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# The Sovereign Charter: Security, Territory and the Boundaries of Constitutional Rights

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## The Sovereign *Charter*: Security, Territory and the Boundaries of Constitutional Rights

IRINA CERIC\*

“The Sovereign *Charter*” takes as its starting point the Supreme Court of Canada’s decision in *Charkaoui v Canada*, which struck down some portions of the security certificate process of the *Immigration and Refugee Protection Act* as contrary to s. 7 of the *Charter*. Although this decision was hailed as a victory, I argue that *Charkaoui* redraws long-standing divisions along long-standing lines of alleged risk, allegiance and origin. I then explore the emergence of tentative shifts in jurisprudential conceptions of state sovereignty and extra-territoriality through a consideration of four post-*Charkaoui* decisions: the two judgments in the Omar Khadr matter, the Amnesty International claim regarding Afghan POWs detained by the Canadian military and a case with respect to an overseas RCMP investigation. The article then develops three arguments about the dialectical process by which changing notions of sovereignty both determine and are reflected in the territorial reach of the *Charter*, and theorize this process as one in which rights continue to constrain ways of challenging disciplinary power at the same time as they minimally limit its reach. These three meditations consider rights and sovereignty as a juridical “act”, through the lens of international law and in the context of biopolitics.

Le concept de « *Charte* souveraine » tire son origine de la décision rendue par la Cour suprême du Canada dans *Charkaoui c Canada*, qui a invalidé certaines parties du processus du certificat de sécurité prévu à la *Loi sur l’immigration et la protection des réfugiés* au motif qu’elles contrevenaient à l’article 7 de la *Charte*. Bien que cette décision ait été saluée comme une victoire, je soutiens que l’arrêt *Charkaoui* ranime de vieilles controverses de même que des visions anciennes des concepts de risques présumés, d’allégeance et d’origine. J’explore ensuite l’émergence de tentatives de renversements dans les conceptions jurisprudentielles de la souveraineté de l’État et de l’extraterritorialité dans quatre décisions rendues dans la foulée de l’arrêt *Charkaoui* : soit les deux jugements prononcés dans l’affaire Omar Khadr, la poursuite intentée par Amnistie internationale relative aux prisonniers de guerre afghans détenus par l’armée canadienne et une cause portant sur une enquête menée à l’étranger par la GRC. L’article élabore par la suite trois arguments au sujet du processus dialectique en vertu duquel des notions novatrices de souveraineté déterminent la portée territoriale de la *Charte*, et définit ce processus comme permettant aux droits de continuer à restreindre les manières de contester les pouvoirs disciplinaires tout en limitant de façon minimale leur portée. Ces trois formes de réflexion examinent les droits et la souveraineté en tant qu’« actes juridiques » selon la perspective du droit international et dans le contexte des biopolitiques.

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# The Sovereign *Charter*: Security, Territory and the Boundaries of Constitutional Rights

IRINA CERIC\*

## I. INTRODUCTION

The jurisprudential borders of the Canadian state appeared to shift in the aftermath of the landmark judgment of the Supreme Court of Canada (Supreme Court or the Court) on the constitutionality of the security certificate provisions of the *Immigration and Refugee Protection Act*.<sup>1</sup> By granting limited constitutional rights to non-citizens implicated in national security proceedings, the decision in *Charkaoui v Canada (Citizenship and Immigration)*,<sup>2</sup> striking down portions of the *IRPA*'s security certificate procedure, was a signal departure from previous caselaw upholding the use of secret evidence and indefinite detention. *Charkaoui* ultimately maintained the contingency of the *Canadian Charter of Rights and Freedoms*,<sup>3</sup> re-drawing long-standing divisions along lines of alleged risk, allegiance and origin, despite the emergence of tentative shifts in jurisprudential conceptions of state sovereignty and extra-territoriality. Where previous national security cases involving constitutional rights claims by non-citizens were predicated on a conceptualization of state sovereignty as the right to exclude from territory (e.g. the oft-quoted maxim that "[t]he most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country"<sup>4</sup>), reading *Charkaoui* in the context of four subsequent cases involving the role of Canadian state actors abroad<sup>5</sup> gives rise to the prospect of the *Charter* operating to delineate and maintain

1 SC 2001, c 27 s 77(1) ff [*IRPA*].

2 2007 SCC 9, [2007] 1 SCR 350 [*Charkaoui*].

3 Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

4 *Chiarelli v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 711 at 733, 90 DLR (4th) 289 [*Chiarelli* cited to SCR].

5 These four cases involve the application of the *Charter* to the actions of the Canadian military in Afghanistan (*Amnesty International Canada v Canada (Chief of Defence Staff)*, 2008 FCA 401, [2009] 4 FCR 149 [*Amnesty International Canada*]); the RCMP's participation in an extra-territorial investigation (*R v Hape*, 2007 SCC 26, [2007] 2 SCR 292 [*Hape*]); and two claims brought by a Canadian citizen imprisoned in Guantanamo Bay (*Canada (Justice) v Khadr*, 2008 SCC 28, [2008] 2 SCR 125 [*Khadr 2008*]; *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44 [*Khadr 2010*]).

the limits of state sovereignty within *and* beyond national borders. While the *Charter* may accompany the extended reach of the Canadian state in some of its guises, it provides only a minimal constraint on the actions of its agents, reinscribing rather than challenging sovereignty. Accordingly, this article argues that the “sovereign *Charter*” represents a key moment in the evolution of the Canadian state’s national security, immigration and foreign policy strategies, serving to harden the boundaries of the nation from within and without. By theorizing the doctrinal rules related to the extra-territorial application of the *Charter*, this article concludes that rights, as reflected in *Charkaoui* and subsequent caselaw, continue to offer only a limited mode of resistance against sovereign power.

I take as a starting point Kunal Parker’s contention that the emancipatory potential of rights cannot be divorced from the seemingly contradictory process in which “the unmitigated ‘defence’ of territory against the incursion of aliens goes along with—indeed, cannot be separated from—the unmitigated commitment to protecting the fundamental constitutional rights of aliens as persons on the territorial ‘inside.’”<sup>6</sup> Parker further argues that “[l]eft-liberal discourses of the nation ... are thus fully aware that the universality of nation and law as they imagine them—in other words, of nation *as* law or law *as* nation—can only be realized in and by building walls around [that] space ...”, such that rights become constitutive of a national sense of self.<sup>7</sup> It is within this context, I argue, that the framework of the sovereign *Charter* emerged, particularly in relation to cases involving the rights of non-citizens and “national security.” Beyond both immigration law’s historical preoccupation with race and the contemporary focus on the “war on terror,” the very notion of rights functions as a discursive and aspirational marker of sovereignty. The focus of the remainder of this article is the trajectory of this jurisprudential process as courts perpetuate and shift the content and strength of rights guarantees.

I begin with a brief historical overview of the key *Charter* decisions on citizenship, national security and the *Charter* prior to *Charkaoui* (especially the previous unsuccessful constitutional challenges to the security certificate process), and then outline the *Charkaoui* decision. In the second part of this article, I discuss four post-*Charkaoui* decisions that engage the *Charter* and questions of territory, security and sovereignty. Finally, I develop three arguments about the dialectical process by which changing notions of sovereignty both determine and are reflected in the territorial reach of the *Charter*. I theorize this process as one in which rights continue to constrain ways of challenging disciplinary power—understood as the operation of broadly dispersed systems of control, regulation and management<sup>8</sup>—at the same time as they minimally limit its reach.

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6 Kunal Parker, “Ejecting an Inside: An Essay on the Politics of the Contemporary American Immigration State” in Peter Fitzpatrick & Patricia Tuitt, eds, *Critical Beings: Law, Nation and the Global Subject* (Aldershot, UK: Ashgate, 2004) 181 at 182-83.

7 *Ibid* at 183 [emphasis in the original].

