



The use and misuse of immigration and refugee law for national security risks and punitive ends by Canada and the Netherlands

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Abstract

States increasingly adopt policies constraining access for refugees to their territory due to the fear of possible foreign criminals in mixed migration movements. Some of these policies derive from international instruments and domestic laws regulating asylum-seeking. This study examines the use of immigration and refugee law for unrelated purposes, including national security and punitive ends, in the Netherlands and Canada and determines their effects on refugees from the Global South. The use of immigration measures for punitive ends is particularly encouraged to eradicate impunity against serious international crimes. By contrast, this thesis argues that identifying perpetrators of serious international crimes through law relating to asylum and immigration violates the fundamental rights of refugee claimants. This trend normalizes the use of asylum procedures, designed to save the lives of individuals fleeing dangers, for purposes unrelated to asylum-seeking in defiance of fundamental rights.

This study establishes that the Netherlands used refugee law for punitive ends even if the use of refugee claimants' testimony in subsequent criminal proceedings violates their right to a fair trial. In contrast, Canada uses the asylum process in violation of procedural rights in an administrative proceeding called security certificate, which can remove a non-citizen from Canada to the country where there is a likelihood of ill-treatment or the death penalty for the accused foreigner. Arguing that asylum testimonies and statements are not voluntarily made as a refugee claimant does not choose to participate in the security certificate system, this thesis demonstrates that Canadian courts are reluctant to perceive the danger of abusing asylum procedures for the sake of national security.

Integrating refugees' voices through that of their lawyers, this research also documents the unfair consequences of these instruments' use on refugees and their families in Canada, including administrative limbo and deportation. The protracted limbo situation is particularly overlooked in the decision-making procedure. Building on the work of Hannah Arendt, the last part argues that migrants in limbo, waiting for their cases to be determined for long years at the Ministry level, are suffering a form of violence: the 'violence of bureaucratization'. This form of violence, including living with administrative uncertainty with heavy consequences and detention with no trial rights, remains invisible to the current human rights discourse due to the underestimated consequences of the limbo situation. Drawing from the critical Third World scholarship and the work of Michael Walzer, this thesis concludes by discussing how the disenfranchisement of a group of non-citizens – those considered to be criminals or national security risks in their host country and live in indefinite limbo – has created a modern caste system in the Global North.

Résumé

Les États adoptent de plus en plus de politiques limitant l'accès des réfugiés à leur territoire par crainte d'éventuels criminels étrangers dans les mouvements migratoires mixtes. Certaines de ces politiques découlent d'instruments internationaux et de lois nationales réglementant la demande d'asile. Cette étude examine l'utilisation du droit de l'immigration et des réfugiés à d'autres fins, notamment la sécurité nationale et à des fins punitives, aux Pays-Bas et au Canada et détermine leurs effets sur les réfugiés du Sud. L'utilisation des mesures d'immigration à des fins punitives est particulièrement encouragée pour éradiquer l'impunité des crimes internationaux graves. En revanche, cette thèse soutient que l'identification des auteurs de crimes internationaux graves par le biais des lois relatives à l'asile et à l'immigration viole les droits fondamentaux des demandeurs d'asile. Cette tendance normalise l'utilisation des procédures d'asile, conçues pour sauver la vie d'individus fuyant des dangers, à des fins sans rapport avec la demande d'asile, au mépris des droits fondamentaux.

Cette étude démontre que les Pays-Bas utilisent le droit des réfugiés à des fins punitives même si l'utilisation des témoignages des demandeur d'asile lors de procédures pénales viole leur droit à un procès équitable. Par contraste, le Canada fait usage des demandes d'asile en violant les droits procéduraux lors d'une procédure appelée l'attestation de sécurité, qui permet d'expulser une personne non-citoyenne vers un état où il est probable que la personne subisse des mauvais traitements ou qu'elle soit condamnée à la peine de mort. Cette thèse, avançant que les déclarations faites lors des procédures de demande d'asile ne sont pas faites librement puisque le demandeur ne choisit pas de participer à la procédure d'attestation de sécurité, démontre que les cours canadiennes sont réticentes à percevoir les dangers d'abuser de la demande d'asile au nom de la sécurité nationale.

Fusionnant la voix des réfugiés à celle de leurs avocats, cette recherche documente les conséquences injustes de l'utilisation de ces instruments sur les réfugiés et leur famille au Canada tels que les limbes administratives et la déportation. Les limbes administratives sont particulièrement ignorées dans la prise de décision. En nous appuyant sur le travail d'Hannah Arendt dans notre dernière partie, nous arguons que les personnes placées pendant de longues années dans les limbes sont victimes d'une forme de violence appelée la « violence de la bureaucratisation ». Ce type de violence, incluant une incertitude liée aux décisions administratives lourdes de conséquences ainsi qu'une détention sans droit procéduraux, est ignoré par le discours sur les droits de l'homme actuel qui sous-estime les conséquences du fait d'être dans les limbes. Nous basant sur les approches critiques tiers-mondistes et le travail de Michael Walzer, cette recherche conclut par une discussion expliquant comment la

dépossession en droits d'un groupe de non-citoyens – ceux considérés comme étant des criminels ou des risques pour la sécurité de leur état hôte et qui vivent dans les limbes – a créé un système de castes dans le Nord global.

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I. Introduction: Foreigners suspected of criminality or considered to be national security risks

Since ancient times, history has witnessed individuals who were accused of crimes or considered to be security risks in their home countries fleeing and finding shelter in different lands. A great military commander of the antique time, Hannibal, had to flee his hometown, Carthage (Tunisia), because of an accusation that he incited the ruler of Syria — Antiochus III — to start a war against Rome.¹ Hannibal was a Carthaginian military commander, fought against Rome during the Second Punic War and remained an opponent of Rome until the end of his life.² He eventually found a shelter in Bithynia (Northern Anatolia-Gebze, Turkey).

Leon Trotsky, a politician, a commander, and a theoretician of communism had to flee the Soviet Union because of the power struggle with Stalin.³ Trotsky was accused of treason as the main conspirator against the communist regime in the Soviet Union and tried, in absentia. He found a shelter in Turkey, France, Norway, and eventually settled in Mexico until he was assassinated by a Stalinist agent in May 1940.⁴

Charlie Chaplin was considered to be a national security risk, suspected of being a communist agitator, in the era of McCarthyism.⁵ In 1953, Chaplin was banned to enter the U.S.⁶ He left the U.S. and eventually settled in Switzerland.⁷ Likewise, the writer and producer of *Citizen Kane*, Orson Welles, was on the list of the FBI during McCarthyism.⁸ In fact, the FBI used his movie, *Citizen Kane*, as evidence to argue that Welles was a communist conspirer.⁹ He eventually fled to Europe.

While the controversy around these suspicions persists, there is no doubt that these individuals needed to find new land to continue their lives. Coming from the 20th century to

¹ Culican, William and Hunt, Patrick, "Hannibal" in *Encyclopedia Britannica* (online).

² Culican, William and Hunt, Patrick, "Hannibal" in *Encyclopedia Britannica* (online).

³ Daniels, Robert V., "Leon Trotsky" in *Encyclopedia Britannica* (online).

⁴ *Ibid.*

⁵ John Sbardellati & Tony Shaw, "Booting a Tramp: Charlie Chaplin, the FBI, and the Construction of the Subversive Image in Red Scare America" (2003) 72:4 Pac Hist Rev 495–530 at 515.

⁶ "Attorney General James McGranery, after consulting with FBI Director Hoover, revoked Chaplin's reentry permit, citing "grave moral charges" and allegations of communist associations. In order to return to the country that had been his home for forty years, Chaplin would have to appear before an Immigration and Naturalization Service (INS) board to answer questions about his politics and morality." Sbardellati & Tony Shaw, *supra* note 5 at 497.; Richard Norton-Taylor, "MI5 spied on Charlie Chaplin after FBI asked for help to banish him from US", *The Guardian* (17 February 2012), online: <<https://www.theguardian.com/uk/2012/feb/17/mi5-spied-on-charlie-chaplin>>; "From the archive, 20 September 1952: Charlie Chaplin may be denied re-entry to the US", *The Guardian* (20 September 2014), online: <<https://www.theguardian.com/film/2014/sep/20/charlie-chaplin-readmission-ban-mccarthy-usa-1952>>. Richard Brody, "What Hollywood Lost When the Communists Were Purged", *The New Yorker* (15 August 2014), online: <<https://www.newyorker.com/culture/richard-brody/hollywood-lost-communists-purged>>.

⁷ Norton-Taylor, *supra* note 6.

⁸ Joseph McBride, *What Ever Happened to Orson Welles? A Portrait of an Independent Career* (The University Press of Kentucky, 2006) at 48. Brody, *supra* note 6.

⁹ "The evidence before us leads inevitably to the conclusion that the film *Citizen Kane* is nothing more than an extension of the Communist Party's campaign to smear one of its most effective and consistent opponents in the United States." FBI Report in McBride, *supra* note 8 at 45.

today, this research started with one thematic inquiry: what happens to individuals who had to flee their home countries but are suspected of serious criminality or considered to be a national security threat in their new homes in the 21st century. Individuals flee their countries that have different ethical standards, cultures, legal obligations, laws, political systems, and governance than those of the country of refugee. An act considered a crime under one country's law could be lawful in another country. An act considered to be legal two decades ago might constitute a crime today. For example, until 1995, the violations of war crimes were only considered in the context of international armed conflicts.¹⁰ Until the *Tadic* decision of the International Criminal Tribunal for the Former Yugoslavia (ICTY), war crimes were not considered within the context of a non-international armed conflict which is the most common form of conflict today.¹¹

Although these complications on spatial and temporal application of crimes still exist, after the Second World War, one international instrument, *Convention Relating to the Status of Refugees*¹² successfully unified the status of individuals who flee their home countries but are suspected of serious crimes. Article 1F of the 1951 Refugee Convention (exclusion provision) excludes from refugee protection individuals against whom there is serious suspicion of having committed war crimes, crimes against humanity, a serious non-political crime before the entrance to asylum country, and crimes against peace or, those who have been guilty of acts contrary to the purposes and principles of the United Nations.

One of the main purposes of this provision was to render the perpetrators of certain heinous acts “undeserving of international protection as refugees”¹³, while the other purposes are to prevent impunity from justice and safeguard the refugee-receiving country from criminals who pose a danger to the country.¹⁴ However, a growing number of Northern countries resort to the exclusion provision to identify perpetrators of serious international crimes.¹⁵ A report on the

¹⁰ *Prosecutor v. Dusko Tadic aka “Dule”* (Decision on the Defence Motion on Jurisdiction), IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 August 1995.

¹¹ UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (2003) at 11, n 22.

¹² *Convention Relating to the Status of Refugees*, (28 July 1951), UNTS 189 at 137. Henceforth “1951 Refugee Convention”.

¹³ United Nations High Commissioner for Refugees, “Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees”, online: *Refworld* <<https://www.refworld.org/docid/3f5857684.html>> at para. 2.

¹⁴ Asha Kaushal & Catherine Dauvergne, “The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions” (2011) 23:1 *International Journal of Refugee Law* 54–92; Geoff Gilbert, “Current issues in the application of the exclusion clauses” in Erika Feller, Volker Türk & Frances Nicholson, eds, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003) DOI: 10.1017/CBO9780511493973.023; Refugees, *supra* note 13 at 2; Nina Larsaeus, “The Relationship between Safeguarding Internal Security and Complying with International Obligations of Protection. - The Unresolved Issue of Excluded Asylum Seekers” (2004) 73 *Nordic Journal of International Law* 69–97.

¹⁵ Joke Reijven & Joris van Wijk, “Alleged perpetrators of serious crimes applying for asylum in the Netherlands: Confidentiality, the interests of justice and security” (2015) 1:18 *Criminal Justice*; Joseph Rikhof, “Prosecuting Asylum Seekers Who cannot be Removed A Feasible Solution” (2017) 15:1 *J Int Crim Justice* 97–113.

Practice of Specialized War Crimes Units¹⁶ shows that as of 2010, ten countries in the Global North had set up units or initiated relevant specialized procedures within their immigration services to work on serious international crime cases.¹⁷ For example, specialized war crime units were founded within the Immigration and Naturalization Department of the United Kingdom (U.K.) Border Agency in 2004.¹⁸ Having founded a special Article 1F unit in 1997, the Netherlands has been forwarding Article 1 F cases to its Prosecution Service when a case meets the criteria of Article 1F.¹⁹ Similarly, Norwegian immigration authorities “share information with prosecution and local police as soon as the first indications of a possible 1F decision arises” during refugee status determination interviews with asylum applicants.²⁰ These special units mushroomed because some excludable acts are so severe under international law, particularly the ones enumerated under Article 1 F (a) including genocide, war crimes and crimes against humanity, that asylum states are empowered to investigate, try, and punish “their perpetrators on the basis of the principle of universal jurisdiction.”²¹ Strikingly, an important number of cases that have led to investigations or proceeded to trial in several countries “involved victims, witnesses or suspects who had entered the respective countries as asylum applicants.”²²

On the other side of the Atlantic, in Canada, Article 1F is regulated under section 98 of Immigration and Refugee Protection Act (IRPA): a person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection. Kaushal and Dauvergne’s comprehensive analysis on Canadian exclusion trends provides striking results on exclusion cases for a decade from 1998 to 2008. According to their finding, the Canadian Immigration and Citizenship Unit (CIC) excluded sixty asylum applicants on the basis of serious criminality between 2002 and 2008.²³ With fifty-one exclusions, China was the top country for exclusions “followed by Colombia, Pakistan, and then Lebanon, Mexico, Sri Lanka, Peru and Cuba.”²⁴ Almost half of the applicants were excluded on the basis of Article 1F(a). The data embedded in the 13th report of Canada’s Program on Crimes Against Humanity and War Crimes mentions that only in 2014-2015, the

¹⁶ Redress & FIDH, *Strategies for the Effective Investigation and Prosecution of Serious International Crimes: The Practice of Specialized War Crimes Units* (2010).

¹⁷ *Ibid.*

¹⁸ Redress & FIDH, *supra* note 16 at 13.

¹⁹ *Ibid* at 14.

²⁰ Reijven & Joris van Wijk, *supra* note 15 at 15.

²¹ Lawyers Committee on Human Rights, “Safeguarding the Rights of Refugees Under the Exclusion Clauses: Summary Findings of the Project and a Lawyers Committee for Human Rights Perspective” (2000) 12 Intl J Refug L at 322.

²² Redress & FIDH, *supra* note 16 at 12.

²³ Kaushal & Catherine Dauvergne, *supra* note 14 at 61.

²⁴ *Ibid.*

Immigration and Refugee Board (IRB) excluded seven individuals on the grounds of war crimes, crimes against humanity, or genocide while this number was 37 in 2011-2012.²⁵ In 2014-2015, Canada Border Service Agency (CBSA) removed 17 individuals following a finding of inadmissibility on the grounds of war crimes, crimes against humanity or genocide.²⁶ In the same year, the CBSA had a backlog of 74 removal orders against inadmissible refugee claimants “on the reasonable grounds that they committed or were complicit in war crimes, crimes against humanity or genocide.”²⁷

The data suggests that exclusion decisions can end up with removal from Canada. Although Canada adopted universal jurisdiction for crimes against humanity, war crimes, and torture, it prefers to deport foreigners, who could otherwise be prosecuted under the principle of universal jurisdiction, to their country of origin with no consideration to their likelihood of persecution or “escaping criminal consequences”.²⁸ The current literature and data show that the Crimes against Humanity and War Crimes Act adopted in 2000 has been rarely invoked for refugee claimants in Canada.²⁹ The 13th report of Canada’s Program on Crimes Against Humanity and War Crimes listed some temporary or permanent resolutions under the name remedies for non-citizens who are suspected of having committed “or complicit in war crimes, crimes against humanity or genocide”; IRPA is counted as one of this legislation in which these remedies are governed.³⁰

1. Hypothesis and research questions: use of refugee law for punitive ends

While the literature in this area is rich in Canada, there remains significant gaps. There is a limited number of cross-national studies examining how the government and judiciary use Article 1F for unrelated purposes including prosecuting refugee applicants in Canada. This research aims to address this gap in the literature by analyzing the impact of using refugee and immigration law for criminal law purposes and assessing national security risks in Canada.

Based on this objective, this research has three clusters of questions. *The first cluster* involves broader questions of *what the current approaches* to the implementation of the exclusion provision and other securitizing instruments are in Canada, and *how* these approaches influence broader refugees’ rights. The second cluster involves the procedural problems affecting the substantive rights of refugee applicants. To what extent are refugee claimants

²⁵ *Canada’s Program on Crimes Against Humanity and War Crimes 2011–2015: 13th Report* (Canada Border Services Agency Department of Citizenship and Immigration Department of Justice Royal Canadian Mounted Police, 2016) at 9.

²⁶ *Ibid* at 11.

²⁷ *Ibid*.

²⁸ Kaushal & Catherine Dauvergne, *supra* note 14 at 59.

²⁹ *War Crimes Program* (Department of Justice Crimes Against Humanity and War Crimes Section, 2016).

³⁰ *Canada’s Program on Crimes Against Humanity and War Crimes 2011–2015: 13th Report* (Canada Border Services Agency Department of Citizenship and Immigration Department of Justice Royal Canadian Mounted Police, 2016) at 6.

informed about the consequences of their statements, and how do immigration officials comply with the right not to incriminate oneself when applicants provide testimonies in Canada? Section 13 of the Canadian Charter of Rights and Freedoms regulates the right not to incriminate oneself. Protecting individuals “from being indirectly compelled to incriminate themselves”³¹ is the *raison d’être* of Section 13. In Canada, it is the government’s burden to establish that “serious reasons for considering that international offences have been committed”.³² In seeking to understand how the government leverages its powers, *the third cluster* of the research questions are a. how much weight is given to testimonies of refugee claimants during the exclusion proceedings conducted in Canada, b. how many of those cases ended up with exclusion decisions, c. how many exclusion decisions are followed by a criminal investigation and d. what the practitioner’s perspective is regarding the exclusion practice in Canada.

With this background and research questions, this research started with a hypothesis that the exclusion provision has become a tool to address security risks of nation-states, drifting away from its humanitarian aim. However, along the way it has evolved into a broader area involving other instruments securitizing the Canadian migration regime, the inadmissibility, and security certificate regimes. Refugee claimants can be barred to seek asylum in Canada through the inadmissibility scheme based on security, violation of human or international rights, serious criminality, or organized criminality grounds.³³ In high-profile cases, these claimants can be subject to the security certificate process. As such, it has become impossible to separate the implementation of Article 1F from that of inadmissibility and security certificate regimes. The Canadian legal landscape has carefully interwoven these three regimes. Thus, one has to understand this interwoven relationship to analyze how refugees and refugee claimants are affected.

As a result of my initial findings, the initial hypothesis has been changed into a different one: identifying perpetrators of serious international crimes through law relating to asylum and immigration, particularly through Article 1F³⁴, violates the fundamental rights of refugee claimants. This trend precariously normalizes the use of asylum procedure that was designed to

³¹ Glen Jennings, *Canada: The Six Minute Criminal Defence Lawyer 2012 - Protection Against Self-Incrimination - Update On Section 13 Of The Charter* (Mondaq, 2012).

³² *Interpretation of the Convention Refugee Definition in the Case Law* (Immigration and Refugee Board of Canada, 2010).

³³ Immigration and Refugee Protection Act, SC 2001, c. 27, s. 101(1)(f) (IRPA or Immigration Act). Kaushal & Catherine Dauvergne, *supra* note 14.

³⁴ There are other means to identify perpetrators of serious international crimes through law relating to asylum and immigration. As an example, Article 2 of the EU Council Decision numbered 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes requires members states to take necessary measures during permanent residency application if the information shows that an applicant is a suspect of genocide, war crimes, and crimes against humanity, these acts may be investigated and prosecuted.

save the lives of individuals fleeing dangers for purposes unrelated to asylum-seeking including national security purposes and criminal law ends.

2. Methodology: Canada and the Netherlands two different approaches to Article 1F

To test my hypothesis, this research takes Canada as the main case to study, and contrasts its practice with a European country, the Netherlands. Having founded a special Article 1F unit in 1997, the Netherlands is a pioneer in investigating criminal acts of refugee claimants. In Canada, exclusion decisions and other securitizing instruments (the inadmissibility scheme and security certificates) can eventually result in deportation in violation of the principle of *non-refoulement* under exceptional circumstances,³⁵ whilst in Europe because of the robust protection of the *non-refoulement* principle (under Article 3 of the European Convention on Human Rights), member states of the Council of Europe cannot return a non-citizen in breach of the principle, even under exceptional circumstances.³⁶

This thesis draws on the experiential knowledge of law practitioners – those directly engaged with individuals who are subjected to policies and law criminalizing migration in Canada. As such, an important element of the research for this thesis was conducted through a qualitative interview study, undertaken with the approval of the Research and Ethics Board at McGill University.³⁷ The study consisted of semi-structured interviews conducted with 14 practitioners from four provinces of Canada (Quebec, Ontario, Manitoba, and British Columbia) and one participant who prefers to be identified as an academic, between October 2018 and October 2019. To best protect the anonymity and confidentiality of participants in this study, participants are referred to only in terms of anonymous enumeration, without reference to their geographic or jurisdictional location.

The participants were selected from lawyers, who are active in Canadian case law and from the list of the Canadian Association of Refugee Lawyers. My intention in conducting interviews with practitioners was to establish the current factors influencing the exclusion practice, the security certificate process, and the inadmissibility proceeding in Canada. Both policy and case law evolution were examined and discussed with participants. During the

³⁵ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, para. 75.

³⁶ Please see *Chahal v. United Kingdom*, Judgement of 15 November 1996, Appl. No. 22414/93, Reports of Judgments and Decisions 1996-V where the ECtHR decided that “the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim’s conduct”. Para. 79-80.

³⁷ REB File number 135-0818. See Appendix A for a copy of the Research and Ethics Board certificate obtained in connection with this study.

interviews, a set of questions formulated in the interview guide were used to start discussions with participants.³⁸ Participants were invited to comment on Article 1F but also the inadmissibility scheme and security certificate proceedings, depending on their area of expertise. Interviews undertaken for this study were recorded with the permission of the participant³⁹; audio recordings were transcribed and analyzed to inform and identify trends bearing on the topics outlined above. Quotes and information from the interviews are used throughout this thesis to both inform and illustrate the points made therein.

The thesis does not aim to provide a comprehensive qualitative analysis of all Canadian practitioners who work in the nexus between criminal law and migration. Rather, my approach has been to understand how the law is implemented in practice and how law enforcement affects the most vulnerable individuals, those who are subject to the strictest immigration measures. Through their lawyers, this dissertation aims to provide space to their narratives and experiences.

Into the third year of my research, I came up with an important piece of scholarship on the Canadian trends of inadmissibility. Angus G. Grant's doctoral dissertation, *Confronting (In)security: Forging Legitimate Approaches to Security and Exclusion in Migration Law*⁴⁰ examined inadmissibility decisions on the national security ground between 2002 and 2013.⁴¹ Among these cases, Grant found out that 81% of the dataset in the national security context involves refugee claimants or refugees. The majority of individuals subject to the inadmissibility hearings on national security grounds are either recognized refugees or persons who come from the countries at the Global South and make a refugee claim in Canada. As noted in Chapter III, his dataset proves that most of the cases involving inadmissibility are related to the asylum-seeking process. Grant proved that individuals who come from the Global North and are suspected of "acts of subversions are, quite literally, *never* subjected to admissibility proceedings" though "the law makes no distinction between these acts and ones committed in the Global South."⁴² This inconsistency in applying the inadmissibility scheme contravenes with "the most basic principles of legality."⁴³ Grant's dissertation and his dataset have been used in this dissertation, particularly in Chapter III. As much as being very comprehensive in

³⁸ See Appendix B for a copy of the interview guide used in this study.

³⁹ See Appendix C for a copy of the research consent form.

⁴⁰ Angus G Grant, *Confronting (In)security: forging Legitimate Approaches to Security and Exclusion in Migration Law* (University of York, 2016) [unpublished].

⁴¹ In total, 195 decisions were disclosed to Angus Grant as a result of his Access to Information Request. "To obtain a full record of ID decisions on national security, therefore, Access to Information Requests were submitted seeking disclosure of all decisions issued by the ID related to admissibility hearings conducted under the provisions of s 34(1) of the IRPA from the date of enactment of the IRPA (June 28, 2002)." *Ibid* at 134.

⁴² *Ibid* at 241. [emphasis in original]

⁴³ *Ibid*.

its scope and analysis, Grant's dissertation is, however, limited to the Canadian inadmissibility scheme. This dissertation centers on Article 1F and analyzes the inadmissibility scheme where it overlaps with Article 1F.

On the European side, one seminal decision from the European Court of Human Rights (ECtHR), *H and J v. the Netherlands* guided this thesis's route. The European Court approved of using asylum procedures for criminal trials without recognizing procedural safeguards that are afforded to citizens. The Netherlands provided a contrasting legal landscape as compared to that of Canada. As explained in Chapter III, the lack of inadmissibility and security certificate regimes in the Netherlands caused Article 1F to become a criminal law tool, unlike Canada. This situation could be due to the differences between civil law and common law as common law provides stricter criminal procedural rights to the accused. As such, the asylum procedure cannot be used for criminal law ends in Canada, as explained in Chapters III and IV. Does this situation make Canada any better in terms of the rule of law? The answer is negative as Canada is still using asylum procedures for unrelated purposes including security certificate procedures without duly recognizing the rights of the non-citizens involved, as unpacked in Chapter IV. These findings will take us back to Chapters I and II in which I discussed the interwoven relationship between concepts guiding today's nation-state system: equality, sovereignty, and the status of a non-citizen in a host country.

As a final note, my past career has shaped the initial ideas and research questions of this dissertation. As a legal officer in an international organization, I interviewed asylum seekers who came from the Global South and who were suspected of acts articulated under Article 1F. Hearing their painful narratives while determining their suspected criminality that often took place decades ago appeared to be an odd task. These individuals and their families were in dire need of protection. How fair was it to use international criminal law principles without providing criminal law's safeguards to their subjects? Together with their families, these individuals had to wait a long time, sometimes a decade, for this bureaucratic process to be finalized. As explained in Chapter VI, Hannah Arendt called this process the violence of bureaucracy. Is "undeserving of protection" transformed into the violence of bureaucracy? Does Article 1F merely serve for the violence of bureaucracy? This dissertation does not have an ambitious answer to all these questions. But rather some of them are answered in a Canadian context.

II. Theoretical Framework: Immigration measures disproportionately affect individuals coming from the Global South

The theoretical framework of this dissertation is the Third World Approaches to International Law (TWAIL) for two main reasons. First, immigration measures involving suspected criminality and security disproportionately affect people coming from the Global South to Canada and to the Netherlands. As discussed further in Chapter VI, the data on the existing exclusion trends in Canada and the Netherlands shows that individuals mainly coming from Afghanistan, Sri Lanka, Haiti and Peru have been subject to these measures. Second, the Canadian and Dutch practice in relation to these immigration measures reflects unbalanced power relations between the Global North and the Global South. Whilst a traditional human-rights discourse centers states and their sovereignty claims as the main framework, TWAIL provides a counter-hegemonic discourse by providing also subaltern voices as sources of the law.

Chapter VI will discuss how the critical Third World scholarship informs the findings of this dissertation. In the following paragraphs, I will discuss TWAIL as an alternative approach; and summarize the shortcomings of the approach. As such, this section constitutes the basis of Chapter VI.

1. TWAIL as an alternative method and approach to the law

A broad literature on TWAIL often starts with the convening of TWAIL scholars.⁴⁴ Although the origins of TWAIL can be traced back to the 1955 Bandung Asian-African Conference and the First Joint Declaration of the Group of 77 (G77)⁴⁵ in 1964, TWAIL scholars first convened at Harvard Law School in 1997.⁴⁶ This chain rapidly extended to contain an array of practitioners and academics, many of whom “born almost entirely in ex-colonies or part of their diasporas.”⁴⁷ In this sense, TWAIL is a decentralized non-hierarchical network of scholars who have shared responsibilities of their consideration of Third World. Scholars within the TWAIL movement have adopted a different approach towards the Eurocentric nature of international law. Among them, one of the most critical one is Makau Mutua, who declared the current regime of international law as illegitimate due to its Eurocentric origin and perspective,

⁴⁴ James T Gathii, “TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography” (2011) 3:1 Trade, Law & Development; Eve Darian-Smith, “Postcolonial Theories of Law” in R Banakar & M Travers, ed, *Law and Social Theory* (Oxford: Hart Publishing, 2013); Makau Mutua & Antony Anghie, *What is TWAIL?* (Washington, 2000).

⁴⁵ “The group 77 was formed by Third World states as a forum for articulating problems and solutions to the international political and economic order, which they considered unjust and unfair. It became a key forum for confronting Western hegemony over global economic and political matters.” Mutua & Antony Anghie, *supra* note 44 at 32, n 9.

⁴⁶ Darian-Smith, *supra* note 44 at 260.

⁴⁷ L Eslava & S Pahuja, “Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law” (2012) 2 Journal of Law and Politics in Africa, Asia and Latin America; Darian-Smith, *supra* note 39 at 260.

whereas contemporary TWAILers focus on making international law egalitarian. Although they also acknowledge and harshly criticize the origins of international law, and its being an instrument to oppress peoples of the Global South, scholars including Chimni, Gathii and Anghie are more constructive in their work.

Besides a network of scholars, TWAIL is also a social, reconstructive movement; a political and ideological commitment; a historically informed method; and resistance towards power and authority over Third World peoples. As a movement, commitment and methodology, TWAIL aims to overcome decolonization and its effects in international law; to propose an alternative model to improve conditions in Third World; to challenge the simplistic visions of an innocent Third World, and a colonizing and dominating First World; to question the dominance of the prevailing descriptions of international law, and to protect the weak against the strong.

a. Third World as a divergent concept

The discussion of TWAIL begs the question of what Third World means. According to OC Okafor and K. Mickelson, contrary to “a monolithic geographical reality”, Third World refers to possible “referencing of a shared set of experiences and concerns by peoples and nations who share histories of subordination and oppression.”⁴⁸ For Mutua, Third World peoples share similar historical experiences that have become “a particular voice, a form of intellectual and political consciousness.”⁴⁹ Though Mutua does not rule out the geographical realities, his description of Third World includes both “geographical, oppositional and political realities that distinguish it from the West.”⁵⁰ Peter Worsley, on the other hand, describes Third World as different states “extremely varied in their cultural heritages, with very different historical experiences and marked differences in the patterns of their economies”.⁵¹

Chimni and Mutua share the same language of resistance to elaborate on Third World. For B.S. Chimni, “third world reflects a level of unity imagined and constitutes in ways which would enable resistance to a range of practices which systematically disadvantage and subordinate an otherwise diverse group of people.”⁵² For Mutua, Third World “is historicized as part of a strategic paradigm for resistance and liberation”⁵³ albeit having “a wide diversity

⁴⁸ Darian-Smith, *supra* note 44 at 261. OC Okafor, “Globalism, Memory and 9/11: A Critical Third World Perspective” in F Johns, R Joyce & S Pahuja, eds, *Events: The Force of International Law* (New York: Routledge, 2011) at 235-236; Karin Mickelson, “Rhetoric and Rage: Third World Voices in International Legal Discourse” (1998) 16:2 Wisconsin International Law Journal at 353.

⁴⁹ Mutua & Antony Anghie, *supra* note 44 at 35.

⁵⁰ Mutua & Antony Anghie, *supra* note 44 at 35.

⁵¹ Peter Worsley, *The Three Worlds: Culture and World Development* (University of Chicago Press, 1984).

⁵² BS Chimni, “Third World Approaches to International Law: A manifesto” (2006) 8 Int Community Law Rev 3–27 at 6.

⁵³ Mutua & Antony Anghie, *supra* note 44 at 36.

among Third World societies”.⁵⁴ Third World should be “understood as a direct attack on the Western hegemony of the globe. TWAIL is the expression of this confrontation in the discipline, theory, and practice of international law.”⁵⁵

Mickelson describes Third World in four ways: (i) a “political coalition”, (ii) a group of countries which are recipients of international rulemaking, rather than being its participants, (iii) a group of countries which are long considered to be “less-developed” in terms of economic prosperity, or (iv) a social movement, “an international protest of the weak against the strong, or the poor against the rich.”⁵⁶ Mickelson concedes that all these classifications are criticized.

Although TWAIL scholars attempted to define what Third World constitutes, all these definitions are incapable of providing a list of Third World countries or regions. Instead, TWAIL scholars generally define Third World against whom they are fighting or resisting. In other words, Third World is described against First World, which generally refers to North American and European states. Although TWAILers have used Third World in a neutral way, such language might be perceived in a way that some countries are inferior to others. To avoid the language of First World and Third World, hereinafter, I will refer to Third World as the Global South and “First World” as the Global North.

b. Underestimated impacts of colonialism on ex-colonies

The problem of colonialism is one of the central concerns of TWAIL. In the words of Makau Mutua, TWAIL responds “to decolonization and the end of direct European colonial rule over non-Europeans...It responds to international law as an imperial project.”⁵⁷ International law is often charged with being indifferent to “atrocities committed by colonial powers against colonized peoples.”⁵⁸ Hence, one of the first objectives of TWAILers is “to understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that subordinate non-Europeans to European.”⁵⁹

Not only does normative international law, but also its implementation entrench this subordination. For Darian-Smith, TWAIL scholars criticize the implementation of international law in maintaining “asymmetrical power relations between Europeans and non-Europeans, ‘first’ and ‘third’ worlds.”⁶⁰ For Mutua, TWAIL embraces “the oppositional dialectic between

⁵⁴ Mutua & Antony Anghie, *supra* note 44 at 36.

⁵⁵ *Ibid.*

⁵⁶ Mickelson, *supra* note 48 at 357.

⁵⁷ Mutua & Antony Anghie, *supra* note 44 at 31.

⁵⁸ Anthony Anghie & BS Chimni, “Third World Approaches to International Law and Individual Responsibility in Internal Conflicts” (2003) 77:2 Chinese J Int’l L at 88.

⁵⁹ Mutua & Antony Anghie, *supra* note 44 at 31.

⁶⁰ Darian-Smith, *supra* note 44 at 249.

the European and the non-European and identifies the plunder of the latter by the former.”⁶¹ James T. Gathii uses the word “dominance” to describe the relationship within the axis of colonial non-colonial power dynamic: “Europe and the United States have established patterns of dominance that persist till date”, “by having exercised substantial economic, military, political power over the former colonies”.⁶² The dominance of Europe and the United States has resulted in repercussions on ex-colonies. The structures adopted by former colonial states have benefited them while substantially restricting the former colonies. To evince his argument, Gathii demonstrates that ex-colonies officially inherited governance structures and languages of formal colonial powers. In addition, “religious majorities in these former colonies with the exception of middle eastern countries have adopted Judeo-Christian morality like their former colonial powers”.⁶³

Two dominant impacts of colonialism on ex-colonies are (i) the rise of a class of elites, and (ii) the genesis of the historiography of human rights lacking the involvement from the Global South. The predominance of Western legalism excludes the viewpoints of ordinary people. As a result of the superiority of Western legalism, examiners of “domestic and international law” are keen on looking primarily at “the privileged domains of legal interaction amongst lawyers, judges, businesspeople and entrepreneurs” and excluding viewpoints of “ordinary people whose culturally informed normative understandings of law may be very different”.⁶⁴

Analyzing the roots of Western tendencies in “the mainstream historiography of the human-rights discourse”, Rajagopal claims that there is a minimum contribution of the Global South in the historiography of human rights.⁶⁵ International human rights are derived from “the wisdom and the benevolence of Euro-American States”.⁶⁶ The human rights discourse itself emerged as a response “by Euro-American States to the atrocities committed during the Second World War” via the founding principles, treaties, legal documents, and institutions.⁶⁷ Some of these instruments and institutions are the Nuremberg principles, numerous Conventions relating to human rights, the United Nations Commission on Human Rights.⁶⁸ Criticizing the contributions made by NGOs to the human rights discourse, Rajagopal puts forward that these institutions are limited to “Third World watchers” of the Global North such as Human Rights

⁶¹ Mutua & Antony Anghie, *supra* note 44.

⁶² Gathii, *supra* note 44 at 38.

⁶³ *Ibid.*

⁶⁴ Darian-Smith, *supra* note 44 at 256.

⁶⁵ Balakrishnan Rajagopal, *International Law from Below Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003) at 174.

⁶⁶ Balakrishnan Rajagopal, *International Law from Below Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003) at 174.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

Watch or Amnesty International.⁶⁹ Ranajit Guha described the origins of human rights as “elitist historiography”.⁷⁰ In fact, TWAIL reconsidered the historical roots of international law. For Gathii, TWAIL centres on the colonial battle between non-Europeans and Europeans in re-examining historical foundations of international law, more than any other scholarship on international law.⁷¹

Although the literature criticizes the historiography of human rights as almost being tainted due to its Western roots, international law has been evolving and embracing converging interpretations. In other words, the history of international law could be Eurocentric, but its implementation today could be diverse. An interpretation respecting diverse legal systems in decision-making procedures depends on institutions and the judiciary. Today, human rights NGOs in the South contribute much to the global human rights movement, even if the scholarship is still concentrated in the Global North.

A similar argument could be made against Mutua’s argument about Eurocentrism. The author wrote that “[i]nternational law has perhaps been the most important weapon in the spread of Eurocentrism, which has been presented as the pinnacle of human civilization. TWAIL, in contrast, assumes the *moral equivalency of cultures* and peoples and rejects “othering”, the creation of dumb copies of the original.”⁷²

At this point, one must ask how to achieve the moral equivalency of cultures, and particularly, how to deal with cultures having traditions such as female genital mutilation, witch crafting, Indian tradition of sati, or polygamy? Should we accept these traditions just because they are non-European? Moral equivalency arguments could tend to bolster cultural relativism. To avoid cultural relativism, it is imperative to be concrete about how to assume the moral equivalency of cultures and where to draw a line between cultural relativism and the universality of human rights.

c. International law perpetuates the interests of the Global North

The abstraction of the Global South is perhaps purposefully created not to put the term of Third World in a positivist box. Perhaps, Western perspective, which is largely shaped around the idea of the nation-state, limits the Global North’s perception of the Global South. B.S. Chimni depicts international law as a *culture* creating “the matrix in which global problems are approached, analyzed and resolved”.⁷³ The leading ideas of the time shape and frame this

⁶⁹ *Ibid.*

⁷⁰ Ranajit Guha, “On Some Aspects of the Historiography of Colonial India” in Ranajit Guha & Gayatri C Spivak, eds, *Selected Subaltern Studies* (New York: Oxford University Press, 1988) at 1.

⁷¹ Gathii, *supra* note 44 at 30.

⁷² Mutua, *supra* note 44 at 36.

⁷³ Chimni, *supra* note 52 at 15.

culture. At present, these ideas consist of a particularistic version of state and rights.⁷⁴ As explained in Chapter I, two peace treaties signed in Westphalia in 1648 (“Peace of Westphalia”) politically embodied the concepts of nation-state, nationalism, and sovereignty, which have been particularly important in the growth of contemporary Euro-American law.⁷⁵ These concepts had been provided by European scholars including Bodin, Vittoria, and Grotius. Darian-Smith argues that from a historical perspective, these concepts (e.g. nation-state, nationalism) justified European imperialism as well as European “states’ overseas oppression and exploitation of colonised peoples.”⁷⁶ The author epitomizes the current legal structure and Western legal scholarship to evince Global North’s legal superiority. As an example, U.S. and European scholars at large continue to consider the rule of law as a distinct individual entity instead of seeing it “as a dynamic product of historically contested and culturally informed colonial/postcolonial interactions.”⁷⁷ The rule of law is a Euro-American legal concept. The dichotomy is that many postcolonial states are required to integrate “the contradictions and pathologies of modern European states whose history of evolving democracy is built upon the oppressive logics of imperialism, colonialism and racism”.⁷⁸

Mutua similarly argues that the term sovereignty is used to justify, manage, and legitimize colonialism. The term helped a few European states to take over “more than three quarters of” the world “for their own aggrandizement”.⁷⁹ Despite acknowledging that international law is crucial and valuable, Mutua stated that the existing system of international law is “illegitimate because it is based almost entirely on the intellectual, historical and, cultural experiences of one region of the world. It privileges Europe, European knowledge and things European. Even the international law of human rights, arguably a benign strand of international law, is rooted in an arrogant Eurocentric rhetoric and corpus”.⁸⁰

For Anghie and Chimni, since the beginnings of international law, the “other”, the non-Europeans are considered to be roots of all violence and must be “suppressed by an even more intense violence”.⁸¹ Today, non-Europeans’ perceived ties with violence adversely affect general refugee discourse. For example, issues about refugee protection are expressed in the language of security which results in a shift in the context of refugee discourse.⁸² Dauvergne

⁷⁴ *Ibid.*

⁷⁵ Darian-Smith, *supra* note 44 at 250.

⁷⁶ Darian-Smith, *supra* note 44 at 250.

⁷⁷ Darian-Smith, *supra* note 44 at 256.

⁷⁸ Darian-Smith, *supra* note 44 at 256.

⁷⁹ Mutua, *supra* note 44 at 33.

⁸⁰ *Ibid* at 36 and 37.

⁸¹ Anghie & B.S. Chimni, *supra* note 58 at 85.

⁸² BS Chimni, “Globalization, Humanitarianism and the Erosion of Refugee Protection” (2000) 13:3 J Refug Stud at 252.

contributes to Chimni's language of security arguments and claims that due to the discourse implying that asylum seekers are mostly criminals or possible criminals, penal acts against the whole group seem to be legitimate.⁸³ As pointed out by Satvinder Singh Juss, the Refugee Convention was never intended to "become subservient to the interests of the dominant powers in their own wars".⁸⁴ The purpose of the human rights documents is to establish a "protection mechanism for those in fear of persecution."⁸⁵ Juss gives a hypothetical but striking example to illustrate the ironic nature of the contemporary exclusion policies. The author asserts that simply and solely excluding Colonel Gaddafi from refugee protection would have been insufficient.

[A]n inappropriate response under the Refugee Convention, if a person like Colonel Gaddafi could, after his exclusion from refugee status, be returned to face "persecution" in Libya, rather than "prosecution" for his crimes, before a properly constituted court under the Rule of Law. In the same way, if an official of the Baath Party has been guilty of human rights abuses under Saddam Hussein's Iraq, the appropriate response nowadays is not necessarily one where that official is returned to Iraq, to face a new regime who may now be baying for his blood, but to ensure that he is properly prosecuted for those crimes in a court of law, subject to all the safeguards that defendants ordinarily have in criminal trials.⁸⁶

Although Colonel Gaddafi was lynched, former Baath party officials have been fleeing from war-torn Iraq to seek asylum in Global North. Another example is the escape story of Jean-Claude Duvalier. The brutal Haitian dictator, is also known as Bébé Doc, arrived in France in 1986. He was refused refugee status because of his crimes, but lived the end of his life (2014) in a villa on the Riviera, without any prosecution.⁸⁷

2. Reimagining international law and resistance of Global Southern peoples

Mutua sees TWAIL as an expressive ideology, instead of considering it as an approach to international law.

TWAIL is not simply an intellectual trend, an academic pursuit. It is a political and ideological commitment to a particular set of views. That is why *TWAIL is fundamentally a reconstructive movement* that seeks a new compact of international law. In this pursuit, TWAIL refuses to treat as sacred any norm, process, or institution of either domestic or international law. All factors that create, foster, legitimize, and

⁸³ Catherine Dauvergne, "The Troublesome Intersections of Refugee Law and Criminal Law" in Katja Franko Aas & Mary Bosworth, eds, *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford: Oxford University Press, 2013) at 81.

⁸⁴ Satvinder Singh Juss, "Complicity, Exclusion, and the 'Unworthy' in Refugee Law" (2012) 31:3 RSQ 1–39 at 2.

⁸⁵ Satvinder Singh Juss, "Complicity, Exclusion, and the 'Unworthy' in Refugee Law" (2012) 31:3 RSQ 1–39 at 2.

⁸⁶ *Ibid* at 11.

⁸⁷ "France granted temporary asylum, but then asked the Duvalier party to find another place of refuge; yet no other country would accept them." "Jean-claude Duvalier" in *Encycl World Biogr*; "Duvalier stayed, an illegal immigrant protected by an official omertà as successive French governments turned a blind eye to his presence." Kim Willsher, "Jean-Claude Duvalier's turbulent years in exile", *the Guardian* (17 January 2011), online: <<http://www.theguardian.com/world/2011/jan/17/jean-claude-duvalier-baby-doc>>; "Jean-claude Duvalier" in *Encyclopedia of World Biography*.

maintain harmful hierarchies and oppressions must be revisited and changed. That is the commitment of TWAIL.⁸⁸

For Gathii, TWAIL scholarship builds on resistance aiming to remove all kinds of authority over Global Southern “peoples - whether that power is military, economic, political, cultural or otherwise.”⁸⁹ TWAIL scholarship critically questions the dominance of the prevailing descriptions of international law, mostly by unraveling “encounters of difference along many axes - race, class, gender, sex, ethnicity, economics, trade, etc. - and in interdisciplinary ways - social, theoretical, epistemological, ontological and so on.”⁹⁰

For Darian-Smith, TWAIL scholars aim at weakening a normative legal doctrine that centers on Western law, and that is insufficient to include divergent legal frameworks.⁹¹ Some TWAIL scholars tend to accuse dominant powers of the West of their unfair implementation of international law. Others situate and highlight the differences of Third World in a dominant western world. Notably, for Ghenga Oduntan, inclusive international law in which non-Western countries and regions are actively involved is hard to achieve since dominant Western powers collaborate to achieve this end.⁹² On the contrary, for Mutua, destabilizing Western legal doctrine is possible if TWAILers propose “an alternative normative legal edifice for international governance.”⁹³ TWAIL is concerned with how to remodel international law to include “the concerns of third world states”.⁹⁴

In this sense, TWAIL tries to eliminate “the conditions of underdevelopment in the Third World” “through scholarship, policy, and politics.”⁹⁵ TWAIL scholarship should be engaged “with justice of the fairness of norms, institutions, processes, and practices in the transnational arena”.⁹⁶ At least, “the author or political actor exposes, attacks, or unpacks a particular phenomenon that is inimical to the Third World.”⁹⁷

3. Egalitarian international law

TWAIL scholars explored transformative ways to achieve egalitarian international law. Antony Anghie urges us to discuss the ways in which “international law can be used” to further “the interests of Third World peoples”, “protecting them against the excesses of the authoritarian...state, on the one hand, and advancing their interests in the international sphere

⁸⁸ Mutua & Antony Anghie, *supra* note 44 at 38.

⁸⁹ Gathii, *supra* note 44 at 35.

⁹⁰ Gathii, *supra* note 44 at 37.

⁹¹ Darian-Smith, *supra* note 44 at 261.

⁹² *Ibid* at 260; G Oduntan, A Parashar & A Dhanda, “International Law and the Discontented: How the West Underdeveloped International Laws” in *Decolonization of Legal Knowledge in India* (India: Routledge, 2009) 92.

⁹³ Mutua & Antony Anghie, *supra* note 44 at 31.

⁹⁴ Gathii, *supra* note 44.

⁹⁵ Mutua & Antony Anghie, *supra* note 44 at 31.

⁹⁶ *Ibid*.

⁹⁷ *Ibid*.

on the other”.⁹⁸ Anghie and Chimni assert that power relations among states are significant for Third World peoples, who are also sensitive to how “any proposed international rule or institution will actually affect the distribution of power between states and people.”⁹⁹ The authors eloquently mentioned that the experience of Third World people rather than solely “that of states which represent them in international fora” should be the “interpretive prism through which rules of international law are to be evaluated.”¹⁰⁰

4. Critique of the TWAIL

TWAIL scholars are generally criticized for centralizing their analysis on the origins of international law without offering much on how to fix these tendencies. Falk argues that Third World scholars successfully contested Eurocentric history and the scope of international law.¹⁰¹ They identified the unequal “nature of the body of rules” that were passed on from the past, whereas they were unsuccessful in offering and enunciating “an alternative approach which is inclusive and internally consistent.”¹⁰² As a matter of fact, the situation received little attention.¹⁰³ For Gathii, TWAILers are considered to be “nihilistic” because of their critical approach to international law.

In fact, TWAILers criticize with a purpose of reckoning and transforming “the egalitarian aspects of international law”.¹⁰⁴ Gathii describes two ways to democratize international legal scholarship. The first one is to create “institutional and imaginative opportunities for participation”¹⁰⁵ of individuals of the Global South to contest international law’s endorsement of European and North American views. The second one is formulating “a substantive critique of the politics and scholarship of mainstream international law to the extent that it has helped reproduce structures that marginalize and dominate third world peoples”.¹⁰⁶ This dissertation discusses both ways: reimagining conceptual and normative frameworks to include the narrative of the Global South — Chapter VI —, and criticizing existing normative frameworks discussed in Chapters III through V.

It is true that TWAIL is limited in its scope and analysis, particularly the interpretation of *Mutua*. As discussed further in Chapter VI, human rights norms are derived from Eurocentric

⁹⁸ Antony Anghie, “The evolution of international law: Colonial and postcolonial realities” (2006) 27:5 Third World Q at 752.

⁹⁹ Anghie & B.S. Chimni, *supra* note 58 at 78.

¹⁰⁰ Anghie & B.S. Chimni, *supra* note 58 at 78.

¹⁰¹ Richard Falk, “Preface” in BS Chimni, ed, *Int Law World Order Crit Contemp Approaches* (New Delhi ; Newbury Park, California: Sage Publications) at 19.

¹⁰² Richard Falk, “Preface” in BS Chimni, ed, *Int Law World Order Crit Contemp Approaches* (New Delhi ; Newbury Park, California: Sage Publications) at 19.

¹⁰³ *Ibid* at 19.

¹⁰⁴ Gathii, *supra* note 44 at 43.

¹⁰⁵ Gathii, *supra* note 44 at 32.

¹⁰⁶ Gathii, *supra* note 44 at 32.

liberal values. However, this fact does not diminish the norms' moral values or obscure the protection of individuals coming from the Global South. The Universal Declaration of Human Rights (UDHR) declared that *all human beings are born free and equal in dignity and rights*. This protection includes everyone including people from the Global South. Some Global North countries have indeed adopted controversial policies that have violated fundamental human rights – ex. Guantanamo Bay, migrants stranded in the borders of Europe and dying in the waters of Europe, offshore processing of Australia declared by the International Criminal Court (ICC) to be amounting to crimes against humanity –. However, as put by Amy Lamdy, the unenforceability of human rights at a given time does not diminish their moral values. In addition, the rights of migrants are constantly violated not only in the Global North but also in the South. For example, Angola deported more than 1,400 undocumented migrants to the Democratic Republic of Congo in 2019.¹⁰⁷

If today, we can discuss rights and violations because these terms exist regardless of how unenforceable they are at a given place. If today what matters was only the origins, modern science would not advance. The Earth is an ellipsoid regardless of where one looks from; this fact was discovered by a European, Galileo. In the same vein, we owe mainly to Louis Pasteur, a French scientist, that all around the world we can fight against viruses through vaccination. Why would it be different for the law? Instead of focusing on the origins, debates on the normative frameworks should be based on fruitful conversations on the axis between the North-South, East-West.

Although Anghie and Chimni's understanding of Third World tends to overgeneralize all individuals, their ideas to focus on the experiences of individuals of the Global South have been guiding points for this research. Using the experience of individuals of the Global South as the interpretive prism to evaluate positivist rules, they aim at altering "international law from being a language of oppression to a language of emancipation", which will eventually promote "truly global justice."¹⁰⁸

Inspired by Chimni and Anghie, this research considers TWAIL as a critical approach to the current implementation of the securitizing regime and alerts critical readers to consider the experiences of individuals coming from the Global South in the decision-making procedure. This research also falls under Gathii's proposal to democratize international legal scholarship. In doing so, this dissertation provides a substantive critique of the current structure and provides

¹⁰⁷ "Over 1,000 illegal immigrants expelled - Angola", online: *ReliefWeb* <<https://reliefweb.int/report/angola/over-1000-illegal-immigrants-expelled>>.

¹⁰⁸ Anghie & B.S. Chimni, *supra* note 58 at 79.

space to the narratives of the Global South in the Global Northern academia. In a way, this is a constructive TWAIL work.

Chapter I: Policies criminalizing migration adversely affected the rule of law

Introduction

This chapter addresses how the concept of sovereignty is related to the criminalization of migration, why this question matters, and how this relationship affects the rule of law situation. It is crucial to understand the rationales behind policies criminalizing migration in order to proceed with investigating specific security regimes such as the exclusion provision and inadmissibility scheme in Chapters II and III. This chapter argues that the criminalization of migration has adversely affected the rule of law situation since policies and laws within this area often violate the principle of equality and non-discrimination on the basis of a social arrangement, that is the presence or absence of citizenship. This argument will be explained in three sections. These sections involve a connected logic. After analyzing the concept of sovereignty as being the basis of the criminalization logic (section I), a relatively new interdisciplinary area, “crimmigration”, will be described with references to two major challenges that it poses to sovereign states (section II). Finally, section III will demonstrate how the rule of law can inform policies criminalizing migration.

1. Sovereignty as the rationale behind migration policies

the people will pay for the decisions made by the State in the name of their Sovereignty.¹

Much has been written about the relationship between non-citizens and the state; sovereignty and national borders have been at the core of the debate. This section argues that the concept of state sovereignty is the main rationale behind policies criminalizing migration. This argument begs two questions. First, what is state sovereignty? Second, how is this concept embedded within the legal and political sphere of the 21st century? In answering these questions, this section focuses on four dimensions of sovereignty: (i) the meaning of sovereignty and its critique; (ii) restrictions on the Sovereign; (iii) the exclusionary nature of sovereignty within the sphere of immigration, and (iv) a clash between individual liberties of non-citizens and state sovereignty.

1.1. An inquiry into the concept of absolute sovereignty

This section will first explore the concept of absolute sovereignty and discuss why absolute sovereignty fails in explaining the acts of contemporary sovereign states.

¹ Jacques Maritain, “The Concept of Sovereignty” (1950) 44:2 Am Polit Sci Rev 343–357 at 357.

The Peace of Westphalia in 1648 marked the beginning of nation-states, designating the concept of sovereignty as their nucleus.² In a traditional sense, sovereignty is an absolute supreme power governing the entire body politic within a territory. The state is the political body where sovereignty is epitomised.³ The Sovereign is non-bound, unlimited, and “unaccountable to anything on earth.”⁴ Sovereignty refers to both “a natural and inalienable right” and “a right to an independence and a power.”⁵ Its inalienable nature derives from the fact that the sovereign state constitutes a one-unit body that cannot desist to be sovereign without discontinuing to be a state.⁶ According to this argument, sovereignty is a property which is unfettered and indivisible, “which cannot be participated in or admit of degrees, and which belongs to the Sovereign independently of the political whole, as a right of his own”.⁷ As a supreme authority, sovereignty regulates mainly two types of relationships. Internally, the sovereign state requires obedience from the people within the territory upon which sovereignty is exercised. Externally, the sovereign state demands recognition from other sovereign states to the effect that other states respect its sovereign rule within the realm of its sovereignty.⁸ John Locke described the Sovereign as a person or a group of persons who receives obedience from the majority of the population, “but who does not habitually obey any other (earthly) person or institution”.⁹

Schmitt’s and Kant’s definition of the Sovereign focuses on the sovereign’s power to make final binding decisions. In *Political Theology*, Carl Schmitt famously wrote that “sovereign is he who decides on the exceptions.”¹⁰ Schmitt argued that the Sovereign was above any constitutional law and ought to be able to decide on behalf of the good of the state during a time of emergency. The Sovereign is the one who decides whether a normal situation exists; “[a]ll law is ‘situational law’”.¹¹ Schmitt refers to this authority as the “monopoly to decide”.¹² For Kant, regardless of being elected or not, “the moral person who holds legislative power is representative of the people...and is thus sovereign”.¹³ Kant and Schmitt look at the person(s) who is empowered to enact to decide who the Sovereign is.

² John H Jackson, “Sovereignty - Modern: A New Approach to an Outdated Concept” (2003) 97 Am J Int’l L 782–802 at 786.

³ Daniel Philpott, “Sovereignty” in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* Summer 2016 Edition (2003).

⁴ Maritain, *supra* note 1 at 346.

⁵ *Ibid* at 349.

⁶ *Ibid*.

⁷ *Ibid*.

⁸ Bas Schotel, *On the Right of Exclusion, Law, Ethics and Immigration Policy* (Routledge, 2011) at 38.

⁹ Brian Bix, “John Austin” in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* Summer 2019 Edition (2001).

¹⁰ Carl Schmitt, *Political Theology: Four Chapters On The Concept Of Sovereignty* (George Schwab Trans., 1922) at 13.

¹¹ Carl Schmitt, *Political Theology: Four Chapters On The Concept Of Sovereignty* (George Schwab Trans., 1922) at 13.

¹² *Ibid* at 13.

¹³ Frederick Rauscher, “Kant’s Social and Political Philosophy” in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* Spring 2017 Edition (2007).

1.2. Absolute sovereignty fails in explaining the acts of contemporary states

This early version of the Sovereign, as unlimited, unaccountable entitled to make final decisions will be referred to as absolute sovereignty. Yet, accepting the sovereign state as a supreme absolute power, internally and externally requiring obedience from its subjects, fails in explaining the nature of states in the 21st century, since multiple factors (e.g. international relations, democratic elections) affect the acts of contemporary states. In explaining these factors, the first part will analyze Maritain's critique regarding the dichotomic nature of democratic sovereign states. The second part will discuss factors restricting state sovereignty starting from early history to the present time. The final part concludes with the argument that international law still centers on the notion of state sovereignty, despite the contemporary factors restricting the acts of sovereign states.

The earlier criticism of sovereignty informs us as to why the traditional description of sovereignty is insufficient to grasp the nature of present-day states. These critiques against the interconnection between state and sovereignty dwell on a dichotomy that states have a both democratic and sovereign nature. As one of the most prominent critics of the notion of sovereignty, Jacques Maritain separates the state from sovereignty since the former is an apparatus of the body politic, and hence, limited and accountable. The author argues that, if states are truly sovereign, they are likely to be totalitarian due to the inner logic of the notion of sovereignty.¹⁴ For the sovereign state to function, centralism, not pluralism, is necessary.¹⁵ As a result of bearing supreme power, the sovereign state ought to be unaccountable, which is at odds with the democratic notion of accountability. On the one hand, sovereign states are democratic, on the other hand, they are free from the people's supervision due to the principle of unaccountability. The unaccountable nature of the sovereign state also means that people, the Sovereign's subject, are responsible for state-made decisions in the name of their Sovereignty.¹⁶

Yet, for Jacques Maritain, the state and its governmental agencies are accountable to the people. If the state is accountable and acts under the supervision of the people, it cannot be simultaneously supreme and sovereign. Thus, the state is neither supreme nor absolute; its independence and power are subject to its law and administration; the body politic oversees the exercise of its rights. Consequently, Maritain concludes that "the State is not and has never been genuinely sovereign".¹⁷

¹⁴ Maritain, *supra* note 1.

¹⁵ Maritain, *supra* note 1 at 356.

¹⁶ Maritain, *supra* note 1 at 356.

¹⁷ Maritain, *supra* note 1 at 351.

Jacques Maritain's approach to the notion of sovereignty refers to its "antiquated" version¹⁸: a supreme absolute power free from any law except those to which the nation-state is consented to be bound. The sovereign nation-state in its "antiquated" version is empowered to "violate virgins, chop off heads, arbitrarily confiscate property, torture citizens".¹⁹

1.3. Restrictions on sovereign state acts

The old-fashioned sovereign state as defined by Locke, Kant, Schmitt, and Maritain has little currency today, due to the restrictions on sovereignty that have arisen throughout history. In the early texts, divine law, natural law, and the will of people were the only restrictions on the sovereign state. Jean Bodin determined divine law as the only law that the Sovereign is bound to. Likewise, Hobbes' Leviathan was superior to any human-made law, constitution or obligation; the Sovereign was only accountable to God and presumably to natural law.²⁰ Rousseau, taking a different stand, referred to "the collective people within a state" to define the Sovereign.²¹ Similarly, for Austin, it is the electorate that forms the Sovereign, instead of elected representatives.²² In Hart's view, in case "the electorate forms the sovereign, then the hierarchical relationship of obedience and command disappears."²³ For Bentham, the Sovereign is limited by the will of people to obey its decisions. In other words, "the will of the people to disobey amounts to a permanent constitutional check on the authority of the sovereign."²⁴

In contrast, contemporary scholars argue that sovereignty is no more a monopoly of the state; it is "shared among state and non-state actors at all levels of governance, depending on the issue or problem at hand".²⁵ Applying the concept of absolute sovereignty to contemporary states is also challenging considering that states are subject to constitutional checks and balances and scrutiny of their universal electorates.²⁶ John H. Jackson warns that the "antiquated" version of sovereignty is no more relevant considering that international law norms including customary international law and treaties enforce legal constraints to sovereign states to curb "extreme forms of arbitrary actions".²⁷ Particularly, after World War II, the sovereign state is restricted through European integration and the proliferation and protection

¹⁸ Please see Jackson, *supra* note 2 for the definition of antiquated version of sovereignty.

¹⁹ Jackson, *supra* note 2 at 790.

²⁰ Philpott, *supra* note 3.

²¹ Philpott, *supra* note 3.

²² TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2003) at p. 74.

²³ *Hart on Sovereignty*, SSRN Scholarly Paper, by Pavlos Eleftheriadis, papers.ssrn.com, SSRN Scholarly Paper ID 2321612 (Rochester, NY: Social Science Research Network, 2013).

²⁴ James E Crimmins, "Jeremy Bentham" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* Spring 2019 Edition (2015).

²⁵ Jens Bartelson, "The Concept of Sovereignty Revisited" (2006) 17:2 *The European Journal of International Law* at 466.

²⁶ Joel Feinberg, "Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution" (1983) 58:3 *Notre Dame Law Review* 445.

²⁷ Jackson at *supra* note 2.

of human rights.²⁸ An idea that the unaccountable nature of the sovereign state caused the Holocaust had in return led to European integration as a preventive mechanism.²⁹ From the Universal Declaration of Human Rights (UDHR) in 1948 – though not binding –, to the Genocide Convention, the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights³⁰, states incrementally consented to restrict their acts on the basis of human rights norms. In this sense, international law norms draw the limits of a sovereign state so far as a state has consented to it.³¹ In addition, state sovereignty is arguably undermined by *jus cogens* rules, which indicate the binding nature of fundamental human rights norms based on consensus, not state consent.³² According to Cohen, the discourse of sovereignty is reshaped by the protection of human dignity, which in return has replaced sovereignty as the basis of global relations.³³

Cohen further argues that the criteria of “separation, autonomy, and defined territorial or jurisdictional boundaries” as conditions of the international system are replaced by “connection, interaction, and interpenetrating networks and institutions.”³⁴ This interconnected global order also implies that law-making expands and spreads without the national government’s consent or control.³⁵ The growth of the global economy through the development of free markets in capital, finance, and labor; the globalization of communication and information technologies further challenged the Westphalian model centralizing the state’s supreme authority over its territory.³⁶ For example, many European Union (EU) member states hold non-absolute sovereignty in their territories; several policy areas, including trade, currency, and social welfare, are shared among EU member states and the EU.³⁷

Although there are restrictions on the sovereign state as discussed above, the concept of sovereignty remains central for international and regional institutions. Article 2 (1) of the United Nations (UN) Charter explicitly recognizes sovereign states as the fundamental principle of the organization: *the Organization is based on the principle of the sovereign equality of all its Members*. The UN Charter also forbids any attacks on the territorial integrity or political independence of the member states as per Article 2 (4).

²⁸ Philpott, *supra* note 3.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ Jackson at *supra* note 2.

³² Jean L Cohen, “Whose Sovereignty? Empire Versus International Law” (2004) 18:3 Ethics & International Affairs 1–24 at 15.

³³ *Ibid* at 7.

³⁴ *Ibid* at 7.

³⁵ *Ibid* 5 and 8.

³⁶ Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2004) at 4.

³⁷ Philpott, *supra* note 3.

Restrictions on sovereignty have emerged because sovereign states consented to be bound by these new regimes. European integration and international law norms are enforceable in so far as the sovereign states have consented to them. Thus, the circumscription of the sovereign state has not occurred due to an invisible hand; but because sovereign states decided to move in this direction, perceiving cooperation, integration and the protection of human rights as in the best interests of their nations.

1.4. A conflict between liberties of non-citizens and the Sovereign

Even if we consider that state sovereignty is diminished due to international norms and supranational institutions, this argument is relevant only within the realm of the citizenry. International law norms restrict excessive arbitrary actions of the sovereign state against its citizens. But does this assumption apply to the sovereign state's actions against non-citizens? Restrictions on the sovereign state with regards to entry to and exist from its territory mostly protect citizens and often exclude non-citizens from their protection. Yet, excluding non-citizens from this protection clashes with the individual liberties of non-citizens. The following pages will explore sovereign states' actions against non-citizens from a liberal perspective. In doing so, this section will also discuss counterarguments to individual liberties of non-citizens including the concept of state liberty, territoriality, national borders and the membership theory.

Proponents of migration control rely on the concept of sovereignty to bolster their argument to control immigration. Joseph Carens conceded that it is within the Sovereign's authority to decide which foreigner to admit or exclude. Each country "has the legal and moral right to exercise that power in pursuit of its own national interest, even if that means denying entry to peaceful, needy foreigners. States may choose to be generous in admitting immigrants, but they are under no obligation to do so."³⁸

However, denying entry to non-citizens could be considered an arbitrary action of the sovereign state as it clashes with the notions of individual and legal liberty. For Schotel, "[l]egal liberty means that an individual may do as he likes, provided that it is not forbidden by law and does not unlawfully harm the liberty/interests of others".³⁹ Freedom could mean that a migrant is free to enter another sovereign state unless she poses an excessive risk to a valid interest of others.⁴⁰ In Rawls' theory on liberties, liberties could be limited for public order and security.⁴¹ Adopting equal liberty would imply that states would recognize the migrants' right to free

³⁸ Joseph H Carens, "Aliens and Citizens: The Case for Open Borders" (1987) 49:2 Rev Polit 251–273 at 251.

³⁹ Schotel, *supra* note 8 at 32.

⁴⁰ *Ibid* at 33.

⁴¹ In limiting the liberty of conscience, Rawls argues that the government has a right to keep public order and security. In the words of Carens, Rawls' idea emphasizes that all liberties hinge on "the existence of public order and security" Carens, *supra* note 38, p. 259.

movement as a rule, and exclusion from the sovereign state's land as an exception.⁴² However, the freedom of non-citizens is disregarded in the interconnected sovereign states' regime of the 21st century. Instead, the state's liberty in their treatment of the foreigner is widely accepted. Schotel describes the principle of state liberty with an aphorism 'everything which is not forbidden is allowed'.⁴³ The state liberty derives from the *Lotus*⁴⁴ ruling of the Permanent Court of International Justice. Accordingly, "it [international law] leaves them [States] in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable."⁴⁵ States have *a priori* no obligation towards foreigners who are outside their territory. Thus, the notion of state liberty allows states to prevent foreigners from entering the state's territory, with no explanation and with very limited exceptions.

For Schotel, the concept of state liberty is based on "two outdated ideas: (state) positivism of the nineteenth century and anthropomorphic conception of the state from the eighteenth century".⁴⁶ According to state positivism, "the state is only bound by positive (international) law to the extent that it (the state) consented to it".⁴⁷ For the latter, the state as an entity has liberty just like individual liberty. As a free person, the state is free to do anything unless an explicit rule prohibits it from doing so.⁴⁸

a. State liberty is limited to territorial landscape

States' liberty to act freely is still limited to their territorial landscape and national borders. The following paragraphs will demonstrate somewhat opposing ideas of Seyla Benhabib, Joseph Carens and Juliet Stumpf over territoriality, and membership in communities. Seyla Benhabib argues that "*territoriality* has become anachronistic delimitation of material functions and cultural identities."⁴⁹ Even though the traditional concepts of sovereignty collapsed, the "ownership" of the territory is actualized through immigration and citizenship policies.⁵⁰ In this regard, states are generally compared to a private house with doors and windows which the owner can close to prevent intruders. In contrast, Joseph Carens compares states to cities, provinces, or states in the American sense, where freedom of movement dominates. Although cities and provinces often have different cultures and differences between

⁴² *Ibid.*

⁴³ Schotel, *supra* note 8 at 35.

⁴⁴ The Case of the S.S. 'Lotus' (Fr. v Turk), PCIJ (7 Sep. 1927), (ser. A) no. 10.

⁴⁵ The Case of the S.S. 'Lotus' (Fr. v Turk), PCIJ (7 Sep. 1927), (ser. A) no. 10, at para. 46.

⁴⁶ Schotel, *supra* note 8 at 47.

⁴⁷ *Ibid* at 47.

⁴⁸ *Ibid* at 47.

⁴⁹ Benhabib, *supra* note 36 at 5.

⁵⁰ *Ibid.*

them are often much greater than the differences across nation-states, they cannot restrict internal migration.⁵¹ Internal migration can put a burden on the local economy and “locally funded social programs”; change “the character of communities.”⁵²

Despite all this, we do not think these political communities should be able to control their border. The right to free migration takes priority...If freedom of movement within the state is so important that it overrides the claims of local political communities, on what grounds can we restrict freedom of movement across states?⁵³

Territoriality also defines the boundaries of societies. Stumpf’s membership theory explains why someone is in and out of this society; it postulates that positive rights are the results of a social contract between the people and the government.⁵⁴ Individuals who are not part of this agreement “yet are subject to government action have no claim to such positive rights, or rights equivalent to those held by members.”⁵⁵ However, the membership theory fails in explaining why people who were born and reside abroad can be a part of the contract, though, they obtained citizenship on the basis of blood. Neither does the theory explain why people residing in a society for a long period are unable to participate in the social contract. As an example, detained foreigners and undocumented migrants may live in Canada for many years, sometimes decades, but they are not considered a part of the social contract.

Carens provocatively asserts that “[i]f people [non-citizens] want to sign the social contract, they should be permitted to do so.”⁵⁶ It is true that “those who choose to cooperate together in the state have special rights and obligations not shared by non-citizens. Respecting the particular choices and commitments that individuals make flows naturally from a commitment to the idea of equal moral worth.”⁵⁷ However, excluding non-citizens who would like to join the community is not compatible with the notion of equal moral worth.⁵⁸

b. States are entitled to make arbitrary decisions on non-citizens

Until now we discussed that sovereignty in its traditional meaning is supreme and absolute; it requires obedience; and is unaccountable. States, though, are not truly sovereign because of three major restrictions that curbed their sovereign nature throughout time: divine and natural law, the will of the people, and international norms and supranational institutions. However, these curtailments of sovereignty are only entirely relevant for the citizenry. The sovereign

⁵¹ Carens, *supra* note 38, p. 266-267.

⁵² Carens, *supra* note 38, p. 266-267.

⁵³ *Ibid.*

⁵⁴ Juliet Stumpf, “The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power” (2006) 56:2 American University Law Review at 397.

⁵⁵ *Ibid.*

⁵⁶ Carens, *supra* note 38, p. 270.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

nature of states in their supremeness and absoluteness is still valid in immigration policies; in the field of immigration, the state is still mostly sovereign. There is little accountability in favor of non-citizens, who have no right to vote, and thus, cannot punish or reward politicians; do not participate in or benefit from any public policy debate; and generally hesitate in triggering supervisory bodies over any government agency or institution of the state, often for lack of resources, but also for fear of retribution in the form of detection, detention, and deportation. In the words of J.H. Ely, they are among “those groups in society to whose needs and wishes elected officials have no apparent interest in attending.”⁵⁹ Although there is little accountability for the state’s actions towards non-citizens, can the state make arbitrary decisions? We will first discuss the notion of arbitrariness from a legal perspective to continue with its political meaning.

In the legal sphere, arbitrariness is not equal to administrative discretion. In *Roncarelli v. Duplessis*, the Supreme Court of Canada determined that “[d]iscretion’ necessarily implies good faith in discharging public duty”.⁶⁰ In *Jones v. Murray*, judicial discretion is described as the one “exercised according to the rules of law.”⁶¹ In this context, the rule of law “establishes a system of rules for preventing abuse of discretion, and allows ordinary courts of law to overrule administrative actions which they deem arbitrary.”⁶² More broadly, discretion is “the reasonable exercise of a power or right to act in judicial capacity.”⁶³ In this context, discretion reflects “the idea of choice”.⁶⁴ A ruling authority, however, does not entrust “a decision-maker to do anything it pleases”.⁶⁵ Arbitrariness is the abuse of discretion when the discretion is not exercised pursuant to the purposes and policies underlying the statute conferring discretion.⁶⁶ A legal decision showing “a perversity of will, a defiance of good judgement, or bias” constitutes an abuse of discretion.⁶⁷

In this section on sovereignty, we refer to the notion of arbitrariness from a political perspective. In *Two Treatises of Government* (1689), Locke defined the notion of arbitrariness by referring to extemporary decrees⁶⁸: “there is no notice of it; the ruler just figures it out as he

⁵⁹ John Hart Ely, *Democracy and Distrust A Theory of Judicial Review* (Cambridge & London: Harvard University Press) at 151.

⁶⁰ *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 140.

⁶¹ *Jones v. Murray* (1908), 9 W.L.R. 204 at 205 (Sask., in chambers).

⁶² “Constitutional Law: Division of Powers” in *Halsbury’s Laws of Canada*.

⁶³ John A Yogis, Catherine Cotter & Steven H Gifis, “Discretion” in *Barron’s Canadian law dictionary* Barron’s Educational Series (Hauppauge, N.Y: Barron’s Educational Series, 2009).

⁶⁴ *Ibid.*

⁶⁵ “Administrative Law” in *Halsbury’s Laws of Canada*.

⁶⁶ *Ibid.*

⁶⁷ Yogis, Catherine Cotter & Steven H. Gifis, *supra* note 63.

⁶⁸ John Locke, *Locke: Two Treatises of Government*, Peter Laslett, ed (Cambridge: Cambridge University Press, 1988) at 135–137.

goes along. It is the arbitrariness of unpredictability, not knowing what you can rely on”.⁶⁹ Similar to Locke’s definition of arbitrariness as unpredictable ruling, for Lovett, arbitrariness equals unpredictability, groundlessness, and is “unfettered by rules.”⁷⁰ Henry Richardson explains arbitrary power by referring to dominating power, which neglects to “express ‘fair’ deliberative processes among ‘free and equal citizens’ that respect ‘fundamental rights and liberties’.”⁷¹ Similar to Richardson’s parameters of fair deliberative processes among free and equal citizens, Lovett refers to democracy to define non-arbitrariness. As such, if people do not have “an equal share in controlling how their state exercises its power”, the power of the state over its citizens is arbitrary.⁷²

In the republican idea of freedom, arbitrariness can be defined with a reference to non-arbitrariness.⁷³ Republicans define non-arbitrariness from a procedural and democratic perspective; both centers on how the power is controlled. From a procedural perspective, if power “is reliably controlled by effective rules, procedures, or goals that are common knowledge to all persons or groups concerned”⁷⁴, it is non-arbitrary. From a democratic perspective, if power “is directly or indirectly controlled by the concerned persons or groups themselves”⁷⁵, it is non-arbitrary. For Philip Pettit, the power is non-arbitrary if people can publicly discuss, “may speak for themselves and for the groups to which they belong.”⁷⁶

My initial premise is that the state is free to exclude non-citizens without justification, and thus, is entitled to make arbitrary decisions. From a democratic perspective, states use arbitrary power as they are entitled to exclude non-citizens from the decision-making process. As defined by Philip Pettit for arbitrary power, there is no public discussion in which non-citizens can speak for themselves. Similarly, the state neglects a fair deliberative process among migrants to respect their fundamental rights and liberties. Finally, migrants do not have an equal share in controlling how the state exercises its power over them.⁷⁷ All is to conclude that states are entitled to make arbitrary decisions concerning non-citizens from a political perspective.

⁶⁹ Jeremy Waldron, “The Rule of Law” in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* Fall 2016 Edition (2016).

⁷⁰ Christopher McCammon, “Domination” in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* Winter 2018 Edition (2018).

⁷¹ *Ibid.*

⁷² Frank Lovett, “Republicanism” in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* Summer 2018 Edition (2006).

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997) at 56.

⁷⁷ Although Lovett and Richardson used these definitions of arbitrary state vis-à-vis its power to citizens, I use these parameters for migrants.

c. Non-citizens have to legitimize their stay in state territories

As a result of states' right to make arbitrary decisions regarding non-citizens, non-citizens are responsible for legitimizing their stay in a state's territory. Perhaps not all foreigners are subject to the same level of scrutiny and suspicion. Immigration law considers socioeconomic status in accepting or refusing a non-citizen into national territories. Law works in favor of foreigners with social capital such as managers, executives, and investors who have financial resources and contacts. In addition, policies regulating "entry tend to favor citizens from European countries."⁷⁸ In the words of Zedner, "[t]hose whose ethnicity, appearance, or documentation fails to provide countervailing reassurance are liable to be turned back, detained, or criminalized."⁷⁹ While non-citizens who possess sufficient bank balance, or "bona fide travel plans" can gain trust relatively easily, non-citizens who are considered to be undocumented are distrusted by the state, "all the more profound because, as outsiders, they owe no loyalty to the polity".⁸⁰

At this point, it is noteworthy to analyze the property analogy of Joseph Carens. Joseph Carens explains that those citizens, who argue that the country belongs to them so that they have a right to accept or refuse whomever they want, consider the country their properties.⁸¹ These citizens base their claims about their right to exclude non-citizens on property rights. In this vein, sovereignty functions as private property: a state possesses sovereignty to exclude "unwanted non-citizens" from the society by convincing citizens that unwanted outsiders are a matter of sovereign security. Consequently, various instruments of the body politics including the judiciary act are in place to protect the property of sovereignty. Just as landowners are allowed to use violence to protect their property, the state has a right to protect its territory from unwanted non-citizens. In return, as the case may be for all landowners, any potential danger to this property from outside can justify the use of violence and an exception to the rule of law.

However, Carens disagrees that individual property rights align with collective or national property rights because "the concept of collective or national property rights would undermine the individual rights that these theories wish to protect."⁸² Individuals cannot use the notion of property as a protection "against the collective if property is collectively

⁷⁸ Stumpf, *supra* note 54 at 416.

⁷⁹ Lucia Zedner, "Is the Criminal Law Only for Citizens? A Problem at the Borders of Punishment" in Katja Franko Aas & Mary Bosworth, eds, *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford University Press, 2003) at 49.

⁸⁰ Lucia Zedner, "Is the Criminal Law Only for Citizens? A Problem at the Borders of Punishment" in Katja Franko Aas & Mary Bosworth, eds, *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford University Press, 2003) at 49.

⁸¹ Carens, *supra* note 38 at 252.

⁸² Carens, *supra* note 38 at 253.

owned.”⁸³ In case “collective ownership” is the reason why foreigners are kept out, then we can also use “the same notion to justify redistributing income or whatever else the majority decides.”⁸⁴ The state is not entitled “to restrict immigration.”⁸⁵

2. Crimmigration poses challenges to states due to their sovereignty claim

It is unpopular minorities whom charters and bills of rights exist to protect. In almost any society, the majority (which usually includes the rich and powerful) can look after itself.⁸⁶

Until now we discussed the concept of sovereignty and restrictions on the sovereign state for its acts towards its citizens. These restrictions only protect citizens and exclude non-citizens from their protection. As a result, states are entitled to make arbitrary decisions related to non-citizens. Policies criminalizing migration to be discussed in this section are based on this notion of exclusion and arbitrariness. These policies are first and utmost immigration policies. Therefore, the sovereign nature of states, the tension between the state power and the individual liberty of migrants are their underpinnings.

This part argues that policies criminalizing migrants pose two major challenges to states due to their sovereignty claim: (i) how to justify the asymmetric incorporation of the criminal justice model into immigration law and, (ii) how to respect the prohibition of discrimination when developing these policies. As such, this part has two sub-sections. The first one will discuss the meaning of the criminalization of migration; analyze similarities between criminal and immigration law through Stumpf’s membership theory, to conclude how the incorporation of the criminal justice model into immigration law occurred asymmetrically. The second sub-section will survey how the principle of equality and non-discrimination are being downplayed when immigration policies are concerned.

2.1. Crimmigration: the mix of immigration and criminal law

The criminalization of migration involves both criminal and administrative law in the areas of borders, immigration and asylum. Stumpf describes the criminalization of migration law as the convergence of two areas in both substance and procedure forming identical systems in which migration law and the criminal justice system are nominally distinct.⁸⁷ The emerging area of law called ‘crimmigration’ confers “the letter and practice of laws and policies” at the

⁸³ Carens, *supra* note 38 at 254.

⁸⁴ Carens, *supra* note 38 at 254.

⁸⁵ Carens, *supra* note 38 at 254.

⁸⁶ Tom Bingham, *The Rule of Law* (England, New York: Penguin Books, 2010).

⁸⁷ Stumpf, *supra* note 54 at 376.

crossroads of criminal law and migration law.⁸⁸ The criminalization of migration further questions how law enforcement agencies and other authorities handle the “threat” of possible perpetrators of serious international crimes including suspected war criminals, *génocidaires* and terrorists moving across borders.⁸⁹ It is a process whereby criminal justice principles are embodied into immigration law, which had been originally perceived as a civil or administrative aspect of state legislation.⁹⁰ Valsamis Mitsilegas explains the threefold process: crimmigration governance occurs (i) through the adoption of substantive criminal law, (ii) through referral to conventional criminal law enforcement techniques such as surveillance and detention, and (iii) through “the development of mechanisms of prevention and pre-emption.”⁹¹ These categories, processes and techniques include the prosecution of immigration violations, use of criminal sanctions to deter citizens from assisting foreigners to enter a host state, deportation of a foreigner due to his past conviction, detention and prosecution of refugee claimants entering a host state with false documents, heightened cooperation between state’s law enforcement offices and immigration departments.⁹² Criminal law enforcement strategies, including “the use of criminal databases, increased use of investigative tools, arrests, seizures, prosecutorial approaches”, are also used in immigration enforcement strategies.⁹³

For Stumpf, the convergence of migration and criminal law is “odd and oddly unremarkable”.⁹⁴ It is odd because criminal law aims to prevent and redress harm to society whilst immigration law regulates the acceptance and refusal of individuals at the borders and beyond. In fact, a very tiny proportion of migrants — regardless of status — poses a threat to society. Despite the dissimilarities on the surface, criminal and immigration laws have one thing in common: regulating the relationship between the state and the individual. Migration law and criminal law have a similar function as both regulates membership into society; both creates insiders and outsiders; both are designed to create distinct categories of people — innocent versus guilty, admitted versus excluded or, as some say, “legal” versus “illegal.”⁹⁵ Although the outcomes of the two systems might differ, both systems govern who should be included and

⁸⁸ Joke Reijven, Joris van Wijk “Alleged perpetrators of serious crimes applying for asylum in the Netherlands: Confidentiality, the interests of justice and security” (2015) 1:15 Criminal Crim Justice at 2.

⁸⁹ *Ibid.*

⁹⁰ Stephen H Legomsky, “The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms” (2007) 64:2 WASH & LEE L REV 469.

⁹¹ Valsamis Mitsilegas, *The Criminalisation of Migration in Europe Challenges for Human Rights and the Rule of Law*, Springer Briefs in law (Cham: Springer, 2015) at 2.

⁹² *Ibid* at 3-4.

⁹³ Juliet P Stumpf, “Doing Time: Crimmigration Law and the Pitfalls of Haste” (2011) 58 UCLA Law Review, online: <<https://www.uclalawreview.org/doing-time-crimmigration-law-and-the-pitfalls-of-haste/>> at 1729.

⁹⁴ Stumpf, *supra* note 54 at 379.

⁹⁵ Stumpf, *supra* note 54 at 380.

excluded from membership. Migration law excludes persons from membership by detaining and expelling them from national territories, whilst criminal law fulfills the same function by incarcerating them.

Yet, immigration and criminal law regulate the acquisition and loss of membership in two different ways. In criminal law, the burden to prove that the defendant should lose its full membership from the society lies with the government. This pro-membership standpoint grants strong constitutional rights to criminal defendants, including the presumption of innocence. When a state uses its power to punish, these rights protect all people “within the constitutional community against exclusion from society without a substantial justification”⁹⁶ and this protection extends to foreigners when they find themselves in criminal proceedings. In contrast, immigration law presumes non-membership. As a rule, foreigners are considered inadmissible “unless they show they are ‘clearly and beyond a doubt entitled to be admitted.’”⁹⁷ In the U.S., the government’s burden of proof in a criminal case is higher than in deportation cases: “clear and convincing evidence” rather than “beyond a reasonable doubt.”⁹⁸ In Canada, mere suspicion may suffice to justify certain detentions and expulsions, while criminal conviction requires proof beyond a reasonable doubt. Thus, unlike foreigners, citizens cannot be expelled and can only be criminally prosecuted, a process in which they have the highest level of constitutional protection.⁹⁹

In criminal law, the membership theory reveals itself through two functions of the sovereign state: the authority to punish and to “express moral condemnation” as a primary response to crime.¹⁰⁰ In immigration law, the powers of a sovereign state appear in the state’s large discretion to decide who to include and exclude membership into and from the society. As opposed to the rehabilitative method, which provides protection to the public by re-integrating the perpetrator into a community, a migrant, who violated the prescribed rules, is not reintegrated into society.¹⁰¹

Yet, one thing is in common: in practice, immigration law and criminal law both discriminate against “certain people of color and members of lower socio-economic classes.”¹⁰² The sovereign state model categorizes ex-offenders and migrants as the “outsiders’ from whom

⁹⁶ Stumpf, *supra* note 54 at 400.

⁹⁷ Stumpf, *supra* note 54 at 400. [footnotes omitted].

⁹⁸ Stumpf, *supra* note 54 at 400.

⁹⁹ Stumpf, *supra* note 54 at 400.

¹⁰⁰ Stumpf, *supra* note 54 at 378.

¹⁰¹ Stumpf, *supra* note 54 at 412. Please note that Stumpf used this argument to include both ex-offenders and migrants.

¹⁰² Stumpf, *supra* note 54 at 405.

citizens need protection”.¹⁰³ These practices result in segregating a community, generally detectable by race and class.

Stumpf’s membership theory implies that ex-offenders (citizens) and non-citizens are treated similarly by the sovereign state. The theory, however, has a limitation: it characterizes ex-offenders and migrants as outsiders, and hence, overlooks that an ex-offender is still a citizen, which draws the fundamental difference between him and a migrant. The difference lies in the fact that a citizen who is suspected of criminality — regardless of whether coming from an unprivileged community —, is guaranteed the protection of criminal law thanks to his citizenship; whilst a migrant is subjected to mostly arbitrary immigration policies. These policies are detrimental to migrants because the incorporation of the criminal justice model into immigration law occurred asymmetrically. Although Stumpf concedes that the government’s burden of proof in deportation cases is lighter than that in a criminal case and that citizens have the highest level of constitutional protection, the author considers ex-offenders and migrants in the same category. This approach is flawed because an ex-offender is a citizen enjoying the protection of citizenship, whilst a migrant is stripped of her liberty including a right to enter into the state. The protection of citizenship here refers to an ex-convict’s right to enter and stay in a state. Otherwise, it is true that protections afforded by citizenship rarely protect against stereotypes and prejudices against ex-convicts, that are so pervasive in society.

