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review

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Redrawing Security, Politics, Law and Rights: Reflections on the Post 9/11 Decade

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September 11, 2011 marked the ten-year anniversary of that tragic and fateful day when four hijacked airliners crashed into the World Trade Center, the Pentagon, and a field in Pennsylvania, killing 2,997 people. Over the last decade, the aftershocks of these terrorist attacks on the US have certainly been felt the world over, including in one of its closest, proximal, neighbours, Canada.

While initial responses claimed that 9/11 "changed everything," this special issue explores and evaluates whether and/or how this was the case for Canada. With the benefit of ten years of hindsight, and the grounded analyses of six academics from across Canada (three legal scholars and three political scientists), the conclusions drawn can be, at once, clearer, but also, more circumspect and qualified. Yes, September 11 transformed law and politics in this country, both discursively and materially. Changes occurred on the level of ideas (and popular discourses), in institutions (including both the state and the courts), and as a result of changing orientations to rights and rules.

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The real-life effects that ensued were multiple, from the more innocuous prolonged security checks at airports, to more insidious racial profiling, targeting of communities, and even, in some instances, wilful ignorance and/or complicity in situations of rendition, detention, abuse and torture of Canadian citizens (e.g., Maher Arar and Omar Khadr) and non-citizens alike.

At the same time, however, the careful analytical work and empirical research featured in this special issue also suggests that these post-9/11 shifts are not necessarily of the order and scale that were initially predicted, and that they have penetrated norms and realms in unanticipated ways domestically and in terms of Canada's place on, and relation to, the broader international stage. Positioned within a broader conceptual framework, the articles gathered here bring to light how many of the "exceptional" or "extraordinary measures" that marked the immediate aftermath of 9/11 have become regularized through law and policy changes as well as through less formal government practices at the domestic, international, and transnational levels (see, for example, Roach in this special issue).

The staying power of these exceptional practices, in Canada and elsewhere, is largely due to the way in which "security" as a particular political discourse has been marshalled by state, legal and other authorities to (re)frame new and old threats.[1] Central to this (re)framing is the re-orientation of the referent object of security. That is to say, threats are said to emanate less from the existential threat posed by self-same enemy states, but rather, are increasingly portrayed as stemming from a range of potential dangers and risks to the population posed by other humans. While terrorism can undoubtedly have its state patrons, it is nonetheless the figure of the individual terrorist that most often populates public pronouncements regarding the continued threat of international terrorism.

The shift in the referent object towards the human has also facilitated the targeting, with added vigour,[2] of more conventional subject identities such as migrants and refugees (see, for instance, MacIntosh and Rygiel in this issue). In turn, this focus has generated new state-sponsored border geographies—from efforts to strengthen cross-border co-operation and information-sharing

1 A similar point is made by Mariana Valverde in her assessment of the general context that informs Canada's anti-terrorism legislation. See Mariana Valverde, "Governing Security, Governing through Security, in Ronald J Daniels, Patrick Macklem and Kent Roach, eds, *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 83.

2 See Alexandra Dobrowolsky, "(In)Security and Citizenship: Im/migration and Shifting Citizenship Regimes" (2007) 8 *Theoretical Inq. L.* 629.

on security related matters (see Mégret and Whitaker in this issue)[3] to a willingness to resort to "in-country" detention centres and consider "offshore" deterrent mechanisms to migration "risks." Yet, at the same time, and quite ironically, security's re-orientation towards the more "human" element evokes a more "progressive" quality in the sense that it appears to ally state security measures with the unqualified good of protecting the well being of citizens and providing for their ongoing safety.[4]

Concomitantly, as security measures no longer appear to respond primarily to threats emanating from enemies that have a recognized or established formal political status (as was the case for instance during the Cold War when much of the current national security apparatus was initially developed), they appear more removed from conventional political (i.e., state) actors and standard politico-legal subjects. However, such processes involve more than distancing, as they serve to "depoliticize" acts that nonetheless remain intensely political. This depoliticization has certainly come into play in other countries when, for example, justifying the extra-judicial assassination or indefinite detention of terrorists. But it is also a feature of the Canadian Supreme Court's minimalist posture in dealing with a range of security policies involving the *Charter of Rights and Freedoms*[5] (see, for example, Macfarlane in this issue), or the trend towards the less sensationalized criminalization and securitization of refugee claimants that is apparent in policy debates and administrative practices in Canada and elsewhere (see Rygiel).

Furthermore, when the shift in the referent object of security is successfully mobilized by government authorities to defend new legislative or administrative measures, the nature and space of political debate is altered. While many pundits and analysts are quick to criticize government authorities for "security failures" or weak security measures that amount to little more than "security theatre," it becomes much more difficult to query whether enhancing security at the domestic, international, or transnational level ought to be a top government priority. Instead, real or perceived security breakdowns are typically met with immediate calls for more robust security practices and a marked absence of any interrogation of security in and of itself.

3 See for the instance the mapping of detention centres provided by the Global Detention Project http://www.globaldetentionproject.org/. See also, Anna Pratt, *Securing Borders: Detention and Deportation in Canada* (Vancouver: UBC Press, 2005).

4 Mark Neocleous, "Inhuman security" in David Chandler and Nik Hynek, eds, *Critical Perspectives on Human Security* (New York: Routledge, 2011) 186.

5 *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 [*Charter*].

All this has taken place, paradoxically, in the midst of an era in which the neo-liberal doctrine of a streamlined, fiscally responsible state has remained triumphant in most social and cultural policy areas (see Whitaker in this issue). Yet, the claim of working towards greater or enhanced security has allowed governments to mobilize resources and expand state authority and administrative bodies. For example, the funds Canadian governments have allocated to security post 9/11 are staggering. A report released by the Rideau Institute in September 2011 noted that, adjusted for inflation, spending on security and public safety programs in Canada increased by 123 per cent since 9/11, rising from $3.9 billion to $8.7 billion. Program spending for the Canadian Security and Intelligence Service alone grew from $83 million in fiscal 2000 to $509 million in 2011–2012.[6]

It is these kinds of discursive and material transformations in the realm of security over the last decade that have helped to justify and normalize a continued "politics of exception." As a consequence, increased forms of executive and discretionary power in decision-making that often run counter to established democratic principles of transparency, oversight, accountability, and judicial and administrative review (see Whitaker, Roach, and Macfarlane in this issue) have become the norm, rather than the "exception."[7]

These mutually reinforcing concerns have renewed academic interest in the age-old concept of sovereignty. This explains the revival of Carl Schmitt's formulation where sovereignty is viewed as a form of juridico-political power marked by the ability to declare a state of exception: "Sovereign is he who decides on the exception."[8] While such formulaic logics and the strict political decisionism they assume are not without their limitations,[9] Schmitt's definition nevertheless helpfully draws our attention to sovereignty's troubled

6 David Macdonald, *The Cost of 9/11: Tracking the Creation of a National Security Establishment in Canada*, Ottawa: Rideau Institute, September 2011. If military expenditures are added to the calculation, federal government spending has increased by $69 billion since 9/11. These increases reflect broader global trends both in the public and private domains. See Rita Abrahamsen and Michael C Williams, "Security Beyond the State: Global Security Assemblages in International Politics," *International Political Sociology* 3 (2009) 1–17.

7 A useful review of the concept of exceptionalism understood as enhanced executive-centred government in Western democracies in response to 9/11 is offered by Jef Huysmans, "Minding Exceptions: The Politics of Insecurity and Liberal Democracy," *Contemporary Political Theory* 3 (2004) 321–41.

8 Carl Schmitt, *Political Theology, Four Chapters on the Concept of Sovereignty* trans George Schwab (Cambridge Mass: MIT Press, 1985) 5.

9 William E Connolly, "The Complexities of Sovereignty," in Jenny Edkins, Véronique Pin-Fat, and Michael J Shapiro eds *Sovereign Lives: Power in Global Politics* (New York: Routledge, 2004) 23–40.

relationship with societies governed by the rule of law, particularly the rule of law in liberal societies.

Sovereignty is that form of political power that appears to stand behind the law, giving the law its force, as is the case with notions of popular sovereignty. However, it also stands outside the law as that form of power that can suspend the rule of law in self-declared "states of emergency," while at the same time assuming the force of interdiction that law normally embodies. And yet, without the law, sovereignty would lack its very condition of possibility in that it would find nothing to suspend.[10] Sovereign power, therefore, stands at once outside and inside the juridical order.

It is in this sense that contemporary philosopher Giorgio Agamben has argued that there is a secret solidarity between a humanitarian understanding of the human as imbued with certain universal rights and the exercise of sovereignty, a solidarity that becomes particularly apparent in the decade since September 11. Thus, for example, sovereign power's ability to suspend rights, as in the case of indefinite detention, depends on finding the human in a political form that is amenable to its sway.[11] Put differently, sovereign power must find a subject with the particular political status that is defined in the legal language of basic human rights, in order to ultimately deny those rights.

Over the last ten years, it is precisely these kinds of processes that have manifested themselves on multiple scales. While Schmitt clearly tied sovereign power to the juridico-political status of the state, sovereign power need not be seen in grand state-centric terms to grasp the contours of its resurgence in the post 9/11 era. Granted, many of the more egregious cases of the exercise of sovereign power continue at the hands of the state, but even so, "Petty sovereigns" abound at the micro level in an environment in which, for instance, security measures call for the enhanced discretionary powers of officials such as border agents.[12]

At the other end of the spectrum, an increase in the exercise of sovereign power on a global plane has also become apparent. The role played by the United Nations' Security Council in the post-9/11 context (see Mégret in this issue), and in particular the counter-terrorism measures demanded by

10 William Rasch, *Sovereignty and its Discontent: On the Primacy of Conflict and the Structure of the Political* (London: Birkbeck Law Press, 2004) 92.

11 Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* trans Daniel Heller-Roazen (Stanford CA: Stanford University Press, 1998) 133.

12 On the notion of 'petty sovereigns' see Judith Butler, *Precarious Life* (London: Verso, 2004).

its Resolutions 1267 and 1373, have brought to light the extraordinary and, some would say, unequalled power of the Security Council as an international body.[13] When its members have found it useful and expedient to do so, then, the Security Council has also played its part in the exercise of sovereign power at the transnational and global levels.

The articles in this special issue underscore, in their respective areas of analysis, how the broad conceptual framework laid out above has translated in the case of Canada. In many regards, Canada's primary response to the events of September 11 was one of re-asserting the boundaries of a sovereign nation-state by reverting to national security preoccupations and beefing up security with a new *Anti-Terrorist Act (ATA)*.[14] Initially, the "border" was everywhere,[15] appearing beyond the *ATA* and new security agencies and measures, and beyond, as in Canada's re-vamped immigration and refugee policy, the *Immigration Refugee Protection Act (IRPA)*.[16]

At the same time, however, Canada's approach also reflected a willingness to accede, often strategically, to pressures to harmonize policies and practices with others, especially with its neighbour to the south. In part, the latter came as a reaction to American claims over Canada's so-called "porous" border, and the faulty allegations that the 9/11 attackers had entered the US through Canada, and partly to preserve and protect trade relations with the US. While harmonization was already in evidence prior to 9/11 (e.g., with the North American Free Trade Agreement, NAFTA), afterwards it expanded to other policy fields, and accelerated processes already in evidence in this country, such as the conflation of security and immigration. This post 9/11 contradictory behaviour of defining the Canada/US border and policing it against some (e.g., particular "humans": explicitly, terrorists; implicitly, refugees), yet concomitantly deferring to certain US policy priorities (see MacIntosh in this issue) is epitomized by the recently announced Canada-US Border Action Plan.

What is more, the contributors to this special issue point to broader patterns and influences of "harmonization," i.e., beyond the US. These developments raise more troubling concerns than those of Canadian sovereignty, as

13 Miguel de Larrinaga & Marc G Doucet, "Governmentality, Sovereign Power and Intervention: Security Council Resolutions and the Invasion of Iraq" in Miguel de Larrinaga & Marc G Doucet eds, *Security and Global Governmentality: Globalization, Governance and the State* (New York: Routledge 2010), 96–110.

14 *Anti-terrorism Act*, SC 2001, c 41.

15 Elia Zureil & Marc Salter eds, *Global Surveillance and Policing: Borders, Security, Identity (*Devon UK: Willan Publishing, 2005).

16 *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

they call to question the state of its liberal democracy. In fact, all the contributors discuss the attenuation of Canada's purported politico-legal norms and commitments, from its democratic ideals and embrace of the rule of law, to its growing reticence to act on various domestic and international rights obligations. Such democratic shortfalls are considered in light of the post-9/11 context domestically, comparatively and internationally.

Reg Whitaker and Emmett Macfarlane carefully examine the impact, over the last decade, of 9/11 on Canadian institutions both political and legal (respectively), while Kent Roach provides a comparative and international assessment by contrasting the Canadian, British and Australian experiences. Frédéric Mégret moves beyond the domestic judicial angle examined by Macfarlane, and examines the effects of international law, supranational bodies, and the broader transnational normative environment, on Canada's response to terrorism.

What is new and important in Whitaker's study is his focus on the impact of changes to security post 9/11 on Canada's accountability mechanisms and how the former has served to substantially undercut the latter. Granted, accountability was already a serious concern for the Canadian state prior to September 11, but ten years later, the shifts in security emphases have reinforced several troubling institutional dynamics and processes that include: a chronic lack of transparency, institutional fragmentation and lack of coordination, as well as limited and weak parliamentary review. According to Whitaker, then, the end result of this combination of strengthened security and diminished accountability is a significantly more threadbare fabric of liberal democracy.

Troubling developments have unfolded at the level of Canadian courts as well. Macfarlane reviews the Supreme Court of Canada's treatment of a range of security policies and cases that directly and indirectly relate to 9/11. Beyond the Court's obvious deference to problematic legislative actions, or perhaps inactions, as in the Omar Khadr decision, Macfarlane identifies other patterns including a high degree of unanimity on the part of Supreme Court justices. Most distinctively, however, Macfarlane makes the original claim that the Court's patchy post 9/11 record on safeguarding rights can be attributed to a combination of judicial deference and judicial minimalism. This mix, Macfarlane argues, results in not only the Supreme Court failing to live up to its rights rhetoric, but also can potentially lead to contradictory policy and political institutional consequences (e.g., recognizing that *Charter* rights

were infringed in the Khadr case, but not requiring the government to rectify the matter).

Roach's study begins by contextualizing and favourably comparing Canada's formal, anti-terrorist law, the *Anti-terrorist Act (ATA),* to those of Australia, Britain, and the United States. Roach emphasizes the *ATA's* relative restraints, reflecting Canadian allegiances to legality and human rights. However, he also cautions that similar fetters may not be built into new anti-terrorism legislation. What is more, Roach goes on to illustrate, in detail, that the real cause for concern lies in the fact that Canada's adherence to rights has not extended to less formal fora as in its counter-terrorism practices abroad, and in its intelligence sharing with its foreign partners. It is in this more informal and uncontrollable terrain that Canada has appeared more willing to suspend its rights commitments.

Mégret's contribution also extends beyond domestic constitutional and legislative issues by examining the role of supranational bodies and international law in shaping Canada's anti-terrorist efforts. He argues persuasively that while international law has been invoked strategically to legitimize controversial anti-terrorist measures, when it comes to human rights, international norms become downplayed or ignored. Mégret thus draws our attention to the use of international law to obscure the uneven and often selective manner in which Canada has responded to its international obligations as they pertain to counter-terrorism and human rights.

The post 9/11 complexities that underlie the relationship between the international, transnational and the domestic are also explored by both Constance MacIntosh and Kim Rygiel. In their respective articles, they hone in on how 9/11 has shaped Canada's approach to refugees and asylum seekers in light of broader influences. The former considers the effects of domestic implementation of new refugee legislation, particularly given the US's pressures, whereas the latter offers a more theoretical and comparative exploration of the changes that have taken place.

MacIntosh highlights the extent to which refugees, refugee claimant processes, and asylum seekers have been subject to discourses and practices of securitization since 9/11. While these associations were present prior to 9/11 and are prevalent around the world, they have intensified and played out in Canada in distinctive ways, particularly given: unsubstantiated claims regarding connections between Canada and the events of 9/11; the portrayal of Canada as a "safe haven" for terrorism; and the events that transpired around

the case of Ahmed Ressam. All have served to ratchet up the securitization and criminalization of refugees in terms of discourse and policy. While MacIntosh notes how this backdrop is critical to understanding the problematic approach taken in recent refugee legislation, Rygiel shows how it has contributed to practices whereby detention becomes a technology of citizenship which serves to block access to rights.

Rygiel describes this move as "governing though detention." This involves a remaking of the refugee from a political subject with a recognized right to a set of limited rights, to a "human" that either becomes the potential recipient of humanitarian assistance, or, increasingly, becomes the object of management *via* penality. Her contribution also dovetails with Mégret's, in that Rygiel highlights Canada's selectivity as it considers policies pursued by Europe and Australia when it comes to using detention as a technology of citizenship. But of course, Rygiel's main concern, as is MacIntosh's, is to expose how post 9/11 developments help to frame and even justify deeply problematic changes to migration control policy that reflect both the intensification of securitization and the strategic practices of depoliticization that are involved.

Taken together, whether through grounded empirical study, legal analysis, and/or broader theoretical engagement, all the authors evocatively underscore that a central element of the legacy of 9/11 has been the worrisome redrawing of the geography of state security practices and the redefining of some fundamental political and legal discourses and practices in this country. As a result, problematic tendencies once considered to be "exceptional" have now become the norm.

Given the richness, depth and thought-provoking nature of all the articles alluded to above, we feel honoured and quite privileged to have had this opportunity to act as guest editors for this timely and relevant special issue of the *Review of Constitutional Studies*. As result, we would sincerely like to thank the authors for all their insights and efforts, and also the anonymous reviewers who provided their invaluable commentaries. Special thanks to the journal's managing editor, Patricia Paradis, for her support and patience, as well as to her editorial team for their copy-editing prowess. We are extremely grateful for these combined efforts that have helped to produced six such insightful and compelling contributions.

The Post-9/11 National Security Regime in Canada: Strengthening Security, Diminishing Accountability

Reg Whitaker*

The post-9/11 national security regime in Canada has been characterised by the addition of resources, new powers, administrative rationalization and general strengthening of security against possible terrorist attacks. This improvement of capacity has had the unanticipated consequence of diminishing the scope of accountability for national security, as accountability mechanisms designed for the Cold War and pre-9/11 era have not been modernized to keep pace. Issues have arisen that have demonstrated the shortcomings of existing accountability structures to cope with post-9/11 realities. The Arar, "Syrian Three," Omar Khadr, Abdelrazik, security certificate, and Afghan detainee cases are all examined from the point of view of failing accountability. The Arar and Air India inquiries have made serious recommendations for reform that have so far been ignored by the government. The Canadian experience is found to be broadly similar to that of its closest allies, the USA and UK. Some explanation is sought in an examination of the institutional and political constraints imposed upon governments, and the tension between the long term need for greater accountability and the short term pressures to avoid greater transparency in the operations of the "secret state."

Le régime de sécurité nationale au Canada après le 11 septembre 2001 a été caractérisé par l'ajout de ressources, de nouveaux pouvoirs, de rationalisation administrative et d'un renforcement général de la sécurité contre les attaques terroristes éventuelles. Cette amélioration de la capacité a eu la conséquence imprévue de diminuer l'étendue de la responsabilité en matière de sécurité nationale étant donné que les mécanismes de responsabilité élaborés pendant la guerre froide et la période précédant le 11 septembre 2001 n'ont pas été modernisés afin d'être à jour. Des problèmes sont survenus, démontrant les lacunes des structures de responsabilité existantes pour faire face aux réalités de l'après 11 septembre. Les affaires Maher Arar, « les trois Syriens », Omar Khadr, Abdelrazik, les certificats de sécurité et celle des détenus afghans ont toutes été examinées du point de vue de la mauvaise responsabilité. Lors des enquêtes sur les affaires Maher Arar et Air India, des recommandations sérieuses concernant des réformes ont été faites, mais jusqu'alors elles ont été ignorées par le gouvernement. On a constaté que l'expérience canadienne est à peu près semblable à celle de ses plus proches alliés, les États-Unis et le Royaume-Uni. L'auteur cherche une explication dans un examen des contraintes institutionnelles et politiques imposées aux gouvernements et de la tension entre le besoin à long terme pour une responsabilité accrue et les pressions à court terme pour éviter une meilleure transparence dans les opérations d'un « état secret ».

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The events of September 11, 2001 have had obvious impact on the institutions, processes, and practices of national security in Canada.[1] Observers have noted: new legislative powers; widened and deepened jurisprudence in national security law; a new national security policy discourse; a new administrative architecture in the federal government; a major expansion of financial and human resources for national security; a new regime for the regulation of aviation security; new forms of interagency co-operation and co-ordination in counter-terrorist investigation and law enforcement; new forms of international regulation of national security practices; and new and wider forms of co-operation and expanded intelligence sharing with foreign agencies.[2]

By and large, these measures have been successful in strengthening security. Certainly by the crudest of indicators—the absence of any terrorist attack on Canadian soil in the decade following the 9/11 events—the terrorist threat that seemed imminent ten years ago appears to have been stymied. Of course, the absence of a successful terrorist action so far does not prove that such will not occur in the future. In the context of a somewhat lowered anxiety index, the government of Canada appeared by the end of the decade to have met its security obligations.

Even a tentative finding of success in strengthening national security misses another important measure. Enhanced state powers must be assessed not just in terms of their efficacy in meeting their objectives (strengthening security) but also in terms of their impact on the fabric of liberal democracy, and in the provision of strengthened mechanisms of accountability. While it may still be too early to judge the long-term impact of 9/11 and the responses to 9/11 on Canadian democracy, the question of enhanced accountability for enhanced security measures has already been answered—in the negative. Stronger security has been accompanied by diminished accountability, and there is little reason to expect that this trend is going to be reversed in the immediate future.

Accountability in and for national security presents some unique problems that go beyond those associated with everyday accountability in gov-

1 Kent Roach, *September 11: Consequences for Canada* (Montreal: McGill-Queen's University Press, 2003).

2 Reg Whitaker, "More or less than meets the eye? The new national security agenda" in George Bruce Doern, ed, *How Ottawa Spends, 2003–2004: Regime Change and Policy Shift* (Don Mills: Oxford University Press, 2003) 44-58; Reg Whitaker, "Made in Canada? The New Public Safety Paradigm" in George Bruce Doern, ed, *How Ottawa Spends, 2005–2006: Managing the Minority* (Montreal: McGill-Queen's University Press, 2005) 77-95.

ernment.[3] At the same time, the history of accountability in the national security area is closely bound up in the broader evolution of accountability in the political system. In recent decades there has been an increasing clamour for greater accountability in Canadian government at all levels. Yet close observers have noted a paradox: the greater the prominence of accountability as a popular watchword in political debate, the more questionable the actual degree of accountability becomes. Some have even spoken of a "collapse" of accountability.[4]

In this paper I will examine the pre-9/11 background of national security accountability in Canada, and then examine the specific challenges posed by the new post-9/11 developments. I will describe the record of failing accountability, and suggest some ways in which this situation could be remedied, were governments to display the same degree of dedication and good will toward resolving the accountability problem that they have displayed in dealing with the security problem.

National Security Accountability Pre-9/11

Federal government concern for the protection of national security goes back to the 19th century, yet despite serious issues surrounding the shadowy activities of the "secret state," a century passed before there was any pressure to bring in formal mechanisms for accountability. The rise of separatist violence in Quebec in the 1960s and 1970s led to the use of "dirty tricks" to counter the threat. The McDonald Commission, an inquiry into RCMP wrongdoing, made a number of bold recommendations for new mechanisms of accountability.[5] *The Canadian Security Intelligence Service (CSIS) Act* was enacted in 1984. At the time it was widely seen as landmark legislation that established independent review of the new civilian security intelligence agency detached from the RCMP, with a specific mandate indicating what it was empowered to do, and not do. There were also judicial checks on the conduct of CSIS, and internal monitoring through an Inspector General reporting to the Minister. In the mid-1980s this was seen by some foreign observers, especially in the

3 For a discussion of the concept of accountability in general, and the degree to which the concept must be modified in relation to national security, see Reg Whitaker & Stuart Farson, "Accountability in and for National Security," online: (2005) 15:9 IRPP Choices 1 at 1–13 <http://www.irpp.org/choices/archive/vol15no9.pdf>.

4 Donald Savoie, *Court Government and the Collapse of Accountability in Canada and the United Kingdom* (Toronto: University of Toronto Press, 2008).

5 Commission of Inquiry Concerning Certain Activities of the RCMP, *Freedom and Security Under the Law* (Ottawa: Government of Canada, 1981) (Chair: David C. McDonald).

UK prior to reform of British accountability practices, as placing Canada at the forefront of accountability reform.[6] Almost three decades later, no one could make such a claim seriously.

Most of the early praise for Canadian reform surrounded the Security Intelligence Review Committee (SIRC), which is an independent arms-length committee of Privy Councilors appointed by the Prime Minister on the advice of the other parties in Parliament with a mandate to review the activities and procedures of CSIS, to evaluate its effectiveness and to report on its adherence to the terms of its mandate. In theory, SIRC has full access to all records of the Service. It performs regular reviews, and also may make special investigations on the request of the Minister or on its own decision. Annual reports are tabled in Parliament and made public, although in redacted form, as are occasional special reports.

SIRC's institutional innovation lies in its status as neither fully an executive nor a legislative creature. In practice, SIRC members have most often been chosen to reflect broadly the party composition of Parliament, reflecting the consent of opposition parties as well as the party in office. As a review body, SIRC has evolved considerably over the years. Its first few years were marked by the aggressive leadership of its first Chair, Ron Atkey, who set out to establish the Committee's independence and autonomy from the outset. This occasioned some strained, if not antagonistic, relations between the review body and the agency it was reviewing. Over time, CSIS suspicion of its external reviewers has diminished; a former CSIS Director has testified that SIRC has made CSIS a more effective agency by assisting it in internalizing the lessons of accountability, to its organizational benefit.[7]

6 Laurence Lustgarten & Ian Leigh, *In From the Cold: National Security and Parliamentary Democracy* (Oxford: Clarendon Press, 1994). These British scholars term Canada "lucky" for its 1984 reforms, and at 465–466 characterise SIRC, the institutional mechanism for independent review of CSIS, as a "unique and fascinating invention, and one which may provide a valuable model for the assertion of greater parliamentary influence and accountability over policy making and administration in areas far removed from that which gave it birth."

7 This was the publicly stated observation of the longest serving Director of CSIS, Ward Elcock. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Public Hearing*, 21 June 2004) at 187, online: Library and Archives of Canada—Electronic Collection <http://epe.lac-bac.gc.ca/100/206/301/pco-p/commissions/maher_arar/07–09–13/www.stenotran.com/commission/maherarar/2004–06–21%20volume%201.pdf>.

Limits on National Security Accountability

The quasi-representational role of SIRC was an attempt to cover over one major departure from the recommendations of the McDonald Commission, one that was to prove a long-lasting deficiency. McDonald had called for a standing committee of Parliament on national security to play an important role. The Trudeau Liberal government chose instead largely to ignore Parliament in its reform package. SIRC tables its redacted annual reports to Parliament, but not to an ongoing oversight committee. Instead, a series of ad hoc House of Commons subcommittees have been struck to carry out sporadic liaison with SIRC and cast desultory glances at the national security policy area, with considerable discontinuity and to little effect. The one area where the *CSIS Act* specified a role for Parliament was its mandated five-year review of the *Act* and its workings. A committee was struck in 1989, carried out its duties in an exemplary non-partisan fashion, and produced a thoughtful report a year later.[8] The government largely ignored its recommendations.[9] Neither it nor any of its successors has seen fit to repeat this exercise of parliamentary scrutiny.

There was one other major deficiency in the accountability innovations of 1984. The relatively elaborate review mechanisms set in place were all institution-specific rather than functional. That is to say, they attached only to CSIS, but not to any other departments or agencies of government that dealt with security and intelligence. When the security service was taken out of the RCMP, the latter agency continued to play a leading role in national security law enforcement. The *CSIS Act* was passed in tandem with the *Security Offences Act,* which mandates the RCMP's criminal law enforcement responsibilities for espionage, terrorism, etc. SIRC noted shortly after its creation that the RCMP had set up its own national security investigations unit, but that this remained outside SIRC's scrutiny. In fact, one of the crucial arguments in favour of "civilianization" had been that the principle of police independence inhibits independent review of police activities, if it does not rule it out altogether. The RCMP emerged after the *CSIS Act* accountable only in the form of a toothless and dysfunctional Public Complaints Commission that would later prove lamentably inadequate to deal with post-9/11 accountability issues.

8 House of Commons Special Committee on the Review of the *Canadian Security Intelligence Service Act* and the *Security Offences Act*, *In Flux but Not in Crisis* (Ottawa: Supply Services Canada, 1990).

9 The Government's Response to the report of the House of Commons Special Committee on the Review of the *Canadian Security Intelligence Service Act* and *the Security Offences Act*, *On Course: National Security for the 1990s* (February 1991).

The RCMP was however only one of many government agencies with some national security responsibilities. The most prominent is the Communications Security Establishment, the closest thing to a Canadian foreign intelligence agency. The CSE was brought under its own external scrutiny with the appointment of a separate CSE Commissioner in 1996, although the CSE itself was only provided with a legislative mandate in 2001. Other agencies of government escape specific review of the conduct of their national security responsibilities altogether. Most importantly, this situation creates a patchy, discontinuous framework that provides no focus for any "big picture" review of the government's conduct of national security as a whole. Given the multiplicity of agencies involved in this area, it also means that even specific reviews of specific cases for concern that arise from time to time may fall victim to jurisdictional "stovepiping."

A further problem lies in the historical pattern of accountability reform: reform tends to happen only after scandal that proves uncontainable by normal institutional means erupts into the public arena. Reforms recommended to deal with scandal are designed primarily to deal with issues of *propriety*. Issues of *efficacy*—whether agencies charged with national security responsibilities are doing the job that governments have requested—tend to receive less focus from improved accountability mechanisms.

From the Cold War to the War on Terror

The problems outlined in the previous section remained in the background, below the radar of serious attention from policy-makers, as the Canadian accountability system weathered the transformation of national security from the end of the Cold War to a new, ill-defined "post-Cold War" era in the 1990s, without major scandal or intelligence failure. The cataclysm of September 11, 2001, however, sent shock waves that soon roiled the relatively placid surface of national security practices in Ottawa.

Under strong pressure from abroad, especially from the Bush administration in the USA that had just declared a "global war on terror," Parliament rushed through the omnibus *Anti-terrorism Act 2001* that created new terrorist offences as well as criminalizing support for listed terrorist groups, and gave government new powers to fight terrorism, some of them particularly controversial, including preventive arrest and investigative hearing powers that limited traditional individual rights. The Liberal government agreed to "sunset" these two clauses: in a 5-year review, Parliament would have to renew these powers, or they would lapse.

Parliamentary review turned out to be a more complicated and disappointing process than might have been envisioned. Fractious partisan minority Parliaments after 2004 provided poor ground for sober and constructive consideration of contentious legislation. Acrimonious conflict over the two powers subject to sunset provisions yielded heat, but little light. In the end, the three opposition parties used their combined numbers to shoot down both powers, which have now been off the books for some five years. Following Prime Minister Harper's majority victory in 2011, it seems certain that preventive arrest and investigative hearing powers, slightly amended from their original form, will finally be returned to the available arsenal of anti-terrorist measures. Apart from this troubled issue, the 2001 anti-terrorist measures survived parliamentary scrutiny more or less intact, with not a great deal of value added in terms of analysis and evaluation.[10]

The Martin Liberal government had called for the creation of a national security committee of parliamentarians,[11] a call broadly endorsed by the Harper Conservatives before taking office. Such a committee would have continuity and a much wider remit than the ad hoc House and Senate committees struck to consider the *Anti-terrorist Act*. But no action has yet been taken on this advice. To understand the implications, we should first consider the series of scandals and issues that have arisen in the post-9/11 era and the various responses and recommendations for accountability reform, and the gap that inaction on parliamentary oversight has left.

The Arar Affair and the O'Connor Recommendations

The first, and by far the most important, scandal in terms of impact was the Arar affair. In September 2002, Canadian citizen Maher Arar disappeared after being taken for questioning by American security officials while transiting at a New York airport en route to his home in Ottawa. It subsequently became known that he had been taken (in effect, kidnapped) to Jordan and thence to his native Syria, where he was confined under abusive conditions and tortured until he was finally released and was able to return to Canada in the fall of 2003. Arar was a victim of the now notorious American practice of "extraordinary rendition," whereby terrorist suspects are "rendered" for interrogation to countries with dubious human rights records—in effect outsourcing torture

10 Kent Roach, "Better Late than Never? The Canadian Parliamentary Review of the *Anti-terrorism Act*" (2007) 13:5 IRPP Choices.

11 Public Safety Canada, *A National Security Committee of Parliamentarians* (Ottawa: Public Safety Canada, 2004).

as an anti-terrorist tool. In February 2004 the Liberal government appointed Justice Dennis O'Connor of the Ontario Supreme Court to inquire into the possible complicity of Canadian officials in Arar's treatment.[12]

When the O'Connor commission's first report was made public in 2006, its findings had a powerful impact.[13] O'Connor found that there was no evidence that Arar was in any way connected to terrorist activity; that the RCMP had improperly disclosed protected information to American officials—some of it incorrect—that helped lead to Arar's rendition and mistreatment; that Canadian officials had not done what they should have to secure Arar's release, and may have relied upon intelligence derived from torture; that there were problems with intelligence sharing that could have potentially damaging effect on Canadians' fundamental rights. O'Connor made a number of recommendations, directed both at the RCMP and the Canadian government more generally, for improved handling of anti-terrorist actions. The government unreservedly accepted all the recommendations, and went further by offering Mr. Arar an official apology and financial compensation. The RCMP insists that it has either implemented the recommendations relating to them fully or is in the process of completing their implementation. The most notable fallout from the report was the resignation of RCMP Commissioner Giuliano Zaccardelli.

The specific findings in relation to Mr. Arar were only one part of a two-part inquiry. The need for a special inquiry in the first place was necessitated by the manifest incapacity of the existing accountability architecture to cope with the issues raised by the Arar affair. The RCMP was the agency most responsible for the government's failure, but the only potential accountability mechanism for the force was the RCMP Public Complaints Commission, which in the view of its own Chair, lacked the mandate and the powers to pursue an effective inquiry.[14] SIRC had such mandate and powers, but had no jurisdiction to extend its monitoring of CSIS to the RCMP, or to Foreign Affairs officials who were also a focus of the inquiry. Along with the factual inquiry, O'Connor was also asked to make recommendations for an independent, arms-length review mechanism with respect to the RCMP's national security activities. This resulted in a second part of the report, the policy re-

12 Reg Whitaker, "Arar: the Affair, the Inquiry, the Aftermath" (2008) 9:1 IRPP Policy Matters.

13 Canada, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar,* vol 3 (Ottawa: Public Works and Government Services Canada, 2006) (Commissioner: Dennis R. O'Connor).

14 Michelle Shepard, "Mountie secrets hinder rights monitor: Arar inquiry gets damning report," *The Toronto Star* (2 March 2005).

view, which was released later in 2006.[15] The policy review went well beyond the RCMP and the specifics of the Arar affair, as such, to extend to the entire landscape of national security operations in the government of Canada. A comprehensive survey of all the government's security and intelligence activities revealed significant changes since 9/11, which might at the risk of some oversimplification be reduced to two main themes: (1) intensified *integration* of counter-terrorist activities, from greater interagency co-operation and co-ordination at the national level to greater integration with provincial/municipal agencies within Canada and, most importantly, greater integration with counter-terrorist activities of foreign governments and international agencies; and (2) greater emphasis than in the past on *intelligence-led* security and policing. Both these trends were applauded by O'Connor as offering the potential for more effective protection against the threat of terrorism, but they also bring with them significant difficulties in constructing effective mechanisms for accountability, and the potential for serious abuses of rights if they are not monitored effectively.

With regard to integration, post-9/11 national security accountability would have to either cross jurisdictional boundaries, or so-called departmental "stovepipes," or prove ineffective. This accountability was, in theory, achievable within the national framework if properly designed reforms were implemented with good will and determination. However, crossing jurisdictional lines beyond Canada's borders presents more difficult, perhaps even intractable, problems for accountability.

With regard to the trend toward intelligence-led policing, the problems here lie with the tension between a criminal law enforcement agency like the RCMP and a security intelligence agency like CSIS. The former looks to gathering evidence that can be used in criminal proceedings, while the latter is more concerned to keep its intelligence out of court, where its secret sources and methods risk being revealed, to the impairment of its effectiveness. Since the counterterrorist activities of both agencies are increasingly integrated in

15 Canada, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Public Works and Government Services Canada, 2006) (Commissioner: Dennis R. O'Connor) [*A New Review Mechanism for the RCMP's National Security Activities*]. Disclosure: the author was a member of the five-person Advisory Panel that helped prepare the findings and recommendations of the policy review.

institutionalized forms like the Integrated National Security Enforcement Team that identified and brought charges against the co-called 'Toronto 18,'[16] the evidence–intelligence tension presents problems for designing appropriate oversight mechanisms that can at the same time protect secret sources and methods from public disclosure, while guarding against abuse of rights as a by-product of unaccountable state actors employing extraordinary powers.

In designing a post-9/11 accountability system, O'Connor considered a beefed-up "Super SIRC" to take on monitoring of the entire security intelligence community, but instead chose another option in which the advantages of government-wide review could be combined with the advantages of dedicated institutional focus. The RCMP would have its own enhanced review body with powers similar to those exercised by SIRC in relation to CSIS. Other government agencies with national security responsibilities but now lacking external review would fall under the scrutiny of an expanded SIRC, with the exception of Canada Border Services which as an agency exercising law enforcement responsibilities would more appropriately fall under the enhanced RCMP review body. The CSE would continue to be reviewed by the existing CSE Commissioner. Crucially, O'Connor recommended an innovation drawn from foreign experience in this area: "statutory gateways" should be established that would permit the three review bodies to exchange information, refer investigations, conduct joint investigations, and co-ordinate the preparation of reports. A new committee, to be composed of the three review body heads with an outside person chosen as chair, was also recommended to ensure that the statutory gateways were operating smoothly, to co-ordinate efforts and avoid duplication, and to serve as a one-stop point of entry for complaints for appropriate disposition.

These recommendations offered the government a timely update to the McDonald Commission-inspired reforms of the 1980s. There were still some gaps in O'Connor's vision. I would cite two areas in particular. First, O'Connor chose not to address the potential role of Parliament, claiming that this fell outside his terms of reference. Second, his reform proposals focused exclusively on the traditional emphasis of national security review in Canada, issues of *propriety*, while ignoring issues of *efficacy*. Focus on propriety alone misses a very important dimension: how well are the agencies doing the jobs assigned to them by government? Efficacy issues can benefit as much from

16 Integrated National Security Enforcement Teams (INSETs) are led by the RCMP, but include CSIS, and sometimes other federal agencies like the Canada Border Services Agency, and where appropriate, provincial and municipal policing agencies.

external scrutiny as propriety issues can; citizens require assurance that the agencies their tax dollars are funding are not using secrecy as a shield, not just to protect public safety, but to cover failure or inefficiency.

This latter concern was brought into sharp focus by another judicial inquiry into national security appointed by the Harper government, this time into the 1985 Air India bombing that killed 379 people, most of them Canadian. Air India represents the worst intelligence failure in Canadian history, but it also represents the worst accountability failure as well. Neither successive governments, nor successive Parliaments, nor SIRC, nor the courts were able to bring the perpetrators to justice or to shed any real transparency on how just a disaster had been allowed to happen. More than two decades later, a comprehensive public inquiry was finally called under retired Supreme Court justice John Major. This would be an inquiry less concerned with propriety than with efficacy: how to explain a terrible intelligence and security failure, and how to construct institutions and practices to prevent any recurrence. It was fair for the Harper government to place a hold on any implementation of O'Connor's policy review recommendations until it heard Major's recommendations, since the latter would bring another, equally appropriate, focus to national security. This however begged the question of how the government viewed O'Connor's proposals. Unlike their swift and favourable response to Part One, they gave no hint of their response to his structural reform proposals. Five years after the report was tabled, they still have not.

O'Connor himself offered a clue to resolving the two gaps in his recommendations when he suggested that Parliament would be the appropriate venue for efficacy reviews.[17] Unfortunately, parliamentary committees in Canada have tended to lack adequate expert staff support resources. One suggestion for combining O'Connor's reforms with an expanded and strengthened parliamentary oversight role—especially in the crucial efficacy area—would be an arrangement whereby Parliament could task the enhanced review bodies, with their expertise, to provide research support for parliamentary inquiries.[18] This would have the advantage of encouraging a more co-operative and complementary relationship between parliamentary and external review—returning to the unfulfilled idea of the McDonald Commission in the 1980s.

17 *A New Review Mechanism for the RCMP's National Security Activities, supra* note 15 at 467.

18 Whitaker and Farson, *supra* note 3 at 41.

The Case of the "Syrian Three"

Any doubts about the relevance of O'Connor's admonitions about the accountability problems arising from the increasing integration of national security activities would be dispelled by three cases that were in effect spinoffs of the Arar inquiry. Three Canadians had also been interrogated and tortured in Syria as alleged terrorists. Unlike Arar, they had not been rendered illegally, but had travelled voluntarily, if unwisely, to Syria where they were detained. Like Arar, there were questions about the complicity of Canadian officials, but as these included CSIS, the RCMP, and Foreign Affairs, none of the existing review bodies had jurisdictional competence. Hence a special inquiry had to be called, this time under another retired high court judge, Frank Iacobucci. Unlike the O'Connor inquiry, this was a much more limited, "internal" inquiry, with severe restrictions on transparency and public input, and no mandate to make policy recommendations. Various interested groups, such as civil liberties associations, boycotted the inquiry in protest. Nevertheless, Iacobucci did find evidence of Canadian complicity in the abuse of these men's human rights, which only made the case for integration and coordination of accountability more compelling, so that external review would not be up to one-off special inquiries every time serious issues arose.[19]

The urgency for reform has been underlined by a series of other high-profile cases that have emerged in the last few years, all of which have encountered serious accountability shortfalls. In each of these cases, judicial intervention has in effect had to substitute for effective civilian oversight. Indeed, judicial review of national security cases has become the de facto accountability mechanism in Canada today, *faute de mieux*. While any accountability is better than no accountability, leaving matters in the hands of judges does present particular problems, particularly the danger of the inappropriate judicialization of national security issues.

The Case of Omar Khadr

We might begin with the well-publicized case of Omar Khadr, the Canadian teenager brought by his family to Afghanistan to support the Taliban and who was severely wounded and captured during an American assault on a

19 Canada, Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almaki, Ahmad Abou-Emaati, and Muayyed Nureddin, *Report* (Ottawa: Public Works and Government Services Canada, 2008) (Commissioner: Frank Iacobucci). See also Kerry Pither, *Dark Days: The Story of Four Canadians Tortured in the Name of Fighting Terrorism* (Toronto: Viking, 2008).

Taliban base in the 2001 invasion of Afghanistan. Charged with the murder of an American Special Forces officer taking part in the assault, Khadr was transported to the Guantanamo Bay camp for "enemy combatants," now notorious for waterboarding and other forms of torture practised upon the detainees. One of the interrogation methods used on Khadr at Guantanamo was systematic sleep deprivation, recognized as a component of torture under international conventions. Notwithstanding Khadr's status as a child soldier, protected under international protocols that Canada has signed, the Harper government resisted all calls for his repatriation.

In co-operation with Khadr's American captors, CSIS and Foreign Affairs had interrogated Khadr at Guantanamo. In 2009 SIRC made public a heavily redacted report that sharply criticized CSIS for its knowing complicity in the abuse of a Canadian adolescent.[20] Of course, SIRC was confined to looking only at the role of CSIS. A government-wide critique of Khadr's treatment had to be left to the courts. The Federal Court ruled that Khadr's section 7 *Charter* rights had been infringed by refusal to recognize his special status as a minor; his lack of legal counsel until 2004; and the decision of Canadian officials to interrogate him in 2004 while fully aware that sleep deprivation had been imposed upon him prior to and during their interviews.[21] Repatriation was found to be the only available remedy. An appeal reached the Supreme Court, which in 2010 unanimously upheld the finding of the lower courts that Khadr's rights had indeed been violated, but refrained from calling for the specific remedy of ordering the government to request his repatriation.[22] The Court instead left it to the government to decide how best to respond. The government interpreted this as a vindication of its policy of non-repatriation. Khadr eventually pleaded guilty to murder before a military court in exchange for an agreement that he would serve one more year at Guantanamo, whereupon he would return to Canada.

The Case of Abousfian Abdelrazik

The bizarre case of Abousfian Abdelrazik demonstrates even more deficiencies in accountability. Abdelrazik, a Canadian citizen, was imprisoned, twice, in his native Sudan and badly mistreated, apparently with the active involvement of CSIS, which had been targeting him as a suspected terrorist in Canada.

20 Security Intelligence Review Committee, *SIRC Review: CSIS's Role in the Matter of Omar Khadr*, Annual Report 2008–2009 (8 July 2009) at 9–13.

