

**COMPARING APPROACHES TO INTERNAL IMMIGRATION ENFORCEMENT:
A STUDY OF AUSTRALIA AND CANADA**

by

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DECLARATION

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ABSTRACT

Viewed through the lens of a peacemaking criminology, this thesis examines and compares how Australia and Canada each operationally approach internal immigration enforcement—namely, how each *identifies*, *arrests*, *detains*, and *removes* temporary non-citizens who initially entered their territories lawfully, yet subsequently violated immigration law. Central to this inquiry is an examination of whether or not Canada’s *policing* approach to internal immigration enforcement, when compared to Australia’s *non-policing* approach, noticeably impacts operational outcomes. Finally, this thesis examines whether the presence of a national constitutional bill of rights (hereinafter referred to as a *bill of rights*)—such as the *Canadian Charter of Rights and Freedoms*—affords non-citizens facing internal immigration enforcement actions greater protection against potential legal, civil, and human rights violations.

Being an exploratory study, this thesis takes a mixed methodological approach in its analysis—primarily drawing on a combination of document review, case study examination, and basic quantitative analysis to compare internal immigration enforcement in both Australia and Canada. Notwithstanding significant challenges in obtaining government data concerning internal immigration enforcement outcomes, sufficient information was attained to comprehensively examine how each nation *identifies*, *arrests*, *detains*, and *removes* non-citizens believed to be in violation of immigration law. Though limitations exist, the findings of this thesis nevertheless provide new insight into the operational approaches Australia and Canada each take toward internal immigration enforcement.

The most pronounced finding of this thesis was that irrespective of whether a *policing* or *non-policing* approach to internal immigration enforcement is taken, in the absence of legal safeguards aimed toward protecting the fundamental rights and freedoms of non-citizens facing internal immigration enforcement, outcomes predictably will resemble what

Pepinsky and Quinney (1991) describe as being *non-peaceful* and *warlike* in nature. Further to this finding was that Canada has surpassed Australia in implementing administrative review processes focused on promoting the tenets of natural justice and protecting the innate rights and freedoms of non-citizens facing internal immigration enforcement actions. Specifically, the 1982 enactment of the *Canadian Charter of Rights and Freedoms* has resulted in all law in Canada (including the *Immigration and Refugee Protection Act*) to be administered and enforcement in a manner that assists in guaranteeing fundamental rights and freedoms are at all times observed and respected.

Irrespective of the fact that Canada Border Services Agency officers are empowered as *peace officers (law enforcement officers)*, trained in the same manner as police, and armed, this thesis did not find Canada's *policing* approach resulted in more *non-peaceful* or *warlike* operational outcomes when compared to Australia's *non-policing* approach. Conversely, it was found Australia's longstanding policy of mandatory detention and automatic removal resulted in a much higher propensity for erroneous and unlawful internal immigration enforcement outcomes occurring—including evidence suggesting hundreds of unlawful incidents of detention, and even removal, have transpired over the past decade. Temporary non-citizens facing internal immigration enforcement actions generally are highly vulnerable to potential legal, civil, and human rights abuse. Considering that each year hundreds of millions of people temporarily enter a nation other than their nation of citizenship to visit, work, or study, it is imperative for our global economic success, as well as for civil society, that the rights and freedoms of temporary global migrants be vigorously safeguarded – failure to do so can unquestionably have significant social, political, and economic consequences for nations that fail to recognise the importance of protecting the innate rights of their temporary guests.

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Max, Daddy's thesis is now finished, so as we agreed, it's now time for you to use the potty.

PREFACE

As a former Immigration Enforcement Officer with the Canada Border Services Agency (CBSA), and now an external doctoral candidate at Monash University, I am particularly interested in how contemporary border security reforms around the world have affected the lives of people visiting, studying, or working temporarily in foreign lands. Particularly, I am interested in the Canadian reality, and in comparing this reality to that of Australia. It is fitting to compare these two nations as they have comparable social, political, and economic traditions, and have maintained similar immigration programs for nearly a century. It was not until 2003, when the CBSA—an armed paramilitary border policing agency—was established that this shared approach diverged. I believe that by using Australia as a measure, a review of Canada’s new approach to immigration enforcement under the CBSA can best be achieved.

