any notion of him being a person of actual concern appears to have disappeared. The offer to interview K.G. was clearly predicated on the possibility that, notwithstanding his political affiliations, he was not necessarily a ‘terrorist’ and not necessarily a person on whom the admissibility regime had to be imposed. To engage in dialogue there needed to be an openness to looking beyond the security-threat label that was being considered. And it was this openness and the dialogue that ensued that led to the determination that K.G. was of no concern to Canadian society. In this, then, we can see that dialogue not only depends upon demystifying security concerns, but it also contributes to this demystification. In short, recognizing that security provisions do not necessarily involve existential questions about the actual security of Canada, tamps down the rhetoric associated with security matters and puts them on a plane similar to other more mundane admissibility matters.

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<sup>168</sup> Interview with K.G. June 17, 2014.



#### ***4.6.3 Abandoning membership as a proxy for security concerns***

In liberal democracies, the law tends to attach consequences to an individual in relation to action (or inaction) deliberately taken by that person. Put differently, it is a generally held principle that individuals should not be subjected to serious state imposed legal censure for acts or events over which they have no individual agency. This connection between agency, action and consequence is ruptured in security matters related to membership under section 34 of the IRPA. Recall some of the absurdities that may arise because of the broad interpretation attached to the concept of membership. Individuals can be found inadmissible for membership in an organization that engaged in proscribed activity only after the individual left the organization. They can similarly be found inadmissible for joining an organization that denounced such activity decades earlier. And in the case of two individuals with whom I spoke – J.M. and M.C. – they can be suspected of membership in an organization simply for writing accounts (albeit sympathetic ones) of their activities.

M.C. is a Colombian human rights advocate who was found to be a Convention refugee in 2003 after he was forced to flee Colombia due to threats from that country's paramilitary groups. Prior to leaving Colombia, M.C. had been a vocal critic of the human rights abuses of the country's paramilitary groups and their connections with the national government. He reported and published on the topic and came to support a leftist political party, in return for which, the paramilitary threatened him, his wife and four year old son.<sup>169</sup> Twelve years after his arrival and recognition as a Convention refugee, Canada has still not made a decision on his application for permanent residence, nor explained the delay. It is clear to M.C. and

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<sup>169</sup> As was documented in calls for M.C.'s immediate protection by both Amnesty International in an "Urgent Action" communique and by the Inter-American Commission for Human Rights in a formal request to the Colombian government.

his lawyer, however, that the delay is related to a suspicion that his actions while in Colombia constituted membership in the FARC guerrilla group.<sup>170</sup>

J.M.'s experience was very similar – he was found inadmissible in relation to his work as a journalist in El Salvador primarily it seems because he acted as an intermediary between foreign journalists and FMLN rebels during that country's prolonged civil war.<sup>171</sup> J.M. describes his actions in the following terms:

I was never a member of the guerrilla, but I went to the front to make stories. At that moment, what you had to do was just say the truth. The media of El Salvador favoured the right, and we said, just say the truth. Yes this was good for the guerrillas, but this was also good for journalism.<sup>172</sup>

The problem with membership as a ground for establishing inadmissibility is its total lack of connection to any personal acts – those set out at paragraphs 34(1)(a) to (c) – that actually animate security concerns. Basing inadmissibility on amorphous notions of membership obviates the need to hear from the individual, as the analysis is almost entirely directed at the actions of the organization in question rather than those of the individual. Once the broad criteria for membership are satisfied, there is very little room for the inadmissible individual's perspective: the complexities and nuances of their own personal history and the fractured history of the countries that they have left become irrelevant. One can immediately see how this concept of membership is at odds with a TWAILian perspective, but for present purposes, I also contend that it forecloses the possibility of meaningful dialogue. Instead, it has created a kind of guilt by association free-for-all that has been

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<sup>170</sup> Interview with M.C. October 16, 2014.

<sup>171</sup> Interview with J.M. March 28, 2014. Of interest, the United States has implemented a general waiver of inadmissibility for FMLN members who did not directly engage in terrorist activity, see *Exercise of Authority Under the Immigration and Nationality Act*, 78, Fed. Reg. 24225 (April 13, 2013). Canada has implemented no such waiver.

<sup>172</sup> *Ibid.*

specifically rejected in other immigration contexts<sup>173</sup> and is at odds with principles of both domestic and international criminal law.<sup>174</sup> Membership does not concern itself with a person's own culpable conduct, but rather with the conduct of others for whom the person cannot, and often does not wish to speak. This is why membership as a proxy for personal or knowing connection to security related actions forecloses dialogue. If individual agency is unimportant to the matter, there really is no basis on which to engage in a meaningful discursive exchange.

It is indeed notable that even the United States, which not surprisingly also adopts a broad approach to security-related immigration matters, has recognized that loose criteria oriented towards group affiliation rather than personal action is problematic. The U.S. does not impose immigration liability for mere membership. What is required, rather, is evidence that an individual provided "material support" to an organization engaged in terrorist or other proscribed activity.<sup>175</sup> Responding to criticism that the "material support bar" similarly held people responsible for the wrongdoing of others, the Department of Homeland Security has recently implemented a series of waivers for those whose contributions were insignificant, were related to routine social or commercial transactions, humanitarian assistance or arose out of "substantial pressure that does not rise to the level of duress."<sup>176</sup> These exemption provisions provide to individuals the raw material with which to present their perspective and, at least in theory, with a meaningful opportunity to

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<sup>173</sup> Most explicitly in the context of refugee status determination and the application of the Refugee Convention's exclusion clauses for acts amounting to complicity in war crimes and crimes against humanity, as elucidated in the decision of the Supreme Court of Canada in *Ezokola v Canada*, 2013 SCC 40 at para 3.

<sup>174</sup> As further noted in the *Ezokola* case, *ibid*, at para 82: "guilt by association violates the principle of individual criminal responsibility. Individuals can only be liable for their own culpable conduct..."[citations omitted] Domestically, criminal code provisions concerning terrorism, while also exceptionally broad, are oriented towards prohibiting *acts* that facilitate terrorist activity rather than mere membership in an organization that may be implicated in such activity: see *Criminal Code of Canada*, RSC, 1985, C-46, s 83.

<sup>175</sup> See section 212(a)(3)(B) of the U.S. *Immigration and Nationality Act* (INA), 8 U.S.C. 1182(a)(3)(B).

<sup>176</sup> The waiver provisions were implemented by discretionary authority under s212(d)(3)(B)(i) of the INA: 79 Fed. Reg. 6913 (Feb. 5, 2014) online: <http://www.gpo.gov/fdsys/pkg/FR-2014-02-05/pdf/2014-02353.pdf> and <http://www.gpo.gov/fdsys/pkg/FR-2014-02-05/pdf/2014-02357.pdf>.

persuade decision-makers that they do not pose a security threat. Just as importantly, these provisions also inform decision-makers that the blunt instrument of inadmissibility based on association is at times in need of nuance and that the ‘right’ decision in such matters is one that, whichever way it goes, is rooted in context. In short, these provisions create the possibility for meaningful and substantive dialogue, a possibility that simply does not exist under the Canadian approach to membership.

#### ***4.6.4 Changing the Decision-Makers and their Practice Ideologies***

As I alluded to above, the “practice ideologies” that suffuse the work of discretionary decision-makers are essential in determining whether they will apply dialogical approaches to the processes over which they preside. I argue here that the transfer of decision-making responsibility for those flagged for security concerns from Citizenship and Immigration Canada to the Canada Border Services Agency makes the creation of dialogical practice ideologies virtually impossible. This is the concern expressed by Dauvergne when she describes the “differing governing ethos” associated with the shift in decision-making responsibility from an agency responsible for admission, to one whose primary task is enforcement and removal.<sup>177</sup>

Whether it is a differing “governing ethos” or a new set of “practice ideologies,” the implication of the shift to border control is clear: the end game of security matters is removal and in this game, dialogical processes are superfluous at best and counterproductive at worst. It is indeed, very difficult to conceive of a set of conditions by which an enforcement agency such as CBSA could ever engage in truly good faith dialogue with those over whom it holds such totalizing power. Handler

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<sup>177</sup> Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge UP 2008) at p 169 and see discussion, above, at Chapter 1.

notes that there are many potential barriers to developing trusting relationships between decision-makers and individuals – “lack of resources, working conditions, staff characteristics,” but *the* crucial one, he continues, is “the construction of the client’s moral character, which...is pre-determined by the organization’s dominant moral system – specifically, are clients to be treated as subjects or objects?”<sup>178</sup> The overarching CBSA construction of the moral character of inadmissible persons is that they are law-breakers and criminals who threaten public safety and state security interests. They are dangerous objects to be contained and processed, and the processing, it hardly need be mentioned, is removal.<sup>179</sup>

This is not to say that decision-makers will never side with individual applicants, or that they are necessarily unsympathetic towards those whose cases they decide. But it is unrealistic to expect an organization with an enforcement mandate and a top-down, command and control approach to truly absorb the elements of trust, dialogue and attention to historical nuance that I suggest are integral to any agenda of reform in security-related decision-making. For these reasons, I believe it is imperative to transfer decision-making in all admissibility cases back to agencies that view admission as an integral part of their mandate – those being Citizenship and Immigration Canada and, as I will describe below, the Immigration and Refugee Board.

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<sup>178</sup> Handler, *Dependent People*, *supra* note 55 at 1056, again citing Yeheskel Hasenfeld, *Human Service Organizations*, *supra* note 82. Once again, of relevance here is the literature on New Institutionalism which explores and seeks to understand the ways in which social interaction, institutional logics, norms and rules guide the behaviour of individuals within organizations. See the discussion at Chapter One, note 94 and, in particular Victor Nee and Paul Ingram, “Embeddedness and Beyond: Institutions, Exchange, and Social Structure” in Mary Brinton and Victor Nee, *The New Institutionalism in Sociology* (New York: Russell Sage, 1990) at 19-20. The refusal of CBSA to engage in personal interviews makes it difficult to precisely assess how these factors play out within the Agency. For the purposes of this project, I merely mention this strand of research in recognition of its relevance in explaining organizational decision-making cultures.

<sup>179</sup> Nowhere is this construction of the moral character of inadmissible persons by the CBSA made more evident than in its creation and energetic promotion of its “Most Wanted List”, which closely mimics criminal ‘wanted lists’. The list can be viewed online at: <http://www.cbsa-asfc.gc.ca/wc-cg/menu-eng.html>.

In addition to changing the location of decision-making in this area, a new “governing ethos” needs to be cultivated amongst those charged with making admissibility assessments and determinations, an ethos built on the following:

- A presumption that those seeking admission have come in good faith;
- A desire to engage with these persons, born of the recognition that “good” decisions – those that are transparent, intelligible and justified – are ones based on information that can usually only be obtained following two-way processes of dialogue;
- A recognition that while the stories of those seeking admission may be complex and their pasts intermingled with conflict, these facts alone do not constitute a threat to national security;
- A further recognition that security is not enhanced, but in fact compromised by focusing on an overly broad cohort of individuals;
- A renewed focus on the actions of individuals, rather than on vague and unhelpful indicia of group affiliation;
- A TWAILian sense of the histories that have led to Southern conflicts, the patterns of forced migration that these histories have created and the asymmetrical ways that security provisions have typically been applied to those fleeing from conflict zones in the Global South.

Returning decision-making responsibility for security matters to immigration officials will not on its own institute the above practice ideologies. They must be proactively introduced, inculcated and reinforced through a number of strategies and instruments. As Sossin notes, these include but are not limited to: soft law instruments, judicial vigilance, leadership, supervision and the fostering of civil service values.<sup>180</sup> What are these values? I suggest that they include Sossin’s conception of the value of neutrality which, as mentioned above, is defined by a

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<sup>180</sup> See most particularly Sossin, *Neutrality to Compassion* *supra* note 1 at 430.

willingness to balance competing obligations that may include those owed to the government of the day, but extend to include duties toward applicants, to the 'public interest' and to 'uphold the rule of law.'<sup>181</sup> This balancing of multiple interests is particularly important in an area implicating security and terrorism, given the politically supercharged nature of the issues and the omnipresent temptation on the part of political actors to curtail liberties in the name of protecting security.