21 *Khadr* v *Canada (Prime Minister), 2009 FC 405*, [2010] 1 FCR 34.

22 *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44.

After his second release, he took refuge in the compound of the Canadian embassy but was refused return to Canada. The Minister of Foreign Affairs declared him to be a threat to the security of Canada. Failing other routes, Abdelrazik's case went to the Federal Court which issued a sharp rebuke to the government for the violation of Abdelrazik's constitutional rights and ordered his immediate return.[23]

Compliance with the Court order did not end Abdelrazik's difficulties. Although both CSIS and the RCMP admitted that they had no evidence against him, he had been listed as a terrorist under the United Nations 1267 regime. Canadian regulations implementing the UN rules prohibited anyone from providing Mr. Abdelrazik with any kind of material aid, including salary, loans of any amount, food or clothing. Justice Zinn in the Abdelrazik decision stated that the UN Committee regime is "a situation for a listed person not unlike that of Josef K. in Kafka's *The Trial*, who awakens one morning and, for reasons never revealed to him or the reader, is arrested and prosecuted for an unspecified crime."[24] It was only in late 2011 that he was finally removed from the UN list.[25] Abdelrazik has filed claim in Federal Court for punitive and aggravated damages against the Government of Canada and personally against then Foreign Affairs Minister Lawrence Cannon for malfeasance in public office.[26]

Given the involvement of CSIS, SIRC should have been requested to investigate the matter by the Minister of Public Safety under section 54 of the *CSIS Act*, but no request was made. SIRC decided instead to undertake a section 54 inquiry at its own initiative. This has yet to be made public, but as usual SIRC can only scrutinize CSIS and is thus inhibited from a full review. In any event, the "Kafkaesque" UN 1267 regime lies beyond the reach of any Canadian review body. Challenges to Canada's implementation of 1267 have been launched in the courts, but there are limits to legal challenges to international obligations to which Canada has agreed.[27]

23 *Abdelrazik v Canada (Minister of Foreign Affairs)*, 2009 FC 580, [2010] 1 FCR 267.

24 *Ibid* at para 53.

25 Paul Koring, "Canadian Abousfian Abdelrazik taken off United Nations terror list," *Globe and Mail* (30 November 2011).

26 Abdelrazik and Attorney General, Statement of Claim; Paul Koring, "Abdelrazik sues Ottawa for $27-million," *The Globe and Mail* (24 September 2009).

27 Craig Forcese & Kent Roach, "Limping into the Future: The U.N. 1267 Terrorism Listing Process at the Crossroads" (2010) 42 Geo Wash Int'l L Rev at 217. Carmen K. Cheung, "The UN Security Council's 1267 Regime and the Rule of Law in Canada," online: British Columbia Civil Liberties Association <http://www.bccla.org/othercontent/1267.pdf>.

The Security Certificate Cases

A good deal of publicity has surrounded five post-9/11 security certificate cases. The Minister of Immigration and the Minister of Public Safety together may sign a certificate declaring a foreign national or a permanent resident inadmissible to Canada on security grounds.[28] Deportation would normally result from a security certificate, but there are legal constraints on the government's ability to deport individuals to countries where the risk of torture or death is significant. This led, ironically, to indefinite detention without charge for individuals who could not be deported but were held to be threats to security if left at large.[29] Five men believed to be associated with Islamic terrorism were detained indefinitely under conditions that roused widespread protests. Legal and constitutional questions proved sufficiently troubling that in 2007 the Supreme Court of Canada declared significant parts of the security certificate process unconstitutional, and gave the government a period of time in which the process had to be fixed, according to guidelines set down by the court.[30] A revised process was set in place, and as a result of further judicial intervention, those being held indefinitely under security certificates were released but only under onerous conditions.

Judicial intervention went further. After review of their cases by the Federal Court, two of the men, Adil Charkaoui and Hassan Almrei, had their certificates quashed. In Charkaoui's case, the government eventually withdrew most of its evidence, citing a refusal by foreign governments to allow disclosure of secret documents to Special Advocates appointed by the Court to argue on behalf of Charkaoui. Justice Danièle Tremblay-Lamer was apparently unimpressed and released Charkaoui from all conditions.[31] In quashing Almrei's certificate, Justice Richard Mosley found that CSIS and the Ministers "were in breach of their duty of candour to the Court."[32] In presenting their case, CSIS had made "significant errors" which if undetected would have seriously misled the Court. Similar problems were found by Justice Simon Noël in the case against Mohamed Harkat, in which he took CSIS to task for incompletely reported polygraph tests which damaged confidence in their evidence.[33]

28 *Immigration and Refugee Protection Act*, SC 2001, c 27, s 77.

29 For the links between security certificates and indefinite detention see Craig Forcese, *National Security Law: Canadian Practice in International Perspective* (Toronto: Irwin Law, 2008) at 569–75.

30 *Charkaoui v Canada (Citizenship and Immigration),* 2007 SCC 9, [2007] 1 SCR 350.

31 *Re Charkaoui*, 2009 FC 1030, [2010] 4 FCR 448.

32 *Re Almrei*, 2009 FC 1263, [2011] 1 FCR 163.

33 *Re Harkat,* 2009 FC 1050, [2010] 4 FCR 149.

Despite these qualms, Justice Noël ultimately upheld Harkat's certificate.[34] Two additional cases are still in process.[35]

A serious issue raised in the security certificate cases is the government's reliance on CSIS intelligence that the agency is unwilling to see revealed in court. While it has operational reasons for this reluctance, it is difficult to justify withholding this information from cross-examination when people's fundamental human rights may be at stake. This is one more example of the unresolved evidence-intelligence problem.

The Afghan Detainee Controversy

No issue has highlighted the failure of the patchwork accountability system more than the Afghan detainee controversy. Despite widespread and credible allegations that suspected Taliban prisoners in Afghan jails are routinely subjected to abuse and torture, Canadian Forces had for some eighteen months from 2006 to 2007 transferred detainees into Afghan control without adequate monitoring. This is a potentially explosive issue: if Canadians had been knowingly complicit in torture it could be considered a war crime. The arms-length Military Police Complaints Commission had initiated an investigation, but the government actively sought to block or impede the process at every turn, claiming that the Commission lacked jurisdiction.[36] The government also refused all calls for a special inquiry. After a parliamentary committee heard from whistleblower diplomat Richard Colvin that he had vainly tried to alert Foreign Affairs and the Canadian mission throughout 2006 and 2007 of the likelihood of detainee abuse, the government insisted that calls from opposition members for production of unredacted documents shedding light on the issue would be refused. The dispute over disclosure finally escalated into a full-blown constitutional crisis when the House of Commons in December 2009 moved a motion to demand the release to Parliament of unredacted documents, setting up the potential for censure of the government for contempt of Parliament.[37] The Speaker of the House of Commons in a landmark ruling on April 27, 2010, citing parliamentary supremacy, ordered the

34 *Re Harkat,* 2010 FC 1241.

35 The cases are those of Mahmoud Jaballah and Mohammad Mahjoub. The latter case witnessed an extraordinary breach by the Crown of solicitor-client privilege: Colin Perkel, "Terror suspect wants case stayed after government takes his lawyers files, *"The Canadian Press* (24 October 2011).

36 In September 2011, the Federal Court turned back applications by the government to limit the MPCC inquiry. See *Lieutenant Colonel (Ret'd) WH Garrick et al. v Amnesty International et al.* 2011 FC 1099.

37 Reg Whitaker, "Prime Minister vs. Parliament," *The Toronto Star* (18 December 2009).

disclosure of all documents, but required the government and opposition to negotiate a method whereby sensitive documents could be viewed unredacted by a select number of MPs.[38] The alternative of continued confrontation and intransigence was so pitted with uncharted dangers for parliamentary democracy[39] that an all-party agreement was finally announced with a mechanism whereby four security-cleared MPs, one put forward from each party, could view unredacted documents, backed by a panel of three eminent jurists agreed upon by all parties to advise on which documents could then be safely released to the public.[40]

This might have seemed a signal victory for parliamentary supremacy and for accountability in national security, but appearances were deceiving. Subsequent interparty negotiations watered down the original deal to the extent that the NDP walked out of the arrangement, although the Liberals and the BQ remained on board. The MPs were not in fact given access to unredacted documents, but to documents first redacted by the panel of jurists, thus turning the intent of the Speaker's ruling on its head. The 2011 election intervened; the Conservatives were returned with a majority; about 10% of the total documents were released in redacted form; and the government simply shut down the work of the jurists, despite their own insistence that their work was unfinished and that they had dealt only with an "initial set of documents."[41] The government appears to have no intention of allowing more committee hearings on the subject. Far from being an exercise in accountability, the government's Afghan detainee disclosure policy could be better described as "out of sight, out of mind."

The Air India Inquiry and Government Inaction

The preceding survey has demonstrated the failure of existing accountability mechanisms to cope with post-9/11 national security issues. Government response to the O'Connor recommendations for comprehensive accountability reform was said to be on hold until the Major Commission on Air India made

38 Ruling on the questions of privilege raised on March 18, 2010, by the Member for Scarborough-Rouge River (Mr. Lee), the Member for St. John's East (Mr. Harris) and the Member for Saint-Jean (Mr. Bachand) concerning the order of the House of December 10, 2009, respecting the production of Afghan detainee documents, April 27, 2010.

39 Reg Whitaker, "After the Speaker's ruling: where do we go from here?," *The Toronto Star* (29 April 2010).

40 House of Commons, "Memorandum of Understanding" by the Minister of Justice in *Sessional Papers,* No 8530–403–10 (2010).

41 Colin Freeze & Daniel Leblanc, "Vetting of Afghan detainee files left unfinished panel says," *The Globe and Mail* (23 June 2011).

its report. Major's input landed on cabinet desks in 2010,[42] and the government has responded with dismissal of a number of his key recommendations, and almost total disregard for accountability reform.[43] Major's concern was primarily efficacy, rather than propriety as with O'Connor, yet accountability for either efficacy or propriety seems to have slipped below the government's horizon.

Major recommended that a national security "czar" be appointed at deputy ministerial level, answering directly to the Prime Minister, to ensure the co-ordination and integration of national security operations, adjudicate any jurisdictional disputes between CSIS and the RCMP, and regularly keep the PM "in the loop." This recommendation was rejected, Public Safety minister Vic Toews insisting that his office already fulfills the envisioned functions.

In the government response to Major, there are only two references to accountability. The first is its intention to beef up the RCMP Complaints Commission, about which it has done nothing, other than refuse to renew the tenure of an activist Commission chair, Paul Kennedy. But O'Connor had pointed out the need for a more integrated approach, and this the government response ignores entirely. The only other reference to accountability is in one sentence on the issue of information sharing between agencies: the government pledges to "enable the review of national security activities involving multiple departments and agencies, and create an *internal mechanism* to ensure accountability and compliance with the laws and policies governing national security information sharing." An "*internal* mechanism" suggests that the government is once again promising that the bureaucrats will police themselves, that public accountability will be a matter of "trust us."

Canada: An Anomalous or Typical Case?

Canadians could legitimately expect a more coherent and detailed plan for accountability that would meet the requirements set out by O'Connor, as well as by Major. They might also expect some indication of enhanced parliamentary oversight of national security, something promised by successive Liberal and Conservative governments, but that has yet to be acted upon. Instead they

42 Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Air India Flight 182: A Canadian Tragedy,* vol 5 (Ottawa: Minister of Public Works and Government Services, 2010) (Commissioner: Hon. John Major).

43 The Government of Canada's Response to the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 (7 July 2011), online: Public Safety Canada <http://www.publicsafety.gc.ca/prg/ns/ai182/res-rep-eng.aspx>.

appear to have received neither. Ten years after 9/11, the national security narrative remains unchanged: strengthened security, diminished accountability.

An obvious question is whether the Canadian experience is anomalous or typical of a pattern that is more widespread in the Western world. There is no space here to develop a detailed comparative framework, but a brief survey suggests that the Canadian experience does not diverge sharply from that of its closest allies. Since 9/11, the United States has witnessed a huge increase in the repressive apparatus of the state dedicated to the "war on terror," including the officially sanctioned use of torture; warrantless domestic surveillance; intrusive domestic data collection, etc. It is striking that to the degree that these secret extensions of state powers have been publicly revealed it has been through investigative journalism[44] rather than through the institutionalized forms of executive and congressional accountability, which have largely failed to maintain adequate scrutiny, let alone critical comment. The record in the UK is somewhat better, with some examples of parliamentary restraint upon the expansion of arbitrary executive powers, but as in Canada, British examples of accountability have been sporadic and lacking in continuity.

In each of these three countries, there have been changes in government since 9/11, with mixed results for improved accountability. The Obama administration came into office pledging to close down the notorious Guantanamo Bay prison where torture has been practised; it has failed to follow through. The Obama administration has yet to demonstrate any greater degree of transparency in national security than the Bush administration. The Coalition government in the UK has pledged to reverse some of its Labour predecessor's excesses and has launched an inquiry into alleged British complicity in the torture abroad of British terrorist suspects, but the outcome of these initiatives remains to be seen. In Canada the Conservative Party—which had criticized its Liberal predecessor for being weak on national security—had a promising start with its initial response to the O'Connor recommendations, but as we have seen, its enthusiasm for accountability has waned dramatically since then. It seems that in none of these countries does party politics play a very important role in determining the degree of accountability in national security.

44 See e.g. Dana Priest & William M Arkin, *Top Secret America: The Rise of the New American Security State* (NY: Little, Brown and Company, 2011).

Shorter Term and Longer Term Considerations

Among the factors at play deeper than party politics or political ideology is the sheer institutional weight of the "secret state," itself greatly enhanced by post 9/11 requirements. In the absence of large-scale political scandals resulting from the operations of national security institutions (catastrophic intelligence failures or grave and visible undermining of constitutional rights and democratic values), there is limited political pressure within liberal democracies to force greater transparency in the silent and opaque activities of counter-terrorist agencies. On the other side there looms severe political liability for any government unlucky enough to experience another 9/11-type attack on its watch: itself a strong disincentive to experiment with accountability reforms that might be perceived as impeding or interfering with the protection of national security. And the international dimension is important. In an anti-terrorist campaign that is necessarily global in scope, each national partner in the global alliance against terrorism is concerned that it maintains its own security of information so as not to threaten the vital exchange of intelligence with its allies. National accountability reforms that promise greater transparency may also be seen, rightly or wrongly, to threaten international standards of confidentiality. This is a concern to which a country like Canada is particularly vulnerable, given that its foreign intelligence resources are relatively more limited than those of its major partners.

However compelling such political and institutional pressures may appear to governments, failure to move forward on accountability reform conceals serious political dangers of its own. It is an often remarked characteristic of bureaucracy that agencies of the state that operate unaccountably come to believe that they can operate with impunity—even when they cut corners or make mistakes. This is an unhealthy attitude that virtually guarantees future problems for the governments that are responsible and answerable for the agencies. Moreover, properly designed mechanisms of accountability not only guard against breaches of propriety but just as importantly may contribute to the more efficacious operation of the agencies. In the other words, in the longer term better accountability in national security is in everyone's interest, even if the short term political pressures seem to militate against it. In this as in many other contemporary public policy areas, democratic governments face the challenge of balancing longer term strategic thinking with the pressures of expediency in the short term.

Failing to Walk the Rights Talk? Post-9/11 Security Policy and the Supreme Court of Canada

Emmett Macfarlane[*]

This article explores the Supreme Court of Canada's record in dealing with a range of security policies implicating the Charter of Rights *in the post-9/11 era, including deportation to torture, the use of security certificates and investigative hearings, and the Canadian government's obligations to Omar Khadr, the sole Canadian citizen held at Guantanamo Bay, Cuba. The article demonstrates that the decisions are marked by a mix of judicial deference and judicial minimalism, each of which has important policy implications. The article concludes that the Court's record in balancing* Charter *rights with security objectives is mixed. The Court has, for the most part, adopted a posture of restraint that safeguards rights in a prudent manner. In certain instances, however, the Court's reasoning fails to live up to its rhetoric in support of rights. When the justices adopt a minimalist posture, rights failures may result from making compromises that weaken the* Charter's *scope. When the justices adopt a deferential posture, rights failures may result from justifications for deference that make little institutional sense. These considerations have important implications for the protection of* Charter *rights.*

Dans cet article l'auteur examine le dossier de la Cour suprême du Canada en matière de politiques sur la sécurité et la charte des droits et libertés *dans les années suivant le 11 septembre 2001, y compris l'expulsion et la torture, l'utilisation de certificats de sécurité et les audiences d'investigation, ainsi que les obligations du gouvernement canadien envers Omar Khadr, le seul citoyen canadien détenu à Guantanamo Bay, à Cuba. L'auteur démontre que les décisions sont caractérisées par un minimalisme et une retenue judiciaires, tous deux ayant des incidences importantes sur les politiques. Il conclut que la Cour suprême a équilibré les droits garantis par la* Charte *et les objectifs de sécurité de façon inégale. En général, la cour a adopté une position de retenue qui protège prudemment les droits. Dans certains cas, cependant, le raisonnement de la cour n'est pas à la hauteur de sa rhétorique à l'appui des droits. Lorsque les juges adoptent une position minimaliste, des manquements au niveau des droits peuvent résulter de compromis qui affaiblissent la portée de la* Charte. *Lorsque les juges adoptent une position de déférence, des manquements au niveau des droits peuvent résulter des justifications de la déférence qui n'ont pas beaucoup de sens sur le plan institutionnel. Ces considérations ont des implications importantes quant à la protection des droits garantis par la* Charte.

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Introduction

One of the most fundamental challenges facing liberal democracies in the aftermath of the September 11, 2001 terror attacks in the United States has been to balance the design and implementation of effective national security policies with the protection of individual rights. In Canada, courts are central players in weighing the federal government's security policies against the perceived demands of the *Charter of Rights and Freedoms*. One of the principal concerns among rights proponents is that the 9/11 context has encouraged undue judicial deference to executive and legislative anti-terrorism or security objectives. Chief Justice Beverley McLachlin acknowledged the considerable challenge faced by the Supreme Court in this regard shortly after the attacks, but noted the necessity of remaining vigilant in protecting civil liberties.[1]

In the decade since 9/11, the Supreme Court of Canada has ruled not only on the constitutionality of provisions in the country's anti-terrorism and immigration legislation, but also on foreign affairs decisions that are considered a matter of executive prerogative. Critics contend that the Court's post-9/11 jurisprudence on these issues has been overly cautious and, even more critically, that certain cases represent an abdication of the Court's responsibility to uphold *Charter* rights. Although the Court makes strong rhetorical statements on the *Charter* rights implicated by security policies challenged in these cases, scholars have expressed concern that the decisions remain generally deferential or fail to impose meaningful remedies on government when rights are infringed.[2]

After exploring the Court's major security policy cases, this article examines two important institutional factors that help shed light on the Court's cautious approach. First, norms of consensus on the Court suggest that in highly salient cases such as these the justices will attempt to reach unanim-

1 Cristin Schmitz, "Chief Justice McLachlin Discusses Terrorism, Liberty, Live Webcasting of Appeals" (2002) 21:33 The Lawyers Weekly.

2 James Stribopoulous, "Charkaoui: Beyond Anti-Terrorism, Procedural Fairness and Section 7 of the Charter" (2007) 16 Const Forum Const 15 [Stribopoulous]; Audrey Macklin, *The Canadian Security Certificate Regime: CEPS Special Report* (Brussels: Centre for European Policy Studies, 2009) [Macklin]; Lorna McGregor, "Are Declaratory Orders Appropriate for Continuing Human Rights Violations? The Case of Khadr v Canada" (2010) 10:3 Human Rights Law Review 487 [McGregor]; Kent Roach, "'The Supreme Court at the Bar of Politics': The Afghan Detainee and Omar Khadr Cases" (2010) 28 NJCL 115 [Roach]; Sonja Grover, "The Supreme Court of Canada's Declining of its Jurisdiction in Not Ordering the Repatriation of a Canadian Guantanamo Detainee: Implications of the Case for Our Understanding of International Humanitarian Law" (2011) 15:3 Int'l JHR 481 [Grover]; David Rangaviz, "Dangerous Deference: The Supreme Court of Canada in Canada v. Khadr" (2011) 46 Harv CR-CLL Rev 253 [Rangaviz].

ity. Indeed, the most prominent and important cases—such as those relating to the government's security certificates regime and those involving the fate of Omar Khadr, the Canadian citizen held by the United States at the Guantanamo Bay detention facility—have resulted in unanimous decisions. Efforts by the justices to achieve consensus in highly visible or controversial cases has important implications for the scope and impact of the Court's reasons. Unanimity produces a moderating effect on any remedies imposed by the Court and a tendency to engender judicial minimalism, which is distinct from straightforward judicial deference. Judicial minimalism is marked by an effort to decide cases on narrow grounds and to avoid clear rules and final resolutions. Unlike judicial deference, however, minimalism is not premised on a belief that the Court should try to avoid intruding on or interfering with the policies of the legislative or executive branches. A minimalist decision can invalidate laws or involve the Court in policy-making. While both deference and minimalism are conceptually related, the distinction between the two is a significant one and helps to explain much of the Court's approach to security issues in the post-9/11 period.

Second, the national security context encourages the justices to pay explicit attention to their role, the role of the Court, and the Court's relationship with the executive and legislative branches of government. In the context of the Khadr cases, this attention to the limits of the judicial role promotes marked deference to government decision-making, particularly the executive's prerogative over foreign affairs. While the explicit attention paid by the justices to their institutional role responsibilities is a welcome development, I argue the Court's approach—particularly in the 2010 Khadr case—is representative of a wider misreading by the Court of its appropriate limits under the *Charter*. This misreading results in a justification for deference premised on questionable logic.

The final section of the article examines the Court's record in balancing *Charter* rights with security policy and concludes that it is mixed. The minimalism and deference the justices have advanced in assessing government policy objectives only ensure that *Charter* rights are sufficiently protected when they are premised on fundamentally sound institutional logic. Thus for the most part the Court has adopted a posture of restraint that safeguards rights in a prudent manner. In certain instances, however, the Court's reasoning fails to live up to its rhetoric in support of rights. If the justices adopt a minimalist posture, rights failures may result from making compromises that weaken the *Charter*'s scope. If the justices adopt a deferential posture, rights failures may result from justifications for deference that make little institu-

tional sense. These considerations have important implications for the protection the *Charter* ultimately affords rights and for the Court's understanding of its own role.

Post-9/11 Security Cases: A Tale of Deference?

The Supreme Court's post-9/11 track record on *Charter* cases implicating security issues is widely regarded as a tale of judicial deference to the policy objectives of Parliament and the executive. While deference is indeed a major factor in many of the cases, the decisions are also marked by judicial minimalism. It is important to distinguish between deference and minimalism. When the Court is deferential, it leaves certain issues or types of decisions in the hands of the executive or legislative branches, usually on the basis of their differing institutional capacities or on the idea that there are legitimate competing values or complex policy choices at stake whose resolution are best left to the realm of democratic politics. By contrast, judicial minimalism, as elaborated by Cass Sunstein, is marked by rulings that focus only on those issues necessary to resolve the particular case at hand, avoiding clear rules and final resolutions where possible.[3]

These concepts are by no means mutually exclusive. In fact, both deference and minimalism often stem from judicial recognition of the institutional limitations of court policy-making. Nevertheless, the distinction has important practical implications. A deferential court makes a determination that the executive or legislature is due a certain discretion or flexibility to make policy decisions. In the *Charter* context, this may mean a more flexible approach to determining the reasonableness of policies that infringe rights or less restrictive (weaker) judicial remedies in response to those infringements. By contrast, a court practicing judicial minimalism limits or restrains the breadth and depth of its own decision (avoiding rulings that apply to a wide set of circumstances and favouring vague, rather than specific, statements on issues of basic principle) but will still not shy away from invalidating legislation or rul-

3 Cass R Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press, 1999) at ix. Sunstein's ideas about minimalism are widely persuasive, although there is much debate about the empirical basis for minimalism (whether it can be regarded as a full-fledged theory of judicial decision-making) and its normative desirability (whether judges should be minimalist). See also Cass R Sunstein, "Beyond Judicial Minimalism" (2007) 43 Tulsa Law Review 825; Neil S Siegel, "A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar" (2005) 105 Mich L Rev 1951; Robert Anderson IV, "Measuring Meta-Doctrine: An Empirical Assessment of Judicial Minimalism in the Supreme Court" (2009) 32 Harv JL & Pub Pol'y 1045; Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (New York: Cambridge University Press, 2011) for a comparative look at post-9/11 security initiatives.

ing against government policy choices when it sees fit. This section provides an overview of the major security cases and demonstrates that the Court's record is characterized by a mix of deference and minimalism. The remainder of the article will focus on explaining this record and its implications.

Four months after 9/11 the Supreme Court released its unanimous decision in *Suresh v Canada*, ruling that deporting suspected terrorists to countries where they face torture would, in most instances, violate the right to life, liberty and security of the person under section 7 of the *Charter*.[4] Despite this central finding, *Suresh* is widely criticized as an example of judicial timidity in the immediate aftermath of the 9/11 attacks.[5] Two facets of the Court's decision stand out. First, the Court articulated a broadly deferential approach to ministerial determinations of whether a deportee faced a substantial risk of torture. The decision outlines several factors to justify this deference. It notes that Parliament intended a limited right of appeal of a ministerial decision that a refugee constitutes a danger to Canada. The justices also note the "relative expertise" of the minister in making such determinations and in balancing national security against the principle of non-refoulement. The decision points to the "highly fact-based and contextual" nature of the case and the absence of clearly defined legal rules as a reason to support a deferential approach.[6] Finally, in defending this deferential standard of ministerial review, the judgment quotes approvingly from Lord Hoffman of the UK House of Lords:

> I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. *This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security.*[7]

This is a rather striking indication that the post-9/11 context weighed heavily on both the justices' reasoning and their contemplation of respective institutional roles.

4 *Suresh v Canada*, 2002 SCC 1, [2002] 1 SCR 3 [*Suresh*].

5 Stribopoulous, *supra* note 2 at 15; Macklin, *supra* note 2 at 4; Kent Roach, "The Role and Capacities of Courts and Legislatures in Reviewing Canada's Anti-Terrorism Law" (2008) 24 Windsor Rev Legal Soc Issues 5 at 43–4.

6 *Suresh*, *supra* note 4 at paras 29–31.

7 *Ibid* at para 33, citing *Secretary of State for the Home Department v Rehman*, [2001] 3 WLR 877 (HL) at para 62 (postscript) [emphasis added by the Court].

Second, the justices took the controversial stand that there may be "exceptional circumstances" where deportation to face torture may be justified as a result of either the balancing process under section 7 or the reasonable limits under section 1.[8] This caveat received international criticism and, as Kent Roach notes, if contemplated in practice would place Canada in clear breach of its international law obligations.[9] Indeed, the justices' suggestion that such an exception might exist flies in the face of their own acknowledgement just three paragraphs earlier that "international law rejects deportation to torture, even where national security interests are at stake."[10] Notably, the decision fails to outline what circumstances could present themselves for the Court to theoretically contemplate invoking an exception, aside from a vague reference to the conditions under which a section 7 violation might be saved under section 1, which might include "natural disasters, the outbreak of war, epidemics and the like."[11] The Court's refusal to completely rule out the possibility that the *Charter* would permit deportation to torture and its refusal to provide guidelines on when such exceptions might be considered is a hallmark of minimalism.

The Court dealt for the first time with provisions in the federal government's *Anti-Terrorism Act*,[12] enacted in response to 9/11, in the 2004 case *Application under s. 83.28 of the Criminal Code (Re)*.[13] A majority of the Court upheld the constitutionality of investigative hearings, which give judges, upon an application from a peace officer, the power to compel a person who has information about a terrorism offense to appear before them and answer questions. The judges agreed that safeguards established by the legislation, specifically use and derivative use immunity protections, preserved the right against self-incrimination, though they extended those protections to immigration and extradition proceedings.[14] Under the Act, investigative hearings, along

8 *Ibid* at para 78.

9 Kent Roach, "National Security and the Charter" in James B Kelly & Christopher P Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) 160 [Roach II].

10 *Suresh*, supra note 4 at para 75.

11 *Ibid* at para 78.

12 *Anti-terrorism Act*, RSC 2001, c 41.

13 *Application under s 83.28 of the Criminal Code (Re)*, *2004 SCC 42*, [2004] 2 SCR 248 [*Application under s 83.28*].

14 *Ibid*. In dissent, Justices LeBel and Fish argued that the provisions were unconstitutional on the grounds they violated the principle of judicial independence by involving the courts in police investigations, matters properly under the purview of the executive. Justice Binnie, with Justices LeBel and Fish concurring, also dissented on the basis that the Crown's resort to the provisions in the particular case at hand was for an inappropriate purpose at paras 179–80.

with preventative arrests, were subject to a sunset provision and expired in 2007.[15]

The 2007 *Charkaoui v Canada (Citizenship and Immigration)* case marked the first time the Court invalidated significant security-related legislative provisions in the post-9/11 period.[16] The unanimous decision, written by Chief Justice McLachlin, dealt with the security certificates regime in the *Immigration and Refugee Protection Act* (*IRPA*),[17] under which a foreign national or permanent resident can be declared inadmissible to Canada and detained pending deportation. The Court found two aspects of the certificates regime unconstitutional. First, the secrecy required by the regime prevented disclosure of evidence and information to detainees. Despite provisions ensuring the designated judge has the power to make assessments about the evidence, detainees are prevented from knowing the case against them (or challenging it), thus impairing their right to a fair hearing under section 7.[18] The Court invalidated the relevant provisions, giving Parliament a year to craft new ones to satisfy the *Charter*. Second, the legislation mandated judicial review for foreign nationals up to 120 days after a certificate is confirmed. By contrast, detainees with permanent resident status obtain review after 48 hours. Given this, the Court ruled that the foreign nationals' right against arbitrary detention was violated.[19] In a subsequent case the following year, the Court ruled that the Canadian Security Intelligence Service (CSIS) was required to retain and disclose all evidence it had gathered relating to those detained under the certificate regime to the minister, the designated judge and, subject to the limits examined in the 2007 case, the detainee.[20]

Commentators are divided on whether the 2007 *Charkaoui* case represents a non-deferential stance by the Court. James Stribopoulous contends that *Charkaoui* marks the end of "the government's honeymoon before the Supreme Court in anti-terrorism cases."[21] Stribopoulous is critical of certain aspects of the decision, noting that the Court does a poor job of distinguishing the decision from an earlier case where it had upheld a previous certificate

15 The Conservative government has made repeated attempts to re-instate the provisions. The most recent attempt, Bill C-17, was introduced in Parliament in April, 2010, but failed to reach the third reading stage prior to the 2011 Federal election.

16 *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 [*Charkaoui*].

17 *Immigration and Refugee Protection Act*, RSC 2001, c 27.

18 *Charkaoui*, *supra* note 16 at paras 64–65.

19 *Ibid* at paras 91–94.

20 *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 SCR 326 [*Charkaoui II*].

21 Stribopoulous, *supra* note 2 at 15.

regime,[22] and that it fails to provide guidelines on the constitutional threshold for disclosure rules and the opportunity of an accused to be heard.[23] While in his view the Court failed to provide a sufficiently coherent account of what the *Charter* demands in terms of due process, Stribopoulous correctly notes that the Court's prior section 7 jurisprudence gave it wide flexibility for choosing a more deferential path, one it opted to avoid.[24]

By contrast, Audrey Macklin describes the Court's approach in *Charkaoui* as "feeble," pointing out that the ruling does little to address the prospects of indefinite detention of those subject to certificates when deportation is impermissible due to a substantial risk of torture.[25] Although the decision acknowledges the importance of ongoing judicial review, it fails to set standards for when a prolonged detention under the regime constitutes cruel and unusual punishment. Instead, McLachlin's opinion refers "obliquely to the 'possibility of a judge concluding at some point'" that a particular detention no longer satisfies *Charter* safeguards.[26]

Roach notes the Court's "deferential" remedy of delaying the declaration of invalidity for one year to enable Parliament to craft an appropriate policy response that provides detainees a means of challenging the protected evidence or information against them.[27] Roach also criticizes the Court's formalistic approach to the question of whether the certificates regime violates the equality rights of non-citizens. The Court rejected such arguments by noting that the mobility rights under section 6 of the *Charter* apply only to citizens, something Roach argues "ignores the vast procedural protections that citizens accused of terrorism offences possess in contrast to non-citizens who are subjected to security certificates."[28]

Despite how the decision is sometimes characterized, *Charkaoui* is not a deferential judgment but a minimalist one. Criticism directed at the decision stems from the justices' disinclination to go beyond what was necessary to resolve the case, particularly their unwillingness to set out guidelines for determining when indefinite detention becomes impermissible under the *Charter*. The delayed declaration of invalidity is also best characterized as minimalism

22 *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711 [*Chiarelli*].
23 Stribopoulous, *supra* note 2 at 17–18.
24 *Ibid* at 16.
25 Macklin, *supra* note 2 at 5–6.
26 *Ibid* at 5, citing *Charkaoui*, *supra* note 16 at para 123.
27 Roach II, *supra* note 9 at 159.
28 *Ibid*. I would argue that this part of the Court ruling reflects that plain meaning and appropriate understanding of the *Charter*'s mobility rights.

rather than deference. Providing Parliament with a year to develop a new policy does not alter the extent of judicially-imposed change; indeed, Parliament's response was to enact a scheme suggested by the Court in its decision.[29]

In 2008 the Court was confronted with the controversial situation of Omar Khadr, a Canadian citizen being held at the US detention centre in Guantanamo Bay. Khadr, then 15 years old, was taken prisoner in 2002 by American forces following a battle in Afghanistan and labelled an "enemy combatant," a classification the US applied to avoid both prisoner of war safeguards and standard criminal justice processes. He faced terrorism and murder charges after it was alleged he threw a grenade that killed an American soldier. At issue in the 2008 case was whether the Canadian government was required to disclose all relevant documents relating to the charges against Khadr following interviews conducted with him at Guantanamo by CSIS officials in 2003.[30] In a unanimous decision, the Court ruled that handing over the fruits of these interviews to US authorities made Canada a participant in a process that contravened its international human rights obligations. It determined that the *Charter* applied to the conduct of Canadian officials and ordered the disclosure of all documents, subject to a review by a designated Federal Court judge.

Two years later the Court dealt with Khadr's claim that the decision of the Canadian government not to seek his repatriation violated his *Charter* rights.[31] The justices determined that CSIS interviews conducted in 2003 and 2004 were sufficiently connected to Khadr's continued detention that Canada's participation violated the principles of fundamental justice protected by section 7. The Court thus fundamentally agreed with lower court judgments on the *Charter* issue, but where the Federal Court and Federal Court of Appeal decisions employed a remedy ordering the government to seek Khadr's repatriation, the Supreme Court took a more deferential position. Noting that the Crown prerogative in foreign affairs includes the making of representations to a foreign government, the justices opted for a simple declaratory judgment and "to leave it to the government to decide how best to respond to this judgment in light of current information, its responsibility for foreign affairs, and in conformity with the *Charter*."[32] The justices further justified this deference

29 For more on legislative responses to Court decisions, see Emmett Macfarlane, "Dialogue or Compliance? Measuring Legislatures' Policy Responses to Court Rulings on Rights" Int'l Political Science Review (forthcoming).

30 *Canada (Justice) v Khadr*, 2008 SCC 28, [2008] 2 SCR 125 [*Khadr*].

31 *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44 [*Khadr II*].

32 *Ibid* at para 39.

to the executive on the basis that the proposed remedy—an order to request Khadr's repatriation—was unclear and that the Court was not in a position to properly assess the potential impact such a request would have on Canadian foreign relations with the US.[33] This deference was widely criticized.[34] In the next section I explore why the deference the Court exhibited in *Khadr II* was misplaced.

Explaining the Court's Caution

In this section I focus on explaining the deference and minimalism that marks the Supreme Court of Canada's security decisions. The 9/11 context instigated new national security policies and brought tremendous public attention to security-related issues. Arguably, this alone places pressure on the Court to adopt a restrained approach to cases that require it to balance rights with government security objectives. Under one theory, the Court is thus a strategic actor that avoids overt conflict with political actors or judicial overreach in policy making in an effort to maintain its own legitimacy and authority.[35] The closed nature of court decision-making makes it inherently difficult to account fully for judicial motivations and behaviour. Judicial restraint might develop from the justices' acknowledgement of the political reality in the post-9/11 context, strategic considerations designed to protect the Court's legitimacy in the eyes of the public, or simply their genuine belief about the most appropriate legal approach to security issues and the *Charter*. There is little doubt that much of the caution exhibited by the Court was a result of the post-9/11 context and a desire to preserve the institution's legitimacy in the eyes of the public. Nonetheless, there are specific institutional factors that contribute to the minimalism and deference evidenced by the Court's decisions.

The first is the Court's effort to produce strong, united decisions on issues with high political salience. There is a *general* preference among the justices to speak with one voice; doing so produces more authoritative judgments, not only for the lower courts, but also for the rest of government and the public. Arguably, unanimous judgments also ensure legal clarity. Efforts to increase consensus by reducing the number of separate opinions has become more of a collegial norm since McLachlin became chief justice in 2000. The preference for unanimity does not belie the value the justices place on dissenting

33 *Ibid* at para 43.

34 McGregor, *supra* note 2; Roach, *supra* note 2; Grover, *supra* note 2; Rangaviz, *supra* note 2.

35 Vuk Radmilovic, "Strategic Legitimacy Cultivation at the Supreme Court of Canada: Quebec Secession Reference and Beyond" (2010) 43:4 Canadian Journal of Political Science 843.

and concurring opinions in instances of significant disagreement. Judicial independence at the level of the individual judge ensures that despite collegial norms that might promote consensus, individual judges remain free to decide how they see fit and to write separate opinions if they so choose. Thus, despite a broadly-held collegial goal of consensus, unanimous outcomes are not often an *explicit* goal with respect to specific cases.[36]

While the consensual norms to which the judges adhere mean that a majority of the Court's decisions are unanimous, it is more difficult for the Court to achieve unanimity in cases involving complex, controversial moral or policy issues, which often arise in the *Charter* context.[37] Where unanimity becomes an explicit goal, the justices make compromises about the wording of judgments and their underlying logic, affecting the tenor and scope of decisions. This generally results in avoiding issues on which they could not obtain agreement or setting them aside for future cases. It also often means the decision is "shallow," because the justices will allow ambiguity to seep in as they avoid making pronouncements on matters of fundamental principle. In effect, unanimity as a goal promotes judicial minimalism.

The post-9/11 security cases are notable for the high degree of consensus obtained by the justices. In fact, aside from *Application under s. 83.28*, all of the cases explored above were decided unanimously. This alone is not enough to suggest that unanimous judgments were an explicit goal. However, it is significant that three of the decisions—*Suresh* and both *Khadr* cases—were authored by "The Court" rather than particular justices. While not unheard of, unsigned opinions like these are somewhat rare and are usually reserved for the most politically sensitive decisions, such as *Reference re Secession of Quebec*.[38] The justices have noted that it is precisely these types of decisions

36 This was confirmed in author interviews with five current and retired Supreme Court Justices and 21 former law clerks conducted from July 2007 to August 2008. See also Emmett Macfarlane, "Consensus and Unanimity at the Supreme Court of Canada" (2010) 52 Sup Ct L Rev 379 [Macfarlane].

37 *Ibid*.

38 *Reference re Secession of Quebec* [1998] 2 SCR 217 [*Reference re Secession*]. Some observers may question whether *Reference re Secession* fits my argument that unanimity-as-a-goal might lead to minimalism; indeed, in the decision, the Justices went beyond the terms of the question, finding that the rest of Canada has a duty to negotiate in the event of a clear majority voting to secede on a clear question. However, as other scholars have pointed out, the decision is remarkable for what it left unanswered, including the issue of what constitutes a clear majority on a clear question. The Justices provide no guidance on a host of other issues: what amending formula should be used to achieve secession; the rights of Aboriginals or other minorities; and the content of negotiations between Quebec and the rest of Canada. Peter Leslie writes that the "*Secession* case actually resolved almost nothing, in the sense of removing any critical questions from the realm of political controversy.

where unanimity becomes a goal.[39] Further, *Charkaoui* was authored by McLachlin, who, as noted, is particularly keen on achieving consensus where possible (and who, as Chief Justice, is responsible for assigning decision authorship). That case—the first in which the Court was faced with anti-terror legislation crafted in response to 9/11—would surely have merited a strong effort from the Chief Justice to achieve a unanimous outcome.

Collegiality is an institutional variable often overlooked in analyses of Court decision-making, but my intent is not to suggest that it is an *alternative* explanation for judicial minimalism. Indeed, there is little doubt that the post-9/11 security context itself produced caution on the part of the Court that promoted judicial minimalism. My argument is that regardless of whether there was a conscious, strategic effort by some or even all of the justices to adopt a minimalist approach to protect the Court's legitimacy, the collaborative nature of decision writing to achieve consensus contributes to and exacerbates the degree of minimalism ultimately reflected by the decisions.

The second institutional factor at work in these decisions is a heightened sensitivity among the justices to the idea that particular branches of government are better suited to making certain types of decisions. Under the *Charter*, and in the course of making particularly controversial decisions, the Supreme Court has often avoided establishing strong precedents that explicitly favour deference based on the notion that some issues fall outside of the Courts' purview. The explicit logic in the *Suresh* and *Khadr* cases in support of deference to the executive, grounded in notions of appropriate institutional roles and competencies, are thus somewhat unusual. This is not to say that employing such logic is necessarily inappropriate. In *Suresh*, the Court advanced deference to ministerial determinations of the risk to deportees of torture on the basis of ministerial expertise, the highly contextual and fact-based nature of making such determinations and the absence of clear legal rules governing them. The Court thus gives a nod to the idea that judges may lack the resources and expertise to make certain decisions.

Yet while the deference in the *Suresh* decision rests on sound institutional logic,[40] the deference to Crown prerogatives elaborated by the Court in *Khadr*

Even the 'obligation to negotiate,' highlighted by so many commentators (certainly by the *indépendentistes*), left in place almost all the existing ambiguities and uncertainties surrounding the process that could lead to secession." See: Peter Leslie, "Canada: The Supreme Court Sets Rules for the Secession of Quebec" (1999) 29(2) Publius at 149–50. This is the hallmark of judicial minimalism.

39 Macfarlane, *supra* note 36 at 401.

40 It is worth noting that although the institutional logic may be sound, one could still make the normative critique that the rights of deportees are insufficiently protected. I address this issue in the

II is highly problematic. The Crown's prerogative powers are described as "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown."[41] They are rooted in the common law and formally exercised by the Governor General on the advice of cabinet. As unwritten powers they can be restricted, modified or completely replaced by Parliamentary statute. Most significantly, as made clear by Justice Wilson's decision in the 1985 case *Operation Dismantle v The Queen*, prerogative powers fall within the scope of the *Charter* and decisions made under those powers are subject to judicial review.[42]

The Court's ruling in *Khadr II* seems to backtrack from *Operation Dismantle* and its broader approach to the *Charter*, at least as it pertains to remedies for *Charter* violations. Roach argues that *Khadr II* raises the "disturbing possibility that the Court has concluded that some judicial remedies that dictate the exercise of foreign affairs prerogative powers are permanently out of bounds," something he refers to as a "mini political questions doctrine."[43] The fact that the Court has repeatedly rejected the idea of a political questions doctrine (something it did for the first time, ironically, in *Operation Dismantle*) only further illustrates the inconsistency of adopting a deferential stance premised on similar logic with respect to prerogative powers.

The Court has supported deference to legislative choices in very specific circumstances, such as severe financial crisis[44] or in examining justifications for limits on rights in the context of electoral laws,[45] but it has rejected deference premised on the type of institutional logic it suddenly applied to prerogative powers in *Khadr II*.[46] For example, in striking down federal prohibitions

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next section.

41 Lorne Sossin, "The Rule of Law and the Justiciability of Prerogative Powers: A Comment on *Black v. Chrétien*" (2002) 47 McGill LJ 435 at 440, citing AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London: Macmillan, 1959) at 424.

42 *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at para 50 [*Operation Dismantle*].

43 Roach, *supra* note 2 at 148. In American constitutional law, the political questions doctrine is premised on the idea that courts should only resolve legal questions, not political questions. The distinction is, of course, not always obvious.

44 *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66, [2004] 3 SCR 381.

45 *Libman v Quebec (AG),* [1997] 3 SCR 569; *Harper v Canada (AG)*, 2004 SCC 33, [2004] 1 SCR 827; *R v Bryan*, 2007 SCC 12, [2007] 1 SCR 527.