2.2. Asymmetrical incorporation of the criminal justice model into immigration law

Although viewing ex-offenders and immigrants in the same category is mostly inappropriate, the membership theory acknowledges that migrants need to justify why they should be admitted to a foreign land. In criminal law, rights offered to the accused including the presumption of innocence, and a higher threshold for the burden of proof, underlie individual liberty as the core of these rights. On the contrary, immigration law prioritizes the state’s discretion. This tension between individual freedom and the state power fully resonates in immigration policies involving criminality. Criminal law protects the accused due to the prospect of loss of individual liberty, whilst immigration law protects — first and foremost — the state’s power by excluding any unwanted migrant from its territories, without requiring justification. One of the results of this tension is the asymmetric way of incorporating the criminal justice model into immigration law.¹⁰⁴

Principles embraced in criminal enforcement have been firmly incorporated into immigration law whilst “the procedural safeguards at the core of criminal adjudication have

¹⁰³ Stumpf, *supra* note 54 at 412.

¹⁰⁴ Legomsky, *supra* note 90.

been consciously rejected. Adjudication has followed the civil regulatory model.”¹⁰⁵ Today, foreigners who are suspected of terrorism are either detained or deported, or both. Deportation means the removal of a non-citizen upon the administrative decision that he is no longer authorized to remain in the foreign state.¹⁰⁶ Daniel Kanstroom asserts that the functions of criminal punishment including incapacitation, deterrence and retribution are achieved through the deportation of some permanent residents in the U.S.¹⁰⁷ While the criminal justice system offers stronger substantive and procedural barriers to a criminal conviction, deportation does not entail similar obstacles, which allow authorities to launch measures based on “citizenship status and ethnicity.”¹⁰⁸

As an example, the Canada Border Service Agency’s (CBSA) Border Watch program – Wanted by the CBSA – list is a compelling immigration penalty. The list contains a photo of each wanted individual together with their personal information such as their gender, date and place of birth, identifying features, and the reason why they are wanted for deportation.¹⁰⁹ The most-wanted list is an immigration enforcement strategy but also presents itself “as a key technology of Canadian crime control, national security, and public safety.”¹¹⁰ The list also encompasses the elements of criminal justice punishment by valuing the expedition, the detention and deportation of foreigners considered to be security threats.¹¹¹

Politicians have long justified and supported the use of these immigration penalties. As an example, then Minister Jason Kenney normalized and advocated the adoption of criminal enforcement strategies in immigration law. As a response to Amnesty International’s open letter, then Minister Kenney ignored “all concerns about human rights and international justice as ‘poppyclock’”.¹¹² Kenney used the “‘preeminent goal’ of ‘defending Canada and upholding the integrity of our immigration system.’...guided by ‘the common sense of the people and the law’” as a reason to justify administrative deportation instead of initiating prosecution against possible war criminals.¹¹³ Likewise, then Toronto Mayor Rob Ford offered that Canadian

¹⁰⁵ Legomsky, *supra* note 90 at 528.

¹⁰⁶ David Miller, “Immigration: The Case for Limits” in Andrew I Cohen & Christopher Heath Wellman, eds, *Contemporary Debates in Applied Ethics* | Wiley (Blackwell Publishing, 2005) at 11.

¹⁰⁷ Daniel Kanstroom, “Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases” (2000) 11 Harv Law Rev 1889–1935 at 1891.

¹⁰⁸ Stumpf, *supra* note 54 at 385.

¹⁰⁹ Anna Pratt, “Wanted by the Canada Border Agency” in Deborah Brock, Amanda Glasbeek & Carmela Murdocca, eds, *Criminalization, Representation, Regulation: Thinking Differently About Crime* (Ontario, New York: University of Toronto, 2014) at 285.

¹¹⁰ *Ibid* at 294.

¹¹¹ *Ibid*.

¹¹² *Ibid* at 308.

¹¹³ *Ibid* at 308.

governments should resort to “Canada’s federal immigration laws to ban individuals convicted of guns crimes from the City of Toronto.”¹¹⁴

Lucia Zedner questions why states have shifted away from “ordinary principles of criminalization” in the area of immigration. For him, the bond of citizenship “provides a license for the standards applied to non-citizens to be reduced, compromised, or dispensed with altogether.”¹¹⁵ In a democratic society, citizens *de jure* “share the privileges of a fundamental right to be presumed [...] free from harmful intentions; they enjoy common authorship, through an elected legislature, of the criminal law; and they benefit from the security of due process protections from unwarranted state interference in their lives.”¹¹⁶ As opposed to citizens, non-citizens are subject of distrust, only entitled to lower protections. Perhaps the best example for this situation is the rehabilitation program that is implemented by the Canadian government for the return of suspected Canadian jihadis.¹¹⁷ The bond of citizenship is the reason why returning Canadian jihadis are considered for rehabilitation because they are members of the Canadian society regardless of how grave their crimes might be in armed conflicts far from home.¹¹⁸ By contrast, a non-citizen who is suspected of similar crimes would be detained; be subjected to a security regimen including security certificates and inadmissibility proceedings, and probably be deported.

States increasingly resort to administrative or hybrid administrative and criminal channels as these proceedings can bypass the strict procedural and evidentiary conditions of the criminal proceeding.¹¹⁹ Administrative proceedings lacking the safeguards of criminal procedures can result in burdens and fines as grave as punishment¹²⁰; yet, are preferred by states. Criminal law also has a power-restricting function during the “pretrial hearings on motions, the trial, appeal and the writ of habeas corpus” assessing the acts of officials enforcing a criminal proceeding.¹²¹ Lacking the above, administrative, civil or hybrid processes are

¹¹⁴ *Ibid* at 295.

¹¹⁵ Zedner, *supra* note 79 at 51.

¹¹⁶ *Ibid* at 52.

¹¹⁷ Hicham Tiflati, “Radicalization to rehabilitation: How does Canada prepare for ISIS returnees?”, *CBC*, online: <<https://www.cbc.ca/cbcdocs/pov/features/radicalization-to-rehabilitation-how-does-canada-prepare-for-isis-returnees>>.

¹¹⁸ In 2015, the Conservative government made changes to the Canadian Citizens act via Bill C-24 that allowed Canada to revoke the citizenship of those, who have dual citizenships or who are eligible to obtain another nationality, if they commit certain crimes. However, the Liberal government repealed these changes in 2017 and ended the second class citizenship on criminality grounds.

¹¹⁹ Zedner, *supra* note 79 at 53.

¹²⁰ *Ibid*.

¹²¹ Joseph Goldstein, “Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice” (1960) 69:4 *The Yale Law Journal* 543–594 at 544.

deprived of the power-restricting function; have no or limited space to evaluate the actions of administrative officials.

2.3. The principle of equality undermined in migration policies

So far, this section discussed similarities and differences between criminal and immigration law as well as the ways in which policies criminalizing migration have asymmetrically incorporated criminal law strategies. The preceding section also demonstrated that the bond of citizenship is the reason why citizens who are suspected of serious criminality receive the protection of the state's criminal law safeguards whilst migrants suspected of almost identical crimes are subjected to administrative law standards with lesser protections. This point takes us to the second challenge that immigration law poses to states: to what extent can states observe their human rights obligations while enforcing criminal law proceedings within an administrative field? The core of this challenge lies in the implementation of the right to non-discrimination.¹²²

The concept of equality has been discussed since early history. Aristotle famously declared that *things that are alike should be treated alike*.¹²³ We also know that not all differential treatments are unjust.¹²⁴ Formal equality encompasses an Aristotelian idea that same or similar things “should be treated in the same or similar ways”, whereas substantive equality involves the notion that disadvantaged individuals living in the society due to barriers and subtle unequal arrangements should be treated differently due to their disadvantaged position.¹²⁵

In the legal sphere, states are committed to applying fundamental rights equally to persons under their jurisdiction due to their international obligations. This situation causes tension between the exclusionary and discretionary nature of immigration policies and the cosmopolitan and universal nature of fundamental human rights. Article 1 of the UDHR highlights that all persons are equal in dignity and rights. Specifically, the International Covenant on Civil and Political Rights (ICCPR) set forth that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.¹²⁶ The law

¹²² *Criminalisation of Migration in Europe: Human Rights Implications*, by Elspeth Guild (Strasbourg: the Council of Europe Commissioner for Human Rights, 2010).

¹²³ Aristotle, *Ethica Nicomachea*, translated by W Ross, JL Ackrill & JO Urmson, eds (Oxford University Press, 1980) at 112–17, 1131a–31b.

¹²⁴ Kasper Lippert-Rasmussen, “Discrimination” in Serena Olsaretti, ed, *The Oxford Handbook of Distributive Justice* (Oxford University Press, 2018).

¹²⁵ Jarlath Clifford, “Equality” in Dinah Shelton, ed, *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013).

¹²⁶ Article 7 of the International Covenant on Civil and Political Rights.

prohibits any discrimination and guarantees to all persons equal and effective protection against discrimination on any ground including national or social origin, birth or other status.¹²⁷ All people are equal before the courts and tribunals.¹²⁸ As put forward by the Inter-American Court of Human Rights, states' obligation to respect and guarantee human rights are directly connected to the principle of equality and non-discrimination. When states violate their obligation to respect and guarantee human rights, due to any discriminatory treatment, they are internationally responsible.¹²⁹ According to the UN Human Rights Committee, Article 26 of the ICCPR is an autonomous right and "prohibits discrimination in law or in any field regulated and protected by public authorities."¹³⁰ In the European context, Article 14 of the European Convention on Human Rights (ECHR) guarantees the principle of non-discrimination in the enjoyment of Convention rights. Likewise, Article 1 of the American Convention on Human Rights prohibits any discrimination on the basis of *inter alia* national origin, birth or other social condition. Similar to Article 7 and 14 of the ICCPR, Article 3 of the African Charter of Human and Peoples' Rights ensures that all individuals are equal before the law and entitled to equal protection of the law.

The principles of equality and non-discrimination are intertwined. The Inter-American Court of Human Rights noted that "when referring to equality before the law...this principle must be guaranteed with no discrimination...[it] prohibits all discriminatory treatment."¹³¹ For the Court, the concept of discrimination refers to "any exclusion, restriction or privilege" that is unobjective and unreasonable, and which "adversely affects human rights."¹³²

In Canada, the right to equality is a constitutional right regulated under Article 15 (1) of the Canadian Charter of Rights and Freedom (Charter); *every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination*. Looking at the legal structure and law, one might conclude that non-citizens and citizens are equal before the law, and hence, no justification exists for policies criminalizing migration. In other words, if all these international, regional and domestic instruments firmly

¹²⁷ Article 26 of the International Covenant on Civil and Political Rights.

¹²⁸ Article 14 of the International Covenant on Civil and Political Rights.

¹²⁹ *Advisory Opinion OC-18/03, "Juridical Condition and Rights of Undocumented Migrants"*, Inter American Court of Human Rights at para 85, 17 September 2003.

¹³⁰ 'General Comment No 18: Nondiscrimination', by United Nations Commission on Human Rights (UNCHR), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies UN Doc HRI/GEN/1/Rev.1 (UNCHR, 1994) at para 12.

¹³¹ *Advisory Opinion OC-18/03, "Juridical Condition and Rights of Undocumented Migrants"*, Inter American Court of Human Rights at para 83, 17 September 2003.

¹³² *Advisory Opinion OC-18/03, "Juridical Condition and Rights of Undocumented Migrants"*, Inter American Court of Human Rights at para 84, 17 September 2003.

protect the principle of equality and non-discrimination, how could states still adopt discriminatory immigration rules?

Throughout history, there has always been an exception to the principle of equality. For example, in ancient times, Aristotle did not find women and slaves as rational human beings and hence, treating them unjustly was entirely justifiable. In the 18th century's America, the Declaration of Independence of 1776 articulates that *all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and Pursuit of Happiness*. The term "all men" hereby refers to slave-owners, because the principle of equality was not endowed to African American people; slavery was fully justifiable in 1776. Likewise, the laws regulating apartheid in South Africa in the 20th century were perfectly justified and impartially implemented.

History also unfolds that the courts of justices are not exempt from the logic of exception to the principle of equality and non-discrimination, regardless of how grave the consequences might be. For example, in the decision of *Dred Scott v. Sanford* (1857), Chief Justice Roger Taney on behalf of the U.S. Supreme Court infamously wrote that under the Declaration of Independence, blacks "had no rights which the white man was bound to respect, and that the negro [sic] might justly and lawfully be reduced to slavery for his benefit."¹³³ As history demonstrates, how courts enforce the principle of equality and interpret the terms of equality and discrimination guides us to understand whose equality is undermined in the 21st century, similar to slavery and women's oppression in history.

a. Exceptions to the principle of equality in the 21st century and Canadian case law

Today, we observe that exceptions to the principle of equality and non-discrimination evolve around the terms of objective and reasonable justification, the principles prevailing in democratic societies, legitimate purpose, and human dignity. For example, for the ECtHR, the exception is an objective and reasonable justification.¹³⁴ When the differential treatment among "persons in relatively similar situations"¹³⁵ has no objective and reasonable justification, the principle of equality is violated. The justification to the general rule of non-discrimination is determined in relation to the aim and effects of the measure under review, which must comply with the principles prevailing in democratic societies.¹³⁶ For the Inter-American Court of

¹³³ *Dred Scott v. Sandford*, 60 US 393 (1856), US Supreme Court at para. 36.

¹³⁴ *Willis v. the United Kingdom*, Appl. No. 36042/97, [2002] ECHR 483.

¹³⁵ *Ibid* at para. 48.

¹³⁶ *Belgium Linguistics Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium* (Merits), Appl. No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, ECHR 23 July 1968, page 31.

Human Rights, the differential treatment is non-discriminatory if it has a legitimate purpose and does not result in “situations which are contrary to justice, to reason or to the nature of things.”¹³⁷ If the differential treatment is based on “substantial factual differences”¹³⁸ and if there is proportionality between these differences, then the treatment is not discriminatory. The UN Human Rights Committee established that “[a] differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26 [of the ICCPR].”¹³⁹

In Canada, equality right is subject to a general exception articulated under section 1 of the Charter: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” In cases in which discrimination amounts to a violation within the meaning of section 15(1), “any justification, any consideration of the reasonableness of the enactment; ... any consideration of factors which could justify the discrimination and support the constitutionality of the impugned enactment”¹⁴⁰ would be assessed under section 1.

Case law on equality is rich in Canada. The first case in which the Supreme Court of Canada (SCC) interpreted section 15 is *Andrews v. Law Society of British Columbia* (1989) (henceforth *Andrews*). In *Andrews*, the SCC defined discrimination as

a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.¹⁴¹

Discrimination is a distinction that imposes a disadvantage on “certain groups and individuals by denying them the rights freely accorded to others”.¹⁴² Interpreting the Court’s decision, Peter Hogg wrote that “discrimination was the imposition of a disadvantage (the imposition of a burden or the denial of a benefit) on an individual by reason of the individual’s possession of a characteristic listed in section 15 or analogous to those listed in section 15.”¹⁴³ Analogous grounds are all unchangeable personal characteristics of persons, or characteristics

¹³⁷ *Advisory Opinion Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, 1984 Inter-American Court of Human Rights at para 57.

¹³⁸ *Ibid.*

¹³⁹ *F. H. Zwaan-de Vries v. the Netherlands*, Communication No. 182/1984 (9 April 1987), U.N. Doc. Supp. No. 40 (A/42/40) at 160 (1987) (1987) at para 13.

¹⁴⁰ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143.

¹⁴¹ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, at 174-175.

¹⁴² *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at 152.

¹⁴³ Peter Hogg, “What is Equality?: The Winding Course of Judicial Interpretation” (2005) 29:1 The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference, online: <<https://digitalcommons.osgoode.yorku.ca/sclr/vol29/iss1/4>> at 46.

that are greatly difficult or costly to change.¹⁴⁴ Finally, the Supreme Court declared that “non-citizens fall into an analogous category to those specifically enumerated in s. 15.”¹⁴⁵

In *R. v. Kapp*, the Supreme Court introduced a two-part test to establish discrimination under section 15(1): “(1)[d]oes the law create a distinction based on an enumerated or analogous ground? (2)[d]oes the distinction create a disadvantage by perpetuating prejudice or stereotyping?”¹⁴⁶

In the case of *Withler v Canada* (2011), the Court established that to determine discrimination, “the object of the measure alleged to be discriminatory in the context of the broader legislative scheme” must be considered, “taking into account the universe of potential beneficiaries.”¹⁴⁷ The key point is whether, considering all relevant factors, “the impugned measure perpetuates disadvantage or stereotypes of the claimant group.”¹⁴⁸ Section 15(1) thus protects substantive equality rather than formal equality.¹⁴⁹ Later in the same year, the Federal Court of Appeal reiterated the two-step approach to assess discrimination: first, whether (i) a distinction causes a disadvantage on certain groups due to their personal characteristics, and second, whether (ii) “the impact of law is discriminatory”.¹⁵⁰

In *Quebec (Attorney General) v. A*, the Supreme Court reaffirmed that the assessment of discrimination is a “flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group”.¹⁵¹ In *Taypotat*, the Court further elaborated on the two-step test. Establishing discrimination *prima facie* would require demonstrating the law “has a disproportionate effect” on the individual “based on his or her membership in an enumerated or analogous group.”¹⁵² The second step enquires whether the law at issue is unsuccessful at responding “to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage”.¹⁵³

In recent cases, the Supreme Court underlined that the “animating norm” of s.15 is substantive equality that requires the Court to consider three main elements: (i) “full context of the claimant group’s situation”, (ii) “actual impact of the law on that situation”, and (iii)

¹⁴⁴ *Ibid.*

¹⁴⁵ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, p. 152.

¹⁴⁶ *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 17

¹⁴⁷ *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 [3].

¹⁴⁸ *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 [3].

¹⁴⁹ *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 at para. 2

¹⁵⁰ *Toussaint v. Canada (Attorney General)*, 2011 FCA 213, at paras. 89-91

¹⁵¹ *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61 at para. 331.

¹⁵² *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548 at para. 21.

¹⁵³ *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548 at para. 20.

“‘persistent systemic disadvantages [that] have operated to limit the opportunities available’ to that group’s members”.¹⁵⁴ The assessment under substantive equality requires adjudicators to determine whether “identical or facially neutral treatment may ‘frequently produce serious inequality’”.¹⁵⁵ The Charter protects both direct and “adverse impact discrimination.”¹⁵⁶ The Court further clarified the first stage of the two-step test: to consider a distinction as discrimination, a law must have a disproportionate affect on “members of a protected group”.¹⁵⁷ To prove that the law has a disproportionate effect, “the situation of the claimant group” or “the results of the law” could be used as evidence. The former would include “evidence about the physical, social, cultural or other barriers. These links may reveal that seemingly neutral policies are “designed well for some and not for others”.¹⁵⁸ In assessing “evidence about the group”, judges should be cautious that “issues which predominantly affect certain populations may be under-documented. These claimants may have to rely more heavily on their own evidence or evidence from other members of their group, rather than on government reports, academic studies or expert testimony.”¹⁵⁹

Statistical evidence could be invaluable to determine a disproportionate impact. Citing Sheppard, the Supreme Court noted that the objective of statistical evidence is to determine “a disparate pattern of exclusion or harm that is statistically significant and not simply the result of chance”.¹⁶⁰

In conclusion, the first part of the two-stage test under section 15 requires demonstrating that “the law imposes differential treatment based on protected grounds, either explicitly or through adverse impact.”¹⁶¹ The second part inquires whether the law “has the effect of reinforcing, perpetuating, or exacerbating disadvantage”.¹⁶²

In *Ontario v. Canada*, the Supreme Court asserted that while formal equality is solely concerned with equality “before the law”, substantial equality examines “conditions of material inequality, the concrete impacts that laws have on individuals and groups, and the manner in which individuals’ choices are embedded in their social and economic surroundings”.¹⁶³ The latter is the focus of the test under section 15.

¹⁵⁴ *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at para. 42.

¹⁵⁵ *Ibid* at para. 46. Please also see *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 164.

¹⁵⁶ *Ibid* at para. 45.

¹⁵⁷ *Ibid* at para. 46. Please also see *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 52.

¹⁵⁸ *Ibid* at paras. 56-57.

¹⁵⁹ *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at para. 57.

¹⁶⁰ Colleen Sheppard, “Grounds of Discrimination: Towards an Inclusive and Contextual Approach” (2001) 80 Can Bar Rev 893 at 546. *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at para. 59.

¹⁶¹ *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at para. 81.

¹⁶² *Ibid* at para. 81.

¹⁶³ *Ontario (Attorney General) v. G*, 2020 SCC 38 at para.44.

Reviewing the case law, this section established that to determine discrimination under section 15 of the Charter, members of the protected group must be disproportionately affected due to the impugned legislation and that the law must reinforce or perpetuate a disadvantage on this group. Recognizing substantial equality, the Supreme Court is flexible in weighing the evidence to prove the disproportionate harm. As such, the following section will analyze a case of *Al Yamani v. Canada* in light of the above-mentioned jurisprudence on the principle of equality.

b. The case of Al Yamani: Discrimination based on a social arrangement, that is, the presence or absence of citizenship

In the case of *Al Yamani v. Canada*¹⁶⁴, Mr. Yamani, a permanent resident of Canada, was found inadmissible to Canada on security grounds for being a member of a terrorist organization, namely, Popular Front for the Liberation of Palestine (PFLP), under section 34 (1)(f) of the IRPA.¹⁶⁵ Before the Federal Court of Canada, Mr. Yamani argued that he is discriminated within the meaning of Article 15 (1) of the *Charter* because the inadmissibility scheme in Canada proscribes associations and activities that are lawful for Canadians but are not lawful for non-citizens.¹⁶⁶ The Applicant also argued that he was discriminated based on his political opinion because of his opinions on Palestinians' self-determination; as such, inadmissibility on security grounds violated his right to "freedom of thought, belief, opinion and expression" under section 2 of the Charter.¹⁶⁷

In her decision, Justice Snider determined that although the Applicant might be satisfying the first stage of the section 15 test — as he was not equally treated compared to citizens—, the *Charter* allows for such distinction between citizens and non-citizens.¹⁶⁸ Mr. Yamani also failed in showing that members of the PFLP constitute a protected group under section 15. Concluding that membership in a terrorist organization is not an analogous ground, Justice Snider stated that “it is difficult to imagine how discriminating against a non-citizen because of his association with a terrorist organization violates that person's human dignity.”¹⁶⁹

Justice Snider erred in her conclusion because the protected group, in this case, was not members of a terrorist organization but *non-citizens who are members of a terrorist*

¹⁶⁴ *Al Yamani v. Canada (Minister of Citizenship and Immigration)* (2006), 149 C.R.R. (2d) 340; 58 Imm. L.R. (3d) 181 (F.C.)

¹⁶⁵ Section 34 (1)(f) of the IRPA reads as follows “[a] permanent resident or a foreign national is inadmissible on security grounds for being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).”

¹⁶⁶ *Al Yamani v. Canada (Minister of Citizenship and Immigration)* (2006), 149 C.R.R. (2d) 340; 58 Imm. L.R. (3d) 181 (F.C.) at para. 47.

¹⁶⁷ *Ibid* at para. 41.

¹⁶⁸ *Ibid* at para. 50.

¹⁶⁹ *Ibid*.

organization. As such, the counterpart of this group would be *citizens* who are members of a terrorist organization. This comparison is more striking considering that the Canadian government's current strategy to deal with returning suspected jihadis of ISIS, a terrorist organization, is enforcement, surveillance and deprogramming.¹⁷⁰ According to Public Safety Canada, approximately 60 out of 190 Canadians suspected of engaging in terrorism abroad returned to Canada in 2017.¹⁷¹ In response to their return, the Prime minister of Canada, Justin Trudeau said “[w]e are going to monitor them. We are also there to help them to let go of that terrorist ideology.”¹⁷² Why are non-citizens suspected of terrorism undeserving of human dignity whilst citizens suspected of the same acts receive the state's help to “let go of that terrorist ideology”? Although answers to this question might be political, in the following paragraphs, I will analyze the situation of non-citizens suspected of terrorism as per the Canadian jurisprudence.

In light of the two-stage test established by the Supreme Court for the section 15 assessment, there are two relevant questions: “(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?”

The law creates a distinction based on an enumerated or analogous ground. As conceded by Judge Snider, section 34 of the IRPA is only applicable to non-citizens. Citizens who are considered for the same grounds, namely being a member of a terrorist organization, are subject to criminal law standards.

The second stage is then questioning whether this distinction creates a disadvantage by perpetuating prejudice or stereotyping. Citing Colleen Sheppard¹⁷³, the Supreme Court in *Fraser v. Canada* decided that the harm could involve “[e]conomic exclusion or disadvantage, [s]ocial exclusion . . . [p]sychological harms . . . [p]hysical harms . . . [or] [p]olitical exclusion” that must be considered “in light of any systemic or historical disadvantages faced by the claimant group”.¹⁷⁴ Chapter V of this dissertation demonstrates that non-citizens who are suspected of criminality or terrorism have to endure disproportionate harm involving economic disadvantage, social exclusion and psychological harm. These foreigners have suffered from (i)

¹⁷⁰ Only a few of them are prosecuted on the grounds of terrorism. One of them, Hussein Sobhe Borhot was charged with knowingly aiding and abetting terrorist activities of ISIS. However, Borhot was released on bail in Calgary under house arrest. Stewart Bell, “Alleged Calgary ISIS kidnapper ordered released on bail | Globalnews.ca”, *Global News* (30 July 2020), online: <<https://globalnews.ca/news/7235604/calgary-isis-bail/>>.

¹⁷¹ *2017 Public Report on the Terrorist Threat to Canada*, by Public Safety Canada (Public Safety Canada, 2018).

¹⁷² Tiflati, *supra* note 117.

¹⁷³ Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal: McGill Queen's University Press, 2010).

¹⁷⁴ *Ibid* at 62-63.

no status situation, decades of litigation with significant financial consequences; (ii) in certain cases, no work permit renewal, no social assistance, no medical coverage; (iii) no family reunion rights and social isolation, and (iv) stigma, and significant mental health consequences as a result of being labeled as a war criminal or terrorist. These obstacles are in addition to physical harm that is the likelihood of deportation to prosecution. As underlined by the Supreme Court in *Fraser v. Canada*, the harm on “certain populations may be under-documented.”¹⁷⁵ As such, statistical evidence could be useful to determine a disproportionate impact. Angus Grant’s dissertation proves that 81% of the dataset in the national security context involves refugee claimants or refugees. Most individuals subject to the inadmissibility hearings on national security grounds are either recognized refugees or refugee claimants who come from Global Southern countries. The author further demonstrated that individuals who come from the Global North and are suspected of “acts of subversions are...never subjected to admissibility proceedings notwithstanding the fact that the law makes no distinction between these acts and ones committed in the Global South.”¹⁷⁶

Does the Federal Court’s interpretation of the principle of equality in *Al Yamani* exclude certain individuals, that are, migrants suspected of serious criminality from the scope of this right? In answering this question, the following paragraphs will examine the general concepts of discrimination and equality to inform the policies that criminalize migrants.

Direct discrimination arises when persons “are subjected to detrimental differential treatment” due to “their membership in a particular social group(s).”¹⁷⁷ Stereotypes and biases associated with certain groups lie at the core of direct discrimination.¹⁷⁸ Systemic discrimination refers to pervasive discrimination, attached to “structural inequalities, and institutionalized in social and organizational practices and procedures.”¹⁷⁹ In the *Report of the Royal Commission on Equality in Employment*, Judge Rosalie Silberman Abella noted that “the systemic approach acknowledges that by and large the systems and practices we customarily and often unwittingly adopt may have an unjustifiably negative effect on certain groups in society.”¹⁸⁰

¹⁷⁵ *Fraser v. Canada* (Attorney General), 2020 SCC 28 at para. 57.

¹⁷⁶ Angus G Grant, *Confronting (In)security: forging Legitimate Approaches to Security and Exclusion in Migration Law* (University of York, 2016) [unpublished].

¹⁷⁷ Sheppard, *supra* note 160 at 19.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ *Report of the Commission on Equality in Employment / Judge Rosalie Silberman Abella, commissioner. : MP43-157/I-1984E-PDF - Government of Canada Publications - Canada.ca*, by Rosalie Silberman Abella, Equality in employment : a Royal Commission report (Ottawa - Ontario: Human Resources and Skills Development Canada October 1984., 2002) at 9.

Inequality arises through “a process of socially constructing differences in terms of a hierarchy of superiority and inferiority.”¹⁸¹ These differences are further bolstered by ideologies narrating that the features of “the dominant groups in society are ‘normal’ and superior.”¹⁸² In the field of migration, a hierarchy of superiority and inferiority occurs when non-citizens who are members of terrorist organizations are considered undeserving of human dignity. In other words, a superior group here is referred to as citizens who are members of a terrorist organization, and an inferior group is non-citizens who are members of a terrorist organization. As the legal conjuncture shows, the bond of citizenship is sufficient to form a dominant group.

As explained under *Section a. Exceptions to the principle of equality in the 21st century and Canadian case law*, in *Andrews v. Law Society of British Columbia*, Justice McIntyre stated that discrimination is “a distinction...based on grounds relating to personal characteristics of the individual or group...which withholds or limit access to opportunities, benefits, and advantages available to other members of society.”¹⁸³ In light of *Andrews*, access to procedural safeguards recognized in criminal law could be considered an opportunity, benefit, advantage available to other members of society. In the same decision, the Supreme Court established that “non-citizens fall into an analogous category to those specifically enumerated in s. 15.”¹⁸⁴ Thus, a barrier to procedural safeguards for non-citizens developed under immigration policies can be considered a distinction due to the lack of citizenship, which has the effect of imposing burdens, obligations, or disadvantages on such individuals or groups not imposed upon others.

As explained by Justice Wilson, constitutional equality aims at “remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society.”¹⁸⁵ Analyzing a specific law or policy “within its larger historical and social context” is a key parameter to determine if the equality right is violated.¹⁸⁶ If non-citizens who are members of terrorist groups are undeserving of human dignity, what is the justification for this conclusion? If the justification is because of their criminality, then why do citizens belonging to the same category receive favorable treatment? Why do judges not consider the larger social and historical context in examining the criminalization of migration policies? Currently, there are no answers to these questions. In his influential book *Sapiens: A Brief History of Humankind*, Yuval Harrari, wrote that the distinctions between “free persons and

¹⁸¹ Sheppard, *supra* note 160 at 35.

¹⁸² Sheppard, *supra* note 160 at 35.

¹⁸³ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 174.

¹⁸⁴ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 152.

¹⁸⁵ *R. v. Turpin*, [1989] 1 SCR 1296 at 1333.

¹⁸⁶ Sheppard, *supra* note 160 at 41.

slaves, between whites and blacks, between rich and poor — are rooted in fictions.”¹⁸⁷ Back in history, many people supported an argument that slavery and the hierarchy of persons are natural, far from being a human invention. For Hammurabi, the gods established slavery.¹⁸⁸ For Aristotle, “slaves have a ‘slavish nature’ whereas free people have a ‘free nature’.”¹⁸⁹ Their position in society reflects “their innate nature.”¹⁹⁰ In the 21st century, discriminating against migrants suspected or convicted of criminality is fully justifiable on the basis of a social arrangement, that is, the presence or absence of citizenship.

The concept of citizenship and its entitlements including voting and democratic rights exclude non-citizens in the political domain.¹⁹¹ In *R. v. Mills*, the Supreme Court of Canada affirmed that “constitutionalism can facilitate democracy rather than undermine it...constitutional democracy is meant to ensure that due regard is given to the voices of those vulnerable to being overlooked by the majority.”¹⁹²

In *Andrews v. Law Society of British Columbia*, Justice Wilson affirmed that compared to citizens, non-citizens are more vulnerable as they lack political power. Their interests might be disregarded and “their rights to equal concern and respect violated...Non-citizens...do not have the right to vote.”

While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.¹⁹³

Public administrative law centers on adjudicating procedural fairness. In some cases, judges underlined that administrative law is the most convenient “source of protection for ensuring government accountability and respect for human rights”.¹⁹⁴ Having this in mind, in the case of *Medovarski v. Canada*, the applicants, Olga Medovarski and Julio Esteban, two permanent residents were ordered for deportation for serious criminality.¹⁹⁵ Mr. Medovarski was found guilty of “criminal negligence causing death while driving a car when intoxicated” and Mr. Esteban was found guilty “for conspiracy to traffic cocaine”.¹⁹⁶ Delivering the Court’s decision, Chief Justice Beverley McLachlin noted that “even if liberty and security of the person

¹⁸⁷ Yuval Noah Harari, *Sapiens: A Brief History of Humankind* (New York: Harper Collins, 2015) at 120.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ Sheppard, *supra* note 173 at 122.

¹⁹² *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 58.

¹⁹³ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at 152.

¹⁹⁴ Sheppard, *supra* note 160 at 64.

¹⁹⁵ *Medovarski v. Canada* (Minister of Citizenship and Immigration); *Esteban v. Canada* (Minister of Citizenship and Immigration) 2005 SCC 51.

¹⁹⁶ *Medovarski v. Canada* (Minister of Citizenship and Immigration); *Esteban v. Canada* (Minister of Citizenship and Immigration) 2005 SCC 51, at para. 2.

were engaged, the unfairness is inadequate to constitute a breach of the principles of fundamental justice.”¹⁹⁷ This is due to the distinction between a citizen and a non-citizen. As set out by the SCC in *Chiarelli v. Canada*¹⁹⁸, “the most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada.”¹⁹⁹ Hence, the deportation of a non-citizen *per se* does not violate rights to liberty and security of the person protected under the *Charter*.²⁰⁰ The Court’s reasoning confirms the “standpoint theory”: those with power and authority do not have experiential knowledge that those with less power in society hold.²⁰¹ As elaborated by Sheppard,

[i]t is unlikely that those who have enjoyed power and privilege based on the historical institutional status quo will be capable of imagining the kinds of transformations needed to implement human rights norms. To them, exclusionary norms and practices often appear necessary, despite their unfortunate effects on those who have been denied equality rights.²⁰²

The case of *Medovarski v. Canada* exemplifies these exclusionary norms and practices, which are deemed necessary while enforcing the immigration rules without considering their unfortunate effect on those who are denied equality rights.

2.4. Conclusion: Changing our mindset regarding the conception of the human rights of foreigners in immigration proceedings

The first section analysed the sovereign nature of states within the field of immigration. Section two started with the premise that the notion of state sovereignty provides a conceptual framework to understand policies criminalizing migration. States are, however, confronted with two main hurdles while developing these policies. The first challenge is related to the asymmetric incorporation of the criminal justice model into immigration law. This is mainly because the borrowing of criminal enforcement strategies causes tension with the civil nature of immigration law. Although states firmly adopted principles of the criminal enforcement model into immigration law, they omitted to incorporate its procedural safeguards. As discussed at length, one good example for this argument is the integration of returning Canadian jihadis into the society whilst detaining or deporting non-citizens who are suspected or convicted of criminality as exemplified with the case of *Al Yamani*. This distinction between a citizen and a non-citizen derives from the sovereignty claim of states within their borders.

¹⁹⁷ *Ibid* at para. 47.

¹⁹⁸ *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at 733

¹⁹⁹ *Ibid*.

²⁰⁰ *Medovarski v. Canada (Minister of Citizenship and Immigration)*; *Esteban v. Canada (Minister of Citizenship and Immigration)* 2005 SCC 51, at para. 46.

²⁰¹ Sheppard, *supra* note 160 at 67.

²⁰² Sheppard, *supra* note 160 at 68.

I then questioned whether a differential treatment between a citizen and a non-citizen amounts to discrimination within the area of immigration law. Throughout history, there was an exception to the principle of equality. The last section analysed predominantly Canadian cases before the Supreme Court of Canada to understand what is justifiable to violate the principle of equality for non-citizens in the 21st century. The section concludes that migrants who are suspected or convicted of serious criminality are undeserving of equality, and thus treating them less favorably is fully justifiable.

Undeserving of equality in this context refers to Justice Snider's comments on non-citizens who are found inadmissible to Canada on security grounds. According to the reasoning, discriminating against non-citizens who are members of a terrorist organization is justifiable. Yet, as discussed above, every individual is equal before the law as per the Charter rights. Consequently, Canada should treat all individuals equally regardless of their status under its jurisdiction. In case these individuals cannot be returned to their home countries (and often it might not be a viable option considering the principle of non-refoulement) both Canada and the individual considered inadmissible, find themselves at a dead-end: no return, but no life here either.²⁰³ The dead-end becomes particularly troublesome considering that the integration of returning Canadian jihadis into the society is currently possible.

Even in the possibility of deportation, should countries of origin be left with the ultimate responsibility to punish these individuals? It gets more complicated when the person who is found inadmissible has a low criminal profile (e.g. membership into a terrorist group). To solve this problem, Joseph Carens argued that those who are legal long-term residents (e.g. permanent residents in Canada) should not be deported for a criminal act because they have been part of the society. In his words, we return "them to some country where they've never lived, sometimes a place where they don't know anyone and don't even speak the local language. Maybe they are criminals. But they're *our* criminals".²⁰⁴ Deporting them is tempting considering that international law allows for deportation; despite being unfair, it is "an easy way to get rid of a social problem".²⁰⁵

Judges and adjudicators could be considering a larger historical and social context in adjudicating immigration cases to comply with substantive equality. If the Supreme Court of Canada views that a restriction of access to the profession that does not have as devastating

²⁰³ Please also see *Chapter V- Part BM- Limbo situation: a new group of disenfranchised non-citizens due to the protracted limbo situation*

²⁰⁴ "Q&A WITH JOSEPH CARENS: THE ETHICS OF IMMIGRATION", (21 December 2020), online: *Harney Program in Ethnic, Immigration and Pluralism Studies* <<https://harneyprogram.ca/qa-with-joseph-carens-the-ethics-of-immigration/>>.

²⁰⁵ *Ibid.*

consequences as the loss of liberty or the prospect of deportation, due to a lack of citizenship²⁰⁶, violates the principle of equality within the meaning of section 15 (1) of the Charter, then the Court is legitimately expected to apply the same reasoning to cases in criminalizing migration, where the impacts on non-citizens are disproportionate.

Impartial and autonomous judgements are feasible through the ability to change our mindset by considering the “perspectives of others in the judging community”.²⁰⁷ The perspective of others will be further discussed in *Chapter VI Rethinking interests, struggles, and rights of immigrants in limbo*. The following section will analyse how the rule of law can restrict the exclusionary nature of the state in its relationship with non-citizens and hence, can change our minds to allow impartial and autonomous judgements.

3. The rule of law to restrict policies criminalizing migration

They don't deserve due process like all ordinary citizens of the nation. They've already violated the trust that was given to them when they came here, or allowed to come here.²⁰⁸
Calgary member of parliament Art Hanger

George Orwell in “Why I write” asserts that many political words such as democracy, justice, fascism and freedom have become empty means; people are using them to serve their own purposes without any definition. In other words, “the person who uses them has his own private definition, but allows his hearer to think he means something quite different.”²⁰⁹ Having this backdrop in mind, how can one define the rule of law? The concept is widely used in human rights instruments; the UDHR’s Preamble mentions that the rule of law should protect human rights; the ECHR’s preamble emphasizes that the Convention is signed by “the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law.” But what are the borders of this concept? Second, how can the rule of law inform immigration norms? Immigration rules are legal norms subjected to general principles of law, and to the parameters of the rule of law. The previous section established that the sovereignty claim is the main reason why states can enact and implement exclusionary immigration policies. This section will discuss whether the rule of law can be an antidote for this premise. Otherwise, do states have unfettered and arbitrary discretion to treat non-citizens despite the rule of law? In answering these questions, this section will first analyse

²⁰⁶ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143.

²⁰⁷ Jennifer Nedelsky, “Embodied Diversity and Challenges to the Law” 42 McGill Law Journal 91 at para 32.

²⁰⁸ CBC News, “Gang member freed amid deportation fight”, *CBC* (22 October 2008), online: <<https://www.cbc.ca/news/canada/calgary/gang-member-freed-amid-deportation-fight-1.694593>>.

²⁰⁹ George Orwell, *Why I write* (England: Penguin Books, 2004) at 109.

what the rule of law is by referring to the work of influential scholars such as A.V. Dicey, Lon Fuller, Philip Selznick, Tom Bingham, Evan Fox-Decent, T.R.S. Allan, Jeremy Waldron, Jacques Yvan-Morin and Joseph Raz. Analysing their work within a few pages would be impossible; hence, this section is limited to incorporating only key points of their understanding of the rule of law. Looking at their analysis, I identified three main components of the rule of law: clear and general law, the equality of law, impartial and fair implementation of the law with due process. After explaining these components, this section will examine how these parameters are applicable to the area of immigration to conclude with eight points at stake in legislating and executing the immigration law.

A.V. Dicey is the first scholar who used the rule of law in his book, *An Introduction to the Study of the Law of the Constitution*, published in 1885.²¹⁰ Dicey lays out three principles of the rule of law: no man is punishable without clear law implemented before ordinary courts, and all people should be subject to these general courts and law in a common law system.²¹¹ Lon Fuller described general, clear and non-contradictory law as *sine qua non* characteristics of the internal morality of law. Laws should be general, promulgated or accessible, prospective not retrospective, clear, non-contradictory, not demand the impossible, be constant and there should be congruence between written rules and their implementation by officials. These requirements are also known as the formal character of the rule of law. For Fuller, non-observance of the formal characters of the rule of law conflicts with “man’s dignity as a responsible agent” as judging his acts “by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey to him your indifference to his powers of self-determination.”²¹² Yet, the elements of Fuller’s internal morality of law are insufficient to understand the substantive component of the rule of law. Scholars such as Tom Bingham and Arthur Chaskalson explained the rule of law with a reference to fundamental human rights while others referred to an idea of liberty or the principle of human dignity.²¹³ Several safeguards and concepts such as “defences in criminal law, provisions concerned with due process, publicity, rights, including rights of appeal”²¹⁴ forming the procedural characteristics of the rule of law are as significant as its formal characteristics. In addition to formal and procedural components, Arthur Chaskalson, former Chief Justice of South Africa, describes the devastating consequences of the laws lacking the substantive component of the rule of law. The apartheid

²¹⁰ Bingham, *supra* note 86 at 109.

²¹¹ A V Dicey, *An Introduction to the Study of the Law of the Constitution*, 9th edition (Macmillan, 1945) at 188.

²¹² Lon L Fuller, *The morality of law* (New Haven: Yale University Press, 1969) at 162–163.

²¹³ Waldron, *supra* note 69.

²¹⁴ Martin Krygier, “Rule of Law” In Michel Rosenfeld & Andras Sajó, Eds, *Oxf Handb Comp Const Law* (Oxford, New York: Oxford University Press) at 238.

law in South Africa was lacking the substantial part of the rule of law. Otherwise, “the laws were clear; publicized, and stable, and were upheld by law enforcement officials and judges.”²¹⁵ Without a doubt, the enactment process and “the laws themselves” were unfair. Discrimination was institutionalized through the laws, which granted “broad discretionary powers in the executive” and did not safeguard “fundamental rights.”²¹⁶ As such, the rule of law can be “an empty vessel into which any law could be poured” if the substantive part is missing.²¹⁷

The equality of law is one of the common themes that Bingham, Selznick and T.R.S. Allan resort to explaining the rule of law. For example, Philip Selznick explains the thicker version of the rule of law, which means more than the abuse of power.²¹⁸ For him, the rule of law compromises values such as “respect for the dignity, integrity, and moral equality of persons and groups.”²¹⁹ Likewise, Evan Fox-Decent argues that the rule of law provides the principles and institutional mechanisms that allow “legal order to protect the vulnerable from certain forms of arbitrary power that could otherwise fill the void, and so the justification of the rule of law runs deeper than merely protection from the abuse of power that law makes possible.”²²⁰ The core of the rule of law lies in its ability to protect us from the unfettered authority of others “by subjecting us to law, a subjection that provides security and independence to the exercise of our agency.”²²¹ For Joseph Raz, the rule of law is not equal to “democracy, justice, equality...human rights of any kind, or respect for persons, or for the dignity of man.”²²² In case the rule of law is limited to its formal meaning, the law can align with the rule of law and still enact slavery. Substantially, the rule of law allows anyone to access tribunals and courts to obtain redress for their human rights violations. Thus, one can argue that human rights without the rule of law are without effectiveness. The rule of law without human rights is without purpose.

Tom Bingham identifies eight core elements of the rule of law in his book *The Rule of Law*. Bingham emphasizes the equal application of the law, human rights and procedural fairness as the requirements of the rule of law. The laws should be applied equally to all people except in situations where differential treatment is justifiable.²²³ T.R.S Allan interprets the

²¹⁵ *WJP Rule of Law Index 2011 Report*, by World Justice Project (2011) at 9.

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

²¹⁸ Philip Selznick, “Legal Cultures and the Rule of Law” in Martin Krygier & Adam Czarnota, eds, *The Rule of Law after Communism* (Aldershot: Ashgate, 1999) at 26.

²¹⁹ Philip Selznick, *The moral commonwealth : social theory and the promise of community* (Berkeley: University of California Press, 1992) at 174. Krygier, *supra* note 214 at 244.

²²⁰ Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford: Oxford University Press, 2012) at 252.

²²¹ *Ibid* at 261.

²²² Joseph Raz, “The Rule of Law and its Virtue” in *The Authority of Law: Essays on Law and Morality* (Oxford University Press) at 211.

²²³ TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2003).

generality of the law as providing formal equality: “[a]ll are treated equally in accordance with whatever scheme of justice is enacted by the legislature or enforced by the courts.”²²⁴

Equal laws would not achieve legal equality without their fair implementation; the decision-making process should be fair.²²⁵ For T.R.S Allan, the principles of natural justice or procedural fairness are inherent features of the concept of law.²²⁶ Jeremy Waldron adds that the law should furthermore be administered impartially and with due process.²²⁷ For Bingham, to meet the conditions of the rule of law, ministers and public officials must exercise their powers in good faith and fairly. However, the rule of law does not imply that public officials or judges are deprived of all discretion; it only requires that the discretion to be used should not be arbitrary and legally untrammelled.²²⁸ For Fuller, citizens must obey the law conforming to the eight principles of the rule of law; but their obedience is conditional upon the acts of public officials. No logical reason exists to assert “that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted”.²²⁹

Impartial and fair implementation of the law also requires equal and fair access to justice. In fact, the United Nations regards access to justice as a basic principle of the rule of law.²³⁰ The Declaration of the High-level Meeting on the Rule of Law underlines the right of equal access to justice for all, including members of vulnerable groups, and reaffirms the commitment of Member States to taking all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all.²³¹ Jacques Yvan-Morin conceptualized access to justice through the prohibition of arbitrary detention. Accordingly, the prohibition of arbitrary detention would be effective only if access to the tribunal, equity in the procedure, rights of the defense are ensured, and if the law is submitted to the supremacy of rights and liberties.²³² Access to justice particularly matters when declaring the state of emergency and during the suspension of rights and liberties, as it slows down the instauration of a permanent rule of law.²³³

²²⁴ *Ibid.*

²²⁵ Bingham, *supra* note 86.

²²⁶ Allan, *supra* note 223.

²²⁷ Waldron, *supra* note 69.

²²⁸ Bingham, *supra* note 86.

²²⁹ Fuller, *supra* note 212, p. 39.

²³⁰ Norul Mohamed Rashid, “Access to Justice”, online: *United Nations and the Rule of Law* <<https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/>>.

²³¹ *Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels : resolution / adopted by the General Assembly*, by UN General Assembly, A/RES/67/1 (2012) at paras 14–25.

²³² Jacques-Yvan Morin, “L’état de droit: émergence d’un principe du droit international (Volume 254)” (1995) 254 Brill (The Hague Academy of International Law), online: <https://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/*A9789041103543_01?lang=fr> at 452.

²³³ *Ibid.*

In conclusion, general, clear, prospective, and equal laws implemented fairly and impartially before ordinary courts form a legal system complying with the rule of law. The next step is how the conversation among the scholars on the rule of law can inform immigration proceedings.

The criminalization of migration process is a hybrid procedure consisting of some processes which are not typically criminal, as the person involved is not formally accused of a crime and not punished as a result of a criminal process, but yet the process is not “one in which the usual civil remedies (damages, or an injunction, or a declaration) are sought.”²³⁴ Instead, the question, in general, is “whether a person represents a danger to the public such that he should be kept under, or made subject to, a measure of restraint.”²³⁵ Moreover, the consequences of immigration detention and expulsion are as life-altering as the consequences of criminal procedures. As it is an atypical proceeding, to what extent the immigration law could be implemented as ordinary and general law comes to mind. Particularly, discrimination against non-citizens is one of these gray areas where the rule of law is tested. David Cole asks, “why the same act should be ‘terrorist’ when committed by a foreign national but not when committed by a US citizen.”²³⁶ An innocent associational activity could result in deportation and incarceration for a foreigner.²³⁷ For example, the U.S. government’s preventive detention program predominantly targeted Arabs and Muslims caused, 1,182 detainees only “in the first seven weeks of the program”²³⁸ and 5,000 detainees in total. Many of these people were never charged and “[v]ery few have been convicted of terrorism.”²³⁹

The rule of law can limit the exclusionary, sovereign nature of state in its relationship with non-citizens if the immigration law observes its parameters such as Fuller’s eight principles, equal laws and their fair and impartial implementation. Having this in mind, this section concludes by identifying eight elements of the rule of law that are at stake in legislating and executing laws and policies criminalizing migration.

- 1- Immigration should not be criminalised in the sense no one should be accused or suspected of a criminal act, without undergoing a criminal law proceeding.
- 2- Administrative law should never lead to anyone risking death, torture or arbitrary detention. This kind of consequences should be left to criminal law.

²³⁴ Bingham, *supra* note 86.

²³⁵ *Ibid.*

²³⁶ David Cole, *Enemy Aliens* (New York: The New Press, 2003) at 58.

²³⁷ *Ibid.*

²³⁸ Bingham, *supra* note 86.

²³⁹ *Ibid.*

- 3- Immigration law should comply with the thicker version of the rule of law. Particularly, the law must respect the dignity, integrity and moral equality of persons and groups.
- 4- The laws of the land should apply equally to all. *Section 2.3. The principle of equality undermined in migration policies* discussed Canadian jurisprudence on section 15 (1) of the Charter, and accordingly, investigated the case of *Al Yamani*. Chapter IV will further discuss security certificate proceedings under sections 7 and 15 of the Charter.
- 5- Immigration law should be accessible, intelligible, clear and predictable. Tom Bingham argues that “questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.”²⁴⁰ However, the legal rights of migrants suspected or convicted of criminality are largely resolved through the exercise of discretion.
- 6- Ministers and public officials should exercise their powers in good faith and fairly. This premise challenges wide discretionary powers that the Immigration and Refugee Divisions and the Minister of Immigration, Refugees and Citizenship of Canada have in implementing the IRPA.
- 7- States should provide fair adjudicative procedures concerning immigration.
- 8- The legislation regulating migration should be properly drafted, administered impartially, and with due process.

Conclusion of Chapter I

This chapter analysed how the criminalization of migration adversely affected the rule of law due to the sovereignty claims of states. This argument implies that states ought to adjust their immigration policies to fully comply with the principles of the rule of law, notably the equality of laws and their fair and impartial implementation. A legal system that excludes some people from the benefits of the rule of law should not be considered as the one respecting the rule of law, particularly in countries such as Canada and the United Kingdom where legal institutions work relatively well. This argument also suggests that judges should review the legislation criminalizing migration from a larger point of view. As the case law in Canada demonstrates, courts generally narrow the issue down to someone’s status.²⁴¹ It is true that the current legal

²⁴⁰ Bingham, *supra* note 86, p. 48.

²⁴¹ Please also read *Chapter IV- On the principle against self-incrimination and the use of asylum testimonies for security certificate proceedings in Canada* for detailed analysis of the case-law.

conjuncture does not give a non-citizen unfettered right to stay in a foreign land. Nonetheless, this is not the issue. The question here is whether discrimination against non-citizens suspected or convicted of criminality amounts to a distinction which, is based on grounds relating to their personal characteristics, has an effect that imposes disadvantages not imposed upon citizens or which withholds or limits access to advantages to citizens. If citizens who are suspected or convicted of criminality receive the state's favourable treatment, then the state discriminates against non-citizens who fall in the same category due to a lack of citizenship.

The next chapter will narrow our discussion down to refugee claimants and refugees. In doing so, Chapter II will analyse refugee status and the exclusion provision in depth.

Chapter II: The privileged status of refugees

The first chapter analyzed the overall understanding of the criminalization of migration. In doing so, we did not discuss specific instruments (e.g. the inadmissibility scheme) applicable to foreigners depending on their legal status as either migrants, refugees or asylum-seekers. As some instruments such as the exclusion provision confer more rights to their subject, the differences between them matter. Consequently, this chapter discusses the privileged status of refugees and refugee claimants, arguing that refugee status has a distinct place in policies criminalizing migration. In explaining this argument, the first section will analyze the differences between refugees, migrants and asylum seekers. The second section discusses the current discourse on refugee status, with a focus on how individuals access asylum systems. Moving from there, this chapter concludes by exploring the place of the exclusion provision in the refugee determination system.

1. Refugees have a distinctive place in migration policies

This section argues that refugee status has a distinct place in policies criminalizing migration for two main reasons. First, refugee status grants certain privileges to an individual. Second, refugee law constitutes an anomaly for the sovereign nature of states.

The aftermath of World War II established today's refugee regime, the overall objective of which is to assure that refugees can access protection.¹ The 1951 Refugee Convention and the 1967 Protocol are two main international instruments defining refugee status, which has been embraced in several regional instruments including the 1984 Cartagena Declaration, the 1969 Organization of African Unity (OAU) Convention, and the 2004 European Council Asylum Qualification Directive intended to enhance the conditions of refugees.²

The term refugee is defined in the 1951 Refugee Convention. Accordingly, a refugee is a person who is outside the country of her nationality or former habitual residence and unable or unwilling to avail herself of that country's protection due to the well-founded fear of being persecuted on the grounds of race, religion, nationality, political opinion or membership of a particular social group.³ As of March 2022, the total number of states party to the 1951 Refugee Convention is 149.⁴ The mandate of UNHCR extends the scope of refugee protection to those who flee their country of origin for the fear of persecution on the grounds of generalized

¹ Alexander Betts, "The Refugee Regime Complex" (2010) 29:1 Refugee Survey Quarterly 12–37 at 12.

² Guy S Goodwin-Gill & Jane McAdam, *The Refugee in International Law*, fourth edition, new to this edition: ed (Oxford, New York: Oxford University Press, 2021).

³ Article 1A (2) of the 1951 Refugee Convention.

⁴ United Nations High Commissioner for Refugees, "States parties, including reservations and declarations, to the 1951 Refugee Convention", online: *UNHCR* <<https://www.unhcr.org/protection/convention/5d9ed32b4/states-parties-including-reservations-declarations-1951-refugee-convention.html>>.

violence, conflict, “or other circumstances that have seriously disturbed public order and who, as a result, require international protection.”⁵ For Shacknove though the term refugee is not strictly defined; several definitions in different jurisdictions provide alternative meanings. Yet, states generally follow the definition established by the 1951 Refugee Convention.⁶

The Refugee Convention’s definition and the United Nations High Commissioner for Refugees’ (UNHCR) Mandate necessitate that “refugees are neither considered nor treated as migrants.”⁷ A refugee flees her country of origin when persecuted for her basic identities such as race or nationality, which are so fundamental that she should not be forced to abandon them to gain security.⁸ On the contrary, a migrant voluntarily leaves her country to reside in another place due to the reasons not mentioned in the 1951 Refugee Convention’s definition.⁹ If a person moves for solely economic reasons, she is not a refugee but an economic migrant.¹⁰ Thus, persons who leave their country of origin merely for economic reasons, personal motivations, or criminal intent are ineligible to receive refugee protection.¹¹ However, in cases where economic measures eradicate the economic existence of a particular group, the victims might be refugees.¹² In other words, there might be subtle political reasons why certain individuals leave their countries on the basis of economic motives, and “it may be the political opinions of the individual that expose him to serious consequences, rather than his objections to the economic measures themselves.”¹³

Compared to refugee status, the concept of asylum is ambiguous and less regulated. Article 14 of the UDHR stipulates that “everyone has the right to seek and to enjoy in other countries asylum from persecution.” Goodwin-Gill and McAdam assert that while non-citizens cannot claim a right to asylum, states cannot prevent the non-citizen’s right to *seek* asylum.¹⁴ In other words, states have no legal obligation to grant asylum, but non-citizens have a right to seek asylum in host states. States have the discretion to grant refugee status under the 1951

⁵ *Note on the Mandate of the High Commissioner for Refugees and his Office*, by UNHCR (UNHCR, 2013) at 3.

⁶ “The definition of “refugee” adopted by the Organization of African Unity (OAU) is the only salient challenge to the proposition that persecution is an essential criterion of refugeehood. That definition, after incorporating the United Nations’ persecution-based phraseology, proceeds to state that: “The term ‘refugee’ shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of nationality.” Andrew E Shacknove, “Who Is a Refugee?” (1985) 95:2 *Ethics* 274–284 at 275-276.

⁷ Catherine Dauvergne, “The Troublesome Intersections of Refugee Law and Criminal Law” in Katja Franko Aas & Mary Bosworth, eds, *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford: Oxford University Press, 2013) at 77.

⁸ James C Hathaway, “Forced Migration Studies: Could We Agree Just to ‘Date’?” (2007) 20:3 *J Refug Stud* 349–369 at 352.

⁹ *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, by UNHCR (UNHCR, 2019).

¹⁰ *Ibid.*

¹¹ Goodwin-Gill & Jane McAdam, *supra* note 2 at 475.

¹² UNHCR, *supra* note 9 at para 64.

¹³ *Ibid.*

¹⁴ Goodwin-Gill & Jane McAdam, *supra* note 2 at 475.

Refugee Convention “to any other person or group it deems fit” so long as the asylum seeker is not forced to return to the country of persecution.¹⁵

The 1951 Refugee Convention does not explicitly regulate the rights of asylum seekers “who have not yet been recognized as refugees”.¹⁶ However, there is a difference between recognition of the refugee status by a state and being a refugee. The Convention defines a refugee as an individual who is out of their country and fears persecution on enumerated grounds. A person becomes a refugee when these conditions are met, regardless of whether they are recognized or not. Specific rights, however, must be vested to asylum seekers until their status is determined in order for the refugee regime to function effectively.¹⁷ For example, the protection of non-refoulement as set forth in Article 33 of the 1951 Refugee Convention should also safeguard asylum seekers until their status is finalized.¹⁸ Ana Maria Salinas de Frias argues that in case the denial of asylum exposes asylum seekers to the risk of persecution on one of the grounds enumerated under the Convention, states are *de facto* obliged “to admit that refugee as the only means to avoid persecution.”¹⁹ Nevertheless, prevailing opinion suggests that states have a sovereign prerogative to grant asylum to refugees within their territories, “while the corresponding duty was respect for that grant of asylum by all other States.”²⁰

1.1. A privilege to receive the protection of the international community

A distinction between refugees and migrants matters because refugee status is privileged. Refugees receive the protection of the international community and are entitled to claim certain rights. Otherwise, we could have classified all non-citizens who are suspected or convicted of serious criminality in a united category.

Refugee status has a functional aim by addressing the limits of “the international community to guarantee a remedy”.²¹ Shacknove asserts that individuals whose states cannot safeguard their fundamental needs, those who have no option left than “to seek international restitution of these needs” should only obtain refugee status.²² Otherwise, granting refugee status to those whose basic needs are not threatened would undermine the legitimacy of the policy. For Shacknove, the basic needs are “physical security, vital subsistence, and liberty of

¹⁵ *Ibid* at 475.

¹⁶ *Ibid* at 465.

¹⁷ *Ibid*.

¹⁸ *Ibid*.

¹⁹ Ana María Salinas de Frias, “Part I Counter-terrorism and The Rule of Law Framework” in Katja Samuel, Nigel D White & Ana María Salinas de Frias, eds, *Counter-Terrorism: International Law and Practice* (Great Britain: Oxford University Press, 2012) at 115.

²⁰ Goodwin-Gill & Jane McAdam, *supra* note 2 at 405.

²¹ Hathaway, “Forced Migration Studies”, *supra* note 8 at 353.

²² Shacknove, *supra* note 6 at 281.

political participation and physical movement.”²³ Furthermore, refugee protection provides certain civil, political, economic, and social rights as well as durable solutions such as long-term integration within a state.²⁴ In addition to permanent resettlement, refugees have access to international remedies such as material relief and asylum.²⁵ Most importantly, the principle of non-refoulement is the fundamental principle of refugee law, prohibiting states not to return any refugee to the frontiers of a country where they could face a risk of persecution. This principle provides asylum-seekers with a “trump card”, and under normal conditions, requires states to suspend their immigration control regime until the process of refugee status determination ²⁶ is finalized.

1.2. Refugee law constitutes an anomaly for states

Due to these defined conditions and the privileges that refugee law grants, it constitutes an anomaly for the sovereign nature of states, encroaching upon their *domaine réservé*. Refugee law creates an exception to the sovereignty rule, which surmises that states generally have considerable discretion to decide whom to accept into and refuse their territories. Bauman describes refugees as “collateral damages” of globalization. Once they leave their home countries, refugees are “in a legal no-man’s land and deprived of the backing of a recognized state authority that can take them under its protection, uphold their rights and intervene on their behalf with other powers. They are now stateless in a new sense of the word: they are outside all laws.”²⁷

For Lord Bingham, the 1951 Refugee Convention represents a compromise between “competing interests, [...] between the need to ensure humane treatment of the victims of oppression on the one hand and the wish of sovereign states to maintain control over those seeking entry to their territory on the other”.²⁸ Similarly, for Hathaway, “refugeehood enables the maintenance of a delicate balance between domestic policies of controlled immigration and the moral obligation of the international community to respond” to forcibly displaced persons.²⁹

²³ Shacknove, *supra* note 6 at 281.

²⁴ Betts, *supra* note 1 at 18.

²⁵ Shacknove, *supra* note 6 at 276.

²⁶ Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge: Cambridge University Press, 2011) DOI: 10.1017/CBO9780511763403 at 14.

²⁷ Reza Barmaki, “Criminals/Refugees in the Age of Welfareless States: Zygmunt Bauman on Ethnicity, Asylum and the new ‘Criminal’” (2009) 2:1 International Journal of Criminology and Sociological Theory, online: <<https://ijest.journals.yorku.ca/index.php/ijest/article/view/22246>> at 261.

²⁸ *House of Lords - Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, 2004 at para. 15.

²⁹ James C Hathaway, “The Evolution of Refugee Status in International Law: 1920-1950” (1984) 33:2 The International and Comparative Law Quarterly 348-380 at 380.

2. Restrictions on accessing the privilege

Knowing that the status of refugee grants rights to its subject, states are increasingly restricting the right to seek asylum. These restrictive policies prevent refugee claimants to make an asylum claim both inside and outside the state of asylum. Several factors explain why states form deterrence policies: the major ones being security concerns and the abuse of the refugee status determination (RSD) system.

Several studies reveal that states increasingly restrict access to refugee status. Roger Zetter asserts that although anyone has the right to claim refugee status, states increasingly restrict who can claim this status.³⁰ Due to the rise in restrictionism, refugee status, once a fundamental right under the 1951 Refugee Convention, is now “a highly privileged prize which few deserve and most claim illegally”.³¹ This restrictionism has emerged due to the fact that the 1951 Refugee Convention does not regulate admission procedures to host states. States thus have significant discretion within the limits of the law to implement complex deterrence policies such as interception and non-arrival. Restrictive policies can be divided into two categories: policies targeting those outside the territories of an asylum state and policies preventing refugee claimants to claim asylum in the territories of an asylum state.

The right to seek asylum is restricted outside the asylum state through state practices, such as visas and related controls including pre-entry clearance procedures, carrier sanctions against transportation companies, readmission agreements, detention, and international zones at airports.³² The principal legal and normative obligations of the state in this refugee regime begin when “an individual reaches the territory (or jurisdiction) of the asylum state.”³³ These deterrence policies largely affect spontaneous asylum-seekers whose ability to gain access to the territory and to lodge an asylum application is significantly hampered.³⁴ For example, many states deny individuals access to their territories and have interdicted these individuals outside their territorial jurisdiction in order not to violate certain obligations such as the principle of non-refoulement.³⁵ While the interception of refugee claimants on the high seas, and sending them to the frontiers of a country where they are likely to be persecuted, violates the principle of non-refoulement, refusing to issue a visa to those who have the well-founded fear of persecution does not violate the same principle.³⁶ Dauvergne notes that the criminalization of

³⁰ Roger Zetter, “More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization” (2007) 20:2 J Refug Stud 172–192 at 184.

³¹ *Ibid.*

³² Goodwin-Gill & Jane McAdam, *supra* note 2 at 258, 417.

³³ Betts, *supra* note 1 at 26.

³⁴ Betts, *supra* note 1 at 26.; Goodwin-Gill & Jane McAdam, *supra* note 2.

³⁵ Goodwin-Gill & Jane McAdam, *supra* note 2 at 416.

³⁶ Goodwin-Gill & Jane McAdam, *supra* note 2 at 417.

asylum is a deterrence policy of western states “to limit access to their borders to those who would seek asylum, and, for those who do make it across the border, to make the process as difficult as possible within (or even beyond) the law.”³⁷ Goodwin-Gill and McAdam argue that states which prevent individuals “seeking to leave their own country” or restrict individuals to access their asylum system may be breaching their obligation “to respect the individual’s right to leave his or her country in search of protection” as per the UDHR and the ICCPR.³⁸ By restricting access to asylum, these states also show “a lack of good faith in implementing their treaty obligations.”³⁹

States also created policies to prevent asylum-seekers who are already in their territories to claim asylum. Refugee claimants who reach the territory of a state might be barred from accessing the refugee status determination system, “or to courts and tribunals generally for the protection of their rights, or to the sources of information that ought to be the essential foundation for informed decision-making.”⁴⁰ Expedited decision making and detention procedures to process asylum claims, reduced appeal rights, “policies intended to block access to the courts by preventing asylum claims from being filed/or issuing temporary forms of protection”⁴¹ are counted as other restrictions to prevent claiming asylum.

3. Reasons to form deterrence policies

There are several reasons why states tend to form sophisticated deterrence policies. The first three reasons are relatively straightforward. First, distinguishing refugees from migrants is often unfeasible⁴² due to mixed movements of individuals. Second, migrants resort to asylum to “secure immigration status at a time when states are increasingly restricting migration opportunities, especially for poor people with limited labour market skills.”⁴³ Third, international law protects refugees, who, according to the law, hold rights to “a better and higher standard of treatment.”⁴⁴ As a result, states intentionally avoid using refugee terminology to avoid their international obligations. Refugee claimants are hence categorized as “displaced persons, ‘illegal immigrants’, ‘economic migrants’, ‘quasi-refugees’, ‘aliens’, ‘departees’, ‘boat-people’, or ‘stowaways’”.⁴⁵

³⁷ Dauvergne, *supra* note 7 at 76.

³⁸ Goodwin-Gill & Jane McAdam, *supra* note 2 at 416.

³⁹ *Ibid* at 417.

⁴⁰ *Ibid* at 416.

⁴¹ John R Campbell, “Asylum v. sovereignty in the 21st century: how nation-states breach international law to block access to asylum” (2016) 2:1 International Journal of Migration and Border Studies 24 at 28.

⁴² Dauvergne, *supra* note 7 at 77.

⁴³ Dauvergne, *supra* note 7 at 77.

⁴⁴ Goodwin-Gill & Jane McAdam, *supra* note 2 at 53.

⁴⁵ Goodwin-Gill & Jane McAdam, *supra* note 2 at 53.

3.1. Refugees are framed as threats to the security of states

One of the main reasons why restrictionism has been rising is due to the security concerns of host states aftermath of the terrorist attacks in the United States and the rest of the world.⁴⁶ As a result of these attacks, states have expanded detention grounds for non-citizens and have established stronger relations between “immigration, intelligence services and criminal law enforcement.”⁴⁷ Another side-effect of the growing securitization regime is that the exclusion provision has been implemented “more broadly than international law” had intended.⁴⁸ Satvinder Juss asserts that dominant countries in the world want to use the 1951 Refugee Convention “as a counter-insurgency instrument against those involved in armed struggles.”⁴⁹ For Chimni, the discourse around refugees has changed from burden-sharing to the language of state security. In other words, refugees are considered as threats to national security “by increasing demands on its scarce resources or threatening the security of regions by their sheer presence”.⁵⁰ As an example, Anders Olin, a Swedish citizen residing in Malmö, laments that “[w]e can’t take care of everybody...It’s a burden on the welfare state. [Refugees] become citizens after a couple of years. Then the whole family comes.”⁵¹ He is not alone; many fellow Malmö residents believe that newcomers, including Syrian and Iraqi refugees, will not embrace the liberal values of Sweden and weaken its welfare state.⁵² This shift into the language of security has deteriorated the basic principles of refugee law such as the principle of non-refoulement. States are now able to justify closing their borders or deporting refugees to the country of origin in worse conditions.⁵³

3.2. Abuse of the refugee determination system

In addition to the language of security, there is a rising discourse on the abuse of the refugee status determination system. Dauvergne observes that claiming refugee status has become equivalent to “concerns about abuse of the refugee determination system and the entry of terrorists and international criminals.”⁵⁴ Alexander Betts states that Global Northern countries seek to limit their responsibility to grant “asylum while simultaneously respecting their obligations under international law”⁵⁵, due to security concerns and the growing concerns

⁴⁶ *Ibid* at 419.

⁴⁷ *Ibid* at 419.

⁴⁸ *Ibid* at 419.

⁴⁹ Satvinder Singh Juss, “Complicity, Exclusion, and the ‘Unworthy’ in Refugee Law” (2012) 31:3 RSQ at 5.

⁵⁰ B.S. Chimni “Globalization, Humanitarianism and the Erosion of Refugee Protection” (2000) 13:3 J Refug Stud at 252.

⁵¹ “Governments need better ways to manage migration” *The Economist* (25 August 2018), online: <<https://www.economist.com/briefing/2018/08/25/governments-need-better-ways-to-manage-migration>>.

⁵² *Ibid*.

⁵³ Chimni, *supra* note 50 at 252.

⁵⁴ Asha Kaushal & Catherine Dauvergne, “The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions” (2011) 23:1 International Journal of Refugee Law 54–92 at 55.

⁵⁵ Betts, *supra* note 1 at 26.

that irregular migrants “abuse” asylum channels.⁵⁶ Some argue that the Canadian refugee determination system is systematically abused by individuals who seek to evade host country prosecution. For example, Martin Collacott argues that terrorists gain entry and avoid removal from Canada by using the refugee system.⁵⁷ For Stephen Gallagher, “the unparalleled generosity of the Canadian extended refugee system” has attracted irregular migrants to the country.⁵⁸ Refugee claimants can access “social assistance, education, health services, emergency housing and legal aid”⁵⁹ while their status is determined. Since refugee claimants can access public healthcare, Chris Alexander characterized the refugee regime in Canada as “a magnet for bogus asylum seekers.”⁶⁰ Robert S. Leiken asserted that Canada is more appealing to enter the US compared to Mexico for jihadists.⁶¹ In the report of the Fraser Institute on Canada’s response to terrorism, it is claimed that among individuals who were either deemed terrorists or suspected of being affiliated with groups such as Al-Qaeda, 16 entered Canada by claiming refugee status.⁶² Nevertheless, the author of the report contends that “the proportion of those found to be terrorists among people making refugee claims in Canada is very small.”⁶³ Thus, the arguments that suspected foreign criminals are abusing the RSD proceedings to a great extent have little credibility.

In conclusion, because refugees receive the protection of the international community, states are diligent in granting refugee status. However, the preceding paragraphs showed that this diligent approach has turned into restrictions on the right to seek asylum, preventing *bona fide* refugees to claim asylum. As discussed, the right to seek asylum is restricted for the security concerns of states of asylum, mixed status of migrants, and the higher protection threshold that refugee status provides. In addition to the language of security, there is a rising discourse of the abuse of the refugee system, which has little merits. This new discourse on refugee status can help us to understand how the criminalizing tools (e.g. the inadmissibility scheme and security certificate proceedings) are construed. Among these tools, the exclusion provision is distinctive for two main reasons. First, the exclusion provision is applicable only

⁵⁶ Betts, *supra* note 1 at 25.

⁵⁷ *Canada’s Inadequate Response to Terrorism: The Need for Policy Reform*, by Martin Collacott (Canada: The Fraser Institute, 2006).

⁵⁸ *Canada’s Broken Refugee Policy System*, by Stephen Gallagher, “Canada’s Broken Refugee Policy System” In *Immigration Policy and the Terrorist Threat in Canada and the United States* (The Fraser Institute, 2008).

⁵⁹ Government of Canada, “Claiming Asylum in Canada- What happens” available at: https://www.canada.ca/en/immigration-refugees-citizenship/news/2017/03/claiming_asylum_incanadawhathappens.html

⁶⁰ Susana Mas, “Refugee health-care reform prompts scolding of Ontario by Ottawa | CBC News”, *CBC* (23 January 2014), online: <<https://www.cbc.ca/news/politics/chris-alexander-scolds-ontario-over-health-care-to-refugees-1.2507008>>. Mas, Susana. 2014.

⁶¹ *Canada’s Inadequate Response to Terrorism: The Need for Policy Reform*, by Martin Collacott (Canada: The Fraser Institute, 2006) at 23.

⁶² *Ibid* at 28.

⁶³ *Ibid* at 28.

to refugee claimants, unlike the admissibility regime which is applicable to all foreigners. Second, the exclusion provision is a part of the 1951 Refugee Convention falling under the refugee regime, and thus, construes *lex specialis*. As mentioned above, refugees are guaranteed to receive protection from the international community. Because they have a privileged position in host states compared to other migrants, their exclusion from protection on the grounds of serious criminality should be approached differently than that of migrants. Second, the exclusion analysis is made as a part of the refugee status determination (RSD) procedure. Thus, all procedural and substantial safeguards inherited in the RSD process are applicable to the exclusion procedure. Having this background in mind, the next sections will discuss the *lex specialis* nature of the RSD process to locate the exclusion provision within it.

4. Exclusion provision as part of the RSD

The previous section argued that refugee status has a distinct place in the criminalization of migration due to the privileges it grants, and the anomaly it creates for state sovereignty. Furthermore, it analysed the states' practice to restrict access to asylum. With this in mind, the following sections will explore the place of the exclusion provision in the RSD procedure. As such, this section argues that RSD is a specific procedure construing *lex specialis* and is vital to protect the rights of refugees. The section will first analyse RSD, in general, to discuss states' duty to conduct the procedure. It will then discuss international human rights standards that the RSD procedures should contain to respect the rights of refugee claimants.

4.1. Duties of states in conducting RSD

Refugee status determination (RSD) is a legal or administrative process, which is carried out by states, or UNHCR to ascertain whether a person seeking asylum fulfills the criteria of refugee status as defined under international, regional or national law.⁶⁴ The refugee definition in the 1951 Refugee Convention comprises three parts: inclusion, cessation and exclusion. The requirements for an individual to be a refugee are defined in the inclusion clauses. Cessation and exclusion clauses have a negative impact; the cessation clause set out "conditions under which a refugee ceases to be a refugee" and the exclusion clause define "the circumstances in which a person is excluded from the application of the 1951 Convention although meeting the positive criteria of the inclusion clauses."⁶⁵

The determination of refugee status is an essential process for refugees to actualize their rights under international law.⁶⁶ RSD is a twofold process: (i) determining the relevant facts of

⁶⁴ UNHCR, "Refugee Status Determination", online: UNHCR <<https://www.unhcr.org/refugee-status-determination.html>>.

⁶⁵ UNHCR, *supra* note 9 at para 31.

⁶⁶ UNHCR, *supra* note 64.

the case is the first stage, (ii) applying the definitions in the 1951 Refugee Convention and the 1967 Protocol to the facts forms the second phase.⁶⁷ In this process, an ultimate decision lies on the adjudicator, who assesses the claim of a refugee claimant, to determine if the applicant has established well-founded fear of persecution.⁶⁸ Proof or (oral or documentary) evidence establishes the facts supporting asylum claims. The burden of proof refers to a duty to produce evidence, in order favorably prove any alleged acts.⁶⁹ UNHCR regards, as a general legal principle, that burden of proof belongs to the person submitting a claim.⁷⁰ Thus, as a principle, a refugee claimant has the burden of establishing the accuracy of her claim. Once the applicant renders “a truthful account of facts” vis-à-vis her claim, she fulfills the burden of proof.⁷¹ However, considering the complexities of the refugee determination system — including the difficulty for a refugee claimant to provide evidence, and to prove her claim — the applicant and state generally share the burden of proof.⁷² Even in the case of the shared burden of proof, the asylum applicant is expected to

- (i) [t]ell the truth and assist the examiner to the full in establishing the facts of his case.
- (ii) Make an effort to support his statements by any available evidence and give a satisfactory explanation for any lack of evidence. If necessary he must make an effort to procure additional evidence.
- (iii) Supply all pertinent information concerning himself and his past experience in as much detail as is necessary to enable the examiner to establish the relevant facts. He should be asked to give a coherent explanation of all the reasons invoked in support of his application for refugee status and he should answer any questions put to him.⁷³

Article 9 of the 1951 Refugee Convention implicitly confers a duty to member states to determine a person’s refugee status, for states to fulfill their obligations under the Convention.⁷⁴ International refugee instruments, however, do not regulate procedures relating to the refugee determination system.⁷⁵ The 1951 Refugee Convention is silent on procedures for determining refugee status and gives discretion to states to establish the procedure at the national level.⁷⁶ Some countries established specific formal procedures, and others regulate RSD as part of

⁶⁷ UNHCR, *supra* note 9 at para 29.

⁶⁸ *Note on Burden and Standard of Proof in Refugee Claims*, by UNHCR (UNHCR, 1998) at para 2.

⁶⁹ *Ibid* at para. 5.

⁷⁰ UNHCR, *supra* note 9 at para 196.

⁷¹ UNHCR, *supra* note 68 at para 6.

⁷² UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (2003) at para 105.

⁷³ UNHCR, *supra* note 9 at para 205.

⁷⁴ UNHCR, *supra* note 9 at para 189.; David James Cantor, “Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence” (2015) 34:1 *Refugee Survey Quarterly* 79–106 at 82.

⁷⁵ UNHCR, *supra* note 68 at para 2.

⁷⁶ Goodwin-Gill & Jane McAdam, *supra* note 2 at 56 and 416.; UNHCR, *supra* note 9 at para 189.

general procedures for the entry⁷⁷ of non-citizens. Other countries set up informal or ad-hoc procedures (i.e. travel documents) for the determination of refugee status.⁷⁸

The substance of RSD implies certain guiding principles.⁷⁹ The Executive Committee of the High Commissioner's Programme (EXCOM) set forth the following basic requirements that the RSD procedures should include, in order to respect the rights of refugee claimants.

- (i) The competent official (e.g., immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments. He should be required to act in accordance with the principle of nonrefoulement and to refer such cases to a higher authority.
- (ii) The applicant should receive the necessary guidance as to the procedure to be followed.
- (iii) There should be a clearly identified authority – wherever possible a single central authority – with responsibility for examining requests for refugee status and taking a decision in the first instance.
- (iv) The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR.
- (v) If the applicant is recognized as a refugee, he should be informed accordingly and issued with documentation certifying his refugee status.
- (vi) If the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system.
- (vii) The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above, unless it has been established by that authority that his request is clearly abusive. He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending.⁸⁰

Although EXCOM decisions are soft law and non-binding, these guiding principles intend to assure the neutrality of RSD in consonance with the well-established principle of equality before the law.⁸¹ Furthermore, international human rights standards might be applicable to RSD procedures. Hathaway suggests that the due process standards set out in Article 14 (1) of the ICCPR are applicable to RSD procedures.⁸² David Cantor's study on Human Rights Treaty Bodies and Refugee Status Determination demonstrates that regional and

⁷⁷ UNHCR, *supra* note 9 at para 191.

⁷⁸ *Ibid.*

⁷⁹ UNHCR, *supra* note 9 at para 192.

⁸⁰ Addendum to the report of the United Nations High Commissioner for Refugees: report of the 28th session of the Executive Committee of the High Commissioner's Programme, Official Records of the General Assembly, Thirty-second Session, Supplement No. 12 (A/32/12/Add.1), para. 53 (6) (e).

⁸¹ Cantor, "Reframing Relationships", *supra* note 74 at 83.

⁸² James C Hathaway, *The Rights of Refugees under International Law* (2005) at 652–656 DOI: 10.1017/CBO9780511614859 at 647-649.

international human rights treaty bodies apply certain human rights instruments to the procedural part of RSD. The following paragraphs summarize the practice of regional and international human rights treaty bodies' application of human rights to the RSD procedure.

The Human Rights Committee (HRC) suggests that in case the RSD procedure concerns determining the risk of serious harm within the meaning of Article 6 or 7 of the ICCPR, some procedural standards apply to the process.⁸³ The HRC's view is pertinent to cases in which a foreigner might be expelled to a country where her right to life under Article 7, or right to be free from torture, or to cruel, inhuman or degrading treatment or punishment, is at stake.⁸⁴ Besides, refugee claimants should be able to challenge "first-instance decisions to an independent body"⁸⁵ by virtue of Article 2(3) of ICCPR. Thus, the HRC considers the right to appeal vis-à-vis asylum decisions within the context of the state's duty to provide an effective remedy for human rights violations.⁸⁶ Likewise, the ECtHR regards that refugee claimants should be able to appeal the decisions rendered by administrative authorities. Analyzing ECtHR's jurisprudence, Cantor wrote that in case of expulsion, "[t]he appeal procedure must always have automatic suspensive effect".⁸⁷ In addition, to the extent that a refugee claimant faces serious challenges to access "a procedure competent to carry out individualised assessment of" applications, or in case of the lack of procedure, the Applicant's right to an effective remedy by virtue of Article 13, and right to be free from torture by virtue of Article 3 might be violated.⁸⁸

The African Commission of Human and Peoples' Rights applies standards of the right to a fair trial, set out in Article 7(1) of the African Charter on Human and Peoples' Rights, to decisions concerning the admission, stay and expulsion of foreigners.⁸⁹ The Inter-American Commission on Human Rights notes that international refugee law renders a refugee claimant the right to a hearing, to determine her refugee status.⁹⁰ Importantly, the Inter-American Commission Human Rights, and Inter-American Court of Human Rights consider RSD "as a process that attracts procedural guarantees in its own right, regardless of any immediate or eventual risk of refoulement."⁹¹

⁸³ Cantor, "Reframing Relationships", *supra* note 74 at 87.

⁸⁴ Cantor, "Reframing Relationships", *supra* note 74 at 87.

⁸⁵ *Ibid* at 88.

⁸⁶ *Ibid* at 88.

⁸⁷ Cantor, "Reframing Relationships", *supra* note 74 at 93.

⁸⁸ *Ibid* at 92. ECtHR, *Hirsi Jamaa and Others v. Italy* (Judgment) (2012) Application No. 27765/09, para. 202 and ECtHR, *MSS v. Belgium and Greece*, para. 301.

⁸⁹ Cantor, "Reframing Relationships", *supra* note 74 at 94.

⁹⁰ Cantor, "Reframing Relationships", *supra* note 74 at 98.

⁹¹ *Ibid* at 105.

Overall, the jurisprudence shows that certain provisions under international human rights law are applicable to the RSD procedures, varying from region to region. These provisions include the right to an effective remedy, the right to a hearing, the right to appeal, and the right to a fair trial.

4.2. History of the exclusion provision: Article 1F was diligently contemplated

The previous section demonstrated that the RSD procedure must respect certain international human rights standards, to actualize the rights of refugee claimants. These standards include the right to an effective remedy, the right of the refugee claimant to a hearing, the right to appeal, and the right to a fair proceeding. Human rights and procedural rights are applicable to the RSD process which makes the process itself more privileged. Thus, the format of RSD is key to protecting the rights of refugees.

Respecting certain human rights and procedural rights, the RSD procedure is *lex specialis*. Although the procedure is not firmly established, some basic rights are granted to refugees to actualize their rights under the 1951 Refugee Convention. The implementation of the exclusion provision is a part of the RSD process. As a result, all human rights and procedural standards that are applicable to the RSD procedure are in the same way applicable to the exclusion provision. Having established the special nature of the exclusion provision, the following paragraphs will discuss the history of the exclusion provision to establish how states initially intended to use it.

Refugee claimants can be excluded from international protection based on criminal and non-criminal grounds. According to Article 1E of the 1951 Refugee Convention, an individual is ineligible to obtain refugee status in case he “is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country”.⁹² Article 1D excludes from refugee protection individuals who already receive protection or assistance from the organs of the United Nations other than the United Nations High Commissioner for Refugees.⁹³ Today, Article 1D is applicable to the cases of “Palestinians who are refugees as a result of the 1948 or 1967 Arab-Israeli conflicts, and who are receiving protection or assistance from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).”⁹⁴

Refugee status can also be ceased. In case a refugee (i) voluntarily re-availed herself of her native country's protection, (ii) voluntarily re-acquire her nationality, (iii) acquired a new

⁹² Article 1E of the 1951 Refugee Convention

⁹³ Article 1D of the 1951 Refugee Convention

⁹⁴ *Applicability of Article 1D of the 1951 Refugee Convention to Palestinian Refugees - UNHCR Note*, by UNHCR (2002) at para 1.

nationality and enjoys the protection of her new nationality, (iv) voluntarily re-established herself in the country which she fled, (v) can avail herself of her native country's protection, or the country of her former habitual residence because the reasons for her plight have ceased to exist, she will lose the protection.⁹⁵

Article 1F governs the legal status of refugee claimants whose act is considered to exclude them from refugee protection on the grounds of criminality. Articles 1D and 1E disqualify individuals from obtaining refugee protection because they already benefit from a sort of protection. In contrast, Article 1F exclusion is due to a person's criminal acts, not because the alternative protection is available.⁹⁶

Article 1F is further regulated in regional documents. The 1969 Convention on the Specific Aspects of Refugee Problems in Africa (OAU Convention) adopted the same wording of Article 1F. The OAU Convention also adds acts contrary to the purposes and principles of the OAU as grounds for exclusion from protection.⁹⁷ In contrast, the Cartagena Declaration does not regulate exclusion on criminality grounds.⁹⁸

The history of the exclusion provision is widely discussed in academia. Notably, Satvinder Juss observes that the term exclusion from refugee status is not written anywhere in the 1951 Refugee Convention. Although the word exclusion has been widely used to describe Article 1F, “this unhappy term does not appear”⁹⁹ in the 1951 Refugee Convention. Article 1F solely articulates that the 1951 Refugee Convention shall not apply to individuals who are suspected of crimes therein. Satvinder Juss argues that using the term exclusion conveys a wrong message about the 1951 Refugee Convention, which “is fundamentally about protecting people — not about ‘excluding’ people from protection.”¹⁰⁰ Instead, Juss uses the word dis-apply to articulate the content of Article 1F.

