

STUCK AT THE BORDER: TEN YEARS AFTER 9/11

Audrey Macklin[†]

INTRODUCTION

In the immediate aftermath of 9/11, I contributed a chapter to a book entitled “The Security of Freedom”. The Canadian government had just introduced Bill C-11, the Anti-Terrorism Act. The bill was hastily drafted amidst the turmoil of events and in response to domestic, US and international pressure. United Nations Security Resolution 1373 exhorted states to adopt anti-terrorism criminal laws, freeze financing of terrorism, deter the alleged abuse of asylum by terrorists, and to “take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information.”¹ The ATA signalled Canada’s commitment to comply.

The Anti-Terrorism Act² created new terrorism related criminal offences, permitted preventive detention, altered the rules of evidence to enable the use of secret evidence in terrorism cases, and authorized listing of terrorist organizations as a means of disrupting charitable and other modes of terrorist financing³. It said nothing about immigration or refugee law and I, in turn, had little to say about the Anti-Terrorism Act, and instead drew attention to the role that migration law and border control would likely play in the ensuing war on terror. I offered an observation, made a prediction, and expressed a concern: I observed (with some bemusement) the instant promotion of something called a North American ‘security perimeter’, and wondered about its rhetorical value as a discursive security blanket, under which proponents could shelter their credible fears and febrile anxieties. I predicted that immigration law, not criminal law (even as amended by the proposed ATA) would furnish the main vehicle by which the state pursued, apprehended, and regulated individuals alleged to pose a risk to national security. I expressed the worry that in the haste to protect ourselves from the alien without, we would not attend sufficiently to the risk of producing the alien within.

After a decade of experience, there is much to say (and much has been said) about border management, immigration law as anti-terrorism law, and the impact of 9/11 on Muslim and Arab communities in Canada. For present purposes, I will address only the accuracy of my immigration forecast, and only in relation to the one small and hyper-visible slice of immigration

[†] Professor of Law, University of Toronto. The author warmly thanks Josh Scheinert for excellent research assistance, incisive comments, and constructive suggestions.

¹ *Threats to international peace and security caused by terrorist acts*, SC Res. 1373, UN SCOR, 56TH Sess., UN Doc. S/INF/57 (2001) 91. [Resolution 1373].

² *Anti-Terrorism Act*, S.C. 2001, c. 41.

³ *Criminal Code*, R.S.C. 1985, c. C-46, s. 83. [*Criminal Code*]

regulation that has reached the highest court, namely the security certificate regime⁴. The preliminary point to make about my narrow focus is that I talk about security certificates because I can: We know how many people have been subject to them and we know the process that governs them because it is encoded in legislation, and subject to judicial review at various stages. I cannot speak (except anecdotally) about how often national security considerations have led to visa refusal, rejections at the border⁵, limbo status for refugees⁶, exploitation of precarious immigration status by intelligence agencies⁷, or the resort to minor immigration irregularities as pretext for exclusion or deportation⁸. Because many of these immigration decisions are made at or outside the border, and typically transpire beyond the effective reach of judicial review, they leave few traces unless they attract media attention. Its very opacity makes immigration regulation particularly attractive in circumstances where the state seeks maximum flexibility with minimal external accountability. I would speculate that immigration law as practiced at the level of routine, discretionary, administration and enforcement, probably has done and does much more national security work than we know, and some of it might disturb us if we did know. The fact that all one can do is speculate is, of course, part of what ought to disturb us.

One reason that the ATA was silent about migration law is that a new immigration bill (the Immigration and Refugee Protection Act (IRPA)) was already in the legislative pipeline immediately prior to 9/11. The proposed Immigration and Refugee Protection Act (IRPA) altered the existing process for addressing non-citizens alleged to constitute threats to national security by levelling down the procedural protections of permanent residents to that of foreign nationals. It also enabled the government to divert asylum seekers designated as suspicious from the process of independent adjudication by the Immigration and Refugee Board. There is no question that 9/11 hastened the passage of IRPA with negligible debate. But for present purposes, what is noteworthy is that 9/11 did not instigate significant alteration to the pre-9/11 text. Evidently, the government believed that IRPA's model of skeletal legislated authority, coupled with conferral of broad executive power to enact regulations and to delegate authority, sufficed to meet the national security challenges of the post-9/11 world.

In my estimation, immigration law already provided ample power to the state to deport non-citizens on national security grounds with far looser procedural or substantive restraints than those imposed on the state in the realm of criminal law. Immigration law had long done to non-

⁴ The expansive interpretation of refugee law's exclusion provisions is presently wending its way through the courts. See *Ezakola v. Canada (Minister of Citizenship and Immigration)*, 2011 FCA 224, leave to appeal to SCC filed; Asha Kaushal and Catherine Dauvergne, "The Growing Culture of Exclusions: Trends in Canadian Refugee Exclusions" (2011) 23:1 *International Journal of Refugee Law* 54

⁵ *Toronto Coalition to Stop the War v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 957.

⁶ *Khalil v. Canada*, 2007 FC 923; *Goven v. Canada*, 2002 FCT 1161.

⁷ Tom Godfrey, "CSIS accused of spying on GTA mosques" *Toronto Sun* (21 November 2010), online: <<http://www.torontosun.com/news/torontoandgta/2010/11/21/16249006.html>>.

⁸ **Cite to Project Thread**

citizens what the anti-terrorism law proposed to do to citizens, with judicial acquiescence and without public opposition. The instrumental assessment that it was easier to deport than to prosecute aligned comfortably (and not coincidentally) with the intense desire to understand terrorism as essentially and necessarily foreign. I forecast that immigration law, despite and because of its under-inclusive application to non-citizens, would be the first and favourite recourse of the state. From the recognition that transborder mobility and migration played a role in transnational terrorism came the tactical choice to approach terrorism as a problem that immigration law could solve.

A decade of experience vindicates my prediction about the state's preference for immigration law over criminal law. The Supreme Court of Canada's jurisprudence on security certificates does not substantiate my assumption of judicial complacency. Rather, it discloses a nuanced picture about the role of constitutional adjudication in tempering governmental preferences. I will argue that the Supreme Court of Canada judgements in *Suresh* and *Charkaoui* (I and II) share two features in common: first, an inclination toward procedural over substantive Charter scrutiny; second, an elliptical deflection on matters of substance, which manifests less in explicit deference to government, than in deferral of decision-making to future 'case by case' analysis by lower courts. I critique the deferral strategy with respect to the so-called *Suresh* exception (as applied to the executive), but recognize the effectiveness of the procedural approach in *Charkaoui* (as applied the Parliament) in significantly diminishing the instrumental allure of security certificates.

I also want to situate these cases in a broader context. In reflecting on the post 9/11 jurisprudence on security certificates and immigration law more generally, I have been led to the belief that one cannot fully comprehend of the evolution of immigration law and criminal law over the last decade solely within the logic of these respective domains of regulation. Securitization has catalyzed the emergence of containment as a paramount (if unarticulated) instrument of risk prevention and management across a range of legal domains, including (but not limited to) migration. While immigration detention and deportation advance the goal of containment up to a point, neither can be made fully congruent with it. The strain on the internal logic of immigration law is exposed through the jurisprudential diffidence on matters of substance and the normative work done silently performed by the legal inequality between citizens and non-citizens.

CONTAINMENT AND IMMIGRATION LAW

In my attempt to make sense of the myriad of migration related policies, practices and events post- 9/11, I joined those who labelled the trends in terms of the "securitization of migration". The security optic became the lens through which all existing policies and practices had to be evaluated, justified, and rationalized. This securitization of migration could not and cannot be fully reconciled with the economic imperatives that require states to facilitate the import of goods and people. Economic globalization impels openness of borders; securitization defaults toward closure.

Viewed from another perspective, the association of securitization with closure misleads, because it only describes the relationship to human mobility, given the equally compelling impetus to facilitate the free flow of intelligence and law enforcement data across borders. Securitization governs through risk management and prevention. It identifies risk through surveillance, data extraction, collection, and information sharing. The ideal conditions for vigilance are data in transit and humans in stasis – the job of intelligence and law enforcement officials would be much easier if nobody moved. And the dominant remedy that securitization generates for risky people (short of physical elimination) is containment. One consequence is that tools supplied by a variety of legal regimes – the laws of war, the criminal law, and migration law – have each been pressed into the service of containment. From the vantage point of the state exercising power, detaining combatants, imprisoning criminals, and deporting non-citizens each has the effect of taking an individual out of circulation and confining him outside the jurisdictional space claimed by the state. And while each regime contains elements compatible with containment, none can fully assimilate containment without enduring distortion to its internal integrity.

Containment sits uneasily with familiar understandings of punishment: In order to harmonize prevention with the punishment wrongful acts rather than prevent, one must adopt temporally elastic understandings of what constitutes a wrongful or even inchoate act. One must also calibrate degrees of liberty deprivation in order to avoid the constitutional burdens that attend ‘punishment’. The awkward designation ‘alien unprivileged enemy combatant’ speaks to the deviation of the Guantanamo Bay regime from international humanitarian law governing both civilians and combatants. Courts in Canada and elsewhere long ago defined deportation as other than punishment (thereby evading the constraints imposed under criminal law), but containing a person in a state where he faces torture strains the distinction. Within the logic of immigration law, detention performed an ancillary role in the execution of immigration law’s ultimate goal of removal, but it too was destabilized when the ‘pending’ event (deportation) appeared to recede into the indeterminate future.

Containment focuses on neutralizing a risk of future harm. That risk is typically proven by evidence of past activities or associations. Since the past is immutable, and containment imposes inertia, the contained person is incapacitated from doing anything that might make him less risky. The termination of containment depends on external events or circumstances, and thus must be indeterminate and potentially indefinite.