Sossin also examines civil service values through the lens of legal norms such as independence, fairness and trust: these norms are important in creating the conditions for substantive dialogue.<sup>182</sup> More specific to our present context, I suggest that well-established international legal norms to which Canada has acceded, most particularly the principle of *non-refoulement*, must also play a role in all decision-making involving individuals who have asserted a fear of persecution if removed to their country of origin. The 1951 *Refugee Convention* is a comprehensive scheme with provisions related to the protection of refugees,<sup>183</sup> but also to the exclusion of those who have engaged in serious and international crimes<sup>184</sup> and to the ineligibility of those few individuals who pose a threat to the security of the host state.<sup>185</sup> These provisions define Canada's international obligations toward refugees. They formalize the commitment of the Canadian public to the protection of the human rights of non-citizens and they make clear to refugee claimants the limits of this commitment: it does not extend to those who have themselves engaged in human rights abuses and it does not apply to those who present a security threat to Canada. Put somewhat differently, the Refugee Convention defines the terms of engagement – the terms of dialogue – between its signatories and those seeking protection under it. I suggest that these parameters must be central in the minds of decision-makers exercising discretion under s34,

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<sup>181</sup> *Ibid* at 428-430.

<sup>182</sup> *Ibid* at 439.

<sup>183</sup> See Article 33 of the 1951 Refugee Convention, *supra* 150.

<sup>184</sup> *Ibid* at Article 1F.

<sup>185</sup> *Ibid* at Articles 32, 33.

particularly because the ambit of that provision is, as we have seen, potentially broader than the limited set of exclusions found in the Refugee Convention.

Internalizing knowledge of the Refugee Convention and understanding how its obligations are woven into security matters is relatively straightforward. More difficult, but no less important, is the need to expand the scope of practice ideologies to include a sensitivity to the global dynamics that have created protracted situations of conflict in the global south and the waves of forced migration that have ensued. As I have mentioned above, if large swaths of the global population are at least notionally captured by broad security provisions, it is crucial that discretionary decisions about admission be informed by context, an appreciation for history and a corresponding focus on the actions of individuals, rather than their mere proximity to conflict. This is central to the TWAILian perspective that I previously explored, but it is also central to a coherent approach to security. In this vein, I propose that decision-makers receive training on the history and context of political conflicts that have created most of the world's refugee-producing situations.

In an engaging and provocative paper, Mohsen al Attar and Vernon Tava provide a conceptual and practical approach to incorporating TWAIL principles into legal pedagogy, particularly in the teaching of international law.<sup>186</sup> The central goal of the approach is, of course, to expose students to southern perspectives on international law. But of particular interest for our purposes is that the authors propose not merely to introduce students to TWAIL scholarship, but to do so through a 'dialogic teaching-learning experience' aimed at fostering genuine student engagement.<sup>187</sup> This approach is a direct response, claim the authors, to the alienation caused by traditional legal pedagogy, an alienation that arises because law students are

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<sup>186</sup> Al Attar, Mohsen & Vernon Ivan Tava, "TWAIL Pedagogy - Legal Education for Emancipation" SSRN Scholarly Paper ID 1438325 (Rochester, NY: Social Science Research Network, 2009) [Al Attar and Tava, "TWAIL Pedagogy"]. See also, Diane Otto, "Handmaidens, Hierarchies and the Crossing of the Public/Private Divide in the Teaching of International Law" (2000) 1 Melbourne J. Int'l L. 35.

<sup>187</sup> Al Attar and Tava, TWAIL Pedagogy, *ibid*, at note 68, citing Otto, *ibid*, at 40-44.



virtually compelled to sever justice claims from the application of legal principle.<sup>188</sup> This in turn “yields a generation of jurists, judges, and legislators unmoved by the plight of the poor and unequipped to tackle the oppression our international legal corpus produces.”<sup>189</sup> By way of contrast, the authors suggest that deploying TWAIL principles – as both international law theory and legal pedagogy – encourages students to become more conscious of themselves and their place in the world and to think independently about the law, the Western world and its role in the problems of the Global South.<sup>190</sup>

It is, of course, unrealistic to expect governments to provide critical legal pedagogy to those they entrust to uphold the current legal order. This is not what I propose. What I do propose is that officers be encouraged to reflect in their training on the histories and inequities that drive global migration and to weave this perspective into an approach to discretion that emphasizes transparency, participation and non-discrimination. One of the ways in which officers may begin this reflection is by consideration of the following scenarios<sup>191</sup>:

Scenario I

Applicant A donated the equivalent of \$60 in 1976 to an organization that asserted independence from a regime that Canada has designated as one that engaged in widespread human rights violations. The successful independence movement was immediately recognized as legitimate by both the United Nations General Assembly and by Canada individually.

Scenario II

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<sup>188</sup> Al Attar and Tava, TWAIL Pedagogy, *supra* note 186 at 22.

<sup>189</sup> *Ibid.*

<sup>190</sup> *Ibid* at 39.

<sup>191</sup> I include these scenarios as an illustration of the kind of thought experiment that I believe officers should be encouraged to undertake. I leave for another day a more fleshed out training curriculum.

Applicant B is the spouse of a politician who was a member of a non-violent, ethnically-based political party that urged negotiations between a militant organization and the federal government.

Scenario III

Applicant C engaged in the subversion by force of a government in the last ten years. He was directly involved in armed confrontations. The subversion led to the falling of the government and the failing of the state, which is now dominated by militants who have subsequently made direct threats against Canada.

Of course the provocative feature of these scenarios is that the more or less innocuous examples of Applicants A and B are based on actual findings of inadmissibility, while the far more concerning Applicant C is a hypothetical American soldier who participated in the Iraq war. The intent of such an exercise would not be to encourage officers to find American soldiers inadmissible, but would rather be to encourage officers to reflect carefully about their perceptions as to who constitutes a security threat and to focus their minds on the commission of acts that trigger security concerns, rather than on discriminatory views of those who seek admission from conflict zones in the global south.

The prospect of translating Al Attar and Tava's approach to teaching TWAIL in law schools into an approach to training immigration decision-makers about the international dimensions of their work is intriguing for reasons related to both process and product. From a process perspective, Al Attar and Tava's approach suggests that the method by which individuals learn about legal relationships informs how they will later engage in such relationships. On this understanding, a dialogical approach to training about the international issues that arise in security decisions can only help to foster a dialogical approach to the decision-making itself. With respect to content, I believe that an engaged exploration of the root causes of political conflicts, taking into consideration TWAILian perspectives on international

legal issues such as colonial rule, foreign domination and the legitimacy of self-determination efforts would help bring nuance to the process, focusing it on individuals who have meaningfully contributed to proscribed activities.<sup>192</sup>

#### ***4.6.5 The Role of the Judiciary***

The suggestion that legal norms have a role to play in considering civil service values brings to the fore the role of the judiciary in reforming and refining the security process. While I accept on a fairly theoretical level the suggestion that judicial control in administrative law does not necessarily improve outcomes and can, in fact impede dialogical processes, I have come to view immigration matters in general and security matters in particular as an exception to this rule. The vulnerability of security decision-makers to overt, top-down political suasion, combined with the extremely high stakes of these decisions require, in my view, some form of oversight from a body more structurally detached from politics and narrowly oriented toward rule of law considerations.<sup>193</sup>

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<sup>192</sup> British scholar Satvinder Juss proposes a somewhat similar approach to discretionary immigration decision-making that he refers to as “cultural jurisprudence.” It is, in large measure, an approach to dialogical discretion in the immigration context that attempts to take seriously the perspectives of those seeking admission and to reform immigration law along non-discriminatory lines. The result, I suggest, provides insight into a similarly promising possibility for decision-making in the migration-security context. In addition to calling for a process based on participation, respect for dignity and trust, Juss’ conception of cultural jurisprudence emphasizes the importance of contextual socio-political and cultural knowledge in crafting appropriate discretionary immigration decisions. See Satvinder Juss, *Discretion and Deviation in the Administration of Immigration Control* (London: Sweet & Maxwell, 1997) at 5-6, 14-15.

<sup>193</sup> In this, I share the view of Daniel Kanstroom, who notes:

Immigration law differs in important respects from many other areas of administrative law, however. Too Olympian, transcendent, or even policy-based a perspective in this arena can put many individuals at grave risk. A sort of theoretical triage, in which abstract intellectual purity may have to be sacrificed in the service of more immediate law reform is therefore justified.

See D Kanstroom, “Surrounding the Hole in the Doughnut: Discretion and Deference in US Immigration Law” (1997) 71 *Tulane Law Rev* 703 at 730.

In a recent public lecture, McGill University professor and United Nations Special Rapporteur on the Human Rights of Migrants François Crépeau provocatively noted that in its increasing use in matters of security, detention and removal, administrative law has become “the most dangerous law in the land,” as invasive on matters of human liberty as the criminal law, yet devoid of the protections that criminal courts have developed over the centuries.<sup>194</sup> Crépeau went on to note that:

In many countries that do not have the death penalty...the administrative judge today is the only domestic judge who can send people to face extrajudicial execution, torture or arbitrary detention. It is a heavy burden to shoulder. Immigration regulations, proceedings, and policies now "mimic" the criminal justice system in many ways...However, these shifts have not been accompanied by increased legal safeguards of the kind found in criminal law. The continued insufficiency of human rights guarantees within administrative proceedings relating to migration, coupled with the increasing use of punitive sanctions and regimes akin to criminal law, often place irregular migrants in a very precarious position.<sup>195</sup>

In flagging a judicial role for preserving rule of law principles in migration-security matters, I am not suggesting that decision-makers be stripped of all latitude in determining how best to go about their work. What I do suggest, however, is that if legislation is to cast security matters in sweepingly broad terms, than the processes for determining questions of admission and expulsion must contain mechanisms for ensuring that the individuals subject to security decisions are listened to in good faith and that they are afforded the opportunity to persuade independent decision-makers that they pose no security threat. In short, migration-security matters need their “*Baker* moment” and in a context in which political

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<sup>194</sup> François Crépeau, “From Enforced Closure to Regulated Mobility: The Need for a Paradigm Shift in Migration Policies”, Public Lecture at the Annual Meeting of the Canadian Association for Refugee and Forced Migration Studies, Toronto, Canada, May 13, 2015.

<sup>195</sup> *Ibid.*

actors seek to secure advantage by entrenching perceived links between migration and insecurity, it would appear that such a moment can only emanate from the courts.

Another, and perhaps more compelling reason that the courts maintain an important role in the security-migration nexus is that this area is not one solely relating to executive discretion, but it also implicates important legal entitlements. These entitlements derive from a complex interplay of international and domestic law – the right against *refoulement* and the non-derogable right not to be returned to torture amongst them – that are firmly within the decision-making expertise of the courts.

This raises a different angle on the notion of dialogue than that which we have discussed, that being the dialogue that may take place, not between decision-maker and individual, but rather between the decision-maker and the judiciary. Above, I referred to the potential that the *Baker* decision held out for a shift to a more dialogic approach to decision-making in humanitarian and compassionate applications. It was predicted that *Baker* would have an impact, not necessarily on the outcomes of H&C applications, but much more fundamentally, on the way in which such applications are considered by immigration officers, a prediction that has to a significant extent at least, been born out.<sup>196</sup> Sossin refers to the changes in soft law instruments that were implemented as a result of the *Baker* decision and the impact of the decision can also be observed, still frequently, in decisions of lower courts sitting on judicial review of H&C decisions.<sup>197</sup>

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<sup>196</sup> See Lorne Sossin, “The Politics of Soft Law: How judicial decisions influence bureaucratic discretion in Canada” in Marc Hertogh and Simon Halliday, eds., *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (New York: Cambridge UP, 2004) at 150.

<sup>197</sup> The examples are myriad, but see for example *Paul v Canada (MCI)*, 2013 FC 1081 and *Damte v Canada (MCI)*, 2011 FC 1212.

Similar change needs to occur in the migration-security context. To reiterate a point I made earlier, this is not a normative call for a more “lenient” approach to discretionary decision-making in this area. It is, rather, a call for substantive review of inadmissibility decisions in the hopes that it will foster a more nuanced, engaged and individualized process. It is a call to bring individuals affected by such decisions into the mix and to recognize that this is central to the legitimacy of the decision-making process.

#### ***4.6.6 Reform the Discretionary Ministerial Relief Provision***

As I illustrated in Part Two of this study, the theoretical availability of a discretionary exemption for inadmissibility found at s42.1 of the IRPA is all but illusory given the delays associated with it and the truly minimal level of engagement that it requires of the Minister of Public Safety and Emergency Preparedness.<sup>198</sup> However, I do not view the availability of a backend discretionary relief mechanism to be inherently problematic; first of all, in a risk averse world, it is likely inevitable that governments will choose to err on the side of caution on questions related to security and admission. In this context, the availability of a discretionary waiver of inadmissibility can provide an important safeguard against overly broad inadmissibility decisions.<sup>199</sup>

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<sup>198</sup> I refer specifically here to the fact that applications for Ministerial relief frequently remain undecided after 8-10 years, and to the more or less “boilerplate” reasons for denying relief that were upheld as sufficient by the Supreme Court of Canada in *Agraira, supra* note 121.