8 See Part IV, below, for more on this topic.

A preliminary question regarding my engagement with the concept of “sovereignty” remains: although the caselaw, as shown below, is replete with references to and justifications for sovereignty, it is almost entirely bereft of definitions, relying on a common-sense understanding of the term.<sup>9</sup> Recent scholarly literature on law and sovereignty, on the other hand, takes as its starting point Carl Schmitt’s now apocryphal statement that “[s]overeign is he who decides on the exception.”<sup>10</sup> This concept of the “exception” took on increased (but hardly new<sup>11</sup>) juridical salience after the events of September 11, 2001, particularly with respect to questions of (anti-)terrorism, states of emergency and constitutional politics.<sup>12</sup> However, as Jeremy Webber explains, for Schmitt, “the emergency tends to swallow up normality,”<sup>13</sup> and his conceptualization of sovereignty and the role of “the decision” was intended as a “general concept in the theory of the state, and not merely ... a construct applied to any emergency decree or state of siege.”<sup>14</sup> In his later work, Schmitt thus outlined a conception of the *nomos*, a “constituting power that bestows upon the laws their sovereign legitimacy,” the outcome of the historical event by which law becomes legal.<sup>15</sup> While I briefly engage with Schmitt’s theoretical framework in part IV of this article, I am concerned far less

9 Perhaps the most considered discussion is found in *Mitchell v MNR*, 2001 SCC 33, [2001] 1 SCR 911 [*Mitchell*] at para 129: “Merged sovereignty” asserts that First Nations were not wholly subordinated to non-aboriginal sovereignty but over time became merger partners. The final *Report of the Royal Commission on Aboriginal Peoples*, vol. 2 (*Restructuring the Relationship* (1996)), at 214, says that ‘Aboriginal governments give the constitution [of Canada] its deepest and most resilient roots in the Canadian soil.’ This updated concept of Crown sovereignty is of importance. Whereas historically the Crown may have been portrayed as an entity across the seas with which aboriginal people could scarcely be expected to identify, this was no longer the case in 1982 when the s. 35(1) reconciliation process was established. The Constitution was patriated and all aspects of our sovereignty became firmly located within our borders. If the principle of ‘merged sovereignty’ articulated by the Royal Commission on Aboriginal Peoples is to have any true meaning, it must include at least the idea that aboriginal and non-aboriginal Canadians *together* form a sovereign entity with a measure of common purpose and united effort. It is this new entity, as inheritor of the historical attributes of sovereignty, with which existing aboriginal and treaty rights must be reconciled” [emphasis in original]. See also Part IV, below, for more on this topic.

10 Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, translated by George Schwab (Chicago: University of Chicago Press, 2005) at 5 [footnotes omitted]. Although Schmitt’s legacy as a legal and political theorist has been inextricably coloured by his membership in the Nazi Party and role as a legal advocate for the Reich government during the last days of the Weimar Republic, his work on sovereignty, legitimacy and the bases of state and popular power remain influential and highly cited. See especially Susan Buck-Morss, “Sovereign Right and the Global Left” (2007) 19:4 *Rethinking Marxism: A Journal of Economics, Culture & Society* 432 at 438.

11 See Obiora Chinedu Okafor, “Newness, Imperialism, and International Legal Reform in Our Time: ATWAIL Perspective” (2005) 43:1 & 2 *Osgoode Hall LJ* 171.

12 See e.g. Giorgio Agamben, *State of Exception*, translated by Kevin Attell (Chicago: University of Chicago Press, 2005). See Part IV(iii), below, for more on this topic.

13 Jeremy Webber, “National Sovereignty, Migration, and the Tenuous Hold of International Legality: The Resurfacing (and Resubmersion?) of Carl Schmitt” in Oliver Schmidtke & Saime Ozcurumez, eds, *Of States, Rights, and Social Closure: Governing Migration and Citizenship* (New York: Palgrave Macmillan, 2008) 61 at 66.

14 Webber, *supra* note 10 at 5.

15 Buck-Morss, *supra* note 10 at 438.

with questions about the exception in constitutional politics than with the notion of sovereignty as constructed by and through law. Rather than rely on a juridical ideal in which sovereignty is usually understood as exclusive authority over territory (with the corollary being that said territory be coterminous with that authority), Saskia Sassen argues that “it is becoming evident that state sovereignty articulates both its own and external conditions and norms.”<sup>16</sup> She concludes that “[t]he politics of contemporary sovereignties are far more complex than notions of mutually exclusive territorialities can capture” and “[t]he question of territory as a parameter for authority and rights has entered a new phase.”<sup>17</sup> This article aims to articulate the scope of that parameter, theorizing the processes by which sovereignty is used, (re)made and abused by, and through, *Charter* jurisprudence.

## II. CHARKAOUI AND ITS PREDECESSORS

### A. *Charter* Jurisprudence Pre-*Charkaoui*

The Supreme Court’s decision in *Singh v Minister of Employment and Immigration*,<sup>18</sup> three years after the inception of the *Charter*, set the trajectory of immigration and refugee constitutional rights cases on something of an arc—an initial embrace of inclusivity and limitations to sovereign prerogative, followed by a slow retreat toward a lukewarm reception of international norms as the basis for narrow constitutional protection. The *Singh* case was brought by seven refugee claimants denied refugee status under the United Nations’ *Convention Relating to the Status of Refugees*<sup>19</sup> without the benefit of an oral hearing. The Supreme Court’s judgment granting rights under section 7 of the *Charter* to “every human being who is physically present in Canada and by virtue of such presence [is] amenable to Canadian law”<sup>20</sup> appeared to provide a foundation for future migration-related rights claims. Four years later, the Supreme Court’s decision in *Andrews v Law Society of British Columbia* established citizenship as an analogous ground of discrimination under section 15 of the *Charter*.<sup>21</sup> Considered in tandem, *Singh* and *Andrews* suggest that constitutional rights claims for migrants and non-citizens emerged with a presumption of inclusion, a tentative reconciliation of national sovereignty, territory and the policy demands of migration.

In the context of these and other fledgling *Charter* cases, the first *Charter* challenge to the national security provisions of the 1976 *Immigration Act*<sup>22</sup> was

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16 Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton: Princeton University Press, 2006) at 415.

17 *Ibid* at 415-16.

18 [1985] 1 SCR 177, 17 DLR (4th) 422, Wilson J [*Singh* cited to SCR].

19 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) [*Convention*].

20 *Singh*, *supra* note 18 at 202. The minority decision, written by Justice Beetz, determined that refugee claimants are entitled to a fair hearing pursuant to the *Canadian Bill of Rights*, SC 1960, c 44, reprinted in RSC 1985, App III, s 2(e) (*Singh*, *supra* note 18 at 223).

21 [1989] 1 SCR 143, 56 DLR (4th) 1 [*Andrews*].

22 *Immigration Act*, SC 1976-77, c 52.

launched.<sup>23</sup> Although the security certificate process has evolved considerably over time, the general framework has remained the same: immigration law allows the federal government to issue a certificate with respect to the inadmissibility to Canada of a named non-citizen (including permanent residents) “on grounds of security.”<sup>24</sup> Under the version of the procedure challenged in *Charkaoui*, this “security certificate” was referred to a single judge of the Federal Court of Canada for determination of its “reasonableness,” a process that generally included *in-camera* hearings in the absence of the named individual and his or her counsel, the use of undisclosed evidence and information, relaxed evidentiary rules and, if the named person was not a permanent resident, mandatory detention during the entire lengthy proceeding. If the certificate was found to be “reasonable,” it lead to the automatic removal of the named person from Canada, and this reasonableness determination could not be appealed on its merits. Thus, the security certificate mechanism arguably imported national security concerns not related to migration into immigration law. Accordingly, constitutional challenges to this process showcase the boundaries of the *Charter*, the role of rights in excluding the partially or contingently included and the concomitant reinforcement of the juridical migration-security-territory nexus as a quintessential exercise of sovereignty. In policing the borders of the state from the inside, through the exercise of immigration rather than criminal law, security certificates underscore that exclusion is a sovereign prerogative, if not duty. Maintaining that policing power in the face of rights-based claims reveals much about the (re)construction and maintenance of national sovereignty.

In *Brito*, the Federal Court of Appeal quickly disposed of Victor Brito’s claim under sections 7 and 12 of the *Charter* on retroactivity grounds (the original deportation order against him had been issued in early 1982, prior to the passage of the *Charter*), but not before setting out one of the key conceptual bases for the security-related *Charter* claims to follow. In the course of disallowing Brito’s claim under the *Canadian Bill of Rights*, and relying on the decision of the Supreme Court in *Prata v Minister of Manpower & Immigration*,<sup>25</sup> Justice Marceau reiterated that “[a]t common law no alien has any right to enter this country except by leave of the Crown; and the Crown can refuse leave without giving any reason,” and therefore, non-removal from Canada is a privilege rather than a right deserving of legal

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23 *Brito v Canada (Minister of Employment and Immigration)*, [1987] 1 FCR 80, 70 NR 102 (FCA) [*Brito* cited to FCR].

