

# Manufacturing “Terrorists”: Refugees, National Security and Canadian Law

## Part 2

SHARRYN J. AIKEN

### **Abstract**

*The overarching objective of this paper is to provide a critical appraisal of the anti-terrorism provisions of Canada’s Immigration Act. The impact of these measures on refugees is the primary concern of this inquiry, but the author’s observations are relevant to the situation of other categories of non-citizens as well. Part 1 of the essay, published in the previous issue of Refuge, began by considering international efforts to address “terrorism,” the relevance of international humanitarian law to an assessment of acts of “terror,” and the nature of contemporary discourse on terrorism. The evolution of the current “admissibility” provisions in Canadian immigration law was examined with particular reference to national security threats and “terrorism.”*

*In part 2, the author focuses on the role played by Canada’s Federal Court in legitimizing the national security scheme. The tensions in the current jurisprudence are considered with a more in-depth analysis of Suresh v. Minister of Citizenship and Immigration, a case pending before the Canadian Supreme Court. The paper concludes with suggestions for restoring human rights for refugees while safeguarding a genuine public interest in security.*

### **Résumé**

*Le but suprême de cet article est de proposer une évaluation critique des provisions antiterroristes de la Loi sur l’immigration du Canada. L’enquête porte principalement sur l’impact de ces mesures sur les réfugiés, mais les remarques de l’auteur sont également pertinentes à la situation d’autres catégories de non-citoyens. La première partie de l’article, parue dans le dernier numéro de Refuge, avait commencé*

*par examiner les efforts déployés sur le plan international pour s’occuper du « terrorisme », la pertinence de la loi humanitaire internationale dans l’évaluation des actes de « terreur », et la nature du discours contemporain sur le terrorisme. Fut ensuite considérée la façon dont ont évolué les dispositions courantes concernant la notion d’admissibilité dans la loi canadienne sur l’immigration, avec référence particulière aux menaces à la sécurité nationale et au « terrorisme ».*

*Dans la deuxième partie, l’auteur se penche sur le rôle joué par la Cour fédérale du Canada dans la légitimation du plan de sécurité nationale. Les tensions qui existent dans la jurisprudence en cours sont examinées à travers une analyse détaillée de Suresh contre le Ministre de l’immigration et de la citoyenneté, un cas qui est présentement en instance devant la Cour suprême du Canada. L’article conclut avec des suggestions pour le rétablissement des droits de l’homme des réfugiés, tout en sauvegardant l’intérêt public légitime dans les questions touchant à la sécurité.*

*Have not horrors enough been perpetrated in the name of national security, and in the very countries from which many asylees come to North America these days? Are the persecutors going to win by making us like them?*

—C.B. Keely and S.S. Russell

### Judging National Security

The Federal Court is the most active forum for adjudicating immigration matters,<sup>2</sup> with jurisdiction to consider judicial review applications of refused refugee claims, the reasonableness (but not the merits) of inadmissibility decisions of adjudicators and visa officers, as well as ministerial security certificates, “danger opinions,” and reports by the Security Intelligence Review Committee (SIRC). The Court also may consider the constitutionality of the Immigration Act, either in the context of a separate “declaratory action” or in relation to a judicial review application.<sup>3</sup> In the eight years since the “terrorism” provisions of Bill C-86 were first implemented, both the Trial Division and Court of Appeal have had occasion to apply them as well as to consider their constitutionality. With few exceptions, the legislative scheme, the advice provided by the Canadian Security Intelligence Service (CSIS) on alleged members of “terrorist” organizations, and the practices of government administrators in response have not been subjected to serious scrutiny; constitutional as well as international legal standards have been deemed largely irrelevant. When the spectre of “terrorism” is conjured, government action tends to be endorsed in decisions that would otherwise be without legal foundation.<sup>4</sup> Judicial deference in this regard can be viewed in terms of the judiciary’s traditional reluctance to interfere in legislative or executive decisions when matters of national security are involved.

In a classic British decision, Lord Denning emphasized that “[t]he balance between [national security and individual freedom] is not for a court of law. It is for the Home Secretary.”<sup>5</sup> This judgment reflects the view that the judiciary lacks the institutional competence and expertise to intervene in matters of national security.<sup>6</sup> Implicit in such a view is that questions of national security are inherently political, as opposed to legal, and are therefore not appropriate for adjudication.<sup>7</sup> In Canada the Federal Court has adopted this deferential view in cases of crown privilege under the Canada Evidence Act. Despite the Act’s implicit invitation for such claims to be balanced against the public interest in the administration of justice, where claims of privilege are asserted on the ground of national security, Canadian courts consistently treat such claims as conclusive.<sup>8</sup> “[T]here can be no public interest greater than national security . . .”, the Federal Court has held, asserting that judges must consider the fact that they “lack expertise in matters of national defence and international relations.”<sup>9</sup> Similarly, in the immigration context, the Federal Court had been unwilling to apply a human rights lens to the government’s strategy of deporting “terrorists” who are

deemed to pose a danger to the security of the country. The judicial approach typically reflects an unwillingness to scrutinize the interests of national security against the competing values intrinsic to the rule of law and constitutional democracy. It also belies a clear contradiction. The denial of institutional competence suggests that the appropriate response would require that courts decline to entertain these cases at all, identifying them as non-justiciable. Rather than following this course, Hanks notes that “the courts have accepted that, when invoked by the government, this undifferentiated term is the solution to the legal issues before them.”<sup>10</sup> He suggests that the judiciary’s failure to give the concept of national security firm boundaries, and to insist that if it is to have legal consequences, it must have a meaning, has placed other societal values at substantial risk. Hanks indicates that these values include freedom of expression, association, and political activity.<sup>11</sup> As we will see in the following sections of this paper, in the immigration context, the additional value at stake includes the most basic right of human security.<sup>12</sup>

The general proclivity of the courts to defer to administrative decision makers in matters of national security has been reinforced in immigration cases with a Supreme Court ruling in 1992. In *Chiarelli v. Canada* the Court found that a long-term permanent resident was in Canada on a “contractual” basis, that committing a crime breached that contract and therefore justified deportation.<sup>13</sup> Mr. Justice Sopinka noted that “non-citizens do not have an unqualified right to enter or remain in the country.”<sup>14</sup> This comment represents the nadir of judicial recognition of immigrant and refugee rights during the last decade and has served to justify a range of measures that accord non-citizens fewer rights than citizens.<sup>15</sup> The discussion that follows exposes the extent to which such reasoning, applied in the context of immigration security and refugee exclusion, has produced decisions that are replete with inconsistencies and compromise the basic tenets of justice. After reviewing a representative selection of Federal Court cases decided after the anti-terrorism amendments were implemented, we will proceed to a more in-depth analysis of *Suresh v. Minister of Citizenship and Immigration*,<sup>16</sup> a case currently pending before the Supreme Court of Canada.

### “Terrorism”: The Play of Meaning and Confusion

In 1996 the Federal Court considered *McAllister v. Minister of Citizenship and Immigration*, one of the few occasions in which a definition of “terrorism” was attempted. Malachy McAllister was a member of the Irish National Liberation Army (INLA), an organization with a record of violence in

Northern Ireland. In 1988 he came to Canada seeking protection as a refugee. Pursuant to the access criteria that were in effect by the time his case was processed, the Minister determined that it “would be contrary to the public interest” to have McAllister’s refugee claim determined and thus he was barred from proceeding with his claim. His application for judicial review of these decisions was dismissed with the following explanation:

... it is to be noted that the *Immigration Act* . . . does not make membership in an organization unlawful in Canada. It does preclude admission to Canada of those who are found to be members of an organization that on reasonable grounds is found to have been or is engaged in terrorism. It applies in the case of foreign nationals, who have no right to enter or remain in Canada except as the Act permits.<sup>17</sup>

Mr. Justice McKay referred to a dictionary definition of *terrorism* and suggested that the term referred to all forms of terror and violence to intimidate in order to achieve a political objective. Borricand would not have approved, given the tautology inherent in defining *terrorism* by the terror it causes.<sup>18</sup> The Court commented further,

In an era when much attention on the international level, and within many countries, has been and continues to be given to containing, restricting and punishing acts of terrorism, I am not persuaded that the word can be considered so vague as to be devoid of sufficient certainty of meaning, or that application of the provision would present uncertainty. The word is recognizable to individuals, as it apparently was to Mr. McAllister in this case, and to those concerned with applying the Act.<sup>19</sup>

McAllister, himself, had accepted that his organization had committed “terrorist” acts but contested the Act’s inclusion of such vague and imprecise terminology as a bar to claiming refugee status. It is interesting to contrast this decision with the Supreme Court’s ruling a few years earlier in *R. v. Morales* on the Criminal Code’s use of the term *public interest* as a criterion for denying bail in pre-trial detention.<sup>20</sup> The Court found a clause in the Code unconstitutional because it authorized detention using terms that were vague and imprecise and thus resulted in a denial of bail without just cause. While agreeing that preventing crime and interference with the administration of justice were important, the means adopted by the government had to be proportional and rationally connected to the legislative objective. Applying the term *public interest* would authorize pre-trial detention in many cases unrelated to the objectives of the measure. The Supreme Court emphasized that statutory terms must be capable of framing the legal debate in a meaningful manner and structuring discretion.

In *McAllister*, the Federal Court refused to apply these principles, suggesting that a statute applicable to a criminal accused who faced a prospect of a serious penalty and denial of liberty, was distinguishable from provisions in the Immigration Act that applied to persons who had no right to remain in Canada and were seeking the benefit of a discretionary remedy. In such circumstances, the Court asserted that greater “caution” was appropriate. It is notable that a few months earlier, Mr. Justice McKay employed a very different conceptual lens in *Al Yamani v. Canada*, a judicial review application brought by a stateless man of Palestinian origin who had been living in Canada as a permanent resident since 1985.<sup>21</sup>

Counsel for Issam Al Yamani raised a number of constitutional issues with regard to a SIRC report and the resulting security certificate that was issued against him. The report was based on CSIS allegations that Al Yamani was a member of the Popular Front for the Liberation of Palestine (PFLP), a “terrorist” organization, likely to engage in acts of violence that might endanger the lives or safety of persons in Canada. Mr. Justice McKay agreed with one of Al Yamani’s arguments, namely that proscribing mere membership in an organization that is likely to engage in violence, regardless of the obligations of membership, the range of the organization’s other activities, or the influence the individual may exercise in the organization, directly violates freedom of association. The Court noted that “the freedoms assured by section 2 of the Charter are for ‘everyone,’ for the permanent resident as for the citizen in Canada.”<sup>22</sup> The Court found that the SIRC report could not stand in view of this constitutional violation, and consequently the matter was remitted for reconsideration.<sup>23</sup> In contrast to the case of *McAllister*, the Court emphasized the need for personal involvement.