My motivation for pursuing my doctorate degree emerged from my decision to depart a 15-year career with the Government of Canada (1993–2008) and embark on an academic career at Mount Royal University in Calgary, Alberta, Canada. I believe my ability to provide new knowledge in the area of border security and immigration enforcement can best be achieved within an evidence-based and comparative context. Having served as a Border Services Officer (Inland Immigration Enforcement Officer) and now working as an academic department Chair and tenured Associate Professor in the Bachelor of Arts in Criminal Justice program at Mount Royal University, I can approach my research from both an applied and a theoretical base.

While completing my undergraduate degree at the University of Victoria (Victoria, British Columbia, Canada), I served as a Customs Inspector at a number of land and marine ports of entry along the southern border of British Columbia. In 1998, I took a permanent position as an Immigration Examination Officer in Victoria, and a year later was promoted to

the position of Inland Immigration Enforcement Officer. In 2000, I was transferred from Victoria to the Southern Alberta Inland Immigration Enforcement Unit in Calgary, where I remained until 2008. Between 2000 and 2008, I at times acted as the Supervisor for Inland Immigration Enforcement and as an Immigration Hearings Officer, and I served three months as an Acting Senior Policy Officer at the CBSA Headquarters in Ottawa, Ontario. While in Ottawa, I helped revise the CBSA's inland immigration enforcement policy—including its investigations policy. More recently, in February 2012, I was qualified as an expert witness for issues related to Canadian inland immigration enforcement by Judge Brown of the Alberta Court of Queen's Bench (Criminal Division), and have given testimony during a criminal court case concerning a non-citizen charged criminally under the *Immigration and Refugee Protection Act*.

As an Inland Immigration Enforcement Officer, I was responsible for investigating persons who entered Canada (either lawfully or unlawfully) and subsequently came to the attention of law enforcement officials due to the suspicion that they might pose a danger to the public or otherwise be in violation of Canadian immigration and/or criminal law. In addition, I was responsible for locating missing and abducted children of foreign origin believed to be within Canadian territory. My duties have taken me to dozens of nations, escorting non-Canadians ordered removed from Canada. Additionally, I have received commendations for excellence in public service (2002 and 2008), arresting one of the Tennessee Bureau of Investigation's (TBI's) ten most-wanted fugitives (2004), and for locating four abducted children (1998). As interesting, exciting, and rewarding as my career was, in 2004 I decided to begin my transition from working as a criminal justice system practitioner to becoming an academic.

In that year, I completed my Master of Arts in Justice and Public Safety Leadership and Training at Royal Roads University (Victoria, British Columbia), during the course of

which I began focusing my research on issues of border security and immigration enforcement. In 2006, I started my academic career as a part-time instructor at Mount Royal College (today Mount Royal University) and commenced my doctoral studies at Monash University. Today, I am the Chair of the Justice Studies Department at Mount Royal University, and in 2010 was tenured as an Associate Professor. Since beginning my academic career, I have published a number of works in the area of border security reform, as well as co-edited the work *Border Security in the Era of Al-Qaeda* (Taylor & Francis, 2010). I view my pursuit of a doctorate degree as a means of finalising my career transition.

When seeking a doctoral program, I wanted to gain an international perspective on my area of research, and as such began to investigate Australia's "Group of Eight" research universities. In my search, I was very impressed with the support and scholarship available at Monash University, especially within the Department of Criminology. Upon graduation, I intend to continue researching border security and immigration enforcement issues, with the intent of improving the system I years ago departed. In my modest opinion, the only way for governments to achieve a balance between maintaining national and border security with the safeguarding of fundamental rights and freedoms is for governments to support academic research and give credence to external review.

