

OF GODS AND MONSTERS: NATIONAL SECURITY AND CANADIAN REFUGEE POLICY

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Résumé de l'article

Le cinquantième anniversaire de la *Convention de 1951* permet de porter un regard sur les promesses faites par le Canada en tant que pays signataire, d'analyser l'étendue de la politique canadienne sur les réfugiés, ainsi que de définir les véritables objectifs de la *Convention*. À travers la vision des principes juridiques établis par la *Convention*, les normes internationales complémentaires, ainsi que la jurisprudence disponible, cet article étudie les situations contemporaines des réfugiés particulièrement par rapport à la dimension de la sécurité nationale. L'article trace l'évolution des lois concernant les réfugiés et leur application pendant la période de la Guerre froide, ainsi que les développements parallèles relatifs à la sécurité et l'immigration. Ensuite, l'analyse se penche sur les mesures de sécurité nationale et d'antiterrorisme mises en œuvre par le gouvernement canadien en 1992 et celles actuellement étudiées par le Sénat. L'article conclut avec l'élaboration d'une approche alternative à la sécurité nationale qui s'inspire des normes légales ainsi que des valeurs fondamentales établies par la *Convention*. Il s'agit d'une approche qui a comme objectif de réduire l'écart entre le « soi civilisé » et « l'autre barbare », ainsi que d'améliorer la sécurité humaine des réfugiés et des populations qui les accueillent.

OF GODS AND MONSTERS : NATIONAL SECURITY AND CANADIAN REFUGEE POLICY

Par Sharryn J. Aiken*

Le cinquantième anniversaire de la *Convention de 1951* permet de porter un regard sur les promesses faites par le Canada en tant que pays signataire, d'analyser l'étendue de la politique canadienne sur les réfugiés, ainsi que de définir les véritables objectifs de la *Convention*. À travers la vision des principes juridiques établis par la *Convention*, les normes internationales complémentaires, ainsi que la jurisprudence disponible, cet article étudie les situations contemporaines des réfugiés particulièrement par rapport à la dimension de la sécurité nationale. L'article trace l'évolution des lois concernant les réfugiés et leur application pendant la période de la Guerre froide, ainsi que les développements parallèles relatifs à la sécurité et l'immigration. Ensuite, l'analyse se penche sur les mesures de sécurité nationale et d'antiterrorisme mises en œuvre par le gouvernement canadien en 1992 et celles actuellement étudiées par le Sénat. L'article conclut avec l'élaboration d'une approche alternative à la sécurité nationale qui s'inspire des normes légales ainsi que des valeurs fondamentales établies par la *Convention*. Il s'agit d'une approche qui a comme objectif de réduire l'écart entre le « soi civilisé » et « l'autre barbare », ainsi que d'améliorer la sécurité humaine des réfugiés et des populations qui les accueillent.

The fiftieth anniversary year of the 1951 Convention affords an appropriate juncture to turn our gaze to the pledges Canada has made as a signatory state and the extent to which Canadian refugee policy has been "securitized" at the expense of vulnerable refugees and the very objectives the Convention was designed to address. Through the lens of the legal standards established by the Convention as well as complementary international norms and jurisprudence, this paper considers Canada's contemporary record on refugee issues with specific reference to the national security dimension of domestic policy. The author begins by tracing the evolution of refugee law and policy during the Cold War period, as well as parallel developments in the area of immigration security. The primary focus then turns to the anti-terrorism and security measures implemented by the federal government in 1992, together with proposals for reform under review in the Canadian Senate. The author concludes by locating the coordinates of an alternative approach to national security, one which incorporates the legal standards and normative values codified in the Refugee Convention. It is an approach that is premised on the overarching objective of bridging the chasm between "civilized self" and "barbaric other," of enhancing human security for refugees and host population alike.

N.D.L.R. : Suite à une malencontreuse erreur d'édition, l'article *Of Gods And Monsters : National Security And Canadian Refugee Policy* publié à (2001) 14.1 *R.Q.D.I.* 7 est incomplet. On trouvera ici l'article de Madame Sharryn J. Aiken tel qu'il aurait dû être publié. La rédaction de la R.Q.D.I. prie Madame Aiken d'accepter ses plus sincères excuses.

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We experience our violent selves by unleashing vicariously our wrath upon hypothetical evil others; with their savage violence, it is they who are our foils and deserving of our civilized retribution [...] [O]ur notions of civilized self and barbaric other are still awaiting demythification and reenchantment.

– Joseba Zulaika and William A. Douglass.¹

Introduction

Since Rome's reception of the fleeing Barbarians, the tradition of asylum has opened doors for desperate refugees in search of sanctuary.² In the modern era, however, national policies with regard to the admission and exclusion of non-citizens are typically characterized as central aspects of state sovereignty. Territorial frontiers, over which states maintain absolute control and authority, define the limits of the nation, differentiate between US and THEM and determine who has the privilege of admission.³ The 1951 Geneva Convention relating to the *Status of Refugees*⁴ represented an intention to accord a different and better standard of treatment to a particular class of non-citizens identified as refugees. The essential logic of the Convention was that when all other forms of human rights protection have failed, individuals must be able to leave their homeland and seek refuge elsewhere. As enunciated in its preamble, the purpose of the Convention was to assure refugees the widest possible exercise of fundamental rights and freedoms. Refugees would no longer be seeking a privilege, but asserting rights which signatory states would be obliged to respect. One of the first major international human rights instruments to be finalized after the 1948 Universal Declaration of Human Rights,⁵ the Convention reflected states' sense of responsibility and moral obligation towards protecting refugees in the wake of the second world war. As Whitaker points out, this moral high ground was relatively easy to achieve at a time when the West dominated the United Nations. The construction of an international refugee regime was seen as a key ideological component of the confrontation between the West and the Communist bloc.⁶ Today, in the fever pitched climate of America's newly proclaimed war on international terrorism, the need for states to uphold their obligations under the Convention remains critical. Yet, the pressures from an increasingly globalized refugee crisis have generated less tolerance and more hostility to refugees than there

¹ *Terror and Taboo : The Follies, Fables, and Faces of Terrorism* (New York and London : Routledge, 1996) at 190.

² James C. Hathaway, "The Evolution of Refugee Status in International Law : 1920-1950" (1984) 33 *Int. & Comp. L.Q.* at 348; see also W.Gunther Plaut, *Asylum- A Moral Dilemma* (Toronto : York Lanes Press, 1995) at 11.

³ See Catherine Dauvergne, "Beyond Justice : The Consequences of Liberalism for Immigration Law" (1997) 10 *Can. J.L. & Juris.* 323 for an interesting discussion of liberal theory's approach to territorial boundaries and immigration.

⁴ *Convention relating to the Status of Refugees* (1951), 189 U.N.T.S. 150, Can. T.S. No. 6 (entered into force 22 April 1954, accession by Canada 4 June 1969) [*Refugee Convention or Convention*].

⁵ GA Res. 217A(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

⁶ Reg Whitaker, "Refugees : The Security Dimension" (1998) 2:3 *Citizenship Studies* 413 at 418.

was fifty years ago.⁷ Countries in the North and South alike are erecting fences and patrolling their borders in an effort to safeguard their citizens from “foreign threats.” In the process, the refugee has been reconceived as a protean menace – as “bogus asylum seeker,” illegal migrant, and even worse, criminal or terrorist.

Numerous studies confirm that the overall impact of refugee flows on the crime rate and internal security of receiving countries tends to be misjudged and overestimated.⁸ In Canada refugees and immigrants are actually less likely to commit major crimes than the native-born, and are under represented in the national prison population.⁹ Nevertheless, in both Canada and the United States, refugees and immigrants have been criminalized and “securitized” in efforts to assuage conditions of turmoil and anxiety. In the immediate aftermath of attacks on the World Trade Center and the Pentagon in September 2001 Canadian Prime Minister Jean Chrétien indicated that tougher requirements for would-be refugee claimants would be part of a package of reforms to respond to the new global realities.¹⁰ A Liberal Senator expressed concern that “a series of governments have been lax” in regard to terrorism and immigration and signaled that proposed changes to the refugee scheme would receive “tougher scrutiny” in the Senate.¹¹ At the same time, a chorus of voices on both sides of the border was pressing for a common North American security perimeter and suggesting that Canada should bring its immigration laws into line with the United States to help combat terrorism.¹² A National Post report cited Canada’s

⁷ Rachael Reilly, “UNHCR at 50 : What Future for Refugee Protection,” Human Rights Watch Background Paper (New York : Human Rights Watch, 2000) at 3.

⁸ Lohrmann argues that “the most important security implications of some population flows are felt by the refugees and migrants themselves.” Reinhard. Lohrmann, “Migrants, refugees and Insecurity : Current threats to peace?” (2000) 38:4 *International Migration* 2 at 6, 8. A recent study suggests there has actually been a decrease in refugee involvement in political violence since the end of the Cold War, despite a few notorious cases (*i.e.*, Rwanda, Afghanistan and Cambodia). See, Sarah Kenyon Lischer, “Refugee involvement in political violence : quantitative evidence from 1987-1998.” New Issues in Refugee Research, Working Paper No. 26, UNHCR (July 2000). However, the impact of refugee-warrior communities on host societies in the context of armed conflict and mass influxes of refugees is a distinct issue, and one which my paper does not purport to address.

⁹ According to the most recent available statistics, 20.5% of the Canadian population over 15 had been born outside the country, while only 11.9% of the total prison population were foreign born. See Derrick Thomas, “The Foreign Born in the Federal Prison Population,” Paper presented at the Canadian Law and Society Association Conference, Carleton University, 8 June, 1993 (figures are for 1993); and John Samuel, “Debunking Myths of Immigrant Crime,” *The Toronto Star* (17 June 1998).

¹⁰ As cited in Tim Harper, “Chrétien pledges battle over global terror threat” *The Toronto Star* (18 September 2001) A1. Other reforms include an omnibus anti-terrorism bill and new funding for federal security agencies.

¹¹ Jerry Grafstein, as cited in “Immigration act to face tough review : Senator” *The Toronto Star* (14 September 2001) A28.

¹² See, for example, Justine Hunter, “Canada Needs Tight Perimeter : U.S. Ambassador” *National Post* (13 September 2001) A11. Although Citizenship and Immigration Minister Elinor Caplan initially dismissed the concept of a common security perimeter, by the end of October she disclosed that her department was in “visa convergence” talks with the Americans and that the idea of a “safe third country” agreement concerning the allocation of asylum claims between the United States and Canada was being resurrected. Campbell Clark, “Canada in talks with U.S. on pact dealing with refugees, visitor visas” *The Globe and Mail* (26 October 2001) A6; and Ed Greenspon, “Seizing the day on Canada-U.S. border flows” *The Globe and Mail* (13 November 2001) A21.

porous borders and overly generous refugee policies as a “conduit for terrorists.”¹³ In the absence of actual evidence that any of the hijackers or their associates had entered the United States from Canada, senior American officials were on record speculating about a “Canadian connection” to the horrific attacks in New York and Washington.¹⁴ In the following days Muslims were subjected to threats, harassment and physical assaults from fellow citizens and mosques were vandalized.¹⁵ In the United States, the FBI was investigating three shooting deaths as possible hate crimes. In less than six weeks, more than eight hundred people had been detained in American jails on mere suspicion of terrorist links. It was presumed that that the overwhelming majority of people taken into custody were immigrants and foreign nationals, while authorities conceded that only about ten may have been members of Osama bin Laden’s Al-Qaeda network.¹⁶ Meanwhile in Ontario, the premier announced the formation of an elite police unit to track down illegal immigrants and see that they are deported, suggesting that Ontario residents want protection from these immigrants –and their potential crimes – in the wake of the September 11 attacks.¹⁷ The Ontario premier’s newly appointed security advisor indicated that ethnic profiling of certain communities would have to be part of new security measures.¹⁸ In times of crisis, the iron grip of prejudice on public attitudes, discourse and policy becomes easy to discern. Typically, pleas to close the border are articulated within a calculus of political realism – of preventing harm and promoting the national interest.¹⁹ National interest may be variously or simultaneously defined in terms of the economy, public safety or geo-politics. However, when any of these interests are perceived to be in jeopardy, a reactionary political discourse seeks to exteriorize the threat by blaming

¹³ Stewart Bell, “A conduit for terrorists,” *National Post* (13 September 2001) B5.

¹⁴ Daniel Leblanc, Anderw Mitrovica and Ingrid Peritz, “No evidence of Canada link” *The Globe and Mail* (14 September 2001) A7. See also, John Geddes, “The Terrorists Next Door” *Macleans* (24 September 2001). Much later, the public learned of the case of Nabil Al-Marabh. A Syrian national born in Kuwait, Al-Marabh had entered Canada as a refugee claimant, was rejected by the Canadian Refugee Board but subsequently managed to elude authorities on both sides of the border until his recent detention in the United States on suspicion of links to Al – Qaeda. See, P. Cheney *et al.*, “The Mystery of the Invisible al-Marabh, Terrorist kingpin or ordinary store clerk” *The Globe and Mail* (27 October 2001) A1.

¹⁵ San Grewal, “Prejudice, yes, but fear?” *The Toronto Star* (17 September 2001) B2; see also, “Indian Immigrant shot dead at U.S. gas station” *The Toronto Star* (17 September 2001); and Tim Harper, “PM ‘shamed’ by hate crimes against Muslims in Canada” *The Globe and Mail* (22 September 2001) A9.

¹⁶ “Let’s remember what we are about” *The Globe and Mail* (20 September 2001) A12; Deborah Sontag, “Who is This Kafka That People Keep Talking About?” *New York Times Magazine* (21 October 2001) 54 at 57; Tu Thanh Ha, “U.S. dragnet snares few al-Qaeda suspects” *The Globe and Mail* (22 October 2001) A1; See also, Richard A. Seranno, “Detainees face assaults, other violations, lawyers say” *Los Angeles Times* (15 October 2001).

¹⁷ “Illegal immigrants pose threat, Harris says” *The Toronto Star* (4 October 2001).

¹⁸ See, Ontario, Legislative Assembly, *Debates* (3 October 2001) at 1440 (Peter Kormos on “Ethnic Profiling”).

¹⁹ For an analysis of migration from the standpoint of political realism, see Myron Weiner, *The Global Migration Crisis : Challenge to States and to Human Rights* (New York : HarperCollins, 1995). See also Charles R. Beitz, *Political Theory and International Relations* (Princeton : Princeton University Press, 1979); and Jack Donnelly, “Twentieth-century Realism” in Terry Nardin and David R. Mapel, eds., *Traditions of International Ethics* (Cambridge : Cambridge University Press, 1992) 85-111.

the “foreigners”²⁰ and repudiating any pretense of cosmopolitanism.²¹ This potent narrative of the dangerous Other assaulting the borders, aiming for society’s civil foundations, readily converts to laws and policies restricting access to immigration and asylum.

A few examples readily illuminate the tenacious appeal of political realism in theorizing migration and framing North American policy responses to immigrants and refugees. In 1918 soaring inflation sparked increasing militancy on the part of Canadian workers, culminating in the Winnipeg General Strike the following year. From May 15 to June 28, 1919, there was a massive confrontation between business and labour in which approximately 30,000 workers walked off their jobs, bringing virtually all industrial activity in the city of Winnipeg to a standstill. Business leaders pronounced that the strike had been fomented by an international Bolshevik conspiracy led by a small group of “alien scum,”²² persuading the federal government to implement a series of draconian amendments to Canada’s immigration and naturalization laws.²³ While none of the available evidence substantiated this charge, national security became a convenient excuse for the assignment of guilt by association, justifying raids on the homes of “foreign-born agitators” and the arrest, internment and subsequent deportation of approximately two hundred “anarchists and revolutionaries.”²⁴ The following year a powerful dynamite bomb exploded in the heart of the financial district in lower Manhattan, killing forty people, seriously injuring an estimated two hundred and fifty more, and causing unprecedented levels of destruction and damage. The bombing was widely attributed to an Italian-born anarchist. Americans responded immediately with calls for tighter controls on immigration and greater vigilance at the nation’s major entry points. Rising “enemy alien” hysteria resulted in the “Palmer raids” during which thousands of people were arrested in thirty three cities on suspicion of Communist or anarchist ties. Nearly all of those arrested were released after agents found only three guns and no explosives.

²⁰ As Macklin asserts, “[t]he myriad tropes of the foreign Other – as vector of disease, agent of subversion, corrupter of the moral order and debaser of the national identity – all trade on the exteriorization of threat and the foreigner as the embodiment of its infiltration.” Audrey Macklin, “Borderline Security” in Ronald J. Daniels, Patrick Macklem and Ken Roach, eds., *The Security of Freedom* (Toronto : University of Toronto Press, 2001) 383 at 392.

²¹ Cosmopolitanism is the antithesis of sovereigntism. As Penz explains, it is an ethical perspective which “treats all of humanity as part of one moral community, without distinguishing between compatriots and foreigners. Whatever moral obligations we have to other persons, we have to *all* other persons, regardless of nationality. States have institutional significance, but they do not define moral communities. Borders do not represent the limits to general moral concerns.” The right to asylum is a concrete expression of cosmopolitanism. Peter Penz, “Ethical Reflections on the Institution of Asylum” (2000) 19:3 *Refugee* 44 at 47. See also, Yasemin Nuhoglu Soysal, “Toward a Postnational Model of Membership” in Gershon Shafir, ed., *The Citizenship Debates* (Minneapolis : University of Minnesota Press, 1998) 189-217.

²² Valerie Knowles, *Strangers at our Gates* (Toronto : Dundum Press, 1997) at 105.

²³ *Ibid.* at 104-107; and Ninette Kelley and Michael Trebilcock, *The Making of the Mosaic : A History of Canadian Immigration Policy* (Toronto : University of Toronto Press, 1998) at 303-304.

²⁴ Donald H. Avery, *Reluctant Host : Canada’s Responses to Immigrant Workers, 1896-1994* (Toronto : McClelland & Stewart, 1995) at 78-79; see also, *Dangerous Foreigners : European Immigrant Workers and Labour Radicalism in Canada* (Toronto : McClelland & Stewart, 1979); and Ninette Kelley and Michael Trebilcock, *ibid.* at 180-182.

Nevertheless, the American government proceeded to implement restrictive anti-immigrant legislation.²⁵

The Japanese bombing of Pearl Harbor in 1941 ignited public outrage and racism against persons of Japanese ancestry, racism which had been smouldering in Canada and the United States since the turn of the century. In British Columbia, the spectre of a Japanese invasion aided by a “fifth column” in Canada became an immediate flash point. Despite advice from senior defence officials that such an invasion was unlikely and that Japanese residents did not pose a security risk, the views of West Coast military commanders prevailed. Within hours of the attack, Prime Minister Mackenzie King ordered the seizure of 1,200 fishing boats owned by Japanese Canadians. Within weeks the first of a series of orders-in-council were passed authorizing the exclusion of “enemy aliens” from any “protected area” in Canada. Subsequent orders-in-council sanctioned the expulsion and internment of 22,000 Japanese immigrants and Japanese Canadians as well as the confiscation of their property. Similar internment policies were adopted in the United States. At the end of the war more than 4,000 people were removed from Canada under a repatriation scheme. In 1988, over forty years later, the Canadian and American governments would acknowledge the abuses inflicted on persons of Japanese descent with formal apologies and reparations.²⁶ As finally recognized by the American Commission on Wartime Relocation and Internment of Civilians, it was not the legitimacy of the public’s security fears that prompted government policies, but rather, “race prejudice, war hysteria, and a failure of political leadership.”²⁷

In 1995, in response to two murders alleged to have been committed by immigrants in Toronto,²⁸ the Canadian government swiftly implemented Bill C-44, imposing mandatory detention and deportation for refugees and permanent residents deemed a “danger to the public.”²⁹ The threshold for a public danger designation was

²⁵ James Adams, “The Day Wall Street exploded” *The Globe and Mail* (15 September, 2001) R3; and Linda Greenhouse, “The Clamor of a Free People” *The New York Times* (16 September 2001) section 4 at 1; see also, Paul Avrich, *Sacco and Vanzetti : The Anarchist Background* (Princeton : Princeton University Press, 1991); and K.R. Johnson, “The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws : Important Lessons for Citizens and Non-citizens” (1997) 28 *St. Mary’s L.J.* 833.

²⁶ Valerie Knowles, *supra* note 22 at 124; and Ninette Kelley and Michael Trebilcock, *supra* note 24 at 291-307.

²⁷ Commission on Wartime Relocation and Internment of Civilians, as cited in Robert S. Chang, “Toward an Asian American Legal Scholarship” in Richard Delgado, ed., *Critical Race Theory, The Cutting Edge* (Philadelphia : Temple University Press, 1995) 322 at 333. 120,000 Japanese Americans had been interned in the United States. See also Ninette Kelley and Michael Trebilcock, *supra* note 24 at 255.