The *Al Yamani* decision is consistent with American Supreme Court cases dealing with anti-Communist legislation of the 1950s. In *Apethekar v. Secretary of State*, for example, the Court found that a law prohibiting members of “Communist-action organizations” from applying for passports was unconstitutional because it deprived members of their constitutional right to travel, without considering whether or not they were active members or were engaging in unlawful activities.<sup>24</sup> Similarly in *Robel*, the Court struck down a law prohibiting any member of a Communist-action organization from working in a government defence facility, because it swept indiscriminately across all types of association, without regard for the quality and degree of membership.<sup>25</sup> In *Al Yamani* the issue was membership in an organization “likely to engage in vio-

lence.” The same logic has not been applied, however, in subsequent cases dealing with membership in organizations likely to engage in “terrorism.”

In *Re Baroud*, for example, the Federal Court considered the reasonableness of a security certificate issued against a Palestinian refugee claimant who had acknowledged that he was a former intelligence officer in the Palestine Liberation Organization (PLO), an organization that the Minister characterized as having engaged in “terrorism.” In upholding the Minister’s certificate, the designated judge indicated that the term *terrorist* is one that need not be defined. Mr. Justice Denault agreed that there were no reasonable grounds to believe Wahid Khalil Baroud himself actually engaged in “terrorism.” It was noted that Baroud had participated in “armed activities”—which did not constitute “terrorism.” However, in light of intelligence information about other practices carried out by Fatah and Force 17, the specific groups to which CSIS alleged Baroud belonged, the security certificate was reasonable.

The Court commented,

I am mindful of the fact that the terms “terrorism” and “terrorist” are not defined in the *Act*. Counsel for the Ministers affirms in her written memorandum that ‘Like beauty, the image of a terrorist is, to some extent, in the eye of the beholder.’ While I accept this statement in general terms, it cannot prevent this court from examining whether, in the circumstances of this case, there are reasonable grounds to believe that a person or organizations have engaged in terrorism.<sup>26</sup>

It deserves mention that Baroud’s reason for seeking asylum in Canada was that, as a PLO renegade, he feared for his life in the Middle East. He had disobeyed an order from the PLO hierarchy to proceed to Iraqi-occupied Kuwait during the Gulf War to assist Iraqi authorities. His disobedience of the official order resulted in his immediate dismissal from the PLO. As Whitaker reports, his stated reason was principled: as a Palestinian, a man whose homeland was under foreign occupation, he would not help another occupying power.<sup>27</sup> When his case was considered by the Federal Court, no evidence was presented that Baroud himself posed a specific threat to *any* nation. Furthermore, the PLO was no longer considered a “terrorist” organization, even by the Israeli government. From this judgment we can infer that the Court is defending an almost unlimited right of the government to define the scope of national security, in the absence of any connection between the impact of a refugee’s conduct and the welfare of either the host country or other nations.<sup>28</sup> After a lengthy detention in a Toronto jail, Baroud was deported to Sudan.

In a similar vein, in *Husein v. Canada* the Court upheld

an adjudicator’s order that the applicant was inadmissible based on his membership in the Oromo Liberation Front (OLF). The Court’s reasons disclose no analysis of the degree and nature of Fahmi Husein’s personal involvement in the organization, referring only to the adjudicator’s findings that OLF was an organization engaged in “terrorism” because its leaders had set fire to a village, killing 144 individuals, and had attacked another location, forcing individuals to jump off cliffs. These two incidents resulted in the deaths of several hundred people and therefore provided sufficient basis to characterize the OLF as an organization engaged in “terrorism.” The Court stated,

Terrorist organizations are not organized states or corporations where the niceties of agency law are applicable. Terrorist organizations are loosely structured groups. Even if I were to accept that an act carried out by an individual might not be attributed to an organization, where there is evidence that the leaders of an organization are involved in the acts of terrorism, I have no doubt that for purposes of subparagraph 19(1)(f)(iii)(B), there are reasonable grounds to believe that the organization itself is involved in acts of terrorism.<sup>29</sup>

The case of *Canada v. Iqbal Singh* concerned an Indian national who had been the organizing secretary of a Sikh student federation and spoke out against injustices perpetrated against the Sikh population by the Indian government.<sup>30</sup> He had been arrested and tortured by Indian authorities and ultimately fled to Canada in 1991, where he was recognized as a Convention refugee. Singh was subject to a security certificate on the basis of his involvement with the Babar Khalsa (BK) and Babar Khalsa International (BK1), which the Court noted originated as Sikh organizations engaged in “activism against the Indian government,” were involved in a range of humanitarian activities, but were also responsible for setting off bombs and killing innocent people. All of the open evidence against Singh dealt with his “close association” with leaders of the BK and his acknowledged financial assistance to a number of its representatives, including a person known to have been involved in a previous hijacking.

The Court upheld the security certificate on the basis that there were reasonable grounds to believe that the BK and BK1 have engaged in “terrorism” and that Singh was a member of these groups. Mr. Justice Rothstein referred to testimony provided by the Director of Internal Policy for the Department of Employment and Immigration given in 1992 before a parliamentary committee, to the effect that the intent in drafting the subsections was to define membership broadly, leaving a discretion with the Minister to provide an exemption in circumstances where, in the Min-

ister's opinion, it would not be detrimental to the national interest. He concludes,

The provisions deal with subversion and terrorism. The context in immigration legislation is public safety and national security, the most serious concerns of government. It is trite to say that terrorist organizations do not issue membership cards. There is no formal test for membership and members are not therefore easily identifiable . . . I think it is obvious that Parliament intended the term "member" to be given an unrestricted and broad interpretation. I find no support for the view that a person is not a member as contemplated by the provision if he or she became a member after the organization stopped engaging in terrorism. If such membership is benign, the Minister has discretion to exclude the individual from the operation of the provision.<sup>31</sup>

The Court's discussion of membership is very much at odds with the interpretive principles that inform refugee status determination and the application of the criminality related "exclusion clauses." In that context, the Federal Court has recognized that mere association with—or membership in—a group that commits acts of the type contemplated by sections 19(1)(e) and (f) is not in itself sufficient to warrant exclusion. One of the leading exclusion cases is *Ramirez v. Minister of Employment and Immigration*, which involved a sergeant in the Salvadoran army during the 1980s.<sup>32</sup> The Federal Court of Appeal upheld the decision of the Refugee Board that Ramirez should be excluded, based on his "personal and knowing" involvement in a military force that routinely tortured prisoners to extract information.<sup>33</sup> However, the Court emphasized that mere presence at the scene of an offence is insufficient to qualify as personal and knowing participation. Only "where an organization is principally directed to a limited brutal purpose, such as a secret police activity, mere membership may by necessity involve personal and knowing participation in persecutorial acts."<sup>34</sup> Applying the same logic in the case of *Moreno v. Canada*, the Court found that a young man who had been forcibly conscripted and had deserted at the first possible opportunity after learning that the army practiced torture, should not be subject to exclusion.<sup>35</sup> In the circumstances of this case the Court identified the key issue as whether José Rodolfo Moreno's membership in the Salvadoran army—an organization responsible for inhumane acts against members of the civilian population—in and of itself, was sufficient justification for invoking the exclusion clause. Citing *Ramirez*, Mr. Justice Robertson noted,

[I]t is well settled that mere membership in an organization involved in international offences is not sufficient basis on which to invoke the exclusion clause . . . An exception to this

general rule arises where the organization is one whose very existence is premised on achieving political or social ends by any means deemed necessary. Membership in a secret police force may be deemed sufficient grounds for invoking the exclusion clause . . . Membership in a military organization involved in armed conflict with guerrilla forces comes within the ambit of the general rule and not the exception.<sup>36</sup>

Both cases made extensive reference to domestic and international criminal law standards for the purposes of "direction." In *Moreno*, the Federal Court of Appeal cited the Supreme Court's majority judgment in a sexual assault case in which the offence of aiding and abetting was considered, underscoring the need for evidence of "prior knowledge of the principal offender's intention to commit the offence . . . and a positive act or omission to facilitate the unlawful purpose."<sup>37</sup>

In *Balta v. Minister of Citizenship and Immigration*, the Federal Court reviewed a decision of the Refugee Board that had described the Serbian army as a "terrorist" organization. The Court questioned whether the Board could reasonably draw such a conclusion and whether the applicant was a personal and knowing participant. Mr. Justice Rothstein elaborated:

In *Ramirez*, Mr. Justice MacGuigan recognized that some groups might be established or operated with the sole intent and purpose of violently and brutally bringing about a course of events. Is the particular goal of the Serbian army the commission of international crimes? While I do not dispute that atrocities are being committed in Bosnia by Serbian forces, I cannot agree, that based on the evidence before them, the Board correctly characterized a national army as a 'terrorist organization.' While the Serbian army may be utilizing terrorist means to achieve political ends, I think it is significant that there are political ends, namely Serbian control of Bosnia.<sup>38</sup>

The Court's analysis suggests there should be a distinction made between an organization that may engage in "terrorist" practices *versus* an organization that is "terrorist"—and that a relevant factor in this regard is the organization's overall purpose.<sup>39</sup> Implicit in this brief passage is an inference that any national army, regardless of its character, would be exempt from proscription. Mr. Justice Rothstein's reasons appear to contradict *Ramirez* and *Moreno* by justifying differential treatment for state and non-state actors. On the specific questions of complicity and membership, however, all three cases are fully consistent with UNHCR Guidelines on Exclusion.<sup>40</sup> Although State practice is not uniform, most countries have recognized that mere membership in an organization is not sufficient basis on which to exclude.<sup>41</sup> A recent House of Lords deci-

sion in the United Kingdom, for example, held that persons may not be excluded from the Convention merely because they or their acts or their organizations have been labelled “terrorist.”<sup>42</sup> The judgment emphasized the importance of assessing personal responsibility for excludable crimes. For Iqbal Singh, however, Mr. Justice Rothstein chose not to follow his own reasoning in *Balta*. Perhaps the Court viewed the rights-based underpinnings of refugee law, in which the exclusion clauses represent a narrow exception to protection, as incompatible with the broader exclusion criteria in section 19, which are rooted in the characterization of immigration as a privilege rather than a right. In any event, questions about Singh’s actual knowledge and involvement in the acts alleged to constitute “terrorism” were deemed irrelevant. Indeed, based on Justice Rothstein’s analysis, we see that the “terrorism” provisions apply equally to the person who ceased his or her membership before the acts occurred or became a member after the acts occurred but without knowledge of their occurrence. Recourse to the principles developed in the exclusion jurisprudence would have provided the Court with a much more coherent framework within which to analyze both the nature of the *БК* and *ВКІ*, as well as the degree of Singh’s involvement. Singh’s financial contributions would be assessed from the standpoint that the organizations at issue had political objectives, were engaged in a range of activities, and could not be characterized as groups with a “single brutal purpose”—all facts that can be inferred from the Court’s decision.