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GLOSSARY AND ACRONYMS

Throughout this thesis, a number of key terms and acronyms are used to describe the various concepts being studied and organisations being described. To overcome differences in terminology, consistent terms needed to be identified to facilitate meaningful contrast and ensure clarity in description. As such, the following key terms are used within this thesis:

Arrest (arrested, apprehend, apprehension)

The Australian *Migration Act 1958* (Cth) is silent on the term *arrest*, whereas §4(2)(b) of Canada's *Immigration and Refugee Protection Act* [S.C. 2001, c.27] refers to an arrest being the first stage in the enforcement of this Act—namely, taking a suspected non-citizen believed to be in violation of the Act into temporary custody pending a determination of their arrest by way of *habeas corpus*. In comparing the two Acts, the term *detain* under §5(1) of the *Migration Act* closely resembles the meaning of arrest under §4(2)(b) of the *Immigration and Refugee Protection Act*. This subtle difference in meaning is in part a result of the *Charter of Rights and Freedoms* (a supra-legislative national constitutional bill of rights-type doctrine). In essence, arrest is detention; however, the distinction is that an arrest constitutes an initial term of detention prior to a court or quasi-judicial body ruling that the initial period of detention (arrest) was lawful and shall be continued (ENF-7, §17).

Specific to this thesis, arrest and the initial point when a suspected unlawful non-citizen is detained under the *Migration Act* will be considered synonymous. Under §4(2)(b) of the *Immigration and Refugee Protection Act*, *detention* constitutes the second stage in the enforcement of this Act—namely, the placing of a suspected unlawful non-citizen into a designated immigration detention centre after their arrest and temporary detention have been found lawful (ENF-20). For this thesis, **arrest** means the period of time between when a suspected unlawful non-citizen 1) has been identified as being present within Australia or

Canada and is suspected of contravening either the *Migration Act* or *Immigration and Refugee Protection Act*; 2) is confronted by an officer based on this identification and supposition; and 3) reasonably formulates the belief he or she no longer can freely leave the presence of an officer—through to the point when 4) an officer suspends the freedoms and liberties of the suspected unlawful non-citizen under the authority of either Act¹ for a period that exceeds what normally would be construed as a temporary period of time (see *R. v. Waterfield* [1963] All E.R. 659 (English Court Appeal); *Goldie v. Commonwealth* [2002] 188 A.L.R. 708 (Australia); *R. v. O'Donoghue* [1988] 34 A.C.R. 397 (Australia); *R. v. Therens* [1985] 1 S.C.R. 613 (Canada); and *R. v. Simpson* [1993] 79 C.C.C. (3d) 482 (Canada)).

Citizen (citizenship)

For both Canada and Australia, a citizen is considered a person who is 1) born within the nation, 2) born abroad to a citizen of the nation, or 3) naturalised as a citizen after being a permanent non-citizen for a specified period of time (DIAC, 2009b; CIC, 2008b). In general, citizens of Australia and Canada each have the right to enter, remain, and exit their nation, and are also provided the full protections afforded by each of their respective national constitutions (Evans & Evans, 2009). Moreover, citizens are the only persons allowed to vote in government elections, hold public office, apply and receive a national passport from the country in which they are citizens, and often are the only persons entitled to apply and gain employment in sensitive public service positions (CIC, 2008b). For this thesis, the term ***citizen*** will describe those persons who were born in either Australia or Canada, were born abroad to Australian or Canadian citizens, or who became naturalised citizens after first being permanent non-citizens.

¹ The definition for *arrest* in relation to this thesis is based on the Australian and Canadian departmental policy manuals used by both the DIAC and CBSA (see PAM3; ENF-7), as well as on the cases of: *R. v. Waterfield* [1963] All E.R. 659 (Court Appeal for England and Wales); *Goldie v. Commonwealth* [2002] 188 A.L.R. 708 (Australia); *R. v. O'Donoghue* [1988] 34 A.C.R. 397 (Australia); *R. v. Therens* [1985] 1 S.C.R. 613 (Canada); and *R. v. Simpson* [1993] 79 C.C.C. (3d) 482 (Canada).