²⁸ The two men who were ultimately convicted in relation to the robbery and shooting at “Just Deserts” were actually Canadian citizens. The suspects in the case, however, were all black men and the victim was a white woman. Shortly after the shooting, Sergio Marchi, Minister of Immigration, told the House of Commons “the system failed us.” Shannon Kari, “Man acquitted in café killing may be deported” *National Post* (26 March 2001). The man convicted in the second murder was a permanent resident who had been ordered deported but his removal had not been effected. Law Union of Ontario, “Submission to the Parliamentary Committee Examining Bill C-11,” Toronto, March 2001.

²⁹ Pursuant to section 70(5) of the amended *Immigration Act*, individuals who are classified as a “danger to the public” may be arrested and held indefinitely pending deportation from Canada under an opinion

based on offences carrying a potential (rather than actual) sentence of ten years or more. Media coverage of the two murders had produced a moral panic concerning immigrant crime, generating broad support for measures which would result in thousands of long term permanent residents, including disproportionate numbers of African Canadians, being deported from Canada.³⁰ Admittedly, the foregoing snapshots are a highly selective rendering of immigration history in North America, but these shameful episodes certainly point to legitimate questions of cause and effect concerning the triggers for xenophobic policy changes and their consequences.

The fiftieth anniversary year of the 1951 Convention affords an appropriate juncture to turn our gaze to the pledges Canada has made as a state party and the extent to which Canadian refugee policy has been “securitized” at the expense of vulnerable refugees and the very objectives the Convention was designed to address. Through the lens of the legal standards established by the Convention as well as complementary international norms and jurisprudence, this paper will consider Canada’s contemporary record on refugee issues with specific reference to the national security dimension of domestic policy. I will begin by tracing the evolution of refugee law and policy during the Cold War period, as well as parallel developments in the area of immigration security. The primary focus then will turn to the anti-terrorism and security measures implemented by the federal government in 1992, together with reforms introduced in 2001. I will conclude by locating the coordinates of an alternative approach to national security, one which incorporates the legal standards and normative values codified in the Refugee Convention but is predicated on an understanding that law itself cannot purchase a secure nation. It is an approach that seeks to accommodate human rights in any calculus of state security and is informed by the overarching objective of shifting security discourse and law to a more cosmopolitan terrain.

issued by the Minister. Violent crimes, drug trafficking and sexual abuse are within the ambit of this provision – as are convictions for dangerous operation of a vehicle, cattle theft, obtaining credit by false pretence, and forgery. There is no appeal from the issuance of a Minister’s danger opinion, only judicial review by the Federal Court, and then only with leave. The procedures resemble those used in security cases with the exception of more fulsome disclosure in the absence of a need to protect intelligence information. According to a report of the Canadian Bar Association, approximately 80% of applications for leave are denied outright, without reasons and without avenue for further review [National Citizenship and Immigration Section Law Section, Canadian Bar Association, “Response to Building on a Strong Foundation for the 21st Century” [99-E], March 1999 at 76.

³⁰ African Canadian Legal Clinic, “No Clear & Present Danger : The Expulsion of African Canadian Residents from Canada, A Discussion Paper, (Toronto, 1999) at 3, 21. This study provides an analysis of data from the Ontario region, noting that in 1998 African Canadians comprised only 3.5% of the population of Ontario but over 60% of the danger to the public removals. See also, R. Christmas, producer, “The Unwanted,” *CBC Television Documentary, The National*, (28 May 2001). Pending implementation in mid-2002, Bill C-11, *An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger* [*Bill C-11* in the text and *Immigration and Refugee Protection Act* in subsequent citations], 1st Sess., 37th Parl., 2001 (Royal Assent, 1 November 2001) will replace the public danger scheme with provisions that mandate automatic deportation for anyone who has been sentenced to a prison term of two years or more.

I. From Cold War Politics to a Multipolar Security Agenda

From its genesis in the early post-Confederation era through to the 1960s, the explicit objective of Canadian immigration law and policy was to sustain the European character of Canada and exclude people of “non-assimilative race,” those deemed incapable of contributing to the Anglo-conformist project of nation building.³¹ Census figures indicate that prior to 1961 only 3 percent of Canada’s overall immigration intake (including refugees, who were not identified in a discrete category) was from “non-traditional” source countries in Asia, Africa and Latin America. In this context, “national security” served as a useful tool of immigration control, a shield for white Canada’s fear that foreign Others were corrupting the nation’s “racial purity” and political fabric.³² Although Canada was an important financial supporter of the United Nations High Commissioner for Refugees (UNHCR) from its inception and subsequently became a member of its governing Executive Committee, the federal government initially refused to sign the Refugee Convention based on a fear that the treaty would impede the deportation of refugees on security grounds.³³ In the immediate post war period fear of Soviet infiltration was the primary security concern. This concern became heightened when a clerk from the Soviet Embassy named Gouzenko defected and revealed the existence of a communist spy network. The “Gouzenko affair” generated a widespread preoccupation within government about security — a concern that grew as Cold War tensions increased. Immigration regulations included an absolute prohibition on admission of communists while Cabinet directives authorized a selective course of immigration security screening without deciding who to screen, how to screen or what screening criteria would be applied. These decisions were left to the discretion of the Royal Canadian Mounted Police (RCMP). Records indicate that Cabinet regarded security matters as a key priority but did not want the security process made public. As reported in a recent Federal Court decision, “[n]ot only was the actual process secret but the fact that such a process was in place was a closely guarded secret.”³⁴

In the absence of legislation governing the admission of refugees, the federal government adopted *ad hoc*, administrative measures. As Whitaker explains, these

³¹ See Anthony Richmond, “Refugees and Racism in Canada” (2001) 19:6 *Refuge* 12 at 14 and 16; and Lisa M. Jakubowski, “‘Managing’ Canadian Immigration : Racism, Ethnic Selectivity, and the Law” in Elizabeth Comack, ed., *Locating Law, Race/Class/Gender Connections* (Halifax : Fernwood Press, 1999) 98 at 100-104.

³² Augustine Brannigan and Zhiqiu Lin, “‘Where East Meets West’ : Police, Immigration and Public Order Crime in the Settlement of Canada from 1896-1940” (1999) 24 *Canadian Journal of Sociology* 87 at 91.

³³ Reg Whitaker, *Double Standard : The Secret History of Canadian Immigration* (Toronto : Lester & Orpen Dennys, 1987) at 53; see also, Ninette Kelley and Michael Trebilcock, *supra* note 23 at 339.

³⁴ *Canada v. Dueck* (T.D.) T 938-95 (1998) at n.144. A fascinating record of post war immigration security procedures is contained in this Federal Court decision rejecting the government’s application to revoke Dueck’s citizenship. See also, Sharryn J. Aiken, “Manufacturing ‘Terrorists’ : Refugees, National Security and Canadian Law” (2000) 19:3 *Refuge* 54 at 60-65 for a historical review of Canadian immigration and national security policy dating back to 1867.

measures were “heavily ideological along a fairly crude Cold War axis.”³⁵ Individual claims by nationals of designated, Communist states were routinely accepted, while Communists, leftists, and even those associated with or related to Communists were excluded.³⁶ Whitaker notes, “interpreting the criteria was always an ideological exercise” in which “national security” consistently trumped refugee obligations.³⁷ Approximately 37,000 Hungarians in 1956, and 11, 000 Czechs in 1968, were admitted to Canada pursuant to policies of accepting “escapees” from the Soviet orbit. Approximately 7,000 highly skilled and educated Asian refugees were admitted from Uganda following Idi Amin’s expulsion orders in 1972. This generosity contrasted sharply with the firmly closed door encountered by Tibetans, primarily agriculturists, fleeing China following the annexation of their country in 1959³⁸ and the Canadian government’s lethargic response to Chilean refugees, many of whom were suspected Marxists, fleeing Pinochet’s coup in 1973.³⁹ While the government took six to eight months to complete security investigations, Chileans were being imprisoned and killed.⁴⁰ Canada’s record on refugee crises during this period clearly demonstrated the extent to which ideologically defined security considerations together with a preference for White Europeans, and for linking labour market needs to all admissions, were the primary drivers of domestic refugee policies.

In 1969 Canada finally acceded to the Convention and the 1967 Protocol⁴¹ but another nine years would pass before domestic law came into effect specifically incorporating the Convention’s definitional provisions and establishing special procedures for the selection and resettlement of refugees. In response to a government green paper recommending that immigration legislation should embody a more positive approach, a new Immigration Act was implemented in 1978.⁴² The Act established a three-part program for refugee admissions. First, Cabinet was given the

³⁵ Reg Whitaker, “Refugees : The Security Dimension” (1998) 2:3 *Citizenship Studies* 413 at 419. See also, Tanya Basok and Alan Simmons, “A Review of the Politics of Canadian Refugee Selection” in Vaughan Robinson, ed., *The International Refugee Crisis* (London : MacMillan, 1993) 132.

³⁶ Reg Whitaker, *ibid.* at 419.

³⁷ *Ibid.* at 419.

³⁸ Ninette Kelley, “History of Canadian Immigration and Refugee Policy” in *Borders and Barriers* (Toronto : Jesuit Centre for Faith and Social Justice, 1988). Despite appeals by the United Nations, Canada refused to respond to the plight of over 75,000 Tibetan refugees who had fled into Nepal and India. Finally in 1971, twelve years after the disaster, Canada agreed to the settlement of 282 Tibetan refugees.

³⁹ Despite the documented atrocities of the Pinochet regime, Canada was slow to send an immigration team, hoping to avoid antagonizing Chile’s new administration and the United States, which supported the new government. Eventually the Canada agreed to accept 6,990 Chilean and non-Chilean supporters of the old regime, after subjecting them to intensive security and health checks. Ninette Kelley and Michael Trebilcock, *supra* note 24 at 348 and 365-66; and Valerie Knowles, *supra* note 22 at 174.

⁴⁰ Ninette Kelley and Michael Trebilcock, *supra* note 24 at 366-67.

⁴¹ The application of the 1951 *Refugee Convention* had been limited to refugees who acquired such status “as a result of events occurring before 1 January 1951.” An optional geographical limitation also permitted states to limit their obligations to refugees resulting from “events occurring in Europe.” *Refugee Convention*, *supra* note 4, art. 1B The 1967 *Protocol* expressly removed these limitations. 1967 *Protocol relating to the Status of Refugees* 606 U.N.T.S. 267 (entered into force 4 October 1967, accession by Canada 4 June 1969).

⁴² S.C. 1976-77, c. 52 [*Immigration Act or Act*].

authority to create designated classes of “displaced and persecuted” people who could apply at a Canadian visa post overseas and be sponsored by the Canadian government or a private organization. Consistent with the Convention, protection would be afforded to persons with a well founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion. A subsequent schedule incorporated the Convention’s exclusion clauses *verbatim* : status would be denied to those deemed undeserving of protection, including the perpetrators of war crimes and crimes against humanity, serious non-political crimes and acts “contrary to the purposes and principles of the United Nations.”⁴³ Overseas applicants faced the additional requirement of demonstrating an ability to become financially independent upon arrival in order to be eligible for either resettlement program.⁴⁴ Second, individuals could qualify under a special measures landing program.⁴⁵ The Immigration Department would use its discretion to ease immigration for people from a particular country or on a case-by-case basis. Finally, asylum seekers who made their way to Canada could apply within Canada and be processed in an in-land refugee determination procedure.

Section 19(1) of the Act refined the broad list of classes of people who were inadmissible to Canada for security reasons : persons who there are “reasonable grounds to believe” have engaged or will engage in espionage, subversion against democratic government and subversion by force of any government.⁴⁶ In addition, persons were inadmissible where

there are reasonable grounds to believe [they] will engage in acts of violence that would or might endanger the lives or safety of persons in Canada or are members of or likely to participate in the unlawful activities of an organization that is likely to engage in such acts of violence.⁴⁷

Finally, there was a provision to exclude persons who had committed war crimes and crimes against humanity.⁴⁸ “Security certificates” could be issued against individuals other than Canadian citizens when the Minister of Immigration and the Solicitor

⁴³ Article 1F, as incorporated in the Schedule to the *Immigration Act*, states : “The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that : (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.” R.S.C. 1985, c.28 (4th Supp), s. 34.

⁴⁴ By 2000 Canada was operating the world’s second largest refugee resettlement program but the primacy of immigration criteria has remained. Refugees are ineligible for resettlement in Canada if a pre-existing medical condition poses an “excessive demand” or if they are unable to successfully establish themselves within twelve months. Reforms announced in 2001 will exempt refugees from the medical admissibility rules but merely extend the establishment period from twelve months to three to five years.

⁴⁵ Beginning in 1979, special programs were established for the Indochinese, Latin American political prisoners and oppressed persons, Eastern Europeans, Salvadorans, and more recently, nationals of the Former Yugoslavia and Ethnic Albanians from Kosovo.

⁴⁶ *Immigration Act*, s. 19(1) (e) and (f).

⁴⁷ *Ibid.* s. 19(1)(g).

⁴⁸ *Ibid.* s. 19(1)(j).

General formed the opinion, based on security intelligence reports which could not be disclosed, that the person fell within one of the security exclusions. Although the certificates were subject to challenge in the Federal Court, in practice most certificates were upheld, resulting in deportation for the named individuals.⁴⁹

In the wake of concerns about the conduct of the Security Service of the RCMP in the 1970s, the government established the Commission of Inquiry Concerning Certain Activities of the RCMP, commonly referred to by the name of its chair, Mr. Justice D.C. McDonald. In 1981 the McDonald Commission released its second report, "Freedom and Security Under the Law."⁵⁰ The Commission found that the RCMP had subjected many groups, including the "new left," Québec separatists, unions, the American Indian movement and others to surveillance, infiltration and "dirty tricks," solely on the grounds that they were exercising their freedom of expression through lawful advocacy, protest and dissent. Indeed by 1977 it was estimated that the RCMP Security Service had files on more than 800,000 Canadian citizens,⁵¹ a mammoth figure which did not include its additional role in the surveillance and screening of prospective immigrants and refugees. A full chapter of the Commission's report addressed immigration security screening. The Commission found that the statutory security criteria set out in the Immigration Act were "too broad" and were inconsistent with the definition of "threats to the security of Canada" which the Commission proposed should inform all security related screening activities.⁵²

Although the Commission recommended including political violence and terrorism within the admissibility provisions of the Immigration Act, it underscored the importance of distinguishing between international groups secretly pursuing in Canada terrorist objectives against foreign governments, from representatives of foreign liberation or dissident groups who come to Canada to promote their cause openly.⁵³ Based on the Commission's findings Parliament endorsed the establishment of a civilian security intelligence agency, outside of the RCMP, with a mandate to investigate and advise but no prosecutorial or enforcement powers. In 1984 the Canadian Security Intelligence Service Act was adopted and a new security agency was created to, *inter alia*, provide government departments and agencies with security

⁴⁹ See, for example, the case of *Regaldo-Brito v. Minister of Employment and Immigration*, concerning a Salvadoran journalist and Convention refugee, in which the Federal Court rejected a challenge of a security certificate under both the *Canadian Bill of Rights* and the *Charter of Rights and Freedoms*, noting that recognition of refugee status did not confer a right to remain in Canada [1987] 1 F.C. 80 (C.A.).

⁵⁰ Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and Security Under the Law, Second Report-Vol. 2* (Ottawa : Minister of Supply and Services Canada, 1981).

⁵¹ Brian Gorlick, *National Security and Immigration : The Exclusionary Nature of Canadian Immigration Law and Policy* (M.A. Thesis, Department of Political Science, London School of Economics) [unpublished] at 52.

⁵² *Supra* note 50 at 823.

⁵³ *Supra* note 50 at 436.

assessments on prospective immigrants.⁵⁴ Section 2 of the CSIS Act defined “threats to the security of Canada” as being (a) espionage or sabotage; (b) foreign influenced activities within or in relation to Canada that are detrimental to its interests and are clandestine or deceptive and involve a threat to any person; (c) activities within or relating to Canada, directed toward or in support of the threat or use of serious violence against persons or property for the purpose of achieving a political objective within Canada or a foreign state; and, (d) activities directed against undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of the constitutionally established system of government in Canada. The statutory language in section 2 is very broad and has been the subject of criticism for this reason. As Gorlick notes, statutory terms such as “clandestine or deceptive” and “foreign influenced” were not defined in the Act and “inevitably the interpretation of such terms will fall to the agency that has the most to gain from statutory power, that is, CSIS itself.”⁵⁵ An important safeguard, however, was the inclusion at the end of section 2 of the specific qualification that a threat to the security of Canada “does not include lawful advocacy, protest or dissent unless carried in conjunction with any of the activities referred to above.”⁵⁶

A number of procedural amendments were made to the Immigration Act as a result of the enactment of the CSIS Act, the creation of CSIS and the Security Intelligence Review Committee (SIRC), an administrative “watchdog,” designed to buttress public accountability. However, Parliament failed to implement the McDonald Commission’s proposals to harmonize immigration security criteria with the CSIS Act. The result is that the definition used by CSIS officers to investigate and provide advice to Ministers with regard to security risks that may be posed by refugee claimants and applicants for permanent residence continued to be inconsistent with the admissibility provisions of the Immigration Act. Whereas the term “threat” in the CSIS Act is specifically defined in terms of enumerated activities rather than associations, subsequent amendments to the Immigration Act would further extend its broad, undifferentiated admissibility categories. Although permanent residents acquired the right to have SIRC investigate security reports and to have an oral hearing before the Review Committee, this procedure was not extended to other non-citizens. Security certificates for refugee claimants and Convention refugees were to be filed with a “designated judge” of the Federal Court for review, with the immediate effect of mandatory detention.⁵⁷

In 1986 the people of Canada were awarded the Nansen medal by the UNHCR in recognition of exceptional contributions to refugee protection. Between

⁵⁴ *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. 21 [CSIS Act]. The new security agency established by the CSIS Act is the “Canadian Security Intelligence Service” [hereinafter *CSIS* or *the Service*].

⁵⁵ Brian Gorlick, “The exclusion of ‘security risks’ as a form of immigration control : law and process in Canada” (1991) 5:3 *Immigration and Nationality Law and Practice* 76 at 77.

⁵⁶ *CSIS Act*, s. 2.

⁵⁷ For a more detailed explanation of these procedures as well an analysis of the extent to which they accommodate state security interests and the values of open justice, see Ian Leigh, “Secret Proceedings in Canada” (1996) 34 *Osgoode Hall L. J.* 113.

1976 and 1986 Canada had resettled over 150,000 refugees from camps overseas – more *per capita* than any other country.⁵⁸ Canadian citizens across the country also had been instrumental in responding to the Indochinese “boat people” crisis after the fall of Saigon in 1975. With the aid of private sponsorships, Canada was able to admit approximately 60,000 Vietnamese, Laotian and Kampuchean refugees between 1979 and 1980 alone. Just a year after receiving the prestigious medal, Canadian generosity took a dramatic downturn. Coinciding with a dramatic increase in the numbers of refugees world wide in 1980s,⁵⁹ the number of “spontaneous arrivals,” refugee claimants arriving at Canadian borders requesting asylum was rising steadily and generating a backlog of refugee claimants waiting for the cases to be processed. In contrast to refugees selected overseas, the government had no control over this increasingly unpredictable rate of arrivals, nor any ability to calibrate admissions to labour market needs. Against this backdrop, the Mulroney government’s response to the arrival on the coast of Nova Scotia of just 174 Sikhs in lifeboats prompted an emergency recall of Parliament to “deal with an issue of grave national importance.”⁶⁰ The emergency session resulted in the introduction of Bills C-55 and C-84, aimed at streamlining Canada’s refugee system, curbing alleged abuses and enhancing border control. Bill C-55 radically restructured the in-land refugee determination system and established the Immigration and Refugee Board. A Supreme Court decision interpreting the newly minted Charter of Rights and Freedoms had held that existing administrative procedures for determining refugee status inside Canada failed to meet the procedural guarantees of fundamental justice.⁶¹ With passage of Bill C-55 in 1988, refugee claimants would have access to an oral hearing before a quasi-judicial tribunal. Bill C-84, on the other hand, provided for the detention and removal of persons who were deemed criminal or security threats; the detention of persons whose identity could not be verified; significant penalties for smugglers of refugees, expanded search and seizure powers, and increases in “carrier sanctions,” the fines imposed on transportation companies for bringing passengers without proper documentation into Canada.⁶² Collectively these measures afforded greater due process for refugee claimants already in Canada but made it much more difficult for refugees to actually reach the country.

By 1990 Cold-War security considerations were giving way to a preoccupation with deterring “illegal migration” from the South. The statement of a federal politician reflected prevailing discourse : “Simple logic dictates that Canada should protect itself against any Tom, Dick or Harry wanting to enter the country –

⁵⁸ Valerie Knowles, *supra* note 22 at 181.

⁵⁹ According to UNHCR estimates, the number of refugees in the world in 1951 was 2, 116,200. By 1985 the numbers had soared to 11, 817,200 and peaked in 1992 at 18,306,400. The dramatic escalation in the numbers of people fleeing across borders prompted many states to adopt enforcement –oriented policies aimed at “stemming the tide.” UNHCR, *The State of the World’s Refugees : Fifty Years of Humanitarian Action* (Oxford : Oxford University Press, 2000) at 310.