Aynur Saygili, a Kurdish refugee claimant, was a political activist whom *CSIS* alleged had been sent to Canada by the Kurdistan Worker’s Party (*PKK*) to “gain control of the general Canadian Kurdish community.”<sup>43</sup> Saygili was deported because the Federal Court upheld the Ministers’ opinion that she was a member of the *PKK*—a “terrorist” organization. In his brief reasons, Mr. Justice Cullen justified his ruling on two grounds: that Saygili had lied about her real name and itinerary to Canada and that her involvement in the Kurdish Community Association of Montreal was “. . . more than that of a passive person, even to delivering speeches apparently prepared by one of her hosts.”<sup>44</sup> The Court cited evidence of conditions in Turkey and the nature of the *PKK*, referring specifically to an expert’s testimony on the cultural genocide perpetrated against the Kurds by the Turkish state, the 4,000 Kurdish villages that had been levelled in the previous three to four years, and the sympathy for the nationalist struggle shared by all Kurds. What the Court would not consider was whether the conditions in Turkey gave rise to a right to armed re-

sistance on the part of the *PKK*. Nor was there any discussion of the *PKK*’s command structure and the presence of a distinct political wing that had as its mandate the promotion of Kurdish nationalism through political means. The nature and degree of personal and knowing participation in unlawful acts on the part of other members of the Kurdish Community Association and Saygili herself, either in Canada or abroad, was not relevant. In this regard, it was not alleged that Saygili’s role within the *PKK* as an executive member or senior leader. Saygili’s speeches at the community centre were sufficient to establish her culpability—effectively “guilt by association.”<sup>45</sup>

Courts have legitimately recognized that certain forms of speech do not deserve constitutional protection because of the harm they engender, that there may be some limit on expressive rights when, for example, expression involves direct physical harm.<sup>46</sup> The application of this standard has not prevented citizens in Canada from expressing support for *NATO*’s high-altitude bombing campaign in Yugoslavia in 1999 or, more recently, the violence that has accompanied the *Al Aqsa Intifada* in Israel/Palestine. Apparently, pure political speech, a sacrosanct freedom in Canada, is a right that must be exercised with extreme caution by refugees and other non-citizens. Mr. Justice Cullen cited an Amnesty International report as evidence that the *PKK* was responsible for politically motivated violence in Turkey, but no attempt was made to establish any connection between Saygili and *PKK*-sponsored violence. The nature of the Court’s limited jurisdiction in reviewing whether or not it was reasonable for the security certificate to be issued, rather than the actual merits of doing so, meant that Turkey’s abysmal human rights record on its Kurdish minority, reported in the same Amnesty document, and what would happen to Saygili if she was returned there, were beyond the Court’s purview.

In *Re Ahani*, the designated judge considered the reasonableness of a security certificate that had been issued against a Convention refugee from Iran.<sup>47</sup> Mr. Justice Denault upheld the certificate, agreeing with the *CSIS* allegations that there were reasonable grounds to believe, *inter alia*, that Mansour Ahani was a member of the Iranian Ministry of Intelligence Security (*MOIS*), an agency that sponsors assassinations of political dissidents worldwide. The Court found that the case, at its heart, turned on Ahani’s credibility, which, according to Mr. Justice Denault, was completely lacking. Without access to the intelligence reports on which the Court’s assessment of credibility was based, it is impossible for an observer to assess the merits of the decision. In common with most security cases, the

judgments themselves never disclose a detailed analysis of the allegations and evidence, because that information has been received in secret, in the absence of the person concerned and his or her lawyer, on the grounds that it would be injurious to national security or persons (*i.e.*, the informants). Nevertheless, critical examination of the premises upon which the credibility determination rests is possible. In this respect, the Court's statements on the interpretation of the language in section 19 of the Act are worth reproducing:

In my view, since Parliament has decided not to define these terms, it is not incumbent upon this Court to define them . . . I do not share the view that the word ["member"] must be narrowly interpreted. I am rather of the view that it must receive a broad and unrestricted interpretation. As to the word "terrorism," while I agree with counsel for the Respondent that the word is not capable of a legal definition that would be neutral and non-discriminatory in its application, I am still of the opinion that the word must receive an unrestricted interpretation.<sup>48</sup>

Mr. Justice Denault's conclusion that a word not capable of legal definition and non-discriminatory application should nevertheless be applied, and further, applied expansively, is inconsistent with the equality guarantees of the Charter of Rights, and the rule of law more broadly.<sup>49</sup> In other contexts, the Supreme Court has recognized that while legislatures 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."<sup>50</sup> Following the Court's ruling, Ahani was ordered deported, and the Minister issued a "danger opinion," which indicated that he could be returned to Iran, a country where he faced only "minimal risk." Ahani is in his seventh year of detention in Canada and has continued his efforts to have his deportation order rescinded.<sup>51</sup> Ahani's case is currently pending before the Supreme Court and will be heard in May 2001, along with *Suresh v. Canada*, considered below.

### ***The Suresh Case: Human Rights or Comity and Complicity?***

The case of Manickavasagam Suresh engages all of the themes addressed in this paper concerning the role of the law in constructing refugees as "terrorists." For this reason, the proceedings in *Suresh* will be examined in somewhat greater depth—albeit with a discrete focus on "terrorism"—rather than the broader constitutional questions that will be canvassed before the Supreme Court.<sup>52</sup>

Suresh is a Tamil man of Sri Lankan origin who was recognized as a Convention refugee in Canada in 1991. During his time in Canada he worked as a co-ordinator for the Federation of Associations of Canadian Tamils (FACT), a non-profit corporation registered in Ontario, and as fundraising co-ordinator with the World Tamil Movement (WTM). FACT is engaged in advocacy in support of Tamil self-determination in Sri Lanka as well as a range of community activities and government-funded settlement services. WTM is a member agency of FACT and supports a community centre, library, educational program in Tamil culture and language, and vocational training. WTM also publishes a weekly newspaper. Suresh's involvement in these organizations resulted in the filing of a security certificate against him alleging that he was described in three of the inadmissible classes within section 19: persons who have engaged in "terrorism" as well as past and present members of organizations engaging in "terrorism."

Mr. Justice Teitelbaum upheld the reasonableness of the security certificate, finding that Suresh was a long-time member of the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, became part of its executive, and continues to be a member in Canada; that he obtained refugee status by "wilful misrepresentation of the facts"; that the WTM is part of the LTTE or "at least an organization that supports the LTTE"; and finally, that there were reasonable grounds to believe the LTTE has engaged in "terrorist" acts.<sup>53</sup> In the course of the hearing, counsel for Suresh called a series of witnesses and international legal experts to address the character of the ongoing conflict in Sri Lanka, the human rights situation in that country with respect to the Tamil minority, whether the Tamils were a "People" for the purposes of international humanitarian law, and whether their character as a group, as well as the conditions they faced in Sri Lanka, gave them a right to resort to force. Evidence was provided by Dr. Richard Falk, and Professors Jordan Paust and Craig Scott, among others. Much of the testimony elaborated on themes considered in part 1 of this paper.

In a nutshell, there was a consensus among the experts who had been called for Suresh that the Tamil minority in Sri Lanka fulfill the criteria for recognition as a "People" with a right to self-determination. The experts supported the conclusion that the LTTE is a national liberation movement within the meaning of international humanitarian law and that the treatment of the Tamils by the national government in Sri Lanka gave rise to the right to armed resistance against a "racist regime," as a matter of customary international law.<sup>54</sup> Based on the foregoing principles,

counsel for Suresh argued that the list of “terrorist” incidents that CSIS alleged were committed by the LTTE have to be viewed as allegations of violations of the laws of war (not “terrorism”); and that the evidence provided by CSIS, primarily press reports, disclosed insufficient information from which to draw conclusions about the nature of the acts committed—including whether the acts constituted reprisals, and whether civilian casualties were incidental to a military attack or not. Submissions were made with regard on the definitional problems associated with “terrorism,” “engaged or engaging,” and “membership,” and the application of constitutional norms to these issues.<sup>55</sup>

In a relatively brief judgment, the security certificate issued against Suresh was upheld. The Court dispensed with all the arguments on the relevance of international humanitarian law to an assessment of the Sri Lankan conflict and the characterization of the LTTE, by deeming these issues irrelevant. In a brief remark, Mr. Justice Teitelbaum stated,

witnesses called by Suresh denied most of these incidents as being “terrorist” in nature as, it is alleged, the LTTE can be considered freedom fighters, and therefore have the “right” to shoot at soldiers or persons who do not support the LTTE and their aims. With respect, I disagree.<sup>56</sup>

The Court supported this perspective by reference to incidents of violent attacks on political representatives, police, and civilians that had been attributed to the LTTE, but it failed to address any of the contextual issues that an assessment of violations in the midst of an ongoing conflict would necessarily require. In contrast to the Court’s judgment in *Re Baroud*, which found that all forms of personal involvement in violence were not necessarily “terrorism,” Mr. Justice Teitelbaum made no distinction between attacks on military sites *versus* those that target civilians. In a classic invocation of the limits of judicial competence in political questions, he suggested that such an analysis would require the Court to resolve “political issues that exist between groups of peoples in another country” and that

... [i]t is not my function as a judge of the Federal Court ... to determine, based on the evidence before me, whether the Tamil people in Sri Lanka should or should not be granted their own homeland or even to express an opinion on that subject. That is a political question to be determined by the people of Sri Lanka, together with the help of the United Nations and other nations of goodwill.<sup>57</sup>

Yet an assessment of conduct in the course of a liberation or secessionist struggle is very much a legal issue. As discussed earlier, such an assessment involves questions that should be guided by the comprehensive scheme of IHL,

which has been directly incorporated into Canadian law. Arguably it is precisely the failure to apply legal norms to an analysis of the nature of particular non-state actors and their conduct that politicizes the judicial role in these cases. While it must be acknowledged that the application of IHL standards may have political *consequences*, the Courts are frequently involved in balancing competing interests with explicit political, economic, and social dimensions.<sup>58</sup> From foreign policy, missile testing, abortion, and the Secession Reference, to the language of signs, the funding of education and pay equity, the right to life and the right to death, Canadian courts directly engage with a broad spectrum of political issues and have attempted, albeit with varying degrees of success, to resolve these questions within the rubric of law and principle.<sup>59</sup> Viewed in this light, judicial deference in the name of protecting Canada from “terrorism” reinforces the dominant discourses that have cast the refugee as a threat to order, and as Whitaker suggests, the “focal point for countermeasures to ‘stem the tide.’”<sup>60</sup> The Court’s surrender becomes a political act of state legitimation, compromising the very tenets judges are entrusted to uphold.