46 Early attempts to limit the issues reviewed under section 7 of the *Charter* along similar lines quickly evaporated. Section 7, as noted above, protects life, liberty and security of the person, and was originally understood to apply only to matters relating to the administration of justice (as opposed to substantive issues). At the time of the *Charter*'s adoption, it is generally understood that the phrase "principles of fundamental justice" was restricted to issues of procedural fairness. See *Re BC Motor Vehicle Act*,[1985] 2 SCR 486 (in this first section 7 case, the Justices of the Supreme Court unanimously decided to ignore the intention of the framers and allow for a substantive interpreta-

on prisoner voting for the second time in 2002, a majority of the Court rejected government arguments that it was owed deference because the decision involved competing social ideas and political philosophy.[47] In the 2005 health care case *Chaoulli v Quebec (Attorney General)* the majority struck down a provincial law prohibiting the purchase of private medical insurance. The decision rejected the notion that deference was owed to legislatures in areas of complex policy, with McLachlin writing that "the mere fact that this question may have policy ramifications does not permit us to avoid answering it."[48] Moreover, the Court has also been willing to use aggressive remedies in the statutory context to correct rights infringements that were the product of deliberate choices of the legislature, such as when it "read in" sexual orientation as a protected ground, effectively re-writing Alberta's *Individual Rights Protection Act* in response to the violation of the *Charter*'s equality guarantee.[49]

The underlying logic for the deference the Court espouses in *Khadr II* effectively privileges executive prerogative powers over legislative authority. In *Operation Dismantle*, Wilson correctly notes that "the royal prerogative is 'within the authority of Parliament' in the sense that Parliament is competent to legislate with respect to matters falling within its scope" and that "there is no reason in principle to distinguish between cabinet decisions made pursuant to statutory authority and those made in the exercise of the royal prerogative."[50] The decision in *Khadr II* defies this straightforward understanding. In fact, a plain reading of the Court's opinion suggests that had the decision been made within the ambit of authority granted to the executive by statute then a more forceful remedy would have been forthcoming.[51] There is no convincing ratio-

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tion of the clause. At the time, at least some of the Justices were concerned that opening section 7 to substantive interpretation risked placing the Court in a position of dealing with matters of pure policy. Lamer acknowledged that such an approach would raise "the spectre of a judicial 'super-legislature'." He thus restricted the scope of the guarantee to matters pertaining to the administration of justice, which he described as "the inherent domain of the judiciary" at paras 19 & 31). As Jamie Cameron notes, this institutionally-grounded distinction between matters of justice and those of public policy quickly dissolved over time and the Court has delved deeper into more pure policy matters in its section 7 jurisprudence. See Jamie Cameron, "From the *MVR* to *Chaoulli v. Quebec*: The Road Not Taken and the Future of Section 7," (2006) Sup Ct L Rev 34:2.

47 *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 SCR 519.

48 *Chaoulli v Quebec (AG)*, 2005 SCC 35, [2005] 1 SCR 791 at para 108.

49 See *Vriend v Alberta*, [1998] 1 SCR 493. The Court has used strong remedies in relation to executive power as well. See also *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 (for a critical discussion of the Court's remedial activity in this case, see Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montreal: McGill-Queen's University Press, 2010) at 139–44).

50 *Operation Dismantle*, *supra* note 42 at para 50.

51 I draw this conclusion based on the fact that the Court explicitly notes that the prerogative power over foreign affairs has not been displaced by statute and by its repeated assertion that courts have

nale for granting deference to residual and discretionary powers that can be subject to Parliamentary amendment or removal, but resisting deference based on the same logic in regards to laws passed by Parliament itself.

This is not to say there are no good reasons for deference to the government's foreign affairs decisions. Indeed, most commentators would agree that only in highly unusual circumstances should courts interfere with the executive's prerogative powers to make appointments, declare or terminate wars or engage in diplomatic affairs. In *Khadr II* the Court attempts to further justify its remedial deference on the basis that an order to request Khadr's repatriation might harm Canada's foreign relations and an uncertainty over whether ordering the remedy would actually result in his return. However, this too is highly specious reasoning on both counts. As David Rangaviz points out, Khadr was the last citizen of a Western country at Guantanamo Bay because all other countries had sought repatriation of their citizens.[52] The justices give no explanation for why they think the American government might refuse a similar request from Canada. In fact, the US made efforts to get Canada to accept Khadr's return.[53] The notion that requesting his repatriation might negatively impact foreign relations is groundless.

It thus bears repeating that my argument is not against judicial deference *per se*, but against deference premised on institutional logic that privileges executive prerogative powers in a manner that is wholly inconsistent with the Court's overall approach to the *Charter*. A consideration of appropriate institutional roles and competencies would no doubt lead to judicial restraint in foreign affairs matters in many instances. Yet contrary to the Court's assertion that the case evinces the limitations of its institutional competencies,[54] Omar Khadr's situation rests within the confines of a criminal process in which the Canadian government participated, an area that the Court is not only qualified to resolve but which falls under the traditional and inherent domain of the judiciary. Having determined that a Canadian citizen, who was a child at the time he was apprehended, was due legal rights under the *Charter* in this criminal process, the Court was compelled to provide a meaningful remedy. It did not.

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only a "limited" or "narrow" power of judicial review as it pertains to prerogative powers (*Khadr II*, *supra* note 31 at paras 35, 37, 38).

52 Rangaviz, *supra* note 2 at 266.

53 Errol P Mendes, "Dismantling the Clash between the Prerogative Power to Conduct Foreign Affairs and the *Charter* in *Prime Minister of Canada et al v. Omar Khadr*" (2009) 26 NJCL 67 at 73.

54 *Khadr II*, *supra* note 31 at para 46.

Appraising the Rights and Security Balance

The Court's record in balancing rights with security policy since 9/11 is best described as mixed. Normative disagreements about the posture the Court ought to adopt in interpreting and enforcing the *Charter* are everlasting. Setting those broader debates aide, it is important to note that neither deference nor minimalism necessarily produces "good" or "bad" decisions on their own. In other words, while critics might differ on the need for a more assertive and liberal enforcement of *Charter* rights, the consistency and institutional logic of the Court's decisions are, on their own, important factors for appraising the Court's record in evaluating security policies under the *Charter*. In this section I briefly explore the impact minimalism and deference have for the Court's security decisions and their implications for evaluating the rights-security balance.

As noted above, judicial minimalism is distinct from deference even if the two are often premised on similar logic. The most glaring distinction is that a minimalist Court is still willing to impinge on government policy objectives in the instance of a *Charter* infringement. The *Charkaoui* decision, for example, remedies two substantial rights issues implicated by the security certificates regime. The first concerned the ability of detainees to know and respond to the case against them. Parliament enacted new legislation that better ensures detainees are represented and that presiding judges hear full arguments before determining which evidence is ultimately disclosed. The second provided that cases in which foreign nationals are detained are subject to judicial review as promptly as those involving permanent residents. The decision thus rectified important issues of justice and equality.

Critics of the Court's minimalist approach, however, contend that the ruling did not go far enough. One of their central concerns is that the justices avoided laying out specific guidelines regarding the prospect of indefinite detention in the security certificate regime. Yet the justices do acknowledge the potential for a *Charter* violation in this regard and point to the process of ongoing judicial review, something they elaborate should be conducted with regard for a number of relevant factors, including the reasons for and length of detention, reasons for delay in deportation, anticipated future length of detention and availability of alternatives.[55] Critics, as explored above, dismiss this as insufficient.[56]

55 *Charkaoui*, *supra* note 16 at paras 110–117.
56 Macklin, *supra* note 2 at 5.

Those who reject the Court's reasoning as inadequate gloss over the fact that the reason the prospect of indefinite detention under security certificates exists is because the courts are (appropriately) unwilling to allow detainees to be deported in instances where they likely face torture. This produces cases that can drag on for years, itself a highly problematic situation in the context where criminal charges are not formally laid. Nevertheless, the ongoing process of review the Court highlights (and which its critics dismiss) has resulted in all of those detained under security certificates being released and, in some cases, having the certificates dismissed. The release of these individuals has often come with strict bail conditions, itself an imperfect solution from an individual rights perspective. Yet it should be noted that the *Charter* does not demand perfect policy solutions to difficult problems. In fact, the *Charter* does not prevent any and all infringements on individual rights, only unreasonable ones. Thus in evaluating the rights and security balance, it is important to acknowledge that sometimes there is no objectively identifiable equilibrium that happily reconciles rights with the relevant policy objectives.

It is for that reason that I argue the Court's minimalist approach in *Charkaoui* does a good job of balancing the concerns with respect to indefinite detention (ensuring continued judicial review and an evidentiary basis for detentions or conditions for release) and preventing the serious rights infringements noted above. Further, a minimalist approach by definition does not prevent the Court from redressing other rights infringements in the future, as illustrated by the Court's ruling in *Charkaoui II*, which required CSIS to retain and disclose evidence. At the same time, the decision's impact on the government's legitimate security objectives is minimal. Parliament's response necessitated creating new special advocates and devoting resources to ensure timely judicial review. The security certificates regime itself was otherwise left untouched.

Nonetheless, minimalism is problematic where it leads to unwarranted uncertainty on the part of the Court, such as the vague notion that there might one day be exceptional circumstances allowing deportation to torture in *Suresh*. The justices' decision to leave that dubious door ajar, however slightly, is troubling. Torture is unequivocally rejected by domestic and international legal norms, something the Court acknowledges while simultaneously leaving the prospect open that the Canadian government might legitimately flout them. Carving an ambiguous exception to the fundamental—even obvious and uncontroversial—notion that the Canadian government should not participate in torture is an abdication of its responsibilities by the Court. The idea diminishes the moral force of the rhetorical support for rights the Court

evinces in *Suresh* and *Charkaoui* (where it mentions, but fails to reverse, its support for the possibility of an exception). Even from a purely practical or strategic perspective, the Court could easily remove itself from such controversy by maintaining an absolute position and noting that if the government were ever to find itself in a situation so severe as to contemplate deportation to torture it has the constitutional option of passing legislation in Parliament that invokes the notwithstanding clause.

Deferential judicial decisions are not necessarily an indication that rights are insufficiently protected or that the wrong balance between rights and governmental security objectives has been struck. Decisions where the Court has assessed whether there are adequate safeguards for *Charter* guarantees, such as its ruling in *Application under s. 83.28*, are not worrying. Put simply, not all *Charter* challenges represent genuine *Charter* violations. In fact, despite an ostensibly "deferential" outcome, the decision in that case actually resulted in the extension of immunity safeguards to the immigration and extradition contexts.

In the previous section I argued that deference premised on a consistent and logical understanding of the respective responsibilities and capacities of the different institutions of government can be appropriate. The confused and distorted logic the Court applied in *Khadr II* represents a failure in this regard. As described in the previous section, the remedial deference in this case cannot be reconciled with the Court's overall approach to deference under the *Charter*. Further, even though there are good reasons to favour a deferential attitude towards foreign affairs decisions, the details of Khadr's case make it an entirely inapt context in which to validate deference.

The justices make it clear that Khadr's rights were violated. The decision to provide no remedy resulted from two interrelated considerations. First, the Court recognized the political and legal catch-22 in which they were ensnared. Ordering the government to repatriate Khadr necessarily meant either charging him for his crimes (a difficult prospect given his status as a child soldier) or releasing him. His alleged activities make the latter option politically unpalatable, to say the least. Second, the Court clearly wished to avoid an open confrontation with the government, which, according to some critics, might have refused a direct order to seek Khadr's repatriation.[57] These factors may explain the Court's deference, but they do not justify it. In failing to provide Khadr with a remedy, the justices ignored his status as a child soldier

57 Rangaviz, *supra* note 2 at 265.

(the only time the Court references Khadr's age is to note that he was interrogated as a "youth").[58] As Roach argues, they also failed to articulate what compliance with the *Charter* would require.[59] This, in spite of the lower court's prior ruling that "no other remedy would appear to be capable of mitigating the effect of the *Charter* violations in issue or accord with the Government's duty to promote Mr. Khadr's physical, psychological and social rehabilitation and reintegration."[60]

Any faith the Court had that the government would resolve the *Charter* violation through the political process was ultimately misplaced. As Roach notes, the government appeared to consider doing nothing to respond to the Court's decision when it was first released.[61] Ultimately, it decided to send a diplomatic note to the American government requesting that Khadr's prosecutors not use the information given to it by his Canadian interrogators. The US reply made no promises, thus essentially ignoring the request.[62] Six months after the Supreme Court's ruling, the Federal Court held that the government had failed to provide a sufficient remedy and ordered Canada to propose, within seven days, a list of potential remedies that would cure or ameliorate the breach.[63] The government's appeal of that decision was rendered moot by Khadr's decision to enter into a plea agreement in October 2010. He will serve an eight-year prison sentence (serving the first year at Guantanamo and then returning to Canada to serve the remainder). Although the Canadian government has agreed to the terms of the plea bargain, it has asserted that it took no part in the negotiations leading to the settlement.[64]

Ultimately, then, the Canadian government did nothing to address the *Charter* violations identified by the Court. It may be the case that the plea bargain was the most politically palatable solution to the problem the government faced in dealing with Omar Khadr, but it came after Khadr spent eight years trapped in a blatantly unconstitutional legal vacuum in which the Canadian government participated. Nor should the Court's remedial deference be credited with giving the government room to assist in reaching this

58 *Khadr II*, *supra* note 31 at paras 25 & 30.
59 Roach, *supra* note 2 at 147.
60 McGregor, *supra* note 2 at 493, citing *Khadr v Canada (Prime Minister)*, 2009 FC 405 at para 78.
61 Roach, *supra* note 2 at 147.
62 See Rangaviz, *supra* note 2. Rangaviz explains that the "State Department's response simply reiterated the relaxed evidentiary standards for military commissions in the Military Commission Act of 2009 and made no specific reference to the information obtained in the 2003 interrogations" at 264–265.
63 *Khadr v Canada (Prime Minister)*, 2010 FC 715.
64 Parliament of Canada, *Hansard* 40th Parl, 3rd Sess, No 091 (1 November 2010) at 1420–1425.

political compromise, not only because Canada apparently played no part but also because it is likely that Khadr only agreed to the plea deal upon realizing he was not going to get any assistance from the Canadian government. In this respect, the plea bargain itself is merely the final fruit of a poisonous tree, tainted by the events and processes that necessitated it in the first place.[65]

Khadr II is a sizable stain on the Court's record in balancing rights and security concerns (indeed, on its overall record under the *Charter*). It is important to acknowledge, however, that it is but one case, and an exceptional one at that. It is for this reason that the Court should have avoided using the case as a platform for a rather broad statement on judicial deference to executive prerogative powers. If anything, the Court could have made clear the exceptional circumstances of the case and the egregious nature of the rights infringements, and highlighted that any remedy it imposed on the executive would itself be exceptional. Instead it chose deference.

Judicial caution can be a positive thing, particularly when the Court provides a strong voice for the relevant rights issues and articulates a clear and logical case for deference to legislative or executive decision making. It has the added benefit of acknowledging that courts are not always the best venue for policy making. Yet when issues arise that are not beyond judicial competencies and when it is clear that the elected branches have not provided sufficient safeguards—or are responsible for flagrant violations of rights—the Court should not shy away from providing effective remedies. Nor should judges allow a desire for consensus or a concern for the institution's reputation to prevent them from making clear judgments about rights.

Ultimately, the Court's successes and failures in this regard hinge on whether it develops a consistent and sensible understanding of its appropriate role under the *Charter*. If the justices' sensitivity to the political dimensions of the cases they confront result in deference premised on flawed logic, or their desire to achieve consensus results in compromises that obviate the core dimensions of the rights in question, rights are put at risk. The unjustified deference in *Khadr II* and the faltering choice to put forward the vague notion of an exception for deportation to torture in *Suresh* are flagrant failures in

65 Some may extend the argument as follows: Khadr, as a child soldier, is best viewed as a victim in this process and thus should not be subject to any sanctions for his actions. I am not sure I would go this far. The issue of culpability of minors for their crimes is not just a legal question but a moral and philosophical one. I would assert that minors should be held to account, but that their ages and the context of their crimes should influence sentencing accordingly. Nonetheless, whether we consider Khadr's sentence itself "just" is entirely separate from whether the process by which it was arrived at was acceptable.

the Court's post-9/11 jurisprudence. Aside from these two significant failures, the Court has expanded and strengthened procedural safeguards in spite of a broadly cautious approach. As the justices deal with future cases they are likely to remain cautious. It is incumbent on them to ensure their minimalist and deferential approach is rooted in principle and appropriate institutional considerations, lest the Court fails to live up to its rhetoric on rights.

Insecure Refugees: The Narrowing of Asylum-Seeker Rights to Freedom of Movement and Claims Determination Post 9/11 in Canada

Constance MacIntosh[*]

This chapter has a modest goal: to track some legislative changes since 9/11 that impact on two rights of asylum seekers where those changes are linked to or justified by security concerns. These are the rights of asylum seekers to have their claim determined, and to not be detained. This article identifies how legislation restricting these key rights of asylum-seekers has largely been promoted as necessary for Canada to be able to protect its public from criminality and security threats. The article thus queries whether measures, especially those introduced under Bill C-11, The Balanced Refugee Reform Act[1] *and those proposed under Bill C-4,* Preventing Human Smugglers from Abusing Canada's Immigration System Act,[2] *actually enable greater security. It concludes that some of the legislative changes have no clear connection with enhancing security, and may result in incentives for asylum-seekers to avoid making their presence known to officials, thus creating new security concerns. The paper concludes by finding that some of the proposed legislative measures regarding detention will likely not withstand a* Charter *challenge.*

L'objectif de ce chapitre est modeste : suivre les modifications législatives depuis le 11 septembre 2001 qui ont un impact sur deux des droits des demandeurs d'asile lorsque ces modifications sont liées à (ou justifiées par) des préoccupations sur le plan de la sécurité, c'est-à-dire le droit d'avoir sa revendication réglée et de ne pas être détenu. Dans cet article, l'auteur explique comment les lois qui restreignent ces droits fondamentaux des demandeurs d'asile ont en grande partie été promues comme étant nécessaires pour que le Canada puisse protéger le public de la criminalité et des menaces à la sécurité. Elle cherche donc à savoir si des mesures, notamment celles introduites en vertu du projet de loi C-11, la Loi sur des mesures de réforme équitables concernant les réfugiés *et celles proposées en vertu du projet de loi C-4, la* Loi visant à empêcher les passeurs d'utiliser abusivement le système d'immigration canadien, *favorisent vraiment une sécurité accrue. L'auteur conclut qu'il n'y a pas de lien évident entre ces modifications législatives et l'amélioration de la sécurité et qu'elles peuvent pousser les demandeurs d'asile à éviter de révéler leur présence aux agents publics, entraînant ce faisant des nouvelles préoccupations liées à la sécurité. Pour conclure, l'auteur constate qu'il est improbable que les mesures législatives proposées en matière de détention résistent à une contestation fondée sur la* Charte.

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1 Canada, Bill C-11, *An Act to Amend the Immigration and Refugee Protection Act and the Federal Courts Act*, 3rd Sess, 40th Parl, 2010–2011 (assented to 29 June 2010) [Bill C-11]. The provisions of Bill C-11 have been incorporated into the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], although they come into force in a staggered fashion.

2 Canada, Bill C-4, *An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act and the Marine Transportation Security Act*, 1st Sess, 41st Parl, 2011 (first reading 16 June 2011, second reading 21 June 2011) [Bill C-4]. This instrument was tabled as Bill C-4 in 2011. However, it was originally tabled as Bill C-49 in 2010, and so some published commentary on this Bill refers to the original designation. At press time, the Bill is in Committee.

Framing the Issues

Seventeen days after 9/11, the United Nations Security Council (UNSC) adopted a resolution that flagged the fact that persons who make refugee claims could be terrorists. The resolution called on states to take measures to ensure that refugee status is not granted to a person who has "planned, facilitated or participated in the commission of terrorist acts," and to ensure that refugee status is "not abused" by those involved in terrorist activities.[3] Given that the *Refugee Convention* excludes from protection those who have committed crimes against peace or humanity, as well as acts that are "contrary to the purposes and principles of the United Nations,"[4] or for whom there are "reasonable grounds for regarding as a danger" to the host state's security,[5] this resolution was substantively redundant. It was also quite pointed.

Read modestly, the UNSC resolution was a call to states to ensure they were respecting their existing obligations. That is, if terrorists were being granted refugee status or otherwise being shielded through the refugee system, then states were not properly administering the *Refugee Convention* and needed to revisit their protocols to ensure that those involved in terrorism were identified and excluded. Given the context and timing, the resolution flags the need for states to be alive to the possibility that the asylum system can be a potential route for terrorists.

The UNSC resolution resonated in many ways with concerns that were identified in the United States about the adequacy of front-end screening processes. However, the American assumptions about risky persons went beyond asylum-seekers, and they also assigned blame. Many declared that the 9/11 terrorist attacks were made possible by Canada practicing weak border controls and being naïve about risk. This perception may have been fueled by the then-recent story of Ahmed Ressam. Mr. Ressam, an Algerian citizen, tried to enter the United States from Canada in December of 1999 with explosives in the trunk of his car. His alleged target was the Los Angeles airport. Mr. Ressam had previously made an asylum claim in Canada, and was found not to be a refugee. However, his deportation was stayed. The reasons for the stay

3 *UN Security Council Resolution* SC Res 1373 (2001) Adopted by the Security Council at its 4385th meeting, on 28 September 2001, UN Doc S/RES/1373, (2001) at paras 3(f) & (g). Available online at <www.fatf-gafi.org/dataoecd/32/12/34254910.pdf>

4 *Convention Relating to the Status of Refugees (1951),* 22 April 1954, 189 UNTS 150, arts 1F(a)-(c), Can TS 1969 No 6 (entered into force 22 April 1954, accession by Canada 4 June 1969) [*Refugee Convention*].

5 *Ibid*, art 33(2).

are not entirely clear.[6] There are indications that the stay was due to a decision to suspend deportations to Algeria, and because CSIS wanted to keep Mr. Ressam under surveillance. Canadian refugee decision-makers had not been duped, nor was Mr. Ressam dodging deportation through technical appeals or living underground. His presence in Canada reflected the exercise of high-order discretionary political decision-making. The threat he caused to the United States appears to reflect failures in CSIS surveillance. However, by 2001 his story—or parts of it—had nonetheless been "repeatedly cited as illustrative of the failings of Canadian refugee policy."[7] The singular fact that Mr. Ressam had once claimed refugee status in Canada displaced all other elements of the story in popular and political American imagination.

In the weeks following 9/11, the terrorists were consistently described as having gained access to the United States via Canada: that is, they were able to easily enter Canada in some fashion, and then take advantage of our lightly controlled shared border.[8] For example, on September 13th, a *Boston Herald* article indicated federal investigators believed "the terrorist suspects may have traveled … by boat" from Canada, and a September 14th article in the *Washington Post* stated that two of the terrorists were known to have "crossed the border from Canada" into Maine, and that others may have entered through Maine as well.[9] More inflammatory conclusions were published in the *New York Post*, which stated that "terrorists bent on wreaking havoc in the United States" came through Canada because it is "the path of least resistance."[10] One of the more colourful characterizations of Canada's border practices as naïve and insecure was offered by a former Senator for Colorado, who asserted shortly after 9/11 that "Osama bin Laden … could land in Ontario, claim he is Osama the tent maker … and walk unfettered probably into the United States."[11] Although the allegation that Canada's border practices were the weak link used by the 9/11 terrorists was discredited,[12]

6 For more details on this story see Audrey Macklin, "Borderline Security" in Patrick Macklem, Ronald J Daniels & Kent Roach, eds, *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 383 at 388–89 [Macklin, "Borderline Security"].

7 *Ibid* at 388.

8 See e.g. *ibid*; Howard Adelman, "Refugees and Border Security Post-September 11" (2002) 20:4 Refuge 5 at 6.

9 Cited in Doug Struck, "Canada Fights Myth it was 9/11 Conduit," *The Washington Post* (9 April 2005) A20.

10 *Ibid.*

11 Cited in Alexander Moens & Nachum Gabler, *What Congress Thinks of Canada* (Vancouver: Fraser Institute, 2011) at 6.

12 See e.g. US, The National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, (2004), ch 7. Here, the report discusses the routes by which the terrorists lawfully entered the United States.

the sentiments which it facilitated and legitimated have persisted over the past decade, both in the public and the political imagination.[13]

It is within this context, where inflammatory claims repeatedly resurface, despite being empirically discredited, that this article considers how state security concerns are intertwined with how Canada recognizes two interrelated rights held by refugees over the last decade. The first right is to have one's claim adjudicated. This right only arises if a state predicates its recognition of the full sweep of rights under the *Refugee Convention* on a formal determination of status (which is a common practice in northern and western states).[14] The right is supported by several sources, including Article 14 of the 1948 *Universal Declaration of Human Rights*, which recognizes the right "to seek and enjoy" asylum from persecution in other states. This right "can only be exercised if the asylum-seeker has the opportunity to have his or her claim heard by an authority competent to do so."[15] The right also arises because a person becomes a refugee when they satisfy the definition of refugee in the *Refugee Convention*.[16] That is, a state determination that a person is a refugee is a declaratory act, not a constitutive one.[17] Given that the fundamental right of a refugee is not to be returned to persecution, the only manner in which a state can comply with their core obligation is to presume all claimants to be refugees, or make a status determination.[18] Thus, for states that do not make the presumption, there is an implied obligation to verify whether a person who claims to be a refugee does indeed have that status.[19]

13 Adelman, *supra* note 8 at 6.

14 Governments may assume that those who claim refugee status are refugees, and only assess the particulars of a claim if there are exclusion issues. Indeed, "most less developed states—which host the majority of the world's refugees—do not operate formal refugee status assessment procedures." See James Hathaway, *The Rights of Refugees in International Law* (Cambridge: Cambridge University Press, 2005) at 181.

15 United Nations High Commissioner for Refugees, *Comments on Bill C-31* (Ottawa: UNHCR, 2000) at para 37.

16 The core elements of the definition in the *Refugee Convention*, *supra* note 4, are set out in Article 1. It defines refugees as persons who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

17 Guy Goodwin-Gill, *The Refugee in International Law* (Oxford: Clarendon Press, 1983) at 20.

18 See e.g. Reinhard Marx "Non-Refoulement, Access to Procedures, and Responsibility for Determining Refugee Claims" (1995) 7:3 Int J of Refugee Law 383. Marx writes at 392 that "[t]he State where an individual seeks protection has a responsibility to identify its obligation by scrutinizing who is in need of protection." The prohibition against refoulement is in Article 33(1) of the *Refugee Convention*, *supra* note 4.

19 This obligation has been noted in a number of cases. See e.g. *Saas v Secretary of State for the Home*

The second right under consideration is freedom of movement. One of its sources is the *Refugee Convention*. Article 26 of the *Refugee Convention* provides that states "shall accord refugees lawfully in its territory the right to … move freely within its territory subject to any restrictions applicable to aliens generally." With regard to persons who enter a state without authorization, Article 31 provides that states are not to impose "penalties" on refugees "on account of their illegal entry or presence … coming directly from a territory" where they faced persecution "provided they present themselves without delay" to authorities and "show good cause for their illegal entry or presence."[20]

The term "penalty" is interpreted generously to include not being subjected to prosecution, fines or imprisonment due to the manner in which the refugee entered a state, regardless of whether their mode of entry violated national laws.[21] However, the *Refugee Convention* grants states discretion to impose some limitations, stating that countries "shall not apply to the movements of such refugees restrictions other than those which are necessary."[22] Such restrictions are only permissible until the refugee's status is "regularized," indicating that the Article 31 right, to only experience "necessary" restrictions on movement, accrue prior to a formal determination of their claim.

This article does not engage the debate on the exact scope of these rights.[23] Instead, it illustrates how Canadian legislation has narrowed its approach to these rights over the past ten or so years. It also considers how these changes

Department, [2001] EWCA Civ 2008 (Eng. CA, Dec 19, 2001). The Court found at para 12 that "[t]here is no doubt that this country is under an obligation under international law to enable those who are in truth refugees to exercise their Convention rights… Although Convention rights accrue to a refugee by virtue of his being a refugee, unless a refugee claimant can have access to a decision-maker who can determine whether or not he is a refugee, his access to Convention rights is impeded."

20 *Refugee Convention, supra* note 4, art 31(1).

21 Hathaway, *supra* note 14 at 411–12; Goodwin-Gill, *supra* note 17 at 158.

22 *Refugee Convention*, *supra* note 4, art 31(2).

23 Their scope is controversial. The UNHCR and many scholars and refugee advocates have expressed concerns that these rights are interpreted too narrowly, or are violated, by some states who claim to be compliant. These concerns relate to practices such as routine extra-territorial detention and refusing to adjudicate the claims of asylum-seekers whom a state intercepts outside of their geographic territory (e.g. in international waters). See e.g. Andrew Brouwer & Judith Kumin, "Interception and Asylum: When Migration Control and Human Rights Collide" (2003) 21:4 Refuge 6; Janet Dench, "Controlling the Borders: C-31 and Interdiction" 19:4 Refuge 34. For a recent example of a government action that was found to violate the *Refugee Convention*, *supra* note 4, see "Australia court rules out refugee 'swap' with Malaysia," *BBC News* (31 August 2011) online: BBC News <http://www.bbc.co.uk>. For the leading text on the *Refugee Convention*, *supra* note 4, see Hathaway, *supra* note 14.

are often entailed within and therefore justified by a discourse that increasingly links asylum-seekers to concerns about security and criminality.

Due to length limitations, this article primarily engages just two key legislative moments. The first is when Canada enacted the *Immigration and Refugee Protection Act* [*IRPA*][24] in 2001 and some amendments to *IRPA* which were introduced shortly after 9/11. The second moment is when Canada introduced extensive amendments to *IRPA*'s refugee provisions in 2010 through Bill C-11, *The Balanced Refugee Reform Act*[25] and Bill C-4, *Preventing Human Smugglers from Abusing Canada's Immigration System Act*.[26]

Canada and the Right to Freedom of Movement

It was shortly after 9/11 that Canada enacted *IRPA,* which brought in a new legal regime for immigration and refugee matters. However, *IRPA* was not drafted in response to 9/11.[27] A key event which informed discussions about refugee claimants occurred in 1999, when four boats carrying 599 Chinese nationals were intercepted off the coast of British Columbia. These individuals had paid, or were to pay, for being smuggled into Canada for the purpose of then transiting to the United States. After being apprehended and so thwarted from being able to attempt to work underground in America, the individuals all claimed refugee protection. Given the circumstances, it is not surprising that the claimants were seen as having economic motivations, as opposed to being people fleeing persecution.[28] The House of Commons Standing Committee on Citizenship and Immigration was subsequently asked to consider "the refugee status determination system and the security of Canada's borders"[29] in relation to this event. They tabled a report, "Refugee Protection and Border Security: Striking a Balance"[30] in early 2001. The title flags tensions between security and protection. However, the border security concerns discussed in this report were not centrally about terrorists or persons who

24 *IRPA*, *supra* note 1.

25 Bill C-11, *supra* note 1.

26 Bill C-4, *supra* note 2.

27 *IRPA, supra* note 1. The first reading took place prior to 9/11. The second reading post-dated it, on September 27th, 2001. The third reading in the House of Commons took place on June 13th, 2001.

28 Regardless of their motivations, several claimants were found to be refugees; a fact which highlights the complex matrix of circumstances behind decisions to move irregularly. See House of Commons, Standing Committee on Citizenship and Immigration, *Refugee Protection and Border Security: Striking a Balance,* 36th Parl, 2nd Sess, No 2 (22 March 2000) [Standing Committee Report].

29 *Ibid.*

30 *Ibid.*

pose major security threats using the refugee system as a conduit. While the Ressam story from 1999 may have raised these concerns with our American neighbours, Canada's security concerns took a different focus.

The report highlights how the refugee system could be exploited by those "who make unfounded claims … as a way of staying in the country" so as to work, and/or to "buy time until they can enter the United States." The prioritized threats from asylum-seekers which the border had to be secured against were associated with the economic impacts of people working illegally, of opportunistically drawing on the public purse, or of feathering the pockets of smugglers. Although these matters raise issues of criminal and socially undesirable behaviour, a causal connection to the safety or security of Canadian citizens is not apparent.

Despite the context in which they were writing, the 2001 Committee was opposed to casting suspicion on the merits of the claim of, or the character of, individuals claiming asylum merely because they entered Canada irregularly or with the use of smugglers. The 2001 Committee wrote that "[e]ven if refugee claimants' manner of arrival is irregular, we recognize that the flight to freedom is often fraught with peril, speed and the necessity to use whatever means are available to reach safety," and that persons with "genuine" claims may employ smugglers and use fraudulent documents.[31]

Nevertheless, the 2001 Committee did identify a need to restrict the movement of some asylum claimants. It recommended that persons who lack identity documents and refuse to provide information on how they entered Canada be detained, because this behaviour raised security concerns that require further inquiries. They also concluded that persons who were trafficked into Canada should be detained as they would otherwise be vulnerable to their traffickers and because "[f]or the traffickers, detaining their human cargo removes the financial underpinning of the whole enterprise." The report cautions that special facilities must be made available to hold all detained individuals, because "[m]igrants must not be presumed to be criminals or security risks." So on the one hand, the fact that an asylum-seeker refuses to co-operate with Canadian officials, or had been trafficked, were explicitly rejected as in and of themselves attracting a presumption of criminality or security issues. On the other hand, the 2001 Committee was sensitive to the broader picture and to considering the sorts of instances where, on the facts, it was reasonable to conclude that detention may be appropriate.

31 See "The Committee Study" in Standing Committee Report, *supra* note 28.

The 2001 Committee's recommendations largely affirmed the then existing legislation and its approach to freedom of movement. Under it asylum-seekers could be detained if their identity could not be established when they entered Canada,[32] or if there were reasonable grounds to believe that they were involved in criminality, were a security threat, etc.[33] In such instances, the legislation provided for immediate detention, but with a right to have the decision reviewed at least once every seven days.[34] In all cases, detention was linked to an individual justification, and not drawn upon as a general or presumptive practice.

Drawing in part on the 2001 Committee's recommendations, but also from other sources, *IRPA* brought several changes to the detention regime, changes which Anna Pratt observes are consistent with the trends that had been developing in Canada through the previous decades.[35] One change was that the power to detain due to identity concerns became exercisable at any time (not just at the point of entry). Commenting on these sorts of practices, Howard Adelman characterized such shifts as meaning that in some ways the "border" becomes everywhere for non-citizens.[36] Indeed, the expansion of practices that were historically only exercised at actual territorial boundaries has become a common feature of Northern states.

Although the general expansion of these practices in-land may cause greater insecurity for some non-citizens,[37] this specific expansion seems objectively reasonable. That is, if a person's identity is at issue, it is reasonable to conclude that public safety may require detention pending further inquiries, and so to extend this power in-land appears justifiable. More importantly, a robust detention review process remained in place, with the first review required to take place within forty-eight hours, the next within seven days, and subsequent reviews once within every thirty days.[38] A second relevant change was that decisions about whether to detain asylum claimants would now be informed by their mode of arrival. In particular, when assessing if detention

32 *Immigration Act*, 1976 SC 1976–77, c 52, s 103.1(1)(a) [*Immigration Act*].

33 *Ibid,* ss 103, 103.1(1)(b).

34 *Ibid*, ss 103.1, 103(6), (7).

35 Anna Pratt, *Securing Borders: Detention and Deportation in Canada* (Vancouver: UBC Press, 2005).

36 Howard Adelman, "Canadian Borders and Immigration Post 9/11" (2002) 36:1 Int Migration Rev 15.

37 See e.g. Benjamin Muller, "Risking it all at the Biometric Border: Mobility, Limits, and the Persistence of Securitization" (2011) 16:1 Geopolitics 91. For a collection of scholarship on these issues from a variety of perspectives, see Elia Zureik & Mark Salter, eds, *Global Surveillance and Policing: Border, Security, Identity* (Portland, Oregon: Willan Publishing, 2005).

38 *IRPA*, *supra* note 1, s 57.

ought to be imposed due to a person being a flight risk, the deciding officer was directed to consider whether the person was "vulnerable to being influenced or coerced" by a smuggling or trafficking organization.[39] Detention in this instance was justified on the basis of the claimant's perceived vulnerability, not because they were cast as posing a security threat.

The question of whether detention ought to be imposed on asylum claimants in a broader range of circumstances, or for longer periods of time, was discussed by a number of government committees. Responding to a 1998 legislative review that recommended augmenting detention practices, the 2001 Committee found no merit in modifying how Canada used detention in relation to asylum-seekers. They rejected using detention as a deterrent practice, or to punish those who violated administrative conditions.[40] On the one hand, given the substantial changes that *IRPA* did bring about, it can only be assumed that political leaders agreed there was no perceived general deficit in Canada's approach to detention when it came specifically to refugees. Importantly, the legislative changes were largely about how immigration officials were to exercise the discretion to detain.[41] On the other hand, Canada did enact the *Anti-Terrorism Act*[42] as a direct response to 9/11, and it does allow for indefinite detention. Although criticized by Kent Roach as overbroad and disproportionate,[43] the legislation cannot be criticized for isolating asylum-seekers as a particular source of terrorist risk, as the legislation contemplated that anyone in Canada could be detained.[44] Similarly, while amendments to

39 *Immigration and Refugee Protection Regulations,* SOR/2002–227, s 245(f) [*IRPR*].

40 Senate, Report of the Standing Committee on Citizenship and Immigration, *Immigration Detention and Removal* (June 1998) (Chair: Stan Dromiskey), online: Parliament of Canada http://cmte.parl.gc.ca/Content/HOC/committee/361/citi/reports/rp1031513/citirp01/09-rec-e.htm (see text preceding recommendation 13).

41 Although outside the purview of this article, these discretionary powers have not been exercised consistently, and so, presumably not fairly. The Canada Border Services Agency's report, *CBSA Detentions and Removals Program—Evaluation Study* (November 2010), online: Canada Border Services Agency http://www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2010/dr-rd-eng.html states at 18–19 that where an admissibility hearing is required, the norm for the Atlantic, Prairie and Pacific regions is to release the individual on conditions, while the norm in Ontario is to detain the individual until the admissibility hearing—unless the Ontario detention facilities were close to capacity, in which case individuals would be released. Thus, "foreign nationals receive different treatment, under similar conditions, depending on where they arrive" (3).

42 *Anti-Terrorism Act*, SC 2001, c 41.

43 Kent Roach, "The New Terrorism Offenses and the Criminal Law," in *The Security of Freedom, supra* note 6 at 168. This volume provides a variety of perspectives on the legislation.

44 Canada moved quickly after 9/11 to enact the *Anti-Terrorism Act, supra* note 42, which became law in late November of 2001. This statute permits the arrest and detention of persons whom a peace officer believes may intend to engage in terrorist activity. This legislative move did not target non-citizens or asylum-seekers for different treatment than citizens. Rather it created a legal framework where *all* persons in Canada could be detained without warrant or a trial. As Michelle Lowry notes,

the security certificate process and modifications to definitions of criminality could result in asylum claimants being detained who would not have been detained under the previous legislation, these provisions affected the liberty rights of all non-citizens.[45] These changes did not target the population of asylum-seekers as a source of unique concern, and it is with such targeted initiatives that this paper is concerned.

Legislation that specifically concerned itself with refugees and freedom of movement remained substantively unchanged after 9/11 until 2010. It was at this point that Canada introduced Bill C-4.[46] This legislation will impose penalties on asylum claimants regardless of whether or not they are confirmed as refugees. Many of these penalties involve mandatory restrictions on freedom of movement.

In particular, if a there is an "irregular arrival … of a group of persons," and either identity or admissibility issues cannot be addressed "in a timely manner," or if there are grounds to believe that the arrival involves smugglers who were working for profit or who have an association with a terrorist or criminal group, then the Minister can order that those individuals be labeled a "designated foreign national" ["DFN"], a status that has far-reaching consequences.[47]

With regard to the right of freedom of movement, all DFNs "must" be detained[48] for a year or until their claim has been determined.[49] Release from detention will otherwise only be granted if in the Minister's opinion "exceptional circumstances exist that warrant the release."[50] This contrasts strikingly

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"domestic terrorism has proven to be as much a threat to nations as international terrorism …[and] terrorists do not need access to Western nations in order to enact terrorism against those nations: they can simply target embassies or military bases abroad": Michelle Lowry, "Creating Human Insecurity: The National Security Focus in Canada's Immigration System" 21:1 Refuge 28 at 32.

45 Many have written on the intensified focus on criminality and security concerns that generally permeate the *IRPA*, *supra* note 1, and some have considered how refugee claimants may be caught in the general sweep, or disproportionately affected. See e.g. Catherine Dauvergne, "Evaluating Canada's New Immigration and Refugee Protection Act in its Global Context" (2003) 41 Alta L Rev 725; John A Dent, "No Right of Appeal: Bill C-11, Criminality, and the Human Rights of Permanent Residents Facing Deportation" (2002) 27 Queen's LJ 749; Francois Crepeau, "Controlling Irregular Migration in Canada: Reconciling Security Concerns with Human Rights Protection" (2006) 12:1 Choices: IRPP 1 at 21–25; Accord Howard Adelman, "Canadian Borders and Immigration Post 9/11" (2002) 36:1 Int Migration Rev 15; Lowry, *supra* note 44.

46 Bill C-4, *supra* note 2.

47 *Ibid* s 5. This provision is proposed to be incorporated into *IRPA, supra note 1,* as s.20.1.

48 *Ibid* s 10(2). This provision is proposed to be incorporated into *IRPA, supra* note 1, as s 55(3.1).

49 *Ibid* ss 11, 12. This provision is proposed to be incorporated into *IRPA, supra* note 1, as s 56(2) and s 57.1.

50 *Ibid* s 14. This provision is proposed to be incorporated into *IRPA, supra* note 1, as s 58.1.

with Justice Rothstein's characterization of immigration detention in 1994 as an "extraordinary" power, a characterization that reflected the severity of being detained without being charged with or convicted of a criminal offense. Now it would seem that *not* being detained is the extraordinary event, a situation that (as discussed below) is unlikely to pass *Charter* scrutiny.

If a DFN is recognized as a refugee, restrictions on freedom of movement continue. In particular, the individual will not be permitted to apply for a temporary or permanent resident permit for five years after their claim is determined.[51] According to *IRPA*, only persons with these permits may obtain travel documents.[52] Without travel documents, refugees recognized by Canada will not have the ability to lawfully board a plane back to Canada if they leave (and may also be unable to enter other states lawfully). This measure directly contradicts the *Refugee Convention*. Article 28 requires states to "issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require." Canada seeks to avoid violating this obligation by indicating that, for the purposes of Article 28, recognized refugees will only be "lawfully staying" in Canada if they have permanent residency or a temporary resident permit.[53] This approach is at odds with international law:

> a state's general right to define lawful presence is constrained by the impermissibility of deeming presence to be unlawful in circumstances when the *Refugee Convention* … deem[s] presence to be lawful.[54]

The *Refugee Convention* deems presence to be lawful once claimants present themselves to authorities to have their claim determined.[55] As observed by

51 *Ibid* s 7. This provision is proposed to be incorporated into *IRPA, supra* note 1, as s 24(5).

52 *IRPA*, *supra* note 1, s 31.

53 Bill C-4, *supra* note 2, s 9. This provision is proposed to be incorporated into *IRPA, supra* note 1, as s 31.1.

54 Hathaway, *supra* note 14 at 177.

55 *Ibid* at 173–86. The term "lawfully in" also corresponds with Article 13 of the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47, 6 ILM 368 (entered into force 23 March 1976, accession by Canada 19 May 1976), which also recognizes rights to freedom of movement. The UN Human Rights Committee in *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9, at para 4, determined that: "The question of whether an alien is 'lawfully' in the territory … is a matter of domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State's international obligations." For a detailed discussion of the term "lawfully in" see Alice Edwards, "Back to Basics: The Right to Liberty and Security of the Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants" (2011) PPLA Review No 1 (UN High Commissioner for Refugees, Division of International Protection).

leading refugee law scholar James Hathaway, it would be an absurd proposition to conclude otherwise, as that would permit signatory states to not act on their key obligations.[56] Alice Edward's close study of the phrase "lawfully present" in international instruments affirms Hathway's conclusions.[57] To deem a person who has not only presented him- or herself to authorities, but has also actually been determined to be a refugee, as nonetheless lacking lawful presence contradicts international law. Although speech acts have power,[58] Canada cannot render itself compliant with international law on freedom of movement by defining recognized refugees—known rights holders—into a state of unlawfulness. This is, however, what the legislation purports to do.

Recall how the Bill operates: based on its language, if as few as two refugees arrive in Canada with uncertain identities and Canada's staffing levels make it administratively inconvenient to address those identity issues in a timely fashion, then those two refugees will be subject to automatic detention for up to a year and five years of restrictions on travel. Similar consequences will follow if a group of two refugees arrives in Canada and the asylum-seekers have paid a smuggler to help them or to provide them with false travel documents. These restrictions on the right of movement are clearly intended to be a punishment based on mode of arrival, so as to discourage persons who intend to claim asylum from engaging the services of smugglers. This is the case despite Canada's knowledge that refugees' flight may involve the "necessity to use whatever means are available to reach safety," including the use of smugglers and fraudulent documents.[59] It is also despite the fact that there is no empirical evidence that the threat of detention discourages people from seeking asylum,[60] and empirical evidence that over 90% of asylum applicants as well as persons *awaiting deportation* who are released into the community will report for hearings and follow other official requirements.[61]

Given that these measures can be expected to impose considerable hardship on persons fleeing persecution, and may also capture persons who arrive not with smugglers but perhaps just in a family group at an inconvenient time,

56 Hathaway, *supra* note 14, ch 3.1.2; Alice Edwards, "Human Rights" (2005) 17 Int'l J Refugee L 297.

57 Edwards, *supra* note 56 at 14.

58 For a discussion of "speech acts" see John Austin, *How to Do Things with Words,* 2nd ed (Cambridge: Harvard University Press, 2005); Judith Butler, *Excitable Speech: A Politics of the Performative* (New York: Routledge, 1997).