Containment is jurisdictional: the repeated avowal that terrorism is global operates in tandem with the fact that most law is domestic, and depends for enforcement on national legal institutions (supranational institutions, in the case of the EU). Domestic courts’ jurisdiction is typically demarcated by nationality and/or territoriality. Indeed, states have manipulated territoriality and nationality (with greater and lesser success) to engage in practices of

containment (and interrogation) precisely to avoid the jurisdictional reach of domestic courts.⁹ Containment is also jurisdictional in another sense. States generally prefer that designated risks be contained in another state, even though the simultaneous insistence that terrorism is ‘global’ would seem to indicate that this merely displaces but does not resolve the risk.

Finally, containment is scalar: individuals may be contained in immigration detention, contained in their homes under control orders, contained on the ground by no-fly lists, contained inside a state by passport denial, or contained by one state in another state through exclusion or expulsion.

Exclusion, detention and deportation constitute the three tools furnished by immigration law to contain non-citizens deemed threats to national security. In certain respects, immigration law seems inapt to the task of combating terror precisely because it only applies to non-citizens. The criminal law applies to citizens and non-citizens alike. And, as I wrote a decade ago, deportation seems like a peculiarly parochial “NIMBY” (Not in My Backyard) reaction in an era where, as we are repeatedly reminded, terrorism is a global threat that operates through transnational networks. Surely the displacement of a terrorist from one state to another only relocates the threat rather than genuinely neutralizes it.¹⁰ I think the most plausible explanation for the perceived utility of deportation is that it will at least redirect the risk away from the departing state toward a more proximate target that is outside the departing states territory, population, and political responsibility. After all, transnational networking of intelligence and policing organizations does not alter the state-centric focus of concern: individual actors are tasked with advancing and protecting national security, not global security as such. At the same time, one also suspects that departing states anticipate that once a person is delivered directly into the hands of state authorities branded with the label ‘terrorist’, the state of citizenship will resume surveillance and containment, by whatever means it devises.

The imperfect fit between containment and immigration detention surfaced in the jurisprudence in the question of confinement is still linked to the valid deportation purpose. While the UK House of Lords confronted this in *Re A (Belmarsh)*¹¹, the Supreme Court of Canada deflected it in *Charkaoui*¹². But an even more fundamental challenge put by containment lurks in the jurisprudence, and it concerns whether there are circumstances where the link between deportation itself and a valid immigration purpose attenuates, and even ruptures. In order reflect on what the Courts do (or do not say) about immigration law as a vehicle for containment, one

⁹ Evasion of US courts’ jurisdiction was the main motive behind using Guantanamo as a detention site. This strategy was only partly successful: See *Rasul v. Bush*, 542 U.S. 446 (2004); *Boumediene v. Bush*, 553 U.S. 723 (2008).

¹⁰ See, Audrey Macklin, “Borderline Security” in Ronald J. Daniels, Patrick Macklem and Kent Roach, eds., *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 383; See also, *A and others*, *supra* note 10 at para. 44, Lord Bingham asking “why a terrorist, if a serious threat, ceases to be so on the French side of the English Channel or elsewhere”.

¹¹ *A and others v. Secretary of State for the Home Department*, [2004] UKHL 56 [*A and others*].

¹² *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9 [*Charkaoui*].

must locate the judgments in the wider post-9/11 debate about the role of courts in supervising legislators and the executive in matters concerning national security.

The nature of the 9/11 attacks, and the subsequent dubbing of state response as a ‘war on terror’, unleashed fierce controversy about whether states’ reactions could be accommodated within law, or whether the nature of the threat required or validated extra-legal (which is to say non-justiciable) measures. At its highest, the defence of the emergency ‘state of exception’ claimed to protect the integrity of the legal order by insulating it from the deformation that judges historically inflicted on it during periods of real or perceived threat to the nation. Others contended that it was precisely when the principles of legality and rights were under greatest stress that courts bore the responsibility to vindicate the tensile strength of the rule of law against the rule of men. Most recently, in the Ontario Court of Appeal decision upholding the stay of proceedings in the Abdullah Khadr extradition, Mr. Justice Sharpe delivers an unequivocal defence of the latter position:

Cases involving alleged terrorists or other enemies of the state who oppose and seek to destroy the fundamental values of democracy and the rule of law put our commitment to those very values to the test. No doubt some will say that those who seek to destroy the rule of law should not be allowed its benefits. I do not share that view. I find compelling the extradition judge's statement, at para. 150, that "[i]n civilized democracies, the rule of law must prevail over intelligence objectives."¹³

Meanwhile, in a 2009 speech, Chief Justice McLachlan depicted a more subdued role for judges in the realm of national security: “The first line of any response to terrorism must come from the legislative branch of government”.¹⁴ It is “duly elected law-makers” who “must trace the difficult line between combating terrorism and preserving liberties in a way that is effective, constitutional and gives clear guidance to those charged with combating terrorism on the ground.”¹⁵ The second line of defence she lists is the executive branch of government; courts come last.¹⁶

The preface ‘duly elected’ before law-makers reminds one of judicial sensitivity to the counter-majoritarian difficulty. Chief Justice McLachlan points out, “The courts do not initiate the laws that govern how terrorism is fought, nor do they execute them.”¹⁷ She notes that “an attitude of respect for the difficult role of Parliament and the executive in combating terrorism”¹⁸ is critical to the performance of the adjudicative task, including constitutional adjudication. While stressing

¹³ *United States of America v. Khadr*, 2011 ONCA 358 at paras. 71-72.

¹⁴ “The Challenge of Fighting Terrorism While Maintaining our Civil Liberties”, Speech by Chief Justice Beverley McLachlan to the Ottawa Women’s Canadian Club, Ottawa, Ontario (22 September 2009), online: <<http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm2009-09-22-eng.asp>> [“Challenge of Fighting Terrorism”].

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

that laws must be constitutional and that government agents not exceed their allocated powers, Chief Justice McLachlin defends judicial deference to Parliament and to the executive as a manifestation of the separation of powers doctrine that guides her approach.

Judges are understandably disinclined to understand themselves as ever sanctioning a suspension of the rule of law, at least to the extent that the constitutional structure within which they operate enables them to resist¹⁹. As external commentators, one task is to query when and whether they might internalize the suspension through juridical measures that David Dyzenhaus describes as the ‘gray holes’, wherein judicial review purports to subject government action to the strictures of the rule of law, but in practice does so through juridical gambits that lend the appearance of legality to governmental responses without the substance²⁰. His critique leads inexorably to vexing line drawing exercises: When does judicial deference devolve into judicial abdication? When does a focus on procedural deficiencies deflect rather than resolve the substantive violations to which the procedures are directed? When does the concern about the democratic legitimacy and judicial competence shade into a conflict of interest between the institutional self-interest of a court and its obligation to apply the equal protection of law to all who come before it?

Each of us may derive different answers from the jurisprudence, and underlying these responses lies a tacit commitment about the institutional location of the rule of law in our legal order. At the risk of oversimplifying, one might take the view that adherence to the rule of law is the exclusive province of the courts, and that the courts’ function is to reign in the actions of the legislature and the executive in accordance with its precepts. This external perspective relies on the courts to compel the legislature and the executive to act within the bounds of legality, in the absence of which the exercise of power will tend to be checked only by political considerations. Another view might be that all branches of government – legislature, executive and judiciary -- are structured by and through the rule of law. As such, they internalize it within their respective and distinctive functions, operations, and modes of exercising power²¹. From an internal perspective, principles of legality are not essentially impediments to exercising democratic authority. Rather, they structure how one conceives and implements the objects of democratic governance and administration.

For my purposes, what matters is whether legislatures and the executive (and here I include its officers and administrators) actually operate from an internal or external perspective. Still more important is the judiciary’s assessment of how the government operates when the moment arrives for the judiciary to consider whether, why and how far to defer. When the judiciary defers

¹⁹ One can imagine that in a state without a written constitution, a clear and explicit statutory provision that unequivocally breaches a fundamental human right might leave a court with the duty to identify and condemn the violation but no capacity to remedy it.

²⁰ David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006).

²¹ *Ibid.*

to a government actor that shares a commitment to the rule of law within the scope of its law making or executing functions, judicial deference does not connote the consecration of a space of governance beyond the reach of legality. Where the judiciary defers to an executive that regards the demands of legality as politically inexpedient, or contrary to the values it prioritizes, the judiciary might expect that the space left open by deference will remain vacant.

One can imagine variability in rule of law commitment between legislators and executive, and between different subject areas of governance. I confine my attention here to the post-9/11 Supreme Court of Canada judgments addressing non-citizens in Canada, who lack the protection of status. A more robust analysis would entail elaboration of the intersection of legal status and the rule of law would entail attention to Federal Court decisions, and to the jurisprudence regarding Canadian citizens abroad, who lack the protection afforded by territoriality. With those caveats in mind, I nonetheless offer two related observations: First, the deference that courts display in relation to national security compounds the deference that courts generally afford to the state in the realm of immigration law and in the conduct of foreign affairs, and this deference is most pronounced in relation to the executive. Secondly, the Court also defers in the secondary sense of the word: rather than impose explicit substantive limits on the lawful exercise of executive discretion, the Court tilts toward resolving the case on procedural grounds, and delegating substantive issues to an incremental ‘case by case’ analysis by lower courts. I present *Suresh* and *Charkaoui* as representative of this combination of judicial deference and judicial deferral.