24 *IRPA*, *supra* note 1, s 77(1). Beginning with the Immigration Act (*supra* note 22, ss 39-42), which first initiated the division of non-citizens subject to removal on security grounds into two categories—permanent residents and persons “other than a Canadian citizen”—various versions of the security certificate procedure were enacted. The most important variation involved the changing role of the Security Intelligence Review Committee (SIRC), which for a time heard security certificate reports at oral hearings for permanent residents and was briefly given responsibility for hearing such reports submitted in respect of all other non-citizens. See generally Ian Leigh, “Secret Proceedings in Canada” (1996) 34:1 Osgoode Hall LJ 113.

25 *Prata v Minister of Manpower and Immigration*, [1976] 1 SCR 376 at 380, 3 NR 484 [*Prata*].



protection.<sup>26</sup> While the Court in *Brito* did not explicitly import this basis for its *Bill of Rights* decision into its *Charter* analysis, and Justice MacGuigan suggested in his concurring reasons that the right/privilege distinction was no longer significant in light of the Supreme Court's decision in *Singh*, the underlying common law alien/citizen dichotomy would seamlessly transfer to subsequent *Charter* challenges to deportation or removal on security grounds, as outlined below.

*Chiarelli* was the Supreme Court's next major immigration law decision after *Singh*. Joseph (Giuseppe) Chiarelli had arrived in Canada from Italy as a 15 year-old landed immigrant in 1975. Almost 20 years later, having never become a Canadian citizen, he was named in a security certificate alleging that there were reasonable grounds to believe that he would engage in a pattern of organized criminal activity, including extortion and drug-related activities. Chiarelli challenged the constitutionality of the security certificate procedure, arguing that the process infringed his rights under sections 7, 12 and 15 of the *Charter*. Writing for a unanimous Supreme Court, Justice Sopinka concluded that as there was no breach of fundamental justice, it was not necessary to address the question of whether Chiarelli had been deprived of his right to life, liberty or security of the person:

[I]n determining the scope of principles of fundamental justice as they apply to this case, the Court must look at the principles and policies underlying immigration law. *The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country.*<sup>27</sup>

As the security certificate procedure continued to evolve after *Chiarelli*, challenges to its constitutionality continued apace. One of the standout decisions was *Al Yamani v Canada (Solicitor General)*, in which the Federal Court held that one of the grounds of inadmissibility set out in the *Immigration Act* was contrary to the *Charter's* guarantee of freedom of association. A Palestinian born in Lebanon, Issam Al Yamani, was considered stateless upon his arrival in Canada as a landed immigrant in 1985. In 1992, he was named in a security certificate alleging inadmissibility because there were reasonable grounds to believe that he was a member of "an organization that is likely to engage" in proscribed acts of violence, on the basis of his association with the Popular Front for the Liberation of Palestine.<sup>28</sup> Federal Court Justice MacKay found that this test for inadmissibility restricts freedom of association because "[i]t is the association of persons as members of the organizations described that leads to their classification for exclusion or deportation" rather than "their individual records of participating in violent activities [or] a determination

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26 *Brito*, *supra* note 23 at 94.

27 *Ibid* at 733 [emphasis added].

28 *Al Yamani v Canada (Solicitor General)*, [1996] 1 FCR 174 at 221, 129 DLR (4th) 226 (FCTD) [*Al Yamani* cited to FCR].

that they are likely to participate in such activities.”<sup>29</sup> In deciding that the breach was not saved by section 1 of the *Charter*, Justice MacKay held:

I am not satisfied ... that there is a rational connection between protecting the lives and safety of persons in Canada and restricting freedom of association of permanent residents who are merely members of organizations, whatever their nature, that are likely (*susceptible*) to commit acts of violence that would or might endanger lives or safety of persons in Canada.”<sup>30</sup>

It is precisely this sort of nuanced contextualization, however, that was lacking in the Supreme Court’s decisions in the *Ahani* and *Suresh* cases decided a few months after the events of September 11, 2001.<sup>31</sup> Manickavasagam Suresh had been found to be a *Convention* refugee but had not yet been granted landed immigrant status when he was named in a security certificate stating that he was a member of an organization, the Liberation Tigers of Tamil Eelam, which was engaged in “terrorist” activity. The certificate was upheld as reasonable by the Federal Court in 1997 and Suresh was ordered deported following a hearing and the issuance of a “danger opinion” by the Immigration Minister.<sup>32</sup> He sought judicial review of these decisions, arguing that his removal to Sri Lanka, where he was at risk of torture, violated his rights under section 7 of the *Charter*. The Supreme Court eventually determined that Suresh had made out a *prima facie* case of the possibility of torture if he were returned to Sri Lanka, and he had not been provided with sufficient procedural safeguards necessary to protect his section 7 interests:

[G]enerally to deport a refugee, where there are grounds to believe that this would subject the refugee to a substantial risk of torture, would unconstitutionally violate the *Charter*’s s. 7 guarantee of life, liberty and security of the person. This said, we leave open the possibility that in an exceptional case such deportation might be justified either in the balancing approach under ss. 7 or 1 of the *Charter*.<sup>33</sup>

Although Suresh was allowed to remain in Canada, the Supreme Court’s rather equivocal decision on the issue of torture did not have the same result in the companion *Ahani* decision. Mansour Ahani made a successful claim for refugee

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29 *Ibid* at 222-23.

30 *Ibid* at 228 [emphasis in original].

31 *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 [*Suresh*]; *Ahani v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 2, [2002] 1 SCR 72 [*Ahani* SCC]

32 *Suresh*, *supra* note 31 at paras 11-14.

33 *Ibid* at para 129 [emphasis added].

status upon his arrival in Canada from Iran in 1991, but prior to becoming a landed immigrant a security certificate was issued, alleging that he was inadmissible to Canada on the basis of involvement in “terrorism” because of his association with the Iranian Ministry of Intelligence and Security. While the designated judge’s decision as to the reasonableness of the certificate was pending, Ahani brought an action alleging that the security certificate procedure for non-permanent residents violated his rights under sections 7, 9 and 10(c) of the *Charter*.<sup>34</sup> Justice McGillis of the Federal Court proceeded with a section 7 analysis premised on the principle that the rights accorded to the him as a *Convention* refugee were limited rights, including a qualified right to enter, to be landed and to not be removed unless he is a member of an inadmissible class and is found to be a danger to the security of Canada.<sup>35</sup> Justice McGillis concluded that the security certificate procedure did not violate the principles of fundamental justice, noting that its constitutional validity “must be analysed in the context of ‘the principles and policies underlying immigration law’” and that the case was “purely and simply an immigration matter.”<sup>36</sup> As a result, the procedural due process rights asserted by Ahani were dismissed, as criminal law standards of fundamental justice do not apply in the context of immigration principles and policies.<sup>37</sup> Following the defeat of this constitutional motion and denial of subsequent appeals, the certificate naming Mansour Ahani was found to be reasonable by a different Federal Court judge in 1998.<sup>38</sup> A “danger opinion” was subsequently issued under section 53 of the *Immigration Act* by the Minister of Immigration, allowing Ahani’s deportation from Canada notwithstanding his status as a *Convention* refugee.<sup>39</sup> Ahani sought judicial review of the Minister’s decision and also challenged the constitutionality of the removal scheme as one which permits deportation to a country where there is a risk of torture or other inhumane treatment, contrary to Canada’s international law obligations. Although pursued through to the Supreme Court of Canada, and despite the opposite decision in the companion *Suresh* decision based on nearly identical facts, this challenge was also unsuccessful, clearing the way for Ahani’s removal to Iran.<sup>40</sup>

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34 *Ahani v Canada*, [1995] 3 FCR 669, 100 FTR 261 (FCTD), aff’d (1996), 201 NR 233, 37 CRR (2d) 181 (FCA), leave to appeal to SCC refused, [1997] 1 SCR v.

35 *Ibid* at 687-88.

36 *Ibid* at 691.

37 *Ibid* at 694.

38 *Ahani v Canada* (1998), 146 FTR 223, 42 Imm LR (2d) 219 (FCTD).

39 *Immigration Act*, RSC 1985, c 29 (4th Supp), s 53 (1)(a). This section allowed for the removal of a *Convention* refugee “from Canada to a country where the person’s life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion” if the Minister was, *inter alia*, “of the opinion that the person constitutes a danger to the security of Canada.” The corresponding provision in the current legislation is found in *IRPA*, *supra* note 1, s 115(2). See John A Dent, “No Right of Appeal: Bill C-11, Criminality, and the Human Rights of Permanent Residents Facing Deportation” (2002) 27 *Queen’s LJ* 749 for a discussion of the evolution of this mechanism.