59 Standing Committee Report, *supra* note 28.

60 Edwards, *supra* note 56 at iii.

61 *Ibid* at 2.

and will be very expensive,[62] how are the new measures justified? The analysis in this paper demonstrates that these measures cannot be divorced from pervasive security concerns, or the purported need to address perceptions that Canada may not control its borders. Relevant government statements read as though American accusations over the last decade have merit.

The Legislative Summary for the Bill positions it as a response to the "generally believed" position that "the law regarding the spontaneous arrival of refugee claimants must be stringent enough to counteract the perception that Canada does not have control of its borders."[63] Whose perception is being cited here and why does their perception matter? Such perceptions could be attributed to the American government. In 2009, the US Homeland Security Secretary, Janet Napolitano, claimed that "to the extent that terrorists have come into our country or suspected or known terrorists have entered our country across a border, it's been across the Canadian border." After making this statement, Napolitano clarified that she was indeed referring to the 9/11 terrorists, although "[n]ot just those but others as well."[64]

The context for Napolitano's statements was that of presenting arguments to justify the enactment of more stringent border control laws on the American side of our shared border, so as to counter the alleged weaknesses of Canada's border practices. She said:

> borders are important … for crime purposes and, in the isolated case, also for terrorism. And because, in part, our two countries have different standards for visas and who is allowed in our countries, there really are some things that the border helps to identify.

These sentiments were affirmed more recently by the American Commissioner for Customs and Border Protection. His testimony to Senate in May of 2011 reflected concerns that "potential terrorists were exploiting Canadian loopholes to gain entry to the United States."[65] Are these the negative percep-

62 *Ibid.* Edwards refers to a Toronto study at 85, where the cost of immigration detention was estimated at $179/day, while the cost of detention alternatives such as bail and bond was $10–12/day.

63 Daphne Harrold & Danielle Lussier, "Legislative Summary: Bill C-49: An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act and the Marine Transportation Security Act," Legislative Comment on Pub L No 40–3-C49-E (2010) (Ottawa: Library of Parliament, 2010) at 3.

64 "Interview with U.S. Homeland Security Secretary Janet Napolitano," *CBC News* (19 October 2010) online: CBC News <http://www.cbc.ca/news/canada/story/2009/04/20/f-transcript-napolitano-macdonald-interview.html>.

65 Colin Freeze, "US Border Chief says terror threat greater from Canada than Mexico," *The Globe and Mail* (18 May 2011).

tions—some false, some presented without empirical evidence—that Canada seeks to counter? Regardless, countering "perceptions" is a spurious justification for violating human rights and will not pass the test of proportionality that is required when asylum-seekers or refugees are detained.[66]

The Legislative Summary goes on to indicate that "large-scale arrivals" make it hard to assess whether individuals pose "risks to Canada on the basis of either criminality or national security."[67] The spectre of risk, and the assertion of a link between public security and these detention measures, is raised more explicitly in Public Safety Canada's official statements. In a 2011 news release on the legislation, they state that "Human smuggling undermines Canada's security." The news release then presents a list of how "our government is ensuring the safety and security of Canadians." The list describes "establishing the mandatory detention of participants [e.g., smuggled persons] for up to one year," preventing smuggled individuals who are recognized as refugees "from applying for permanent resident status for a period of five years," and "preventing individuals from sponsoring family members for five years."[68] Advancing the goals of promoting security and safety is a key government mandate, and smuggling operations may raise considerable security concerns, especially if used by terrorists or to enable organized crime networks. It is not clear, however, that the legislative measures actually promote security and safety. A one-year term of mandatory detention which is ordered due to administrative convenience has no connection to security or safety. Detention only serves this role when security concerns are, in fact, present. Detention which persists after identity and security concerns are addressed is also disconnected from promoting safety or security. Other measures, like preventing DFNs from family reunification, do not have any connection to enabling the safety of Canadians, as family members are already only permitted to join recognized refugees if they pass security and criminality screening.[69] It would

66 As Alice Edwards, *supra* note 56 at 3, writes, "[the i]nternational legal principles of reasonableness, proportionality and necessity require that states justify their use of detention in each case by showing that there were not less intrusive means of achieving the same objective. The principle of proportionality must also be read as requiring detention to be a measure of last resort."

67 Harrold & Lussier, *supra* note 63 at 3.

68 Public Safety Canada, News Release, "Preventing the Abuse of Canada's Immigration System by Human Smugglers" (19 January 2011) online: Public Safety Canada <http://www.publicsafety.gc.ca/media/nr/2011/nr20110119–2-eng.aspx>.

69 This connection, between mandatory long-term detention and security needs, is also made in a speech delivered by the Honourable Vic Toews, Minister of Public Safety, who stated that "Our government is … taking action to ensure the safety and security of our streets and communities by establishing the mandatory detention of participants in human smuggling events for up to one year to allow for the determination of the identity of these individuals, their inadmissibility and their illegal activity." Public Safety Canada, Media Release, "Remarks by the Honourable Vic

appear that Canada hopes that by vigorously punishing those who use smugglers, it will dry up the market for smuggling into Canada. This strategy may, however, provide considerable incentives for asylum-seekers to attempt to live an undocumented life in Canada, and to provide a disincentive for making their presence known to state authorities.

Just as the Safe Third Country Agreement, discussed below, is considered to have resulted in more asylum-seekers entering Canada irregularly and therefore raising considerable security concerns, this measure could produce communities of people in Canada who seek to avoid detection—a formula that necessarily produces people who are vulnerable to exploitation by those who would turn them in. This potential outcome would intensify security and criminality risks, instead of lessening them.

In another news release about the legislation, Public Safety Canada provided a more fulsome description of the security concerns that it associates with unconfirmed identity:

> where identity is unconfirmed, authorities cannot identify potential security and criminal threats, including human smugglers and traffickers, terrorists, or individuals who have committed crimes against humanity. It is an unacceptable risk to release into Canadian communities individuals whose identities have not been determined and who could potentially be inadmissible on the grounds of criminality or national security.[70]

Persons with unconfirmed identities raise security concerns pending satisfactory identification and screening for safety concerns. As noted above, the existing legislation already permits detention on such grounds, which is obviously justified in the name of public safety. What the existing legislation does not permit, however, is detention as a form of punishment. It only permits detention where identity is *in fact* at issue, where the person *is* considered a flight risk, or if there *are* identified security or inadmissibility concerns. That is, the detention has an objective and individualized basis.[71] The proposed

Toews, Minister of Public Safety: Human Smuggling and the Abuse of Canada's Refugee System" (22 October 2010) online: Public Safety Canada <http://www.publicsafety.gc.ca/media/sp/2010/sp20101021-eng.aspx>.

70 Public Safety Canada, News Release, "Protecting our Streets and Communities from Criminal and National Security Threats" (16 June 2011), online: Public Safety Canada <http://www.publicsafety.gc.ca/media/nr/2011/nr20110616–7-eng.aspx>.

71 Although, as Aiken has argued, even the existing provisions may be considered to be arbitrary and punitive, with "mere administrative convenience and suspicion … justify[ing] arbitrary and long term detention." See Sharryn Aiken, "Of Gods and Monsters: National Security and Canadian Refugee Policy" (2001) 14:2 RQDI 1 at para 46.

legislation substitutes claims of risk for reasoned argument: risk and security concerns simply do not continue *after* a person has been determined to not pose a threat.

These proposed legislative changes have provoked considerable criticism, as they clearly violate the right to freedom of movement recognized by Article 31(2) of the 1951 *Refugee Convention*,[72] which "denies governments the right to subject refugees to any detriment for reasons of … unauthorized entry or presence."[73] International law aside, this Bill's approach to detention will not withstand *Charter* scrutiny. It is inconsistent with *Sahin v Canada*[74] where Justice Rothstein characterized the power of detention under immigration legislation as "extraordinary,"[75] as it could be ordered without an individual having been convicted of a crime. As such, it necessarily has to be exercised in careful conformity with section 7 of the *Charter*, which recognizes the right of everyone "to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[76] It has been repeatedly affirmed by the Supreme Court that asylum claimants and other non-citizens in Canada possess *Charter* rights,[77] including the section 7 right to not be arbitrarily deprived of life, liberty or security of the person.[78] The test for determining whether a law is arbitrary involves proving that there is "not only a theoretical connection between the limit [on life, liberty and security] and the legislative goal, but a real connection on the facts."[79] It is hard to imagine how a one-year mandatory detention (which can be ordered on the basis that a "group" arrived and individual identity could not be addressed "in a timely manner") has a "connection on the facts" to depriving an individual of liberty after their identity is established and security concerns have been addressed.

72 See e.g. Amnesty International, News Release, "Anti-Smuggling Legislation Violates Refugee Rights—Media Release" (22 October 2010) online: Amnesty International <http://www.amnesty.ca/resource_centre/news/view.php?load=arcview&article=5662&c=Resource+Centre+News>.

73 Hathaway, *supra* note 14 at 410–11.

74 *Sahin v Canada (Minister of Citizenship and Immigration)* (1994), 85 FTR 99, [1995] 1 FC 214.

75 *Ibid* at para 26.

76 *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 [*Charter*].

77 See e.g. *Singh v Minister of Employment and Immigration,* [1985] 1 SCR 17, 17 DLR (4th) 422.

78 *Charkaoui v Canada (Citizenship and Immigration),* 2007 SCC 9, [2007] 1 SCR 350 at paras 90–94 [*Charkaoui*].

79 *Chaouilli v Quebec (Attorney General),* 2005 SCC 35, [2005] 1 SCR 791 at para 131.

Jurisprudence has also confirmed that non-citizens have the right to have detentions reviewed promptly.[80] When immigration detention is for an extended period, it will violate *Charter* rights if there is no "meaningful process of ongoing review that takes into account the context and circumstances of the individual case."[81] In the case of *Charkaoui v Canada (Citizenship and Immigration),* a mere three-month mandatory detention without meaningful review was found to violate the detainee's *Charter* rights. This was the case even though the detention was originally ordered on national security grounds.[82] The proposed legislation will thus fail on the supplemental issue of failing to provide for the required ongoing and meaningful review of whether the detention ought to be continued.

This narrowed approach to the right to freedom of movement is primarily justified through calls to ensure public security and safety. However, given that the grounds for being detained do not reflect whether security issues are still present, the disproportionality of the detention practices, and the bar against the detention being reviewed, the provisions are unlikely to pass *Charter* scrutiny.

The Right to Have One's Claim Determined

Whereas the erosion of the right to freedom of movement is tied to security concerns, the narrowing of the right to have one's claim determined has been framed as a security and criminality issue, with security concerns being dominant in 2001 and criminal or quasi-criminal concerns coming to the fore to justify changes in 2010.

The 2001 *IRPA* included numerous shifts that impacted on whether asylum-seekers would have their claim determined. Like its predecessor legislation, the *IRPA* includes terms that dictate when persons will be ineligible to have their claim determined. Several of these provisions refer to situations such as the person having already been recognized as a refugee, or having had a status claim denied.[83] The predecessor legislation also barred claim de-

80 *Charter*, *supra* note 76, ss 9, 10(c). The Supreme Court of Canada determined in *Charkaoui, supra* note 78 at paras 90–94, that the *Charter* rights of foreign nationals were violated under a legislative regime where they could be detained without trial if a security certificate was issued against them. The *Charter* violation arose, in part, because the detention decision was not to be reviewed for 120 days. One year of detention without a review to see if there is cause to detain would also seem to be indefensible.

81 *Charkaoui, supra* note 78 at para 107.

82 *Ibid.*

83 See e.g. the *Immigration Act, supra* note 32, s 46.01; *IRPA*, *supra* note 1, s 101.

termination if (i) the claimant had committed or been convicted of a serious crime *and* the Minister issued an opinion that the claimant was a danger to the public, or (ii) if the claimant was inadmissible due to security concerns, involvement with war crimes or crimes against humanity, etc. *and* the Minister issued an opinion that the claimant's entry was contrary to the public interest.[84] These restrictions are largely consistent with the *Refugee Convention*.[85] Under *IRPA*, the serious crime provision was modified. The danger opinion became required only if the crime took place outside of Canada. The other terms of exclusion, which result in the claim not being heard, require no such determination.[86] The decision to remove the need for an individualized assessment of actual risk to the community would seem to reflect a presumptive alignment between security and public interest concerns arising, and these identified grounds.

On its face, the right to have one's claim determined was not radically modified by the specific legislative changes in *IRPA* and *IRPR* as first enacted,[87] although as Lowry and others have noted that the overall changes did create a heightened association between migrants, generally, and criminality.[88] More significant changes for refugees came through the Minister acting on statute-enabled discretionary powers. These include the power to impose visa requirements or sanctions on carriers who transport persons lacking proper documentation into Canada.[89]

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84 *Immigration Act*, *supra* note 32, s 46.01(e).

85 The *Refugee Convention*, *supra* note 4, identifies circumstances where the right of non-refoulement does not apply, or where the Convention does not apply. See e.g. arts 1(c)-1(f), 28, 32 and 33.

86 *IRPA*, *supra* note 1, s 101.

87 In practice, however, they have had a dramatic effect, as decision-makers are also immersed in the securitization discourse. The decisions on ineligibility from 1998 to 2008 indicate that judicial perceptions on what constitutes terrorism, a terrorist act, or a "serious non-political crime," have dramatically increased in scope and, indeed, today's "refugee claimants must be untainted by proximity to a terrorist organization or to its violent means." See Asha Kaushal & Catherine Dauvergne, "The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions" (2011) 23:1 Int'l J Refugee L 54 at 88. The authors observe that if the seminal refugee law case, *R v Ward* [1993] 2 SCR 689, 1 WLR 619 was heard today, the fact that Ward had joined a terrorist group would have resulted in his exclusion, despite his having never committed a terrorist act and having deserted due to his conscience while on his first assignment.

88 Michelle Lowry, "Creating Human Insecurity: The National Security Focus in Canada's Immigration System" (2002) 21:1 Refuge 28.

89 Whereas *IRPA*, *supra* note 1, s 11(2) and *IRPR*, *supra* note 39, ss 6 and 7(1) require all foreign nationals including visitors to obtain a visa prior to entering Canada. Section 7(2) of the *IRPR* sets out exceptions, which include being a national of a state designated under Division 5 of Part 9 of the regulations. The Minister has discretion to designate, or de-designate, a state. Canada imposes visa requirements on the nationals of refugee claimant source countries. The *IRPA* ss 148–50 sets out the obligations of carriers to not transport persons without proper documentations, and a framework for imposing penalties. Part 17 of the regulations, which the Minister has discretion

Another route by which the right to have one's claim determined was at least temporarily eroded was by Canada designating the United States as a "safe third country."[90] The predecessor legislation also permitted such designations, but had not been acted upon. Following 9/11, Canada and the United States negotiated an agreement that was then codified in the *Immigration and Refugee Protection Regulations* in 2004.[91] At its core, the agreement required that most asylum claimants who presented themselves at the shared Canadian/American land border be deflected back to have their claim adjudicated in the country through which they were transiting.[92] In its first few years, this agreement resulted in large numbers of persons who sought to enter Canada and have their claim determined here being turned back, and a smaller number of persons being deflected back from their attempt to enter the United States.[93] The impact for claims determination arises significantly from the fact that the United States will not hear a claim if the claimant has been in the United States for over a year.[94] In addition, Canada has tended to interpret the *Refugee Convention* more generously than has the United States, particularly when claims are based on gendered persecution,[95] and so individuals whose claims may have been recognized in Canada may instead have had their claims summarily dismissed in the United States.

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to amend, sets out specific cost penalties. For a detailed discussion of how measures are used to prevent refugee claimants from ever setting foot on Canadian soil, and others, see e.g. Francois Crepeau & Delphine Nakache, "Controlling Irregular Migration in Canada: Reconciling Security Concerns with Human Rights Protection" (2006) 12:1 IRRP Choices 1.

90 *IRPA*, *supra* note 1, ss 5(1), 101(1)(e), and 102.

91 *IRPR, supra* note 39, s 159.1.

92 Under *IRPA*, *supra* note 1, s 101(1)(e), persons who enter Canada directly from a safe third county are ineligible to have their claim determined in Canada. The exceptions are set out in *IRPR*, *supra* note 39, ss 159.5 and 159.6.

93 Evidence adduced at a Federal Court hearing regarding the lawfulness of the agreement indicated that in its first year of operation, the number of claims made at the Canadian border fell from an average of 8,436/year to 4,000/year. See *Canadian Council for Refugees et al v Her Majesty the Queen*, 2007 FC 1262, [2008] 3 FCR 606 [*Canadian Council for Refugees*] (Factum of the Applicant at para 14), online: Canadian Council for Refugees <http://ccrweb.ca/STCA%20Factum.pdf>.

94 American practice is also to detail most asylum-seekers. The agreement is discussed in detail in Audrey Macklin, "Disappearing Refugees: Reflections on the Canada-US Safe Third Country Agreement" (2004–2005) 36 Colum HRL Rev 365 [Macklin, "Disappearing Refugees"]. Differences between Canadian and American practices are documented in *Canadian Council for Refugees*, *supra* note 93 at paras 144–240, rev'd on other grounds 2008 FCA 229, [2009] 3 FCR 136, leave to appeal to SCC refused, [2008] SCCA 422. While the decision was overturned on a point of law, the findings of fact regarding why American practices may endanger refugees were not disputed.

95 Sonia Akibo-Betts, "The Canada-US Safe Third Country Agreement: Why the US is not a safe haven for refugee women asserting gender-based asylum claims" (2005) 19 Windsor Rev Legal Soc Issues 105.

The Safe Third Country Agreement was rather implausibly characterized by the then Minister of Citizenship and Immigration as a measure to "help ensure the safety of Canadians in the fight against terrorism."[96] Although addressing the threat of terrorist activities is essential, it is not clear how the agreement's terms can be linked to safety or undermining terrorist activity, as the agreement only impacts on where claims are heard, and only then in those instances where claimants present themselves to officials and self-identify their intention to make a claim while at a land border. It could be that a vocal segment of Americans and Canadians believe themselves safer when decisions about non-citizens are determined under American procedures. Such a sentiment would resonate with the continuing (wrongful) assertions that Canada was the 9/11 terrorist conduit,[97] and has been expressed by Canadian critics of our asylum process.[98]

Regardless, the agreement has essentially failed. After a few years, the number of asylum claims made by people at Canadian in-land offices (i.e., not at the land border) increased. Canada Border Services attributes this increase to "irregular migrants entering Canada between POEs [Ports of Entry] … to avoid being turned back at the border based on the Safe Third Country Agreement."[99] That is, the agreement is believed to have resulted in *increased* irregular or illegal border crossings. It thus has had little long-term effect on the right to have one's claim determined (as long as individuals manage to cross the border illegally but safely), while presumably augmenting the market for smugglers who will not only get people to the border but also across the border and deep into the country.

96 Cited in Macklin, "Disappearing Refugees," *supra* note 94 at 414.

97 For example, in 2005, a Senator asserted in a congressional hearing and a press release that "as we all know, terrorists entered the U.S. from Canada on September 11, 2001," leading the Canadian Ambassador to the United States to observe in an interview with the Washington Post that the false linkage had become an "urban myth," which "took on a life of its own, like a viral infection": Doug Struck, "Canada Fights Myth It Was 9/11 Conduit: Charge Often Repeated by U.S. Officials," *The Washington Post* (9 April 2005) A20. Despite this reminder having been made in a prominent American newspaper, just eight months later another senator asserted: "We've got to remember that the people who first hit us in 9/11 entered this country through Canada": "U.S. senator apologizes for claiming 9/11 attackers came from Canada," CBC news, (21 December 2005) online: <http://www.cbc.ca/news/world/story/2005/12/21/border-senator-051221.html>.

98 In an interview shortly before the agreement came into force, James Bisset, a former Canadian ambassador, described in-land refugee claimants as "the greatest threat to North American security" because the claims process "undermines" American and Canadian border control. Cited in Michael Friscolanti, "Fewer refugees seeking asylum inside Canada: Claims fall by 35%," *The National Post* (18 June 2004).

99 Canada Border Services Agency, "CBSA Detentions and Removals Program—Evaluation Study" (November 2010) at 12, online: CBSA <http://www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2010/dr-rd-eng.html>.

Security concerns were, however, largely absent in government statements on the 2010 reforms to *IRPA* through the *Balanced Refugee Reform Act*.[100] The discourse surrounding these amendments is firmly grounded in portrayals of asylum claimants as quasi-criminals, a discourse which Anna Pratt identifies as having a significant presence in Canadian discourse since the 1990s.[101] The tone of the press release for Bill C-11[102] affirms that the asylum process in Canada has been placed at risk through persons who abuse the refugee process, and that these reforms will address those problems. Specifically, it is drafted "in recognition that some claims for refugee protection are clearly fraudulent."

To call a claim fraudulent is to use very strong language—it suggests a clear and knowing criminal intention to deceive. Given the way the legislation is framed, an insinuation of fraudulent intent seems to be leveled against persons from states that are not, statistically speaking, significant refugee-producing countries,[103] despite the fact that "it is often refugee claimants who are among the first sources of information about new or intensified instances of human rights abuses."[104] Under Bill C-11, nationals from states that are not expected to "produce" refugees will be subjected to an expedited hearing process. If their claims are denied at first instance, the claimant will not be able to seek a stay of their removal pending judicial review. If a person's claim is not correctly determined the first time, their removal to their state of nationality may render the review process moot.

100 For Bill C-4, *supra* note 2, many of the changes were immediate upon the Bill receiving royal assent on June 29, 2010, while others phase in over a two year period. Regulations to enable much of the new legislation were published in the *Canadian Gazette* on March 19, 2011.

101 Anna Pratt, *Securing Borders: Detention and Deportation in Canada* (Vancouver: UBC Press, 2005). See also Macklin, "Disappearing Refugees," *supra* note 94; Alexandra Mann, "Refugees Who Arrive by Boat and Canada's Commitment to the Refugee Convention: A Discursive Analysis" (2009) 26:2 Refuge 191; Lowry, *supra* note 88.

102 Citizenship and Immigration Canada, News Release, "The *Balanced Refugee Reform Act* moves closer to becoming law" (15 June 2010) online: Citizenship & Immigration Canada <http://www.cic.gc.ca/english/department/media/releases/2010/2010–06–15a.asp>.

103 The statute introduces a regime for identifying these states, which considers factors such as their human rights records and the historic success rates when their nationals have sought asylum in Canada: *IRPA*, *supra* note 1 109.1(1), *IRPR*, *supra* note 39, s 159.8.

104 Amnesty International cautions that "many human rights violations remain undocumented or poorly documented … [and that] it is often refugee claimants who are among the first sources of information about new or intensified instances of human rights abuse in countries": Amnesty International, *Amnesty International Canada's Brief to the House of Commons Standing Committee on Citizenship and Immigration: Fast and Efficient but not fair: Recommendations with respect to Bill C-11* (May 2010) at 6–7. The UNHCR has similarly observed that state conditions can change rapidly: "UNHCR Brief relating to Bill C-11, An Act to Amend the Immigration and Refugee Protection Act and the Federal Courts Act" (25 May 2010) at 6 [UNHCR Brief].

The Canadian government's stated justification for restricting rights in this fashion is that such measures are required to "discourage people from using Canada's asylum system as a way to jump the immigration queue." The integrity of the immigration system and a sense of fairness to those who seek to immigrate must certainly be maintained. However, there is a notable logical flaw here. If a person is *in fact* a refugee, and as a result is granted protection in Canada, then they are not "queue-jumping." Rather, they are experiencing the manifestation of Canada's obligation to protect people from persecution, an obligation which Canada freely undertook when it ratified the *Refugee Convention*.

To elaborate upon the inappropriateness of conflating the conferral of refugee protection with the processing of immigration applications, applications to immigrate are evaluated through an entirely different system. The "queue" for immigrating is not disrupted, nor does anyone lose their place in line by refugee claims being processed. It must be recalled that the refugee regime is a remedy for specific and narrowly defined human rights violations. It is only granted in the face of convincing evidence of persecution, and lack of state protection, where the individual's human rights are violated and they are targeted because of, for example, their race or religion.[105] It is not granted to a claimant merely because that person lives in abject poverty, comes from a state where no infrastructure exists to provide the population with safe drinking water, or will die from a treatable medical condition (and their home state does not subsidize health care).

Essential to the integrity of the system is the fact that if a claimant is determined not to be a refugee, then their claim is rejected. The individual will not suddenly be moved into an immigration processing queue—instead they will most likely be required to depart the country. Restricting the right to ensure that a decision was correctly made—by shortening the time line for making the decision, and modifying the appeal mechanism—bears no relation to preventing people from jumping to the front of a line that the person was not in.

All claimants will now experience a faster process—with an initial interview no sooner than 14 days after arrival, and then a hearing within either 60 or 90 days. These timelines raise the risk of inadequate evidentiary records being put before the decision-maker—which in turn raises the risk of claims

105 There are only five grounds of persecution that are recognized under the *Refugee Convention, supra* note 4, art 1, as granting a right of asylum. They are when a person is targeted due to their race, religion, political opinion, nationality, or membership in a particular social group.

not being properly heard. Procuring, certifying, translating and disclosing documents that must be obtained from home countries take time. Other key elements of preparing one's case, such as having the opportunity to consult with psychological experts and having those experts produce reliable reports, of procuring and developing a relationship with qualified counsel, and reviewing and responding to the country reports which the decision-maker will be relying upon also takes time. If a person is detained pending, for example, the receipt of confirmatory identity documents, the possibility of preparing a case becomes quite problematic. The right to have one's claim determined necessarily implies the right to be able to produce relevant, reliable and probative evidence. These timelines put the right to have one's claim fairly determined at considerable risk.[106]

Timeliness must be addressed for a plethora of reasons. Delays in determinations not only raise questions about whether the system is sound but also have considerable detrimental effects on persons who have been traumatized, and also result in increased costs to the system. At issue, however, is whether timelines that the federal government finds unacceptable are in fact the product of persons knowingly bringing fraudulent claims in numbers that overwhelm our system. While enormous delays have become the Canadian norm over the past few years due to a huge backlog of outstanding claims, empirical evidence to support the conclusion that the backlog is due to the high numbers of claims which are denied or are found "fraudulent" is absent. Rather, the delays have long been attributed to the long-standing deficit in the number of adjudicators sitting on tribunals for the Refugee Protection Division, a situation that was triggered when the federal government exercised restraint in appointing new members while it considered how the appointments process ought to be amended. This lull in appointments or re-appointments lasted several years. The Immigration and Refugee Board's Department Performance Reports consistently refer to a growing backlog due to being understaffed. For example, the 2008–2009 report states that "the PRD operated with approximately 40 fewer decision-makers than its funded complement … [which] hampers the RPD's ability to resolve more cases more quickly."[107] The 2005–2006 report similarly asserts that "the shortfall in final-

106 These and related concerns have been raised by several entities, including the Canadian Bar Association and the United Nations High Commissioner for Refugees. See Canadian Bar Association, "Submission of the Citizenship and Immigration Section of the Canadian Bar Association, Bill C-11, *Balanced Refugee Reform Act*" (May 2010) at 6–8; UNHCR Brief, *supra* note 104.

107 Treasury Board of Canada Secretariat, "Immigration and Refugee Board of Canada 2008–2009 Department Performance Report," Section II—Analysis of Program Activities, online: Treasury

izations and associated growth in the RPD's pending inventory" is attributed to the expected number of decision-makers not being appointed.[108] The claims have certainly been piling up, leading to delays in claims being determined. However, when the claims *are* adjudicated, the acceptance rates have been and remain extremely high. From 2005 to 2010 the percentage of claims that were heard and accepted ranged from 40% to 46%,[109] and the rejection rates *were consistently dropping,* from a high of 43% in 2005–2006 to a low of 38% in 2009–2010.[110] These figures do not suggest that the system is being over-run by fraudsters or abusers.

However, the 2010 legislative changes are presented as remedies to "resolve the problems that are crippling our broken asylum system."[111] What are these crippling problems? CIC explains:

> Most Canadians recognize that there are places in the world where the persecution of people is less likely to occur compared to other areas…. Yet many people from these places try to claim asylum in Canada and are ultimately found not to need protection. This suggests that they may be using Canada's asylum system as a way to jump the immigration queue.[112]

The insinuation is that persons whose claims are rejected are knowingly seeking to avoid the operation of Canadian law, to act unlawfully. But is a rejected claim evidence of abuse or fraud? The definition of a refugee is a narrow and technical one. Rejection only means that the person did not fit the definition: it does not mean that they did not fear for their life. For example, many of the rejected claims originating from Mexico in recent years reflect situations where the claimant lived in risk due to high levels of kidnapping, extortion,

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Board of Canada Secretariat http://www.tbs-sct.gc.ca/dpr-rmr/2008–2009/inst/irb/irb02-eng.asp#s2 [Treasury Board 2008–2009].

108 Treasury Board of Canada Secretariat, "Immigration and Refugee Board of Canada 2006–2007 Department Performance Report" online: Treasury Board of Canada Secretariat <http://www.tbs-sct.gc.ca/dpr-rmr/2006–2007/inst/irb/irb02-eng.asp#section2>.

109 Data drawn from Treasury Board 2008–2009, *supra* note 107, and Treasury Board of Canada Secretariat, "2009–2010 Performance Report for the Immigration and Refugee Board" online: Treasury Board of Canada Secretariat <http://www.tbs-sct.gc.ca/dpr-rmr/2009–2010/inst/irb/irb00-eng.asp>.

110 *Ibid*. The yearly figures do not add up to 100%. This is because the reports present data on claims that were heard in a given fiscal year in three categories: accepted claims, rejected claims, and claims which had been heard but the decision had not yet been rendered.

111 Citizenship and Immigration Canada, News Release, "The *Balanced Refugee Reform Act* moves closer to becoming law" (15 June 2010) online: CIC <www.cic.gc.ca/english/department/media/releases/2010/2010–06–15a.asp>.

112 Citizenship and Immigration Canada, News Release, "Backgrounder: Safe Countries of Origin" (30 March 2010) online: CIC <http://www.cic.gc.ca/english/department/media/backgrounders/2010/2010–03–30b.asp>.

police corruption and violent organized crime.[113] However, given the requirements of the *Refugee Convention*, refugee status would not be recognized if the individual could live safely anywhere in the whole country of Mexico, if they were targeted for persecutory treatment for a reason other than their race, religion, nationality, political opinion, or social group membership, or if in the opinion of the adjudicator there was more the individual could have done to get their state to protect them, such as seek entry into witness protection programs.[114] As a result, people who have experienced persecution and may fear for their lives, and who therefore may reasonably believe that could be granted asylum, will not qualify for refugee protection.

This sort of distinction is missing from CIC's public communications, which instead emphasize that most asylum claimants knowingly seek to deceive Canada. CIC asserts that "[g]iven that 58% of claims in Canada are unfounded, these figures suggest that Canada is a destination of choice for many unfounded asylum claimants,"[115] and that the changes are necessary to ensure that "people in need get quick protection while false claimants are sent home

113 For a discussion of the level of violent organized crime, kidnappings, gang-related executions and police corruption in Mexico, see [2007] RPDD No 258. In this decision, the adjudicator describes some of the documentary evidence that has been collected on these activities. For example, he observes that in 2006 there were over 500 execution-style killings in one state alone (at para 11), and that in 2003 there was an estimated 3,000 kidnappings (at para 13). The adjudicator also found there was a noticeable level of police collaboration in kidnappings (para 14). The adjudicator ultimately articulated the conclusion that "illicit drug trafficking and illegal activities and corruption within the ranks of the police, the military, and state officials who have aided and abetted illegal drug cartels continues to be a problem in Mexico" (para 17). However, in this particular case, the adjudicator dismissed the claim for asylum, finding that although the claimant had been abducted and tortured by police at the request of a powerful illicit narcotics trafficker, that he could evade further persecution if he was to relocate to a large urban centre in another state such as Mexico City.

114 The definition of a refugee is set out in footnote 16, *supra*. One element of this definition is that claimants must prove that their own state is unable or unwilling to protect them. The jurisprudence has established that where a state is a functioning democracy, it will be presumed to be able to protect its own citizens from persecution. For a claim to succeed, therefore, the claimant must rebut this presumption, and "adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that state protection is inadequate." (See *Carillo v Canada (Minister of Citizenship and Immigration)* 2008 FCA 94; [2008] FCJ No. 399 at para 30.) To meet this standard, claimants may be required to pursue complaints against ineffective police officers, or to show that they pushed for special protections. For example, in cases coming out of Mexico where the persecutors are members of organized crime, a claim will fail if the claimant has not pursued such options as seeking to participate in witness protection programs. See *Re X,* [2007] RPDD No 253. Indeed, such a claim will fail even if the claimant was unaware that a witness protection program existed, or if they did not believe that they would qualify for protection under such a program (see *Re DHS,* [2003] RPDD No 169 at paras 125-126).

115 Citizenship and Immigration Canada, Backgrounder, "Challenges faced by Canada's asylum system" (30 March 2010) online: CIC <http://www.cic.gc.ca/english/department/media/backgrounders/2010/2010–03–30a.asp>.

quickly."[116] This language portrays those individuals whose claims are unsuccessful as "false" and "fraudulent," out to dupe the system, therefore justifying more restrictive treatment, as giving the misleading impression that all the unsuccessful claimants knew from the start that their claim would likely fail.

The *Preventing Human Smugglers Act,* a Bill whose terms are entirely embedded in security concerns, will also affect the ability of asylum claimants to have their claim determined. If claimants are designated, they then have different rights than other refugee claimants. In particular, the legislation would prohibit them from being able to appeal a negative determination, as well as a series of other decisions such as a determination that a claim has been abandoned or ought to be vacated.[117] It is also clear that living in mandatory detention will have a "significant impact on the ability of claimants to advance their claims" due to lack of access to counsel and interpreters.[118]

Concluding Comments

Benjamin Muller describes 9/11 as "bringing pre-existing issues and trends … to the surface,"[119] and as having accelerated the trend towards surveillance and risk management strategies,[120] while Audrey Macklin describes 9/11 as having solidified the "exteriorization of threat and the foreigner as the embodiment of its infiltration."[121] As has been well documented over the past few decades, many Western and Northern states have become increasingly interested in deflecting asylum-seekers.[122] While the horror of 9/11 gave undeniable urgency to ensuring security concerns are addressed, security concerns do not seem to provide an objective justification for many of the existing and proposed legislative measures described in this article.

An extremely telling illustration of Canada's shift to a more restrictive approach to freedom of movement, and its use of the rhetoric of security as a justification for such the shift, arises from comparing how the federal govern-

116 *Ibid.*

117 Bill C-4, *supra* note 2, s 17. This provision is proposed to be incorporated into *IRPA, supra* note 1, as s 110(2).

118 Canadian Bar Association, National Citizenship and Immigration Law Section, "Bill C-49, *Preventing Human Smugglers from Abusing Canada's Immigration System Act*" (November 2010) at 7.

119 Benjamin Muller, "(Dis)qualified bodies: securitization, citizenship and 'identity management'" (2004) 8:3 Citizenship Studies 279 at 285.

120 Benjamin Muller, "Risking it all at the Biometric Border: Mobility, Limits, and the Persistence of Securitization" (2011) 16:1 Geopolitics 91 at 94, 97.

121 Macklin, "Borderline Security" *supra* note 6 at 392.

122 See e.g. Hathaway, *supra* note 14 at 998–1000.

ment responded to the 155 Sri Lankan Tamils found in lifeboats off the coast of Newfoundland in 1986 who claimed asylum, with its response to the 76 Sri Lankan Tamil asylum-claimants who arrived in 2009 on the *Ocean Lady*.[123] The 1986 arrivals were interviewed by an emergency team of immigration officials, and then the majority were also interviewed by the RCMP.[124] They were hosted in student residences at Memorial University until the interviews were complete, and then sent to be hosted by members of the Tamil community in Montreal and Toronto.[125] Canada issued these individuals Minister's Permits, which regularized their status and permitted them to work or study in Canada. There was public protest about these measures, especially when information came out that the Tamils had lied about their transit route and had come directly from West Germany where many had already filed refugee claims.[126] The government's response was striking. The then Prime Minister stated:

> (m)y government will do anything but allow refugees in lifeboats to be … turned away from our shores…. We don't want people jumping to the head of the line …. We don't want excessive delays. But there will always be human suffering and human misery and there will be people who come to Canada for freedom…. And if we err, … we will always err on the side of justice and on the side of compassion.[127]

Perhaps more pointedly, the then Prime Minister denied that there was any connection between securing the integrity of Canada's immigration system and refugee claimants, asserting that "it's not the presence of 155 frightened human beings searching for freedom and opportunity that's going to undermine Canada or our immigration policies."[128] The government screened the Tamils for security concerns and to ensure that none were members of the Tamil Tigers. However, the state's emphasis was on avoiding pre-judgment.[129] With regards to the 2009 arrival of 76 Tamils on the *Sun Sea*, all were immediately deemed flight risks and detained. The Minister's lawyers have aggressively fought against individuals being released. They have often drawn on stays and other means to delay the implementation of court orders to release

123 For a thorough and detailed comparison of these two arrivals, and that of the *Komagata Maru* from India in 1914, see Alexandra Mann, "Refugees Who Arrive by Boat and Canada's Commitment to the *Refugee Convention*: A Discursive Analysis" (2009) 26:2 Refuge 191 [Mann, "Refugees Who Arrive by Boat"]. Much of the discussion below follows from this article.

124 *Ibid* at 195–96.

125 *Ibid* at 196.

126 *Ibid*.

127 Joe O'Donnell, "Show compassion for Tamil refugees Mulroney urges," *The Toronto Star (*18 August 1986), cited in Mann, "Refugees Who Arrive by Boat," *supra* note 123 at 197.

128 Mann, "Refugees Who Arrive by Boat," *supra* note 123.

129 *Ibid* at 197–98.

individuals, orders which had been granted because judges determined there was no longer cause to continue the detention. In one case, a federal court judge found that to accept the Minister's arguments against release "would result in nothing short of an abuse of the court process."[130]

The 1986 Minister of State for Immigration rejected the conflation of refugee claimants with immigrants, asserting that "[t]here is a difference between an immigrant and a refugee and a refugee cannot wait for a number."[131] Such a distinction was not flagged in 2009. Instead the government emphasized that Canadian security interests were at issue and conflated the claimants with illegal immigrants of the worse kind. In particular, Alykhan Velshi, Minister Kenney's spokesperson, indicated Canada would not "become a place of refuge for terrorists, thugs, snakeheads and other violent foreign criminals" nor would they permit the creation of:

> a two tier immigration system: one tier for law-abiding immigrants who wait patiently in the queue, and a second, for-profit tier for criminals and terrorists who pay human smugglers to help them jump the queue.[132]

In just a sentence, asylum claimants who pay smugglers to assist them are not just inaccurately conflated with immigration "queue jumpers," but also become "criminals and terrorists." Such labels resonate with notions of immorality, being undeserving, as well as with risk. These sentiments coincide with much of the 2010 legislation, and seem to be gaining in popular support. A 2010 poll confirmed that 50% of Canadians believe the Tamils should be deported *regardless* of whether they are refugees and have no links to terrorist groups. [133]

The UN High Commissioner for Refugees observed back in 2006 that in "public opinion, there has been a blurring of illegal migration and security problems with asylum and refugee issues."[134] The response to this situation is to enable a recasting of the public imagination, so that refugees and refugee claimants are identified as the presumptive victims of insecurity, not

130 *Canada (Citizenship and Immigration) v B386,* 2011 FC 140, [2011] FCJ No 219 (TD).

131 "Tamils involved in criminal acts will be deported, minister vows," *The Gazette* (20 August 1986), cited in Mann, "Refugees Who Arrive by Boat," *supra* note 123 at 197.

132 Stewart Bell, "Tamil's ship alleged to have traces of explosives: Suspected gunboat," *The National Post* (3 November 2009), cited in Mann, "Refugees Who Arrive by Boat," *supra* note 123 at 201.

133 Angus Reid, "More Canadians are questioning the value of immigration" (9 September 2010), online: Vision Critical <http://www.visioncritical.com/wp-content/uploads/2010/09/2010.09.09_Immigration_CAN.pdf>.

134 Antonio Guterres, "Foreword" in UNHCR, *The State of the World's Refugees: Human Displacement in the New Millennium* (Oxford: Oxford University Press, 2006) x at x.

its agents. A second and related response is to clearly distinguish between the refugee regime—as a remedy to specific and narrow human rights violations—and the immigration system, a distinction that was clearly understood by the Canadian government in 1986. Instead, Canadian legislative and government actions have served to further concretize these associations, making them conceptually synonymous in many instances. This has enabled core refugee rights to be eroded swiftly, based in many instances on linkages that are simply asserted to be present, instead of ones that must be specifically identified and supported by at least some evidence.

In conclusion, some of the legal changes to how Canada is approaching the rights to freedom of movement and to have one's claim determined may create new security and criminality issues. Some of the changes are also sufficiently arbitrary that they will not withstand legal challenge: however, legal challenges are costly and time-consuming, and rights will be trampled in the meantime.

Governing Mobility and Rights to Movement Post 9/11: Managing Irregular and Refugee Migration through Detention

Kim Rygiel[*]

The arrival of Sri Lankan migrants in British Columbia on the MV Sun Sea *in the summer of 2010 renewed policy discussion in Canada around "managing migration" and the role that detention of irregular migrants and refugee claimants should play in this process. Within this context calls emerged for Canada to adopt models for handling irregular migration similar to those being practiced in Europe and previously used in Australia. In response, the Canadian government introduced Bill C-49 (reintroduced as Bill C-4)* Preventing Human Smugglers from Abusing Canada's Immigration System Act. *This article examines Bill C-4 within the context of the greater securitization of mobility in the post-9/11 period as well as comparative border control policy in Australia and Europe. The article argues that governments increasingly use detention as a technology of citizenship to govern mobile populations and their rights to movement, with the effect of undermining established refugee rights to movement.*

L'arrivée de migrants sri lankais en Colombie-Britannique à bord du MS Sun Sea *à l'été 2010 a relancé le débat au Canada sur les politiques entourant « la gestion de la migration » et le rôle que devrait jouer la détention des migrants et demandeurs d'asile irréguliers dans ce processus. Dans ce contexte, on a demandé que le Canada adopte des modèles pour gérer la migration irrégulière, semblables à ceux qui sont utilisés en Europe et, auparavant, en Australie. La réponse du gouvernement du Canada a été d'adopter le projet de loi C-49 (déposé de nouveau comme le projet de loi C-4),* la Loi visant à empêcher les passeurs d'utiliser abusivement le système d'immigration canadien. *L'auteur de cet article examine le projet de loi C-4 dans le contexte de la sécurisation accrue de la circulation dans l'après-11 septembre 2001, ainsi que les politiques de contrôle frontalier comparatives en Australie et en Europe. L'auteur soutient que les gouvernements utilisent de plus en plus la détention comme « technologie de citoyenneté » afin de régir les populations mobiles et leur liberté de circulation, ce qui a pour effet de saper la liberté de circulation établie des réfugiés.*

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I. Introduction

This article examines the issue of how rights to movement of irregular migrants and refugees are managed through detention as part of a larger politics of citizenship in the post-9/11 period. One of the results of the ten-year period since 9/11 is the normalization of a greater securitization of mobility and the unsettling of mobility rights of both citizens and non-citizens. The article focuses on the effects of the securitization of mobility through detention. It argues that governments increasingly use detention as a technology of citizenship to govern mobile populations and their rights to movement, with the effect of undermining established refugee rights to movement. While modern citizenship is commonly understood as a legal institution encompassing status and membership within a political community (usually that of the nation-state), which accrues rights and obligations, I refer here to citizenship as *government* in order to encompass a broader, more sociological understanding of citizenship. Following Michel Foucault, citizenship as government includes the political relations involved in shaping "the conduct of conduct"—that is, the relationships of power, discourses, technologies and subjectivities involved in governing others and ourselves as populations.[1] From this perspective, detention is integral to the functioning of citizenship as a regime governing populations, for it is in spaces of detention that those who are excluded from the polity are placed. Places of detention are also, according to scholars such as Giorgio Agamben and Hannah Arendt, constitutive of the polity in the first place.[2] Detention can thus be understood as part of what Anna Pratt refers to as "immigration penality" integral to the construction of both non-citizen and citizen populations.[3]

1 Michel Foucault, "Afterword: The Subject and Power" in HL Dreyfus & P Rabinow, eds, *Michel Foucault: Beyond Structuralism and Hermeneutics* (Chicago: University of Chicago Press, 1982) 138.