The security certificate as it existed when *Suresh* and *Charkaoui* were decided authorized the Minister of Citizenship and Immigration and the Minister of Public Security and Emergency Preparedness (PSEP) to sign a security certificate designating a non-citizen a danger to the security of Canada based on various available broad grounds of inadmissibility, including terrorism and organized crime. The named person was detained immediately and automatically without warrant and little or no judicial oversight of the continuing detention. The security certificate was reviewed by a judge according to a process in which the person concerned may be excluded and refused access to the evidence against him beyond a summary of the allegations against him. A parallel process authorized the Minister to deport a non-citizen to face a danger to life or freedom if the person was inadmissible and, in the Minister’s opinion, posed a danger to national security. If the security certificate was upheld as reasonable, it became operational as a deportation order with no further recourse. The automatic detention, protection of information, and limited judicial recourse made the security certificate attractive to immigration and intelligence authorities who proposed them, and ministers who signed them. The security certificate permitted immigration authorities to bypass the usual processes for determining inadmissibility, detention, judicial review, and removal.

Although first legislated in the late 1970s, security certificates were seldom used and rarely publicized. Since 2000, all men named in security certificates (with the brief exception of Ernst Zundel), have been Muslim men originally from the Middle East or North Africa, accused of

connection to Muslim extremism and al Qaeda²². Almost all judicial attention to the intersection of immigration law and terrorism has been directed at implementing and adjudicating the legality of security certificates.

Suresh

Manickavasgem Suresh is a Sri Lankan Tamil. A security certificate signed in 1995 alleged that he was a member of a terrorist organization (the LTTE or ‘Tamil Tigers’) based on his fundraising activities for the World Tamil Movement, which was allegedly associated with the LTTE. His security certificate was upheld as reasonable, and the Minister of Citizenship and Immigration exercised his discretion to designate Suresh a threat to national security and to order Suresh’s deportation, despite the substantial risk that Suresh would be tortured upon return to Sri Lanka. The *Suresh* judgment concerns the ultimate outcome of the security certificate, namely the exercise of ministerial discretion to deport, and does not address the process of determining the reasonableness of the certificate itself.

The *Suresh* decision has been the subject of extensive commentary, much of it critical of the so-called “Suresh exception”, which I will address below. But the Supreme Court in fact did more than address the constitutionality of deporting a deemed threat to national security to face a substantial risk of torture. It provided a plausible definition of ‘terrorism’ and ‘national security’ (two notoriously difficult interpretive tasks), and used section 7 to read into legislative silence various procedural requirements (including notice, right of reply and reasons) on a ministerial decision to deport a person deemed to pose a threat to national security. Using principles of deference rooted in administrative law, the Court explicitly calibrated the level of deference that it would afford the executive in the each of the sequential determinations of whether deportation to torture violated s. 7 of the Charter (no deference), whether the person concerned posed a threat to national security (deference) and whether he faced a substantial risk of torture (deference). Though cast in negative and exceptional terms, the Supreme Court of Canada retained the possibility of deportation of a non-citizen to torture.

But this attentiveness to the right to procedural fairness paled in significance against the Court’s endorsement of the object of that inquiry: The Supreme Court ruled that “barring extraordinary

²² There have been five primary security certificates in this area. Each of the certificates was renewed after Charkaoui I ruled the existing process unconstitutional. Adil Charkaoui is a Moroccan national whose certificate was signed in May 2003; he was granted conditional release in February 2005; and the certificate was dropped in September 2009. Hassan Almrei is a Syrian national whose certificate was signed in October 2001; he was granted conditional release in January 2009; and his certificate was quashed in December 2009. Mohammad Harkat is an Algerian national whose certificate was signed in December 2002; he was granted conditional release in May 2006; and his certificate was most recently upheld in December 2010. Mohammad Mahjoub is an Egyptian national whose certificate was signed in May 2000; he was granted conditional release in February 2007; he subsequently returned to detention in March 2009 at his own request and was ordered re-released on conditions in November 2009; the reasonableness of his security certificate is before the Federal Court. Mahmoud Jaballah is an Egyptian national whose certificate was signed in April 2001; he was granted conditional release in April 2007; and the reasonableness of his certificate is still before the Federal Court.

circumstances, deportation to torture will generally violate the principles of fundamental justice protected by s. 7 of the *Charter*.”²³ The Court reserved a notional space within law – circumscribed by ‘exceptional circumstances’, wherein the executive could deport a person to face a substantial risk of torture because the danger the person posed to Canada outweighed the harm of torture. Unsurprisingly, critics of the judgment found little to praise in the Court’s solicitude toward the fairness of a process oriented toward deciding whether a person should be handed over to torture. They deplored the Court’s refusal to declare an absolute prohibition on deportation to torture, as the European Court of Human Rights did in the 1986 *Chahal* decision (and subsequently re-affirmed in the 2008 *Saadi* decision²⁴).

For scholars of international law who celebrated the Baker decision as heralding a warmer and wider embrace of international legal norms within Canadian law, *Suresh* could only amount to a significant disappointment. Early Charter jurisprudence exhorted that the Charter should be interpreted to extend at least as much rights protection as international legal instruments binding on Canada. The *Convention Against Torture* unequivocally prohibited returning a person to face a substantial risk of torture. The prohibition on torture was generally understood to have acquired the status of *jus cogens*. It was a single, short step to interpreting s. 7 of the Charter in conformity with these norms. And yet the Court abruptly halted its reasoning process at the point of conceding that deportation to torture would violate international law, and did not proceed to the conclusion that a consistent interpretation of s. 7 would therefore preclude deportation. Instead, it simply left a gap where reasons might normally be supplied. In its place, it offered the curious and contradictory non-sequitur that “Insofar as Canada is unable to deport a person where there are substantial grounds to believe he or she would be tortured on return, this is not because Article 3 of the CAT directly constrains the actions of the Canadian government, but because the fundamental justice balance under s. 7 of the *Charter* generally precludes deportation to torture when applied on a case-by-case basis.”²⁵

Having framed return to torture as ‘exceptional’, and cautioned that it will rarely be justifiable, the Court coyly declines to stipulate the criteria by which national security might trump the risk of torture:

We may predict that [the balance] will rarely be struck in favour of expulsion where there is a serious risk of torture. However, as the matter is one of balance, precise prediction is elusive. The ambit of an exceptional discretion to deport to torture, if any, must await future cases.”²⁶

²³ *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para. 76 [*Suresh*]. Interestingly, the Court omitted to mention the level of deference appropriate to judicial review of the case-by-case balancing between national security and deportation torture.

²⁴ *Saadi v. Italy*, no. 37201/06, [2008] ECHR 179.

²⁵ *Suresh*, *supra* note 27 at para. 78.

²⁶ *Suresh*, *supra* note 27 at para. 78.

Perhaps the Court meant to signal an expectation that the exception would not be invoked in practice. If so, the Court was quickly proven wrong. In each post-9/11 security certificate cases where the government had occasion to address the issue, it took the position that the named person fell within the exception. In none of these cases (or in *Suresh*) was the person detained on the security certificate alleged to have committed or conspired to commit, or been directly involved in an act of violence in Canada or abroad.

I will not rehearse here the deontological objection to torture (ie. the prohibition on torture is a moral absolute from which no deviation can be tolerated), or the concern about the Court's selective attention to international law. These criticisms have been thoroughly canvassed by others. Instead, I want to notionally walk the Court's utilitarian talk. When might the legal balance tip in favour of deliberately delivering a person to be water boarded, to be electrocuted, to be raped, to be beaten until his limbs are smashed, or to be driven mad by sleep deprivation? In the typical utilitarian calculus popularized after 9/11, the tipping point was the mythical ticking bomb. Torture one terrorist to locate the ticking bomb, and save many innocent lives. For the obstinate absolutist, one can even up the ante, as Jeremy Bentham cleverly did: torture one terrorist, and avoid the torture of a thousand others²⁷.

Leave aside for the moment the various principled and pragmatic objections to the ticking bomb scenario. It is enough to note that the utilitarian hypotheticals all presuppose highly specific and horrific consequences which can *only* be averted by, and *will* be averted by the torture of the terrorist.

Security certificate detainees never did and, importantly, never could remotely fit the hypothetical. There were no literal or figurative ticking bombs in Canada, or elsewhere, that these detainees harboured knowledge about. Their torture abroad served no instrumental purpose. The allegedly immutable riskiness of the security certificate detainee was the problem and containing him in his state of citizenship was the solution promised by immigration law. The 'balancing' that the *Suresh* exception presupposes is unintelligible even on a utilitarian calculus that weighs the evil of torture against its supposed benefits. In security certificate cases, torture confers no benefit on Canada; it is simply an externality ensuing from deportation.

John Finnis asserts that the state can legitimately choose to tolerate lower levels of risk from non-citizens than from citizens²⁸. This might explain why, for example, a non-citizen may be labelled a terrorist if there are reasonable grounds for believing that he is, was, or may become a member of an organization that there are reasonable grounds for believing did, does, or may in the future commit acts of terror. In contrast, the criminal law requires proof beyond a reasonable

²⁷ See Jeremy Waldron, "What are Moral Absolutes Like?" (2011) online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1906850>.

²⁸ John M. Finnis, "Nationality, Alienage and Constitutional Principle" (2007) 123 *Law Quarterly Review* 417.

doubt²⁹. But even if one provisionally grants the entitlement of the state to set the acceptable level of risk lower for non-citizens for purposes of branding and expelling, it does not follow that it warrants handing the non-citizen over to torture. That is to say, the argument might suffice to justify inadmissibility or expulsion where the consequences are unknown, but once torture is on the horizon, it simply deflects the question: why is the torture of non-citizens permissible when the same could not be done to similarly situated citizens?