40 *Ahani SCC*, *supra* note 31.

B. *Charkaoui*

In early 2007, the Supreme Court of Canada issued its long-awaited decision on the constitutionality of the security certificate provisions of *IRPA*. The three claimants before the Supreme Court, Adil Charkaoui, Hassan Almrei and Mohamed Harkat, challenged the procedure under various sections of the *Charter* and appealed to general principles underlying the rule of law. *Charkaoui* was a permanent resident of Canada, while Almrei and Harkat had been found to be *Convention* refugees but had not yet attained residence status. In a unanimous judgment delivered by the Chief Justice, the Supreme Court held that the security certificate mechanism violates section 7 of the *Charter* by permitting “inadmissibility based on secret material without providing for an independent agent at the stage of judicial review to better protect the named person’s interests” and that the arbitrary time limits on provisions relating to the detention of foreign nationals violate sections 9 and 10(c) of the *Charter*.<sup>41</sup>

At first glance, the *Charkaoui* decision appeared to signal a realization of the emancipatory potential of the *Charter*. Contrary to previous instances where refugees, permanent residents and other non-citizens had challenged the constitutionality of security-related immigration measures on the basis of violations of fundamental justice, denial of due process rights or inconsistency with international law norms, the *Charter* claims brought by the three security certificate detainees in *Charkaoui* were at least partially vindicated. As discussed above, the section 7 analyses in the earlier line of cases were premised on a bare reading of *Chiarelli*, essentially hinging the right to exclude non-citizens on an absolute and monolithic construction of state sovereignty, demonstrating “the popular belief that excluding non-citizens is the ultimate prerogative of sovereignty.”<sup>42</sup> The seeds of this supposition are found in Audrey Macklin’s assessment of the relative weight of the *Charter* rights of non-citizens faced with removal for reasons of national security. She notes, “[w]hile it is technically true that most *Charter* rights apply to all persons physically in Canada, in practice the courts have sharply circumscribed the nature and extent of those rights for non-citizens faced with removal,” and “[c]ontrary to the exhortations of media pundits and anti-immigrant crusaders, the Constitution has proved a fairly thin cloak protecting non-citizens.”<sup>43</sup> In other words, such jurisprudence reflects what Parker describes as “an understanding of sovereignty as inhering in the state’s control of immigration through the ‘defence’ of a territorial ‘inside’ against the incursions of aliens.”<sup>44</sup>

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41 *Charkaoui*, *supra* note 2 at para 3.

42 Audrey Macklin, “Borderline Security” in Ronald J Daniels, Patrick Macklem & Kent Roach, eds, *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 384 at 389.

43 *Ibid* at 394 [footnotes omitted].

44 Parker, *supra* note 6 at 181.

In *Charkaoui*, the Supreme Court's key section 7 reasoning seems to sidestep such absolutes, concluding that "[w]hile the 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."<sup>45</sup> Inching away from the immigration law as destiny calculus, the Court stated, "[i]n determining whether s. 7 applies, [a court] must look at the *interests at stake* rather than the legal label attached to the impugned legislation."<sup>46</sup> As in the *Ahani* and *Suresh* decisions, however, and in light of the limited finding of unconstitutionality and the remedy ordered (the Court suspended its declaration for one year from the date of judgment<sup>47</sup>), the limited re-working of the *Chiarelli* framework in *Charkaoui* ought to be seen as only a partial incursion into sovereign power. While the Court retreated somewhat from non-citizenship as a presumptive limit on the scope of rights, it also implicitly maintained previous historical and conceptual currents in the jurisprudence in its approach to non-citizenship and exclusion (the juridical migration-security-territory nexus) on which *Charter* cases in this area are predicated. In the cases that have followed, this limited incursion has been further inscribed through the selective extra-territorial deployment of *Charter* protections.

### III. POST-CHARKAOUI

Four judgments rendered since the decision in *Charkaoui* shed further light on this argument. The Supreme Court considered the issue of the extraterritorial application of the *Charter* in a criminal law (search and seizure) context in *R v Hape*, ruling on the claim made by a Canadian citizen whose off-shore office was the subject of a warrantless search by RCMP officers working with local police. A five-judge majority of the Court ruled that although the *Charter* generally has no application extra-territorially, its application should be considered in light of Canada's international law commitments, such that Canadian state agents should not participate in actions that would cause Canada to be in violation of international law principles of jurisdiction. The Court called this a jurisprudential concept "distinct from, but integral to, the principle of state sovereignty" and arising from "sovereign equality [between states] and the corollary duty of non-intervention."<sup>48</sup> The Court outlined a two step approach to determining whether *Charter* guarantees apply to a foreign investigation: first, determine whether the activity falls under section 32(1) (in other words, whether the conduct of a Canadian state actor is implicated) and if yes, and depending on the facts of the case, determine whether there is "an exception to the principle of sovereignty that would justify the application of the *Charter* to

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45 *Charkaoui*, *supra* note 2 at para 17 [emphasis in the original].

46 *Ibid* at para 18 [emphasis added].

47 *Ibid* at para 140.

48 *Hape*, *supra* note 5 at para 57.

the extraterritorial activities of the state actor.”<sup>49</sup> On the facts in *Hape*, the Court found that although the RCMP officers involved were clearly government actors, the searches and seizures took place in the Turks and Caicos under local authority, with consent given only for the participation of Canadian officers but not for the exercise of extraterritorial jurisdiction.<sup>50</sup> As a result, the searches were not “matters within the authority of Parliament” and the *Charter* did not apply.<sup>51</sup> The latest in a line of cases considering the question of extraterritorial application of the *Charter* to evidence gathering abroad,<sup>52</sup> the majority ruling in *Hape* is principally a restatement of classic jurisprudential engagement with state sovereignty as evidenced in the interplay between domestic law and the international realm. Yet a three-judge minority decision would have grounded extra-territorial application of the *Charter* in the involvement of the RCMP, belying the majority’s inflexible approach to sovereign authority and consent as a controlling determinant of jurisdiction.<sup>53</sup> Read as a whole, *Hape* is a reminder that the application of doctrinal rules with respect to the extra-territorial application of the *Charter* is a contested exercise, even in a context where there is little to no engagement with the themes of national security, terrorism and war to which the same doctrinal analysis is applied.

A year later, in 2008, the Supreme Court ruled for the first time on the case of Omar Khadr, a Canadian citizen captured in Afghanistan by United States (US) military forces in 2002 at the age of 15 and then imprisoned at Guantanamo Bay, Cuba. Khadr was questioned by Canadian state agents in Guantanamo in 2003, despite their knowledge of the fact that he had been subjected to sleep deprivation (a form of torture designed to render him less resistant to interrogation), and information obtained during those interviews was shared with the US authorities. In a unanimous, unsigned ruling, the Supreme Court determined that section 7 of the *Charter* applied to require the disclosure of this evidence to Khadr, on the basis of a US Supreme Court decision finding that the procedures in place during the interviews violated US law as well as international human rights treaties to which Canada is party.<sup>54</sup> Highlighting the exception set out in *Hape*, the Court noted that the deference required by the principle of comity “ends where clear violations of international law and fundamental human rights begin.”<sup>55</sup> Given the unambiguous ruling of the US Supreme Court and the factual circumstances underlying Khadr’s interactions with Canadian investigators, “no question of deference to foreign law arises. The *Charter* bound Canada to the extent that the conduct of Canadian officials involved it in a process that violated Canada’s international obligations.”<sup>56</sup>

49 *Ibid* at para 113.

50 *Ibid* at paras 115-17.

51 *Ibid* at para 118.

52 See *ibid* at para 71-82 for an overview of the reasons in these cases.

53 *Ibid* at paras 161-62.

54 *Khadr 2008*, *supra* note 5 at paras 3, 26.

55 *Ibid* at para 18, citing *Hape*, *supra* note 5 at para 52.

56 *Khadr 2008*, *supra* note 5 at para 26.