⁶⁰ *House of Commons Debates* (11 August 1987) at 7910 (Lucien Bouchard).

⁶¹ *Re Singh and Minister of Employment and Immigration and 6 other appeals* [1985] 1 S.C.R. 177.

⁶² See Ninette Kelley and Michael Trebilcock, *supra* note 24 at 386.

and you realize that some of these people are false claimants, don't you?"⁶³ Public narratives of "illegal migration" were tending to conflate genuine refugees with economic migrants; and "undocumented" refugees – people who arrived without valid passports and visas in hand – with criminality. At the same time, transnational crime and globalized terrorism were viewed by policy-makers and some Canadians as critical challenges in terms of the management of Canada's refugee program. When the Immigration Act of 1976 was implemented, Canada received 1,200 refugee claimants a year, all of whom were fleeing Soviet communism. By 1992 the political terrain had changed dramatically and Canada was admitting a record level of 34,340 refugee claimants from all continents.⁶⁴ With the shifting demographics, security threats were defined along increasingly diffuse, multipolar axes. Much of the explicit racism and political bias in domestic policy was being replaced by a patchwork of specific biases and systemic discrimination.⁶⁵ Responding to Canadians' worries about their personal safety came to be seen as a key priority by the Conservative government. The notion that more effective legal tools were needed to improve "system integrity" and to achieve better control over the numbers of spontaneous arrivals, swiftly acquired currency in the Canadian policy arena.

II. Thwarting the Monsters : Refugees as Terrorists

Bill C-86 was introduced into the House of Commons in June 1992 and passed into law within six months. Restrictive and enforcement oriented, the bill was promulgated as the "non-arrival" approach to undesirable migration from the South was being embraced by refugee receiving states in the North. According to former Solicitor General Doug Lewis, the security measures introduced in 1992 were designed to ensure that Canada does not become a safe haven for retired or active terrorists.⁶⁶ It was suggested that the former Immigration Act "put the safety and security of Canadians at risk [...] we have to face the fact that the world of the 1990's is a world of increasingly sophisticated, internationally organized criminals and terrorists."⁶⁷ In this regard, Bill C-86 featured a series of security related deterrents. Changes were made to the overall structure of immigration security procedures and specific objectives for the scheme were enumerated under the heading "Safety and

⁶³ Legislative Committee of the House of Commons on Bill C—86, *Minutes of Proceedings and Evidence*, 3rd Sess., 34th Parl., 1991-1992, 4:25 [*Minutes* and cited by Issue] (Fernand Jourdenais). For commentary on how the language of public discourse conceals a racial logic, reinforcing systemic racism in Canada's refugee and immigration programs, see, Sherene Razack, "'Simple Logic': Race, The Identity Documents Rule and the Story of a Nation Besieged and Betrayed" (2000) 15 *J. L. & Soc. Pol'y* 181; and Peter Li, "The Racial Subtext in Canada's Immigration Discourse" (2001) 2:1 *Journal of International Migration and Integration* 77. See also, Anthony Richmond, *supra* note 31.

⁶⁴ Valerie Knowles, *supra* note 22 at 196; and Margaret Young, "Canada's Immigration Program," Parliamentary Research Branch, Revised 1999, online : Library of Parliament <<http://www.parl.gc.ca/information/library/PRBpubs/bp190-e.htm>>.

⁶⁵ See Reg Whitaker, *supra* note 6 at 427; Alan Simmons, "Racism and Immigration Policy" in Vic Satzewitch ed., *Racism and Social Inequality in Canada* (Toronto : Thompson Educational Publishing, 1998) at 91; and Sharryn J. Aiken, "Racism and Refugee Policy" (1999) 18:4 *Refugee* 2.

⁶⁶ *House of Commons Debates* (22 June 1992) at 12533 (Doug Lewis).

⁶⁷ *House of Commons Debates* (22 June 1992) at 12504-5 (Jack Shields).

Security of Canada.” Section 38.1 of the amended Act began by “[r]ecognizing that persons who are not Canadian citizens or permanent residents have no right to come into or remain in Canada and that permanent residents have only a qualified right to do so.”⁶⁸ Absent from the text was any reference to the distinct claim of refugees to international protection. Prior to Bill C-86, the phrase “danger to the security of Canada,” along with provisions concerning unlawful or violent acts, were incorporated in the Immigration Act as a basis for security inadmissibility and deportation. The Minister already had authority to initiate revocation proceedings if information surfaced later to suggest that residence or citizenship status was conferred improperly. With the amendments in Bill C-86, “terrorism” became an a new category of security inadmissibility. Refugees would be “inadmissible” where there are reasonable grounds to believe they will “engage in terrorism”⁶⁹ or are “members of an organization that there are reasonable grounds to believe will [...] engage in terrorism.”⁷⁰ An additional subsection provided that persons are inadmissible if they engaged in terrorism in the past, or are “members of an organization that was engaged in terrorism” unless they can satisfy the Minister that their admission would not be detrimental to the national interest.⁷¹ The amendments offered no definition for “security of Canada,” “terrorism” or “membership” despite the inclusion of an extensive list of definitions for other terms and categories. In testimony before the House of Commons committee examining Bill C-86, senior policy analyst Brian Grant explained that the “approach [to membership and terrorism] was to define broadly, with the discretion.”⁷² Ministerial discretion to exempt from inadmissibility anyone whose association with terrorism was in the past was characterized as a key safeguard to ensure that “legitimate people” were not unfairly targeted.⁷³ The extent to which the C-86 amendments and recent reforms are responsive to concerns about unfairly targeting innocent refugees will be considered below by reviewing the nature and impact of provisions aimed at identifying and deporting alleged terrorists and other threats to national security, bars to asylum, the “danger opinion” procedure, identity document requirements, detention and interdiction policies.

III. Terrorism or Resistance

Since the General Assembly identified terrorism as a priority concern for the United Nations in 1972, the international community has adopted a functional approach to terrorism, consistently rejecting umbrella definitions and related hazards of ambiguity and over-breadth. A series of strongly worded resolutions rhetorically condemned “all acts, methods and practices of terrorism” as threats to international

⁶⁸ *Immigration Act*, s.38.1; see ss. 39 - 40.1 for details of the procedures.

⁶⁹ *Ibid.* s. 19(1)(e)(iii). For an overview of the Canadian policy context concerning serious criminality (including terrorism) in the current *Immigration Act*, see Joseph Rijkof, “Access, Asylum and Atrocities: An Unholy Alliance?” (2000) 19:4 *Refugee* 100.

⁷⁰ *Ibid.* s. 19 (1)(e)(iv)(C).

⁷¹ *Ibid.* s. 19(1) (f)(ii), (iii)(B).

⁷² *Minutes, supra* note 63, Issue 3, 28 July 1992 (Brian Grant).

⁷³ *Ibid.*

peace and security.⁷⁴ However, counter terrorism strategy at the United Nations has centred on the promulgation of treaties which proscribe specific and defined criminal conduct – from hijacking to hostage-taking, bombing, and most recently, the financing of terrorist offences.⁷⁵ The essential goal of these treaties is to elevate the specified offences to the status of “international crimes,” ensuring prosecution of the accused by imposing upon signatory states the alternative obligation to extradite or submit the accused for prosecution to the appropriate national authority. The consensus on anti-terrorism initiatives has been preserved by ensuring that treaties carefully enumerate and define the activities which would attract criminal sanctions. As numerous scholars suggest, such an approach was key to ensuring that national

⁷⁴ U.N.G.A. Res. 53/108, 26 Jan. 1999 at para. 1. General Assembly resolutions on terrorism were passed in 1972, 1976, 1977, 1979, 1981, 1983, 1985, 1991 and 1993 through to 1997. The Security Council passed resolutions on terrorism in 1989, 1992, 1999 and 2001 and there were Presidential Statements in 1994 and 1996. See, for example, U.N.G.A. Res. 3034, 18 Dec. 1972; U.N. G.A. Res. 44/29, 6 Dec. 1989; U.N.G.A. Res. 46/51, 9 Dec. 1991; and the *Declaration on Measures to Eliminate International Terrorism*, annex to U.N.G.A. Res. 49/60, 9 Dec. 1994, which states, *inter alia*, that “criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.” See also *Measures to Eliminate International Terrorism*, U.N.G.A. Res. A/51/631, 4 Dec. 1996; and U.N. G.A. Res. A/51/210, 16 Jan. 1997. See generally, Omer Elagab, *International Law Documents relating to Terrorism*, 2nd ed., (London : Cavendish Publishing Limited, 1997). For a discussion of international efforts to eliminate terrorism and their impact on the climate for refugee protection, see, Michael Kingsley Nyinah, “Exclusion Under Article 1F : Some Reflections on Context, Principles and Practice” (2000) 12 *IJRL Special Supplementary Issue on Exclusion* 295 at 312-313.

⁷⁵ To date, the United Nations has developed eleven separate treaties : the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963); the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970); the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971); the Protocol to the Montreal Convention for the Suppression of Unlawful Acts of Violence at Airports serving International Civil Aviation (1988); the International Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973); the International Convention Against the Taking of Hostages (1979); the Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988); the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (1988); the Montreal Convention on the Marketing of Plastic Explosives for the Purpose of Detection (1991); the International Convention for the Suppression of Terrorist Bombings (1997); International Convention for the Suppression of the Financing of Terrorism (1999, not yet in force) [hereinafter Terrorist Financing Convention]. The text of these treaties is available online : <<http://www.untreaty.un.org/English/Terrorism.asp>>. Two instruments, while not directed expressly at terrorism, are also relevant : the Convention on the Prohibition on the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their Destruction (1972); and the Vienna Convention on the Physical Protection of Nuclear Material (1980). Regional bodies have adopted similar treaties. See, e.g., European Convention on the Suppression of Terrorism (1977); and OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are Internationally Significant (1971). Similarly, the Statute of the new International Criminal Court, a complementary initiative, does not identify “terrorism” among the distinct categories of crimes within the Court’s jurisdiction (proposals by India, Sri Lanka, Algeria and Turkey to include an aggregate crime of terrorism within the Court’s jurisdiction were rejected). See A/CONF.183/C.I.L. 27. With the exception of the crime of aggression, which remains undefined pending adoption of an agreed definition, the treaty defines the offences of genocide, war crimes, and crimes against humanity, with reference to specific acts. Rome Statute of the International Criminal Court (1998).

liberation movements, which may have a right, or at least a legal license, to resort to force against an oppressive government once certain conditions are met, could be accorded distinct treatment under international law.⁷⁶ While the yardstick for determining the scope and limits of legitimate resistance remains somewhat imprecise, International Humanitarian Law (IHL) represents an accepted codification of the rules of conduct for both state and non-state actors in armed conflict and distinguishes between permissible and impermissible uses of force.

Drawing upon the rules governing the resort to armed conflict (*ius ad bellum*) and IHL principles, Kälin and Künzli suggest that resistance by non-state actors would appear to be legitimate when the following conditions exist :

- i) a State policy of serious and systemic violations of fundamental human rights toward the entire population or towards significant parts of it (for example, ethnic or religious minorities);
- ii) institutionalized and effective forms of legal redress are not available;
- iii) the act of resistance was directed at the perpetrators of violations; and
- iv) the act was aimed at preventing a specific violation or stopping a regime which does not respect human rights.⁷⁷

⁷⁶ See, Walter Kälin and Joerg Künzli, "Article 1 F(b) : Freedom Fighters, Terrorists and the Notion of Serious Non-Political Crimes" (2000) 12 *IJRL Special Supplementary Issue on Exclusion* 46; Elizabeth Chadwick, Self-Determination, *Terrorism and the International Humanitarian Law of Armed Conflict* (The Hague : Martinus Nijhoff Publishers, 1996); Rosalyn Higgins, "The General International Law of Terrorism" in Rosalyn Higgins and Maurice Flory, eds., *Terrorism and International Law* (London : Routledge, 1997); and Sharryn J. Aiken, *supra* note 34. When a draft comprehensive anti-terrorism convention, sponsored by the United States, was introduced at the United Nations in 1972, a bitter debate ensued between First World and Third World states on the merits of a categorical ban on the use of violence and the draft convention was rejected. T. H. Mitchell, "Defining the Problem" in David A. Charters, ed., *Democratic Responses to International Terrorism* (New York : Transnational Publishers, 1991) at 14. In 1979, members of the *Ad Hoc* Committee on International Terrorism drew attention "to the unacceptability of a broad interpretation of the concept of international terrorism which would include the national liberation struggle, acts of resistance against the aggressor in territories occupied by the latter and demonstrations by workers who were opposed to exploitation." *Report of the Ad Hoc Committee on International Terrorism*, ch. 2 Summary of the General Debate, UN Doc. A/34/37 (1979), para. 16; and see paras. 30-31. More recently, a 1996 proposal by India to develop an omnibus treaty on terrorism has met with a distinct lack of political will in the General Assembly. See, Patrick Macklem, "Canada's Obligations at International Criminal Law" in Ronald J. Daniels *et al.*, *supra* note 20 at 357. With the perceptible shifts in discourse and in the domestic laws and practices of many NATO member states post September 11, together with the fact that states in the South have been increasingly preoccupied with the destabilizing effects of home grown insurgencies, it seems likely that principled resistance to an omnibus treaty and definition of terrorism may weaken.

⁷⁷ Walter Kälin and Joerg Künzli, *ibid.*, at 53. In effect, Kälin and Künzli are extending by analogy the concept of self-defence, which remains the only exception to the prohibition on the use of force by states, to individuals. There is ongoing disagreement with regard to the circumstances in which self-defence may be exercised by states and individuals, at least partly attributable to the wide gap between official rhetoric and actual state practice. Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed., (London : Routledge, 1997) at 311- 341; Cassese suggests that international law presently reflects a compromise between the conflicting views concerning the use of force by

Article 21 of the United Nations treaty on the financing of terrorism explicitly acknowledges the interplay between its own mandate and international humanitarian law : “[n]othing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, international humanitarian law and other relevant conventions.”⁷⁸ Thus full compliance with the treaty would explicitly require its provisions to be interpreted in light of international humanitarian law. Even in the immediate aftermath of the September 11 attacks in the United States, United Nations Security Council resolutions focused on the need for international cooperation in preventing and suppressing acts and offences.⁷⁹ A list of proscribed organizations was drawn up – but it was readily apparent that none of them could be characterized as national liberation movements. It should be equally apparent that past and present political struggles against oppressive regimes in such countries as South Africa, Mozambique, Palestine, Turkey and Sri Lanka, directly engage questions concerning the application of IHL – and underscore the need to distinguish between recourse to force in the context of armed combat of a clearly military character or against regimes responsible for very serious human rights violations *versus* other acts of politically motivated violence which are not lawful under any circumstance (the category in which the September attacks clearly belong).

Canada has directly incorporated IHL into the *Geneva Conventions Act* and the government has been an advocate of the principles of equality rights and self-determination at the United Nations.⁸⁰ Nevertheless, Canadian decision-makers, whether at the administrative or judicial level, have resisted applying the analytic framework of IHL to refugees facing security proceedings. An illustrative case is *Re*

oppressed peoples, asserting that liberation movements have been given a legal entitlement that is less than a right proper but more than the absence of any authorization whatsoever. Among the related consequences of this position is that liberation movements do not breach international law if they engage in armed action against a state that forcibly denies their right to self-determination. Antonio Cassese, *Self-Determination of Peoples, A Legal Reappraisal* (Cambridge : Cambridge University Press, 1995) at 153 –154, and 197-98.

⁷⁸ *Terrorist Financing Convention*, *supra* note 75, art. 21. As of October 30, 2001 the treaty has 118 signatories but only 13 parties. Both the United States and Canada signed in 2000 but have yet to ratify it.

⁷⁹ Resolution 1368 (2001), Adopted by the Security Council at its 4370th meeting, 12 September 2001, UN Doc. S/Res/1368 (2001); and Resolution 1373 (2001), Adopted by the Security Council at its 4385th meeting, 28 September 2001, UN Doc. SC/7158 (2001). U.N. Secretary General Kofi Anan and High Commissioner for Human Rights Mary Robinson have characterized the September 11 hijackings as crimes against humanity. Regardless of the legal nomenclature, there is little doubt that those acts constitute an international crime in view of their magnitude as well as the deliberate and systematic targeting of civilians. Antonio Cassese, “Terrorism is also Disrupting Some Crucial Legal Categories of International Law” online : European Journal of International Law <http://www.ejil.org/forum_WTC/ny-cassese.html>. In other contexts, however, a broad definition of terrorism (rather than a careful focus on specific acts) may blur the distinction between easy - case crimes and political resistance, punishing actors who should not otherwise be held responsible for any wrongdoing. See A. Cassese, *supra* note 77 at 154.

⁸⁰ *Geneva Conventions Act*, R.S.C. c. G-3, as am. S.C. 1990, c.14; Statement of the Canadian Delegation to the UN Commission on Human Rights, 21 Oct.-1 Nov. 1996.

Suresh, concerning a Tamil man of Sri Lankan origin who was recognized as a Convention refugee in Canada in 1991.⁸¹ His involvement as a coordinator for two Toronto-based agencies which CSIS alleged to be fronts for the Liberation Tigers of Tamil Eelam (LTTE) resulted in the filing of a security certificate against him on grounds of engaging in terrorism and being a member of organizations engaged in terrorism. The Federal Court upheld the reasonableness of the security certificate, emphasizing that terrorism “must be seen through the eyes of a Canadian” and that “the term ‘terrorism’ or ‘terrorist act’ [...] must receive a wide and unrestricted interpretation.”⁸² Most relevant for our purposes was the Court’s refusal to engage with expert testimony concerning the characterization of the LTTE as a liberation movement entitled to self-determination or to distinguish between the group’s attacks on military sites *versus* those that targeted civilians. Mr Justice Teitelbaum suggested that such an analysis would require the Court to “resolve political issues that exist between groups of people in another country” and that

[i]t is not my function as a judge of the Federal Court [...] to determine, based on the evidence before me, whether the Tamil people in Sri Lanka should or should not be granted their own homeland or even to express an opinion on that subject. That is a political question to be determined by the people of Sri Lanka, together with the help of the United Nations and other nations of goodwill.⁸³

Yet, an assessment of conduct in the course of a liberation or secessionist struggle is very much a legal issue. As discussed above, such an assessment involves questions which should be guided by the comprehensive scheme of IHL that has been directly incorporated into Canadian law. Arguably it is precisely the failure to apply existing legal norms to an analysis of the nature of particular non-state actors and their conduct that politicizes the judicial role in refugee security cases. While it must be acknowledged that the application of IHL standards may have political

⁸¹ *Re Suresh*, [1997] F.C.J. No. 1537 (T.D.), online : QL (FCJ). A separate challenge, concerning the constitutionality of the terrorism and national security provisions of the *Immigration Act* as well as the Minister’s exercise of discretion in the circumstances of the case, is currently pending before the Supreme Court of Canada. *Suresh v. Minister of Citizenship and Immigration* (1998), 160 F.T.R. 152, aff’d [2000] 2 F.C. 592 (C.A.), leave to appeal to S.C.C. granted [2000], SCC File No. 27790, appeal heard 22 May 2001 (judgment reserved).

⁸² *Re Suresh, Ibid.* See also, the more recent case of *Canada v. Mahjoub*, [2001] F.C.J. No.1483 (T.D.), online : QL (FCJ) for similar reasoning. As a result of the Court’s decision in *Suresh*, an adjudicator issued a deportation order on the basis of membership in an organization engaged in terrorism [s.19(1)(e)(iv)(C) and s.19(1)(f)(iii)(B)], but not on the ground of having engaged in terrorism [s. 19(1)(f)(ii)]. Subsequently the Minister determined that *Suresh* posed a danger to Canada’s security and should be removed to Sri Lanka, despite an acknowledged risk on return. *Suresh v. Minister of Citizenship and Immigration* (Appellant’s factum, S.C.C., at paras. 4-6), *Ibid.*

⁸³ *Re Suresh, Ibid.* The government of Sri Lanka outlawed the LTTE as a terrorist group in 1998. The Canadian government had never taken steps to formally proscribe particular organizations until after September 11. The LTTE was added to a newly created list in November 2001. Daniel Leblanc, “Tamil groups terrorists, MPs say” *The Globe and Mail* (10 November 2001) A8.

consequences, the Courts are frequently involved in balancing competing interests with explicit political, economic and social dimensions.⁸⁴

Less than six months after Bill C-86 came into effect, a defiantly “law and order” federal government moved the entire Immigration bureaucracy to a newly created Department of Public Security,⁸⁵ reinforcing the negative image of refugees and immigrants as dangerous Others, intent on abusing Canadian generosity. Implementation of the amendments afforded Immigration officers an expanded basis to support determinations of inadmissibility. With the new provisions on terrorism, the Immigration Act delegated the job of identifying possible terrorists to CSIS while retaining for its own department the ultimate authority to decide who will be excluded from Canada on the basis of possible terrorist links. Certain refugee communities within Canada found themselves increasingly subject to surveillance by CSIS. Many of the criticisms that had been levelled against the RCMP began to surface with regard to the security intelligence agency and the practices and conduct of its officers.⁸⁶ Complaints were made to SIRC, documenting the extent to which the Service had deployed the mantle of counter terrorism, not just to monitor national security threats, but, like the RCMP before it in respect of “subversives,” to intrude into the lives and futures of those involved in legitimate forms of expression and dissent.⁸⁷ Reporting on investigations spanning several years, SIRC found instances in

⁸⁴ As Justice Jackson once suggested, “all constitutional interpretations have political consequences” Robert H. Jackson, *The Supreme Court in the American System* (1955) at 56 [emphasis added].