4.2.1. Predecessors of Article 1F: Criminal refugees were not welcomed in the 16th century

The idea of excluding criminals from the scope of asylum was debated in early history, well before the forerunners of Article 1F in the 20th century. Having been a refugee himself, Hugo Grotius considered that “‘victims of unmerited persecution’ or suppliants had a right to

⁹⁵ Article 1C of the 1951 Refugee Convention.

⁹⁶ Michael Kingsley Nyinah, “Exclusion Under Article 1F: Some Reflections on Context, Principles and Practice” (2000) 12:suppl_1 Int J Refugee Law 295–316 at 296.

⁹⁷ Article 5(C) of the OAU Convention.

⁹⁸ Joseph Rikhof, *The Criminal Refugee: The Treatment of Asylum Seekers with a Criminal Background in international and domestic law* (Dordrecht: Republic of Letters, 2012) at 23.

⁹⁹ Juss, *supra* note 49 at 7.

¹⁰⁰ Juss, *supra* note 49 at 8.

asylum and favourable treatment”¹⁰¹ under specific conditions. This right, however, does not extend to individuals “who had committed crimes injurious to mankind and destructive to society.”¹⁰² Having accepted the fundamental “rights of a banished or exiled person to live elsewhere”, Vattel believed that individuals, who constituted public security threats due to their personality and prevalence of their crimes, and who declare “themselves enemies of the whole human race”, should be excluded from the scope of asylum. For him, these individuals include assassins, poisoners, pirates and incendiaries.¹⁰³

4.2.2. The interwar period: exclusion on criminality grounds came into existence

The first normative exclusion clauses can be traced back to the period between the first and second world wars. Three instruments regulating the exclusion from refugee protection on criminality or security grounds were (i) the Convention of 28 October 1933 relating to the International Status of Refugees, (ii) resolutions adopted by the United Nations Relief and Rehabilitation Administration (UNRRA), and (iii) the Constitution of the International Refugee Organization.

Article 2 of the Convention of 28 October 1933 relating to the International Status of Refugees refers to holders of Nansen certificates without defining refugee.¹⁰⁴ According to Article 3 of this Convention, refugees shall not be refouled other than the national security or public order grounds.¹⁰⁵ The Convention related to German refugees included a similar exception to the principle of non-refoulement, “for national security or public order.”¹⁰⁶ Yet, these provisions were limited in their scope and only applicable vis-à-vis the principle of non-refoulement. The first general exclusion clauses can be found in resolutions adopted by the UNRRA, which was established to address the needs of displaced persons in Europe by 44 allied nations in 1943.¹⁰⁷ Accordingly, enemy collaborators and individuals suspected of crimes against the interests or nationals of the United Nations were ineligible to receive assistance from the UNRRA.¹⁰⁸

Later, the Constitution of the International Refugee Organization (IRO), adopted by the UN General Assembly in 1946, provided a more detailed description of individuals ineligible

¹⁰¹ Rikhof, *supra* note 97 at 23.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Convention Relating to the International Status of Refugees*, 1933. Rikhof, *supra* note 98 at 37.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ Rikhof, *supra* note 98 at 38.

¹⁰⁸ Para. 2(a) of Resolution 71 on the “Functions of the Administration with Respect to Displaced Persons”, adopted at the third session of the Council of the UNRRA in August 1945. Andreas Zimmermann & Felix Machts, eds, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011) at 583.

to receive protection. The IRO was founded to address the immediate needs of more than one million persons and carried out its duties between 1947 and 1952.¹⁰⁹ According to Part I, Section A (2) of the IRO's constitution; war criminals, quislings¹¹⁰ and traitors are excluded from the refugee protection.¹¹¹ Part II further elaborates on the exclusion for criminality grounds. Accordingly, the refugee protection was not extended to (i) individuals who assisted the enemy in persecuting civilians in member states, or who voluntarily helped the enemy forces in their operations against the UN starting from the second world¹¹², (ii) ordinary criminals who are extraditable by treaty¹¹³, (iii) individuals who participated in any terrorist organization, or who were leaders of movement hostile to their government or other member states, (iv) individuals in the military or civil service of a foreign state.¹¹⁴

The IRO Constitution, later included in Annex III of a resolution of the UN General Assembly (GA), considered that “(d) no action taken as a result of this resolution shall be of such a character as to interfere in any way with the surrender and punishment of war criminals, quislings and traitors, in conformity with present or future international arrangements and agreements.”¹¹⁵

The Universal Declaration of Human Rights adopted in 1948 also enunciates a ground for exclusion. The second paragraph of Article 14 invokes the right of asylum “in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations”.¹¹⁶

Following the adoption of the UDHR, the General Assembly of the UN established the High Commissioner's Office for Refugees, which started its operation on 1 January 1951. When the UNGA adopted the Statute of the Office of the United Nations High Commissioner for Refugees on 14 December 1950, it included an explicit exclusion clause. Provision 7 (d) of the UNHCR Statute excludes from protection a person against whom

there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in article VI of the London

¹⁰⁹ Rikhof, *supra* note 98 at 41.

¹¹⁰ “Quislings are generally understood to be persons who, while occupying high public office, have committed acts which amount to treason under the laws of their respective countries of origin, and in doing so, have acted in that office under the direction- or in coordination with- the enemy. In other words, quislings were leaders of key men of governments or semi-governmental organizations, which were in sympathy with and actually helped the Nazis.” International Refugee Organization, *Manual for Eligibility Officers* (United Nations Relief and Rehabilitation Administration, 1947) at para 14.

¹¹¹ *Ibid* at Part I, Section A (2).

¹¹² *Ibid* at Part II, 2 (a) and 2 (b).

¹¹³ *Ibid* at Part II, 3.

¹¹⁴ *Ibid* at Part II, 6.

¹¹⁵ United Nations High Commissioner for Refugees, *Refugees and Displaced Persons* (UNHCR, 1946).

¹¹⁶ Article 14 of the UDHR.

Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights.¹¹⁷

4.2.3. Deliberations of Article 1F during the drafting period of the 1951 Refugee Convention

a) Discussions during the ECOSOC meetings

The early draft of the 1951 Refugee Convention was prepared by the Ad hoc Committee on Statelessness and Related Problems, which was established by the United Nations Economic and Social Council (ECOSOC). The Committee was vested to analyse draft resolutions from different countries to prepare a draft convention. The draft convention was later submitted to ECOSOC.¹¹⁸ The draft version of the 1951 Refugee Convention formed the basis of debates during the Conference of Plenipotentiaries held in Geneva from 2-25 July 1951.

For the first time excluding war criminals from the benefits of the 1951 Refugee Convention was discussed during the initial session of the Ad hoc Committee on Statelessness and Related Problems in January-February 1950.¹¹⁹ The French representative proposed to deny refugee status to any person falling under the scope of Article 14(2) of the UDHR.¹²⁰ France particularly described that recognizing war criminals as refugees is “intolerable.”¹²¹ The Ad Hoc Committee on Statelessness and Related Problems later adopted the following provision similar to Provision 7 (d) of the UNHCR Statute.

No Contracting State should apply the benefits of this Convention to any person who in its opinion has committed a crime specified in Article VI of the London Charter of the International Military Tribunal or any other act contrary to the purposes and principles of the Charter of the United Nations.¹²²

During the deliberations, some states¹²³ expressed concerns that the wording of the exclusion “was too vague so that it could be open to abuse”.¹²⁴ The Canadian delegation opposed to using the wording of “any other act contrary to the purposes and principles of the Charter of the United Nations”, since “[t]hat was an extremely vague and wide provision which

¹¹⁷ *Statute of the Office of the United Nations High Commissioner for Refugees*, 1950.

¹¹⁸ Rikhof, *supra* note 98 at 51.

¹¹⁹ Goodwin-Gill & Jane McAdam, *supra* note 2 at 198.; Zimmermann, *supra* note 108 at 584.

¹²⁰ Zimmermann, *supra* note 108 at 584.

¹²¹ Statement of Mr. Rain of France *Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Fifth Meeting Held at Lake Success, New York, on Wednesday, 18 January 1950, at 2.15 p.m.*, 1950 at 16.

¹²² *Report of the Ad Hoc Committee on Statelessness and Related Problems, Lake Success, New York, 16 January to 16 February 1950*, by UN Ad Hoc Committee on Statelessness and Related Problems, E/1618 E/AC.32/5 (New York: UN Ad Hoc Committee on Statelessness and Related Problems, 1950) at 13.

¹²³ These countries include Canada, Pakistan, the United Kingdom, Mexico.

¹²⁴ Rikhof, *supra* note 98 at 53.

might obviously lay itself open to much abuse”.¹²⁵ The French delegate stated that any other act contrary to the purposes and principles of the Charter of the United Nations in the provision did not target ordinary persons but “persons occupying government posts, such as head of states, Ministers, and high officials.”¹²⁶

The final version was adopted by the ECOSOC as follows: “[n]o contracting State shall be obliged, under the provisions of this Convention, to grant refugee status to any person whom it has serious reasons to consider as falling under the provisions of Art. 14 (2) of the Universal Declaration of Human Rights.”¹²⁷

b) Discussions during the Conference of Plenipotentiaries

As the ECOSOC meetings could not result in an agreement for a convention, the UN Conference of Plenipotentiaries was convened in Geneva in July 1951. The Conference eventually adopted the 1951 Refugee Convention on 25 July 1951. The following text was the preliminary version of Article 1F that was discussed during the conference.

The provisions of the present Convention shall not apply to any person with respect to whom there are serious reasons to considering that (a) he has committed a crime specified in article VI of the London Charter of the International Military Tribunal; or, (b) he falls under the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights.¹²⁸

France rightfully argued that “[t]here were so many bona fide refugees that it was important not to allow any confusion between them and ordinary common-law criminals.”¹²⁹ Likewise, Germany asserted that the main objective of Article 1F was to exclude criminals from the protection so that “they should not be placed on an equal footing with bona fide refugees.”¹³⁰ Finally, the working group on Article 1F recommended Article 1F(a) to have phrased as including crimes against peace, war crimes, and crimes against humanity.¹³¹

b.1. Discussions on Article 1F (b)

During the conference, the primary concern of states was directed towards the exclusion of war criminals from the protection of the draft refugee convention.¹³² Goodwin-Gill and

¹²⁵ *Social Committee : summary record of the 165th meeting held at the Palais des Nations, Geneva, on Saturday, 5 August 1950*, by United Nations Economic and Social Council, [digitallibrary.un.org](https://digitallibrary.un.org/record/696440), E/AC.7/SR.165 (United Nations Economic and Social Council, 1950) at 23.

¹²⁶ *Social Committee : summary record of the 166th meeting held at the Palais des Nations, Geneva, on Monday, 7 August 1950*, by United Nations Economic and Social Council, [digitallibrary.un.org](https://digitallibrary.un.org/record/696440), E/AC.7/SR.166 (United Nations Economic and Social Council, 1950) at 6.

¹²⁷ Zimmermann, *supra* note 108 at 586.

¹²⁸ Zimmermann, *supra* note 108 at 586.

¹²⁹ Statement of Mr. Rochefort of France, “Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons : summary record of the 24th meeting, held at the Palais des Nations, Geneva, on Tuesday, 17 July 1951” (1951) A/CONF.2/SR.24 United Nations Digital Library System, online: <<https://digitallibrary.un.org/record/696440>>.

¹³⁰ Statement of Mr. von Trützschler of Germany, *ibid*.

¹³¹ Zimmermann, *supra* note 108 at 587.

¹³² Goodwin-Gill & Jane McAdam, *supra* note 2 at 208.

McAdam note that the *travaux préparatoires* of the 1951 Convention do not answer “questions relating to the general exclusion of criminals from the benefits of refugee status.”¹³³ Yet, there were some debates as to whether the exclusion provision should comprise suspected common-law criminals.

The British delegate objected to any reference to Art. 14 (2) of UDHR since excluding them from protection would be quite arbitrary and unjustifiable. In return, France firmly opposed the proposal on the grounds that agreeing “to drop the limiting clause in the case of common-law criminals”¹³⁴ would be impossible. The French representative maintained that differentiating between bona fide refugees and criminals is imperative “in the article defining the term ‘refugee’”.¹³⁵ A consensus was reached to include only serious crimes committed prior to the entry. It was due to the UK’s concern that “prior to the entry” was added; otherwise, Article 1F “could be used to exclude refugees after their admission to a receiving country and possibly for trivial offences”.¹³⁶

Although there were discussions as to whether “the crime” mentioned in Art. 1F (b) is an extraditable one, the drafters finally omitted any reference to crimes of having extraditable nature.¹³⁷ Hathaway and Foster argue that the reason for this omission was “not everyone who has committed an extraditable crime should be deemed unworthy of refugee protection”.¹³⁸

As a final note, the purpose of Article 1F (b) is not the protection of the country of asylum from a danger that a refugee might pose. Article 1F (b) does not allow countries of asylum “to exclude peremptorily asylum seekers in the exercise of security-based discretion.”¹³⁹ Security-based concerns of the country of asylum is regulated under Article 33 of the 1951 Refugee Convention.

b.2. Discussions on Article 1 F (c)

The final version of Article 1F (c) was proposed by the Yugoslav representative. During the discussions, the UK representative questioned the difficulty of defining acts contrary to the purpose and principles of the UN, and assumed that these acts comprise “war crimes, genocide,

¹³³ Goodwin-Gill & Jane McAdam, *supra* note 2 at 208.

¹³⁴ *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Twenty-fourth Meeting*, 1951 at 5.

¹³⁵ Statement of Mr. Rochefort of France, , “Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons”, *supra* note 129.

¹³⁶ Zimmermann, *supra* note 108 at 588. [footnotes omitted].

¹³⁷ Zimmermann, *supra* note 108 at 588.

¹³⁸ James C Hathaway & Michelle Foster, *The Law of Refugee Status* (Cambridge: Cambridge University Press, 2014) DOI: 10.1017/CBO9780511998300 at 541.

¹³⁹ James C Hathaway & Colin J Harvey, “Framing Refugee Protection in the New World Disorder” (2001) 34:2 *Cornell Int’l L J* 257–320 at 273.

and subversion or overthrow of democratic regimes.”¹⁴⁰ Canada, Pakistan and Mexico expressed concern that the term — any other acts contrary to the purpose and principles of the Charter of the UN — were so ambiguous that they might be abused “by governments wishing to exclude refugees.”¹⁴¹ The Mexican representative stated that “there had been instances in which tyrants had imprisoned their political enemies on the pretext that they were enemies of democracy and of the United Nations.”¹⁴²

The following text of what was to become Art. 1 F (c) was adopted by 22 votes to none, with two abstentions: “he has committed an act contrary to the purposes and principles of the United Nations.”¹⁴³ In the final phase, no change was made to the Style Committee’s text on the whole article, which “was adopted by 18 votes to one, with one abstention.”¹⁴⁴ As a final note, making reservations to Article 1F is not possible as per paragraph 1, Article 42 of the 1951 Refugee Convention.

The implementation of Article 1F is mandatory for states. During the discussions, the United States¹⁴⁵ supported the idea that allowing the entry of serious criminals to a country of asylum should be at the discretion of the state. In return, France and Israel¹⁴⁶ opposed the idea on the grounds that the application of Article 1F should be compulsory.¹⁴⁷ As such, the final text of Article 1F imposes a duty to states to enforce the exclusion provision. Considering the history of the exclusion provision, Hathaway and Foster argue that “the *integrity and viability of refugee law as a whole* require that no such person be recognized as a *Convention refugee*”.¹⁴⁸ That is to say, although a state might allow the stay of a person falling under the scope of Article 1F in its territory by relying on sovereignty it cannot grant her refugee status.¹⁴⁹

¹⁴⁰ *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Twenty-fourth Meeting*, 1951.

¹⁴¹ *Social Committee: summary record of the 160th meeting held at the Palais des Nations*, by Social Committee, digitallibrary.un.org, E/AC.7/SR.160 (New York, 1950) at 16.

¹⁴² *Ibid* at page 19.

¹⁴³ Zimmermann, *supra* note 108 at 588.

¹⁴⁴ Zimmermann, *supra* note 108 at 588.

¹⁴⁵ Mr. Henkin, *Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Seventeenth Meeting Held at Lake Success, New York*, by UN Ad Hoc Committee on Refugees and Stateless Persons, digitallibrary.un.org, E/AC.32/SR.17 (UN Ad Hoc Committee on Refugees and Stateless Persons, 1950) at 39.

¹⁴⁶ Mr. Robinson of Israel, *ibid* at 38. Statement of Mr. Rain of France, *Ad Hoc Committee on Statelessness and Related Problems, 1st session: summary record of the 18th meeting held at Lake Success, New York, on Tuesday, 31 January 1950*, by UN Ad Hoc Committee on Refugees and Stateless Persons, digitallibrary.un.org, E/AC.32/SR.18 (New York: UN Ad Hoc Committee on Statelessness and Related Problems, 1950) at 5.

¹⁴⁷ Hathaway & Michelle Foster, *supra* note 138 at 528.

¹⁴⁸ Hathaway & Michelle Foster, *supra* note 138 at 528. [emphasis in original]

¹⁴⁹ Hathaway & Colin J. Harvey, *supra* note 139 at 264.

4.2.4. The relationship between Article 33 (2) of the Convention and Article 1F

Article 33 (2) of the 1951 Refugee Convention provides an exception to the prohibition of refoulement by entitling host states to return refugees, who pose a danger to their security, to face a risk of persecution in their country of origin. Article 33 (1) set forth that states cannot return a refugee “to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”. Constituting an exception to the rule, the second paragraph articulates that a refugee can be returned to a country in violation of non-refoulement if there are reasonable grounds to believe that he is a danger to the security of the asylum country, or he is “convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”

Although both Article 33 (2) and Article 1F govern a degree of criminality, their scope of application is quite distinct. Article 1F excludes individuals from refugee status while Article 33 (2) excludes refugees from the protection of *refoulement*.¹⁵⁰ The rationale of Article 1F is not about the state’s security concerns, which are separately regulated under Article 33 (2) of the 1951 Refugee Convention.¹⁵¹ A host state can expel a refugee posing a security risk, to the frontiers of a country where she could be persecuted, provided that “the risk to national security or communal safety is established on the basis of a more demanding standard of proof”.¹⁵²

In contrast, Article 1F allows states to deny refugee status only to individuals who are suspected of past criminality. In the decision of *Bundesrepublik Deutschland v. B and D*, the European Court of Justice decided that “any danger which a refugee may currently pose to the Member State concerned”¹⁵³ is considered not under the exclusion provision within the relevant EU Directive, but under Article 33 (2) of the 1951 Geneva Convention. Yet, several studies have revealed that asylum states rely on Article 1F instead of Article 33 (2) since the former allows the state to relinquish its usual responsibility to determine refugee status and to deny refugee status on the basis of a lower standard of proof.¹⁵⁴

Invoking Article 1F for safety and security reasons that should only trigger the application of Article 33 (2), states fail to comply with international refugee law and disturb the delicate balance “between refugee rights and asylum-state interests.”¹⁵⁵

¹⁵⁰ Zimmermann, *supra* note 108 at 590.

¹⁵¹ Juss, *supra* note 49 at 8; Hathaway & Colin J. Harvey, *supra* note 139 at 264.

¹⁵² Hathaway & Colin J. Harvey, *supra* note 139 at 260.

¹⁵³ *Bundesrepublik Deutschland v B (C-57/09) and D (C-101/09)*, [2010] 2010 I-10979 European Court Reports at 101.

¹⁵⁴ Hathaway & Colin J. Harvey, *supra* note 139 at 264.

¹⁵⁵ Hathaway & Colin J. Harvey, *supra* note 139 at 260.

Conclusion of Chapter II

This chapter argued that refugee status has a distinctive place in migration policies. As part of the 1951 Refugee Convention, the exclusion provision falls under the refugee regime, thus, establishing it as *lex specialis*. As discussed, refugees are guaranteed to receive the protection of the international community. Because they have a privileged position in host states compared to other migrants, their exclusion from refugee protection on the grounds of serious criminality should be approached differently than that of migrants. Exclusion decisions are made as a part of the refugee status determination (RSD) procedure. Thus, all procedural and substantial safeguards inherited in the RSD process are applicable to the exclusion procedure. Having established the special nature of the exclusion provision, this Chapter then analysed the history of the provision to understand how states initially intended to use it.

As the *travaux préparatoires* reveal, the words describing acts in Article 1F were carefully chosen by the delegates. Notably, delegates expressed a concern that the vague wording could be abused by governments wishing to exclude refugees. This concern accounts for why the word “serious” was added to Article 1F (b) crimes. It is also the reason why there were long deliberations over the wording of “any other acts contrary to the purpose and principles of the Charter of the UN” in Article 1F (c). Can we see the same diligent approach behind other securitizing instruments such as the inadmissibility scheme? Bearing this question in mind, Chapter III addresses how the exclusion provision differs from other securitizing instruments, particularly the inadmissibility scheme in Canada, and explains why such a distinction matters. Chapter III will also test the hypothesis of this thesis: whether Canada and the Netherlands resort to Article 1F to punish refugee claimants for the suspected acts laid down in Article 1F.

Chapter III: Article 1F used to punish refugee claimants - Cases of Canada and the Netherlands

Introduction

This chapter addresses whether states resort to Article 1F to punish refugee claimants for the suspected acts laid down in Article 1F. Since the Article 1F adjudication process requires adjudicators to interpret and apply the criminal law provisions, states might be utilizing information gathered in a refugee adjudication process for the prosecution of foreigners.

After introducing the emerging practice of the heightened collaboration between the states' immigration offices and their respective justice departments to prosecute refugee claimants, the first part of this chapter will examine whether Canada uses Article 1F for punitive ends. As to be analyzed further, Continental European legal systems do not interpret the distinction between administrative and criminal law as strictly as Anglo-American legal systems. As such, the second part continues with the analysis of how, a European state, the Netherlands is resorting to Article 1F for punitive ends. Based on the European Court of Human Rights (ECtHR)'s decision on *H. and J. v the Netherlands*, the second part will argue that the use of refugee claimants' testimony in a subsequent criminal proceeding violates the right not to incriminate oneself to conclude that the ECtHR and the Netherlands mostly do not consider the waiver of the right not to incriminate oneself in relation to asylum seekers.

I. The emerging practice to use refugee law for punitive ends

This part argues that there is an emerging practice of heightened collaboration between the states' immigration offices and their respective justice departments to prosecute individuals who are excluded from refugee protection based on Article 1F crimes. As a result, states gradually began to resort to immigration proceedings for an unintended purpose: to punish serious international non-political crimes.¹

The intersection of refugee law and criminal law has been subject to academic debate. According to Catherine Dauvergne, the developments in international criminal law, which emerged as a result of the trials held in the International Criminal Tribunals for Former Yugoslavia (ICTY) and Rwanda in the 1990s, are directly transposed into refugee law.² During the drafting period of the 1951 Refugee Convention, specific rules concerning war crimes, crimes against humanity, and crimes against peace were not foreseeable. It was not yet known

¹ Asha Kaushal & Catherine Dauvergne, "The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions" (2011) 23:1 Int J Refug Law 54-92 at 58.

² *Ibid* at 3.

that the legal interpretations of the ICTY, the International Criminal Tribunal for Rwanda, and the International Criminal Court would significantly affect refugee law. Specifically, the seminal interlocutory decision of the *Tadic*³ was not foreseeable in 1951. It was with the *Tadic* case that the violations of war crimes began to include acts committed both in international and non-international armed conflicts.⁴ At the time that the 1951 Refugee Convention was drafted, war crimes were only considered within the meaning of international armed conflict.⁵ Additional Protocols I and II of the Geneva Conventions, which for the first time provided detailed humanitarian rules applicable to non-international armed conflicts, were also adopted on 8 June 1977.⁶ Particularly, Additional Protocol I regulates individual criminal responsibility such as a command or superior responsibility.⁷ These developments in international criminal and humanitarian law have had a significant impact on the implementation of Article 1F. For example, following the *Tadic* case, UNHCR considers crimes committed during the Kurdish Civil War in Iraq, as well as during the armed conflict between the Iraqi Security Forces and Multi-National Forces, and insurgent groups after 2004 within the meaning of war crimes section of the exclusion provision.⁸

These developments occurred after the adoption of the 1951 Refugee Convention, and, within the context of international criminal law, were transposed into refugee law without considering the adverse effects. First, the punitive approach is now used in the interpretation of the exclusion provision. This means criminal law concepts are selectively embedded into refugee law. A refugee claimant suspected of Article 1F crimes is heavily subjected to the criminal law mechanisms in an administrative law without the corresponding protection of the rights of the defense.⁹ As an example, courts do not consider in exclusion cases the high standard of proof required by criminal law.¹⁰ Excluding a refugee claimant on the basis of a much lower standard of “serious reasons to consider”, which is even lower than the civil standard of the balance of probabilities, is sufficient.¹¹ Second, states gradually began to resort

³ *Prosecutor v Duska Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, 1995 International Criminal Tribunal for the former Yugoslavia (ICTY).

⁴ UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (2003) at 11, n 22.

⁵ *Ibid* at 11.

⁶ ICRC, “Protocols I and II additional to the Geneva Conventions - ICRC”, (1 January 2009), online: ICRC <<https://www.icrc.org/en/doc/resources/documents/misc/additional-protocols-1977.htm>>.

⁷ Kai Ambos, “Development of International Criminal Law and Tribunals” in *Encycl Criminol Crim Justice* (Springer, New York, NY, 2014) 1030 DOI: 10.1007/978-1-4614-5690-2_576.

⁸ *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Iraq*, by United Nations High Commissioner for Refugees, HCR/EG/IRQ/12/03 (UNHCR, 2012) at 145.

⁹ Kaushal & Catherine Dauvergne, *supra* note 1 at 58.

¹⁰ *Ibid*.

¹¹ *Ibid*.

to administrative mechanisms to “punish” serious international non-political crimes.¹² As mentioned in the Introduction, as of 2010, ten countries in the developed world had set up units or initiated relevant specialized procedures within their immigration services to work on serious international crime cases.¹³

Some researchers assert that the collaboration between criminal law and refugee law is indeed desirable. Notably, Joseph Rikhof supports the idea of establishing war crimes units within the immigration department of states. In his article analyzing how Australia, Canada, New Zealand, the United Kingdom, and the United States deal with foreigners who have been involved in genocide, war crimes, and crimes against humanity, Rikhof concluded that the five countries “utilized the basic concepts of international criminal law” similarly.¹⁴ In relation to refugee law, “four of these five countries were in the top ten refugee receiving countries in 2006”.¹⁵ In most cases, their decisions are based on international jurisprudence and even contributed to the development of international criminal law. Rikhof hopes that “they will also continue their cooperation, as well as the cross-fertilization of each other’s case law, to ensure that war criminals will feel even less welcome”.¹⁶ In his most recent article, Rikhof explored “how far the possibility of criminal prosecutions can be considered a viable alternative for those persons who cannot be removed from the country of refuge”.¹⁷ European and North American countries mostly used universal jurisdiction options for international crimes of genocide, war crimes, crimes against humanity, and torture that mostly overlap with Article 1F(a) criminality. 15 countries in Europe use universal jurisdiction for common crimes. The results are striking; in the majority of cases, an individual was prosecuted for direct involvement in a low-level capacity for the crimes of torture, genocide, war crimes, and crimes against humanity. On the other hand, 700 individuals were excluded from international protection in the Netherlands between 2000 and 2008. Countries started “only four prosecutions involving five persons...for extra-territorial crimes” and just two cases resulted in a conviction.¹⁸ As Rikhof points out, this number corresponds to “just over half of one percent of the Article 1F population in the Netherlands had proceedings initiated against them”¹⁹ between 2000 and 2008. Furthermore,

¹² *Ibid.*

¹³ Redress & FIDH, *Strategies for the Effective Investigation and Prosecution of Serious International Crimes: The Practice of Specialized War Crimes Units* (2010) at 2 n 1.

¹⁴ Joseph Rikhof, “War Criminals Not Welcome; How Common Law Countries Approach the Phenomenon of International Crimes in the Immigration and Refugee Context” (2009) 21:3 Int J Refug Law 453–507 at 454.

¹⁵ Joseph Rikhof, “War Criminals Not Welcome; How Common Law Countries Approach the Phenomenon of International Crimes in the Immigration and Refugee Context” (2009) 21:3 Int J Refug Law 453–507 at 454.

¹⁶ *Ibid* at 507.

¹⁷ Joseph Rikhof, “Prosecuting Asylum Seekers Who cannot be Removed A Feasible Solution” (2017) 15:1 J Int Crim Justice 97–113 at 100.

¹⁸ *Ibid* at 111.

¹⁹ *Ibid* at 111.

the Netherlands started prosecution against just “1.4 percent of excluded caseload”²⁰ between 2000 and 2016. Despite the extremely low level of prosecutions, Rikhof concludes that “this effort should not be abandoned” since a few prosecutions might have a deterrent effect “on the choice of perpetrators fleeing their crimes to enter, remain or seek asylum in a country that prosecutes such international crimes.”²¹

In practice, since 2003, the European Union (EU) has embraced the punitive approach to immigration law. The EU Council decision dated 8 May 2003 stipulates that

[m]ember states should ensure that law enforcement authorities and immigration authorities have the appropriate resources and structures to enable their effective cooperation and the effective investigation and prosecution of genocide, crimes against humanity and war crimes.²²

Following the EU Council’s decision, many EU member-states initiated collaboration between the countries’ immigration offices and their respective prosecution services to prosecute migrants and refugee claimants who are suspected of having committed certain crimes.²³

In Canada, Article 1F is regulated under section 98 of the Immigration and Refugee Protection Act (IRPA), which provides that a person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection. The Immigration and Refugee Board (IRB) is “the body that employs a jurisprudence of exclusion” in Canada.²⁴ The Minister of Citizenship and Immigration generally raises the exclusion issue at the IRB on the basis of the previous affiliations of a refugee claimant with an organization or “the nature of the claimant’s crimes”.²⁵ The statements of the refugee claimant together with other evidence are considered by the Board in a non-adversarial process. The IRB then determines the facts and credibility of the case based on this evidence.²⁶ The Federal Court and the Federal Court of Appeal may judicially review a limited number of decisions of the IRB.²⁷ The case is often finalized at the tribunal level. Besides the exclusion provision, certain individuals such as senior government officials, diplomats, members of guerrilla, “who are from

²⁰ *Ibid* at 112.

²¹ *Ibid*.

²² *EU Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes*, 2003, Article 9.

²³ Please also see Introduction of this thesis.

²⁴ Kaushal & Catherine Dauvergne, *supra* note 1 at 59.

²⁵ Kaushal & Catherine Dauvergne, *supra* note 1 at 60.

²⁶ “These are crucial determinations, which include the nature of the organization, the terrorist acts committed by the organization, and the nature of an individual’s involvement in the organization”. Kaushal & Catherine Dauvergne, *supra* note 1 at 60.

²⁷ The judicial review “is limited in both coverage (because the Federal Court must first grant leave to hear the case, which is granted in only a small number of cases)²⁹ and in scope (because the Federal Court may only review the decision for unreasonableness and errors of law).” Kaushal & Catherine Dauvergne, *supra* note 1 at 60.

countries where there is/was internal turmoil, genocide, or where human rights abuses are/were widespread” are subjected to an in-depth investigation during the investigation of an allegation for inadmissibility in Canada.²⁸ Inadmissibility determinations are often made at the border “after an initial interview with an immigration officer”.²⁹ Possible refugee claimants may be inadmissible on the grounds of “security, violating human or international rights, serious criminality or organized criminality”.³⁰ Notably, “eligibility decisions are made without a right to counsel and without reasons”.³¹ There is even less judicial review for admissibility decisions than a refugee determination at the IRB.

The earlier literature on Article 1F highlights the rarity of exclusion decisions in Canada. However, we still do not know what happens to excluded individuals for the post-exclusion phase. For example, is there a similar trend of collaboration between the Immigration, Refugees and Citizenship Canada (IRCC) and the prosecution service to prosecute excluded individuals based on their asylum testimonies? The available data demonstrates removals but no prosecutions. As such, the following part will examine whether Canada resorts to Article 1F instead of prosecuting possible foreign criminals.

II. The Case of Canada: Canada does not use Article 1F for punitive ends

For Article 1F to be used for punitive ends, first, there should be a sufficient number of cases where refugee status determination findings are used in a subsequent criminal investigation. This requires an efficient information flow between Canadian immigration authorities and the prosecution service. I initially reviewed 21 cases before the Canadian courts and the IRB with a focus on procedural problems. The preliminary research showed that there are not enough Canadian cases to test if Canada is using Article 1F for punitive ends. However, there is a rather different pattern in Canada: several cases reviewed under the inadmissibility clause could have been reviewed under the exclusion provision because in these cases, applicants were refugee claimants.³² This finding has led to more questions, such as why the IRCC reviews the cases under the inadmissibility clause instead of the exclusion provision. My initial hypothesis was that there is a policy choice. The IRCC deliberately chooses to review the cases of refugee claimants about whom there are serious reasons to consider that they committed serious crimes, under the inadmissibility clause instead of the exclusion provision.

²⁸ *Canada’s War Crimes and Crimes Against Humanity Manual* (Immigration and Citizenship Canada, 2016) at 16.

²⁹ Kaushal & Catherine Dauvergne, *supra* note 1 at 61.

³⁰ Immigration and Refugee Protection Act, SC 2001, c. 27, s. 101(1)(f) (IRPA or Immigration Act). Kaushal & Catherine Dauvergne, *supra* note 1 at 61.

³¹ Kaushal & Catherine Dauvergne, *supra* note 1 at 61.

³² *B095 v Canada (Minister of Citizenship and Immigration)*, 2016 FC 962 Federal Court where the applicant was a member of the LTTE. *Jaballah (Re)*, FC 224.

Having discussed these questions with a few scholars in Canada in June 2018, I decided to interview practitioners who could provide me with information on the Canadian practice, to establish the current factors influencing the exclusion practice, particularly on my findings and hypothesis. As explained in the Introduction, I conducted semi-structured interviews with practitioners in Canada through face-to-face or phone (or Skype) interviews. I conducted fourteen interviews with practitioners from Quebec, Ontario, Manitoba, and British Columbia and one interview with an academic. Their answers have provided a clearer picture of the Article 1F practice in Canada, particularly a woven relationship between the inadmissibility clauses and Article 1F.

1. The inadmissibility scheme replacing Article 1F decisions

This part argues that the inadmissibility scheme on security, violation of human or international rights, serious criminality, and organized criminality grounds is replacing Article 1F decisions. In explaining this argument, this section will first introduce the Canadian refugee and immigration law system to conclude that Canada uses the inadmissibility scheme at the front end to reduce the number of refugee claimants in violation of the right to seek asylum. The following section will explain the reasons why Canada prefers the inadmissibility scheme instead of Article 1F. These reasons will show that Canada prioritizes sovereign interests instead of international obligations towards refugees. Leveraging on these findings, the third section will discuss whether the inadmissibility grounds breach the 1951 Refugee Convention. The final section will discuss three major reasons, besides the inadmissibility scheme, to explain Canada's reluctance to prosecute excludable individuals based on their asylum testimonies.

1.1. Lodging an asylum claim in Canada is not a one-step mechanism

An individual can make an application for asylum in or outside Canada.³³ Those who claim protection outside Canada apply for a visa.³⁴ As our topic only covers the asylum-seeking process inside Canada, we will not analyze the overseas application to Canada or Canadian resettlement mechanisms. There are two stages to make an asylum claim inside Canada: (i) the first stage refers to the eligibility screening, which determines whether an individual is entitled to seek asylum in Canada, and (ii) after the determination of eligibility, the second step is to analyze the substantive merit of the claim.

Refugee protection in Canada can be conferred either by the Refugee Protection Division (RPD) and the Refugee Appeal Division (RAD) of the IRB³⁵ or by the Minister as part of the

³³ IRPA, section 99 (1).

³⁴ IRPA, section 99 (2).

³⁵ IRPA, section 95(1) b.

pre-removal risk assessment (PRRA) procedure.³⁶ The latter can be determined by an officer of the IRCC, “in some cases together with a delegate of the minister”.³⁷ The RSD process starts with the application of an individual to the CBSA at a port of entry (airports or land border crossings).³⁸ If a claimant is already inside Canada, the claim will be made to an officer of the IRCC.

In 1988, the Canadian Parliament “introduced the concept of eligibility criteria into the legislation” governing refugee claimants by revising the Immigration Act.³⁹ One of the rationales behind introducing eligibility criteria was “to control widespread abuse of the procedures for determining refugee claims, particularly in light of organized incidents involving large-scale introduction of persons into Canada to take advantage of those procedures.”⁴⁰ Since then, the eligibility criterion has been the prerequisite to claim refugee status in Canada.

A CBSA officer at a port of entry or an IRCC officer for inland claims, first, determines the admissibility of the claim. If the officer believes that a foreigner who makes a claim for refugee protection could be inadmissible, she must refer the issue to “an admissibility hearing where a member of the Immigration Division will determine whether or not the person is inadmissible.”⁴¹ In certain cases, the CBSA is empowered “to issue removal orders directly; that is, to send the person out of Canada, without requesting an admissibility hearing.”⁴² If the claimant is found inadmissible, she is ineligible to seek refugee protection in Canada. Otherwise, she will be referred to “a hearing before the Refugee Protection Division”.⁴³

An individual is ineligible to make an application for refugee protection in Canada for six reasons⁴⁴:

1. if a claimant has already received refugee protection in Canada,
2. if the claim has been rejected by the IRB,
3. if a prior claim has been withdrawn or abandoned or determined to be ineligible previously,
4. if the claimant has already been recognized as a Convention refugee by another country where she can be returned to,

³⁶ IRPA section 95 (1) c.

³⁷ Sharryn J Aiken et al, *Immigration and Refugee Law: Cases, Materials, and Commentary*, 2nd Edition (Toronto, Canada: Emond Publishing, 2015) at 886.

³⁸ *Ibid.*

³⁹ *Berrahma v Canada (Minister of Employment and Immigration)*, 1991 Federal Court of Appeal at para 1.

⁴⁰ *Ibid* at para. 8.

⁴¹ Lorne Waldman, “HIM-283 Role of officer.” in *Halsburys Laws Can – Immigr Citizsh 2019 Reissue* (LexisNexis Canada, 2019).

⁴² Immigration and Refugee Board of Canada, “Admissibility Hearing Process”, (10 October 2008), online: <<https://irb.gc.ca:443/en/legal-policy/procedures/Pages/ProcessAdmEnq.aspx>>.

⁴³ Waldman, *supra* note 41 please also see section 100.

⁴⁴ IRPA, section 101.

5. if the claimant came to Canada from a safe third country,
6. if the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality, or organized criminality, except for persons who are inadmissible solely on the grounds of paragraph 35(1)(c).⁴⁵

1.2 Inadmissibility scheme reducing the number of refugee claimants in violation of the right to seek asylum

A non-national, including a permanent resident, is inadmissible to Canada under seven grounds: security, human or international rights violations, serious criminality, organized criminality, health grounds, financial reasons, and misrepresentation.⁴⁶ As the acts enumerated in Article 1F and the inadmissibility grounds of security, human or international rights violations, serious criminality, and organized criminality (SHSO) mostly overlap, this section will omit the inadmissibility grounds of health, financial reasons, and misrepresentation from our analysis.

The admissibility step has not been envisaged in the 1951 Refugee Convention. This section argues that using the inadmissibility scheme on the SHSO grounds to reduce the number of refugee claimants violates the right to seek asylum with no valid justification, as it directly prevents individuals from seeking asylum in the territory of a nation-state.

The inadmissibility determination process on the grounds of SHSO can be based on facts for which there are “reasonable grounds to believe” that they have occurred, are occurring or may occur.⁴⁷ The assessment has a very broad spectrum, allowing future-oriented determinations. It is noteworthy that the determination of inadmissibility on the grounds of health, finance, and misrepresentation is subject to a higher standard of proof, “balance of probabilities”, while the determination of inadmissibility on the grounds of SHSO requires a less stringent burden of proof, “reasonable grounds”.⁴⁸

From a human rights perspective, no justification exists for Canada to deny the right to seek asylum in its territory on the grounds of SHSO. Most of these grounds were envisaged by the drafters of the 1951 Refugee Convention and regulated under Article 1F. Even if some acts including espionage and subversion by force in section 34 were not explicitly worded in Article 1F, with the current interpretation of Article 1F, a refugee claimant can be excluded from

⁴⁵ According to IRPA section 35 (1) “[a] permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for... (c) being a person, other than a permanent resident, whose entry into or stay in Canada is restricted pursuant to a decision, resolution or measure of an international organization of states or association of states, of which Canada is a member, that imposes sanctions on a country against which Canada has imposed or has agreed to impose sanctions in concert with that organization or association.”

⁴⁶ IRPA, sections 34-40.

⁴⁷ IRPA, section 33.

⁴⁸ *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2 SCR 40; *Harkat (Re)*, FC 1241; *Almrei (Re)*, FC 1263.

refugee protection for those unenumerated grounds as well. For example, UNHCR considers that the serious criminality ground for acts committed outside Canada as regulated in section 101(2)(b) could be assessed under Article 1F(b) serious criminality so long as the act in question is serious and non-political.⁴⁹

Article 1F has a twofold purpose: first, excluding perpetrators of certain grave acts from refugee protection; and second, safeguarding the host country from individuals who could pose “a danger to public safety or the security of the country.”⁵⁰ For the UNHCR, the determination of such exclusion must be actualized “*within* the jurisdiction of the authority competent for” RSD.⁵¹

Contrary to the UNHCR’s position, Canada places exclusion “*outside* the refugee status determination procedure, in the hands of adjudicators or immigration officials.”⁵² As the RSD procedure bestows certain rights to refugee claimants such as consideration for mitigating factors, “the nature and seriousness of the alleged acts should be made *within* the asylum procedure” by officials “with expertise and training in refugee law and status determination, in the context of a full consideration of the refugee claim”.⁵³ In addition, during the RSD hearing, the risks posed by an individual are balanced against the “severity of the persecution feared”, the valid “state interest in security and public welfare” as well as “due consideration of a refugee’s need for protection”.⁵⁴

The case law in Canada demonstrates that Canada does not consider ineligibility requirements for certain categories of individuals as conflicting with the right to seek asylum. As early as 1991, the Federal Court of Appeal decided that the “concept of eligibility of a refugee status claim, in the context of the Immigration Act, does not contravene s. 7 of the Charter”.⁵⁵ Later in *Nguyen*, the Federal Court of Appeal decided that a non-citizen is not legally entitled “to be recognized as a political refugee under either the common law or any international convention to which Canada has adhered.”⁵⁶ If eligibility requirements subject “a group of claimants to discriminatory treatment within the meaning of section 15” then the scheme might be violating the Charter. However, denying “dangerous criminals the right...to

⁴⁹ *Comments on Bill C-11 “An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger” Submission to the House of Commons Standing Committee on Citizenship and Immigration*, by United Nations High Commissioner for Refugees (UNHCR, 2001) at para 46.

⁵⁰ *Ibid.*

⁵¹ *Ibid.* [emphasis in original].

⁵² *Ibid* at para. 47. [emphasis in original].

⁵³ *Ibid* at para. 47.

⁵⁴ *Ibid.*

⁵⁵ *Berrahma v. Canada (Minister of Employment and Immigration)*, *supra* note 39 at para 6.

⁵⁶ *Nguyen v Canada (Minister of Employment and Immigration) (CA)*, 1993 Federal Court of Canada - Court of Appeal.

seek refuge in Canada certainly cannot be seen as a form of illegitimate discrimination.”⁵⁷ The eligibility requirement might trigger the application of section 15, but not section 7, because “a declaration of ineligibility does not imply or lead, in itself, to any positive act which may affect life, liberty or security of the person.”⁵⁸ This statement is in line with the Supreme Court’s later decision in *Charkaoui* in which the Court ruled that deportation in itself does not engage the right to liberty.⁵⁹

Particularly, after the Supreme Court of Canada's (SCC) seminal decision of *Ezokola*, excluding a refugee claimant on the basis of Article 1F has become more difficult. In 2013, the *Ezokola* decision defined strict parameters to apply the threshold for complicity for Article 1F (a) acts. Presumably, the *Ezokola* decision has led to more inadmissibility and fewer exclusion decisions. Based on the literature and interviewees’ perspective, the following section will analyze how the interwoven relationship between the inadmissibility scheme and Article 1F has changed after the *Ezokola* decision in Canada.

1.2.1 After *Ezokola* more inadmissibility and fewer Article 1Fs

In 2008, a senior official of the Democratic Republic of Congo (DRC) government, *Ezokola*, who was the head of Permanent Mission of the DRC at the United Nations in New York resigned from his job and fled to Canada to seek asylum as he opposed the government of President Kabila. He claimed that his resignation would be viewed as an act of treason by the DRC government. In Canada, *Ezokola* was excluded from refugee protection on the basis of Article 1F(a), being complicit in crimes against humanity committed by the DRC government. *Ezokola* had never been involved in any criminal acts of the DRC government, individually. Being a senior government official of an infamous regime was however sufficient for him to be excluded for being complicit in these crimes. In this vein, the Federal Court of Appeal ruled that

a senior official in a government could demonstrate personal and knowing participation and be complicit in the crimes of the government by remaining in his or her position without protest and continuing to defend the interests of his or her government while being aware of the crimes committed by the government.⁶⁰

In 2013, in its landmark decision, the SCC held that guilt by association is not one of the modes of complicity for acts enumerated in Article 1F(a). The Court determined that “guilt by association violates the principle of individual criminal responsibility. Individuals can only

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Charkaoui v Canada (Citizenship and Immigration)*, 1 SCR 9 at 17.

⁶⁰ *Ezokola v Canada (Citizenship and Immigration)*, 2 SCR 40.

be liable for their own culpable conduct.”⁶¹ The Applicant would be considered complicit in international crimes under Article 1F (a), and hence be excluded, in case “there are serious reasons for considering that he or she voluntarily made a knowing and significant contribution to the crime or criminal purpose of the group alleged to have committed the crime.”⁶²

Consequently, the Court developed a new test for complicity under Article 1F(a). According to this new test, “[t]o exclude a claimant from the definition of “refugee” by virtue of art. 1F(a), there must be serious reasons for considering that the claimant has voluntarily made a significant and knowing contribution to the organization’s crime or criminal purpose.”⁶³

The *Ezokola* decision is important for several reasons. By ending the guilt by association, *Ezokola* has changed parameters for Article 1F (a) complicity, which is voluntary, knowing, and significant contribution to the crime or criminal purpose of a group. Previously, with the decision of *Ramirez*, the test in complicity was “personal and knowing participation in persecutorial acts.”⁶⁴ To this end, “mere membership in brutal, limited purpose organization is no longer an independent head of liability.”⁶⁵ The new complicity test developed in *Ezokola* has been imported to apply in Article 1F (c) cases. After *Ezokola*, the Federal Court decided that the new test for complicity should be applied to Article 1F (c) cases.⁶⁶ As to the Article 1F (b) cases, Canadian Courts have not yet conclusively answered the application of the complicity test for these acts.⁶⁷ *Ezokola* has also affected the interpretation of inadmissibility cases. In the case of *Kanagendren*, the Federal Court of Appeal decided that the test in *Ezokola* is to apply to the determination process of inadmissibility on the ground of national security — section 35 (1) — while for cases arising under section 34(1)(f), there is no requirement to apply the *Ezokola* test to prove membership⁶⁸ since courts have established that proving a sole membership is sufficient to find an individual inadmissible under section 34(1)(f).

In the literature, there is a tendency to see a decrease in exclusion cases and an increase in inadmissibility cases after the *Ezokola* decision. In a recent article, Jennifer Bond, Nathan Benson and Jared Porter argued that the tension between the inadmissibility scheme and the exclusion provision that have been coexisting since 1969 was “less apparent” before *Ezokola*,

⁶¹ *Ibid* at para 29.

⁶² *Ibid*.

⁶³ *Ibid* at para 84.

⁶⁴ *Ramirez v Canada (Minister of Employment and Immigration)*, 2 FC 306 at para. 15.

⁶⁵ *Update On Exclusion And Inadmissibility Jurisprudence: New Developments Since The Decisions Of The Supreme Court Of Canada In Ezokola And Febles*, by Joseph Rikhof, CARFMS Working Paper No: 2017/2 (2017) at 8.

⁶⁶ *Alam v Canada (Citizenship and Immigration)*, FC 556.

⁶⁷ Rikhof, *supra* note 65 at 10.

⁶⁸ *Kanagendren v Canada (Citizenship and Immigration)*, 1 FCR 86 at 22. Please also see Angus Grant’s thesis *Angus G Grant, Confronting (In)security: forging Legitimate Approaches to Security and Exclusion in Migration Law* University of York, 2016) [unpublished] at 114.

and the discrepancies between the two schemes have since become very noticeable.⁶⁹ Joseph Rikhof notes that while most of the decisions during the pre-*Ezokola* time involved the exclusion provision (120 exclusion decisions as opposed to 14 inadmissible cases out of 134 Federal Court decisions), in the post-*Ezokola* period these numbers have been reversed in favor of inadmissibility, “with 8 cases for exclusion and 17 dealing with inadmissibility” out of 25 decisions.⁷⁰ Looking at the statistics provided by the War Crimes Program, we detect a similar pattern: a decrease in exclusion decisions rendered under Article 1F (a) after the *Ezokola* decision. For example, the number of exclusion decisions was eight and five in 2013 and 2014 respectively, while the numbers were much higher with 37 and 34 in 2011 and 2012, respectively.⁷¹

By contrast, Angus Grant’s research demonstrates that the tension between the refugee process and the inadmissibility regime was omnipresent before the *Ezokola* decision. In his dissertation, Angus Grant analysed inadmissibility decisions rendered on the ground of national security between 2002 and 2013.⁷² Among these cases, Grant found out that 81% of the dataset in the national security context involves refugee claimants or refugees. Strikingly, “...while the numbers of inadmissibility cases steadily rose, the number of refugee claimants ...sharply declined, from almost 44,000 cases in 2001, to less than 20,000 per year in more recent years”.⁷³ The majority of individuals subject to the inadmissibility hearings on the grounds of national security are either recognized refugees or persons making a refugee claim. His dataset proves that most of the cases involving inadmissibility are related to the asylum-seeking process.

- “Twenty-six of the cases involved persons who had already been found to be Convention refugees”.
- “Eight cases involved persons who had already been denied refugee status”.
- “Seven cases involving individuals who had never made a refugee claim”.
- “131 cases in which the individuals had made a refugee claim and were still at some stage in the refugee claim process”.⁷⁴

⁶⁹ Jennifer Bond, Nathan Benson & Jared Porter, “Guilt by Association: Ezokola’s Unfinished Business in Canadian Refugee Law” (2020) 39:1 Refug Surv Q 1–25 at 19.

⁷⁰ There were 134 Federal Court decisions between July 19, 2003 and 2013. The number of Federal Court decisions between January 1, 2014 and December 31, 2016 was 25. Rikhof, *supra* note 65 at 12.

⁷¹ *Canada’s Program on Crimes Against Humanity and War Crimes 2011–2015: 13th Report* (Canada Border Services Agency Department of Citizenship and Immigration Department of Justice Royal Canadian Mounted Police, 2016) at 9.

⁷² In total, 195 decisions were disclosed to Angus Grant as a result of his Access to Information Request. “To obtain a full record of ID decisions on national security, therefore, Access to Information Requests were submitted seeking disclosure of all decisions issued by the ID related to admissibility hearings conducted under the provisions of s 34(1) of the IRPA from the date of enactment of the IRPA (June 28, 2002).” Grant, *supra* note 68.

⁷³ *Ibid.*

⁷⁴ *Ibid* page 149.

The view in the literature that there is an increase in inadmissibility cases and a decrease in the exclusion provision corroborates some interviewees' perspectives. Four interviewees explicitly share the view that, since the *Ezokola* decision, there has been a shift from the Article 1F determination to the inadmissibility proceedings. In other words, in the post-*Ezokola* era, the number of exclusion decisions went down while more inadmissibility decisions have come into the scene.

The following summarizes the main points of interviewees' testimony regarding the changes after *Ezokola* in the landscape of the Canadian refugee law practice. In the 1990s and 2000s, until the *Ezokola* decision came out, the main problem was the application of the exclusion provision. Article 1F was interpreted very broadly in that a mere association with an organization (i.e. a political organization, police forces, governments, a militia group) that has committed serious international crimes would directly result in exclusion from refugee protection. Excluding someone from refugee protection was also easy during the pre-*Ezokola* era. The minister only needed to submit NGO reports describing the situation in the country of origin.⁷⁵ After *Ezokola*, the Minister's burden got higher. For example, an interviewee mentioned that a client who worked for the Eritrean government at a low level — processing leader applications — was excluded from protection on the basis of Article 1F (before *Ezokola*) due to the atrocities committed by the current Eritrean government. The Canadian Council for Refugees used this case in their submission for *Ezokola* to support their case regarding the interpretation of Article 1F in the Canadian refugee context.⁷⁶

A1: Refugee claimants who might have helped a militia group or a similar organization in their countries of origin would be swept up in the exclusion provision and that was a big problem for many years. This situation was going on from the time that I started practicing from 1990s to 2000s until *Ezokola* came out, which was in 2013 or 2014. The decision more or less solved the problem in terms of the application of the exclusion provision. That was a positive first step.

Another example comes from the Tamil minority in Sri Lanka. An individual who was forced to hand out pamphlets for the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka was excluded under Article 1F in Canada.⁷⁷ As testified by an interviewee, the UNHCR's representative in Canada in 1997-1998 was surprised by the wrong interpretation of Article 1F

⁷⁵ Interview with A7.

⁷⁶ Interview with A4.

⁷⁷ Interview with A1.

as Canada was extremely applying the provision to exclude refugee claimants to whom Article 1F should not have been applied.⁷⁸

Almost unanimously all interviewees agree that there is a better interpretation of the law of exclusion as the Supreme Court of Canada ended the guilt by association with the *Ezokola* decision. As explained previously, a threshold for exclusion has become serious reasons for considering that a claimant voluntarily and knowingly made a significant contribution to the crime or criminal purposes of an organization. Instead of a mere membership, a nexus between the crime, criminal purposes and the claimant is now required. As such, a child soldier who could have been caught by the exclusion provision during the pre-*Ezokola* era is now not considered for Article 1F in this way.⁷⁹ Likewise, a court returned the file of a member of the Afghan air force to the Board since Article 1F was applied too broadly.⁸⁰

A4: In terms of exclusion we have got a better jurisprudential landscape and a better interpretation of the law of exclusion.

After *Ezokola*, the test for complicity for Article 1F (a) acts has been narrowed, and hence, it has become difficult for claimants to be excluded from protection. As the *Ezokola* decision set a much higher threshold for exclusion, the number of exclusion decisions went down. Although *Ezokola* has provided a better legal interpretation of complicity for Article 1F acts, a similarly rigorous analysis has not been extended to the inadmissibility provisions. As a result, individuals are still found inadmissible based on a mere association and subject to removal procedures or even renewed security certificates.⁸¹

⁷⁸ Interview with A12

⁷⁹ Interview with A4.

⁸⁰ Interview with A4.

⁸¹ Interview with A10.

The government now prefers to invoke the immigration inadmissibility provisions instead of processing claimants through the exclusion provision. For example, one interviewee mentioned that when they were a member of the IRB before 2001, there was a significant number of cases before the Board where the exclusion provision was involved. The way the government interpreted the eligibility and admissibility provisions has however changed the situation to the extent that Article 1F cases have been found inadmissible to be referred to the RPD. In their words, “what it once has been the work of the board members shifted for inadmissibility”.⁸² Consequently, the only legal remedy to prevent these people’s removal from Canada would be a pre-removal risk assessment.

A1: Even though *Ezokola* was a very good decision and it clarified the test very well, it had limited affect because they used the backdoor to stop these people from getting a refugee status. They would not refer them to the IRB. Instead, they would immediately put them into admissibility proceedings, under sections 34, 35, 36.

A1: After *Ezokola*, the response from the government was to say fine we are going to process them through inadmissibility provisions of the IRPA instead. So, now you see very few exclusion cases at the Board. It used to be hundreds and hundreds of exclusion cases. Now it is very rare that you get an exclusion at the Board on 1F; but, they are processing all through inadmissibility provisions.

A14: Where *Ezokola* kind of solved the issue under 1F, these people are being found inadmissible under section 34 without the government or the ministry needing to prove any act under part personally.

⁸² Interview with A9.

By resorting to the inadmissibility provisions upfront, the government is actively preventing individuals, who could fall under the refugee definition in the 1951 Refugee Convention, to be recognized as refugees in Canada.

A12: Targeting people for inadmissibility is happening more in this century and especially since 2012, after Stephen Harper made it much easier to do. It could happen any time when the police state wants to keep some undesirable person out. For the last ten years, the government has been often applying the inadmissibility scheme to individuals who are really refugees.

One interviewee argues that, in retrospect, *Ezokola* made the regime even worse, because it is easier to bring section 34(1)(f) allegations and keep people out of the RSD proceedings.⁸³ Another interviewee argued that the Canadian immigration and refugee regime does not respect the *Ezokola* decision. During the pre-*Ezokola* time, the exclusion provision was invoked to keep out *bona fide* refugees. After *Ezokola*, the exclusion policy has not changed; the regime continues to keep people out for trivial reasons. One of the reasons behind excluding certain people is systemic racism as the case of *Ezokola* proves.⁸⁴

A12: You might ask me, does the system right now respect the *Ezokola* decision? The answer is often no. They do not really care; the government is still trying to keep the great unwashed from this country. The public safety ministry and the people who are intervening in these cases have police state mentality; they want to keep the people out. It does not really matter whether it respects the exclusion provision or not.

It is not sufficient that solely Canadian tribunals follow the reasoning of the *Ezokola* decision. Even if administrative tribunals correctly apply legal reasoning, bureaucracy still attempts to exclude individuals on a flimsy basis. Imbalanced power dynamics are also involved in the Board decisions. The government holds power, financially and hierarchically. When the government intervenes in a case, board members give a lot of importance to what they are saying, often more than what lawyers representing claimants present.⁸⁵

⁸³ Interview with A3.

⁸⁴ Interview with A12.

⁸⁵ Interview with A12.

A12: The people who are deciding policies on criminality and on exclusion do not share our democratic values or belief in the Charter. The high level of the security people in immigration have very little to do with the security. They could not take the decisions that they are taking in a police context or an intelligence service context; but, in an immigration context, they can get away with murders and reject people on the basis of suspicion.

1.2.2. Concluding remarks on the use of the inadmissibility scheme at the front end to reduce the number of refugee claimants in violation of the right to seek asylum

In this section, we explored that a prerequisite to seeking asylum in Canada is to pass the eligibility test. This step was not envisaged in the 1951 Refugee Convention. The ineligibility step includes the inadmissibility on the grounds of SHSO. The inadmissibility assessment on SHSO grounds has a very broad-spectrum allowing future-oriented determination. This broad application bars refugee claimants from seeking asylum in Canada. This section thus argued that Canada is using the inadmissibility regime on the grounds of SHSO to reduce the number of refugee claimants in defiance of the right to seek asylum.

The rationale of the inadmissibility scheme originally was to protect the Canadian population from criminals and prevent the abuse of the RSD system in Canada. Yet, there is a flimsy border between protecting the RSD regime from abuse and keeping foreigners from seeking asylum in Canada, which is their right under the UDHR and the Refugee Convention. This border becomes invasive and overreaching when the protection of the RSD regime from abuse becomes a priority so much so that it prevents refugee protection. In a way, our fear of abuse supersedes our moral and legal obligation to protect refugees.

Similar acts regulated under inadmissibility on the grounds of SHSO could be considered under Article 1F. This is where it comes to a head. In 2013, the *Ezokola* decision defined strict parameters to apply the threshold for complicity for Article 1F (a) acts. This threshold was later extended to Article 1F (c) cases. After the *Ezokola* decision, excluding an individual from refugee protection on the basis of Article 1F has thus become more difficult, for excellent reasons linked to a constitutional understanding of how the Rule of Law should function in Canada.

The reason why the exclusion provision was integrated into the 1951 Refugee Convention was to prevent certain individuals to be recognized as refugees and to protect the integrity of the Convention. In *Esse v. Canada*, the Federal Court decided that the focus of section A35(1)(b) “is to ensure...that Canada does not become a haven for persons who have engaged in terrorism, systematic or gross human rights violations, war crimes or crimes against

humanity.”⁸⁶ This is the same rationale that Article 1F (a) and (b) exist for refugee claimants. If protecting the integrity of the refugee system has been already ensured with the exclusion provision, why does Canada need the inadmissibility scheme on the SHSO grounds for refugee claimants?

The next section will explain the reasons why Canada prefers inadmissibility instead of exclusion cases.

1.3. Canada prefers inadmissibility over exclusion for the same acts

This research determines eight main reasons for Canada to bar the asylum-seeking process on the SHSO grounds instead of applying Article 1F for similar or overlapping acts.

1. Denying Access to RSD.
2. Denying access to appeal rights.
3. Easier and faster to find someone inadmissible.
4. The scope of inadmissibility on the SHSO grounds is broader than that of Article 1F.
5. The discretion is not used in favor of the claimant.
6. Canada has broad discretion in enforcing the inadmissibility scheme.
7. Institutional culture is different in two divisions.
8. The standard of proof in inadmissibility and Article 1F are similar, but the burden of proof is different.

a. Denying access to RSD

Canada restricts the number of refugee claimants by denying access to the RSD system to certain unwanted individuals. The legislation and government policies are constructed in a way that these unwanted individuals are prevented to proceed to the RSD system. Denying access to RSD is one of the key strategies to curb the number of refugee claimants in Canada. The following explains why Canada wants to prevent unwanted individuals to make a claim in Canada. Here, the expression “unwanted foreigners” refers to foreigners who fall under the scope of sections 34-37, that is, inadmissibility on the grounds of SHSO.

Having a refugee claimant status in Canada provides certain rights and entitlements. Denying access to RSD through inadmissibility will prevent unwanted foreigners to access certain rights and entitlements. We can divide these entitlements and rights into two parts: material and procedural. Material rights are those that help refugee claimants to stay and sustain their livelihoods in Canada. Procedural rights grant certain safeguards to refugee claimants in pursuing their claims within the Canadian RSD system. Those safeguards include appeal rights

⁸⁶ *Esse v Canada (Minister of Citizenship and Immigration)*, 1998 FCJ at para 11.

and other administrative protection mechanisms. The following will summarize material rights that refugee claimants are bestowed upon once they access the RSD system.

Refugee claimants are granted an automatic stay of removal while their case is determined by the IRB.⁸⁷ The automatic stay of removal bars refugee claimants to be returned to countries where there is a risk of persecution, torture, or death penalty while their claim is decided. While they stay in Canada, refugee claimants can apply for and obtain a work permit.⁸⁸ They “enjoy a somewhat simpler procedure for issuance of work permits”⁸⁹ and are exempt from processing fees.⁹⁰ Refugee claimants and their family members can enroll in preschool, primary and secondary schooling without a need for a permit.⁹¹ Although they are exempt from processing fees, a refugee claimant still needs to obtain a study permit to engage in post-secondary studies in Canada.⁹² Refugee claimants “may have access to EI [Employment Insurance] if they accumulated the required number of insurable hours and can demonstrate their readiness and availability to work.”⁹³ In Ontario, refugee claimants can receive income assistance as per the Ontario Works Act and Regulations.⁹⁴

On the contrary, ineligible individuals — those who are found ineligible to be referred to the RPD — are not eligible for such assistance.⁹⁵ As to the medical coverage, refugee claimants are covered for essential and emergent health services in Canada through the Interim Federal Health Program (IFHP).⁹⁶ Finally, provincial legal aid mechanisms can help claimants to ease their burden to find legal representatives for their cases. The delivery of immigration and refugee legal aid services is currently available in six provinces (British Columbia, Alberta, Manitoba, Ontario, Quebec, and Newfoundland and Labrador).⁹⁷ To receive legal aid though, the claimant must be found eligible to make a claim.⁹⁸ For example, one interviewee attests that legal aid for claimants who are found inadmissible is significantly hard. It is because a claimant

⁸⁷ IRPA, section 49 (2).

⁸⁸ *Immigration and Refugee Protection Regulations*, 2022 Articles 199, 206(1), 207(c), 209 and 215.

⁸⁹ Sasha Baglay & Martin Jones, *Refugee Law 2/e*, Essentials of Canadian Law (Irwin Law Inc., 2017) at 109; *Immigration and Refugee Protection Regulations*, *supra* note 88 Article 200 (2).

⁹⁰ *Immigration and Refugee Protection Regulations*, *supra* note 88 Articles 299 (2) a and b.

⁹¹ IRPA, 30 (2)

⁹² *Immigration and Refugee Protection Regulations*, *supra* note 88 section 300 (2) (a) and (b).

⁹³ Baglay & Martin Jones, *supra* note 89 at 114.

⁹⁴ *Ibid* at 115.

⁹⁵ *Ibid* at 116. Refugees and Citizenship Canada Immigration, “Interim Federal Health Program: What is covered”, (25 April 2012), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/help-within-canada/health-care/interim-federal-health-program/coverage-summary.html>>. *Ontario Works Act, 1997 Ontario Regulation 134/98* section 6 (1) and (2).

⁹⁶ Refugees and Citizenship Canada Immigration, “Interim Federal Health Program: What is covered”, (25 April 2012), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/help-within-canada/health-care/interim-federal-health-program/coverage-summary.html>>.

⁹⁷ Department of Justice Government of Canada, “Legal Aid Program”, (12 April 2013), online: <<https://www.justice.gc.ca/eng/fund-fina/gov-gouv/aid-aide.html>>.

⁹⁸ Refugees and Citizenship Canada Government of Canada; Immigration, “Is legal assistance available to asylum claimants?”, (7 November 2012), online: <<https://www.cic.gc.ca/english/helpcentre/answer.asp?qnum=702&top=11>>.

who is found inadmissible is often detained. As a result, obtaining legal aid, retaining a lawyer, and receiving sufficient legal representation is much harder for a detained claimant.⁹⁹

These rights provide advantages to refugee claimants compared to other foreigners. On the one hand, one might argue that any foreigner could abuse the Canadian RSD system by lodging a fake claim to receive these entitlements. To prevent abuse, a robust system of ineligibility is a requirement. On the other hand, these rights protect Canadian public security and welfare as much as refugee claimants. To leave a foreigner stranded with no option for work, study, or access to health services could only incentivize refugee claimants to invoke illegal means to sustain their livelihoods. As one of the interviewees says, “having somebody here for ten years with no status does not benefit anybody...even from a policy perspective it does not make sense”.¹⁰⁰

In the field, six interviewees (A10, A2, A1, A9, A12, A5) attest that having introduced and extended the inadmissibility scheme, Canada intentionally denies access to the RSD process; it has been the legislative intent from the beginning. In this vein, Canada invokes the inadmissibility criteria for tenuous links with certain organizations and non-serious criminality. For example, one interviewee observes that based on the *Suresh* decision, Canada prevents a potentially threatening non-citizen to access the refugee system. Providing a pre-removal risk assessment (PRRA) is deemed to suffice Canada to comply with its obligations under the 1951 Refugee Convention.¹⁰¹

One interviewee argues that denying access to RSD on the basis of inadmissibility is both a concomitant result of the 9/11 attacks in Canada and a part of the restrictive measures taken by the conservative government to curb the number of refugees to make claims in Canada.

A10: A bar to accessing the protection hearing was a very intentional policy choice that the government made in defiance of guidance provided by the UNHCR at the time which was that the general bars to asylum are not recommended.

⁹⁹ Interview with A9.

¹⁰⁰ Interview with A2.

¹⁰¹ Interview with A9. Likewise, A1 shares that Canada reroutes refugee claimants to the inadmissibility scheme to deal with the risk analysis later on during the PRRA analysis, which is ineffective.

A2: The legislative intent is to use the eligibility instead of exclusion. The idea was to block access to the refugee system because resorting to the inadmissibility is easier and also broader. It was the clear intent of the legislation when they made the amendments to broaden the ineligibility sections around 2012.

Before the 9/11 attacks, refugees were not perceived as a danger to the general public in Western countries including Canada; the main problem concerned the number of refugee claims. After 9/11, the perception towards refugees has adversely changed, and as a result, Canada has adopted policies to restrict the number of refugees entering and making claims in Canada. The government had adopted “a generally hostile view to Canada’s inland refugee system”.¹⁰² The wide use of inadmissibility provisions has thus originated from this shift in perception towards refugees. As such, any non-citizen who was suspected of any degree of criminality or falling under the scope of Article 1F would be excluded under the current IRPA.¹⁰³

The restrictive measures go beyond a matter of exclusion and criminality. Their policies include attempting to remove medical care from refugees, establishing the designated country of origin concept, and removing appeal rights. The aim was the same: restraining the refugee system. As a part of this broad goal, the government considered that a non-citizen about whom “there had the slightest taint of being involved with any form of criminality of any kind” did not deserve an opportunity to lodge a refugee claim.¹⁰⁴ Particularly, those are individuals who were members of organizations suspected of having committed terrorist acts or international crimes.

Similar views were shared by other interviewees.

A9: You probably know what is called the Mandela provision because Nelson Mandela under that law would not have been eligible to make a refugee claim in Canada or would not have been admissible to Canada.

¹⁰² Interview with A9.

¹⁰³ Interview with A9.

¹⁰⁴ Interview with A9.

A12: Basically around 20 years ago, they set up a plan to try in keeping as many people out of the refugee protection system as they could with inadmissibility hearings, and they decided that they would intervene massively in cases before the refugee protection division to try to exclude people on a fairly systematic fashion.

Instead of targeting high-profile criminals such as terrorists, torturers or individuals involved in organized crimes, the government has targeted individuals “who are very peripherally linked with repressive regimes”, who have minor criminality or who have not committed serious non-international crimes as articulated under Article 1F.¹⁰⁵ The government prevents non-citizens from accessing the RPD through the use of the inadmissibility regime. The Ministry intervened to “exclude people for very tenuous links to some groups” before the Board. Even if the claimant could get a refugee status, the Ministry still prevents them from becoming permanent residents for 15-20 years. It is because the government considers that the organization that the claimant associated with has engaged and is trying to overthrow a government or is “involved in international crimes.”¹⁰⁶

As to procedural rights, having access to the RSD system entails more safeguards than the inadmissibility scheme. These include a full oral hearing at the RPD, the power to call witnesses before the Board and an appeal right before the Refugee Appeal Board.¹⁰⁷ As a result, the proceedings before the IRB tend to be fairer and more efficient. In deciding cases, the RPD follows UNHCR guidelines, and jurisprudence. The Board’s decisions often conform with the relevant international law and norms. One interviewee testifies that “it is better to deal with exclusion and international criminality through the refugee system” that is “more than adequate to deal with” these issues.

¹⁰⁵ Interview with A12.

¹⁰⁶ Interview with A12.

¹⁰⁷ A1 emphasized this point.

Analysing cases involving criminality before the Board yields efficient results as the balancing factor is considered. As refugee claimants are facing some risk, it is more proper to assess their cases under the refugee adjudication process which is well designed for this end. The Board has experts in assessing risks and applying the exclusion provision.

A1: if you are allowed to balance the risk you can assess the risk and you have an expert person assessing the risk and doing the balancing before the Board.

A10: exclusion issues to the extent that they arise are best dealt with in the context of a refugee hearing by adjudicators that are trained in refugee law; but the reality is that that struggle has been lost not just in Canada but in countless other RSD jurisdictions where inadmissibility proceedings are invoked right upfront as quickly and as early as possible. It is a tool for saying no and for shutting door in the case where there is even a merest suspicion of a problem. The ability to challenge those first instance decisions are also very very difficult.

b. Denying access to appeal rights

One of the significant differences between the inadmissibility scheme and the RSD system is access (or the lack of) to appeal before the Refugee Appeal Division (RAD). The UNHCR considers that a full merit-based appeal is a basic requirement to provide the applicant with an essential safeguard.¹⁰⁸ To be explained below, those who seek asylum in Canada but are caught by the inadmissibility scheme on the grounds of SHSO do not have any appeal rights.¹⁰⁹ This part will first summarize the processes of appeal and judicial review in Canada for refugee and immigration decisions, then continue with the differences between appeal and judicial review to conclude why denying access to appeal rights matters.

After a refugee claimant passes the eligibility screening, an immigration officer refers the case to the RPD.¹¹⁰ RPD, “an independent quasi-judicial administrative tribunal” of the IRB determines refugee claims.¹¹¹ Some of the RPD’s decisions can be appealed before the RAD.

¹⁰⁸ *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, by UNHCR (UNHCR, 2019) at para 192.

¹⁰⁹ The point that individuals have no appeal rights but only judicial review in the inadmissibility scheme has been particularly emphasized by A11, A10, A9, A12 and A2.

¹¹⁰ IRPA, 100(1)

¹¹¹ Sean Rehaag, “Judicial Review of Refugee Determinations (II): Revisiting the Luck of the Draw” (2019) 45:1 *Queens Law J* 1 at para. 5.

An appeal before the RAD means “a full appeal on the merits.”¹¹² Both the Minister and the claimant can appeal “on a question of law, of fact or of mixed law and fact” to the RAD.¹¹³ A final IRB decision can be brought before the Federal Court for judicial review.¹¹⁴ If the leave for judicial review is granted, a hearing is scheduled. At the judicial review phase, the judge will also determine whether to allow “the case for appeal to the Federal Court of Appeal, with the applicable test being whether the case raises a serious issue of general importance.”¹¹⁵ If the appeal is not granted, “then no further appeals are available. If the case is certified, the losing party can choose to proceed to an appeal at the Federal Court of Appeal (and ultimately the Supreme Court of Canada, with leave from that Court).”¹¹⁶

Refugee claimants can present their cases and argue the law before the RPD. In case of rejection, they can still appeal it to RAD. An interviewee argues that if the case directly goes to the Federal Court without any appeal mechanisms, which is the case in the inadmissibility scheme, the Ministry of Justice uses every argument to deport a claimant about whom there is a slight suspicion of wrongdoing.¹¹⁷

A12: They do not really care whether the person is guilty or not; they basically defend state’s right to deport anybody. The Ministry in terms of administering the exclusion provision supports the idea of deporting anybody where there is some suspicion of wrongdoing. The lawyers for justice in Canada are basically supporting a system that does not care whether you are actually did anything or not. They just want to exclude people.

Kaushal and Dauvergne argue that the judicial review before the Federal Court and the Federal Court of Appeal is narrow in terms of coverage and scope.¹¹⁸ It is narrow in coverage because the Federal Court’s discretion to grant leave to hear the case is granted “in only a small number of cases”.¹¹⁹ In support of this view, Rikhof’s research also shows that only a small number of leave to appeal requests were accepted.¹²⁰ In the words of Grant and Rehaag, “[t]here

¹¹² Grant, *supra* note 63, p. 212.

¹¹³ IRPA, section 110 (1).

¹¹⁴ IRPA, section 72 (1).

¹¹⁵ Rehaag, “Judicial Review of Refugee Determinations (II)”, *supra* note 111 at 4.

¹¹⁶ *Ibid.*

¹¹⁷ Interview with A12.

¹¹⁸ Kaushal & Catherine Dauvergne, *supra* note 1.

¹¹⁹ “Leave was granted in approximately 13% of cases during the time frame of this dataset. This estimate is generated from the statistics reported on the Federal Court of Canada website: <http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Statistics>.” *Ibid* at 60, n 29.

¹²⁰ Rikhof, *supra* note 14 at 457.

is no direct right of judicial review”.¹²¹ It is limited in scope because “the Federal Court may only review the decision for unreasonableness and errors of law”.¹²² In a way, the RAD appeal serves “as the safety net that would catch all mistakes made by the RPD, be it on the law or the facts.”¹²³

When it comes to other differences between appeal and judicial review before the Federal courts, “[a] judge on judicial review has almost no capacity to receive new evidence and has only a limited capacity to substantively revisit factual determinations”.¹²⁴ Baglay and Jones note that the judicial review is mostly inaccessible to refugee claimants because of its “relatively formal and legalistic nature”.¹²⁵

The remedies for judicial review and appeal are also different. RAD can supersede a decision of the RPD whereas the Federal Court can solely return the issue “for reconsideration”.¹²⁶ During an appeal process before the RAD and judicial review of its decision, a removal order is automatically stayed. On the contrary, claimants who are ineligible to apply for a RAD appeal do not obtain an automatic stay of removal during “judicial review of an RPD decision”.¹²⁷ Although these claimants can “apply for a court-ordered stay” — in case it is not granted — they can be removed from Canada before a decision is made on their judicial review application.¹²⁸

Contrary to the decisions of the RPD, those who are found inadmissible on the grounds of security, violating human or international rights, serious criminality or organized criminality — sections 34-37 — have no appeal right to the Immigration Appeal Division.¹²⁹ The no appeal bar affects individuals who are inadmissible because they are convicted of an offense for which a term of imprisonment of more than six months has been imposed.¹³⁰ They can only apply for judicial review to the Federal Court. In the majority of cases, an officer’s removal order at the end of the inadmissibility process can be appealed to the Immigration Appeal Division. The Division can allow the appeal (i) if the decision is wrong in law or fact or mixed law and fact, (ii) if a principle of fundamental justice has been breached, or (iii) if there are sufficient

¹²¹ Sean Rehaag & Angus Grant, “Unappealing: An Assessment of the Limits on Appeal Rights in Canada’s New Refugee Determination System” (2015) Osgoode Leg Stud Res Pap Ser, online: <<https://digitalcommons.osgoode.yorku.ca/olsrps/132>> at 217.

¹²² “*Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, in which the Supreme Court of Canada held that there should be only ‘two standards of review, those of correctness and reasonableness’, and that reasonableness ‘is a deferential standard’.” Kaushal & Catherine Dauvergne, *supra* note 1 at 60, n 30.

¹²³ *Canada (Citizenship and Immigration) v Huruglica*, 4 FCR 93 at para 98.

¹²⁴ Baglay & Martin Jones, *supra* note 89 at 334.

¹²⁵ *Ibid.*

¹²⁶ *Ibid* at 343.

¹²⁷ *Ibid* at 343.

¹²⁸ *Ibid* at 343.

¹²⁹ IRPA, section 64 (1). A2, A11 and A12 emphasized this point.

¹³⁰ IRPA, section 36(1). A12 raised the same point.

humanitarian and compassionate grounds to allow the appeal, taking into account the best interests of a child directly affected by the decision.¹³¹

To make a comparison, while those who are considered under the exclusion provision have an additional procedural safeguard of access to appeal before an expert panel, those who are found ineligible on the grounds of SHSO have no such a right. The function of the appeal could be perhaps best described by the Federal Court: "Parliament sought to achieve something other than that available under judicial review."¹³²

A12: Colombian guy, he had became permanent resident in 1979 and they deported him last year and he had a small criminal conviction for being involved in cocaine but he had a problem with himself and he did not make a lot of money he is being used by a criminal gang who is threatening him. He is a grandfather, he has got several Canadian grandchildren, and they deported him to Colombia. He will never come back. He had been here since 1979 and he is sentenced with more than 6 months who he did not have an appeal. I doubt he will ever come back.

Imbalanced power dynamics between the Ministry and an individual are ubiquitous in the way Canada designed the appeal rights to the Federal Court. For example, while the Minister has a unilateral right of appeal to and *de novo* hearing before the Federal Courts, the appeal rights of individuals subjected to the inadmissibility scheme are restricted.¹³³

We will now examine the differences between judicial review and the appeal stage to understand why the denial of access to appeal matters. One of the conceptual differences that Angus Grant and Sean Rehaag mentioned is that RAD and Immigration Appeal Division have "no role in the equilibrium of the constitutional order and their powers are more constrained".¹³⁴ These administrative bodies are not meant to regulate "the relationship between the judiciary and specialized tribunals but exist, rather, to enhance the quality of decision making emanating from first-instance administrative matters."¹³⁵ By contrast, the judicial review mechanism is "designed to supervise the relationship between the legislative, executive, and judicial branches of government."¹³⁶ The most important function of the judicial review mechanism is to keep "a division of powers that respects legislative choices while preserving the role of the judiciary in

¹³¹ IRPA, section 67 (1)

¹³² *Huruglica v Canada (Citizenship and Immigration)*, FC 799 at para 41.

¹³³ Interview with A2.

¹³⁴ Rehaag & Angus Grant, "Unappealing", *supra* note 121 at 216.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

ensuring the legality of executive action.”¹³⁷ For Grant and Rehaag, its role in reviewing administrative decisions are hence limited to ensure that decisions are rendered in compliance with the legislative intent and “the rule of law is respected.”¹³⁸ That is the reason why “judicial review generally extends deference to administrative decisions”.¹³⁹ In areas where the administrative bodies and officers have specialized expertise such as “factual findings and legal determinations”, the standard of review is reasonableness, a more deferential one compared to the standard of correctness. For example, the court examining an administrative decision as per the standard of reasonableness “will not overturn an administrative decision if it falls within a range of reasonable possible outcomes-even if the court would have decided the case differently had it approached the matter on a *de novo* basis”.¹⁴⁰

During the appeal process and judicial reviews of RAD decisions, refugee claimants generally enjoy the automatic stay of removal. By contrast, those who are found inadmissible on the grounds of SHSO do not have automatic stays on removal pending judicial reviews in the Federal Court and the Federal Court of Appeal.¹⁴¹ Grant and Rehaag conclude that considering the significant differences between appeal and judicial review, “the availability of judicial review is not a replacement for a full appeal on the merits at the RAD”.¹⁴²

c. Easier and faster to find someone inadmissible

As a corollary result of not having sufficient procedural safeguards, finding an individual inadmissible on the grounds of SHSO is expeditious and easier.¹⁴³ Immigration officers including border officers do not have to follow the reasoning of *Ezokola*, nor any international norms regulating the exclusion provision in applying the inadmissibility provisions. They simply apply sections 34-37 of IRPA.¹⁴⁴

A6: Although the same facts can apply to both the inadmissibility scheme and the exclusion provision, the legal tests are different. It is easier to get an inadmissibility finding than getting an exclusion finding because it is harder for the claimant to escape in inadmissibility finding than exclusion finding. This might be the factor to decision to go for inadmissibility rather than exclusion.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ A11 shared a similar opinion.

¹⁴² Rehaag & Angus Grant, “Unappealing”, *supra* note 121 at 216.

¹⁴³ This point has been emphasized by A1, A9 and A5.

¹⁴⁴ Interview with A1.

Section 34 (1)(f) and section 35(1)(b) allow the Minister to find a non-citizen inadmissible on the ground that a person was a member of an organization infamous for Canadian authorities or occupied a senior position in a repressive government. As the Minister does not need to prove that individuals subjected to the inadmissibility proceedings have committed any offense — unlike the exclusion provision whereby the Supreme Court ended the guilt by association — excluding an individual through the inadmissibility proceeding is much easier. One interviewee shared that “I have seen cases many cases where this is the issue: a person would not have been excluded but they were found inadmissible and lost refugee protection.”¹⁴⁵ Another interviewee shares a similar view: “they find people inadmissible who are actually real refugees and should not be excluded.”¹⁴⁶

One of the safeguards that the RSD process provides is the obligation to conduct an oral hearing before the RPD.¹⁴⁷ In the seminal decision of *Singh v Canada*, the Supreme Court decided that refugees have the right to a full oral hearing of their claims.¹⁴⁸ Oral hearings safeguard two main “objectives: (1) it provides the claimant with an opportunity to state his case and know the case he has to meet, and (2) it allows the Board to assess the credibility of the claimant.”¹⁴⁹ Unlike the RSD process, there is no obligation to conduct an oral hearing for inadmissibility, which makes all the process faster and simpler.¹⁵⁰

d. The scope of inadmissibility on the SHSO grounds is broader than that of Article 1F

One of the reasons why the inadmissibility process is expeditious and preferable compared to Article 1F is because the inadmissibility grounds of SHSO, and particularly, the ground of security — section 34 — covers a broad range of acts. Being a member of an organization that is considered to engage, has engaged, or will engage in an act of espionage, in terrorism, an act of subversion against a democratic government, institution, or process is sufficient to find a

¹⁴⁵ Interview with A5.

¹⁴⁶ Interview with A12.

¹⁴⁷ IRPA, section 170 (b).

¹⁴⁸ *Singh v Minister of Employment and Immigration*, 1 SCR 177.

¹⁴⁹ Baglay & Martin Jones, *supra* note 89 at 296.

¹⁵⁰ This point was emphasized by A9 and A11.

foreigner inadmissible.¹⁵¹ The wording of the section suggests that the legislative intent was to apply this clause to as many people as possible.¹⁵²

A13: The courts have interpreted section 34 so broadly that claimants who attended two meetings to see what was going on there could be labelled as a member even though they have never joined the organization. One of the judges said there was no limits to this article that one cannot strictly define who is a member. In having a broad definition, they catch people that we should not be catching.

A14: Especially inadmissibility hearings there is no humanitarian element; it is very black and white. The article is so vague that in the future we will need the Supreme Court to intervene in the way that it did in *Ezokola*; the problem is this article.

The scope of section 34 is thus much broader than that of Article 1F. Most of the time, the refugee claimant herself declares that she is a member of a certain group which constitutes the basis of her refugee claim.¹⁵³ Section 34 does not only affect refugee claimants but also recognized refugees who are on the path of obtaining permanent resident status. Even if the foreigner becomes a recognized refugee, section 34 is invoked by the Minister to prevent them from getting permanent residency. One interviewee explained the strategy of the government in dealing with security matters as follows. Because of the *Ezokola* decision, allegations with regard to section 35 and Article 1F(a) require rigorous analysis. As a result, the government simply brings inadmissibility allegations under section 34. As individuals who are found inadmissible are ineligible to make a refugee claim, they are *de facto* “excluded from the Refugee Convention” due to “the very wide primitive given to section 34 of the act.”¹⁵⁴

A4: What that means is that people who would not be declared excludable under the Convention are in fact excluded from refugee protection because they are determined inadmissible and therefore ineligible to make a refugee claim.

¹⁵¹ IRPA, section 34 (1)(f).

¹⁵² A13 and A14 concur this opinion.

¹⁵³ A14 shared this point for their clients.

¹⁵⁴ Interview with A4.

One interviewee sent an access to information request to learn about the internal system within the Ministry in terms of the application of section 34(1)(f). Particularly, they inquired why their clients who are Bangladeshis and were members of the Bangladesh Nationalist Party (BNP), a political party in Bangladesh, were targeted under that section. After starting their refugee claim, their clients were channeled into an inadmissibility hearing at the Immigration Division. Although BNP is a legitimate political party in Bangladesh, the Canadian government states that the party has been involved in terrorist activities. The interviewee notes that as their clients did not commit any offense, the Ministry's case to argue an Article 1F case before the Board would be much weaker.