One might counter that there are circumstances where the risk to national security is quantitatively commensurate with the risk of torture, assuming that commensurability is even meaningful in this context. So imagine instead that the state proffers compelling evidence about the individual that indicates he poses a specific and substantial risk to Canadian security: he *is* the walking, talking, ticking time bomb. But the stronger the evidence, the weaker the argument. The very acts that would demonstrate the existence of the risk would support prosecution under one of many anti-terrorism provisions. To choose one example, s. 83.13(1) an individual faces conviction if he “knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity”³⁰. The state retains various methods for monitoring and even controlling individuals under suspicion, most notably through an anti-terrorist ‘peace bond’ provision (s. 810.01 of the Criminal Code)³¹. These are the options available to the state irrespective of the suspected person’s legal status.

The Court can draw on numerous legal resources to explain why deportation to torture violates s. 7, but provides neither authority nor argument in support of its exception. It makes passing reference to the possibility of Canada becoming a ‘safe haven’ for terrorists, but having admitted

²⁹ While the terrorism offenses attenuate the criminal law’s traditional insistence on culpable actions and mental states that are temporally and causally hitched to harmful conduct, they stop short (barely) of criminalizing association.

³⁰ *Criminal Code*, *supra* note 3, s. 83.18(1). The other offences are: knowingly facilitating a terrorist activity, 83.19(1); committing an indictable offence under the *Criminal Code* or any other act “for the benefit of, at the direction of or in association with a terrorist group”, 83.2; knowingly instructing “directly or indirectly, any person to carry out any activity for the benefit of, at the direction of or in association with a terrorist group, for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity”, 83.21(1); knowingly instructing “directly or indirectly, any person to carry out a terrorist activity”, 83.22(1); and knowingly harboring or concealing “any person whom he or she knows to be a person who has carried out or is likely to carry out a terrorist activity, for the purpose of enabling the person to facilitate or carry out any terrorist activity”, 83.23.

³¹ *Criminal Code*, *supra* note 3, s. 810.01, authorizes a one year, reviewable recognizance order against a person whom there are reasonable ground to fear will commit, inter alia, a terrorism offence. The government never used the preventive detention power and allowed that provision of the ATA to lapse under a sunset provision, although the current government proposes to reinstate it. “MPs vote against extending anti-terrorism measures” *CBC* (27 February 2007), online: <<http://www.cbc.ca/canada/story/2007/02/27/terror-vote.html>>. See also Jonathan M. Coady, “Conditional Release of Terror Suspects in Canada: Lesson from the United Kingdom” (2010) 36 *Queens Law Journal* 251 at 270.

³¹ *Criminal Code*, *supra* note 3, s. 810.01, authorizes a one year, reviewable recognizance order against a person whom there are reasonable ground to fear will commit, inter alia, a terrorism offence. The government never used the preventive detention power and allowed that provision of the ATA to lapse under a sunset provision, although the current government proposes to reinstate it.

in *Burns and Rafay* that the same unsubstantiated conjecture cannot justify extradition of fugitives to face possible execution, the Court cannot credibly rely on it to justify deportation to torture. Indeed, the state interest in national security seems to properly belong under a s. 1 analysis, not principles of fundamental justice. So one is left unclear about what principle justifies the exception.

My suspicion is that the *Suresh* exception manifests a tacit deference to the exercise of the familiar prerogative of sovereignty, namely the power of the state to deny entry to non-citizens. . As the Supreme Court states in *Chiarelli*, “the most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country”³² Indeed, in its positive formulation, the unique entitlement of citizens to enter and remain is enshrined in s. 6 of the Charter. Can the principle that non-citizens do not have the right to remain bear the normative weight of deporting a non-citizen to torture? I do not think so.

The question before the Court in *Suresh* is whether exposing a person to a substantial risk of torture violates s. 7 of the Charter. The claim that the state possesses the power to deport non-citizens is an answer to a different question. What is at stake is not the existence of the power to deport, but the limits imposed by the Charter on the exercise of that power. Protecting a Charter right might impinge on the state’s power to deport the non-citizen, but only contingently and in highly qualified circumstances.

Freedom from torture is a human right; the right to enter and remain is a right of citizens. Even if freedom from torture entails qualified protection from deportation, this does not diminish the superiority of the citizen’s constitutionally protected right to enter and remain. At its highest, *Chiarelli* directs the inquiry to the circumstances producing a conditional right to remain under s. 7 of the Charter.

The state possesses a power to deport, not a ‘right’ to deport. State power is subject to the discipline of justification within a framework of legality. Individual rights are asserted against the state, and a state that seeks to limit rights bears the burden of justification. Constitutions do not articulate rights of the state against individuals; they set out the rights of individuals (and sometimes groups), and the powers of the state. To the extent that a state has the sovereign ‘right’ to expel non-citizens, this is a right against non-interference by other states or international bodies; it is not a right of a state as against an individual. Yet the absence of reasoning on the justification for deportation to torture seems to confuse power with right, as if the non-citizen must justify infringing upon the state’s right to deport him. Within this analytical frame, ‘exceptional circumstances’ signifies the residual ‘right’ to deport remaining to the state by virtue of the non-citizen’s failure to fully discharge his burden.

None of the five security detainees have actually deported to face a substantial risk of torture, and two have had their security certificates quashed. I would venture to speculate that even if the

³² *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at 733.

security certificates of the remaining three are upheld as reasonable, they will not be deported as long as they face a substantial risk of torture. Indeed, in 2006, after upholding the security certificate against Jaballah under the pre-Charkaoui process, the Federal Court categorically stated that “the Minister... may not exercise discretion to remove Mr. Jaballah to any country where and when there is a substantial risk that he would face torture or death or cruel and unusual punishment”³³. One expects that future contestation about deportation will turn on the factual existence of a risk of torture, and the approach of reviewing courts to a determination that the person concerned does not (or no longer) faces a substantial risk of torture.

One might conclude that my attention to the Suresh exception is overwrought. After all, the Court hinted that the state should hesitate before deporting to torture, or even before accepting assurances that torture will not be inflicted, even as it declared that the state can deport. In practice, the exception matters little because it has never been successfully applied to any of the security certificate detainees anyway. And by leaving open the possibility of removal of non-citizens to torture, the Supreme Court of Canada avoided direct confrontation with the executive by refusing to impose definitive constitutional limits on the power to deport. No harm done, right?

In my estimation, the *Suresh* exception has produced at least three harms, in addition to the obvious peril in which it placed security certificate detainees. First, Canada has actually deported non-citizens in circumstances where it knew or ought to have known that torture was likely. These cases occurred outside the security certificate context, and deployed lower visibility immigration processes to which the Federal Court assented through a deferential standard of review³⁴. In a remarkable and disturbing judgment, the Federal Court explicitly upheld the *refoulement* of an excluded refugee to face a substantial risk of torture in Angola³⁵. After citing Suresh in support of the proposition that “in exceptional circumstances it is possible to deport a person to a country where he or she is at risk of being tortured”, the court proceeds swiftly to this conclusion: “In this case exceptional circumstances do exist, namely the need to protect Canada's

³³ *Jaballah (Re)*, 2006 FC 1230 at paras. 84, 85.

³⁴ In *Sogi*, the Minister's delegate twice determined that the risk to national security posed by Sogi outweighed the risk of torture, and was rebuffed by the Federal Court. On the third occasion, the Minister's delegate determined that the risk of torture was no longer significant. The Federal Court deferred to this factual determination, using the reasonableness standard of review that Suresh deemed appropriate to reviewing the likelihood of torture. See *Sogi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 108. The UN Committee Against Torture later found that Canada breached its obligations under Article 3 of the Convention Against Torture, *Bachan Singh Sogi v. Canada*, U.N. Doc. CAT/C/39/D/297/2006 (16 November 2007). Sogi was reportedly detained, mistreated and eventually released by Indian authorities following his well publicized return.

³⁵ *Nlandu-Nsoki v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 17. The claimant was excluded on the basis of membership in a terrorist organization that had committed war crimes and crimes against humanity in Angola.

security. Accordingly, Mr. Nlandu-Nsoki cannot claim that the decision by the Minister's representative is inconsistent with the Charter or with Canada's international obligations.”³⁶

Secondly, the Supreme Court's refusal to specify the conditions under which deportation to torture would be constitutional effectively downloaded the task to the Federal Courts. But as I have suggested, performance of the task does not simply await the provision of an adequate factual matrix. It is, rather, a task that is not performable. To impose on lower courts a duty to apply an unintelligible rule corrodes the integrity of the enterprise of adjudicationry itself. Mr. Justice Mackay's judgment in *Jaballah* gives a flavour of the challenge where, as is the case with each detainee, the person has been contained under strict surveillance and physical control for several years and was never alleged to pose a specific risk to Canada:

“In assessing "exceptional circumstances" that would justify Mr. Jaballah's deportation to face torture, the decision of the Minister's delegate relies upon the terrorist activities of the AJ and its link to Al Qaida, and Mr. Jaballah's association with some AJ activities and some leaders of AJ, to reach the conclusion that his presence in Canada constitutes an extraordinary danger to the security of Canada. There is no reference to circumstances facing Canada or its security, other than the conclusion that it is endangered by Mr. Jaballah's presence in Canada.