In *Suresh* the Federal Court appeared to be relying on the common law political questions doctrine, without precisely invoking it. Concerned with justiciability, the doctrine stipulates that judges “should decide not to decide” in cases where issues do not present clear legal questions susceptible to “judicially discoverable or manageable standards.” See *Baker v. Carr* 369 U.S. 186 (1962). In Canada, the doctrine has been considered in numerous cases, including *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, online : QL (SCJ), where the Supreme Court noted that the case engaged “momentous questions that go to the heart of our system of constitutional government” (at para. 1) but rejected the notion that the questions were not justiciable. In doing so, the Court attempted to articulate a principled approach to the political questions doctrine, noting that where questions have an extralegal component, it is the Court’s role to determine whether there are legal issues, and to answer those (at paras. 26-31). See also, Lorne Sossin, *Boundaries of Judicial Review : The Law of Justiciability in Canada* (Toronto : Carswell, 1999). Courts in many jurisdictions, however, tend to resist subjecting legislative or executive decisions concerning national security to serious judicial scrutiny. See, e.g. *R. v. Secretary of State for Home Affairs, Ex Parte Hosenball*, [1977] 1 W.L.R. 766 at 783 (C.A.), in which Lord Denning upheld the deportation of an American journalist from the U.K., noting that “[t]he balance between [national security and individual freedom] is not for a court of law. It is for the Home Secretary.” See, however, *Secretary of State for the Home Department v. Rehman*, *infra* note 141, in which the House of Lords adopted a deferential posture to national security decisions taken by the Secretary of State but nevertheless found some scope for judicial oversight.

⁸⁵ Janet Dench, “A Hundred Years of Immigration to Canada, 1900-1999 : A Chronology focusing on refugees and discrimination,” online : CCR <<http://www.web.net/~ccr/history.html>>. Later the same year, the newly elected Liberal government transferred the immigration department to Citizenship and Immigration Canada.

⁸⁶ See, e.g., Mary Jo Leddy, *At the Border Called Hope* (New York : Harper Collins, 1997) at 76-82; and the recent conclusions of the Security Intelligence Review Committee (SIRC), discussed *infra*, In the Matter of the Complaints under the Canadian Security Intelligence Service Act by S.G. and S.D., SIRC File Nos. 1500-82, 83, 7 April, 2000. SIRC finalized reports on three immigration related complaints in 2000. See *SIRC Annual Report, 1999-2000* at 82, footnote, 33, online : SIRC <http://www.sirc-csars.gc.ca/annual/1999-2000/ar9900_e.html> (date accessed 9 September 2001).

⁸⁷ SIRC File Nos. 1500 – 82, 83, *Ibid*.

which CSIS instructions that sources were only to report on “authorized subjects of an investigation” had not been fully implemented.⁸⁸ Also noted was “an occasional lack of rigour in the Service’s application of existing policies, which oblige it to weigh the requirement to protect civil liberties against the need to investigate potential threats.”⁸⁹ Media reports exposed how, in some cases, refugees were overtly or implicitly induced to become informers on fellow community members – with promises of prompt resolution of their own residence applications.⁹⁰

The broad discretion built into the Act with regard to terrorism leaves an unacceptably wide scope for xenophobic prejudices to inform administrative and judicial decision making. It also leaves certain groups susceptible to decision making based on popular and pervasive stereotypes that they are likely to be terrorists. Many refugees already have painful experiences of the politics of terrorism, having been labelled as “terrorists” by a persecutory state intent on criminalizing its opponents. In a recent report, *Refugees and Security*, the Canadian Council for Refugees (CCR) documented the extent to which certain refugee communities seem to be particularly targeted, including Iranians associated with the Mujahedin-E-Khalq movement, Kurds, Sri Lankan Tamils, Sikhs, Algerians and Palestinians, while other groups are not subjected to the same levels of security scrutiny.⁹¹ There also tends to be a generalized bias in favour of designating the acts of non-state agents as terrorist, but not similar acts carried out by a state (particularly those which are strategic allies). This tendency can easily translate into a specific bias against the refugee and in favour of the persecutory state. The principles of equality and equal protection of the law are enshrined in a plethora of international instruments to which Canada is a party, as well as the Charter of Rights and Freedoms. Available evidence, admittedly anecdotal given the constraints in accessing classified data, suggests that the concept of terrorism in the Immigration Act has been the basis of discriminatory and

⁸⁸ *SIRC Annual Report 1999 -2000*, *supra* note 86, Section 1, at 17.

⁸⁹ *Ibid.* See also, *SIRC Annual Report 1997 - 1998* at 10-14 online : SIRC <http://www.sirc.csars.gc.ca/ar9798_e.html>. However in SIRC’s most recent report, released in October 2001, the Committee found that all the Service briefs concerning immigration inadmissibility were “accurate and adequately supported by the information collected.” *SIRC Annual Report 2000 - 2001* at 13, online : SIRC <http://www.sirc.csars.gc.ca/annual/2000-2001/ar0001_e.html> (date accessed 26 October 2001).

⁹⁰ See, Allan Thompson, “Not our policy to coerce refugees” *The Toronto Star* (1 May 1998); “More refugees come forward with claims of CSIS threats” *The Toronto Star* (23 April 1998); “Spy Agency Tactic Under Fire” *The Toronto Star*, (4 April 1998); “How a spy is hired, Case of Tamil refugee claimant shines light on how CSIS operates” *The Toronto Star* (20 January 1996). This has been difficult to “prove” for the purposes of formal complaints as screening interviews are not tape recorded. Certain CSIS officers have been unable to recall such remarks when subsequently requested to address concerns regarding the manner in which an interview was conducted. Although complaints of this nature were raised in the cases of S.G. and S.D., the Chair was unable to substantiate them with regard to the complainants themselves. See SIRC File No. 1500 – 83 *supra* note 86 at 32.

⁹¹ Canadian Council for Refugees, *Refugees and Security*, 25 March 2001, online : CCR <<http://www.web.net/~ccr/security.pdf>>. The cases documented in this brief are based on interviews with the individuals, conducted by NGOs or counsel or the person’s own account of their situation, as well as available documentation, including letters from Canada Immigration. See also, Canadian Council for Refugees, *Comments on Bill C-36, Anti-Terrorism Act*, 5 November 2001; and Colin Freeze, “Refugees fight terrorist label in Canada” *The Globe and Mail* (3 April 2001).

inconsistent application of the admissibility provisions, with devastating consequences for the affected individuals.⁹²

In terms of consequences, the long delays associated with security clearance procedures have meant that some individuals could expect to wait more than eight years before being able to sponsor and reunite with family members, enrol in post secondary education, start a business or travel outside the country. Refugees have experienced severe psychological stress as a result of these delays and the ever-present fear of being *refouled* to torture and possibly death.⁹³ The case of Mr. "G.", one of nineteen cases highlighted in the CCR's report is typical. An Ethiopian national who was found to be a Convention refugee by the Canadian Immigration and Refugee Board in 1994, Mr. "G." had been waiting for seven years for security "background checks" to be completed so that his application for permanent residence could be processed. He no longer had hopes of reuniting with three of the children he had left behind when he fled to Canada. They were all over the age of nineteen now and the law no longer permitted their sponsorship as dependants. In the summary of his case, the CCR notes :

[f]or several years, Mr 'G'. was seriously ill. The stress of living in limbo increased the stress involved in his illness. In addition, as for others in limbo, Mr 'G'. has been unable to feel like an integrated participant in Canadian society.⁹⁴

IV. Guilt by association

The majority of security inadmissibility cases appear to have involved allegations that particular individuals were past or present members of organizations engaging in terrorism, rather than individuals directly engaged in terrorist activity. "Membership" has received extensive treatment in international criminal and refugee law. According to international (and Canadian) criminal norms, individuals are complicit in the commission of an offence only when they knew or ought to have known that their activities were supporting the crime. Superior officers are considered complicit for offences committed by their subordinates in cases where personal command responsibility is established.⁹⁵ To the extent that the international treaties

⁹² American scholars have come to similar conclusions about immigration security procedures in the United States. See, e.g., Susan Akram, "Scheherazade Meets Kafka : Two Dozen Sordid Tales of Ideological Exclusion" (1999) 14 *Geo. Imm. L. J.* 51; and Michael J. Widden, "Unequal Justice : Arabs in America and United States Antiterrorism Legislation" (2001) 69 *Fordham L.Rev.* 2825.

⁹³ Canadian Council for Refugees, *Refugees and Security*, *supra* note 91. For 2000 – 2001, SIRC noted that the time taken by CSIS to process immigration security clearances "rose significantly" over previous years but that the average length of time to deliver an inadmissibility report to Canada Immigration was under two years. *SIRC Annual Report 2000 – 2001*, *supra* note 89 at 34. Many of the cases of lengthy delays documented by CCR likely are due to a combination of CSIS processing delays as well as inaction on the part of Canada Immigration, after receiving the CSIS reports.

⁹⁴ Canadian Council for Refugees, *Refugees and Security*, *supra* note 91, Case No. 13.

⁹⁵ These principles have been codified in art. 25(3) "Individual Criminal Responsibility," art. 28, "Responsibility of Commanders and Other Superiors," and art. 30, "Mental Element," of the *Statute of the International Criminal Court*, adopted 17 July 1998, UN Doc. A/CONF.183/9 (1998) [hereinafter

allow for the possibility of an individual being designated as a “terrorist,” they do so only with regard to persons who have intentionally perpetrated or been complicit in a specified act of violence. The requirement of this mental element (*mens rea*) necessarily implies that mere membership or affiliation with groups responsible for international crimes would not be sufficient to establish the required degree of personal and knowing participation.⁹⁶ On the other hand, individuals are criminally responsible even where they did not participate in the physical commission of a crime in circumstances where they acted as knowing accomplices or aided and abetted the commission of offences. Consistent with this principle, the Terrorist Financing Convention criminalizes “terrorist” fundraising only when funds are collected “wilfully [...] with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out [...]” the specified offences or acts.⁹⁷ Additional provisions indicate that it is also an offence to participate as an accomplice, organize or direct others to commit an offence, or intentionally “contribute to the commission of an offence by a group of persons acting with a common purpose.”⁹⁸ The treaty is a clear affirmation that those who financially contribute to violent acts are to be considered just as culpable as those who detonate the bombs. At the same time, mere membership in an organization, in the absence of other evidence demonstrating intentional and personal involvement, would not meet the test for prosecution or extradition under the terms of the treaty. Similarly, neither federal anti-gang laws nor the omnibus anti-terrorism bill recently introduced in the wake of September 11, directly criminalize membership.

In the context of refugee exclusion, UNHCR guidelines indicate :

The fact of membership does not, in and of itself, amount to participation or complicity [...] [M]embership *per se* of an organization which advocates or practices violence is not necessarily decisive or sufficient to exclude a person from refugee status. The decision maker will need to consider whether the applicant had close or direct responsibility for, or was actively associated with, the commission of any crime specified under Article 1F [...] Moreover, regard must also be had to the fragmentation of certain terrorist groups. In some cases, the group in question is unable to

Rome Statute]. See also Report of Preparatory Commission for the ICC, Finalized Draft Text of the Elements of Crimes, PCNICC/2000/INF13/Add.2, online : United Nations <www.un.org/law/icc/statute/elements/english/add2e_w.doc>; and the decision of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Tadic*, which gave extensive consideration to the question of criminal responsibility, Opinion and Judgment. Case No. IT-94-1-T, 7 May 1997, at paras. 688-692.

⁹⁶ An exception is accorded to membership in groups of a particularly violent and notorious nature, such as a “death squad.” The UNHCR notes : “the purposes, activities and methods of some groups or terrorist organizations are of a particularly violent and notorious nature. Where membership of such a group is voluntary, the fact of membership may be impossible to disassociate from the commission of terrorist crimes. Membership may, in such cases, amount to the personal and knowing participation, or acquiescence amounting to complicity to the crimes in question.” UNHCR, Exclusion Clauses : Guidelines on Their Application (December 1996), at para. 47 [UNHCR Exclusion Guidelines].

⁹⁷ *Terrorist Financing Convention*, *supra* note 75, art. 2.1.

⁹⁸ *Ibid.* art. 2.5.

control acts of violence committed by militant wings. ‘Unauthorized acts’ may also be carried out in the name of the group [...].⁹⁹

The concept of membership has received judicial interpretation in Canada within refugee exclusion decisions, primarily on the ground of article 1F(a) concerning individuals who are alleged to have committed war crimes or crimes against humanity. In a number of precedent setting cases, the Federal Court has adopted the clear parameters for membership and complicity developed in the context of both international criminal and refugee law.¹⁰⁰ The very same Court has been resistant to applying this jurisprudence in security cases, preferring instead to accord a broad and unrestricted interpretation to the word “membership,” regardless of the obligations of membership, the range of the organization’s other activities, or the influence the individual may have in the organization.¹⁰¹ Security review training for immigration officers includes the provision of a list of factors to be taken into consideration when deciding whether a person is a member of a particular group or organization. The training module indicates that the factors must be considered in their entirety but the text makes no reference to the treatment of membership in refugee and international criminal law.¹⁰² The reason for constraining the

⁹⁹ UNHCR Exclusion Guidelines, *supra* note 96 at paras. 40, 45, 47, 48. See also, UNHCR Global Consultations on International Protection, Lisbon Expert Roundtable, “Summary Conclusions – Exclusion from Refugee Status,” EC/GC/01/2Track/1 (30 May 2001), online : UNHCR <<http://unhcr.ch/issues/asylum/globalconsult/main.htm>> (date accessed : 2 September 2001) at para. 18 [*Summary Conclusions – Exclusion from Refugee Status*]. With the notable exception of United States legislation, which bars individuals from applying for asylum on the basis of mere membership in a designated terrorist organization, most states have endorsed the UNHCR’s position. See, Michael Bliss, “‘Serious Reasons for Considering’ : Minimum Standards of Procedural Fairness in the Application of the Article 1 F Exclusion Clauses” (2000) 12 *IJRL Special Supplementary Issue on Exclusion* 92 at 123-127; and Sibylle Kapferer, “Exclusion Clauses in Europe — A Comparative Overview of State Practice in France, Belgium and the United Kingdom” (2000) 12 *IJRL Special Supplementary Issue on Exclusion* 195 at 210-214.

¹⁰⁰ See the leading case of *Ramirez v. Minister of Employment and Immigration*, [1992] 2 F.C. 306 (C.A.) concerning a sergeant in the Salvadoran army in the 1980s against whom the Federal Court upheld an exclusion order on the basis of his “personal and knowing involvement in a military force that routinely tortured prisoners to extract information. See also, *Gutierrez v. Canada* [1994] 84 F.T.R. 227; *Moreno v. Canada*, [1994] 1 F.C. 298 (C.A.); *Sivakumar v. Canada*, [1994] 1 F.C. 433 (C.A.); and *Cardenas v. Canada* (1994) 23 Imm. L.R. (2d) 244, 74 F.T.R. 214 (T.D.).

¹⁰¹ See, for example, *Canada v. Iqbal Singh*, [1998] 151 F.T.R. 101, in which the Federal Court cited Brian Grant’s testimony before the parliamentary committee in 1992 and found : “It is trite to say that terrorist organizations do not issue membership cards [...] I think it is obvious that Parliament intended the term ‘member’ to be given an unrestricted and broad interpretation. I find no support for the view that a person is not a member as contemplated by the provision if he or she became a member after the organization stopped engaging in terrorism.” Similar reasoning may be found in *Re Baroud* (1996) 98 F.T.R. 99 (T.D.) at 109; *Husein v. Canada*, [1998] F.C.J. No. 726 (T.D.), online : QL (FCJ); and *Re Suresh*, *supra* note 81.

¹⁰² The factors include : acknowledgement of membership by the organization, by other members or by the applicant; actively worked to further the organization’s goals in a way suggesting close affiliation, *i.e.* proposing legislation; occupied a position of trust in the organization; receiving financial support from the organization, *i.e.* scholarship, pension, salary; contributing money to the organization; determined a member by a competent court; frequent association with other members; participation in the organization’s activities, even if lawful; attendance at meetings; distribution of the organization’s

interpretation of membership in the context of status determination proceedings stems from the broader principle that exceptions to human rights protections should be construed narrowly.¹⁰³ Restrictive interpretation is further justified by the severe consequences of an incorrect decision for the refugee who risks return to a situation where his or her very life may be endangered.¹⁰⁴ Arguably, this rationale is no less compelling for security related procedures, which have a distinct purpose and feature a less demanding evidentiary threshold,¹⁰⁵ but which equally engage the risk of *refoulement* for refugees with few of the procedural or substantive safeguards available in the asylum context.

In addition to combat and other forms of violence, insurgent groups in conflict zones commonly are involved in a range of activities, from lobbying their cause in the international arena, to providing aid and humanitarian relief, and in many cases, serving as the *de facto* government in areas under their control. In Canada, organizations formed to defend the interests of particular refugee populations may be serving a key role in the community, offering newcomer settlement services, representing the community's political aspirations and providing a venue for cultural events. Typically a wide cross section of the community is involved in these organizations – from active supporters of violent homeland struggles to those who merely express sympathy for the political cause but reject the violence. The organizations bring together large numbers of people who may have little in common apart from a shared ethnicity and an experience of persecution.¹⁰⁶ Yet any degree of

literature; voluntarily displaying symbols of the organization; receiving honours and awards given by the organization; recruiting members for the organization; training members or having received training from members of the organization. Citizenship and Immigration Canada, Security Review Training, Module 03, Analysis of A 19, Handout #3.

¹⁰³ UNHCR Exclusion Guidelines, *supra* note 96 at para. 8; UNHCR, Note on the Interpretation of Article 1F (c) of the 1951 Convention relating to the Status of Refugees (April 1998) at para. 3. This principle was explicitly endorsed by the Canadian Supreme Court in *Pushpanathan v. Canada*, [1998] 1 S.C.R. 982 at am. [1998] 1 S.C.R. 1222.

¹⁰⁴ UNHCR, Handbook on Procedures and Criteria for Determining Refugee (1979) at para. 149; UNHCR, 'Note on International Protection', UN Doc. A/AC.96/882, para. 13 (1997). See also, Summary Conclusions – Exclusion from Refugee Status, *supra* note 99 at para. 4; and Michael Bliss, *supra* note 99.

¹⁰⁵ Article 1F permits the exclusion of an asylum seeker where there "are serious reasons for considering" that he or she has committed an excludable crime. In contrast, security assessments are made in Canada pursuant to a much less demanding evidentiary threshold: "reasonable grounds to believe." The Federal Court relies upon *Canada (Attorney General) v. Jolly*, [1975] F.C. 216 (F.C.A.) for the principle that "reasonable grounds to believe" may be satisfied even if evidence is given negating the particular allegation – since it is only necessary for the Minister to show the existence of reasonable grounds for believing the allegation and not that the allegation is factually correct.