Detention

Both Australian and Canadian immigration authorities may place suspected non-citizens who they believed are in violation of immigration law into immigration detention. As identified in §5(1) of *Migration Act 1958* (Cth), the term *detention* refers to a suspected unlawful non-citizen being physically taken into the custody of an officer or being placed into a designated immigration detention centre. As identified in §4(2)(b) of the *Immigration and Refugee Protection Act* [S.C. 2001, c.27], the detention refers to the second stage of enforcing this Act—namely, placing suspected unlawful non-citizens into a designated immigration detention centre *after* their arrest and temporary detention has been determined to be lawful by way of *habeas corpus* (see *Arrest* above). Under §189 of the Australian *Migration Act*, all non-citizens without a valid visa must be detained (however, in certain circumstances, may be released from detention if an officer issues them a new visa, or when, being detained on the force of a deportation order, a court finds this order unlawful). All persons in Canada (regardless of their citizenship or immigration status) who have been detained have the right under §10 of the *Canadian Charter of Rights and Freedoms* to 1) be informed of the reason for their detention; 2) retain and instruct counsel without delay; and 3) have the validity of their detention determined by way of *habeas corpus*. Moreover, §58(1) the *Immigration and Refugee Protection Act* states that a non-citizen shall be ordered released from immigration detention unless they 1) pose a danger to the public; 2) pose a threat to national security; 3) cannot have their identity established; or 4) are unlikely to appear for a lawful purpose under this Act. For this thesis, the term ***detention*** will constitute the time when a suspected unlawful non-citizen in either Australia or Canada is physically taken into custody subsequent to his or her detention being reviewed by way of *habeas corpus* or upon being denied a valid visa subsequent to the initial detention.

Globalisation

The term *globalisation* is frequently used throughout this thesis to describe the post–World War II global integration of communities, governments, organisations, and economies. As identified by Scholte (2000),

[T]he literature to date has produced few tightly focused full-length assessments of the causes and consequences of globalization. In these circumstances, ideas of globalization have readily become so diverse, so broad, so loose, so changeable—in a word, so elusive—that one can pronounce virtually anything on the subject. This situation is worrying . . . A clear, precise, explicit and consistently used concept of globalization can reveal a great deal about continuity and change in contemporary social life. Such a notion can also provide a basis for careful, critical and creative assessments of efficiency, security, justice, democracy and ecological integrity in today's world. (p. xiii)

Keeping with Scholte's description, the narrative surrounding the term *globalisation* will refer to the developed world, western world, or first world as being members of the G20, and reference to the *developing world* will mean all other nations. This approach is consistent with the predominant literature surrounding comparative international relations. For this thesis, the term ***globalisation*** will describe the perpetual process by which national and regional economies, societies, and cultures become interconnected and influenced through a global network of exchange (Scholte, 2000).

Identify (identification, identified)

Both the *Migration Act 1958* (Cth) of Australia and *Immigration and Refugee Protection Act* [S.C. 2001, c.27] of Canada provide immigration authorities the power to collect information from non-citizens who are seeking entry to their territory, living within their territory, or who are the subject of enforcement action. This information is collected and stored for statistical purposes, program review, and investigative needs. Specific to this

thesis, it is of paramount importance to understand how the Australian and the Canadian immigration officials each identify suspected non-citizens who are believed to be in violation of immigration law. For this thesis, the term *identify* will mean the act of establishing the identity of suspected unlawful non-citizens after they have entered either Australian or Canadian territory to determine their location and then initiate first contact with them, with possible subsequent acts of arresting, detaining, and removing them.