In the absence of statutory criteria defining *membership* and *terrorism*, Mr. Justice Teitelbaum could have ensured that those terms were interpreted in a manner consistent with the Geneva Conventions Act as well as the Charter and international human rights law. The Court could have read into the law the presumption that Parliament did not intend those terms to be interpreted by either ministers or judges in an unconstitutional manner, in a way that would sweep within its ambit advocacy and fundraising efforts in support of lawful activities and, indeed, fundamental human rights.<sup>61</sup>

Another reasonable course of action could have been to find that the absence of definitional criteria renders non-discriminatory application of the law impossible (as Mr. Justice Denault noted in *Ahani*) and that therefore the Minister’s decision could not be upheld. In other contexts, the courts have recognized the disadvantage suffered by non-citizens in Canada.<sup>62</sup> The courts have also held that seemingly neutral laws that affect a person or group in a manner related to their personal characteristics is an affront to the values of equality and human dignity.<sup>63</sup> Indeed, the right to equality enshrined in the Charter has been described as the “broadest of all guarantees” that applies to and supports all other rights.<sup>64</sup> In *Re Suresh* we are advised instead that the law must be interpreted through the “eyes of a Canadian” and that ministerial discretion to interpret “membership in a terrorist organization” should be unre-

stricted. The irony is that the refugees and immigrants most affected by the law are very often from countries with the worst records on human rights. In this case we can see how the Court's judgment lends legitimacy to the efforts of the Sri Lankan government to suppress a secessionist struggle borne of fundamental deprivations and human rights abuse. Mr. Justice Teitelbaum stated,

I am satisfied that there is no need to define the word "terrorism." When one sees a "terrorist act" one is able to define the word. When one sees a bomb placed in a public market frequented by civilians and the bomb causes death and injury, one is able to see a "terrorist act" or what is referred to as "terrorism." The word need not be defined. As I have stated, one can see a "terrorist act" and, I am satisfied, the "act" must be seen through the eyes of a Canadian . . . [t]he term "terrorism" or a "terrorist act," I am satisfied must receive a wide and unrestricted interpretation . . .<sup>65</sup>

In contrast to the decisions on complicity in the context of refugee exclusion (*Ramirez, Moreno, and Balta*) and the judgment in *Al Yamani*, which distinguished between support activities and personal involvement, in *Re Suresh* we see that all forms of conduct in support of an organization deemed to be engaging in "terrorism," in the absence of any nexus between the support activities and acts of violence, is "terrorism." The Court need not have found that the LTTE was a national liberation movement for the purposes of absolving Suresh (although the preponderance of evidence suggests otherwise). Further, the Court need not have discounted evidence of serious human rights violations that have been committed by members of the LTTE during the seventeen-year conflict in Sri Lanka. Indeed, Amnesty International has consistently documented violations of international humanitarian principles by both sides in the conflict.<sup>66</sup> Rather, the Court could have relied on evidence of the organization's conventional combat activity as well as its humanitarian and relief activities in support of internally displaced Tamils and its status as a *de facto* government in areas of the country within its control, to conclude that the LTTE was not an organization with a "limited brutal purpose," such that someone engaged in fundraising and political advocacy should be effectively criminalized for whatever acts of violence members of the group may initiate.<sup>67</sup>

Subsequent to the Court's decision upholding the reasonableness of the security certificate, the Minister gave notice that she was considering the option of declaring Suresh a danger to the security of Canada and that she would be assessing the risk that he represented for the Canadian public and the possible risks to which he would be

exposed if returned to Sri Lanka. Pursuant to the procedures set out in the Act, Suresh had fifteen days to respond to the Minister's notice. Documentation submitted on his behalf included extensive evidence of human rights abuses, including torture in detention and extra-judicial executions, committed by Sri Lankan security forces against Tamils. The human rights reports confirmed that most of the torture victims were "Tamils suspected of being LTTE-insurgent collaborators." There was evidence submitted confirming that Suresh personally would be at serious risk if returned to Sri Lanka, in particular as a Canadian-certified "terrorist." A letter from Amnesty International emphasized the non-derogable nature of Canada's obligations under the CAT and indicated that "[a]pplying the language of article 3 to Mr. Suresh, Amnesty International believes 'there are substantial grounds for believing that he would be in danger of torture' if he were returned to Sri Lanka."<sup>68</sup> The department analyst who reviewed the case recommended that the Minister issue a danger opinion against Suresh, noting,

. . . on balance there are insufficient humanitarian and compassionate considerations present to warrant extraordinary consideration. It is difficult, however to assess the treatment reserved for Mr. Suresh upon his return to Sri Lanka. Given his high profile in the Canadian Tamil Community and international media, we feel that this will likely mitigate any harsh sanctions taken against him by Sri Lankan authorities. Furthermore, while we acknowledge that there is a risk to Mr. Suresh on his return to Sri Lanka, this is counterbalanced by the serious terrorist activities to which he is a party, committed while abusing Canada's protection and freedom.<sup>69</sup>

The Minister issued the danger opinion and took steps to arrange for his deportation. A judicial review application in the Trial Division and a subsequent appeal, challenging the constitutionality of the terrorism and *refoulement* subsections as well as the Minister's exercise of discretion in the circumstances of the case, were both unsuccessful.<sup>70</sup> From the wide-ranging legal and constitutional issues arising from the judgment by the Federal Court of Appeal, a few points warrant particular mention for our inquiry.

First, none of the human rights reports available at the time the analyst wrote his report or today lend any support to his contention that a "high profile" would mitigate against harsh treatment.<sup>71</sup> It is notable that just a few months after the analyst completed his memorandum, the Canadian government was involved in a sophisticated interdiction action involving a boat of 192 Tamil asylum-seekers bound for Europe. Canadian interdiction policies are the

mirror image of anti-terrorist laws: both serve to control access to asylum. In this case a boat was tracked and intercepted off the coast of Senegal. None of the passengers were properly interviewed to determine whether they would be at any risk if returned to Sri Lanka.<sup>72</sup> Summarily described as “economic migrants,” they were encouraged to consent to “voluntary” repatriation under the watchful eyes of Canadian officials. All of the Tamils were arrested upon arrival back to Sri Lanka and held in detention for several weeks. One of these individuals was rearrested one month later and brutally tortured on the pretext of his alleged involvement in the LTTE.<sup>73</sup> Two years later, representatives for the Canadian government still speak of their “success” in safeguarding Canada from illegal migration.<sup>74</sup> Neither the attention the case attracted (two bulletins by Amnesty International), nor the direct involvement of the Canadian government in the operation and subsequent monitoring in Sri Lanka, prevented this atrocity from happening. The most recent human rights reports confirm that “[d]espite legal prohibitions, the security forces and police continue to torture and mistreat persons in police custody and prisons, particularly Tamils suspected of supporting the LTTE,” and that “torture continues with relative impunity.”<sup>75</sup> The U.S. State Department report for 2000 indicates that

[m]ethods of torture included electric shock, beatings (especially on the soles of the feet), suspension by the wrists or feet in contorted positions, burning, slamming testicles in desk drawers, and near drownings. In other cases, victims must remain in unnatural positions for extended periods, or they have bags laced with insecticide, chilli powder, or gasoline placed over their heads. Detainees have reported broken bones and other serious injuries as a result of their mistreatment.<sup>76</sup>

A second observation concerns the Court of Appeal’s textual analysis of the relevant international human rights treaties. In dismissing Suresh’s appeal, the Court engaged in interpretive gymnastics with regard to the requirements of the applicable treaties. As emphasized in the Supreme Court ruling in *Pushpanathan*, provisions that disentitle a person to human rights protection should be read narrowly.<sup>77</sup> The Federal Court did precisely the opposite by attempting to find support for the proposed deportation, where none actually existed, in the text of the treaties. Mr. Justice Robertson suggested that the International Covenant on Civil and Political Rights enunciates a non-derogable prohibition on torture that is geographically restricted to conduct within a state’s jurisdiction; that its ambit does not extend to expulsion or extradition.<sup>78</sup> The fact that the UN Human Rights Committee’s own guidelines directly contradict such an interpretation did not dissuade the Court

from this view.<sup>79</sup> The Court proceeded to infer that derogation from the Convention against Torture’s prohibition against *refoulement* to torture was contemplated because article 3 contained no reference to a non-derogation requirement (although the plain language is mandatory: “no State Party shall expel, return . . .”). The next leap was to article 16 of the Convention, which addresses the circumstances where references to torture can be read to include “cruel, inhuman or degrading treatment or punishment” and to provide broader protection by explicitly indicating that the Convention’s provisions are without prejudice to guarantees afforded in other international instruments. The Court inferred from this article that since the Refugee Convention permits *refoulement* pursuant to the security exception of article 33.2, the Convention against Torture should be interpreted to include the very same exception. Yet this reading directly contradicts the Convention’s own preamble as well as decisions of the Committee Against Torture and the European Court of Human Rights.<sup>80</sup>

The Court agreed that a breach of fundamental justice had been occasioned by procedures that permitted the Minister to deport “a suspected terrorist” where there were substantial grounds for believing that *refoulement* would expose the person to a risk of torture. However, this was a reasonable limitation in view of the security interests at stake. One might legitimately wonder how such action can be reconciled with the Court’s conclusion that Suresh himself had not committed any crimes in Canada, nor had he engaged in any “terrorist” activity in Sri Lanka. Indeed, in reasons granting an earlier interlocutory order, Mr. Justice Robertson stated,