<sup>199</sup> Though to be clear, I do not suggest that after-the-fact waivers of admissibility are a sufficient curative to an otherwise overly broad security regime. Just as courts have rejected the notion that prosecutorial discretion can ameliorate constitutionally impaired criminal provisions, so too (in my estimation) should they reject arguments that a Ministerial discretion can cure an otherwise infirm inadmissibility regime: see for example *R. v. Smith*, [1987] 1 S.C.R. 1045 at paras 86-88. As I have noted above, however, in matters of security, states will virtually always seek to maintain the flexibility that a discretionary regime provides and it is on this basis, rather than on the basis of an endorsement of the current discretionary regime, that I make these comments.

Secondly, if designed properly – that is, if designed to provide timely, impartial and justified decisions – a discretionary relief mechanism can form an important part of an overall scheme that takes national security concerns seriously without compromising the state’s international human rights obligations. Recall that it was the very availability of such a mechanism that the Supreme Court of Canada in the *Suresh* decision relied upon to uphold the legality of the security provisions then in place.<sup>200</sup>

Unfortunately, the promise of the Ministerial exemption provision has wilted out of neglect, to the point that it should now be viewed as an entirely ineffective administrative mechanism. One can see why elected politicians, particularly the Minister responsible for public safety, would want to avoid making the politically charged decision to grant rights to those already found to have engaged in acts such as terrorism and subversion of foreign governments. And yet, given the seemingly innocuous forms of involvement of many of these individuals, a significant percentage of the applications for Ministerial relief will be strong on the merits. The result, it seems, is avoidance. Successive Ministers have confirmed through their (in)action that they simply want no part of this process, and so I would propose that they be granted their wish. I would instead place responsibility for waiver decisions in the hands of the Immigration Appeal Division of the Immigration and Refugee Board, a body that already possesses considerable expertise balancing, in the criminal context, concerns over public safety and security with the rights of individuals.<sup>201</sup> Recall from earlier in our discussion that the review of inadmissibility findings at the Immigration Division of the IRB is asymmetrical – the Minister may appeal Immigration Division decisions to the IAD, but the individual found to be inadmissible may only seek leave and judicial review before the Federal Court. I would propose to allow both parties to appeal inadmissibility findings

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<sup>200</sup> *Suresh*, *supra* note 116 at para 110.

<sup>201</sup> The IAD hears appeals of criminal inadmissibility matters pursuant to its authority under sections 62-71 of the IRPA and may grant relief to appellants on humanitarian and compassionate grounds.

under s34 to the IAD, and to grant the IAD the residual discretionary authority to waive inadmissibility in appropriate cases. It is imperative that in considering these security cases, the IAD be required to act expeditiously and to conduct hearings, as it does in the other appeals that come before it. This, of course, is the key element of any discretionary regime built around dialogical principles, for it is at this moment of literal dialogue that the decision-maker must listen to the individual whose future is in their hands and it is frequently at this moment, I contend, that the individual ceases to simply be a terrorist or a spy or a security threat and instead becomes a person whose past actions may be adjudged on their own merits.

Transforming the process along these lines would breathe life into the relief provision – it would attain a degree of insulation from political rhetoric and give inadmissible individuals a sense that they are active participants in a process that is fundamentally important to them. Public safety considerations would still be prominent in the process and the Minister would retain avenues of recourse to respond to decisions with which s/he disagrees. What would end, however, is the indefinite period of waiting that most inadmissible persons endure, only to be followed by a boilerplate decision that merely reiterates the original basis of the inadmissibility determination.

## **Conclusion**

The use of discretion is ubiquitous and controversial. In its many incarnations it has been both praised and criticized; it has been viewed as essential to a progressive state and as a troubling deviation from the rule of law and individual rights. The paradox of administrative discretion is that it is at once an expression of state power and a limitation on it. It is exercised in contexts in which the state possesses the power to establish the parameters of acceptable choice. At the same time, the existence of discretion implies a ceding of state control to the administrative realm which balances multiple duties beyond those owed to the government of the day. In the preceding pages, I have argued that for states to exercise this power in



justifiable ways, it must approach discretion as a location of democratic action. This requires, at a minimum, that those who are affected by expressions of discretionary state power be placed at the centre of the processes by which it is exercised. This, I suggest, is as true in the context of migration-security determinations as it is in any other domain.

The reality of discretion in security matters is, however, very far removed from any principle of dialogism and instead resembles a classic iteration of top-down executive power. The result is a security regime that is suspicious of context and skewed to ensnare those who have fled conflict in the global south. This is a problem from a TWAIL perspective, but it is also a problem from the perspective of a coherent and legitimate security regime. The solution, I propose, is to recalibrate the approach of decision-makers so that they meaningfully engage with the individuals affected by their decisions and consider carefully both the content of their actions and the context in which they occurred. Given the rights at stake in these matters and the fundamentally legal nature of them, I believe that the courts should preserve an important role in the security context, but one that is mindful of the complex weighing of interests in the discretionary process. While rights must be preserved, the courts also play an important role in creating the conditions for dialogue. There are times, as in the example of *Baker*, when the courts must take it upon themselves not to end a conversation, but to begin it.

In the end, then, what I have proposed in the above pages is rather modest: I do not suggest that individuals within Canada should not be subject to some form of security screening process. I do not suggest that such individuals have a right to any particular form of substantive outcome. But what I do suggest is that where these individuals assert that their core rights will be affected by removal, they should be entitled to a rich procedural process that focuses on the security threat that they may pose in an individualized, dialogical and good faith process, and which takes as sacred Canada's commitment to comply precisely with its international obligations.

## **CONCLUSION**

As the final stages of this dissertation were being completed, public interest in the Syrian refugee crisis exploded following the viral image of a young boy who drowned, together with his brother and mother, in their efforts to seek asylum in Europe. This tragic event created a renewed push to prioritize the resettlement of refugees, yet even in these solemn circumstances, the security discourse surged to the front of the agenda. In refusing to commit to admitting more refugees, Prime Minister Stephen Harper asserted that his political rivals were not capable of making the tough national-security decisions required of a prime minister. He continued: “Our opponents are simply not up to it. Thomas Mulcair and Justin Trudeau will not even call jihadist terrorism what it is. But if you cannot call jihadist terrorism by its name then you cannot be trusted to confront it and you cannot keep Canadians safe from it.”<sup>1</sup> In an instant, Mr. Harper sought to reframe the national conversation from one about refugees and the common call of humanity to one that unsubtly cast refugees as security threats.

At roughly the same time, the American Migration Policy Institute published an interesting commentary, revealing that in the 14 years since September 11, 2001, the United States has resettled 784,000 refugees. Of those refugees, precisely two have been arrested for planning terrorist activities and, the report goes on to note, neither of these individuals were planning an attack on the United States.<sup>2</sup>

These two stories, and the geopolitical context from which they emerge, help to frame the debate that I have explored over the preceding pages. They illustrate the tensions of the securitized state, brought into sharp relief in the context of a refugee crisis of historical proportions. As Syrian refugees converge on European borders,

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<sup>1</sup> Tonda MacCharles, “Conservative Leader Stephen Harper discounts meeting with other party leaders to discuss refugee crisis, holds to 10,000 more admissions from Syria, Iraq in next three years”, *The Toronto Star* (7 September 2015), online: The Toronto Star <<http://www.thestar.com>>.

<sup>2</sup> Kathleen Newland, “The U.S. Record Shows Refugees Are Not a Threat”, *Migration Policy Institute* (October, 2015), online: Migration Policy Institute <http://migrationpolicy.org>.

they implicitly question the legitimacy of closing borders to those who face danger at home. In this, they are backed by international law, but not necessarily by the states tasked with receiving them, many of which are reconsidering (in highly non-theoretical ways) the twin imperatives of the liberal democratic state: ensuring the security of citizens while respecting the universality of human rights.

### ***Revisiting the Analysis***

This brings me to some concluding remarks about security, inadmissibility and migration. Over the course of this exploration, I have endeavoured to identify an approach to security in immigration matters that would be generally acceptable to a wide spectrum of observers, ranging from those who propose a generally open borders approach, to those who defend the sovereign orthodoxy of contemporary migration law.

As I have noted at various points along the way, exclusionary migration policies are relatively uncontroversial where they are *legitimately* tied to matters implicating the security of the host community. It is equally uncontroversial that states owe certain obligations to non-citizens within their territory, at the very least where removal of such individuals would result in their persecution. In the space between these principles, decisions on security must be made and in the securitized context of this era, states are tempted to leave this space largely unencumbered by any substantive notions of legality. It is, I have argued, an example of a legal grey hole – one that contains superficial trappings of legality but in reality remains a zone of virtually unfettered executive power. I have argued that states ought to resist the temptation to create such grey holes.

My arguments in this regard have proceeded in a number of steps, all with an emphasis on the Canadian context. In the first step, I examined some of the prevailing debates on issues germane to my topic: migration, security, the rule of law and exclusion in times of perceived exception. After a brief ‘first principles’

review of scholarship on liberalism, migration and security, I moved on to outline the arguments of scholars such as Benhabib and Dauvergne who make the case, in a variety of ways, for a thick conception of the rule of law, one that applies to citizens and non-citizens alike and even in times of perceived exception. The position is not dissimilar to that of Joseph Carens who, in his recent work, has proposed a version of liberalism that “takes rights seriously without making them absolute,” and at the same time is sensitive to context and history.<sup>3</sup> At the very least, Carens notes, liberal states should take seriously the moral claims of outsiders within a political community who would like to remain.<sup>4</sup> Exclusion, Carens concludes, “has to be justified.”<sup>5</sup> While I do not, in this dissertation, attempt to settle the argument as to whether this process of justification is owed to *all* persons outside a political community who may seek entry into it, I do assert one very basic fact that is of central importance to my later argument: justification *is* required in relation to those already within a community who assert a risk to themselves if removed. As I later explore in the first chapter, this position is consistent with other scholars who write, more generally, about principles of legality and the rule of law. As Dyzenhaus notes, “the constraints of legality are the constraints of adequate justification.”

With this frame in mind, I moved on in the second step to an examination of the Canadian decision-making regime in immigration security cases. In doing so, I made reference to the various periods of exclusion in Canadian immigration law and to the current preoccupation with security as a basis for inadmissibility. I also outlined the broad legislative language applicable to these cases and the correspondingly broad and deferential approach adopted by Canadian courts in reviewing security-related decisions. The result, I suggested, is that Canadian law renders inadmissible not just those thought to pose a security threat to Canada, but a significantly

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<sup>3</sup> Joseph H Carens, “A Reply to Meilaender: Reconsidering Open Borders” (1999) 33:4 Int Migr Rev 1082 at 1083.

<sup>4</sup> Joseph Carens, *Immigrants and the Right to Stay* (Cambridge, Mass.: MIT Press, 2010).

<sup>5</sup> *Ibid.*

broader ambit of individuals. To further explore this observation, I then turned to a quantitative assessment of Canadian decision-making in security cases, revealing that such cases: a) virtually never relate to actual security threats against Canada or its allies; b) virtually never involve allegations related to the actual commission of crimes, but rather to membership – broadly defined – in organizations alleged to have committed crimes; and c) are generally made against individuals from the Global South who wish to make, or have made, a claim to refugee status in Canada. The reality, I conclude, is that Canada’s security-migration regime appears to be primarily focused on a surprising cohort of individuals: those with some connection to localized, Third World (and frequently anti-colonial) movements. This preoccupation is not only empirically unconnected to actual security concerns, but it also has important and, I assert, unjustified consequences for those subject to security measures.

In the third step, I incorporated a TWAIL perspective to help explain – and ultimately resolve – the deficits in justification identified in the preceding chapter. A paradox of immigration law lies in the fact that it is a domain of both insular state-based policy and intimate connection to international law. At the outset of the chapter I sought to illustrate the myriad ways in which domestic migration law is both informed and constrained by international law and, inversely, how migration law also transmits legal principles onto the international plane.

With this in mind, I set out to explore how a third world perspective on international law can help us to think differently about some of the central themes of this study. I argued that TWAIL’s emphasis on reading history and context into the law, its focus on the rights of individuals rather than states, its critical stance on the war on terror and its insistence on a substantive place for the rule of law are all important ingredients in improving decision-making in the migration-security realm. I also sought to illustrate how transposing TWAIL onto the migration-security realm would require the adoption of discursive and participatory

interactions between all parties and focus the security analysis on the *actions* rather than the *associations* of individuals, bringing to it a sense of justification that it currently lacks.