The exceptional circumstances referred to are not those directly related only to the person of concern, rather the circumstances referred to appear to concern those facing Canada as a nation. In this case, the Minister's delegate makes no reference to such circumstances except as the reader may infer, that Mr. Jaballah presents a continuing danger to national security. While I agree that Suresh should not be read as limiting exceptional conditions to those suggested as illustrations, the decision here in issue fails to assess conditions facing Canada as a nation that would warrant exception from section 7 protection, either in the balancing of fundamental rights or in the examination of evidence to support an exception based on section 1 of the Charter.”³⁷

In *Almrei*, the Federal Court also refused to sanction the balance in favour of torture, finding that even on the most deferential standard of review “the Delegate's decision in respect to the danger Mr. Almrei poses to the security of Canada is not supported on the evidence before the decision-maker”.³⁸ The Federal Court in *Mahjoub* eventually balks at doing the Supreme Court of Canada's dirty work, and “find[s] on a balance of probabilities that Mr. Mahjoub is unlikely to be removed from Canada until the Supreme Court authoritatively decides whether circumstances will ever justify a removal to torture.”³⁹

³⁶ *Ibid.*, at para. 22.

³⁷ *Jaballah (Re)*, 2005 FC 399 at paras. 44-45.

³⁸ *Almrei v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 355, para. 95.

³⁹ *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1596 at para. 29.

This Federal Court resistance points to a third kind of damage inflicted by the *Suresh* exception, which is to the rule of law itself. Jeremy Waldron develops the argument in the United States context that torture can never be rendered lawful without fundamentally subverting the legal order itself. He helpfully explains how a ban on torture is a kind of legal archetype that encapsulates the aspirations of the rule of law. He argues that we ought to conceive of the rule of law as standing in opposition not only to arbitrariness in government, or in favour of regulation through law, but also in defiance against rule through sheer brutality.

The rule of law has set its face against brutality, and has found ways of remaining forceful and final in human affairs without savaging or terrorizing its subjects. The promise of the Rule of Law, then, is the promise that this sort of ethos can increasingly inform the practices of the state and not just the practices of courts, police, jailers, prosecutors etc. In this way, a state subject to law becomes not just a state whose excesses are predictable or a state whose actions are subject to forms, procedures and warrants; it becomes a state whose exercise of power is imbued with this broader spirit of the repudiation of brutality.⁴⁰

When the Supreme Court of Canada makes state complicity in torture legally conceivable, it reneges on the promise of the rule of law, and capitulates to the idea “that the state that it aims to control will be permitted in some areas and to at least a certain extent to operate towards individuals who are wholly within its power with methods of brutality that law itself recoils from”.⁴¹ The effect of the *Suresh* exception is to use law to sanction its own negation or, in other words, to judicially authorize the suspension of the rule of law.

That torture is only legally thinkable with respect to non-citizens exposes a troubling point about the place of non-citizens in the legal order. It suggests that the inequality of non-citizens is not constituted and delimited by the power of the state to exclude and expel them, or the authority to deny them the franchise or restrict access to public service jobs. It is, rather, a more profound and existential inequality. To subject a person to torture is to deny their fundamental humanity. Though a utilitarian might be willing to sacrifice the humanity of a few in order to secure the survival of the many, the Court emphatically resists a qualified or utilitarian approach to torture: Torture is wrong, period. Nor did the Court avail itself of the opportunity to evade the s. 7 issue by exploiting the normative distance between committing torture and delivering a person to the substantial risk of torture by another: “At least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand.”⁴²

⁴⁰ Jeremy Waldron, “Torture and Positive Law: Jurisprudence for the White House” (2005) 105 *Columbia Law Review* 1681 at 1742-1743.

⁴¹ *Ibid.* at 1743.

⁴² See, *Suresh*, *supra* note 27, at para. 54.

Ultimately, alienage, emerges as the sole variable that makes torture juridically thinkable within a domestic legal order: Citizens may not lawfully be exposed to a substantial risk of torture; non-citizens may be. This outcome is the antithesis of utilitarianism, which takes as its foundational premise that each person counts equally as one person in the calculus. It is not utilitarianism that is doing the work in *Suresh*, it is the devaluation of the non-citizen.

The effect of the *Suresh* exception is to install citizenship over personhood for purposes of containment. The citizen/non-citizen distinction (and the attendant rights to enter and remain) are recruited to the task of ensuring containment in another country. Where containment is accompanied by the probability of torture, the integrity of deportation's purpose within immigration law is held hostage to the relentless demands of containment. What *Suresh* teaches us (or perhaps reminds us) is that non-citizens are a little less human than the rest of us. That is the enduring and dispiriting message of *Suresh*.

Charkaoui

Suresh addressed the enforcement outcome of the security certificate process but did not actually deal with the security certificate process itself. To draw an analogy to the criminal law, *Suresh* addressed sentencing, and only later did *Charkaoui* tackle the process leading to the finding of culpability. Much like *Suresh*, the *Charkaoui* court rests its judgment on procedural violations, not substantive infringements. In the context of the security certificate regime, this translated into scrutiny of the use of secret evidence in the course of a designated Federal Court Judge's review of the reasonableness of the security certificate, and the process of reviewing ongoing detention. The Court did not engage directly with the substantive basis for liability⁴³, or with IRPA's apparent authorization of indefinite or indeterminate detention. In relation to the latter, the Court deferred the issue much as it did with the *Suresh* exception, declaring that the constitutionality of indeterminate detention should be resolved on a case by case basis.

The *Charkaoui* decision focuses on the unfairness of the process used to test the reasonableness of the security certificate. The Court is admirably unequivocal in announcing that "deportation of a non-citizen in the immigration context may not *in itself* engage s. 7 of the *Charter*, some features associated with deportation, such as detention in the course of the certificate process or the prospect of deportation to torture, may do so". The Court also affirms that the state's national security considerations may affect how the state accords fundamental justice in a given context, but cannot derogate from the requirement of fundamental justice itself.

Specifically, the regime permitted the use of secret evidence on grounds of national security confidentiality. A judge could view it and pose questions about it, but neither the person concerned nor his counsel could view or test the evidence through cross examination. The named person was entitled to a judicially approved factual summary of the allegations against him, with

⁴³ In fairness to the Court, the peculiar trajectory of the *Charkaoui* litigation seemed to preclude the possibility of addressing the substantive dimensions of inadmissibility.

the proviso that the summary did not contain or reveal information protected by national security confidentiality. In practice, the factual summary was a laconic and vague account prepared by the government and typically approved by the judge without amplification. Without explicitly casting the problem in these terms, the Court confronted one dimension of the intelligence versus evidence conundrum. Intelligence data is collected for purposes of general risk prediction, and without attention to its validity or reliability *qua* evidence. Yet the security certificate process relies on intelligence as evidence in a judicial proceeding to inculcate a specific individual. The statutory regime *accommodated* the deficiencies of intelligence *qua* evidence by diluting the standard of proof for the grounds of inadmissibility and the judicial scrutiny of the security certificate⁴⁴. The statute also *compensated* for the potentially weak probative value of intelligence unfiltered by evidentiary norms by empowering the judge to question the government on the reliability and credibility of the secret evidence. *Charkaoui* critically assesses only the compensatory aspect of the security certificate scheme. The Supreme Court of Canada expresses concern about the fairness of the regime in handling secret evidence from the perspective of two actors: The person named in the certificate and the designated judge tasked with determining the fairness of the certificate. The denial of the person's actual right to know and respond to the case against him is irrefutable, and so it is the sufficiency of the designated judge as proxy that preoccupies the Court. The Court affirms the concern (to which one Federal Court judge publicly alluded in a speech) that the pseudo-inquisitorial mandate imposed on designated judges compromises the integrity of the traditional role of a judge in the adversarial system:

The fairness of the *IRPA* procedure rests entirely on the shoulders of the designated judge. Those shoulders cannot by themselves bear the heavy burden of assuring, in fact and appearance, that the decision on the reasonableness of the certificate is impartial, is based on a full view of the facts and law, and reflects the named person's knowledge of the case to meet. The judge, working under the constraints imposed by the *IRPA*, simply cannot fill the vacuum left by the removal of the traditional guarantees of a fair hearing. The judge sees only what the ministers put before him or her. The judge, knowing nothing else about the case, is not in a position to identify errors, find omissions or assess the credibility and truthfulness of the information in the way the named person would be. Although the judge may ask questions of the named person when the hearing is reopened,

⁴⁴ The judge shall uphold a security certificate not if its allegations are proved beyond a reasonable doubt, or on balance of probabilities, but if the security certificate reasonably discloses reasonable grounds to believe that the person is, was, or may commit prohibited acts or become a member of a prohibited organization that there are reasonable grounds to believe did, does or may engage in terrorist acts. Among other things, this means that if a person is a member of a non-terrorist organization at T_1 , dissociates from it at T_2 , and the organization commences terrorist activities at T_3 , the person is still considered a terrorist for purposes of immigration law. If one notionally understands a standard of proof as authorizing less full certainty ($1/y$), and reasonable grounds as something less than a balance of probabilities, one can quickly appreciate how the multiplier effect of these fractional certainties ($1/y \times 1/y \times 1/y$) as applied to past, present and future events yields an extraordinarily dilute standard of proof ($1/y^3$).

the judge is prevented from asking questions that might disclose the protected information. Likewise, since the named person does not know what has been put against him or her, he or she does not know what the designated judge needs to hear. If the judge cannot provide the named person with a summary of the information that is sufficient to enable the person to know the case to meet, then the judge cannot be satisfied that the information before him or her is sufficient or reliable. Despite the judge's best efforts to question the government's witnesses and scrutinize the documentary evidence, he or she is placed in the situation of asking questions and ultimately deciding the issues on the basis of incomplete and potentially unreliable information.... The judge is therefore not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring. Such scrutiny is the whole point of the principle that a person whose liberty is in jeopardy must know the case to meet. Here that principle has not merely been limited; it has been effectively gutted. How can one meet a case one does not know?⁴⁵

As in *Suresh*, the scope of non-citizens' inequality was not itself subject of analysis; instead, the fact that citizens are non-deportable while non-citizens are deportable was the predicate upon which the analysis rests. By the time *Charkaoui* was decided, the UK House of Lords had ruled in *Belmarsh*, that the UK immigration regime's indefinite detention provisions discriminated on the basis of nationality.