In late 2008, the Federal Court of Appeal upheld a ruling in an application for judicial review brought by Amnesty International and the British Columbia Civil Liberties Association, holding that the *Charter* does not apply during the detention of non-Canadian prisoners and prisoners of war by the Canadian Forces in Afghanistan or their transfer to Afghan authorities.<sup>57</sup> The ruling distinguished *Khadr* on the facts of the two cases and found that no exception to comity and extraterritoriality applied, but rather that international humanitarian law governed the situation. Addressing the applicants' argument that *Hape* set out just such an exception, Justice Desjardins, writing for the Court, stated that while the Supreme Court had found that "deference and comity end where clear violations of international law and fundamental human rights begin," this does not necessarily mean "the *Charter* then applies as a consequence of these violations."<sup>58</sup> This reasoning is based on Justice Desjardins' finding that the Canadian Forces "are not an occupying force—they are in Afghanistan at the request and with the consent of the governing authority."<sup>59</sup>

Finally, in early 2010, the Supreme Court issued a second unanimous decision in the Omar Khadr case, ruling that although the Canadian state had "breached Mr. Khadr's s. 7 rights in 2003 and 2004 through its participation in the then-illegal military regime at Guantanamo Bay"<sup>60</sup> (in other words, the matters under consideration in the 2008 Khadr ruling), the remedy sought—an order that Canada request Khadr's repatriation—was not appropriate. Although "courts are empowered to make orders ensuring that the government's foreign affairs prerogative is exercised in accordance with the constitution,"<sup>61</sup> the Court concluded that "the evidentiary uncertainties, the limitations of the Court's institutional competence, and the need to respect the prerogative powers of the executive, lead us to conclude that the proper remedy is declaratory relief."<sup>62</sup> The Court's accommodation of executive prerogative stood in sharp contrast to the argument by one of the Interveners, the Canadian Civil Liberties Association, that "Canadian state officials' ongoing decision not to request the respondent's repatriation" triggered the application of the *Charter* in and of itself and that the appropriate remedy for a resulting s. 7 breach would be to order such a request.<sup>63</sup>

#### IV. SOVEREIGNTY: THREE MEDITATIONS

Having traced the trajectory of case law under the *Charter* relating to non-citizenship, security and jurisdiction, the remainder of this article proposes three theorizations

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57 *Amnesty International Canada*, *supra* note 5.

58 *Ibid* at para 20.

59 *Ibid* at para 26.

60 *Khadr 2010*, *supra* note 5 at para 29, referring to the holding in *Khadr 2008*, *supra* note 5.

61 *Khadr 2010*, *supra* note 5 at para 37.

62 *Ibid* at para 46.

63 *Khadr 2010*, *supra* note 5 (Factum of the Intervener Canadian Civil Liberties Association at paras 3 and 21) [footnotes omitted].

of the means by which constitutional rights reflect, construct and maintain state sovereignty. Employing an interdisciplinary method aimed at excavating the historical, political and analytical underpinnings of constitutional law, these theoretical excursions consider sovereignty in terms of territory, governance and collective identity as reflected in *Charter* decision-making. Each of these analyses is concerned with the impact of shifting notions and practices of sovereignty and evolving techniques of power and statecraft on the emancipatory potential of rights. The first analytic is about the simultaneous construction and reification of sovereignty through and by *Charter* jurisprudence, as rights act to establish and re-establish the sovereignty of the Canadian state, viewed historically and contemporaneously through the lens of nation-building. The second theorization interrogates the relationship between international law and the *Charter*, and how their intertwined operation serves to minimize the already limited sovereign incursions of international norms. The third, and most nascent, argument is about biopolitics and how *Charter* jurisprudence is implicated in non-juridical modes of governmentality, as it acts selectively on some bodies/subjects within and beyond the territory of the nation-state. These three analyses are necessarily overlapping, but each attempts to carve out a distinct aspect of the interplay between constitutional rights, sovereignty and territory, casting seemingly static legal doctrine and reasoning in a new light.

#### A. The State of Rights: Acts of Sovereignty and the *Charter*

In contrast to the taken-for-granted, yet seemingly fixed, understandings of sovereignty in the case law set out above, *Charter* decisions with respect to security, territory and migration should also be understood as juridical “acts of sovereignty” in their own right. This claim arises from Peter Nyers’ suggestion that “[w]hile state sovereignty has been typically understood as either a legal principal or an achieved state of being, ‘it’ must also be understood as a practice: historical, performative, constantly in motion.”<sup>64</sup> Seen in this light, the course of *Charter* jurisprudence is a way of making and unmaking sovereignty, a constant re-drawing of borders beyond and against territory through the selective application, receipt and recognition of rights guarantees.<sup>65</sup> Bringing to light this process does not just provide an alternative explanation of the evolution of doctrinal rules, but reframes that evolution as a means of theorizing the reinscription, (re)construction and reification of state sovereignty through law. As described in the remainder of this section, the trajectory of *Charter* decisions as “acts of sovereignty”—conceptually and doctrinally—is most visible in relation to juridical elements of nation-building: citizenship and immigration, national security and the borders of the nation-state.

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64 Peter Nyers, “The accidental citizen: acts of sovereignty and (un) making citizenship” (2006) 35:1 *Economy and Society* 22 at 26 [in-text citation omitted].

65 For a cogent discussion of sovereignty, extraterritoriality and constitutional rights in the US context, see James Thuo Gathii, “Torture, Extraterritoriality, Terrorism and International Law” (2003) 67 *Albany Law Review* 335.



I rely here on sociologist Saskia Sassen's analysis of the shifting salience of the modern state in terms of sovereignty and exclusive territory in the context of transnational economic frameworks, globalization and technological shifts. She argues that "[i]t is in this sense that immigration is a strategic site to inquire about the limits of the new order: it feeds the renationalizing of politics and the notion of the importance of sovereign control over borders, yet it is embedded in a larger dynamic of transnationalization of economic spaces and human rights regimes."<sup>66</sup> In highlighting the complex way in which the state's exclusive authority over territory and borders has changed, Sassen's interdisciplinary approach to the political economy of globalization illuminates the broader import of the relationship between the *Charter* and immigration law and policy. Constitutional law becomes visible as one example of the way in which domestic courts negotiate contested legal spaces, even as they themselves construct the juridical framework of national sovereignty. The nationalizing role of constitutional rights is clearly visible in the pre-*Charkaoui* security certificate case law, particularly in the reinscription of state sovereignty through the persistent linkages drawn between national security and non-citizenship—the current iteration of the historical narrative of immigration law as nation-building. This modern expression of a state's exclusionary prerogative has its roots in what F. Pearl Eliadis describes as “ancient customs, traditional perceptions of national self-interest and political manipulation of local resentment of ‘foreigners,’ all of which have created fundamental legal distinctions between nationals and non-nationals that go back hundreds of years.”<sup>67</sup>

More specifically, however, the roots of the *Chiarelli* sovereignty calculus lie in pre-*Charter* decisions that laid the foundation for the status of the “alien” in the common law of Canada. As discussed above, *Chiarelli* itself followed from the decision of the Federal Court in *Brito*, in which non-removal from Canada was posited as a discretionary privilege rather than a right deserving of legal protection. That reasoning was based on the Supreme Court's 1976 decision in *Prata* and the English case *R v Governor of Pentonville Prison*, where Lord Denning MR summarized the position of an alien at common law as follows:

At common law no alien has any right to enter this country except by leave of the Crown; and the Crown can refuse leave without giving any reason: [citation omitted]. If he comes by leave, the Crown can impose such conditions as it thinks fit, as to his length of stay, or otherwise. He has no right whatever to remain here. He is liable to be sent home to his own country at any time if, in the opinion of the

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66 Saskia Sassen, *Losing Control?: Sovereignty in an Age of Globalization* (New York: Columbia University Press, 1996) at xvi [Sassen, *Losing Control*].

67 F Pearl Eliadis, “The Swing from *Singh*: The Narrowing Application of the *Charter* in Immigration Law” (1995) 26 *Immigration Law Reporter* (2d) 130 at 136.

Crown, his presence here is not conducive to the public good; and for this purpose, the executive may arrest him and put him on board a ship or aircraft bound for his own country [citation omitted].<sup>68</sup>

In turn, the lineage of these cases traces back to a 1906 Privy Council case, *Attorney General for Canada v Cain*, in which the constitutionality of the 1897 *Alien Labour Act*<sup>69</sup> was upheld on the basis that “[o]ne of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from that State, at pleasure . . . .”<sup>70</sup> Although *Cain* was decided under the *Alien Labour Act* rather than the *Immigration Act*, and thus dealt with a purely exclusionary statute of limited application, the Privy Council’s construction of an inflexible and seemingly immutable role for the state in relation to “aliens” has endured and expanded beyond the confines of one defunct statute. The result is, as Edward Morgan argues, that “[t]he historical pattern of Canadian immigration law . . . may be said to be one of movement in terms of process and stagnation in terms of substance. . . . Thus, alienage simultaneously decreases in significance and maintains its time honoured importance.”<sup>71</sup> In *Suresh and Ahani*, the demarcation of borders from the inside through the exclusion/excision of threat and risk is especially clear in the balancing test with respect to deportation to face torture. In this calculus, constitutional rights serve to underscore the act of sovereignty inherent in routine administrative determinations with respect to removal and detention. These are key decisions that highlight “the essence of the state’s sovereignty, which must be juristically defined correctly, not as the monopoly to coerce or to rule, but as *the monopoly to decide*,”<sup>72</sup> a role that the advent of the *Charter* has impacted but not eliminated.