¹⁰⁶ For a discussion of "associational pluralism" as a requirement for democracy, see Nancy L. Rosenblum, *Membership and Morals: The Personal Uses of Pluralism in America* (Princeton: Princeton University Press, 1998). Drawing on Rosenblum's work, Schneiderman and Cossman suggest that Canada's new anti-terrorism bill (with new offences of "participating in" and "facilitating" a terrorist activity – offences which are considerably more limited in scope than the membership provisions in the *Immigration Act*) fails to account for the "hybrid" and "dynamic" nature of associational life: "[...] people join and leave groups for all variety of reasons. They may support one aspect of a group cause but not others. They may find that there is only one viable opposition group, in which case support for a political movement may be expressed only through support of that

participation in these groups, risks the prospect of being identified as a security risk where CSIS suspects links between the diaspora community and the country of origin. The result is that individuals are forced to choose between abandoning their associational life or living in constant fear that their involvement in the local community centre may lead to expulsion from the country. Participation in civic life and opportunities to freely express one's beliefs are fundamental rights, and can be an integral means of facilitating the adaptation and integration of newcomers. The CCR has documented the chilling effect of "security limbo" on refugees' participation in political and community activities :

Convention refugees in limbo because of security issues may feel that they must avoid certain people or activities, especially political or community activities, since they might be interpreted by the Canadian government as suspect. The fact that people are found inadmissible on the basis of their association with organizations deemed "terrorist" means that affected persons are under pressure to demonstrate that they have severed their links with the organization, which generally entails abstaining from political involvement in relation to their country of origin. Since "membership" is interpreted in a very broad way, refugees have reason to feel that even participation in local community activities (such as involvement in ethno-specific organizations offering services to arriving refugees, or participation in community events) may further delay their chance of obtaining permanent residence.¹⁰⁷

Complaints lodged with SIRC concerning the delays associated with CSIS security assessments as well as the nature of the advice provided, failed to resolve the problems. In three recent Kurdish cases SIRC Chair Robert Rae concluded that adverse assessments provided by CSIS were based on inaccurate assumptions. Suleyman Goven, an Alevi Kurd from Turkey who was granted Convention refugee status in Canada in 1993, was one of the three complainants. Goven's affiliation with a union that was subsequently banned by the military government in Turkey, resulted in his arrest, detention without charge, and torture. After his release, a series of events, including the assassination of his father and cousin, led Goven to believe his life was in danger and he fled. Once in Canada, he assumed a leadership role in the Canadian Kurdish community, becoming a board member of the Toronto Kurdish Community Information Centre (TKCIC), organizing social functions, helping other Kurdish newcomers and participating in local demonstrations in support of Kurdish nationalism. In his interview with CSIS, Goven acknowledged "strong sympathy" for the Kurdistan Workers Party (PKK) but stated that he condemned recent acts of violence by the PKK in Europe, believing that killing innocent people and abductions are not the way to freedom. Nevertheless, it would become clear to Goven and his advocates that CSIS believed that that the TKCIC had links with the PKK in Europe

one association." David Schneiderman and Brenda Cossman, "Political Association and the Anti-terrorism Bill" in Ronald J. Daniels *et al.*, *supra* note 20 at 183.

¹⁰⁷ *Supra* note 91, at para. 5.7. Note that the *Refugee Convention* accords refugees the right to "non-political" and "non-profit making" association [art. 15] but more recent human rights instruments enshrine broader association and expressive rights [see, e.g., *International Covenant on Civil and Political Rights*, arts. 19 and 22].

and that Goven himself was a member of the organization.¹⁰⁸ After waiting in limbo for three years for security clearance, Goven initiated a formal complaint to CSIS, and subsequently to SIRC. In a public statement after the release of the SIRC report regarding his complaint, Mr. Goven, recounted :

When I first got to Canada, I found peace, physical protection, and hope, but that all changed dramatically in 1994 after I was interrogated by CSIS because they misinterpreted what, on my part, were law-abiding activities and the legitimate effort to build a place for the Kurdish community to meet. Since then harassment, intimidation and threats have become a part of my daily life. For example, CSIS bugged my phone, took pictures of me, and followed me around [...] In 1996, some belongings were stolen from my home and, just before I gave testimony before SIRC, my briefcase was stolen. It was also common practice for CSIS to question Kurds and even some Turks about me.

During the interview I had with CSIS in 1994 – which I call an interrogation because it lasted seven hours – I was not given an opportunity to eat and I was under huge psychological pressure [...] During my interrogation I was threatened and asked to be an informer in exchange for landing papers [...]

I did not bring any domestic conflict to Canada when I came [...] I was persecuted and tortured by the Turkish government because I was Kurdish and a trade unionist. That's why I came to Canada to seek this country's protection nine years ago. However, like many other Kurdish refugees, the harassment and psychological torture has continued here, this time not by the Turkish police but by CSIS.¹⁰⁹

Goven's statement underscores many of the procedural and substantive problems associated with refugee security screening under the rubric of the Immigration Act's anti-terrorism provisions. An important element of Goven's complaint concerned the manner in which the security screening interview by CSIS officers had been conducted – the length of the interview itself, the style of the questioning, particularly in view of the fact that Goven, like many refugees, was a survivor of brutal interrogations and torture in his country of origin. On the question of screening interviews, the report on Goven's complaint recommended, *inter alia*, that a recording be made of all interviews so that factual disputes concerning the nature of the interview or the evidence elicited during the interview could be resolved with reference to an objective record; that applicants should receive written notice of purpose of the interview, and their right to attend with counsel. The Committee also

¹⁰⁸ The author was one of Suleyman Goven's lawyers in his complaint to SIRC. The information concerning Goven's activities in Canada was provided in oral testimony before the Committee and substantiated in confidential documents disclosed by CSIS counsel through the course of the fifteen day hearing in 1998 and 1999.

¹⁰⁹ Statement of Suleyman Goven, Press Conference, Queen's Park, Toronto, 11 May 2000. See also, A. Thompson, "Report slams CSIS treatment of refugees" *The Toronto Star* (11 May 2000) A10; and Andrew Mitrovica, "Immigration forged letter in refugee case, Rae says" *The Globe and Mail* (28 April 2001).

recommended that CSIS officials making assessments develop a more sophisticated analytic framework with respect to “membership” and the definition of a “terrorist” organization. In this regard, a recent report produced by CSIS lends strong support to the Committee’s observations and underscores what appears to be the intelligence agency’s disproportionate reliance on state-based sources of information as well as partisan perspectives on global politics.¹¹⁰

After a careful review of the facts in Goven’s case, the SIRC report indicated that they “simply don’t support the view that Mr. Goven was a member of the PKK.”¹¹¹ None of the evidence supported a finding of membership in a terrorist organization, but rather, described

instances in which Mr. Goven has taken some steps to be supportive of the PKK, or has been in association with someone alleged to be one of its members, or is described by some member of the Kurdish community (who has himself heard this) as a member of the PKK.¹¹²

The SIRC Chair stated that “he was convinced of Mr. Goven’s sincerity” and recommended that his application for permanent residence be processed.¹¹³ Despite the extensive investigations and hearings that supported SIRC’s conclusions in Goven’s case, the Service responded by preparing “updated assessments” on the three Kurdish files defending its original advice, a move that was interpreted as an attempt to overrule and effectively discredit the Committee.¹¹⁴ More than a year after SIRC issued its recommendations, Goven would learn that his application for permanent residence had been denied. His rejection letter indicated that he will continue to receive Canada’s protection as a Convention refugee – an ironic twist that appears to suggest that he is not considered to pose any actual risk to the “security of Canada,” but that he must pay the price for activities deemed unacceptable for non-citizens in Canada.

In a submission to the Special Committee of the Senate on Security and Intelligence in 1998, the Director of CSIS Ward Elcock indicated that with perhaps the singular exception of the United States, there were more international terrorist

¹¹⁰ SIRC File No. 1500-83, *supra* note 84 at 32. See, CSIS, Report #2000/06, *Conflict Between and Within States*, 8 August 2000 at 7 (under the heading ‘Canadian Security Interests’) : “Many of the 250 conflicts will not be resolved in a manner satisfactory to all parties. Winners normally will form the government, with intelligence and security forces to keep them in power; losers will tend to form terrorist organizations to continue and export the struggle to the developed world and strive to obtain the best publicity for their cause.” This paragraph purports to provide an analysis of threats to Canadian security but does so by discussing internal conflicts throughout the world in an undifferentiated manner, and by using broad assertions unsubstantiated by empirical or qualitative research, or even any reference to the particular social, political and historical context for these conflicts. Also not considered is that many of the “losers” continue to be the victims of state-sponsored or countenanced brutality, including arbitrary arrest, torture and extra-judicial executions. See, *e.g.*, *Amnesty International annual report 2000*, Country reports on Sudan, Sri Lanka and Columbia, online : AI <<http://www.web.amnesty.org>>.

¹¹¹ *Ibid.* at 26.

¹¹² *Ibid.*

¹¹³ *Ibid.* at 27 and 30.

¹¹⁴ Interview with Andrew Brouwer, Maytree Foundation, 22 November 2000. See also SIRC Files No 1500-82,83; and *SIRC Annual Report 1999-2000*, *supra* note 84.

groups active in Canada than in any other country in the world and that “Canada’s counter-terrorism effort will never succeed if we allow our borders to become mere sieves [...]”¹¹⁵ In 1999 the case of failed refugee claimant Ahmed Ressay crossing into the United States from Canada with explosives in his car and intentions of unleashing a millennium attack on the Los Angeles airport, became another flashpoint for concern by media and government alike and renewed criticism that the refugee program was to blame for Canada becoming a “safe haven for terrorists.”¹¹⁶ In response to concerns of this nature, the Canadian government commissioned a series of studies and consultations,¹¹⁷ and most recently, proposed a significant overhaul of the Immigration Act. Bill C-11, the “Immigration and Refugee Protection Act” was proclaimed into law on November 1, 2001. Hearings conducted by the Senate Committee for Social Affairs, Science and Technology yielded a number of suggestions concerning the content of proposed regulations but no concrete recommendations for changes to the text of the bill.¹¹⁸ Despite a number of positive

¹¹⁵ Ward Elcock, Submission to the Special Committee of the Senate on Security and Intelligence, 24 June 1998 at 11 and 23. This assertion has been cited in a number of Federal Court security decisions (see, e.g. *Mahjoub*, *supra* note 82 at para. 22; and *Suresh (C.A.)*, *supra* note 81 at 661-62) and repeated by Mr. Elcock on numerous occasions. See also, *Report of the Special Committee on Security and Intelligence* (Kelly Committee), January 1999, c. 1 at 2, online : <http://www.parl.gc.ca/36/1/parlbus/commb/com_e/secu-e/rep-e/repsecintjan99-ehm>. The Canadian government does not maintain a reliable record of “terrorist” incidents in Canada but CSIS confirms that there are approximately 50 organizations and 350 individuals who are “targets” of ongoing intelligence investigations. Whether or not Mr. Elcock’s depiction of Canada as the second largest venue for international terrorism is accurate, the events of September 11 underscore the threats posed by highly mobile international criminal networks that move across borders as easily as multinational corporations. Nevertheless, there are critical legal distinctions to be drawn between such transnational violence and the violence borne of civil conflicts in many parts of the world. In other words, clandestine Al-Qaeda cells are not the same as Palestinian resistance groups. From Afghanistan and the Former Yugoslavia, to Sudan, Sri Lanka and Turkey, many civil conflicts are produced by the suppression of minority rights; conditions which produce large numbers of genuine refugees as well as violent insurgencies supported by affected diaspora communities in the West.

¹¹⁶ For trenchant criticism in this vein, see the evidence provided by Former Ambassadors Martin Collacott and William Bauer before the Standing Committee on Citizenship and Immigration on 1 Dec. 1999 with regard to the Committee’s Study, “Refugee Protection and Border Security,” online : Parliament of Canada : <<http://www.parl.gc.ca/InfoComDoc/36/2/CIMM/Meetings/Evidence/cimnev07-e.htm>>.

¹¹⁷ Roger Tassé, *Removals : Processes and People in Transition*, Report prepared for Citizenship and Immigration Canada, February 1996; Legislative Review Advisory Group, “Not Just Numbers, A Canadian Framework for Future Immigration” (Minister of Public Works and Government Services Canada, 1997). In January 1999 the government released its long awaited white paper : *Building on a Strong Foundation for the Twenty First Century : New Directions for Immigration and Refugee Policy and Legislation [New Directions]* online : CIC <www.cic.gc.ca>. The document proposed reforms in broad terms without providing much indication of concrete measures that were to be pursued. For relevant commentary see the special issue : “Not Just Numbers and New Directions : Implications for Canadian Refugee Policy,” (1999) 18:1 *Refugee*.

¹¹⁸ Observations of the Standing Senate Committee on Social Affairs, Science and Technology on Bill C-11, Journals of the Senate, 1st Session, 37th Parl., Issue 61 (23 October 2001). The Senate appended a number of observations to its report, including the suggestion that the term “terrorism” be defined in legislation or regulation and that the same definition of “terrorism” should be used in all relevant Canadian legislation. In this regard, the Committee highlighted the definition of “terrorist activity” contained in the government’s anti-terrorism bill (*infra* note 121) and suggested that a similar

reforms, the national security dimension of the bill is particularly troubling. Immigration Minister Elinor Caplan suggested that the bill was designed to reflect the dual mandate of her department : “to close the back door to those who would abuse our rules, in order to open the front door wider to those who would come to us from around the world to help us build our country.”¹¹⁹ In public hearings, the Minister was quick to highlight the fact that “overwhelmingly the people who apply to come [to Canada] are law abiding, honest and hardworking.” Benign references to the need to for tougher measures aimed at ensuring “public confidence in the system”¹²⁰ failed to adequately account for the significant incursions on substantive and due process rights for non-citizens reflected in the new bill.

Bill C-11 maintains the category of inadmissibility on the grounds of “membership” in a “terrorist” organization and proposes further grounds for security inadmissibility.¹²¹ In addition, persons believed inadmissible on security grounds will lose all appeal rights.¹²² The bill fails to address repeated recommendations that the definition of “security threat” in the Act be harmonized with the definition in the CSIS Act.¹²³ The absence of harmonization means that refugees who are involved in legitimate national liberation movements, or are simply active supporters of a political organization, without themselves being involved in any violent activities, are still caught in the security net. The bill also expands the powers of immigration officers to provide for the examination of non-Canadians, not only on entering Canada, but at any time within Canada. As noted by CCR, “this change means that the border is brought into Canadian society” – all non-citizens are treated as if they are eternally at

definition, adapted to the context of Bill C-11, should be considered for the regulations that that would apply to Bill C-11.

¹¹⁹ Standing Committee on Citizenship and Immigration, House of Commons, *Minutes of Proceedings and Evidence*, 1st Sess., 37th Parl., 2001-, 1 March 2001 (Elinor Caplan) at 2.

¹²⁰ *Ibid.*, at 7 and 2.

¹²¹ Section 35(c) of the new *Immigration and Refugee Protection Act* states that foreign nationals will be inadmissible on grounds of violating human or international rights in cases where their entry into or stay in Canada is restricted pursuant to sanctions imposed by an international organization or association of states. It deserves mention that the omnibus anti-terrorism bill introduced by the Canadian government in the aftermath of the September attacks in the United States, does not criminalize membership in terrorist organizations but focuses instead on participation in “terrorist activity.” The bill provides a definition for “terrorist activity” and specifically states : “[...] for greater certainty, [terrorist activity] does not include an act or an omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict [...]” As the bill does not amend the *Immigration Act* (although more anti-terrorism amendments may be forthcoming), it remains to be seen how the new definition may inform immigration security decisions. Bill C-36, *An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts and to enact measures respecting the registration of charities, in order to combat terrorism* [hereinafter *Anti-terrorism Act*], 1st Session, 37th Parl., 2001, cl. 83.01(1)(b)(ii) (1st reading 15 October 2001).

¹²² *Immigration and Refugee Protection Act*, s. 64.

¹²³ See, e.g., The Report of the Special Senate Committee on Security and Intelligence, Jan. 1999, Chapter II at 11, online : Parliament of Canada <www.parl.gc.ca/36/1/parlbus/commb.../com-e/secu-e/repsecintjan99-chnm>; Legislative Review Advisory Group, *supra* note 117, Recommendation 138; and *SIRC Annual Report 1997-1998*, *supra* note 89 at 10.

the border, subject to examination at any time by immigration officers.¹²⁴ For the purposes of security certificate procedures, the Bill strips SIRC of its current responsibility for permanent residents. Both refugees and permanent residents will be accorded an “informal and expeditious” Federal Court review of the reasonableness, but not the merits, of ministerial security opinions with no possibility of further review or appeal. While anyone retains the right to complain to SIRC with regard to CSIS conduct or advice, such complaints do not act to stay a person’s removal while an investigation is pending nor are the recommendations of SIRC binding on the Minister. It deserves mention that some ten years ago, a parliamentary review of the CSIS Act recommended that the Immigration Act be amended to allow any person subject to an adverse security report to have their case investigated by SIRC with direct recourse to an administrative hearing.¹²⁵ In a special report on Canada last year, the Inter-American Commission on Human Rights drew particular attention to procedural inadequacies inherent in the security certificate regime and related provisions concerning preventive detention.¹²⁶ Nevertheless, Bill C-11 not only fails to address existing shortcomings on these issues, but will further erode an essential safeguard. As in the current Act, Bill C-11 imposes mandatory detention on non-permanent residents named in a security certificate, regardless of whether they pose any actual danger and with no possibility of release for at least four months.¹²⁷

V. Bars to Asylum and Danger Opinions

The package of reforms introduced in 1992 also introduced “access criteria” into the Act, requiring all refugee claimants to undergo an eligibility determination pursuant to an enumerated list of disqualifications which were based, *inter alia*, on

¹²⁴ *Immigration and Refugee Protection Act*, s. 15; Canadian Council for Refugees, Bill C-11 Brief, 25 March 2001, online : CCR <<http://www.web.net/~ccr/>>.

¹²⁵ “In Flux but not in Crisis,” Report of the Special Committee on the Review of the CSIS Act and the Security Offences Act (Ottawa : Queen’s Printer, 1999); and see Brian Gorlick, *supra* note 55 at 79. In response to the proposal to eliminate SIRC’s security certificate review mandate, the agency expressed concern, noting its “unique expertise in acting as a competent tribunal to handle appeals related to intelligence and security matters – a capacity that Parliament intended it to have [...] this proposal would remove important existing safeguards in the activities of CSIS that could have a serious negative impact on national security, on individual rights, or on both.” SIRC Annual Report 1999-2000, *supra* note 86 at 2.

¹²⁶ Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, OEA/Ser.L./II.106/Doc.40 rev. (2000) at paras. 143-157, online : IACHR <<http://www.cidh.org>>. The Commission found that Canadian security procedures raised three principle concerns implicating provisions of the *American Declaration* and other applicable norms : (1) the compatibility of the provisions concerning access to review of the legality of the detention, (2) the apparent difficulties presented for a person deemed to be a security risk to seek protection for his or her right to non-return due to a risk to life or physical integrity, and (3), the compatibility of the procedures which allow the judge reviewing the certificate to consider evidence which may be withheld from the person concerned on the basis of the need to protect national security. The *ex parte* certificate procedure and its non-disclosure provisions were the subject of an unsuccessful constitutional challenge by a permanent resident alleged to be involved in organized crime in *Chiarelli v. Canada* [1992] 2 S.C.R. 711. See also, *Ahani v. Canada* [1995] 3 F.C. 669 (T.D.), *aff’d* [1996] F.C.J. No. 937 (C.A.) (QL), leave to appeal refused (3 July 1997), (S.C.C.).

¹²⁷ *Immigration and Refugee Protection Act*, s. 82(2).

the new security admissibility criteria. In cases where the Minister deemed that it would be “contrary to the public interest” to have the claim determined, claimants would be divested of the right to pursue their refugee claim.¹²⁸ Bill C-11 eliminates the need for a Ministerial opinion and renders persons found inadmissible on grounds of security or human or “international rights” violations, ineligible to make a refugee claim. In contrast, a refugee claimant who is believed to have committed a crime that is not considered “terrorist,” will be ineligible only if there has been a conviction for an offence punishable by a maximum of ten years or more *and* the Minister has designated the person a danger to the public. Pursuant to new provisions in Bill C-11, it becomes mandatory for the Immigration and Refugee Board to suspend consideration of a claim in all cases of security inadmissibility.¹²⁹

While article 1F of the Refugee Convention permits states to exclude certain categories of individuals from protection as refugees, UNHCR has consistently advocated against the use of the exclusion clauses as an admissibility threshold outside the refugee status determination procedure. On the basis that exclusion from refugee status is an extreme sanction with potentially life-threatening consequences, UNHCR urges that such decisions should be made by the authority with expertise and training in refugee law and status determination, in the context of a full and fair examination of the asserted claim.¹³⁰ Many commentators agree, arguing that the use of article 1F to decide on the admissibility of claims is inconsistent with the exceptional nature of exclusion clauses. As Kingsley Nyinah notes,

[s]uch use effectively creates a ‘presumption of excludability’ by promoting the erroneous impression that the exclusion clauses are potentially applicable to all asylum seekers as a matter of course. It also elevates exclusion clauses to a predominant position which they were never intended to occupy in the status determination procedure.¹³¹

The eligibility provisions introduced in both C-86 and C-11 refer back to the admissibility subsections (*inter alia*, terrorism, membership in terrorist organizations, and danger to the security of Canada) and differ from the phrases used in article 1F, particularly as serious non-political crimes pursuant to article 1F(b) include offences which occurred outside the country of refuge and prior to admission, whereas security inadmissibility is frequently applied to conduct in Canada. On the other hand, as the

¹²⁸ *Immigration Act*, s.46.01(1)(e)(ii).

¹²⁹ *Immigration and Refugee Protection Act*, ss. 101(1)(f) and 103(1)(a). Note that “international rights” does not have a precise meaning in international law and the new bill has not offered a definition.

¹³⁰ For the most recent UNHCR commentary on statutory bars to asylum in Canadian legislation, see, UNHCR, Comments on Bill C-11, Submission to the House of Commons, Standing Committee on Citizenship and Immigration, 5 March 2001, online : CCR <<http://www.web.net/~ccr/>> (date accessed : 9 September 2001). Security Council Resolution 1373, *supra* note 79 at para. 3 (f) and (g) calls upon states to ensure that an asylum seeker has not participated in the commission of terrorist acts and to ensure that refugee status is not abused by the perpetrators of terrorist acts. Inasmuch as the text requires such steps to be taken in conformity with international standards of human rights, the resolution should not be viewed as endorsing the use of statutory bars to asylum procedures, but rather, the appropriate application of the exclusion clauses within refugee status determination proceedings.