Building on this TWAIL analysis, I turned in the final chapter to an examination of similar conversations from the realm of administrative law – about dialogue, participation and the rule of law – and examined how a progressive interpretation of administrative discretion could assist in bringing a greater sense of justification to security-based immigration decisions. After briefly tracking the ebb and flow history of discretionary decision-making in administrative law, I focused in on recent approaches that assert that for discretionary authority to produce results that are viewed as both legitimate and justified, they must engage in meaningful dialogue with those over whom it is exercised. Dialogue and justification are reinforcing concepts: a legal culture that aspires to justification is one that emphasizes dialogue as the principle mechanism by which to attain it. Fostering such a legal culture is particularly important when dealing with individuals who lack the ability to assert their own voice; who lack the power, in other words, to assert their version of the story that has placed them under the authority of the administrative decision-maker. It is all the more so in legal domains where the decision at issue is one that affects important rights.

Foreign nationals, particularly those alleged to have taken part in activities that raise national security concerns are perhaps the prototype of such individuals. They lack political voice and frequently face obstacles in asserting legal rights. And for many such individuals, the discretion exercised in determining how their case will proceed is perhaps the most important administrative decision that they will ever confront. At this point in the analysis, I again addressed a central question: what obligates states to engage in dialogue with non-citizens? The answer, at least for present purposes, lies in two facts. The first is that, as I illustrated in my empirical research, the vast majority of those subject to the security mechanisms in Canada

have asserted a well-founded fear of persecution if removed to their countries of origin. The second is that the cases that I examined over the course of this study involved persons already present in Canada who were asserting a right to stay. As such, processes to determine their legal entitlements are necessarily also processes that define state authority to exercise coercion over such individuals. State coercion is an important trigger for the application of the Canadian *Charter of Rights and Freedoms*, and it also, I assert, triggers obligations to engage in dialogue.

Given that the actors in this legal context also tend to assert rights under international law, most notably the Refugee Convention, this is also where TWAIL commentary converges with dialogical approaches to administrative law. As noted above, TWAIL principles support the use of discursive approaches when considering the rights of Third World peoples, but it also provides direction, guidance and context on the question of *how* that dialogue should take place. It provides substantive meaning, in other words, to administrative dialogue in a manner that comports with the reality of those affected by security-based decisions. At the end of this final step, I therefore sought to articulate an approach to decision-making that incorporates both TWAIL perspectives and dialogical principles as two ingredients that, I suggest, would remedy many of the ailments that presently plague decisions in this area.

### ***A TWAILian, Dialogical Model of Decision-Making***

In the end, I suggest that taking principles derived from TWAIL scholarship and combining them with dialogical approaches to administrative law creates a promising formula for enhancing the legitimacy and justification of security related decisions. It would accomplish this by issuing a number of prescriptions for reform of the current process that I outlined in the previous chapter. To briefly reiterate, the most important changes that this approach would dictate include the following:



- *Demystifying Security* – A prescription born of the realization that security provisions will inevitably be cast in broad legislative language, reserving to decision-makers the authority to distinguish cases of true concern from those that are not. While immigration policy cannot be an avenue of impunity for international crimes, nor too can it become a vehicle for recasting all activity related to foreign instability as a security threat. Measures must be taken to instil in decision-makers an understanding of the complexity and context of global geo-political instability and a general recognition that many cases flagged under the broad security legislation do not raise existential questions about the actual security of the state. Where a person is found to be notionally described by the security legislation, this merely triggers the requirement to engage in good faith dialogue, taking into consideration relevant TWAIL factors, such as colonial history and post-colonial repression. And as I illustrated by reference to one individual, engaging in dialogue at this level fosters the demystification of security as a necessarily more threatening form of inadmissibility than any of the others.
- *Abandoning membership as a proxy for security concerns* – This prescription aims to bring inadmissibility determinations in security cases, at least in respect of refugee claimants, into conformity with the Refugee Convention and with commonly accepted principles of individual criminal responsibility. In Chapter Two, I revealed that mere membership in groups alleged to have committed proscribed acts is the most frequent ground of security-related inadmissibility. This has occurred over a period of time in which appellate courts around the world have firmly rejected membership as a form of liability in international refugee law. Recalling that the vast majority of individuals subject domestically to the security provisions are asylum seekers or Convention refugees, it is a simple and incontrovertible fact that the

membership criterion places Canada outside its international legal obligations. I suggest that security-related decisions be based instead on the concept of complicity, a ground of secondary liability that has been both well-developed internationally and widely recognized as a legitimate basis on which to assess individual responsibility for illicit group activity.

- *Changing the Decision-Makers and their Practice Ideologies* – In the binary world of immigration law, evaluating inadmissibility is as much about admission as it is exclusion. This being the case, I further proposed that it is inappropriate for front-end decision-making in this domain to be undertaken by a government agency whose principal *raison d'être* is enforcement and removal. As such, I argued that decision-making authority for security-related inadmissibility determinations be entirely returned to Citizenship and Immigration Canada.
- *The Role of the Judiciary* – I also contended that courts must maintain a role in ensuring the legitimacy of security-related decisions, given both the complex domestic and international law issues that arise and the core, protected legal rights at stake. Processes of dialogue, such as those that now routinely take place in the context of refugee determination proceedings and humanitarian and compassionate applications are frequently generated and maintained by a backdrop of legal entitlement.
- *Reform the Discretionary Ministerial Relief Provision* – Finally, I proposed that the mechanism for providing relief for inadmissibility be reformed by shifting it away from the Public Safety Minister and placing it instead within the framework of an appeal to the Immigration Appeal Division of the Immigration and Refugee Board. This would not only bring parity to the appellate processes under the IRPA's inadmissibility regime, granting

to individuals that which the Minister already possesses, but it would also situate dialogue and discretion in the same decision-making location. This is in contrast to the current regime which confers discretion in a process (the s44 report) that does not require dialogue and then confers dialogue in a location with no discretion (the Immigration Division hearing).

### ***Agenda For Future Research***

While this dissertation touches upon a variety of themes, its central objective is a relatively modest one: to enhance the legitimacy and justification of security-related decisions within one particular decision-making regime. Several interesting questions remain unaddressed, which gives rise to a research agenda that includes the following issues: 1) the use of security provisions in overseas immigration applications, particularly applications for refugee status submitted from abroad; 2) a detailed analysis, beyond that which could be provided here, of the particular kinds of groups that attract scrutiny from a security perspective; 3) further international comparative research on how other countries determine inadmissibility for security purposes; and 4) a consideration of the contributions that a TWAIL approach might make to other immigration contexts, most notably, the present global refugee crisis. I now briefly expand on these topics:

#### *1) Inadmissibility and Overseas Immigration Applications*

The empirical work that I have undertaken in this dissertation concerns two sights of decision-making on inadmissibility: decisions of the Immigration Division of the Immigration and Refugee Board and decisions on Ministerial relief made by the Minister of Public Safety and Emergency Preparedness. There remains another area of decision-making that this dissertation does not touch upon: overseas immigration applications determined by Citizenship and Immigration Canada. While I endeavoured to collect data on these decisions – I spent over a year in back and forth communication with CIC on various Access to Information Requests – I

was repeatedly frustrated in my efforts and was ultimately told that this data could not be captured without absorbing exorbitant fees. Nevertheless, as an area of inquiry, I continue to believe in the importance of collecting information on these decisions. In the procedurally stripped down world of immigration law, overseas immigration applications represent a certain kind of nadir: the *Charter* is of limited application, procedural safeguards are minimal and judicial deference of such decisions is at its highest. In particular, I would be keenly interested to find out how many overseas applications for refugee protection are refused by Canadian officials on the basis of s34 of the IRPA. The rights at stake in such applications are at least equal to many of those individuals in Canada whose cases were included in this study and yet decision-making in this area is virtually devoid of scrutiny.

## 2) *International Comparative Research*

While I have briefly referred over the preceding pages to migration-security practices internationally, a more sustained comparative analysis of comparable security regimes in other refugee-receiving countries would be of clear assistance in evaluating the Canadian approach. In particular, it would be interesting to delve into the recent waivers implemented in the United States, which represent an apparent recognition of the overbreadth of their security-related inadmissibility criteria. It would also be helpful to explore whether countries distinguish between immigrants and refugees in the application of their security criteria and, if this is the case, whether security measures applied vis-à-vis refugees are consistent with the Refugee Convention.

## 3) *Analysis of Inadmissible Groups*

As I noted in my empirical analysis of s34 decisions, it was beyond the scope of this dissertation to delve deeply into the nature of the organizations that become embroiled in security proceedings. While I have looked into this elsewhere in the

particular context of one country,<sup>6</sup> a more in-depth analysis of the various movements, organizations and groups would be of considerable value in shedding further light on the motivations that drive security decisions. This vein of potential research could help us understand whether there are any particular kinds of groups that attract sanction; whether it matters if such groups are considered Canadian allies or whether the question of current engagement in armed conflict is truly considered to be an irrelevant consideration.

#### 4) *TWAIL in other Immigration Contexts*

I have found TWAIL to provide a useful lens through which to examine my dissertation topic. As I have argued, it can help to bring nuance and sensitivity to legal domains not known for these traits. It can help to convey an understanding of broad, macro-political phenomena as they are embodied in the lives of the individuals who have been affected by them in ways that are highly relevant to legal proceedings. And as many TWAIL scholars have argued, it is an approach that is readily transposable to many areas of legal enquiry. In the realm of immigration and refugee law, I suspect that a TWAIL approach could provide interesting insights into a variety of areas, including: i) the application of the exclusion clauses under the Refugee Convention; ii) the assessment of the *bona fides* of spousal sponsorships under immigration legislation; iii) the assessment of credibility in relation to refugee determination proceedings; iv) the selection of skilled workers for immigration and the subsequent accreditation processes that follow immigration.

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<sup>6</sup> Angus Grant, Catherine Bruce & Catherine Reynolds, "Out of the Fire and into the Pot: The Eritrean Liberation Movement, the Right to Self-Determination and the Over-Breadth of North American Immigration Security Provisions" (2010) 25 *Georgetown Imm Law J* 859 at 870.

## 5) *Exploring the Role of Institutions in Migration-Security Decisions*

As I have mentioned at various points, the influence of institutions in shaping the discretionary decisions of their employees is an area of inquiry that is both immensely important and, unfortunately, difficult to undertake in an era of guarded access. Nevertheless, further research on the internal dynamics of various institutional players – CBSA, CIC and the IRB – and the role they play in influencing security-related decisions would represent a helpful further contribution.<sup>7</sup>

More specifically, it would be interesting to examine how both formal “norms-building” exercises such as training and less formal social relationships serve to differentially inform the decision-making processes of CBSA enforcement officers, CIC immigration officers and IRB adjudicators. Because circumstances arise in which individuals from all three agencies make essentially the same determinations, it would be particularly informative to explore whether, and to what extent, their different institutional structures lead to different approaches to the question of security.<sup>8</sup>

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<sup>7</sup> Once again, I refer here to the literature on New Institutionalism, which could prove particularly insightful in thinking about how to improve decision-making in security matters, given its emphasis on issues related to institutional change and inertia. See once again Mary Brinton and Victor Nee. *The New Institutionalism in Sociology* (New York: Russell Sage, 1990) at pp 32-33 and see Helen Marie Williams, “Examining the Nature of Policy Change: A New Institutional Explanation of Citizenship And Naturalisation Policy in the UK and Germany 2000-2010”, PhD Dissertation, University of Birmingham, 2011.

<sup>8</sup> See Mariano-Florentino Cuéllar, “The Political Economies of Immigration Law” (2012) 2 UC Irvine Law Review 1 at 46, who devotes considerable attention to the fragmentation of immigration law and policy in the United States and to the disparate institutional players within the system that, when working at odds, may compromise the “coherence and practical viability of immigration policy.” Any engaged assessment of Canadian institutions that engage in security-related decisions would have to confront the same possibility.

## ***Conclusion***

“There was only one catch and that was Catch-22, which specified that a concern for one's safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to.<sup>9</sup>

In a very recent decision of the Federal Court of Canada, the court was confronted, once again, with its own version of a Catch-22 when it considered whether an individual had reasonably been found inadmissible for his opposition to the Soviet-backed regime that ruled over Afghanistan from 1978 to 1992. This was also a regime that Canada has designated as one that committed gross human rights violations or war crimes. In finding that it had no choice but to uphold the decision finding the applicant to be inadmissible for security reasons, the court expressed its discomfort, but nevertheless stated:

Although I am highly sympathetic to the Principal Applicant's position and recognize the potential absurdity in denying refugee status to an individual on the basis of his efforts to combat organizations that Canada opposed as well, I am nonetheless bound to apply the jurisprudence of our Court of Appeal.