If *Charkaoui* suggested an emancipatory turn, given that the judgment did implicate the most egregious of state actions in respect to the intersection of national security and immigration law, it only minimally shifted the overall conceptual and analytical framework for the *Charter* as it relates to, constructs and maintains state sovereignty. Again positioning rights as a minimal intrusion on the state’s ability to exclude from within, *Charkaoui* is not a disruption of the juridical migration-security-territory sovereignty nexus, but a mere recalibration. Indeed, with the subsequent case law we see the law redrawing boundaries even in cases where immigration law is not at issue. This is perhaps clearest in the *Khadr* decisions, in which the remedy of repatriation—of a Canadian citizen—was ultimately denied,

68 [1973] 2 All ER 741 at 747 (CA) [footnotes omitted].

69 1897 (UK) 60 & 61 Vict, c 11.

70 [1904-07] All ER Rep 582 at 584 [*Cain*].

71 Edward M Morgan, “Aliens and Process Rights: The Open and Shut Case of Legal Sovereignty” (1988-89) 7 Wis Int’l LJ 107 at 125.

72 Schmitt, *supra* note 10 at 13 [emphasis added].

thereby extending the *Charter*'s long-standing approach to executive prerogative and the contingent rights of non-citizens. By limiting oversight of the operation of executive power justified on the basis of what amounts to "the interests of state" to declaratory relief, the *Khadr* cases juridically enshrine foreign relations, diplomacy and statecraft as "acts of sovereignty." Despite the Supreme Court's declaration that his section 7 rights had been violated, Omar Khadr remains cast out from both Canadian national territory and law, his very location the result of overlapping, yet rigid and irreconcilable, national sovereignties and modes of power—excluded from without through the same calculus that excludes from within. We witness, in other words, an apparent expansion of the reach of *Charter* rights, but only in ways consistent with sovereignty, never as an incursion.

A similar phenomenon is also visible in the Supreme Court's interpretation of the exception required to ground extra-territorial jurisdiction in *Hape* and previous cases. The choice to find an exception is a quintessential act of sovereignty domestically, but the *Charter* extends this particular act of sovereignty beyond the borders of the Canadian state through diplomacy, as in the matter of Omar Khadr, but also military force (*Amnesty International*).<sup>73</sup> In facilitating acts of state through law, constitutional rights jurisprudence contributes to "a ... host of complex practices and wilful performances" necessary for the constant reproduction of state sovereignty.<sup>74</sup> As a result, *Charter* jurisprudence commits acts of sovereignty at the same time as it regulates or even catalyzes direct acts of sovereignty by the state.

However, *Charkaoui* and the cases that follow do more than underscore the shifting nature of sovereignty in the aftermath of 9/11 and the dictates of globalization more broadly.<sup>75</sup> Beyond its historical grounding in immigration law, the roots of modern *Charter* jurisprudence also lie in the foundational narrative of the Canadian nation-state, reflecting a discursive and analytical legacy emanating from Canada's colonial history, particularly the interaction of Indigenous and European norms. The violence inherent in that founding act of sovereignty reveals what Nyers calls the "profound and inescapable paradox" of such a moment: "the founding of any sovereign order involves practices that are both violent and arbitrary."<sup>76</sup> It is not only the foundational moment that reflects this violence, however, as acts of sovereignty are continuously mediated through indigenous law, at once highlighting and obfuscating the violence and paradox of the founding moment. The Supreme Court recently considered the meaning and content of Canadian sovereignty, both historically and currently, in the context of a symbolic border crossing by Grand

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73 The Speaker's ruling in the subsequent House of Commons debate with respect to the disclosure of documents pertaining to the treatment of detainees in Afghanistan underscores the complex and fragmentary nature of territorially delineated sovereignty. See e.g. Adrian Wylde, "Afghan Records Denial is Privilege Breach: Speaker", *CBC News* (27 April 2010), online: CBC News <<http://www.cbc.ca>>.

74 Nyers, *supra* note 64 at 26.

75 See generally Sassen, *Losing Control*, *supra* note 66.

76 Nyers, *supra* note 64 at 26.

Chief Michael Mitchell over a Canada-US boundary located in traditional Mohawk Nation territory.<sup>77</sup> He carried a large amount of goods, for both free distribution and sale, but refused to pay customs duties, waiting until he was served with a notice for unpaid duty to file a constitutional challenge to the imposition of such fees. Ultimately, the Supreme Court denied Mitchell's claim, arguing that he had not established a constitutional right pursuant to section 35(1) of the *Charter*. In a concurring judgment, however, Justice Binnie explored the sovereignty-related issues raised by the case, particularly the traditional doctrine of "sovereign incompatibility" – the notion that the sovereignty of First Nations was incompatible with the new European, and later Canadian, sovereignty.<sup>78</sup> He concluded that, although this pre-*Charter* view was once a justification for an almost complete obliteration of Aboriginal interest in traditional lands, sovereign incompatibility ought now to be seen as "a doctrine that must be applied with caution."<sup>79</sup> Nonetheless, Justice Binnie held that "[c]ontrol over the mobility of persons and goods into one country is, and always has been, a fundamental attribute of sovereignty,"<sup>80</sup> and that therefore, "the international trading/mobility right claimed by the respondent as a citizen of the Haudenosaunee (Iroquois) Confederacy is incompatible with the historical attributes of Canadian sovereignty."<sup>81</sup>

Having regard to the degree of autonomy within Canadian sovereignty available for some other Aboriginal practices, traditions and customs, however, Justice Binnie's analysis demonstrates that such a conclusion was not immediately obvious. Read at its broadest, the decision recognized that the flip side of sovereign *incompatibility* may be sovereign *compatibility*, with the suggested "cautionary" application of the former doctrine arising from both the paradox of sovereignty's founding moment and the *Charter* as a site of mediation between current sovereignties. Perhaps not surprisingly, such elasticity was not recognized by the Supreme Court in *Mitchell*, nor in subsequent cases, particularly those in which Aboriginal persons charged with criminal offences have denied the jurisdiction of Canadian courts. These challenges were dismissed due to the "certain reality of Canadian sovereignty" established by legal principle and precedent.<sup>82</sup> Nonetheless, this line of cases reflects another historical antecedent of *Charter* decisions confronting current modes of state sovereignty, while at the same time demonstrating a more self-reflexive judicial act of sovereignty. As Stewart Motha argues in the context of Australian debates with respect to Indigenous land rights, sovereignty must not be understood as unitary or as "One," suggesting that present-day legal struggles over Indigenous

77 *Mitchell*, *supra* note 9.

78 *Ibid* at para 150.

79 *Ibid* at para 151.

80 *Ibid* at para 160.

81 *Ibid* at para 163.

82 *R v David* (2000), 45 WCB (2d) 471 at para 15, 2000 CLB 1177 (Ont Sup Ct), cited in *R v Francis* (2007), 85 OR (3d) 45 at para 7, [2007] 3 CNLR 294 (Ont Sup Ct).

claims to sovereignty highlight sovereignty's "supposition and alterability by law" as much as they do its resilience.<sup>83</sup>

#### B. International Law, State Sovereignty and the Domestic Realm of the *Charter*

The current prevailing narrative of international law as a check on sovereignty is a triumphalist account of the demise of the Westphalian order and the concomitant rise of a universally empowering, if not liberating, language of human rights, in which nation-states are no longer the only agents or subjects of international law. This narrative is aptly summed up by Geoffrey Robertson's contention that the international human rights movement has been a "struggle against sovereignty."<sup>84</sup> In the Canadian context, debates regarding the actual veracity of this account are epitomized by evaluations of the intersecting roles of international human rights norms and constitutional guarantees in determinations of *Convention* refugee status. Noting that "national policies with regard to the admission and exclusion of non-citizens are typically characterized as central aspects of state sovereignty," Sharryn Aiken maintains that attempts to overcome this prerogative in international law, particularly in the 1951 Geneva Convention relating to the Status of Refugees<sup>85</sup> and the 1948 Universal Declaration of Human Rights,<sup>86</sup> were crucial developments that signalled a shift in the character of traditional state sovereignty.<sup>87</sup> Catherine Dauvergne, however, argues that "[t]he extent to which refugee law can be understood as a constraint on national sovereignty is exaggerated by the fact that there are no other international legal constraints in the migration law realm," and that in practice, "the Refugee Convention is a minimal constraint."<sup>88</sup> Reg Whitaker's view, on the other hand, is more mixed: "far from representing a limitation upon state sovereignty, granting inclusion is actually a quintessential exercise of sovereignty [citation omitted],"<sup>89</sup> as can be seen through policies linking immigration levels to labour market needs, admission requirements based on skills, education or language ability and the ethnic heritage-based membership rules of certain states (e.g., Germany or Israel). Refugee admissions pursuant to the governing international *Convention*, however, are not dependent on these or similar rules, and thus exist outside of the sovereignty-as-exclusion model. Current redefinitions of refugees as

83 Stewart Motha, "The Sovereign Event in a Nation's Law" (2002) 13 *Law and Critique* 311 at 311.

84 Geoffrey Robertson QC, *Crimes Against Humanity: The Struggle for Global Justice*, 3d ed (London, UK: Penguin Books, 2006) at xxx.