A14: The only thing that the Ministry has against them is that they were members of a political party that the government believes has done terrorist activities. The claimants themselves are not found to have done anything wrong personally and in a lot of our files the Minister would even acknowledge that.

Members of the BNP are being targeted at every level: not only refugee claimants but also individuals who were in the process of being heard by the RPD, as well as recognized refugees who were in the process of applying for permanent residency.

A14: This article- section 34(1)(f)- is being used at all stages by the government which they are allowed to do so. It is part of the Act.

Another interviewee explains that it is almost “impossible to legally defend against an allegation under section” 34(1)(f).¹⁵⁵ Lawyers have tried different arguments to challenge that section. For example, they argued that 34(1)(f) violates the principles of fundamental justice under section 7 of the Charter since it is uncertain that organizations to which individuals are members were involved in terrorism or serious criminal offenses. Canadian courts, however, do not accept the section 7 challenge, as judges have interpreted that the deprivation of life, liberty and security of the person “is only engaged when somebody is about to be deported.”¹⁵⁶ An individual found inadmissible is not immediately going to be deported from Canada since they can still request a pre-removal risk assessment; section 7 is thus inapplicable.

¹⁵⁵ Interview with A4.

¹⁵⁶ Interview with A4.

Other arguments that the scope of membership under section 34(1)(f) should be narrowed and any personal circumstances affecting the claimant's membership and balancing factors should be considered have also been dismissed by courts.

A4: Even if you are not an official member of an organization, the inadmissibility for membership applies. Even if you are a member of the organization before it took part in any terrorist acts and disassociated as soon as you knew about it; even if you are a member of the organization after it renounced any involvement in terrorism you are still inadmissible to Canada. Even if you were so young at the time that you did not really have the *mens rea* [or your involvement was involuntary], still you are inadmissible to Canada; even if it was involuntary you are still inadmissible to Canada.

Some interviewees share the view that inadmissibility is explicitly used by the government to prevent the Article 1F process — as Article 1F is strictly applied by courts — or that applicants who would not be excludable otherwise were found to be inadmissible, since the inadmissibility grounds are much broader than Article 1F acts. Accordingly, the exclusion provision in Canada, through the practice and with an intentional design, has turned into the inadmissibility proceeding. As a result, admissibility grounds are systemically used instead of the exclusion provision.

As one interviewee articulates “the Canadian system is bent out of whack with the Refugee Convention, and international law because there is a number of inadmissibility provisions that are *de facto* exclusions.”¹⁵⁷ For example, a soldier who had a low-ranking position in the Burundian Army and who had never engaged in any crimes is not going to be considered to have voluntarily and knowingly participated in a crime under Article 1F(a).¹⁵⁸ The Ministry knows that Article 1F(a) is inapplicable; thus, they argue for membership to an organization under section 34(1)(f). They only need to prove that an “organization has any time in its existence committed an act of terrorism, engaged in subversion” or in espionage.¹⁵⁹ This is easy to prove considering that an army in existence for 70 years has done something offensive at a time. The sharp truth is “they can get these exclusions within inadmissibility under 34(1)f that they would never be able to get on the exclusion clause”.¹⁶⁰

¹⁵⁷ Interview with A3.

¹⁵⁸ Interview with A3.

¹⁵⁹ Interview with A3.

¹⁶⁰ Interview with A3.

Some of the members of organizations that might be considered to have engaged in acts of terrorism can also be beneficial to society as they worked in orphanages, taught in schools, or cared in hospitals. Those people such as members of the LTTE or Hamas fell into a grey area. If they were allowed to go through the RSD process, they would not be excluded under Article 1F.

A15: Nelson Mandela —if he was seeking asylum in Canada today— would be found inadmissible on the ground of security under section 34.

A13: There is no reason to refuse a woman who helped an orphanage because it was run by a PLO organization. She is an orphanage, not a terrorist. Those kinds of issues arise substantively because the law is way too broad.

Tamils fleeing from Sri Lanka to seek refuge in Canada is another example. One interviewee argues that most Tamils who politically supported the Tamil Tigers during the civil war that lasted for 30 years were not involved in any crimes.¹⁶¹ However, Canada has considered any Tamil who has been involved in the organization at any level as a security threat.

A10: The government of Canada is still actively working to deport Tamils who had engagement with Tiger affiliated organization here in Canada, who have never had any direct or indirect involvement in atrocity crimes.

Canada disapproves of certain regimes and considers people who have been associated with these regimes as inadmissible. For example, the Board interpreted that an individual who was a member of the ordinary Polish forces in 1980 could be inadmissible to Canada “because he could have done things during martial law”.¹⁶² Similar things have occurred for different countries in similar contexts (i.e. diplomats of unsavory countries.) However, no action is taken place until the person subject to the regime mentioned that he was working for a disapproved regime.

A8: Very frequently the facts presented themselves as somebody marries a Canadian and applies. Everything is fine until they say he worked in a militia.

¹⁶¹ Interview with A10. A15 shared a similar view on LTTE and Hamas.

¹⁶² Interview with A8.

Canadian courts consider that several legal remedies are available for individuals who are found inadmissible. One of the resources to overhaul the decision of inadmissibility is a ministerial exemption. Some inadmissible individuals could still be admitted to Canada if the Minister of Citizenship and Immigration is satisfied that doing so is not contrary to the national interest. Those who are found inadmissible on security grounds; who are inadmissible on the ground that they are senior officials in governments considered by the Minister to have engaged in terrorism, systematic or gross human rights violations, genocide, a war crime, or a crime against humanity; who come from a country against whom Canada has agreed to impose sanctions; and who is inadmissible because of organized criminality fall in this category.¹⁶³ However, individuals who are found inadmissible on the ground that they are considered to have committed war crimes or crimes against humanity cannot obtain ministerial relief.¹⁶⁴ In addition, as one interviewee notes, these remedies are not available at the front end.¹⁶⁵ Waldman noted that “[m]inisterial relief may be granted...if a person innocently joined or contributed to an organization that he or she did not know was a terrorist organization...[or] the person was coerced into joining or contributing to the organization”¹⁶⁶

Ministerial exemption for inadmissible individuals is an extraordinary remedy, as attested by some interviewees, not often granted in practice. The Minister instead delays deciding the case.¹⁶⁷

A4: Essentially the minister can exempt anybody from inadmissibility if to do so is not contrary to the national interest. So the Courts have said well it is okay because in the end the minister can exempt you from all these pernicious consequences, except the problem is that minister does not like to find somebody who is *prima facie* being found inadmissible as the terrorist in the national interest to or not against the national interest to Canada.

e. The discretion is not used in favor of the claimant

Referring an individual to the inadmissibility is discretionary but often immigration officers use this discretion to refer claimants to the inadmissibility scheme. According to section 44(1) of the IRPA, an immigration officer who thinks that a foreigner including permanent

¹⁶³ IRPA, section 42.1.

¹⁶⁴ Lorne Waldman, “HIM-299 Admission not detrimental to national interests.” in *Halsbury's Laws Can – Immigr Citizsh 2019 Reissue* (LexisNexis Canada).

¹⁶⁵ Interview with A2.

¹⁶⁶ Lorne Waldman, *supra* note 164.

¹⁶⁷ A13 raised this point.

residents of Canada is inadmissible may prepare a report setting out the relevant facts. This report will be then transmitted to the Minister. Certain CBSA and IRCC officials have been designated to prepare an inadmissibility report under section 44(1).¹⁶⁸ According to the Department's Manual, the CBSA is the sole agency to prepare and review an inadmissibility report under section 44 (1) on the SHSO grounds.¹⁶⁹

Although the provision has been framed in a discretionary language, Canadian courts determined that an officer's discretion under section 44 is very limited. In 2004, in *Correia v. Canada*, the Federal Court decided that the immigration officer's discretion not to prepare a report is extremely limited.¹⁷⁰ *Correia v. Canada* involves a permanent resident who was found inadmissible on the serious criminality ground. In explaining the limited discretion that an officer has in preparing an inadmissibility report, Justice Phelan noted that "[t]he discretion not to report must be extremely limited and rare otherwise it would give to officials a level of discretion not even enjoyed by the responsible Minister".¹⁷¹ In the same vein, the officer's discretion is limited to obtaining the information "that the conviction and sentence were rendered" for an inadmissibility ground under section 44(1) — serious criminality— as it is "based on the conviction and sentence itself".¹⁷²

In the same year, in *Leong v. Canada*, the Federal Court determined that "although both ss.44 (1) and (2) use the word 'may', the discretion conferred on an immigration officer is very narrow."¹⁷³ In 2006, Justice Mosly relied on *Correia v. Canada* to decide that the reason to conduct an interview under section 44(1) is "simply to confirm the facts that may support the formation of an opinion by the officer that a permanent resident or foreign national present in Canada is inadmissible"¹⁷⁴ If the officer finds that such facts exist, she has a responsibility to prepare a report and is not empowered by the statute to exercise discretion.¹⁷⁵

In 2008, Justice Mosly relied on his decision of *Awed v. Canada* to explain the extremely limited discretion that the officer has in preparing an inadmissibility report.¹⁷⁶

In 2006, in *Cha v. Canada*, the Federal Court of Appeal decided that "the wordings of sections 36 and 44..." does not permit "immigration officers and Minister's delegates, in making findings of inadmissibility...any room to manoeuvre apart from that expressly carved

¹⁶⁸ Refugees and Citizenship Canada Immigration, *Immigration Manual: Enforcement (ENF). Chapter ENF 5: Writing S44(1) Reports* (2017) under section 4- Instruments and delegations.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Correia v Canada (Minister of Citizenship and Immigration)*, FC 782 at paras 11–13.

¹⁷¹ *Ibid* at para 20 and 21.

¹⁷² *Ibid* at para. 27.

¹⁷³ *Leong v Canada (Solicitor General)*, FC 1126 at para 18.

¹⁷⁴ *Awed v Canada (Citizenship and Immigration)*, FC 469 at para 18.

¹⁷⁵ *Awed v Canada (Citizenship and Immigration)*, FC 469 at para 18-20.

¹⁷⁶ *Richter v Canada (Minister of Citizenship and Immigration)*, 1 FCR 806 at para 12.

out in the Act and the Regulations”.¹⁷⁷ Even in the situation that the wording of “may” is read “as granting discretion, all grants of discretion are not created equal: depending on the purpose and object of the legislation, there may be considerable discretion, or there may be little.”¹⁷⁸

Immigration officers...are simply on a fact-finding mission, no more, no less. Particular circumstances of the person, the offence, the conviction and the sentence are beyond their reach. It is their respective responsibility, when they find a person to be inadmissible on grounds of serious or simple criminality, to prepare a report and to act on it.¹⁷⁹

In 2017, the Federal Court of Appeal decided that an officer’s decision under subsection 44 (1) is not considered to be a judicial or quasi-judicial decision.¹⁸⁰ In this case, the counsel argued that as the provision used the word “may” as opposed to “shall” in the previous version of IRPA, immigration officers “have broad discretion to consider personal or mitigating circumstances in deciding to make an inadmissibility report.”¹⁸¹ The Federal Court of Appeal acknowledged there is no consensus among judges on the scope of the discretion under section 44. While some Federal Court judges interpreted the scope so narrowly that officers have no discretion, some others interpreted it broadly by determining that “officers have a wide enough discretion to consider the personal circumstances of an individual, in addition to the facts underlying the alleged inadmissibility.”¹⁸²

Although immigration officers “appear to have some flexibility when deciding whether or not to write an inadmissibility report or to refer it to the [Immigration Division] ID”, the extent of the discretion depends on “grounds of inadmissibility and whether the person concerned is a permanent resident or a foreign national”.¹⁸³ The Federal Court of Appeal also admitted that once the report is referred, the option of the Immigration Division is “very limited” as the division has no choice but to make a removal order. Thus, “the only discretion... to prevent a foreign national or permanent resident from being removed rests with the immigration officer and the Minister or his delegate.”¹⁸⁴ Although the Court admitted that the only discretion belongs to the officer and the Minister, Justice de Montigny concluded that “the duty of fairness is clearly not at the high end of the spectrum in the context of decisions made pursuant to subsections 44(1) and (2).”¹⁸⁵

¹⁷⁷ *Cha v Canada (Minister of Citizenship and Immigration)*, 1 FCR 126 at para 35.

¹⁷⁸ *Ibid*, para. 19.

¹⁷⁹ *Ibid*, para. 35.

¹⁸⁰ *Sharma v Canada (Public Safety and Emergency Preparedness)*, 3 FCR 319 at para 23.

¹⁸¹ *Ibid*, para. 43.

¹⁸² *Ibid*, para. 44.

¹⁸³ *Ibid*, para. 23.

¹⁸⁴ *Ibid*, para. 24.

¹⁸⁵ *Ibid*, para. 29.

The Federal Court’s decision in *McAlpin* ruled out a possibility for a CBSA officer to consider the humanitarian and compassionate grounds in exercising his discretion for the referral. The Court decided that so long as the rationale is stated, an officer or a ministerial delegate is allowed to “prioritize public safety and security, even to the point of entirely refraining from taking [humanitarian and compassionate] H&C factors into account”.¹⁸⁶ Disregarding H&C factors would particularly matter for cases involving an inadmissibility ground of serious criminality. The officer or the delegate is not required to consider H&C factors “in exercising the discretion that is contemplated by subss. 44(1) and (2) of the IRPA.”¹⁸⁷

Not only does the case-law highlight the limited discretion, but also the Manual for the CBSA and the IRCC supports the narrow discretion that the officer has in not preparing an inadmissibility report. In fact, the Manual encourages the preparation of a report for inadmissibility on SHSO grounds to keep a formal record of inadmissibility, as not doing so “may have an impact on possible future dealings with the person”.¹⁸⁸ For inadmissibility cases triggering the application of SHSO clauses, it is crucial to “have a formal record of that inadmissibility. This is best accomplished by preparing an A44(1) report.”¹⁸⁹

The Manual affirms that in cases of inadmissibility on SHSO grounds, “the scope of discretion enjoyed by officers making a decision regarding whether or not to write an A44(1) report will be very narrow and it generally is reasonably open to an officer or an MD [minister’s delegate] to prioritize public safety and security.”¹⁹⁰ The Manual underlines that national security is a top priority for Canada as elucidated in the objectives of the IRPA.¹⁹¹

The intention of the Parliament to prioritize security as the objectives of the IRPA is further echoed in several court cases. In *Medovarski v. Canada*, the Supreme Court stated that the objective of prioritizing the security of Canada is actualized by removing individuals with criminal records from Canada.¹⁹² In *Sharma*, the Federal Court of Appeal confirmed that immigration officers have to respect the objectives of the IRPA for their work in the context of section 44(1); protecting public health and safety and maintaining the security of Canadian society are among these objectives.¹⁹³

¹⁸⁶ *McAlpin v Canada (Public Safety and Emergency Preparedness)*, 4 FCR 422 at para 65.

¹⁸⁷ *Ibid.*

¹⁸⁸ Refugees and Citizenship Canada Immigration, *supra* note 168 under 8.1 Limited discretion of officer at A44(1).

¹⁸⁹ *Ibid* under 8.1 Limited discretion of officer at A44(1).

¹⁹⁰ Refugees and Citizenship Canada Immigration, *supra* note 160 under section 8.2. priority cases.

¹⁹¹ *Ibid* under section 10.4 A44(1) reports for criminality cases.

¹⁹² *Medovarski v Canada (Minister of Citizenship and Immigration)*; *Esteban v Canada (Minister of Citizenship and Immigration)*, 2 SCR 51 at para 10.

¹⁹³ Subsection 3 (1)(h) of the IRPA. *Sharma v. Canada (Public Safety and Emergency Preparedness)*, *supra* note 180.

As the case law suggests, the application of section 36 might be straightforward: whether or not the individual has a conviction and the length of her sentence. For rather ambiguous provisions such as sections 34, 35, and 37, how can an officer form an opinion that a person is inadmissible to Canada? Specifically, how can an officer form an opinion that an organization will engage in an act of terrorism under section 34 of the IRPA? As of now, we do not know how officers use their broad discretion for these questions other than the fact that the Manual is encouraging them to prepare an inadmissibility report, rather than not to.

In designing the methodology of this thesis, I questioned why an officer—in almost all cases—continues with the inadmissibility scheme instead of referring a refugee claimant to the RPD division where she can be considered under Article 1F. In the beginning, this question was particularly important considering that officers have the discretion to prepare an inadmissibility report under section 44(1). I asked this question to all interviewees and have inquired how the preparation of this report has become compulsory in practice. Some of them referred to the case-law interpreting this section to be compulsory; some said officers do not use this discretion in favor of the individual due to an internal policy.

A14: Immigration officers are using that discretion to it is full extent right now because of an internal policy within the Minister...yes they do not need to issue, they do not have to issue a report 44 but they can. The officers have a certain amount of discretion that they can use. The issue is that they do not use it.

A10: I think there is case law very clearly speaks to the fact it when there is an issue of security inadmissibility that provides as an advent of the hearing our report is written and the person is precluded from proceeding to the protection hearing.

f. Canada has broad discretion in enforcing the inadmissibility scheme

The main legal source for the IRB members in deciding Article 1F cases explicitly states that

Article 1F(a) must also be interpreted so as to include the international instruments concluded since its adoption. This would include the *Statute of the International Tribunal for Rwanda* and the *Statute of the International Tribunal for the Former Yugoslavia* as well as the *Rome Statute of the International Criminal Court (Rome Statute)*.¹⁹⁴

¹⁹⁴ Immigration and Refugee Board of Canada, *Chapter 11 - Article 1F* (Immigration and Refugee Board of Canada, 2011) Under Section 11.2. [footnotes omitted] [emphasis in original].

In *Ezokola*, the Supreme Court expressed that the interpretation of these terms should not only be based on the International Criminal Court's (ICC) jurisprudence but also the international jurisprudence including ad hoc tribunals and national courts.¹⁹⁵

As one interviewee shares, "far greater opportunities" are available for refugee claimants, "if they manage to actually get to a hearing" before the RPD.¹⁹⁶ These opportunities not only include the availability of defences or evidence for a claimant to argue but also means including having a lawyer representing the claimant before the Board.¹⁹⁷

The availability of defenses is a substantial right that a refugee claimant can argue during the Article 1F adjudication process, and thus, is inherent in the exclusion context as Canadian courts and tribunals follow international jurisprudence in this regard. Interpretation of the Convention refugee definition in the case law states that the IRB must consider the defences accepted in international criminal law including duress, superior orders, and military necessity, once a claimant invokes them.¹⁹⁸ If successfully invoked, such defences relieve the claimant from responsibility, and thus, prevent his exclusion from refugee status.¹⁹⁹ For example, in *Bermudez*, Justice Phelan stated that "[t]he failure to consider the defence of duress is a failure to consider a relevant matter and is an error of law."²⁰⁰

While an Article 1F determination is an individuated process, the inadmissibility scheme leaves no room for the consideration of balancing factors. Addressing the ineligibility provisions as automatic statutory bars to the asylum procedure, the UNHCR underlines the importance of the individualized assessment for alleged acts and refraining from "guilt by association".²⁰¹ For example, rather than having a blanket terrorism provision under section 34(1)(c), "the individual's specific role or involvement in the acts or organisations which would exclude him or her from the scope of refugee protection" should be considered.²⁰² Likewise, inadmissibility by virtue of solely occupying a senior rank in a government infamous for human rights violations was criticized by the UNHCR, as section 35(1)(b) leaves no room for an individualized determination, and is solely based "on a person's status of association".²⁰³

The RSD hearing considers the nature and seriousness of the alleged acts and any mitigation factors. The UNHCR's recommendation for the seriousness of a non-political crime

¹⁹⁵ *Ezokola v. Canada (Citizenship and Immigration)*, *supra* note 60.

¹⁹⁶ Interview with A9.

¹⁹⁷ Interview with A9.

¹⁹⁸ Immigration and Refugee Board of Canada, *Chapter 11 - Article 1F* (Immigration and Refugee Board of Canada, 2011) under section 11.2.4. Defences.

¹⁹⁹ A12 shares the same point of view.

²⁰⁰ *Bermudez v Canada (Minister of Citizenship and Immigration)*, FC 286 at para 11.

²⁰¹ United Nations High Commissioner for Refugees, *supra* note 49 at para 51.

²⁰² *Ibid* at para 49.

²⁰³ *Ibid* at para 50.

is “a capital crime or a grave punishable act”.²⁰⁴ In deciding the seriousness of a non-political crime under Article 1F(b), the Board applies the presumption of seriousness for a potential sentence of 10 years or more “if the crime had been committed in Canada.”²⁰⁵ This presumption is nevertheless rebuttable. As decided in the *Febles* decision, “the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner”.²⁰⁶ By contrast, an individual is inadmissible to Canada for the conviction of an offence outside Canada that, if committed in Canada, would constitute an offence punishable by a maximum term of imprisonment of at least 10 years.²⁰⁷ In other words, the ten-year rule is solely sufficient to find an individual inadmissible on the serious criminality ground under section 36.²⁰⁸ The UNHCR considers “assessing the severity of a conviction outside Canada based on the maximum sentence for a crime, without regard for when the crime was committed or whether the sentence was suspended or not” bars “access to the [RSD] procedure of an individual convicted years or even decades earlier, who served his or her sentence, and where rehabilitation is complete.”²⁰⁹

In addition, section 36 has no consideration for the political nature of a crime; an individual convicted abroad due to his political opinions or acts can be found inadmissible.²¹⁰ For example, in *Gil v. Canada*, the Federal Court decided that even “[a] very serious crime, such as murder, may be accepted as political” if the crime is committed against an oppressive government that “offers no scope for freedom of expression and the peaceful change of government or government policy.”²¹¹ The Applicant might be considered to have no other recourse other than committing that crime to accomplish “political change.”²¹²

In contrast, during the determination of inadmissibility, immigration officers have no discretion to balance other ends such as bringing a political change with the seriousness of a crime. Consequently, the inadmissibility grounds of SHSO are applied in a mechanistic, decontextualized, or unjust manner.

No discretion in the application of the inadmissibility grounds results in unjust exclusions, compared to results stemming from Article 1F’s application.²¹³ Strikingly diverging results

²⁰⁴ *Ibid* at para 55.

²⁰⁵ *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 4 FCR 404 at para 55 (d).

²⁰⁶ *Febles v Canada (Citizenship and Immigration)*, 3 SCR 68 at para 62.

²⁰⁷ For inadmissibility on the serious criminality ground under subsection 36 (1)(b).

²⁰⁸ Section 36(1)(a) of the IRPA. The contrast between the section 36(1)(a) and Article 1F(b) was emphasized by A5.

²⁰⁹ United Nations High Commissioner for Refugees, *supra* note 49 at para 57.

²¹⁰ *Ibid* at para 56.

²¹¹ *Gil v Canada (Minister of Employment and Immigration)*, 1 FC 508.

²¹² *Gil v Canada (Minister of Employment and Immigration)*, 1 FC 508.

²¹³ A12 and A9 share the same concern.

emerge from the application of two provisions, Article 1F(a) and subsection 35(1)(b)²¹⁴ of the IRPA. In the case of *Al-Ani*, Ani made a refugee claim, which was suspended due to his inadmissibility hearings. The Immigration Division found him inadmissible on the ground of 35 (1) (b), as he was a prescribed senior official in Saddam Hussein’s government in Iraq. In his defense, Mr. Ani used *Ezokola* to assert that “he was inadmissible solely because his rank...is akin to a finding of guilt by association.”²¹⁵ In return, the Federal Court reiterated that “a finding of inadmissibility” on the ground of 35 (1) (b) “results from a person’s status, not his actions”.²¹⁶ As stated by Bond et al., “Al-Ani demonstrates that refugee claimants in identical circumstances to Mr. Ezokola can be barred from refugee protection based on the inadmissibility framework, even where they would not be excluded under Article 1F(a).”²¹⁷

g. Institutional culture is different in the two divisions

Immigration and RPD Divisions within the IRB are different in their expertise and mandate. As a result, their decisions diverge and affect refugee claimants in different ways. As we will see below, while the RPD and RAD specialized in applying the 1951 Refugee Convention and the relevant IRPA provisions, the Immigration Division (ID) and the Immigration Appeal Division (IAD) have focused on detention and inadmissibility hearings.

The RPD decides claims for refugee protection in Canada as per the 1951 Refugee Convention, “as implemented through” the IRPA. The Division also decides the vacation and cessation of refugee protection.²¹⁸ The RAD decides “appeals from decisions of the RPD to allow or reject claims for refugee protection.”²¹⁹

CBSA or IRCC officers receive asylum requests and determine whether to refer them to the IRB for determination.²²⁰ At this stage, it is not the IRB’s competent area to rule on inadmissibility. IRCC also conducts pre-removal risk assessments and decides applications based on humanitarian and compassionate grounds. Once a CBSA or IRCC officer decides to refer the case, the Immigration Division conducts admissibility hearings for foreigners considered to be inadmissible to, or removable from Canada. The Division also “conducts detention reviews for foreign nationals or permanent residents detained by the CBSA to review

²¹⁴ Section 35 (1) (b) set forth that “...being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*”

²¹⁵ *Al-Ani v Canada (Citizenship and Immigration)*, FC 30 at para 16.

²¹⁶ *Ibid* at para. 20.

²¹⁷ Bond, Nathan Benson & Jared Porter, “Guilt by Association”, *supra* note 69 at 14.

²¹⁸ Immigration and Refugee Board of Canada, “Immigration and Refugee Board at a glance”, (10 October 2017), online: <<https://irb.gc.ca:443/en/information-sheets/Pages/irbGlance.aspx>>.

²¹⁹ *Ibid*.

²²⁰ IRPA, 100(3)

the reasons for detention.”²²¹ The IAD decides on “appeals by permanent residents who are subject to deportation and by sponsors who are seeking to bring members of the family class into Canada.”²²² The IRB with all its divisions is empowered to apply the Charter. According to Waldman, its Divisions are “courts of competent jurisdiction and can therefore provide remedies under s. 24 of the Charter”.²²³ However, the officers of CBSA and IRCC (immigration officers) “do not have the same power as granted to immigration tribunals to apply the Charter.”²²⁴ Nevertheless, in exercising their discretion, immigration officers have to comply with the Charter. The Charter also applies in the judicial review process for decisions made by them.²²⁵

As the RPD specialized in applying the 1951 Refugee convention and the relevant provisions of the IRPA, the Division has built expertise and adopted a humanitarian approach in deciding refugee claims.²²⁶ By contrast, the Immigration Division specialized in inadmissibility and detention matters, not directly relevant to the 1951 Refugee Convention. As we saw earlier though, most individuals found ineligible on security grounds are refugee claimants. The Immigration Division is thus dealing with refugee claims, albeit not being trained in this area. Four interviewees (A1, A3, A10, A12) strongly emphasized that poorly qualified people have been appointed to the Immigration Division: people “who do not understand the complicated political context of being from a persecuted minority group in a country where the individuals have no rights for generations”.²²⁷ In such situations, supporting the cause of independence, “a cause of homeland for my people does not mean that a person is a criminal”.²²⁸ In a similar vein, one interviewee argues that in the Immigration Division one has to deal with bureaucrats who have no expertise and perspective in refugee law.²²⁹ Another interviewee concurs; “one of the biggest problems of the immigration division is the institutional culture that has not been informed by the human rights.”²³⁰ A12 goes as far as

²²¹ Immigration and Refugee Board of Canada, *supra* note 218.

²²² Lorne Waldman, “HIM-2 Parts of the Immigration and Refugee Protection Act.” in *Halsburys Laws Can – Immigr Citizsh 2019 Reissue* (LexisNexis Canada).

²²³ Lorne Waldman, “HIM-410 Jurisdiction.” in *Halsburys Laws Can – Immigr Citizsh 2019 Reissue* (LexisNexis Canada).

²²⁴ Lorne Waldman, “HIM-16 Tribunals have jurisdiction to apply the Charter.” in *Halsburys Laws Can – Immigr Citizsh 2019 Reissue* (LexisNexis Canada).

²²⁵ *Ibid.*

²²⁶ This point was underlined by A10 and A12.

²²⁷ Interview with A10.

²²⁸ Interview with A10.

²²⁹ Interview with A1.

²³⁰ Interview with A10.

saying that the Immigration Division is a “police division, deportation division and ethnic cleansing division.”²³¹

The exclusion provision well designed to deny refugee protection to persecutors is part of the RSD system. The decision to exclude someone from protection is a complex process whereby the risks must be weighed against non-protection and a member has to adjudicate a crime that took place abroad falling under a completely different panel system. Yet, adjudicators with no background in criminal law are “expected to make these very significant decisions.”²³² The proper place to make this analysis is within the RSD system which is rejected by Canada.²³³

A1: You do not get the best outcomes there; you do not get the best quality decisions from that...Because to decide that someone who is claiming refugee status and who may actually be at risk for some reason should not get refugee status is sort of a policy decision that should be made by someone who knows refugee law and refugee policy and has a good grasp of all the issues.

Unlike the RPD, the Immigration Division is not an independent administrative tribunal, but rather is a part of the Ministry which casts a doubt on how independently officers can adjudicate the risks.²³⁴ Two interviewees claim that the immigration division of the IRB is very close to the government.

A12: When you go to the Immigration Division of the IRB it is very close to the government. The people who are part of the Board at the Immigration Division are very close to the mindset of the government trying to keep people out. So, it is much easier to exclude people there than later on in the process.

²³¹ Interview with A12.

²³² Interview with A3.

²³³ Interview with A1.

²³⁴ Interview with A5.

A10: The Immigration Division has largely been called from the CBSA or immigration enforcement or from completely unrelated fields of activity which do not make them ideally suited for understanding the nuance context that many of the individuals have come from.

One interviewee argued that some officers of the Immigration Division think that claimants who are recognized as refugees are not genuine refugees.²³⁵ In their words, “the department of immigration and CBSA really did not trust the Immigration and Refugee Board.”²³⁶ Because of this sided perception and distrust, the Immigration Division “wanted to take control of any case where there was some element of threat or danger and exceptionally low threats.”²³⁷ For the interviewee, “an absurdly low standard of criminality” was designed by the conservative government which wanted to gain control over refugee protection and did not want these cases to “go before an independent member of the Board.”²³⁸

h. The standard of proof in inadmissibility and Article 1F are similar, but the burden of proof is different

The inadmissibility scheme and exclusion process often diverge from each other significantly. This divergence makes the inadmissibility scheme preferable for the Canadian government. However, there are a few things as problematic in both schemes. The standard of proof is one of them.²³⁹

A13: Even though you may be a refugee and need protection and even though you are no threat to anybody and never did so the threshold is the problem. The way that they operate does not respect due process.

The standard of proof in the adjudication of Article 1F cases and inadmissibility cases on SHSO grounds are “reasonable grounds to believe” that is less stringent than the civil standard of the balance of probabilities. One exception is for permanent residents who are considered inadmissible for an act committed outside Canada that would constitute an indictable offense, if committed in Canada.²⁴⁰ For those acts, the standard of proof is the civil standard of the balance of probabilities, whereas, for other foreigners, the standard is still

²³⁵ Interview with A9.

²³⁶ Interview with A9.

²³⁷ Interview with A9.

²³⁸ Interview with A9.

²³⁹ A13, A6, A5, A8 and A12 shared the view that the threshold is the problem.

²⁴⁰ IRPA, section 36 (2) c.

reasonable grounds.²⁴¹ As the Minister's burden is low to establish that the person is inadmissible or excludable, it is very difficult for lawyers to bring evidence to challenge their allegation based on lower evidence requirements.²⁴² A lower threshold also means that the IRB and immigration officer can use hearsay or undisclosed sources to find someone inadmissible or excludable.²⁴³

According to the *Mugasera* decision of the Supreme Court of Canada, "[t]he 'reasonable grounds to believe' standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities. Reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information."²⁴⁴

While the standard of proof for Article 1F cases and inadmissibility on the grounds of SHSO is mostly the same, the burden of proof diverges. For individuals who seek to enter Canada, the onus is on the individual to demonstrate that she is admissible to Canada.²⁴⁵ For individuals who are authorized to enter Canada, the burden is however on the Minister to establish that the individual is inadmissible.²⁴⁶

Contrary to the inadmissibility on the grounds of SHSO, the onus to show that the refugee claimant is excludable falls on the Minister. In the decision of *Ramirez*, the Federal Court established that the burden of proof is "on the Government, as well as being on the basis of less than the balance of probabilities."²⁴⁷ The standard of proof in exclusion cases, serious reasons for considering, "requires proof to a less than civil standard, but requires some credible evidence that provides an objective basis for the facts asserted".²⁴⁸

A9: It is very strange. I have to prove that he is not inadmissible; she [immigration officer] does not have to prove that he is inadmissible. So I have to make evidence, establish that he is not against something that I do not really understand in the first place, because it is obvious this is all I want to tell her.

²⁴¹ IRPA, section 36 (3) (d).

²⁴² A5 and A12 emphasized this point.

²⁴³ Interview with A8.

²⁴⁴ *Mugasera v. Canada (Minister of Citizenship and Immigration)*, *supra* note 48 at paras 113–117.

²⁴⁵ IRPA, section 100 (1.1)

²⁴⁶ Refugees and Citizenship Canada Immigration, *supra* note 168 under section 7.3 Burden of proof.

²⁴⁷ *Ramirez v. Canada (Minister of Employment and Immigration)*, *supra* note 64 at para 10.

²⁴⁸ Lorne Waldman, "HIM-204 Article 1F." in *Halsbury's Laws Can – Immigr Citizsh 2019 Reissue* (LexisNexis Canada); *Lai v Canada (Minister of Citizenship and Immigration)*, [2005] FCJ No 584, 2005 FCA 125, 2005 CAF 125, [2005] ACF no 584, 253 DLR (4th) 606, 332 NR 344, 139 ACWS (3d) 113, Federal Court of Appeal Vancouver, British Columbia; *Xie v Canada (Minister of Citizenship and Immigration)*, [2004] FCJ No 1142, 2004 FCA 250, 2004 CAF 250, [2004] ACF no 1142, [2005] 1 FCR 304, [2005] 1 RCF 304, 243 DLR (4th) 385, 325 NR 255, 37 Imm LR (3d) 163, 132 ACWS (3d) 348, Federal Court of Appeal Winnipeg, Manitoba.

1.4. Conclusion: Canada prefers to handle the dirty work in an evasive way according to its national interest

This section analyzed eight reasons to explain why Canada prefers to invoke the inadmissibility scheme for refugee claimants, instead of allowing them to access the RSD system and to be considered under the exclusion provision. The remedies available to inadmissible individuals are quite restricted compared to those available to excluded individuals in the RSD system. The grant of judicial review is very low and ministerial exemption is rarely granted, if ever granted. The inadmissibility ground of security captures refugee claimants broader than the acts envisaged in Article 1F. As a result, for Canada, it is much easier and expeditious to find refugee claimants inadmissible compared to a rigorous process of Article 1F adjudication within the RSD system.

Earlier under *Section 1.2.1. The Ezokola decision has led to more inadmissibility cases and fewer Article 1Fs*, Angus Grant's research showed that since the enactment of IRPA in 2002, there has been a trend to hunt refugee claimants under the inadmissibility scheme. This hunting mechanism works well for Canada, to the extent that 81% of Grant's dataset in the national security context—section 34— involves refugees and refugee claimants. Other scholars such as Bond et al. and Rikhof earlier contended that since *Ezokola*, there has been an increase in inadmissibility cases and a decrease in exclusion. At least eight interviewees (A1, A2, A5, A7, A12, A14, A9, A3) shared a similar concern: instead of the exclusion provision, increasingly, the inadmissibility scheme has been invoked in Canada. We thus established that the inadmissibility grounds of SHSO are replacing Article 1F decisions in Canada.

This part concludes that Canada prefers to handle the dirty work of discerning who is a refugee and who is excludable in an evasive way. This work is at least not actualized as per the human-rights-based approach but rather on the ground of national interest. The national interest that Canada prioritizes in this area takes us back to the concept of state sovereignty, discussed in Chapter I, as the rationale behind the criminalization of migration.

It is true that Canada is a sovereign country, has a legitimate right to deny access to certain individuals to enter its territory. Perhaps unwanted individuals are unwanted in Canada for legitimate reasons. However, the problem occurs when Canada regulates the scope of unwanted individuals so broadly that the situation conflicts with its international obligations under the 1951 Refugee Convention. The following section will discuss how the inadmissibility grounds of SHSO breach the 1951 Refugee Convention.

1.5. Using a broader inadmissibility scheme violates the 1951 Refugee Convention

Earlier, *Section 1.2. Inadmissibility scheme reducing the number of refugee claimants in violation of the right to seek asylum* explained that the scope of Article 1F greatly overlaps with that of SHSO grounds. Subsequently, the Section inquired the reasons for Canada to prefer the inadmissibility scheme, if the safeguarding of its territory has already been saved by Article 1F. Finally, this section will explain how the inadmissibility grounds of SHSO violate the 1951 Refugee Convention.

In its response to Bill C-11 that has become IRPA in 2002, the UNHCR affirmed that automatic statutory bars to the asylum procedure including ineligibility requirements are inconsistent with the 1951 Refugee Convention as such bars significantly narrow “the scope of the right to seek asylum”.²⁴⁹ These provisions narrow the scope of the right to seek asylum to the extent that genuine refugees who would not be excluded under Article 1F might be found ineligible to seek asylum in Canada. This consequence puts Canada in a position where it clearly and intentionally prevents access to asylum to the contrary to its commitments under the 1951 Refugee Convention. Later, in its response to Bill C-31, UNHCR reiterated its “concerns over exclusion being examined under the heading of ‘ineligibility’, or admissibility to the refugee proceedings”.²⁵⁰ For inadmissibility on the serious criminality ground, the UNHCR expressed that “convictions outside Canada... may form the basis for exclusion under Article 1F”.²⁵¹ The assessment of serious criminality ground thus should “be made as part of the procedure to determine the merits of the claim rather than at the admissibility stage.”²⁵² Consequently, UNHCR recommended that “expanding ineligibility grounds further in ways that are not consistent with the 1951 Convention” should be avoided.²⁵³

In literature, Baglay and Jones warn that inadmissibility grounds that are also grounds of exclusion can bar a claim for RSD to be referred to the IRB and restrict “the protection available through other reviews of risk.”²⁵⁴ Bond et al. recently argued that “the overall effect of these provisions...is that Canada’s inadmissibility regime is actively barring protection for individuals who meet the legal definition of a refugee under the Refugee Convention. This renders Canada noncompliant with the Convention and in violation of international law”.²⁵⁵

²⁴⁹ United Nations High Commissioner for Refugees, *supra* note 49 at para 40.

²⁵⁰ *UNHCR Submission on Bill C-31 : Protecting Canada’s Immigration System Act*, by United Nations High Commissioner for Refugees (UNHCR, 2012) at para 35.

²⁵¹ *Ibid*, para. 37.

²⁵² *Ibid*, para. 37.

²⁵³ United Nations High Commissioner for Refugees, *supra* note 250 under Recommendation no. 10.

²⁵⁴ Baglay & Martin Jones, *supra* note 89 at 249.

²⁵⁵ Bond, Nathan Benson & Jared Porter, “Guilt by Association”, *supra* note 69 at 22.

As explained under *Section 1.2. Inadmissibility scheme reducing the number of refugee claimants in violation of the right to seek asylum*, the inadmissibility determination process on the grounds of SHSO can be based on facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur. Since inadmissibility renders an application to be ineligible to be referred to the RPD — in other words, it bars or ends the asylum-seeking process in Canada— the interdiction on the basis of possible criminal acts that may occur in the future could bring about Canada’s responsibility in an international arena. The inadmissibility determination for claims at a port of entry or inside Canada is made in the territory of Canada.²⁵⁶ Canada, thus, has a duty to apply the 1951 Refugee Convention to individuals seeking asylum in its territory.

Looking at the case law, however, we see that the Supreme Court of Canada does not consider the ineligibility provisions conflicting with Canada’s commitments under the 1951 Refugee Convention. Even if so, the Supreme Court allows such breaches. In *Febles*, the Court allowed the Parliament to enact legislation that “falls short of the” 1951 Refugee Convention’s protection.

Article 1F(b) of the Refugee Convention is part of an international treaty, the meaning of which is not affected by provisions of the IRPA. However, the Board is bound by the IRPA, and not by the Refugee Convention itself. Parliament has the power to pass legislation that complies with Canada’s obligations under the Refugee Convention, or to pass legislation that either exceeds or falls short of the Refugee Convention’s protections.²⁵⁷

In the seminal case of *Suresh*, the Court stated “that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the *Charter* or under s. 1”.²⁵⁸ Interpreting the *Suresh* decision, the Inadmissibility Manual written for the IRCC personnel argues that “[d]enying entry to Convention refugees on security grounds is not a violation of the *Convention Against Torture*, *Covenant on Civil and Political Rights* or the *Convention Relating to the Status of Refugees*.”²⁵⁹ A state is allowed “to rid itself of those who pose a security risk without being in breach of its

²⁵⁶ “Determinations as to inadmissibility can arise in three different ways: overseas when a person applies for a visa to enter Canada, at a port of entry when a person seeks to come into Canada, or inland when there is concern whether a person who is in Canada should be removed.” Lorne Waldman, “HIM-340 Determination of inadmissibility.” in *Halsburys Laws Can – Immigr Citizsh 2019 Reissue* (LexisNexis Canada).

²⁵⁷ *Febles v. Canada (Citizenship and Immigration)*, *supra* note 206 at para 64.

²⁵⁸ *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 Supreme Court of Canada at para 78.

²⁵⁹ Refugees and Citizenship Canada Immigration, “ENF 1-Inadmissibility Manual”, (5 December 2017), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals.html>> at 50. [emphasis in original].

international obligations.”²⁶⁰ These two seminal cases indicate that Supreme Court prioritizes the sovereign right to allow or deny who enters Canada over its international commitments.

The way the inadmissibility provisions interacts with the 1951 Refugee Convention is problematic. Using inadmissibility provisions that are broader than Article 1F as an eligibility requirement violates the 1951 Refugee Convention. In other words, a person might lose “the right to be a refugee on the grounds that are much broader than those envisaged under the 1951 Convention.”²⁶¹ Two interviewees stated that the inadmissibility provisions on SHSO grounds violate Canada’s commitments under the 1951 Refugee Convention.

A2: There are large number of people who can be found ineligible in situations where they would not or should not be excluded under the Convention, but they are effectively excluded through the eligibility provisions. In other words, the implementation of the eligibility provisions has effectively put us in breach of a number of obligations under the Convention. It is wrong in the sense that this is not a good implementation of the Convention and it puts us in breach of our obligations under the Convention.

A5: I deeply disagree with inadmissibility provisions that captured many more people than the Refugee Convention was meant to capture. It puts people’s lives in limbo for many years since they do not get a permanent resident status as protected people. Canada is very realistically sending people to persecution in many cases because we did not want to protect them from persecution simply because of their association with other people.

In conclusion, the current inadmissibility grounds of SHSO are violating the 1951 Refugee Convention as these grounds exclude more refugee claimants than what the Convention envisaged. It might be true that a finding of inadmissibility does not necessarily end up in the deportation of an individual due to the other recourses such as humanitarian and compassionate grounds and PRRA reviews. Nevertheless, these provisions in themselves breach the 1951 Refugee Convention because inadmissible individuals do not get substantial and procedural rights that they are normally granted in RSD hearings. As underlined by Justice Aballe in her dissenting opinion in *Febles*, the 1951 Refugee Convention is the “the Rosetta Stone of refugee protection under international law, setting out.... the corresponding

²⁶⁰ *Ibid.*

²⁶¹ Interview with A5.

obligations of states towards refugees in their territory.”²⁶² It is an obligation of Canada to treat refugee claimants as it is. Narrowing the number of refugee claimants on the SHSO grounds instead of resorting to already established Article 1F acts breaches the corresponding obligations of states towards refugees.

2. Canada does not prefer criminal prosecution for non-citizens

In this chapter, our hypothesis is to test whether Canada resorts to Article 1F to detect possible foreign criminals, by doing so transforming Article 1F into a punitive tool. In our inquiry, we first realized that there is not a sufficient number of cases where RSD findings are used in a subsequent criminal investigation. As will be explored in the next part, unlike Canada, using Article 1F as a punitive tool is encouraged in Europe. For example, the Evaluation Report for the Canadian War Crimes and Crimes Against Humanity Program admits that Belgium and Sweden “conducted more prosecutions than Canada in a shorter period.”²⁶³ Why is there a sharp difference between Canada and Europe, two places are known to hold human rights dear? We argued that in Canada, the inadmissibility scheme is preferred over the exclusion provision for overlapping acts. As a result, it is highly unlikely to use RSD findings in a criminal trial, as the inadmissibility scheme takes over. To evaluate the latter, we explored whether there is any asylum case that is later used in a criminal trial in Canada. The answer is negative except for human trafficking or smuggling reasons. These cases are set aside because those are not the focus of this thesis.

Since the Crimes Against Humanity and War Crimes Program was launched in 1998, as a result of the Deschênes Commission’s finding that alleged [Nazi] war criminals have resided in Canada, the country prosecuted only two non-nationals for war crimes, crimes against humanity, or genocide allegations. But none of these prosecutions took place on the basis of RSD findings. The Evaluation Report of the program defines denying safe haven to individuals allegedly involved in crimes against humanity, war crimes, or genocide, “and to contribute to the domestic and international fight against impunity” as its purpose.²⁶⁴ If fighting against impunity is paramount for Canada, why does it not use the RSD findings to launch a criminal investigation? The answer is not because Canada respects the *nemo tenetur* principle, or other human rights ends, as the case of *Jaballah* shows —to be discussed under Chapter IV— that the asylum testimonies are permitted to be used in a quasi-criminal proceeding, the security certificate proceeding in Canada.

²⁶² *Febles v. Canada (Citizenship and Immigration)*, *supra* note 206 at para 72.

²⁶³ *Crimes Against Humanity and War Crimes Program Evaluation*, by Department of Justice Government of Canada (2016) at vii.

²⁶⁴ *Ibid* at 3.

This section argues that as a policy, Canada does not prefer criminal prosecution for extra-territorial crimes. It is inapt to prosecute refugee claimants on the basis of their asylum testimonies because of three reasons: a. Canada considers inadmissibility and exclusion sufficient to end impunity; b. Canada prefers deportation over prosecution; and c. the burden of proof and evidentiary standards are hard to achieve in prosecuting extra-territorial crimes.

2.1. Canada considers inadmissibility and exclusion sufficient to end impunity

There are many intersections between criminal law and refugee law in Canada. The Program on War Crimes listed some temporary or permanent resolutions under the name remedies for individuals who are considered to have participated in war crimes, crimes against humanity, or genocide. According to the report, “[r]emedies...can be immigration or criminal based, and one or more remedies can be employed regarding the same individual”.²⁶⁵ The IRPA is counted as one of the legislations in which these remedies are governed. Seven concrete remedies are denial of visa, exclusion from the refugee determination process, inadmissibility hearings, removal, revocation of citizenship, extradition and surrender to an international criminal tribunal, and criminal investigation and prosecution. The File Review Committee of the War Crimes Unit is authorized to determine the type of remedy to be applied to the case in question.²⁶⁶

Canada tends to choose immigration-based remedies for foreigners who are suspected of criminality. Being “the least costly and complex remedy”, the denial of visa applicants for the alleged acts is the top priority. This priority order is followed by the immigration remedies including refugee exclusion, admissibility hearings, and deportation proceedings.²⁶⁷ Canada's Program on War Crimes Report states that “[i]mmigration remedies have been found to be effective and cost efficient. Criminal investigations and prosecutions of war criminals are the most expensive and resource-intensive remedies and, as such, are pursued infrequently.”²⁶⁸ This is where the Canadian approach towards the implementation of the exclusion provision becomes more visible and problematic since the exclusion provision, which traditionally falls under refugee law, is considered a “remedy” by Canada’s Program on Crimes Against Humanity and War Crimes, which is pivoted on criminal law. There are two clear contradictions of naming exclusion and inadmissibility as remedies to fight against impunity. First, justice is not served by denying access to Canada or causing people to live in limbo for decades. In the

²⁶⁵ Canada’s Program on Crimes Against Humanity and War Crimes 2011–2015: 13th Report, *supra* note 71 at 6.

²⁶⁶ *Ibid.*

²⁶⁷ Department of Justice Government of Canada, *supra* note 263 at 39.

²⁶⁸ Canada’s Program on Crimes Against Humanity and War Crimes 2011–2015: 13th Report, *supra* note 71 at 5.

words of Nicholas P Weiss, “**Canada chose practical expediency over justice.**”²⁶⁹ Second, pursuing immigration remedies conflicts with the *Ezokola* decision in which the Supreme Court determined that the purpose of the exclusion provision is not to “determine guilt or innocence” but to exclude those “**who are not bona fide refugees**.”²⁷⁰ This is the reason why the IRB hearings are likely to be less stringent than criminal trials.²⁷¹

One of the common arguments of the cost-efficient approach for the Program is budgetary concerns. Since the start of the program in 1998, its budget has been intact with \$15.6 million per fiscal year. Due to the high cost of launching a domestic prosecution for extra-territorial crimes, Canada ought to be careful in choosing which crime to prosecute.²⁷² Ironically, the federal government allocated 12 million dollars only to purchase new refrigerators from Loblaws last April.²⁷³

It is not because of the budgetary concerns that Canada does not prefer prosecuting possible foreign criminals but there is a deliberate intent to pursue immigration-based remedies. The amount of \$7.2 million, out of the Program’s overall budget of \$15.6 million, has been solely allocated to the CBSA for immigration cases, whereas the RCMP, the agent responsible for investigating allegations of crimes against humanity, war crimes, or genocide received only \$682,000.²⁷⁴ If the budgetary concerns were real, the RCMP would not have received such a small amount of money compared to the amount that the CBSA got from the start of the Program. Furthermore, in 2003, “the majority of the modern war crimes activities and corresponding resources of IRCC was transferred to the CBSA.”²⁷⁵ As constructed deliberately in this way, “the CBSA serves as the program lead for immigration cases involving crimes against humanity, war crimes, or genocide.”²⁷⁶ The Report admits that the “Ministry of Justice has recently worked with the RCMP to reduce the criminal inventory by shifting files to IRCC and Justice to pursue immigration remedies, which is hoped to reduce the investigative burden on the RCMP.”²⁷⁷

Finally, the report underlines that the accession of the Rome Statute and the IRPA’s enforcement “reinforced Canada’s existing “no safe haven” policy and established Canada as a

²⁶⁹ Nicholas Weiss, “Somebody Else’s Problem: How the United States and Canada Violate International Law and Fail to Ensure the Prosecution of War Criminals” (2012) 45:1 Case West Reserve J Int Law 579 at 580. [Emphasis added]

²⁷⁰ *Ezokola v. Canada (Citizenship and Immigration)*, *supra* note 60 at para 38. [Emphasis added]

²⁷¹ *Ezokola v. Canada (Citizenship and Immigration)*, *supra* note 60 at para 39.

²⁷² Colin Butler, “Canada knew for a decade accused Liberian war criminal was living here”, *CBC* (24 June 2020), online: <<https://www.cbc.ca/news/canada/london/bill-horace-war-crimes-london-ontario-canada-1.5624295>>.

²⁷³ *Ibid.*

²⁷⁴ Department of Justice Government of Canada, *supra* note 263 at 11.

²⁷⁵ Department of Justice Government of Canada, *supra* note 263 at 8.

²⁷⁶ Department of Justice Government of Canada, *supra* note 263 at 8.

²⁷⁷ *Ibid* at 38.

global leader in holding persons who have committed war crimes, crimes against humanity or genocide accountable.”²⁷⁸ It is unknown how refusing visas or finding an individual inadmissible to Canada establishes Canada as a global leader for accountability.

2.2. Canada prefers deportation over prosecution

Kaushal & Dauvergne argues that although Canada adopted universal jurisdiction for crimes against humanity, war crimes and torture, Canada prefers to deport foreigners, who could be normally subjected to universal jurisdiction and be prosecuted in Canada, to their country of origin with no consideration that they might be persecuted or escape criminal consequences.²⁷⁹

In the same vein, one interviewee criticized the deportation policy of Canada for not gauging the security risk of an individual to the country of origin. For example, a refugee claimant who was wanted on robbery charges in Canada was deported to Bosnia where he ended up bombing up a place in Bosnia.²⁸⁰

A13: They knew he was a security threat. Canada does not really worry sending people or the risk that they are putting anybody else there. He sought refuge and he was involved in criminal activities and so rather than prosecute him they just deported him.

It is well-documented that Canada deports an individual —regardless of having a permanent resident or a refugee status— who committed a crime in Canada or posed a security threat to a country where the person’s life is at risk. As such, the UN Human Rights Committee criticized Canada’s preference for deportation on several occasions. Notably, in *Jama Warsame v the Human Rights Committee*, the permanent resident who had been living in Canada since the age of four was deported to Somalia where he has never been to, due to his conviction of robbery and possession of a scheduled substance for trafficking. Warsame was found inadmissible on the ground of serious criminality and ordered for deportation. The UN Human Rights Committee found that his deportation to Somalia would be “disproportionate to the legitimate aim of preventing the commission of further crimes and therefore arbitrary.”²⁸¹ His deportation order was carried out notwithstanding the decision of the Human Rights Committee that removal would violate article 12 of the ICCPR.²⁸²

²⁷⁸ *Canada’s Program on Crimes Against Humanity and War Crimes 2011–2015: 13th Report*, *supra* note 71 at 6.

²⁷⁹ Kaushal & Catherine Dauvergne, *supra* note 1 at 58–59.

²⁸⁰ Interview with A13.

²⁸¹ *Jama Warsame v Canada*, 2011 UN Human Rights Committee (HRC) at para 8.6.

²⁸² Andrew Stobo Sniderman, “Jama Warsame is a citizen of nowhere”, (10 December 2013), online: *Macleans.ca* <<https://www.macleans.ca/news/canada/jame-warsame-is-a-citizen-of-nowhere/>>.

Similarly, Mostafa Dadar, a refugee and a permanent resident of Canada, was deported due to his conviction of aggravated assault and theft to Iran where his life was at risk. Although the Committee against Torture determined that his deportation to Iran would violate article 3 of the Convention against torture²⁸³, he was deported to Iran in 2006.²⁸⁴

Mansour Ahani, a recognized refugee, was deported to Iran as he allegedly was a trained assassin with the Iranian secret service on the basis of a report from the Canadian Security Intelligence Service (CSIS). Mansour Ahani accepted his past association with “the Iranian secret service, but he....denied any terrorist activity.”²⁸⁵ The Supreme Court approved his deportation to Iran as he had not proved the risk of torture in Iran.²⁸⁶ The UN Human Rights Committee decided on the breach of “article 13 of the Covenant, in conjunction with article 7.”²⁸⁷ Canada violated “its obligations under the Optional Protocol by deporting the author [Ahani] before the Committee's determination of his claim.”²⁸⁸ The spokeswoman of the Immigration department Danielle Sarazin admitted that they do not “follow up on what happens to people who are deported.”²⁸⁹

Other examples include *Roger Judge v. Canada* where the person convicted for the death penalty in the U.S. was returned without guaranteeing that the death penalty would not be executed.²⁹⁰ In *Boily v. Canada*, the individual was extradited to Mexico where he was accused of having killed a prison guard and marijuana trafficking.²⁹¹ Upon his return to Mexico, Boily was tortured in the prison.²⁹² In all these cases, the UN Human Rights or Torture Committee decided that Canada has violated international law. For Baglay and Jones, the UN Human Rights and Torture Committee’s such decisions recognize “that the overall strategy of framing cases of mistreatment of refugees in terms of human rights violations is well-founded” in Canada.²⁹³

²⁸³ *Mostafa Dadar v Canada*, 2005 UN Committee Against Torture (CAT).

²⁸⁴ CBC News, “Dadar deported to Iran despite fears of torture”, *CBC* (27 March 2006), online: <<https://www.cbc.ca/news/canada/new-brunswick/dadar-deported-to-iran-despite-fears-of-torture-1.604648>>.

²⁸⁵ Eduardo Cue , “UNHCR welcomes Canadian ruling limiting torture-related deportations”, (15 January 2002), online: *UNHCR* <<https://www.unhcr.org/news/latest/2002/1/3c444cf4/unhcr-welcomes-canadian-ruling-limiting-torture-related-deportations.html>>.

²⁸⁶ *Ahani v Canada (Minister of Citizenship and Immigration)*, 1 SCR 2.

²⁸⁷ *Mansour Ahani v Canada*, 2004 UN Human Rights Committee (HRC) at para 10.8.

²⁸⁸ *Ibid* at para. 11.

²⁸⁹ Estanislao Oziwicz, “Suspected assassin deported to Tehran”, (21 June 2002), online: <<https://www.theglobeandmail.com/news/national/suspected-assassin-deported-to-tehran/article1024320/>>.

²⁹⁰ Baglay & Martin Jones, *supra* note 89 at 395.

²⁹¹ *Boily v Canada*, FC 1021.

²⁹² *Ibid*.

²⁹³ Baglay & Martin Jones, *supra* note 89 at 395.

More examples include Dejan Demirovic who fled to Canada in 2001 to seek asylum which was dismissed, as he was found to be inadmissible on the ground that “he committed or, at a minimum, was complicit in the commission of crimes against humanity.”²⁹⁴ Demirovic was allegedly one of the soldiers in the infamous Scorpions paramilitary unit, which ethnically cleansed a village in Kosovo. Canadian officials arrested him in 2003 “on the basis of an arrest warrant issued by Serbia and Montenegro.”²⁹⁵ Although his lawyer contested that no evidence showed that he was one of those soldiers, he was deported to Serbia, where he was charged with war crimes. Eventually, “[t]he charges against [him] had been thrown out due to a lack of evidence”.²⁹⁶

Perhaps the most famous case is the extradition of Léon Mugesera, who was returned to Rwanda in 2012, for having incited “genocide and crimes against humanity stemming from an incendiary anti-Tutsi speech he gave in 1992.”²⁹⁷ *Mugesera* ultimately received a life sentence “for hate speech aimed at stirring up killings of minority Tutsis during [Rwandan] genocide” in Rwanda.²⁹⁸

The majority of interviewees agree that Canada prefers deportation over prosecution.²⁹⁹ Instead of prosecuting them in Canada, individuals were told: “to go back home”.³⁰⁰

A5: It seems to me we just want to protect ourselves here. You can go back to where you came from you have not been found guilty or maybe they would think we do not have any evidence to prosecute this person criminally. I have certainly seen numerous cases where Canada has requested individuals to go back on.

By contrast, one interviewee mentioned without providing details that they have seen cases that were prosecuted after the exclusion. The interviewee added that prosecution is very rare since the gathering of evidence required to launch a criminal prosecution is difficult. Canada mostly prefers immigration remedies over prosecution because the former is easier.³⁰¹ Another interviewee thinks that no criminal investigation took place in Canada based on the

²⁹⁴ *Demirovic v Canada (Minister of Citizenship and Immigration)*, FC 1284 at para 1.

²⁹⁵ *Ibid.*

²⁹⁶ NEWEurope, “Suspected war criminal released from custody in Serbia”, (23 April 2006), online: *New Eur* <<https://www.neweurope.eu/article/suspected-war-criminal-released-custody-serbia/>>.

²⁹⁷ “Canada deports Rwanda genocide suspect Leon Mugesera”, *BBC News* (24 January 2012), online: <<https://www.bbc.com/news/world-us-canada-16694130>>.

²⁹⁸ Thomson Reuters, “Léon Mugesera, ‘spokesman of hatred,’ handed life sentence for Rwandan genocide crimes”, *CBC* (15 April 2016), online: <<https://www.cbc.ca/news/canada/montreal/1%C3%A9on-mugesera-rwandan-genocide-life-sentence-1.3537607>>.

²⁹⁹ A5, A6, A7, A11 and A3 concurred on this point.

³⁰⁰ Interview with A5.

³⁰¹ Interview with A11.

information that a refugee claimant has provided during the RSD proceedings.³⁰² One interviewee highlighted the unfair outcomes of applying the immigration remedies instead of criminal law to foreigners in comparison to lenient results of the same act conducted by a Canadian citizen. A Canadian citizen of Tamil origin was prosecuted and sentenced to six months imprisonment “for supporting LTTE in the context of being president of a “we are all Tamil” movement organization in British Columbia” while a non-citizen in a similar context would face inadmissibility provisions. As put by the interviewee, “the conduct that is rendering people inadmissible demonstrates that on criminal law standards these are not significant crimes, a six-month sentence”.³⁰³

A10: This man has already served his sentence and he is a free person today. By contrast Manickavasagam Suresh whose case went to our SCC in 2002 and who is still being threatened with deportation today after almost 30 years in Canada. When you look at the conduct at issue in relation to *Suresh* and you look at the six-month sentence that was imposed on someone for the exact same kind of activities you have no better case to highlight how problematic Canada’s immigration security provisions are.

2.3. The burden of proof and evidentiary standards are hard to achieve in prosecuting extra-territorial crimes

The reason for Canada to prefer deportation over prosecution could be that the latter requires more resources, more time, and the standard of proof is higher.³⁰⁴ The burden of proof and evidentiary standards to prove that an individual is guilty in a criminal trial is higher than that of exclusion and inadmissibility. As put by one interviewee “it is much easier to introduce second-hand evidence in an immigration proceeding than a criminal proceeding.”³⁰⁵ There would be no case where Canada does both or where they first apply immigration remedies and then criminal remedies.³⁰⁶

Philippe Larochelle and Sébastien Chartrand argue that the reason for Canada to pursue immigration remedies is to avoid “the safeguards applied by criminal courts”.³⁰⁷ The criminal and extradition procedures grant judicial guarantees that are not recognized in assessing

³⁰² Interview with A8.

³⁰³ Interview with A10.

³⁰⁴ Interview with A6.

³⁰⁵ Interview with A6.

³⁰⁶ Interview with A6.

³⁰⁷ Philippe Larochelle & Sébastien Chartrand, “Balancing the Rights of Migrants and International Criminal Law: The Case of Alleged Rwandan War Criminals Under Canada’s Immigration Laws” (2015) 93:2 Can Bar Rev 409 at 414.

inadmissibility and receiving a removal order. International criminal justice serves the purpose of applying the rule of law “by bringing suspects to justice and determining criminal liability in accordance with the fundamental rights of the accused.”³⁰⁸ Larochelle and Chartrand concluded that the cost of overriding this purpose is to return “even the worse suspects without due process and to countries where they might not receive fair trials.”³⁰⁹

The War Crimes Program Report reiterates that launching a domestic prosecution is costly and “resource intensive”.³¹⁰ The program lists several reasons to explain the hurdles of pursuing a domestic prosecution including traveling and negotiating with foreign governments, locating witnesses, and convincing them to provide testimonies.³¹¹ Joseph Rikhof argues that domestic prosecution for extra-territorial crimes is rare because of the cost of investigation, the sufficiency of the evidence, public interest, discretion of prosecution to start the case.³¹² For Dauvergne, Western states remarkably prefer deportation for non-nationals. The reasons for this preference is that “the secret evidence would not stand up to the higher evidentiary standards of a criminal trial, or that in criminal prosecution there is a higher standard of proof than in immigration security matters, and therefore a greater risk, from the state’s perspective, that the person will be released.”³¹³

It is true that in some cases Canada does not possess sufficient evidence to start prosecution as either the subject of a trial is a foreign national or the offence in question took place abroad. As attested by one interviewee, dichotomously, individuals, who are labeled as war criminals or a perpetrator of crimes against humanity by the virtue of immigration provisions, would often not meet the test under criminal law standards.³¹⁴

3. General Conclusion for Part II

Canada does not resort to Article 1F for punitive ends for two main reasons. First, Canada uses the inadmissibility scheme at the front end to reduce the number of refugee claimants in violation of the right to seek asylum. As fewer refugee claimants get into the RSD system, there are fewer Article 1F exclusions. Most of the inadmissibility grounds of SHSO were envisaged by the drafters of the Convention and regulated under Article 1F. Similar acts regulated under inadmissibility on the grounds of SHSO could be considered under Article 1F. The reason why

³⁰⁸ *Ibid* at 432.

³⁰⁹ *Ibid*.

³¹⁰ *Canada’s Program on Crimes Against Humanity and War Crimes 2011–2015: 13th Report*, *supra* note 71 at 13.

³¹¹ *Canada’s Program on Crimes Against Humanity and War Crimes 2011–2015: 13th Report*, *supra* note 71 at 13.

³¹² Rikhof, *supra* note 17.

³¹³ Catherine Dauvergne, “Security and Migration Law in the Less Brave New World”: (2016) Soc Leg Stud, online: <<https://journals.sagepub.com/doi/pdf/10.1177/0964663907082734>> at 535.

³¹⁴ Interview with A10.

the exclusion provision was integrated into the 1951 Refugee Convention was to prevent certain individuals to be recognized as refugees and to protect the integrity of the Convention. This research established eight reasons to explain why Canada prefers the inadmissibility scheme instead of Article 1F, although the integrity of the refugee system has been already ensured with the exclusion provision. All these reasons support the view that Canada is prioritizing its national interest over its human rights obligations to decide who is excludable. Our inquiry established that the inadmissibility grounds of SHSO are replacing Article 1F decisions in Canada. These provisions narrow the scope of the right to seek asylum to the extent that genuine refugees who would not be excluded under Article 1F are nevertheless found ineligible to seek asylum in Canada. As a result, we concluded that using the broader inadmissibility scheme on SHSO grounds violates the 1951 Refugee Convention.

Second, we discussed three major reasons, besides the inadmissibility scheme, that explain Canada's unwillingness to prosecute excludable individuals on the basis of asylum testimonies or RSD findings. As a policy, Canada does not prefer criminal prosecution for extra-territorial crimes; it prefers immigration-based remedies including Article 1F, inadmissibility, and deportation. As the case-law, literature and interviewees suggest Canada has no qualms about whether or not suspects will receive a fair trial in returning them to their countries.

III. The Troubled Due Process of Law in the Netherlands for Refugee Claimants Suspected of Criminality

The previous part analyzed why Canada does not resort to Article 1F for punitive ends. We established that Canada does not prefer criminal trials for Article 1F acts due to the presence of the inadmissibility scheme, and its reluctance to prosecute extra-territorial crimes.

This part will examine how the Netherlands uses Article 1F for punitive ends. The first section will argue that the use of refugee claimants' testimony in subsequent criminal proceedings violates the right not to incriminate oneself. We will analyze the right not to incriminate oneself to demonstrate a dichotomy of resorting to criminal law instruments in determining exclusion cases without providing safeguards of criminal law. This dichotomy occurs when cases are subsequently referred to prosecution services for a possible criminal trial. In doing so, this part will discuss a case study from the Netherlands, and the European Court of Human Rights (ECtHR) jurisprudence on the right not to incriminate oneself. Leveraging on the findings of the case study, this part concludes that the Netherlands and the ECtHR largely do not consider the waiver of the right not to incriminate oneself in relation to refugee claimants.

1. The use of refugee claimants' testimony in a subsequent criminal proceeding violates the right not to incriminate oneself

The right not to incriminate oneself emerged under English law and is based on the disinclination to compel anyone, on pain of punishment, to provide incriminating evidence against herself.³¹⁵ The ECtHR affirmed that the right to remain silent under police questioning and the right not to incriminate oneself are recognized international standards and central to fair procedure enunciated in Article 6 of the European Convention on Human Rights (ECHR).³¹⁶ The European Court also confirmed that avoiding “miscarriages of justice”³¹⁷ is the *raison d'être* of these standards. In addition to the ECHR, Article 48 of the Charter of Fundamental Rights of the EU stipulates that a suspect is presumed innocent by authorities until proven guilty according to law. The presumption of innocence includes *inter alia* remaining silent and not to self-incriminate. The right not to incriminate oneself is applicable from the very beginning of the accusation process and is a key component of the principle of presumption of innocence. How is the right not to incriminate oneself relevant to asylum law?

One of the key elements of the refugee status determination (RSD) system is maintaining confidentiality during the process.³¹⁸ In the Netherlands, RSD interviewers assure applicants that their testimony will be kept confidential and will not be shared with third parties.³¹⁹ Reijven & Wijk support the idea that sharing information provided by asylum applicants who could be excluded from protection on the basis of criminality can be in the interest of security and justice.³²⁰ Although they warn that information sharing with a wide range of actors is not encouraged, “carefully sharing sections of information about a selected number of high risk individuals” with a limited number of institutions could be the solution.³²¹ Similarly, the Supreme Court of the Netherlands concluded that the use of testimony obtained during the asylum procedure as evidence in a criminal procedure did not breach the *nemo tenetur* principle or the right not to incriminate oneself in a case against two former members of the KhAD/WAD, the Afghan State Intelligence Agency in 2008.³²² In deciding so, the

³¹⁵ Adrian Keane & Paul McKeown, *The Modern Law of Evidence*, ninth edition ed (Oxford, New York: Oxford University Press, 2011) at 595.

³¹⁶ *John Murray v The United Kingdom*, 1996 European Court of Human Rights at para 45.

³¹⁷ *Ibid.*

³¹⁸ According to the UNHCR, the integrity of the asylum system requires that “information given on the basis of confidentiality must remain protected” even when a final decision is exclusion from protection. UNHCR, *supra* note 4 at para 104.

³¹⁹ “[U]nless this is necessary in the execution of the Aliens Act and in supervising aliens” Joke Reijven & Joris van Wijk, “Alleged perpetrators of serious crimes applying for asylum in the Netherlands: Confidentiality, the interests of justice and security” (2015) 1:18 *Criminol Crim Justice* at 7.

³²⁰ *Ibid.*

³²¹ *Ibid.*

³²² *Ibid.*

Supreme Court asserted that “the use of such information and the violation of privacy had been proportional.”³²³ This case will be discussed further below.

According to the ECtHR jurisprudence, the right not to incriminate oneself falls under the notion of a fair trial within the meaning of Article 6 of the ECHR.³²⁴

Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 ... The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.³²⁵

The ECtHR considers “the nature and degree of compulsion”, “the existence of any relevant safeguards in the procedure”, and “the use to which any material so obtained is put” as parameters to determine if a procedure quashes the very essence of the right not to incriminate oneself.³²⁶ All criminal proceedings regardless of the type of a criminal act must contain the general requirements of fairness embedded in Article 6. Although “the public interest in the investigation and punishment of the particular offence” at stake may be “weighed against the individual interest that the evidence against him be gathered lawfully”, “public interest concerns cannot justify measures which extinguish the very essence of an applicant’s defence rights”, including the right not to incriminate oneself guaranteed by Article 6 of the ECHR.³²⁷ In addition, statements made by the applicant before any criminal charge might constitute an infringement of her right under Article 6, if the statements are later used in criminal proceedings.³²⁸

In addition to the ECtHR jurisprudence, the EU Directive No. 216/343 requires member states to ensure that suspects and accused persons have the right to remain silent for the criminal act that they are suspected or accused of having committed.³²⁹ Member states are also obliged to observe the right not to incriminate oneself. The exercise of the right to remain silent and the

³²³ *Ibid.*

³²⁴ *Jalloh v Germany*, 2006 ECtHR at para 100. *JB v Switzerland*, no 31827/96, 2000 ECtHR at para 64; *Saunders v The United Kingdom*, 1996 ECtHR at para 68; *Heaney and McGuinness v Ireland*, 2000 ECtHR at para 40; *ALLAN v THE UNITED KINGDOM*, 2002 ECtHR at para 44.

³²⁵ *Saunders v. The United Kingdom*, *supra* note 324 at para 68. *Jalloh v. Germany*, *supra* note 324 at para 100; *H against the Netherlands and J against the Netherlands*, ECtHR at para 68; *Heaney and McGuinness v. Ireland*, *supra* note 324 at para 40; *J.B. v. Switzerland*, no. 31827/96, *supra* note 324 at para 64; *ALLAN v. THE UNITED KINGDOM*, *supra* note 324 at para 44.

³²⁶ *Jalloh v. Germany*, *supra* note 324 at para 101; *O’Halloran and Francis v United Kingdom*, 2007 ECtHR at para 55; *Bykov v Russia*, 2009 ECtHR at para 104.

³²⁷ *Jalloh v. Germany*, *supra* note 324 at para 97; *Heaney and McGuinness v. Ireland*, *supra* note 324 at para 57-58. [emphasis added].

³²⁸ *Saunders v. The United Kingdom*, *supra* note 324 at para 74.

³²⁹ Article 7 of the *Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings*, COM/2013/0821 final-2013/0407 (COD).

right not to incriminate oneself cannot be used against suspects; any evidence gathered in breach of these rules cannot be considered for the criminal offense concerned.³³⁰ The member states were expected to adopt legislation complying with the provisions of the Directive by April 2018,³³¹ though the legal implementation of the Directive within domestic law is not foreseeable as of the writing of this chapter.

As to the intersection of the exclusion practice with criminal law, during the exclusion proceedings, if an asylum seeker remains silent for any allegation or question concerning his involvement in an organization infamous for human rights violations, what would happen? In examining this question, I will first look at the procedural rules laid down by UNHCR, a leading organization for providing recommendations on the application of Article 1F.³³² UNHCR also conducts refugee status determination process in countries where the relevant national legislation is absent.³³³ Then, the Dutch practice of Article 1F will be analysed.

International refugee instruments do not regulate procedures relating to the refugee determination system.³³⁴ The ultimate decision lies on the adjudicator, who assesses the claim of an asylum applicant, to determine if the applicant has established a “well-founded fear of persecution.”³³⁵ Proof or (oral or documentary) evidence establish the facts supporting asylum claims. In this process, the “burden of proof” refers to a duty to produce evidence in order favorably prove any alleged acts.³³⁶ UNHCR regards, as a general legal principle, that burden of proof belongs to the person submitting a claim.³³⁷ Thus, as a principle, an asylum seeker has the burden of establishing the accuracy of her claim. Once the applicant renders “a truthful account of facts” vis-à-vis her claim, she fulfills the burden of proof.³³⁸ However, considering the complexities of the refugee determination system—including difficulty for an asylum seeker to provide evidence to prove her claim—the applicant and state generally share the burden of proof.³³⁹ Even in the case of the shared burden of proof, the asylum applicant is expected to

- (i) [t]ell the truth and assist the examiner to the full in establishing the facts of his case.
- (ii) Make an effort to support his statements by any available evidence and give a satisfactory explanation for any lack of evidence. If necessary he must make an effort to procure additional evidence.
- (iii) Supply all pertinent information concerning himself and his past experience in as much detail as is necessary to enable the examiner to establish the relevant facts. He should be asked to give a coherent explanation of all the

³³⁰ *Ibid* at Article 7.

³³¹ *Ibid* at Article 14.

³³² Reijven & Joris van Wijk, *supra* note 319 at 249.

³³³ *Ibid*.

³³⁴ *Note on Burden and Standard of Proof in Refugee Claims*, by UNHCR (UNHCR, 1998) at para 2.

³³⁵ *Ibid* at para. 2.

³³⁶ *Ibid* at para. 5.

³³⁷ UNHCR, *supra* note 108 at para 176.

³³⁸ UNHCR, *supra* note 334 at para 6.

³³⁹ UNHCR, *supra* note 4 at para 105.

reasons invoked in support of his application for refugee status and he should answer any questions put to him.³⁴⁰

UNHCR further notes that the asylum seeker's lack of cooperation can lead to the rejection of her asylum request in some cases.³⁴¹ If the lack of cooperation implies that the basics of an asylum claim cannot be established, the issue of exclusion becomes irrelevant³⁴², and the applicant's request can be rejected because she could not establish her case.

As a Dutch judgment will be the focus, the following provides a summary of the Dutch practice. Since April 2001, the Aliens Act 2000 regulates the admission, residence and expulsion of foreigners in the Netherlands. These issues are further regulated in the Aliens Decree, the Regulation on Aliens and the Aliens Act Implementation Guidelines. Provisions of the General Administrative Law Act (*Algemene Wet Bestuursrecht*) are also applicable to proceedings under the Alien Act 2000 unless stipulated otherwise in the Act.³⁴³ In the Netherlands, the Minister of Justice is the ultimate authority to grant, reject, cancel or not process an asylum residence permit.³⁴⁴ The Minister of Justice can issue asylum residence to a refugee within the meaning of the 1951 Refugee Convention.³⁴⁵ According to Section 30 (a) of the Aliens Act, such a permit can be canceled or not renewed if the refugee has provided false information or "has withheld information in circumstances where such information would have led to the rejection of the original application to issue or renew the permit."³⁴⁶ Individuals excluded from protection as per Article 1F are barred to obtain any other subsidiary protection or a regular residence permit.³⁴⁷ In addition, they can be arrested, detained, and do not have access to "basic rights".³⁴⁸ Their files are automatically referred to the local war prosecutor who has a group of investigators helping her on these files.³⁴⁹ If they cannot be refouled, excluded individuals perceived "the *de facto* consequences" of the exclusion decision as punishment.³⁵⁰

Let's assume a hypothetical case in which an asylum applicant provides detailed and truthful assertions regarding his role and rank in an army that is infamous in the host country. After the person is excluded from protection on the grounds of an Article 1F crime, his file is

³⁴⁰ UNHCR, *supra* note 108 at para 205.

³⁴¹ UNHCR, *supra* note 4 at para 111.

³⁴² *Guidelines on Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 2003 at para 35.

³⁴³ *AAQ v THE NETHERLANDS*, 2015 ECtHR at para 37.

³⁴⁴ Section 26 (1) of the *Netherlands: Aliens Act 2000*, 2001.

³⁴⁵ Section 27 (1) (a) of the *Aliens Act 2000*.

³⁴⁶ *Netherlands: Aliens Act 2000*, *supra* note 344.

³⁴⁷ Joke Reijven & Joris van Wijk, "Caught in Limbo: How Alleged Perpetrators of International Crimes who Applied for Asylum in the Netherlands are Affected by a Fundamental System Error in International Law" (2014) 26:2 Int J Refug Law 248–271 at 249.

³⁴⁸ *Ibid.*

³⁴⁹ Maarten P Bolhuis, Hemme Battjes & Joris van Wijk, "Undesirable but Unreturnable Migrants in the Netherlands" (2017) 36:1 Refug Surv Q 61–84 at 74.

³⁵⁰ Reijven & Joris van Wijk, "Caught in Limbo", *supra* note 347 at 249.

shared with the prosecution office. Consequently, he is prosecuted, found guilty, and eventually imprisoned. In this case, the applicant established the facts of his refugee claim; yet, the oral evidence provided by him during his refugee determination interviews is ultimately used against him during the subsequent criminal proceedings. Can we argue that his right not to incriminate oneself is infringed?

Let's assume another scenario whereby an asylum applicant refuses to give detailed information regarding his status and roles in the same army because of the prospects of prosecution. Did he discharge the burden of proof to establish his case?

Answers to these questions might change from case to case and depend on national legislation. In the second scenario, according to the UNHCR rules, the asylum applicant could not discharge his burden of proof as he was not able to assist the examiner to establish the facts of his case. In addition, he could not provide all pertinent information regarding himself and his past experience. The applicant eventually failed in answering questions put to him. As a result, he would be denied refugee status due to the lack of cooperation. If this scenario occurs in the Netherlands, his status will be eventually withdrawn, since such information would have led to the rejection of his original application. Under criminal law, however, the applicant exerted his procedural right to remain silent to avoid providing self-incriminating statements. Then, which standard applies: that within administrative law or that within criminal law?

There are several examples from the EU Member States laying out the dichotomy above. As outlined above, in the Netherlands, if there are serious reasons for considering that an asylum seeker was involved in serious international crimes, a case is automatically referred to the Article 1F unit. Such indications include statements provided by the asylum seeker.³⁵¹ Frequently, asylum applicants “themselves provide information that gives reasons to believe that they committed or facilitated international crimes”³⁵² during the RSD proceedings. If adjudicators further question what kind of activities “they were engaged in, it may even happen that applicants confess having perpetrated certain crimes.”³⁵³ Sources other than self-incriminating statements of an asylum-seeker rarely trigger the exclusion from protection.³⁵⁴ In addition, according to Dutch law,³⁵⁵ the information provided by the asylum applicant “can be shared with law enforcement agencies to prosecute the applicant”.³⁵⁶ Other European countries such as the United Kingdom and Denmark similarly “maintain the information flow between

³⁵¹ Reijven & Joris van Wijk, “Caught in Limbo”, *supra* note 347.

³⁵² Reijven & Joris van Wijk, “Caught in Limbo”, *supra* note 347 at 5.

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*

³⁵⁵ Article 2.2 of the *Netherlands: Aliens Act 2000*, *supra* note 344; Reijven & Joris van Wijk, *supra* note 319 at 9.

³⁵⁶ Reijven & Joris van Wijk, “Caught in Limbo”, *supra* note 347 at 9.

their immigration departments and their respective justice departments to prosecute those denied refugee statuses because of serious criminality”.³⁵⁷ Likewise, Norway shares information with prosecution and police once “first indications of a possible 1F decision arise during initial interview.”³⁵⁸ As a consequence, information revealed by asylum seekers as a necessary part of the asylum process can create an irreconcilable tension between a state’s right to information and an individual’s right against self-incrimination. The following section will analyze the Dutch case law to demonstrate how the current policy of maintaining the information flow between states’ immigration and their respective justice departments violates procedural rights.

2. Two Afghan asylum seekers in the Netherlands

The Netherlands permits the use of statements obtained during the asylum-seeking procedure to be used as evidence within criminal procedures. Asylum seekers challenged this practice both before the Supreme Court of the Netherlands and the ECtHR where the applicants argued that the use of their information in criminal proceedings violated their rights under Articles 6 and 8 of the ECHR in the decision of *H. and J. v. the Netherlands* of 13 November 2014. The ECtHR upheld the decision of the Supreme Court of the Netherlands on the grounds that the use of statements of asylum applicants as evidence in criminal procedure does not violate the *nemo tenetur* principle and the right not to incriminate oneself.³⁵⁹

In *H. and J. v. the Netherlands*, both asylum applicants were ex-members of the KhAD/WAD, the Afghan State Intelligence Agency under the state’s past communist regime. During their RSD interviews, both applicants provided a detailed description of their positions and roles in Afghanistan. They were both assured that their information would be kept confidential during their interview process. In 1994, the Dutch Immigration and Naturalisation Service rejected Mr. H.’s request for asylum on the basis of Article 1F(a) of the 1951 Refugee Convention under crimes against humanity and also under Article 1 of the Convention against Torture. Mr. H.’s appeal before the Dutch administrative tribunals also failed. On the contrary, Mr. J. was initially granted refugee status but subsequently, his status was withdrawn based on Article 1F. After both Afghans were excluded from protection on the basis of Article 1F crimes³⁶⁰, their files were transferred to the public prosecutor for possible prosecution. During

³⁵⁷ Didem Doğar, “The trouble with impunity: War crimes and a humanitarian agency”, online: *The Conversation* <<http://theconversation.com/the-trouble-with-impunity-war-crimes-and-a-humanitarian-agency-94563>>.

³⁵⁸ Reijven & Joris van Wijk, *supra* note 319 at 15.

³⁵⁹ *H. against the Netherlands and J. against the Netherlands*, *supra* note 325.

³⁶⁰ According to the Dutch Immigration and Naturalisation Service’s decision, there are serious reasons to believe that Mr H. had committed (in a leadership role or as a co-perpetrator or accomplice) crimes against humanity as per Article 1F (a), or in the alternative, that he had been guilty of acts contrary to the purposes and principles of the United Nations as per Article 1F

the criminal investigation, Mr. J. was informed about his right not to self-incriminate, but the police department submitted a report that contained information previously incriminating himself to the public prosecutor. The report included Mr. J.'s statements to the Dutch Immigration and Naturalisation Service. Likewise, during the criminal investigations against Mr. H., the authorities informed him about his right to remain silent. The legal dichotomy here is that both applicants had already provided self-incriminating statements during their RSD interviews, which subsequently established a ground for their criminal investigations.

Both asylum applicants were tried before a regional court of The Hague for bearing command responsibility for torture as ex-members of the KhAD. The regional court convicted (i) Mr. H. of complicity in and bearing command responsibility for torture and sentenced him to twelve years' imprisonment, and (ii) Mr. J. of violation of war crimes and sentenced him to nine years' imprisonment. Both asylum applicants appealed to the Court of Appeal, which in return upheld the regional court's decisions on the substantive part but quashed its decisions on the technical grounds. For the self-incriminating statements, the Court of Appeal ruled that Mr. H. was required to provide information about his background because he had willingly subjected himself to the Netherlands. Although Mr. H.'s right to respect for his private life under Article 8 of the ECHR was interfered with because of the file transfer, the situation was justified to prosecute war crimes.

Mr. J. challenged the decision before the Supreme Court of the Netherlands. During the appeal process, the Advocate General held that although an asylum seeker might feel "pressurised into speaking" to provide complete and accurate information to the immigration office, this practice does not amount to coercion.³⁶¹ In addition, confidentiality, as undertaken by the Dutch Immigration and Naturalisation Service, cannot be interpreted as an assurance not to disclose it to the prosecuting authorities. Similar to the regional and appeal courts' judgments, the transfer of the file interferes with Mr. J.'s rights under Article 8 of the ECHR. However, this interference was justifiable because of the suspicion of war crimes. Considering that Mr. J. cannot be deported to Afghanistan due to the principle of *non-refoulement*, he should not "enjoy impunity" in the Netherlands. As a result, the Supreme Court of the Netherlands dismissed Mr. J.'s appeal.³⁶²

(c). Mr. J.'s refugee status was withdrawn on the grounds of Article 1F. *H. against the Netherlands and J. against the Netherlands*, *supra* note 325 at para. 9 and 16.

³⁶¹ *H. against the Netherlands and J. against the Netherlands*, *supra* note 325 at para. 44.

³⁶² *H. against the Netherlands and J. against the Netherlands*, *supra* note 325 at para. 45.

Both asylum applicants challenged the Dutch decisions before the ECtHR under Articles 8³⁶³ and 6³⁶⁴ of the ECHR. They claimed that the conviction decisions were based on incriminating statements obtained during the asylum-seeking proceedings under the assurance of confidentiality. These incriminating statements were later used during their criminal investigations, in defiance of the *nemo tenetur* principle.

In its decision, the European Court affirmed that the right to remain silent under police questioning and the right not to incriminate oneself are central to the fair procedure under Article 6 of the ECHR. The ECtHR also confirmed that avoiding “miscarriages of justice”³⁶⁵ is a *raison d’être* of these standards. However, the Court ruled that the use of Afghan asylum seekers’ incriminating statements, which were obtained during the asylum proceedings in return for a promise of confidentiality, is “natural.”³⁶⁶ In addition, the use of these statements in the criminal investigation “has no bearing on the fairness of the criminal proceedings”.³⁶⁷ The applicants voluntarily entered the Netherlands and, hence, bore the burden of proof to prove their stated fear of persecution was well-founded. Because the statements were offered voluntarily, the Court found their claims that the incriminating statements were made under coercion to be contradictory and baseless. Moreover, given that the applicants were not deported and enjoyed safe shelter in the Netherlands, the government of the Netherlands has a burden to prosecute the applicants for the crime of torture. A practice of promising confidentiality in exchange for an asylum applicant’s honest statements should not be an excuse to protect “the guilty from condign punishment”.³⁶⁸ At this moment, one might question how could the ECtHR possibly be sure that the asylum applicants were guilty? In the end, the European Court unanimously found their applications inadmissible.