...

There is therefore a Catch-22 quality to the outcome for Mr. Maqsudi vis-à-vis subversion.<sup>10</sup>

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<sup>9</sup> Joseph Heller, *Catch-22* (New York: Simon & Schuster, 1961) at 32.

<sup>10</sup> *Maqsudi v Canada (PSEP)*, 2015 FC 1184.

In this dissertation, I have sought to demonstrate that the above catch-22 situation is by no means confined to that case, but is in fact pervasive in the realm of migration-security laws. I have also argued that this need not be the case. I have done so by drawing upon commentary on migration and the rule of law, TWAIL scholarship and a dialogical conception of administrative law. The confluence of these distinct areas of legal inquiry can, I have argued, help us to conceive of an approach to security in immigration matters that takes seriously the concerns of the receiving state, while ensuring that inadmissibility findings are both justified and limited to those who truly constitute a security threat.

I close with a final example of the problematic, and in some instances self-defeating, security regime. In recent days, it emerged that the CBSA detained and refused entry to Mourad Benchellali, a well-known Muslim anti-radicalization activist. Benchellali had been an inmate at the U.S. Naval Base in Guantanamo Bay, Cuba but this was not the end of his story; in the years following his release in 2004 he had become engaged in educational programs aimed at preventing the radicalization of young Muslims, highlighting the dangers of ISIS and calling into question the glamour of armed Jihad. Benchellali was seeking entry into Canada to participate in a documentary on deradicalization and to speak to school groups. Instead, he was deemed inadmissible under s34 and promptly returned to his native France.<sup>11</sup> In its efforts to secure Canada's borders, the CBSA refused entry to someone whose chief ambition is to diminish the imposing spectre of global terrorism and insecurity. A Catch-22 of the highest, and most unjustified order.

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<sup>11</sup> Nicholas Keung, "Anti-radicalization activist to return to France after arrest at Pearson" *The Toronto Star* (05 November, 2015) online: *Toronto Star* <http://www.thestar.com>.



**APPENDIX A – Data on Inadmissibility  
Determinations at the Immigration and Refugee  
Board of Canada**

IRPA s.34(1) Decisions														
Year	Country	Individual concerned	IRB File No./Locator	IRPA Section	Proscribed Organization	Organization Type	Outcome	Refugee Claim	Board Member	IRB Region	Judicial Review	Comments	Counsel	
2002	India	Redacted	2p.1	34(1)(f)(c)	(BK)	Separatist/Liberation	Inadmissible	Yes	Ladouceur	Montreal	Unknown	Sikh org.		
2002	Turkey	Redacted	A2-02062/Tor.2p.84	34(1)(f)(a)(b)(c)	HADEP	Political Movement	Admissible	Yes	Dennis Paxton	Toronto	Unknown	Dismissed HADEP-PKK connection	Timothy Leach	
2003	Eritrea	Redacted	A2-00882/Tor.1p.1	c)	ELF	Separatist/Liberation	Inadmissible	Yes	M.A. Stoddart	Toronto	2004 FC 283		Aaron Weinstock	
2003	Pakistan	Redacted	A2-02220/Tor.2p.113	34(1)(f)(c)	ISO/TJP	Religious	Admissible	n	Vlad. Tumir	Toronto	Unknown	Note: contemp. case on TJP with opp. Conc.	Robert Blanshay	
2003	Pakistan	Redacted	A2-02084/Tor.2p.99	34(1)(f)(c)	ISO/TJP	Religious	Inadmissible	Yes	I. DeCarlo	Toronto	Unknown	Imamia Students Org/Tehrik-e-Jafaria Pakistan	M. Berger/Orman	
2003	Sri Lanka	Redacted	A2-02739/Tor.2p.125	34(1)(f)(c)	LTTE	Separatist/Liberation	Admissible	n	Aina Martens	Toronto	Unknown	Accepted recanting of LTTE membership	Lorne Waldman	
2003	Sri Lanka	Redacted	A3-00040/Vanc.2p.30	34(1)(f)(c)	LTTE	Separatist/Liberation	Admissible	Yes	M. Tessier	r	Unknown	Rejected PCs airport admission to LTTE member.		
2003	Sri Lanka	Redacted	A3-02442/Tor.2p.229	34(1)(f)(c)	LTTE	Separatist/Liberation	Admissible	Yes	Viad. Tumir	Toronto	Unknown	Min fail to estab. LTTE as terror. and PC as mem.	Unknown	
2003	Iran	Redacted	A2-02052/Tor.2p.64	34(1)(f)(c)	MEK	Political Movement	Inadmissible	n	Marlou Funston	Toronto	2005 FCA 85	Premature Charter; No age limitation, broad mem.	Avi Sirlin	
2003	Germany	Redacted	A2-00439/Vanc.1 p.4	34(1)(f)(a)(c)	STASI	Government agency	Inadmissible	No	Irene Dicaire	r	No			
2004	India	Redacted	A4-00008/Tor.2p.240	34(1)(f)(c)	BTF	Separatist/Liberation	Admissible	n	M.A. Stoddart	Toronto	Unknown	Fail to estab. Balwinderwal Tiger Force as terror.	R. Addinall	
2004	United States	Redacted	A4-00251/Vanc.1 p.10	34(1)(c)	Earth Liberation Front	Environmental	Admissible	No	Leeann King	r	Unknown	But found inad. under 36(1)(c)		
2004	Colombia	Redacted	A4-00623/Vanc.2p.102	34(1)(f)(c)	FARC	Political Movement	Inadmissible	susp.	Irene Dicaire	r	No			
2004	Sri Lanka	Redacted	A3-00661/Tor.2p.147	34(1)(f)(a)(c)	LTTE	Separatist/Liberation	Inadmissible	susp.	Dennis Paxton	Toronto	Unknown	Rejected recanted LTTE membership	Robert Blanshay	
2004	Sri Lanka	Redacted	A4-00253/Tor.2p.259	34(1)(f)(c)	LTTE	Separatist/Liberation	Inadmissible	Denied	J. Walkinshaw	Toronto	Unknown	ID reject bias alleg. against US DOS	K. Sriskanda	
2004	Sri Lanka	Redacted	p.11	34(1)(f)(c)	LTTE	Separatist/Liberation	Admissible	n	Beauchamp	Montreal	Unknown	Membership not made out		
2004	Sri Lanka	Redacted	A4-00028/Tor.2p.247	34(1)(f)(c)	LTTE	Separatist/Liberation	Admissible	n	Marlou Funston	Toronto	Unknown	Accepted recanting of LTTE membership	M. Crane	
2004	Sri Lanka	Redacted	A2-01163/Tor.2p.32	34(1)(f)(c)	LTTE	Separatist/Liberation	Admissible	Yes	Viad. Tumir	Toronto	Unknown	See notes re retracting admission and Min burden	Ian Hamilton	
2004	Pakistan	Redacted	A4-00291/Vanc.2p.46	34(1)(f)(c)	MQM	Political Movement	Inadmissible	Denied	M. Tessier	r	2005 FC 1053	JR Denied.		
2004	Not stated	Redacted	A4-00221/Tor.2p.255	34(1)(f)(c)	Not stated	Not stated	Admissible	Denied	C. DeCarlo	Toronto	Unknown	ID accepts RPD lack of cred. finding re member	M. Herman	
2005	Iran	Redacted	A4-00552/Vanc.2p.66	34(1)(f)(c)	Fedayan-e Khalq	Political Movement	Admissible	Denied	O. Nuppenon	r	not of this	GREAT re meaning of 34 and discretion - notes.		
2005	India	Redacted	A4-00754/Vanc. 2p.140	34(1)(f)(c)	ISYF	Separatist/Liberation	Inadmissible	1996	M. Tessier	r	No	Relied on CC listing of ISYF, rather than evidence		
2005	Pakistan	Redacted	A4-00685/Vanc.2p.114	34(1)(f)(c)	JKLF	Separatist/Liberation	Admissible	CR	Leeann King	r	No	Jammu Kashmir Lib Front/Accepted b/c temporal		
2005	Pakistan	Redacted	A4-00745/Vanc.2p.133	34(1)(f)(c)	JKLF	Separatist/Liberation	Inadmissible	Denied	M. Tessier	r	No	JR of Ref Claim - 2000 CanLit 15299		
2005	Russia	Redacted	A4-00550/Vanc.1 p.148	34(1)(a)(f)	KBG	Government agency	Admissible	No	O. Nuppenon	r	No	See notes multi-faceted org.		
2005	India	Redacted	A4-00248/Tor.2p.1360	34(1)(f)(c)	KLF	Separatist/Liberation	Inadmissible	susp.	Leeann King	Toronto	No	1st JR granted: 2003 FC 1022; also inad under 35&36	C. Elgin	
2005	Sri Lanka	Redacted	A3-02249/Tor.2p.179	34(1)(f)(c)	LTTE	Separatist/Liberation	Inadmissible	susp.	Aina Martens	Toronto	Unknown	Rejected recanted LTTE membership	Ron Poulton	
2005	Pakistan	Redacted	A5-00065/Vanc. 2p.151	34(1)(f)(c)	MQM	Political Movement	Admissible	Denied	O. Nuppenon	r	2007 FC 1049	Temporal distinction/Minister's IAD and JR denied		