2 See e.g. Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1995); Hannah Arendt, "The Decline of the Nation-State and the End of the Rights of Men" in *The Origins of Totalitarianism* (San Diego, New York & London: Harcourt Inc, 1968) 266 [Arendt]; Didier Bigo, "Detention of Foreigners, States of Exception, and the Social Practices of Control of the Banopticon" in Prem Kumar Rajaram & Carl Grundy-Warr, eds, *Borderscapes: Hidden Geographies and Politics at Territory's Edge, Borderlines Series # 29* (London and Minneapolis: University of Minnesota Press, 2007) 3 [Bigo I]. Bigo argues that detention refers not just to spaces of exclusion but also to the transitory spaces and states of circulation in which people find themselves in limbo and endless states of waiting while they are prevented from settlement (at 31).

3 Anna Pratt, *Securing Borders: Detention and Deportation in Canada* (Vancouver: UBC Press, 2005) [Pratt]. As Pratt explains, "Immigration penality is heterogeneous and diverse; it includes but is not limited to legal regimes or formal institutions of government. Detention and deportation are the two most extreme and bodily sanctions of this immigration penality, which constitutes and enforces borders, polices noncitizens, identifies those deemed dangerous, diseased, deceitful, or

In looking at detention as a technology of citizenship as government, this article views detention as a continuum of sites and practices that have in common the goal of "the deprivation of liberty of non-citizens because of their status."[4] Detention sites used for immigration detention take a variety of different forms as a person passes through the various stages of the immigration process, ranging for example from "accommodation" and "reception" centres on the one end, to "removal," "departure" and "expulsion" centres on the other. While immigration detention often takes the form of non-criminal administrative detention, it may also share similarities with forms of criminal detention. In recent years, as Elspeth Guild notes, countries have passed laws that "criminalise undocumented entry and presence on the territory, foreigners who are found in such positions are detained, charged, convicted and sentenced to further detention on the basis of criminal law."[5] Given this understanding, this article examines not only cases where detention is used in the administrative processing of refugee claimants at the front end of the continuum, but also cases where detention is used in the back end in more criminal forms of incarceration—such as the deportation of irregular migrants, deemed to have arrived illegally, and failed asylum seekers—in order to draw attention to the strong linkage and overlap between the two types of processes. As will be discussed, this linkage can perhaps best be seen in Europe, as European countries increasingly turn towards "externalizing" migration and asylum policies by using third countries or transit countries bordering the EU, such as Morocco, Libya and Turkey, not only to host but also to detain and process refugees, migrants and asylum seekers.[6]

The rest of this article develops these theoretical arguments further around detention as a technology of citizenship more generally and then in light of proposed Canadian legislation, Bill C-4 *Preventing Human Smugglers from Abusing Canada's Immigration System Act* (formerly Bill C-49, reintroduced in

destitute, and refuses them entry or casts them out" (at 1).

4 Michael Flynn, *Immigration Detention and Proportionality—Global Detention Project Working Paper No 4* (Geneva: Global Detention Project Programme for the Study of Global Migration, Graduate Institute of International and Development Studies, 2011) at 7, online: <http://www.globaldetentionproject.org/fileadmin/publications/GDP_detention_and_proportionality_workingpaper.pdf> [Flynn].

5 Elspeth Guild, "Report for the European Parliament: Directorate General Internal Policies of the Union: A Typology of Different Types of Centres in Europe," online: (2005) <http://www.liberty-security.org/article1181.html>. This point is also central to Flynn, *ibid*.

6 Human Rights Watch, *European Union: Managing Migration Means Potential EU Complicity in Neighboring States' Abuse of Migrants and Refugees* (Libya, Ukraine: Human Rights Watch, 2006) at 3–14, online: <http://www.unhcr.org/refworld/docid/4565dfbb4.html>. See also Christina Boswell, "The 'external dimension' of immigration and asylum policy" (2003) 79:3 International Affairs 619 [Boswell].

June 2011 as Bill C-4),[7] in response to recent arrivals of Sri Lankan migrants in British Columbia on the *MV Sun Sea*. It does so within a comparative context of post-9/11 border control policy in Australia and Europe. Within the Canadian context, the recent arrival of Sri Lankan migrants in British Columbia has renewed policy discussion around "managing migration" and the role that detention of irregular migrants and refugee claimants should play in this process. Calls for Canada to adopt models for handling irregular migration similar to those being practiced in Europe and previously used in Australia have also emerged against this backdrop. For example, former High Commissioner to Sri Lanka, Martin Collacott, among others, has called for Canada to adopt Australia's model of the "Pacific Solution" of intercepting asylum seekers at sea and transporting them to detention centres on neighbouring islands, where asylum claims can be processed offshore. This model of processing irregular migrants and refugees offshore or outside of a *Refugee Convention* signatory's territory is also a model increasingly favoured within the European context.

The Australian and European models of managing migration through detention provide important precedents through which to consider—and soundly reject—recent demands for changes to Canadian border and migration control policy. They also provide important precedents through which to understand the way securitization of mobility since 9/11 has unraveled citizen and non-citizen rights to movement. The point here is not a nostalgic lament for the loss of a former period of established refugee rights. As Robyn Lui has pointed out, the development of the international refugee regime was never motivated primarily by humanitarian concern but rather by the need for an international order in which refugees are characterized as being a force of disorder, a disruption to citizenship's managed mobility between states and hence a threat to state security.[8] As Lui explains, "the international refugee regime is an example of the policing of non-citizens. The regime is part of a larger project, like immigration policy, aimed at the international government of populations."[9] While the international refugee regime may have developed with the intent of ordering populations, the fact is that migrants have success-

7 Bill C-4, *An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act and the Marine Transportation Security Act* (short title: *Preventing Human Smugglers from Abusing Canada's Immigration System Act*) 1st Sess, 41st Parl, 2011 (first reading 16 June 2011), online: <http://www.parl.gc.ca/LEGISInfo/BillDetails.aspx?Language=E&Mode=1&billId=5089199> [Bill C-4].

8 Robyn Lui, "Governing Refugees 1919–1945," online: (2002) 1:1 Borderlands eJournal <www.borderlands.net.au/vol1no1_2002/lui_governing.html> [Lui].

9 *Ibid* at para 11.

fully used this regime as a way of enacting themselves as political subjects—as refugees with a right to have rights. From the perspective of a politics of citizenship, making claims to being a refugee is one of the ways in which those who lack formal citizenship status have of enacting themselves as citizens by claiming rights to membership and belonging as political subjects of a political community.[10] Thus, from a governmental perspective, the argument put forth here is that governing through detention exercises a different governmental logic, one that unmakes the refugee from a political subject, with a limited right to have rights, to a mere body to be managed through modes of either penality or humanitarian assistance.[11]

II. Securitization of Mobility and Detention Post 9/11

Before discussing in further detail the Canadian proposal for detaining boat arrivals outlined in Bill C-4, it is useful to situate the proposal within the larger post-9/11 context, in which detention is increasingly employed as part

10 Engin F Isin, *Being Political: Genealogies of Citizenship* (Minneapolis: University of Minnesota Press, 2002) & "Citizenship in Flux: The Figure of the Activist Citizen" (2009) 29 Subjectivity 367 in R Andrijasevic & B Anderson, eds, *Migration, Labour and Political Subjectivities*.

11 As Peter Nyers and I explain in more detail:

> The element of contestation is never far from the phenomenon of migration. The figure of the refugee, for example, has historically had a close relationship to resistance. The act of taking flight from circumstances that have become intolerable—the "well founded fear of persecution" of the UN Refugee Convention—is itself a political act. It is political in the sense of being a strategic counter measure to real or perceived persecution. It is political also in the sense that the process of becoming someone new—a refugee—is simultaneously the act of refusal, as the flight signifies a lack of legitimacy of [the] state from which he or she flees. The resistive dimension to refugees is often forgotten in the various discursive regimes that claim to speak for refugees. The refugee is caught between two competing, and at times overlapping, discursive regimes: humanitarianism and securitization. On the one hand, the humanitarian regime of the UNHCR, major international NGOs, and human rights groups have institutionalized the figure of the refugee as a humanitarian figure whose abject victimage has silenced their voice and emptied their subjectivity of agency (Malkki 1996, Rajaram 2002, Nyers 2006). On the other hand, politicians and governments have targeted refugees and asylum seekers as objects of securitization, representing them as harbingers of threats, dangers, and social ills (Watson 2009).
>
> Peter Nyers & Kim Rygiel, eds, *Citizenship, Migrant Activism and the Politics of Movement* (London & New York: Routledge, 2012) [forthcoming] at 8. See also the following references cited in the above quotation: Scott Watson, *The Securitisation of Humanitarian Migration: Digging Moats and Sinking Boats* (London: Routledge, 2009); L Malkki, "Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization" (1996) 11: 3 Cultural Anthropology 377; P K Rajaram "Humanitarianism and Representations of the Refugee" (2002) 15: 3 Journal of Refugee Studies 247; P Nyers *Rethinking Refugees: Beyond States of Emergency* (New York: Routledge, 2006).

of an overall trend toward a greater securitization of mobility, in general, and of irregular migrants and refugees, in particular. By securitization, I am referring to the work of the Copenhagen School and its argument that securitization is the process of constructing an object as an existential threat through a "securitizing move" involving "speech acts" and the reception of this process by an audience who accepts it as such.[12] Importantly, the Copenhagen School argues that securitizing a referent object enables exceptional measures to be used, which are often justified by appealing to national security interests. One of the responses to the 2001 terrorist attacks in the United States has been the greater securitization of mobility and migration.[13] Governments, particularly across North America and Europe, have responded to the 9/11 terrorist attacks by intensifying border controls and implementing a range of policies with the intent of governing the movement of people across borders. These include the harmonization of travel documents, such as biometric passports and identity cards, risk-profiling programs, and a heightened surveillance of certain populations deemed to be "risky," resulting in the detention, deportation and extraordinary rendition of many.

People of Middle Eastern and/or Muslim origin, particularly men, along with refugees, asylum seekers and irregular migrants, have found themselves to be the particular target of more restrictive border controls in the name of fighting a "war on terror."[14] For example, immediately after the 9/11 attacks an investigation in the United States by the FBI ("PENTTBOM") resulted in the detention of over 1,200 individuals within the first two months, after which point the Department of Justice stopped releasing figures.[15] In June 2002 the US government announced its National Security Entry-Exit Registration System (NSEERS), which specifically targeted men between the

12 Barry Buzan, Ole Waever & Jaap de Wilde, *Security: A New Framework for Analysis* (Boulder: Lynne Rienner, 1998).

13 On the securitization of migration more generally see Watson, *supra* n 11; Maggie Ibrahim, "The Securitization of Migration: A Racial Discourse" (2005) 43:5 International Migration 163 [Ibrahim]; Ayse Ceyhan & Anastassia Tsoukala, "The Securitization of Migration in Western Societies: Ambivalent Discourses and Policies" (2002) 27 Alt J 21; Didier Bigo, "Security and Immigration: Towards a Critique of the Governmentality of Unease" (2002) 27:1 Alt J 63 [Bigo II].

14 See e.g. Kim Rygiel, *Globalizing Citizenship* (Vancouver: University of British Columbia Press, 2010) [Rygiel]; Krista Hunt & Kim Rygiel, eds, *(En)Gendering the War on Terror: War Stories and Camouflage Politics* (Aldershot: Ashgate Publishing, 2006, 2007); David Cole, "Enemy Aliens" (2002) 54 Stan L Rev 953; Council on American–Islamic Relations (CAIR) Research Center, *American Muslims: One Year After 9/11*, online: <http://www.cair.com/PDF/cairsurveyanalysis.pdf>.

15 US, Office of Inspector Gen, Dept Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003) 1, online: <http://www.justice.gov/oig/special/0306/full.pdf>.

ages of 16 and 45 from countries largely in the Middle East to register and divulge personal information, including biometrics. In just one year of operation, the program had compiled data on 177,260 individuals (of which 2,870 were detained but of these only 143 were identified as criminals, mostly for immigration infractions such as overstaying visas and using fraudulent documents).[16] As of 2004, as many as 15,300 asylum seekers had been detained at US borders and airports.[17] During this time terrorist watch lists also expanded, with no-fly lists increasing from a hundred names before 9/11 to 325,000 names by 2006 according to the US Counterterrorism Center.[18]

Alongside these incidences, cases of extraordinary rendition involving detention and torture have also come to light. These include the cases of several Canadian citizens with dual citizenship of a Middle Eastern country, such as Maher Arar, Abdullah Almalki, Ahmad El Maati, and Muayyed Nureddin. In addition to the detention of these dual citizens, detention of non-citizens in Canada also increased, in part through the intensified administration of security certificates.[19] Originating in the 1970s, but currently codified in the 2001 *Immigration and Refugee Protection Act (IRPA*), security certificates were used to detain several men of Muslim origin (known as "the secret trial five") on suspicion of being "national security threats," denying them full access to evidence against them along with the right to a full trial before a jury in a court of law.[20] In 2007, the Supreme Court of Canada ruled in *Charkaoui v Canada (Citizenship and Immigration)* [2007][21] on the constitutionality of security certificates and indefinite detention. In its decision, the Supreme Court

16 Jonathon Finn, "Potential threats and potential criminals: data collection in the national security entry-exit registration system" in Elia Zureik & Mark Salter, eds, *Global Surveillance and Policing: Borders, Security, Identity* (Portland: Willan Publishing, 2005) 139 at 146.

17 Michael Welch, "Quiet Constructions in the War on Terror: Subjecting Asylum Seekers to Unnecessary Detention" (2004) 31:1–2 Social Justice 113.

18 American Civil Liberties Union (ACLU), "Letter to the Privacy Office, US Department of Homeland Security. Re: Comments of the American Civil Liberties Union and Privacy International to the Department of Homeland Security Regarding the Proposed Secure Flight Program (*Privacy Act*, 1974: System of Records, Secure Flight Test Records, TSA-2004–19160, 69 Fed Reg 57,343)" (25 October 2004) at 8; Privacy International, "PHR2006-Privacy Topics-Travel Surveillance" (18 December 2007) at 5, online: <www.privacyinternational.org>.

19 See The Global Detention Project, "Canadian Detention Profile" (2009), online: <www.globaldetentionproject.org/countries/americas/canada/introduction.html>.

20 These men are Mohammad Mahjoub, Mohammed Harkat, Adil Charkaoui, Mahmoud Jaballah and Hassan Almrei. For details on security certificates, see Rob Aitken, "Notes on the Canadian exception: security certificates in critical context" (2008) 12:4 Citizenship Studies 381; Colleen Bell, "Subject to exception: security certificates, national security and Canada's role in the 'war on terror'" (2006) 21:1 CJLS 63.

21 *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350, online: <scc.lexum.org/en/2007/2007/scc9/2007/scc9.html> [*Charkaoui*].

upheld the constitutionality of security certificates and the government's right to hold those suspected of being a security threat (where there is insufficient evidence to bring these individuals to trial before a court of law). Rather than finding the indefinite detention of foreign nationals to be discriminatory, as was the case in a ruling in the United Kingdom by the House of Lords in its *Belmarsh Detainees* decision,[22] the Supreme Court merely found problematic the length of time of the detention, arguing:

> The detention of foreign nationals without warrant does not infringe the guarantee against arbitrary detention in s. 9 of the *Charter*. (. . .) However, the lack of review of the detention of foreign nationals until 120 days after the reasonableness of the certificate has been judicially confirmed (s. 84(2)) infringes the guarantee against arbitrary detention in s. 9 of the *Charter*, which encompasses the right to prompt review of detention under s. 10(*c*) of the *Charter* (SCC 2007).[23]

In its ruling, the Supreme Court therefore gave constitutional approval to indefinite detention. As legal scholars rightly point out, rather than advancing the rights of non-citizens, the *Charkaoui* decision permitted the differential treatment of foreign nationals and thus can be seen as a "partial retreat" from both the commitment within Canada to protect equally the rights of non-citizens and citizens alike as found in Section 1 of the *Charter*, which guarantees rights and freedoms to everyone, and Section 7, which recognizes that justice is owed to everyone.[24] Finally, during this period, immigration detention also increased in Canada, with "some 13,413 people detained in 2003–2004 representing a 68% increase over the numbers for 1999–2000" and with

22 *A (FC) and others v Secretary of State for the Home Department and others*, [2005] UKHL 71, 2 AC 68 [*Belmarsh Detainees*]. In the *Belmarsh Detainees* decision, Lord Bingham writing for the House of Lords, ruled that Part 4, Section 23, of the *Anti-Terrorism, Crime and Security Act (ACSA) 2001* (UK), c 24, which allowed for the indefinite detention of foreign "terrorist suspects," was both disproportionate and discriminatory because it applied only to foreign nationals and was incompatible with both the *Human Rights Act 1998* (UK), c 42 and the *European Convention on Human Rights*, 4 November 1950. Section 23(1) of the *ACSA* reads as follows: "a suspected international terrorist may be detained under a provision specified in subsection (2) despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by (a) a point of law which wholly or partly relates to an international agreement, or (b) a practical consideration." The UK government responded by passing the *Prevention of Terrorism Act 2005* (UK), c 2, which allowed for "control orders" to be applied to British citizens as well as foreign nationals, thus addressing the concern of the discriminatory nature of Section 23 of the *ACSA* raised in the *Belmarsh Detainees* decision.

23 See *Charkaoui*, *supra* n 21.

24 Francois Crépeau, Delphine Nakache & Idil Atak, "International Migration: Security Concerns and Human Rights Standards" (2007) 44:3 Transcultural Psychiatry at 314 [Crépeau et al]. See also Benjamin Perrin, "Migrant Smuggling: Canada's Response to a Global Criminal Enterprise" (2011) Macdonald-Laurier Institute 15.

detention of asylum seekers in Europe becoming much more "systematic."[25] The post-9/11 environment, in other words, can be characterized by a much more punitive approach to regulating mobility through what Didier Bigo refers to as the "mobius ribbon" of security networks, involving co-operation between various national security, policing, immigration border, and intelligence "managers of unease," who share a perception of the unknown migrant as a viable security threat.[26] Moreover, it is within this context that detention as a technology of citizenship as government has come to play a larger role in securitizing mobility, in general, and, more specifically, in relation to the "war on terror."[27]

As noted earlier, detention can be understood as a technology of citizenship as government in that detention spaces and practices are constitutive of citizen and non-citizen populations. Detention spaces, for example, are often spaces of exclusion in which to hold risky individuals and populations, for example in cases where an immigration or border officer is not satisfied as to the identity of a foreign national or has reasonable grounds to believe he or she might be a security risk to the public. However, detention also involves spaces and processes of transition, in which political subjectivities are made and unmade, with implications for a person's ability to access social, political and economic rights. For example, detaining migrants arriving by boat has the potential effect of blurring distinctions between migrant subjectivities such as between irregular migrants, asylum seekers and refugees and those increasingly associated with criminality such as the smuggler or "illegal" migrant. As François Crépeau et al. have noted,

> the reinforcement of security-related migration policies has resulted in the perception of the foreigner, and especially the irregular migrant, as a category outside of the circle of legality. . . . Restrictions imposed upon irregular migrants' basic political and civil rights have been accompanied by major obstacles to their access to economic and social rights.[28]

The application of detention (something associated in the public perception with criminality) to an irregular migrant or refugee can have the effect of constructing that person as somehow suspect, potentially criminal, or associated with criminality. At a more personal level, detention also transforms migrants' sense of their own subjectivity from that of a positive self-perception to one of

25 Crépeau et al, *ibid* at 321.

26 Bigo II, *supra* n 13.

27 For example, it is notable that in Canada provisions for security certificates fall under the *IRPA* rather than anti-terrorism legislation.

28 Crépeau et al, *supra* n 24 at 311.

vulnerability, defined through their experiences of being trapped, unable to make future plans, and increasingly isolated from community and an outside world.[29]

Beyond this, detention can also hinder the ability of a migrant to claim to be a refugee in cases where, for example, detention is used to expedite mass deportations or results in limited access to lawyers and UNHCR representatives (as will be discussed in the case of Europe's externalization of migration and asylum policies). The fact is that making a claim to being a refugee is itself a significant political act on the part of migrants since it is to claim a political status that is accompanied by an internationally recognized "right to have rights."[30]

Along with the international recognition of the refugee as a political subject with a right to have rights, more specifically, one of the foundational and defining rights of a refugee is that of the right to protection from *refoulement*. The 1951 *United Nations Convention Relating to the Status of Refugees* (with amendments made in the 1967 Protocol removing the temporal and geographical limitations) outlines a series of rights and obligations under international law and a general definition of who is a refugee.[31] Of particular importance to the recognition of rights of refugees is the principle of *non-refoulement*. According to Article 33 (1) of the 1951 *Convention*, "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 or political opinion."[32] In cases where a third or transit country is not a

29 Jesuit Refugee Service (JRS)-Europe, *Becoming Vulnerable in Detention: Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union (The DEVAS Project)*, (Brussels: JRS-Europe, 2010), online: <www.jrseurope.org>. In its report, JRS notes, "Remarkably, detainees hold positive perceptions of themselves despite the adversities they experience. But almost 70 percent say that detention steadily worsens their self-perception" (at 4).

30 Arendt, *supra* n 2 at 297.

31 According to the 1951 definition, which provides the basis for the current system and today's understanding of a refugee, a refugee is "any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it," *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954, in accordance with article 43) at 1A, online: Office of the High Commissioner for Human Rights <http://www.unhchr.ch/html/menu3/bo_c_ref.htm> [*Refugee Convention*].

32 This principle is also enshrined in other international law such as the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), 10

Convention signatory, or where a country has a history of practicing *refoulement* itself or of human rights abuses, placing asylum seekers in detention facilities in this third country risks violating a refugee's fundamental right to *non-refoulement* and ultimately to protection.

Finally, in addition to hindering the right to claiming to be a refugee, and the refugee-specific rights such as *non-refoulement*, detention may be used as a preventative measure that limits a person's access to the territory of a country (such as, for example, in models of externalizing asylum processing). Hindering access to territory, of course, also hinders access to a range of additional economic, social and political rights that accompany settlement.[33] After all, as Audrey Macklin correctly observes, it is the "lawful access to territory of a state (rather than citizenship per se)" that is "the pre-requisite to the exercise and enjoyment of most rights, entitlements and opportunities available inside the state."[34] Many countries ensure some rights for non-citizens. In Canada, for example, the *Canadian Charter of Rights and Freedoms* (hereafter *Charter*) guarantees rights and freedoms to every person who is physically present in Canada (Section 1).[35] Access to territory is thus integral to materializing political, social and economic rights.

III. Doormats or Detention? Debating Canadian Border and Migration Control in Comparative Perspective

> "We are out of step with all of the other countries that are grappling with the asylum phenomenon. What is recognized as a major international problem finds that Canada—which once led the world in dealing positively with this global issue—is stubbornly determined to keep its head in the sand and do little, or nothing to help."
>
> —James Bissett, former Canadian Ambassador[36]

December 1984 (entered into force 26 June 1987, in accordance with Article 27(1)), which states that no state party "shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture" (at Article 3). Similar obligations are made implicit in the *International Covenant on Civil and Political Rights*. For a detailed discussion of this see Savitri Taylor, "Protection Elsewhere/Nowhere" (2006) 18:2 Int'l J Refugee L 283.

33 Flynn, *supra* n 4 at 7.

34 Audrey Macklin, "Who is the Citizen's other?" (2007) 8:2 Theoretical Inquiries in Law 335.

35 Crépeau et al, *supra* n 24 at 313; *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 [*Charter*].

36 James Bissett, "Abusing Canada's Generosity and Ignoring Genuine Refugees: An Analysis of Current and Still-needed reforms to Canada's Refugee and Immigration System" (2010) 96 Frontier Centre for Public Policy: Policy Series 37 [Bissett].

> "Human smugglers are clearly targeting Canada and are treating our country like a doormat. The problem is growing and must be stopped."
>
> —Dave MacKenzie, Parliamentary Secretary to the Minister of Public Safety, 40th Parliament, Government of Canada[37]
>
> "It means that we would stop them from landing in Canada and take them to a safe place, maybe in a country somewhere else in Central America . . . and still screen all of them, still give them all the chance to come to Canada as refugees, but not face the problem of having a lot of people arrive on our soil. (. . .)
>
> What the Australians did was this: they said, 'We have an international obligation to consider these people's claims. But what we will not do is let them to land on Australian soil.' And the reason for that was in the case of those people that they did not think were genuine refugees, it was very hard to remove them once they were in Australia. There are all sorts of appeals and legal questions [in that situation]."
>
> —Martin Collacott, former Canadian High Commissioner to Sri Lanka[38]

It is against this background of heightened securitization of mobility after 9/11, which targets foreign nationals, those constructed as "foreign," irregular migrants and refugees that the specific proposals contained within Bill C-4 can be understood. Moreover, within this larger context of securitizing mobility, detention became a high-profile issue with the mass detention of some 300 of the 492 Tamil migrants arriving from Sri Lanka to British Columbia in August of 2010 on the *MV Sun Sea*. The heightened fear of these Sri Lankan migrants was compounded further by the fear that some migrants might belong to the Liberation Tigers of Tamil Eelam or LTTE, listed in 2006 as a terrorist organization in Canada.[39]

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37 *House of Commons Debates*, 40th Parl, 3rd Sess, No 89 (28 October 2010) "Government Orders: Preventing Human Smugglers From Abusing Canada's Immigration System Act" at para 1025, online: <www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=89&Parl=40&Ses=3&Language=E&Mode=1> ["Government Orders"].

38 Quoted in Carlito Pablo, "Australian policy urged for refugees to Canada in wake of Tamil arrivals," *Georgia Straight* (19 August 2010) online: Straight <www.straight.com/article-338988/vancouver/oz-policy-urged-refugees>.

39 Of the 492, evidence has been made public of an indirect link to the LTTE in only five cases. See Tim Naumetz, "Mass detention of 300 Tamil migrants cost $18-million, says Canada Border Services Agency," *The Hill Times online* (14 February 2011) online: <http://www.hilltimes.com/news/2011/02/14/mass-detention-of-300-tamil-migrants-cost-%2418-million-says-canada-border-services-agency/25475> [Naumetz]. Those cases include "a newspaper reporter who worked for a publication controlled by the Tamil Tigers and who was injured by an artillery shell in 2009, a man who underwent weapons training, a rebel karate instructor who appeared in a propaganda film, another who allegedly used his tractor to transport people and supplies to Tamil fortifications and a woman who worked for a library funded by the Tamil Tigers."

In response to these arrivals, the Harper government announced its plans to introduce Bill C-49, which would mandate the use of detention as a response to boat arrivals in order to deter human smuggling. Opposition MPs, and legal, refugee and civil rights advocates criticized the detention of the Tamil migrants, along with the Bill, which would authorize detaining boat arrivals despite the fact that it contradicted both Canadian and international law (a point to which I will return). Critics also argued that detention was costly (some 8 million dollars for the Tamil migrants as of February 2011)[40] and unnecessary given that most were released to pursue refugee claims (as of July 2011, eight remained in custody), and of some fifty migrants subject to admissibility hearings, only six had so far been ordered deported as of July 2011.[41] The announcement by the Harper government that, if passed, the Bill might also be applied retroactively to those Sri Lankan migrants still in custody further outraged opposition MPs.[42] Liberal MP Justin Trudeau accused the government of using the boat arrivals to inflame fear of refugee arrivals that would not only stir up support for its new legislation but also create division within immigrant communities, a situation that could be used for electoral gain before the 2011 federal elections.[43]

Yet, the detention of the *MV Sun Sea* arrivals also became a high profile issue because it conjured up memories of a much longer Canadian history of responses to "boat arrivals" to Canada. This includes the arrival of 174 Sikhs in Nova Scotia in 1987 and some 600 people from China who arrived in 1999 in Victoria, BC.[44] In particular, the detention of the 1999 Fujian refugee claimants proved controversial for the fact that, as Alison Mountz notes, migrants were transported for processing to Esquimalt naval base (which government authorities redesignated as a "port of entry") in order to be able to extend the processing period until immigration officers had gathered more information about the journey, and delay the moment of lawyers' access to the refugee

40 *Ibid*.

41 Douglas Quan, "Tamil migrant from MV Sun Sea deported on war-crimes suspicions," *Vancouver Sun* (17 July 2011) online: <www.vancouversun.com/news/Tamil+migrant+from+deported+crimes+suspicions/ 5163092/story.html>.

42 As MP Paul Dewar explained, "This is just a harbinger of things to come if this bill [C-49] goes through, it's going to put a lot of emphasis on putting people behind bars before they get due process, because that's what's contemplated in the bill" (quoted in Naumetz, *supra* n 39).

43 Justin Trudeau, "House speeches—Bill C-49 (Speech 1) October 28th, 2010" online: <http://justin.ca/en/bill-c49/>.

44 See *Ibrahim*, *supra* n 13 at 163–87; Alison Mountz, "Human Smuggling and the Canadian State" (2006) 13:1 Canadian Foreign Policy Journal 59; Alison Mountz, "Embodying the nation-state: Canada's response to human smuggling" (2004) 23:3 Political Geography at 323–24.

claimants.[45] In addition to these more recent cases, the *MV Sun Sea* boat arrivals recall events in Canada's past such as the arrival in 1914 of 354 people from India on the *Komagata Maru*, who were turned back to India, with many of these migrants subsequently losing their lives as result.[46] Similarly, in 1939 when the *SS St Louis* arrived in Canadian waters carrying 937 European Jews who were fleeing the Third Reich in Germany, the Canadian government under Mackenzie King refused refuge to the Jewish people on board, turning the boat back to Europe where at least a third of those on board were subsequently killed in the Holocaust.[47]

In contrast to these more xenophobic approaches, Canada's history of official responses to boat arrivals also includes more welcoming reactions such as in 1979–1981 where Canada provided refugee to some 60,000 refugees from Vietnam, Cambodia and Laos, who became known as the "Vietnamese Boat People," for which Canada was awarded the Nansen Award (the only country to have ever been awarded the medal).[48] As evident by the Parliamentary debate in the House of Commons in response to the Harper government's proposed Bill C-4,[49] the recent boat arrivals of Sri Lankans quickly became politicized by reviving debate over the policy direction Canada should take within the context of this history of two very different approaches.

Thus it is within this already highly politicized post-9/11 context around the detention of refugee claimants in Canada that policy discussion has

45 Alison Mountz, *Seeking Asylum: Human Smuggling and Bureaucracy at the Border* (Minneapolis & London: University of Minnesota Press, 2010) at xiii-xiv. The issue of detention should also be situated within the context of larger debates on the future of Canada–US border security, most recently with the February 4, 2011 Canada–US "Beyond the Borders" declaration and the anticipated perimeter security agreement announced in December 2011. Refer also to discussions of future directions of NAFTA as either "Fortress America," based on the "unilateral fortification of US border controls," or "Fortress North America," based on a "'Europeanization' of border controls akin to the Schengen arrangement amongst most European Union countries." See Yasmeen Abu-Laban, "Regionalism, Migration, and Fortress (North) America" (2005) 10:1–2 Rev Const Stud 147.

46 In 1914 when the *Komogata Maru* arrived in Vancouver harbour with 374 people of Indian origin (many of them Sikh) on board, the dominion government refused to let them disembark. The boat remained in Vancouver for two months until it returned to Calcutta where it was met by police, with some 20 people being killed and many more jailed upon disembarking. See Hugh Johnston, *The Voyage of the Komagatu Maru: The Sikh Challenge to Canada's Colour Bar* (Vancouver: University of British Colombia Press, 1989).

47 "Government Orders," *supra* n 37 at para 1055; B Farber, "Voyage of the SS St. Louis: Journey toward a better future," *Toronto Star* (27 May 2008) online: <www.thestar.com/comment/article/431217>. See Irving Abella & Harold Troper, *None Is Too Many: Canada and the Jews of Europe 1933–1948* (Toronto: Lester Publishing Limited, 1991) at 63–64.

48 United Nations High Commissioner for Refugees (UNHCR), "Archive of Past Nansen Winners," online: <http://www.unhcr.org/pages/49c3646c467-page5.html>.

49 "Government Orders," *supra* n 37.

emerged around the role that detention of irregular migrants and refugee claimants should play in managing migration. These "boat arrivals" have galvanized discussion around the need for the Canadian government to "get tough" on irregular and unwanted migration as evidenced by the formation of the new Centre for Immigration Policy Reform and Bill C-4, the proposed new policy on smuggling.[50]

A. A Canadian Approach: Bill C-4 and the Detention of Irregular Migrants and Refugees

Bill C-4 (formerly Bill C-49) P*reventing Human Smugglers from Abusing Canada's Immigration System Act* was introduced to the House of Commons on 21 October 2010 (the 39th Parliament) and reintroduced to the first session of the 40th Parliament. The Bill received widespread criticism by opposition parties and refugee, human rights and civil rights groups. Although immigration detention is not new in Canada, its use has been on the rise since the 1990s and intensified after 9/11, particularly with the codification of detention in the 2001 *Immigration Refugee Protection Act (IRPA)* replacing *the 1976 Immigration Act*.[51] As Pratt notes, "the *IRPA* and regulations have substantially expanded the detention powers of immigration officers and made identity-based detentions much more prominent."[52] Outlined in Division 6 Section 55 of the *IRPA*, permanent residents and foreign nationals can be arrested and detained if an officer has reasonable grounds to believe a person is "inadmissible," a "danger to the public," or "unlikely to appear for examination, an admissibility hearing or removal from Canada"; or if an officer is "not satisfied of the identity of the foreign national" or there is reason to do so for the completion of the examination process.[53] Thus the detention of irregular migrants under C-4 is not new. Yet the use of detention proposed under C-4 would break with even this expanded use of detention under the *IRPA* in ways that significantly contravene Canadian and international law.[54] One key area has to do with stipulations for review, which currently under

50 Bill C-4, *supra* n 7.

51 *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]; *Immigration Act*, SC 1976–77, c 52 s 1.

52 Pratt, *supra* n 3, notes that prior to the *IRPA*, *supra* n 51, while grounds for detention existed (for example in port of entry cases where a person failed to establish sufficiently his or her identity or where a person was deemed to be a member of an inadmissible class) according to the 1998 *IRP Guidelines on Detention* these circumstances were not widely used (at 30–31).

53 *IRPA, supra* n 51 at Division 6, s 55, Articles 1–4.

54 For an excellent overview of this see Canadian Council for Refugees (CCR), "Bill C-4—Comments on a bill that punishes refugees" (11 November 2011), online: <http://ccrweb.ca/files/c-4-brief.pdf> [CCR].

the *IRPA* must take place within 48 hours of the detention, with a subsequent hearing occurring within 7 days of the first review and further hearings once every 30 days during the duration of a person's detention. Under C-4, irregular migrants and refugees (including children) could be mandatorily detained without review of their detention for up to 12 months. As the Canadian Bar Association (CBA) points out, "denying detention reviews for 12 months breaches Charter protections against arbitrary detention and right to prompt review of detention."[55] As noted earlier, the Supreme Court in its ruling in *Charkaoui v Canada* deemed arbitrary detention without review unconstitutional because it violated Section 9 of the *Charter*, which stipulates that "Everyone has the right not to be arbitrarily detained or imprisoned," and contravenes the *IRPA,* which mandates reviews after 48 hours.[56]

In addition, C-4 proposes to expand the use of detention from the *IRPA* in two significant ways that would contravene international law. As James Hathaway notes, "refugees are entitled to an expanding array of rights as their relationship with the asylum state deepens."[57] At minimum, as a basic first order of rights, this includes a prohibition against returning a refugee to a place where they risk being persecuted (i.e. Article 33 on *non-refoulement*).[58] However, an expanded set of rights applies when refugees are simply "physically present" in a state's territory regardless of how they arrive. These include "rights to receive identity papers, to freedom from penalization for illegal entry, and to be subject to only necessary and justifiable constraints on freedom of movement."[59] For example, Article 31 of the *Refugee Convention* stipulates that countries "shall not impose penalties, on account of their illegal entry or presence" and "shall not apply to the movements of such refugees restrictions other than those which are necessary."[60] Through the imposition of detention on asylum seekers, Bill C-4 could be said to be in violation

55 Canadian Bar Association, Press Release, "CBA says Bill C-49 denies rights of refugee claimants" (1 December 2010) online: <www.cba.org/CBA/news/2010_Releases/2010–12–01-HumanSmuggling.aspx>.

56 *Charkaoui*, *supra* n 21.

57 James C Hathaway, *The Rights of Refugees Under International Law* (Cambridge & New York: Cambridge University Press, 2005) at 156 [Hathaway].

58 *Ibid* at 160.

59 *Ibid* at 171. However, Hathaway qualifies this by noting that "Art. 31 does not prohibit the imposition of immigration penalties on all refugees. Because of the drafters' instrumentalist orientation, protection against penalization for illegal entry or presence is only granted to those refugees who take affirmative steps to make themselves known to officials of the asylum country, who do so within a reasonable period of time, and who satisfy authorities that their breach of immigration laws was necessitated by their search for protection. If any of these three requirements is not met, there is no exemption from forms of penalization that fall short of *refoulement*" (at 388–389).

60 *Refugee Convention*, *supra* n 31.

of Article 31. Unlike the *IRPA,* which recognizes that protected individuals such as Convention refugees or refugee claimants should not be detained, Bill C-4 in contrast mandates detention for this group if they arrive by boat, thus unnecessarily penalizing refugees precisely because of their illegal entry. Additionally, detention mandated under Bill C-4 includes that of children arriving by boat, thus contravening the *Convention on the Rights of the Child*, which states that governments must take into consideration the best interest of the child in making decisions.[61] Furthermore, Bill C-4 would prevent refugees from applying for permanent residence for up to five years. During this time refugees would not be allowed to travel outside Canada or to sponsor family members. This, too, violates refugee rights to receive identity papers that would enable their rights to movement. Article 28 of the *Refugee Convention* stipulates that states "shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require."[62] In other words, the proposed legislation would in effect create two classes of refugees with differential rights awarded to them simply based on the fact of how they arrive to Canada. As the Canadian Council for Refugees (CCR) argues, the Bill is discriminatory because it "creates two classes of refugees, with one class (those 'designated' based on mode of arrival) treated worse than the other. This is discriminatory and contrary to the Charter, which guarantees equality before the law (section 15)."[63]

Finally, legal scholars have argued that the Bill is inherently problematic because it is ineffective in targeting smugglers and has a cumulative effect of punishing refugees.[64] As Louis-Philippe Jannard and François Crépeau have

61 CCR, *supra* n 54 at 2. The *IRPA*, s. 60 *supra* n 51, significantly recognizes that detention for children must only be used as a last resort and the Convention on the Rights of the Child, Art. 37 states: "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time." Convention on the Rights of the Child, Resolution 44/25 20 Nov 1989, (entered into force 2 September 1990, in accordance with article 49), online: < http://www2.ohchr.org/english/law/crc.htm>.

62 *Refugee Convention*, *supra* n 31 at Article 28 ("Travel Documents"). This is noted in CCR, *supra* n 54 at 2.4.

63 Canadian Council for Refugees, "Bill C-49 Key Concerns" (27 October 2010) online: <ccrweb.ca/en/c49-key-concerns>.

64 See e.g. Canadian Council for Refugees, "Government bill punishes refugees" (21 October 2010) online: <ccrweb.ca/en/bulletin/10/10/21>. See also Canadian Council for Refugees, "Rights advocates decry detention of refugee claimants from MV Sun Sea" (10 February 2011) online: <ccrweb.ca/en/bulletin/11/02/10)> [CCR II]; Louis-Philippe Jannard & François Crépeau, "The Battle Against Migrant Trafficking in Canada: Is the Target Organized Crime or Irregular Immigration?" (2010) 7 Our Diverse Cities, online: Metropolis <canada.metropolis.net/pdfs/ODC_vol7_spring2010_e.pdf> [Jannard & Crépeau].

argued, trafficking in migrants to Canada is already an offence under the *Immigration and Refugee Protection Act* (SC 2001, c 27) and carries a maximum sentence of life in prison for trafficking 10 or more people and a sentence of up to 10 years in prison for trafficking fewer than 10 people.[65] When compared with similar anti-trafficking legislation in France, Britain, the United States and Australia, these sentences are considerably harsher and more punitive.[66]

If Canada already has such legislation, the question that arises is, what does the new legislation propose to do differently? Critics argue that this is precisely what is at stake since the difference in the new legislation is that the focus of its policy is on the refugees themselves. The anti-smuggling legislation, in other words, is less about "getting tough" on traffickers than it is about expanding government powers of detention with the aim of using detention as a deterrent to would-be asylum seekers and irregular migrants who dare to arrive "unauthorized" by boat. One of the main concerns of refugee rights advocates over the handling of Sri Lankan refugees arriving on the *MV Sun Sea* was the desire on the part of the Canadian government to detain the refugees. As Gloria Nafziger of Amnesty International, Canada, noted,

> Liberty is a fundamental right. It can only be restricted only when absolutely necessary and for as short a period of time as possible. Any such restrictions should be in keeping with clear legal standards. And everything possible should be done to avoid locking up children. The government's approach to the detention of the Sun Sea passengers runs counter to these fundamental human rights principles.[67]

The Bill thus departs significantly from both Canadian law (the *IRPA* for example) and from international law by introducing detention as the preferred response to so-called "boat arrivals" and thus punishing asylum seekers for their method of arrival.

Thus, while C-4 does not introduce detention, it does broaden the parameters of how, when, and towards whom detention may be used. Insofar as detention is associated with criminality in the public imagination, the greater deployment of detention in dealing with irregular migration can have a productive effect of blurring categories of migrant legality and illegality such as between the asylum claimant/refugee and "illegal" smuggled/trafficked migrant. This blurring of subjectivities can be seen, for example, during the arrival and processing of *MV Sun Sea* migrants, in the widely repeated misnomer

65 Jannard & Crépeau, *ibid* at 118.
66 *Ibid* at 119.
67 CCR II, *supra* n 64.

that they were "queue jumpers." As refugee rights organizations repeatedly pointed out, this claim is factually incorrect despite its seeming persistence in public discourse and the media as "there is no queue for refugees."[68] Thus, Bill C-4 introduces detention as a means of managing irregular migration but in ways that unmake the public perception of the refugee as a legitimate and legal political subject with a right to have rights, while at the same time also circumventing existing Canadian and international refugee rights.

However, while Bill C-4 has been criticized as just noted, it is also not without its advocates. Right-wing Canadian think tanks, former Canadian diplomats (such as James Bissett and former High Commissioner to Sri Lanka Martin Collacott), and media reports[69] have advocated for a broader application of detention as an overall approach to "managing migration." Within these circles, there have been calls for Canada to follow European and Australian models of border control that increasingly promote externalizing migration and asylum policy, often by using detention as a deterrent or by creating what Sandro Mezzadra and Brett Nielsen call "paths of expulsion" that force migrants back along the paths by which they came.[70] As former Canadian diplomat and member of the newly formed Centre for Immigration Policy Reform, James Bissett, put it: "There is one solution to smuggling. That's to send them back. If you send one boat back you won't get another."[71] Bissett advocates keeping refugees in detention until a ruling is made on their claims.[72] In a 2010 report written by the Frontier Centre for Public Policy, Bissett calls for reform to Canadian border and migration control and provides European and Australian approaches as models that Canada should follow.[73] Included in the European model are the use of readmission agreements to take back supposedly rejected asylum seekers along with safe third country measures, effective tracking entry and exit systems, and the harmonization of EU asylum policy through the *Schengen Agreement* (1985) and later *Treaty*

68 CCR, *supra* n 54.

69 See e.g. Kevin Libin, "What Australia can teach us about the Tamil asylum seekers," *National Post* (12 August 2010); Martin Collacott, CBC Radio 1, "The Current" (20 August 2010); Canadian Press, "Canada looks to Aussie experience in crackdown on asylum-seekers," *Globe & Mail* (17 September 2010) online: <www.theglobeandmail.com/news/politics/canada-looks-to-aussie-experience-in-crackdown-on-asylum-seekers/article1711058/> ["Canada looks to Aussie experience"].

70 Sandro Mezzadra & Brett Nielsen, "Né qui, né altrove—Migration, Detention, Desertion: A Dialogue" (2003) 2:1 Borderlands eJournal at para 8, online: <http://www.borderlands.net.au/>.

71 Quoted in Norma Greenway, "Send get-tough message on human smuggling: new immigration group," *Montreal Gazette* (28 September 2010) online: <http//: allvoices.com/news/6877374-send-gettough-message-on-human-smuggling-new-immigration-group>.

72 *Ibid*.