3. *H. and J. v. the Netherlands* and the ECtHR jurisprudence on the right not to incriminate oneself

H. and J. v. the Netherlands was not the first decision of the European Court assessing the right not to incriminate oneself within the meaning of Article 6. The ECtHR has been examining the right not to incriminate oneself under Article 6 since 1993 with its decision of *Funke v.*

³⁶³ For the sake of this Chapter, I will not examine their complaints under Article 8, which set forth that “1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

³⁶⁴ The relevant part of Article 6 of the European Convention on Human Rights reads as follows “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...”

³⁶⁵ *H. against the Netherlands and J. against the Netherlands*, *supra* note 325 at para. 68.

³⁶⁶ *H. against the Netherlands and J. against the Netherlands*, *supra* note 325 at para. 77.

³⁶⁷ *Ibid* at paragraph 80.

³⁶⁸ *H. against the Netherlands and J. against the Netherlands*, *supra* note 325 at para. 78.

France.³⁶⁹ However, *H. and J. v. the Netherlands* was the first decision where the Court analysed excluded individual's rights within the meaning of Article 6.

Although I believe that the possible human rights violations caused by the implementation of Article 1F are somehow unique—as discussed earlier Article 1F is heavily subject to criminal law provisions while its decisions are made according to administrative law standards—in what follows I will discuss *H. and J. v. the Netherlands* in comparison to other key decisions of the ECtHR. *Saunders v. the United Kingdom* will be the predominant one in the discussion since this decision shows the stalemate in the ECtHR jurisprudence most clearly.

In the case of Saunders, Mr. Saunders, who was a director and chief executive of Guinness PLC in the United Kingdom, was suspected of having committed criminal offences during the takeover of a public company.³⁷⁰ As a result of rumors about the criminal offences at the time of the bidding, the U.K. Secretary of State for Trade and Industry appointed inspectors to investigate the allegations under the U.K. Companies Act 1985.³⁷¹ During the investigation, the Applicant answered the questions set to him by the inspectors, who in return found strong evidence of criminal acts having been committed. They shared transcripts of the Applicant's interviews and other documentary evidence with the Prosecution Service.³⁷² The prosecution used the transcripts of the interviews in a criminal trial which led to the Applicant's conviction for conspiracy, false accounting, and theft.³⁷³

During the investigations, the Applicant knew that the answers given to the inspectors could be used as evidence in criminal proceedings as it was explicitly set forth in the Companies Act 1985.³⁷⁴ Refusal to answer the questions during the investigations could have led to a contempt of court, “and the imposition of a fine or committal to prison for up to two years”.³⁷⁵

In its judgment, the European Court found that the Applicant's answers regardless of being directly self-incriminating were used during “the proceedings in a manner which sought to incriminate the applicant”.³⁷⁶ Since the Companies Act 1985 permits “the subsequent use in criminal proceedings of statements obtained by the inspectors” of a regulatory body, the applicant's right not to incriminate oneself has been infringed.³⁷⁷ In comparison to the

³⁶⁹ Andrew Ashworth, “Self-Incrimination in European Human Rights Law - A Pregnant Pragmatism” (2008) 30 Cardozo Law Rev 751 at 752. *Funke v France*, 1993 ECtHR.

³⁷⁰ *Saunders v. The United Kingdom*, *supra* note 324 at para 14-18.

³⁷¹ *Ibid* at para. 18.

³⁷² *Ibid* at para. 20.

³⁷³ *Ibid* at para. 31-34. Later, the Court of Appeal quashed that conviction for one count and reduced his sentence to two and a half year's imprisonment. Para. 38

³⁷⁴ *Companies Act 1985* Section 434 (5).

³⁷⁵ *Saunders v. The United Kingdom*, *supra* note 324 at para 70.

³⁷⁶ *Saunders v. The United Kingdom*, *supra* note 324 at para 72.

³⁷⁷ *Saunders v. The United Kingdom*, *supra* note 324 at para 75-76.

Saunders, in *H. and J. v. the Netherlands*, the Court failed in analysing whether or not the asylum applicants' answers were used in subsequent proceedings in an incriminating manner. As was the case in *Saunders*, the Dutch legislation permits the use of statements obtained by the Immigration and Naturalization Service officers in the subsequent criminal proceeding. However, unlike *Saunders*, the Court ruled that the Applicants' right not to incriminate oneself within the meaning of Article 6 has not been infringed. Why is that the case?

First, the ECtHR took a different standpoint in analysing *H. and J. v. the Netherlands*. The Court ruled that since the Applicants were not deported, the Netherlands had a duty to prosecute them.³⁷⁸ This reasoning is paradoxical because in almost all criminal trials the state has a duty to prosecute wrongdoing under international or domestic law. In *Saunders*, the U.K. had a duty to prosecute fraud, theft, and conspiracy; in *Heaney and McGuinness*, Ireland had a duty to prosecute terrorist acts; in *Funke v. France*, France had a duty to prosecute tax evasion offences; in *Jalloh v. Germany*, Germany had a duty to prosecute drug offences, whereas, in *H. and J. v. the Netherlands*, this duty was towards an act of torture. Either the Court implied that duties arising under international law prevail over domestic law, or that prosecuting an act of torture is so vital that this end can outweigh the importance of procedural standards. The latter is more reasonable but conflicts with the Court's reasoning in *Saunders*. In *Saunders*, the Court rejected the Government's reasoning of "the complexity of corporate fraud and the vital public interest in the investigation of such fraud and the punishment of those responsible" to bypass the fundamentals of a fair procedure. The right not to incriminate oneself, as part of Article 6, must be applied to all criminal proceedings regardless of the type of the crime.³⁷⁹

The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings....Moreover the fact that statements were made by the applicant prior to his being charged does not prevent their later use in criminal proceedings from constituting an infringement of the right.³⁸⁰

In *H. and J. v. the Netherlands*, the European Court did not apply the general requirements of fairness contained in Article 6, including the right not to incriminate oneself; certainly, did not question whether the use of statements made by the applicants prior to their being charged in subsequent criminal proceedings, constituted a violation of the right. The only reasonable explanation here is that the Court outweighed the Netherlands' duty under international law to prosecute foreigners who allegedly committed torture over the Applicants'

³⁷⁸ *H. against the Netherlands and J. against the Netherlands*, *supra* note 325 at para. 73.

³⁷⁹ *Saunders v. The United Kingdom*, *supra* note 324 at para 74.

³⁸⁰ *Ibid.* [Emphasis added]

right to a fair trial. Although the ECtHR reversed its position regarding the public interest argument under *Saunders* in its later decisions, the Court still defined the legal parameters. In *Heaney and McGuinness*, and *Jalloh v. Germany*, the European Court ruled that although “the public interest in the investigation and punishment of the particular offence” at stake may be “weighed against the individual interest that the evidence against him be gathered lawfully”, “public interest concerns cannot justify measures which extinguish the very essence of an applicant’s defence rights”, including the right not to incriminate oneself guaranteed by Article 6 of the ECHR.³⁸¹ Unlike these cases, the ECtHR did not analyse if public interest concerns extinguish the very essence of Applicants’ defence rights in the *H. and J. v. the Netherlands*.

Second, the European Court relied on the arbitrary reasoning of willingness in *H. and J. v. the Netherlands*. The Court ruled that since the Applicants entered the Netherlands of their own accord and asked for its protection, they had the burden of proof to convince the Netherlands Government that their stated fear of persecution was well-founded. Because they had the burden of proof, asking all truth from the Applicants —without explaining that these truthful statements were going to be the basis for their prosecution— is not “incongruous.”³⁸² Thus, an argument that “the applicants’ statements to the immigration authorities were extracted under coercion is...baseless”.³⁸³

This reasoning could be, possibly, applicable only to foreigners. At the outset, no one questions that the Applicants entered the Netherlands and asked for its protection willingly. Nor did anyone question if they had the burden of truth to establish their cases. The legal question here was whether the use of their statements that were obtained during an administrative process in the subsequent criminal trials violated their rights under Article 6. The legal reasoning requires the ECtHR to have followed the following steps: (i) how the ECtHR interpreted coercion and compulsion in its early jurisprudence; (ii) if the ECtHR would use the willingness argument, what the boundaries of this argument are (i.e. is it only relevant to foreigners or could it be used in other circumstances?); (iii) what the result of refusing to answer questions during refugee status determination interviews is (i.e. is there any finding of contempt of court or is it only denial of status?); (iv) if the refusal leads to denial of refugee status and residence permit, is this result as severe as the prospects of imprisonment?; and, (v) considering the *Saunders* judgement, was there any legal means to prevent the admissibility of self-incriminating statements as evidence in the subsequent criminal procedure?

³⁸¹ *Jalloh v. Germany*, *supra* note 324 at para 97; *Heaney and McGuinness v. Ireland*, *supra* note 324 at para. 57-58. [Emphasis added]

³⁸² *H. against the Netherlands and J. against the Netherlands*, *supra* note 325 at para. 75.

³⁸³ *Ibid* at para 75.

For example, in its later decisions of *O'Halloran and Francis v. United Kingdom*, *Jalloh v. Germany*, and *Bykov v. Russia*, the Court analysed “the nature and degree of compulsion”, “the existence of any relevant safeguards in the procedure”, and “the use to which any material so obtained is put”, to determine if a procedure quashes the very essence of the right not to incriminate oneself.³⁸⁴ The ECtHR did not analyse any of these parameters in the *H. and J. v. the Netherlands*.

The ECtHR's reasoning suggests that because the Applicants entered the Netherlands willingly, they willingly provided self-incriminating statements to the state. Along with this reasoning, whatever the state asks them to answer is justifiable because they entered the country of their own accord. This reasoning is dangerous as the European Court justifies a different treatment between citizens of the member states, and non-citizens, who are suspected of criminality. Deportation and extradition are the key terms that the Court uses in assessing the procedural rights of a foreigner, who is suspected of criminality. This is where the arbitrariness lies: although the ECHR explicitly enunciates that everyone is subject to Article 6, the ECtHR narrows down a foreigner's claim to a mere fact: a foreigner who is seeking refugee protection. Conversely, the European Court does not use similar logic in other cases. To show how dangerous this line of thought could be I will apply the same reasoning to the case of *Saunders*. The Applicant became the chief executive of a well-known British company of its own accord, entered the bid of his own accord, knew that his company and the bid would be subjected to the British Law, and enjoys a safe shelter in the UK—given that as a citizen—he cannot be deported to another country. The UK Government, hence, had a duty to prosecute the applicant for the crimes of fraud and theft. Compelling the Applicant to answer the questions related to these crimes and using them in the follow-up criminal trial should not be an excuse to protect “the guilty from condign punishment”.³⁸⁵

Third, what the European Court found natural in *H. and J. v. the Netherlands* is unnatural for its own jurisprudence. The Court ruled that the use of Afghan asylum seekers' incriminating statements in return for a promise of confidentiality is “natural.”³⁸⁶ For the Court, it is hard to conceive “an asylum system” operating correctly unless refugee claimants are assured that

their statements will not come to the knowledge of the very entities or persons from whom they need to be protected.... Consequently, the Court cannot find that once these statements were in the possession of the Government the Deputy Minister of Justice was

³⁸⁴ *Jalloh v. Germany*, *supra* note 324 at para 101; *O'Halloran and Francis v United Kingdom*, 2007 ECtHR at para 55; *Bykov v. Russia*, *supra* note 326 at para 104.

³⁸⁵ *H. against the Netherlands and J. against the Netherlands*, *supra* note 325 at para. 78.

³⁸⁶ *Ibid* at para. 77.

precluded by Article 6 of the Convention from transferring them to the public prosecution service, another subordinate Government body, to be used by it within its area of competence.³⁸⁷

Let's examine this statement in light of other decisions of the ECtHR. In *Saunders*, the Court did not ask if the corporate system in the U.K. could function properly if the Applicant's statements will not come to the knowledge of the very entities or persons from whom they got a license to operate. Nor did the Court analyse whether the transfer of statements from the Trade Department to the Prosecution Service was within the U.K. Government's area of competence. In *Heaney and McGuinness*, the Court did not question whether the law enforcement system to protect the public from terrorist acts could function properly if the state does not compel the terrorist suspects to answer their whereabouts.³⁸⁸ In *Funke v. France*, the ECtHR did not consider whether a tax system in France could function properly and fairly if the Applicant is not compelled to show certain documents to the state.³⁸⁹

The two legal issues at stake in *H. and J. v. the Netherlands* were whether (i) asking full collaboration from the refugee claimants, when there is a prospect of criminal prosecution can be considered coercion within the meaning of Article 6 —considering the results of denial to answer— and (ii) any procedural safeguards in the Netherlands to prevent the use of asylum interviews in the subsequent criminal trials are available. The Court failed to analyse both.

IV. Concluding remarks: Netherlands and the ECtHR do not consider the waiver of the right not to incriminate oneself in relation to refugee claimants

This chapter established that the Netherlands resorts to Article 1F to punish refugee claimants for the suspected acts articulated in Article 1F. By contrast, Canada does not resort to Article 1F for punitive ends. As the next chapter will analyze, Canada permits the use of asylum applicants' statements in the security certificate proceeding. Two possible explanations for the divergence in the use of Article 1F are first, the Netherlands has no inadmissibility scheme to channel possible Article 1F cases and second, Canada's criminal law does not allow the use of asylum testimonies in a subsequent criminal trial. In Canada, if a refugee claimant is compelled to testify, he can seek the protection of Canada's Evidence Act. As a result, the evidence cannot be used against him in subsequent proceedings.³⁹⁰ This safeguard, however, does not include security certificate proceedings, which are administrative and not criminal in

³⁸⁷ *H. against the Netherlands and J. against the Netherlands*, *supra* note 325 at para. 77-78.

³⁸⁸ *Heaney and McGuinness v. Ireland*, *supra* note 324 at para 7-17.

³⁸⁹ *Funke v. France*, *supra* note 369 at para 42.

³⁹⁰ Canada Evidence Act R.S.C., 1985, c. C-5, section 5 (2)

nature. The following chapter will discuss the applicability of the privilege against self-incrimination in security certificate proceedings and its relationship with asylum testimonies.

Focusing on the results for the European continent, this chapter concludes that the Netherlands and the ECtHR largely do not consider the waiver of the right not to incriminate oneself in relation to refugee claimants. More importantly, there is no discussion or oversight over the use of administrative instruments in criminal procedures. The Dutch practice highlights the quandary of establishing criminal grounds by using statements obtained in an asylum procedure. In other words, with this emerging practice, criminal charges are based on evidence gathered in an administrative process, which fails in providing safeguards to the accused as recognized under criminal law. This emerging practice threatens fundamental rights, as states are now able to justify evading criminal procedural law by appealing to asylum law, and by disguising charges as issues of national security.

This chapter proposes that where a case that initially falls under immigration law leads to a criminal trial or removal of a person from host states, these proceedings should include procedural safeguards, and integrate the rules of the right to presumed innocence, notably the right not to incriminate oneself. At the beginning of the asylum-seeking process, individuals must be informed of what they might be accused of at the end of this administrative proceeding. Alternatively, procedural safeguards should be provided to prevent the use of testimony obtained in the asylum proceeding as evidence in criminal proceedings. If states continue to use the compulsory questioning powers during the asylum procedure, the use of the evidence in subsequent criminal trials must be prevented.

This section highlighted how refugee claimants have been trapped by the current system, are facing legal pressure to incriminate themselves without having received sufficient information about the process in return. Those who fight against impunity for grave human rights violations may well find my arguments implausible. I contend that relying on impunity arguments is an illusion. An Angolan soldier who claimed —during RSD interviews— to have participated in the brutal acts of cutting out eyes and disembodiment of the heads of supporters of an opposing party was told to leave the Netherlands, after being excluded. Reijven and Wijk's research shows that this applicant was not prosecuted. After he left the asylum center, he disappeared.³⁹¹ He is not the only one. There were 745 definite exclusion decisions in the Netherlands between January 2000 and November 2010; only four of them were prosecuted and convicted.³⁹² This means that many other “possible criminals” are not prosecuted and are

³⁹¹ Reijven & Joris van Wijk, *supra* note 319.

³⁹² Reijven & Joris van Wijk, *supra* note 319.

probably living in the same country due to the principle of non-refoulement. We then ought to ask, whom states are prosecuting and why? If causing a safe haven for perpetrators of grave human rights violations is a concern, what about those who were never subjected to criminal proceedings? In fact, the prosecuted individuals —at least in the Netherlands— do not even constitute 1% of the total excluded individuals.

Another common argument is that providing stronger procedural rights to refugee claimants will allow “criminals” to enter a host country and hence, will harm the whole refugee law system. First, these people have already entered, and —in most of the cases— have lived in host countries for a long time, before any exclusion decision is rendered.³⁹³ Second, if states are sure that these people are “criminals”, then they ought to recognize procedural rights to the accused foreigner. The right to a fair trial is a fundamental one, not a favorable choice or luxury that a state awards to a foreigner. The Netherlands is a party to the International Covenant on Civil and Political Rights, which sets forth that “everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to the law.”³⁹⁴ Failing to apply this rule to refugee claimants, who are suspected of serious criminality, is non-justifiable. Otherwise, the current practice is at odds with the established principles of criminal law- *Ei incumbit probatio qui dicit, non qui negat*.

³⁹³ An Afghan excluded individual expressed that “‘Because of you I am 1F, our kids have 1F.’ My children say: ‘why have you said you were in the military, why didn’t you lie?’ Because of the war I lost my brothers, parents and family. But because of the injustice here I lost my spouse, kids and life.” For a detailed analysis of the profile of excluded individuals and their living conditions, please refer to Reijven & Joris van Wijk, “Caught in Limbo”, *supra* note 347.

³⁹⁴ Article 14 (2) of the *International Covenant on Civil and Political Rights*, 1966.

Chapter IV: On the principle against self-incrimination and the use of asylum testimonies for security certificate proceedings in Canada

This chapter discusses the Canadian legal framework concerning the use of asylum testimonies for criminal or quasi-criminal proceedings. As established in Chapter III, Canada does not allow the use of asylum testimonies in a subsequent criminal trial. However, as this chapter will demonstrate, Canada still uses asylum testimonies in violation of procedural rights in security certificate proceedings. As such, the first section will introduce the security certificate proceeding in Canada and its relation to the protection against self-incrimination. Analyzing this relation requires us to understand how Canadian courts have interpreted the protection against self-incrimination in earlier case law. After concluding the case analysis, section 3 will discuss the Federal Court's decision of *Jaballah (Re)*, which epitomizes how the principle against self-incrimination has engaged in the use of asylum testimonies for security certificate proceedings. The last two sections are devoted to the critique of this decision with concluding remarks.

1. Security certificate process in Canada: fewer procedural safeguards available to its subjects

The Canadian legal framework defines well the procedural rights for the accused under criminal law; however, it does not recognize the same rights for refugee claimants who are deemed to pose national security risks. As such, Canadian judicial authorities can use the statements obtained during asylum proceedings as evidence in an administrative proceeding called the *security certificate process*, although they would not be able to use them in a criminal proceeding.

Foreigners “who are subject to the security certificate process could be removed from Canada for reasons of national security, human rights violations and participation in organised serious crimes”.¹ This process does not determine criminal liability; yet, it “can end up removing an asylum seeker to the frontiers of a country where he could face ill-treatment and death penalty.”²

In the *Charkaoui* (2008) decision, the Supreme Court explained the security certificate process as different from a criminal trial: “[n]o charges are laid against the person named in the certificate. Instead, the ministers seek to expel the named person from Canada on grounds

¹ Didem Doğar, “On the Use of Asylum Testimonies in Criminal and Quasi-Criminal Proceedings: H. and J. v the Netherlands and *Jaballah (Re)*” in *Causes and Consequences of Migrant Criminalization* Ius Gentium: Comparative Perspectives on Law and Justice (Springer, Cham, 2020) 235 at 253 DOI: 10.1007/978-3-030-43732-9_12.

² *Ibid* at 253.

of prevention or public safety.”³ As put forward by Macklin, by allowing to expel a foreigner in defiance of the non-refoulement principle under exceptional circumstances, the SCC “adopted a stance in stark contrast to” the ECtHR’s landmark decision in *Chahal*.⁴ Therefore, “the Canadian practice has more serious consequences for foreigners compared to Europe where the principle of *non-refoulement* is endorsed by the ECtHR, even if an asylum applicant can pose a danger for national security.”⁵ Although the return to ill-treatment or death could be considered highly unlikely to happen in reality, Macklin demonstrated that Canada has used “exceptional circumstances favouring return to torture in all cases involving security certificate proceedings since the *Suresh* decision.”⁶

The security certificate process in Canada is composed of administrative and judicial components. The Federal Court reviews the certificate for its reasonableness after it is issued by the government authorities.⁷ If the Federal Court determines that it is reasonable, the certificate “becomes a removal order. The decision of the Federal Court is open to appeal. During this process, the Canadian government is entitled to issue a warrant for the arrest of the foreigner, if it considers that the foreigner poses a danger to national security or to the public safety.”⁸ The decision of detention approved by the Federal Court is reviewed at least every six months. Classified information in the process must be kept confidential and is not disclosed to the public or the person subject to the certificate or their lawyer. “Instead of full disclosure, an unclassified summary of the case is provided to the accused person for information purposes. During the judicial reviews or appeal stage, the judge may appoint a special advocate to protect the interests of the accused foreigner.”⁹ However, special advocates “are limited in how they can respond because they cannot communicate about the case with anyone else”.¹⁰ For example, a special advocate must get the leave of the court to obtain the assistance of an expert witness to respond to allegations.¹¹

The possible consequences of a security certificate are serious: removal from Canada to the country where there is a likelihood of ill-treatment or death penalty for the accused foreigner.¹² Not only do the prospects of expulsion, but also stigma and limbo situations

³ *Charkaoui v Canada (Citizenship and Immigration)*, 2 SCR 38 at para 50.

⁴ *The Canadian Security Certificate Regime*, CEPS Special Report, by Audrey Macklin, CEPS Special Report (Centre for European Policy Studies, 2009) at 4.

⁵ Doğar, *supra* note 1 at 253.

⁶ Macklin, *supra* note 4 at 4.

⁷ Doğar, *supra* note 1 at 253.

⁸ *Ibid.*

⁹ *Ibid.* [footnotes omitted].

¹⁰ Interview with A15.

¹¹ Interview with A15.

¹² *Charkaoui v. Canada (Citizenship and Immigration)*, *supra* note 3 at para 14; Please also see *Singh v Minister of Employment and Immigration*, 1 SCR 177 at 207.

arising from the process have severe impacts on persons. Some interviewees explained these serious consequences felt by their clients. One of Mr. Jaballah's lawyers stated that the way security certificate proceedings are actualized in Canada is "draconian, they all got put in jail. To put them into jail, 20 police cars come for them in front of his little kids."¹³ The Canadian Secret Service, CSIS, interviews people subject to security certificate proceedings. In practice, agents can come to their place any time at night or on the weekends or ask to meet them in restaurants.¹⁴ As no witnesses are there, agents' notes provide the only content of an interview.¹⁵ The lawyer found that the CSIS misstated and twisted what happened in interviews and challenged this practice.¹⁶

A13: *There are no taped interviews which would be the most accurate way. What happened in Jaballah's case was his son taped it, the interview of CSIS officers. It is one of the reasons Jaballah won in 1999 because CSIS got caught out on it because there was a tape.*

Accordingly, in the *Charkaoui* decision of 2008, the Supreme Court decided that if CSIS agents destroy their interview notes, they cannot use the summary of the interview in the case.¹⁷

Considering the grave consequences of a security certificate, Canadian courts acknowledged that the life, security and liberty interests of a person named in a certificate have been engaged. In *Charkaoui*, the SCC decided that section 7 rights of a non-citizen who was subject to the security certificate proceeding were involved as the process can result in "deportation and the loss of liberty associated with detention raise important issues of liberty and security".¹⁸ Gerald Heckman states that, although, in the *Charkaoui* decision, the detention took place, "the possibility of detention" is sufficient to engage the liberty interests of the person in security certificate proceedings.¹⁹

The *Charkaoui* decision highlighted an earlier decision of the SCC in which the Court decided "factual situations which are closer or analogous to criminal proceedings will merit greater vigilance by the courts".²⁰ Later in 2008, the SCC confirmed that section 7 is engaged

¹³ Interview with A13.

¹⁴ Interview with A13.

¹⁵ Interview with A13.

¹⁶ Interview with A13.

¹⁷ Interview with A13.

¹⁸ *Charkaoui v. Canada (Citizenship and Immigration)*, *supra* note 3 at para 50.

¹⁹ Gerald Heckman, "Revisiting the Application of Section 7 of the Charter in Immigration and Refugee Protection" (2017) 68 UNBLJ 312–312 at 329.

²⁰ *Dehghani v Canada (Minister of Employment and Immigration)*, 1 SCR 1053 at 1077 *per* Iacobucci J.. Also, *Charkaoui v. Canada (Citizenship and Immigration)*, *supra* note 3 at para 25.

for the security certificate proceedings which have “serious consequences ... on the liberty and security of the named person”.²¹

The section 7 protection is however not limitless and not as complete as the protections afforded to an accused under criminal law. Guarantees of the defence in criminal law evolved in order to protect the innocent in the proceedings that were the most dangerous for the individual concerned, who could be legally executed, tortured or detained. Nowadays, in most of the Global North, executions, torture and arbitrary detentions are prohibited and individuals benefit from the procedural and evidentiary guarantees in criminal proceedings. The consequence of expulsion from Canada could be “as severe as the “prospect of loss of liberty” in criminal law”.²² The consequences could be graver since expelling a person to a country of persecution can result in extrajudicial execution, arbitrary detention and torture, all of which Canadian law prohibits. “Criminal law offers substantial protection for the rights of the accused due to the serious consequences of a likelihood of confinement and conviction.”²³ As the decisions of *Chiarelli* and *Ruby* suggest, criminal law offers rigid protection as compared to other fields of law.²⁴ “Strong protection for the rights of the accused is neglected in the security certificate process, though a foreigner is *de facto* accused of posing a danger to national security or to an individual.”²⁵

The strong protections for the rights of the accused have been articulated by the Supreme Court of Canada. In its decision of *R. v. Noel*, the Court underlined that the absolute nature of the privilege against self-incrimination “can best be understood as a response to the abusive practices of the prerogative courts of the sixteenth and seventeenth centuries” in England.²⁶ In the eighteenth and nineteenth centuries’ England, courts established “absolute prohibitions...to prevent abusive practices.”²⁷ The protection against self-incrimination originated from “trial fairness and the prevention of abuse.”²⁸ For the SCC, the protection against self-incrimination is “overarching”²⁹, and “the single most important organizing principle in criminal law.”³⁰ The *Charter* regulates the protection against self-incrimination

²¹ *Charkaoui v. Canada (Citizenship and Immigration)*, *supra* note 3 at para 18.

²² Doğar, *supra* note 1 at 254.

²³ Doğar, *supra* note 1 at 254.; Please also see Catherine Dauvergne, “The Troublesome Intersections of Refugee Law and Criminal Law” in Katja Franko Aas & Mary Bosworth, eds, *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford: Oxford University Press, 2013) at 6.

²⁴ Department of Justice Government of Canada, “Charterpedia - Section 7 – Life, liberty and security of the person”, (9 November 1999), online: <<https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art7.html>>.

²⁵ Doğar, *supra* note 1 at 252.

²⁶ *R v Noël*, 3 SCR 67 at para 113.

²⁷ *Ibid.*

²⁸ *Ibid* at 113.

²⁹ *R v White*, 2 SCR 417 at paras 44–45.

³⁰ *R v P (MB)*, 1 SCR 555 at 470.

under Articles 11(c) and 13. Preventing “individuals from being indirectly compelled to incriminate themselves is the *raison d’être* of Section 13.”³¹ Particularly, Article 11(c) of the *Charter* assures that an individual “charged with an offence has the right not to be compelled to be a witness in proceedings against” themselves regarding the offense.³²

Linda Fuerst, however, asserts that this protection is not afforded to an individual compelled to provide evidence “in a securities regulatory investigation or an administrative proceeding, as the individual is not ‘charged with an offence’”.³³ Likewise, Bankim Thanki articulated that the right to silence and the privilege against self-incrimination would not be often violated if the information was produced for “an administrative purpose... However, if the information so produced is or could be used in subsequent judicial proceedings, whether criminal or civil, then the use of the information in such proceedings could breach those rights and so make that trial unfair.”³⁴

Our broader inquiry is the applicability of the protection against self-incrimination to an asylum process – which is administrative – in case self-incriminating statements stemming from the RSD process are used as evidence in a subsequent criminal trial. Although a person named in a certificate is *de facto* accused, “and detained in some cases, the statements of” the refugee claimant before the IRB “obtained during an administrative procedure is one of the sources that the federal court relies on to determine whether a security certificate is reasonable.”³⁵ The case of *Jaballah (Re)*³⁶ of 26 February 2010 before the Federal Court of Canada epitomizes this absence of procedural rights for the person subject to the security certificate procedure.³⁷ The following section will discuss how Canadian courts and tribunals interpreted the protection against self-incrimination prior to the *Jaballah* decision was rendered.

2. Precursors of *Jaballah (Re)*: the principle against self-incrimination is not absolute

This section will analyze eleven important cases interpreting the principle against self-incrimination in divergent contexts including criminal, regulatory, and immigration fields.

³¹ Doğar, *supra* note 1 at 252. [footnotes omitted].

³² *Ibid.*

³³ Glen Jennings, Rachel McMillan & Max Muñoz, “Preventing Self-Incrimination In Cross-Border Investigations - Corporate/Commercial Law - Canada”, (2 June 2016), online: <<https://www.mondaq.com/canada/securities/497052/preventing-self-incrimination-in-cross-border-investigations>> at 2; Please also see Linda Fuerst, “Multijurisdictional investigations: challenges for Canadians”, (July 2015), online: *Financier Worldwide* <<https://www.financierworldwide.com/multijurisdictional-investigations-challenges-for-canadians>>.

³⁴ Bankim Thanki et al, *The Law Of Privilege*, Third Edition Ed (Oxford, New York: Oxford University Press, 2018) at para 8.44-(5).

³⁵ Doğar, *supra* note 1 at 254.

³⁶ *Jaballah (Re)*, FC 224.

³⁷ Doğar, *supra* note 1.

The landmark decision preceding *Jaballah* on the use of evidence gathered in immigration proceedings in a subsequent trial is *Seth v. Canada* of the Federal Court in 1993. As they are widely cited in *Seth v. Canada*, our analysis starts with earlier decisions of *Haywood Securities* and continues with the principles laid out in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*³⁸ regarding the residual protection provided in section 7 against self-incrimination-

I. *Haywood Securities*: balancing society and the individual is the key for cases involving self-incrimination

In *Haywood Securities*, the British Columbia Court of Appeal examined whether individuals have an unfettered right against self-incrimination for questions that might incriminate them. The decision involves an appeal from the British Columbia Court of Appeal which “ruled that s. 7 of the Charter was not intended to contain a general right against self-incrimination.”³⁹ The majority decision of the British Columbia Court of Appeal, written by Justice Macfarlane, explains the relationship between fundamental justice and the right against self-incrimination. In this regard, Justice Macfarlane ruled that the breach of fundamental justice vis-à-vis the right against self-incrimination could only be relevant if the proceedings “were so devoid of any legitimate public purpose and so deliberately designed to assist the prosecution of the witness”.⁴⁰ However, not all cases related to self-incrimination and testimonial compulsion will result in the breach of section 7.⁴¹ If the only “**aim and purpose of the proceeding was to obtain evidence to support a charge or to assist the criminal prosecution of the witness,**” then it is tenable that “**the witness ought not to be compelled to divulge information which might lead to his conviction.**”⁴²

[S]uch a result would follow only **if the proceedings in which such evidence was given were so devoid of any legitimate public purpose and so deliberately designed to assist the prosecution of the witness that to allow them to continue would constitute an injustice. In such circumstances, the continuance of the proceedings could be said to constitute a violation of the principles of fundamental justice.**⁴³

Although Justice Macfarlane mentions that there might be cases where the legislation or the procedure is designed to incriminate an individual, it is doubtful that, in a country such as Canada where the rule of law is taken dearly, a procedure the sole aim and purpose of

³⁸ *Thomson Newspapers Ltd v Canada (Director of Investigation and Research)*, 1 SCR 425.

³⁹ *Ibid* at 466.

⁴⁰ *Haywood Securities Inc v Inter-Tech Resource Group Inc*, BC CA at para 18, 1985.

⁴¹ *Ibid*.

⁴² *Haywood Securities Inc. v. Inter-Tech Resource Group Inc.*, *supra* note 40 at para 18. [emphasis added]

⁴³ *Ibid*. [emphasis added]

which is to obtain evidence “to support a charge or to assist the criminal prosecution”⁴⁴ has ever existed.

Justice Macfarlane continued his reasoning by balancing the interests of individuals with those of the State and society.

The right of one person is to be balanced against the right of others and the needs of society generally...The proper administration of civil justice requires full disclosure, the right to discovery of parties, and of relevant documents. **Fundamental justice requires a balancing of the right of a witness against the freedom of others to pursue their lawful remedies.**⁴⁵

In determining whether there was a breach of fundamental justice by section 7, Justice Macfarlane asks whether, in Canada, there is “a generally held revulsion against forcing a person to provide, out of his own mouth, the evidence which will lead to his conviction”.⁴⁶ If an answer that is obtained by “**compelling a witness to answer questions in a civil proceeding**” leads to “**a conviction of the person on the basis of answers forced from him**” then such compulsion is “contrary to the feeling of justice or fairness with which Canadian society reacts to our criminal process” and violates “the principles of fundamental justice.”⁴⁷ This conclusion balances “the interests of the individual against the interests of society.”⁴⁸

In conclusion, with *Haywood Securities*, the British Columbia Court of Appeal established that to ascertain the principles of fundamental justice under section 7 are violated, the civil procedures in which the person is compelled to testify and incriminate themselves must be lacking any legitimate public purpose. In determining this violation, one must balance the interests of the society with these of the individual. Otherwise, under section 7, there is no general rule against self-incrimination in civil proceedings.

II. *Thomson Newspapers Ltd. v. Canada*: limited residual protection against self-incrimination available under section 7

In *Thomson Newspapers*, the appellants, including a corporation and its officers, were required to appear before a commission under oath and produce documents for an investigation determining whether the corporation engaged in an anti-competitive behavior – predatory pricing – amounting to an indictable offense. A refusal to comply with the order to testify before the commission and provide documentary evidence was punishable and could also

⁴⁴ *Ibid* at para. 21.

⁴⁵ *Ibid* at para. 22. [emphasis added]

⁴⁶ *Ibid* at para. 64.

⁴⁷ *Ibid* at para. 69-70. [emphasis added]

⁴⁸ *Ibid* at para. 69-70.

constitute an offense. The appellants *inter alia* argued that the orders violated their rights under section 7.

In dismissing the appeal, the Supreme Court provided a complex and divided decision. The Court concluded that the orders to appear before a commission under oath and produce documents for an investigation were consistent with section 7. However, Justice Lamer did not reply to arguments regarding section 7. Justice Wilson dissented from the Court's conclusion on section 7 and Justice Sopinka dissented from the conclusion "to the extent only that it authorizes an order to be made for an examination under oath of a person".⁴⁹

Judges all seemed to have agreed that section 7 of the Charter "may in certain contexts at least provide residual protection to the interests the right is designed to protect that goes beyond the specific protection provided by ss. 11(c) and 13."⁵⁰ However, this residual protection does not include "an absolute right to silence or a generalized right against self-incrimination".⁵¹

Much of the disagreement among judges emerged in affording the privilege against self-incrimination for the use of derivative evidence. A trial judge has the discretion to accept derivative evidence. In this vein, Justice La Forest stated that the principles of fundamental justice do not provide "complete immunity against the use of derivative evidence"; though, the use of compelled testimony is prohibited.

Derivative evidence, because of its independent existence, can be found independently of the compelled testimony....If the evidence would not have been found or appreciated apart from such compelled testimony, it should, in the exercise of the trial judge's discretion to exclude unfair evidence, be excluded since its admission would violate the principles of fundamental justice.⁵²

Paraphrasing Justice Lamer's opinion on *R. v. Collins*⁵³, Justice La Forest underlined "a distinction between real and self-incriminating evidence, ...that the admission of the former would rarely bring the administration of justice into disrepute" under section 24(2) of the Charter.⁵⁴ For Justice La Forest, "[t]he fact that the evidence already existed means that it could have been discovered anyway...it would be the exclusion rather than the admission of evidence that would bring the administration of justice into disrepute".⁵⁵ If the derivative evidence is not accessible, "undiscoverable" without the help of the accused, then "the subsequent use of such

⁴⁹ *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, supra note 38 at 427.*

⁵⁰ *Ibid* at 537

⁵¹ *Ibid* at 427.

⁵² *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, supra note 38 at 428.*

⁵³ *R v Collins*, 1 SCR 265.

⁵⁴ *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, supra note 38 at 552.*

⁵⁵ *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, supra note 38 at 553.*

evidence would be indistinguishable from the subsequent use of the pre-trial compelled testimony.”⁵⁶ In such cases, the accused is compelled to “answer a case that he or she was forced to make stronger than it would otherwise have been.”⁵⁷

Justice L'Heureux-Dubé took a stricter position on the use of derivative evidence by stating that the residual protection against self-incrimination under section 7 is only applicable to “testimonial evidence” excluding derivative evidence.

There is a clash between the values of the public's interest to investigate wrongdoings promptly and the person's right against self-incrimination an opinion shared by Justices L'Heureux-Dubé and La Forest. The Supreme Court was divided between these two clashing values in deciding whether section 7 protects against the use of derivative evidence. In his opinion, Justice La Forest underlined the importance of keeping a balance between “the rights of the individual and the community's legitimate interest in discovering the truth”.⁵⁸ If valuable information for an investigation can be easily obtained by asking questions, “an absolute right to refuse to answer questions would represent a dangerous and unnecessary imbalance between the rights of the individual and the community's legitimate interest in discovering the truth”.⁵⁹

Inquiries in *Thomson Newspapers* were “inquisitorial rather than adversarial in nature” in that “no final determination as to criminal liability is reached [...] the investigations conducted under [this procedure] do not involve the use of state power in the interests of securing the conviction of a particular individual.”⁶⁰ Granting complete immunity for derivative evidence would “**furnish wrongdoers with the type of "immunity baths"**”.⁶¹ Law enforcement agencies would have to choose between investigating quickly and “conducting more protracted and widely cast investigations.”⁶² It is not possible to accept that “the advantages the community currently enjoys from the power to compel testimony” to be restricted in cases where the use of derivative evidence would not undermine “the fairness of a person's trial”.⁶³ The Charter protects a fair trial, “**not the most favourable procedure** imaginable, and that fairness involves the weighing of the public interest in the equation.”⁶⁴

As a solution, Justice La Forest suggested adopting a flexible approach whereby a “balance between the interests of the individual and that of the state” could be achieved.⁶⁵ Like

⁵⁶ *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, supra note 38 at 553.*

⁵⁷ *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, supra note 38 at 553.*

⁵⁸ *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, supra note 38 at 541.*

⁵⁹ *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, supra note 38 at 540.*

⁶⁰ *Ibid* at 541-542.

⁶¹ *Ibid* at 556 [Emphasis added]

⁶² *Ibid* at 556.

⁶³ *Ibid* at 556.

⁶⁴ *Ibid.* [Emphasis added]

⁶⁵ *Ibid* at 559.

Justice La Forest, Justice L'Heureux-Dubé underlined achieving a balance between the public's interest in an effective investigation and the individual's right against self-incrimination.⁶⁶

Although the balance is required, the protection against self-incrimination is not limited to ss. 11(c) and 13 of the Charter and is provided within the sphere of section 7.

[A]n individual who is neither a "person charged with an offence" (s. 11(c)) nor a "witness who testifies in any proceedings" (s. 13) may look to s. 7 for protection in an appropriate case. However, s. 13 is useful in determining the extent of the protection such an individual may find in s. 7. In my opinion, the limitation of s. 13 to "testimonial" evidence strongly indicates that s. 7 is likewise limited.⁶⁷

We analyzed Thomson Newspaper in detail to understand what values are at stake in compelling a person to testify and the use of evidence stemmed from that compulsion. While agreeing that section 7 provides residual protection against self-incrimination for the use of testimonial evidence, the judges were mostly divided on the use of derivative evidence.

Out of five sitting judges, two judges, Justices La Forest and L'Heureux-Dubé clearly stated that the use of derivative evidence in a subsequent trial often does not violate the fairness of procedures under section 7. For Justice La Forest the use of derivative evidence in a subsequent trial would depend on the value of this evidence's existence, independently from the compelled testimony and based on the balance between the public's interest to uncover wrongdoings and the right of a person against self-incrimination; the balance argument was also shared by Justice L'Heureux-Dubé. While Justice Sopinka stated that compelling an individual to produce documents does not violate section 7, his reasoning did not precisely answer whether the use of derivative evidence in a subsequent trial would contravene section 7. Justice Lamer did not analyze the case in detail as for him "the appellants challenged the wrong section."⁶⁸ Justice Wilson dissented from the Court's opinion on the use of compelled testimony and derivative evidence in a subsequent trial on the grounds that both violated section 7.

⁶⁶ "Effective enforcement of anti-combines legislation would be virtually stultified if those who can assist in the advancement of investigation into proscribed activity could hide beneath a constitutional blanket of silence. Fundamental justice in our Canadian legal tradition and in the context of investigative practices is primarily designed to ensure that a fair balance be struck between the interests of society and those of its citizens. ...s. 7 may offer residual protection in commanding some type of immunity in respect of the testimony given by individuals during an investigation." *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, supra note 38 at 579.*

⁶⁷ *Ibid.* [Emphasis added]

⁶⁸ *Ibid* at 430.

III. *R. v. Hebert*⁶⁹: balancing the state's superior resources with its power to deprive an individual of life, liberty, or security under section 7

R. v. Hebert concerned the use of confession made by the suspect in detention to a police officer who was disguised as a fellow cellmate. The confession was the only evidence for the conviction. Although the decision falls within the parameters of criminal law, it sat out the limits of the right to remain silent. The obiter sheds light on the interwoven relationship between the principle against self-incrimination, the right to remain silent and the confessions rule.

The Supreme Court decided that the right to silence is not absolute under section 7 “but must be qualified by considerations of the state interest and the repute of the judicial system”.⁷⁰ The right to silence within the scope of section 7 is applicable only after detention and thus, does not apply to an administrative process. Although the exclusion of the confession would result in acquittal, the majority of the Court decided that “it is contrary to the notions of fundamental justice to require an accused to secure his own conviction.”⁷¹

Justices Wilson and Sopinka underlined that the right to remain silent differs from the privilege against self-incrimination, which is applicable “only in the course of proceedings.”⁷² The right to remain silent applies “when the coercive power of the state is brought to bear against the individual, either formally (by arrest or charge) or informally (by detention or accusation).”⁷³ The right applies when an adversarial relationship between the individual and state starts. After this point, “any communication between an accused and an agent of the state (including a suborned informer) is subject to the right and may proceed only if the accused waives the right”.⁷⁴

As to the confessions rule, before the Charter was adopted in 1982, the Supreme Court adopted a broader version of the confessions rule, in that at least the suspect “must possess the mental capacity to make an active choice”.⁷⁵ The jurisprudence emphasized the notion that an individual “in the power of the state's criminal process has the right to freely choose whether or not to make a statement to the police.”⁷⁶ This notion is associated with an accompanying concern of “the repute and integrity of the judicial process”.⁷⁷

⁶⁹ *R v Hebert*, 2 SCR 151.

⁷⁰ *Ibid* at 153.

⁷¹ *Ibid* at 154.

⁷² *Ibid* at 154.

⁷³ *Ibid* at 201.

⁷⁴ *Ibid* at 201.

⁷⁵ *Ibid* at 172.

⁷⁶ *Ibid* at 173.

⁷⁷ *Ibid* at 175.

a. The right to remain silent and the privilege against self-incrimination: the reputation and integrity of the judicial process is the key

Justice McLachlin explained that courts often referred to “the right of every person not to be required to produce evidence against himself”; in other words, *nemo tenetur seipsum accusare* in justifying both the confessions rule and the privilege against self-incrimination.⁷⁸ Historically, the privilege against self-incrimination was embedded in the revulsion against notorious practices of the Star Chamber and the old ecclesiastical courts. The privilege underlines that “an accused person has no obligation to give evidence against himself, that he or she has the right to choose”.⁷⁹

Recognizing the privileges against incrimination in a trial stage but offering “no protection with respect to pre-trial statements” would be deceptive.⁸⁰ Ed Ratushny explains that:

[O]ur system meticulously provides for a public trial only after a specific accusation and where the accused is protected by detailed procedures and strict evidentiary rules...The accused is under no legal or practical obligation to respond to the accusation until there is an evidentiary case to meet. **There is a hypocrisy to a system which provides such protections but allows them all to be ignored at the pre-trial stage where interrogation frequently occurs in secret, after counsel has been denied, with no rules at all and often where the suspect or accused is deliberately misled about the evidence against him.**⁸¹

The privilege against self-incrimination undoubtedly embodies “the right to choose whether to testify or to remain silent... The philosophic and practical relationship between the privilege against self-incrimination and the right of the suspect to silence prior to trial suggests that the same right of choice should prevail at the earlier phase of the criminal process.”⁸²

Although the privilege against self-incrimination and the common law confessions rule are distinct concepts, the main concerns behind them are the same: “the reput[e] and integrity of the judicial process.”⁸³

These two concepts also share a common notion that “the right of the individual to choose whether to make a statement to the authorities or to remain silent”.⁸⁴ If the fundamental themes are similar, “the measure of the right to silence may be postulated to reside in the notion that a person whose liberty is placed in jeopardy by the criminal process cannot be required to give

⁷⁸ *Ibid* at 174

⁷⁹ *Ibid* at 174.

⁸⁰ *Ibid* at 174.

⁸¹ Ed Ratushny, *Self-incrimination in the Canadian Criminal Process* (Toronto: Carswell, 1979) at 253. [Emphasis added]

⁸² *R. v. Hebert*, *supra* note 69 at 175.

⁸³ *Ibid* at 175.

⁸⁴ *Ibid* at 175.

evidence against himself or herself, but rather has the right to choose whether to speak or to remain silent.”⁸⁵

b. The relation between the right to silence, the right to counsel, and the privilege against self-incrimination

The Court analyzed the scope of the right to silence for a detained person in relation to other Charter rights. In this regard, section 10 (b) of the Charter which regulates the right to counsel is particularly important. Justice McLachlin wrote that

[t]he detained suspect, **potentially at a disadvantage in relation to the informed and sophisticated powers at the disposal of the state**, is entitled to rectify the disadvantage **by speaking to legal counsel at the outset**, so that **he is aware of his right not to speak to the police and obtains appropriate advice with respect to the choice he faces**.⁸⁶

The state has a duty “to allow the suspect to make an informed choice about whether or not he will speak to the authorities. To assist in that choice, the suspect is given the right to counsel.”⁸⁷ The right to counsel guarantees that the accused has a free will to make a statement or not. Justice McLachlin defined an objective test as to whether the accused’s choice to make a statement has been violated: “[w]as the suspect accorded his or her right to consult counsel? By extension, was there other police conduct that effectively deprived the suspect of the right to choose to remain silent, thus negating the purpose of the right to counsel?”⁸⁸ Achieving the Charter’s guarantee against self-incrimination as enshrined in sections 11(c) and 13 at a trial stage means the right to choose must prevail before the trial stage.

c. Conclusion on Hebert: the balance between the unfair use by the state of its superior resources vs. the state's power to deprive an individual of life, liberty, or security

Section 7 and procedural guarantees are about striking a “proper balance between the respective rights of the individual and the state in judicial proceedings where the accused's life, liberty or security of person is at stake.”⁸⁹ These rights are however limited, and the individual can be deprived of life, liberty, or security in accordance with the principles of fundamental justice.

Preserving the rights of the detained person, and maintaining “the reput[e] and integrity of our system of justice” are the purposes of ss. 7-14, which govern the rights of an individual involved

⁸⁵ *Ibid* at 175.

⁸⁶ *Ibid* at 176. [Emphasis added]

⁸⁷ *Ibid* at 177.

⁸⁸ *Ibid*.

⁸⁹ *Ibid* at 179.

in the criminal process.⁹⁰ These sections particularly concern “the control of the superior power of the state *vis-à-vis* the individual who has been detained by the state, and thus placed in its power”.⁹¹ There needs to be a delicate balance between the fair use of the state’s superior resources against an individual “involved in the judicial process” and the state’s power to deprive a person of life, liberty or security under s. 7 so long as the state complies with “fundamental principles of justice.”⁹²

The balance is critical. Too much emphasis on either of these purposes may bring the administration of justice into disrepute -- in the first case because the state has improperly used its superior power against the individual, in the second because the state's legitimate interest in law enforcement has been frustrated without proper justification.⁹³

After the suspect uses their right to counsel and chooses not to make a statement, “the state is not entitled to use its superior power to override the suspect's will and negate his or her choice.”⁹⁴

IV. *Seth v. Canada*⁹⁵: the only case discussing whether the prior testimony of a refugee claimant can be used in a subsequent criminal trial

Seth v. Canada analyzes the right to remain silent in refugee proceedings in the face of criminal charges. Although the case has been cited several times by the Federal Court, IRB, and by the Canadian Human Rights Commission, it has not been subject to academic debate.

In *Seth v. Canada*, the Federal Court of Appeal examined whether a refugee claimant who applied to seek asylum in Canada can get an adjournment for his refugee hearing by virtue of the privilege against self-incrimination while waiting for “the determination of criminal charges which have been laid against him after his arrival in Canada.”⁹⁶

The Applicant was an Indian citizen who remained in Canada without authorization after his visitor visa expired in 1989. In 1990, an immigration officer prepared a report noting that he entered Canada as a visitor and remained therein after ceasing to be a visitor; a direction for immigration inquiry was prepared accordingly. In 1991, the Applicant was charged with indictable offenses in British Columbia. During the immigration inquiry in May 1991, the Applicant started an asylum application. He claimed that the legislation (the Act and Regulations) “compelled him to give both oral and documentary evidence” regarding “his

⁹⁰ *Ibid* at 179.

⁹¹ *Ibid* at 179.

⁹² *Ibid* at 180.

⁹³ *Ibid* at 180.

⁹⁴ *Ibid* at 181.

⁹⁵ *Seth v Canada (Minister of Employment and Immigration)*, 3 FC 348.

⁹⁶ *Ibid* at para.1

personal history and circumstances relevant to his refugee claim”.⁹⁷ As a result, this “disclosure constituted a breach of his section 7 rights under the Canadian Charter...in violation of fundamental justice, in that he would be required to forego his right to silence in the face of criminal proceedings.”⁹⁸

During the immigration inquiry, the adjudicator invited a member of the Refugee Division to assess whether the applicant's refugee claim had a credible basis. The applicant “maintained his right to silence and refused to tender either the Personal Information Form or oral evidence in respect of the credible basis of his claim.”⁹⁹ The Division concluded that the Applicant could not meet “the burden of establishing his claim and the adjudicator ordered that the applicant be deported from Canada.”¹⁰⁰ The applicant argued that the Division’s decision on the lack of credibility was the result of a breach of fundamental justice in that “he is entitled to maintain his right to silence until” a form of protection during the RSD proceedings such as an adjournment of the proceedings is afforded.¹⁰¹

The Federal Court summarized the remedies available in the legislation to prevent the use of immigration testimonies in a subsequent criminal trial. Those are “protection of the testimonial evidence under section 5 of the Canada Evidence Act [R.S.C., 1985, c. C-5] and section 13 of the Charter”.¹⁰² Furthermore, for this case, the RCMP was ordered “not to use the information disclosed, a written undertaking by the Minister of Employment and Immigration and his officials not to reveal the information disclosed”.¹⁰³

In discussing the applicability of section 11(c) of the Charter which set forth that any person charged with an offense has the right not to be compelled to be a witness in proceedings against that person in respect of the offense, Justice Décary decided that the protection in section 11(c) is not applicable at this stage because that protection is afforded to a person charged with an offense

and not in proceedings, such as the credible basis proceedings, which are not in respect of the criminal charges laid against self-incrimination afforded by section 13 of the Charter...and by subsection 5(2) of the Canada Evidence Act:...does not protect a witness against testimonial compulsion and does not prevent the introduction at a subsequent criminal trial of evidence discovered as a result of such testimony.¹⁰⁴

⁹⁷ *Ibid* at para. 5

⁹⁸ *Ibid* at para. 5

⁹⁹ *Ibid* at para.8

¹⁰⁰ *Ibid* at para. 8

¹⁰¹ *Ibid* at para. 11

¹⁰² *Ibid* at para. 10

¹⁰³ *Ibid* at para. 10

¹⁰⁴ *Ibid* at para. 12.

After concluding that sections 13 and 11(c) are irrelevant, Justice Décaré determined that section 7 applies to the case. Justice Décaré also noted Justice Pinard's reasoning in *Meade v. Canada*, among which Justice Pinard stated that the applicants are protected from the use of compelled testimony in a subsequent criminal proceeding and the judge has the discretion to exclude derivative evidence in a subsequent criminal proceeding.¹⁰⁵

In reaching his conclusion that the section 7 right did not provide the Applicant with “an adjournment of the credible basis proceedings until completion of his criminal trial”, Justice Décaré laid out six important principles¹⁰⁶: (i) an immigration inquiry is administrative in nature and not a trial. No suspect or accused was involved in the inquiry. The person subject to the inquiry is not determined to be liable for any legal condition. The inquiry's “**sole function, in the case at bar, is to determine the credible basis of the Convention refugee claim made by the claimant.**”¹⁰⁷ The only purpose of this inquiry is to determine whether the individual has a well-founded fear of persecution regarding his country of origin and not to determine whether he has violated “Canadian criminal laws”; (ii) “[t]he documentary evidence to be filed by the applicant” is fundamental for the Tribunal to perform its duties under its mandate. Otherwise, the Tribunal has no choice but “dismiss the claim”¹⁰⁸; (iii) if the applicant decides to testify in the immigration inquiry, the use of compelled testimony in a subsequent criminal proceeding is prevented under section 13 of the Charter; (iv) a trial judge has the discretion to exclude any documentary or derivative evidence if she deems that “**such evidence would not have been discovered without the compelled testimony of the applicant at his Convention refugee hearing**”¹⁰⁹; (v) after a refugee claim is lodged, public interest in Canada compels this claim to be determined as expeditiously as possible. The legislator clearly intended that “there is a need to proceed expeditiously and that the adjudicator must ensure that the statutory duty to hold an inquiry is fulfilled within a reasonable time”¹¹⁰; (vi) in the case of *Seth v. Canada*, there is no indication that “any evidence obtained at or through the inquiry” would be used in the applicant's “upcoming criminal trial”.¹¹¹ In the absence of “a genuine and unmistakable prejudice to the accused criminal charges against an individual should not, per se, prevent the State from pursuing legitimate administrative inquiries unrelated to these charges.”¹¹²

¹⁰⁵ *Meade v Canada (TD)*, 3 FC 365.

¹⁰⁶ *Seth v. Canada (Minister of Employment and Immigration)*, *supra* note 95 at para 24.

¹⁰⁷ *Ibid* at 366-367. [Emphasis added]

¹⁰⁸ *Ibid* at 366-367.

¹⁰⁹ *Ibid* at 366-367. [Emphasis added]

¹¹⁰ *Ibid* at 366-367.

¹¹¹ *Ibid* at 366-367.

¹¹² *Ibid* at 366-367.

Finally, Justice Décary determined that

it would require exceptional circumstances to stay the proceedings of an administrative tribunal, whose functions, powers and decisions have absolutely nothing to do with the criminal liability of the person compelled to testify and offer evidence before it, for the reason that that person, because he was criminally charged, has claimed the right to silence. There are no exceptional circumstances in this case. **The State is merely engaging itself in the most legitimate process, which is by law to be expeditious, of determining the status of a person who seeks the right to remain in Canada.**¹¹³

More importantly, a refugee claimant can be compelled to testify in a hearing before the Refugee Protection Division (RPD). Justice Décary, yet, carefully noted that

I am disposed, for the sake of argument and without reaching a final conclusion on the point, to recognize that a Convention refugee claimant can be equated with a "compellable witness". **While not bound to testify personally at his hearing** (see s. 29(1) of the *Immigration Act*), **he cannot be successful in his claim unless he meets the burden imposed on him** by s. 46(2) [as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 14] of the Act and tenders sworn documentary evidence in support of his claim respecting his personal history (s. 45(2) [as am. idem] of the Act; s. 18 of the *Convention Refugee Determination Division Rules* [SOR/89-103]). **While he need not make a claim, he will be expelled from Canada if he does not do so** and while he is not necessarily detained prior to the hearing, he will be ordered out of Canada if his claim is unsuccessful. **To that extent he appears to be in "the control of the superior power of the state" and "cannot walk away"**, to use the words of McLachlin J. in *R. v. Hebert*, supra, note 11, at p. 179.¹¹⁴

V. *R. v. S. (R.J.)*¹¹⁵: compulsion to testify in itself would result in deprivation of liberty under section 7

Another key decision to understand the principle against self-incrimination is the Supreme Court's decision of *R. v. S. (R.J.)* rendered in 1995 concerning criminal law. The appellants, young offenders, were charged in an administrative procedure at the youth court. The Crown subpoenaed one of the offenders (M.) as its main witness at the other one's (S.) trial but, "the trial judge quashed the subpoena on the ground that to compel the M's

¹¹³ *Ibid* at 367. [Emphasis added]

¹¹⁴ *Seth v. Canada (Minister of Employment and Immigration)*, supra note 95 at n 13. [Emphasis added] The *Seth* decision came in 1993 after the IRPA came into force in 2002. "IRPA introduced the pre-removal risk assessment which allows any person in Canada to apply to an officer for an assessment, as to whether he or she would be at risk of persecution, torture or other forms of cruel and inhumane treatment." Lorne Waldman, "Introduction" in *Halsbury's Laws of Canada – Immigration and Citizenship (2019 Reissue)* (LexisNexis Canada).

In *R. v. Hebert*, Justice McLachlin wrote that "In a broad sense, the purpose of ss. 7-14 is two-fold to preserve the rights of the detained individual, and to maintain the repute and integrity of our system of justice. More particularly, it is to the control of the superior power of the state *vis-à-vis* the individual who has been detained by the state, and thus placed in its power, that s. 7 and the related provisions that follow are primarily directed. The state has the power to intrude on the individual's physical freedom by detaining him or her. The individual cannot walk away. This physical intrusion on the individual's mental liberty in turn may enable the state to infringe the individual's mental liberty by techniques made possible by its superior resources and power." *R. v. Hebert*, supra note 69 at 179.

¹¹⁵ *R. v. S. (R.J.)*, 1 SCR 451.

testimony” would breach section 7 of the Charter.¹¹⁶ Eventually, S. was acquitted as the standard of proof – beyond a reasonable doubt – could not be established. “The Crown appealed the acquittal on the ground that the trial judge erred in quashing M's subpoena.”¹¹⁷

The Supreme Court decided that “M was properly compellable at S's trial and the trial judge erred in quashing the subpoena.”¹¹⁸ Although M's liberty interests were engaged due to the statutory compulsion to testify, these interests are affected “in accordance with the principles of fundamental justice. Fundamental justice is satisfied because neither M's testimony, nor a limited class of evidence derived from his testimony, can later be used to incriminate him in other proceedings.”¹¹⁹ M. is compellable in S's trial and “the principle against self-incrimination is satisfied if M receives the simple use immunity provided by s. 13 of the Charter, together with a residual derivative use immunity in respect of evidence which could not have been obtained but for his compelled testimony.”¹²⁰ The trial judge will exercise discretion to grant this residual immunity “but exclusion will be the likely result because the self-incrimination principle demands the preservation of trial fairness.”¹²¹

The Court decided that in addition to section 13, sections 24(2) and 7 regulate the principle against self-incrimination. Section 7 protects against compulsion to testify in proceedings subject to possible imprisonment for failure to comply, as such compulsion in itself would result in a deprivation of liberty.¹²² The compellability rule depends on the context; if the proceeding has a self-incriminatory purpose, then section 7 engages. A proceeding's purpose or character determines as to whether the proceeding “at which testimony is sought to be compelled” limits a general compellability rule. As such, “[a]n objection must be lodged against proceedings which are justified by a self-incriminatory purpose.”¹²³

The residual protection under section 7 includes the right to remain silent; yet, this protection is not broader than what was envisaged under common law. Although section 7 provides residual protection against self-incrimination, there is no absolute right to silence that will damage the existence of section 13. However, section 7 provides residual protection to an individual in cases where the individual's life, liberty, and security interests are at stake and section 13 is inapplicable.

¹¹⁶ *Ibid* at 452.

¹¹⁷ *Ibid* at 452.

¹¹⁸ *Ibid* at 452.

¹¹⁹ *Ibid* at 452.

¹²⁰ *Ibid* at 455.

¹²¹ *Ibid* at 455.

¹²² *Ibid* at 462 (majority opinion)

¹²³ *Ibid* at 453 (majority opinion)

Delivering the majority's opinion, Justice Iacobucci wrote that "[d]erivative evidence which could not have been obtained, or the significance of which could not have been appreciated, but for the testimony of a witness ought generally to be excluded under s. 7 in the interests of trial fairness."¹²⁴ Jonathan Dawe and Heather McArthur commenting on the decision explained that the majority's decision on the use of derivative evidence is generally accepted. The majority, however, decided that "sections 7 and 24(2) should *both* be understood to prohibit the admission of otherwise undiscoverable derivative evidence."¹²⁵ With that the Supreme Court of Canada upheld Justice La Forest's opinion in *Thomson Newspapers*: if the derivative evidence is "so concealed or inaccessible as to be virtually undiscoverable without the assistance of the wrongdoer" then accepting his evidence in a subsequent trial will have the same effect as admitting compelled testimony in a subsequent trial.¹²⁶

A disagreement on the confessions rule emerged among judges. Paraphrasing Justice McLachlin's conclusion on *Hebert*, Justice L'Heureux-Dubé underlined that **"the confessions rule is based upon the notion of voluntariness and, more importantly, choice. Only if an individual chooses to co-operate with authorities will the fruits of such co-operation be properly admissible against him or her at trial."**¹²⁷ The reasons behind this proposition concerned protecting human dignity and reliability.¹²⁸

Reviewing several court decisions, Justice L'Heureux-Dubé concluded that "the Canadian common law can accommodate non-compellability in certain very exigent circumstances when fundamental considerations of fairness have required it."¹²⁹ However, the principle against self-incrimination "is not so broad as to contemplate all self-incriminatory effects."¹³⁰ No principle against the use of derivative evidence exists in the common law.¹³¹

Justice L'Heureux-Dubé articulated that extending residual protection under section 7 to the use of derivative evidence requires balancing "societal interests with those of the accused. Here, these societal interests are in obtaining evidence that is relevant to another proceeding, and the accused's interest is the right to remain silent."¹³² Accordingly, the

¹²⁴ *Ibid* at 454.

¹²⁵ Jonathan Dawe & Heather McArthur, "Charter Detention and the Exclusion of Evidence after Grant, Harrison and Suberu" (2010) 51:1 The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference, online: <<https://digitalcommons.osgoode.yorku.ca/scslr/vol51/iss1/15>> at 412. [emphasis in original].

¹²⁶ *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research*, *supra* note 38 at 555..

¹²⁷ *R. v. S. (R.J.)*, *supra* note 115 at 581. [Emphasis added]

¹²⁸ *Ibid* at 581.

¹²⁹ *Ibid* at 585.

¹³⁰ *Ibid* at 587.

¹³¹ *Ibid* at 587.

¹³² *Ibid* at 604

evidence derived from compelling a person to help in procedures that might incriminate them does not automatically violate the principles of fundamental justice.¹³³

[W]here the state, on justifiable grounds, compels the individual to assist in procedures which may incriminate that person, then the state compulsion involved in obtaining this evidence need not necessarily offend the principles of fundamental justice. As such, the "common thread" that is truly fundamental to our system of **justice cannot be so broad as to extend to all potentially self-incriminatory effects of state action.**¹³⁴

Justice L'Heureux-Dubé continued her analysis with human dignity in refuting self-incriminatory statements: common law and the Charter recognizes "the dignity of the individual" as a fundamental value.¹³⁵ "Although the state may legitimately invade many of these spheres for valid and justifiable investigatory purposes *vis-à-vis* the accused, **it is fundamental to justice that the state not be able to invade the sanctum of the mind for the purpose of incriminating that individual.**"¹³⁶

However, preventing the use of incriminatory testimony might shield an individual "behind false walls".¹³⁷ The state may legitimately compel a person to achieve "pressing and substantial interests".¹³⁸ These interests include "advancing the search for truth in a separate criminal proceeding...exercising administrative regulatory powers, or holding a full and effective public inquiry into a broad matter of substantial public importance."¹³⁹

The effect may be to compel a witness to disclose information that may incriminate or otherwise prejudice that person, but the compellability of that witness in furtherance of that valid activity would not *per se* contravene the principles of fundamental justice embodied in s. 7, given other existing protections under the *Charter*. The subsequent acquisition of evidence which may be derivative also would not, *per se*, violate the *Charter*.¹⁴⁰

To truly balance the interests of the state and those of the compelled witness would require adopting an approach that would respond to "the problem at both ends. Individual witnesses must not be compelled to participate in shams, nor should they be permitted to protect themselves behind false walls."¹⁴¹

¹³³ *Ibid* at 604

¹³⁴ *Ibid* at 604. [Emphasis added]

¹³⁵ *Ibid* at 605.

¹³⁶ *Ibid* at 605. [Emphasis added]

¹³⁷ *Ibid* at 616

¹³⁸ *Ibid* at 609

¹³⁹ *Ibid* at 609.

¹⁴⁰ *Ibid* at 609.

¹⁴¹ *Ibid* at 616.

VI. *British Columbia Securities Commission v. Branch*¹⁴²: the possible subsequent derivative use of the testimony does not suffice to rule out statutory compellability

In 1995, the Supreme Court of Canada signed yet another significant decision on the principle against self-incrimination, *British Columbia Securities Commission v. Branch*. This case differs from the previous *R. v. S. (R.J.)* decision because the *Branch* decision analyzed the “compellability outside of the criminal justice system”.¹⁴³

The Court reiterated its position in *R. v. S. (R.J.)* regarding the compellability rule: the purpose of the proceeding whereby the individual is compelled defines whether the protection against self-incrimination is violated. The proceeding must be devoid of some legitimate purpose to go against the principles of fundamental justice.¹⁴⁴

While the predominant purpose of the inquiry at hand could be related to obtaining “the relevant evidence for the purpose of the instant proceedings, and not to incriminate”, the appellants, they are entitled to receive “evidentiary immunity” for subsequent proceedings.¹⁴⁵ The Court reiterated that if the only concern with regard to statutory compellability is “the possible subsequent derivative use of the testimony, then the compulsion to testify” will not often harm that witness as they will be “protected against such use.”¹⁴⁶

On a separate opinion, Justice L'Heureux-Dubé brought up another consideration in relying on self-incriminatory testimony: the reliability of that testimony and its potential to mislead.

The main objective for Canada to recognize the protection against self-incrimination “**was concern over the reliability of the compelled evidence, and its potential to mislead a trier of fact.** Although notions of individual dignity, fairness and privacy were also relevant to the inquiry”, these notions could be considered “within the rubric of fundamental fairness.”¹⁴⁷

VII. *R. v. Fitzpatrick*¹⁴⁸: free and informed consent is required for testimony to be later used in an adversarial proceeding

In the *Jaballah* decision to be discussed under section 3, Justice Dawson relied on the Supreme Court’s *Fitzpatrick* decision to refuse the applicability of the principle against self-incrimination to the use of asylum testimonies in security certificate proceedings. In *R. v. Fitzpatrick*, the appellant who was a fisherman was charged with catching and retaining fish

¹⁴² *British Columbia Securities Commission v Branch*, 2 SCR 3 at 5.

¹⁴³ *Ibid* at 12.

¹⁴⁴ *Ibid* at 23.

¹⁴⁵ *Ibid* at 28.

¹⁴⁶ *Ibid* at 5. [Emphasis added]

¹⁴⁷ *Ibid* at 43.

¹⁴⁸ *R v Fitzpatrick*, 4 SCR 154.

more than the fixed quota. The trial judge excluded the hail report and fishing logs that each fisherman is required to provide under the Fisheries Act, as “they were self-incriminatory and that their admission would infringe the appellant’s rights under” section 7 of the Charter.¹⁴⁹

The Supreme Court, however, decided that at the time that fishermen provide these documents, they were neither in an adversarial nor inquisitorial relationship with the state. The issue of coercion is missing in the case as no person is compelled to carry out groundfish fishery. The appellant consciously chose to “participate in a regulated area, with its attendant obligation”.¹⁵⁰ Delivering the Court’s judgment, Justice La Forest wrote that

[i]n accepting his licence, the appellant is presumed to know, and to have accepted, the terms and conditions associated with it, which include the completion of hail reports and fishing logs, and the prosecution of those who overfish. Just because the information in the returns may later be used in an adversarial proceeding, when the state seeks to enforce the restrictions necessary to accomplish its regulatory objectives, does not mean that the state is guilty of coercing the individual to incriminate himself.¹⁵¹

Fitzpatrick is the first case where the Court decided on the applicability of the principle against self-incrimination in the context of “a self-reporting requirement in the regulatory sphere.”¹⁵² The Court explained two rationales behind the principle against self-incrimination: (i) the protection “against unreliable confessions”, and (ii) the protection “against the abuse of power by the state.”¹⁵³ After deciding that neither rationales are threatened in the case, the Court analyzed whether the use of the information contained in hail reports and fishing logs is an affront to individual dignity. The answer was negative as these reports do not contain divulged information pertaining to the personality of the individual.¹⁵⁴

Justice La Forest relied on Chief Justice’s definition for the principle against self-incrimination in *Jones*: “[a]ny state action that coerces an individual to furnish evidence against him or herself in a proceeding in which the individual and the state are adversaries violates the principle against self-incrimination. **Coercion, it should be noted, means the denial of free and informed consent.**”¹⁵⁵

Applying his rationale into the case, Justice La Forest concluded that

[n]o one is compelled to participate in the groundfish fishery; they do so purely as the result of their own free decision. Having decided to participate, they are then informed in great detail about all the obligations that attach to their participation in the industry. They receive

¹⁴⁹ *Ibid* at para. 6.

¹⁵⁰ *Ibid* at para. 34.

¹⁵¹ *Ibid* at para. 42.

¹⁵² *Ibid* at para. 25.

¹⁵³ *Ibid* at para. 43.

¹⁵⁴ *Ibid* at para. 51.

¹⁵⁵ *R v Jones*, 2 SCR 229 at 249. [Emphasis added]

a copy of the Pacific Groundfish Trawl Management Plan, which details the quotas established for certain species of fish in designated areas.¹⁵⁶

VIII. *R. v. White*¹⁵⁷ reiterated the four-factored analysis to decide whether oral and written statements could violate the principle against self-incrimination

Later in 1999, in *R. v. White*, the Supreme Court of Canada carefully noted that “[i]n every case, the facts must be closely examined to determine whether the principle against self-incrimination has truly been brought into play by the production or use of the declarant’s statement.”¹⁵⁸ *R. v. White* concerned the use of statements made by an individual to the police after she was involved in an accident later in a subsequent trial. The matter at hand was “whether the admission into evidence in a criminal trial of statements made by the accused under compulsion of the *Motor Vehicle Act* offends the principle against self-incrimination” under section 7.¹⁵⁹

Delivering the majority’s opinion, Justice Iacobucci paraphrased Justice La Forest’s four-factored analysis in *Fitzpatrick* to decide whether oral and written statements could violate the principle against self-incrimination. These factors are

(1) the lack of real coercion by the state in obtaining the statements; (2) the lack of an adversarial relationship between the accused and the state at the time the statements were obtained; (3) the absence of an increased risk of unreliable confessions as a result of the statutory compulsion; and (4) the absence of an increased risk of abuses of power by the state as a result of the statutory compulsion.¹⁶⁰

Justice Iacobucci stated that the first factor, the lack of real coercion, depends on determining whether the principle against self-incrimination is violated must be based on a neutral factor: free and informed consent exists.¹⁶¹

IX. *R. v. Jarvis*¹⁶²: the person is compellable as long as the predominant purpose of the inquiry is not criminal liability

In *R. v. Jarvis*, the taxpayer was charged with a tax evasion offense, after the appellant provided information and the documentary evidence, during the tax audit, without being informed that this information would later be used in his trial. In deciding the case, the Supreme Court of Canada developed a test for establishing at which point “*Charter* rights are engaged in

¹⁵⁶ *R. v. Fitzpatrick*, *supra* note 148 at para 38.

¹⁵⁷ *R. v. White*, *supra* note 29.

¹⁵⁸ *Ibid* at para. 48

¹⁵⁹ *Ibid*.

¹⁶⁰ *Ibid* at para. 51.

¹⁶¹ *Ibid* at para. 55

¹⁶² *R v Jarvis*, 3 SCR 73.

the context of a regulatory investigation conducted by regulatory officials.”¹⁶³ Reiterating its position in the earlier jurisprudence, the Court decided that evidence can be “compelled using statutory inquiry or inspection powers as long as the “predominant purpose” of the inquiry is not “penal liability”.¹⁶⁴ In ascertaining whether the predominant purpose of an inquiry is to investigate penal liability, the Court set out certain factors for trial judges.

The Court accepted that the taxpayer’s liberty interest under section 7 was engaged as the compelled information was later used in his trial. The adversarial relationship between the state and the taxpayer exists “[w]here the predominant purpose of an inquiry is the determination of penal liability”.¹⁶⁵ In case the inquiry has such a purpose, “all *Charter* protections that are relevant in the criminal context must apply.”¹⁶⁶

Supreme Court reiterated its position that section 7 is not “an abstract and absolute rule that would prevent the use of information in all contexts in which it is statutorily compelled”.¹⁶⁷ The principle against self-incrimination must be balanced “with the principle that relevant evidence should be available to the trier of fact.”¹⁶⁸ The regulatory contexts engaging in the public interest will often inherit these competing interests. Delivering the judgment of the Court, Justices Iacobucci and Major wrote that

[i]t would be a fiction to say that the adversarial relationship only comes into being when charges are laid. Logically, this will only happen once the investigators believe that they have obtained evidence that indicates wrongdoing...**The active collection of such evidence indicates that the adversarial relationship has been engaged, since it is irrelevant to the determination of tax liability.**¹⁶⁹

The point at which an adversarial relationship between the state and the individual starts depends on all relevant factors. Enumerating non-exhaustive factors for trial judges to determine the existence of an adversarial relationship, the Court noted that any other provincial or federal departments or agencies with different organizational settings will have to apply these factors in their contexts. These factors are the following.

- (a) Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation could have been made?
- (b) Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?
- (c) Had the auditor transferred his or her files and materials to the investigators?

¹⁶³ Glen Jennings, “Canada: Regulatory Investigations: Applying ‘Jarvis’ In The Securities Context”, (16 July 2012), online: <<https://www.mondaq.com/canada/securities/187068/regulatory-investigations-applying-jarvis-in-the-securities-context>>.

¹⁶⁴ *Ibid.* [footnotes omitted].

¹⁶⁵ *R. v. Jarvis*, *supra* note 162.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.* at para. 68.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.* at para. 91. [Emphasis added]

- (d) Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?
- (e) Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?
- (f) Is the evidence sought relevant to taxpayer liability generally? Or, as is the case with evidence as to the taxpayer's mens rea, is the evidence relevant only to the taxpayer's penal liability?
- (g) Are there any other circumstances or factors that can lead the trial judge to the conclusion that the compliance audit had in reality become a criminal investigation?¹⁷⁰

When the predominant purpose of a question or inquiry is established to investigate penal liability, all Charter rights applicable to the criminal context “are engaged for the taxpayer’s protection.”¹⁷¹ Consequently, the taxpayer cannot be compelled to make statements or provide documents to advance the criminal investigation. In these cases, “investigators must provide the taxpayer with a proper warning.”¹⁷² On contrary, in cases where the predominant purpose of a question or inquiry is to determine tax liability rather than establishing a penal liability, the auditors can compel the taxpayer.¹⁷³

X. *Warman v. Western Canada for Us*¹⁷⁴: a voluntary choice to provide information at an administrative hearing does not amount to coercion

Although not a court case, *Warman v. Western Canada for Us* before the Canadian Human Rights Tribunal (the Tribunal) is worthwhile to discuss. The Tribunal decided that an individual has an informed choice to testify before the Human Rights Tribunal; testifying before the Tribunal is not a legal requirement but a choice; any incriminating testimony before the Tribunal can be later excluded by the criminal court in a criminal trial.

The complaint involved the accusation that Mr. Bahr and “Western Canada for Us communicated hate messages” through the internet violating s. 13 of the *Canadian Human Rights Act*.¹⁷⁵ Mr. Bahr was also charged with the willful promotion of hatred. Mr. Bahr argued that if the inquiry “is not adjourned pending the resolution of the criminal proceedings against him, his right to a fair criminal trial” would be violated because the publicity of the Tribunal hearing would undermine the publication ban in the criminal trial.¹⁷⁶ Furthermore, his right to a fair hearing in the Tribunal proceedings would be violated as he used his right to remain silent and hence, is required “to refuse to testify during the human rights

¹⁷⁰ *Ibid* at para. 94.

¹⁷¹ *Ibid* at para. 96 and 98.

¹⁷² *Ibid* at para. 99.

¹⁷³ *Ibid* at para. 97.

¹⁷⁴ *Warman v Glenn Bahr and Western Canada for Us*, CHRT 52.

¹⁷⁵ *Ibid* at para. 1.

¹⁷⁶ *Ibid* at para. 3.

proceedings.”¹⁷⁷ He, consequently, argued to have been “unable to properly defend himself against the s. 13 complaint.”¹⁷⁸

The Tribunal discussed whether one is “compelled or coerced to testify at an administrative proceeding when it appears to be the only way to successfully defend oneself?”¹⁷⁹ Paraphrasing *R. v. Van Haarlem* (1991), the member Karen A Jensen stated that “the rights to silence and the protection against self-incrimination are threatened only when one is compelled or coerced to disclose incriminating information. These rights are not violated by voluntary disclosure”.¹⁸⁰

Relying on several court decisions, the Tribunal noted that “where **one has a choice about electing to come forward to provide information at an administrative hearing, and one does so in order to present information necessary to establish one's case, this does not amount to being compelled or coerced to give information**”.¹⁸¹ If law does not require a person “to testify at an administrative proceeding” but allows her “to make an informed choice about whether to testify, the rights to silence and to protection against self-incrimination are not violated.”¹⁸² Mr. Bahr has “a choice about whether to testify” before the Tribunal, though he might not perceive that he has a choice; “no legal requirement” exists for him to testify.¹⁸³ In addition, he has a right to legal counsel “representing him during the criminal proceedings” and can have a person to assist “him during the pre-hearing matters in the Tribunal proceedings. Mr. Bahr is, therefore, **in a position to make an informed choice regarding his participation in the Tribunal proceedings**.”¹⁸⁴

With this reasoning, the Tribunal established that any information provided at an administrative hearing is voluntarily given because no legal requirement compels the individual to do so. The perception of being obliged to testify is related to the fact that one may lose the case and be obliged to pay damages or incur another type of sanction.

¹⁷⁷ *Ibid* at para. 4

¹⁷⁸ *Ibid* at para. 4.

¹⁷⁹ *Ibid* at para. 13.

¹⁸⁰ *Ibid* at para. 12.

¹⁸¹ *Ibid* at para. 13.

¹⁸² *Ibid* at para. 13.

¹⁸³ *Ibid* at para. 14.

¹⁸⁴ *Ibid* at para. 14. [Emphasis added]

XI. *Islam v. Canada*¹⁸⁵: not informing the applicant that his interview with the CBSA would be used for his exclusion does not violate procedural rights

The last court case to be analyzed before *Jaballah* is *Islam v. Canada* in which procedural problems (self-incriminating testimonies) were discussed in the context of the exclusion provision.

In *Islam v. Canada*, the applicant relied on paragraph 2(d) the Canadian Bill of Rights¹⁸⁶ to argue that the RPD acted unfairly by admitting in evidence the applicant's interview with the CBSA and basing its decision on that interview; that he had been denied procedural fairness by the Refugee Division's use of the evidence he gave at his interview in making its decision.

The Applicant was a Bangladeshi who was involved in politics as a member of the Awami League (AL). The tribunal relied on the documentary evidence to find that "violence, including murder, is very often associated with political activity in Bangladesh...the government formed by the AL, including the Prime Minister, encouraged this violence. Elections are also regularly characterized by abuse, intimidation and violence."¹⁸⁷ Police forces are used to incite violence by the ruling party including AL. Police engaged in torture, attack, and even murder members of the opposition.¹⁸⁸ The applicant declared that he became the Secretary for Youth and Sports and a Public Relations Secretary for the local chapter of the AI; "directed protest demonstrations against the government in power since 2001 and made vehement anti-government speeches at public meetings."¹⁸⁹ In 2005, he fled Bangladesh to seek asylum in Canada due to his fear of the police and the government.¹⁹⁰ After the RPD informed the CBSA about the issue of exclusion on crimes against humanity or of acts contrary to the purposes and principles of the United Nations grounds, the CBSA interviewed the applicant to collect further information about his application.¹⁹¹ In its final decision, the RPD excluded him from protection on the basis of being complicit in acts contrary to the purposes and principles of the United Nations. The RPD noted that

in his narrative of the events leading up to his flight, the applicant emphasized the extent of his political involvement and the role he held, and that he had begun to minimize it only when he was facing the possibility of being excluded from the category of potential

¹⁸⁵ Translation of *Islam v Canada (Minister of Citizenship and Immigration)*, 2010 Federal Court translated by Francie Gow.

¹⁸⁶ Paragraph 2(d) set forth that "Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to.... (d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self incrimination or other constitutional safeguards" Canadian Bill of Rights S.C. 1960, c. 44

¹⁸⁷ *Islam v. Canada (Minister of Citizenship and Immigration)*, *supra* note 185 at para 4.

¹⁸⁸ *Ibid* at para. 5.

¹⁸⁹ *Ibid* at, para. 6.

¹⁹⁰ *Ibid* at para. 7.

¹⁹¹ *Ibid* at para. 8 and 9.

refugees because of this involvement. The tribunal believed the applicant's initial version and not his subsequent one. On the other hand, the tribunal noted that it was often local and not national leaders who were responsible for atrocities committed by the AL.¹⁹²

Notably, the exclusion decision was based on complicity by association that was outlawed with the *Ezokola* decision later in 2013.

After the rejection of the RPD, the Applicant sought judicial review. As to the admission in evidence of the applicant's interview with the CBSA, Justice Pinard noted that although "a copy of the letter from the RPD to the CBSA" had been provided to the applicant's representative, the applicant did not oppose to be interviewed "in the absence of his consultant or an attorney. He said nothing when he was asked if he had any questions at the beginning of the interview."¹⁹³ As a result, Justice Pinard ruled that the applicant's rights were not violated.¹⁹⁴

The fact that the applicant was not specifically warned that the information supplied at the interview could be used in the analysis of his file is also not an infringement of procedural fairness. It was explained to the applicant that the purpose of the interview was "to look for much more details than your Personal Information Form". It is difficult for me to believe that he could have imagined that he was being met out of mere curiosity.¹⁹⁵

Justice Pinard's opinion on the matter completely disregards the power dynamics between a refugee claimant and a state authority: a foreigner coming from the Global South to seek asylum in Canada was expected to know interior regulation of the RPD and CBSA without a clear indication of the purpose of the interview. Relying on Justice Le Dain's opinion in *Ziegler v. Hunter*¹⁹⁶, Justice Pinard concluded that the person can be compelled to provide self-incriminatory evidence as the use of this evidence is prevented to be used in a subsequent criminal trial.¹⁹⁷

As a result, the Federal Court found that there is no infringement of procedural fairness when the applicant was not informed about the exclusion provision and his testimony was the sole reason for his exclusion from protection. Self-incriminating statements can be used in an asylum hearing and the Canadian Bill of Rights protection is not absolute. Accordingly, the application for judicial review is dismissed. According to the reporting of

¹⁹² *Ibid* at para. 17.

¹⁹³ *Ibid* at para. 28.

¹⁹⁴ *Ibid* at para. 28.

¹⁹⁵ *Ibid* at para. 29.

¹⁹⁶ *Ziegler v Hunter*, 1983 2 F.C. 608.

¹⁹⁷ *Islam v. Canada (Minister of Citizenship and Immigration)*, *supra* note 185 at para 31.

TVA Nouvelles, Islam disappeared from the radar of authorities and was one of those who was included in the “Wanted by the CBSA” list in 2012.¹⁹⁸

XII. Conclusion on the case law

This section reviewed cases interpreting the use of self-incriminatory testimonies in diverse areas between 1985 to 2010 before the *Jaballah* decision was rendered. In light of the case-law, the following paragraphs will list a series of rules for the use of self-incriminatory testimonies.

The main finding is that the principle against self-incrimination is not absolute and depends on the context. The application of the principle is not limited to the sphere of criminal law either; it applies to certain regulatory and administrative contexts. As a rule, the person is compellable as long as the "predominant purpose" of an inquiry is not a penal liability. Section 7 provides residual protection against self-incrimination to a person subject to administrative proceedings depending on the balance between the interests of the public and the person's right against self-incrimination. Section 7 protects against compulsion to testify in proceedings subject to possible imprisonment for failure to comply, as such compulsion in itself would result in a deprivation of liberty. Otherwise, to determine whether the testimony is compelled, the Court assesses whether free and informed consent of an individual existed.

Canadian law does not prevent a refugee applicant from providing testimony in an immigration inquiry. As there is no absolute right against self-incrimination, a person in immigration inquiries can be compelled to testify. In immigration cases, the principles of fundamental justice in this regard are often not contravened because the compelled testimony in an immigration inquiry cannot be used in a subsequent criminal trial. More importantly, the Federal Court confirmed that the testimony provided in RSD proceedings is a compelled one.

Finally, there is no infringement of procedural fairness when the applicant was not informed about the exclusion provision and his testimony was the sole reason for his exclusion from protection. Self-incriminating statements can be used in an asylum hearing, and the Canadian Bill of Rights protection is not absolute. The implications of these findings for the *Jaballah* decision will be discussed further under *Section 3.2.: critique of the Jaballah decision*.

¹⁹⁸ Charles-Antoine Gagnon, “L’Agence des services frontaliers à la recherche de huit criminels”, (11 March 2012), online: *TVA Nouvelles* <<https://www.tvanouvelles.ca/2012/03/11/lagence-des-services-frontaliers-a-la-recherche-de-huit-criminels>>.

3. *Jaballah (Re)*: asylum testimonies can be used in security certificate proceedings

As introduced in the first section, in the *Jaballah* decision, the Federal Court of Canada discussed whether the protection against self-incrimination should be granted to a person named in a security certificate for the use of asylum testimonies. This section will summarize Mr. Jaballah's case and integrate his lawyers' opinion to proceed with the critique of this decision showing how the Federal Court of Canada erred in its findings by ignoring the earlier jurisprudence concerning the protection against self-incrimination as discussed under the preceding section.