2005	Pakistan	Redacted	A5-00256/Vanc.2p.174	34(1)(f)(c)	MQM	Political Movement	Admissible*	n	Leeann King	r	2008 FC 610	Overturned by IAD, which was upheld by FC.		
2005	Philippines	Redacted	A3-02428/Tor.2p.202	34(1)(f)(a)(b)(c)	NPA	Political Movement	Inadmissible	Yes	Douglas	Toronto	Unknown	New People's Army - Military wing of Com Party	Helen Kim	
2005	Lebanon	Redacted	94-00306/Tor.2p.6	34(1)(f)(c)	PFPL	Separatist/Liberation	Inadmissible	No	C.A. Simmie	Toronto	2006 FC 1457	PR since 1985 - Foundational 34 temporal case	B. Jackman	
2005	Pakistan	Redacted	A5-00305/Vanc.2p.240	34(1)(f)(c)	SSP	Religious	Inadmissible	Yes	O. Nuppenon	r	No	Sipah-e-Sahaba. Dismissed s.35 allegations		
2005	Angola	Redacted	A7-02227/Tor.2p.1	35(1)(a)**	UNITA	Political Movement	Admissible	1995	W. Willoughby	Toronto	Unknown	NOTE: Seems to be limited to 35 allegations	M. Korman	
2006	EJ Salvador	Redacted	A4-00577/Vanc.2p.79	34(1)(f)(c)	FMLN	Political Movement	Inadmissible	Denied	D. Shaw Dyck	r	No			
2006	Russia	Redacted	A4-00778/Vanc.1 p.52	34(1)(a)(f)	KBG	Government agency	Inadmissible	No	Irene Dicaire	r	2007 FC 43	34(2) decision: 2009 FC 942		
2006	Nigeria	Redacted	A6-00680/Vanc.2p.424	34(1)(f)(c)	MAD	Political Movement	Admissible	Yes	D. Shaw Dyck	r	No	Movement for Advance Democracy/ Hijacking		
2006	Pakistan	Redacted	A5-00762/Vanc.2p.380	34(1)(f)(c)	MQM	Political Movement	Admissible*	CR	O. Nuppenon	r	IAD appeal	Overturned by IAD: 2007 CanLit 68319 (IRB)		
2006	Pakistan	Redacted	A5-00730/MII2p.19	34(1)(f)(c)	MQM	Political Movement	Inadmissible	n	Louis Dube	Montreal	2007 FC 478	Applies complexity anal.		
2006	Pakistan	Redacted	A5-02189/Tor.2p.370	34(1)(f)(c)	MQM	Political Movement	Inadmissible	Yes	J. Walkinshaw	Toronto	Unknown		R. Pannu	
2006	Pakistan	Redacted	A2-01501/Tor.2p.41	34(1)(f)(c)	MQM	Political Movement	Inadmissible	susp.	S. Gratton	Toronto	Unknown	But jr of PRRA 2011 FC 221	Jack Davis	
2006	Lebanon	Redacted	A5-00895/Tor.2p.1349	34(1)(f)(c)	PLO	Separatist/Liberation	Inadmissible	Yes	S. Gratton	Toronto	Unknown	Joined as minor - poshfeh cited...	Eziefulu	
2007	India	Redacted	A7-00191/Vanc.2 p.447	34(1)(f)(c)	AISSF/ISYF	Separatist/Liberation	Admissible	Denied	M. Tessier	r	No	Accepted recanted story/No memb. through temple		
2007	Jordan	Redacted	A5-01856/Tor.2p.340	34(1)(f)(c)	Arab Lib. Front	Liberation/Political	Inadmissible	Yes	C.A. Simmie	Toronto	No	Joined as student, simple donations student activ.	G. Levesque	
2007	Spain	Redacted	A7- 00473/ Vanc. 1 p.75	34(1)(c)(f)	ETA	Separatist/Liberation	Inadmissible	No	D. Shaw Dyck	r	No	Friend of Sancho		
2007	EJ Salvador	Redacted	A5-00146/Tor.2p.282	34(1)(f)(c)	FMLN	Political Movement	Inadmissible	Yes	M.A. Stoddart	Toronto	Unknown	Allegations not brought on subversion...	None listed	
2007	Pakistan	Redacted	A6-01465/Tor.2p.518	34(1)(f)(c)	JKLF	Separatist/Liberation	Inadmissible	1997	J. Walkinshaw	Toronto	Unknown	contra A6-01120, connect b/w IndianPak JKLF	D. Barker	
2007	Pakistan	Redacted	A6-01120/Tor.2p.468	34(1)(f)(c)	JKLF	Separatist/Liberation	Admissible	2003	C. DeCarlo	Toronto	No	ID rejects connection b/w JKLF Indian and Pak.	Lani Gozian	
2007	Sri Lanka	Redacted	A5-01011/Tor.2p.300	34(1)(f)(c)	LTTE	Separatist/Liberation	Inadmissible	Yes	Marlou Funston	Toronto	Unknown	Rejected recanted LTTE membership/	Ian Wong	
2007	Iran	Redacted	A6-02505/Tor.2p.557	34(1)(f)(c)	Mahdaviyat	Religious	Inadmissible	Yes	S. Gratton	Toronto	DR	Not inad per s.36 - group cmlt. one act of terror	None listed	
2007	Iran	Redacted	A7-00389/ Vanc.1 p.68	34(1)(f)(c)	MEK	Political Movement	Inadmissible	Yes	Leeann King	r	Unknown	Youth when joined MEK		
2007	Pakistan	Redacted	A5-00761/MII2p.25	34(1)(f)(c)	MQM	Political Movement	Inadmissible	Yes	Ladouceur	Montreal	No			
2007	Pakistan	Redacted	A6-01490/Tor.2p.526	34(1)(f)(c)	MQM	Political Movement	Inadmissible	Yes	Douglas	Toronto	Unknown	Ref. to Siddiqui re consistency; A35 alleg. Denied	Jack Davis	
2007	Nigeria	Redacted	A6-02450/Tor.2p.541	34(1)(f)(c)	Cong.	Political Movement	Inadmissible	Yes	C.A. Simmie	Toronto	No	Also inadmiss per A35.	Johnson Babaloo	
2007	Sudan	Redacted	A6-01328/Tor.2p.508	34(1)(f)(c)	SPLA	Political Movement	Admissible	Yes	Douglas	Toronto	No	Min. Counsel recommended a finding of admis.	Aaron Weinstock	
2008	Eritrea	Redacted	AB-00369/Tor.1p.103	34(1)(f)(c)	ELF	Separatist/Liberation	Inadmissible	susp.	K. Thomson	NF	No		A.Grant	
2008	Ethiopia	Redacted	A6-00947/Tor.1p.12	34(1)(f)(c)	ERFP	Political Movement	Inadmissible	n	R. Stratigopoulos	Toronto	Unknown	Reject. Min sub that PC was lying re: mem.	E.Brown/J.Phipps	
2008	Spain	Redacted	1p.1	34(1)(c)(f)	ETA	Separatist/Liberation	Inadmissible	Yes	Louis Dube	Montreal	No			
2008	Palestine	Redacted	A5-02375/Tor.2p.380	34(1)(f)(c)	Fatah/PLO	Separatist/Liberation	Inadmissible	susp.	DeCarlo/Simmie	Toronto	No	Also inadmiss per 35, temporal - terror after left	Ed Corigan	
2008	Sri Lanka	Redacted	A6-00310/Tor.2p.395	34(1)(f)(c)	LTTE	Separatist/Liberation	Admissible	susp.	Marlou Funston	Toronto	No	Membership not made out - little CBSA int. notes	Ian Hamilton	
2008	Iran	Redacted	00711/MII2p.44	34(1)(f)(c)	MEK	Political Movement	Inadmissible	Yes	Marco Gaetani	Montreal	2009 FC 141	Ref/Claim was accepted		
2008	Niger	Redacted	A8-01194/Tor.2p.833	34(1)(f)(b)	MNJ	Political Movement	Admissible	Yes	Harold Shepherd	Toronto	No	Mmtl of Nigerians for Justice - Accept recent mem.	Sandra Zaher	
2008	Mongolia	Redacted	A5-01959/Tor.2p.353	34(1)(a)(f)	Mongolia/China	Government agency	Inadmissible	susp.	C.A. Simmie	Toronto	No	Double agent for Mongolia/China spent on fugues?	Clifford Luyt	
2008	Pakistan	Redacted	A7-00971/Tor.2p.634	34(1)(f)(c)	MQM	Political Movement	Inadmissible	1997	Bill Willoughby	Toronto	Of 34(2) dec.	See notes re: contextual nature of ID decisions	Chantal Desloges	
2008	Pakistan	Redacted	A5-00684/Vanc.2p.267	34(1)(f)(c)	MQM	Political Movement	Admissible*	Yes	O. Nuppenon	r	Red. '07 FC 6	Overturned by IAD: 2010 CanLit 68719 (IRB)		
2008	Pakistan	Redacted	00230/MII2p.40	34(1)(f)(c)	MQM	Political Movement	Inadmissible	Yes	Isabel Germain	Montreal	No	Ref/Claim was accepted		
2008	Pakistan	Redacted	A8-00335/Tor.2p.805	34(1)(f)(c)	MQM	Political Movement	Inadmissible	Yes	R. Stratigopoulos	Toronto	Unknown		Joel Sandaluk	
2009	India	Redacted	A9-00743/Vanc.2 p.559	34(1)(f)(c)	AISSF	Separatist/Liberation	Admissible	n	Geoff Rempel	r	IAD appeal	Reasons@588		
2009	Bangladesh	Redacted	A8-02587/Tor.2p.925	34(1)(f)(c)	Bang. Freedom Party	Political Movement	Admissible	Yes	A. Seifert	Toronto	No	ID rejected Min evidence re BFP - int. re: temporal	S. Ashamalla	
2009	Nigeria	Redacted	A9-00297/Vanc.2p.522	34(1)(f)(c)	Biafran/Ogoni Orgs	Separatist/Liberation	Admissible	Yes	Geoff Rempel	r	Unknown	Was in US when said to work for orgs		
2009	Namibia	Redacted	A8-02764/Tor.2p.953	34(1)(f)(b)	Caprivi Lib. Army	Separatist/Liberation	Inadmissible	Yes	Harry Adamidis	Toronto	2010 FC 308-dea	See notes, no dispute over minimal role of FC	Edoh	
2009	Namibia	Redacted	A8-01053/Vanc.2p.467	34(1)(f)(b)	CLM	Separatist/Liberation	Inadmissible	Yes	Leeann King	r	2009 FC 1260	Caprivi Liberation Movement		
2009	Eritrea	Redacted	A8-01933/Tor.1p.32	34(1)(f)(c)	ELF	Separatist/Liberation	Inadmissible	2004	Ama Beecham	Toronto	No		Jack Davis	
2009	Ethiopia	Redacted	p.122	34(1)(b)(f)	EPRDF	Political Movement	Inadmissible	Yes	Geoff Rempel	r	Unknown	Oremade re: Mandela		