Internal Immigration Enforcement (onshore compliance, inland enforcement)

Internal Immigration Enforcement refers to a government body administering and enforcing domestic immigration law so as to monitor, control, and regulate the activities of non-citizens living within its sovereign territory (Brotherton & Kretsedemas, 2008; Givens, Freeman, & Leal, 2009; Meyers, 2004; Pratt, 2005; Vrachnas, Boyd, Bagaric, & Dimopoulos, 2008). Since the mid-1900s, when western governments (specifically the United States) began placing immigration officers within metropolitan centres and tasking them with locating and removing unlawful non-citizens, the term *internal immigration enforcement* increasingly became common. In Australia, the term *on-shore immigration compliance* is used to describe internal immigration enforcement; in Canada, the term *inland immigration enforcement* is used. For this thesis, the term *internal immigration enforcement* will describe an immigration authority investigating and enforcing immigration legislation within its sovereign territory.

Permanent Non-Citizen (landed immigrant, permanent resident)

A *permanent non-citizen* refers to a person who is not a citizen yet has been granted an indefinite period of stay within either Australia or Canada. The *Migration Act 1958* (Cth) refers to a non-citizen who has been issued a permanent visa pursuant to §30(1) and granted indefinite abode, as being a permanent non-citizen. In Canada, the *Immigration and Refugee*

Protection Act [S.C. 2001, c.27] refers to a non-citizen who has been issued an immigrant visa pursuant to Division 7 of the *Immigration and Refugee Protection Regulations* [SOR/2002-227] and granted indefinite abode, as being a *permanent resident*.² For this thesis, the term ***permanent non-citizen*** will refer to a person in Australian or Canadian who is not a citizen of the nation they reside in, yet has been granted a period of indefinite stay as a non-citizen pursuant to either the *Migration Act* or *Immigration and Refugee Protection Act* (or preceding *Immigration Act*).

Removal (exclusion, deportation, and mandatory departure)

Removal refers to the physical expulsion of a suspected unlawful non-citizen from a nation. Divisions 8 and 9 of the *Migration Act 1958* (Cth) (in particular §189 and §200) address the issue of physically removing a non-citizen from Australia. Specifically, §189 of this Act addresses unlawful non-citizens being removed by an officer, whereas §200 concerns non-citizens who have been ordered deported by the Minister of Immigration. Pursuant to §223 through to §225 of the *Immigration and Refugee Protection Regulations* [SOR/2002-227], there are three types of removal orders that can be issued pursuant to §45(d) of the *Immigration and Refugee Protection Act* [S.C. 2001, c.27], namely, 1) a departure order, which has no statutory prohibition for re-entry, yet is deemed to be a deportation order if not complied with within thirty days; 2) an exclusion order, which prohibits a removed non-citizen from re-entering Canada for a one- or two-year period (depending on the circumstances the order was issued); and 3) a deportation order, which prohibits a removed non-citizen from ever re-entering Canada. For this thesis, the term ***removal*** will refer to a non-citizen being physically removed from either Australia or Canada as per a provision of, or order issued pursuant to, the *Migration Act* or *Immigration and Refugee Protection Act*.

² Under the former Canadian *Immigration Act* [S.C. 1976, s.4] a permanent non-citizen was referred to as a *landed immigrant*.

Temporary Non-Citizen (foreign national)

A *temporary non-citizen* refers to a person who is neither a citizen nor permanent non-citizen of the nation he or she is physically located in, yet has been granted temporary admission to this nation either explicitly or implicitly. The *Migration Act 1958* (Cth) refers to a person who is not a citizen simply as being a non-citizen. In Canada, the *Immigration and Refugee Protection Act* [S.C. 2001, c.27] refers to a person who is not a citizen or permanent resident as being a foreign national. For this thesis, a **temporary non-citizen** will refer to a person 1) in Australia who is not an Australian citizen, or a person in Canada who is not a Canadian citizen; 2) in Australia who has not been granted status as a permanent non-citizen, or a person in Canada who has not been granted status as a permanent resident (see *Permanent Resident* in this glossary); 3) in Australia or Canada who has not applied for or otherwise sought asylum and/or refugee protection; and 4) in Australia or Canada who has been granted a period of temporary stay pursuant to provisions of either the *Migration Act* or *Immigration and Protection Act* as a tourist (visitor), international student, or temporary worker.