3.1. The *Jaballah* decision: some progress but not enough

Mr. Jaballah and his family entered Canada in 1996 to seek asylum. In 1998, Mr. Jaballah appeared and testified before the IRB. In 1999, the first security certificate was issued against him on the grounds of national security. The alleged national security risk came to the attention of the CSIS very shortly after he arrived "in Canada because he was seen meeting with, heard to be conversing with people who they already had under investigation."¹⁹⁹ The certificate was quashed by the Federal Court in November 1999. The second certificate, which was issued in 2001, was found reasonable, yet "set aside by the Federal Court of Appeal on procedural grounds in July of 2004."²⁰⁰ After the case was returned to the Federal Court for the determination of reasonability, in 2006, the Federal Court again found the certificate was reasonable. Since the *Charkaoui* decision of the Supreme Court of Canada in 2007 found certain procedural aspects of the security certificate process violating section 7 of the Charter, the violation interfered with the proceedings in *Jaballah*. Following the *Charkaoui* decision, the third certificate was issued in 2007 based on a "secret security intelligence report."²⁰¹

As lawyers representing a person in security certificate proceedings cannot see the case but only special advocates, the lawyers are left with the only choice of guessing how authorities are resourced.²⁰² A lawyer of Mr. Jaballah explained how the evidence was adduced in their cases. In the cases of both *Mahjoub*²⁰³ and *Jaballah*, their lawyers applied to exclude the evidence that was used for their cases as there were reasonable grounds to believe that it was obtained through torture or cruel, inhuman or degrading treatment. Although the

¹⁹⁹ Interview with A15.

²⁰⁰ *Jaballah (Re)*, *supra* note 36 at para 10.

²⁰¹ *Ibid* at para. 18.

²⁰² Interview with A15.

²⁰³ *Mahjoub v. Canada* (Citizenship and Immigration), 2017 FCA 157.

lawyers did not know what the evidence was, they assumed that the evidence was likely to have been obtained through inhuman treatment.

A15: Both of our clients were from Egypt and we could hence adduce the evidence about the conduct of Egyptian security services and conditions within Egyptian jails and various other things. We were lucky that a significant portion was excluded from Mr. Mahjoub's case and some of the less significant portion from Mr. Jaballah's case because of the success of that motion.

The publicly disclosed part of the certificate shows that among others “the Ministers rely upon portions of Mr. Jaballah's testimony given before the IRB” to support their allegations. Three issues at the case were whether Mr. Jaballah was entitled to a remedy under (i) subsection 24(2) of the Charter, (ii) section 13 of the Charter, and (iii) whether paragraph 83(1)(h) of the IRPA applied to the case. This section will only analyze the second point: whether Mr. Jaballah was entitled to a remedy under section 13 of the Charter with regards to his testimony before the IRB.

Mr. Jaballah argued that the use of his testimony before the IRB in the subsequent security certificate proceedings violated his right against self-incrimination regulated under Article 13 of the *Charter*. Mr. Jaballah “further argued that he was a compellable witness before the IRB and thus, he was compelled to testify and provide evidence against himself during the refugee adjudication process.”²⁰⁴ Under Canadian law, a compellable witness is an individual who can be compelled to provide evidence in court under the proceedings for contempt if they refuse to obey.²⁰⁵ An individual who is charged with an offence cannot be compelled by the prosecution to be a witness in his case. In contrast, “a person subject to administrative proceedings can be compelled by the authorities to provide evidence.”²⁰⁶ However, in exceptional situations, the protection against self-incrimination within the meaning of section 13 is applicable in administrative proceedings. If an administrative proceeding exposes the person to “true panel consequences, such as imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large” then the individual has the protection against self-incrimination.²⁰⁷

After determining that section 7 was engaged in security certificate proceedings, Justin Dawson analyzed whether accepting Mr. Jaballah's testimony would violate the principles of

²⁰⁴ Doğar, *supra* note 1 at 254.

²⁰⁵ Sidney N Lederman, Alan W Bryant & Michelle K Fuerst, *The Law of Evidence, 5th Edition* (LexisNexis Canada, 2018) at para 13.46.

²⁰⁶ Doğar, *supra* note 1 at 254.

²⁰⁷ Lederman, Alan W. Bryant & Michelle K. Fuerst, *supra* note 205 at para 8.255.

fundamental justice.²⁰⁸ Section 7 can provide “a residual protection against compellability” as much as it provides “a residual protection against self-incrimination”.²⁰⁹ Justin Dawson determined that Mr. Jaballah is not a compellable witness in security certificate proceedings and hence, his prior testimony to that extent cannot be used by the Minister to meet their case.²¹⁰

Following her conclusion that the prior testimony cannot be used in the present case, Justice Dawson questioned whether the receipt of Mr. Jaballah’s testimony before the IRB violates the principles of fundamental justice.²¹¹ Justice Dawson “ruled that the applicant’s prior testimony before the IRB is admissible before the Federal Court, as the use of prior evidence would not violate the principles of fundamental justice. In its ruling, Justice Dawson mentioned that the applicant’s refugee claim is his own free decision. As a consequence, the applicant was not compelled to provide evidence as he chose to advance his refugee claim. Failing to provide personal information or to attend a hearing would have only constituted the abandonment of the refugee claim; there would have been no penalty or proceeding for contempt. In addition, the Applicant did not hold an adversarial position to the state in the refugee hearing unless cessation or exclusion clauses are applied. When an adversarial relationship between the state and an individual exists, the *Charter* protections including the right not to incriminate oneself are involved.”²¹²

It is noteworthy to mention that “once the asylum application is referred to the inadmissibility proceedings, which was the case in *Jaballah*,¹²³ his refugee application is directly suspended as per section 103(1)(a) of the IRPA, and then terminated as per section 104(2)(a) of IRPA- section 46.1(2) of the previous act, Immigration Act of 1976.”²¹³ As a result, applying Article 1F before the Refugee Board is *de facto* not possible since an immigration officer can apply the inadmissibility clause *a priori*.²¹⁴ One of Mr. Jaballah’s lawyers explained that in the case of *Jaballah*, it was the findings of the inadmissibility proceedings that were applied to the security certificate proceedings.²¹⁵

It is incontestable that “the applicant was free to file an asylum application in Canada but does it justify that his statements that were made under oath under the refugee adjudication process can be used as evidence in a subsequent process whereby his ‘liberty and

²⁰⁸ *Jaballah (Re)*, *supra* note 36 at para 71.

²⁰⁹ *Ibid* at para. 77.

²¹⁰ *Ibid* at paras. 82 and 87.

²¹¹ *Ibid* at para. 94.

²¹² Doğar, *supra* note 1 at 255. [footnotes omitted].

²¹³ IRPA, section 44(1), Immigration Act 1976 45(2)-46(1). Please also see Doğar, *supra* note 1 at 255.

²¹⁴ Doğar, *supra* note 1 at 255.

²¹⁵ Interview with A13.

security interests are so engaged’? This is a controversial one and takes us back to the dilemma that I analyzed under the case of *H. and J. v. the Netherlands*: once an applicant filed the asylum application of his own accord, can all subsequent proceedings be considered as being done under his own accord?”²¹⁶

Justice Dawson relied on the Supreme Court’s decision in *R. v. Fitzpatrick*²¹⁷ to determine if the protection against self-incrimination has any limit. As such, the protection against self-incrimination is established based on two factors: “first, to protect against unreliable confessions, and second, to protect against the abuse of power by the state.”²¹⁸ For the first rationale, Justice Dawson ruled out a possibility to categorize Mr. Jaballah’s testimony before the IRB as a confession. For the second rationale, Justice Dawson concluded that “there is little danger of abusive state conduct arising out of the voluntary participation in a refugee claim and the subsequent use of that testimony.”²¹⁹

Albeit having flaws, the *Jaballah* decision is still a headway since the applicant’s testimony from his previous security certificate hearings was excluded from the evidence. Justice Dawson “acknowledged that using the prior testimony in the current security certificate proceedings would violate principles of fundamental justice and thus, the Ministers were not allowed to rely on them in making their case against the Applicant.”²²⁰ Furthermore, Justice Dawson stated that the severeness of “the liberty and security interests involved in the security certificate proceeding require proportionate procedural protections that satisfy “the common law duty of fairness and the requirements of fundamental justice”.”²²¹

In conclusion, Mr. Jaballah was subject to various proceedings for fifteen and a half years. A lawyer of Mr. Jaballah stated that the conditions of release imposed until the third security certificate process were challenging for both Mr. Jaballah and his family. Particularly, the way that the conditions of release were implemented was problematic; the nature of the conditions was punitive rather than preventive for national security risks. Although his phone and mail were monitored due to public court orders, the authorities thought that he would set up some clandestine meetings at this daughter’s elementary school.²²²

²¹⁶ IRPA, section 44(1), Immigration Act 1976 45(2)-46(1). Please also see Doğar, *supra* note 1 at 255. [footnotes omitted].

²¹⁷ *R. v. Fitzpatrick*, *supra* note 148.

²¹⁸ *Ibid* at para. 98

²¹⁹ *Jaballah (Re)*, *supra* note 36 at para 100.

²²⁰ Doğar, *supra* note 1 at 256.; *Jaballah (Re)*, *supra* note 36 at para 87.

²²¹ Doğar, *supra* note 1 at 256.

²²² “Instances where for example he and his wife went to parent teacher interviews at his kids school and his daughter who would have been in middle school at that point was horrified to see CBSA following them around the building from room to room as they went to each of her classrooms to speak with each of her teachers” Interview with A15.

A15: *One of his supervisors had been sleeping upstairs while Mr. Jaballah was in a living room with concerns as to whether he had misrepresented his own doctors' appointment, his wife's doctor appointment; he could not leave the house and go with her. None of that was meaningfully connected in any sort of way to ensuring that there was not a national security threat associated with his relief.*²²³

All security certificates were ultimately quashed, and Mr. Jaballah is now waiting for his citizenship application to be finalized.

3.2. Critique of the *Jaballah* decision: mistakes in applying the findings of the previous jurisprudence on the principle against self-incrimination

Justice Dawson's analysis of Mr. Jaballah's prior testimony before the IRB misses significant factors that have been developed in earlier jurisprudence. This section explains these factors in four main arguments: (i) refugee claimants are unable to make an informed choice as to whether they should provide statements or testify in their asylum hearings; (ii) a refugee claimant is a compellable witness insofar as their asylum testimonies or statements used in security certificate proceedings; (iii) Canadian legal system disregards the rationales behind the protection against self-incrimination for the use of asylum testimonies; and (iv) remedies available to a person compelled to testify function as check and balances for the superior power of the state; however, are unavailable for refugee claimants.

a. Refugee claimants are unable to make an informed choice

The protection against self-incrimination becomes relevant only when a person is compelled or coerced to disclose incriminating information. Justice Dawson categorized Jaballah's prior testimony before the IRB as voluntary; thus, the crux of the Jaballah decisions is whether asylum testimonies are voluntarily made or compelled. This section argues that asylum testimonies are not voluntarily made; a refugee claimant does not make an informed choice free of coercion when they provide inculpatory statements. In developing this argument, this section will unpack four sub-arguments: (i) asylum-seeking is not freely undertaken in precisely the same way as one is free to participate in a regulated industry; (ii) the Basis of Claim Form and the legislation describes asylum statements as a duty; (iii) interviewees' collaborating statements that inculpatory statements are mostly made by refugee claimants; and (iv) a refugee claimant is a compellable witness insofar as their asylum testimonies or statements used in security certificate proceedings. These sub-arguments were further evolved around four themes that were used by Canadian courts to determine whether a

²²³ Interview with A15.

statement is voluntarily disclosed. These are i. the existence of coercion, ii. free and informed consent, iii. the choice to make a statement to state authorities, and iv. the compellability rule.

First, I argue that asylum-seeking is not freely undertaken in precisely the same way as one is free to participate in a regulated industry. Justice Dawson, thus, erred in relying on *Fitzpatrick* as a sole case to refuse the applicability of the principle against self-incrimination. The Supreme Court in *Fitzpatrick* analyzed the principle against self-incrimination in the context of a regulated industry which requires a self-reporting from the person subject to the regulation. The asylum procedure in comparison is far from being categorized as such an industry. Asylum seeking is neither a profession nor an industry. The consequences of failing to provide testimony in asylum proceedings are as serious as returning to a country of origin in which one may be persecuted.

In *Fitzpatrick*, the Court defined coercion or the lack thereof as to whether the subject of the regulation is compelled to participate in the activity. Fishermen are informed about reporting obligations, of the penalties for non-compliance with the relevant regulations, and of the possibility that any reports could be used against them. As already decided in *Jones*, “[c]oercion...means the denial of free and informed consent”.²²⁴ In asylum proceedings, claimants are not informed about possible consequences. Asylum-seeking is not freely undertaken in precisely the same way as one is free to participate in a regulated industry such as the commercial fishery. When a person flees their country of origin based on the well-founded persecution to find a haven in Canada, the choice of whether to seek asylum is not truly as free as the choice of whether to enter into an industry. Consequently, the analogy which Justice Dawson has attempted to draw between the context of *Jaballah* and that in *Fitzpatrick* is inapt.

Both in *Fitzpatrick* and *R. v. White*, the Court applied a four-factored test to determine whether the principle against self-incrimination is violated. As to the first factor — the existence of coercion — the Court ruled that determining whether the principle against self-incrimination is violated must be based on a neutral factor, which is whether free and informed consent exists.²²⁵ *R v. White* answers “the question of how it is to be determined that a statement was, in fact, made under compulsion of the statute.”²²⁶ Accordingly, I will analyze how the compulsion in asylum proceedings becomes relevant in asylum testimonies and statements.

²²⁴ *R. v. Jones*, *supra* note 155 at 249.

²²⁵ *R v White*, 2 SCR 417 at para 55.

²²⁶ *R v White*, 2 SCR 417 at para 73.

a.1. The Basis of Claim Form and the legislation describe asylum statements as a duty

The principle against self-incrimination is brought into play by numerous aspects of the context surrounding the compulsion to testify in asylum testimonies. For example, in the basis of claim (BOC) form provided to refugee claimants, a warning explicitly states that providing false or misleading information is a serious offense.²²⁷ In addition, the applicant's claim "may also be rejected - and any favorable decision, if already given, revoked, if you give information that is not true or is misleading, or if you try to hide important information."²²⁸ In the appendix of the same form, another warning appears: the information provided by the applicant in "BOC Form must be **complete, true and correct.**"²²⁹ The BOC Form "will be used as evidence in your claim for refugee protection, and you will be asked questions about the information you give in the form. Your claim may be rejected if you give information that is not true or if you try to hide important information."²³⁰ In Claimant's Guide Kit provided to refugee claimants, it is repeated that the claimant must give information that is complete, true and correct in their BOC Form; and must make sure that the RPD receives all of the documents it asks them for, including their BOC Form, on time.²³¹ Accordingly, as per section 100 (4) of the IRPA, a refugee claimant must provide the RPD with the documents and information including the BOC form required by the rules of the Board.

The Supreme Court of Canada in *R. v. White* determined that "[t]he requirement that the claimant's honest belief be reasonably held also relates to the meaning of compulsion."²³² Drawing from the reasoning and methodology of Justice Iacobucci's opinion in *R. v. White*, I argue that the Basis of Claim form and asylum testimonies are often given by the applicant on the basis of a subjective belief prevailing as a compulsion.²³³ The principle against self-incrimination has a bearing on preventing the abuse of state power. It is not related to "preventing unreasonable perceptions that state power exists. There is no risk of true

²²⁷ Immigration and Refugee Board of Canada, "Basis of Claim Form", (13 July 2013), online: <<https://irb.gc.ca:443/en/forms/Pages/RpdSpr0201.aspx>> at 1 and 10.

²²⁸ Immigration and Refugee Board of Canada, *supra* note 227.

²²⁹ *Ibid.* [Emphasis added]

²³⁰ *Ibid.*

²³¹ Immigration and Refugee Board of Canada, "Claimant's Guide (Print version) Version 5 - 2018", (30 November 2012), online: <<https://irb.gc.ca:443/en/refugee-claims/Pages/ClaDemGuide.aspx>>.

²³² *R v White*, 2 SCR 417 at 419.

²³³ *Ibid* at para. 76.

oppression of the individual where the state acts fairly and in accordance with the law, but the individual unreasonably perceives otherwise...The requirement that an honest belief be reasonably held is an essential component of the balancing that occurs under s. 7.”²³⁴ The missing point in *Jaballah* decision is that there is no discussion whether a claimant’s honest belief in compulsion is reasonable. The social interest as well as “the application of the principle against self-incrimination”²³⁵ starts in the expeditious RSD, at the moment when a claimant speaks on the basis of a reasonable and honest belief that they are required by law to do so.

Fitzpatrick and *R. v. White* are not the only cases in which the concept of coercion was discussed. *Warman v. Western Canada for Us* discussed the concept of compulsion under administrative law. The Tribunal analyzed whether one is “compelled or coerced to testify at an administrative proceeding when it appears to be the only way to successfully defend oneself”.²³⁶ Paraphrasing *R. v. Van Haarlem*, the member Karen A Jensen stated that “the rights to silence and the protection against self-incrimination are threatened only when one is compelled or coerced to disclose incriminating information. These rights are not violated by voluntary disclosure”.²³⁷

The Tribunal decided that an individual has an informed choice to testify before the Tribunal; testifying before the Tribunal is not a legal requirement but a choice; any incriminating testimony before the Tribunal can be later excluded by the criminal court in a criminal trial.²³⁸ If we apply this reasoning to asylum claims, in the current system, refugee claimants are unable to make an informed choice as to whether they should provide statements or testify in their asylum hearings. As already explained, the BOC explicitly states that providing false or misleading information is a serious offense. The Applicant’s claim “may also be rejected - and any favourable decision, if already given, revoked”; if they provide untrue or misleading information, or if they try “to hide important information.”²³⁹ If a refugee claimant does not know the consequences of their testimonies that can be used in security certificate proceedings and has been tricked into making an inculpatory statement, is it possible to assert that this statement is voluntarily made?

In *R. v. Hebert* Justice MacLachlin explained that the privilege against self-incrimination and the common law confessions rule share a common notion that “the right of the individual to

²³⁴ *Ibid* at para. 77.

²³⁵ *Ibid* at para. 77.

²³⁶ *Warman v. Glenn Bahr and Western Canada for Us*, *supra* note 174 at para 12.

²³⁷ *Ibid* at para. 12.

²³⁸ *Ibid* at para. 5, 13-14.

²³⁹ Immigration and Refugee Board of Canada, *supra* note 227.

choose whether to make a statement to the authorities or to remain silent”.²⁴⁰ As per the *Jaballah* decision, in security certificate proceedings, refugee claimants become suspects with their own mouths as they do not make an active choice. Refugee claimants speak about their past to authorities such as agents of the CBSA, members of the RPD or the Federal Court to seek asylum and collaborate, not to incriminate themselves.

a.2. Interviewees’ perspective: asylum testimony is crucial in immigration inquiries

The challenging question is not whether refugee claimants must have a choice but what choice means.²⁴¹ Under what conditions are a claimant’s choice to incriminate herself valid? Lisa Dufraimont asks “[w]hat kinds of state action represent an unjustifiable interference with that choice?”²⁴² To understand whether refugee claimants have a choice, the following will summarize the main points of interviewees as to how they evaluate their clients’ testimony.

Three interviewees attest that refugee claimants themselves generally provide the information that was later used to have found them inadmissible.²⁴³ The Minister was able to learn about alleged accusations or memberships because claimants declare their memberships and life stories in their basis of claim form.²⁴⁴ For example, Bangladeshis who sought asylum in Canada provided in their refugee claimant forms that they were a member of the BNP, and due to this membership, they were politically targeted.²⁴⁵ Based on their declaration, they were later found to be inadmissible to Canada. In a way, claimants themselves do the favor for the minister by acknowledging and proving that they are members of the BNP.²⁴⁶ As their clients already declared their membership, the only thing the Minister has to do is to demonstrate that the BNP is involved in terrorist activities or acts of subversion based on *harkats* organized by the BNP.²⁴⁷ The lawyer argued that once a refugee claim is made by a BNP member, chances are more than 90 percent that the claim is going to be terminated after an admissibility hearing, and the only remedy that they will get is an opportunity to explain their fear in the pre-removal risk assessment.²⁴⁸ In the words of another interviewee, “that is

²⁴⁰ *R. v. Hebert*, *supra* note 69 at 175.

²⁴¹ Lisa Dufraimont, “The Patchwork Principle against Self-Incrimination under the Charter” (2012) 57:1 The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference, online: <<https://digitalcommons.osgoode.yorku.ca/sclr/vol57/iss1/11>> at 250. Lisa Dufraimont asked these questions in relation to suspects under criminal law, not related to Refugee claimants.

²⁴² *Ibid* at 250.

²⁴³ Interview with A1. A3 and A9 stated the same problem.

²⁴⁴ Interview with A1.

²⁴⁵ Interview with A1. A14 shared the same opinion on BNP members: in filling up the BoC, refugee claimants “have to explain everything that has happened to them and in that context, they already acknowledged that they are members of BNP because that is the grounds for making their claims”, its their “political affiliation or actually their political opinion.”

²⁴⁶ Interview with A14.

²⁴⁷ Interview with A14.

²⁴⁸ Interview with A14.

what triggers the pulling them out of the refugee stream and put them into the admissibility stream”.²⁴⁹

The government generally “knows little about what the person did beyond what they admitted that they have done”.²⁵⁰ They often declare their membership with a group, militia, military, or police force. As mentioned by an interviewee, “[i]t is the same thing that lands them in Article 1F lens that underlies their claim for protection.”²⁵¹ They usually put enough of those facts on the table that the government will come back and say “well, we think you are complicit in war crimes or crimes against humanity”.²⁵²

A3: The vast majority of times, the most important information that is used against people come out of their own mouths.

It is a common thing to find refugee claimants inadmissible based on their own statements but there can be other ways such as security checks. For example, the same interviewee explained that certain people “is going to come to authorities’ attention no matter what, due to basic security screening, or they have to reveal those facts because those are the facts that put them at risk on return to their country.”²⁵³ In the case of *Sabadao*²⁵⁴, the allegations of war crimes and crimes against humanity came to the attention of authorities because Mr. Sabadao disclosed his service in the Filipino Army in the Basis of Claims form.²⁵⁵ His service in the Filipino Army must have been part of his asylum claim because his job was the main reason for him to have been targeted by the New People’s Army (NPA).²⁵⁶

Three interviewees explained that refugee claimants are not provided information about the consequences of their declaration.²⁵⁷ When applicants make their claim at the airport, they are not informed about the consequences of their statements.²⁵⁸ When an individual, a member of a group opposing the current Syrian regime that was funded by Canada, makes a refugee claim stating that having been a member of an armed group funded by Canada, they are in danger in Syria, authorities bring an inadmissibility allegation on the basis of section 34 of the IRPA.²⁵⁹ Another example comes from Burundi: high-ranking

²⁴⁹ Interview with A1. A9 shared a similar view: after the changes in the IRPA made by the conservative government, “many of the exclusion cases in actuality became a matter of inadmissibility.” Interview with A9.

²⁵⁰ Interview with A3.

²⁵¹ Interview with A3. A6 stated the same problem.

²⁵² Interview with A3.

²⁵³ Interview with A3.

²⁵⁴ *Sabadao v Canada (Citizenship and Immigration)*, 2014 FC 815. The case of Sabadao will be explained in Chapter V under *Case study: Sabadao living in limbo for over two decades*.

²⁵⁵ Interview with A1.

²⁵⁶ Interview with A1.

²⁵⁷ Interview with A3, A4 and A12.

²⁵⁸ Interview with A4.

²⁵⁹ Interview with A4.

Burundian army members who are purged by the current Burundian regime made refugee claims that put some at risk of an exclusion allegation.²⁶⁰

Providing information about the consequences of asylum testimonies also depends “on the fairness of the individual agents.”²⁶¹ Some agents might inform refugee claimants about the importance of their statements and warn them to get a lawyer “and others are just looking for enough to be able to deport them, that is all they want, just depends on your luck partly.”²⁶²

A3: The government does not proactively say be careful about what you say because you might implicate yourself in an exclusion, they obviously do not do that. There is probably half of the war crimes or security inadmissibility cases I have done the allegations were initially based on my client’s own testimony in the sense that people come and say what they need to say in order to get refugee protection.

Seven interviewees agreed that their clients’ testimony is crucial in the decision-making procedure. Often the only evidence available aside from the country-of-origin information is the information coming from their clients.²⁶³ Some countries do not even have computers to provide any evidence.²⁶⁴ Furthermore, some countries actively prevent their minorities to obtain refugee status by not providing documentary evidence.²⁶⁵ For example, Indonesia tries to ensure that “their Chinese students did not get refugee status on the grounds of discrimination against the Chinese in Indonesia.”²⁶⁶

One of Mr. Jaballah’s lawyers explained the dilemma of providing testimony or the lack thereof in security certificate proceedings.

A15: If your client does not testify, they opened themselves up to a negative inference with respect to their credibility. If they do testify, they open themselves up to cross-examination with respect to things that they have not seen or been advised of. It is a catch 22. It can be tremendously important that they do testify, particularly in a world that is used to drawing a lot of conclusions about how someone presents... but it can also be enormously to their detriment as well.

Here is the conundrum: on the one hand, if refugee applicants do not testify, the authorities can draw negative interference from their silence. On the other hand, if they

²⁶⁰ Interview with A3.

²⁶¹ Interview with A12.

²⁶² Interview with A12.

²⁶³ When no security check or criminal record is available it is mostly the client’s testimony or the form that he or she filled out provide the basis for the exclusion. Interview with A6.

²⁶⁴ Interview with A8.

²⁶⁵ Interview with A8.

²⁶⁶ Interview with A8.

testify, their testimony can be used against them in security certificate proceedings. This conundrum makes the legal categorization of their testimony so crucial that their testimony cannot be considered voluntarily made. This argument will be discussed in the following section.

b. A refugee claimant is a compellable witness insofar as their asylum testimonies or statements used in security certificate proceedings

The concept of voluntariness is linked to the rule of compellability. I argue that a refugee claimant is a compellable witness insofar as their asylum testimonies or statements are used in security certificate proceedings. Although Justice Dawson determined that Mr. Jaballah's interests under section 7 have been engaged for the use of asylum testimonies in the security certificate proceeding, she did not discuss whether refugee claimants are compellable witnesses pursuant to the findings in earlier case law. This section will first introduce the concept of compellable witness and Justice Décary's opinion on the compellability of a refugee claimant. I will then discuss my main argument that a refugee claimant is a compellable witness in three sub-arguments. Finally, this section will introduce the *Jarvis* model as a partial solution to protect refugee claimants from self-incrimination.

As explained under section 3, in Canadian law, "a compellable witness is a person who can be compelled to provide evidence in court under the proceedings for contempt in case s/he refuses to obey".²⁶⁷ Contrary to criminal law, a person is compellable in administrative proceedings. However, in exceptional situations, the protection against self-incrimination is afforded in an administrative process that "exposes the person to 'true penal consequences, such as imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large' then the person has the right not to incriminate herself".²⁶⁸

A refugee claimant can be compelled to testify during the RSD process. *Seth v. Canada* left the door open for the possibility that refugee claimants are compellable witnesses who provide evidence under "the control of the superior power of the state".²⁶⁹ Thus, the most important implication of *Seth v. Canada* for the *Jaballah* decision is that refugee claimants such as Jaballah may be considered as compellable witnesses.

In *Seth v. Canada*, the Applicant asserted his right to remain silent during the RSD proceeding and the Refugee Division in return decided that the Applicant failed to establish

²⁶⁷ Doğar, *supra* note 1 at 254.

²⁶⁸ Doğar, *supra* note 1 at 254.

²⁶⁹ *Seth v. Canada (Minister of Employment and Immigration)*, *supra* note 95 at n 13.

his case. Justice Décary determined that the RSD process is not a trial; no determination regarding criminal or any other kinds of liability made against an applicant. Accordingly, the sole purpose of the RSD process is to establish whether the claimant is a Convention refugee. In tandem with this sole purpose, the Refugee Division must ask for documentary evidence from the applicant. Otherwise, the Division is ought to reject the claim.

The RSD hearing and process is an administrative proceeding in which “the applicant would be compelled to testify”.²⁷⁰ If the applicant prefers to testify, “the use of compelled testimony...protected in subsequent criminal proceedings by section 13 of the Charter”.²⁷¹ Justice Décary in fact confirmed that the testimony provided in RSD proceedings is a compelled one. He repeated the same reasoning in determining that a criminal court can “exclude any documentary and derivative evidence if he reached the conclusion that such evidence would not have been discovered without the compelled testimony of the applicant at his Convention refugee hearing”.²⁷² Justice Décary also ruled that, in exceptional circumstances, an applicant can claim the right to remain silent during RSD proceedings. Later, in *B095 v. Canada*, paraphrasing Justice Décary’s opinion in *Seth v. Canada*, the Federal Court shared the compellability of a refugee claimant in that “an applicant could be compelled to testify in a hearing before the Refugee Division”.²⁷³

Most importantly, Justice Décary stated that, without concluding, a refugee claimant “can be equated with a ‘compellable witness’” as they cannot establish their case without filling out the BOC form and providing testimony. If they choose not to do so, they can be “expelled from Canada...and while...[they are] not necessarily detained prior to the hearing, ...[they] will be ordered out of Canada if...[their] claim is unsuccessful. To that extent...[they appear] to be in ‘the control of the superior power of the state’ and ‘cannot walk away’”.²⁷⁴

²⁷⁰ *Campbell v Canada (Attorney General)*, FC 683 at para 18.

²⁷¹ *Seth v. Canada (Minister of Employment and Immigration)*, *supra* note 95 at 366.

²⁷² *Seth v. Canada (Minister of Employment and Immigration)*, *supra* note 95 at 366.

²⁷³ *B095 v Canada (Minister of Citizenship and Immigration)*, 2016 Federal Court. “In *Seth v. Canada (Minister of Employment and Immigration)*, 1993 CanLII 2968 (FCA), [1993] 3 F.C. 348 (C.A.), Mr. Justice Décary, writing for the Court, concluded that an applicant could be compelled to testify in a hearing before the Refugee Division, but was careful to point out at p. 357, n. 13: I am disposed, for the sake of argument and without reaching a final conclusion on the point, to recognize that a Convention refugee claimant can be equated with a “compellable witness”. While not bound to testify personally at his hearing (see s. 29(1) of the *Immigration Act*), he cannot be successful in his claim unless he meets the burden imposed on him by s. 46(2) [as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 14] of the Act and tenders sworn documentary evidence in support of his claim respecting his personal history (s. 45(2) [as am. *idem*] of the Act; s. 18 of the *Convention Refugee Determination Division Rules* [SOR/89-103]). While he need not make a claim, he will be expelled from Canada if he does not do so and while he is not necessarily detained prior to the hearing, he will be ordered out of Canada if his claim is unsuccessful. To that extent he appears to be in “the control of the superior power of the state” and “cannot walk away”, to use the words of McLachlin J. in *R. v. Hebert*, [1990] 2 S.C.R. 15], 1 at p. 179. Given Mr. Justice Décary’s comments here, it is not clear that a foreign national, alleged to be inadmissible, can be equated with a “compellable witness” under the *IRPA*.

²⁷⁴ *Seth v. Canada (Minister of Employment and Immigration)*, *supra* note 95 at n 13.

Considering the reasoning above, I argue that a refugee claimant is a compellable witness insofar as their asylum testimonies or statements are used in security certificate proceedings since (i) there are strong sanctions against providing false asylum testimonies, (ii) refusing to testify would eventually result in expulsion, sometimes after a period of detention, and (iii) no safeguard has been provided to a refugee claimant against the control of the superior power of the state.

b.1. For Justice Dawson, a refugee claimant voluntarily participates in the Canadian refugee system

In the *Jaballah* decision, on the one hand, Justice Dawson concedes that “strong sanctions already exist for the giving of false testimony under oath” for asylum testimonies.²⁷⁵ On the other hand, Justice Dawson determined that Mr. Jaballah is not a compellable witness as refusing to testify would not result in a penalty or proceeding for contempt. As stated by Justice Dawson, a refugee claimant cannot provide false testimony as that would result in a serious offense. A factor absent in Justice Dawson’s reasoning is that a refugee claimant cannot refuse to testify either as refusing to testify would mean that they could not establish their case; eventually, they would be expelled from the country. Under these conditions, the claimant hypothetically provides an honest account of his past and collaborates with the authorities. According to the *Jaballah* decision, these testimonies can be used in a security certificate proceeding which could put him in detention for decades with no formal accusation. However, according to Justice Dawson, such testimonies are not considered to be violating the principle against self-incrimination because he “voluntarily” participated in the refugee system; there is no contempt of court if the claimant refuses to obey.²⁷⁶

b.2. Some interviewees agreed that refugee claimants provide statements voluntarily

One of Mr. Jaballah’s lawyers explained the consequences of refusing to obey in refugee proceedings as follows:

A13: *You do not have to make a claim if you do not want to and it is your case to make. The ministers are not normally in the room. They’d be in the room if there was an article 1F exclusion being raised but in a regular refugee case, ministers are not in the room. A claimant can say “I do not want to testify” and that is it; the board cannot make you testify.*

²⁷⁵ *Jaballah (Re)*, *supra* note 36 at para. 99.

²⁷⁶ *Jaballah (Re)*, *supra* note 36 at paras. 100 and 97.

The lawyer mentioned that section 128 of the IRPA²⁷⁷ does not apply to refugee hearings. Section 128 applies only when a person is compellable.²⁷⁸ A claimant is not compellable in refugee proceedings.²⁷⁹ The claimants can be compellable if the court says the person is compellable in inadmissibility proceedings.²⁸⁰ Likewise, four interviewees share the view that refugee claimants voluntarily participate in the system, and hence they must provide testimony. One of them argues that as refugee claimants initiate the asylum process, “they are expected to be able to provide testimony”; they apply for a benefit.²⁸¹ Establishing one’s refugee status is unlikely to happen without testifying.²⁸² Unless a claimant is incapable of testifying such as having a mental condition that does not allow to testify or unless overwhelming evidence establishes that a person is a refugee, the claimant cannot establish their case without testifying.²⁸³ In this regard, criminal law differs from refugee law as in the former, authorities have to establish accusations.²⁸⁴

A8: I am not worried about self-incrimination in that sense because I cannot see much of an opportunity to establish refugee status without testifying.

I will now analyze two interviewees’ opposing approaches to the argument that refugee claimants are not compelled to testify or produce documents.

b.3. For two interviewees, the Canadian immigration system compels a refugee claimant to testify

IRPA often states that a person applying to remain in Canada must answer questions.²⁸⁵ A person can be compelled to answer the questions of IRB, CBSA, or CSIS. Changing section 100 (1.1.) of the IRPA would require a constitutional challenge.²⁸⁶

A3: I have had clients who refused to talk, and the decision-makers just say fine. It is worse if you are silent. Because if you do not have the right to silence, then you do not have the right to know negative inferences being drawn from your silence. They assume that you do not want to defend yourself and there are no mitigating factors in your case.

²⁷⁷ Section 128 set forth that “A person who contravenes a provision of section 126 or 127 is guilty of an offence and liable (a) on conviction on indictment, to a fine of not more than \$100,000 or to imprisonment for a term of not more than five years, or to both; or (b) on summary conviction, to a fine of not more than \$50,000 or to imprisonment for a term of not more than two years, or to both.”

²⁷⁸ Interview with A13.

²⁷⁹ Interview with A13.

²⁸⁰ Interview with A13.

²⁸¹ Interview with A10.

²⁸² Interview with A8.

²⁸³ Interview with A8.

²⁸⁴ Interview with A8.

²⁸⁵ Interview with A3. Section 16 (1) sets forth that “[a] person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.”

²⁸⁶ Interview with A3. According to section 100 (1.1.) of the IRPA, “[t]he burden of proving that a claim is eligible to be referred to the Refugee Protection Division rests on the claimant, who must answer truthfully all questions put to them.”

Mr. Jaballah's lawyer, for example, stated that if their clients made any inculpatory statements, "it is super important for the government...quite often it is the client's testimony that makes a case".²⁸⁷ If their clients testify, "they are constructing a case just based on what they said, so if they admit any kind of association with anybody or having a phone call with anybody" the information can be used against them.²⁸⁸ In Mr. Jaballah's case, there was a phone call, documentation in his asylum file that was later used against him.²⁸⁹

A3: They are essentially compelled to testify and answer questions about what they did and in most cases, the government has their testimony about their own particular function and then country conditions such as media reports, or international reports about what the organization was doing at the time, that usually comes almost entirely through their testimony.

b.4. Conclusion: refugee claimants have no safeguards against the state's powers

In this system, what is the safeguard provided to a refugee claimant against the superior power of the state? The system stalemates a refugee claimant, put into a vulnerable position, stripping his rights that he would be normally entitled under criminal law. Adopting Justice Décary's opinion in *Seth v. Canada*, I thus propose that balancing the superior power of the state requires a refugee claimant to be considered a compellable witness insofar as their testimonies or statements are used in criminal and security certificate proceedings because expelling a person to another country where his life will be threatened is at least as serious a consequence as detention for contempt of court. This consequence becomes more salient in light of what some interviewees shared, in that Canada does not care where the person is expelled or what happened to these people after expulsion.²⁹⁰ For example, a refugee claimant who was wanted on robbery charges in Canada was deported to Bosnia where he ended up bombing up a place in Bosnia.²⁹¹

A13: They knew he was a security threat. Canada does not really worry about sending people or the risk that they are putting anybody else there. He sought refuge and he was involved in criminal activities and so rather than prosecute him they just deported him.

Finally, as to the contempt of the court, it is noteworthy to mention that commissioners of the IRB have powers to summon any witness and require them to "(a) give

²⁸⁷ Interview with A13.

²⁸⁸ Interview with A13.

²⁸⁹ Interview with A13.

²⁹⁰ Please see *Chapter III- Section 2.2. Canada prefers deportation over prosecution* for further discussion on deportation over prosecution.

²⁹¹ Interview with A13.

evidence, orally or in writing, and on oath...and (b) produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine.”²⁹² Furthermore, “[t]he commissioners have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases.”²⁹³ A person who refuses to obey these orders “is liable, on summary conviction before any provincial court judge, or judge of a superior or county court... to a fine not exceeding four hundred dollars.”²⁹⁴ In fact, the counsel for Mr. Jaballah argued that he was a compellable witness before the IRB based on the powers vested to the commissioners; however, Justice Dawson dismissed this argument by stating that “Mr. Jaballah's evidence before the IRB” is “qualitatively different from his testimony in previous certificate proceedings.”²⁹⁵ Justice Dawson’s reasoning does not respond to the argument that commissioners of the IRB have powers to compel a person to provide evidence and produce documents. I believe it was a missed opportunity for the Federal Court to discuss whether no contempt of the court argument is reasonable considering that, according to the law, IRB commissioners indeed have powers to compel an individual.

b.5. In practice, security certificate and asylum proceedings are both adversarial

Returning to the analysis of the jurisprudence, the following paragraphs will discuss the case law on the compellability and introduce the *Jarvis* model as a partial solution to protect a refugee claimant against self-incrimination.

After the compellability is established, the second step is to determine whether life, liberty, and security interests are deprived in accordance with the fundamental principles of justice. This two-step process was delineated in the *Branch* decision. Writing for the majority, Justices Sopinka and Iacobucci stated that the liberty interest of an individual “is engaged at the point of testimonial compulsion.”²⁹⁶ If the liberty interest of an individual is engaged, “the question is whether there has been a deprivation of this interest in accordance with the principles of fundamental justice.”²⁹⁷ In analysing whether the deprivation happened in accordance with the principles of fundamental justice, the Court determines the predominant purpose of an inquiry “at which a witness is compelled to attend”.²⁹⁸

²⁹² Inquiries Act R.S.C., 1985, c. I-11, section 4. According to IRPA, “[t]he Refugee Protection Division, the Refugee Appeal Division and the Immigration Division and each member of those Divisions have the powers and authority of a commissioner appointed under Part I of the Inquiries Act and may do any other thing they consider necessary to provide a full and proper hearing.” IRPA, section 165.

²⁹³ Inquiries Act R.S.C., 1985, c. I-11, section 5.

²⁹⁴ Inquiries Act R.S.C., 1985, c. I-11, section 10(1).

²⁹⁵ *Jaballah (Re)*, *supra* note 36 at para 96.

²⁹⁶ *British Columbia Securities Commission v. Branch*, *supra* note 142 at para 33.

²⁹⁷ *Ibid* at para. 34

²⁹⁸ *Ibid*.

Contrary to Justice Dawson's reasoning in *Jaballah*, I argued that a refugee claimant is compelled in asylum proceedings. If the refugee claimant's testimony is compelled, the liberty interest of the claimant is directly engaged. The second stage requires an analysis as to whether the refugee claimant's deprivation of liberty interests is done in accordance with the fundamental principles of justice. I, thus, need to determine the predominant purpose of an asylum inquiry. The asylum proceedings do not violate section 7 as the purposes of the IRPA with respect to refugees are *inter alia* saving lives and offering protection to the displaced and persecuted. Fulfilling Canada's international legal obligations with respect to refugees, protecting the health and safety of Canadians and maintaining the security of Canadian society justify inquiries of limited scope.

As established in *Seth v. Canada*, an immigration inquiry legitimately compels testimony as the IRPA is concerned with the furtherance of a goal which is of substantial public importance – namely “having refugee status determined as soon as is practically possible after a claim is made”.²⁹⁹ The inquiry is of the type permitted by Canada as it serves a social utility. The predominant purpose of an immigration inquiry is then to “determine the credible basis of the Convention refugee claim made by the claimant”, and not to incriminate the claimant.³⁰⁰ Asylum proceedings, thus, do not have a self-incriminatory purpose. As a result, compelling a refugee claimant complies with the principles of fundamental justice.

In the same vein, in *Jaballah*, Justice Dawson acknowledged that “section 7 may provide a residual protection against compellability.”³⁰¹ As such, Justice Dawson briefly analyzed whether receiving the testimony of Mr. Jaballah before the IRB would be contrary to principles of fundamental justice. In return, Justice Dawson concluded that the use of asylum testimonies in security certificate proceedings would not contravene the principles of fundamental justice.

The predominant purpose of an immigration inquiry is indeed a legitimate one and the state can compel anyone seeking asylum to testify and to answer its questions honestly. However, a problem occurs if these statements can be used in a subsequent security certificate process that significantly engages the person's liberty and security interests and requires “commensurate procedural protections that meet the common law duty of fairness and the requirements of fundamental justice”.³⁰² Both asylum and security certificate proceedings are regulated under the IRPA; however, they are different in their functions and purposes. On the

²⁹⁹ *Seth v. Canada (Minister of Employment and Immigration)*, *supra* note 95 at 366.

³⁰⁰ *Seth v. Canada (Minister of Employment and Immigration)*, *supra* note 95 at para. 24.

³⁰¹ *Jaballah (Re)*, *supra* note 36 at para 77.

³⁰² *Ibid* at para.77.

one hand, the asylum-seeking procedure under the IRPA mostly aims to save lives and to protect displaced and persecuted individuals; (b) “to fulfill Canada’s international legal obligations” in relation to refugees and assist the resettlement of refugees; (c) “to grant...fair consideration to those who come to Canada claiming persecution; (d) to offer safe haven to persons with a well-founded fear of persecution based on” defined factors, and persons who “are at risk of torture or cruel and unusual treatment or punishment; (e) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada’s respect for the human rights and fundamental freedoms of” everyone.³⁰³ On the other hand, security certificate proceedings determine non-citizens’ inadmissibility on the grounds of security, violating human or international rights, serious criminality or organized criminality.³⁰⁴ However, these two proceedings are intertwined in practice. The *Jarvis* decision can guide Federal Court judges on how to proceed when these proceedings are interwoven.

Although the *Jarvis* decision emerged in relation to an audit and subsequent criminal investigation under the Income Tax Act, the decision has implications “for other regulatory contexts that employ broad inquiry powers to compel information.”³⁰⁵ I believe the security certificate proceeding is relevant to such context. Although the predominant purpose of an immigration inquiry is not the determination of penal liability, the Federal Court should adopt the *Jarvis* model in deciding whether the use of prior asylum testimonies in a security certificate proceeding would be in accord with the principles of fundamental justice. Based on the questions raised in the *Jarvis* decision, when the Federal judge reviews a certificate, they should be guided to determine whether the use of asylum testimonies should be excluded from the Minister’s case.

(a) Did the authorities have reasonable grounds to use the asylum proceeding in a security certificate proceeding?

(b) Does it appear that the Minister intended to use IRB as their agent in the collection of evidence?

(c) Is the evidence sought relevant to asylum-seeking purposes generally?

(d) Are there any other circumstances or factors that can lead the Federal Court judge to the conclusion that the asylum-seeking process had, in reality, become a security certificate inquiry?

³⁰³ IRPA, section 2.

³⁰⁴ IRPA, section 77(1)

³⁰⁵ Jennings, *supra* note 163.

Adopting similar reasoning developed in *Jarvis*, I suggest that when the predominant purpose of a question or inquiry has become the determination of a security certificate proceeding the full panoply of Charter rights should be applicable for the use of these testimonies. Accordingly, such documents or statements should be prevented to be used to advance the security certificate proceeding. So long as the predominant purpose of the asylum-seeking process (i.e. IRB hearings) is the determination of the person's status, the agents may continue to resort to their investigative powers under the IRPA.

Not adopting procedural measures such as the *Jarvis* Model, allowing the use of asylum testimonies in a security certificate proceeding implies that the state is "allowed to do indirectly what it cannot do directly".³⁰⁶ Dissenting from the majority's decision in *Thomson Newspaper*, Justice Wilson explained that, since sections 11(c) and 13 do not provide protection against compelled testimony before "any charges being laid", should "the state...be allowed to do indirectly what it cannot do directly"? "Can a suspect be compelled to testify at a pre-trial proceeding which may lead to his being charged with a criminal offence on the basis of such compelled testimony when he cannot be compelled to give that testimony at the trial itself?"³⁰⁷

It seems to me that in order to prevent a suspect from being conscripted against himself in a criminal or quasi-criminal proceeding..., the suspect must be protected against the use of evidence derived from testimony given at the earlier investigatory proceeding as well as against the use of the testimony itself. Otherwise the suspect is convicted, metaphorically if not literally, out of his own mouth.³⁰⁸

In conclusion, this section acknowledged that compelling a refugee claimant to answer questions put by authorities serves a legitimate purpose while arguing that the collaboration of the claimant should not be used against themselves in a subsequent security certificate proceeding. As such, I proposed the *Jarvis* model as a partial solution to protect the claimant against self-incrimination in a security certificate process. The next section will analyze why protecting a claimant against self-incrimination matters in the use of their asylum testimonies.

c. Canadian legal system disregards the rationales behind the protection against self-incrimination for the use of asylum testimonies

The protection against self-incrimination is afforded to an accused in our legal systems because of significant reasons. These reasons originated from the revulsion against notorious practices of the Star Chamber and the old ecclesiastical courts. Through the evolution of case law, the rationales behind the protection against self-incrimination have been articulated as

³⁰⁶ *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research*, *supra* note 38 at 481.

³⁰⁷ *Ibid* at 481.

³⁰⁸ *Ibid* at 483.

preventing the abuse of power by the state and, by so doing, preserving the reputé and integrity of our justice system; protecting the dignity and privacy of the person; and preventing unreliable confessions. The *Jaballah* decision, however, overlooked these concerns, as Justice Dawson simply concluded that “there is little danger of abusive state conduct arising out of the voluntary participation in a refugee claim and the subsequent use of that testimony.”³⁰⁹ This section will analyze how these concerns are examined in the earlier case law and why Justice Dawson erred in her conclusion.

As mentioned earlier, *Fitzpatrick* defined a four-factored test to determine whether the principle against self-incrimination is violated. Under the section on voluntariness, I analyzed the first factor – the existence of coercion as explained in *R. v. White*.³¹⁰ Justice Iacobucci in *R. v. White* continued with the last two rationales behind the principle against self-incrimination: (i) unreliable confessions, and (ii) abuse of power for the case at bar. As these are the reasonings that Justice Dawson principally relied on to allow the use of asylum testimonies in a subsequent security certificate proceeding, I will apply Justice Iacobucci’s reasoning and methodology in *R. v. White* at para 62 to determine whether there is a danger of unreliable confessions in asylum testimonies.

Justice Dawson concluded that “Mr. Jaballah’s testimony before the IRB was not a confession. Further, I do not see how allowing that evidence to be adduced in a security certificate proceeding would increase the likelihood of false testimony before the IRB.”³¹¹ Although strong sanctions exist to prevent false testimonies provided under oath, a claimant might be inclined to provide false testimony to obtain refugee status. In a way, asylum testimonies are statements made in response to an imagined threat: if a refugee claimant is unsuccessful, they would be expelled from the country. As much as a threat, testimonies including confession can be considered as a perceived promise; the state might grant asylum to the person in exchange for confidentiality. At the very least, if these testimonies are the only source to result in criminal or security certificate proceedings, they might be untrue and untrustworthy.

Asylum testimonies under the IRPA are given directly to a CBSA officer or an RPD member, a person in authority whose physical presence might cause the claimant to produce a statement in circumstances where they are not truly willing to speak. The claimant who reasonably believes that they must provide oral testimony under the IRPA will likely

³⁰⁹ *Jaballah (Re)*, *supra* note 36 at para 100.

³¹⁰ *R. v. White*, *supra* note 225 at para 55.

³¹¹ *Jaballah (Re)*, *supra* note 36 at para 99.

experience a significant “fear of prejudice” if they do not speak.³¹² In the meanwhile, “a strong incentive to provide a false statement” may exist considering the grave consequences which the claimant may feel will flow from telling the truth, “even if the truth does not in fact support a finding that a criminal offence was committed. It is reasonable to expect that this fear of prejudice and incentive to lie would be dissipated” if the claimant could be confident that the contents of the oral testimony “could never be used to incriminate” them in criminal or quasi-criminal proceedings.³¹³

As much as preventing unreliable confessions, the protection against self-incrimination is concerned with preserving the repute and integrity of our system of justice and preventing abuse of power by the state. The Supreme Court decided that preserving the rights of the detained person, and maintaining “the repute and integrity of our system of justice” are the purposes of ss. 7-14, which govern the rights of the accused involved in the criminal process.³¹⁴ These sections particularly concern “the control of the superior power of the state *vis-à-vis* the individual who has been detained by the state, and thus placed in its power”.³¹⁵ An individual who is in a disadvantaged position compared to a state in a criminal process is similarly disadvantaged in the security certificate proceeding. The asymmetric power relations are more salient in security certificate proceedings that apply only to non-citizens who come from different cultures and legal backgrounds. An act that is legitimate in another country might trigger national security risks in Canada. The state *de facto* holds a superior power against a refugee claimant who is presumably in an unknown land, in an unknown legal system.

Finally, the protection against self-incrimination safeguards the dignity and privacy of a person. In dissenting the majority’s decision in *Thomson Newspapers*, Justice Sopinka underlined that the right against self-incrimination protects the person against the affront to dignity and privacy. Neither provinces nor the federal government can transfer the investigative powers, “**which is normally carried out by the police, to other agents**” because the right to remain silent is protected under the Charter.³¹⁶ Similar to the privilege against self-incrimination, “the right to remain silent protects the individual against the affront to dignity and privacy which results if crime enforcement agencies are allowed to conscript the suspect against himself or herself”.³¹⁷

³¹² Justice Iacobucci used “fear of prejudice” for the relation between a statutory duty to provide an accident report under the *Motor Vehicle Act*. *R. v. White*, *supra* note 225 at para 62.

³¹³ *R. v. White*, *supra* note 225 at para 62.

³¹⁴ *R. v. Hebert*, *supra* note 69 at 179.

³¹⁵ *Ibid* at 179.

³¹⁶ *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research*, *supra* note 38 at 603. [Emphasis added]

³¹⁷ *Ibid*.

Citing the decision of *R. v. Amway Corp.*, Justice Sopinka reminds that the preservation of the rights against compellability and self-incrimination “is prompted by a concern that the privacy and personal autonomy and dignity of the individual be respected by the state. The state must have some justification for interfering with the individual and cannot rely on the individual to produce the justification out of his own mouth.”³¹⁸

Protecting a person against the affront to dignity and privacy requires us to think asylum testimonies differently than other administrative and regulatory spheres. An asylum testimony is not analogous to “the hail reports and fishing logs in Fitzpatrick, which La Forest J. compared to business records in so far as they were impersonal lists in which the declarant had little expectation of privacy.”³¹⁹ The question in *Jaballah* involves the expectation of privacy that a claimant has in their statements. Asylum testimonies “are a personal narrative of events, emotions, and decisions that are extremely revealing” of the claimant’s personality, opinions, thoughts, and state of mind.³²⁰ The dignity of the claimant is affected by using this narrative to incriminate himself in the security certificate proceeding.

d. Remedies available to a person compelled to testify function as checks and balances are however unavailable for refugee claimants

The jurisprudence on the principle against self-incrimination often enumerated several remedies available to a person compelled to testify. These remedies function as checks and balances against the superior power of the state vis-à-vis an individual. These are (i) remedies available in legislation; (ii) the right to counsel, and (iii) the discretion granted to a trial judge to use the derivative evidence in a criminal trial. These remedies are, however, not available to a refugee claimant who provides asylum testimonies to be later used in security certificate proceedings.

In *Warman v. Western Canada for Us*, the Tribunal articulated remedies available to prevent the use of incriminating statements in criminal proceedings. Member Jensen explained that if the person testifies at this hearing, the law provides him with safeguards “during the criminal proceedings to ensure that his rights to a fair trial and to protection against self-incrimination will be protected.”³²¹ In case he is asked a potentially self-incriminatory question at this hearing, he can claim “the protection of s. 13 of the *Charter* and s. 5(2) of the *Canada Evidence Act* in the criminal proceedings.”³²² These sections protect a

³¹⁸ *R v Amway Corp.*, [1989] 1 SCR 21 at 000.

³¹⁹ *R. v. White*, *supra* note 29 at para 66.

³²⁰ *R. v. White*, *supra* note 29 at para 66.

³²¹ *Warman v. Glenn Bahr and Western Canada for Us*, *supra* note 174 at para 18 and 21.

³²² *Ibid.*

witness who chooses to testify or is compelled to testify. However, it is “**a matter for the criminal court to decide** whether testimony given during the Tribunal proceedings should be excluded on the basis of s. 13 of the *Charter* or s. 5(2) of the *Canada Evidence Act*.”³²³

This reasoning is inapplicable to the use of asylum testimonies in a subsequent security certificate proceeding, for it is not a criminal trial. In fact, Justice Dawson approved of using these testimonies in the subsequent security certificate proceeding. The counsel of Mr. Jaballah also “acknowledged that security certificate proceedings are not criminal in nature, and do not attract true penal consequences.”³²⁴ However, the consequences for the individual may be worse than a criminal conviction.

Earlier, *Seth v. Canada* established that “[t]he use of compelled testimony by the applicant, should he elect to testify, is protected in subsequent criminal proceedings by section 13 of the Charter”.³²⁵ Justice Décaré explained that a criminal court can “exclude any documentary and derivative evidence if he reached the conclusion that such evidence would not have been discovered without the compelled testimony of the applicant at his Convention refugee hearing”.³²⁶ Justice Décaré also ruled that in exceptional circumstances, an applicant can claim the right to remain silent during RSD proceedings. Similar to the reasonings in *Warman*, these remedies are not available for the use of asylum testimonies in a subsequent security certificate proceeding, as the Federal Court does not act as a criminal court in these matters. As such, Justice Dawson determined that Mr. Jaballah could not “establish that section 13 of the Charter applies to” the security certificate proceeding.³²⁷

Since none of these remedies are available for the use of asylum testimonies in a subsequent security certificate proceeding, the question remains how to balance the asymmetric power relations between the state and the individual. The right to counsel could be a partial solution. Relying on Justice McLachlin’s objective test in *R. v. Hebert* as to whether the accused’s choice to make a statement has been violated, I designed a similar test for refugee claimants. This test assesses whether the claimant is accorded their right to counsel to make an informed choice about testifying. The same logic in criminal law applies to refugee claimants who are potentially in a disadvantaged position compared to the informed and sophisticated powers at the disposal of the state. This disadvantage can be partially rectified by speaking to legal counsel at the outset. The state should be obliged to allow refugee claimants to make an

³²³ *Ibid.* [Bold emphasis added]

³²⁴ *Jaballah (Re)*, *supra* note 36 at para 57.

³²⁵ *Seth v. Canada (Minister of Employment and Immigration)*, *supra* note 95 at 366.

³²⁶ *Seth v. Canada (Minister of Employment and Immigration)*, *supra* note 95 at 366.

³²⁷ *Jaballah (Re)*, *supra* note 36 at para 58.

informed choice as to whether they will speak to the authorities, a choice that can be actualized by the right to counsel. If refugee claimants have the right to counsel at the very beginning, while filling out personal information forms, they might be able to make an informed choice. However, the right to counsel would not sufficiently prevent the abuse of power by the state. Even though a claimant can get counsel from the outset, they still stalemate for the reasons described under the section on the compellability rule. In addition, finding a lawyer for a claimant who speaks to a CBSA agent at the airport is not a viable solution. Even if so, lawyers are hog-tied; they cannot mislead their clients to provide false or missing testimony.

Most of the discussions in earlier case law concerning the protection against self-incrimination have evolved around the use of derivative evidence. In *Jaballah*, Justice Dawson provided immunity for certain derivative evidence. However, it is unclear whether derivative evidence from asylum testimonies is permitted to be used in security certificate proceedings. I argue that residual immunity should be granted for testimonies compelled in asylum proceedings as well as for derivative evidence through the exercise of discretion in security certificate proceedings. A claimant who testifies under the warnings outlined in the Basis of Claims form should be entitled, at least, to use immunity in criminal or security certificate proceedings in relation to the contents of that statement and any statements that can lead to another evidence (e.g. derivative evidence) later to be used in security certificate proceedings.

In *R. v. S. (R.J.) v. Canada*, the Supreme Court decided that

[d]erivative evidence which could not have been obtained, or the significance of which could not have been appreciated, but for the testimony of a witness ought generally to be excluded under s. 7 in the interests of trial fairness. Such evidence, although not created by the accused and thus not self-incriminatory by definition, is self-incriminatory nonetheless because the evidence could not otherwise have become part of the Crown's case. To this extent, the witness must be protected against assisting the Crown in creating a case to meet.³²⁸

For dissenting Justice L'Heureux-Dubé, the evidence deriving from compelling a person to help in procedures that might incriminate the person does not automatically violate the principles of fundamental justice. Her thought is particularly relevant as asylum proceedings fall under this category. Adopting Justice L'Heureux-Dubé's strict approach on the use of the derivative evidence would not result in the violation of the principles of fundamental justice: "where the state, on justifiable grounds, compels the individual to assist in procedures which

³²⁸ *R. v. S. (R.J.)*, *supra* note 115 at 454.

may incriminate that person, then the state compulsion involved in obtaining this evidence need not necessarily offend the principles of fundamental justice.”³²⁹

However, the majority decided that the residual immunity will be recognized “by the trial judge through the exercise of a discretion, but exclusion will be the likely result because the self-incrimination principle demands the preservation of trial fairness.”³³⁰

The *R. v. S. (R.J.) v. Canada* decision concerns criminal law. The *Branch* decision on the other hand involves the compellability rule “outside of the criminal justice system”³³¹ where the appellants were ordered to appear before the British Columbia Securities Commission in contempt. The *Branch* decision determined that the testimony of a compellable witness “receives evidentiary immunity in return. The appellants are also entitled to claim the protection of subsequent derivative use immunity. This is a protection that is afforded to witnesses notwithstanding that the source of their evidence may derive from corporate activity.”³³² The majority of the Supreme Court established that the testimony of a compellable witness is subject to “the general rule applicable under the Charter, pursuant to which a witness is compelled to testify, yet receives evidentiary immunity in return.”³³³ The applicability of this reasoning to the security certificate proceeding depends on accepting refugee claimants as compellable witnesses. I earlier established that refugee claimants are compellable witnesses insofar as their testimonies or statements are used in criminal and security certificate proceedings. Indeed, refugee claimants do not appear before the IRB in contempt; if they do not appear or answer any questions, they are considered to have “voluntarily” abandoned their claims. However, the rationales behind the protection against self-incrimination prevail in asylum testimonies and statements. Those are preventing the abuse of power by the state; balancing asymmetric power dynamics between the state and the individual; protecting the dignity and privacy of the individual; preserving repute and integrity of the justice system and deterring unreliable confessions. Thus, insofar as their asylum testimonies and statements are used in a security certificate proceeding, refugee claimants should be considered as compellable witnesses and afforded the protection of derivative immunity in security certificate proceedings.

Accepting an immunity against the use of asylum testimonies in subsequent security certificate proceedings is itself a balancing between society’s goal of expeditious RSD, on the

³²⁹ *Ibid* at 604.

³³⁰ *Ibid* at 455.

³³¹ *British Columbia Securities Commission v. Branch*, *supra* note 142 at 12.

³³² *Ibid* at 6.

³³³ *Ibid*.

one hand, and the fundamental importance for the individual of not being compelled to self-incriminate, on the other.³³⁴ As indicated in *R. v. White*, to grant immunity for the use of derivative evidence does not mean that the principle against self-incrimination overrides other “fundamental principles...the grant of a use immunity permits the state to achieve the important objective of acquiring relevant information immediately, for a purpose unrelated to the investigation of specific crimes, while protecting the individual against jeopardy from the use of that information against him or her in penal proceedings at a later time.”³³⁵

In *Jaballah*, Justice Dawson granted immunity for the use of derivative evidence stemming from Mr. Jaballah’s prior testimony in previous security certificate proceedings. Justice Dawson excluded such derivative evidence from the Minister’s case.

The special advocates have identified one item of information in the closed record filed in support of the current security certificate which they say is derivative evidence. The Ministers agree that should the Court find that the Ministers’ reliance on Mr. Jaballah’s prior testimony violates one or more of Mr. Jaballah’s Charter rights, the one item of information can be considered to be derivative evidence.³³⁶

Accordingly, Justice Dawson decided that “the principles of fundamental justice would be violated if the Ministers are allowed to use this evidence in support of the certificate.”³³⁷ However, we do not know whether this derivative immunity involved Mr. Jaballah’s testimony before the IRB or only previous security certificate proceedings. In any case, because Justice Dawson allowed the Minister to use Jaballah’s testimony before the IRB to meet its case, concomitantly, any derivative evidence would be allowed to be used, which would be against the reasonings in *R. v. S. (R.J.) v. Canada, Branch*, *R. v. White* and the rationales behind the protection against self-incrimination.

4. Concluding remarks: Canadian courts are oblivious to the use of asylum procedures for purposes unrelated to asylum-seeking including for national security purposes

Unlike the Netherlands, in Canada, the prior testimony provided during an administrative proceeding cannot be used in a criminal case because of the Charter rights. However, as the case of *Jaballah* demonstrated, the prior asylum testimony classified as voluntary can still be used in a security certificate process.

³³⁴ Justice *Iacobucci* used this reasoning for the relation between an accident report and the principle against self-incrimination: “I would emphasize that that creating an immunity against the use of an accident report in subsequent criminal proceedings is itself a balancing between society’s goal of discovering the truth, on the one hand, and the fundamental importance for the individual of not being compelled to self-incriminate, on the other.” *R. v. White*, *supra* note 29 at para 71.

³³⁵ *R. v. White*, *supra* note 29 at para 71.

³³⁶ *Jaballah (Re)*, *supra* note 36 at para 104.

³³⁷ *Jaballah (Re)*, *supra* note 36 at para 105.

Security certificate proceedings fall into a gray area: they are neither criminal trials nor a typical administrative process. Not being considered as a criminal proceeding comes with disadvantages for the person named in a certificate; procedural safeguards recognized for criminal trials are inapplicable to security certificate proceedings. As mentioned in Chapter III, procedural safeguards are recognized in criminal law due to the ferocious history of humankind. Criminal law adopted the right against self-incrimination as the law had had the harshest consequences including death, torture, and arbitrary detention. Today, death penalty has been abolished in most western jurisdictions.³³⁸ Dichotomously, the decisions of a trial judge do not have as severe consequences as these of an administrative judge. Today, the only judge who can send a non-citizen to extra-judicial execution, arbitrary detention and torture or cruel, inhuman, and degrading treatment is the administrative judge in immigration proceedings (via the refusal of refugee status, deportation) or in security certificate proceedings (deportation).³³⁹ Perhaps administrative judges are unintentionally oblivious to these concerns, yet the consequences for the individual may be the harshest in all our current legal system.

Ignoring criminal law safeguards in security certificate proceedings would result in a question of how to protect the vulnerable, refugee claimants in this system. As Didier Bigo asked “[i]f security is seen as the protection of a certain category of population, the “free men of the world” against crime and violence, what happens to the “Others”?”³⁴⁰

This chapter focused on one procedural problem: the use of asylum testimonies in violation of the protection against self-incrimination. In doing so, this section demonstrated that asylum testimonies and statements are not voluntarily made in the sense that a refugee claimant does not choose to participate in the security certificate system that could put him in detention or home surveillance for long years.

This section also proposed three solutions to make the system fairer by protecting refugee claimants against self-incrimination: the *Jarvis* model which would afford discretion to a judge to decide which parts of asylum testimonies could be used by the Minister in its case; albeit being very limited, providing the right to counsel at the outset; and recognizing a refugee claimant as a compellable witness for the sake of security certificate proceedings. I believe only accepting the last solution – recognizing a refugee claimant as a compellable

³³⁸ Bethany Hastie & Francois Crepeau, “Criminalising irregular migration: The failure of the deterrence model and the need for a human-rights-based framework” (2014) 28:3 JIANL 213–236 at 8.

³³⁹ *Ibid.*

³⁴⁰ Didier Bigo, “Is Otherness A Question Of Security Or A Question Of Freedom?” in François Crépeau & Colleen Sheppard, eds, *Human Rights & Diverse Societies* (Cambridge Scholars Publishing, 2013) at 178.

witness insofar as their statements are used in a security certificate – could rectify the current imbalance between the state and the individual.

This chapter also showed that judges do not make the diligent analysis that the subject requires. Although Justice Dawson attempted to balance the interests of the state and Mr. Jaballah, the decision lacks a rigorous analysis of the legitimate concerns constituting the protection against self-incrimination including Mr. Jaballah's right to dignity and privacy and balancing the asymmetric power relations between the state and Mr. Jaballah. Like the European approach, Canadian courts do not discuss the voluntariness argument and the rationales of the protection against self-incrimination. Courts are equally reluctant to perceive the danger of abusing asylum procedures for the sake of national security, and the dire consequences of this collaboration. Determining that refugee claimants provide voluntary statement is sufficient to halt further discussion on the principle against self-incrimination. However, as this chapter discussed, there are many intersections between the earlier jurisprudence on the principle against self-incrimination and the use of asylum testimonies for security certificate proceedings. The question thus remains: why are courts so reluctant to make a rigorous analysis on the matter?

Didier Bigo asks “[i]s the question of Otherness a question of security? Is it a move of the government, in the name of security, to develop illiberal practices and to focus on some minorities, on national, ethnic or religious grounds, with the development of profiling...?”³⁴¹ I believe the answer to this question lies in political science. However, understanding the grave consequences of the security certificate system and refugee claimants' unintentional contribution to this system requires us to think broader than the black-letter law. The next chapter will thus analyze the consequences of immigration decisions involving national security and criminality on non-citizens subject to these proceedings; the consequences that are generally overlooked in the decision-making procedure.

³⁴¹ Didier Bigo, “Is Otherness A Question Of Security Or A Question Of Freedom?” in *Human Rights and Diverse Societies* (eds. François Crépeau and Colleen Sheppard) Cambridge Scholars Publishing: 2013 at page 177.

Chapter V- Severe Consequences of Immigration Decisions involving National Security and Serious Criminality on Individuals

This chapter will analyze the consequences of immigration decisions involving national security and serious criminality on individuals subject to these proceedings. Based on interviewees' perspectives, case law, literature, and legislation, this chapter defined two main consequences of immigration decisions involving national security and serious criminality as deportation and limbo. The first section will assess the prospect of deportation for excluded individuals to conclude that removal is likely to take place because of two main reasons: the state-center paradigm and the prematurity principle adopted by Canadian courts.

Even if not deported, non-citizens subject to decisions involving national security and serious criminality live limbo in Canada with limited rights. The second section, thus, continues with the analysis of the limbo situation awaiting these non-citizens in Canada. Based on interviewees' perspective, the second section defines four severe results awaiting them in Canada: (i) no status situation, decades of litigation with significant financial consequences; (ii) no family reunion rights and social isolation; (iii) in certain cases, no work permit renewal, no social assistance, no medical coverage; and finally, (iv) stigma and significant mental health consequences because of being labeled as a war criminal or terrorist.

The chapter will conclude that the limbo situation, which might continue for decades has resulted in an emergence of a new group of disenfranchised non-citizens in the Global North who are undesirable in the eyes of authorities and yet unreturnable.

A. Evaluating the risk of deportation

1. The risk of deportation: interviewees' perspective

I asked 13 interviewees, who have had clients subject to an Article 1F assessment, what happened to their excluded clients following an exclusion decision, particularly, whether they are deported or not. The interviewees often shared their experiences by including clients subjected to both inadmissibility proceedings on security, human or international rights violations, serious criminality, and organized criminality (SHSO) grounds and Article 1F proceedings, indiscriminately. Thus, this section explicitly points out when exclusion is under Article 1F. Otherwise, observations are a mix of inadmissibility proceedings based on both Article 1F and SHSO grounds.

Interviewees' perspective on the risk of deportation varies. While five interviewees observed that Canada is reluctant to deport non-citizens to a risk of death, torture, or ill-treatment depending on several factors, six interviewees affirmed that such deportation takes

place.¹ One of the interviewees explained that three paths are possible for these individuals: (i) deportation, (ii) voluntary return to a dangerous and difficult situation, (iii) living in limbo in Canada for long years.²

1.1.The prospect of deportation is real

Six interviewees shared that deportation takes place following an immigration decision involving national security or serious criminality. Among them, some noted that deportation depends on the situation. For example, some removable individuals simply disappeared from the radar of the authorities.

Both exclusion and inadmissibility decisions can end up with a deportation order. One interviewee shared that their clients, who were excluded and/or found inadmissible, were deported to China; taken to a prison; to India, Turkey (possibly), Iran (possibly).³ Another interviewee stated that their excluded clients were deported to Congo, Côte d'Ivoire, and El Salvador (possibly).⁴

One interviewee explained that, as a rule, any non-citizen who receives a removal order upon the rejection of a refugee claim and who has lost all appeals can be deported. However, some of them cannot be removed because they make humanitarian applications, or their Canadian spouse makes a successful sponsorship application. In the interviewees' words, "[s]ome of them go underground and disappear into the woodwork, but the system is if you are refused you get removed."⁵

A5: Every time I meet someone who has been excluded or found inadmissible under one of the more serious grounds, I tell them your risk of deportation is very high at that point and the reason is that...they lose section 96 protection.

1.2.The risk of deportation is rare

One interviewee agreed that the risk of deportation after an exclusion decision is unlikely.⁶ The interviewee explained that many excluded individuals go underground.⁷ Applicants who are not represented or poorly represented can be easily deported.⁸ For example, some of their clients were deported after Article 1F(b) exclusions or security inadmissibility.⁹

¹ Those who affirmed that deportation takes place: A2, A5, A6, A7, A11, A12

² Interview with A3.

³ Interview with A11.

⁴ Interview with A12.

⁵ Interview with A6.

⁶ Interview with A3.

⁷ Interview with A3.

⁸ Interview with A3. A7 shared a similar opinion that the prospect of deportation is high for excluded individuals who cannot have a good lawyer.

⁹ Interview with A3.

One interviewee stated that the risk of deportation after an exclusion decision is rare unless an applicant fails to show a real danger upon return to the country of origin. Another interviewee agreed with the latter, that the risk of deportation “depends on whether the individual has human rights-related reasons for fearing to return to their country”.¹⁰ If there is no such danger, excluded individuals “will be deported quickly, but where they do their cases would be tied up for years.”¹¹

Another interviewee stated that the Canadian government has been reluctant to expel a non-citizen who is at the risk of persecution.¹² If the person is excluded, deportation would not automatically take place.¹³ For the interviewee, the Canadian standard of risk is a reasonable possibility that the person could be persecuted upon return.¹⁴

One of the interviewees’ clients, who was a diplomat from Iraq, was allowed to stay in Canada; however, he was excluded from protection under Article 1F. If the person is requested for a trial abroad, then they might be extradited, as happened in the *Mugesera* case. In such cases, “the only thing that Canada has to require under our constitutional law is a guarantee that there would be no execution.”¹⁵

Another interviewee mentioned that their male client from Tunisia who was excluded under Article 1F ended up in a long litigation battle.¹⁶ In 2003, Mr. Mehrez Ben Abde Hamida was excluded under Article 1F (a) and (c) because, as a police officer in Tunisia, he was working for a police force infamous for human rights violations.¹⁷ Mr. Hamida stated that he was fired from the police force because he helped a hungry detainee by providing him with food.¹⁸ According to his lawyer, Mr. Hamida was severely persecuted in Tunisia because the detainee was a political prisoner and “they had been ordered not to give any food to him”.¹⁹

A12: Someone was crying there and begging for something to eat and they gave him a sandwich and he lost his job, and he was severely persecuted. He eventually ran off to Canada, and Canada instead of having sympathy for this person who gave a sandwich to somebody who is really hungry went section F against him.

¹⁰ Interview with A10.

¹¹ Interview with A10.

¹² Interview with A9.

¹³ Interview with A9.

¹⁴ Interview with A9.

¹⁵ Interview with A8.

¹⁶ Interview with A12.

¹⁷ *Hamida v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 468 at para 4.

¹⁸ *Ibid* at para.1.

¹⁹ Interview with A12.

His application on humanitarian and compassionate (H&C) grounds and for the first pre-removal risk assessment (PRRA) were all dismissed. His second application on H&C grounds as well as the judicial review of his second PRRA application was also rejected. Finally, his third PRRA application was also dismissed, and his removal was scheduled in 2007. His lawyer lodged a complaint to the Human Rights Committee (HRC) which in return “recommended that Canada stay the applicant’s removal on the ground that it would be contrary to Article 7 of the Convention.”²⁰ Following the HRC’s decision, his third application on H&C grounds and last PRRA application were also rejected in 2012. Furthermore, the Minister of Public Safety and Emergency Preparedness “refused to stay deportation of the applicant in accordance with the recommendations of the Human Rights Committee”.²¹ According to his lawyer, the Minister tried to deport him in 2013 after the Arab Spring on the ground that in Tunisia, conditions have changed.²² The Federal Court decided that the judicial review of this decision was moot because Mr. Hamida was “entitled to a new PRRA and a new assessment on humanitarian and compassionate grounds in light of *Ezokola*.”²³ According to his lawyer, Mr. Hamida is a permanent resident today and has been married to a Quebecker woman for 16 years.²⁴

1.3. Instead of deportation, Canada prefers to detain non-citizens who are at risk of persecution upon return to their country of origin

Canada is reluctant to deport a non-citizen to a risk of persecution and often prefers to detain the person in order to incite them to voluntarily leave the country. If they do not leave within five years after incarceration, they might be able to get permanent residency on humanitarian grounds. One interviewee stated that individuals who cannot be removed because of a risk of persecution in the country of origin are often detained for two or three years so that “they would be in a position of being prepared to voluntarily leave. If they were not prepared to voluntarily leave then in many instances, they were detained.”²⁵ Several of their clients were detained until the authorities could no longer incarcerate them. The IRPA did not regulate the upper time limit of detention for immigration matters.

A9: Informal working number was five years. If after five years they had not committed any offense, and they were seen not to be too dangerous, then they might be able to apply for permanent residency under humanitarian compassion provisions...In Canada, there certainly have been people that have been three four-five years in

²⁰ *Hamida v. Canada (Public Safety and Emergency Preparedness)*, supra note 17 at para 11.

²¹ *Ibid* at para. 14

²² Interview with A12.

²³ *Hamida v. Canada (Public Safety and Emergency Preparedness)*, supra note 17 at para 26.

²⁴ Interview with A12.

²⁵ Interview with A9.

detention, but I have not followed that law to say whether there is a time limit where at a certain point, they have to be released simply because they have been detained for a long time.

Another interviewee concurred that non-citizens are often subject to “virtually indefinite long-term detention, in some cases for the flimsiest of reasons”.²⁶ However, Board members essentially endorse “continued detention without any appreciation of the liberty and trust at stake.”²⁷

According to the CBSA’s annual detention statistics, in 2019-2020, the number of detained non-citizens was 8,825.²⁸ Among them, the number of non-citizens who were detained on the grounds of danger to the public, suspected inadmissibility on SHSO grounds (human/international rights violation, security, serious criminality/criminality/organized criminality), and unlikely to appear were 651.²⁹ 85.1% of the cases involving detention were due to the concern that the detained individual would be “unlikely to appear for either an examination, admissibility hearing, removal from Canada or a proceeding that could lead to the making of a removal order by the Minister.”³⁰ Although the average length of detention by day is 13.9, 241 non-citizens were detained over 99 days from 2019 to 2020.³¹

2. The prospect of deportation is real for excluded individuals despite the available remedies

As the previous section showed the interviewees’ experience with their clients regarding the risk of deportation varies; the risk depends on several factors including adequate legal assistance and the country of origin’s situation. This section, based on the review of literature, case law, and legislation, argues that deportation is likely to take place regardless of these factors because of two reasons. First, instead of adopting a human-rights-based approach, Canadian Courts have interpreted noncitizens’ rights under the Charter against deportation in a state-centered way. Second, Canadian courts do not assess this risk of deportation during exclusion determination because subsequent proceedings will take place before actual removal: this is called the prematurity principle. However, subsequent proceedings fail to sufficiently protect excluded individuals from deportation to the country of origin in violation of the principle of non-refoulement, for two main reasons. First, subsequent proceedings following

²⁶ Interview with A10.

²⁷ Interview with A10.

²⁸ Canada Border Services Agency Government of Canada, “Arrests, detentions and removals - Annual detention, fiscal year 2019 to 2020”, (8 September 2020), online: <<https://www.cbsa-asfc.gc.ca/security-securite/detent/stat-2019-2020-eng.html>>.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

an exclusion decision under Article 1F are not effective because these proceedings have significantly low success rates; provide temporary solutions, and being immigration decisions, they are subject to limited judicial review, in which administrative courts provide extensive deference to the immigration decision-makers. Second, labeling a non-citizen as a criminal or a terrorist with an exclusion determination will often adversely affect outcomes of subsequent proceedings.

2.1. The state-centered paradigm adopted by the Canadian courts

Reviewing the case law, I define two main approaches adopted by Canadian courts regarding the deportation of non-citizens. First, deportation does not involve criminal law, and is not considered as a punishment; consequently, sections 11 to 13 of the Charter providing broader safeguards to the individual subject to criminal law proceedings are inapplicable to deportation proceedings. Second, reasons to deport a non-citizen from Canada that are to protect the country from the presence of ‘undesirable’ non-citizens and to combat terrorism, are not often found to violate non-citizens’ rights under sections 7 and 15 of the Charter.

A final exclusion decision by itself has grave consequences, including deportation from Canada. In her dissenting opinion in *Febles*, Justice Abella observed that “[a]n excluded individual is consequently at risk of being returned to face persecution in his or her country of origin, barring the availability of any residual protection under domestic or international human rights law.”³² The prospects of “a failure of refugee protection” is no less serious than that of accusation in criminal law.³³ Foreigners who lose protection in refugee law can be deported to countries “that will not protect them from the most serious human rights abuses”.³⁴ However, the Supreme Court of Canada and the Federal Court are reluctant to accept the prospects of a failure of refugee protection as serious as an accusation in criminal law, even if the rejection leads to deportation.

The rights articulated under sections 11 and 13 of the Charter are granted to a person who is involved in the criminal process. Notably, section 11 regulates the legal rights of individuals who are charged with an offense.³⁵ The rights under section 11 among others include the right to be tried within a reasonable time, the protection against testimonial compulsion, and the presumption of innocence. Canadian courts, however, do not afford section 11 rights to a non-

³² *Febles v Canada (Citizenship and Immigration)*, 3 SCR 68 at para 87.

³³ Catherine Dauvergne, “The Troublesome Intersections of Refugee Law and Criminal Law” in Katja Franko Aas & Mary Bosworth, eds, *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford: Oxford University Press, 2013) at 18.

³⁴ *Ibid* at 18.

³⁵ Department of Justice Government of Canada, “Charterpedia”, (9 November 1999), online: <<https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/index.html>>.

citizen who is under a deportation order. In 1992, in *Chiarelli*, Justice Sopinka relied on the Supreme Court’s decision dated 1933 – to be analyzed below – to agree with the Federal Court of Appeal’s statement that “deportation is not imposed as a punishment.”³⁶ In *Argueles v. Canada*, the Federal Court relied on *Chiarelli* to state that “[a] deportation order is not a criminal or penal charge”.³⁷ Because deportation is not considered a punishment, the Charter rights exclusively applicable to criminal proceedings do not apply to non-citizens subject to a deportation order. The Court’s interpretation of section 11 could be considered old compared to European landscape, given that section 47 of the EU Charter provides for everyone — not only person charged with an offence — whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal. As such,

[e]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.³⁸

Two legal instruments that can prevent the deportation of non-citizens who are convicted or suspected of serious criminality are sections 7 and 15 of the Charter. Section 7 of the Charter protects “everyone’s the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”.³⁹ Equally as important, section 15 guarantees equality before and under the law: “[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”⁴⁰ Canadian courts are, however, reluctant to provide the rights under sections 7 and 15 of the Charter to non-citizens who are convicted or suspected of serious criminality because they are considered “undesirable” before the Canadian authorities.

The inclination of the Supreme Court of Canada to deport “undesirable” non-citizens dates as back as 1933 when the Court determined that if a convict who was subject to deportation proceedings fell under “one of the ‘prohibited or undesirable classes’ which is defined [as], “any person who has been convicted of a criminal offence in Canada,” that individual was still

³⁶ *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711.

³⁷ *Argueles v Canada (Minister of Citizenship and Immigration)*, FC 1477 at para 18.

³⁸ Section 47 of the *Charter of Fundamental Rights of the European Union*, 2012.

³⁹ Section 7 of the Canadian Charter of Rights and Freedoms.

⁴⁰ Section 15 of the Canadian Charter of Rights and Freedoms.

removable regardless of having served their “sentence in full or upon his release from prison”.⁴¹ The Supreme Court of Canada further noted that the provisions concerning deportation aimed to protect Canada against “the presence...of classes of aliens who are referred to in the statute as ‘undesirable.’”⁴² Thus, these provisions are not related to “the penal consequences of the acts of individuals”.⁴³ Considering that in the decision of *Chiarelli* dated 1992, the Supreme Court of Canada still referred to its decision of 1933 when there was a Statute regulating “prohibited or undesirable classes”, the Court’s paradigm towards non-citizens who are convicted or suspected of serious criminality has not changed much since that date.

The Supreme Court of Canada allows the deportation of non-citizens convicted of serious crimes, while citizens would solely be subject to criminal law procedures for the same acts. The Court, thus, differentiates between non-citizens and citizens who are convicted of serious crimes. Audrey Macklin eloquently stated that as far as “Canada subjects non-citizens to differential and worse procedures and consequences (including deportation to torture) than citizens alleged to engage in prohibited conduct”, criminal law should apply to “all alleged terrorism-related activity”.⁴⁴ If criminal law meets “state objectives” and protects “individual rights with respect to citizens”, it could as well achieve the same ends for non-citizens.⁴⁵ This differential treatment, however, is deemed not to violate the equality rights under section 15.

As early as 1992, the Supreme Court of Canada manifested that “[t]he most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country.”⁴⁶ Such right has not been recognized under the common law “and the *Charter* recognizes the distinction between citizens and non-citizens”.⁴⁷ Accordingly, deportation of a permanent resident convicted of serious crimes “was not cruel and unusual.”⁴⁸ The Court concluded that “[a] deportation scheme applicable to permanent residents, but not to citizens, does not infringe s. 15 of the *Charter*. Section 6 of the *Charter* specifically provides for differential treatment of citizens and permanent residents in this regard.”⁴⁹ However, one could argue that the fact that deportation is possible only for non-citizens does not imply that the administrative proceedings leading to deportation should provide fewer guarantees for non-citizens than the

⁴¹ *Reference as to the effect of the Exercise by His Excellency the Governor General of the Royal Prerogative of Mercy upon Deportation Proceedings*, 1933 SCR 269 at 269.

⁴² *Ibid* at 278.

⁴³ *Ibid* at 278.

⁴⁴ *The Canadian Security Certificate Regime*, CEPS Special Report, by Audrey Macklin, CEPS Special Report (Centre for European Policy Studies, 2009) at 13.

⁴⁵ Audrey Macklin, “The Canadian Security Certificate Regime CEPS Special Report”, *Centre for European Policy Studies*, March 2009 at page 13.

⁴⁶ *Canada (Minister of Employment and Immigration) v. Chiarelli*, *supra* note 36.

⁴⁷ *Ibid*.

⁴⁸ *Ibid*.

⁴⁹ *Ibid*.

criminal proceedings provided for citizens. If the consequence can be equated, the guarantees should be similar.

In the context of section 7, the security interests of a person cover both physical and psychological security.⁵⁰ In *Blencoe*, the Supreme Court of Canada determined that “the right to security of the person guaranteed by s. 7 protects the psychological integrity of an individual.”⁵¹ The question of whether the right to security of the person under section 7 is engaged in a non-criminal context, depends on a case by case taking into account severe effects of “the state-imposed psychological stress on the individual”.⁵² In addition to being led by a state action, the psychological harm must be serious to be considered within the ambit of section 7.⁵³ Relying on *Blencoe*, Lorne Waldman stated that the security of the person under section 7 is triggered in immigration cases in which deportation resulted in “serious psychological harm” exceeding the ordinary “stress anxiety”.⁵⁴

For matters falling outside psychological harm, the *Suresh* decision established that deporting a refugee to the place where there is “a substantial risk of torture would” often contravene section 7. According to the majority’s decision,

“everyone” includes refugees and that deportation to torture may deprive a refugee of liberty, security and perhaps life. The only question is whether this deprivation is in accordance with the principles of fundamental justice. If it is not, s. 7 is violated and, barring justification of the violation under s. 1..., deportation to torture is unconstitutional.⁵⁵

The Supreme Court of Canada determined that if there is a sufficient causal link between the torture inflicted abroad and the act of government, section 7 applies to the case. According to the Court’s reasoning, Canada cannot pretend to be “merely a passive participant ... There is always the question ... of whether there is a sufficient connection between Canada’s action and the deprivation of life, liberty, or security.”⁵⁶ Even if the deprivation of life, liberty, or security is not ensued by the Canadian government but by external actors, “the guarantee of fundamental justice applies” insofar as “a sufficient causal connection” link exists between the deprivation and the Canadian government’s participation to it.⁵⁷ At least, two factors must be established to determine a sufficient causal connection. First, Canada’s participation in the deprivation

⁵⁰ Department of Justice Government of Canada, “Charterpedia - Section 7 – Life, liberty and security of the person”, (9 November 1999), online: <<https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccd1/check/art7.html>>.