Year	Country	Individual concerned	IRB File No./Locator	IRPA Section	Proscribed Organization	Organization Type	Outcome	Refuge e Claim	Board Member	IRB Region	Judicial Review	Comments	Counsel
2009	Ethiopia	Redacted	p.109	34(1)(f)(b)(c)	EPRP	Political Movement	Inadmissible	Yes	Geoff Rempel	r	No	See also re temporal	
2009	Ethiopia	Redacted	A8-01009/Vanc.1 p.94	34(1)(f)(b)(c)	EPRP	Political Movement	Inadmissible	Yes	Geoff Rempel	r	Unknown	See notes re: temporal	
2009	China	Redacted	A7-01067/Tor.2p.642	34(1)(f)(c)	ETLO	Separatist/Liberation	Inadmissible	susp.	Jennifer Hamm	Toronto	No	East Turkistan Liberation Organization - Uyur.org	Brian Cintosun
2009	Colombia	Redacted	A9-01668/Tor.2p.1129	34(1)(f)(a)(b)(c)	FARC	Political Movement	Admissible	susp.	L. Del Luca	Toronto	No	Int'l Sikh Youth Federation	John Grice
2009	El Salvador	Redacted	A7-01850/Tor.2p.721	34(1)(f)(b)	FMLN	Political Movement	Inadmissible	2000	M. Hayes	Toronto	No	Joined RedX as youth, then FMLN as medic	M. Melvin
2009	El Salvador	Redacted	A7-01324/Tor.2p.651	34(1)(f)(b)	FMLN	Political Movement	Inadmissible	Yes	Ama Beecham	Toronto	2010 FC 245-den	Helped father as youth, then stayed member	P. Bhardwaj
2009	El Salvador	Redacted	A7-00358/Tor.2p.1335	34(1)(f)(c)	FMLN	Political Movement	Inadmissible	2004	L. Lasowski	Toronto	No	Rejected duress argument	Jonathan Jurmain
2009	Iran	Redacted	A9-01155/Tor.2p.1002	34(1)(f)(a)	KGB	Government agency	Inadmissible	2000	M. Hayes	Toronto	No	PC was crypto. for KGB, but not against democ.	None listed
2009	Iran	Redacted	A8-00771/Tor.2p.811	34(1)(f)(c)	MEK	Political Movement	Inadmissible	CR	Marlou Funston	Toronto	No	Counsel admitted inadmissibility	Ed Corrigan
2009	Pakistan	Redacted	A8-01383/Tor.2p.841	34(1)(f)(c)	MQM	Political Movement	Inadmissible	CR	C.A. Simmie	Toronto	No	Low level worker for MQM - Rejected S.35	J. Gill
2009	Pakistan	Redacted	A7-02748/Tor.2p.762	34(1)(f)(c)	MQM	Political Movement	Inadmissible	1998	M. Hayes	Toronto	No	PC denied any MQM involvement. In terror-rej.	None listed
2009	Pakistan	Redacted	A7-02749/Tor.2p.782	34(1)(f)(c)	MQM	Political Movement	Inadmissible	1999	O. Kowalyk	Toronto	Unknown	PP - 34(2) refused as in A7-02748	A. Naqvi
2009	Pakistan	Redacted	A6-01259/Tor.2p.483	34(1)(f)(c)	MQM	Political Movement	Inadmissible	Yes	Harold Shepherd	Toronto	Unknown	s.35 alleg. rejected	Max Sultan
2009	Pakistan	Redacted	A8-01943/Tor.2p.852	34(1)(f)(c)	MQM	Political Movement	Inadmissible	Yes	R. Stratigopoulos	Toronto	Unknown	Rejected s.35 allegations	Peter Wuebolt
2009	n	Redacted	A8-01297/Vanc.2p.482	34(1)(a)(d)	n/a	n/a	Admissible	n	M. McPhalen	r	Unknown	espionage but not against democracy	
2009	Nigeria	Redacted	A7-02397/Tor.2p.737	34(1)(f)(c)	NDV	Political Movement	Inadmissible	Yes	A. Laut	Toronto	No	Niger Della Vigilantes - See notes re memb.	Stella Anaele
2009	Nigeria	Redacted	A6-02796/Tor.2p.569	34(1)(f)(b)	Force	Political Movement	Admissible	Yes	A. Laut	Toronto	No	ID rejects PC's credibility w/rt early claim of memb.	J. Jubenville
2009	Ethiopia	Redacted	A8-00912/Tor.1p.19	34(1)(f)(c)	OLF	Separatist/Liberation	Inadmissible	Yes	Harold Shepherd	Toronto	2010 FC 198	JR dismissed	Alyssa Manning
2009	Pakistan	Redacted	A7-00748/Tor.2p.622	34(1)(f)(c)	L.	Political Movement	Inadmissible	Yes	Harry Adamidis	Toronto	No	Pakistan Muslim League and Muslim Student Fed	Peter Wuebolt
2010	DRC	Redacted	A9-00692/Vanc.2p.534	34(1)(f)(b)	AFLD	Political Movement	Inadmissible	n	O. Nupponen	r	Unknown	All. des Forces Democ. pour la Lib. du Congo-Zaire	
2010	India	Redacted	B0-00544/Tor.2p.1250	34(1)(f)(c)	AISDF	Separatist/Liberation	Inadmissible	Yes	S. Kim	Toronto	No	Also member of Dardami Takasal and SADAM	S. Chera
2010	India	Redacted	01324/Mil2p.120	34(1)(f)(c)	AISDF/ISYF	Separatist/Liberation	Inadmissible	CR	Me Marisa Musto	Montreal	No	All India Sikh Student Federation (AISSF) and/or the International Sikh Youth Federation (ISYF)	
2010	Macedon./Albania	Redacted	A9-01189/Tor.2p.1016	34(1)(f)(a)(b)(c)	Army	Separatist/Liberation	Inadmissible	susp.	Ama Beecham	Toronto	No	ANA, not an actual army. ID rejected recanted memb.	Randal Montgomery
2010	Libya	Redacted	B0-00392/Tor.2p.1204	34(1)(f)(c)	Al-Haramain	Religious	Inadmissible	CR	Harry Adamidis	Toronto	No	Allgd Qaeda link, s.35 alleg. rej., see notes delay&AcP	Jacqueline Swaisland
2010	Iran	Redacted	A9-01127/Tor.2p.977	34(1)(f)(a)(c)	Basij Forces	Government agency	Inadmissible	Yes	A. Seifert	Toronto	Unknown	See notes: also part of Min. of Iran Intel and Sec.	S. Morris
2010	Iran	Redacted	A9-01137/Tor.2p.995	34(1)(f)(c)	Basij Forces	Government agency	Admissible	Yes	C.A. Simmie	Toronto	Unknown	ID accepts PC claim not to have adm. mem. @ POE	Michael Korman
2010	India	Redacted	A8-01252/Vanc.2p.474	34(1)(f)(c)	BTF	Separatist/Liberation	Admissible	1993	O. Nupponen	r	No	Bhindranwale Tiger Force/post-stroke interview	
2010	Eritrea	Redacted	A9-01456/Tor.1p.73	34(1)(f)(b)(c)	ELF	Separatist/Liberation	Inadmissible	susp.	L. Del Luca	Toronto	Unknown	Terror/war crimes def.	Patrick Roche
2010	Eritrea	Redacted	p.131	34(1)(f)(c)	EPFL	Separatist/Liberation	Inadmissible	n	Leeann King	r	No		
2010	Colombia	Redacted	A6-00892/Tor.2p.402	34(1)(f)(c)	FARC/M19	Political Movement	Inadmissible	susp.	Ama Beecham	Toronto	Unknown	Prelim motion re: disc. and R to C - reject kidnap	Leigh Salsberg
2010	El Salvador	Redacted	A9-01356/Vanc.2p.612	34(1)(f)(c)	FMLN	Political Movement	Inadmissible	CR	M. McPhalen	r	Unknown		
2010	El Salvador	Redacted	A9-01353/Vanc.2p.598	34(1)(f)(c)	FMLN	Political Movement	Inadmissible	n	O. Nupponen	r	No		
2010	India	Redacted	B0-01468/Vanc.1 p.1	34(1)(f)(c)	ISYF	Separatist/Liberation	Inadmissible	n	Leeann King	r	No	Int'l Sikh Youth Federation	
2010	Sudan	Redacted	A9-01424/Tor.2p.1056	34(1)(f)(b)(c)	Mvmt	Political Movement	Inadmissible	Yes	S. Kim	Toronto	acc	ID rejects recanted PIF, distinction b/w JEM & ESML	Aaron Weinstock
2010	Sri Lanka	Redacted	A9-02910/Tor.2p.1193	34(1)(f)(a)(b)(c)	LTTE	Separatist/Liberation	Inadmissible	No	S. Kim	Toronto	No	ID rejects recanted adm. made b/c of schizoph.	K. Srisakanda
2010	Sri Lanka	Redacted	B0-00511/Tor.2p.1224	34(1)(f)(a)(b)(c)	LTTE	Separatist/Liberation	Inadmissible	Inel.	L. Del Luca	Toronto	No	ID rejects recanted LTTE memb claim from France	Max Berger
2010	Sri Lanka	Redacted	A8-02353/Tor.2p.859	34(1)(f)(c)	LTTE	Separatist/Liberation	Admissible	Yes	I. Kohler	Toronto	No	Also rej. ASS/Accepted recanting LTTE membership	Ian Hamilton
2010	Sri Lanka	Redacted	A8-02994/Tor.2p.959	34(1)(f)(c)	LTTE	Separatist/Liberation	Admissible	Yes	John Grant	Toronto	No	ID accepted recanting of LTTE mem... from UK claim	L. Vasan / L. Waldman
2010	Sri Lanka	Redacted	A7-01631/Tor.2p.703	34(1)(f)(c)	LTTE	Separatist/Liberation	Inadmissible	Yes	Harold Shepherd	Toronto	2011 FC 339-den	ID Denied recant re membership, upheld	Waikwa Wanyojke
2010	Sri Lanka	Redacted	A9-01358/Tor.2p.269	34(1)(f)(c)	LTTE	Separatist/Liberation	Inadmissible	Yes	John Grant	Toronto	Unknown	Husband & wife contradict-wife inad for inad. Fam	Robert Blanshary
2010	Sri Lanka	Redacted	A5-01713/Tor.2p.319	34(1)(f)(c)	LTTE	Separatist/Liberation	Inadmissible	susp.	I. Kohler	Toronto	Of prev dec.	Redet. of prev. inadmis hearing based on psych	John Grant
2010	Nigeria	Redacted	A9-01649/Tor.2p.1121	34(1)(f)(b)(c)	MASSOB	Separatist/Liberation	Inadmissible	Yes	Harry Adamidis	Toronto	No	See Canli for MASSOB cases where no inad. brought	Bola Adetunji
2010	Nigeria	Redacted	A9-01860/Tor.2p.1162	34(1)(f)(b)(c)	MASSOB	Separatist/Liberation	Inadmissible	susp.	Ama Beecham	Toronto	No	ID rejects recanted PIF / See Canli for RPD MASSOB	S. Orjiwuru
2010	Iran	Redacted	B0-00268/Vanc.2p.644	34(1)(f)(b)(c)	MEK	Political Movement	Admissible	susp.	Geoff Rempel	r	Unknown	PC on US MEK list, but was MEK prisoner: duress	
2010	Iran	Redacted	00890/Mil2p.62	34(1)(f)(c)	MEK	Political Movement	Inadmissible	CR	Louis Dube	Montreal	No	Temporal issue	
2010	Pakistan	Redacted	01585/Mil2p.73	34(1)(f)(c)	MQM	Political Movement	Inadmissible	CR	Louis Dube	Montreal	No	11yr delay b/w ref and inadmiss	
2010	Afghanistan	Redacted	A8-01302/Vanc.2p.497	34(1)(f)(c)	Muslim World League	Religious	Admissible	Yes	O. Nupponen	r	Unknown	MWL (or IWLL) alleged Al Qaeda funder	
2010	Iraq	Redacted	A3-00236/Vanc.2p.38	34(1)(f)(b)(c)	Pat. Union.Kurd.	Separatist/Liberation	Inadmissible	Yes	Geoff Rempel	r	No	PC arrived 2003, ref claim, IH suspended for 34(2)	
2010	Cameroon	Redacted	B0-00240/Vanc.2p.628	34(1)(f)(b)	SCYL	Political Movement	Inadmissible	susp.	Geoff Rempel	r	2011 FC 409	Rejected account of South Cam. Youth League factions	
2010	Sudan	Redacted	A6-02902/Tor.2p.588	34(1)(f)(c)	Sudan Lib Move.	First Separatist then Political	Inadmissible	Yes	A. Seifert	Toronto	No	SLA not same as SPLA from A6-01328	A. Weinstock
2010	Sri Lanka	Redacted	00136/Mil2p.82	34(1)(f)(c)	Move.	Separatist/Liberation	Inadmissible	n	Cote	Montreal	No	World Tamil Movement (WTM) front for LTTE	
2011	Colombia	Redacted	C/Vanc.2p.638	34(1)(f)(c)	AUC	Political Movement	Inadmissible	Yes	Leeann King	r	2011FC1013	Defence of duress not made out - JR denied.	
2011	Sudan	Redacted	A9-01759/Tor.2p.1136	34(1)(f)(b)	Beja Congress	Separatist/Liberation	Inadmissible	Yes	Harold Shepherd	Toronto	No	No (1)(c) re: targeting of pipeline but accept 70s coup	Aaron Weinstock
2011	Ethiopia	Redacted	B1-00592/Tor.1p.94	34(1)(f)(b)(c)	EPRP	Political Movement	Admissible	susp.	A. Laut	Toronto	Unknown	ID accepts recanted memb/ship claim: see notes	P. Vandervennen
2011	El Salvador	Redacted	B1-00206/Vanc.2p.1	c)	FMLN	Political Movement	Admissible	1991	L. Ko	r	No	process (p.13-26)	
2011	Iran	Redacted	01330/Vanc.2p.1010	34(1)(f)(b)	Komala	Political Movement	Inadmissible	susp.	M. Tessler	r	2012 FC 131	JR dismissed	
2011	Sri Lanka	Redacted	B0-00989/Vanc.2p.952	c)	LTTE	Separatist/Liberation	Admissible	susp.	Leeann King	r	Unknown	Ref. to sign IOM waiver: IRPA s.16, Con Inf.- see notes	
2011	Sri Lanka	Redacted	B0-00897/Vanc.2p.739	c)	LTTE	Separatist/Liberation	Admissible	susp.	L. Ko	r	Unknown	UK claim based on LTTE memb. Rejected = not inad.	
2011	Sri Lanka	Redacted	B0-00896/Vanc.2p.728	c)	LTTE	Separatist/Liberation	Admissible	susp.	Leeann King	r	Unknown	Bad cred. s.35 charge rejected as well for help to army	
2011	Sri Lanka	Redacted	B0-00878/Vanc.2p.716	c)	LTTE	Separatist/Liberation	Admissible	susp.	Leeann King	r	Unknown	As in B0-00847, no inadmiss. for work in LTTE comp.	
2011	Sri Lanka	Redacted	B0-00911/Vanc.2p.764	34(1)(f)(b)(c)	LTTE	Separatist/Liberation	Admissible	susp.	M. McPhalen	r	Unknown	No inadmiss. for work in LTTE comp. to avoid LTTE	
2011	Sri Lanka	Redacted	B0-00925/Vanc.2p.779	34(1)(f)(b)(c)	LTTE	Separatist/Liberation	Admissible	susp.	M. McPhalen	r	Unknown	Posted LTTE material on FB, lent motor., wife contra.	
2011	Sri Lanka	Redacted	B0-00955/Vanc.2p.822	34(1)(f)(b)(c)	LTTE	Separatist/Liberation	Admissible	susp.	Leeann King	r	Unknown	See notes. Use of CI; on int'l list from IOM	
2011	Sri Lanka	Redacted	B0-01106/Vanc.2p.979	34(1)(f)(b)(c)	LTTE	Separatist/Liberation	Admissible	susp.	L. Ko	r	Unknown	Reject. CI ev. and prev. adm. of LTTE memb.	
2011	Sri Lanka	Redacted	B0-00940/Vanc.2p.800	34(1)(f)(b)(c)	LTTE	Separatist/Liberation	Inadmissible	susp.	M. McPhalen	r	Unknown	Admitted member 'by accident', rejected coercion arg.	
2011	Sri Lanka	Redacted	B0-00953/Vanc.2p.807	34(1)(f)(b)(c)	LTTE	Separatist/Liberation	Inadmissible	susp.	Geoff Rempel	r	Unknown	SunSea admitted LTTE member, also inadmiss per 35	
2011	Sri Lanka	Redacted	B0-00988/Vanc.2p.870	34(1)(f)(b)(c)	LTTE	Separatist/Liberation	Inadmissible	susp.	M. McPhalen	r	No	know pass. didn't have papers: p.942	
2011	Sri Lanka	Redacted	B0-01101/Vanc.2p.967	34(1)(f)(b)(c)	LTTE	Separatist/Liberation	Inadmissible	susp.	Geoff Rempel	r	Unknown	Heavily redacted; PC was actor in LTTE film	
2011	Sri Lanka	Redacted	B0-01188/Vanc.2p.998	34(1)(f)(b)(c)	LTTE	Separatist/Liberation	Inadmissible	susp.	D. Shaw Dyck	r	No	Admitted membership in LTTE	
2011	Sri Lanka	Redacted	B0-00844/Vanc.2p.676	34(1)(f)(c)	LTTE	Separatist/Liberation	Admissible	susp.	M. Tessler	r	Unknown	SI newspaper associated with LTTE	
2011	Sri Lanka	Redacted	B0-00847/Vanc.2p.690	34(1)(f)(c)	LTTE	Separatist/Liberation	Admissible	susp.	M. Tessler	r	Unknown	See notes: work for LTTE company OK in context	
2011	Sri Lanka	Redacted	B0-00866/Vanc.2p.708	34(1)(f)(c)	LTTE	Separatist/Liberation	Admissible	susp.	M. McPhalen	r	Unknown	As in B0-00847, no inadmiss. for work in LTTE comp.	
2011	Sri Lanka	Redacted	B0-00972/Vanc.2p.836	34(1)(f)(c)	LTTE	Separatist/Liberation	Admissible	susp.	M. Tessler	r	Unknown	Dec.p83-Worked and paid by LTTE	
2011	Nigeria	Redacted	B0-11458/Tor.2p.1287	34(1)(f)(b)(c)	MASSOB	Separatist/Liberation	Admissible	Yes	J.M. McCabe	Toronto	No	Insuff evidence of MASSOB - same rec as other cases	R. Amadi
2011	Nigeria	Redacted	B0-02641/Tor.2p.1299	34(1)(f)(b)(c)	MASSOB	Separatist/Liberation	Inadmissible	susp.	A. Laut	Toronto	No	ID rejected recanted MASSOB membership story	K. Kwan Anderson