¹³¹ Michael Kingsley Nyinah, *supra* note 74 at 305. For a different view, see James C. Hathaway and Colin Harvey, “Framing Refugee Protection in the New World Disorder” (2001) 34:2 *Cornell Int’l L.J.*

international community appears intent on including international terrorism within the ambit of acts “contrary to the purposes and principles of the United Nations,” and thereby within the scope of article 1F(c),¹³² the logic of assessing such matters as an element of refugee status determination is reinforced.

Subject to a further ministerial opinion under the current Act that they constituted a “danger to the security of Canada,” Convention refugees as well as those deemed ineligible to claim refugee status are to be deported back to the very countries from which they fled and where their lives or freedom would be threatened. The procedure for this further ministerial opinion does not include an oral hearing but rather, a paper review conducted by the very same decision - maker who had sought to uphold the security certificate in Federal Court.¹³³ Although Bill C-11 identifies compliance with Canada’s international human rights commitments as a new objective, the explicit exemption authorizing the Minister to deport people regardless of the risks they might face, remain in place for designated security cases. Pursuant to new provisions in Bill C-11, removal is authorized for persons inadmissible on security grounds if the Minister is of the opinion that they should not remain, taking into account the nature and severity of the acts they committed and the “danger to the security of Canada.”¹³⁴

As emphasized by Goodwin-Gill, the principle of *non-refoulement* has been “the foundation stone of international protection” over the past fifty years, an obligation which most states generally recognize, notwithstanding a degree of inconsistency in actual practice.¹³⁵ The Refugee Convention itself includes two exceptions to the prohibition on *refoulement*. Article 33(2) indicates that

¹³² See *Pushpanathan v. Canada*, *supra* note 103 at 1030, in which the Court commented in *obiter* that international terrorism may fall within the ambit of 1F (c). The Court added that the purpose of 1F(c) is to exclude those individuals responsible for serious, sustained or systematic violations of fundamental human rights in a non-war setting; and indicated that an explicit designation that an act is contrary to the purposes and principles of the United Nations is not determinative, unless the “declarations or resolutions represent a reasonable consensus of the international community [...]” More recently, article 5 of Security Council Resolution 1373, *supra* note 79, “[d]eclares that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations.”

¹³³ The constitutionality of this procedure is currently being challenged on the basis that it offends the principles of fundamental justice guaranteed in the *Canadian Charter of Rights and Freedoms*. *Suresh v. Minister of Citizenship and Immigration*, *supra* note 81; and *Ahani v. Minister of Citizenship and Immigration* [2000] F.C.J. No. 53 (C.A.), leave to appeal to S.C.C. granted, SCC File No. 27792, appeal heard 22 May 2001 (judgment reserved). Five further constitutional questions were certified by the Court in these two cases : whether s. 19(1)(e) and (f) infringe freedom of association and expression and whether the term danger to the security of Canada found in s. 53(1)(b) and/or the term terrorism found in s. 19(1)(e) and (f) are void for vagueness and therefore contrary to the principles of fundamental justice.

¹³⁴ *Immigration and Refugee Protection Act*, s. 115(2).

¹³⁵ Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed. (Oxford : Clarendon Press, 1996) at 30 and in greater detail at 129-171. See also, Eli Lauterpacht and Daniel Bethlehem, “The Scope and Content of the Principle of Non-Refoulement,” Opinion for UNHCR Global Consultations on International Protection, Cambridge Roundtable, June 2001 at para. 216, online : UNHCR <<http://unhcr.ch/issues/asylum/globalconsult/main.htm>> (date accessed : 2 September 2001); Karen Parker and Lyn B. Neylon, “Jus Cogens : Compelling the Law of Human Rights” (1989) 12 *Hastings*

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitute a danger to the community of that country.¹³⁶

The interpretation of these somewhat diffuse exceptions to protection has been aided by the Convention's *travaux préparatoires* as well as *opinio juris*, conclusions of the UNHCR's Executive Committee and emerging jurisprudence from treaty monitoring bodies. From the *travaux* we learn that article 33(2) was not actually included in the initial version of the Convention drafted by the Ad Hoc Committee on Refugees and Stateless Persons which met in 1950 and 1951. The drafting group expressly noted that "[w]hile some question was raised as to the possibility of exceptions to Article 28 (later 33(1)), the Committee felt strongly that the principle expressed was fundamental and should not be impaired."¹³⁷ The article 33(2) exception was subsequently introduced in response to concerns raised by some states about refugees in the increasingly volatile climate of the Cold War. The *travaux* indicate that the exceptions were intended to be interpreted restrictively, and as the delegate from the United States suggested, "it would be highly undesirable to suggest in the text of [article 33] that there might be cases, even highly exceptional cases, where a man might be sent to death or persecution."¹³⁸ Similarly, in 1977 the UNHCR's Executive Committee cautioned that as exceptions to an important protection principle, the security and public order provisions should be interpreted and applied restrictively.¹³⁹ The *travaux* further elaborate that the Convention's drafters were concerned only with significant threats to national security. The

International & Comp. L.Rev. 411 at 435-436; Gunnel Stenberg, *Non-Expulsion and Non-Refoulement : The Prohibition against Removal of Refugees with Special Reference to Articles 32 and 33 of the 1951 Convention Relating to the Status of Refugees*, Swedish Institute of International Law, Studies in International Law, Vol. 9 (Uppsala : IUSTUS Forlag, 1989) at 278-280; D. Weissbrodt and I. Hortreiter, "The Principle of Non-Refoulement : Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other Human Rights Treaties" (1998) 5 *Buffalo Human Rights Law Review* 1; *Cartagena Declaration on Refugees*, 1984-85 Report of the Inter-American Commission on Human Rights, Conclusion 5 at 177-182; and 1988 Report of the United Nations High Commissioner for Refugees, UN GAOR, 40th Sess., Supp. No. 12 at 6, UN Doc. A/40/12 (1985).

¹³⁶ Refugee Convention, art. 33(2); and UNHCR Global Consultations on International Protection, Cambridge Roundtable, July 2001, "Summary Conclusions – The principle of *Non-Refoulement*," online : UNHCR <<http://unhcr.ch/issues/asylum/globalconsult/main.htm>> (date accessed : 2 September 2001).

¹³⁷ Paul Weis, *The Refugee Convention, 1951 : The Travaux Préparatoires Analysed, with a Commentary by the Late Dr. Paul Weiss* (Cambridge : Cambridge University Press, 1995) at 327.

¹³⁸ *Ibid.* at 326. Similar statements were made by the French, British and Israeli delegates. A restrictive interpretation is also consistent with the principle that exceptions to international human rights treaties must be interpreted narrowly. Eur. Ct. H.R. Klass case, judgment of 6 September 1978, A/28 at para 42; Eur. Ct. H.R. Winterwerp case, judgment of 24 October 1979, A/33 at para. 37.

¹³⁹ See EXCOM Conclusions No. 6 (XXVIII) on Non-Refoulement and No. 7 (XXVIII) on Expulsion (1977); and *Cartagena Declaration on Refugees*, 1984-85 Report of the Inter-American Commission on Human Rights, Conclusion 5 at 177-182; and 1988 Report of the United Nations High Commissioner for Refugees, UN GAOR, 40th Sess., Supp. No. 12 at 6, UN Doc. A/40/12 (1985). Consensus reached by the UNHCR Executive Committee in annual sessions are expressed in the form of Conclusions. Strictly speaking, these Conclusions are not binding on states, but they comprise a form of "soft law," which contribute to the development of international refugee law.

statement of the British representative reflects the nature of the concerns which led to the inclusion of the threat to security exception :

Among the great mass of refugees it was inevitable that some persons should be tempted to engage in activities on behalf of a foreign power against their country of asylum, and it would be unreasonable to expect the latter not to safeguard itself against such a contingency.¹⁴⁰

This view is shared by Grahl-Madsen, who suggested that the security of the country should only be invoked against “acts of a rather serious nature endangering directly or indirectly the constitution, government, the territorial integrity, the independence, or the external peace of the country concerned.”¹⁴¹ Lauterpacht and Bethlehem emphasize that the exceptions in article 33(2) amounted to a compromise between the danger to a refugee from *refoulement* and the danger to the security of his or her country of refuge from their conduct. For this reason,

[a] broadening of the scope of the exception to allow a country of refuge to remove a refugee to a territory of risk on grounds of possible danger to other countries or to the international community, would [...] be inconsistent with the humanitarian and fundamental character of the prohibition of *refoulement*.¹⁴²

Even if it is established that there is a very serious danger to the country of refuge, *refoulement* under article 33(2) will only be justified as a last resort, in circumstances where the remedy of *refoulement* is proportionate to the threat, and the danger to the country of refuge outweighs the risk to the refugee upon *refoulement*. Kälin notes that

[...] *refoulement* to the country of persecution is any case not permissible, if a less serious measure such as expulsion to a third country, prosecution, imprisonment etc., would suffice to remove the threat to state security. State practice confirms this, since *refoulement* because of activities endangering the state is exceptionally rare.¹⁴³

Concerning national security in international law, Kiss concludes that it has a very specific meaning which is distinct from public safety or order. As it is used in

¹⁴⁰ Paul Weiss, *supra* note 137 at 330.

¹⁴¹ Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951* (Geneva : Division of International Protection, UNHCR, 1997) at 236.

¹⁴² Eli Lauterpacht and Daniel Bethlehem, *supra* note 135 at para. 165. In a recent decision the House of Lords accepted that promotion of terrorism against any state is capable of being a threat to the security of the U.K. Lord Slynn found that whether there is a real possibility of an adverse affect on the U.K. is a matter which has to be weighed by the Secretary of State and balanced against the injustice to the individual if a deportation order is made. *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 at paras. 16-17.

¹⁴³ Walter. Kälin, *Grundriss des Asylverfahrens* (Guide to the Asylum Procedure) (Basel and Frankfurt : Helbing & Lichtenhahn, 1990) at 226-227 as cited in *Suresh v. Minister of Citizenship and Immigration*, *supra* note 79 (Factum, intervener U.N.H.C.R. at 19).

the International Covenant on Civil and Political Rights to limit specified rights, the phrase “national security” means

the protection of territorial integrity and political independence against foreign forces or threats of force. It would probably justify limitations on particular rights of individuals or groups where the restrictions were necessary to meet the threat or use of excessive force.¹⁴⁴

In a similar vein, Gilbert notes that the broad and unrestricted meaning domestic courts generally accord to the concept of “national security” should be distinguished from the “more demanding” idea of “danger to the security of the country” as articulated in the Convention.¹⁴⁵ Consistent with this view, the threshold for losing *non-refoulement* protection would be reached only when conditions justifying derogation from international human rights obligations exist.

The norms codified in the Convention against Torture¹⁴⁶ impose a further limitation on the right of states to rely on the national security exception. Canada signed the 1984 Convention Against Torture in 1985 without any reservation and ratified in 1987, after extensive consultations with provincial and territorial governments.¹⁴⁷ Article 2 of the Convention against Torture requires states to prevent acts of torture and indicates that no exceptional circumstances “whatsoever” may be invoked as a justification of torture.¹⁴⁸ Article 3(1) expressly prohibits *refoulement*

¹⁴⁴ Alexandre C. Kiss, “Permissible Limitations on Rights,” in Louis K. Henkin, ed., *The International Bill of Rights* (New York : Columbia University Press, 1981) at 297. This view is consistent with the definition of “legitimate national security interest” as defined in Principle 2(a) of *The Johannesburg Principles of National Security, Freedom of Expression and Access to Information* (1995) : “A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country’s existence or its territorial integrity against the use or threat of force, or its capacity to respond to the threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.”

¹⁴⁵ Geoff Gilbert, “Current Issues in the Application of the Exclusion Clauses,” Paper prepared for the UNCHR Global Consultations, (2001), online : UNHCR <<http://www.unhcr.ch/issues/asylum/globalconsult/main.htm>>. See also, E. Lauterpacht and D. Bethlehem, *supra* note 135 at paras. 159-179.

¹⁴⁶ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N.G.A . Res. 39/46, 10 December 1984, Can. T.S. No. 36 (entered into force 26 June 1987, accession by Canada 1987)[hereinafter *Convention Against Torture*].

¹⁴⁷ *Outlawing an Ancient Evil : Torture, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Initial Report of Canada* (Ottawa : Multiculturalism and Citizenship Canada, 1989) at 1. The Committee Against Torture is a body of ten experts who are elected by states but serve in their personal capacity to monitor state compliance with the treaty. Every four years signatory states must submit a performance report on measures they have adopted to effect their treaty commitments and defend the report before the Committee. Currently 44 states, including Canada, have recognized the Committee’s competence to receive and consider communications alleging violations of the treaty, from individuals subject to their jurisdiction as well as other states. Office of the United Nations High Commissioner for Human Rights, “Status of Ratifications of the Principal International Human Rights Treaties as of 22 August 2001,” online : United Nations High Commissioner for Human Rights <<http://www.unhcr.ch/pdf/report.pdf>> (date accessed : 20 September 2001). Canada submitted in its third report in September 1999 which the Committee evaluated in November 2000.

¹⁴⁸ The prohibition of torture, widely accepted as a *jus cogens* norm from which no derogation is permitted, is also codified in art. 7 of the International Covenant on Civil and Political Rights, art. 3 of

when there is a risk that a person will face torture upon return.¹⁴⁹ The Vienna Convention on the Law of Treaties provides that where states have each ratified successive treaties that relate to the same subject matter, the latter treaty prevails in relations between those states.¹⁵⁰ The Vienna Convention further stipulates that in the interpretation of a treaty both the context and any relevant rules of international law must be taken into account.¹⁵¹ Accordingly, the security and public order exceptions in article 33(2) must be interpreted within the evolving context of international human rights law and, in effect, have been superceded in cases where there is a risk of torture by an absolute right of *non-refoulement*.¹⁵² In 1996 Canadian government representatives in Geneva joined in the consensus for the 1996 Conclusion of the UNHCR's Executive Committee in reaffirming "the fundamental principle of *non-refoulement*, which prohibits the expulsion and return of persons in respect of whom there are grounds for believing that they would be in danger of being subjected to torture, as set forth in the Convention Against Torture."¹⁵³ Yet, domestically, the government has maintained its firm commitment to its "right" to deport "security risks," regardless of the human rights at issue.¹⁵⁴ In two cases currently pending

the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5(2) of the American Convention on Human Rights and art. 5 of the African Charter on Human and Peoples' Rights. See Herman J. Burgers and Hans Danelius, *The United Nations Convention Against Torture : A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrech, Netherlands : Martinus Nijhoff Publishers, 1988) at 12 and 176; *Re Pinochet Ugarte* [1999] H.L.J. No. 12 (24 Mar. 1999); *Prosecutor v. Furundzija* (10 Dec. 1998), Case No. : IT-95-17/1-T 10.

¹⁴⁹ Art. 3(1) of the *Convention Against Torture* states : "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."

¹⁵⁰ *Vienna Convention on the Law of Treaties (Vienna Convention)*, [1980] Can. T.S. No. 37, art. 30(3) and (4). See also, Human Rights Committee, General Comment No. 24(52), UN Doc. CCPR/C/21/rev.1.add.6 at para. 17.

¹⁵¹ *Ibid.* art. 31(3)(c).

¹⁵² For the most recent articulation of this principle, see, UNHCR Global Consultations on International Protection, "Summary Conclusions – The Principle of *Non-Refoulement*" *supra* note 136, which note : "There is a trend against exceptions to basic human rights principles. This was acknowledged as important for the purposes of the interpretation of Article 33(2). Exceptions must be interpreted very restrictively, subject to due process safeguards, and as a measure of last resort. *In cases of torture, no exceptions are permitted against refoulement.*" [emphasis added]

¹⁵³ EXCOM Conclusion No. 79 (XLVII) General Conclusion on International Protection (1996), para. (j).

¹⁵⁴ In 1998 the House of Commons Standing Committee on Citizenship and Immigration issued a report in which the question of deporting people in contravention of formal requests by international human rights bodies was considered. The Committee indicated that "[w]e are unwilling to recommend that deportation should *never* occur in these cases, because there could be extreme situations that would shock Canadians should the government not remove an individual." It was recommended that "great caution" should be exercised in such cases and that deportation proceed "only for the most compelling reasons." Standing Committee on Citizenship and Immigration, *Immigration Detention and Removal*, June 1998, at 19 Recommendation 28. In its formal response the government agreed that "such caution is needed" but made no commitment to comply with the requests of international human rights bodies. Government response to the Report of the Standing Committee on Citizenship and Immigration, *Immigration Detention and Removal*. See also, Canadian Council for Refugees, Comments on Canada's Compliance with the Convention Against Torture, Prepared for the United Nations Committee Against Torture, November 2000; and the UN Committee's recent Concluding Observations on Canada's third periodic report which expressed concern with regard to "[t]he position of the State party in arguments before courts, and in policies and practices that, when a person is

before the Supreme Court of Canada, the government has adopted the position that undifferentiated security concerns are an “exceptional circumstance” sufficient to justify derogation from the absolute prohibition on *refoulement* contained in the *Convention against Torture*.¹⁵⁵ This position is in direct opposition to the UN Human Rights Committee’s own guidelines as well as those of the UNHCR.¹⁵⁶ In 1996 the UNHCR’s Executive Committee reaffirmed “the fundamental principle of *non-refoulement*, which prohibits the expulsion and return [...] of persons in respect of whom there are grounds for believing that they would be in danger of being subjected to torture, as set forth in the Convention [against Torture].”¹⁵⁷ Although United Nations resolutions urge states to ensure that refugee status is “not used for the purpose of preparing or organizing terrorist acts,”¹⁵⁸ international jurisprudence firmly supports an absolute prohibition against deporting anyone to a country where they are at risk of torture. In the case of *Paez v. Sweden* the UN Committee against Torture considered the scope and nature of article 3 of the Convention Against Torture and its relationship with the Refugee Convention.¹⁵⁹ This case involved Sweden’s proposal to deport a failed refugee claimant who was a member of the Shining Path and had admitted to handing out home-made bombs which were used against police. The Committee rejected Sweden’s contention that the “terrorist character” of the Shining Path could justify the deportation, noting that “the nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention.”¹⁶⁰

considered a [...] security risk, the person can be returned to another state even where there are substantial grounds for believing that the individual would be subjected to torture, an action which would not be in conformity with the absolute character of the provisions of Article 3(1) of the Convention [...]” *Conclusions and Recommendations of the Committee against Torture : Canada*. 22/11/2000. CAT/C/XXVI/Concl.4.

¹⁵⁵ *Suresh v. Minister of Citizenship and Immigration*, *supra* note 81, (Respondent’s factum at para. 36); see also, *Ahani v. Minister of Citizenship and Immigration*, *supra* note 133.

¹⁵⁶ International Covenant on Civil and Political Rights, art. 7; the U.N. Human Rights Committee General Comment 20 (article 7) UN Doc. CCPR/C/21/Add.3 : “State parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement” (at para. 9); and EXCOM Conclusions No. 6 (XXVIII) on Non-Refoulement and No. 7 (XXVIII) on Expulsion (1977); EXCOM Conclusion No. 79 (XLVII) General Conclusion on International Protection (1996), para.(j).

¹⁵⁷ EXCOM Conclusion on International Protection No. 79 (XLVII), 1996, para. (j); see also EXCOM Conclusion on International Protection No. 81 (XLVII), 1997, para. (l); and EXCOM Conclusion on Safeguarding Asylum, No. 82 (XLVII), 1997, para. (d)(i); EXCOM Note on International Protection, UN Doc. A/AC.96/898, 3 July 1998, para. 11.

¹⁵⁸ U.N.G.A. Res. 51/210 (16 Jan. 1997), para. 3; see also, Declaration on Measures to Eliminate International Terrorism, U.N.G.A. Res. 49/60 (9 Dec. 1994) Annex, para. 5 (f); and Security Council Resolution 1373, *supra* note 77.

¹⁵⁹ Committee against Torture, Communication No.39/1996, U.N. Doc.A/52/44 (1997).