Unlike its Canadian counterpart, the UK House of Lords was bound by the 1986 *Chahal* decision by the European Court of Human Rights that imposed an absolute prohibition on the deportation of a non-citizen to face a substantial risk of torture. In 2001, the British Parliament authorized indefinite or indeterminate detention of non-citizen security threats who could not be deported because, inter alia, of the *Chahal* decision. In *Belmarsh*, the House of Lords ruled that indeterminate detention of non-deportable non-citizens on security grounds violated the European Convention on Human Rights' liberty and security of the person and did not fall within the emergency exception contemplated by the ECHR's derogation provision. Importantly, it ruled that the indefinite or indeterminate detention of non-nationals who were otherwise similarly situated to nationals qua terrorist threats led to the 'inescapable' conclusion that the derogation provision was discriminatory (contrary to s. 15 of the ECHR) and disproportionate. If the exigencies of counter-terrorism did not demand the indeterminate detention of citizens, how could they justify indeterminate detention of non-citizens?:

Detention under section 23 cannot be imposed on British nationals. It can only be invoked against immigrants who have no right of residence in this country. But a terrorist may be an immigrant or may be homegrown. The differentiation between suspected terrorists who are immigrants with no right of residence and suspected terrorists who are British nationals is, in my opinion, plainly discriminatory. The difference between the two groups, namely, that one group has the right of residence and the other group does

⁴⁵ *Charkaoui*, *supra* note 11 at paras. 64-65.

not, seems to me to be irrelevant to the issue as to what measures are required in order to combat the threat of terrorism that their presence in this country may be thought by the Secretary of State to present.

The Secretary of State argues that measures restricted in their application to those suspected terrorists who do not have rights of residence will suffice to combat the “public emergency” and that to extend the measures to everyone who was a suspected terrorist would be to go further than was “strictly required”. In my opinion, however the article 15 requirement does not justify a discriminatory distinction between different groups of people all of whom are suspected terrorists who together present the threat of terrorism and to all of whom the measures, if they really were “strictly necessary” would logically be applicable. If those who are suspected terrorists include some non-Muslims as well as Muslims, it would, in my opinion, be irrational and discriminatory to restrict the application of the measures to Muslims even though the bulk of those suspected are likely to profess to be Muslims. Some might well not be professed Muslims. Similarly, it would be irrational and discriminatory to restrict the application of the measures to men although the bulk of those suspected are likely to be male. Some might well be women. Similarly, in my opinion, it is irrational and discriminatory to restrict the application of the measures to suspected terrorists who have no right of residence in this country. Some suspected terrorists may well be home-grown⁴⁶.

The Supreme Court of Canada inclines away from equality claims and prefers deciding cases on other grounds wherever possible. In *Charkaoui*, the Supreme Court of Canada despatched a *Belmarsh*-inspired equality argument by citing *Chiarelli*, and then distinguishing *Belmarsh* in the following way: As long as detention is linked to the purpose or effect of deportation, it falls within the ambit of justified discrimination between citizens and non-citizens. The legislation in *Belmarsh* explicitly authorized indefinite or indeterminate detention without deportation. In contrast, IRPA did not explicitly authorize indefinite detention in the absence of foreseeable deportation. The explicit recognition in the UK that deportation to torture was legally impossible meant that ongoing detentions had been formally “unhinged from the state’s purpose of deportation”. The same could not be said of the Canadian scheme.

Of course, what the Supreme Court omits is that IRPA did not need to explicitly authorize potentially indefinite detention because (unlike its UK counterpart) it was enacted in the absence of any constitutionally stipulated limits on the power to deport. In the UK case, once *Chahal* took deportation off the table in 1986, non-nationals were functionally equal to nationals, and the state could not evade the need to justify discriminatory subjection to indefinite detention. The fact that the UK persisted in its quest for diplomatic assurances that the deportees would not be tortured post-return did not persuade the court that deportation remained viable enough to sustain continued detention.

But with the *Suresh* exception in place, the government could continue to argue (as it did in various Federal Court proceedings) that deportation remained its purpose in all cases, even where

⁴⁶ *A and others*, *supra* note 10, at paras. 157-158.

torture was likely. So the reason why the Canadian security certificate regime is unassailable under the Charter's s. 15 equality guarantee is that non-nationals remain, in principle, deportable, because torture of non-nationals remains, in principle, a lawful consequence of deportation. And so one returns to the existential inequality dividing aliens from citizens in the Canadian legal imagination: the former are torturable; the latter are not.

IMMIGRATION LAW AND CRIMINAL LAW AS ANTI-TERRORISM LAW

What would have been entailed in confining the inequality of non-citizens to its proper legal place? One must accept the constitutional starting position that s. 6 only grants citizens an unconditional right to enter and remain, and so deportation as such is not cognizable as an equality breach. But this tells us nothing about the legality of the criteria for designating someone a terrorist threat to national security; the process for determining whether that person meets the criteria; the imposition of indeterminate detention; and subjecting the person substantial risk of torture.

Each of these queries now elicits a separate and parallel response from the criminal law. In a 1993 immigration case of *Dehghani*, Mr. Justice Iacobucci wrote that: "factual situations which are closer or analogous to criminal proceedings will merit greater vigilance by the courts"⁴⁷. Since the introduction of the ATA in 2001, Canada is in a situation that did not obtain in 1993. Canada now has two parallel regimes for regulating a person who is suspected of involvement in terrorism: the criminal law and immigration law.

So perhaps the first question that ought to be posed now is why we do not prosecute citizens and non-citizens under the Criminal Code? I expect that this will land on the ears of many as a wacky, bleeding heart proposition. Yet it is hardly radical. In fact, this is how immigration law handles most other forms of conduct that is criminalized. Under IRPA, a non-citizen can be deported from Canada for commission of a criminal offence, but the state must first prosecute and convict that person. Generally, the offender also serves the sentence in Canada, and is subject to deportation upon release. We do not generally permit the use of immigration law to bypass the criminal law where immigration enforcement is addressed to the alleged commission of criminal offences.

In my view, the symmetry between the current anti-terrorism provisions of the criminal law and the national security provisions of IRPA is robust enough to legitimate inquiry into the justification for the asymmetries. Actual deployment of the Anti-Terrorism Act's criminal law provisions against alleged terrorists arrived late on the scene in Canada, and remains rare⁴⁸. Two

⁴⁷ *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053 at p. 1077

⁴⁸ An *Associated Press* investigation published 3 September 2011 documents 35,000 terror convictions worldwide since 9/11. Turkey and China accounted for half; the United States convicted almost 2600 on terrorism charges, an eight fold increase from the previous decade. Martha Mendoza, "AP Impact: 35,000 Convicted Worldwide for Terror" *Associated Press* (3 September 2011) online, <http://hosted2.ap.org/APDEFAULT/*/Article_2011-09-03-Sept%2011-Convicted%20for%20Terror/id-6fba27def61c4c73b2ce2911159e5df4>.

highly publicized prosecutions have led to convictions (Khawaja⁴⁹, “Toronto 18⁵⁰”), and among them, some very harsh sentences.

Early Charter cases in the criminal law emphasized that the stigma attaching to certain crimes was so grave as to warrant special attention to the criteria for branding a person a murderer or rapist⁵¹. Whatever one makes of the conceptual viability of ‘stigma’ as a relevant factor in constitutional adjudication, there surely exists no label more stigmatizing today than ‘terrorist’. In virtually every respect, immigration law designates a person as a terrorist on more tenuous grounds, using a drastically dilute standard of proof⁵², according to a less fair process, and with deprivations of liberty and security at least as severe as the criminal law. Indeed, as the Supreme Court of Canada remarks in a later *Charkaoui* case, “The consequences of security certificates are often more severe than those of many criminal charges. For instance, the possible repercussions of the process range from detention for an indeterminate period to removal from Canada, and sometimes to a risk of persecution, infringement of the right to integrity of the person, or even death.”⁵³

The scope of criminal liability for terrorism offences, much like under IRPA, is wide and oriented toward risk prevention. In *R v. NY*, a case arising from the “Toronto 18” prosecution, the Ontario Superior Court itemizes the elements of the terrorism offence under 83.18(1) of the Criminal Code that the Crown must prove beyond a reasonable doubt:

- “(a) terrorist group existed;
- (b) the accused knew the existence of the terrorist group;
- (c) the accused participated in or contributed to, directly or indirectly, any activity of the terrorist group, and
- (d) the participation or contribution was intended by the accused to enhance the ability of any terrorist group to facilitate or carry out a terrorist activity.”⁵⁴

The offence requires an *actus reus* (direct or indirect contribution or participation), and a *mens rea* (knowledge and intention), but unlike a typical criminal offence, there is no requirement to prove that the accused intended or foresaw any conventionally harmful act or consequence. The lack of proximity between the prohibited acts and a terrorist act signals the ascendance of a ‘preventive justice’ model of criminal law, at least in relation to anti-terrorism. In *R. v. Ahmad*,

⁴⁹ *R. v. Khawaja*, [2008] O.J. 4244, 238 C.C.C. (3d) 114 (conviction), [*Khawaja I*]; *R. v. Khawaja*, 2010 ONCA 862 (sentence). [*Khawaja II*]

⁵⁰ For a survey of convictions and sentences, see “Toronto 18: Key events in the case” *CBC* (4 March 2011), online: <<http://www.cbc.ca/news/canada/story/2008/06/02/f-toronto-timeline.html>>. [“Toronto 18”]

⁵¹ See, *R. v. Martineau*, [1990] 2 S.C.R. 633, opinion of Lamer, C.J.