What is clear is that Mr. Suresh has not committed any acts of violence in Canada. He is being deported largely because he is the leader of a Canadian organization which raises financial aid for a terrorist organization, namely, the LTTE. In short, there is no evidence to support a valid concern that Mr. Suresh’s presence in Canada represents a threat to the personal safety of Canadians.<sup>81</sup>

Even if one were to accept that the human rights treaties permit states to balance competing interests in cases of *refoulement* to torture (which they do not), there is an utter lack of proportionality between the law’s legislative purpose of general deterrence—ensuring that Canada does not become “a safe haven for terrorists,” and the means invoked, when a person who poses no threat is *refouled* to a risk of torture. When the constitutional rights of citizens are at stake, the government is held to a more rigorous test in order to defend the proposed action.<sup>82</sup> For a non-citizen, the most basic right to security of the person will be com-

promised in the name of safeguarding the “security of Canada.” Perversely, the Court appeals to the need to foster comity among nations—to ensure that Canada “lives up to its international commitment to fight terrorism,” as an additional benefit of the law, while rejecting the very same internationalism to promote human rights.<sup>83</sup> It is noteworthy that the government itself is on record suggesting that the fight against “terrorism” must be consistent with the broader commitments to human rights and the rule of law; that the institutions entrusted to fight “terrorism” would attract public support by respecting those principles.<sup>84</sup>

Third, the Court’s judgment conflates “terrorism” with crimes against humanity. It is suggested that “[n]o one questions the right to use force in seeking political independence so long as the struggle is between two combatants.” However, we are told,

... a line separating acceptable means of protest from unacceptable means must be drawn somewhere. In my view terrorism is an unacceptable means of attempting to effect political change... I accept that nations may be unable to reach a consensus as to the exact definition of terrorism. But this cannot be taken to mean that there is common ground with respect to certain types of conduct. At the very least, I cannot conceive of anyone seriously challenging the belief that killing innocent civilians, that is crimes against humanity, does not constitute terrorism.<sup>85</sup>

The terrorist is now reconceived as the criminal against humanity—a term that actually has legal content and meaning, from its codification in the Charter of Nuremberg to its more recent applications by the *ad hoc* tribunals for Yugoslavia and Rwanda, and in the Rome Statute.<sup>86</sup> It may indeed be the case that members of the LTTE have committed such crimes, but justice would not tolerate a trial *in absentia*—nor would it implicate everyone in a leadership position without reference to the context of the conflict or degree of personal responsibility.<sup>87</sup> Apart from decisions of the Federal Court, none of the ill-fated efforts to define “terrorism” have ever suggested an equivalence with crimes against humanity. Such a suggestion is offensive in the context of the Sri Lankan conflict, where daily reports of human rights violations committed by the state as part of a systemic, deliberate policy of race-based persecution far outstrip the crimes of the Tamil Tigers, whose fundamental objective concerns a legitimate right of self-determination.<sup>88</sup> While we share the same horror as the Court over atrocities committed against innocent people, the suggestion that Suresh’s conduct could ever be equated with crimes against humanity trivializes the massive brutalities of the past cen-

tury—from the Nazi Holocaust to the killing fields of Cambodia and Rwanda.

The United Nations Human Rights Committee has expressed concern that “Canada takes the position that compelling security interests may be invoked to justify the removal of aliens to countries where they may face a substantial risk of torture or cruel, inhuman or degrading treatment.”<sup>89</sup> In November 2000, the Committee against Torture expressed a similar concern and recommended that Canada “comply fully with article 3(1) of the Convention prohibiting return of a person to another state where there are substantial grounds for believing that the individual would be subjected to torture, whether or not the individual is a serious criminal or security risk.”<sup>90</sup> In its more wide-ranging study also released last year, the Inter-American Commission on Human Rights commented that “[t]he fact that a person is suspected of or deemed to have some relation to terrorism does not modify the obligation of the State to refrain from return where substantial grounds of a real risk of inhuman treatment are at issue.”<sup>91</sup> The Commission gave particular attention to the procedural inadequacies inherent in the immigration security scheme.

What should be clear from the foregoing review is that a parochial discourse of anti-terrorism has been a substitute for conceptual consistency, coherence, and justice. Non-citizens have been subjected to standards that fall far short of the guarantees afforded citizens, and the most basic entitlements to equality and security of the person have been sacrificed on the altar of national security. In most cases, once an adverse CSIS report has been issued, even the most compelling testimony by the person concerned and Herculean efforts by counsel have been unable to persuade the Federal Court that the advice should be discounted. With each security certificate that the Court has upheld on the basis of “terrorism” allegations, the government’s strategy of selective refugee deflection and deterrence, of closing the borders for some while extending a welcome mat to others, has been reinforced.

### Conclusion

It was a security-conscious, “law and order” Conservative government that developed the “terrorism” clauses ultimately included in Bill C-86. This was the same government that moved the entire Immigration bureaucracy to a newly created Department of Public Security. Once elected, the Liberal government swiftly reconfigured the department as “Citizenship and Immigration” but endorsed and sustained the measures introduced in C-86. In his submission to the Special Committee of the Senate on Security

and Intelligence (Kelly Committee) in 1998, Ward Elcock, the director of CSIS, warned that "the terrorist threat to Canada—and Canadians—has not diminished."<sup>92</sup> Mr. Elcock indicated that with perhaps the singular exception of the United States, there were more international terrorist groups active in Canada than in any other country in the world and that "Canada's counter-terrorism effort will never succeed if we allow our borders to become mere sieves . . ." <sup>93</sup> Reporting in January 1999, the Kelly Committee agreed that

Canada remains . . . a "venue of opportunity" for terrorist groups: a place where they may raise funds, purchase arms and conduct other activities to support their organizations and their terrorist activities elsewhere. Most of the major terrorist organizations have a presence in Canada. Our geographic location also makes Canada a favourite conduit for terrorists wishing to enter the United States, which remains the principal target for terrorist attacks world-wide.<sup>94</sup>

It is interesting to note that government does not actually maintain a reliable record of "terrorist" incidents in Canada, but CSIS confirms that there are approximately fifty organizations and 350 individuals who are "targets" of ongoing intelligence investigations.<sup>95</sup> Ironically, even CSIS accepts that during the past ten years the number of reported incidents of politically motivated violence internationally has declined "notably."<sup>96</sup> More people continue to be killed and injured every year in traffic and workplace accidents—and as one observer recently remarked, even by bee stings<sup>97</sup>—than by "terrorism" under any definition of the term. Yet legal and policy discourse on "terrorism" continues to be informed by a moral panic.<sup>98</sup> The anti-terrorism measures in Canadian immigration law, much like the draconian anti-mugging reforms adopted in the United Kingdom in the 1970s (which focused on members of the Black community as scapegoats) are the result of the manner in which the state and the media have constructed and distorted social reality. As Lohrmann indicates, the overall impact of immigration on the internal security of receiving countries "tends to be misjudged and overestimated. Public debates on this issue are often marked by prejudicial stereotyping of the proneness of immigrants toward crime and deviant behaviour."<sup>99</sup> In the Canadian context statistics firmly establish that refugees and other immigrants commit crimes at rates far below the Canadian-born population.<sup>100</sup> Yet in the past year the isolated incident of failed refugee claimant Ahmed Ressam crossing the United States from Canada with explosives in his car became a flashpoint for concern by the media and government alike and renewed criticism that the refugee program was to

blame for Canada's becoming a "safe haven for terrorists."<sup>101</sup> Similarly, in the lead-up to the Supreme Court's hearing of the *Suresh* case later this spring, national media have repeatedly rehashed the story of federal Cabinet ministers attending a community event organized by FACT in Toronto, giving voice to concerns that federal politicians were dining with "terrorists."<sup>102</sup> It is acknowledged that there have been some serious incidents in Canada, and in this regard the role of the state in maintaining national as well as international security is important. Most people remember the 1985 Air India flight that originated in Vancouver and ended in the skies over Ireland with an explosion that killed all 329 passengers on board—becoming the biggest mass murder case in Canadian history. However, "counter-terrorism" must not become a blanket justification for victimizing innocent people. As Keely and Russell imply, the perpetrators must not win by making us like them.

The cold-war efforts of the House Un-American Activities Committee and Senator Joseph McCarthy to uncover members of the Communist Party in Hollywood and the U.S. State Department are widely regarded as witch hunts. In Canada, more than fifty years later, in the face of increasing concerns about the activities of biker gangs, certain politicians have demanded that the federal government declare an outright ban on membership in organized crime groups. Both the federal Justice Minister and national media appropriately urged caution.<sup>103</sup> The solution wasn't to make new laws that trenched on important civil liberties, but rather to do a better job of enforcing the laws that already exist.<sup>104</sup> That as a society we are unable to marshal the same logic in support of refugees and other non-citizens in this country is shameful.

As for concrete reforms, the following recommendations represent a modest attempt. The relatively recent amendments targeting "terrorists" and members of "terrorist" organizations should be removed from the Immigration Act. The Federal Court's jurisprudence in the aftermath of the c-86 amendments provides ample illustration of the extent to which application of the term permits an unacceptably wide margin for decisions based on stereotype and other biases. The Court's cliché, that "one knows a terrorist act when one sees one," is symptomatic of the lack of rigour and principle that attempts to apply "terrorism" in the legal arena necessarily engender. Even if it were possible, as Chadwick might assert, for Parliament to develop a more even-handed definition of the term, one that would provide meaningful and non-discriminatory guidance for decision makers, there is no need for it. The admissibility provisions already included in section 19 of the Immigration

Act are fully adequate to address genuine security concerns by including within their ambit persons who have committed unlawful acts in the past as well as those who are considered likely to engage in acts of violence or unlawful activities in the future.<sup>105</sup>

It deserves mention that the Minister has authority pursuant to existing legislation to initiate revocation proceedings if information surfaces later to suggest that residence or citizenship status was conferred improperly.<sup>106</sup> A focus on acts and offences, rather than support for causes, is consistent with international treaty obligations and should go some way to ensuring that political activists are not caught in the net. However, for the law to be truly non-discriminatory, its treatment of refugees and immigrants from conflict-ravaged countries should be explicitly guided by international humanitarian law. The Immigration Act should be amended to include reference to the Geneva Conventions Act so that people who have engaged in violent acts in the context of a legitimate conflict are no longer criminalized for the mere fact of having been engaged in the conflict, either as combatants or civilians. A further amendment should provide a specific definition for the term *security of Canada*, with reference to international legal standards as well as the definition of threat in the CSIS Act. While the government seeks to promote international cooperation in the eradication of violence, the Courts have an important role in ensuring that comity does not become an all-purpose justification for riding roughshod over individual rights and undermining legitimate political dissent, at home and abroad. The norms developed in refugee and criminal law concerning membership, complicity, and conspiracy should inform all security-related decisions. Clear policy guidelines articulating these principles would provide critical assistance to both administrative decision makers and judges. Under no circumstances should deportation be authorized in circumstances where an individual is at risk of torture or other serious human rights violations. In this regard, the Act should be amended to fully incorporate the obligations of the Convention against Torture. Finally, the government should redouble genuine efforts to end impunity for international crimes through recourse to the criminal justice system. Canada's role in promoting international justice would be immeasurably enhanced if the small number of refugees and other non-citizens who have committed war crimes or crimes against humanity were prosecuted in Canada, rather than subject to expulsion. Meaningful implementation of the Crimes against Humanity and War Crimes Act means there is no longer an excuse for inaction. Implementation of any of

these recommendations would require a degree of political will that appears to be lacking at present. In the coming months, however, the Supreme Court will be uniquely positioned to address some of these issues. May the Court be guided by wisdom and justice.