73 Bissett, *supra* n 36. See also "Canada looks to Aussie experience," *supra* n 69.

of Amsterdam (1997) and the *Dublin Convention 1990,* later replaced by the *Dublin Regulation* (2003).[74] The core rationale behind many of these measures, however, seems to be a concern with the fact that refugees make claims once they have arrived in another country and that, through the process of claims-making as a refugee, they find access and entitlement to settlement and services. As Bissett explains:

> The third simple truth is to recognize that the key to the problem of asylum seekers in that under all current systems the asylum decision about whether the claimant complies with the UN Convention definition of 'refugee' can only be taken after the claimant has entered the territory of the country concerned. However, by then it is too late. This is the heart of the matter, and until it is addressed, it is unlikely that asylum flows will be managed, because the aim of the vast majority of asylum seekers is not protection but access to a Western country.[75]

Given this "simple truth," Bissett advocates following the Australian approach of "adjudicating claims offshore."[76] While admitting this proposal is controversial, Bissett justifies this approach with the argument that "the establishment of asylum centres outside the territory of the receiving state is not in violation of the UN Refugee Convention. The core obligation of the Convention is to not return refugees to the countries where they might face persecution. It says nothing about where the claim is heard."[77] However, Bissett does acknowledge that such direction in policy reform may violate Section 7 of the *Canadian Charter of Rights and Freedoms*.[78] Therefore, reform of the *Charter*,

74 Dublin Regulation (Regulation 2003/343/CE), *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*. online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R0343:EN:NOT>; Dublin Convention (97/C 254/01), *Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention* (97/C 254/01) OJ C 254, 19.8.1997, online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41997A0819(01):EN:NOT>; *Schengen Agreement* (1985), *The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders* Official Journal L 239 , 22/09/2000 P. 0019 – 0062 online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922(02):en:HTML>; *Treaty of Amsterdam* (1997), *Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts*, Official Journal C 340, 10 November 1997. online:<*http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html*>.

75 Bissett, *supra* n 36 at 11.

76 *Ibid* at 12.

77 *Ibid*.

78 Section 7 of the *Charter*, *supra* n 35, states, «Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

he argues, might also be necessary if "because of its wording the Charter itself endangers the 'life, liberty and security of Canadians' if it means that as Canadians, we cannot control our borders."[79] Given that both the proposed new legislation and policy advocates on the right are pushing for a more punitive approach using detention and justifying this by looking to European and Australian practices, it is important to examine the role that detention has played in European and Australian approaches in more detail.

B. A European Approach: Externalization, "Friendship Pacts" and Detention

The European approach to managing migration can be characterized as one of "externalizing" migration and asylum policy, which has been set out at the EU level in several of the European Council conclusions.[80] This approach involves co-operating with third countries or transit countries in co-ordinating migration and asylum policy. As Christina Boswell notes, this "external dimension" of EU policy is a two-pronged approach.[81] First, it involves the "externalization" of "traditional tools of domestic or EU migration control," which includes such elements as strengthening co-operation between transit and sending countries around border control to tackle illegal entry, migrant smuggling and trafficking and the issue of readmitting migrants who cross illegally into the EU through readmission and safe third country agreements.[82] This "external dimension" or "externalization" of border control includes the growing use of detention, deportation and readmission agreements. This trend is accompanied by the increased interception at sea of boats carrying asylum seekers by national sea patrols as well as by FRONTEX, Europe's authority responsible for integrated border security management. Second, this approach involves measures aimed at preventing people from moving in the first place, including development aid and foreign policy to deal with root causes of migration to provisions facilitating "access to protection nearer their countries of origin."[83] This "externalization" has resulted in the increasing reliance on detention centres to stop flows of migrants to EU countries located on the

79 Bissett, *supra* n 36 at 12.

80 EC, *Presidency conclusions SN 200/99*, Tampere (15–16 October 1999); EC, *Presidency conclusions SN 300/1/01*, Laeken (14–15 December 2001) REV 1; EC, *Presidency conclusions SN 200/1/02*, Seville, (21–22 June 2002) REV 1.

81 Boswell, *supra* n 6 at 619–638.

82 *Ibid* at 619.

83 *Ibid* at 620.

external borders of the EU, such as those found in the Spanish territories of Ceuta and Melilla in Morocco or at Edirne in Turkey.[84]

The external dimension that has the effect of pushing back migrants along the paths from which they came is also complimented by EU policy, which pushes migrants back to be processed for asylum in the "first country of asylum" or possibly a "safe third country." The *Dublin Regulation*, which came into effect in 2003 (replacing the 1997 *Dublin Convention*), requires that asylum seekers be processed in the first country they pass though in order to deter multiple asylum claims.[85] This means that countries on the external borders of the EU, such as Greece, Italy and Spain, are expected to bear the brunt of responsibility for a disproportionate share of asylum seekers (both those who have crossed into these countries as well as those who are sent back from other EU countries such as France). This results in heightened tensions at certain border points such as along the Turkish-Greek border, with talk of plans to build an eight-mile-long new security fence at the north-eastern border in the Orestiada area where, according to FRONTEX, an average of 245 people per day cross illegally.[86] In fact, however, rather than hold asylum seekers for processing, Greek border officials often prefer not to process asylum claimants, choosing instead to follow a policy of "unofficial deportation," a politics of "push-back" at border points such as the Greek islands of Samos, Lesbos, Chios and to Edirne in the Evros River region on the Turkish-Greek border. This can amount to an approach that contravenes the principle of *non-refoulement* enshrined in article 33(l) of the 1951 *Refugee Convention* in cases where asylum seekers are placed at risk of death or drowning, for example by being forced back along water routes to Turkey, or in cases where an asylum seeker is at risk of deportation from Turkey to an unsafe country.[87] As well, asylum

84 For an excellent discussion on this see Claire Rodier, "The Migreurope Network and Europe's Foreigners' Camps" in Michel Feher, ed, *Nongovernmental Politics* (Cambridge, MA: Zone Books, MIT Press, 2007) 446.

85 EC, *Commission Regulation (EC) 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, [2003] online: EUR-Lex 32003R0343 <eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R0343:en:NOT>. See also Jean-Pierre Cassarino, "Informalising Readmission Agreements in the EU Neighborhood" (2007) 42:2 The International Spectator 179.

86 BBC News, "Greece plans Turkey border fence to tackle migration," *BBC News* (4 January 2011) online: <http://www.bbc.co.uk/news/world-europe-12109595>.

87 Pro-Asyl, *The truth may be bitter but it must be told: The Situation of Refugees in the Aegean and the Practices of the Greek Coast Guard* (Frankfurt, Germany: Pro-Asyl, 2007), online: <www.proasyl.de/en/pro-asyl/about-us/index.html>; Migreurop, *European borders—Controls, detention and deportations* (Paris: Migreurop, 2010), online: <http://migrantsatsea.wordpress.com/2010/11/21/migreurop-report-european-borders-controls-detention-and-deportations/> [Migreurop]. This view

seekers held in detention in the Edirne Turkish *misafirhane* or "guesthouse" may have limited access to a UNHCR representative through which to make claims to refugee status.[88]

In addition to less formal means of "pushing-back" migrants through unofficial deportation, European countries have found more formal ways to do this as well through the signing of readmission agreements and "friendship pacts." Readmission agreements between European countries ensuring co-operation over the return of irregular migrants to countries of origin or transit enable a form of "subcontracting" of detention and policing to bordering third countries. Readmission agreements have also been signed with some eleven third countries, including Morocco, Sri Lanka, Russia, Pakistan, Ukraine, Algeria, Albania, Turkey and China.[89] In addition, individual countries have signed their own bilateral readmissions agreement such as those signed between Italy and Libya.[90] "Friendship pacts," such as those signed between Italy and Libya in 2008 and between Morocco and Spain in 2003 are agreements to co-operate on border security, including around issues of migration, often in exchange for development aid. In the case of Morocco and Spain, for example, the Moroccan government agreed to assist in migration control in exchange for $390 million in aid.[91] Since 1992, Morocco has agreed to readmit any migrants crossing irregularly into Spain. With the externalization of EU migration and asylum policy, Morocco has experienced increased pressure to halt the flow of migrants crossing into Spain. In response, the Spanish enclave of Ceuta was fortified with high security fences and security patrols. In 2005, several sub-Saharan migrants tried to cross the barriers and were shot by Spanish and Moroccan security forces, leading to thirteen deaths and the

is also based on discussions with a member of the Istanbul Helsinki Citizens' Assembly (HCA) and with legal representatives and the Director of the Edirne *misafirhane* in the Spring of 2008 in Edirne, Turkey ["Discussions in Edirne, Turkey, 2008"].

88 *Ibid*.

89 Europa, Press Release, MEMO/05/351, "Readmission Agreements" (5 October 2005) online: <europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/351&format=HTML&aged=1&language=EN&guiLanguage=en>.

90 Rutvica Andrijasevic, "From Exception to Excess: Detention and Deportations across the Mediterranean Space" in N De Genova & N Peutz, eds, *The Deportation Regime: Sovereignty, Space and the Freedom of Movement* (Durham & London: Duke University Press, 2010) 147 [Andrijasevic].

91 Behzad Yahmaian, "Why Europe Fears the North African Uprisings," *Sabbah Report* (25 February 2011) online: <sabbah.biz/mt/archives/2011/02/25/the-spectre-of-a-black-europe/> [Yahmaian]. See also Amnesty International, *Spain and Morocco: Failure to protect the rights of migrants– Ceuta and Melilla one year on* (AI Index EUR41/009/2006) at 1–22, online: <www.amnesty.org/en/library/info/EUR41/009/2006>.

subsequent roundup and deportation of other sub-Saharan migrants in parts of Morocco.[92]

In another example, in 2003–2004 Italy signed a readmission agreement with Libya in which Libya agreed to accept irregular migrants from Italy in exchange for funding assistance from Italy for the construction of three detention centres in Libya and border-guard training. Italy's approach of detention and deportation drew mass criticism when between October 2004 and March 2005 some 1,500 migrants were returned from Lampedusa to Libya (some 1,153 of these deported between 1–7 October 2004 alone), where they were held in Libyan detention centres that were inaccessible to human rights organizations and even the UNHCR.[93] According to a European Parliamentary delegation sent to investigate the situation at Lampedusa, many of those seeking refuge status were never able to access and make formal claims to refugee status while in detention at Lampedusa. It is therefore likely that included among those deported to Libya in these mass deportations were bona fide refugees.[94] Here, detention prevented asylum seekers from making claims to refugee status, with the specific rights that his political subjectivity might entail in contrast to that of an irregular migrant. The position of these asylum seekers, moreover, was made more precarious by their being sent to Libya, which is not a *Convention* signatory and has no asylum system.[95] As Brigadier General Mohamed Bashir Al Shabbani, director of the Office of Immigration at the General People's Committee for Public Security in Libya at that time told Human Rights Watch, "There are no refugees in Libya. (. . .) They are people who sneak into the country illegally and they cannot be described as refugees."[96] Investigating the situation of asylum claimants returned to Libya, Human Rights Watch's 2009 report notes regular incidents of migrants who were beaten when in detention as well as other serious violations of trafficking in migrants and attempted shootings of migrants by border police in Libya, all of which illustrate the unfit nature of Libya as a safe place to which to deport asylum seekers prior to the more recent upheaval.

92 Migreurop, *supra* n 87 at 7.

93 Andrijasevic, *supra* n 90 at 154.

94 *Ibid* at 150.

95 *Ibid*.

96 Human Rights Watch, *Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers* (New York: Human Rights Watch 2009) at 10, online: <www.hrw.org/en/reports/2009/09/21/pushed-back-pushed-around-0> [Human Rights Watch I].

This example illustrates how the Italian government used detention as a way of circumventing its commitments to the 1951 *Refugee Convention* and the principle of *non-refoulement*. The Italian government denied many of the allegations of the investigation, particularly the charge of breaching the principle of *non-refoulement*, arguing that the migrants were mostly economic migrants and not refugees.[97] Nevertheless, on 30 August 2008, Italy furthered its externalization of border control by signing *The Treaty of Friendship, Partnership and Cooperation between the Italian Republic and Great Socialist People's Libyan Arab Jamahiriya* (the "*Friendship Pact*").[98] This agreement called for "intensifying" co-operation in "fighting terrorism, organized crime, drug trafficking and illegal immigration."[99] Italy and Libya agreed "to strengthen the border control system for Libyan land borders (50 percent funded by Italy with funding for the other 50 percent to be sought from the EU), and to use Italian companies in this endeavor."[100] As part of this agreement the Libyan leader, Muammar Gaddafi, also "agreed to keep African migrants from leaving its frontiers for Italy, and readmit to Libya those intercepted in international waters. The price tag for this service was $5 billion Italian investment, and six patrol boats to police the waterways between Africa and Europe."[101]

In other words, the approach taken by EU countries such as Italy, Greece and Spain of resorting to policies of externalization to push migrants back along the routes by which they have travelled is extremely dangerous for the migrants themselves, putting their lives at risk, and making it difficult at times for migrants to make claims to the legal rights that should be theirs, principally the right to claim protection as a refugee. In the cases discussed of Morocco/Spain, Turkey/Greece and Italy/Libya, detention can make it more difficult for asylum seekers to access the refugee system in cases where detention either limits access to lawyers or UNHCR representatives or is used to expedite mass deportations, in which all migrants are treated as "illegal," including bona fide refugees who get swept up in the mass deportation. In these cases, detention effectively blurs the categories of migrant legality and

97 Ibid.

98 *The Treaty of Friendship, Partnership and Cooperation between the Italian Republic and Great Socialist People's Libyan Arab Jamahiriya* (the "*Friendship Pact*") 30 August 2008. See Human Rights Watch I, *ibid* at 7 and *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.* Official Journal L 304 , 30/09/2004 P. 0012 – 0023. Online <http://eur-lex.europa.eu/LexUriServ/ LexUriServ.do?uri=CELEX:32004L0083:EN:HTML>(accessed 11 February 2012).

99 Human Rights Watch I, *ibid* at 7.

100 *Ibid*.

101 Yahmaian, *supra* n 91.

illegality, thus leading to the wrongful deportation of individuals who may be refugees but who have not had the opportunity to make claims or who have made claims but are deported nevertheless. Insofar as refugees are deported to countries like Libya, where they may experience abuse, trafficking or further deportation to unsafe third countries, their rights to *non-refoulement* are violated. The European model, therefore, is ultimately a problematic model to suggest as one that Canada should follow.

C. An Australian Approach: Interception, Offshore Processing, and the "Pacific Solution"

The other approach that advocates have suggested Canada follow is that of Australia's approach of interception and offshore processing, an approach whose logic bears striking similarity to the European one just discussed. As the earlier quotation by former Canadian diplomat and current Fraser Institute fellow Martin Collacott illustrates, there is a push by Collacott, Bissett and others for Canada to follow the Australian model of offshore processing as a way of preventing asylum seekers from access and temporary settlement on Canadian territory and, through settlement, access to rights and services. Canadian Immigration Minister Jason Kenney has also expressed interest in learning from the Australian model.[102]

Unlike Canada, Australia has for some time had a policy of automatically detaining asylum seekers and others who lack proper documentation. The 1958 *Migration Act* in Australia states that any person who is not an Australian citizen and does not have a visa, is an "unlawful non-citizen" and is to be removed from Australian territory.[103] This policy was extended in 1992 through the *Migration Amendment Act*, which mandated the detention of all unlawful non-citizens.[104] Like Canada, Australia has also been the recipient of several boat arrivals of asylum seekers in recent years, including in 2009 and 2010 those of Sri Lankan origin, including those on the *MV Oceanic Viking*. Moreover, as in the Canadian case, in Australia, asylum seekers arriving by boat can animate the public's imagination in ways that can generate people's commonly held anxieties of the "unfamiliar." As Anne McNevin explains:

102 "Canada looks to Aussie experience," *supra* n 69.

103 Rygiel, *supra* n 14 at 85.

104 Janet Phillips & Adrienne Millbank, Commonwealth (Austl), *The detention and removal of asylum seekers*, E-Brief, (5 July 2005) online: <http://www.aph.gov.au/library/INTGUIDE/SP/asylum_seekers.htm>. Also noted in Rygiel, *supra* n 14 at 84.

> Boat arrivals have captured the public imagination and have come to stand for asylum seekers in general, most of whom arrive by plane. The symbolism of boat arrivals taps into deep-seated (perhaps universal) anxieties about encounters with the unknown. The boats prompt legitimate questions: how did these people get here? Where have they come from? Why are they on the move? And what legal, moral and ethical response does their arrival require?[105]

Australia's controversial response to this anxiety has been a punitive one based on interception of boats and offshore processing of asylum claimants, widely known as the "Pacific Solution." In 2006, under the leadership of Prime Minister Howard, the Australian government passed a law mandating that all asylum claimants arriving to Australia by ship (regardless of where the boat lands) should have their claims for asylum assessed and processed at an offshore location.[106] This was a further extension of a policy direction in which the Australian government had created "excised offshore places" and "offshore processing centers" to assist in its approach to managing migration. The government in 2001 passed laws to create "excised offshore places," essentially enabling Australian government authorities to remove certain parts of Australian territory from Australia's "migration zone," including Christmas Island and the Cocos (Keeling) Islands in the Indian Ocean; Ashmore and Cartier Island in the Timor Sea; and any Australian sea installation or offshore resource installation (e.g. an oil rig).[107] This meant that anyone arriving without a visa to any of these places would not be eligible to apply for a refugee protection visa unless the Minister of Immigration personally granted it.[108] This approach was designed to make it difficult for migrants to access Australian territory and thereby to be able to make claims to refugee status. As part of this approach, the Australian government regularly intercepts boat arrivals, with one of the most infamous cases being the *MV Tampa*, which was prevented from landing on Australia's mainland in 2001.[109] Its 433 passengers (many of them Afghan refugees) were sent to offshore processing camps set up on Papua New Guinea's Manus Island and the Pacific island of Nauru, where they remained in detention camps for several years.[110] The use of these

105 Anne McNevin, "Beyond border control: rethinking asylum and refugee protection in Australia and the region" (2010) 8 Local-Global 4.

106 Rod McGuirk, "Australia to Send Asylum Seekers to Camps," *The Guardian* (13 April 2006).

107 Department of Immigration and Citizenship, "Fact Sheet 81—Australia's Excised Offshore Places," Australian Government (30 January 2007) online: <http://www.immi.gov.au/media/fact-sheets/81excised-offshore.htm>.

108 *Ibid*.

109 For an excellent overview of this policy see Heather Johnson, "Intercepting boat arrivals: What the Australian policy model means for Canadian asylum policy" (2010) Canada-Asia Agenda 15 at 1–6 [Johnson].

110 BBC News, "Australia's offshore camps are 'hellish'" (6 December 2001) online: <news.bbc.

"offshore processing centers" to process asylum claimants, which came to be known as the "Pacific Solution," generated much controversy. Asylum seekers were turned away from Australian territory to "declared countries," such as Nauru and Papua New Guinea (Manus island), countries or islands with which the Australian government had made arrangements (often in exchange for money) to establish processing centres and process the claims of "unauthorized people" on its behalf.[111] This policy essentially amounted to the "subcontracting of detention to poorer neighboring states,"[112] with figures suggesting that as many as 1,800 asylum seekers had been transferred to these islands.[113] In the Australian case, detention acted as an alternative system to that of the international refugee system through which the care and protection of refugees was no longer implemented on Australian territory and was therefore no longer the primary responsibility of the Australian government. The "Pacific Solution" ended with the election of the Labor Party's Prime Minister Kevin Rudd in 2008. However, with the increasing arrivals of boats to Australia in 2009 and 2010, the desire to intercept and turn boats away to Indonesia for processing has intensified with the newly appointed Prime Minister, Julia Gillard, suggesting she will reintroduce some aspects of the former "Pacific Solution" policy. A High Court decision ruled against deporting two asylum seekers to Malaysia in August 2011, which would have seen a revival of a version of the "Pacific Solution."[114]

Thus, the Australian model, briefly outlined here, suggests a desire on the part of certain western governments to govern mobility, particularly that of irregular migrants and refugees, by using detention. Offshore processing of refugees represents a "creative" alternative through which Australian and European governments have renegotiated their responsibilities incurred through commitments as signatories to the *UN Convention on Refugees*. In both the Australian and European cases, detention arrangements have en-

co.uk/1/hi/world/asia-pacific/1695930.stm> [BBC News].

111 In August 2001, the Australian government paid ten million dollars to Nauru to house refused and unlawfully arrived asylum seekers in makeshift camps, making similar deals with Papua New Guinea, Kiribati and in November 2001, with Tuvalu. See BBC News, *ibid*.

112 Human Rights Watch, *Not For Export: Why the International Community Should Reject Australia's Refugee Policies*: *A Human Rights Watch Briefing Paper* (New York: Human Rights Watch, 2002) at 1 [Human Rights Watch II].

113 Amnesty International, *Australia-Pacific: Offending human dignity—the 'Pacific Solution'* (AI Index ASA 12/009/2002) at 5 [*Australia-Pacific*]. Also noted in Rygiel, *supra* n 14 at 86.

114 Johnson, *supra* n 109 at 5. See also Martin Mulligan, "Addressing 'forced migration' from Sri Lanka at its source: assessing the 'retreat' of the Rudd and Gillard governments" (2010) Local-Global 8 at 17. On the ruling of the High Court of Australia, see *Plaintiff M70/2011 v Minister for Immigration and Citizenship*, [2011] HCA 32, online: <http://www.hcourt.gov.au/assets/publications/judgment-summaries/2011/hca32–2011–08–31.pdf>.

abled an alternative system for addressing asylum seekers and their claims to mobility that potentially weakens the refugee system and migrants' ability to make claims to refugee subjectivity as well as to the rights that materialize through being recognized as a refugee. In the case of offshore processing centres, the centres were located on islands, in isolated camps surrounded by high fencing and patrolled by private security, an arrangement designed to complicate access to legal council and family visits.[115] By placing asylum seekers in detention centres and camps on islands at a distance from proper access to Australia's legal system and their legal rights, the ability of asylum seekers to make claims as refugees was made more difficult.[116]

More than simply a matter of states shirking their responsibilities, however, the point of such change in policy direction is directly related to a politics of citizenship. As I have argued elsewhere, "through such alternative forms of processing, the very category of the refugee as a political subject with a right to have rights, a category that then mobilizes the ability to make claims to a better life (for example to safety, housing, employment), including the right to become a future citizen, is undermined."[117] These arrangements prevent those who should have rights (or at least the right to make claims to rights) under international refugee law (such as the right to escape and to protection) from being able to access these rights immediately. In other words, sending asylum seekers to these more isolates spaces "is a strategy in restricting the ability of certain groups to engage and act as political beings with rights—rights that should be theirs by virtue of claiming refugee status or by having a presence upon which to engage in claims-making."[118] As the quotations by Bissett and Collacott suggest, this policy approach has everything to do with preventing asylum seekers from access and settlement and presence on territory from which they are able (despite lack of legal status) to enact themselves as if citizens by making claims to rights as political subjects (in this case refugees) with a right to have rights. Moreover, as Heather Johnson observes, "This shift towards an evasion of responsibility and an emphasis on control evident in Australia's policies is becoming more present in the Canadian discourse which views Australia as a policy model." Discourses of "fear, threat and the perceived need to 'stop' migrants present in Australia" has emerged in Canadian

115 *Australia-Pacific*, *supra* n 113.

116 *Ibid*, Human Rights Watch II, *supra* n 112.

117 Rygiel, *supra* n 14 at 165. The logic is also one of cost-saving measures that place the burden of the cost of support of refugees on other countries and agencies outside of European governments. See John Edwards, "Security, Asylum, Rights" (2005) 10:1–2 Rev Const Stud 82.

118 Rygiel, *ibid*.

public debate" as just some of the "emerging policy parallels."[119] As Johnson notes, this turn toward Australia for ideas around managing migration reveals an interest in developing its own means of "externalizing" the Canadian border, which it is pursuing through "an increasing partnership with Southeast Asian states in Canadian border security initiatives."[120] This is part of what the Canadian government now refers to as its "pushing-borders-out strategy," a strategy specifically designed to prevent groups of refugees and irregular migrants from arriving on Canadian territory.[121]

IV. Conclusion: Redressing the Balance of Security and Rights

This article has argued that rights to movement, particularly of irregular migrants and refugee claimants, enshrined in such international legal instruments as the 1951 *Refugee Convention*, are increasingly being circumvented as refugee and irregular migration is managed to a greater extent through detention and externalized border control as part of a larger politics of citizenship. Within Canada, recent boat arrivals of Sri Lankan refugees fleeing years of civil war have reinvigorated calls to adopt a "get tough" approach on asylum seekers and irregular migrants. This is manifest in proposed government legislation on smuggling as well as calls by lobbyists, media and policy advocates to look to other models such as found in Europe and Australia. However, as this article has illustrated, such approaches are highly controversial and problematic for the way they use detention as a technology of citizenship and as a tool of managing migration. The article has also argued that more than simply a means of shirking commitments to international refugee law, the principle effect of detention is one of changing statuses of would-be refugees and interrupting processes of citizenship-making. Placing asylum seekers in detention constructs this group as criminal-like, if not as potential criminals. Further, asylum seekers are hindered, if not prevented outright, from making claims to refugee status by being detained in isolated detention centres. This limits their ability to make contact with community groups, legal counsel and UNHCR assistance. Where detention is externalized to offshore processing locations, this process of interruption is only exacerbated. Asylum seekers find

119 Johnson, *supra* n 109.

120 *Ibid* at 6.

121 This logic can be seen to be at work for instance in policies such as the *US Canada Safe Third Country Agreement,* according to which refugees must make a claim to protection in the first country they enter. Given that a majority of refugee claimants arriving at land borders in Canada come from the USA, this has the effect of pushing migrants back to the USA as the first country in which they must make their asylum claim.

themselves in much more precarious positions when placed in countries such as Libya that breach fundamental refugee rights. Finally, the use of detention effectively institutes a system of managing refugee migration that potentially hinders refugee access to the established international refugee system and rights and protection that it affords.

However, as noted in the introduction, the concern here is not simply one of a loss of rights. The implications of this shift in governing may extend further than this. Robyn Lui's observations regarding the impetus behind the development of the international refugee regime reminds us that, at the core, the regime was constituted in response to the perceived need for ordering populations as much as out of ethical concerns for people's well-being. Insofar as this later aspect has developed, it has done so through the conscientious nurturing of a human rights regime. The fact that the international refugee system developed within the context of the international management of population, as much as it did out of humanitarian concerns, suggests that we need to take seriously alternative proposals for managing migration through greater reliance on detention and externalization of policy to third and transit countries as this can effect the processing of refugee claims, thus endangering the protection of refugees. It can also potentially weaken what are a fairly recently institutionalized set of refugee rights to movement. When debate in Canada calls for Canada to harmonize its policy to be in step with such problematic European and Australian models, we need to consider seriously what is at stake in using detention as a technology of citizenship as government. Scholarship has shown that such "getting-tough" approaches to migration have little effect in deterring desperate and resourceful people on the move in search of safety and better life opportunities. In fact, as border controls are made more restrictive, people are forced into more precarious and irregular forms of movement, which in turn strengthens the use of smuggling and trafficking networks, the very networks that governments claim they are targeting. Perhaps, then, what is at issue behind calls for more punitive approaches to border and migration control is less about the actual management of people on the move than it is about creating the spectacle of being in control. Here, the refugee becomes the "bogeyman" for the real issues, which are much harder to control. These are the growing global disparity of income distribution and inequality of rights and quality of life, issues which are the "bread and butter" of citizenship rights and struggles. Hence, we need to examine the management of rights to movement as part of an ongoing globalizing politics of citizenship.

Counter-Terrorism In and Outside Canada and In and Outside the *Anti-Terrorism Act*

Kent Roach*

Canadian counter-terrorism as practiced in the Anti-Terrorism Act (ATA) *has been more respectful of human rights than Canadian counter-terrorism as practiced outside the* ATA *and outside of Canada. Although the* ATA *was influenced by British law, its definition of terrorism, preventive arrest, investigative hearings and secrecy provisions are more restrained than those of some other democracies. The* ATA *demonstrates a commitment to legality and democratic debate. In contrast, counter-terrorism outside the* ATA *has involved indeterminate detention of non-citizens on the basis of secret evidence and with the threat of deportation to torture; listing of terrorists on the basis of secret evidence; and refusal by Canadian courts to require Canada to request Omar Khadr's repatriation or to restrain Canadian officials from transferring Afghan detainees to possible torture by Afghan officials. Despite the recommendations of the Arar and Air India public inquiries, Canada does not have adequate accountability structures to monitor and restrain informal and transnational counter-terrorism.*

Le contre-terrorisme canadien, tel qu'il est appliqué dans le cadre de la Loi antiterroriste, est plus respectueux des droits de la personne que le contre-terrorisme canadien tel qu'il est appliqué en dehors du cadre de cette loi. Bien que le droit britannique ait influencé la Loi antiterroriste, ses définitions du terrorisme, de l'arrestation préventive, des audiences d'investigation et des dispositions sur le secret sont plus restreintes que celles d'autres démocraties. La Loi antiterroriste fait preuve d'un engagement envers la légalité et le débat démocratique. En revanche, le contre-terrorisme hors du cadre de cette loi a entraîné la détention pour une période indéterminée de non-citoyens sur la base de preuves secrètes, la menace d'expulsion et de torture, l'établissement d'une liste de terroristes sur la base de preuves secrètes et le refus des tribunaux canadiens d'obliger le Canada à demander le rapatriement d'Omar Khadr ou d'empêcher les responsables canadiens de transférer les détenus afghans, qui risquent la torture par les responsables afghans. En dépit des recommandations des enquêtes publiques sur les affaires Maher Arar et Air India, le Canada n'a pas les structures de responsabilité adéquats pour surveiller et restreindre le contre-terrorisme officieux et international.

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Introduction

The 10th anniversary of 9/11 and the subsequent enactment of Canada's *Anti-Terrorism Act* (*ATA*)[1] provide a good opportunity to reflect on Canadian counter-terrorism from a comparative perspective. The dust has settled on the controversies that surrounded the enactment of the *ATA* and it has become apparent that while influenced by comparative and especially British law, the *ATA* is more restrained by human rights concerns than British or Australian law. Except for a few minor amendments, the *ATA* represented the end of criminal law reform to respond to terrorism, whereas there have been multiple new Acts in both the United Kingdom and Australia. At the same time, the formal law of the *ATA* has played a more minimal and a less problematic role in Canadian counter-terrorism than many expected compared to other forms of counter-terrorism outside the *ATA*.

Counter-terrorism outside the *ATA* has included the use of indeterminate administrative detention in the form of immigration law security certificates; judicially sanctioned possibilities of deportation of non-citizens and transfer of Afghan detainees to torture; the listing of terrorists without due process; and intelligence sharing that resulted in Canadian complicity in torture in the cases of Maher Arar and other Canadians detained outside of Canada. In hindsight, worries that the *ATA* went too far in emphasizing security over various rights when it was enacted can now be seen as a form of innocence that located counter-terrorism in the relatively ordered world of formal domestic law where Canada had considerable control over what happened.[2]

In the first part of this article, I will outline some of the major features of the *ATA* from a comparative perspective. Even as it was influenced by British anti-terrorism law, the *ATA* was significantly more restrained than British laws on the definition of terrorism and preventive arrests. Investigative hearings were controversial and were allowed to lapse in 2007, but they were more restrained than similar powers in the United States, Australia and the United Kingdom. The *ATA* featured some restrictions on freedom of expression, but they were relatively mild compared to those subsequently enacted in Australian and British law. The *ATA* stressed the state's interests in secrecy, but

1 S.C. 2001, c 41.

2 As noted by the Arar Commission, Canadian counter-terrorism, including information sharing, often has "a 'ripple effect' beyond Canada's borders with consequences that may not be controllable from within Canada." Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Public Works and Government Services Canada, 2006) at 431.

those provisions, like investigative hearings, have been upheld by the Supreme Court from constitutional challenge because they also provide protections for human rights.

The second part of this article will examine Canadian counter-terrorism outside of the *ATA* and Canada. These less formal and more transnational practices are more problematic than the *ATA* in prioritizing security interests over human rights, including the most basic human right against torture. They are also influenced by global pressures, including various international mandates to use immigration law as anti-terrorism law, to share intelligence and to compile lists of terrorists on the basis of secret evidence. To its credit, Canada conducted two extensive inquiries into Canadian complicity in torture. Nevertheless, it has failed to ensure permanent accountability structures for intelligence sharing, which will only increase under new perimeter security agreements with the United States. Canada has provided some domestic remedies for the intelligence gathering activities of its officials at Guantanamo and for domestic damage caused by the UN terrorist listing regime, but these domestic remedies cannot address the problematic nature of the underlying transnational regimes. Counter-terrorism outside the *ATA* and Canada has proven to be much more important and more invasive of human rights than the *ATA*.

The Formal Counter-Terrorism of the *ATA*

The enactment of the *ATA* attracted much critical attention at the time. The speed with which the *ATA* was enacted reflected not only the dramatic and frightening nature of 9/11, but the UN Security Council's enactment of a quasi-legislative Resolution 1373 that required states to ensure that terrorism and terrorism financing were serious crimes and required them to report to a new Counter-Terrorism Committee (CTC) within 90 days. The Security Council and its CTC did not concern itself with human rights in the first few years after 9/11,[3] so the concerns that human rights would be neglected in the *ATA* were not frivolous. Nevertheless, the *ATA* now appears rather benign compared to comparative law and other forms of counter-terrorism.

3 See generally Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (New York: Cambridge University Press, 2011) at c 2 for a critical examination of the counter-terrorism work of the UN Security Council and its Counter-Terrorism Committee [Roach].

The Definition of Terrorist Activities

The Security Council demanded that all nations treat terrorism and terrorism financing as serious crimes, but avoided the thorny issue of the definition of terrorism. The Council urged states to ratify the 1999 Financing Convention, but did not promote that Convention's restrained general definition of terrorism. In early 2002, however, the Supreme Court of Canada applied this definition, one that focused on violence against non-combatants, to an undefined definition of terrorism in Canadian immigration law.[4] By that time, however, Canada like many other countries had enacted much broader definitions of terrorism into its criminal law.

The definition of terrorist activities in the ATA was inspired by the very broad definition of terrorism in the UK's Terrorism Act, 2000.[5] Like other states influenced by the British definition, Canada did not simply copy the British legislation, but took a more restrained approach. For example, the Canadian law requires that terrorist actions be taken to compel governments to act and not simply to influence governments. The Canadian definition also provided that politically or religiously motivated serious property damage would only be considered terrorism if it was likely to endanger life, health or safety.[6] This helped reduce the risk of having protesters who destroyed property investigated and labelled as terrorists. Canada and subsequently Australia also provided exemptions for strikes and protests from the definition of terrorist activities even though such exemptions were absent in both American and British definitions.

At the same time, however, Canada broadened the British reference to disruption of electronic systems to include serious disruption of all public or private essential services. It also included attempts to compel persons, including corporations, to act and to intimidate the public with respect to its economic security.[7] These neo-liberal provisions reflected Canada's economic vulnerability to American thickening of the border. These concerns were dramatically underlined by the fact that a section of the *USA Patriot Act*[8] was entitled "Protecting the Northern Border" partly in response to erroneous, yet plausible, claims that some of the 9/11 hijackers had entered the United States from Canada.

4 *Suresh v Canada*, [2002] 1 SCR 3.
5 *Terrorism Act 2000 (U.K.),* c 11 ss 1.
6 *Criminal Code*, RSC 1985, c C 34 s 83.01(b) (ii) (D) [*Criminal Code*].
7 *Ibid* at s 83.01(b) (I)(B).
8 US, HR 3162, *USA Patriot Act*, 107th Cong, 2001 at Title 4 Subtitle A.

Canada borrowed a political or religious motive requirement from British law as a means to distinguish terrorism from other crimes. The motive requirement was, however, more much controversial in Canada than in the UK or Australia. Canadian concerns reflected multicultural sensitivities and concerns about targeting Muslims. Interestingly, similar concerns lead Singapore with its even larger 15% Muslim minority to simply delete this requirement.[9] Bill C-36 was amended to include a provision providing that the expression of political or religious opinion would not constitute a terrorist activity unless it did so.[10] The amendment may be legally meaningless, but it signalled some concern about criticisms that the *ATA* might be used to target Canada's growing and diverse Muslim population.

Even with this amendment, in the first case prosecuted under the *ATA* the political or religious motive requirement was struck down as an unnecessary burden that would chill free speech and affect freedom of religion. The Ontario Court of Appeal, however, reversed that decision in 2010 by concluding that terrorist activities were not protected by freedom of expression. The Court of Appeal blamed terrorists and "the temper of the times" rather than the law for "racial and cultural stereotypes" that equated "radical Islamists" with terrorism.[11] Even while it recognized the existence of such stereotypes, the Court of Appeal refused to hold the *ATA* responsible for them. As such, this case fits a pattern of the more objectionable forms of counter-terrorism being located outside of the *ATA*. The Supreme Court's decision to grant leave in this case suggests that Canadian controversies over the religious and political motive requirement may not be over. If the Supreme Court accepts that the *ATA* infringes fundamental freedoms of expression and religion by targeting non-violent attempts to convey meaning, it may be difficult to justify the political and religious motive requirement given that many other definitions, including the one used by the Court itself in *Suresh*,[12] do not use it.

Proscription and Related Offences

The emphasis on terrorism financing in Security Council Resolution 1373 made the proscription of groups and individuals associated with terrorism

9 Michael Hor, "Terrorism and the Criminal Law" (2002) Sing JLS 30.

10 *Criminal Code*, *supra* note 6, at s 83.01(1.1).

11 *R v Khawaja*, 2010 ONCA 862 at para 126, leave to appeal to SCC granted, 34103 (June 30, 2011). The Court of Appeal indicated that any acts of discriminatory profiling could be challenged apart from the *ATA*. On the difficulties and limits of such an executive-based approach, see Sujit Choudhry & Kent Roach, "Racial and Ethnic Profiling" (2003) 41 Osgoode Hall LJ 1.

12 [2002] 1 S.C.R. 3 at para 98.

inevitable. Terrorism financing laws rely on lists that can be distributed to financial institutions and others who enforce the law. Canada, however, did not follow the United Kingdom or Australia in criminalizing membership in a terrorist group. In this respect Canada is closer to the United States, where membership in a terrorist group is also not criminalized. Listing decisions can be subject to judicial review in Canada, but secret evidence can be used to defend the listing and there are no protections, as there are in UK law, to ensure that challengers are not charged simply for associating with a group challenging the listing.

Canada only listed the Tamil Tigers in 2006 and a Tamil-Canadian convicted in Canada's first purely terrorism financing prosecution received a 6-month sentence for providing $3000 to the Tamil Tigers during the civil war in Sri Lanka. Although controversial, the sentence was upheld on appeal. The sentence demonstrates some ambivalence about the seriousness of the financing offence given the circumstances in Sri Lanka at the time.[13] Some may criticize this approach as out of step with tougher terrorism sentences in the Toronto 18 and other terrorism cases, but the Australian courts have ordered non-custodial sentences for those who provided much larger funds to the Tamil Tigers.[14] Listing of terrorist groups accompanied with absolute prohibitions on even humanitarian aid to those listed groups is a common but blunt and simplistic counter-terrorism strategy.

The most problematic feature of proscription under the *ATA* is the definition of terrorist group which deems that all groups listed by Cabinet shall be considered to be terrorist groups for the purposes of criminal prosecutions. David Paciocco has made a strong argument that this provision violates the presumption of innocence by substituting a Cabinet decision made on the basis of secret evidence for proof beyond a reasonable doubt in a criminal trial.[15] This problematic provision has, however, not been used in the major Canadian terrorism prosecutions. Consistent with the evolution of al-Qaeda from a central organizing group into an ideology,[16] the Canadian terrorist groups have been ad hoc homegrown and transnational groups that are not formally linked with al-Qaeda or any other listed group. Proscription plays a significant role in many counter-terrorism laws enacted in response to Security Council Resolution 1373, but it may be an example of fighting the last war.

13 *R v Thambaithurai*, 2011 BCCA 137.

14 Roach, *supra* note 3, at 320–22.

15 David Paciocco, "Constitutional Casualties of September 11" (2002) 16 SCLR (2d) 199.

16 Marc Sageman, *Leaderless Jihad* (Philadelphia: University of Pennsylvania Press, 2008).

Terrorism Offences

The *ATA* provides a broad array of terrorist offences, but generally requires relatively high levels of subjective fault. It does not follow the example of British offences that sometimes provide for negligence or even no fault liability or that impose reverse onuses on the accused. It also does not follow Australian offences that provide for lesser forms of liability based on recklessness. The Canadian offences are broad, but do not go quite as far as British offences that apply to the possession of items and training that may only be peripherally linked to terrorism. The Canadian offences anticipated what in Australia became the "the/a" controversy that required rushed amendments to the law in 2005 that made it unnecessary for the prosecution to establish that the accused knew the specific nature of the terrorist activity.[17] Broad Canadian provisions that do not require the accused to know the specific nature of the planned terrorist activity have been upheld by the Ontario Court of Appeal as consistent with the *Charter* and the Supreme Court of Canada will soon hear an appeal on whether the participation offence is constitutionally overbroad.[18] The Court's performance on other *ATA* matters suggests that it may likely uphold the offences, but that it may also highlight or even read in some restrictions on them.

Speech Associated with Terrorism

The *ATA* foreshadowed some developments in the UK's *Terrorism Act, 2006*[19] by providing for the ability to remove speech from the internet. One important difference is that the *ATA* provision requires a prior judicial warrant whereas ss 3-4 of the UK's *Terrorism Act, 2006* allows individual constables to give notice that material said to encourage terrorism must be removed from the internet in two working days or it will be considered as having being endorsed by those who have received a notice requesting removal. [20] Another important difference is that the *ATA* provision only applies to hate propaganda, which had long been criminalized under the Criminal Code, whereas the British provision applies to speech that directly or indirectly advocates terrorism, in-

17 Australian legislation originally required that preparation would have to relate to "the" specific terrorist act, but the legislation was amended in 2005 so that the preparation only had to relate to "a" or any terrorist act. The Canadian legislation from the start applied to any terrorist activity and made clear that the accused need not know of the specific nature of the terrorist activity (see *Criminal Code*, *supra* note 6, at ss 83.18(2)(c) & 83.19(2)).

18 *United States v Nadarajah*, 2010 ONCA 859, leave to appeal to SCC granted, 34013 (February 15, 2011).

19 *Terrorism Act 2006 (U.K.)* c 11 ss 1-4.

20 *Criminal Code*, *supra* note 6, at s 320.1.

cluding glorifying past or present acts of terrorism in circumstances that can result in emulation of such acts. The move towards speech regulation raises concerns about terrorism being seen as a kind of thought crime and one that targets political or religious extremists.

Canada has not responded to Security Council Resolution 1624 or British responses to the London bombing by enacting new offences against the indirect advocacy or glorification of terrorism. Canada has also not followed Australia in modernizing treason and sedition offences to include support for terrorism groups despite the fact that Canadian troops, like Australian troops, were in combat in Afghanistan. On formal matters relating to speech, Canada has been closer to the American First Amendment tradition than to European concepts of militant democracy. It remains to be seen whether this will change under the majority Conservative government elected in 2011.

Investigative Hearings

One of the more controversial features of the *ATA* was investigative hearings that allow judicially authorized legal compulsion of those who have information relevant to terrorist investigations. The *ATA*, however, balanced compelled self-incrimination with broad restrictions on the subsequent use of compelled statements. In 2004, the Supreme Court upheld investigative hearings under the *Charter* while stressing the importance of this statutory use and derivative use immunity protection and extending it to subsequent extradition and immigration proceedings.[21]The Court also stressed the restraining role that counsel, the presiding judge and the media could play in investigative hearings and applied the open court presumption to investigative hearings to the dismay of dissenters who argued that this would obliterate any investigative advantage to using the hearings. The result is that investigative hearings have more due process and publicity than American grand jury proceedings or the very controversial Australian provisions that allow the Australian Security Intelligence Organization to require people to provide information.[22]

The Canadian investigative hearing provisions are silent on what will happen should a person refuse to co-operate at an investigative hearing. Nevertheless, the response may be less punitive than in the UK where a number of close relatives of terrorism suspects have been charged with the offence

21 *Re Section 83.28 of the Criminal Code*, [2004] 2 SCR 248; *Re Vancouver Sun*, [2004] 2 SCR 342.

22 Kent Roach, "A Comparison of American Grand Juries and Canadian Investigative Hearings" (2008) 30 Cardozo L Rev 1089; Kent Roach, "A Comparison of Australian and Canadian Anti-Terrorism Legislation" (2007) 30 UNSWLJ 53.

of refusing to provide authorities with information about terrorism. This offence originally was used in Northern Ireland and was abolished in the 2000 legislation, but was revived in the British response to 9/11.[23]

Preventive Arrests

Like investigative hearings, preventive arrests were a controversial feature of the *ATA* and were allowed to expire in 2007. Although there were no preventive arrests from 2001 to 2007, preventive arrests, like investigative hearings, will likely soon be re-enacted. Canadian preventive arrests were restrained compared to their British and Australian counterparts. Except in exigent circumstances, they required judicial pre-approval on the basis of reasonable grounds that a terrorist activity would be carried out and reasonable suspicion that an arrest or a peace bond was necessary to prevent the act of terrorism. In contrast, section 41 of the *Terrorism Act, 2000* allows police officers to arrest those they reasonably suspect to be terrorists and to hold them for 48 hours subject to judicial authorization of longer periods.