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2011	Nigeria	Redacted	B0-00517/Tor.2p.1242	34(1)(f)(c)	MASSOB	Separatist/Liberation	Inadmissible	Yes	R. Stratigopoulos	Toronto	No	ID rejected 34(1)(a) and (b) allegations	M. Akinyemi
2011	Iran	Redacted	B0-00438/Vanc.2p.651	34(1)(f)(b)(c)	MEK	Political Movement	Inadmissible	n	Geoff Rempel	r	Unknown	Disting. From B0-00268 - similar facts, not coerced	
2011	nd	Redacted	B1-00301/Vanc.1 p.140	34(1)(f)(b)(c)	Army	Political Movement	Inadmissible	n	M. Tessler	r	Unknown		
2011	Pakistan	Redacted	A7-00723/Vanc.2p.455	34(1)(f)(c)	MQM	Political Movement	Inadmissible	CR	M. McPhalen	r	Unknown	Disbelieved distinction b/w MQMs	
2011	Afghanistan	Redacted	A8-02510/Tor.2p.884	34(1)(a)(b)(c)	Mujahdeen	Political Movement	Admissible	Yes	M. Hayes	Toronto	Pending	S. notes re: subv&JR: IMM-6362-11. Also inad per A35	Leigh Salsberg
2011	Iran	Redacted	B1-00360/Tor.2p.1315	34(1)(f)(b)(c)	NCRI	Political Movement	Admissible	Yes	J.M. McCabe	Toronto	No	Natl Council of Resistance of Iran # MEK	Timothy Leach
2011	Liberia	Redacted	B0-00545/Tor.2p.1261	34(1)(f)(b)(c)	NPFL	Political Movement	Inadmissible	susp.	C.A. Simmie	Toronto	2012 FC 317-den	ID rejected recanted story and defence of duress	P. Vanderveen
2011	.	Redacted	01108/M11p.13	34(1)(f)(c)	PFLP	Separatist/Liberation	Admissible	Yes	Dianne Tordorf	Montreal	No		
2011	Sudan	Redacted	B1-00362/Tor.2p.1326	34(1)(f)(b)(c)	SLM	First Separatist then Political	Admissible	Yes	Harry Adamidis	Toronto	No	Admission of membership not enough/insuff evidence	Howard Eisenberg
2011	Sri Lanka	Redacted	A9-01567/Tor.2p.1070	34(1)(f)(c)	TNA-LTTE	Separatist/Liberation	Inadmissible	susp.	O. Kowalyk	Toronto	Leave-denied	MC withdrew 35 alleg.; TNA-LTTE ref. - See notes	Raoul Boulakia
2012	Lebanon	Redacted	00846/UPDATE/p.22	(c) 35 (1)(a)	Brigade/AMAL	Religious	Inadmissible	Yes	Louis Dube	Montreal			Richard Lage
2012	India	Redacted	00758/UPDATE/p.59	(34)(1)(f)(c)	faction)	Separatist/Liberation	Admissible	Yes	O. Nupponen	Montreal		Mentions PIF!	Giovanna Allegra
2012	Lebanon	Redacted	00041/UPDATE/p.559	(34)(1)(f)(c)	Amal	Religious	Inadmissible	Yes	Ken Thomson	Niagra			N/A
2012	Colombia	Redacted	00767/UPDATE/p.656	(34)(1)(f)(c)	AUC	Political Movement	Inadmissible	Yes	M. Tessler	r		Autodefensas Unidas de Colombia	Robin Bajer
2012	Ethiopia	Redacted	03051/UPDATE/p.414	(34)(1)(f)(b)	7/EPPF/CUD	Political Movement	Inadmissible	susp.	O. Kowalyk	Toronto			A. Brower
2012	Palestine	Redacted	00804/UPDATE/p.684	(34)(1)(f)(c)	Hamas	Separatist/Liberation	Admissible	Yes	Geoff Rempel	Edmonton			S. Yu
2012	Lebanon	Redacted	00847/UPDATE/p.709	(34)(1)(f)(c)	Hezbollah	Political Movement	Inadmissible	n	Geoff Rempel	Edmonton			S. Binder
2012	Sudan	Redacted	01424/UPDATE/p.240	c)	Mvmt	Political Movement	Inadmissible	susp.	I. Kohler	Toronto		JEM	Barbara Jackman
2012	Iran	Redacted	00322/UPDATE/p.636	(34)(1)(f)(b)	KMPI	Separatist/Liberation	Inadmissible	1999	Geoff Rempel	r		Kurdish Democratic Party of Iran	P. Larlee L. Waldman
2012	Sri Lanka	Redacted	01914/UPDATE/p.353	c)(42)(b)	LTTE	Separatist/Liberation	Inadmissible	Yes	I. Kohler	Toronto		national, other than a protected person, is inadmissible	N. Mithowani
2012	Sri Lanka	Redacted	00341/UPDATE/p.47	(34)(1)(f)(c)	LTTE	Separatist/Liberation	Admissible	n	Marisa Musto	Montreal		training (coersion) successfully proven. Refers to CBSA	Ethan Alan Friedman
2012	Sri Lanka	Redacted	00889/UPDATE/p.209	a)(b)	LTTE	Separatist/Liberation	Inadmissible	n	R. Stratigopoulos	Toronto		argued re: c	L. Waldman
2012	Sri Lanka	Redacted	B0-00824/Vanc.2 p.661	34(1)(f)(b)(c)	LTTE	Separatist/Liberation	Admissible	susp.	L. Ko	r	Unknown	Forced to transport items for LTTE. Not membership.	
2012	Colombia	Redacted	00770/UPDATE/p.667	b)	M-19	Political Movement	Inadmissible	Yes	L. King	r			R. Kincaid
2012	Nigeria	Redacted	66	a)	MASSOB	Separatist/Liberation	Inadmissible	susp.	A. Beecham	Toronto			R. C. Amadi
2012	Nigeria	Redacted	01950/UPDATE/p.186	c)	MASSOB	Separatist/Liberation	Inadmissible	susp.	Harold Shepherd	Toronto			Sina Oguniye
2012	Nigeria	Redacted	00176/UPDATE/p.675	c)	MASSOB	Separatist/Liberation	Admissible	Yes	L. King	r		subversion by force of Nigerian government.	G. Badh
2012	Iran	Redacted	002336/UPDATE/p.222	(34)(1)(f)(c)	MEK	Political Movement	Inadmissible	Inel.	L. Del Duca	Toronto		previously.	K. Kostadinov
2012	Pakistan	Redacted	00269/UPDATE/p.101	35)(1)(a)	MQM (MQM-A)	Political Movement	Inadmissible	1999	O. Nupponen	Montreal		341fa founded allegation 35 unfounded	Mark Gruszczynski
2012	Turkey	Redacted	96	b)	PKK	Separatist/Liberation	Inadmissible	susp.	L. Del Duca	Toronto			C. Acikgoz
2012	Palestine	Redacted	00303/UPDATE/p.2	35)(1)(a)	PLFP	Separatist/Liberation	Admissible	n	Yves Dumoulin	Montreal			Razul Rahman
2012	Tunisia	Redacted	01145/UPDATE/p.81	1)(a)	RCD Party	Government agency	Inadmissible	Yes	Yves Dumoulin	Montreal		inadmissible under section 351a, government did not	Kamel Bali
2012	India	Redacted	02216/UPDATE/p.510	(34)(1)(f)(a)	Redacted	Not stated	Inadmissible	Yes	Mariou Funston	Toronto			E. C. Roth
2012	Lebanon	Redacted	00137/UPDATE/p.72	(34)(1)(f)(c)	SSNP	Separatist/Liberation	Inadmissible	Yes	Dianne Tordorf	Montreal		Syrian Socialist Nationalist Party	Anthony Karkar
2012	Pakistan	Redacted	00530/UPDATE/p.696	(34)(1)(f)(c)	SSP	Religious	Inadmissible	Yes	T. Cook	r			G. Murtaza
2012	Afghanistan	Redacted	00137/UPDATE/p.451	(34)(1)(f)(c)	Taliban	Political Movement	Inadmissible	susp.	O. Kowalyk	Toronto		Unsuccessfully tried to argue coercion.	E. Sehatzadeh
2012	Sri Lanka	Redacted	02470/UPDATE/p.311	35)(1)(a)	TNA-LTTE	Separatist/Liberation	Inadmissible	Yes	S. Kim	Toronto		Found TNA and LTTE same group.	S. Boyd
2012	Sri Lanka	Redacted	01126/UPDATE/p.624	(37)(1)(b)			Inadmissible	Yes	L. King	r		Sun Sea.	Sadreshemi
2013	India	Redacted	00449/UPDATE/p.168	(34)(1)(f)(c)	AISSF	Separatist/Liberation	Admissible	Yes	Cote	Montreal		Singh Gill faction of the AISSF was or is engaged in	Giovanna Allegra
2013	India	Redacted	00612/UPDATE/p.497	(34)(1)(f)(c)	AISSF	Separatist/Liberation	Inadmissible	Yes	A. Seifert	Toronto			K. Kostadinov
2013	India	Redacted	02368/UPDATE/p.537	b)(36)(1)(c)	BKI	Separatist/Liberation	Inadmissible	susp.	M. Mokbel	Toronto		Babbar Khalsa International	S. Bharati D.S. Jammu
2013	Sri Lanka	Redacted	01115/UPDATE/p.523	(34)(1)(f)(c)	LTTE	Separatist/Liberation	Inadmissible	n	A. Seifert	Toronto			B. Jackman
2013	Sri Lanka	Redacted	01189/UPDATE/p.598	(34)(1)(f)(c)	LTTE	Separatist/Liberation	Admissible	susp.	Geoff Rempel	r		Minister failed to prove he was a de facto member.	P. Edelmann
2013	Sri Lanka	Redacted	01079/UPDATE/p.591	(34)(1)(f)(c)	LTTE/TRO	Separatist/Liberation	Admissible	Yes	M. Tessler	r		Rehabilitation Organization was tied to the LTTE. Came	G. Chand
2013	DRC	Redacted	000763/UPDATE/p.137	(34)(1)(f)(b)	MLC	Political Movement	Inadmissible	susp.	Cote	Montreal			Marie-Josée L'Ecuyer
2013	DRC	Redacted	01019/UPDATE/p.124	35)(1)(b)	MLC	Political Movement	Inadmissible	1999	Louis Dube	Montreal		Movement for the Liberation of Congo	Jacques Beauchemin
2013	Iraq	Redacted	00161/UPDATE/p.609	c)	PUK/CTG	Separatist/Liberation	Admissible	Yes	L. Ko	r		Counter Terrorism Group	G. Badh
2013	Peru	Redacted	02956/UPDATE/p.583	b)	Shining Path	Political Movement	Inadmissible	n	Staligopoulos	Toronto			Campbell

\* Fields blacked out where names of individuals were, in many instances wrongfully, disclosed by IRB

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