Terrorism

Another term commonly used within this thesis is *terrorism*. Though this term is frequently used to describe typically non-state sponsored acts of violence by ideologically motivated individuals, to date there is no internationally accepted legal definition of what constitutes an act of terrorism (Van Krieken, 2002; White, 2002; Winterdyk & Sundberg, 2010a). Considering this, this thesis will use the general definition provided by the United Nations (UN) during the March 17, 2005, hearing and briefing before the U.S. House of Representatives subcommittee on International Terrorism and Non-Proliferation: **terrorism** is any act “intended to cause death or serious bodily harm to civilians or non-combatants with

the purpose of intimidating a population or compelling a government or an international organization to do or abstain from doing any act” (UN, 2005, p. 30).

Unlawful Non-Citizens (inadmissible person)

An *unlawful non-citizen* refers to persons who are not citizens of the nation where they are physically located, and who are in violation of this nation’s immigration law. Specific to Australia, the *Migration Act 1958* (Cth) refers to an unlawful non-citizen as being a person who is without a valid visa. In Canada, the *Immigration and Refugee Protection Act* [S.C. 2001, c.27] refers to a person in violation of the Act as being an inadmissible person (either permanent resident or foreign national). For this thesis, an ***unlawful non-citizen*** will designate a person who is neither a citizen nor a permanent resident of Australia or Canada, and who lawfully entered Australia or Canada as a *temporary non-citizen* and subsequently violated provisions of either the *Migration Act* or *Immigration and Refugee Protection Act*.

Table 1:*Acronyms Common Within the Border Security Lexicon*

Organisation Titles and Other Terms	Acronym
Attorney-General's Department (Australia)	AGD
Australian Customs Service	ACS
Australian Federal Police	AFP
Australian Quarantine and Inspection Service	AQIS
Border Services Officer (Canada)	BSO
Canada Border Services Agency	CBSA
Canada Food Inspection Agency	CFIA
Canada Revenue Agency	CRA
Citizenship and Immigration Canada	CIC
Commonwealth Ombudsman (Australia)	CO
Customs Border Protection	CBP
Department of Homeland Security (United States)	DHS
Department of Immigration and Citizenship (Australia)	DIAC
Immigration and Customs Enforcement (United States)	ICE
Immigration and Refugee Protection Act	IRPA
Immigration Intelligence Officer	IIO
Immigration Officer (Australia)	IO
Inland Immigration Enforcement Officer (Canada)	IIEO
International Police Organisation	INTERPOL
On-Shore Compliance Officer (Australia)	OSCO
Passport	PPT
Port of Entry	POE
Public Safety Canada	PSC
Royal Canadian Mounted Police	RCMP
Solicitor-General (Australia)	ASG
Undocumented Marine Arrival	UMA
United Kingdom Border Agency	UKBA
United Nations	UN

Table 2:*Acronyms and Short-form Titles of Cited Australian and Canadian Acts*

Fully Name of Act / Citation / Nation	Acronym / Short-form Title
<i>Anti-terrorism Act (No 2) 2005 (Cth) Australia</i>	Australian Anti-Terrorism Act
<i>Anti-terrorism Act [S.C. 2001, c.41] Canada</i>	Canadian Anti-Terrorism Act
<i>Canada Border Services Act [2005, c.38] Canada</i>	CBSA Act
<i>Crimes Act 1914 (Cth) Australia</i>	Crimes Act
<i>Criminal Code Act 1995 (Cth) Australia</i>	Australian Criminal Code
<i>Criminal Code [R.S.C. 1985, c.46] Canada</i>	Canadian Criminal Code
<i>Immigration and Refugee Protection Act [S.C. 2001, c.27] Canada</i>	IRPA
<i>Migration Act 1958 (Cth) Australia</i>	Migration Act
<i>The Border Security Legislation Amendment Act 2002 (Cth) Australia</i>	Australian Border Security Act

CHAPTER I: INTRODUCTION

The very category of security, once associated in virtually singular relation with the protection of the political state from the threats posed by subversion, treason, and espionage, has been reconfigured to include an expanding roster of criminal threats to the public. Public safety, economic security, and system integrity are key constituents of contemporary concerns for the safety and welfare of the population that surround the programs and practices of immigration penalty and border control. (Pratt, 2005, p. 15)