### Notes

1. C.B. Keely and S.S. Russell, "Asylum Policies in Developed Countries: National Security Concerns and Regional Issues" in A. Simmons, ed., *International Migration, Refugee Flows and Human Rights in North America: The Impact of Free Trade and Restructuring* (Staten Island, N.Y.: Center for Migration Studies, 1992) 229 at 241.
2. Although provincial superior courts may address immigration matters in the context of their inherent jurisdiction over constitutional matters, the Federal Court has primary jurisdiction in the review of ministerial security certificates and admissibility decisions. See *Reza v. Canada*, [1994] 2 S.C.R. 394; *Baroud v. The Queen* (1995) 22 O.R. (3d) 255 (O.C.A.); *Suresh v. The Queen* (1998) 38 O.R. (3d) 267, aff'd on appeal [1999] O.J. No. 28 (Ont. Div. Ct.).
3. Note, however, that a designated judge does not have jurisdiction to consider constitutional challenges in the context of a review of the reasonableness of a security certificate pursuant to s. 40.1 of the Immigration Act. See, e.g., *Canada v. Mahjoub* [2001] F.C.J. No. 79 (T.D.), online: QL (FCJ). For a detailed study of the broader legislative scheme and applicable procedures, see D. Galloway, *Immigration Law* (Concord, Ont.: Irwin Law, 1997).
4. See B. Gorlick, "The Exclusion of 'Security Risks' as a Form of Immigration Control: Law and Process in Canada" (1991) 5:3 *Immigration and Nationality Law and Practice* 76 at 78. A comment on the use of national security doctrine by the British Courts and equally apt for Canada: "[A]s soon as national security is mentioned, the courts quake." I.A. Macdonald and N.J. Blake, *Immigration Law and Practice in the United Kingdom*, 4th ed. (London: Butterworths, 1995) at 501. See *ibid.*, at 499-502 for an overview of the national security procedures in the U.K.
5. *R. v. Secretary of State for Home Affairs, Ex Parte Hosenball*, [1977] 1 W.L.R. 766 at 783(C.A.).
6. For a more recent endorsement of this view, see *Rehman v. Secretary of State for the Home Department* [2000] E.W.J. No. 2830 at para. 43 (C.A.), online: QL (EWJ), regarding a deportation order against a man suspected of links with a "terrorist" group operating in Pakistan. The British Court of Appeal observed, "The Executive is bound to be in a better position to determine what should be the policy on national security than any tribunal no matter how eminent." The Court of Appeal did suggest, however, that British security could be threatened only by promotion of violence abroad where there is evidence of "adverse repercussions on the security of this country" (at para. 39).
7. The common law "political questions doctrine" stipulates that the judge "should decide not to decide" in cases where the issues do not present clear legal questions susceptible to "judi-

- cially discoverable or manageable standards.” See *Baker v. Carr* 369 U.S. 186 (1962). In Canada, the doctrine was considered in *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, and most recently, in the *Secession Reference*, where the Court chose not to invoke it [1998] 2 S.C.R. 21. See L. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999).
8. P. Hanks, “National Security: A Political Concept” (1988) 14 *Monash U.L.Rev.* 114 at 116.
  9. *Re Goguen and Albert and Gibson* (1984) 7 D.L.R. (4th) 144 at 156.
  10. P. Hanks, *supra* note 8 at 133.
  11. *Ibid.*, at 119.
  12. As defined by the United Nations Development Programme (UNDP), *human security* means, first, “safety from such chronic threats as hunger and repression,” and second, “protection from sudden disruptions in the patterns of daily life”—whether in homes, jobs, or communities. UNDP, *Human Development Report* (Oxford: Oxford University Press, 1994) at 23. In this regard, Lohrmann reminds us that “the most important security implications of some population flows are felt by the refugees and migrants themselves . . . the concept ‘human security’ as developed by the UNDP, underlines the significance of the individual-level analysis in any discussion on the international migration-security nexus.” R. Lohrmann, “Migrants, Refugees and Insecurity. Current Threats to Peace?” (2000) 38:4 *International Migration* 2 at 6. See also, J. Milner, “Sharing the Security Burden: Toward the Convergence of Refugee Protection and State Security,” Refugee Studies Centre Working Paper No. 4, University of Oxford, May 2000 at 11.
  13. See Canadian Council for Refugees, *Submission to the UN Committee on Human Rights in Preparation for the Examination of Canada on Its Compliance with the International Covenant on Civil and Political Rights*, online: <<http://www.web.net/~ccr/iccpr.htm>> March 1999.
  14. *Chiarelli v. Canada* [1992] 1 S.C.R. 711; 16 Imm. L.R.(2d) 1 at 20.
  15. See P. Eliadis, “The Swing from Singh: The Narrowing Application of the Charter in Immigration Law” (1995) 26 Imm.L.R. (2d) at 130.
  16. *Suresh v. Minister of Citizenship and Immigration* (1998), 160 F.T.R. 152, aff’d [2000] 2 F.C. 592 (C.A.), leave to appeal to S.C.C. granted [2000] [hereinafter *Suresh* (C.A.)].
  17. *McAllister v. Minister of Citizenship and Immigration*, [1996] 2 F.C. 190 (T.D.) [hereinafter *McAllister*].
  18. See J. Borricand, “France’s Responses to Terrorism” in R. Higgins and M. Flory, eds., *Terrorism and International Law* (London: Routledge, 1997) at 145.
  19. *McAllister*, *supra* note 17.
  20. *R. v. Morales* [1992] 3 S.C.R. 711; see also *R. v. Nova Scotia Pharmaceutical Society* [1992] 2 S.C.R. 606. In the more recent decision of *City of Chicago v. Jesus Morales*, the United States Supreme Court found an anti-gang ordinance unconstitutionally vague because it did not provide adequate notice of the proscribed conduct. 527 U.S. 41 (1999).
  21. *Al Yamani v. Canada (Solicitor General)* [1996] 1 F.C. 174 (T.D.).
  22. *Ibid.*
  23. Last year the Trial Division set aside SIRC’s second report concerning Al Yamani on the evidence that the Committee had ignored crucial evidence on the current nature of the PFLP. At the same time the Court considered a number of other issues, including whether the term *subversion* in subsection 19 (1) (f), pursuant to which Al Yamani was found inadmissible in the second report, was constitutionally vague. Justice Gibson determined that *subversion* was “an extraordinarily elusive concept” that did infringe the principles of fundamental justice. However, the social and security objectives that the use of the term was designed to achieve were sufficiently important to warrant overriding the constitutionally protected right. *Al Yamani v. Canada (Minister of Citizenship and Immigration)* IMM 1919-98, 14 March 2000 (T.D.).
  24. 378 U.S. 500 (1964).
  25. *United States v. Robel*, 389 U.S. 258 (1967).
  26. *Re Baroud* (1996) 98 F.T.R. 99 (T.D.) at 109.
  27. R. Whitaker, “Refugees: The Security Dimension” (1998) 2:3 *Citizenship Studies* 413 at 428. Professor Whitaker was an expert witness in Baroud’s hearing and provides an excellent analysis of that case in the broader context of reviewing the role of security considerations in shaping refugee policy in the West.
  28. Hathaway and Harvey agree that this approach “goes too far.” J.C. Hathaway and C.J. Harvey, “Framing Refugee Protection in the New World Disorder,” forthcoming (2001) 34:2 *Cornell Int’l L.J.* at n. 166 ff.
  29. [1998] F.C.J. No. 726 (T.D.), online: QL (FCJ).
  30. [1998] 151 F.T.R.101.
  31. *Ibid.*
  32. *Ramirez v. Minister of Employment and Immigration*, [1992] 2 F.C. 306 (C.A.).
  33. *Ibid.*
  34. *Ibid.*
  35. *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 (C.A.).
  36. *Ibid.*
  37. *Dunlop and Sylvester v. The Queen*, [1979] 2 S.C.R. 881 at 891 and 896.
  38. *Balta v. Minister of Citizenship and Immigration*, IMM-2459-94, 27 Jan.1995 (T.D.) at 5-6.
  39. But see *Sivakumar v. Canada* in which the Court held that “the closer one is to a position of leadership or command in an organization, the easier it will be to draw an inference of awareness of crimes and participation in the plan to commit crimes.” The Refugee Board’s decision to exclude the appellant from refugee status was upheld on the basis that he had held a number of leadership positions in the LTTE in Sri Lanka—an organization the Court described as having committed crimes against humanity. The Court emphasized the importance of a case-by-case, factual determination. Sivakumar’s own testimony confirming knowledge of the crimes and executive roles in, *inter alia*, military training and intelligence services, were the determinative factors in this case. [1994] 1 F.C. 433 (C.A.).
  40. As the UNHCR has stated, “The fact of membership does not, in and of itself, amount to participation or complicity . . . [M]embership per se of an organization which advocates or