85 *1951 Convention Relating to the Status of Refugees*, 31 January 1967, 189 UNTS 150, Can TS 1969 No 6 (entered into force 22 April 1954, accession by Canada 4 June 1969).

86 *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) 71.

87 Sharryn J Aiken, "Of Gods and Monsters: National Security and Canadian Refugee Policy" (2001) 14:1 *Revue québécoise de droit international* 7 at 8.

88 Catherine Dauvergne, "Sovereignty, Migration and the Rule of Law in Global Times" (2004) 67:4 *Mod L Rev* 588 at 596.

89 Reg Whitaker, "Refugees: The Security Dimension" (1998) 2:3 *Citizenship Studies* 413 at 416.

first and foremost security risks or threats are, according to Whitaker, “inspired by the desire to reaffirm traditional national sovereignty,” but are actually “an important part of a discourse that in practice facilitates the erosion of traditional sovereignty.”<sup>90</sup> This is true in the sense that refugee policies are guided as much by transnational political commitments as by internal legal practices, as was demonstrated by the coordinated responses of Western countries to the flow of refugees from Eastern Europe during the Cold War. These tensions are attenuated in pre-*Charkaoui* security certificate case law, where international law norms governing asylum nonetheless left Convention refugees subject to removal or exclusion, notwithstanding the *Charter*. This underscores the implicit exercise of sovereignty underlying both the refugee determination process and the balancing of constitutional rights against imperatives of national security and migration generally, and their intersection specifically.

*Charkaoui* and the cases that followed have maintained this relationship between Canada’s domestic law and policy and governing international norms, keeping in place a limited incursion on sovereignty marked by current iterations of the historical political considerations described by Whitaker. Tracing the shift from fixed, discrete security concerns of the Cold War era to the nearly boundless terrain of the “War on Terror” makes the resilience of the relationship especially evident. More than a jurisprudential battle between domestic and international law, the interplay of international and constitutional rights guarantees reveals another aspect of the construction and maintenance of that domestic legal context, suggesting in turn a lens through which to glimpse the inherently political nature of that project. Just as the *Charter* reflects courts engaged in “acts of sovereignty,” judicial engagement with international law demonstrates a parallel process of nation-building, one inextricably linked to processes of globalization and the resulting shift in state sovereignty, suggesting that the “retreat of the state”<sup>91</sup> argument is something of a red herring. As Sassen argues, the tension between state sovereignty and international human rights is not a clear inside-outside binary given that the international human rights regime must operate partly inside the national state.<sup>92</sup> She goes on to show, “as is the case with the new legal frameworks for global capital, it is this partial grounding of a transnational regime in national institutions and practices (at least in countries under the rule of law) that lends it a distinctive power and legitimacy.”<sup>93</sup>

In this sense, the role of international norms in shaping domestic constitutional rights claims and, by extension, state sovereignty, is only completely legible as a process when viewed in the context of an unequal world order both created and facilitated by international law.<sup>94</sup> It is no coincidence that the vast majority of

90 *Ibid* at 414.

91 See Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge, UK: Cambridge University Press, 1996). See also Sassen, *supra* note 66.

92 *Ibid* at 65.

93 *Ibid* at 61.

94 See e.g. Amy Bartholomew, ed, *Empire’s Law: The American Imperial Project and the ‘War to Remake the World’* (London, UK: Pluto Press, 2006).

security certificate cases have as their background context refugee claims arising from political struggles with global geopolitical significance (e.g., Sri Lanka (*Suresh*), Iran (*Ahani*), Algeria (*Charkaoui*), Israel/Palestine (*Al Yamani*)) and that three of the four cases that followed are focused on issues and events related to the occupation of Afghanistan and the “War on Terror.” The crucial historical work of Antony Anghie and other scholars associated with the Third World Approaches to International Law movement has arguably revealed the colonial origins of international law, highlighting the ways in which sovereignty arose from relations of conquest and inequality: “the structure of sovereignty, the identity of sovereignty, no less than the identity of an individual or a people, is formed by its history, its origins in and engagement with the colonial encounter.”<sup>95</sup> Such historicizing calls into question the presumption of sovereign inequality in the international sphere<sup>96</sup> and suggests that the interplay between the *Charter* and international law norms continues to operate through a hegemonic frame. For example, *Khadr* and *Amnesty International* both trace the operation of the *Charter* in spheres bounded by Canada’s relationship with the US,<sup>97</sup> while *Charkaoui* and its predecessors reflect the faultlines of Canada’s international commitments, allegiances and responsibilities more broadly. Finally, the schism between civilizer and uncivilized reflected in international law’s history—from its inception during the conquest of the Americas through to the Mandate System<sup>98</sup> and beyond—is discernible within the demarcations of race and ethnicity underlying citizenship generally and security certificates particularly.<sup>99</sup> Sherene Razack identifies this as “race thinking,” arguing that the clash between the *Charter* and national security “is underpinned by the idea that modern, enlightened, secular peoples must protect themselves from pre-modern religious peoples whose loyalty to tribe and community reigns over their commitment to the role of law.”<sup>100</sup>

Accordingly, constitutional rights consistently serve as a site of connection between the domestic and global. Commenting on the *Suresh* decision, Obiora Okafor and Pius Okoronkwo argue that the Supreme Court “viewed the Canadian legal order

95 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, UK: Cambridge University Press, 2005) at 312.

96 See e.g. Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge, UK: Cambridge University Press, 2004).

97 See also the discussion with respect to Canada-US diplomatic relations in the context of the ‘war on terror’ in the Report of the Events Relating to Maher Arar, especially Recommendation 22 calling on the Canadian government to register a formal objection with the US government concerning their treatment of Mr. Arar: Canada, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa: Minister of Public Works and Government Services, 2006) at 361.

98 See generally Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge, UK: Cambridge University Press, 2003).

99 With the exception of Ernst Zündel, a white German citizen, all of the men named in recent security certificates have been Muslims, most of them from Arab countries, as have many of the targets of earlier certificates. See *Zündel v Canada*, 2006 FCA 356, 358 NR 161.

100 Sherene H Razack, “‘Your Client has a Profile:’ Race and National Security in Canada After 9/11” in Austin Sarat, ed, *Studies in Law, Politics and Society* (Bingley, UK: Emerald Group, 2007) vol 40, 3 at 8.

as virtually shielded by the concept of state sovereignty from the direct governance of international norms.”<sup>101</sup> Absent from this calculus, they suggest, is an alternative weaker conception of state sovereignty of the sort that Western governments

“have promoted for decades as the panacea for most of the human rights and economic problems of the weaker Third World states, one that allows much more room for the penetration of foreign and international legal, economic, political, and social norms and power into the domestic orders of states.”<sup>102</sup>

However, as outlined above, it is not just in the deportation to torture context that the interplay of *Charter* rights and international law serves to sustain the sovereign power of the Canadian state, even where state agents such as the police and military operate extra-territorially. The limited role of international law norms as an exception in *Hape* and subsequent cases signals the use of constitutional law as a shield against the limited incursion on state sovereignty by international law norms. In limiting both the reach of the *Charter* (in terms of subject/object and territory) and the remedies it can offer (for example, not just refusing repatriation for its own sake, but failing to prevent the torture that gave rise to the remedy of disclosure, as in the Khadr matter), recent Canadian constitutional law maintains the selective constraint international law has always placed on relatively powerful and wealthy states.