I-1) Introduction

Subsequent to the September 11, 2001, al-Qaeda terrorist attacks (herein referred to as 9/11), there has been a global shift in the way many western democracies approach border security—in particular the way they approach internal immigration enforcement. After 9/11, security concerns have come to the forefront of border and immigration policy throughout the world (Brunet-Jailly, 2007). Prior to 9/11, in particular since the mid-1980s, most western democracies sought ways to capitalise on the expansion of globalisation through the opening of their borders to skilled foreign workers, tourists, and international students, with the aim of promoting transnational trade and commerce (Meyers, 2004). However, in the aftermath of 9/11, these same borders quickly became fortified as security concerns trumped global economic expansion (Andreas & Biersteker, 2003).

Accelerating during the 1980s and up until the tragic events of 9/11, most western democracies focused their border and immigration policies on promoting the trans-border movement of people, goods, capital, and resources (Brunet-Jailly, 2007). It was during this period when globalisation came to full fruition and the world began to reflect what noted Canadian scholar Marshall McLuhan coined the *global village* (McLuhan, 1964, pp. xii–xiii). In Western Europe, physical borders all but disappeared as the European Union (EU) began to take shape (Givens et al., 2009). In North and Central America, the world's largest tri-national free trade agreement between Canada, the United States, and Mexico was established

(known as the *North America Free Trade Agreement*, or NAFTA), and economic ties between the 15 member states of the Caribbean Community expanded (Andreas & Biersteker, 2003). Elsewhere throughout Africa, Asia, Oceania, South America, and the Middle East, nations increasingly established and expanded trade and customs agreements among neighbouring nations with the aim of attracting new global capital and investment (Buchanan & Moore, 2003). Of particular importance in understanding how contemporary globalisation has impacted the world is the identification that strategic migration³ was viewed by most western policymakers as a vital component in the development and expansion of global economic markets and international commerce (Givens et al., 2009).

Considering that in the decade preceding 9/11 there was a global move toward the opening of borders and increasing the levels of strategic global migration, it is important to note that most nations around the globe (including nations that traditionally were fairly reluctant to accept non-citizens into their territory) began viewing temporary non-citizens as an important component for to their domestic economic success (Givens et al., 2009). Additionally, as a result of advancements in commercial air transportation technology, the level of air travel continuously increasing from approximately 310 million travellers per year in 1970, to over 1.85 billion travellers per year in 2004 (ICAO, 2008; UNWTO, 2010). Of these travellers, over 70% purchased round-trip tickets for travel lasting less than three months (ICAO, 2008; UNWTO, 2010). Though these figures are not specific to international travel, they nonetheless support the general assertion that over the past two decades, there has been a substantial increase in the number of people who transit international borders. Resulting from this increase in global travel, coupled with heightened post-9/11 security concerns, numerous opportunities have developed for the interplay between security and

³ *Strategic migration* refers to the formulation of immigration policy in such a manner as to maximise the economic return associated with the entry and exit of non-citizens. As discussed by Givens et al. (2009), temporary migration in the form of skilled workers, international students, and tourists were seen as a vital economic component of globalisation between the 1980s and 2001 (pp. 1–14). However, they also identified that it was during this period that concerns surrounding irregular and unauthorised migration (e.g., human trafficking/smuggling, unauthorised border crossings, asylum seeking, etc.) began to emerge as a global concern.

migration to be studied—including how nations today operationally approach internal immigration enforcement.