- practices violence is not necessarily decisive or sufficient to exclude a person from refugee status. The decision maker will need to consider whether the applicant had close or direct responsibility for, or was actively associated with, the commission of any crime specified under Article 1F . . . Moreover, regard must also be had to the fragmentation of certain terrorist groups. In some cases, the group in question is unable to control acts of violence committed by militant wings. 'Unauthorized acts' may also be carried out in the name of the group." UNHCR, Exclusion Clauses: Guidelines on Their Application (December 1996), paras. 40, 45, 47, 48.
41. Lawyers Committee for Human Rights, *Safeguarding the Rights of Refugees under the Exclusion Clauses: Summary findings of a Project of the Lawyers Committee for Human Rights*, October 2000 at 17.
  42. *T. v. Secretary of State for the Home Department* [1996] 2 All ER 865, [1996] 2 WLR 766, House of Lords, 22 May 1996. T., an Algerian national and member of the Islamic Salvation Front, was excluded from asylum in the U.K. on the basis that he had committed a serious non-political crime within the terms of art. 1 F(b) of the Geneva Convention. In the end, the House of Lords upheld T.'s exclusion from asylum because his participation in the planning of a bomb attack at an airport in Algiers and a raid on an army barracks was beyond the "political." For an interesting comment on this case as well as national security and British asylum policy generally, see P. Shah, "Taking the 'Political' out of Asylum: The Legal Containment of Refugees' Political Activism" in F. Nicholson and P. Twomey, eds., *Refugee Rights and Realities* (Cambridge: Cambridge University Press, 1999) 119-135.
  43. *Saygili v. Canada*, [1997] F.C.J. No. 287 (T.D.), online: QL (FCJ).
  44. *Ibid.*
  45. *Ibid.*
  46. See *Irwin Toy Ltd., v. Quebec (Attorney General)* [1989] 1 S.C.R. 927 in which the Supreme Court held that not all expression is protected; *Reference re ss. 193 and 195.1 (1)(c) of the Criminal Code* in which the Court found that expression of "direct attacks by violent means on the physical liberty and integrity of another person" is not protected by the Charter of Rights [1990] 1 S.C.R. 1123 at 1186; and *R. v. Butler* [1992] 1 S.C.R. 452. An unwarranted expansion of this principle can be found in the Federal Court's reasons in a case concerning an alleged member of an Armenian "terrorist" organization (where there was evidence of unlawful activity in Canada committed by others). The Court found no basis for scrutinizing a law [s. 19(1)(g)] that permitted deportation of a permanent resident who had lived in Canada for twenty years. A "belief in the indiscriminate use of violence in the furtherance of political ends" was identified as among the reasons that constitutional protection should not be afforded [emphasis added]. See *Moumdjian v. Canada*, [1999] 4 F.C. 624 (C.A.).
  47. [1998] F.C.J. No. 507 (T.D.), online: QL (FCJ).
  48. *Ibid.*
  49. Section 15(1) of the Canadian Charter of Rights and Freedoms provides that "[e]very individual is equal before and under the law and has the right to equal protection and benefit of the law without discrimination, in particular that based on race, religion, national or ethnic origin, colour, religion, sex, age or mental or physical disability."
  50. *Andrews v. Law Society of British Columbia* (1989), 91 N.R. 255 [hereinafter *Andrews*]. See also, *Symes v. Canada* [1993] 2 S.C.R. 695; *Egan v. Canada* [1995] 2 S.C.R. 513; *Benner v. Canada (Secretary of State)* [1997] 1 S.C.R. 358; *Eaton v. Brant County Board of Education* [1997] 1 S.C.R. 241; *Vriend v. Alberta* [1998] 1 S.C.R. 493; and *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497.
  51. See *Ahani v. Minister of Citizenship and Immigration* [1999] F.C.J. No. 1020 (T.D.), online: QL (FCJ); and *Ahani v. Canada* [2000] F.C.J. No. 53 (C.A.), online: QL (FCJ). An earlier attempt to challenge the constitutional validity of the security certificate procedures under 40.1 of the Act was unsuccessful. See *Ahani v. Canada* [1995] 3 F.C. 669 (T.D.); aff'd (1996) 201 N.R. 233 (F.C.A.) application for leave to appeal to S.C.C. refused [1997] S.C.C. No. 25580.
  52. The Court has certified six constitutional questions addressing whether s. 53(1)(b) offends the principles of fundamental justice; whether s. 19(1)(e) and (f) infringe freedom of association and expression and whether the term *danger to the security of Canada* found in s. 53(1)(b) and/or the term *terrorism* found in s. 19(1)(e) and (f) are void for vagueness and therefore, contrary to the principles of fundamental justice. S.C.C. No. 27790, 19 Oct. 2000.
  53. *Re Suresh*, [1997] F.C.J. No. 1537 (T.D.), online: QL (FCJ).
  54. *Ibid.*, Transcript, Vol. 1, 19 March 1996, Prof. Paust; Transcript, Vol. 38, 15 October 1996; Transcript, Vol. 48, 3 February 1997. Note that counsel for the Minister and Solicitor General called one expert in reply, Prof. Greenwood, who did not endorse many of the views articulated by the respondent's experts. In particular, Greenwood described the conflict in Sri Lanka as "internal" and suggested that the LTTE had no right to resort to force. In his view there was no consensus in the international community about the right of a people to take up arms beyond the colonial situation in South Africa, which was quasi-colonial, and in Southern Rhodesia. *Ibid.*, Transcript, Vol. 46, 14 November 1996 Prof. Greenwood, at 61-67, 72-76, 197-198.
  55. *Ibid.*, Respondent's Submissions, 27 March 1997.
  56. *Ibid.*
  57. *Ibid.*
  58. Jackson suggested that "all constitutional interpretations have political consequences." R.H. Jackson, *The Supreme Court in the American System* (1955) at 56 [emphasis added].
  59. See M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thomson Educational Publishers, 1994) at 3.
  60. Whitaker, *supra* note 27 at 415.
  61. See *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038 at 1056-1057, 1078; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 20; *Baker v. Canada*, [1999] 2 S.C.R. 817; and *Little Sisters Book and Art Emporium v. Canada* [2000] S.C.C. 69, File No. 26858. See also C. Scott, "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?" (1999) 10:4 *Constitutional*

*Forum 97*, for a discussion of the use of international human rights law by domestic courts.

62. *Andrews, supra* note 50.
63. *Andrews, ibid.*; and *Egan v. Canada*, [1995] 2 S.C.R. 513, at 597.
64. *New Brunswick v. G. (J)*, [1999] 3 S.C.R. 46 at para. 112, L’Heureux-Dubé J.
65. *Re Suresh, supra* note 52.
66. See, e.g., Amnesty International, *Annual Report 2000, Sri Lanka*, online: <<http://www.amnesty.org>>.
67. The evidence provided by witnesses for Suresh on the activities of the LTTE in Sri Lanka was provided *in camera* to protect the safety of the individual sources and their families in Sri Lanka. However, reliable information about the conflict is readily available from the *Sri Lanka Monitor*, a publication of the Refugee Council in the U.K. The *Sri Lanka Monitor* confirms that the LTTE has a well-organized fighting force that engages in conventional operations as well as “guerrilla warfare.” For information on the LTTE in 1996-97, the time frame of the security certificate proceedings, see “West of the Lagoon,” describing LTTE attacks on police and soldiers, government reprisals that included indiscriminate shooting on civilians, shelling of an entire village, and the gang rape of a villager (*Sri Lanka Monitor* No. 106, November 1996); “No Progress on Peace Alert,” reporting that the LTTE was prepared to discuss peace at a ministerial level (No. 107, December 1996); “Refugees Killed in Reprisal Firings,” reporting on LTTE attack of the Batticaloa district police station, police firing on the Pelthalai refugee camp, and the army using bus passengers as a human shield; “Securing Mannar,” LTTE attack on a soldier, police firing indiscriminately on Mannar town, and army attack on civilians; “Tigers Strike East,” reporting that LTTE challenged government control of key towns in eastern Sri Lanka, mounting simultaneous assaults on an airbase and army camp (No. 110, March 1997). For more recent information, see “Tigers Take Chavakachcheri” (No. 148, May 2000); “Red Cross Concern” (No. 150, July 2000); “Vavuniya Violations” (No. 151, August 2000); “Depriving the North” (No. 152, September 2000), online: <<http://www.gn.apc.br/br/psl/project>>. The LTTE collects taxes, and finances and delivers a range of “municipal” services in the Vanni region as well as large parts of the Jaffna peninsula and the Eastern province. The LTTE finances the Puthukkudiyirupu Hospital in Vanni and several orphanages, and distributes food and medicine. See R. Cheran, *Nationalism and National Liberation in Sri Lanka and the Tamil Diaspora* (Ph.D. Thesis, Department of Sociology, York University, 2000, c. 6 [unpublished]). Even security and intelligence agencies, which generally assess the LTTE as a “terrorist” organization, acknowledge that the LTTE provides a “reasonably well-managed administration.” *Jane’s Sentinel*, 4 September 2000, online: <[http://www.janes.com/security/regional\\_security/news/sentinel/sent000904\\_6\\_n.shtml](http://www.janes.com/security/regional_security/news/sentinel/sent000904_6_n.shtml)>. Note also a letter from Bill Graham, MP for Toronto Centre-Rosedale (26 September 1997) which stated, “As a political organization, the LTTE operates in several Western countries including France and the U.K. Officials with Canada’s Department of Foreign Affairs have met with LTTE political officials in Sri Lanka and elsewhere . . .” As for the Court’s concern about Suresh’s refugee claim, a procedure is available to the Refugee Board to revoke refugee status if it is found warranted, after a full oral hearing and a right of judicial review. That question, however, is distinct from an assessment of the security risk Suresh could pose, or the risks he faces on return to Sri Lanka.
68. Letter from Amnesty International, Canadian Section (English-speaking Section) to Minister of Citizenship and Immigration, 12 November 1997. Amnesty International has continued to advocate for Suresh: see “Urgent Action Re Manickavasagam Suresh,” AI Index AMR 20/02/98; “It’s Time, Amnesty International’s Briefing to the UN Committee against Torture with Respect to the Third Report of Canada” [UN Doc. CAT/C/3/Add./3 Nov. 2000]. The organization is one of several public-interest groups seeking leave to intervene in his appeal, pending before the Supreme Court.
69. Memorandum by D. Gauthier, Case Management Branch, Citizenship and Immigration, 18 December 1997, as cited in *Suresh (C.A.) supra* note 16.
70. *Suresh (C.A.) supra* note 16.
71. See, e.g., U.S. Department of State Report on Sri Lanka, 1997; Human Rights Watch Report on Sri Lanka, 1997; Amnesty International, “Sri Lanka: Torture in Custody,” AI Index, 37/10/99; Amnesty International, *Annual Report 2000, Sri Lanka, supra* note 66; and Amnesty International, Canadian Section (English-speaking), “Amnesty International’s Concerns with Regard to Tamils Returned to Sri Lanka,” 18 May 2000.
72. While the Refugee Convention does not impose an obligation on states to *grant* asylum, the Convention’s provisions for *non-refoulement* are binding and apply to protect all refugees, regardless of whether refugee status has been formally conferred. The Convention has extra-territorial application, which means that a signatory state cannot avoid responsibility for *refoulement* when actions within its effective control were carried out on the high seas or in another country. See OAS, Inter-American Commission on Human Rights, *Haitian Center for Human Rights et al., v. United States*, Report No. 51/96, Decision as to the Merits of Case 10.675, United States (1997), online: IACHR <<http://www.cidh.org/annualrep/96eng/96ech3zy.htm>> (date accessed: 26 February 2001).
73. *The Globe and Mail* (16 January 1999); Amnesty International Bulletins ASA 37/19/98; ASA 37/21/98.
74. The documentary “In Search of the African Queen: A People Smuggling Operation” (Montreal: Wildheart Productions, 2000), screened on TV Ontario in March 2000. The film covered the full saga of the Tamil asylum seekers and the actions of the Canadian government and includes interviews with everyone involved, including twenty-one-year-old T. Kamalathanan, the man who was tortured.
75. The U.S. Department of State, Country Reports on Human Rights Practices-2000, Sri Lanka, at 7, online: <<http://www.state.gov>> (date accessed: 26 February 2001). The report also indicates that “[p]rison conditions generally are poor and do not meet minimum international standards because of overcrowding and lack of sanitary facilities” at 8. The report documents an incident in October 2000 in which police allegedly looked on while twenty-seven Tamil males between fourteen