The maximum period of detention in Canada was 72 hours, whereas in the UK it was 7 days under the 2000 Act, a figure that was subsequently extended to 14 and then 28 days, and has recently returned to 14 days. The maximum period of detention became a symbolic issue with Prime Ministers Blair and Brown, who unsuccessfully attempted to increase the maximum period to 90 and 42 days respectively. Australia responded to the London bombings with preventive arrest provisions that allow a maximum of 14 days detention, albeit through combined federal and state legislation. The Canadian provisions are restrained by comparison.[24] If re-enacted, however, Canada should follow Australia and the UK and attempt to regulate the treatment of detainees during the period of preventive arrest. There is also merit in continuing sunset provisions and tying them to periodic legislative or executive watchdog reviews.

The Canadian preventive arrests regime has the potential to morph into a de facto control order regime because judges can impose peace bonds for up to one year on those subject to preventive arrest. There may, however, not be much Canadian appetite for such measures given that there has been no reported use of a regular peace bond provision for suspected terrorists that

23 Clive Walker, "Conscripting the Public In Terrorism Policing" (2010) Crim L Rev 441.

24 Craig Forcese, "Catch and Release: A Role for Preventive Detention without Charge in Canadian Anti-Terrorism Law" Choices July 2010.

was introduced in 2001 and was not subject to the 2007 sunset clause.[25] In any event, Canadian peace bonds would be imposed by judges, unlike non-derogating British control orders which are imposed by the executive and then reviewed under legislative provisions designed to inspire judicial deference.

Canada has accepted the application of the reasonable doubt standard to acquit those charged with the horrific Air India bombings.[26] In contrast, control orders have been imposed in the United Kingdom and Australia after accused persons have been acquitted or have had their terrorism convictions overturned.[27] Canadian authorities have so far avoided the temptation to use less restrained administrative measures or pretextual criminal charges in cases where they have not been able to establish terrorism charges.

Like the United States, Canada has no preventive arrest powers at present. The restraint of the formal American approach, however, can be exaggerated because material witness warrants for grand juries were abused in the aftermath of 9/11 as a de facto mechanism for preventive arrests. This follows a pattern of extra-legalism in which the harshest US responses to terrorism were not authorized by legislation, but were undertaken by the executive. American extra-legalism is also supplemented by a broad state secrets doctrine that has prevented those harmed by extra-legal conduct from obtaining compensation.

Extra-legalism begs the disturbing question of whether restraint in formal laws and powers will be counteracted by a lack of restraint and regulation in less formal powers. There are some examples of Canadian versions of extra-legalism, especially in the immediate aftermath of 9/11. The summary transfer of refugee applicant Benamar Benatta to American custody the day after 9/11, CSIS's transfer of Mohammed Jabarah to American custody in 2002, and the RCMP's wholesale transfer of unvetted and uncaveated investigative files that included information on Maher Arar and other Canadians subsequently detained and tortured in Syria are all unfortunate and troubling examples.

25 *Criminal Code*, *supra* note 6, at s 810.01.

26 *R v Malik*, 2005 BCSC 350 at paras 662, 1254 (affirming the reasonable doubt standard and the rule of law even in a horrific case involving the murder of 329 people). But see Colin Freeze, "Who's who in the SHU," News Story, *The Globe and Mail* (31 August 2011). Five men convicted in Canada of terrorism offences, including Momim Khawaja, Said Namouh and three men convicted in the Toronto terror plot are, however, being held together in isolation in a Special Handling Unit at St. Anne des Plaines, Quebec in an apparent attempt to prevent prison radicalization.

27 Roach, *supra* note 3, at 282, 342–344.

Signals Intelligence

The antidote to extra-legalism is legality. The *ATA*, like the British legislative response to terrorism, was based on a commitment to legality that can be contrasted with the American executive-based and often extra-legal approach. The *ATA* provided the first statutory recognition of the role of Canada's signals intelligence agency. It provided some legislative authorization for surveillance of foreign communications that might involve Canadian conversations and would be authorized by an elected Minister as opposed to a judge.[28] To its credit, however, the *ATA* also provided for independent review and audit of signals intelligence. In contrast, a similar expansion of signals intelligence powers in the United States was done on the basis of secret executive authority and a legal opinion authored by John Yoo, who is infamous for his role in the torture memos. Much of the program was subsequently ratified by Congress, but only after it was revealed by the *New York Times*. At least the Canadian program was authorized and regulated by legislation from the start.

Secrecy

An important global trend since 9/11 has been the blurring of distinctions between secret intelligence and evidence of many new terrorist crimes and overlapping security intelligence and police terrorism investigations. As a result, public interest immunity procedures which allow judges to make non-disclosure orders that secret intelligence that is not used as evidence does not have to be disclosed to the accused and the public have become a central feature of terrorist trials. The *ATA* recognized this trend by reforming section 38 of the *Canada Evidence Act*[29] to require participants to notify the Attorney General of Canada about attempts to call classified information.

National security confidentiality claims had been an absolute privilege in Canada until 1982 and the *ATA* continued a cautious approach to secrecy by only allowing specially designated judges of the Federal Court to see the secret information and then to balance the competing interests in disclosure and non-disclosure. The new provisions provided safeguards for both the state and the accused in the form of provisions that allow the Attorney General of Canada to issue a certificate countering a judicial order of disclosure and provisions that allow a trial judge to make any order, including a stay of pro-

28 For contrasting views of the constitutionality of this approach, see Stanley Cohen, *Privacy, Crime and Terror* (Toronto: Butterworths, 2005) at 230 and Steven Penny, "National Security Surveillance Powers in an Age of Terror" (2010) 48 Osgoode Hall LJ 247.

29 RSC 1985 c C-5.

ceedings, that may be necessary to protect the accused's right to a fair trial in light of a non-disclosure order by the Federal Court. The *ATA* did not, as 2004 Australian legislation did,[30] place a legislative thumb on the balance by telling judges to prefer the state's interests in secrecy over the accused's interest in disclosure.

The Supreme Court in *R v Ahmad*[31] upheld section 38 from constitutional challenge by stressing that trial judges should not hesitate to use their powers under section 38.14 to stay terrorism trials if they are left in doubt about the fairness of the trial. The Court stressed that the efficiency of Canada's two-court approach to public interest immunity was not before it. The formal law of the *ATA* places considerable emphasis on rights and due process even at the price of contemplating that major terrorism prosecutions might have to be permanently halted if trial judges have doubts about their fairness.

The restraints in the *ATA* are praiseworthy in their commitment to legality and human rights. Nevertheless, the possibility that such restraint may lead to less formal and harsher forms of counter-terrorism cannot be discounted. For example, the Americans made a decision to render Maher Arar to Syria after being informed by Canadian officials that he would not be charged criminally if allowed to return to Canada. The publicity and formality of investigative hearings might encourage authorities to use less formal and more coercive methods to recruit human sources.[32] In addition, Canada's relative inexperience in terrorism prosecutions and the potential of a statutory stay of proceedings might encourage alternatives to domestic prosecutions, including extradition or the use of immigration law.

Less Formal and Restrained Counter-terrorism Outside of the *ATA* and Canada

In the remainder of the paper, I will suggest that counter-terrorism outside of the *ATA* and outside of Canada has presented greater threats to rights than the *ATA*. Counter-terrorism outside the *ATA* is also more reliant on the counter-

30 *National Security Information Act 2004*, s 31(8). For a comparative and critical examination of s 38, see Kent Roach, *The Unique Challenges of Terrorism Prosecutions* (Ottawa: Public Works, 2010).

31 *R v Ahmad*, [2011] 1 SCR 110 For an analysis of this decision and its implications see Kent Roach "'Constitutional Chicken': National Security Confidentiality and Terrorism Prosecutions after *Ahmad*" (2011) 54 SCLR(2d) 357.

32 See e.g. *R v Mejid*, 2010 ONSC 5532 (involving the coercive and persistent nature of CSIS's approach to a potential source/suspect, which resulted in exclusion of evidence unconstitutionally obtained by CSIS).

terrorism activities of other countries than that contemplated within the more orderly confines of the *ATA*.

Indeterminate Immigration Detention and Torture

From 2001 to 2003, Canada issued immigration law security certificates to detain five men suspected of being involved in al-Qaeda. In 2003, it used immigration law powers of investigative detention to detain non-citizens originally suspected of terrorism in Operation Thread. Canada used immigration law as anti-terrorism law in part because immigration law, unlike the *ATA*, allowed the use of investigative detention, secret evidence, and burdens of proof well short of proof beyond a reasonable doubt and detention on the basis of membership in or association with a terrorist group.

Security Council Resolution 1373 encouraged the use of immigration law as anti-terrorism law by calling on all states to ensure that refugee status was not abused by terrorists. The United States detained about 5,000 non-citizens after 9/11 and imposed selective registration schemes for men from Muslim countries.[33] The United Kingdom derogated from the European Convention to authorize indeterminate detention of non-citizens suspected of terrorism who could not be deported because of a risk that they would be tortured.

Security certificates had been authorized in Canadian immigration law before 9/11 and their revision shortly after 9/11 received much less critical attention than the enactment of the *ATA*.[34] In theory, those detained under security certificates are only being detained until they can be deported. The problem is that terrorist suspects could not be deported to Egypt, Syria or Algeria without a substantial risk that they would be tortured. In the *Suresh*[35] case decided in early 2002, the Supreme Court provided two answers to the deportation to torture dilemma. The first was that the court would defer to executive decisions about whether there was actually a substantial risk of torture. This approach has been followed in subsequent British cases that have dangerously contemplated deportation to Algeria and Libya.[36] The second response was that the *Charter* might in undefined exceptional circumstances

33 David Cole, "English Lessons: A Comparative Analysis of UK and US Responses to Terrorism" (2009) 59 Curr Legal Probs 136.

34 But see James Hugessen, "Watching the Watchers: Democratic Oversight" in David Daubney et al, *Terrorism Law and Democracy* (Montreal: Themis, 2002) Justice Hugessen's speech was an important exception, as he expressed concerns about the use of secret evidence not subject to adversarial challenge and stated "I sometime feel a little bit like a fig leaf" at 384.

35 *Suresh v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3.

36 *RB (Algeria) v Secretary of State*, [2009] UKHL 10.

allow deportation to torture. In articulating the infamous *Suresh* exception, the Supreme Court contributed to a post 9/11 erosion of the absolute right not to be tortured.[37] Fortunately, however, no Canadian court has yet applied the *Suresh* exception and it has been implicitly rejected by the European Court of Human Rights.[38]

Security certificates have been used as a de facto form of indeterminate administrative detention in a manner not altogether different from the administrative detention regimes in Israel and the Middle East and in internal security acts in Malaysia and Singapore. Unlike in these countries,[39] administrative detention in Canada has been subject to epic and often successful litigation. The detainees won two important victories in the Supreme Court which have led to special advocates being able to challenge the secret information[40] and increased retention of raw intelligence that may have evidential value.[41] Even these due process victories have been a double-edged sword. They have led to continued use of security certificates, which now operate as de facto control orders in three remaining cases, as well as disturbing warnings from the head of CSIS that his agency is retaining so much intelligence that he expects that they will be accused of being the Stasi, the East German intelligence agency infamous for its extensive holdings. CSIS Director Fadden has also complained bitterly that terrorists receive public and media sympathy[42] without apparently reflecting on whether that sympathy is related to the use of secret intelligence, some derived from torture,[43] as evidence and threats of deportation to torture.

37 Jutta Brunee & Stephen Toope, *Legality and Legitimacy in International Law* (Cambridge: Cambridge University Press, 2010) at c 5.

38 *Saadi v Italy*, 37201/06, Eur Ct HR.

39 Administrative detention is constitutionally protected in Malaysia and Singapore and was constitutionally protected in Egypt from 2007 to 2010. In Israel, the administrative detention regime has been expanded since 9/11 and unsuccessfully challenged in the courts (see Roach, *supra* note 3, at c 3).

40 *Charkaoui v Canada*, [2007] 1 SCR 350.

41 *Charkaoui v Canada*, [2008] 2 SCR 326.

42 Richard Fadden, "Remarks" (October 29, 2009), online: Canadian Security Intelligence Service <http://www.csis-scrs.gc.ca/nwsrm/spchs/spch29102009-eng.asp>.

43 *Re Mahjoub*, 2010 FC 787; *Re Mahjoub*, 2010 FC 937. CSIS opposed 2008 amendments that by adding s 83 (1.1) to the *Immigration and Refugee Protection Act* SC 2001 c 27 specifically prohibit the use of information believed on reasonable grounds to have been obtained as a result of torture or cruel, inhuman or degrading treatment by arguing that the new provision "could render unsustainable the current security certificate proceedings." Director of CSIS to Minister of Public Safety Jan 15, 2008 available at http://www.montrealgazette.com/news/CSIS+head+urged+government+fight+information+obtained+through+torture/5805186/story.html.

Despite the legal and political controversies over "the secret trials" of security certificates and problems with the reliability of some of the intelligence used as evidence, Canada has persisted in using immigration law as anti-terrorism law long after the United Kingdom abandoned Part IV of its 2001 law in the wake of the House of Lord's 2004 Belmarsh[44] decision that relying on immigration law was irrational and discriminatory given that the terrorist threat was not limited to citizens. Although reformed security certificates have been upheld under the *Charter*,[45] there are limits on the ability of special advocates to make the use of secret evidence fair. For example, the British and European courts have insisted that the gist of the allegations must be disclosed to the detainee to allow for an informed defence.[46]

Security certificates were part of a post-9/11 global erosion in confidence in the criminal law as a means of responding to terrorism. Guantanamo underlined a lack of confidence in criminal law, one that has increased with Congressional restrictions on the transfer of detainees to the United States for criminal prosecution and new provisions that allow foreign terrorist suspects to be subjected to military detention and trials. The Canadian government has dug in on using controversial alternatives to the criminal law in the remaining security certificate cases just as the American government remains committed to detention at Guantanamo and other military venues despite the high success of other post-9/11 terrorism prosecutions. These alternatives to the criminal law respect rights, including rights to an impartial jury, less than the criminal law. They also may be counter-productive if they are perceived as second-class secret trials reserved for suspected Islamic terrorists. There seems to be much less public sympathy for those convicted of terrorist plots after a public criminal trial than for security certificate or Guantanamo detainees.

Intelligence Sharing and Accountability Gaps

In the immediate aftermath of 9/11, Canadian officials co-operated with American officials in secret and problematic ways. Inadequately trained RCMP officers shared complete investigative files with American officials without vetting them for reliability or attaching restrictions on their further use. This information played a role in Maher Arar's detention in the United States and his subsequent rendition to Syria and in the detention of three other Canadians also tortured in Syria. Canada was complicit in the torture

44 *Secretary of State v A*, [2004] UKHL 56, online: Parliament.UK <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm>.

45 *Harkat v Canada*, [2010] FC 1242.

46 *United Kingdom v A*, (2009) 49 EHRR 29.

of these men because it sent questions to be asked of these men to both Syrian and Egyptian officials. Canada has much less control and basic human rights such as the absolute right against torture are at risk when Canada shares information in transnational counter-terrorism. Increased sharing of intelligence was encouraged by Resolution 1373, but not enough attention was paid to the reliability of the intelligence.

One of the challenges of less formal transnational counter-terrorism is to ensure accountability for secret activities that have a potential to violate human rights. The need to prevent another 9/11 placed much pressure on governments to break down barriers to information sharing, but in many cases accountability structures remain tied to individual agencies. The Arar and Iacobucci inquiries could examine the activities of all Canadian officials, but foreign agencies declined to participate. The Arar Commission recommended enhanced review structures that would dramatically expand SIRC's jurisdiction and allow review agencies to work together.[47] The government ignored this recommendation and introduced a Bill that would not even ensure that the RCMP's complaints body would have access to secret information; something the Arar Commission had stressed was a prerequisite for effective review.[48]

Much national security activity in Canada is subject to limited review[49] given the absence of a federal Ombudsperson and the inability of Parliamentary committees to access secret information. Canada lags behind Australia, which has expanded the jurisdiction of its Inspector General, who can examine all intelligence matters within government, strengthened review by Parliamentary committees, and created an independent monitor of counter-terrorism laws. The Arar case and cases of other Canadians tortured abroad suggest that the greatest threat to human rights lies not within the tidy legal confines of the *ATA*, but in the less formal worlds of intelligence sharing and transnational terrorism investigations. The threat is aggravated by secrecy and the absence of effective accountability mechanisms short of the extraordinary appointment of public inquiries.

47 Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Public Works and Government Services Canada, 2006).

48 Bill C-38, *An Act to Amend the RCMP Act*, 3rd Sess, 40th Parl, 2010 (first reading 14 June 2010).

49 Review by the Canadian Human Rights Commission, the Privacy Commissioner and the Access to Information Commissioner is available but restrained by secrecy provisions. See Craig Forcese, *National Security Law* (Toronto: Irwin Law, 2008) at 386–398, 439–448.

The need for effective review is also underlined by recent reports that Canada continues to share information (including the name of Mubin Shaikh, an informant in the Toronto terrorism prosecution) with the United States on the basis of associations with suspected terrorists. It appears that this information is used to place people on US and other foreign terrorist watch lists,[50] raising again the issue of whether Canada is placing proper restrictions on the use of the information it shares with the United States. Sharing of information will increase under new security perimeter arrangements with an action plan released in December 2011 that calls for increased informal information sharing while only committing Canada and the US later to formulate shared principles to govern information sharing.[51] The point is not that Canada should not share information, but that independent review must be expanded to ensure appropriate screening of such information. In Canada and elsewhere, there is no effective audit of how police, intelligence agencies, customs, financial intelligence and foreign affairs departments share information about suspected terrorists. Even if there was effective review, information sharing remains a risky business because there is no guarantee that other countries will respect Canadian restrictions or caveats on the use of shared intelligence; moreover, they will not participate in our domestic reviews.

Canada has provided for extraordinary forms of accountability by appointing three multi-year and multi-million dollar public inquiries into national security activities since 9/11. Only such ad hoc inquiries have jurisdiction to examine the various parts of governments involved in national security. As discussed above, the government has rejected the major recommendations of the Arar Commission to expand propriety-based review. It has also rejected

50 Wesley Wark, "No one wants another Arar case," *Ottawa Citizen* (20 May 20 2011) online: <http://www.ottawacitizen.com/news/wants+another+Arar+case/4819009/story.html#ixzz1NBnii6iv>; Colin Freeze, "Easy for terror suspects to get onto no-fly lists, much harder to be taken off," *The Globe and Mail* (1 June 2011) online: <http://www.theglobeandmail.com/news/national/easy-for-terror-suspects-to-get-onto-no-fly-watch-lists-much-harder-to-be-taken-off/article2043591/page2/>; Wiki leak document (Secret 2/10/2009), online: http://www.cbc.ca/news/pdf/wikileaks-usembassyottawaseglins.pdf. (This document suggests that the United States used the information to include names on various watch lists but it does not contain the originating information from Canada and whether any caveats were attached to the information shared.)

51 These principles will apparently address privacy and oversight concerns as well as concerns about the reliability of the information and the possible transfer of shared information to third countries. Nevertheless, the action plan also notes that exceptions can be made to protect victims, informants and ongoing investigations. *Perimeter Security and Economic Competitiveness Action* Plan December 2011 at 32. The focus in the action plan on compliance with each country's privacy laws discounts the fact that s 8(2) of Canada's *Privacy Act* RSC 1985 c P-21 makes generous allowance for disclosure of private information for "consistent use", pursuant to international agreements, for investigations and when necessary in the "public interest." See Stanley Cohen *Privacy, Crime and Terror* (Toronto: Butterworths, 2005) at c 4.

the Air India commission's recommendations to expand the efficacy-based review role of the Prime Minister's National Security Advisor.[52] The government has also refused to appoint more public inquiries, for example, to examine the treatment of Canada's Afghan detainees. The successful resistance to increased review is unfortunate because a lack of effective review can threaten both human rights and security.

International Processes of Terrorist Listing

Canada participates in various terrorist listing regimes mandated by the UN under its Chapter VII powers. Two Canadians have been caught in the 1267 listing regime which is based on the sharing of secret intelligence and intergovernmental decision-making. Liban Hussein's name was added to the 1267 and US and Canadian lists shortly after 9/11, but was subsequently removed from those lists.[53] Although Hussein's lawyers were prepared to challenge his extradition and listing in Canada, they would have been powerless to obtain a remedy from the 1267 committee had the US not agreed that it had listed him in error.

Abousfian Abdelrazik continued to be on the 1267 list despite receiving a strong domestic remedy that held he should be allowed to return to Canada after he was tortured in Sudan and denied travel documents. In that case, Justice Zinn strongly criticized the 1267 listing process as Kafkaesque, but was of course not able to provide a direct remedy against UN listing.[54] The Abdelrazik case and other domestic challenges have contributed to significant reforms of the 1267 listing process, including the creation of an Ombudsperson. In December 2011, Mr. Abdelrazik was removed from the UN list as a result of a delisting recommendation made by the Ombudsperson. This recommendation had presumptive force under Security Council Resolution 1989 and was not overturned by the 1267 committee or the Security Council.[55] Each country, however, retains control over the secret intelligence said to support the listing.[56] No reasons were given for the delisting and Canada did not take a position on the delisting apparently on the basis that it had not seen the

52 Air India Commission, *Air India Flight 182 A Canadian Tragedy*, vol 3 (Ottawa: Public Safety Canada, 2010). The recommendations of the Air India Commission were also echoed by a bipartisan Senate committee See Senate of Canada, *Interim Report of the Special Senate Committee on Anti-Terrorism* (Ottawa: Senate of Canada, March 2011).).

53 E Alexandra Dosman, "For the Record" (2004) 62 UT Fac L Rev 1.

54 *Abdelrazik v Canada*, [2009] FC 580.

55 Security Council Committee, *United Nations Security Council Resolution 1989*, UNSCOR, 2011.

56 Craig Forcese & Kent Roach, "Limping into the Future: The 1267 Listing Regime at the Crossroads" (2011) 42 Geo Wash Int l L Rev 217.

intelligence used to list its own citizen and despite leaking CSIS documents prior to the delisting that suggested that electronic surveillance had revealed that Mr. Abdelrazik had discussed acts of terrorism in 2000.[57] The reliability of the intelligence—including allegations that Mr. Abdelrazik was "closely associated" with abu Zabadayah, who was repeatedly waterboarded by the CIA—may have been suspect, but that is only conjecture given the absence of meaningful reasons for both the listing and delisting. The Canadian courts provided a domestic remedy in 2009 that allowed Mr. Abdelrazik to return to Canada, but it took an additional 2.5 years for him to be delisted by the UN and his lawsuit against the Canadian government continues.

Counter-terrorism Beyond Borders

The Omar Khadr case also illustrates the limits of domestic remedies. Khadr's Canadian lawyers won a number of cases and restrained Canadian officials from continuing to interrogate him at Guantanamo.[58] They also won two Supreme Court victories that concluded that Canadian officials violated both international law and the *Charter* when they interrogated Khadr at Guantanamo in 2003 and 2004, the latter after extensive sleep deprivation.[59] Khadr's victories were, however, hollow. The disclosure remedy first ordered by the Court was limited by national security confidentiality claims, including arguments rejected by the court that disclosure would adversely affect Canada's relations with the United States.[60] In the second case, the Supreme Court overturned the trial judge's remedy that Canada be required to request Khadr's repatriation on the basis that it interfered too much with Canada's diplomatic affairs with the United States.[61] Even though this decision left Khadr without an effective remedy, it is in line with British and South African decisions that stopped short of ordering governments to make diplomatic rep-

57 Paul Koring "Canadian taken off of UN terror list" Globe and Mail Dec. 1, 2011; "CSIS files reveal plot to bomb plane" CBC News Aug. 5, 2011 available at http://www.cbc.ca/news/politics/story/2011/08/05/pol-la-presse-plane-plot.html

58 *Khadr v Canada*, 2005 FC 1076.

59 *Canada v Khadr*, [2008] 2 SCR 125; *Canada v Khadr*, [2010] 1 SCR 44.

60 *Khadr v Canada (AG)*, 2008 FC 807 at para 89. Note, however, that the precise parameters of the disclosure are not revealed in the public reasons.

61 *Khadr v Canada*, 2010 FC 715. Khadr persisted and won a trial judgment that held the government had breached a common law duty by not consulting him before issuing a diplomatic note that the United States not use the Canadian interrogation in his Guantanamo proceedings. The decision also noted that the United States did not comply with Canada's request and concluded that if necessary to provide an effective remedy, the courts could require Canada to request Khadr's repatriation. This judgment, however, was stayed pending appeal and the appeal declared moot given Khadr's guilty plea before a military commission. See *Khadr v Canada*, 2010 FCA 199; *Khadr v Canada (Prime Minister)*, 2011 FCA 92.

resentations on behalf of terrorist suspects.[62] Even if courts did make such orders, they would not provide an effective remedy if the United States refused to release someone held at Guantanamo. The same is true with 1267 listings. No effective remedy is possible if the US says no.

Canadian courts are, however, not always powerless to provide effective remedies for abuses in transnational terrorism investigations. Khadr's brother, Abdullah, was captured, beaten and detained in Pakistan before eventually being released and allowed to return to Canada. The US then sought to extradite him to face material support of terrorism charges. The Canadian courts, however, stayed extradition proceedings in response to various abuses committed against him in Pakistan. The Ontario Court of Appeal upheld the stay and stressed that Canada could prosecute Abdullah Khadr in Canada.[63] This decision underlines how a purely domestic Canadian approach can be the most rights protective. At the same time, the case also likely placed pressures on Canadian/American relations no less severe than in the Omar Khadr case and the government sought, but was denied, leave to appeal the judgment to the Supreme Court. The remedy obtained by Abdullah Khadr largely depended on the fact that he, unlike his younger brother, was fortunate enough to be present in Canada.

The Afghan Detainees

A final example of how counter-terrorism outside of Canada has threatened rights more than counter-terrorism in Canada is the disturbing decision that Canadian courts could not restrain the transfer of Canada's detainees in Afghanistan even if the transfer resulted in their torture at the hands of Afghan intelligence. Such litigation by public interest groups would not have been allowed in the United States where it would have been prevented through narrow standing requirements and broad political questions and state secrets doctrines.[64] Nevertheless, after allowing the litigation to proceed on the assumption that the detainees faced a substantial risk of torture if transferred, the Federal Court of Appeal ruled that there was no *Charter* violation because the affected persons were not Canadian citizens even though section 7 rights

62 *Kaunda and others v President of South Africa*, [2004] ZACC 5; *Abassi v Secretary of State*, [2002] EWCA Civ 1598.

63 *United States of America v Khadr*, 2011 ONCA 358 at para 76, leave to appeal to SCC refused, 34357 (November 3, 2011).

64 *Munaf v Geren*, 128 S Ct 2207 (2008); but see *Al Skeini v United Kingdom*, No 55721/07, [2011] ECHR*; Al Jedda v United Kingdom*, No 27021/08, [2011] ECHR. The European Court of Human Rights recently affirmed that the European Convention applies to the activities of British forces in Iraq.

textually and traditionally have been extended to non-citizens.[65] This decision, combined with the *Suresh* exception for torture, underlines the fact that since 9/11 Canadian courts have regrettably not been resolute in defending the absolute right against torture. The Canadian courts have, of course, not tolerated torture by Canadian officials, consistent with the thesis that the most serious threats to rights are located outside Canada.

Finally, the Afghan detainee affair underlines Canada's large accountability gaps for national security activities. The Security Intelligence Review Committee noted that its review of the Afghan detainee affair would have been more comprehensive had its jurisdiction extended beyond CSIS.[66] The courts also enforced significant limits on the jurisdiction of the military police complaints commission to examine military conduct.[67] Parliamentary committees experienced difficulties and delays and could only access secret information after it had been vetted by retired judges. Finally, the government refused to appoint a public inquiry that could examine the actions of all relevant Canadian officials whether they be in CSIS, foreign affairs or the military.

Conclusion

Don DeLillo has a striking passage in his 9/11 novel, *Falling Man*.[68] He remarks that we were all less innocent by the time the second aircraft hit the World Trade Centre. Canada's robust debate about the *ATA* can in hindsight be seen as a form of innocence. We are all now less innocent given what we have learned in the last decade about harsh counter-terrorism outside of the *ATA* and outside of Canada. The *ATA* struck a balance between rights and security that in comparison to the balance struck in other democracies, most notably the United Kingdom and Australia, respected human rights while also enacting new offences and providing the state with new powers to investigate terrorism.

The *ATA* debate assumed that Canada was in control of its own counter-terrorism and that it could strike its own balance between respect for human

65 *Amnesty International v Canada*, 2008 FC 336, aff'd 2008 FCA 401, leave to appeal to SCC refused. For my critique of the Supreme Court's unwillingness to hear this appeal and affirm the right against torture for the benefit of non-citizens, see Kent Roach, "'The Supreme Court at the Bar of Politics'" (2010) 28 NJCL 115.

66 Security Intelligence Review Committee, *SIRC Annual Report 2010–2011*: *Checks and Balances. Viewing Security Intelligence Through the Lens of Accountability* (Ottawa: Public Works and Government Services Canada, 2011) at 6.

67 *Canada v Amnesty International*, 2009 FC 918.

68 Don DeLillo, *Falling Man* (New York: Scribner, 2007).

rights and security. Some did not agree with where the *ATA* struck the balance, but the *ATA* proceeded on assumptions that Canadian norms, especially those of the *Charter*, would prevail. In the years following 9/11, Canadians began to appreciate that Canada does not call all, or perhaps most, of the shots in its counter-terrorism. Canadian courts have at times, as in the Abdullah Khadr case, been able to provide effective remedies for counter-terrorism abuses. In other cases, most notably the Omar Khadr case, however, they have been unable to provide such remedies and in the Afghan detainee case, they were unwilling to do so. Canadians caught in international listing processes based on secret intelligence could only seek indirect remedies from Canadian courts. Both Liban Hussein and Abousfian Abdelrazik were eventually delisted by the UN, but their delisting could have been subject to a veto in the UN Security Council.

The worst post-9/11 abuses of human rights are not found in the carefully crafted legal text of the *ATA*, but in the informal and often secret world of Canada's participation in transnational counter-terrorism. Canada has carefully dissected these activities in two inquiries that found indirect Canadian complicity in torture abroad. Public inquiries are, however, extraordinary and not likely to be called on national security matters any time in the foreseeable future. As the Afghan detainee affair and recent reports of information sharing with the US suggest, fundamental accountability gaps exist with respect to much of Canada's transnational counter-terrorism activities including pervasive intelligence sharing that will intensify under new perimeter security arrangements with the United States.

For three years after 9/11 Canada relied on security certificates to detain terrorist suspects rather that criminal prosecutions under even the enhanced *ATA*. Security certificates have been problematic in part because Canada cannot control the risk of torture if it deports terrorist suspects to countries such as Syria. Canada also found out that intelligence it shared might contribute to renditions and torture and intelligence that it received and used in the security certificate cases could be derived from torture. Counter-terrorism outside of the *ATA* and outside of Canada has been less respectful of rights and more resistant to effective remedies than counter-terrorism inside Canada and inside the *ATA*.

The Role of International Law in Shaping Canada's Response to Terrorism

Frédéric Mégret[*]

The impact of international law on Canada's response to terrorism post 9/11 has been significant, but in ways that are less benign than typically anticipated by international lawyers. There is a tension between the strong obligations imposed by the Security Council to combat terrorism and the soft pull of international human rights treaties and mechanisms. The Executive Branch has tended to implement international law selectively, rushing to adopt the former and drawing far less on the latter to ensure that counter-terrorism efforts respect core liberties. Surprisingly, it is domestic courts that have occasionally had a role to play in successfully resisting some of international law's illiberal tendencies. Canada's post 9/11 response is not only shaped by international law, it is shaping international law's relation to Canada.

L'impact du droit international sur la réponse du Canada en matière de terrorisme depuis le 11 septembre 2001 a été significatif mais de manière moins inoffensive que ce à quoi s'attendent généralement les juristes de droit international. Il existe une tension entre les fortes obligations imposées par le Conseil de sécurité pour combattre le terrorisme et l'influence modérée des traités et mécanismes internationaux relatifs aux droits de la personne. L'autorité exécutive a eu tendance à mettre en œuvre le droit international de façon ponctuelle, se précipitant pour adopter le premier et beaucoup moins enclin à faire appel au second afin de s'assurer que les efforts pour combattre le terrorisme respectent les libertés fondamentales. Chose étonnante, ce sont les tribunaux nationaux qui ont eu, à l'occasion, un rôle à jouer pour résister (avec succès) les tendances intolérantes du droit international. La réponse du Canada, suivant le 11 septembre 2001, est non seulement déterminée par le droit international, elle est en train de déterminer le rapport entre droit international et le Canada.

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The debate on Canada's response to terrorism in the wake of 9/11 has been dominated, perhaps understandably, by a focus on domestic constitutional and legislative issues.[1] Less attention has been paid to the way in which the Canadian response has been influenced, and even shaped in some respects, by its international normative environment.[2] This article will suggest that a proper understanding of this international dimension can help to understand some of the finer dynamics at work in the Canadian response, as well as provide an illustration of the operation of international law. Specifically, the article will explore the vertical, top-down effect of international law on Canadian anti-terrorism practices, with a focus on a supranational body such as the UN, whose influence has been most significant. This dimension has elicited less attention than the horizontal and lateral effect of other domestic anti-terror legislation, particularly coming from other common law jurisdictions.[3]

Canada's response to 9/11 provides an opportunity to examine the relationship of international law to Canadian law. That relationship is generally analyzed from a judicial angle, where Canada's strict legal dualism is typically presented as constituting a significant barrier to domestic implementation of international treaty obligations.[4] Several conceptions seem to undergird the scholarship on the effect of international law on Canadian law: (i) international law's impact on Canadian law is muted by its dualism and the fact that Canadian courts do not consider that Canada's international treaty commitments are directly applicable domestically; (ii) treaties (or customary international law) are normally the main conduit through which the impact of international law domestically ought to be felt; (iii) it is desirable that international law have more of an impact on Canadian law, and compliance with it is generally associated with greater respect for human rights. This article takes issue with these assumptions in the context of Canada's response to terrorism. First, the influence of international law on Canadian law is much broader than the courtroom debate on the applicability of the former in domestic law. A convincing examination of the impact of international law must also neces-

1 Ronald Joel Daniels, Kent Roach & Patrick Macklem, eds, The Security of Freedom: Essays on Canada's Anti-terrorism Bill (Toronto: University of Toronto Press, 2001).

2 E Alexandra Dosman, "For the Record: Designating Listed Entities for the Purposes of Terrorist Financing Offences at Canadian Law" (2004) 62 UT Fac L Rev 3.

3 Ian Cram, "Resort to Foreign Constitutional Norms in Domestic Human Rights Jurisprudence with Reference to Terrorism Cases" (2009) 68 Cambridge LJ 118.

4 See Irit Weiser, "Undressing the Window: Treating International Human Rights Law Meaningfully in the Canadian Commonwealth System" (2004) 37 UBC L Rev 113; Accord Armand De Mestral & Evan Fox-Decent, "Rethinking the Relationship Between International and Domestic Law" (2008) 53 McGill LJ 573; Stephen J Toope, "Inside and out: The Stories of International Law and Domestic Law" (2001) 53 McGill LJ 11.

sarily take into account the extent to which certain treaties influence executive and legislative policy formulation, and to what degree (in fact, evaluating this influence is all the more important precisely because of the courts' adherence to a strict dualist doctrine). Second, the focus on treaties distracts from the study of obligations undertaken by Canada as a result of membership within international organizations and, specifically, the increasing tendency of the Security Council to impose quasi-legislative obligations on member states that are either autonomous from treaties or influence the way these treaties are understood. Third, those who advocate greater incorporation of international law in Canadian law pay insufficient attention to the degree to which international law may have occasionally reinforced illiberal tendencies in Canada's normative responses—a relatively novel development that should be cause for thought.

As will be shown, the effect of international law on Canada's response to terrorism illustrates all of these propositions. Part of the reason why the impact of international law on Canada's post 9/11 policies has been ambiguous in terms of human rights is that the international community itself is torn between competing approaches to dealing with terrorism.[5] This tension is reflected in the imbalance internationally between the relatively powerful international peace and security agenda wielded by the Security Council on the one hand (I), and the challenges of ensuring that Canada conforms to its international human rights commitments in dealing with terrorism on the other (II).

I. The Impact of the Security Council

The Security Council's involvement in matters of terrorism predates 9/11 by at least a decade. However, pre-9/11 initiatives were noticeably less broad and ambitious, and still largely indebted to a classical view of international peace and security. For example, measures adopted by the Council typically targeted specific states accused of having strong links to international terrorism and that were thus seen as a threat to international peace and security. This changed after 9/11 when the Council adopted an anti-terror policy that was much broader in that it required *all* states to adopt a whole series of anti-terrorism measures with clear domestic incidences. The two main planks of that policy were Resolution 1373[6] and its broad injunction to criminalize cer-

5 Peter Gutherie, "Security Council sanctions and the protection of individual rights" (2004) 60 New York University Annual Survey of American Law 491 [Gutherie, "Security Council sanctions"].

6 *Resolution 1373: Threats to International Peace and Security Caused by Terrorist Acts*, UNSCOR,

tain behaviour, and the development of an earlier Security Council sanctions regime against individuals and organizations suspected of supporting or being involved in terrorism.

A. Resolution 1373: A Broad International Mandate For Anti-Terror Legislation

Resolution 1373 is the centrepiece of the UN's post-9/11 anti-terror drive. For the first time in the United Nations' history, it obliged states to become party to certain international treaties criminalizing various forms of terrorist activity.[7] The resolution demands of states that they adopt a series of measures against terrorism and the financing of terrorism, including freezing of assets, criminalization, and mutual assistance. The Counter-Terrorism Committee, which was to become crucial to the UN's anti-terrorism strategy, was set up under Resolution 1373. States are required to report regularly to the Council on the measures they have adopted. As a result, the Council has presided over what is surely one of the fastest global legislative changes in history, one with often far-reaching consequences in the domestic law and organization of UN member states.

Resolution 1373 has been criticized as an unprecedented foray of the Council into matters that should have remained within the domain of state sovereignty (and in particular the ability to voluntarily enter certain treaties or not). Initially, the critique was dominated by international lawyers who saw the issue mostly from a UN-constitutional perspective as an abuse of Council powers, usurping states' treaty-adopting procedures.[8] Increasingly, however, the critique has taken a more domestic constitutional tenor, as some lawyers deplored a new threat on parliamentary sovereignty, [9] and others expressed

4385th meeting, UN Doc. S/RES/1371 (2001) at para. 3.

7 Andrea Bianchi, "Assessing the effectiveness of the UN Security Council's anti-terrorism measures: the quest for legitimacy and cohesion" (2007) 17 EJIL 881; Andrea Bianchi, "Security Council's Anti-terror Resolutions and their Implementation by Member States" (2006) 4 Journal of International Criminal Justice 1044.

8 Paul C Szasz, "The security council starts legislating" (2002) 96 AJIL 901; Stefan Talmon, "The Security Council as world legislature" (2005) 99 AJIL 175; Eric Rosand, "The Security Council as Global Legislator: Ultra Vires or Ultra Innovative" (2004) 28 Fordham Int'l LJ 542; Mathew Happold, "Security Council Resolution 1373 and the Constitution of the United Nations" (2003) 16 Leiden J Int'l L 593.

9 The two are quite connected since what negatively affects the functioning of democracy can also have negative effects on human rights. See Craig Forcese, "Hegemonic Federalism: The Democratic Implications of the UN Security Council's Legislative Phase" (2007) 38 VUWLR 175 [Forcese, "Hegemonic Federalism"].

concern about the implications for human rights of laws and regulations adopted in the Security Council's name.

There is always going to be some ambiguity about what precipitated a particular domestic policy, even when that policy seems to be objectively encouraged by international developments. By and large, the immediate post-9/11 era was marked by a strong degree of international/domestic convergence on the need for resolute measures to confront an exceptional threat, so it is fair to say that the terms of Resolution 1373 were hardly "imposed" on a reluctant Canada. Other influences, including bilateral US pressure, were surely considerable in shaping Canada's response. What is nonetheless interesting and revealing from the point of view of ascertaining the origin of normative developments, is the extent to which international law was expressly invoked as a way of signalling the legitimacy of domestic policy outcomes. Honouring international obligations was presented as a determinant motivational factor in the adoption of Bill C-36. The very fact that the Bill was tabled two weeks before Canada's report to the Counter-Terrorism Committee was due is not a coincidence, nor is the remarkable speed with which it was subsequently adopted. One expert called by the Special Senate Committee on Bill C-36 described Resolution 1373 as "a beacon to so many years of stalled efforts to energize the UN into doing something concrete and significant about terrorism," insisted on the resolution's "mandatory" character, and urged parliamentary action to go "as far as it can in ensuring that we implement all of the mandatory requirements."[10] A Senator insisted that "the UN Security Council commands us to take stringent steps"[11] and one official boasted that "With the passage of Bill C-36 in December, Canada was able to report full compliance."[12] One author has since described Resolution 1373 as "clearly the impetus behind ATA."[13] The rapidity with which Resolution 1373 was incorporated into Canadian law can usefully be contrasted with Canada's relative lack of enthusiasm to implement its international treaty obligations domestically, especially when it comes to human rights. This is despite the fact that

10 Canada, Senate, *Special Senate Committee on Subject Matter of Bill C-36,* 37th Parl, 1st Sess, No 3 (24 October 2001) at 33 (Professor Anne Bayefsky).

11 *House of Commons Debates*, 37th Parl, 1st Sess, 37th Parliament, Vol 139, No 82 (13 December 2001) (Hon Douglas Roche).

12 Notes for Remarks by Richard Mosley, QC, Assistant Deputy Minister, Criminal Law Policy and Community Justice Branch, Department of Justice Canada, "The New Global Terrorism: An Assessment of Canada's Response" Conference held at the Robarts Centre for Canadian Studies, "The Canadian Response to September 11th: Taking Stock and Next Steps," June 17, 2002.

13 Craig Forcese, "Fixing the Deficiencies in Parliamentary Review of Anti-terrorism Law: Lessons from the United Kingdom and Australia" (2008) 14 IRPP Choices 4.

Chapter VII of the *UN Charter* a Security Council resolution is legally neither more nor less binding than a treaty to which Canada is party.

Resolution 1373 provided subtle legitimacy for a certain scope and style of post-9/11 legislation adopted by countries such as Canada. The resolution was framed in very vague language (e.g., adopt "the necessary steps to prevent the commission of terrorist acts") that entrusted states with a very broad mandate. The failure by the UN or the Security Council to define terrorism also provided a sort of "blank cheque" for states to adopt legislation according to *their* definition of terrorism. Canada's own definition, like that of other countries, eventually raised concerns that it was too broad, yet the Council seemed more interested in measures being adopted than in ensuring that such measures actually dealt with the same phenomenon. Moreover, Resolution 1373's insistence that "any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice" may be seen as having inspired very broad modes of participation when it comes to terrorism in Canadian law. When looking at some of the biggest scandals of Canadian anti-terror initiatives, particularly the co-operation of the RCMP with US authorities in securing the removal of Maher Arar to Syria where he was tortured, it is difficult to ignore Resolution 1373's frequent exhortations to share information and to co-operate. Moreover, the resolution drew a very strong link between cross-border mobility and terrorism (even though no such abuse was involved, for example, in the run-up to 9/11). This arguably helped frame a response to terrorism that is based in part on differential treatment of citizens and foreigners in anti-terror legislation, and which has become a hallmark of Canadian as well as many other states' response. Resorting to immigration law reinforces administrative measures at the expense of the judicial system and thus facilitates anti-terrorism efforts if only by lowering evidentiary thresholds. Resolution 1373 has been accused, however, of contributing to discriminatory patterns and to the fact that certain ethnic communities linked to immigration have born the brunt of anti-terrorism efforts.

If it is too much to argue that Canada's very broad and energetic response to 9/11 was entirely determined by Resolution 1373,[14] the latter certainly provided an environment that was both quite constraining on states (in terms of the number of scope of measures they had to adopt) yet also curiously permissive (in terms of how they defined terrorism or how exactly they un-

14 *Resolution 1373, supra* n 6.

derstood the need to avert attacks or suppress terror financing). In December 2001, Canada dutifully reported to the Resolution 1373 Counter-Terrorism Committee, which had asked for a first batch of reports within 90 days (an exceptionally short delay by UN standards). Subsequently, Canada entered into a fairly sustained dialogue with the Committee through annual reports. Its first report is notable for presenting Bill C-36 as a point-by-point implementation of Resolution 1373. This is of course partly a manner of speaking based on audience: the Committee specifically asked Canada what it had done to implement the resolution.[15] Nonetheless, it is interesting that most of the measures adopted post 9/11 seem to be subsumable under a broad category prescribed by the Council. Very few significant aspects of Bill 36 do not have a corresponding clause in Resolution 1373.

After each report from Canada, the Counter-Terrorism Committee asked questions on a vast range of issues that primarily reflect a security agenda: the holding of accounts by foreign nationals; the regulation of remittances (including Hawala); confiscation of assets, including those of NGOs; criminalization and prosecution, as well as civil and administrative liability for terrorism; the scope of extradition and mutual assistance provisions; money laundering; the Government's anti-terrorism apparatus and the sufficiency of funding; efforts made to prevent recruitment into terrorist groups; "special investigative techniques"; protection of vulnerable targets; co-operation and information-sharing mechanisms among different government agencies; *aut dedere aut judicare* and jurisdictional issues; listing of organizations as terrorist; protection of port facilities; ICAO recommendations implementation; and the ratification of several treaties (e.g., the *UN Convention on Organized Crime*). The Committee also sought detailed statistical information, for example on the number of suspicious transaction reports, or accounts frozen as a result of terrorism suspicions.