⁵¹ Lorne Waldman, *Canadian Immigration & Refugee Law Practice*, 2021 Ed. (LexisNexis Canada, 2021).

⁵² *Ibid* at Introduction.

⁵³ *Blencoe v British Columbia (Human Rights Commission)*, 2 SCR 44.

⁵⁴ Waldman, *supra* note 51 at Introduction.

⁵⁵ *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 Supreme Court of Canada at para 44.

⁵⁶ *Ibid* at para. 55. [emphasis in original]

⁵⁷ *Ibid* at para. 54.

constitutes its “necessary precondition” and second, “deprivation is an entirely foreseeable consequence of Canada’s participation”.⁵⁸ In these cases, the government cannot bypass “the guarantee of fundamental justice merely because the deprivation in question would be affected by someone else’s hand.”⁵⁹

However, showing that a refugee is deprived of life, liberty or security is not sufficient; this deprivation can be complying with the principles of fundamental justice, in so far as “Canada’s interest in combating terrorism” is balanced against “the refugee’s interest in not being deported to torture.”⁶⁰ Although the Supreme Court of Canada conceded that “international law rejects deportation to torture, even where national security interests are at stake”⁶¹, it allowed the possibility of returning a non-citizen to a place where there is a substantial risk of torture, yet only under exceptional circumstances. The Court considers “the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the *Charter* or under s. 1.”⁶²

Later in 2005, in *Medovarski*, the Supreme Court of Canada adopted a rather narrow approach to the rights of non-citizens: “the deportation of a non-citizen in itself” does not involve “the liberty and security interests” of an individual; “even if liberty and security of the person were engaged, the unfairness is inadequate to constitute a breach of the principles of fundamental justice.”⁶³

In 2007, the Supreme Court of Canada clarified when and under which conditions deportation of non-citizens would trigger the section 7 scrutiny by stating that “the prospect of deportation to torture”, not the deportation of non-citizens in itself, could be subject to section 7 scrutiny.⁶⁴ The Court examined “whether the process is fundamentally unfair to the affected person” to determine whether the laws interfering with the life, liberty, and security of the person conform with the principles of fundamental justice.⁶⁵ Writing for the majority, Chief Justice McLachlin established that if the process is fundamentally unfair to the affected person, “the deprivation of life, liberty or security of the person simply does not conform to the requirements of s. 7.”⁶⁶

⁵⁸ *Ibid* at para. 54.

⁵⁹ *Ibid* at para. 54.

⁶⁰ *Ibid*.

⁶¹ *Ibid* at para. 75.

⁶² *Ibid* at para. 78.

⁶³ *Medovarski v Canada (Minister of Citizenship And Immigration); Esteban v Canada (Minister of Citizenship and Immigration)*, 2 SCR 51 at paras 46–47.

⁶⁴ *Charkaoui v Canada (Citizenship and Immigration)*, 1 SCR 9 at para 17.

⁶⁵ *Ibid* at para. 22.

⁶⁶ *Ibid* at para. 22.

In conclusion, examining the jurisprudence, this section defines four general principles regulating non-citizens' deportation from Canada under sections 7 and 15 of the Charter. First, the deportation of non-citizens *per se* does not implicate their interests to security and liberty under section 7. Second, a proceeding with the prospect of deportation to torture is subject to the section 7 scrutiny. The Supreme Court of Canada, then, analyzes whether the rights under section 7 are deprived according to the principles of fundamental justice. This test requires balancing the interests of the state and those of the individual. Third, under "exceptional circumstances", non-citizens can still be deported to torture. Finally, the differential treatment between deportation proceedings against non-citizens and criminal proceedings against citizens is allowed, and such treatment does not violate the equality rights as protected under section 15.

These four principles favor the state's interests over the non-citizen's protection against refoulement. As discussed in Chapter III, Canada prioritizes sovereign interests instead of fulfilling its international obligations towards refugees. To protect the state from undesirable non-citizens, the Supreme Court of Canada has allowed non-citizens' return to torture or death penalty under exceptional circumstances, without defining what these circumstances entail. The next section will analyze how the Supreme Court's paradigm to favor the sovereign's interest over individuals' protection against refoulement has affected the interpretation of Article 1F in Canada.

2.2. Exclusion proceedings do not engage section 7

In tandem with the Supreme Court of Canada's approach that the prospect of deportation is insufficient to engage section 7, the exclusion process does not involve section 7 rights. It is because an excluded individual is not at immediate risk of deportation. Canadian judicial authorities instead delay assessing the risk of returning a person to torture, death penalty or ill-treatment until the last proceeding available to the non-citizen. Gerald Heckman explained this delay in assessing the risk until the last proceeding available to the individual before the actual removal, as the 'prematurity principle'. According to the prematurity principle, the security and liberty interests of non-citizens are not engaged "by decisions taken at preliminary stages of the administrative process eventually leading to removal"⁶⁷ since "these interests are more directly engaged and considered in the stages of this process that immediately precede removal."⁶⁸ However, this section argues that, as these proceedings immediately before removal are

⁶⁷ Gerald Heckman, "Revisiting the Application of Section 7 of the Charter in Immigration and Refugee Protection" (2017) 68 UNBLJ 312–312 at 347.

⁶⁸ *Ibid.*

ineffective in practice, the prospect of deportation is strong for excluded individuals. I will first review the Supreme Court's decisions interpreting excluded individuals' rights under section 7.

Before rendering the *Febles* decision, the Supreme Court of Canada was receptive to afford the section 7 protection to refugee claimants during the exclusion process. In 1985, in *Singh*, the Supreme Court of Canada decided that refugee claimants "are entitled to assert" the section 7 protection during the refugee status determination process.⁶⁹ Although the *Singh* decision explicitly stated that refugee applicants can claim section 7 protection during an RSD process, later in *Febles*, the Court determined that "even if excluded from refugee protection, the appellant is able to apply for a stay of removal to a place if he would face death, torture or cruel and unusual treatment or punishment if removed to that place."⁷⁰ The Court here referred to the restricted pre-removal risk assessment (PRRA) under section 112.

Later, in *B010 v. Canada*, the Court further noted that "[i]t is at this subsequent pre-removal risk assessment stage of the IRPA's refugee protection process that s. 7 is typically engaged."⁷¹ Relying on *Febles*, Chief Justice McLachlin stated that "a determination of exclusion from refugee protection under the IRPA did not engage s. 7" in *B010*.⁷² As per the *B010* decision, the Supreme Court affirmed that the non-citizens' rights under section 7 are triggered during a PRRA in which a risk to return the person to ill-treatment, torture and death would be assessed.⁷³ However, Gerald Heckman criticized that the *Febles* decision was interpreted wrongly in *B010* in the sense that section 7 rights do not apply to the exclusion.

While *Febles* may be read as affirming that a provision restricting the authority of the IRB to grant refugee status to excluded persons does not in itself violate their s. 7 rights, the Court did not expressly find that s. 7 was not even engaged because their liberty or security of the person were not engaged. It certainly supplied no reasoning to justify such a conclusion.⁷⁴

Allowing the section 7 scrutiny in earlier stages could paralyze the IRPA's enforcement, as stated by Canadian courts.⁷⁵ Heckman proposes a solution via "principled application of the s. 7 framework developed by the Supreme Court in other contexts, including the Bedford standard of causation."⁷⁶ The Federal Court can refuse judicial review "where an adequate

⁶⁹ *Singh v Minister of Employment and Immigration*, 1 SCR 177.

⁷⁰ *Febles v. Canada (Citizenship and Immigration)*, *supra* note 32 at para 67.

⁷¹ *B010 v Canada (Citizenship and Immigration)*, 3 SCR 58 at para 75.

⁷² *Ibid.*

⁷³ Heckman, *supra* note 67 at 313.

⁷⁴ Heckman, *supra* note 67 at 351.

⁷⁵ *Ibid* at 353.

⁷⁶ *Ibid* at 353.

alternative remedy in the form of an internal or external appeal or other statutory mechanism is available to the applicant”.⁷⁷

A recent decision of the Federal Court, though, confirms the Supreme Court’s finding in *B010*. Acknowledging the Supreme Court of Canada’s and the Federal Court of Appeal’s earlier decisions, in *Seklani v. Canada*, the Federal Court stated that an inadmissibility or exclusion determination is insufficient to trigger section 7 rights since the link between an inadmissibility or exclusion decision and the deportation of a refugee applicant is not proximate enough.⁷⁸ For the Federal Court, “section 7 rights are engaged at the removal stage, not at the prior stage of making a refugee claim”.⁷⁹ The risk to return a refugee applicant to persecution, torture, cruel and unusual treatment or death does not increase for excluded refugee claimants in “the ‘Five Eyes’ countries”.⁸⁰ In fact, in *Celestin v. Canada*, Justice Pamel stated that neither Article 1F nor Article 1E includes a risk assessment.⁸¹ Thus, for the Federal Court, “the forward-looking evidence-based [exclusion] assessments” proving “the risks involved in a removal” causes “unreasonable or absurd consequences with respect to the objectives of the IRPA’ and could mean Canada running afoul of its international obligations.”⁸²

The prematurity principle adopted by Canadian courts was echoed by an interviewee who explained that cases triggering section 7 are limited to “two issues: detention and removal to torture”.⁸³

A2: The actual removal to torture. Basically, once they are throwing you on the plane, section 7 is engaged, prior to that throwing you on the plane, section 7 is not engaged.

If section 7 is not engaged, procedural fairness is not engaged either.⁸⁴ In other words, cases falling outside the section 7 scrutiny are subject to general administrative law principles that are significantly lax in comparison to the principles of fundamental justice under section 7.⁸⁵ The interviewee also highlighted that section 7 precedes legislation, while, confined to certain limits, the legislator can sidetrack general administrative law principles.⁸⁶ For example, retrospective application of criminal law is constitutionally prohibited under section 11 (g) of the Charter⁸⁷ whereas retrospective application of administrative law is an interpretive

⁷⁷ *Ibid* at 353.

⁷⁸ *Seklani v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 778 at para 4.

⁷⁹ *Ibid* at para. 4

⁸⁰ *Ibid*.

⁸¹ *Celestin v Canada (Citizenship and Immigration)*, 2 FCR 97 at para 89.

⁸² *Ibid*.

⁸³ Interview with A2.

⁸⁴ Interview with A2.

⁸⁵ Interview with A2.

⁸⁶ Interview with A2.

⁸⁷ Section 11(g) of the Canadian Charter of Rights and Freedoms reads as “Any person charged with an offence has the right: (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence

presumption, which was endorsed by the Supreme Court of Canada in the *Tran* decision. Delivering the judgment of the Supreme Court of Canada in the *Tran* case, Justice Côté agreed with the Federal Court of Appeal's interpretation that "s. 11 (i) of the Charter does not apply to the decision of the Minister's delegate because the proceedings were neither criminal nor penal, the presumption against retrospectivity is a rule of statutory interpretation that is available".⁸⁸

As the reviewed cases suggest that section 7 will be engaged in subsequent proceedings available to excluded individuals prior to removal in later stages, the following section will analyze these proceedings to determine whether the prematurity principle adopted by the Supreme Court of Canada is reasonable.

2.3. Three proceedings open to excluded individuals to stay in Canada are ineffective

In determining section 7 is not engaged in exclusion proceedings, Canadian courts rely on two proceedings available for excluded individuals to stay in Canada: a restricted pre-removal risk assessment (PRRA), and permanent residency on humanitarian and compassionate grounds, and public policy considerations. This section will additionally analyze the temporary resident permit regulated under IRPA since there is no restriction for excluded individuals to apply for the permit.

In addition to these proceedings, in *Seklani v. Canada*, the Federal Court stated that the risk to return an individual to persecution, torture, cruel and unusual treatment or death is assessed "by CBSA officers at the administrative deferral of removal stage, and by this Court on judicial review of PRRA or refusal of deferral decisions and on motions seeking a stay of a removal order."⁸⁹ For the Court, these remedies ensure that if removal takes place, it is done in consistent with section 7.⁹⁰ However, as per subsection 230 (3)(e) of the Regulations, excluded individuals are not able to apply for the administrative deferral of removal. Besides, the administrative deferral of removal "is not meant to address persistent and systematic human rights problems which constitute individualized risk."⁹¹ Therefore, this section will not analyze the administrative deferral of removal in detail.

under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;"

⁸⁸ *Tran v Canada (Public Safety and Emergency Preparedness)*, 2 SCR 50 at para 43.

⁸⁹ *Seklani v. Canada (Public Safety and Emergency Preparedness)*, *supra* note 78 at 39.

⁹⁰ *Ibid.*

⁹¹ Canada Border Services Agency Government of Canada, "Arrests, detentions and removals - Removal from Canada", (4 January 2016), online: <<https://www.cbsa-asfc.gc.ca/security-securite/rem-ren-eng.html>>.

a. Restricted pre-removal risk assessment (PRRA)

An excluded individual can apply to the Minister to obtain a restricted PRRA to stay in Canada.⁹² The Supreme Court of Canada stated that a restricted PRRA regulated under ss. 97, 112, 113(d)(i) and 114(1)(b) of the IRPA is an available remedy “to apply for a stay of removal” if a refugee applicant was excluded under Article 1F and their removal would place them “at risk of death, torture or cruel and unusual treatment or punishment”.⁹³ It is restricted in a way that the person would be solely considered under factors set out in section 97 that are a risk of returning the individual (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention against Torture (CAT); or (b) to death or cruel and unusual treatment or punishment if the risk is not due to generalized violence or due to the inadequate health or medical care.⁹⁴ In a standard PRRA, individuals are subject to broader protection; they would be considered under additional factors set out between sections 96 and 98, including a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group, or political opinion.

Restricted PRRA is a highly discretionary instrument and has a higher threshold risk requirement.⁹⁵ The PRRA’s acceptance rate is seven percent when it is considered as a last recourse measure.⁹⁶ Showing the risk of death, cruel and inhuman punishment or treatment is not sufficient; such a risk is balanced against the danger that an excluded individual might pose to the Canadian public and security.⁹⁷ In the *Febles* decision, Chief Justice McLachlin stated that exclusion under Article 1F in Canada complies with the Charter because during a PRRA review, the Minister has to “balance the risks faced by the appellant if removed against the danger the appellant would present to the Canadian public if not removed... Section 7 of the *Charter* may also prevent the Minister from issuing a removal order to a country where *Charter*-protected rights may be in jeopardy”.⁹⁸

Although in *Celestin v. Canada*, the Federal Court stated that “PRRA officers are best placed to perform the risk analysis” as *inter alia* they have the expertise, up-to-date evidence, and can evaluate “fears based on facts raised after the last day of the RPD hearing”⁹⁹, Jennifer Bond’s research demonstrated that out of 51,944 applications for PRRAs between 2005 and

⁹² Section 112 of the *Immigration and Refugee Protection Act* [IRPA].

⁹³ *Febles v. Canada (Citizenship and Immigration)*, *supra* note 32.

⁹⁴ Section 97 (1) of the IRPA

⁹⁵ Sharryn J Aiken et al, *Immigration and Refugee Law: Cases, Materials, and Commentary*, 2nd Edition (Toronto, Canada: Emond Publishing, 2015) at 1006.

⁹⁶ “UNHCR’s Statement to the Committee on Citizenship and Immigration - 7 May 2019”, (7 May 2019), online: *UNHCR Canada* <<https://www.unhcr.ca/news/unhcrs-statement-to-the-committee-on-citizenship-and-immigration-7-may-2019/>>.

⁹⁷ Section 113 (d) of the IRPA.

⁹⁸ *Febles v. Canada (Citizenship and Immigration)*, *supra* note 32 at para 67.

⁹⁹ *Celestin v. Canada (Citizenship and Immigration)*, *supra* note 81 at paras 116–117.

2010, only 22 percent of these was successful, “meaning that personalised risk was not a barrier to removal in those cases”.¹⁰⁰

If the PRRA application is successful, the excluded individual receives only a stay of removal to the country where they could be at risk.¹⁰¹ In contrast, the successful result of a standard PRRA means obtaining refugee status for failed refugee claimants.¹⁰² In restricted PRRA, the stay of removal can be canceled anytime, if circumstances preventing the removal of a non-citizen change. Although applicants can “apply for leave to seek judicial review” for a negative PRRA assessment to the Federal Court, the stay of removal “ends with a negative PRRA decision”.¹⁰³

Under a restricted PRRA, “the appellants must establish on a balance of probabilities that removal would more likely than not subject them to a personal risk of torture, death or cruel and unusual treatment”.¹⁰⁴ Unlike excluded applicants, other failed refugee claimants are subject to a broader risk analysis under section 96; they are not required “to establish that persecution would be more likely than not...If they convince the PRRA officer that they face a section 96 risk, refugee protection is conferred”.¹⁰⁵ The standard of proof to establish only factual findings of the case under section 96 is a balance of probabilities; however, the applicant does not have to prove that “persecution would be more likely than not in order to meet the objective portion of the test under s96.”¹⁰⁶ The test to establish the risk of persecution is lower than the balance of probabilities, which is articulated by the Federal Court as “reasonable possibility” or “serious possibility”.¹⁰⁷ In fact, in *Ramanathy, Murugesakumar v. M.C.I.*, the Federal Court decided that “the Board incorrectly required the applicant to prove persecution on a balance of probabilities.”¹⁰⁸

Even in a standard PRRA, the restrictions on time and providing evidence prevent many individuals to apply for a PRRA. For example, rejected refugee claimants can submit solely new evidence for review during the PRRA assessment.¹⁰⁹ An applicant cannot apply for protection if less than 12 or 36 months — depending on the situation — have passed since their

¹⁰⁰ Jennifer Bond, “Unwanted but Unremovable: Canada’s Treatment of ‘Criminal’ Migrants Who Cannot be Removed” (2017) 36:1 Refugee Survey Quarterly 168–186 at 175.

¹⁰¹ Section 114(1) (b) of the IRPA. *Tapambwa v Canada (Citizenship and Immigration)*, [2019] 1 FCR 34 at para 3.

¹⁰² Subsection 114(1)a of the IRPA.

¹⁰³ Jamie Chai Yun Liew & Galloway, J Donald C, *Immigration law*, second edition, ed (Toronto: Irwin Law) at 391.

¹⁰⁴ *Tapambwa v. Canada (Citizenship and Immigration)*, *supra* note 101 at para 3; Please also see *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 at para 29.

¹⁰⁵ *Tapambwa v. Canada (Citizenship and Immigration)*, *supra* note 101 at para 4.

¹⁰⁶ *Ramanathy v Canada (Minister of Citizenship and Immigration)*, 2014 FC 538 at para 15; *Adjei v Canada (Minister of Employment and Immigration)*, 2 FC 680 at 682.

¹⁰⁷ *Adjei v. Canada (Minister of Employment and Immigration)*, *supra* note 106 at 682.

¹⁰⁸ *Ramanathy v. Canada (Minister of Citizenship and Immigration)*, *supra* note 106 at para 23.

¹⁰⁹ IRPA, s 113(a).

last application for protection was rejected, or determined to be withdrawn, or abandoned by the RPD, or the Minister.¹¹⁰ As noted by Jamie Chai Yun Liew and Donald Galloway, the restriction of timelines prevents many individuals to apply for a risk assessment before deportation, “thereby raising the question whether Canada is sending people to places where they would be facing torture, death, or other cruel and unusual punishment.”¹¹¹

Another possible problem is that the Minister lacks institutional impartiality for determining PRRAs. In the case of *Kanagaratnam* in which the applicant was excluded from protection under Article 1F due to his links with LTTE, the Applicant argued that the Minister’s delegate does not hold “the necessary independence to make a determination with respect to risk” in his PRRA, which is necessary to have since the Applicant could be removed to a risk of torture or other forms of cruel and unusual treatment or punishment based on that decision.¹¹² Justice Diner responded that it was not necessary to “conclusively decide whether the Delegate is sufficiently institutionally independent and/or institutionally impartial” stating that Justice Strickland’s reasoning in *Muhammad 2014*¹¹³ was persuasive.¹¹⁴ In the case of *Muhammad 2014*, Justice Strickland stated that the claim of “a lack of institutional impartiality” is so important that “the grounds to establish it must be substantial”.¹¹⁵ The claim is solely based on the fact that “the Minister’s Delegate is situated in the Case Management Branch (CMB), particularly when considered together with the evidence concerning her relationship to and communications with both Mr. Dupuis and the Minister’s Office” does not reach the burden.¹¹⁶

One important aspect is that it is often the Minister’s delegate, who raises the issue of exclusion before the IRB and supports the individual’s exclusion from protection, makes the determination of PRRAs for the same individual. The conflict of interest in these cases is salient and therefore, the objective assessment of the risk to return an individual to persecution, torture, cruel and unusual treatment or death might be compromised.

Finally, the following paragraphs will review the interviewees’ opinions on PRRAs. Four interviewees explained the hardships that the applicants endure in their application for a PRRA. One interviewee stated that excluded applicants’ chances “of being found at risk in a restrictive PRRA are much lower than their chances of being found at risk at the [Refugee Protection Division] RPD.”¹¹⁷ Another interviewee shares a similar idea that because PRRA is

¹¹⁰ IRPA, section 112(2) (b.1)

¹¹¹ Liew & Galloway, J. Donald C., *supra* note 103 at 392.

¹¹² *Kanagaratnam v Canada (Citizenship and Immigration)*, FC 295 at para 71.

¹¹³ *Muhammad v Canada (Citizenship and Immigration)*, 2014 FC 448.

¹¹⁴ *Kanagaratnam v. Canada (Citizenship and Immigration)*, *supra* note 112 at para 77.

¹¹⁵ *Muhammad v. Canada (Citizenship and Immigration)*, *supra* note 113 at para 134.

¹¹⁶ *Ibid.*

¹¹⁷ Interview with A2.

done before the Minister, instead of the Immigration and Refugee Board, the decision-makers at the Ministry look at excluded individuals through different lenses.¹¹⁸ In their experience, when they argue cases before the Federal Court to have excluded individuals to stay in Canada through a stay of removal or judicial review, the Minister's lawyers often leverage on the fact that they were excluded under "Article 1 F(a) for the most serious crimes that exist in the world".¹¹⁹ Thus, the individual's image and chances of staying in Canada drastically decrease.¹²⁰ Another interviewee stated that the PRRA process itself does not engage section 7.¹²¹ In contrast, section 7 always engages in security certificate proceedings that implicate an actual removal and detention.¹²²

From a procedural perspective, one interviewee stated that evidentiary thresholds differ in a PRRA carried out under section 96 from that done under 97. Another interviewee highlighted that excluded individuals "do not have a right to a hearing" in PRRA procedures, contrary to the RPD, "where everyone is given a hearing before a board member and their testimony is heard."¹²³ In a PRRA procedure, an officer has the discretion to determine whether the individual requires an interview.¹²⁴

In conclusion, since (i) the restricted PRRA is a highly discretionary instrument, has a higher threshold risk requirement with a very low acceptance rate; (ii) the risk of returning an excluded individual to persecution, torture, cruel, unusual treatment, or death is balanced against the danger that the individual might pose to the Canadian public and security; (iii) the successful outcome of a restricted PRRA provides only a stay of removal that can be canceled anytime, and (iv) the conflict of interest might exist during the Minister's review of a restricted PRRA, the restricted PRRA option cannot be guaranteed to provide a procedurally fair opportunity against the removal of excluded individuals from Canada.

b. Humanitarian and Compassionate (H&C) grounds and public policy considerations

Refugee applicants who are not found inadmissible under sections 34, 35, or 37 can apply for permanent residency on H&C grounds.¹²⁵ However, the vast majority of refugee applicants who are excluded under Article 1F (a), and under Article 1F (b) based on terrorism findings, could not apply for permanent residency on H&C grounds, because their exclusion is often followed

¹¹⁸ Interview with A5.

¹¹⁹ Interview with A5.

¹²⁰ Interview with A5.

¹²¹ Interview with A2.

¹²² Interview with A2.

¹²³ Interview with A14.

¹²⁴ Interview with A14.

¹²⁵ IRPA, section 25.1.

by an inadmissibility decision under sections 35 or 37. In *Tapambwa v. Canada*, the Federal Court clearly stated that “those who are inadmissible on the grounds of sections 34, 35 and 37, are ineligible for humanitarian and compassionate relief.”¹²⁶

The Minister might grant permanent resident status, if such a decision is justified by humanitarian and compassionate considerations, for example taking into account the best interests of a child directly affected.¹²⁷ The Federal Court considers permanent residence status on H&C grounds an “exceptional remedy”.¹²⁸ In tandem, the IRCC Manual defines the humanitarian and compassionate decision-making process as “highly discretionary”.¹²⁹ Immigration officers are expected to assess the application according to “unusual and undeserved” or “disproportionate” hardship that the applicant could face.¹³⁰ For example, in *Kanthasamy*, the Supreme Court of Canada approved of the finding that the rejected refugee claimant’s application to permanent residency on H&C grounds was not justified, as the officer “was not satisfied that a return to Sri Lanka would result in hardship that was unusual and undeserved or disproportionate.”¹³¹

The Minister can also grant permanent resident status to a foreigner who is inadmissible, or does not meet the requirements of the IRPA, or exempt them from any applicable criteria or obligations if the Minister thinks that such a decision is justified by public policy considerations under section 25.2.¹³² Where the applicant is barred from applying for permanent residency on H&C grounds under section 25.1., the Federal Court is reluctant to consider an application for public policy considerations under section 25.2., on the ground that section 25.2 is not a “backdoor” of section 25.1.¹³³ For the Federal Court, a restricted PRRA together with a stay of removal is adequate “to protect the appellants’ Charter rights.”¹³⁴

The highly discretionary nature of humanitarian and compassionate considerations was recently upheld by the Federal Court of Appeal. In *Tapambwa v. Canada*, the applicants, who were excluded under Article 1F (a), were also found inadmissible “for crimes against humanity under paragraph 35(1)(a) of the IRPA and ordered...deportation”.¹³⁵ The applicants requested

¹²⁶ *Tapambwa v. Canada (Citizenship and Immigration)*, *supra* note 101 at para 106.

¹²⁷ IRPA, section 25.1

¹²⁸ *Singh v. Minister of Employment and Immigration*, *supra* note 69 at para 14.

¹²⁹ Refugees and Citizenship Canada Immigration, “Humanitarian and compassionate considerations: Assessment and processing”, (24 July 2014), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/humanitarian-compassionate-consideration/processing.html>>.

¹³⁰ IRCC, *Immigration Manual IP 5- Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds* (IRCC) section 6.7.

¹³¹ *Kanthasamy v Canada (Citizenship and Immigration)*, [2015] 3 SCR 61.

¹³² IRPA, section 25 (2) (1).

¹³³ *Tapambwa v. Canada (Citizenship and Immigration)*, *supra* note 101 at para 106.

¹³⁴ *Ibid* at para. 112.

¹³⁵ *Ibid* at para. 15.

an exemption “from the exclusion finding on public policy grounds under section 25.2”.¹³⁶ However, the finding that the Minister has no obligation “to consider the request by the appellants”, was upheld by the Federal Court on the ground that the Minister can refuse to exercise their discretion.¹³⁷

An excluded individual cannot apply for H&C considerations before twelve months have passed as of the decision of the RPD or RAD.¹³⁸ During a year, the applicant is at risk of removal. In fact, rejected refugee applicants might not be able to make a successful application on H&C grounds, at all.¹³⁹ The applicant is at the immediate risk of removal following “a refugee claim has been rejected, withdrawn, or abandoned.”¹⁴⁰ A twelve-month bar entitles “removals officers to proceed with removal, thereby denying failed refugee claimants any other route for obtaining status in Canada.”¹⁴¹

Indeed, in *Stables v. Canada*, the Federal Court upheld the finding that the prospect of deportation pending a decision for the applicant’s ministerial relief application, in and itself, does not trigger the section 7 scrutiny, as non-citizens do not have a right to stay in Canada. For Justice de Montigny, the fact that an unsuccessful refugee claimant can be removed from Canada pending their ministerial relief application is insufficient “to trigger the application of section 7 rights”.¹⁴² This conclusion conforms with the basic tenets of Canadian immigration law that non-citizens do not hold “an unqualified right to enter or remain in Canada”.¹⁴³ Their entry or stay in Canada must depend on “their satisfaction of the admissibility criteria decided by Parliament.”¹⁴⁴

One of the interviewees shared their experience with an immigration officer when they applied for permanent residency on humanitarian and compassionate grounds. The officer denied the application because their client “is not about to be removed from Canada and managed to get a job and his family is here”.¹⁴⁵ In the officer’s mind, there was no concern for the client.¹⁴⁶ The testimony of this interviewee shows that officers are oblivious to the grave consequences of their decisions. Perhaps they do not know or disregard how challenging it

¹³⁶ *Ibid* at para. 24.

¹³⁷ *Ibid* at para. 24.

¹³⁸ IRPA, section 25 (1.2)- According to IRPA section 25 (1.21), there are two exceptions to this barrier: (i) persons subject to a risk to their life in the country of nationality or former habitual residence due to inadequate health or medical care; and (ii) persons whose removal would have an adverse effect on the best interests of a child affected.

¹³⁹ Liew & Galloway, J. Donald C., *supra* note 103 at 396.

¹⁴⁰ Liew & Galloway, J. Donald C., *supra* note 103 at 396.

¹⁴¹ Liew & Galloway, J. Donald C., *supra* note 103 at 396.

¹⁴² *Stables v Canada (Citizenship and Immigration)*, [2011] 3 FCR 1319 at paras 40–41.

¹⁴³ *Ibid*.

¹⁴⁴ *Ibid*.

¹⁴⁵ Interview with A4.

¹⁴⁶ Interview with A4.

could be to live in limbo. The severe consequences of living in limbo will be discussed at length in *Part B. Limbo situation: a new group of disfranchised non-citizens due to the protracted limbo situation.*

In conclusion, ministerial relief under humanitarian and compassionate grounds and public policy is foremost an exceptional remedy. The Minister has full discretion to refuse an application, and this is upheld by the Courts. In the year during which excluded applicants are barred from applying for ministerial relief, they can be deported; no protection is afforded to them against non-refoulement. Finally, ministerial reliefs have an exclusionary nature; excluded applicants who are also found inadmissible under sections 35 or 37 of IRPA cannot apply for a ministerial relief. All these points render ministerial relief proceedings insufficient to prevent excluded applicants' removal from Canada.

c. Temporary resident permit- section 24(1) of the IRPA

An immigration officer can issue a temporary resident permit (TRP) to a non-citizen, who is inadmissible, or fails to meet the requirements of the IRPA.¹⁴⁷ TRP can be canceled at any time. As there is no limitation as to whom to issue a TRP, excluded individuals can be considered for a TRP. According to the IRCC's Manual, there should be "compelling reasons for an officer to issue a temporary resident permit to allow a person...to enter or remain in Canada. Temporary resident permits allow officers to respond to exceptional circumstances".¹⁴⁸

Like the ministerial relief on humanitarian and compassionate and public policy considerations, a twelve-month period bars failed refugee applicants to apply for a TRP. Thus, a failed refugee applicant cannot apply for a TRP, if less than 12 months have passed since their claim was rejected.¹⁴⁹ Canada issued 7,132 TRPs in 2018 to inadmissible individuals; the grounds for most cases were criminality or non-compliance with the IRPA.¹⁵⁰

Similar to the ministerial relief on humanitarian and compassionate and public policy considerations, TRPs are discretionary measures at the disposal of the Minister. The IRCC's Operational Manual explicitly states that TRP is an exceptional remedy. If the success rate of PRRAs – despite being a non-exceptional remedy – is very low, TRP would not be a viable option for excluded applicants to stay in Canada. Likewise, since the Canadian courts have interpreted that (i) ministerial relief on humanitarian and compassionate and public policy considerations are highly discretionary measures, and that (ii) the availability of a restricted

¹⁴⁷ IRPA, s. 24 (1)

¹⁴⁸ Citizenship and Immigration Canada, *Operational Manual OP 20: Temporary Resident Permits* (Citizenship and Immigration Canada, 2005).

¹⁴⁹ IRPA, s. 24 (4)

¹⁵⁰ *Annual Report to Parliament on Immigration 2019*, by The Honourable Marco E L Mendicino, PC, MP (Immigration, Refugees and Citizenship Canada, 2020).

PRRA, in itself, is a sufficient measure to protect the excluded individual's Charter rights, TRP would not be a common remedy for excluded applicants to remain in Canada.

Until now, this section analysed subsequent proceedings available for excluded individuals to apply before their removal. The following section will analyze the case of *Mata Mazima* to demonstrate why the subsequent remedies are ineffective for excluded individuals.

2.4. Case study: Mata Mazima deported to the Democratic Republic of Congo

Eugene Mwalumba Mata Mazima was deported to the Democratic Republic of Congo (DRC) because of his work with the DRC's army and government. Mr. Mazima was a second secretary at the Embassy of the DRC in Algeria responsible for "administration and Congolese scholarship students in Algeria."¹⁵¹ He was suspected of being "a member of the Alliance des patriotes pour la refondation du Congo, an opposition party" as he was doing favors "for non-scholarship students from that party".¹⁵² In August 2007, Mr. Mazima "learned of a letter sent to the chargé d'affaires at the Embassy by the government of the DRC directing that he be repatriated to his country to be interrogated by the intelligence service."¹⁵³ After his half-brother "physically assaulted Francis Kalombo, a close associate of President Joseph Kabila" in New York, Mr. Mazima decided to leave Algeria.¹⁵⁴ Mr. Mazima and his family entered Canada in November 2007 and made an asylum claim at the border. He was excluded under Article 1F (a), crimes against humanity, and then found inadmissible under paragraph 35(1)(a) of the IRPA.¹⁵⁵ The Federal Court dismissed the application for judicial review of this decision as Justice LeBlanc decided that there was no breach of the rules of procedural fairness, and the inadmissibility decision was reasonable.¹⁵⁶

His two PRRA applications as well as a motion for stay of a removal order against him were also dismissed.¹⁵⁷ His lawyer argued that he was deported because of his connection to his cousin. In other words, Mr. Mazima was excluded under Article 1F (a) for guilt by association that was abandoned with the *Ezokola* decision. His lawyer underlined that although his exclusion decision was rendered before *Ezokola*, Mazima was found inadmissible during the post-Ezokola era. It was because "the conclusions of the facts of the refugee board" set forth during the pre-Ezokola era "have to be taken and kept unless there is evidence to contradict it."¹⁵⁸

¹⁵¹ *Mata Mazima v Canada (Citizenship and Immigration)*, 2012 FC 698 at para 4.

¹⁵² *Ibid* at para. 5.

¹⁵³ *Ibid* at para. 5.

¹⁵⁴ *Ibid* at para. 6.

¹⁵⁵ *Mata Mazima v Canada (Citizenship and Immigration)*, 2016 FC 531 at para 1.

¹⁵⁶ *Ibid*.

¹⁵⁷ *Mata-Mazima v Canada (Citizenship and Immigration)*, 2016 FC 734.

¹⁵⁸ Interview with A7.

In 2001, Mr. Mazima was responsible for “computer services in the Congolese armed forces (FAC)”, a position that he could get “with the help of his cousin, Admiral Baudoin Liwanga Mata Nyamunyobo (Admiral Liwanga), Chief of Staff in the FAC.”¹⁵⁹ Although he was aware that the FAC committed human rights violations, Mr. Mazima did not witness any abuse or violations, nor did he have any subordinates or access to secret emails; he was responsible for developing “a local computer network to connect the office with the other departments of the army”.¹⁶⁰ In its decision, the RPD believed that Mr. Mazima “had facilitated communication between Admiral Liwanga and the various battalions and armed militias that were committing acts of violence against the civilian population. He had therefore been a [translation] “link in the chain” and actively participated in that savage civil war.”¹⁶¹

The RPD further noted that Mr. Mazima “was aware of the acts of violence committed by the FAC” but continued to work for the Chief of Staff.¹⁶² Mr. Mazima left his work in 2004 only after he could save space “in the Ministry of Foreign Affairs as a research officer”.¹⁶³ As a research officer at the Ministry of Foreign Affairs, his job was similar to that in the FAC, developing a “computer tool to connect the office and the transmission department of the Ministry of Foreign Affairs, which was in charge of correspondence between the office and Congolese embassies abroad.”¹⁶⁴ As per the reasoning of the RPD, Mr. Mazima continued to work “for the same government, which turned a blind eye to the abuses committed by its army.”¹⁶⁵ Consequently, the RPD decided to exclude him from protection under Article 1F(a) of the Convention as “there were serious reasons to consider that the applicant was complicit in crimes against humanity or war crimes committed by factions of the FAC”.¹⁶⁶

At the Federal Court level, during the judicial review, Justice Montigny approved of the RPD’s finding on complicity.¹⁶⁷ As the Applicant developed and maintained “a computer network to connect the office of the Chief of Staff with the other units of the army throughout the country”, he was not a mere bystander; “he was contributing to the conduct of the military operations.”¹⁶⁸ Even though the Board had no direct evidence that the applicant had engaged in certain grave acts, it was reasonable to conclude that Mr. Mazima “**had put his shoulder to**

¹⁵⁹ *Mata Mazima v. Canada (Citizenship and Immigration)*, *supra* note 151 at para 2.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid* at para. 11.

¹⁶² *Ibid* at para. 12

¹⁶³ *Ibid* at para. 13.

¹⁶⁴ *Ibid* at para. 3.

¹⁶⁵ *Ibid* at para. 13

¹⁶⁶ *Ibid* at para. 14

¹⁶⁷ *Ibid* at para. 27.

¹⁶⁸ *Ibid* at para. 33.

the wheel and knowingly participated in the crimes against humanity and war crimes committed by the FAC in the course of its military operations.”¹⁶⁹

Later in 2016, the Federal Court dismissed the judicial review of a revised inadmissibility decision after an immigration officer reconsidered their initial determination of inadmissibility in light of the *Ezokola* decision.¹⁷⁰ The decision of inadmissibility was upheld by the Federal Court. The conclusions of the RPD on Mr. Mazima’s exclusion, rendered before *Ezokola*, were still applied to Mr. Mazima’s inadmissibility determination that was delivered after the *Ezokola* decision. This is because *among others* according to section 15 of the Immigration and Refugee Protection Regulations, if the RPD determined that a non-citizen is excluded from protection under Article 1F, based on findings that they have committed a war crime or a crime against humanity, “the findings of fact set out in that decision or determination shall be considered as conclusive findings of fact”, to determine, whether a non-citizen is inadmissible under paragraph 35(1)(a) of the IRPA.¹⁷¹ Indeed, this obligation imposed upon an immigration officer to consider the RPD’s findings of facts as conclusive was upheld by Justice LeBlanc, who stated that the officer “could not ignore the RPD’s findings of fact that were deemed reasonable by the Court during judicial review of the RPD’s decision”.¹⁷²

According to his lawyer, Mazima was eventually deported to the DRC while his family stayed in Canada.

2.5. Analysis of Mazima’s case: the notions of morality imbued in the interpretation of the law rendering subsequent proceedings before the removal mostly ineffective

Mr. Mazima’s case epitomizes two things in Canadian jurisprudence. First, the “notions of morality” are integrated into the assessment of Article 1F(a) to the extent that some states are considered to be lacking “the basic markers of statehood.”¹⁷³ Second, once a person is excluded, particularly under Article 1F (a), the findings in the determination of Article 1F are carried out to subsequent stages preceding removal.

For the notions of morality, Kaushal and Dauvergne stated that the exclusion of refugees from protection under Article 1F is “based on the moral choices they make”.¹⁷⁴ The legal tests

¹⁶⁹ *Ibid* at para. 33. [Emphasis added]

¹⁷⁰ *Mata Mazima v. Canada (Citizenship and Immigration)*, *supra* note 151 at para. 53. This decision concerned the judicial review of “an immigration officer’s...decision dated June 1, 2015, confirming what was determined by another officer on March 31, 2014, refusing to grant him permanent resident status on the grounds that he is inadmissible under paragraph 35(1)(a) of the Act.” *Mata Mazima v. Canada (Citizenship and Immigration)*, *supra* note 151 at para. 1.

¹⁷¹ *Immigration and Refugee Protection Regulations*, 2002 s 15.

¹⁷² *Mata Mazima v. Canada (Citizenship and Immigration)*, *supra* note 151 at para. 56.

¹⁷³ Asha Kaushal & Catherine Dauvergne, “The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions” (2011) 23:1 *International Journal of Refugee Law* 54–92 at 87 and 89-90.

¹⁷⁴ *Ibid* at page 87.

for Article 1F(a) assess the morality of a refugee applicant through the voluntary participation to the group, “knowledge and sympathy for its purposes, and disassociation from the organization at the earliest opportunity”.¹⁷⁵ The authors underlined that the discerning factor is whether the applicant was disassociated from the organization at the earliest opportunity. If the claimant continued their membership with the organization, they were considered to have failed “conscience and morality.”¹⁷⁶ The genuinely “moral refugee” must break their association with an organization “not because of a threat to her family and certainly not because of fear for her own well-being, but because of a *crisis of conscience*.”¹⁷⁷

Kaushal and Dauvergne used the case of *Loayze* to demonstrate how Canadian courts were ready to exclude “members of the police force, army, navy and even government ministries”.¹⁷⁸ Like Mr. Mazima’s case, Carlomagno Reyna Loaysa held a position as a police officer in Peru. In his decision, Justice Russell wrote that “[t]he principal claimant preferred to maintain his position in the PNP, hoping to rise to the rank of General rather than listen to his voice of conscience.”¹⁷⁹ These decisions suggest that refugee law incorporated current “public and political discourses” via Article 1F.¹⁸⁰

Police forces, army, navy and government agencies are at the core of “state sovereignty” and could be assumed to “have at least some legitimate aims”.¹⁸¹ However, Canada often determined that these foreign agencies “have a ‘limited, brutal purpose’ or...engage in terrorism”.¹⁸² Any refugee applicant having ties with these agencies was thus flagged for possible exclusion. The authors mentioned that in some cases that they reviewed, Canadian courts conceded that “the arm of the state may have legitimate purposes but the claimant is still excluded on the basis of that state agency’s crimes against humanity”.¹⁸³ As Kaushal and Dauvergne rightly stated, the findings “that the army or police force of the state is illegitimate, that the state cannot control the defenders of its own sovereignty” is contentious and a “highly political determination.”¹⁸⁴ To a certain degree, these findings imply that some countries do not have a right to have “the basic markers of statehood.”¹⁸⁵

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid* at page 89.

¹⁷⁹ *Loayza v Canada (Minister of Citizenship and Immigration)*, 2006 FC 304 at para 40.

¹⁸⁰ Kaushal & Catherine Dauvergne, *supra* note 173 at 88.

¹⁸¹ *Ibid* at page 89.

¹⁸² *Ibid* at 89.

¹⁸³ *Ibid* at 89.

¹⁸⁴ *Ibid* at 89-90.

¹⁸⁵ *Ibid.*

Their research further revealed that Canadian judicial authorities considered the following legitimate states' apparatuses having a "limited and brutal purpose": the Angolan Army, the *Agence Nationale de Renseignements* (ANR) in the DRC, Punjabi police force, and the Armed Forces Revolutionary Council (AFRC) in Sierra Leone.¹⁸⁶

The most interesting decision comes from a Turkish refugee applicant, Arif Bengi, who was a member of the Turkish Air Force. Keith Brennenstuhl, a member of the IRB found that "the Turkish Air Force committed crimes against humanity with respect to Kurds in southeast Turkey" when Mr. Bengi was serving with the Turkish Air Force stationed at bases in Iskenderun and Diyarbakir.¹⁸⁷ As a result, Mr. Bengi was excluded under Article 1F(a) with no evidence that he was engaged in atrocities. As underlined by Kaushal and Dauvergne, this decision came as a surprise because the Turkish military force is a member of NATO, "a military alliance of democratic states in Europe and North America".¹⁸⁸

These decisions show that an applicant who engaged in "the state's fight against terrorism, where the state employed violent means of suppression, cannot be a refugee."¹⁸⁹ In cases in which an applicant has been involved in a conflict, the term terrorism is "used to ground a finding that the state of origin is *not* sovereign."¹⁹⁰

Mr. Mazima's case confirms the findings of Kaushal and Dauvergne's that Canada considers foreign states' apparatuses to have a brutal purpose. The Federal Court relied on the RPD's decision to establish that, being in charge of the computer services department in the Congolese armed forces, and working for the Ministry of Foreign Affairs in low levels sufficed to have been complicit in crimes against humanity or war crimes. Justice Montigny upheld the RPD's decision on the basis of moral standards in the sense that Mr. Mazima was expected to have the highest moral values to quit his work with the government and the army. No evidence demonstrated that he was involved in the violations that took place in the DRC. This decision represents moral judgment, as suggested by Justice Montigny: Mr. Mazima "could have left his job at any time and put an end to his involvement in the acts of violence committed by the FAC. He did not do that and left his position only after Admiral Liwanga was dismissed."¹⁹¹

Kaushal and Dauvergne's research and Mr. Mazima's case suggest that political considerations including the brutality of a sovereign state, have been guiding Canadian judges' review of Article 1F determinations, and hence, overshadowing the actual act of a refugee

¹⁸⁶ *Ibid* at 90.

¹⁸⁷ *Bengi v Canada (Minister of Citizenship and Immigration)*, [2004] RPDD 117 at para 29.

¹⁸⁸ Kaushal & Catherine Dauvergne, *supra* note 173 at 90.

¹⁸⁹ *Ibid* at 91.

¹⁹⁰ *Ibid* at 91.

¹⁹¹ *Mata Mazima v. Canada (Citizenship and Immigration)*, *supra* note 151 at para 34.

applicant. Refugee applicants could be working for legitimate state organs for different reasons. Expecting a citizen not to work for their state for having been involved in human rights violations engenders a utopian version of Article 1F, and bolsters a utopian image of a refugee. Judging people for working for their own states on morality grounds, without having any evidence that they committed crimes, is contentious because the notion of morality is changeable as per judges' understanding. A similar moral judgment can be done against a civil servant working for the government of Canada: should no one work for the government because this government is responsible for the genocide of its indigenous peoples?¹⁹²

Mr. Mazima's case also suggests that subsequent proceedings available for excluded individuals to apply before their removal could be rendered ineffective by the findings of the exclusion decision. The Immigration and Refugee Protection Regulations were written in a way that imposes an obligation for immigration officers to find an excluded individual inadmissible as well. Pursuant to the Regulations, in cases where an applicant is excluded under Article 1F, based on findings that the person has engaged in terrorism, "the findings of fact set out in that determination or decision shall be considered as conclusive findings of fact" to determine whether the person is inadmissible under subsection 34(1)(c) of the IRPA.¹⁹³ Likewise, in cases where an applicant is excluded under Article 1F, based on findings that the person has committed a war crime or a crime against humanity, these findings must be considered as conclusive facts to determine whether the person is inadmissible under subsection 35(1)(a) of the IRPA.¹⁹⁴ Thus, any exclusion decision under Article 1F (a) prompts an inadmissibility decision. In practice, one interviewee agreed that if a refugee applicant is excluded, the Minister tries to find them inadmissible as well; thus, the applicant's "chances of being able to stay here are greatly reduced".¹⁹⁵

2.6. Conclusion: the prospect of deportation is strong for excluded individuals

As stated by Canadian courts, the only viable proceeding prior to removal is a restricted PRRA, through which an excluded applicant must show both the risk of death, cruel and inhuman punishment or treatment upon removal, and that this risk does not outweigh the danger that the individual might pose to the Canadian public and security.

The Supreme Court of Canada determined that an exclusion decision does not engage section 7 because the excluded individual could apply "for a stay of removal to a place if he

¹⁹² The final report of the National Inquiry into Missing and Murdered Indigenous women and girls articulated that the violence against Indigenous people amounts to "a race-based genocide". *The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Volume 1a* (2019) at 50.

¹⁹³ Section 14 (b) of the *Immigration and Refugee Protection Regulations*, *supra* note 171.

¹⁹⁴ Section 15 (b) of the *Immigration and Refugee Protection Regulations*, *supra* note 171.

¹⁹⁵ Interview with A5.

would face death, torture or cruel and unusual treatment or punishment if removed to that place.”¹⁹⁶ However, the success rate of PRRAs is statistically low with only seven percent. Even if an applicant succeeds in their restricted PRR application, a stay of removal is temporary. The latest point corroborates what Gerald Heckman has argued that the current regime put “non-citizens under the administrative control of the state in large measure through the threat of their forced removal from Canada.”¹⁹⁷

Other subsequent proceedings enumerated by Canadian Courts are not viable options for excluded individuals to stay in Canada for four reasons. First, excluded individuals are often barred from applying for permanent residency on humanitarian compassionate grounds and public policy considerations because of subsequent inadmissibility decisions. Second, all subsequent proceedings prior to removal including the restricted PRR are at the discretion of the Minister. Third, administrative discretion is subject to a lower level of standard of review by the Federal Court during judicial review. Fourth, reasonableness is the applicable standard of the review unless there is “a clear indication of legislative intent or by the rule of law” that will require courts to derogate from the presumption.¹⁹⁸ As determined by the Supreme Court of Canada, “[r]easonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process.”¹⁹⁹

As explained in Chapter III, the judicial review before the Federal Court and the Federal Court of Appeal is narrow in terms of coverage and scope.²⁰⁰ It is narrow in coverage because the Federal Court’s discretion to grant leave to hear the case is granted “in only a small number of cases”.²⁰¹ It is limited in scope because “the Federal Court may only review the decision for unreasonableness and errors of law”.²⁰² For Grant and Rehaag, judicial review’s function in reviewing administrative decisions is limited to ensuring that decisions are rendered in compliance with the legislative intent and “the rule of law is respected.”²⁰³ That is the reason

¹⁹⁶ *Febles v. Canada (Citizenship and Immigration)*, *supra* note 32 at para 67.

¹⁹⁷ Heckman, *supra* note 67 at 331.[footnotes omitted].

¹⁹⁸ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10.

¹⁹⁹ *Ibid* at para. 13.

²⁰⁰ Kaushal & Catherine Dauvergne, *supra* note 173.

²⁰¹ “Leave was granted in approximately 13% of cases during the time frame of this dataset. This estimate is generated from the statistics reported on the Federal Court of Canada website: <http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Statistics>.” Kaushal & Catherine Dauvergne, *supra* note 173 at 60, n 29.

²⁰² “*Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, in which the Supreme Court of Canada held that there should be only ‘two standards of review, those of correctness and reasonableness’, and that reasonableness ‘is a deferential standard’.” Kaushal & Catherine Dauvergne, *supra* note 173 at 60, n 30.

²⁰³ Sean Rehaag & Angus Grant, “Unappealing: An Assessment of the Limits on Appeal Rights in Canada’s New Refugee Determination System” (2015) Osgoode Legal Studies Research Paper Series, online: <<https://digitalcommons.osgoode.yorku.ca/olsrps/132>> at 215.

why “judicial review generally extends deference to administrative decisions”.²⁰⁴ In areas where the administrative bodies and officers have specialized expertise such as “factual findings and legal determinations”, the standard of review is reasonableness, a more deferential one compared to the standard of correctness.²⁰⁵ Dennis R. O’Connor, the Commissioner of Inquiry into the Actions of Canadian Officials in relation to Maher Arar, acknowledged that national security investigations are often subject to less judicial scrutiny compared to criminal investigations. It is rare that a national security investigation “receive[s] the degree of external scrutiny found in the investigative hearing process or in criminal prosecutions.”²⁰⁶

Finally, subsequent proceedings after the exclusion and prior to removal (except for PRRA) are considered highly exceptional measures. In fact, the Federal Court determined that a restricted PRRA together with a stay of removal are adequate remedies; thus, it is not necessary to investigate other proceedings such as ministerial relief or temporary resident visa.²⁰⁷

In his article, Heckman concludes that Canadian “courts should recognize that these s. 7 interests are engaged in the early stages of the administrative process and not only at the stage most proximate to deportation.”²⁰⁸ This section agrees with Heckman’s conclusion: exclusion determination proceedings should recognize section 7 interests of the individual since proceedings that are the most proximate to removal do not provide sufficient protection.

In conclusion, it is extremely hard for excluded individuals to succeed in reviewed proceedings since they are “undesirable” in the eyes of authorities. As one of the interviewees put it, the minister is entitled to grant exemption to individuals. However, “no Minister wants to be, seen to be helping someone who is already been labeled a terrorist; so, then ministerial exemption never works in practice...they just sit on the cases.”²⁰⁹ Since available proceedings for excluded individuals rarely end up with success, the deportation option stands as a real consequence.

B. Limbo situation: a new group of disfranchised non-citizens due to the protracted limbo situation

This section argues that, if not deported, individuals who are excluded as per Article 1F or found inadmissible under SHSO grounds would live in an infinite limbo situation in Canada,

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ *A New Review Mechanism for the RCMP’s National Security Activities*, by Dennis R O’Connor (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, 2006) at 439.

²⁰⁷ *Tapambwa v. Canada (Citizenship and Immigration)*, *supra* note 101 at para 112.

²⁰⁸ Heckman, *supra* note 67 at 354.

²⁰⁹ Interview with A13.

which has eventually led to a new group of disenfranchised non-citizens in host states. In explaining this argument, this section will first review the interviewees' perspective to define the main consequences of the limbo situation and proceed with the analysis of a case study to illustrate the problems that a non-citizen, who lives in limbo, endured in Canada. This section will conclude with the analysis of an emerging class of disenfranchised non-citizens, who live in a protracted limbo situation in host states. No regulation, law, international agreement, or convention regulates their status. The existing policy options have all been shaped around the sovereign's interests; are far from being inclusive and representative.

1. Four severe results awaiting excluded and inadmissible individuals in Canada: interviewees' perspective

Even if an excluded or inadmissible individual stays in Canada, their stay, with heavily organized, restricted rights, can have serious consequences on them. As one of the interviewees noted, "deportation is, of course, a terrible thing, but we should step back from that and realize that even if deportation itself does not occur, the consequences are enormous."²¹⁰

The only research done in Canada on non-citizens who cannot be removed but who are suspected or convicted of serious criminality or security risks was conducted by Jennifer Bond. Bond defined five main outcomes for such non-citizens: (i) permanent residence; ii) "temporary stay of removal until impediment removed"; (iii) "temporary status while still under active removal order"; (iv) living in legal limbo, no-status; (v) "suspect deportation despite apparent impediment to removal".²¹¹ As noted by Bond, most of these individuals cannot access permanent residency and are solely granted temporary status. Among them, those who are considered to be posing a security risk or in a flight risk are likely to be detained. If they are released from detention, they are put under house arrest with electronic surveillance.²¹²

In this research, I will focus on interviewees' experiences to define the consequences of immigration decisions involving security risks and serious criminality besides deportation. Based on the interviewees' perspective, this section explains four severe results awaiting excluded and inadmissible individuals in Canada:

- (i) no status situation, decades of litigation with significant financial consequences;
- (ii) in certain cases, no work permit renewal, no social assistance, no medical coverage;
- (iii) no family reunion rights and social isolation;

²¹⁰ Interview with A4.

²¹¹ Bond, "Unwanted but Unremovable", *supra* note 100 at 169 and 181.

²¹² *Undesirable and Unreturnable? Policy Challenges around Excluded Asylum Seekers and Other Migrants Suspected of Serious Criminality Who Cannot Be Removed*, by Refugee Law Initiative & Centre for International Criminal Justice (University of London, 2016) at 23.

- (iv) stigma, and significant mental health consequences as a result of being labeled as a war criminal or terrorist.

1.1. No status situation, decades of litigation

Eight interviewees provided details of the no-status situation that their clients faced in Canada due to an immigration decision involving criminality or security risks.²¹³ One interviewee stated that deportation does not take place quickly, because legal remedies that are available for rejected applicants such as pre-removal risk assessments, appeals, judicial reviews take a long time to finalize.²¹⁴ In addition to time-consuming litigation, there are other obstacles to deporting non-citizens. For example, the country of origin does not want to accept these individuals, or they cannot get passports.²¹⁵ In the words of the interviewee, “a lot of them just hang around, sometimes for decades.”²¹⁶ Another interviewee shares the opinion that “limbo is the most frequent consequence of these findings”.²¹⁷ For example, one of their clients has been living in limbo since 1991.

A3: He is very much the exception; he is the only person I can think of who managed to live relatively well...notwithstanding this exclusion.

Another interviewee shared that although the *Suresh* decision allows non-citizens to be returned to a place where there is a likelihood of torture, death penalty, and ill-treatment under exceptional situations, lawyers end up litigating for years to prove that their case is not an exceptional one.²¹⁸

One of the interviewees stated that Bangladeshi refugees who were members of the BNP are often found inadmissible when they applied for permanent residency.²¹⁹ These refugees have found themselves in limbo because the principle of non-refoulement applies to their cases. However, they are not allowed to travel to Bangladesh, the fact of which has been acknowledged by the government. At the same time, “they are not given the opportunity to continue with their establishment and have their families join them here.”²²⁰

One interviewee argues that although there are other mechanisms to prevent refoulement, the 1951 Refugee Convention does not solely regulate the principle of non-refoulement.²²¹ Although the principle of non-refoulement is the most important protection

²¹³ Those who articulated the limbo situation are A1, A2, A3, A4, A5, A7, A10, A14

²¹⁴ Interview with A1. Likewise, A7 stated that litigation over section 42(1)- inadmissible family member- takes on average seven year wait and can go over ten years.

²¹⁵ Interview with A1.

²¹⁶ Interview with A1.

²¹⁷ Interview with A3.

²¹⁸ Interview with A10

²¹⁹ Interview with A14.

²²⁰ Interview with A14.

²²¹ Interview with A2.

afforded in the Convention, the Convention also provides for rights.²²² The non-status people are, however, trapped in Canada, separated from their families, are unable to be unified.²²³ For example, one of their clients, Mr. Haqi, has been living in limbo for eight years.

A2: The problem is that there is nobody who is saying Mr. Haqi is a danger, the KDPR is a danger; the only thing is that an officer wrote a 44 report [inadmissibility report] at some point and then sets off this train that cannot be stopped except by the minister of public safety personally.

One interviewee was concerned that the inadmissibility provisions capturing more people than the 1951 Refugee Convention envisaged, put people's lives in limbo for long years because they cannot get a permanent resident status as protected people.²²⁴

Another interviewee told a story of their client who was excluded under Article 1F and set in limbo for long years even though "his case was used as an example in *Ezokola*."²²⁵ The Supreme Court of Canada "commented that exclusion was not meant to apply to him, but he had been excluded."²²⁶ Despite the Court's comment, their client was caught in "a legacy backlog".²²⁷ Having waited many years in the backlog, their client's judicial review was accepted. The file was returned to the RPD which finally determined their client was a refugee and Article 1F does not apply to their case. Their client was truly traumatized: "**having been labeled as somebody who was complicit in the commission of war crimes or crimes against humanity it was for him an enormous stigma and it had very significant psychological impacts upon him.**"²²⁸ In the words of their lawyer, "nothing can really account for the years that were lost by that horrendous stigmatization which has no basis in law."²²⁹

Haj Khalil's case exemplifies the limbo situation that a refugee had to go through after having been found inadmissible. In 2000, Ms. Haj Khalil, a stateless Palestinian, was found to be inadmissible under section 34(1), alleged to have "been a member of an organization that engaged in terrorist acts."²³⁰ The long litigation battle started and her situation in legal limbo was continuing in 2007. Previously, in 1994, she was found to be a Convention refugee and applied for permanent residence in 1995.²³¹ In claiming damages for the delay in processing her permanent residence application, Ms. Haj Khalil described the "psychological distress

²²² Interview with A2.

²²³ Interview with A2.

²²⁴ Interview with A5.

²²⁵ Interview with A4.

²²⁶ Interview with A4.

²²⁷ Interview with A4.

²²⁸ Interview with A4. [Emphasis added]

²²⁹ Interview with A4.

²³⁰ *Haj Khalil v Canada*, [2007] 4 FCR 923 at para 35.

²³¹ *Ibid* at paras. 14 and 25.

(depression); economic loss; loss of guidance, care and companionship of her husband”.²³² In her decision, Justice Layden-Stevenson acknowledged that “there was unreasonable and inordinate delay in the processing of their applications for permanent residence”.²³³ Ms. Haj Khalil mentioned that she had to renew the student authorization, health care card, and social insurance number, annually. She could not understand why she had to go through this bureaucracy with no clear reason.²³⁴ Strikingly, Ms. Haj Khalil had to live in limbo although she was not “considered to be a danger to the security of Canada.”²³⁵

In conclusion, Justice Layden-Stevenson decided that Ms. Haj Khalil was not entitled to claim damages because “the action in negligence fails and the plaintiffs have not established infringement of their *Charter* rights”.²³⁶ Even if so, “Ms. Haj Khalil has not persuaded me [Justice Layden-Stevenson] that she would work on a full-time basis. Her commitment to her children coupled with her previous work history, as she related it, render full-time employment highly unlikely.”²³⁷ This belief in return would have allowed Ms. Haj Khalil to claim a smaller amount than she actually claimed.

Ms. Haj Khalil’s case exemplifies how the limbo situation is overlooked by the administrative court; the limbo situation in itself does not amount to negligence nor violate the *Charter*. Although it constitutes *obiter dicta*, Justice Layden-Stevenson argued on a highly subjective assumption that Ms. Haj Khalil would not be employed full time. This assumption collaborates with the conclusion of Chapter IV that judges do not make the diligent analysis that the subject requires.

1.2. In certain cases, no work permit renewal, no social assistance, no medical coverage, the prospect of arrest, no travel overseas

During litigation, the situation of excluded individuals or individuals found inadmissible on SHSO grounds is unknown. In other words, they have no status. One interviewee explained that these individuals may not get their work permit renewed; “they may not be qualified for social assistance if they cannot work...they may not have medical coverage.”²³⁸ Another interviewee mentioned that their clients have to apply “every couple of years for a renewal of his work permit...If that work permit is not renewed by the government in a timely fashion, he would not be able to work. This has happened on several occasions.”²³⁹ Their clients must

²³² *Ibid* at para. 6.

²³³ *Ibid* at para. 8.

²³⁴ *Ibid* at para. 59.

²³⁵ *Ibid* at para. 19.

²³⁶ *Ibid* at para. 348.

²³⁷ *Ibid* at para. 349.

²³⁸ Interview with A1. A4 also shared that their clients may not “get full access to health care”.

²³⁹ Interview with A4.

regularly report to the CBSA which is often located far away.²⁴⁰ Failing to report results in their clients' arrest. During this period, their clients "cannot leave the country", either.²⁴¹

One interviewee stated that some of their clients could access work permits but often only after authorities are sure that they cannot be deported. Even if they are eventually authorized to work, "there is often a gap of a year or two and they cannot work. It is harder to get back to the workforce".²⁴² In addition, these individuals are in a vulnerable situation because employers know from their social insurance number that they have a temporary status.²⁴³

1.3. No family reunion rights and social isolation²⁴⁴

Having no status does not only affect applicants but also their families. One interviewee explained that some of the applicants "flee alone and their family members are left behind".²⁴⁵ There is no mechanism to bring their family to join them in Canada, or to have their family status changed.²⁴⁶ As a result, these individuals cannot move forward in Canada or visit their families in their country of origin or reunite with their families.²⁴⁷ Another interviewee shared a similar opinion; because an individual cannot sponsor their family to come to Canada, they live apart for long years.²⁴⁸

A5: I can tell you from personal experience of people who have been divorced over the years because they are apart for a decade. It may be easier for us to explain to a client what their legal problem is but when they try to explain to a family member, they do not understand the delays or accusations, which sometimes lead to frustration or disbelief. They start thinking actually you are trying to abandon me. I have seen cases of family separation that are horrible.

One interviewee stated that, if the client's family member dies overseas, they cannot travel to see their family members.²⁴⁹ Likewise, individuals living in limbo cannot bring their young dependent children to Canada.²⁵⁰

²⁴⁰ Interview with A4.

²⁴¹ Interview with A4.

²⁴² Interview with A3.

²⁴³ Interview with A3.

²⁴⁴ This opinion was articulated by A3, A4, A5, A7.

²⁴⁵ Interview with A3.

²⁴⁶ Interview with A3.

²⁴⁷ Interview with A3.

²⁴⁸ Interview with A5.

²⁴⁹ Interview with A4.

²⁵⁰ Interview with A4.

1.4. Stigma and significant mental health consequences as a result of being labeled as a war criminal or terrorist²⁵¹

Having no status has enormous consequences on individuals, even if they are not deported. Being labelled as a war criminal or a terrorist stigmatizes individuals and “alienates them from their national community”.²⁵² One of the most important consequences of being labelled as a war criminal or terrorist is mental health repercussions on the applicants.²⁵³

The report prepared by Dennis R. O'Connor, the Commissioner of Inquiry into the Actions of Canadian Officials in relation to Maher Arar, states that “the stigma suffered by an individual who is linked inappropriately or improperly to terrorism may be enormous. When that information is shared with agencies such as the RCMP, the CBSA or CSIS, it can have further intrusive impacts.”²⁵⁴ The report further explains that powers of the CIC and CBSA to deny entry to Canada and “to deport from Canada on national security grounds” can harm individuals.²⁵⁵ The report highlights that “[t]he police powers of the CBSA allow it to use intrusive methods, such as arrest, detention, search or seizure that are very much like those used by the RCMP.”²⁵⁶

Two interviewees were concerned that the Canadian government, decision-makers, and immigration authorities do not appreciate the gravity of their decisions because their clients will not be deported.²⁵⁷ Since they are not going to be deported, they are assumed to be safe.²⁵⁸ By adopting the prematurity principle, the Supreme Court of Canada also endorsed a similar approach. However, so many consequences flow “directly and immediately from these decisions apart from deportation. It is one of the hardest things in my practice, seeing the effect that has on people.”²⁵⁹ People, in general, do not consider “how stigmatizing it is, and how deeply impacted people are by those kinds of allegations”.²⁶⁰ One interviewee stated that, in those cases, the government fighting against an individual is unfair. They often have no support including media support. Considering other intricacies in the process including the low thresholds, stigmatizing people with these decisions is unjust.²⁶¹

²⁵¹ This opinion was articulated by (A3) (A7) (A4).

²⁵² Interview with A3.

²⁵³ (A3) (A7) (A4) shared this opinion. A7 added that they referred several of their clients to therapy.

²⁵⁴ O'Connor, *supra* note 206 at 570.

²⁵⁵ *Ibid* at 570.

²⁵⁶ *Ibid* at 570.

²⁵⁷ Interview with A3 and A4.

²⁵⁸ Interview with A3 and A4.

²⁵⁹ Interview with A3.

²⁶⁰ Interview with A4.

²⁶¹ Interview with A7.

Immigration officers who process these individuals' cases are adversely biased as well. One of the interviewees stated that their client was found inadmissible because the client knew there was torture in Lebanon. An immigration officer suspected without any evidence that the client might have carried someone who was tortured in Lebanon. The interviewee underlined that the officer's finding without a referral from the CBSA or CSIS was unusual. In this case, both the CSIS and CBSA did not find any problem in the client's case, cleared the client off but the immigration officer insisted that the client was inadmissible. The client was not excluded under Article 1F during their asylum-seeking process nor were they deferred before the immigration division.

A7: CBSA and CSIS both said not sufficient grounds to go and defer non-sufficient grounds, but the immigration officer says I believe there are sufficient grounds; so, she has declared him once inadmissible.

When the lawyer objected to the inadmissibility, the file was returned to the same officer who again found the client inadmissible on the same grounds. The consequence is that their client must wait for long years to win the legal battle.²⁶²

2. Case study: Sabadao living in limbo for over two decades

Based on the interviewees' perspectives, the previous section explained four severe results awaiting individuals who were excluded under Article 1F or found admissible on SHSO grounds in Canada. To illustrate the problems, this section will analyze the case of *Sabadao* who has been living in Canada for over 20 years with no status.

Danius Sabadao, a Filipino citizen, entered Canada in 1991 to seek asylum on the basis of death threats that he received "from members of the New People's Army (NPA) for refusing to stop fighting for the government as a Second Lieutenant during the Marcos regime and to join their group as a training officer."²⁶³ In 1993, the Canadian Convention Refugee Determination Division excluded him from protection under Articles 1F(a) and (c) of the Convention, as he was believed to have participated in military operations involving battles, "in human rights violations which were committed against the NPA by the Philippine Army during that period, and to have killed human beings on government orders."²⁶⁴ It is noteworthy that the European Union and the U.S. have listed NPA as a terrorist organization.²⁶⁵

²⁶² Interview with A7.

²⁶³ *Sabadao v Canada (Citizenship and Immigration)*, 2014 FC 815 at para 3.

²⁶⁴ *Ibid* at para. 4.

²⁶⁵ "Foreign Terrorist Organizations", online: *United States Department of State* <<https://www.state.gov/foreign-terrorist-organizations/>>.

After his asylum claim was rejected, he sought several remedies to stay in Canada. In 1993, Mr. Sabadoa had become a permanent resident via his wife's sponsorship. In his application for the residency, he did not disclose the fact that his asylum claim was denied due to the exclusion decision.²⁶⁶ In 1997, when Mr. Sabadoa filed a citizenship application, he was found inadmissible to Canada.²⁶⁷

After a deportation order was issued, a long battle started for Mr. Sabadoa to stay in Canada. He filed an appeal to the Immigration Appeal division, which decided to discontinue his appeal based on section 196 of the IRPA that came into force in 2002. His two applications for leave and judicial review were dismissed by the Federal Court in 2006.²⁶⁸ Mr. Sabadao discontinued his application for leave and judicial review against a negative PRRA decision rendered in 2003. In 2006, his application for the spousal sponsorship was rejected "on the same grounds of inadmissibility pursuant to subsection 35(1) of the *IRPA*."²⁶⁹ In the same year, his application for PRRA against a removal order was also rejected. The subsequent application for leave was denied in 2007.

Mr. Sabadao's application for permanent residence on H&C grounds was also rejected in 2013.²⁷⁰ His application for judicial review was dismissed in 2014 as well. In rejecting Mr. Sabadoa's application for leave and judicial review against the negative decision of an immigration officer, Justice de Montigny stated that "[i]t is of course unfortunate that **it took seven years for the government to process the Applicant's H&C application**, thereby extending his establishment in Canada and rendering his removal more painful."²⁷¹ However, the seven-year delay in processing his application *per se* is insufficient to decide in favour of the applicant. His establishment in Canada "must be balanced with **Canada's commitment not to become a safe haven for perpetrators of crimes against humanity**."²⁷² According to one of his lawyers, Mr. Sabadao was still in Canada by 2018. His lawyer stated that their files waited for years in Ottawa.²⁷³

According to the lawyer, there is a special unit processing the applications with criminal and security problems. The unit balances the risk of returning an applicant to persecution, torture, cruel, unusual treatment or death with the threat they pose to Canada.²⁷⁴ For unknown

²⁶⁶ *Sabadao v. Canada (Citizenship and Immigration)*, *supra* note 263 at para 5.

²⁶⁷ *Sabadao v. Canada (Citizenship and Immigration)*, *supra* note 263 at para 6.

²⁶⁸ *Sabadao v. Canada (Citizenship and Immigration)*, *supra* note 263 at para 7.

²⁶⁹ *Sabadao v. Canada (Citizenship and Immigration)*, *supra* note 263 at para 9.

²⁷⁰ *Sabadao v. Canada (Citizenship and Immigration)*, *supra* note 263 at para 9.

²⁷¹ *Sabadao v. Canada (Citizenship and Immigration)*, *supra* note 263 at para 3738. [Emphasis added]

²⁷² *Ibid.* [Emphasis added]

²⁷³ Interview with A1.

²⁷⁴ Interview with A1.

reasons, these applications stay in Ottawa for years “waiting for some kind of a decision on balancing.”²⁷⁵ The lawyer thinks that since the government knows these applicants are often at risk, it does not prefer to make a decision on the case. On the one hand, the Minister does not want to deport these individuals. On the other hand, “they cannot seem to accept somebody that has...security or criminal problem. So, the solution is often just doing nothing with these people, not making the decision. So, these kinds of cases just sit there.”²⁷⁶

Mr. Sabadao’s lawyer underlined that their client was fighting in the Philippine Army which is not a criminal organization. The Army might have been involved in questionable operations; however, simply serving in that army cannot make someone a war criminal. The notion of morality that I discussed under Mazima’s case arises in Mr. Sabadao’s case as well.

A1: They can be spending their time and resources may be on real security threats and real terrorists who are infiltrating our country. But why are they spending resources on these people? It is so unfair that [immigration officers or administrative judges] create litigation and sometimes successfully, and then we have to repeat procedures and steps because it is just an absurdity. Once you have this stigma attached to having a security problem or criminal problem, you are fighting an appeal battle for these people.

In 2006, Mr. Sabadao was interviewed by a magazine called The North American Filipino Star. In his interview, he stated that there was an error of translation when he was asked whether he killed anyone during his hearing for asylum. According to the records, Mr. Sabadao answered this question twice affirmatively in 1992 and 1993.²⁷⁷ In his interview with The North American Filipino Star, he explained that he never engaged in a battle as a soldier of the Philippine Army because “his platoon was sent only to man the outpost for security of the village.”²⁷⁸ However, the minutes of the hearings stated that his explanation was not credible because he answered the same question differently. The Magazine underlined that “from then on, the judges were consistently accusing him of being a “war criminal.”²⁷⁹ It is not clear; from what records or evidence he was labeled a “war criminal.”²⁸⁰

The magazine published the quotes from a report prepared by Mr. L.K. Chiu of Immigration & Citizenship Canada. Accordingly, Danius Sabadao was a second lieutenant responsible for “a platoon of 30 soldiers”; obeyed governmental orders; took a part in

²⁷⁵ Interview with A1.

²⁷⁶ Interview with A1.

²⁷⁷ *Sabadao v. Canada (Citizenship and Immigration)*, *supra* note 263 at para 12.

²⁷⁸ “Urgent appeal for Canadian justice!” *The North American Filipino Star* (July 2006), online: <<http://www.filipinostar.org/>> at 1.

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

assignments and directed military operations involving “combat, murder, illegal arrest and torture”; **“has committed a number of crimes against humanity as a result of the above acts that these crimes against humanity”** constituting the crimes of murder, kidnapping, and aggravated assault under Canadian law.²⁸¹

The magazine also stated that “Mr. Sabadao’s own testimony was used against him” for these allegations.²⁸² In the editorial section, Zenaida Ferry Kharroubi questioned whether the Board had “any first hand knowledge of the country’s conditions” between 1979 and 1984 “when Mr. Sabadao was a soldier”.²⁸³ According to the evidence that his lawyer presented, it was plausible to believe that Mr. Sabadao never engaged in warfare with a New People’s Army (NPA) member because NPA was not active in the region where “he was assigned”.²⁸⁴ It is thus astonishing that before “the Immigration courts, one is presumed guilty even without any evidence and is subject to deportation”.²⁸⁵

3. Analysis of the *Sabadao* decision: decision-makers and administrative judges using criminal justice arguments, impairing the presumption of innocence

Leveraging on the case of *Sabadao* and the interviewees’ testimonies, this section will analyze the consequences of the limbo situation based on three arguments. First, an inordinate delay caused by the government and judiciary in processing or reviewing cases where the individual was found inadmissible or excluded under Article 1F could amount to an abuse of process under section 7. Second, serious psychological harm caused by a stigma attached to a person’s reputation as a result of these proceedings might violate the security of the person under section 7. Finally, in contrast to a criminal court judge, an administrative court judge has the power to label a person criminal, solely based on lax evidence rules. This labeling eventually impairs the presumption of innocence and invalidates the reasoning of the Supreme Court of Canada in the *Ezokola* decision that an exclusion determination is not a penal decision. The following paragraphs will explain these arguments by taking our case study as a focal point.

Mr. Sabadao has been living in a limbo situation for over two decades in Quebec. Being married to a Canadian citizen does not affect his situation. As acknowledged by the Federal Court, Mr. Sabadao “has been married for almost 20 years, but his status in Canada has been uncertain for approximately the same amount of time.”²⁸⁶ It is true that certain parts of this long process were caused by Mr. Sabadao’s own decisions such as discontinuing applications or

²⁸¹ *Ibid* at 4. [Emphasis added]

²⁸² *Ibid* at 4.

²⁸³ *Ibid* at 2.

²⁸⁴ *Ibid* at 2.

²⁸⁵ *Ibid* at 2.

²⁸⁶ *Sabadao v. Canada (Citizenship and Immigration)*, *supra* note 263 at para 15.

appeals. However, the disproportionate period of delay was caused by the government to process his applications. Justice de Montigny acknowledged that it was “unfortunate” for the government to process Mr. Sabadao’s application in seven years.²⁸⁷ It is not only unfortunate but also unfair that Mr. Sabadao had to wait long years while continuing his establishment in Canada, only to be deported in the end.

An unreasonable delay inducing serious prejudice to the individual may breach fundamental principles of justice under section 7.²⁸⁸ Canadian courts first review whether the delay was reasonable and then analyze whether an inordinate delay has caused prejudice.²⁸⁹ In *Power*, Justice L’Heureux-Dubé wrote for the majority that the proceedings that are “unfair to the point that they are contrary to the interests of justice” could be considered for the abuse of process.²⁹⁰ It is not the delay in and of itself, but an unreasonable and excessive delay might amount to a violation of the duty of fairness.²⁹¹ The person subjected to the delay must show that “the delay was unacceptable to the point of being so oppressive as to taint the proceedings.”²⁹²

Lorne Waldman argued that, in three cases, Canadian courts have determined the abuse of process due to an inordinate delay caused by immigration authorities: *Parekh*²⁹³, *Beltran*²⁹⁴, *Fabbiano*²⁹⁵ where they also proved the “evidence of prejudice.”²⁹⁶ In *Parekh*, the Federal Court Judge decided that the delay in processing the applicants’ file involving revocations of their citizenship was not normal. The judge could not find a “satisfactory explanation for the delay of three and a half years...to move the revocation process forward.”²⁹⁷ The Court further noted that “the delay in the treatment of the possible revocation of their citizenship has caused the Defendants great psychological stress.”²⁹⁸ All these factors resulted in the abuse of power.²⁹⁹

In *Beltran*, Justice Harrington decided that declaring that a non-citizen who acquired refugee status in 1988 was inadmissible was an abuse of process because the Minister had “all relevant information for 22 years”.³⁰⁰ Fundamental principles of natural justice and the rule of

²⁸⁷ *Sabadao v. Canada (Citizenship and Immigration)*, *supra* note 263 at para 37.

²⁸⁸ Waldman, *supra* note 51 Introduction.

²⁸⁹ *Ibid.*

²⁹⁰ *R v Power*, [2004] 1 SCR 601 at 616.

²⁹¹ *Blencoe v. British Columbia (Human Rights Commission)*, *supra* note 53 at para 121.

²⁹² *Ibid.*

²⁹³ *Canada (Citizenship and Immigration) v Parekh*, 2010 FC 692.

²⁹⁴ *Beltran v Canada (Citizenship and Immigration)*, 2011 FC 516.

²⁹⁵ *Fabbiano v Canada (Citizenship and Immigration)*, 2014 FC 1219.

²⁹⁶ Waldman, *supra* note 51 Introduction.

²⁹⁷ *Canada (Citizenship and Immigration) v. Parekh*, *supra* note 293 at para 39.

²⁹⁸ *Ibid* at para. 47.

²⁹⁹ *Ibid* at para. 75.

³⁰⁰ *Beltran v. Canada (Citizenship and Immigration)*, *supra* note 294 at para 1.

law require that an individual be provided “a fair opportunity to answer the case against him. That opportunity has been lost. It was abusive to issue an opinion in 2009 that Mr. Beltran is inadmissible considering that the authorities had been aware of his situation for 22 years.”³⁰¹

In *Fabbiano*, the Minister of Public Safety and Emergency Preparedness delayed communicating a decision of referral for an admissibility hearing to the applicant for four years. Justice O’Reilly held that the delay with no explanation prejudiced him amounting to the abuse of process.³⁰²

However, in *Memon*, Justice Annis found that the excessive delay was a result of legal procedures under s. 34 inadmissibility, “intervening procedure” and Mr. Memon’s “own contribution to the delay” to conclude that, despite being unacceptable, the delay was not oppressive.³⁰³ Likewise, in *Kanagaratnam*, Justice Diner decided that an eleven-year delay was due to the case’s “factual complexity (including the presence of classified information), the involvement of agencies and the presence of departmental reorganizations during its adjudication” to dismiss the applicant’s judicial review.³⁰⁴ The Federal Court judges ignored that none of these factors are attributable to the individual concerned.

The case-law shows that there is no consensus among Federal Court judges; the decisions on what constitutes an unreasonable and inordinate delay prejudicing the applicant are still varying. However, there are sufficient grounds to argue that the delay in Mr. Sabadao’s case can be considered unreasonable and inordinate, amounting to an abuse of process, as Mr. Sabadao suffered from the prejudice of being branded a war criminal.

In certain cases, the psychological hardship that excluded individuals like Mr. Sabadao must have endured due to the stigma might be violating the security of the person as protected under section 7 of the Charter. Security of the person covers both physical and psychological security.³⁰⁵ In *Blencoe*, the Supreme Court of Canada determined that “the right to security of the person guaranteed by s. 7 protects the psychological integrity of an individual.”³⁰⁶ The psychological harm must be serious and led by a state action to be considered for within the ambit of section 7.³⁰⁷

In *G. (J.)*, the court explained that “the impugned state action must have a serious and profound effect on a person’s psychological integrity” to restrict the security of the

³⁰¹ *Ibid* at para. 54.

³⁰² *Fabbiano v. Canada (Citizenship and Immigration)*, *supra* note 295 at paras 22–29.

³⁰³ *Memon v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 908 at para 93.

³⁰⁴ *Kanagaratnam v. Canada (Citizenship and Immigration)*, *supra* note 112 at para 49 and 84.

³⁰⁵ Department of Justice Government of Canada, *supra* note 50.

³⁰⁶ *Blencoe v. British Columbia (Human Rights Commission)*, *supra* note 53.

³⁰⁷ *Ibid*.

person.³⁰⁸ The impacts of the state intervention have to be evaluated “objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.”³⁰⁹

In *Blencoe*, the respondent claimed *inter alia* that the delay in proceedings before the Human Rights Commission in a sexual harassment case had caused a stigma and prejudice against him. Writing the majority’s decision, Justice Bastarache stated that inordinate delay constitutes an abuse of process where the delay has directly engendered serious psychological harm to an individual, “or attached a stigma to a person’s reputation, such that the human rights system would be brought into disrepute”.³¹⁰ The s. 7 security of the person’s interest would not be easily triggered by “the type of stress, anxiety and stigma that result from administrative or civil proceedings.”³¹¹ Dignity and reputation are underlying values of the Charter. In *Hill v. Church of Scientology of Toronto*³¹², the Supreme Court decided that “the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the Charter rights. It follows that the protection of the good reputation of an individual is of fundamental importance to our democratic society.”³¹³ However, in dissenting from the majority’s decision rendered by the British Columbia Court of Appeal, Justice Lambert wrote that “[n]one of that stigma was brought about by the processes under” the relevant human rights legislation.³¹⁴ The Supreme Court of Canada relied on Justice Lambert’s reasoning to rule out that Mr. Blencoe’s suffering was a result of the human rights proceedings.

Contrary to *Blencoe*, in the case of Sabadao, the stigma was brought by the process under the IRPA. Although Mr. Sabadao’s lawyers did not bring up the argument based on the psychological harm, as Mr. Sabadao’s interview with the magazine and interviewees’ corroborating testimonies suggest, some cases where excluded or inadmissible individuals stay in Canada for long years with a label of war criminal or terrorist would have a serious and profound effect on the person’s psychological integrity. In fact, Jennifer Bond’s research showed that some of these individuals “committed suicide after years of being in a state of indefinite limbo.”³¹⁵

³⁰⁸ *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46.

³⁰⁹ *Ibid* at para. 60.

³¹⁰ *Blencoe v. British Columbia (Human Rights Commission)*, *supra* note 53 at para.115.

³¹¹ *Ibid*.

³¹² *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130.

³¹³ *Ibid* at para. 120. [Emphasis added]

³¹⁴ *Blencoe v. British Columbia (Human Rights Commission)*, *supra* note 53 at para. 29.

³¹⁵ Bond, “Unwanted but Unremovable”, *supra* note 100 at 169 and 186.

Finally, the case of *Sabadao* exemplifies that an administrative judge has the power to label a person criminal, whereas a criminal court does not hold such an unlimited power without crossing the beyond the reasonable doubt threshold. Throughout Mr. Sabadao's decision, he was referred to as a criminal, as if an administrative decision was his conviction. For example, Justice de Montigny referred to him as "excluded because of his direct participation in crimes against humanity."³¹⁶ Likewise, Justice de Montigny stated that "CRDD had excluded him on the grounds that he had committed crimes against humanity while working for the Philippine Army."³¹⁷ The latter conflicts with the reasoning of the *Ezokola* decision where the Supreme Court of Canada determined that the purpose of the exclusion clause is not to "determine guilt or innocence" but to exclude those "who are not *bona fide* refugees".³¹⁸ This is the reason why the IRB hearings are determined to be less stringent than criminal trials.³¹⁹ Exclusion determinations are solely administrative, not penal decisions.³²⁰ Therefore, safeguards in criminal procedural law such as "traditional rules of evidence" are unnecessary in a refugee hearing.³²¹

Contrary to the reasoning of the Supreme Court of Canada in the *Ezokola* decision, in the *Sabadao* decision, the Federal Court and immigration officers treated him as if his criminality was already established. An immigrant officer claimed that rejecting Mr. Sabadao's application on humanitarian and compassionate grounds contributed to international justice and human rights.³²² In the same vein, Justice de Montigny stated that Mr. Sabadao's establishment in Canada for decades "must be balanced with Canada's commitment **not to become a safe haven for perpetrators of crimes against humanity**."³²³ Perhaps it is not surprising that administrative court judges and immigration officers rely on criminal justice arguments because Canada has named exclusion and inadmissibility proceedings as remedies to fight against impunity. However, as explained in Chapter III, justice is not served by denying access to Canada or causing people to live in limbo for decades.

³¹⁶ *Sabadao v. Canada (Citizenship and Immigration)*, *supra* note 263 at para 39. [Emphasis added]

³¹⁷ *Sabadao v. Canada (Citizenship and Immigration)*, *supra* note 263 at para 5. [Emphasis added]

³¹⁸ *Ezokola v Canada (Citizenship and Immigration)*, 2 SCR 40 at para 38.

³¹⁹ *Ibid* at para. 39.

³²⁰ The Supreme Court of Canada stated that "A refugee hearing is not a criminal trial before an international tribunal. International criminal tribunals render verdicts for some of the most serious crimes in the international legal order. In contrast, the Board makes exclusion determinations; it does not determine guilt or innocence." *Ibid* at para. 38

³²¹ "To achieve this purpose, Board hearings tend to be less formal than criminal trials. The Board is not bound by traditional rules of evidence... Section 162(2) of the *IRPA* instructs each division of the Board to "deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit". *Ibid* at para. 39.