¹⁶⁰ *Ibid.* at 94. See also *Khan v. Canada*, Committee against Torture, Communication No. 15/1994, U.N. Doc. A/50/44 (1995) at 46; and U.N. Human Rights Committee General Comment 20 (article 7) UN Doc. CCPR/C/21/Add.3 : “State parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement” (at para. 9). In *Eur. Court. H.R., Chahal v. United Kingdom*, 1996-V No. 22 (1996) at 1831, the European Court of Human Rights held that the prohibition of inhuman treatment is a fundamental value underpinning the principal human rights Conventions. See *id.*, para. 79. While States necessarily face “immense difficulties” in protecting the public from terrorism, even under those circumstances the prohibition remains absolute, “irrespective of the

Similarly, in a recent House of Lords decision regarding a deportation order against a man suspected of links with a “terrorist” organization in Pakistan, Lord Hoffman noted that

[...] whether deportation is in the interests of national security is irrelevant to rights under article 3 [of the European Convention]. If there is a danger of torture, the Government must find some other way of dealing with a threat to national security.¹⁶¹

Removal is also proscribed to a country where a person may become a victim of extra-legal, arbitrary or summary execution,¹⁶² where fair trial guarantees are absent, the death penalty will be imposed (albeit with considerable variation in state practice in this regard)¹⁶³ or, with some balancing of interests, in cases which result in statelessness,¹⁶⁴ and family separation, particularly where children are involved.¹⁶⁵ International standards and practice in extradition recognize an express limitation on the duty to extradite where the accused will face serious human rights violations or otherwise discriminatory applications of the criminal law authority.¹⁶⁶ In

victim’s conduct.” *Id.* The Court stated that the prohibition applies equally in expulsion cases. *Id.* para. 80. See also, Brian Gorlick, “The Convention and the Committee against Torture : A Complementary Regime for Refugees” 11 *IJRL* 479 (1999); and Richard. Plender and Nuala Mole, “Beyond the Geneva Convention : constructing a *de facto* right of asylum from international human rights instruments” in Frances Nicholson and Patrick Twomey, eds., *Refugee Rights and Realities* (Cambridge : Cambridge University Press, 1999) at 81-105.

¹⁶¹ *Secretary of State for the Home Department v. Rehman*, *supra* note 142 at para. 55.

¹⁶² Principle 5 of the *United Nations Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* states : “No one shall be involuntarily returned or extradited to a country where there are substantial grounds for believing he or she may become a victim of extra-legal, arbitrary or summary execution in that country.” E.S.C. res. 1989/65, annex, 1989 U.N. ESCOR Supp. (no.1) at 52, U.N. Doc. E/1989/89 (1989).

¹⁶³ *Second Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989). See, e.g., *United States v. Burns and Rafay* [2001] S.C.C. 7, where the Supreme Court of Canada concluded that assurances that the death penalty will not be imposed are constitutionally required in the extradition context, in all but exceptional cases. The Court noted that a rule requiring such assurances not only accords with Canada’s principled advocacy on the international level, but also is consistent with the practice of other countries with which Canada generally invites comparison, apart from the retentionist jurisdictions in the United States.

¹⁶⁴ Art. 8 of 1961 *Convention on the Reduction of Statelessness*; and EXCOM Conclusion No. 78 (XLVI) Conclusion on the Prevention and Reduction of Statelessness and the Protection of Stateless Persons (1995). Although the Convention does not directly address deportation, it imposes on states a positive obligation to ensure that the right to nationality is protected and that state action does not lead to statelessness. See also art. 12.4 of the *International Covenant on Civil and Political Rights*.

¹⁶⁵ The right to family life is affirmed in arts. 17 and 23 of the *International Covenant on Civil and Political Rights* as well as in arts. V and VI of the *American Declaration on the Rights and Duties of Man*; the *Convention on the Rights of the Child* imposes a direct obligation on states to ensure that the “best interests” of children are a primary consideration in all actions concerning children. See *Baker v. Canada* [1999] 2 S.C.R. 817; and Richard Plender and Nuala Mole, *supra* note 160 at 97-101.

¹⁶⁶ See, Eur. Court H.R., Soering case, judgment of 7 July 1989, Series A No. 161 where the European Court of Human Rights found that extradition of an individual to face the “death row phenomenon” in the United States would constitute inhuman, degrading treatment or punishment, contrary to obligations under art. 3 of the *European Convention*.

this regard, two Canadian Supreme Court rulings have confirmed that fundamental justice should prevent Canada from surrendering a fugitive to a foreign state in circumstances where they would be subjected to torture.¹⁶⁷ Although the Canadian government has been an increasingly vocal proponent of human rights standards and institutions in international and regional fora, no steps have been taken to explicitly incorporate the obligations assumed under article 3 of the CAT into domestic immigration law.¹⁶⁸ Bill C-11 has expanded the mandate of a newly constituted "Refugee Protection Division" within the Immigration and Refugee Board. In addition to considering claims for Convention refugee status, the Division will assess claims by persons whose removal would subject them to a danger of torture within the meaning of article 1 of the Convention Against Torture, or to a risk of cruel and unusual treatment, subject to a number of limitations.¹⁶⁹ However, this wider, humanitarian protection is to be denied to anyone who falls within the exclusion clauses of the Refugee Convention. A procedure for "pre-removal risk assessment" will not protect persons who have been found inadmissible on, *inter alia*, security related grounds or persons who have been rejected by the Refugee Protection Division on the basis of the exclusion clauses.¹⁷⁰ The principle of *non-refoulement* as set out in the bill permits the removal of protected persons to torture and other forms of persecution on security grounds.¹⁷¹

The United Nations Human Rights Committee has expressed concern that "Canada takes the position that compelling security interests may be invoked to justify the removal of aliens to countries where they may face a substantial risk of torture or cruel, inhuman or degrading treatment."¹⁷² In November 2000, the Committee against Torture expressed a similar concern and recommended that Canada "comply fully with article 3(1) of the Convention prohibiting return of a person to another state where there are substantial grounds for believing that the individual would be subjected to torture, whether or not the individual is a serious

¹⁶⁷ *R. v. Schmidt* [1987] 1 S.C.R.500 at 522 and 532; *Kindler v. Canada* [1991] 2 S.C.R. 779 at 832 and 851.

¹⁶⁸ The Criminal Code, s. 269 criminalizes torture, defined in the same terms as art. 1 of the *Convention Against Torture*. The government would later suggest that the "post claim review," revised in 1993 and available to refused refugee claimants, served the function of implementing Canada's obligations under art. 3 of the treaty. However, people at risk of torture were not eligible to apply if they never made a refugee claim, if they were found ineligible to make a refugee claim, if their refugee claim was found to have "no credible basis", if they have been designated as a security risk or public danger, or if they failed to apply within 15 days of a negative refugee decision.

¹⁶⁹ *Immigration and Refugee Protection Act*, s. 97.

¹⁷⁰ *Ibid.*, s. 112(3). The government retains the authority to issue a "temporary resident permit" to individuals who are inadmissible for security reasons but for whom there are exceptional circumstances to grant a temporary right to remain in the country. Generally evidence of successful establishment is required in addition to any personal risk associated with return. Such "ministers permits," as they are termed in the current *Immigration Act*, are issued infrequently in security cases. See, Citizenship and Immigration Canada, *Annual Report to Parliament on Minister's Permits Issued in 2000*, online : CIC <<http://www.cic.gc.ca/english/pub/permits2000.html>>.

¹⁷¹ *Immigration and Refugee Protection Act*, s. 115(2)(b).

¹⁷² UN Human Rights Committee, Concluding Observations on Canada, UN Doc. CCPR/C/79 Add. 105, 7 April 1999.

criminal or security risk.”¹⁷³ In its report on Canada, the Inter-American Commission on Human Rights commented that “[t]he fact that a person is suspected of or deemed to have some relation to terrorism does not modify the obligation of the State to refrain from return where substantial grounds of a real risk of inhuman treatment are at issue.”¹⁷⁴ Bill C-11 is silent with regard to the nature of the procedures by which a “danger opinion” justifying removal will be made. These will be set out in Regulations. The *ad hoc* process under the current Act does not accord with the most basic procedural protections, including the right of “equality of arms,” to know the details of the case one has to meet, and the requirement for decision makers to provide reasons for their decisions. The current Act and Regulations fail to contemplate a hearing of any kind and necessarily preclude any meaningful review or recourse from an unprincipled or arbitrary exercise of discretion which result in an opinion that a refugee or other protected person is a “danger to the security of Canada” and should be removed.

VI. Identity Documents and Detention

A further feature of the 1992 reform package was the requirement for Convention refugees to have a “satisfactory identity document” before receiving permanent residence.¹⁷⁵ Canada became the only state party to the 1951 Convention which required further proof of identity *after* recognition by a national status determination authority.¹⁷⁶ Previously, Convention refugees applying for permanent residence after recognition by the Canadian Immigration and Refugee Board were exempt from furnishing identity documents in any particular form. The extensive examination of credibility and identity issues undertaken by decision-makers at the Refugee Board together with subsequent security checks conducted by CSIS, had been sufficient for the purposes of verifying identity, ensuring that a refugee was who he or she claimed to be. In cases where there was any reason for concern about a person’s identity and possible criminality, immigration officers had the authority to order that a refugee claimant be detained and subject to further investigations. In practice this power had not been invoked very often. Immigration officers at ports of entry understood that many claimants would arrive without “proper” documents. As noted by Brouwer, refugees arrive in countries of prospective asylum without documents for a variety of reasons.¹⁷⁷ Many refugees are fleeing from conflict zones

¹⁷³ UN Committee against Torture, Concluding Observations on Canada, UN Doc. CAT/C/XXV/Concl. 4 22 Nov. 2000.

¹⁷⁴ The Inter-American Commission on Human Rights found that Canadian procedures did not ensure full compliance with the government’s obligations to prevent and protect against torture. Inter-American Commission on Human Rights, *supra* note 126 at para.154.

¹⁷⁵ Section 46.04(8) of the *Immigration Act* states : “An immigration officer shall not grant landing either to an applicant under subsection (1) or to any dependant of the applicant until the applicant is in possession of a valid and subsisting passport or travel document or satisfactory identity document.”

¹⁷⁶ Guy S. Goodwin-Gill and Judith Kumin, “Refugees in Limbo and Canada’s International Obligations” (Ottawa : Caledon Institute for Social Policy, 2000) at 9.

¹⁷⁷ Andrew Brouwer, “What’s in a Name? : Identity Documents and Convention Refugees” (Ottawa : Caledon Institute for Social Policy, 1999), online : <http://www.maytree.com/publications_name.html>. See also, Julia Dryer, “The Undocumented Convention Refugees in Canada

and all their personal documents have been destroyed. In other cases, refugees are forced to leave their homes at the last minute and have no time to search for documents or even a change of clothes. In some countries there are simply no functioning civil institutions to issue identity documents while in others, written records documenting life events are seldom relied upon. Dissidents are denied identity documents by oppressive governments or have them confiscated while other refugees would resist any contact with persecutory governments to obtain documents for fear of reprisals. Furthermore, in the face of international visa and passport controls, refugees commonly flee with the assistance of agents, smuggling networks and forged documents.¹⁷⁸ Agents routinely advise their clients to destroy their documents upon arrival in the country of asylum. Yet, as Razack points out, the new identity documents requirement appeared to rely on the notion that people who use smuggling rings are not *bona fide* refugees.¹⁷⁹ The new law articulated the implicit message that not having documents was synonymous with treachery. As the Liberal Immigration minister would announce a few years after the identity documents requirement had been implemented :

[b]ecause they have no ID, we will not grant these people permanent residence status until they have time to demonstrate respect for the laws of Canada and for us to detect those who may be guilty of [...] acts of terrorism [...] The message is clear – fraud will not be tolerated.¹⁸⁰

When this speech was delivered in 1996, there were approximately 7,500 Convention refugees in Canada who were living in a legal limbo, a virtual underclass in Canadian society unable to be landed because they lacked “satisfactory documents.” By 1998, the number had grown to 13,000. Estimates indicated that this group included a disproportionate number of women and children. The Department of Immigration acknowledged that approximately forty percent of the limbo population were children – not the most likely candidates for terrorist activity.¹⁸¹ These refugees were unable to enjoy the benefits of “landing.” As highlighted in a letter by a senior officer with the UNHCR, “the inability to obtain permanent residence status can be a serious

Class : Creating a Refugee Underclass” (1998) 13 *J.L. & Soc’l Pol’y* 167; and Jaya Ramji, “Legislating Away International Law : The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act” (2001) 37 *Stan. J. Int’l L.* 117 at 125 (for discussion of the reasons why refugees often travel without the requisite travel documents).

¹⁷⁸ For an analysis of international interdiction policies which have forced refugees to rely upon ever more clandestine forms of transit and entry, see François Crépeau, “International Cooperation on the Interdiction of Asylum Seekers : A Global Perspective” in Canadian Council for Refugees, *Interdicting Refugees*, May 1998. In a recent study on European asylum policy, Morrison found that a very large number of asylum seekers in Europe were smuggled or trafficked; and that the main nationalities being smuggled or trafficked are the very same nationalities recognized as Convention refugees. See, John Morrison, “The Trafficking and Smuggling of Refugees : the end game in European Asylum Policy” (Geneva : UNHCR, 2000).

¹⁷⁹ Sherene Razack, *supra* note 63 at 193.

¹⁸⁰ Citizenship and Immigration Canada, News Release 96/27 “Minister Robillard Announces Measures for Refugees Lacking ID to Become Permanent Residents” (13 November 1996).

¹⁸¹ Andrew Brouwer, *supra* note 177 at 5; and Citizenship and Immigration Canada, “The Undocumented Refugee Population” (Ottawa : n.d.); and — “Speaking Notes for the Honourable Lucienne Robillard, Minister of Citizenship and Immigration, for the Standing Committee on Citizenship and Immigration concerning the Main Estimates,” House of Commons (18 March 1997).

impediment to integration in Canadian society.”¹⁸² Relative to other Convention refugees, those without the requisite documents suffered from systemic discrimination.¹⁸³ As Goodwin-Gill and Kumin noted, Canadian law and administrative practice were not compatible with several provisions of the 1951 Convention : the obligation under article 25 to provide administrative assistance to refugees who have been recognized under domestic law and procedure, but who are without the documentation required to exercise rights available to other, similarly situated refugees; the obligation under article 27 to “issue identity papers to any refugee in their territory who does not possess a valid travel document;” the obligation under article 28 to “issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory;” as well as the general obligation under article 34 to “facilitate the assimilation and naturalization of refugees.” As a result of ongoing pressure by affected refugee communities and advocates, the government slowly moved to soften the measures by introducing a special exemption for designated groups, permitting landing to be granted after a five year waiting period for refugees from Somalia and Afghanistan, reducing the period to three years and then in 2000, agreeing to settle a broad Charter challenge on terms that would facilitate landing for refugees unable to obtain identity documents with affidavits.¹⁸⁴ It deserves mention that a 1998 report prepared for the department confirmed that not a single criminal or security threat was found among those who had completed the waiting period and applied for landing.¹⁸⁵ Although the requirement for refugees to present a “satisfactory identity document” for landing does not appear in Bill C-11, regulations proposed to accompany the bill will maintain the requirement to establish identity to the satisfaction of an immigration officer as a prerequisite for landing. In cases where identity documents are not available for “objectively verifiable” reasons, alternative documents, including statutory declarations may be submitted. Regulatory proposals also indicate that protected persons will be provided with status documents to facilitate access to Canadian programs and services and to assist them in obtaining travel documents.¹⁸⁶

¹⁸² Letter of Dennis McNamara, Director, Division of International Protection, UNHCR to S. Aiken, Canadian Council for Refugees (14 May 1997).

¹⁸³ See, Guy S. Goodwin-Gill and Judith Kumin, *supra* note 176 at 9; and Inter-American Commission on Human Rights, *supra* note 121 at paras. 74-79.

¹⁸⁴ In *Aden et. al. v. Her Majesty the Queen* [Court File No. IMM500-96 (F.C.T.D.)], representatives of the Somali community launched an action challenging s. 46.04(8) of the *Immigration Act*, arguing that the provision was discriminatory on the basis of race and nationality, violating the equality guarantee in section 15 of the *Canadian Charter of Rights and Freedoms*. Pursuant to the court-sanctioned agreement reached between the parties in December 2000, Convention refugees who lack satisfactory identification may provide two sworn declarations attesting to their identity. One must be from the refugee and the other must come from either a credible person who knew them before they came to Canada, or from a legitimate organization that has taken steps to establish the refugee’s identity since his or her arrival. See, Jim Bronskill, “Ottawa relaxes identity rules for refugees” *National Post* (3 January 2001) A9.

¹⁸⁵ Audit and Consulting Canada, “Evaluation Framework for the Undocumented Convention Refugee In Canada Class,” Final Report, April. 1998.

¹⁸⁶ Bill C-11 : Explanation of Proposed Regulations, prepared for the members of the Senate Committee on Social Affairs, Science and Technology, online : CIC <<http://www.cic.gc.ca.english/about/policy/c11-reg.html>> at 16 and 21.

These proposals appear to bring Canadian law more closely into line with the Convention's requirement that refugees benefit from Convention rights upon recognition of their refugee status. On the other hand, the bill expands powers of immigration officers to arrest and detain refugee claimants on entry to Canada if an officer considers it necessary to complete an examination, or where the officer has reasonable grounds to believe that the person is inadmissible on grounds of security or for violating human rights. As before, individuals can also be detained if there are reasonable grounds to believe they are unlikely to appear for future proceedings. Proposed Regulations will specify that the "unlikely to appear" provision includes claimants who have arrived as part of a criminally organized smuggling or trafficking operation, thereby creating an explicit link between mode of arrival and likelihood of detention. In its brief on Bill C-11, UNHCR responded to these proposals by noting that the grounds for detention go beyond those set out in Executive Committee Conclusion 44 (XXXVII), which does not include the ground "unlikely to appear." UNHCR cautioned against establishing a policy based solely on the mode of arrival of an asylum seeker as "[m]any asylum seekers are forced to resort to the services of smugglers in order to reach safety."¹⁸⁷ Indeed article 31 of the Refugee Convention obliges member states not to impose penalties on refugees for illegal entry as long as they present themselves promptly to the authorities and "show good cause" for their illegal entry. Bill C-11 also provides for increased scope for detention without warrant where an officer is not satisfied of a foreign national's identity.¹⁸⁸ These changes raise the spectre that mere administrative convenience and suspicion will justify arbitrary and long-term detention, with greater numbers of asylum seekers being detained. Such a result would be in direct contravention to UNHCR guidelines that detention of asylum seekers is inherently undesirable and should normally be avoided; and further, that detention should be for the shortest period possible and that it should not be imposed as part of a policy to deter future asylum seekers or to discourage those who have commenced asylum procedures from pursuing them.¹⁸⁹ On the other hand, judicious, carefully targeted invocation of existing powers of short term, preventative detention may be entirely appropriate where there is an objective basis for concerns that an entrant – whether asylum seeker or temporary resident – is not who he or she claims to be and may pose a security risk. Detention for investigative purposes in these more limited circumstances is a legitimate means of protecting national security interests and maintaining public confidence in both refugee and immigration programs.

¹⁸⁷ EXCOM Conclusion No. 44 (XXXVII) 1986, Detention of Refugees and Asylum Seekers; "Detention of Asylum Seekers and Refugees : The Framework, the Problem and Recommended Practice," UNHCR Executive Committee, 15th meeting, EC/49/SC/CRP.13 (4 June 1999).

¹⁸⁸ *Immigration and Refugee Protection Act*, ss. 55-58.

¹⁸⁹ EXCOM Conclusion No. 44 (XXXVII) 1986, *supra* note 187; and see, UNHCR, Comments on Bill C-11, *supra* note 130 at 28-30.

VII. Interdiction Policies

Interdiction generally refers to measures adopted by states to prevent or deter asylum seekers and other migrants from gaining access to domestic asylum procedures.¹⁹⁰ In its broadest sense, interdiction includes all of the legal and policy measures discussed in the preceding sections of this paper. As both deterrents and concrete mechanisms of immigration control, interdiction policies serve two principal aims : to restrict the flow of economic migrants pursuing unfounded refugee claims or going “underground” to work; and to protect the “health, safety and good order” of receiving societies,¹⁹¹ ensuring that suspected criminals or terrorists are denied sanctuary. In service of these aims, an additional dimension of interdiction requires consideration : strategies to intercept would-be entrants in transit before reaching their intended destination. Since 1989, Canada, in concert with the United States and European governments, obliges airline personnel to screen and prevent improperly documented passengers from boarding airplanes overseas. Networks of immigration control officers are stationed overseas, charged with assisting and training host country officials and carrier personnel in fraudulent document detection and Canadian entry requirements. In addition, vessels suspected of carrying “illegal migrants” are tracked in the territorial waters of transit states, intercepted and detained.¹⁹² Canadian officials frequently stress that interdiction has a fundamental security purpose, particularly with respect to preventing access by terrorists. Reference is also made to the need to foster international cooperation in combating criminal smuggling and trafficking¹⁹³ as well as the more humanitarian concern of “rescuing” people from unseaworthy vessels and preventing them from drowning at sea.¹⁹⁴ The concern is that

¹⁹⁰ See, François Crépeau, “International Cooperation on Interdiction of Asylum Seekers : A Global Perspective” in Canadian Council for Refugees, *Interdicting Refugees* (Montreal, 1998) at 7 –20, online : <<http://www.web.net/~cct/Interd.pdf>>.