On rare occasions, the questions asked by the Committee referred to human rights issues. For example, following Canada's Fifth Report, the Committee sought more information about the use of intelligence data in judicial proceedings and how that might be reconciled with the defendant's right to due process of law. It also asked how Canada had ensured that its criminalization of incitement would "comply with all its obligations under

15 As Scheppele puts it, "reading the country reports to the CTC, while a good starting point, cannot alone reveal either what concretely pushed a state to take specific measures to fight terrorism": Kim Lane Scheppele, "The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency" in Sujit Choudhry, ed, *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006) 359 at n 20.

international law, in particular international human rights law, refugee law and humanitarian law."[16] However, by and large the tone of the Committee's questions is one that is almost exclusively focused on the "efficiency" of anti-terrorism efforts. One former anti-terrorism committee official has insisted that even though "the Committee is aware of the interaction of its work with human rights concerns, inter alia through the contact the Committee has developed with the Office of the United Nations High Commissioner for Human Rights . . . monitoring performance against other international conventions, including human rights law, is outside the scope of the Committee's mandate."[17] In practice, the Counter-Terrorism Committee is of course a relatively soft mechanism, ensuring a continuous monitoring of implementation, and not one in a position to enforce its recommendations, except through reporting back to the Council. Yet it is also an exceptional mechanism within the Security Council, and one that is very single-minded in its focus. In practice, the Committee's actual power probably exceeds its formal power. It has helped channel states' policy priorities in a certain direction by focusing them on a particular form of transnational terrorism.

The way in which Canadian policy in relation to terrorism is increasingly presented as an implementation of Security Council resolutions may create concerns from the point of view of parliamentary sovereignty because of the way in which it seems to portray democracy as merely a conveyor belt for the international community. Yet all in all, it is probably the case that Resolution 1373 and its subsequent monitoring did not *force* the Canadian government to adopt policies that it did not want to adopt. For example, many of the more contentious provisions in Canada's response—such as the security certificate system—were not specifically demanded by Security Council resolutions. In fact, rather than democracy being usurped by Security Council injunctions, the fear might be that under the loose guise of doing the international community's bidding, a number of draconian measures are passed which have only a tangential relationship to the actual wording of Council resolutions. Resolution 1373 has provided an additional layer of legitimacy and, occasionally, an excuse to engage in policies that the government was probably keen on adopting anyhow, but which it could as a result adopt even more expediently and with less opposition. If anything, it is in this context that the Security

16 UN Security Council, *Letter Dated 23 March 2006 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1373 (2001) Concerning Counter-terrorism Addressed to the President of the Security Council*, UNSCOR, UN Doc S/2006/185, (2006), online: UNHCR http://www.unhcr.org/refworld/docid/46de602f0.html at para 1.5.

17 Walter Gehr, "The Counter-Terrorism Committee and Security Council Resolution 1373 (2001)" (2004) 4 Forum on Crime and Society 106.

Council's strong leaning towards the security end of the anti-terrorism equation must be read: as something that, overall, reinforces in states their belief that exceptional measures are required to combat terrorism, and makes it easier for them legally and politically to argue that this is so.

B. The UN Sanctions Regime

Aside from Resolution 1373 and its legislative drive, one of the most noteworthy features of the UN's anti-terrorism regime is the emergence of an international sanctions regime against suspected terrorists. This predated 9/11 and was initiated in the late 1990s to cover Al-Qaida, Bin Laden and the Taliban (Resolution 1267[18]). It has been expanded since to other terrorist entities and has become increasingly active. The sanctions regime has a Working Group, which has the power to recommend measures against particular individuals and groups. More than 500 individuals are on the list. In effect, the Council can freeze the assets and impose a global travel ban on individuals at the request of any state (most such requests have been made by the US). The process was, and continues to be, notable for its opaqueness. Information provided by states as to why a certain individual is connected to a terrorist group is often scant or non-existent (and the risk of confusion between individuals with similar names, for example, is high), and Council members tend to defer to requests submitted by other states.

Where Resolution 1373 can be seen as partly usurping legislative sovereignty, Resolution 1267 might be seen as usurping a more *judicial* sovereignty by allowing an international body to limit individuals' freedom outside the guarantees of the domestic court system.[19] In that respect it also represents a dubious abandonment of the sovereign ability to determine who is truly dangerous for national security, especially when relying on information provided by allies that has at times proved to be untrustworthy. Arguably, it creates legal obligations for states far beyond what was originally contemplated by the *United Nations Charter*. Worse, it does so under procedural conditions that seem deeply at odds with elementary due process and human rights (most notably, the procedure does not make the information on which listing was

18 *Resolution 1267: On the Situation in Afghanistan*, UNSCOR, 4051st meeting, UN Doc. S/RES/1267 (1999).

19 Hans Koechler, *The Security Council as Administrator of Justice?* (Vienna: International Progress Organization, 2011). At 64 Koechler points out that "although the measures imposed by the Council (travel embargo, freezing of assets) are officially considered as sanctions in the meaning of Article 41 of the UN Charter. . . . they are materially something totally different, namely *sentences* that would require convictions on the basis of proof in judicial proceedings."

ordered available to the person listed). The Council has been prone to consider that it is not bound by the international human rights standards promoted by the United Nations themselves and that at any rate the procedure was more administrative than judicial in nature and therefore did not attract specific internationally protected fair trial standards.

In 2002 (not before more than 200 individuals had already been placed on the list), guidelines were first adopted designating how one might be put on the list, and how one might obtain the removal of one's name from the list. These guidelines rely on listed persons' ability to petition their state to press their case with the Council or with third states from which the listing originated. This sort of diplomatic and political process is hardly the equivalent of rule of law guarantees based on respect for human rights.[20] It is only since 2006 that a procedure has been set up to allow individuals to appeal listings[21] and since 2008 that delisting criteria were identified, although the adequacy and fairness of those procedures remain open to challenge. Proposals for a more vigorous form of international judicial review of Security Council decisions in the context of the "war on terror" are sometimes mooted, but seem very remote.[22] In 2010, an ombudsperson, (Canadian) Judge Kimberly Prost, was nominated to consider delisting procedures.[23] For all these developments of the last few years, the delisting decision is still in the hands of the same Committee that decides the listing in the first place and the information on the basis of which the listing occurred remains inaccessible to the petitioners. The system thus continues to fall far short of international standards for administrative review, let alone those for judicial remedies and competent tribunals.

Despite these obvious limitations, the Canadian government has had little choice but to comply with listings. The sanctions resolutions are implemented directly by the Executive Branch on the basis of the 1985 *United Nations Act*,[24] which does not require prior consultation with Parliament. Specifically, two sets of regulations were adopted, the Afghanistan Regulations[25] (before 9/11, covering Al-Qaeda and the Taliban) and the interim Canadian Suppression

20 Gutherie, "Security Council sanctions," *supra* n 5.

21 *Resolution 1730: General Issues Relating to Sanctions*, UNSCOR, 5599th meeting, UN Doc. S/RES/1730 (2006).

22 Jared Genser and Kate Barth, "When Due Process Concerns Become Dangerous: The Security Council's 1267 Regime and the Need for Reform" (2010) 33 Brit Inst Int'l & Comp L 1.

23 The position was created by *Resolution 1904: Threats to International Peace and Security Caused by Terrorist Acts*, UNSCOR, 6247th meeting, UN Doc. S/RES/1904 (2009).

24 *United Nations Act,* RSC 1985, c U-2.

25 *United Nations Afghanistan Regulations*, SOR/99444.

of Terrorism Regulations[26] (after 9/11, covering all forms of terrorism). Under the former, individuals are listed directly by incorporation of the Security Council's own list, and under the latter by the Governor in Council in a Schedule. In effect, the pressure of Council resolutions has provided considerable power for the Cabinet to push through an anti-terrorism agenda, as part of what Craig Forcese has described as a new "hegemonic federalism."[27] Although only one Canadian citizen has been put on the list as a result of being named an associate of Al-Qaeda, Canada is inevitably co-operating in the listing of others whose presence on the list raises similar concerns about the fairness of the proceedings and the effectiveness of the judicial review process.

Canada has expressed concern in principle before the Council, as have many other states, about the need for transparency and clarity in the listing of individuals.[28] Moreover, it supported the application of one of its citizens, Abousfian Abdelrazik, to be delisted. Even though that challenge was unsuccessful, it showed that occasionally the Executive has been willing to defend Canadian citizens against the opaqueness of an international anti-terrorism mechanism. However, the Canadian government is in a quite ambiguous position to do so: it is in effect bringing up before the Council the case of the very person against whom it has implemented listing measures at the Council's behest, as part of a process which it otherwise fundamentally supports. This sense of being both judge and party, of having to ask to be released from obligations one is otherwise enthusiastically implementing, is of the sort that begs for some external yardstick, a role one would expect to be assumed by international and domestic human rights standards.

II. Human Rights Challenges

The rights shortcomings of Canada's anti-terrorism policy, both those that could arguably be traced to an international injunction and those that were largely domestic, have elicited strong human rights reactions from individuals affected by them and by civil society groups. The record of international law's impact on Canada, however, is decidedly more mixed than that of Security Council initiatives when it comes to human rights. Even a cursory study of the

26 *United Nations Suppression of Terrorism Regulations*, SOR/2001360.

27 Forcese, "Hegemonic Federalism," *supra* n 9.

28 Permanent Mission of Canada to the UN, *Statement by His Excellency Henri-Paul Normandin, Ambassador and Deputy Permanent Representative of Canada to the United Nations, to the United Nations Security Council debate on the counter-terrorism committee, the 1267 committee and the 1540 committee,* (14 November 2007), online: Canada International <http://www.canadainternational.gc.ca/>.

impact of international human rights mechanisms on Canada suggests that it has been mild (A). Ironically, this has meant that some of the most potent challenges to internationally mandated anti-terrorism policies have come from Canada, including at least one noteworthy Canadian judicial decision (B).

A. Weaknesses of the International Human Rights Pressure

There is no paucity of international human rights mechanisms that have been mobilized to deal with the terrorism issue, including mechanisms that relate to Canada. Various *UN Charter* bodies with human rights mandates have taken a look at Canada's performance. Canada's human rights record came up for review before the Human Rights Council under the new Universal Periodic Review system, and several states complained about what they saw as a disproportionate impact of anti-terrorism efforts on some ethnic and religious communities. Among Human Rights Council rapporteurs, the Special Rapporteur on Contemporary Forms of Racism and the Working Group on Arbitrary Detention have been the most active. The Working Group, in particular, issued a scathing indictment of the security certificate system.[29] So-called "treaty bodies," which monitor states' performance under specific human rights treaties, have also been quite active. The Human Rights Committee, the Committee on the Elimination of Racial Discrimination, and the Committee against Torture[30] all reviewed one or several periodic Canadian reports and devoted significant attention to terrorism related issues.

Canada has taken its obligations to report to treaty bodies seriously, has welcomed UN rapporteurs on Canadian territory, and has lent itself to the Universal Periodic Review. The various reports emanating from international bodies shed an interesting light on what might internationally be considered some of the most glaring human rights weaknesses of Canada's response. They have highlighted the problematic aspects of the security certificate system, and have shown that problems of ethnic and religious discrimination are foremost

29 Commission on Human Rights, *Report of the Working Group on Arbitrary Detention: Visit to Canada (1–15 June 2005)*, UNESCOR, 62nd Sess, Supp no 11(a), UN Doc E/CN.4/2006/7/Add.2, (2005) at para 84.

30 International Covenant on Civil and Political Rights, *Concluding Observations of the Human Rights Committee: Canada*, UNHRC, 85th Sess, UN Doc CCPR/C/CAN/CO/5, (2006) [HRC Report]; Office of the High Commissioner for Human Rights, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada*, 61st Sess, UN Doc A/57/18 (2002); International Convention on the Elimination of All Forms of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada*, 17th Sess, UN Doc CERD/C/CAN/CO/18 (2007); Office of the High Commissioner for Human Rights, *Concluding Observations of the Committee Against Torture: Canada*, 34th Sess, UN Doc CAT/C/CO/34/CAN (2005).

from the international standpoint. Nonetheless, the experience of the last decade also illustrates the failure of UN human rights mechanisms to have much bite, especially when it comes to an issue of high national interest such as terrorism. No international human rights body has attained the sort of influence on Canadian terrorism policy that, for example, the European Court of Human Rights has attained in relation to various Council of Europe countries' dealings with terrorism. There is very little evidence of the Canadian policy process being significantly influenced by international human rights bodies' pronouncements when it comes to framing its response to the issue of terrorism. In fact, in its first post 9/11 Concluding Observations, the Human Rights Committee itself noted "with concern that many of the recommendations it addressed to the State party in 1999 remain unimplemented" and that its concluding observations "have not been distributed to members of Parliament and that no parliamentary committee has held hearings on issues arising from the Committee's observations, as anticipated by the delegation in 1999."[31] Despite ongoing efforts by the Senate Committee, very little change in that respect seems to have occurred. The reasons for the weak impact of international human rights mechanisms can be briefly stated as follows.

First there is the well know formal argument that under international law there is very little in international human rights mechanisms' output that is formally compulsory. This is of course in contrast with the Security Council resolutions and the work of the counter-terrorism and sanctions committees that benefit from the unchallenged authority of Chapter VII of the *UN Charter*. In one case from Canada involving a security certificate, even an interim request by the Human Rights Committee was ignored, leading to the petitioner's deportation. International human rights treaties are in themselves binding but treaty bodies are not courts and Canada's dualism means that if international human rights instruments as such are unlikely to be invoked in court, then *a fortiori* so is their interpretation by treaty bodies. The comments of special rapporteurs or working groups of the Human Rights Council or comments made in the course of the UPR are even more devoid of formal status and the odds that they would have any concrete legal impact are even less. The obvious relay for the treaty bodies or special rapporteurs would be the Executive or, at best, Parliament, but there is extremely little evidence of either treaty body Concluding Observations or special Rapporteur Reports having even a soft influence.

31 HRC Report, *supra* n 30 at para 6.

Second, the international human rights regime suffers from its isolation from the Security Council and a logic of functional specialization at the UN that has always made human rights a separate domain from international peace and security. In other words, while there are various forms of review of states' performance when it comes to human rights, there is next to none when it comes to the UN's own responsibilities in protecting rights. This was not particularly problematic during the several decades in which the Security Council devoted itself almost exclusively to classical issues of international peace and security involving state relations. But the Council's unprecedented forays into domestic policy and its tendency as a result to engage in policies that seem dubious from a rights point of view means that there is an increasing gap internationally and in Canada between the focus of international rights monitoring and some of the most evident sources of rights curtailments. Hence for example, at no stage did the treaty bodies reviewing Canada's reports ever make the link between Canada's policies and international obligations imposed by the Council. It is often as if UN bodies cannot see the role that the UN itself has in creating conditions that should raise alarm bells from a rights point of view.

Third, compared to the Security Council's committee's single-minded focus on measures adopted to combat terrorism, the international human rights system lacks specificity. The issue of terrorism is a crosscutting issue that can arguably involve separate but overlapping types of human rights violations. This is something that is well captured by the existence of a special rapporteur on terrorism and human rights, but when it comes to the treaty bodies, terrorism has tended to be very much a shared issue between various committees (Human Rights Committee, Committee on the Elimination of Racial Discrimination and Committee Against Torture). Moreover, terrorism is only one issue among many to which the treaty bodies must turn their attention, something which may not have helped give the issue of terrorism the profile it deserved, or facilitated in-depth monitoring.

Fourth, even if one sees international human rights mechanisms' strength as lying less in the fact that they are binding than the fact that they provide a forum to develop "best human rights practices," the output has not been of uniform usefulness. Many of the international responses remain largely political and so general as to not be very helpful. For example, while countries such as Saudi Arabia and Algeria did complain about the risk of discrimination in Canada as a result of anti-terrorism policies during Canada's UPR review, it is very difficult to see what effect such complaints might have on Canadian policy which, for example, similar complaints articulated by well organized

domestic groups and communities in Canada might not better have. The more precise and technically informed work of the treaty bodies may have some impact, especially in ministries involved in legislation development and implementation, but whether that is actually the case remains a matter for empirical determination that would probably be quite hard to establish.

Fifth, there is a risk that international human rights bodies will legitimize rather than challenge dubious practices as a result of the generality of their outlook, or their tendency to defer to a domestic margin of appreciation. The general tone of exchanges between treaty bodies and Canada has been very conciliatory. Canadian representatives in Geneva have been pressed to explain some points of Canadian anti-terrorism policy but have generally successfully defended practices as fitting within the exercise of Canadian sovereign prerogatives. In the Mansour Ahani case,[32] the Human Rights Committee found that the fact that it took four years for a review of his security certificate detention to occur, notwithstanding that much of that delay was attributable to the author's disputing its constitutionality, violated his right to challenge detention "without delay."[33] Canada had also violated his right to be free from torture by ordering him to be deported to Iran and by denying him access to material that formed the basis for his deportation on the grounds that he had failed to make out a prima facie risk of harm.[34] However, the Committee also found no fault with the principle of the certification process. It pointed out that "detention on the basis of a security certification by two Ministers on national security grounds does not result ipso facto in arbitrary detention" and that the "reasonableness" hearing in Federal Court was sufficient judicial review. What is notable about such a finding is that it failed to fault Canada for shortcomings that were subsequently highlighted by the Canadian Supreme Court itself. All in all, these limitations of the international human rights monitoring of Canada's anti-terrorism policy suggest an influence that is limited at best.

32 *Mansour Ahani v Canada*, CCPR/C/80/D, UNHCR, 18th Sess, Supp No 1051/2002, (2004) [*Ahani*].

33 *Ibid* at Appendix, Individual Opinion of Committee members, Sir Nigel Rodley, Mr. Roman Wieruszewski, Mr. Ivan Shearer (Dissenting). It is worth noting that several Committee members dissented on this point. Nisuke Ando found that the period did not seem unreasonably prolonged given the need to assess national security concerns, and Rodley, Wieruszewski, and Shearer found that "there is no evidence that the proceedings were unduly prolonged or, if they were, which party bears the responsibility."

34 *Ibid* at para 10.

B. Domestic Human Rights Resistance

It is often as a result of domestic human rights initiatives and mechanisms rather than as a result of international human rights mechanisms that some of the more illiberal aspects of Canadian anti-terrorism legislation have been rolled back. The Supreme Court has condemned the security certificate system; Parliament did not renew some of the more exorbitant provisions adopted following 9/11; civil society has been active in denouncing a security agenda that increasingly circumscribes *Charter* freedoms. This is as one might expect, given the relative weakness of international human rights mechanisms. More surprising and significant is the way in which domestic actors have specifically invoked international human rights obligations and done so, occasionally, to resist some of the pressure brought to bear by the Security Council.

Perhaps the best hope of international human rights mechanisms' pronouncements being taken seriously domestically is that they are taken up by civil society actors. Amnesty International Canada took up the Human Rights Committee's Concluding Observations and presented them as going in the same direction as its own analysis,[35] and a representative of Human Rights Watch mentioned them during Parliamentary hearings.[36] Some of the most important Canadian NGOs picked up on the Concluding Observations by writing a letter to Paul Martin requesting a review by Parliament of their recommendations.[37] Several Canadian NGOs also made representations to the Arbitrary Detention group during its visit of Canada.[38] It may well be that these international mechanisms' observations are of value because of the way they reinforce certain domestic constituencies rather than through their sheer binding value or intrinsic authority. Nonetheless, these are instances of international human rights being invoked to resist largely domestic practices.

A more interesting case arises when international law is, at it were, played against international law. The Abdelrazik case is a stark illustration of this

35 Amnesty International, "It is Time to Comply: Canada's Record of Unimplemented UN Human Rights Recommendations: An Update to Amnesty International's Human Rights Agenda for Canada" (19 December 2005), online: Amnesty International Canada <http://www.amnesty.ca/amnestynews/>.

36 Canada, Parliament, Standing Committee on Public Safety and National Security, *Evidence* (5 December 2007) (Mrs. Julia Hall, Senior Counsel, Terrorism and Counter-Terrorism Program, Human Rights Watch).

37 "UN Human Rights Committee Harshly Criticizes Canada—Open Letter to Prime Minister Paul Martin from Human Rights Groups" (3 November 2005), online: Prison Justice <http://www.prisonjustice.ca>.

38 Canadian Council for Refugees, "Submission on the occasion of the visit to Canada of the UN Working Group on Arbitrary Detention" (8 June 2005), online: CCR: <http://ccrweb.ca/en/>.

phenomenon. Abdelrazik, a Sudanese-Canadian suspected of terrorism, was prevented from returning to Canada as a result of having been put on the 1267 list. He alleged violations of his *Charter* rights. The Executive Branch made much of the fact that, in preventing him from returning to Canada, it was merely respecting international law.[39] As Judge Zinn summarized the Executive's position:

> The position of the respondents is that it is not as a consequence of any of Canada's actions that Mr. Abdelrazik has been prevented from entering Canada; rather it is as a consequence of his listing by the 1267 Committee as an associate of Al-Qaida. If true, then there is nothing Canada is required to justify because it is not Canada that is preventing this citizen's entry into Canada.[40]

In effect, the Government's awkward argument was that it was merely an agent of the Security Council and that its hands were bound by its international commitments. Confronted with challenges to the rights-worthiness of the regime, the Government was prompt to emphasize that recommended changes "could result in Canada failing to comply fully with its international obligations. Given the significant implications this could carry for Canada's domestic security and international obligations, it is important that the current processes be maintained."[41] Judge Zinn acknowledged a "tension between the obligations of Canada as a member of the UN to implement and observe its resolutions, especially those that are designed to ensure security from international terrorism and the requirement that in so doing Canada conform to the rights and freedoms it guarantees to its citizens."[42]

The government would clearly have resolved that tension in favour of complying with its obligations to the Council. Yet Judge Zinn launched into an unusual critique of the international framework. He branded the 1267

39 This is a leitmotiv in the government's official policy, and is a reference to the obligatory character of Security Council resolutions which it typically features prominently. See Government Response to the Seventh Report of the Standing Committee on Public Safety and National Security Subcommittee on the Review of the Anti-Terrorism Act Rights, Limits, Security: A Comprehensive Review of the Anti-Terrorism Act and Related Issues [Government Response]: "As a Member State of the United Nations and State Party to the United Nations Charter, Canada is legally obliged to give effect to measures imposed by binding resolutions of the Security Council; including the measures required by Resolution 1267, its successor resolutions and Resolution 1373 . . . Taken together, the three mechanisms advance domestic security interests and support Canadian conformity with a range of international obligations, including those under Resolutions 1267 and its successors, Resolution 1373."

40 *Abdelrazik v Canada (Minister of Foreign Affairs),* 2009 FC 580 at para 44, [2010] 1 FCR 267 [*Abdelrazik*].

41 Government Response, *supra* n 39.

42 *Abdelrazik*, *supra* n 40 at para 4.

Committee regime "a denial of basic legal remedies and as untenable under the principles of international human rights" and added that "There is nothing in the listing or de-listing procedure that recognizes the principles of natural justice or that provides for basic procedural fairness."[43] Although he did not reference any specific international human rights instrument, or raise the issue of the international and *UN Charter* "constitutionality" of the Council's actions, the statement is nonetheless striking for uniting in a single phrase a reference to international human rights and principles of natural justice characteristic of the Canadian tradition. Judge Zinn found that the Resolution 1267 procedure did not even make it to the level of the Canadian security certificate procedure, which at least allowed a limited hearing (and even then was struck down by the Supreme Court as being in violation of the *Charter*). He considered, moreover, that he could interpret the scope of the Security Council resolutions, and challenge the Executive Branch's own interpretation of them, in an effort to understand them in a way compatible with Canadian liberties. Ultimately, the Canadian government was found to have failed to implement its obligations under Resolution 1267 in a way compatible with the Canadian *Charter* and consequently violated Abdelrazik's constitutional right to enter Canada. The decision does not address what the situation would have been had Canada *correctly* interpreted Resolution 1267 as requiring it to arbitrarily limit *Charter* liberties, but is nonetheless a striking rejoinder of the tendency of the Canadian government to invoke its international obligations in ways that seem to undermine constitutional guarantees.

Conclusion

The study of anti-terrorism efforts in Canada during the last decade suggests a very uneven role for international law, one which has given considerable prominence to measures for fighting terrorism and which has only secondarily insisted on human rights. This has given the government considerable leeway in choosing which parts of international law it vigorously implements and which parts it treats as being of less immediate relevance. At times, the Executive has appeared to go out of its way to implement a Security Council-ordained program of fighting terrorism, successfully enlisting Parliament to ratify that program (a form of "Executive monism"). Paradoxically, Security Council injunctions to broadly reform domestic law or adopt sanctions against specific individuals are treated with scrupulous respect, even though their validity has been questioned by international lawyers as in excess of what was anticipated

43 *Ibid.*

by the *UN Charter*. By contrast, long-standing commitments expressed in international human rights treaties that Canada has ratified (but often not felt the need to implement expressly) have been treated with less urgency, and are rarely invoked by the Executive to challenge Security Council fiat. Moreover, the pronouncements of the UN human rights machinery that is partly built around those treaties and is meant to ensure their continued implementation have been treated politely, but with little evidence that they have had an impact on terrorism policy.

Part of the problem lies with institutional fractures at the UN itself which, in separating security and human rights issues, is liable to send a dissonant message. There is considerable imbalance between the way the security and human rights messages are conveyed. Security pressures come with the full force and credibility of the Security Council, a very active committee, and frequent reporting obligations all focused on one functionally narrow topic. Canada has taken its reporting obligations to the Council very much to heart and although it would be too much to say that they have determined Canadian policy, they have certainly helped legitimize a broad security turn as being in furtherance of a UN mandate. By contrast, although the international human rights mechanisms dealing with Canada's human rights performance are many, they typically have less authority. The lack of integration of human rights and security issues makes human rights internationally appear almost as an afterthought, with the priority being very much to fight terrorism. It then becomes easy for governments, including the Canadian government, to exploit these contradictions. In short, international law is invoked when it helps legitimize security policies, and it is ignored whenever it might pose a challenge to them.

One possibility with the passing of years is of course that some of the contradictions inherent in the UN's strategy will gradually be resolved and that some of the exorbitant procedures of the early days will become increasingly normalized. Changes since 2006 suggest that some at the Security Council have become worried that it wields excessive powers that would be unacceptable in a domestic context. In that respect, international law may be going through a process of gradual normalization not unlike that of domestic law in the wake of 9/11. Yet if anything the international system has relatively *less*, not more, counter-powers than most democratic systems, and it seems likely, if the half-hearted reform of the Resolution 1267 listing procedure is any guide, that the tensions will persist. The problem at the UN is magnified by the fact that its human rights machinery is still very state-centred, and has evidenced little ability to detect the hand of the international community

in measures adopted by states. Martin Scheinin, the Special Rapporteur on Terrorism, who argued that Security Council "terrorist listing procedures did not meet due process requirements of fair trial,"[44] is one of the rare exceptions. But there has been too little sustained engagement of Security Council policies in general by human rights bodies.

In this context, Parliament has not had a strong role in resisting Executive Branch initiatives based on international law. It has often seemed to take the need to implement Council resolutions at face value, even though the threat that Canada might be "in violation of its international obligations" is somewhat theoretical, and even though, at any rate, there is inevitably room for a significant "margin of appreciation" between what the Council demands and its concrete implementation in the laws of any country. Canada's pre-existing obligations under human rights treaties have not featured as prominently as they could have in debates on devising the most appropriate anti-terrorism policy. The judiciary, for its part, has often been hampered by its rigid dualism. Faced with a form of "Executive monism" that is almost too willing to consider that international law as mandated by the Council can and should be implemented broadly and immediately, it has most of the time been unwilling to judge Canadian policies by the standards of international human rights (for example, very few references were made to international human rights law in the context of debates on security certificates).

Yet Judge Zinn's decision in the Abdelrazik case stands out as a rather unique attempt to judge an international practice of designating terrorists as incompatible with the domestic human rights standards of the *Charter* and of international law itself. Together with efforts from civil society, it shows that there is more to international law than a narrow anti-terrorism focus, and that the UN should be held to the same standards it expects from states. It also shows that there is room for a form of vigorous "judicial dualism" when to incorporate certain international legal obligations domestically wholesale and uncritically would in fact undermine other international legal obligations. From an international law perspective, there will remain something awkward about domestic courts' standing as a significant bulwark of respect for human rights, even against the international community's own occasionally more authoritarian preferences. Yet it is interesting that domestic courts may be called upon to have an increasing role in decentralized enforcement of international

44 UN Department of Public Information, News and Media Division, "Press Conference by Special Rapporteur on Human Rights and Countering Terrorism" (22 October 2008), online: UN <http://www.un.org/News/>.

norms, and this reflects on Canadian judicial "dualism," at least when strategically used, in a much less negative light than is usually the case.

Overall, the international legal response to 9/11 does signal a transformation of the role of international law in relation to domestic law and policy in Canada. As one author pointed out, "While international law famously has compliance problems, such problems seemed to disappear" when it comes to terrorism.[45] Yet this may be precisely the problem, in a context where there is much need for the scope of compliance to be carefully examined to make sure that, under the guise of respecting international law, fundamental liberties are not rolled back. International law's contradictory signals when it comes to terrorism are bound to have contradictory effects domestically. If the last decade in Canada is any guide, parliaments and judiciaries would be well advised to strengthen their understanding of how international law continues to affect policies that too often pass for entirely domestic, and to explore ways in which, without reneging on international commitments, these can be interpreted dynamically so as to conform with human rights standards.

45 Kim Lane Scheppele, "The International Standardization of National Security Law" (2010) 4 Journal National Security Law & Policy 437.

From Counter-Terrorism to National Security?

Adam Tomkins[*]

Review of Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism*. (Cambridge University Press, 2011), 477 pp.

Comparative counter-terrorism law is now an established feature of legal scholarship, and Kent Roach is one of its leading exponents. In *The 9/11 Effect*, he has written perhaps its definitive text. The book is superb. Through more than a decade of assiduous work, Roach has amassed unrivalled learning in and experience of counter-terrorism law. In this book his knowledge and understanding embraces not only the United Nations, the United States, the United Kingdom, Canada and Australia, but also Israel, Egypt, Syria, Singapore and Indonesia. It is a remarkable achievement, and *The 9/11 Effect* will deservedly sit on top of the pile of well-thumbed works that all scholars working in counter-terrorism law will turn to frequently.

Enviably, *The 9/11 Effect* is not weighed down by this mass of learning. So at ease with his material is this author that he is able to combine great authority with an always welcome lightness of touch. The book is extremely easy to use. It is perfectly signposted, it comes with a helpful introduction and a pointed conclusion and even in its densest moments (and there is much technical law to come to grips with here) it avoids both the obvious traps—we don't get bogged down and at the same time we're not patronised by an author who wants only to skate over surfaces.

In short, I have nothing but praise for this book, and nothing but admiration for its author.

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Instead of merely piling on the compliments, what I want to do in this short review is to sketch one story of what might be about to happen next in the world of counter-terrorism law. I will do so not in the comparative format that Professor Roach has so brilliantly exploited but from the much more parochial perspective of the jurisdiction I happen to know best: the United Kingdom. I do so more in fear than in any spirit that Britain knows best. As has many times been pointed out, the UK is more of a leader than a follower in counter-terrorism law and, in my view regrettably, many countries have in the past followed or sought to follow where the UK has led. In 2012 we may be about to witness a potentially devastating example of this.

One of the core themes of *The 9/11 Effect* is that while counter-terrorism law is (or at least ought to be) rooted in the criminal law, too much of what we have seen around the world since 9/11 has, in too many countries, sought to find ways of countering terrorism through means other than those of the criminal law. Immigration law has been asked to bear a particularly heavy burden, and Professor Roach is right to be deeply critical of numerous aspects of this trend. I may be wrong about this, but my sense of it now is that we have gone about as far as we can go in creating new criminal offences to try to capture terrorists and that there is not very much room for manoeuvre, either, in terms of tinkering further with rules of criminal evidence or with other aspects of criminal procedure before we run into the limits that are set by various of our international and/or constitutional law norms (many of which have been more vigorously enforced by a number of the world's courts than might have been expected ten years ago).

The development that I want to explore here is not a development in the criminal law: it is a matter that arises in the context of civil justice. We are now at the point at which numerous victims of "the 9/11 effect" have brought—or have sought to bring—civil actions against those agencies of the State that have perpetrated or have been complicit in the perpetration of the abuses they have suffered. Victims of torture have started to sue various intelligence agencies. Victims of "extraordinary rendition" (a.k.a. kidnapping) have started to sue either their governments or, in the US, the private corporations that flew them about the place, from black site to black site. Relatives of those detained illegally in apparently lawless black holes such as Bagram have started to resurrect ancient devices such as habeas corpus in an effort to bring some kind of

legal regime to bear,[1] and so on. These are not criminal prosecutions, but civil actions, in which a variety of remedies is sought: not always damages.

Two such actions gripped the English courts in 2009–11. (These two are the best-known instances but they are not the only cases in this area in the UK.) The first was brought by Binyam Mohamed: *R (BM) v Secretary of State for Foreign and Commonwealth Affairs* ("*BM*").[2] At the material time Mr Mohamed was detained at Guantanamo. He was facing prosecution and, if convicted, was liable to be sentenced to death. He sought to argue in his defence that much of the evidence against him had been obtained under torture and was therefore unreliable. Before his capture Mr Mohamed had been lawfully resident in the United Kingdom. He understood that the British security and secret intelligence services had been informed by their American counterparts of the circumstances of his detention. With this in mind he launched a *Norwich Pharmacal* action in the English courts.[3] The *Norwich Pharmacal* jurisdiction provides that a third party who has become involved in the wrongdoing of another may be legally obliged to give to the victim of the wrongdoing documentation in the custody of the third party to assist the victim in identifying and pursuing the wrongdoer. Mr Mohamed sought to rely on this principle not to seek public disclosure of any material in the possession of the British security and secret intelligence services, but rather to seek the disclosure of any such material to his security-cleared counsel in the United States.

The Divisional Court held that, in principle, the *Norwich Pharmacal* jurisdiction applied in these circumstances but that its application on the facts would be subject to public interest immunity ("PII"). In the event the court never had to rule on the substance of the matter, as the material in question was passed by the US Government to Mr Mohamed's US lawyers. The Divisional Court described the general nature of the material in seven short paragraphs of its judgment. While the court judged that the publication of these paragraphs would pose no threat to national security, the security and secret intelligence services disagreed robustly. In their view the paragraphs summarised US intelligence that had been passed to the UK in strict confidence. They contended that any publication even of a high-level gist of the

1 On this matter see the recent and remarkable decision of the Court of Appeal in London in *Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs,* [2011] EWCA Civ 1540, [2011] WLD (D) 368.

2 *R (BM) v Secretary of State for Foreign and Commonwealth Affairs,* [2010] EWCA Civ 65, [2010] EWCA Civ 158, [2011] QB 218.

3 *Norwich Pharmacal Co v Customs and Excise Commissioners,* [1974] AC 133 HL (Eng).

intelligence in question would breach the "control principle," apparently the governing principle of intelligence sharing, whereby intelligence will be shared with an ally only on condition that its onward use remains under the control of the provider. The paragraphs were accordingly redacted. There followed a lengthy series of hearings in the Divisional Court and in the Court of Appeal as to whether the paragraphs in question should remain redacted or should be published. In the end the Court of Appeal ruled that they should be published but only because, by the time of this judgment, the material on which they were based had been released in separate legal proceedings in the United States.[4] Yet, at this ruling there was apparent fury in the United States, with wild threats that intelligence sharing with the United Kingdom would be jeopardised if the English courts could not be persuaded that the secrecy of intelligence material was more important than the values of open justice.[5]

The second case, known as *Al Rawi*, was brought by six men who had been lawfully resident in the United Kingdom but who were detained at Guantanamo. They sought damages from various departments and agencies of Her Majesty's Government for complicity in their rendition, detention and mistreatment. The claims were brought for false imprisonment, trespass to the person, conspiracy to injure, negligence, misfeasance in public office and breach of the UK's *Human Rights Act 1998*. The security and secret intelligence services argued that they could not defend the claims. To make their defence they would be required to disclose to the parties so much sensitive material that the trial itself would be a significant risk to national security, they contended. To overcome this problem, it was proposed that the trial be held not in accordance with our normal procedures but under a new, specially-created procedure known as closed material procedure ("CMP"). This procedure, modelled on the sort of process adopted by specialist tribunals in the UK such as the Special Immigration Appeals Commission, would have entailed the sensitive material in question being disclosed not to the parties and to their "open" lawyers, but only to the court and to a special advocate who would act on behalf of the claimants in the closed hearings but who would have to do this without being able to take any instructions from the claimants (or indeed without being able to communicate with them or with their open lawyers at all) once the closed material had been served.

4 For the full story of this extraordinary case, see Adam Tomkins, "National Security and the Due Process of Law" (2011) 64 Curr Legal Probs 1, esp at 9–29.

5 See UK, "Intelligence and Security Committee: Annual Report 2010–2011," Cm 8114 in *Sessional Papers* (2011) 1 (Chairman: The Rt. Hon. Sir Malcolm Rifkind, MP).

At first instance the trial judge ruled that, absent specific statutory authority to this effect, he had no power to order that any part of a civil action for damages be conducted under a CMP.[6] The Court of Appeal affirmed, ruling in an impressive judgment that to proceed in accordance with a CMP would be contrary to fundamental common law principles of open justice.[7] This was in May 2010. At this point the UK's new Prime Minister, Mr. Cameron, intervened with a statement in Parliament that the claim in *Al Rawi* would be settled for the reason that he could not tolerate the resources of the security and secret intelligence services being tied up in the vagaries of litigation.[8] Notwithstanding the settlement of the substantive matter, however (reported to have amounted to £20 million plus costs)[9] the UK Supreme Court decided to hear and to rule upon the appeal from the Court of Appeal on the procedural matter of whether the court possessed a common law power in certain circumstances to order that a civil trial proceed in part or in whole under a CMP. After some months the Supreme Court delivered a split opinion that had little of the clarity of the Court of Appeal.[10] A panel of nine Justices was unanimous on the point that a CMP could not be ordered until after a PII exercise had been undertaken (but it was unclear that this point was even in contention: the trial judge at first instance seems to have proceeded on the basis that it was not). The panel was split three ways—with no clear majority position—on the matter of whether a CMP could be ordered in a civil action after a PII exercise had been undertaken.[11]

A PII exercise is as follows: a minister decides whether evidence that is material to a case ought, in the public interest, to be withheld (despite its materiality). If so, he or she signs a certificate to this effect. The court, normally after inspecting the evidence in question in private, will rule on where the balance of the public interest lies. On the particular facts and circumstances of the case, does the public interest in the administration of justice outweigh the public interest cited in the PII certificate, such that the evidence should be disclosed, or vice versa? If the balance lies in favour of non-disclosure, then the evidence in question cannot be used by any of the parties (and cannot be

6 *Al Rawi v Security Service,* [2009] EWHC 2959 (QB).

7 *Al Rawi v Security Service,* [2010] EWCA Civ 482, [2010] 3 WLR 1069.

8 UK, HC, *Parliamentary Debates*, Vol 513, col 175 ff (6 July 2010) (Prime Minister David Cameron).

9 See UK, HC, *Parliamentary Debates*, Vol 533, col 905 (19 October 2011).

10 *Al Rawi v Security Service,* [2011] UKSC 34, [2011] 3 WLR 388.

11 *Ibid.* Lord Clarke, Lord Mance and Lady Hale thought that it could; Lords Dyson, Hope and Kerr thought that it could not; Lord Brown took a different approach altogether; Lord Phillips declined to answer the question; and Lord Rodger died after the argument in the case had been heard but before the judgment of the Court was handed down.

used by the court) at all.[12] The PII exercise in the *Al Rawi* litigation was said to be so complex that more than twenty lawyers were working on it and that it would take three years or more to complete. Even then, the result may have been that so much material would have to be excluded that the claim would be untriable.

In late 2011 the UK Government published a consultation paper ("Green Paper") on *Justice and Security*.[13] The Green Paper contains radical proposals as to how our civil justice system should be reformed in the light of the problems alleged to be illustrated by *BM* and *Al Rawi*. First, it is proposed that legislation be introduced that would provide for the removal of the *Norwich Pharmacal* jurisdiction "where disclosure of the material in question would cause damage to the public interest."[14] Under this proposal, it is envisaged that for material held by the security service or the secret intelligence service there would be an absolute exemption from disclosure. For other sensitive material it is proposed that a minister could certify that disclosure would be damaging. In such cases the *Norwich Pharmacal* claim would fail, but the minister's decision to issue a certificate would be amenable to judicial review on ordinary common law grounds.

Secondly, it is proposed that legislation be brought forward that would provide for civil actions to proceed under a CMP.[15] Under the Government's proposed model it would be for the Secretary of State (not for the court) to decide that the use of a CMP was required in any particular case.[16] Such a decision would be amenable to judicial review on ordinary common law grounds.

These proposals are extraordinary and go very much further than is required to meet any "problem" that is alleged to have been caused by the courts' rulings in *BM* and *Al Rawi*. There is no evidence in support of the proposition that the UK's current legal rules or procedures pose a danger to national security. There is no evidence that our well-established rules and practices of PII are failing or are ineffective or inappropriate. I am aware, for example, of no case in which operationally sensitive security information has been disclosed by a court in the United Kingdom over the judgment of a Government minister. Neither is there any compelling evidence that civil actions cannot be tried

12 The leading authorities on PII include: *Conway v Rimmer,* [1968] AC 910 HL (Eng), [1968] 2 WLR 998, and *R v Chief Constable of West Midlands Police, ex parte Wiley,* [1995] 1 AC 274 HL (Eng), [1994] 3 ALL ER 420.

13 UK, "Justice and Security: Green Paper," Cm 8194 in *Sessional Papers* (2011) 1.

14 *Ibid* at para 2.91.

15 *Ibid* at paras 2.3–2.9.

16 *Ibid* at para 2.7.

without recourse to a CMP. There is only one reported case of an action being struck out because so much material would have been excluded from the trial by reason of its sensitivity and even that case (*Carnduff v Rock*)[17] was almost certainly wrongly decided. Relevant case law on PII does not appear to have been cited to the court that decided *Carnduff* and in subsequent decisions judges have gone out of their way to distance themselves from it.[18]

Despite this, however, it is conceivable that more such cases may arise in the future. If the *Al Rawi* claim had not settled, the claimants would surely have faced an application to strike the claim out if it became clear through the PII process that so much material would be subject to PII that the Government could not properly defend itself against the claims made. Certainly this prospect seems to have concerned a number of Supreme Court Justices in the case—there is considerable discussion of *Carnduff* in the judgments in *Al Rawi*. It may therefore be that the Government is wise to consider bringing forward legislative proposals in this area, despite the grave concerns that one would want to raise as regards open justice. This said, however, there can be no justification for the particular scheme of CMP in civil actions that is proposed in the Green Paper. For one thing, it must be for the court (and not for the Government) to decide whether a CMP is required. Further, no resort to CMP could possibly be justified until after it had been established (by undertaking the full PII process) that it was absolutely necessary: that is to say, until after it had been established that without it the action simply could not go ahead at all.

Points such as these have been put to the Government by numerous commentators during the consultation period that was triggered by the Green Paper.[19] At the time of writing we wait to see whether the legislation that is expected on these matters later in 2012 presses ahead with the unconscionable scheme proposed by the Green Paper, or adopts instead modifications along the lines suggested above.

Regardless, it seems that the issues addressed in the UK's Green Paper are matters that will dominate national security law not only in Britain but across the world as we move further into the second decade post 9/11. Kent

17 *Carnduff v Rock,* [2001] EWCA Civ 680, [2001] 1 WLR 1786.

18 See e.g. *Barracks v Chief Superintendent John Coles,* [2006] EWCA Civ 1041, [2007] ICR 60.

19 On behalf of the Bingham Centre for the Rule of Law I co-authored with Tom Hickman a submission to the consultation exercise, which has been published on the Bingham Centre's website: http://www.biicl.org/binghamcentre/. A number of the points made in this review are developed in more detail in that submission.

Roach teaches us in *The 9/11 Effect* that the principal legal lessons of the first decade were that counter-terrorism law became a subject of serious and deep comparative study, and that the ongoing tension between terrorism-as-crime and the perceived need to find alternative legal (and illegal) models of counter-terrorism to that of the criminal law is one of the recurrent themes of the subject. The suggestion made here is that the focus may now shift beyond the specifics of terrorism towards an even messier array of ways in which national security (of which counter-terrorism is just one part) poses great challenges for those of us who, like Professor Roach, are convinced that it is national security that must be brought within and made subject to the rule of law, and not the other way around. In making that argument, lawyers the world over will cite and rely upon Kent Roach's groundbreaking scholarship. We are all greatly in his debt.