### C. Biopolitics and the Rights of the Abandoned

In a study of Australian policy on the detention of asylum seekers, Anne Orford argues that “human rights law in its liberal manifestation offers limited means for countering the administration of human life represented by biopolitics, and indeed in some ways supports this mode of governmentality.”<sup>103</sup> Orford invokes the Foucauldian notion of “biopower,” a technique of power and control predicated on the management of populations through the regulation of life and the human body: birth, death, health and reproduction.<sup>104</sup> Michel Foucault himself described biopower as “what brought life and its mechanism into the realm of explicit calculations and

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101 Obiora Chinedu Okafor & Pius Lekwuwa Okoronkwo, “Re-configuring *Non-refoulement*? The *Suresh* Decision, ‘Security Relativism’, and the International Human Rights Imperative” (2003) 15:1 Int’l J Refugee L 30 at 53-54.

102 *Ibid* at 54.

103 Anne Orford, “Biopolitics and the Tragic Subject of Human Rights” in Elizabeth Dauphinee & Cristina Masters, eds, *The Logics of Biopower and the War on Terror: Living, Dying, Surviving* (New York: Palgrave Macmillan, 2007) 205 at 206.

104 See generally Michel Foucault, “*Society Must Be Defended*,” *Lectures at the Collège de France*, ed by Mauro Bertani et al, translated by David Macey (New York: Picador, 1997); Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France*, ed by Michel Senellart et al, translated by Graham Burchell (New York: Picador, 2004).



made knowledge-power an agent of transformation of human life.”<sup>105</sup> In tracing the genesis of “power over life,” Foucault highlighted the historical evolution of sovereign rule towards complex techniques of management and regulation of *life* rather than the threat or control of death.<sup>106</sup> Accordingly, Orford suggests, sovereign power became preoccupied with control rather than domination, meaning that rights guarantees took on a facilitative role, ameliorating the excesses incurred in the management of human life, particularly in cases where core sovereign functions are also at play: migration control, national security and the administration of (quasi-) criminal justice. Yet human rights, in focusing only on the juridical or sovereign form, obfuscate “the operation of power in its biopolitical form,” backgrounding administrative, diplomatic and managerial channels of control, all of which are deeply implicated in the facts of the cases outlined above.<sup>107</sup> Rights represent the legitimacy of the sovereign state, states Giorgio Agamben, never more crucially than at the “hidden point of intersection between the juridico-institutional and biopolitical models of power” marked by the convergence of “techniques of individualization and totalizing procedures.”<sup>108</sup> For Agamben, this moment crystallizes in the state of emergency or exception, when law facilitates the legitimation of sovereign power.<sup>109</sup> But as Margaret Kohn explains, since sovereign power is fundamentally the power to place people into the category of bare life—a life lived outside the politically or morally constituted community, while being at the same time constitutive of the political order—“the law, in effect, both produces and legitimizes marginality and exclusion.”<sup>110</sup>

This invocation of biopolitics makes legible the process by which *Charter* rights serve to selectively exert power over persons located both within and beyond the territory of the nation-state, producing a shifting terrain of sovereign power that underscores how the “sovereignty of the nation-state is grounded on the inclusion of the bodies of its subjects through the management and transformation of human life.”<sup>111</sup> Seen in this light, constitutional law, while posited as the protector of life, actually facilitates the selective abandonment of life. As reflected in both pre- and post-*Charkaoui* decision-making, rights claimants abandoned by the law of the sovereign state are “included as subjects of law only by being excluded from the community to which the law gives rise.”<sup>112</sup> Orford argues that this “hidden point of intersection” demonstrates that the only way that

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105 Michel Foucault, *The History of Sexuality*, translated by Robert Hurley (New York: Pantheon, 1978) vol 1 at 143.

106 Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France*, ed by Michel Senellart et al, translated by Graham Burchell (New York: Picador, 2007).

107 Orford, *supra* note 103 at 215.

108 Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998) at 6.

109 *Ibid* at 15.

110 Margaret Kohn, “Bare Life and the Limits of the Law”, Book Review of *State of Exception* by Giorgio Agamben, (2006) 9:2 *Theory & Event* at para 10.

111 Orford, *supra* note 103 at 209. See also Agamben, *supra* note 101 at 126-35.

112 Orford, *supra* note 103 at 205-06.

“the state can appear at the same time as the mighty sovereign and as the manager, protector, and cultivator of life is if the population is fragmented, so that some people within its jurisdiction or territory are understood to be properly subject to the power to kill (or detain or torture), and some are subject to its powers of normalization, regularization, and cultivation of life.”<sup>113</sup>

Throughout the security certificate jurisprudence, this division takes place almost invisibly, hidden in plain sight, the minimal rights protections imposed by the Court in *Charkaoui* only serving to maintain the selective convergence of juridical and biopolitical power. In *Ahani*, the abandonment is even more pronounced, as a *Convention* refugee present in Canadian territory is nonetheless subsequently excluded through administrative procedures, notwithstanding the *Charter* rights also accorded to him. In clearing the way for a sovereign decision to deport Ahani to Iran, the Supreme Court facilitated a mode of governance only fully comprehensible as biopolitical. Post *Charkaoui*, the administration of life through the operation of rights remains entangled within this frame, catalyzing the further legitimation of sovereign power within and beyond national territory. In the *Khadr* judgments, the abandonment of rights-claimants takes physical form—a biopolitical exercise of sovereignty over a Canadian citizen beyond Canadian territory, where Guantanamo Bay stands as the quintessential site of bare life. Finally, the *Amnesty International* decision illuminates how the exercise of military command elides the simultaneous operation of biopower, as clashing sovereignties arising from occupation enmesh detainees in less, rather than more, law.

The evolution of sovereign power toward biopolitical governance has thus seemingly increased the possible terrain—territorial and juridical—of constitutional rights claims, while at the same time limiting their realization as effective emancipatory tools. Reach, in other words, does not equal remedy. Viewed in this light, this shift is another illustration of the complex relationship between national sovereignty and human rights generally, further eroding the notion that the latter are a serious threat to the former. As Balakrishnan Rajagopal has argued in the context of the rise of international human rights as political instruments, the myth that “human rights is an anti-state discourse” relies on an understanding of sovereignty that does not account for non-juridical forms of power.<sup>114</sup> Highlighting biopolitical forms of power, governance and administration uncovers the interplay of constitutional rights and sovereignty not as purely oppositional forces, but as constitutive elements of the modern state.

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113 *Ibid* at 222-23.

114 Rajagopal, *supra* note 98 at 189.

## V. CONCLUSIONS

In the midst of such enigmatic sovereignty, Anne Orford's contention that "the invocation of human rights constrains our capacity to think about and counter the ways in which power circulates in this global politics and economy"<sup>115</sup> must serve as more a provocation than a nihilist act of abandonment. Indeed, the three meditations in respect of sovereignty, the state and the boundaries of the *Charter* set out above ought to be read in that emancipatory spirit, having been shaped and inspired by campaigns against security certificates<sup>116</sup> and in support of Omar Khadr,<sup>117</sup> as well as by other movements for social justice aiming to realize the potential of human and constitutional rights guarantees. Nonetheless, inside the courtrooms where security certificates are challenged and other rights claimed, the operation of the *Charter* continues to redraw lines of exclusion and inclusion within ever shifting borders of territory, power and authority. Understanding the *Charter* as "sovereign" locates *Charkaoui* historically, analytically and politically, revealing the extra-doctrinal framework informing the limitations of the judgment. Just as importantly, the three modes of a sovereign *Charter* theorized above—acts of sovereignty, international law and biopolitics—together demonstrate the complex and often contradictory impact of globalization, internationalization and supra-national governance on constitutional rights. Given this global context, the historical antecedents that continue to constrain *Charter* decision-making and the political imperative of constitutional rights claims, sovereignty must be recognized as a site of engagement and contestation. For Agamben, this project would "clear the way for a long-overdue renewal of categories in the service of a politics in which bare life is no longer separated and excepted, either in the state order or in the figure of human rights."<sup>118</sup> This article has aimed to make a modest contribution to such renewal, sketching out the terrains of rights, territory and security as political categories available for disruption, redefinition and emancipation.

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115 Orford, *supra* note 103 at 206.

116 See e.g. Homes Not Bombs, Campaign to Stop Secret Trials in Canada, online: Homes Not Bombs <<http://www.homesnotbombs.ca>>.

117 See e.g. University of Toronto Faculty of Law, *Khadr Case Resources Page*, online: University of Toronto <<http://library.law.utoronto.ca>>.

118 Agamben, *supra* note 108 at 134.