- and twenty-three years of age were hacked to death by local villagers armed with machetes and clubs; fifteen others were injured. "Police allegedly took part in the killings and did nothing to prevent the villagers from entering the detention camp. The victims were former child soldiers being detained at a government-run 'rehabilitation' camp at Bindunuwewa near Bandarawela . . . [T]he massacre . . . led observers to question the continued security of residents of these facilities" (at 3 and 12). See also Amnesty International, *Annual Report 2000, Sri Lanka* at 2, online: <<http://www.amnesty.org/web/ar2000web.nsf/countries/>> (date accessed: 25 February 2001).
76. The U.S. Department of State, *ibid.*, at 7.
  77. *Pushpanathan v. Canada*, [1998] 1 S.C.R. 982, as am. [1998] 1 S.C.R. 1222. Note, as well, that the Vienna Convention on the Law of Treaties provides that treaties should be interpreted in "good faith in accordance with the ordinary meaning to be given to the treaty in their context and in light of its object and purpose." 8 I.L.M. 679 (1969), 1155 U.N.T.S. 331.
  78. *Suresh (C.A.)*, *supra* note 16 at paras. 23-35.
  79. UN Human Rights Committee, General Comment No. 20 (article 7), para. 9 states, "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement..." UN Doc. CCPR/C/21/Add.3.
  80. For a discussion of these decisions, see part 1 of this paper, n.132.
  81. *Suresh v. Minister of Citizenship and Immigration* [2000] 176 D.L.R. (4th) 296 at 308 (C.A.), in which the Court granted an application for a stay of removal.
  82. Note, however, *Minister of Justice v. Burns and Rafay et al.* [2001] S.C.J. No. 8 at para 48, online: QL (SCJ) concerning the Justice Minister's decision to extradite Canadian fugitives without obtaining assurances from American authorities that the death penalty would not be imposed. In a ruling released in February, the Supreme Court confirmed that the citizenship of the fugitives was an irrelevant factor in determining the human rights and justice issues at stake. More generally, a limitation to a constitutional guarantee will be sustained when two conditions are met. First the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be "reasonable" and "demonstrably justified in a free and democratic society." In order to satisfy the second requirement, three criteria must be met: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must impair rights and freedoms as little as possible; and (3) there must be proportionality between the effect of the measure and its objective, so that attainment of the legislative goal is not outweighed by the abridgement of the right. *R. v. Oakes* [1986] 1 S.C.R. 103; and *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 182, Iacobucci J. Generally the second criterion is the most difficult to meet because it requires the government to demonstrate that Parliament chose the least injurious means of achieving the goal.
  83. For an interesting discussion of how international comity has overtaken human rights in the extradition context, see E. Morgan, "In the Penal Colony: Internationalism and the Canadian Constitution" (1999) 49 U.T.L.J. 447.
  84. R. Fowler, Statement in the UN Security Council, 19 October 1999, UN Press Release SC/6741.
  85. *Suresh (C.A.) supra* note 16 at paras. 36 and 67.
  86. See *Sivakumar v. Canada supra* note 38.
  87. In *The Prosecutor v. Rutaganda*, ICTR-96-3-T (6 December 1999) the Chamber noted that an essential element of "crimes against humanity" is that they are widespread or systematic. *Widespread* has been defined as "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims"; while *systematic* has been defined as "thoroughly organized action following a regular pattern on the basis of a common policy and involving substantial public or private resources . . . there must be some kind of preconceived plan or policy" (at paras. 66-67). See also *The Prosecutor v. Akayesu*, ICTR-96-4-T (2 September 1998); and The Rome Statute, art. 7. In terms of individual responsibility, military commanders are responsible for crimes within their command and control about which they know or *should have known*, while non-military superiors are held to a lower standard—responsibility is engaged for crimes committed by subordinates about which they knew or *consciously disregarded*, concerning activities that were within their effective responsibility and where superiors failed to take all necessary and reasonable measures within their power to prevent or suppress. In any event, the Minister made her decisions about Suresh based on a law that purports to deal with "terrorism."
  88. See Human Rights Watch, *World Report 2001: Sri Lanka*, online: <<http://www.hrw.org>>.
  89. UN Human Rights Committee, Concluding Observations on Canada, UN Doc. CCPR/C/79 Add.105, 7 April 1999. In 1997 and 1998 Canada carried out deportations in contravention of requests from the Committee against Torture (*Tejinder Pal Singh v. Canada*) and the Inter-American Commission on Human Rights (*Roberto San Vicente v. Canada*). See Amnesty International, "Refugee Determination in Canada: The Responsibility to Safeguard Human Rights," Response to Government of Canada's White Paper, February 1999.
  90. UN Committee against Torture, Concluding Observations on Canada, UN Doc. CAT/C/XXV/Concl.4 22 November 2000.
  91. The Inter-American Commission on Human Rights found that Canadian procedures did not ensure full compliance with the government's obligations to prevent and protect against torture. The Commission commented further that "[t]he fact that a person is suspected of or deemed to have some relation to terrorism does not modify the obligation of the State to refrain from return where substantial grounds of a real risk of inhuman treatment are at issue." Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, OEA/Ser.L./V/II.106/Doc.40 rev. (2000) at para.154.
  92. W. Elcock, Submission to the Special Committee of the Senate on Security and Intelligence, 24 June 1988 at 1.
  93. W. Elcock, *ibid.*, at 11 and 23.
  94. *Report of the Special Senate Committee on Security and Intelli-*

- gence (Kelly Committee), January 1999, c. 1 at 2, online: <<http://www.parl.gc.ca/36/1/parlbus/commb/com-e/secu-e/rep-e/repsecintjan99-ehm>>.
95. W. Elcock, *supra* note 92 at 11.
  96. CSIS, Report #2000/01, *Trends in Terrorism*, 18 December 1999 at 2, online: <<http://www.csis.gc.ca/eng/miscdocs/20001e.html>> (date accessed: 23 July 2000).
  97. W.M. Reisman, as cited in R.F. Turner, "Legal Responses to International Terrorism: Constitutional Constraints on Presidential Power" (1999) 22:1 *Houston Journal of International Law* 77 at 78.
  98. Cohen coined the phrase "moral panic" to explain how certain groups in society are periodically labelled as a particular threat to society, a process that becomes the basis for "law and order" responses. S. Cohen, *Folk Devils and Moral Panics* (London: Macgibbon and Kee, 1972). In a similar vein, Stuart Hall identified a moral panic as the source for "mugging" being presented in the British media as a new and rapidly growing phenomenon in the face of official statistics to the contrary. S. Hall *et al.*, *Policing the Crisis: Mugging the State, and Law and Order* (London: Methuen, 1978).
  99. R. Lohrmann, *supra* note 12 at 8.
  100. D. Thomas, "The Foreign Born in the Federal Prison Population" (Canadian Law and Society Association Conference, Carleton University, 8 June 1993) [unpublished].
  101. See P. Koring, "Some Border Security Gaps Plugged Remain" *The Globe and Mail* (14 March 2001) A10.
  102. A recent report indicates that Canada's High Commissioner in Sri Lanka was "called onto the carpet by the Sri Lankan government" after the event. However, Finance Minister Paul Martin and International Development Minister Maria Minna have vigorously defended their decision to attend the dinner, which was "attended by hundreds of people, Canadian citizens and contributing citizens of the country." Minna stated that she did "not judge all of the Tamil community as being part of the terrorist group." S. McCarthy, "Grits Warned about Fundraiser" *Globe and Mail* (24 February 2001) A17. The *National Post* has published numerous reports citing concerns that Canada has become a safe haven for Tamil "terrorists." See, e.g., S. Bell, "Court Ruling Could Make Canada 'Haven' for Terrorists, Assassins" *National Post* (17 February 2001).
  103. See J. Beltrane, "The Enemy Within" *Macleans* 113:43 (23 October 2000) 36.
  104. See K. Selick, "Go Ahead, Make My Day" *Globe and Mail* (10 January 2001) A15.
  105. Section 19(1) of the Immigration Act provides, *inter alia*, that [n]o person shall be granted admission who is a member of any of the following classes:
    - (c) persons who have been convicted in Canada of an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more;
    - (c.1) persons who there are reasonable grounds to believe
      - (i) have been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more, or
      - (ii) have committed outside Canada an act or omission that constitutes an offence under the laws of the place where the act or omission occurred and that, if committed in Canada, would constitute an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more.

105. See Maytree Foundation, *Brief to the Standing Committee on Citizenship and Immigration Regarding Bill C-31*, 18 August 2000 at 30, online: <<http://www.maytree.com>> (date accessed: 27 August 2000).

---

*Sharryn J. Aiken is a lecturer at Osgoode Hall Law School. The author gratefully acknowledges Barbara Jackman for her generosity and assistance. Thanks are also due to Jamie Cameron, Jetty Chakkalikal, Brian Gorlick, Audrey Macklin, and Lorne Sossin for their helpful comments on an earlier draft. This paper is dedicated to Sami Durgun and Suleyman Goven, whose struggles for justice in Canada remain an inspiration.*

---