⁵² See note 44, *supra*.

⁵³ *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2008 SCC 38 at para. 54 [*Charkaoui II*].

⁵⁴ *R. v. N.Y.*, [2008] O.J. No. 3902 at para. 154.

the Ontario Superior Court validated this expanded scope of criminal liability, drawing on the October 2001 testimony of then Minister of Justice Anne McLellan:

“The approach we have taken in the bill is a preventative one because punishing terrorists for crimes after the occur is simply not enough. We must be able to disable organizations before they put hijackers on planes or threaten our sense of security... We cannot wait for terrorists to strike before we begin investigations and make arrests where there is a reasonable suspicion that a terrorist act will take place. To wait would be irresponsible.”⁵⁵

The Court upholds and defends the wide scope of the element,

It is this preventive objective that explains why Parliament took such an expansive approach to defining the scope of liability, and which, in my view, ultimately leads to the conclusion it is not overbroad... These provisions achieve their preventive objective by ensuring that conduct which, in general terms, is knowingly done for the purpose of enhancing the potential for the completion of a terrorist act is criminalized.”⁵⁶

The upshot is that the preventive orientation toward national security animates both the criminal law’s definition of offences and immigration law’s definition of inadmissibility. In relation to the use of secret evidence (and the attendant challenges posed by the blurring of intelligence and evidence), the criminal law’s corollary to the special advocate model is s. 38 of the *Canada Evidence Act*. The process by which a Federal Court judge determines disclosure of confidential information in the course of a trial conducted by a superior court judge was recently upheld by the Supreme Court of Canada in *R v. Ahmad*.⁵⁷ Thus, *Ahmad* affirms that the criminal law affords the government the ability to keep information confidential from the public, even from the trial judge, without fatally impairing the Charter’s fair trial guarantees. The Court even dangles the prospect of special advocates migrating from immigration to criminal law, by interjecting them (as amicus) into the s. 38 model.⁵⁸

In the cases where Canadians have faced criminal prosecution for terrorism offences, the courts have not shied away from imposing very harsh sentences, even on young offenders. Indeed, the Ontario Court of Appeal appears to have embraced the subordination of penal law’s object of rehabilitation to securitization’s exclusive emphasis on containment. The most prominent case thus far has been that of Momin Khawaja who was arrested in 2004 and charged with seven counts under the terrorism provisions of the *Criminal Code*. He was convicted in 2008 on five and sentenced by the trial judge to ten and a half years in prison.⁵⁹ However, on appeal, Khawaja’s sentence was lengthened to life imprisonment.⁶⁰ In increasing Khawaja’s sentence the

⁵⁵ *R. v. Ahmad*, [2009] O.J. No. 6151 at para. 55.

⁵⁶ *Ibid.*, at para. 61.

⁵⁷ *R. v. Ahmad*, 2011 SCC 6.

⁵⁸ *Ibid.*, at para. 47.

⁵⁹ *Khawaja I* and *Khawaja II*, *supra* note 22.

⁶⁰ *R. v. Khawaja*, 2010 ONCA 862.

Court of Appeal bases their reasons on the nature of terrorism, and pronounced that “The import of rehabilitation as a mitigating circumstance is significantly reduced in this context given the unique nature of the crime of terrorism and the grave and far-reaching threat that it poses to the foundations of our democratic society.”⁶¹ Later in the judgment, the Court of Appeal endorses containment when it suggests that “there is much to be said for keeping those who have shown a willingness to engage in the indiscriminate killing of innocent civilians under the aegis of the parole system, if not in prison, for well beyond 20 years.”⁶²

The sentencing of the youthful offenders (some actual young offenders) convicted as part of the Toronto 18 varied from the exceptional harshness sanctioned by Khawaja (for those who played an active leadership role) to sentences that appear less exceptional⁶³. I will leave to criminal law scholars the task of evaluating the wisdom and necessity of abandoning rehabilitation as a penal objective for offences falling within the category of terrorism. For present purposes, it suffices to note that the criminal courts do not lack for ability or will to deploy the penal system to contain those whose culpability is demonstrable beyond a reasonable doubt.

The offense must be proven according to the procedural and evidentiary requirements of the criminal law. And the sanctity of non-citizens’ legal inequality is preserved, because deportation is a consequence of conviction that non-citizens face but citizens do not, subject to the prohibition on return to torture.

A range of predictable objections arises to my proposition. They can be bundled into two categories. The first assert that the criminal law is inadequate to combat the terrorist threat because it confines counter-terrorism in an unacceptable constitutional straitjacket that immigration law does not. In order for the argument to stick, we must accept that the criminal law as currently framed, in tandem with broad powers of intelligence and law enforcement surveillance, exposes us to an unacceptable risk of terrorist attack from citizens⁶⁴. Thus, when the Federal Court insists that “national security is such an important interest that it warrants the use of standards other than the preponderance of evidence standard”⁶⁵, the obvious question is why it does not warrant lowering the standard of proof in criminal law for terrorism offences. To generalize the question: If the existing powers of the state are adequate to protect us from

⁶¹ *Ibid.*, at para. 201.

⁶² *Ibid.*, at para. 222.

⁶³ See *R v. Amara* [2010] OJ No. 181 (life imprisonment for a young, first offender); *R v. Khalid*, [2010] OJ No. 4575. The pattern is not consistent, however, and other young and youthful offenders received the usual credit for pretrial custody and normal eligibility for parole. See, “Toronto 18”, *supra* note 23.

⁶⁴ It is useful to recall here that in the notorious case of ‘millennium bomber’ Ahmed Ressam, the individual was rejected as a refugee claimant, even though inadmissibility on grounds of national security did not arise. Ressam later attempted to enter the US from Canada in a car containing explosives, allegedly destined for LAX. It eventually emerged that immigration officials had been prepared to deport Ressam *qua* failed refugee claimant, but intelligence officials preferred to defer immigration enforcement in order to continue their surveillance of him for intelligence purposes. They then lost track of Ressam until he was stopped by US authorities in his attempt to enter the US. Ultimately, the incident proves little about the use of immigration law over criminal law to deal with threats to national security, and probably reveals more about the efficacy of intelligence forces at the time.

⁶⁵ *Charkaoui (Re)*, 2003 FC 1419 at para. 127.

threats posed by citizens, how can they be deficient with respect to non-citizens? The rejoinder that non-citizens as such pose a distinctive and more severe threat to national security cannot bear serious scrutiny.

The alternative argument reverts to the brute inequality of non-citizens. It ultimately devolves to the claim that a national community is not obliged to accept the same level of risk from non-members as from members, and that the state is entitled to do things to non-citizens it cannot do to citizens. I have addressed that argument above. To the extent that it exerts legitimate normative force, it founders on the gravity of the various rights violations that accompany the regime, en route and consequent to deportation.

So, the launching point for analysis that is consistent with - but does not exceed -- the legal inequality of non-citizens is to allocate determination of terrorism to the criminal law and reserve deportation for non-citizens, as s. 6 of the Charter permits and IRPA effectuates. I do not deny that there may exist cogent reasons for departing from this default position. For instance, where the alleged activity that forms the basis of the allegation occurred entirely abroad, one might defend using immigration measures to address actions or risks emanating from beyond the jurisdictional reach of Canadian criminal law. Section 34 of IRPA makes provision for this in respect of criminality by deeming a person inadmissible “for committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament”. Similarly, pragmatic – but not unprincipled – considerations might animate the division of labour between criminal and immigration law in addressing war crimes and crimes against humanity, where Canada has assumed universal jurisdiction to prosecute⁶⁶.

I am not insisting that there can never be a basis for adopting a ‘separate but equal’ regimes under immigration and criminal law for addressing national security. For instance, perhaps a defensible argument can be advanced that the special advocate model under IRPA is roughly equivalent to the s. 38 process under the *Canada Evidence Act*. Nor am I advancing a naïve claim that all non-citizens alleged to pose threats to the security of Canada are wrongly accused. My general point is simply that the case for deviating from the default position should be made and justified in respect of the various disparate and inferior elements of a separate immigration regime where the impact of potential rights infringements are equivalent to those imposed under the criminal law. This is a more coherent approach than the current practice of subsuming the legitimacy of the regime under the legal inequality of citizens that renders them deportable. *Belmarsh* demonstrates how one might engage a principled analysis by reference to indeterminate detention. *Charkaoui I* simply defers ruling on the substantive question of indefinite detention by reverting to the procedural gambit of requiring regular review of ongoing

⁶⁶ This issue recently erupted in headlines when the Minister of Citizenship and Immigration posted a ‘wanted list’ of alleged non-citizen war criminals. See the exchange of open letters between Amnesty International and Jason Kenney, online: <<http://www.amnesty.ca/media2010.php?DocID=814>> and <<http://www.jasonkenney.ca/news/an-open-letter-to-amnesty-international/>>.

detention. On the other hand, *Charkaoui II* begins to draw the links between the criminal and the security certificate process when it imposes an analog of the *Stinchcombe* obligation on CSIS: It must retain and disclose all its notes and information about the named person to the designated judge⁶⁷.