¹⁹¹ See *New Directions*, *supra* note 117 at 46, which uses this phrase, one of the enumerated objectives of the *Immigration Act*, in announcing policy directions to address “the concern of improperly documented arrivals.”

¹⁹² “Response to an Information Request from the Standing Committee on Citizenship and Immigration, Issue : Interception of migrant smuggling boats at sea” (November, 1999).

¹⁹³ Interception on the high seas has been incorporated into the *Protocol against the Smuggling of Migrants by Land, Sea and Air* to the *U.N. Convention against Transnational Organized Crime* (2000), obliging signatory states to criminalize migrant smuggling (arts. 5, 6); cooperate in enforcement by helping stop a vessel suspected of smuggling migrants and requesting authorization from the flag state to take appropriate measures, such as boarding and searching a vessel strongly suspected of smuggling migrants (art. 8); and assist in the return of smuggled migrants (art. 18). Article 19 of the Protocol is a savings clause which stipulates that nothing in the Protocol shall affect other rights and obligations of states and individuals under international law, including, where applicable, the Refugee Convention and the principle of *non-refoulement*. The Canadian government was an active member of the drafting committee for the Protocol and became an immediate signatory in December, 2000.

¹⁹⁴ In response to the arrival in British Columbia of 599 Chinese nationals by boat in 1999, Immigration Minister Caplan expressed concern for the “well being of people who choose such a dangerous way to come to Canada.” Statement by Minister Elinor Caplan on Illegal Human Smuggling to Canada, 11 August 1999, online : <<http://www.cic.gc.ca/english/press/speech/smuggle-e.html>>. Instead of using force to prevent the boats from reaching shore, the passengers were admitted to Canada, detained but permitted to pursue refugee claims. Those whose claims did not succeed were deported back to China,

in that process of deterring unfounded claims and thwarting would-be terrorists, governments also prevent genuine refugees from gaining access to protection.

While no state has an absolute obligation to grant permanent asylum to persons seeking admission to their territory, states must ensure that refugees are not returned to a country where their life or freedom would be threatened.¹⁹⁵ Grahl-Madsen once suggested that the *non-refoulement* provisions of the Convention had no extra-territorial application – the obligation not to return a refugee to a country of persecution pertained only to persons who had set foot on a signatory state's territory.¹⁹⁶ This view was shared by the American government as it implemented its Haitian interdiction program in 1981, intercepting Haitian asylum seekers on the high seas and returning them to their country of origin, a practice subsequently endorsed by the US Supreme Court.¹⁹⁷ However, more recent scholarship, supported by the views of treaty-monitoring bodies, confirm that the core of *non-refoulement* is the

prohibition of *return in any manner whatsoever* of refugees to countries where they might face persecution. The scope and application of the rule are determined by this essential purpose, thus regulating state action *wherever* it takes place, whether internally, at the border, or through its agents outside territorial jurisdiction.¹⁹⁸

As emphasized by the UNHCR,

The principle of *non-refoulement* does not imply any geographical limitation. In UNHCR's understanding the resulting obligations extend to

where they were imprisoned by Chinese authorities and fined. Direct Action Against Refugee Exploitation, *Movements Across Borders : Chinese Women Migrants in Canada* (April 2001).

¹⁹⁵ Refugee Convention, art. 33(1).

¹⁹⁶ Atle Grahl-Madsen, *supra* note 141 at 229-232.

¹⁹⁷ In *Sale, Acting Commissioner, INS v. Haitian Centers Council* 113 S.Ct 2549 (1993), the US Supreme Court expressly ruled that the provisions of the Refugee Convention had no extra-territorial application, and thus article 33 did not limit the power of the President to order the Coast Guard to repatriate undocumented aliens, including refugees, on the high seas. In the first ten years of the Haitian interdiction program the American government intercepted 22,000 Haitians at sea, and only 28 persons were permitted into the United States to pursue asylum claims. UNHCR, *The State of the World's Refugees, Fifty Years of Humanitarian Action* (Oxford : Oxford University Press, 2000) at 176. The United States has maintained an aggressive interdiction program in the Pacific and the Caribbean. American policy now requires asylum officers to board intercepted vessels in order to address protection concerns. See generally, Stephen H. Legomsky, "An Asylum – Seeker's Bill of Rights in a Non-Utopian World" (2000) 14 *Geo. Imm. L. J.* 619; and Bill Frelick, "Haitian Boat Interdiction and Return : First Asylum and First Principles of Refugee Protection," (1993) 26 *Cornell Int'l L.J.* 675.

¹⁹⁸ Guy S. Goodwin-Gill, *supra* note 135 at 143. For commentary on the accountability of states for human rights violations committed by public agents beyond their borders, see the views of the United Nations Human Rights Committee in : *De Lopez v. Uruguay* (52/1979), HRC, *Selected Decisions under the Optional Protocol* : UN Doc. CCPR/C/OR/1 (1985), 88-92 at para. 12; *de Casanego v. Uruguay, ibid.*, 92-4, at para. 10; the views of the European Commission on Human Rights in : *Cyprus v. Turkey* (6780/74; 6950/75), Report : 10 July 1976. For an express ruling that art. 33 of the Refugee Convention has "no geographical limitations," see the views of the Inter-American Commission on Human Rights in *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Report No. 51/96, Inter-Am.C.H.R., OEA/Ser. L/V/II.95 Doc. 7 at 550 (1997), holding that US interdiction policies violated treaty obligations in respect of art. 33 of the Refugee Convention as well as art XXVII of the American Declaration of Human Rights.

all government agents acting in an official capacity, within or outside national territory. Given the practice of States to intercept persons at great distance from their own territory, the international protection regime would be rendered ineffective if States' agents abroad were free to act at variance with obligations under international refugee law and human rights law.¹⁹⁹

During the year 2000, approximately 6,000 persons were intercepted seeking to come to Canada without proper documentation.²⁰⁰ All of these interceptions took place on land, presumably in airports. Immigration control officers reportedly are sensitized to Canadian refugee policy and are governed by a code of conduct which directs them to refer asylum seekers to UNHCR or appropriate diplomatic missions.²⁰¹ The problem is that the code applies to government officers but not to airline staff. As the latter actually conduct pre-embarkation checks, it is likely that a significant number of intercepted asylum seekers would never come to the attention of the immigration control officers, and are therefore never referred to UNHCR or other agencies for assistance. Although there is little empirical data in this regard, it is equally likely that interception results in the *refoulement* of a significant number of asylum seekers.²⁰² One of the rare, documented cases of such *refoulement* occurred in 1998. Canadian government officials participated in the interception of a boat in the territorial waters of Senegal which was carrying one hundred and ninety two Tamil asylum seekers from Sri Lanka. One of the young men on the vessel, Thambirasa Kamalathan, describes being detained on the boat and told that he would not be given food or water until he signed a document stating that he agreed to voluntarily return to Sri Lanka. None of the authorities involved in the interception, including representatives of the Canadian and American governments as well as staff with the International Organization for Migration, afforded Kamalathan an opportunity to explain that he had been arrested by Sri Lankan police on several occasions in the past few years, mistreated in detention, but always released without charge. No one

¹⁹⁹ UNHCR, "Interception of Asylum- Seekers and Refugees : The International Framework and Recommendations for a Comprehensive Approach" UN Doc. EC/50/SC/CRP.17 (30 May 2000). See also, UNHCR, EXCOM Conclusion on International Protection No. 89 (LI) (2000); UNHCR, "Benchmarks for Refugee Protection in the Puebla Process," Paper submitted at the 5th Regional Conference on Migration, Washington, D.C., 20-24 March 2000.

²⁰⁰ Draft Summary Record of Regional Meeting on Incorporating Refugee Protection Standards into Interception Measures, UNHCR Workshop, Ottawa, May 14-15, 2001. For the final version of this report, which omits country-specific data, see, UNHCR Global Consultations on International Protection, Regional Workshops in Ottawa (Canada) and in Macau, EC/GC/01/13, 31 May 2001. In the past five years approximately 33,000 people have been deflected from reaching Canada as a result of the government's interdiction program. See Allan Thompson, "Is Canada really the weak link" *The Toronto Star* (6 October 2001).

²⁰¹ International Air Transport Association, Control Authority Working Group, *A Code of Conduct for Immigration Liaison Officers*, art. 2.3 (October 1998).

²⁰² See, Amnesty International, *Refugees : Human Rights Have No Borders*, ACT 34/03/97 (1997) at 55. For analysis of the impact of interdiction policies with reference to actual case histories of refugees interdicted in transit to Canada, see *Interdicting Refugees*, *supra* note 190; and Liz Hales, "Refugees and Criminal Justice?" Cropwood Occasional Paper No. 21, University of Cambridge Institute of Criminology, 1996. Both studies document the impact of interdiction policies with reference to actual case histories of refugees interdicted in transit to Canada.

gave him an opportunity to explain his fears concerning the prospect of return to Sri Lanka.²⁰³ Upon return to Sri Lanka, the Tamils were arrested and held in detention for up to five weeks.²⁰⁴ Several weeks after his release, Kamalathasan was re-arrested by the police on the pretext of a terrorism investigation and subjected to severe torture.²⁰⁵ In the only public acknowledgement of this interdiction almost a full year later, a Canadian government spokesman described the action as a success in safeguarding the country from “illegal economic migrants.”²⁰⁶ In subsequent private correspondence, a senior civil servant responded to concerns about Kamalathasan’s treatment by the Sri Lankan security forces by disclosing a letter from the Sri Lankan government asserting that Kamalathasan had been re-arrested on the grounds of being a suspected terrorist,²⁰⁷ an allegation that has never been substantiated.²⁰⁸

In October 2001 the Immigration Minister unveiled an “Anti-Terrorism Plan” which includes as central objectives, stopping terrorists from getting into Canada and protecting Canadians from terrorist acts.²⁰⁹ While few would dispute the

²⁰³ Interview by Rudhramooty Cheran with Thambirajah Kamalathasan (30 April 1999). At least 29 of the other passengers on the intercepted boat, all of whom were interviewed for the purpose of developing the screenplay for the video Documentary, “In Search of the African Queen,” described similar experiences of arrests, inhumane treatment in detention and fears of return to Sri Lanka. Interview with Rudhramooty Cheran (31 August 2001).

²⁰⁴ Letter from Peter Schatzer, Director External Relations and Information, International Organization for Migration (IOM), to I. Massage (4 September 1998). The IOM became involved in the case at the request of the Senegalese authorities, facilitating repatriation of the Tamils to Sri Lanka.

²⁰⁵ This case is documented in two Amnesty International Bulletins : AI Index, ASA 37/19/98; ASA 37/21/98; as well as in the video documentary “In Search of the African Queen : A People Smuggling Operation,” Wild Heart Productions, 2000. It is interesting to note that official assurances provided by representatives of the Sri Lankan government with regard to the treatment of the returnees were accepted despite readily available evidence that human rights abuses perpetrated by state security forces against the Tamil minority continued to be widespread [see, e.g., U.S. Department of State, *Country Reports on Human Rights Practices for 1998 : Sri Lanka*, online : <<http://www.state.gov>>]. The IOM subsequently acknowledged that the assurances were overridden as soon as the Tamils reached Sri Lanka, that their “staff may have failed to appreciate that the official assurances it received might be overridden upon arrival at Colombo airport, or did not have sufficient elements of information suggesting that such a change of official position might happen.” In a meeting convened to discuss the policy implications of the case, IOM adopted a new policy aimed at preventing future occurrences of this nature, requiring, *inter alia*, all staff to make every effort to “gather precise and realistic information about the modalities of return.” [Letter from Peter Schatzer, *supra* note 204].

²⁰⁶ As reported by Brian Laghi, *The Globe and Mail* (16 January 1999).

²⁰⁷ Letter from Gerry Van Kessel, Director General, Refugee Branch, Citizenship and Immigration, to Sharryn J. Aiken (1999). In a similar vein, the U.S. Counterterrorism Coordinator specifically cited the interdiction of the Sri Lankans in the context of a wide ranging submission on, *inter alia*, overseas enforcement efforts aimed at interdicting terrorists. In this regard, the United States was “dismantling migrant smuggling syndicates and disrupting established routes, in both source and transit countries.” It was noted that U.S. officials had participated with the Canadian and Senegalese governments in a “joint effort aimed at deterring human trafficking at the global level.” Omitted from the report was any reference to the treatment the Tamils received upon return to Sri Lanka. W.D. Cadman, Counterterrorism Coordinator, Immigration and Naturalization Service, Testimony Before the Senate Judiciary Subcommittee on Technology, Terrorism, and Government Information, regarding Foreign Terrorist Activities in the United States, (24 February 1999) online : <<http://www.ins.usdoj.gov/graphics/aboutins/congress/testimonies/1998/980224.pdf>>.

²⁰⁸ Interview by Rudhramooty Cheran with Thambirajah Kamalathasan, *supra* note 203.

²⁰⁹ Citizenship and Immigration Canada, “Strengthened Immigration Measures to Counter Terrorism” (12 October 2001) online : <<http://www.cic.gc.ca/english/press/01/011119-pre.html>>.

value of this goal, the Minister's statements give rise to concern that interdiction strategies will continue to jeopardize protection for genuine refugees. As the case of Kamalathanan clearly illustrates, the terrain of terrorism is shifty – it is problematic to accept, uncritically, the designation of terrorists from governments which use “terrorism” and sweeping anti-terrorism powers as a means of targeting minorities, and of suppressing legitimate dissent. It is also problematic to assume that assurances from such states, particularly those which either practice or tolerate torture, are sufficient to justify interception and *refoulement*. In cases where the intercepted vessels include “mixed flows,” there are bound to be persons with well founded fears of persecution and others who are simply in search of greater well being.²¹⁰ In these circumstances the importance of ensuring access to asylum procedures for individualized determination is critical.

In a recent workshop on interception convened in Ottawa by UNHCR, participants noted the need for more detailed data on interception, including the methods, numbers and nationalities of the persons intercepted.²¹¹ Participants also underlined the importance of proper procedures and mechanisms to identify intercepted persons who are in need of international protection. It was stressed that the principle of *non-refoulement* must be fully respected in the context of interception measures deployed by states.²¹² In Canada, there is neither a legislative nor policy framework to ensure that genuine asylum seekers can be identified from intercepted passengers, and that the fate of Kamalathanan and his compatriots will not befall other refugees.

* * *

There can be little doubt, as Baxi recently suggested, that visions of world orderings, and the role of international law, have been disrupted by the catastrophic events of September 11, 2001 and the response of the international community.²¹³ Baxi notices how, almost overnight, a new cold war is in the making, in which citizen allegiance to “war against terror,” reproduces “the ever escalating sharp division

²¹⁰ For example, among the 599 Fujianese “boat people” arriving in 1999, there were at least 26 persons subsequently recognized as Convention refugees, underscoring the importance of ensuring case by case adjudication. Direct Action Against Refugee Exploitation, *supra* note 194 at 5.

²¹¹ UNHCR Global Consultations on International Protection, Regional Workshops in Ottawa (Canada) and in Macau, *supra* note 200 at para. 7.

²¹² *Ibid.* at paras. 10-11. Participants elaborated that depending on the actual mode and context of interception, proper procedures include (1) screening by the intercepting state or state which has requested the interception, (2) referral to the competent authorities in the country where the interception took place, or (3) referral to the UNHCR or another suitable agency [at para. 11]. Participants also noted that interception activities in countries of origin require particular consideration and that alternatives to interception in countries of origin (e.g. in-country processing for organized departures), though limited in scope and situation-specific, could usefully be explored [at para. 10].

²¹³ Upendra Baxi, “Keynote Address” (Conference on “The ‘Third’ World and the International Order : Law, Politics and Globalization,” Osgoode Hall Law School, York University, 13 October 2001) [unpublished].

between 'global' citizens and violent 'outlaw' human beings."²¹⁴ Under the long shadow of the events of September 11 - those who make the law as well as those who implement it face a critical challenge. In Canada's efforts to eradicate terror, it is imperative to resist an unrestrained discourse of national security as an all-purpose justification for riding roughshod over refugee rights and undermining legitimate resistance or political dissent, at home and abroad. Indeed, Canada once was on record stating that the fight against terrorism must be consistent with the broader commitments to human rights and the rule of law. The institutions entrusted to fight terrorism would attract public support by respecting those principles.²¹⁵ Nevertheless, an assessment of the security dimension of Canadian refugee policies against the requirements of the 1951 Refugee Convention, together with the standards which have evolved in international refugee, humanitarian and human rights law, discloses a number of serious flaws. In security specific measures concerning admissibility, bars to asylum and deportation as well as in policies of wider, general application concerning identity documents, detention and interdiction, Canada's record falls far below its expressed commitments. Perhaps most disturbingly, problematic security measures enacted in 1992 and 2001 bear remarkable similarity to historical forms of exclusion. Seemingly neutral laws and policies alternately serve to disadvantage and marginalize particular communities and individuals or foreclose the possibility of admission and asylum altogether. Faced with the complexities of modern geopolitics, when yesterday's monsters become today's gods, the application of national security policies to refugees has been fraught with contradictions.

Managing security is a complex task and in acknowledging this reality, this paper has not attempted to design a blueprint which resolves all the concomitant dilemmas. It is important to emphasize, however, that the weakest link in Canada's counter terrorism strategy is not refugee admissions, but rather, the unprincipled and arbitrary manner in which existing legal tools have been administered. Since 1990, annual reports of the Auditor General of Canada have signalled concerns about the operational effectiveness of key enforcement functions across the full range of immigration programs, indicating that front line customs inspectors lack adequate information from other agencies; that training has been limited and inconsistent, impeding the ability of customs officers to properly do the job of identifying potential security risks at ports of entry; that the Immigration department has insufficient information to manage removals adequately; and that security screening and removals generally required greater attention.²¹⁶ Arguably, resource reductions to the public service, a key plank of the neo-liberal economic agenda,²¹⁷ as well as intellectual

²¹⁴ *Ibid.* at 1.

²¹⁵ See Robert R. Fowler in the Security Council, 19 Oct. 1999, Press Release SC/6741.

²¹⁶ See, e.g., the 1990 (c. 15), 1992 (c. 3 and 15), 1997 (c. 25) and 2000 (c. 5) Reports of the Auditor General of Canada, online : <http://oag-bvg.gc.ca/domino/other.nsf/html/99repm_e.html>.

²¹⁷ Drawing connections between neo-liberal shifts in governance and security lapses, Macklin cites as an example the processing of refugee admissions at the border. Although border officials had the authority to commence security inquiries, the lack of resources meant that refugee claimants were routinely admitted and given forms to complete and mail back. As Macklin notes, "this laxity had nothing to do with refugee policy or a dearth of state power, but was entirely attributable to lack of staff and resources to do the job." Audrey Macklin, *supra* note 20 at 390. Over ten years ago the Auditor

atrophy,²¹⁸ have constrained the institutional capacity of government to address many of the concerns highlighted by the Auditor General. Instead, “quick fix” legal reforms have been sought, international legal obligations and constitutional values have been ignored – all in the name of a promoting a safer society. If the tragic events of September 11 teach us anything, it should be that coercive laws (as the United States already had in place for non-citizens since 1996)²¹⁹ which consider human rights an acceptable trade off are an ineffective guarantee of security and reflect a moral myopia.

A world without violence and inequality may be a utopian dream. However, refugee receiving states like Canada at least can ameliorate these oppressions by ensuring that domestic refugee policies do not re-victimize the victims. Consistent application of the Refugee Convention and related international norms would require significant shifts in the paradigm within which domestic law and policy in the area of immigration and national security is located. I believe such shifts are absolutely essential in order to ensure that fundamental human rights are not sacrificed on the altar of counter-terrorism. Harmonizing domestic security policies with the values and norms first embodied in the Refugee Convention and extended in more recent instruments, can safeguard essential rights without compromising anyone’s safety. In this regard the McDonald Commission’s warning that the requirements of security must be reconciled with the requirements of democracy is apposite :

Canada must meet both the requirements of security and the requirements of democracy : we must never forget that the fundamental purpose of the former is to secure the latter.²²⁰

In a world where absolute security will remain beyond our reach for the foreseeable future, the project of closing the gap between our promises and practice lies in reaching beyond the binary opposition of the civilized and the barbarous to an essential humanity that binds us all.

General expressed concern that “the enforcement function has suffered from the gradual reductions in resources.” Report of the Auditor General of Canada, 1990 at 15.104.

²¹⁸ Andrew Mitrovica, “The real problem with our spies” *The Globe and Mail* (24 October 2001) A13 (citing evidence of atrophy within CSIS : “Properly directed, CSIS has more than enough power to root any prospective terrorist in Canada. Perhaps too much power.”).

²¹⁹ See Jaya Ramji, *supra* note 177 for a comprehensive analysis of how reforms introduced in the United States in 1996, including expedited removal, mandatory detention without examination of the individual circumstances, one year filing deadlines for refugee claims, limitations on judicial review as well as the “aggravated felony” and “terrorist activity” bars to asylum, have abrogated U.S. treaty obligations.

²²⁰ Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *supra* note 50, Vol. 1, at 43-44.