³²² "The Officer concluded that the objective of promoting international justice and human rights outweigh the objective of family reunification in the present case." *Sabadao v. Canada (Citizenship and Immigration)*, *supra* note 263 at para 15.

³²³ *Sabadao v. Canada (Citizenship and Immigration)*, *supra* note 263 at para 37. [Emphasis added]

Labeling Mr. Sabadoa like a criminal convict without a verdict also violates the presumption of innocence. In *Mills*, Justice Lamer, in dissent, stated that “under s. 11(b), the security of the person is to be safeguarded as jealously as the liberty of the individual.”³²⁴ Security of the person includes both physical integrity and safeguard against “overlong subjection to” the difficulties and uncertainty “of a pending criminal accusation”.³²⁵ These problems “include stigmatization of the accused, loss of privacy, stress and anxiety” deriving from several factors such as “possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction. These forms of prejudice cannot be disregarded nor minimized when assessing the reasonableness of delay.”³²⁶ The presumption of innocence protects the accused against stigmatization by limiting the time for a criminal trial that can be harmed by the effect caused by the public nature of criminal proceedings on the accused.³²⁷ Thus, section 11 (b) ³²⁸ of the Charter protects the accused from excessive prejudice by delimiting the period for a criminal trial.³²⁹ Justice Lamer eloquently stated that

many pay no more than lip service to the presumption of innocence. Doubt will have been sown as to the accused's integrity and conduct in the eyes of family, friends and colleagues. The repercussions and disruption will vary..., but they inevitably arise and are part of the harsh reality of the criminal justice process.³³⁰

Justice Lamer’s reasoning is applicable solely to criminal matters. In other words, trying an accused within a reasonable time as articulated under section 11 (b) of the Charter solely applies to criminal matters and “cannot be imported into s. 7. There is no analogous provision to s. 11(b) which applies to administrative proceedings, nor is there a constitutional right outside the criminal context to be ‘tried’ within a reasonable time.”³³¹ Although individuals like Sabadao have to endure a similar stigma, “loss of privacy, stress and anxiety” similar to an accused in a criminal trial, they are not afforded a right to be tried within a reasonable time under section 11 (b).

In *Blencoe*, Justice Bastarache underlined that, because the accusation in itself causes serious social and personal repercussions on the accused that are “the unavoidable consequences of an open and adversarial judicial system”, “a security interest” of the accused may be engaged.³³² This section demonstrated the grave social and personal consequences of

³²⁴ *Mills v The Queen*, [1986] 1 SCR 863 at para 145.

³²⁵ *Ibid* at para. 145

³²⁶ *Ibid* at para. 145

³²⁷ *Ibid* at para. 146

³²⁸ According to section 11(b) of the Canadian Charter of Rights and Freedoms, “Any person charged with an offence has the right:... (b) to be tried within a reasonable time”

³²⁹ *Mills v. The Queen*, *supra* note 324 at para 148.

³³⁰ *Ibid* at para. 146

³³¹ *Blencoe v. British Columbia (Human Rights Commission)*, *supra* note 53 at para.88.

³³² *Blencoe v. British Columbia (Human Rights Commission)*, *supra* note 53 at para.95.

these proceedings on the applicant, including but not limited to stigma. Once Article 1F is engaged, the process becomes adversarial. In the case of *Sabadao*, the Federal Court's decisions labeling him as a criminal are open to the public. As a result, excluded or inadmissible individuals whose files are open to the public are stigmatized by state pronouncements.

Another consideration should be given to the possible abuse of process by immigration officers and the Federal Court judges of labeling applicants as war criminals, torturers, or terrorists. All public decision-makers must act according to the general duty of fairness conforming "with the principles of natural justice and procedural fairness."³³³ In *Martineau*, Justice Dickson asked, "[d]id the tribunal on the facts of the particular case act fairly toward the person claiming to be aggrieved?...this is the underlying question which the courts have sought to answer in all the cases dealing with natural justice and with fairness."³³⁴ Having labelled Mr. Sabadao a criminal, the Federal Court and immigration officers inflicted psychological stress on him that makes him an aggrieved party.

In conclusion, the case of *Sabadao* epitomizes all points that the interviewees observed in their daily practice. The government refrains from making decisions on these cases. Decision-makers and administrative judges overlook the fact that living in a limbo situation for a long time causes serious hardships to applicants. Unfortunately, as the *Sabadao* decision proves, this kind of hardship is not considered disproportionate.³³⁵ Administrative decisions involving excluded or inadmissible individuals do not only affect the applicants but also their families and children; issuing a deportation order after decades of litigation cut them off from their community and families, the fact of which had been given little consideration in legal decisions. None of Mr. Sabadao's applications to remain in Canada was accepted after an exclusion decision; labelling someone a criminal could potentially affect the subsequent proceedings. Mr. Sabadao's interview with the magazine also proves how much he was traumatized by an administrative decision labelling him a war criminal, which was a decision rendered based on his own testimony with no external evidence.

On the one hand, people like Mr. Sabadao suffer from the stigma attached to being branded a war criminal with an administrative decision. On the contrary, senior-level politicians such as former Ivorian President Laurent Gbagbo and his defence minister Charles Blé Goudé, who was accused of the post-election atrocities claiming 3,000 people's lives in 2011, were

³³³ *Blencoe v. British Columbia (Human Rights Commission)*, *supra* note 53 at para.105. *Martineau v Matsqui Institution*, [1979] 1 SCR 602 at 628.

³³⁴ *Martineau v. Matsqui Institution*, *supra* note 333.

³³⁵ Justice Montigny stated that "[w]hile there is no doubt that a removal would have an impact on the family unit, there is no disproportionate hardship" *Sabadao v. Canada (Citizenship and Immigration)*, *supra* note 263 at para 15.

acquitted by the International Criminal Court (ICC) because of the lack of evidence.³³⁶ Likewise, the ICC Appeals Chamber acquitted the former Vice-President of the Central African Republic, Jean-Pierre Bemba in 2018 because the evidence could not reach the threshold of “the required degree of proof, that Bemba as a military commander, failed to take the necessary and reasonable measures to prevent and/or to punish the crimes.”³³⁷ As attested by one interviewee, dichotomously, individuals who are labeled as war criminals or perpetrators of crimes against humanity by the virtue of immigration provisions would often not meet the test under criminal law standards.³³⁸

One important function of criminal justice systems is victims’ status in these proceedings and the restorative power that the system endows to the victims. Punishing the guilty and restoring public order are not sole functions of criminal proceedings; criminal law is also concerned with ending “victims’ suffering and [helping] them to rebuild their lives”.³³⁹ This restorative process is generally considered as necessitating “not only recognition of the wrong committed and the consequent guilt of the perpetrator, but also the acknowledgement by judicial institutions and society as a whole of the victims’ suffering”.³⁴⁰ Victims of crimes and human rights violations are more satisfied when they can take an active part in criminal proceedings.³⁴¹ The vast majority of national and international criminal justice systems allow the participation of victims in criminal proceedings to a certain degree.³⁴² This participation would allow them to “have a restorative power”.³⁴³

Canada’s bifurcated approach towards excluded individuals takes us to the gist that decision-makers and administrative court judges are using criminal justice arguments without holding the power of a criminal court and omitting fundamentals of criminal justice philosophy. Mr. Sabadao’s case suggests that immigration officers and administrative court judges consider the deportation of a person as a contribution to justice and human rights, without making the same rigorous analysis that an international criminal court does, and certainly without considering any concerns underlying national and international criminal justice systems, including victims’ participation into the process. However, as this part on Limbo demonstrated,

³³⁶ Abraham Kouassi, “Gbagbo acquittal: ‘3,000 dead, and no one guilty!’”, (1 April 2021), online: *JusticeInfo.net* <<https://www.justiceinfo.net/en/75568-gbagbo-acquittal-3000-dead-no-one-guilty.html>>.

³³⁷ Richard Goldstone, “Acquittals by the International Criminal Court”, (18 January 2019), online: *EJIL: Talk!* <<https://www.ejiltalk.org/acquittals-by-the-international-criminal-court/>>.

³³⁸ Interview with A10.

³³⁹ Mina Rauschenbach & Damien Scalia, “Victims and international criminal justice: a vexed question?” (2008) 90:870 *International Review of the Red Cross* 443 at 443.

³⁴⁰ *Ibid* at 443.

³⁴¹ *Ibid* at 445.

³⁴² *Ibid* at 445.

³⁴³ *Ibid* at 445.

this approach only engenders a stigma and families living in limbo for decades with no contribution to public order, with no punishment of the guilty, without restoring the suffering of victims of the human rights abuses.

Conclusion: emerging group of disenfranchised non-citizens in the Global North

The previous section explained that non-citizens who are excluded under Article 1F or found inadmissible for security reasons, sit in limbo with limited rights and serious social and economic challenges until a final decision is made on their cases in Canada.

The earlier literature explained the hardship that non-citizens who are suspected or convicted of criminality or security risks have endured in Canada. Jennifer Bond analyzed in-depth “Canada’s treatment of migrants who are ‘undesirable’ for reasons of alleged criminality but who cannot be removed.”³⁴⁴ Bond stated that some of these individuals “committed suicide after years of being in a state of indefinite limbo.”³⁴⁵ Angus Grant highlighted the adverse impacts of “an inadmissibility finding, particularly one related to allegations of terrorism and/or security” as “stigma, isolation, bars on the ability to work and permanent separation” from family.³⁴⁶

Jennifer Bond underlined that refugee claimants who are found inadmissible on SHSO grounds are in a particularly precarious situation: they will be either deported in spite of real danger or stay in Canada “but without stable or predictable status, effectively in a state of legal limbo.”³⁴⁷ Angus Grant stated that if non-citizens who are found inadmissible are lucky enough to “receive a positive risk assessment under s97” as a result of their PRRA, “they then enter into a period of indefinite limbo with no assurances that they will be permitted to work, to receive healthcare or other social services and with” the constant removal possibility.³⁴⁸ For example, Mr. Harkat who was subjected to the security certificate, was frustrated “at his state of legal limbo, one in which he has never been charged with, much less convicted of, a crime.”³⁴⁹

The “limbo” situation does not only occur in Canada but also in several other Global Northern states to deal with the status of Global South people in their territories. The situation

³⁴⁴ Bond, “Unwanted but Unremovable”, *supra* note 100 at 169 and 168.

³⁴⁵ Bond, “Unwanted but Unremovable”, *supra* note 100 at 169 and 186.

³⁴⁶ Angus G Grant, *Confronting (In)security: forging Legitimate Approaches to Security and Exclusion in Migration Law* (University of York, 2016) [unpublished] at 132, n 126.

³⁴⁷ Jennifer Bond, Nathan Benson & Jared Porter, “Guilty by Association: Ezokola’s Unfinished Business in Canadian Refugee Law” (2020) 39:1 Refugee Survey Quarterly 1–25 at 14.

³⁴⁸ Grant, *supra* note 346 at 310.

³⁴⁹ Matthew Behrens, “Kafka’s Canada at 15: The secret trials of Mohamed Harkat”, (29 November 2017), online: *rabble.ca* <<https://rabble.ca/columnists/kafkas-canada-15-secret-trials-mohamed-harkat/>>.

of excluded individuals who cannot be removed nor allowed to stay has been subject to academic debate, more in Europe than in Canada. In the literature, these individuals were given different names: undesirable and yet unreturnable individuals (UBUs), non-returnable 1F-excluded individuals. The most comprehensive research on undesirable and yet unreturnable individuals was conducted by Professors David Cantor and Joris van Wijk, as a two-year collaborative project of the Centre for International Criminal Justice (CICJ), at VU Amsterdam, and the Refugee Law Initiative (RLI), School of Advanced Study, University of London. The project analyzed “the legal and policy challenges surrounding” non-citizens “who are suspected of serious criminality but who cannot be” deported from host states.³⁵⁰ The project underlined that the quintessential profile of “undesirable and yet unreturnable individuals” derives from the enforcement of Article 1F.³⁵¹ The number of non-citizens who found themselves in the limbo situation due to Article 1F exclusion has been estimated to be hundreds in Europe and North America.³⁵² This number increases to thousands when it comes to non-citizens who are deemed “undesirable” due to criminal activity that occurred in Europe and North America.³⁵³

States are challenged by “an unusual situation” in which some excluded individuals “are trapped in limbo.”³⁵⁴ Because international law does not regulate their situation, “many of these individuals live in limbo and destitution.”³⁵⁵ The legal limbo is a result of the non-refoulement principle which does not allow excluded individuals to be returned to their country of origin.³⁵⁶ Some unreturnable and undesirable individuals who were excluded under the UNHCR’s mandate also ended up living in a limbo situation in refugee camps.³⁵⁷

Sarah Singer analyzed the situation of “undesirable and yet unreturnable individuals” who, after being excluded in the U.K., cannot be deported “to their country of origin, nor removed to a third State for prosecution”.³⁵⁸ Singer concluded that these people stay in legal limbo, “subject to a precarious legal status, the threat of removal ever-present.”³⁵⁹ Like in Canada, they have no status with a constant prospect of deportation from the U.K.

³⁵⁰ David James Cantor et al, “The Emperor’s New Clothing: National Responses to ‘Undesirable and Unreturnable’ Aliens under Asylum and Immigration Law” (2017) 36:1 Refugee Survey Quarterly 1–8 at 2.

³⁵¹ *Ibid* at page 3.

³⁵² Refugee Law Initiative & Centre for International Criminal Justice, *supra* note 212.

³⁵³ Cantor et al, “The Emperor’s New Clothing”, *supra* note 350 at 4, n 9.

³⁵⁴ Putranto, Christian Donny, “Excluded from the refugee protection but unreturnable: The international human rights protection of the undesired.” (2015) 22 Australian International Law Journal at 1.

³⁵⁵ *Ibid* at 14.

³⁵⁶ Mariagiulia Giuffrè, *Expelling Undesirable Foreigners: The Challenge of Human Rights* (2015) at 2.

³⁵⁷ James C Simeon, “Refugee Adjudication under the UNHCR’s Mandate and the Exclusion Dilemma” (2017) 2:75 De Lege Ferenda Cambridge Law Review.

³⁵⁸ Sarah Singer, “‘Undesirable and Unreturnable’ in the United Kingdom” (2017) 36:1 Refugee Survey Quarterly 9–34 at 26.

³⁵⁹ Sarah Singer, “‘Undesirable and Unreturnable’ in the United Kingdom” (2017) 36:1 Refugee Survey Quarterly 9–34 at 26.

Maarten Bolhuis argued that the ‘no safe haven’ policy of some states has resulted in a significant number of unremovable excluded non-citizens living in legal limbo because their “guilt or responsibility will never be properly determined in a criminal trial.”³⁶⁰ These people, who face significant social, economic, and psychological hardships for long years, are often going to stay in a host state “or disappear from the radar and relocate elsewhere in Europe”.³⁶¹ Bolhuis mentioned that “by the year 2017, some of these individuals have been in legal limbo in the Netherlands for twenty years.”³⁶² Likewise, Reijven and Van Wijk stated that due to the protection afforded by Article 3 of the ECHR, some excluded individuals cannot be deported from the Netherlands nor can they access “refugee or subsidiary protection and corresponding rights in the Netherlands”.³⁶³ These unreturnable but undesirable individuals stay in legal limbo, “equaling a situation of 20th-century ‘universal banishment’”.³⁶⁴

In another study, Joris van Wijk and Maarten Bolhuis exemplified the situation of an Afghan national, Rafiq Naibzay, who was excluded from protection under Article 1F in the Netherlands and “lived in legal limbo for years.”³⁶⁵ Analyzing unreturnable and undesirable non-citizens’ situation in Belgium, Denmark, Sweden and Norway, the authors determined that excluded individuals “temporarily end up in ‘legal limbo’” whilst the same group of individuals can be deported if the non-refoulement principle is inapplicable.³⁶⁶ Many excluded individuals who cannot be removed and permitted to stay in a European state, face a legal limbo situation, to which no European country has found “an all-encompassing solution” other than exchanging information about these people crossing their borders.³⁶⁷ The authors recommended European states find a sustainable policy for the aftermath of the exclusion decision.³⁶⁸

Finally, this research demonstrated the limbo situation that excluded or inadmissible individuals found themselves in Canada based on the case law and the interviewees’ perspective. This new group of disenfranchised non-citizens requires the attention of host states at a policy level, as it is unsustainable for them to live in an indefinite limbo situation. No

³⁶⁰ M P Bolhuis, *Narrowing the impunity gap?: How host states deal with alleged perpetrators of serious crimes excluded from international protection: a case study of the Netherlands* (Vrije Universiteit Amsterdam, 2018) [unpublished] at 181.

³⁶¹ *Ibid* at 50 and 181.

³⁶² *Ibid* at 142.

³⁶³ Joke Reijven & Joris van Wijk, “Alleged perpetrators of serious crimes applying for asylum in the Netherlands: Confidentiality, the interests of justice and security” (2015) 1:18 *Criminology & Criminal Justice* at 5.

³⁶⁴ *Ibid*.

³⁶⁵ *Study on the exchange of information between European countries regarding persons excluded from refugee status in accordance with Article 1F Refugee Convention*, by Maarten P Bolhuis & Joris van Wijk (Norwegian Directorate of Immigration, 2015) at 50.

³⁶⁶ *Ibid* at page 23.

³⁶⁷ *Ibid* at page 71.

³⁶⁸ *Ibid* at page 71.

regulation, law, international agreement, or convention regulates their status. The lack of regulation does not only harm them but also society at large.

The final report of the project on “unreturnable yet undesirable individuals”³⁶⁹ discussed existing policy responses of the selected countries from the Global North. These responses included extradition, domestic prosecution, providing diplomatic assurance, temporary residence permits, or a no-status situation.³⁷⁰ The report suggested to “limit the number of (allegedly) criminal migrants ending up in legal limbo” by diminishing the number of “undesirable and yet unreturnable individuals” or by “increasing the number of returns and removals”.³⁷¹ As a long-term solution, the project interviewees proposed a “balancing test” as the most viable option. According to the balancing test, the grave consequences of the limbo situation on an individual who has been living in a host state for long years will be weighed against “the interests of the state to prolong the status of undesirability (level of acute security threat, seriousness of the alleged crimes, mode of complicity, level of responsibility)”.³⁷² However, this solution is not viable for immigrants who live in limbo in Canada. A similar balancing test has already been included in PRRAs and permanent residency applications on humanitarian and compassionate grounds. Yet, as this chapter demonstrated, the success rate of these applications is low. Above all, decision-makers and administrative court judges do not often consider long years of living in Canada sufficient to lift the limbo situation.

According to the final report of the UBUs project, the EU member states discussed an option of “regularising irregular migrants” including “undesirable yet unreturnable” migrants according to certain criteria including “the level of cooperation of the migrants, the length of factual stay and integration efforts made by the migrant”.³⁷³ However, this option was rejected by the states’ experts as they preferred to hold “full discretionary powers in dealing with such matters, rather than being subjected to a harmonized approach.”³⁷⁴ Retaining full discretionary powers in dealing with immigrants in limbo once again reflects the state-centric approach adopted by the states in the criminalization of migration.

Although the earlier literature and policy options briefly evaluated concerns of immigrants-in-limbo, these solutions often center on the sovereign’s interests, setting aside inclusive and representative ideas. The last chapter of this thesis will thus analyze these

³⁶⁹ Thereafter, non-citizens who live in limbo because of an inadmissibility decision on SHSO grounds or exclusion decision will be referred as immigrants in limbo.

³⁷⁰ Refugee Law Initiative & Centre for International Criminal Justice, *supra* note 212 at 4.

³⁷¹ *Ibid* at 5.

³⁷² *Ibid*.

³⁷³ *Ibid*.

³⁷⁴ *Ibid*.

individuals' situations from a different standpoint, the Third World Approaches to International Law (TWAIL) which centers on hearing subaltern voices in decision-making procedure.

Chapter VI: Rethinking interests, struggles, and rights of immigrants in limbo

Introduction

This thesis started with one thematic question: what happens to individuals who had to flee their home countries but are suspected of serious criminality or considered to be a national security threat in their new homes. Throughout this thesis, I discussed legal instruments and Courts' decisions regulating these individuals' status, mainly in Canada. The previous chapter established that two main consequences of immigration decisions involving security risks and serious criminality in Canada are deportation and living in a protracted limbo situation. The last chapter of this thesis will solely discuss the status of these immigrants who are forced to live in a protracted limbo situation. The main reason why immigrants-in-limbo instead of deported individuals is the focus is that the literature has not yet discussed immigrants in limbo from a theoretical perspective: what does it mean for a society to have individuals who are locked in indefinite limbo, for the governance of the society and for these individuals? How do their presence and precarious status affect conversations along the Global North-South axis?

In answering these questions, this chapter argues that regulating these immigrants' status based on the existing discourse would lack inclusivity and representation since states do not prefer harmonized solutions that could restrict their discretionary powers in this domain.¹ The critical Third World scholarship provides firmer grounding for considering the interests and rights of immigrants who are forced to live in limbo in the Global North.² The last chapter of this thesis will thus focus on rethinking and shifting the existing discourse on these immigrants to alternatives.

The first section will recall the primary features of the TWAIL scholarship set out in the Introduction and will elaborate on how TWAIL can provide agency to immigrants in limbo. The first section argues that TWAIL is the continuation of liberalism through which individuals have been granted rights against tyranny; in which enlightenment is the guidance. Section 2 will discuss a paradox in liberal democracy: while liberal democracy emerged as freedom from tyrannical rulings, it still excludes segments of the population from having a political agency. This paradox becomes more salient considering human rights protection is also derived from libertarian thought but their current practice limits protection based on the individual's status in society.

¹ Please see *Chapter V- Conclusion: emerging group of disenfranchised non-citizens in the Global North*.

² Immigrants who are suspected or convicted of criminality or considered national security risks, and who live in limbo situation as per Chapter 5 will hereinafter be referred as immigrants in limbo or immigrants forced to live in limbo.

Based on the exclusionary nature of liberal democracy, Section 3 and 4 will then narrow down the discussion to immigrants in limbo to argue that they are members of a counter-hegemonic class. The class-based governance in liberal democracies has caused a modern caste system. Section 3 will draw on the membership and political justice theory, developed by Walzer, to situate members of this new immigrant class in the society, and understand the importance of its implications within a modern caste system. Finally, section 4 will propose the concepts of subalterns and counterpublics, developed by Nancy Fraser, as alternative approaches in which meaningful representation and inclusivity can be achieved.

1. TWAIL as a path to alternative narratives

The previous chapters have demonstrated that existing Article 1F practice and the inadmissibility on SHSO grounds cannot be understood without taking due account of their impact on their subjects. As to be discussed in the following paragraph, Article 1F and the inadmissibility on SHSO grounds have been predominantly used against refugee applicants coming from the Global South. Understanding how to ameliorate their conditions must then begin by returning to the concepts of TWAIL literature, set out in the Introduction.

Existing asylum movements are overwhelmingly from the Global South³; while the decisions on Article 1F and the inadmissibility clauses on SHSO grounds are mostly made to the detriment of persons coming from the Global South. Concrete data illustrates the contemporary exclusion trends in the Global North. Joke Reijven and Joris van Wijk's research shows that Afghan nationals constitute the biggest group of excluded individuals in the Netherlands, with 448 files among the 745 definite exclusion decisions⁴ reviewed between January 2000 and November 2010.⁵ At the top of the list, other refugees who are excluded are Iraqis, Angolans, Congolese, and Sierra Leonians.⁶ Similarly, James C. Simeon's research on 307 publicly accessible Article 1 F (a) cases in Canada shows that the top five countries, in terms of appellants' nationality or last habitual residence, are Sri Lanka, Haiti, Peru, El Salvador, and Guatemala.⁷ Angus Grant's research shows that almost 96% of the cases involving individuals subjected to inadmissibility (section 34 of the IRPA) are from the Global

³ Catherine Dauvergne, "The Troublesome Intersections of Refugee Law and Criminal Law" in Katja Franko Aas & Mary Bosworth, eds, *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford: Oxford University Press, 2013) at 2.

⁴ Definite exclusion decision means "it had not been revoked or had not (yet) been successfully appealed (as at November 2010-February 2011)." Joke Reijven & Joris van Wijk, "Caught in Limbo: How Alleged Perpetrators of International Crimes who Applied for Asylum in the Netherlands are Affected by a Fundamental System Error in International Law" (2014) 26:2 *Int J Refugee Law* 248–271 at 250.

⁵ *Ibid* at 251.

⁶ *Ibid* at 254.

⁷ James C Simeon, "The Application and Interpretation of International Humanitarian Law and International Criminal Law in the Exclusion of those Refugee Claimants who have Committed War Crimes and/or Crimes Against Humanity in Canada" (2015) 27:1 *Int J Refugee Law* 75–106 at 86.

South.⁸ Grant asserts that the government has used section 34 “in alarmingly asymmetrical ways, almost entirely against those from the Global South.”⁹

Mutua considered Third World as a “political reality...a set of geographic, oppositional, and political realities that distinguish it from the West.”¹⁰ Immigrants in limbo belong to this political reality that distinguishes themselves from the West. The data from the previous paragraph infers that Canada has a double standard in implementing Article 1F and the inadmissibility provision under section 34; foreigners who come from the Global North are mostly unaffected. Since the existing asylum movements are from South to North, it is understandable that refugee claimants from the Global South are subject to Article 1F. However, the enforcement of inadmissibility grounds indicates that Canada differentiates between foreigners of Global South and North. Otherwise, it would be hard to explain why members of a legitimate political party in the Global South (such as BNP) are found inadmissible to Canada for violating human rights, while the members of Western intelligence units are untouched.

For example, one interviewee explained that any employee of the CIA would be able to enter and live in Canada whereas any member of the secret services from the Global South would not get the same treatment. The law was used in a discriminatory way because Canada has never gone after a CIA or MOSSAD officer, although it knows when an officer comes to Canada. CIA has been engaged all over the world in subversion by force of governments, which constitutes an inadmissibility ground under section 34 of the IRPA. Any member of any intelligence services from the five eyes countries, any members of the militaries from any of the colonial powers should be inadmissible to Canada, but Canadian authorities would never proceed against them.¹¹

TWAIL aims to fully represent “all voices, particularly those non-state, nongovernmental, rural and urban poor” and demands to fully democratize “the structures of both national and international governance so that all voices can be heard.”¹² Discussions surrounding immigrants in limbo are rarely inclusive and representative. The previous research conducted on this topic is mostly doctrinal; a few empirical research provides a voice to these individuals.¹³ The normative framework regulating immigrants who are excluded as per Article

⁸ The data on Section 34 cases by country of origin (2002-2013). Angus G Grant, *Confronting (In)security: forging Legitimate Approaches to Security and Exclusion in Migration Law* (University of York, 2016) [unpublished] at 138.

⁹ *Ibid* at 311.

¹⁰ Makau Mutua, *What is TWAIL?* (Washington, 2000) at 35.

¹¹ Interview with A11.

¹² Mutua, *supra* note 10 at 37.

¹³ Two research having empirical components on these individuals are Joke Reijven & Joris van Wijk's and Angus Grant's research.

1F or found inadmissible on SHSO grounds are not informed by its subjects, either. In addition, the lack of inclusivity and representation of individuals coming from the Global South is adversely reflected in the Canadian court cases, as discussed in Chapters III through V.

Aiming to bring inclusivity and representation into the mainstream discourse, TWAIL is the continuation of liberalism. Liberalism originated from “a political philosophy that privileged individual liberty, property rights, and market freedom over mercantilist trade restrictions.”¹⁴ During the 20th century, liberalism was united with democracy in the Global North under a “‘liberal democracy’ banner.”¹⁵ It is true that democratic rights are bedrock against tyrannical ruling and guarantees basic human rights. However, democratic rights are limited and exclusionary, granted only to citizens. This fact puts liberalism as a political philosophy and liberal democracy in a conundrum. TWAILers draw attention to this paradox; by criticizing the origins of human rights, nation-state system, and the Western human rights model, TWAILers aim to make the vulnerable status of migrants visible. This critique of the human rights discourse would aspire to bring inclusivity and political agency into liberal democracy that is currently lacking.

2. Failure of liberal human rights practice to protect migrants

This section will discuss liberalism as the origins of human rights norms. I will then narrow down the discussion to liberalism from the perspective of migration studies and conclude with shortcomings of the existing human rights practice. Prominent TWAILers, most notably Mutua, criticize the origins of human rights norms and liberal democracy for being exclusionary and Western. Mutua’s critique is still valid as in the current interpretation of human rights norms migrants are excluded from democratic rights. The human rights discourse applies essentially to individuals who have political agency — the right to vote and to a certain extent wealth and influence — to support their claim. However, it is important to note that this part considers liberalism and liberal democracy as a political ideology based on Western-style representative democracy, epitomized by the right to vote. Liberalism here is not used as a philosophical approach, as a way of freedom or enlightenment. As such, this section criticizes the interpretation of liberalism solely in a political sense.

For Locke, individual liberty refers to the freedom of owning “economic possessions that could not be” appropriated by the state.¹⁶ As much as economic freedom, liberty refers to

¹⁴ Sean Phelan & Simon Dawes, “Liberalism and Neoliberalism” in *Oxford Research Encyclopedia of Communication* (Oxford Research Encyclopedia of Communication, 2018) DOI: 10.1093/acrefore/9780190228613.013.176 at 2.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

being subject to “nonarbitrary law ... to which the individual had consented.”¹⁷ For Gaus et al., liberty as an autonomy refers to having an “ability” and “effective power [...] to pursue one’s own ends.”¹⁸ Libertarians have had disagreements about the state’s interference with the “socioeconomic life, on the relation between property and liberty, and on fundamental conceptions of the good and the right.”¹⁹ Classical liberalism accepted the notion that the state should refrain from interfering with the individual’s and society’s life.²⁰ On the contrary, utilitarian libertarians supported state intervention as a requirement to mitigate the conditions of underprivileged members of society.²¹ The lack of having an ability and effective power in society such as living in poverty would significantly undermine individual freedom.²² As such, liberal thought includes ameliorating the conditions of underprivileged members of society. In fact, it was neo-libertarians who criticized utilitarians including Bentham and Mill for having tarnished “liberal ideals” with their “socialist and statist doctrines”.²³ For neo-libertarians, the society should be governed by a capitalist market economy complemented by liberal democracy and “a modest welfare state.”²⁴ TWAILers’ critique of human rights and liberalism in the following section should be read with this trend in the 20th century, conjoined with neoliberalism and the nebulous definition of liberalism.

2.1. Two oppositional interpretations of liberalism in migration studies

From a perspective of migration studies, liberalism has been originally unconcerned with migrants because the term mainly deals with internal affairs concerning individuals’ liberty from the state, and private property. As it was initially unconcerned with the status of foreigners, liberalism in migration studies has been interpreted in two opposite ways: (i) liberal thought implies unrestricted immigration because it centers on individual liberty, and (ii) liberal thought recognizes nation-state as a legitimate body to safeguard individual liberty whereas the same nation-state has been built on the concept of borders restricting immigration.

For Carens, liberalism could lead to open border policies. Interpreting Rawls’ “veil of ignorance”, Carens argued that the original position to govern society should be global rather than national because a person’s status, as a foreigner or a citizen, constitutes a social contingency and hence is morally arbitrary.²⁵ Rawls’ “veil of ignorance” questions how society

¹⁷ *Ibid.*

¹⁸ *Ibid.* [references omitted]

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ Kevin Vallier, “Neoliberalism” in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (2021).

²⁵ Rawls “argues that people in this original position would choose two principles. The first principle would guarantee equal liberty to all. The second would permit social and economic inequalities so long as they were to the advantage of the least well

would be governed if members of the society would not know any personal information about each other including race, gender, class, ethnicity, birthplace, generation, and talent.²⁶ As such, the original position would obscure an individual to know another person's place of birth or from which society they came from.²⁷ On the one hand, Carens concedes that liberalism derived from "the modern state and presupposes it."²⁸ Liberalism was not intended to tackle questions about foreigners; it presumed "the context of the sovereign state."²⁹ On the other hand, liberal arguments were also used to extend citizenship rights "to women and members of the working class."³⁰ Responding to the argument that the principle of equality applies "fully only to those who are already members of the community", Carens pointed out that the requirement of equal treatment was not granted to once excluded members of the society including workers, blacks, and women.³¹ In the beginning, liberals excluded them from these rights.³² The same logic could apply to the status of foreigners.

For global liberals, restrictions on immigration lack any moral justification.³³ Paul Hafner argued that liberalism would imply "open borders" because the state cannot prevent an individual's liberty to migrate.³⁴ Restrictions on immigration only benefit members of the wealthiest, "least crowded states."³⁵ Liberal states indeed have a responsibility to ensure the welfare and security of their citizens. However, this duty has been changed into a duty "to act in accordance with the wishes of their citizens" actualized through elections. Internal policies of the liberal state on borders and foreigners manifest "this particularistic version of the state's responsibilities."³⁶ These responsibilities undergird that liberal states' response to refugees depends on its internal political climate.³⁷

As much as leading to open border policies, liberalism could be the justification of borders. For Arendt, in the 20th century, human rights apply solely to citizens.³⁸ Human rights

off (the difference principle) and attached to positions open to all under fair conditions of equal opportunity. People in the original position would give priority to the first principle, forbidding a reduction of basic liberties for the sake of economic gains.⁶⁰ Joseph H Carens, "Aliens and Citizens: The Case for Open Borders" (1987) 49:2 *The Review of Politics* 251–273 at 255–256.

²⁶ John Rawls, *A Theory of Justice* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1999) at 118–119. Please also see Carens, "Aliens and Citizens", *supra* note 25 at 255–256.

²⁷ Carens, "Aliens and Citizens", *supra* note 25 at 257.

²⁸ *Ibid* at 265.

²⁹ *Ibid* at 265.

³⁰ *Ibid* at 265.

³¹ *Ibid* at 268.

³² *Ibid* at 268.

³³ Matthew J Gibney, "Liberal Democratic States and Responsibilities to Refugees" (1999) 93:1 *The American Political Science Review* 169–181 at 172.

³⁴ Hafner, Paula, "The Varying Degrees of Liberalism in Migration and Immigration Policy Within the European Union: Causes, Consequences and Clashes" (2016) 1:1 *Conspectus Borealis*.

³⁵ Gibney, *supra* note 33 at 172.

³⁶ Gibney, *supra* note 33 at 175.

³⁷ *Ibid*.

³⁸ Hannah Arendt, *The Origins of Totalitarianism* (San Diego New York London: A Harvest Book, 1976) at 295.

have value in communities. Refugees fall outside any community; “no law exists for them; not that they are oppressed but that nobody wants even to oppress them.”³⁹ Having a nationality has become a passport to demand human rights. The concept of nationality is the reason why the survivors of concentrations camps demanded “their nationality...as their only remaining and recognized tie with humanity.”⁴⁰

Human rights no matter how they are defined have been endowed to citizens; “these are rights of citizens whose loss does not entail absolute rightlessness.”⁴¹ The tragedy of this “rightlessness” is not that refugees do not have human rights, but they do not “belong to any community whatsoever”.⁴² Equality does not come with birth but comes from our decision to “guarantee ourselves mutually equal rights”.⁴³ Political communities from city-states to modern states are built on “ethnic homogeneity” eliminating differences.⁴⁴ As such, a foreigner is “a frightening symbol of the fact of difference” that should be destroyed.⁴⁵

Liberals accept the state “as a just institution” and support human rights.⁴⁶ Interpreting Arendt’s arguments, Andy Lamey argued that a disparity between the discourse “and the reality of human rights was rooted in a tension between human rights and national sovereignty.”⁴⁷ Prominent TWAILers such as Rajagopal and Mutua similarly pointed out the tension between human rights norms and sovereignty. For Rajagopal, international human rights law, its theory, and implementation originate from the “doctrine of sovereignty” despite “its anti-state rhetoric”.⁴⁸ States have both developed and enforced the normative framework of human rights.⁴⁹ Alternative narratives and methods to the human rights doctrine “with its historical connection to ideas of property and sovereignty” must replace it, to overcome its conventional consequences.⁵⁰ Human rights law is adopted by States at the international or constitutional level to provide legitimacy to their actions. Most human rights instruments assigned the protection of human rights to the state and these norms are actualized through “the expansion of the state.”⁵¹ The doctrine of sovereignty and “expansionary state” are thus at the core of the

³⁹ *Ibid* at 295-296.

⁴⁰ *Ibid* at 300.

⁴¹ *Ibid* at 295.

⁴² *Ibid* at 295.

⁴³ *Ibid* at 301.

⁴⁴ *Ibid* at 301.

⁴⁵ *Ibid* at 301.

⁴⁶ Andy Lamey, “A liberal theory of asylum” (2012) 11:3 *Politics, Philosophy & Economics* 235–257 at 236.

⁴⁷ *Ibid*.

⁴⁸ Balakrishnan Rajagopal, *International Law from Below Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003) at 246.

⁴⁹ *Ibid* at 187.

⁵⁰ *Ibid*.

⁵¹ *Ibid* at 186 and 189.

discourse.⁵² In fact, the state-centered human rights discourse is ubiquitous in the Canadian immigration regime. As explained in Chapter III, the Supreme Court of Canada decided that Parliament can enact legislation that “falls short of the” 1951 Refugee Convention’s protection.⁵³ In *Suresh*, the Court decided that in exceptional situation foreigners can be returned to the place of torture, ill-treatment, or death penalty.⁵⁴ Finally, Chapter V explained how the Court relied on the sovereignty argument to deny entrance or stay in Canada for certain non-citizens, including permanent residents.⁵⁵

Mutua argued that insofar as the human rights discourse is close to change, the movement becomes dogmatic. To prevent “the human rights movement” to be dogmatic, it has to change its direction from “moral, political, and legal certitude.”⁵⁶ Although human rights is a relatively young field, its norms have been set. This assertive approach in return blocks discussions about “the political and philosophical roots, nature, and relevance of the human rights corpus.”⁵⁷ Yet, Mutua’s critique of the human rights discourse ignores the fact that albeit taking time and often facing stiff political resistance, the interpretation of norms is constantly evolving. The protection of indigenous peoples and LGBTQ2+ communities was not envisaged by the drafters of the 1948 Universal Declaration. Likewise, the European Convention of Human Rights did not envisage that the protection from torture would protect returning migrants crossing from Libya to Europe. As discussed previously, women and black people were once not considered as persons.

It is true that human rights norms are not apolitical and derive from a political ideology. However, the principles of liberalism “have implications that the original advocates of the principles did not entirely foresee.”⁵⁸ For Carens, “the history of liberalism.... expand[s] both the definition of the public sphere and the requirements of equal treatment.”⁵⁹ On the contrary, Mutua, described liberal democracy as a prerequisite for human rights arguing that “human rights and Western liberal democracy are virtually tautological”.⁶⁰ For Mutua, liberalism, democracy, constitutional state, and human rights are enmeshed; it is not possible to understand human rights norms and its discourse without considering all other elements that formed this normative framework. One of these elements is constitutionalism. As human rights rules

⁵² *Ibid* at 191.

⁵³ *Febles v Canada (Citizenship and Immigration)*, 3 SCR 68 at para 64.

⁵⁴ *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 Supreme Court of Canada at para 78.

⁵⁵ *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711.

⁵⁶ Makau Mutua, “The Ideology of Human Rights” (1996) 36:3 *Virginia Journal of International Law* 589–657 at 655.

⁵⁷ *Ibid* at 655.

⁵⁸ Carens, “Aliens and Citizens”, *supra* note 25 at 251-273.

⁵⁹ *Ibid*.

⁶⁰ Mutua, *supra* note 56 at 592.

originated from liberalism, their implementation would necessitate a constitutional model.⁶¹ This model has five characters. The notion of “popular sovereignty” forms the basis of “political society” in which the public elects the government that “is accountable to the populace” according to the constitutional rules. As the main principle of liberal democracy, the government is restrained “in its powers through checks and balances and the separation of powers”.⁶² Judicial organs are “independent” and protect “legality and the rule of law”.⁶³ Finally, civil and political rights are formally declared.⁶⁴

Conventional doctrinalists and constitutionalists, two main human rights factions according to Mutua⁶⁵, establish “the human rights “orchestra” in which their proponents are the composers and conductors of the discourse; they “control” the content and map the margins of the discourse.”⁶⁶ Conventional doctrinalists dominantly rely on “positive law in treaties, custom, and other sources of international law as the basis for their activist advocacy or scholarly inquiry.”⁶⁷ For constitutionalists, human rights law necessitates “a constitutional regime and a philosophy” that is based on liberal democracy.⁶⁸ A constitutional system restrained in powers and “accountable to the broad public” constitutes the fundamentals of liberal democracy together with the development and universalization of human rights law. Liberalism engendered democracy, “which, in turn, now seeks to present itself internationally as the ideology of human rights.”⁶⁹

Slaughter defines liberal democracy as a system in which separation of powers, an elected government, protection of civil and political rights, and an independent judiciary are unified.⁷⁰ These elements of liberal democracy determine the relationship between “the State and individual and group actors in domestic and transnational society”.⁷¹ Liberal states amongst each other have stronger ties including legislative, judicial, administrative, and governmental cooperation that are grouped “in transnational society and interacting in multiple configurations across borders.”⁷²

⁶¹ *Ibid* at 592.

⁶² *Ibid* at 596.

⁶³ *Ibid* at 596.

⁶⁴ *Ibid* at 596.

⁶⁵ In analyzing the main human rights approaches, Mutua defined four categories, among them, are “conventional doctrinalists” and “constitutionalists or conceptualizers”. *Ibid* at 594.

⁶⁶ *Ibid* at 596.

⁶⁷ *Ibid* at 596.

⁶⁸ *Ibid* at 597.

⁶⁹ *Ibid* at 601.

⁷⁰ Anne-Marie Slaughter, “International Law in a World of Liberal States” (1995) 6:3 *Eur J Int Law* 503–538 at 511.

⁷¹ *Ibid* at 511.

⁷² *Ibid* at 538.

As analyzed in Chapter V, non-citizens can be judged according to which group of states they belong to, the liberal or non-liberal, rather than being judged as per their individual actual act or criminality. The “notions of morality” are integrated into the assessment of Article 1F(a) acts to the extent that some states are considered to be lacking “the basic markers of statehood.”⁷³ Kaushal and Dauvergne’s research demonstrated that these states are predominantly non-liberal.⁷⁴

Liberal international theory necessitates “a distinction among different types of States based on their domestic political structure and ideology.”⁷⁵ To prove the latter, Slaughter stated that liberal states with democracies often do not “go to war with one another.”⁷⁶ Liberal peace refers to the situation in which states with functioning democracies would not initiate war with one another.⁷⁷ Drawing upon the conversation on liberal peace, this thesis adds that maintaining liberal peace is not limited to war but affects the internal policies of liberal states as well. Not imposing inadmissibility grounds to individuals coming from states with liberal democracies but imposing them on citizens of non-liberal countries exemplifies liberal peace. Liberal peace could explain why some non-citizens are targeted under the inadmissibility regime and not others by “the nature of relations among liberal states as compared to relations between liberal and non-liberal States.”⁷⁸ As such, ruling out a political party from the Global South while protecting agencies from the Global North would be legitimate to maintain the liberal peace.

At the governance level, liberalism requires formal arenas, institutions, and the unity of social actors. For Rajagopal, liberal democracy empowers “sovereign will” and requires formal arenas “such as legislatures” and institutions including political parties to administer “all political activity”.⁷⁹ Consequently, liberal democracy is predicated on these official arenas where “the social actor (as a consumer, producer, citizen, etc.)” is unified and “where the interests of such social actors would be represented.”⁸⁰ Social actors elect representatives who occupy these formal arenas.

As migrants are not considered social actors, liberal democracy in its current form denies migrants to politically participate in the law-making procedure. The mainstream rights

⁷³ Asha Kaushal & Catherine Dauvergne, “The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions” (2011) 23:1 International Journal of Refugee Law 54–92 at 87, 89 and 90.

⁷⁴ Canadian judicial authorities considered the following legitimate states’ apparatuses having “limited and brutal purpose”: the Angolan Army, the *Agence Nationale de Renseignements* (ANR) in the DRC, Punjabi police force, and the Armed Forces Revolutionary Council (AFRC) in Sierra Leone. *Ibid* at 90.

⁷⁵ Slaughter, *supra* note 70 at 504.

⁷⁶ *Ibid* at 504.

⁷⁷ *Ibid* at 509.

⁷⁸ *Ibid* at 537.

⁷⁹ Rajagopal, *supra* note 48 at 241.

⁸⁰ *Ibid*.

discourse builds on “a narrow vision of liberal democracy that is realized through the right to vote, stand for election”.⁸¹ The right to vote, however, is inadequate to define a system as democratic since it generally hides other barriers to “political participation” including “institutional biases and barriers based on race, gender, religion, social status, and wealth.”⁸²

For Smitu Kothari, adopting liberal democracy and “even affirmative policies for economically and socially underprivileged groups” are insufficient; reorganization of society is necessary to create “greater egalitarianism.”⁸³ A democratic system often masks how a segment of the population, here migrants, are denied political participation. That denial, in turn, forms the basis of their exclusion from the policy and law-making process. Likewise, Rajagopal argued that because most of the traditional political and civil rights can only be exercised through voting, “the Western human-rights model attempts to export a Western liberal–democratic model”.⁸⁴ The Western human-rights model is not directly concerned with individuals of the Global South, or their needs and interests, since the norms are not built on their struggles. However, these arguments can only be relevant for liberal democracy at a constitutional level. At the international stage, democratic governance has never existed; it does not adopt human rights accountability and is mostly governed through power struggles.

Consequently, the practice of human rights protection fails migrants: migrants do not have access to the political levers which help to trigger the appropriate mechanisms in favor of citizens. Citizens often make migration policies for fellow citizens in the absence of migrants’ opinions.⁸⁵ As such, migrants are objects of migration policies, not subjects entitled to a voice in how these migration policies are elaborated and applied.

2.2. The violence of bureaucratization

As derived from the nation-state system, the existing human rights discourse ignores certain types of violence incurred on immigrants in limbo. As discussed in Chapter V, Canada is oblivious to the grave consequences that immigrants in limbo have to endure. Rajagopal distinguishes the types of violence made visible to human rights discourse from the invisible ones, and questions “[i]f some types of violence are less visible, is this due to a ‘class bias’ against poor and marginalized communities?”⁸⁶

⁸¹ *Ibid* at 252.

⁸² Mutua, *supra* note 56 at 603.

⁸³ Kothari, Smitu, “Damming the Narmada and the Politics of Development” in William Fisher, ed, *Toward Sustainable Development? Struggling over India’s Narmada River* (Armonk, NY: M. E. Sharpe, 1995) at 448.

⁸⁴ Rajagopal, *supra* note 48 at 254.

⁸⁵ François Crépeau, Human rights and gender equality challenges / Implications of criminal justice responses to smuggling of migrants”, *Launch of the UNODC Toolkit for mainstreaming Human Rights and Gender Equality into criminal justice interventions to address trafficking in persons and smuggling of migrants*” Wednesday, 10 February 2021.

⁸⁶ Rajagopal, *supra* note 48 at 195.

Human rights justifies certain types of violence.⁸⁷ To protect the human rights of other individuals, the state can legitimately inflict “‘necessary’ forms of violence”.⁸⁸ For Didier Bigo, “[l]iberty is a possession, a property of a specific group... that the others do not have.”⁸⁹ Privileged groups judge themselves and “the others only through the prism of [their] criteria and standards set up as ‘universal’ in this narrative.”⁹⁰ Giving an example, Rajagopal underlined that while “the mass deportation of people from Phnom Penh by the Khmer Rouge in 1975” might constitute crimes against humanity, the eviction of 33 million individuals “from their homes due to development projects, by the Indian Government” is considered to be collateral damage of development.⁹¹

Likewise, the violence against refugee claimants subjected to immigration measures is often overlooked in the human rights discourse. These forms of violence, including living in limbo with heavy consequences, and detention with no trial rights, remain invisible due to the underestimated consequences of the limbo situation, as compared with a deportation option. Human rights are indeed an important “tool of strategy and mobilization for oppressed groups”, yet it is not “the sole language”⁹² – and often not the sufficient one – to think of immigrants in limbo. Human rights are powerless unless backed by political mobilisation.

In addition, immigrants in limbo, waiting for their cases to be determined for long years at the Ministry level, are being inflicted a certain form of violence, that is the ‘violence of bureaucratization’. Hanna Arendt famously wrote that “[t]he greater the bureaucratization of public life, the greater will be the attraction of violence.”⁹³ Who would be responsible for the consequences: judges, Ministry agents, or CBSA personnel? Realistically, no one can be held responsible for the consequences of the limbo situation. It is the whole system from the legislator to its enforcement agents that causes the violence step by step. In a great bureaucracy, there is no person to whom one can argue or “present grievances”;⁹⁴ no one can be held accountable. As a form of government, bureaucracy is “the rule by Nobody...where all are equally powerless, we have a tyranny without a tyrant”.⁹⁵ Arendt stated that

if... we identify tyranny as the government that is not held to give account of itself, rule by Nobody is clearly the most tyrannical of all, since there is no one left who could even

⁸⁷ *Ibid* at 195.

⁸⁸ *Ibid* at 200.

⁸⁹ Didier Bigo, “Is Otherness a Question of Security or a Question of Freedom?” in François Crépeau & Colleen Sheppard, eds, *Human Rights & Diverse Societies* (Cambridge Scholars Publishing, 2013) at 196.

⁹⁰ *Ibid* at 196.

⁹¹ Rajagopal, *supra* note 48 at 195.

⁹² *Ibid* at 232.

⁹³ Hannah Arendt, *On Violence* (San Diego New York London: A Harvest Book, 1970) at 121–122.

⁹⁴ *Ibid* at 122.

⁹⁵ *Ibid* at 122.

be asked to answer for what is being done. It is this state of affairs...that is among the most potent causes for the current world-wide rebellious unrest.⁹⁶

The violence of bureaucracy will remain intact unless an alternative discourse emerges, or immigrants in limbo are assigned direct representation; only then would their struggles be comprehensible in liberal democracies and hence recognizable in the mainstream discourse.

3. Immigrants in limbo at the bottom of a modern caste system

The previous part analyzed the shortcomings of the existing human rights discourse to address the struggles and interests of immigrants in limbo. Not fitting into the mainstream discourse, immigrants in limbo form a counter-hegemonic class. Like Rajagopal sees social movements “as counter-hegemonic discursive practices”, we similarly consider immigrants in limbo a counter-hegemonic discursive class.⁹⁷ The most significant implication is their place in liberal democracies. In its current version, liberal democracies have engendered a caste system in their societies. In explaining this argument, I will first define the parameters of this new class.

3.1. Immigrants in limbo as a counter-hegemonic class

Immigrants in limbo are all non-citizens, excluded from a possibility of membership to host states, under a constant threat of deportation. To some degree, they all endure grave consequences of administrative decisions. As explained in Chapter 5, these consequences include years or decades of litigation with financial consequences; in certain cases, no work permit renewal, no social assistance, no medical coverage; no family reunion rights and social isolation; stigma, and significant mental health consequences as a result of being labeled as a war criminal or terrorist.

With the implications of administrative decisions, these immigrants have formed “a new subordinate position in society”,⁹⁸ akin to a caste system. Leveraging on Walzer’s arguments on membership and political justice, the following subsections will analyze this new counter-hegemonic class based on two analogies; first, in relation to Athenian Metics; and second, in relation to temporary migrant workers.

a. Immigrants in limbo as Metics of a modern state

Metics were permanent foreign residents of Athens in B.C. 480-479. They were not able to attain citizenship – nor were their children –, had no voting rights, could not own land; but had to contribute to the local economy, pay taxes and obey local laws.⁹⁹ Because of these

⁹⁶ Arendt, *supra* note 93 at 57.

⁹⁷ In this part, I was inspired by Rajagopal’s explanation of social movements. Rajagopal, *supra* note 48 at 253.

⁹⁸ Anna Stilz, “Guestworkers and Second Class Citizenship” (2010) 29:4 Policy and Society 295–307 at 303.

⁹⁹ James Watson, “The origin of metic status at Athens” (2010) 56 The Cambridge Classical Journal 259–278. Watson, J. (2010). Michael Walzer, *Spheres of Justice A defense of Pluralism and Equality* (New York: Basic Books, 1983) at 53–56.

restrictions, Walzer defined the ruling class in ancient Athens as “a family with live-in servants”; non-citizens and slaves were subject to the city’s ruling but had no participation rights in the governance.¹⁰⁰ In the Athenian governance of Metics, like slaves, foreigners “were simply [citizens’] passive subjects, ... with whom they had no political relations at all.”¹⁰¹ Foreigners shared “the city-state, but they had no voice there.”¹⁰² They were not able to “hold public office or attend the assembly or serve on a jury”; did not own “political organizations of their own and were never consulted about impending decisions.”¹⁰³ Although they had a capacity for “rational deliberation”, they were excluded from certain rights. Walzer described their governance as “a band of citizen-tyrants, governed without consent.”¹⁰⁴

Like Athenian Metics, immigrants in limbo are passive subjects of citizens.¹⁰⁵ Their governance without their consent constitutes permanent alienage, a form of tyranny, that is contrary to political justice defined by Walzer. According to Walzer, residents who work in the local economy and are subject to local law should be able to participate in democracy. Political justice requires that, notwithstanding their status, all individuals, who live in the same territory, and who contribute to the local economy and obey local law must be able to participate in “the process of self-determination through which a democratic state shapes its internal life”.¹⁰⁶ Otherwise, by establishing “a fixed status between citizen and foreigner”, host states become anti-democratic.¹⁰⁷ Political justice prevents permanent alienage both for certain persons “or for a class of changing individuals.”¹⁰⁸

Albeit having difficulties in securing work permits, immigrants in limbo work legally or illegally in host states and are subject to local law and the state’s authority. In Walzer’s understanding, these elements should grant them political participation. If individuals are subject to the state’s authority, “they must be given a say, and ultimately an equal say, in what that authority does.”¹⁰⁹

Forming permanent alienage without political participation rights is a form of tyranny. For Walzer “the rule of citizens over non-citizens, of members over strangers, is probably the most common form of tyranny in human history...The denial of membership is always the first

¹⁰⁰ *Ibid* at 54.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid* at 60.

¹⁰⁷ *Ibid* at 61.

¹⁰⁸ *Ibid* at 61.

¹⁰⁹ *Ibid* at 61.

of a long train of abuses.”¹¹⁰ When the path to citizenship is closed, “the political community” is divided between “members and strangers...where the strangers are subjects of the members.”¹¹¹ Although members are equal, what “determines the character of the state” is their tyranny; “not their equality”.¹¹²

b. Disenfranchised inferior classes: temporary migrant workers and immigrants in limbo

The second comparison will be done between immigrants in limbo and temporary migrant workers. Several commonalities exist between these two groups. Like temporary migrant workers, immigrants in limbo often occupy temporary lower rank jobs, whether they are documented or not; are prevented to obtain citizenship; are barred to bring dependents to join them. Like temporary migrant workers, they are neither citizens nor potential citizens, they are without any political rights.¹¹³

A difference might be that, while immigrants in limbo come to foreign states to be members of the community, temporary migrant workers arguably knew that their residence will be temporary with no path to citizenship. Walzer argued that temporary migrant workers’ consent to be ruled for a definite amount of time is insufficient for “democratic politics”; continuous consent of its subjects is essential for political power to be exercised democratically.¹¹⁴ The subjects of the political power include all individuals living in the same territory where political decisions are implemented.¹¹⁵

Like for temporary migrant workers, for immigrants in limbo, a state is a ubiquitous “frightening power” penetrating in their lives and regulating “their every move” without taking “their opinion. A departure is only a formal option; deportation, a continuous practical threat.”¹¹⁶ Forming a powerless class, immigrants in limbo are often “exploited or oppressed” partly because “they are disenfranchised, incapable of organizing effectively for self-defense.”¹¹⁷ With continuing fear of repercussions based on their administrative status, their precarity as the victims of multiple exploitations is not likely to be changed.¹¹⁸ Immigrants in limbo are trapped in an underprivileged position as “outcasts in a society that has no caste

¹¹⁰ *Ibid* at 62.

¹¹¹ *Ibid* at 61.

¹¹² *Ibid* at 61.

¹¹³ *Ibid* at 57.

¹¹⁴ *Ibid* at 58.

¹¹⁵ *Ibid* at 58.

¹¹⁶ *Ibid* at 59.

¹¹⁷ *Ibid* at 59.

¹¹⁸ *Ibid* at 59.

norms, metics in a society where metics have no comprehensible, protected, and dignified place.”¹¹⁹

3.2. Entrenched caste system

Immigrants in limbo form a counter-hegemonic subordinate class that is akin to societies governed by a caste system. Castes are “rigidly segregated groups”.¹²⁰ Rejected visa applicants who are not deported, undocumented migrants, temporary migrant workers and immigrants in limbo all form a subordinate class.

In this system, immigrants in limbo are locked in a subordinate position, while citizens who live in the same territory under the same governance have a higher status. The difference among these classes is defined by citizenship, which is a valid gateway to membership into the community. Walzer defines membership to a political community as the main social good to be distributed by the members to foreigners; citizens determine its value through their “work and conversation”.¹²¹

The distribution of the political community is contingent on the internal decisions of citizens regarding who to admit into their territories.¹²² Citizens’ relationship including “actual contacts, connections, alliances” with foreigners regulates the choice of this distribution.¹²³ Yet, in liberal democracies, not all citizens but a certain group of citizens make these decisions. There is a fundamental difference between all citizens versus a class of citizens deciding on membership. A group of citizens including administrative judges and immigration officers determine the fate of non-citizens. Some immigrants in limbo have established their lives in Canada with Canadian spouses and children; they are well received by their community. However, they have no status for an indefinite time – and are ultimately deported – by the decisions of privileged citizens. Walzer defines such power as a monopoly.

A certain group of individuals in the community has “a monopoly or a near monopoly of some dominant good. This dominant good is more or less systematically converted into all sorts of other things — opportunities, powers, and reputations.”¹²⁴ For example, the strong have the wealth; the wellborn have the honor, and the well educated have the office.¹²⁵ It is true that by enacting laws, the parliament decides on the admission and exclusion policies. However, administrative judges – and in high profile constitutional cases, the Supreme Court judges –

¹¹⁹ *Ibid* at 59.

¹²⁰ *Ibid* at 27.

¹²¹ *Ibid* at 32.

¹²² *Ibid* at 29.

¹²³ *Ibid* at 32.

¹²⁴ *Ibid* at 12.

¹²⁵ *Ibid* at 12.

define the boundaries of these policies. By upholding or overruling certain immigration decisions, the judiciary determines the interpretation of constitutional and international standards, including the implementation of Article 1F, or domestic policies such as inadmissibility grounds. In this vein, administrative judges hold a near monopoly of distributing the dominant good – i.e. membership to the community – by approving or rejecting the decisions of tribunals and immigration officers.

3.3. Domination of monopoly holders

Unlike a caste or feudal system, democracies are linked to the idea of egalitarian societies.¹²⁶ In a caste system, the individual's rank or characteristics establish their worth in society.¹²⁷ The caste model eventually causes a relationship of domination among individuals living in the same society that contravenes the idea of an egalitarian society.

For Iris Marion Young, domination is a structural condition that hinders individuals from “participating in determining their actions or the conditions of their actions.”¹²⁸ In such a structure, dominating individuals determine the conditions of actions for dominated ones, with no reciprocity.¹²⁹ For domination to exist in a social relationship, the dominant must have superior power over the dominated.¹³⁰ As a result, the dominated individual will not have “the psychological status of an equal. Subordinates may be subject to threats on the part of those with greater power, their choices may be interfered with.”¹³¹

Lovett defines the concept of domination based on three elements: “the imbalance-of-power condition”, “the dependency condition”, and “the absence-of-rules condition”.¹³² Power is possessing the means to impact others' situations. Hence, the imbalance of power means “an unequal distribution of those means within a...relationship.”¹³³ Dependency condition refers to individuals' power to exit a relationship “without incurring costs.”¹³⁴ Power holders can arbitrarily use their power unless there are “established and commonly known rules, laws, or conventions effectively” regulating “the use of power”.¹³⁵ Like immigrants, “a defendant” before Stalin's courts was not assured that “certain rules” such as “standards of evidence or definitions of crime” would be observed so that “the authority's use of power could not be

¹²⁶ Stilz, *supra* note 98.

¹²⁷ *Ibid.*

¹²⁸ Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990) at 38.

¹²⁹ *Ibid.*

¹³⁰ Francis N Lovett, “Domination: A Preliminary Analysis” (2001) 84:1 *The Monist* 98–112 at 101.

¹³¹ Stilz, *supra* note 95 at 303.

¹³² Lovett, “Domination”, *supra* note 130 at 104.

¹³³ *Ibid* at 107.

¹³⁴ *Ibid* at 102.

¹³⁵ *Ibid* at 103.

avoided or planned around.”¹³⁶ Lovett defines this “absence-of-rules condition” as a “final condition of domination”.¹³⁷

For Hobbes, “[t]he publique worth of a man” and “[t]he manifestation of the Value” referred to as “honouring or dishonoring” means power.¹³⁸ Interpreting Hobbes’ ideas on power, Lovett stated that possessing “certain goods” including wealth, education, and status implies having “instrumental powers”.¹³⁹ For egalitarian public policies, balancing the goods and resources among different groups in society is essential. Public policies diminishing “power inequalities” would, as a result, reduce “the overall level of domination.”¹⁴⁰ The desirable public policy to reduce “the overall level of domination” would be to relocate “goods and resources to the weakest group”.¹⁴¹ Attenuating “the total domination in a political community” would result in egalitarian public policies.¹⁴²

The relationship between immigrants in limbo and the state is an example of severe domination. Immigrants in limbo totally depend on the state; the state has a superior power by sanctioning them to limited rights including the right to liberty. They cannot simply leave their host country. Voluntarily leaving is often not an option because incurring costs would be high: possible persecution upon return to their country of origin and breaking the community and family bonds in Canada. Judges hold instrumental powers in the Hobbian way by possessing a monopoly of the distribution. The cost of not obeying their rules would be high, deportation. Finally, as the state is sovereign in its actions towards non-citizens, and that no external actor can intervene to influence its decisions, the state is implicitly allowed to exercise its power over immigrants in limbo in an arbitrary way. State’s superior control over them also results in domination in favour of citizens. For example, restrictions on right to work put immigrants in limbo “into dominating social relationships”¹⁴³ among other members of the community.

A perfectly equal relationship between the state and these immigrants would be unrealistic; they would probably never be as considered in the regulatory framework as states are to consider their national interests. However, by leveraging more powers to immigrants in limbo, and by enacting rules in favour of them, the total domination could be lessened.

¹³⁶ *Ibid* at 103.

¹³⁷ *Ibid* at 103.

¹³⁸ Hobbes, Thomas, *Leviathan* (Lerner Publishing Group, 2018) at 78.

¹³⁹ Lovett, “Domination”, *supra* note 127 at 107.

¹⁴⁰ *Ibid* at 110.

¹⁴¹ *Ibid* at 110.

¹⁴² *Ibid* at 110.

¹⁴³ Stilz, *supra* note 95 at 303.

Establishing egalitarian societies would mean ending any kind of caste system. Reducing the overall level of domination held by privileged groups would require providing goods and resources to immigrants in limbo. Granting decision-making powers to communities could potentially weaken the imbalance of power between the state and the members of the new immigrant class. Alternative approaches to the current human rights discourse such as subalterns and counterpublics could balance the power between the state and members of this class.

4. A need for subaltern counterpublics to empower immigrants in limbo

The previous sections analyzed how the existing human rights practice fails to capture the struggles of immigrants in limbo in liberal democracies. Building on the discourse's shortcomings, I argued that immigrants in limbo constitute a counter-hegemonic class, excluded from democratic governance. Focusing on immigrants in limbo, this Chapter then discussed how liberal democracies have recreated a caste system. Political participation is a building block of liberal democracies. The caste system emerged in democracies mainly because these classes have no political agency. If some members of the same community have no political agency, the precarity of their status would mean a tyrannical ruling in the understanding of Walzer.

Focusing on subalterns, TWAIL promises a more inclusive and representative discourse. TWAIL adopts a subaltern perspective in which individuals who do not belong to the structures of Eurocentrism and modernity can find a place and fully participate "in their governance."¹⁴⁴ In his book, Rajagopal inquired how international law can be de-elitized to accept subaltern perspectives.¹⁴⁵ The central concern is then how to "incorporate this new class into...law "and "make it recognize subaltern voices?"¹⁴⁶ Involving in the theory and practice of this immigrant class necessitates transforming "human-rights discourse from its narrow, state-centered, elitist basis to a grassroots-oriented praxis of the subalterns."¹⁴⁷ Drawing upon Rajagopal's inquiry, the last section is thus concerned with the methods and approaches through which law can include subaltern voices in its praxis toward this new class.

For Nancy Fraser, subaltern counterpublics are alternative "discursive arenas" where underprivileged members of the society create and disseminate "counter-discourses" that would allow them to develop "oppositional interpretations of their identities, interests, and needs".¹⁴⁸

¹⁴⁴ Mutua, *supra* note 10 at 37.

¹⁴⁵ Rajagopal, *supra* note 48 at 292.

¹⁴⁶ Rajagopal, *supra* note 48 at 1.

¹⁴⁷ Rajagopal, *supra* note 48 at 271.

¹⁴⁸ Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy" (1990) 25/26 *Social Text* 56–80 at 67.

Members of subordinated groups are isolated from “the public sphere and civil society”.¹⁴⁹ Counterpublics thus has two aims: creating “spaces of withdrawal and regroupment”; and creating catalyst acts aimed at the society.¹⁵⁰ Both functions together could form an emancipatory path for subalterns. As a result, these two functions could empower subaltern counterpublics in part to counterbalance “the unjust participatory privileges enjoyed by members of dominant social groups”.¹⁵¹

As members of a subordinated social group, immigrants in limbo need subaltern counterpublics, parallel discursive arenas informed by their interests and needs. Because the mainstream discourse ignores the subaltern’s identity and interests, this thesis is an attempt to create a counterpublic discourse in academia, in order to give this group a voice. I aim to use a TWAIL lens to rethink discussions that are locked in a specific “intellectual trajectory, into a broader trajectory.”¹⁵²

This thesis avoids adopting a managerial position in international law. Koskeniemi argued that as of the 1990s, international law has evolved into an expert discipline in which experts are expected to lay down solutions to challenges such as “managing refugee problems”.¹⁵³ This thesis does not provide a managerial response to what the alternative should be. Likewise, this thesis does not attempt to be the “thinking corps” of the human rights movement; nor does it provide intellectual directions and rigor.¹⁵⁴ Rather, shifting the focus from human rights discourse to subaltern voices is the aim to think about alternative conceptual and normative frameworks. What happens “when you bring an outsider focus, and when you bring a deep commitment to the idea that it is the subjects of” immigration law “who make the law”?¹⁵⁵ The aim would be for the law to centers on marginalized immigrants in the Global North, and a method to further this inclusivity. We can imagine “norms and political models whose experimental purpose is the reduction — if not the elimination — of conditions that

¹⁴⁹ Rajagopal, *supra* note 48 at 262.

¹⁵⁰ Fraser, “Rethinking the Public Sphere”, *supra* note 148 at 68.

¹⁵¹ *Ibid.*

¹⁵² Rajagopal, *supra* note 48.

¹⁵³ Dimitri Van Den Meerse, “Interview: Martti Koskeniemi on International Law and the Rise of the Far-Right”, (10 December 2018), online: *Opinio Juris* <<https://opiniojuris.org/2018/12/10/interview-martti-koskeniemi-on-international-law-and-the-rise-of-the-far-right/>>.

¹⁵⁴ Mutua describes constitutionalists as “the “thinking” corps of the movement; as its ideologues they provide intellectual direction and rigor. They explore and explain issues relating to the movement’s origin, its philosophical and historical bases, its normative content, and the connections among social, political, and cultural structures and values, as well as the questions that arise from the norms’ enforcement and internationalization. When constitutionalists critique the human rights corpus and its movement, it is in language that is internal and “friendly” to the discourse, that is, conversations which are meant to sharpen the movement’s focus, expand its influence, and bare its dilemmas.” Mutua, *supra* note 56 at 626.

¹⁵⁵ Amin Parsa & Niklas Selberg, “Decolonizing Labour Law: A Conversation with Professor Adelle Blackett”, (24 January 2021), online: *TWAILR* <<https://twailr.com/decolonizing-labour-law-a-conversation-with-professor-adelle-blackett/>>.

foster human indignity, violence, poverty, and powerlessness”.¹⁵⁶ These elements must be the predominant aim of all actors in an alternative discourse.

The lawmaking and the practice of law ought to take immigrants in limbo seriously as actors, instead of regarding them as outcasts. Achieving this aim would require communities to create principles and structures “that enhance the human dignity of all”.¹⁵⁷ Alternatives could be to focus on local communities on the meanings and values, community decision-making, to support research providing a voice to immigrants in limbo, to create counterpublics in cities through media attention, through storytelling, and to train judiciary and law enforcement agencies to understand the grave consequences of their decisions.

Immigrants who are convicted or suspected of criminality or considered to be security risks “have literally been written out of”¹⁵⁸ refugee law. The question is then are we considering “a rewrite that includes them? Departing from this framework implies a broadened understanding of representation and social protection.”¹⁵⁹ The inclusion of these immigrants “challenges us to do something that is radically deeper: to see what it means”¹⁶⁰ to be in limbo with limited protection and rights in the Global North.

¹⁵⁶ Mutua, *supra* note 56 at 657.

¹⁵⁷ *Ibid.*

¹⁵⁸ Amin Parsa & Niklas Selberg, “Decolonizing Labour Law: A Conversation with Professor Adelle Blackett”, (24 January 2021), online: *TWAILR* <<https://twailr.com/decolonizing-labour-law-a-conversation-with-professor-adelle-blackett/>>.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

CONCLUSION

This thesis has aspired to do two things: (1) to uncover how refugee law participates in the criminalization of migration, and (2) through the cases of Canada and the Netherlands, to expose how states have been using asylum procedures in unintended ways including for criminal law ends and national security risks in defiance of fundamental rights. Case studies and interviewees' testimony have been used to illustrate the pernicious effects of Article 1F, the inadmissibility scheme, and the security certificates not only on targeted individuals and families, but also on the rule of law, and local communities. As unfolded through Chapters III to VI, judicial authorities are oblivious to these effects in the legal decision-making. More strikingly, these instruments disproportionately affect non-citizens coming from the Global South.

This thesis started with the rationale behind law and policies criminalizing migration, that is the concept of state sovereignty. Chapter I and II endeavored to define and problematize the logic of criminalizing migration, how its logic conflicts with the rule of law and the principle of equality. The first chapter argued that using immigration measures for criminal law ends adversely affected the rule of law since policies and law within this area often violate the principle of equality and non-discrimination based on a social arrangement, that is the presence or absence of citizenship.

Moving from this conclusion, Chapter II thus discussed the sovereignty claim of states in relation to a specific group of non-citizens, refugees, arguing that refugee status has a distinct place in the criminalization of migration. Because refugees receive the protection of the international community, states are diligent in granting refugee status. However, this diligent approach has been turned into restrictions on the right to seek asylum, preventing *bona fide* refugees to claim asylum. The right to seek asylum is restricted *inter alia* for security concerns and concerns related to the abuse of the refugee system, which has little merits, of asylum states.

This new discourse on refugee status lays foundations for understanding how immigration measures criminalizing migrants including the inadmissibility scheme and security certificate proceedings are construed. Among these tools, the exclusion provision is distinctive for two main reasons. First, the exclusion provision applies only to refugee claimants, unlike the admissibility regime which applies to all foreigners. Second, the exclusion provision is a part of the 1951 Refugee Convention falling under the refugee regime and is thus *lex specialis*. Because refugees have a privileged position in host states compared to other migrants, their exclusion from protection on the grounds of serious criminality should be approached differently than that of migrants. As the *travaux préparatoires* reveal, the words describing acts in Article 1F were carefully chosen by the delegates. Notably, delegates expressed a concern that the vague wording could be abused by governments wishing to exclude refugees. Can we see the same diligent approach behind other securitizing instruments such as the inadmissibility scheme?

Chapter III through VI focused on two case studies, Canada, and the Netherlands. The first part of Chapter III demonstrated that Canada does not resort to refugee law for punitive ends because it uses the inadmissibility scheme at the front end to reduce the number of refugee claimants in violation of the right to seek asylum. It is much easier and expeditious to find refugee claimants are inadmissible compared to a rigorous process of Article 1F adjudication within the refugee status determination (RSD) system. Canada prefers to handle the work of discerning who is a refugee and who is excludable in an evasive way. This work is at least not actualized as per the human-rights-based approach but rather on the ground of national interest. The national interest that Canada prioritizes in this area takes us back to the concept of state sovereignty, discussed in Chapter I, as the rationale behind the criminalization of migration. It is true that Canada is a sovereign country, has a legitimate right to deny access to certain individuals to enter its territory. However, the problem occurs when Canada regulates the scope

of unwanted individuals so broad that the situation conflicts with its international obligations under the 1951 Refugee Convention. It might be true that a finding of inadmissibility does not necessarily end up in deportation due to the other available recourses such as the humanitarian and compassionate grounds and pre-removal risk assessments (PRRA); the premise that is also contentious, as Chapter V established that these resources are not effective in practice. Nevertheless, these provisions in themselves breach the 1951 Refugee Convention because inadmissible individuals do not get substantial and procedural rights that they are normally granted in RSD hearings.

On the contrary to the practice of Canada, the second part of Chapter III established that the Netherlands uses refugee law for punitive ends, even though the use of refugee claimants' testimony in subsequent criminal proceedings violates refugee claimants' fundamental rights. Moreover, there is no discussion or oversight over the use of administrative instruments in criminal procedures. The Dutch practice showed that criminal charges are based on evidence gathered in the administrative process, which fails in providing safeguards to the accused as recognized under criminal law. This emerging practice threatens fundamental rights, as states are now able to justify evading criminal procedural law by appealing to asylum law, and by disguising charges as issues of national security. To avoid these consequences, Chapter III thus proposed where a case that initially falls under immigration law leads to a criminal trial or removal of a person from host states, these proceedings should include procedural safeguards. Alternatively, procedural safeguards should be provided to prevent the use of testimony obtained in asylum proceedings as evidence in criminal proceedings. If states continue to use the compulsory questioning powers during asylum procedures, the use of the evidence in the subsequent criminal trials must be prevented.

In analyzing the case of *Al Yamani v. Canada* in Chapter I, I asked three questions: (i) if non-citizens who are members of terrorist groups are undeserving of human dignity, what is the

justification for this conclusion?; (ii) if the justification is because of their criminality, then why do citizens belonging to the same category receive favorable treatment?, and (iii) why do judges not consider the larger social and historical context in examining the criminalization of migration policies? The same questions came back in Chapter IV in analyzing *Jaballah (Re)*. Why do judges not make the diligent analysis that the subject requires? Chapter IV proves that Canadian courts are oblivious to the use of asylum procedures for purposes unrelated to asylum-seeking such as for national security purposes. The implementation of Canadian law has evolved in a way that refugee claimants unintentionally contribute to their removal from Canada. Understanding the grave consequences of the security certificate system and refugee claimants' unintentional contribution to this system prompts us to think broader than the black-letter law.

Moving from this conclusion, Chapter V analyzed the consequences of immigration decisions involving national security and criminality on non-citizens subject to these proceedings; the consequences that are generally overlooked in the decision-making procedure. Two severe consequences of immigration decisions involving national security and criminality are deportation and living in limbo in Canada. Although living in limbo has severe impacts on individuals — as interviewees' testimonies demonstrate — these effects are generally underreported and disregarded by the judiciary.

By exploring the interests, struggles, and rights of immigrants in limbo, based on the critical Third World scholarship, the last chapter argued that the presence of an emerging group of non-citizens, who are considered to be criminals or national security risks in their host country, has created a modern caste system in the Global North. Drawing from interviews conducted with Canadian practitioners, this dissertation demonstrates that Canadian policies criminalizing migrants most often affect individuals coming from the Global South.

While this thesis has undertaken an in-depth analysis of the ways in which asylum procedures participate in the criminalization of migration, the framework and concepts developed through this thesis offer a rich platform for continued dialogue and research.

First, this thesis provides a strong foundation for a much broader conversation about the situation of immigrants who are suspected or convicted of criminality in the Global North, and particularly can be used to further investigate their situation from different conceptual frameworks. Although this thesis discussed their situation based on TWAIL scholarship, it would be important to uncover how race has played role in decision-making procedures. This thesis has established that immigrants coming from the Global South have been disproportionately affected by policies and laws criminalizing migration; however, we do not know how many of those have been criminalized because of their “race”. For example, one interviewee suggested that one of the reasons behind excluding certain people is systemic racism.¹ Future research could address this gap based on the critical race theory.

Second, the thesis provides an in-depth study of Canada as to how immigration law has been used for unintended purposes and contrasted its practice with the Netherlands. The findings and methodology of this thesis could be used to initiate similar research into the practice of Continental European countries. The thesis established that the Netherlands has been using asylum procedures for punitive ends, the practice of which was endorsed by the European Court of Human Rights. Future research could explore how widely asylum procedures are used for unintended purposes, by looking into the practice of Denmark, Sweden, and Germany. Another avenue to explore could be examining the practice of other common-law countries including the U.K., Australia, and the USA to contrast their practice with Canada. From thereon, we could understand how extensive the problem is in Global Northern countries.

¹ Interview with A12.

Finally, the examination of subalterns, as undertaken at the end of this thesis, offers a more nuanced understanding of immigrants-in-limbo. The conceptual framework of subalterns also provides agency to these immigrants. This framework can thus be further developed to offer policy-based solutions to their situation.

Immigrants who are convicted or suspected of criminality or considered to be security risks “have literally been written out of”² refugee law. The question is then are we considering “a rewrite that includes them? Departing from this framework implies a broadened understanding of representation and social protection.”³ The inclusion of these immigrants “challenges us to do something that is radically deeper: to see what it means”⁴ to be in limbo with limited protection and rights in the Global North.

² Amin Parsa & Niklas Selberg, “Decolonizing Labour Law: A Conversation with Professor Adelle Blackett”, (24 January 2021), online: *TWAILR* <<https://twailr.com/decolonizing-labour-law-a-conversation-with-professor-adelle-blackett/>>.

³ *Ibid.*

⁴ *Ibid.*

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Research Ethics Board I
Certificate of Ethical Acceptability of Research Involving Humans

REB File #: 135-0818

Project Title: Punitive tool of humanitarian panacea: The current approaches to Article 1F of the 1951 Refugee Convention in Canada

Principal Investigator: Didem Dogar

Department: Faculty of Law

Status: Ph.D. Student

Supervisor: Professor François Crépeau

Approval Period: September 18, 2018 to September 17, 2019

The REB-I reviewed and approved this project by delegated review in accordance with the requirements of the McGill University Policy on the Ethical Conduct of Research Involving Human Participants and the Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans.

Deanna Collin
Ethics Review Administrator, REB I & II

-
- * Approval is granted only for the research and purposes described.
 - * Modifications to the approved research must be reviewed and approved by the REB before they can be implemented.
 - * A Request for Renewal form must be submitted before the above expiry date. Research cannot be conducted without a current ethics approval. Submit 2-3 weeks ahead of the expiry date.
 - * When a project has been completed or terminated, a Study Closure form must be submitted.
 - * Unanticipated issues that may increase the risk level to participants or that may have other ethical implications must be promptly reported to the REB. Serious adverse events experienced by a participant in conjunction with the research must be reported to the REB without delay.
 - * The REB must be promptly notified of any new information that may affect the welfare or consent of participants.
 - * The REB must be notified of any suspension or cancellation imposed by a funding agency or regulatory body that is related to this study.
 - * The REB must be notified of any findings that may have ethical implications or may affect the decision of the REB.

Annex B- Sample Questionnaire

Questions are organized around specific modules or topics. Depending on the area of expertise or knowledge of the interviewee, questions from the relevant modules will be asked. The interviews are semi-structured, and the questions may be used as a starting point for discussion on the relevant topics and issues. Not all questions in relevant modules may be asked to participants.

All questions should be answered only in relation to the participant's experience or knowledge in the area, and only to the extent that he or she feels it is appropriate to share that information.

A. Questions related to the interviewees' practice

- 1- How long have you been in this practice?
- 2- How many cases did you take in the field of inadmissibility proceedings?
- 3- How many cases did you take in the field of security certificate proceedings?
- 4- How many cases did you take in the field of exclusion related proceedings?
- 5- How do cases of the exclusion, inadmissibility, and security certificate, primarily come to your attention?

B. Question related to the proceedings and outcomes

- 6- How does the relevant procedure work?
- 7- How would you define the challenge(s) of implementing the proceedings (e.g. the inadmissibility proceedings, security certificate and exclusion proceedings)? /What are the problems you observed as a practitioner during the inadmissibility proceedings, security certificate and exclusion proceedings?
- 8- In your opinion, are there any procedural problems which can hamper due process of law in these proceedings?
- 9- What are the sources of the Immigration and Refugee Board of Canada (for exclusion) and the Ministry of Justice to prepare a security certificate and find someone inadmissible?
- 10- How important is your clients' testimony in the decision-making procedure?
- 11- Several cases reviewed under the inadmissibility provision could have been reviewed under the exclusion clause. Why does the Immigration, Refugee and Citizenship of Canada (IRCC) review the cases under the inadmissibility clause instead of the exclusion provision? Ex: *B095 v. Canada (Minister of Citizenship and Immigration)*
- 12- Do you believe the inadmissibility proceedings are used instead of the exclusion provision because determining inadmissibility is easier?
- 13- In some cases, individuals were initially granted refugee status. (e.g. *Segayosa, Mahjoub, Suresh* cases) After having been granted refugee status, they (*Segayosa, XXXXX, Suresh, XXXX*) were found inadmissible and subjected to deportation at the time they applied for permanent residency. In your opinion, why were they not excluded from refugee protection at the beginning?
- 14- Unlike the implementation of the exclusion provision, the procedural problems and the violation of the Canadian Charter of Rights and Freedoms were often litigated before the Canadian Courts in the inadmissibility proceedings and security certificate proceedings. (i.e. whether or not an applicant can be compelled to be a witness in his/her hearing) In your opinion, why is there not a sufficient number of cases where the exclusion provision was litigated before the Canadian courts and/or IRB on the grounds of procedural fairness?

C. Question related to clients of the interviewees

- 15- What is the profile of your clientele? (e.g. nationality, gender)
- 16- What happened to those who are excluded from international protection on the basis of Article 1F in Canada?
- 17- Is there any risk for deportation at the end of the exclusion assessment?

- 18- What happened to your clients at the end of the process (the inadmissible proceedings, security certificate and exclusion proceedings)? Anyone deported? / Is there any case that ended up with deportation eventually?
- 19- Did in this case the Immigration and Refugee Board of Canada, the Ministry of Justice and the Ministry of Citizenship, or the Federal Court relied on your client's (prior) testimony?

D. Questions related to recommendations and best practices

- 20- What do you feel needs to be improved in these proceedings to respect the due process of law?
- 21- What other provinces or countries have you identified best practices arising out of?
- 22- What do these best practices look like?
- 23- Do you have any final comments you would like to make before we conclude the interview?

REB File Number: 135-0818

Annex 2 – Informed Consent Document

Title of Project: Punitive tool or humanitarian panacea: The current approaches to Article 1F of the 1951 Refugee Convention in Canada

Principal Investigator: Didem Doğar, Doctoral (DCL) Candidate, McGill University, Faculty of Law (didem.dogar@mail.mcgill.ca), Tel: (438) 346-2424

Supervisor: Professor François Crépeau, Oppenheimer Chair in Public International Law, Director of the McGill Centre for Human Rights and Legal Pluralism, Faculty of Law, McGill University, email: francois.crepeau@mcgill.ca

Purpose: As a part of my doctoral research, I am conducting research to examine the current approaches to the implementation of Article 1F of the 1951 Refugee Convention (the exclusion provision) in Canada, and how these approaches influence broader refugees' rights. This project aims to uncover dominant trends in the implementation of the exclusion provision in Canada. Specifically, I examine whether the exclusion provision has become a criminal law tool to address the security policies of host states such as Canada.

Procedures: Your participation in the study will involve answering questions during a [...] minute interview focusing on your work and perspective on the implementation of the exclusion provision, the inadmissibility proceedings and the security certificate process in Canada, including known cases, as well as your opinions and information on the existing response to this issue in Canada, such as problematic facets of the criminalization of migration. Information and quotations from this interview may be used in the publication of research results. The attribution of information and quotations from this interview to you personally as the interview subject may be made in resulting publications, but only with your permission. At this time, intended publication of the results will take the form of the researcher's doctoral thesis, and may at a later date take the form of academic articles, a monograph, and/or conference presentations.

Risks and Benefits: There are no anticipated risks to you or your organization resulting from this research, which focuses on legal and policy processes and outcomes. Although this study will not benefit you personally, this research will add to the knowledge base about the implementation of the legal instruments that criminalize asylum seeking and migration procedures, and provide useful lessons for officials, experts and activists working on these issues.

Confidentiality: All of your responses will be confidential. Only with your permission will anything you say be attributed to you. In any publication resulting from this research, the information that you may provide will not be attributed to you by name- unless otherwise is permitted below- and will instead be attributed to a generic description such as "Lawyer", "Canadian NGO Activist", "Immigration and Refugee Board of Canada commissioner", "Canadian Government Official." The only individuals who will have access to documents with identifying information are myself, and any research assistant under my employ. The members of editors of journals that may publish my results may also request copies of the interview transcripts, from which I will have removed any identifying information. Your identifying information will also be removed from any policy briefs that may be produced with the collaboration of third parties to disseminate the results of this research.

Do you permit the information that you will provide to be attributed to you in publication?

YES

NO

Record Keeping: With your consent, I will prepare an audio recording of your interview. The audio recordings will then be transformed into a transcript. The transcript will be numbered and the code

linking the number with your name will be stored in a separate electronic document. After this process has been completed, I will destroy the audio recordings. I will also remove identifying information from the transcripts before sharing them with any editor of academic journals and publishing companies that may request them. All information obtained in this interview will be used for the purposes of this research project and may be used only with your consent in future related studies developed by the Researcher.

Do you consent the use of data that you provide for this study to be used in future-related research?

YES

NO

Voluntary Participation: Participation in this study is completely voluntary. You are free to decline to participate, to withdraw (meaning your data will be destroyed) at any time for any reason, or to refuse to answer any individual question.

Questions: 'If you have any questions or concerns regarding your rights or welfare as a participant in this research study, please contact the McGill Ethics Officer at 514-398-6193 or deanna.collin@mcgill.ca.

After you have read the preceding consent document, please sign below if you agree to be interviewed.

Do you consent to being recorded for the purposes of participating in this interview?

YES

NO

“Please sign below if you have read the above information and consent to participate in this study. Agreeing to participate in this study does not waive any of your rights or release the researchers from their responsibilities. Please keep a copy of this document for your records.”

Signature

Date