Despite my critique of the *Charkaoui* methodology, I gladly concede that my assumption ten years ago that the security certificate regime would be greeted by continued judicial complacency was wrong. The legislature responded to the ruling by introducing a model that mimics the UK Special Advocate system, which was the most restrictive of the least restrictive alternatives canvassed by the Court in *Charkaoui*. But it was better than what it replaced.

Moreover, the pragmatic outcome of *Charkaoui* might well elicit the same reply as did the aftermath of *Suresh*: no harm done, right? *Belmarsh* forced the UK to develop control orders as an alternative to indefinite detention, and this precedent created an opening for Canadian Federal Court judges to craft release orders for security certificate detainees. So even though the Supreme Court did not find that IRPA unconstitutionally sanctioned indefinite detention, it didn't matter because most of the detainees had been released to some version of house arrest by that point anyway.

As for the security certificate regime, two cases have already collapsed under the prospective or actual intercession of special advocates. Adil Charkaoui's security certificate was withdrawn, and Hassan Almrei's security certificate was ultimately quashed. Harkat's security certificate was upheld, despite the finding by Justice Noel that CSIS authorities had misled the court (as they also did in *Almrei*) regarding evidence in its possession and the special advocate's urging of a stay of proceedings⁶⁸. The ability of special advocates to fulfill their responsibility when they are effectively precluded from meeting with the named person after viewing the secret evidence remains contested and subject to protracted case-by-case incrementalism⁶⁹.

Whatever the ultimate outcome for Harkat, Jaballah and Mahjoub, predictions of the security certificate regime's demise do not seem exaggerated. No security certificates have been signed since 2003, and one expects that the Ministers of Immigration and PSEP will exercise caution before embarking on another security certificate process. If this prediction proves correct, it validates the view that the imposition of fair process can sometimes lead to the unraveling of substantively unfair systems. And from an institutional perspective, focusing on procedural fairness does so at lower political cost to the court's legitimacy than more direct confrontation with the substantive deficiencies of the regime.

⁶⁷ *Charkaoui II*, *supra* note 53.

⁶⁸ See, *Harkat (Re)*, 2009 FC 1050 for finding of CSIS non-disclosure; see, *Harkat (Re)*, 2010 FC 1241 for upholding security certificate as reasonable. [*Harkat 2010*]

⁶⁹ See, Aileen Kavanagh, "Special Advocates, Control Orders and the Right to a Fair Trial" (2010) 73:5 *Modern Law Review* 836; *Secretary of State for the Home Department v AF and another*, [2009] UKHL 28.

While the security certificate regime appears to have failed in advancing the purposes internal to immigration law (speedy deportation with minimal judicial oversight), the verdict is less clear when measured against the goal of containment. In each of the security certificate cases, the Federal Court has identified that the risk posed by the named person may attenuate with the passage of time spent⁷⁰. In *Almrei*, Justice Mosley quashed the security certificate as unreasonable, but acknowledges that he would have decided the case differently in 2001:

“Having considered all of the information and other evidence presented to the Court, I am satisfied that Hassan Almrei has not engaged in terrorism and is not and was not a member of an organization that there are reasonable grounds to believe has, does or will engage in terrorism. I find that there are no reasonable grounds to believe that Hassan Almrei is to-day, a danger to the security of Canada.”⁷¹

However, he notes that in 2001 there was no question as to the reasonableness of the certificate.

“I would have had no difficulty upholding the certificate in 2001 on the grounds that he constituted a danger to the security of Canada and that there were reasonable grounds to believe then that he was a member of a terrorist organization, on the information available to the Court at that time.”⁷²

Justice Mosley’s conclusion provokes further query: Was Hassan Almrei a member of a terrorist organization in 2001 but not in 2009? Or did the Court find that Hassan Almrei was never a member of a terrorist organization, but there were reasonable grounds in 2001 (pre-*Charkaoui I* and *Charkaoui II*) for believing that he was, whereas in 2009 (with the intervention of special advocates and disclosure requirements), that belief was no longer reasonable? It seems that the latter is the better reading, given the broad temporal reach of the inadmissibility provisions⁷³.

But something else changed between 2001 and 2009. Hassan Almrei spent the intervening years in detention or under strict terms of a control order, and Mosley J. concluded that the lapse of time had both changed Hassan Almrei and/or rendered him too conspicuous to be useful to any terrorist network:

The Hassan Almrei of 2001 is not the same person that I heard and observed in the courtroom. ...

I am also persuaded by the evidence that if he is the person that the Ministers believe him to be, it is unlikely that after such a prolonged period of detention that he could re-enter the life that he had and reactivate his contacts in the false document trade. Given the

⁷⁰ *Charkaoui (Re)*, 2005 FC 248 at para. 74.

⁷¹ *Almrei (Re)*, 2009 FC 1263 at para. 504.

⁷² *Ibid.*, at para. 505.

⁷³ *Ibid.*, at para. 69.

notoriety that he has acquired, that would be foolhardy for him and for anyone inclined to do business with him.

I note that CSIS, in their most recent assessment of Mr. Almrei, considers that the risk that he poses a threat to the security of Canada, if released without conditions, was reduced as a result of a number of factors. They had no new information to indicate that he was engaged in threat-related activities, his original network of contacts has been disrupted and his high public profile and lack of anonymity would render him less effective⁷⁴.

When the Federal Court recently loosened Jaballah's release conditions, it gave as one reason that "The Ministers have failed to establish that the threat has not attenuated to a degree since the conditions were last reviewed by the Court."⁷⁵

In relaxing the conditions imposed upon Mohammad Mahjoub the Court declared,

"The Ministers have not satisfied me that the threat that Mr. Mahjoub poses to the security of Canada or to any person has not declined with the passage of time. On the evidence, and given the Ministers' increased burden with the passage of time, I am satisfied that the danger Mr. Mahjoub poses has been lessened by his lengthy detention and release on stringent conditions."⁷⁶

Even in Harkat, where the Federal Court upheld the security certificate as reasonable, Noel J. ruled that the risk to national security posed by Harkat had diminished over the long period of confinement:

During his first years in Canada up to his arrest in December 2002, the danger associated to him was towards the high end of the spectrum. Now, after having been incarcerated for years, released on conditions which were loosened with the passage of time, the risk he poses to Canada has decreased.⁷⁷

While these rulings by the Federal Court do not directly repudiate the formal purpose of immigration detention in relation to the purpose of deportation, they speak clearly to its functionality in terms of containment: whether they did or did not pose a threat to national security when the security certificates were issued, they presently do not.

The UK has moved explicitly down this path with the control order regime, which applies to citizens and non-citizens alike and relies on the special advocate model to manage issues of national security confidentiality. After five years of experimentation, controversy over procedure

⁷⁴ *Ibid.*, at paras. 506-508

⁷⁵ *Jaballah (Re)*, 2010 FC 507 at para. 155.

⁷⁶ *Mahjoub (Re)*, 2009 FC 1220 at para. 98.

⁷⁷ *Harkat 2010*, *supra* note 68 at para. 543.

and substance, annual independent review⁷⁸, and burgeoning litigation before the UK and EU courts, the UK stands poised to abolish the existing regime and introduce a new one. It is beyond my remit to evaluate the existing UK system, or opine on what ought to succeed it. I would only observe that scrapping an existing control order system in the UK creates the appearance of a regulatory void which, in turn, induces the perception that something else is needed to fill it. With a decade's distance from 9/11, other states should carefully consider whether that regulatory gap is more apparent than real⁷⁹.

CONCLUSION

I count myself among those who maintain that the events of 9/11 did not instigate the securitization of migration or, for that matter, the rise of 'preventive justice' in the criminal field. The depiction of the foreigner as a menace to the security of the body politic is virtually archetypal. But that is not to deny the catalytic effect of 9/11 on the intensity, extent and normative force of securitization. My analysis of the Supreme Court of Canada's jurisprudence on security certificates suggests that using immigration law as a legal habitat for containment has come at a cost to government, to the enterprise of adjudication enterprise, and to the coherence of immigration law itself.

Rather than offer a tidy summation of my argument, I will finish by undermining it. Ten years ago, I cautioned that in our haste to protect ourselves from the enemy without, we should attend to the danger of producing the alien within. I have pitched the argument that using immigration law rather than criminal law to address terrorism requires non-opportunistic justification. By this I mean that it is not good enough to say, 'we do it because we can'. I have also acknowledged that *Charkaoui I* and *Charkaoui II* have detracted from the instrumental allure of security certificates. But the claim that the criminal law is preferable to immigration law presupposes that ordinary practices of democratic politics exerts a restraining influence on the exercise of national governments' power over citizens: states cannot politically or legally 'get away with' doing things to citizens that they do to non-citizens. But those inhibitions might be loosened where a widely shared expectation prevails that laws of general application in practice will apply to and be enforced against an identifiable ethnic and religious minority. If this happens, legal arguments predicated on discriminatory enforcement come too late in the process and are unlikely to gain traction. Laws that apply equally to citizens and non-citizens but unequally as between other designated groups transpose and reinscribe the border between insider and outsider in a different place. That is one way that aliens are produced from within.

⁷⁸ See, U.K., Lord Carlile of Barriew Q.C., "Sixth report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005" (London: Her Majesty's Stationary Office, 2011), online: <<http://www.official-documents.gov.uk/document/other/9780108510106/9780108510106.pdf>>. Other reports can be accessed via Official Documents, online: <<http://www.official-documents.gov.uk/>>.

⁷⁹ As noted earlier, *Criminal Code*, *supra* note 3, s. 810.01, authorizes a one year, reviewable recognizance order against a person whom there are reasonable ground to fear will commit, inter alia, a terrorism offence.