I-2) Focus

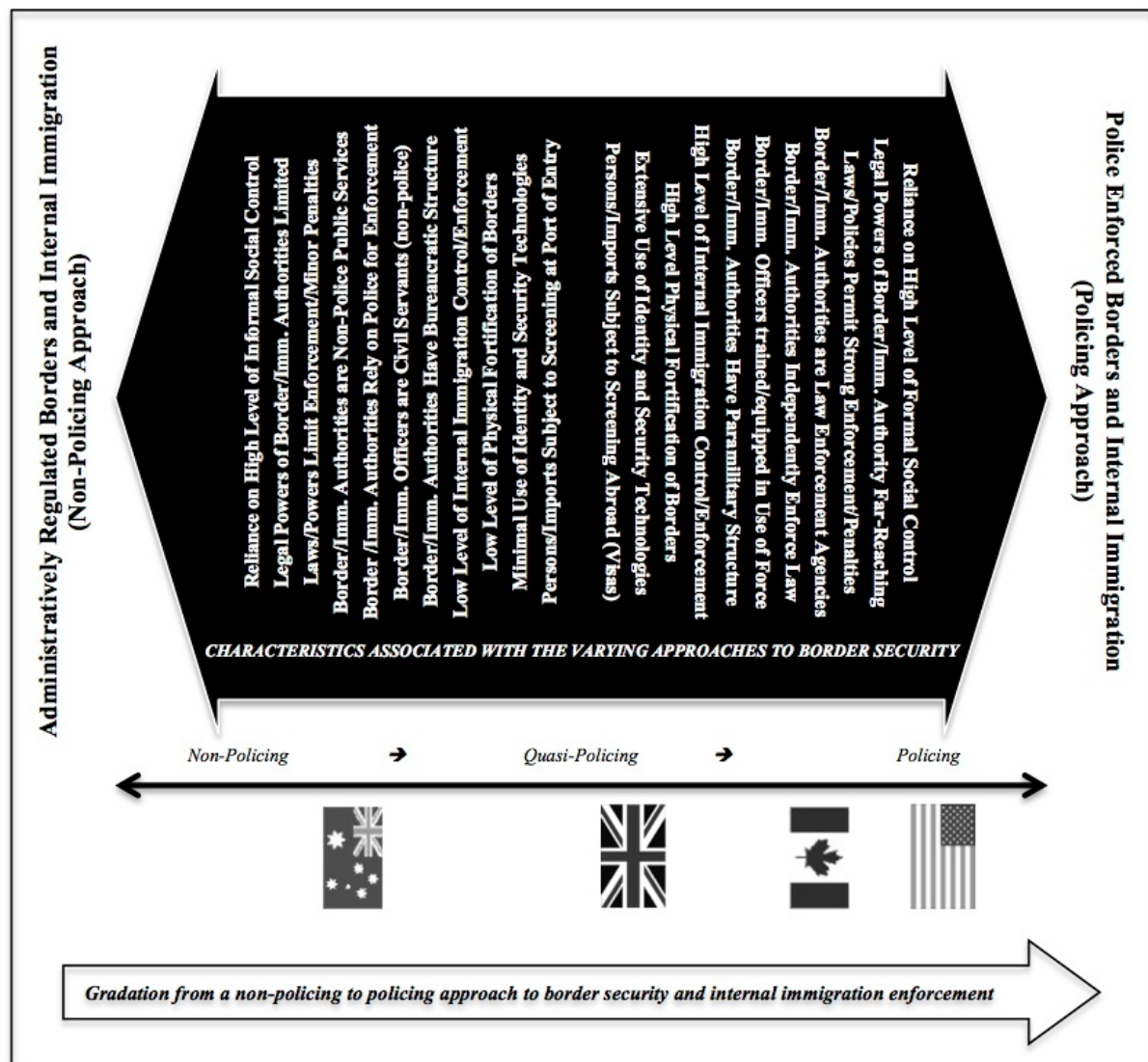
Internal immigration enforcement is a vital component of every western democracy's national and border security strategy. As will be discussed throughout this thesis, internal immigration enforcement constitutes a government body administering and enforcing its domestic immigration law so as to monitor, control, and regulate the activities of non-citizens living with their sovereign territory (Brotherton & Kretsedemas, 2008; Givens et al., 2009; Meyers, 2004). Although internal immigration enforcement has existed within most western democracies for nearly half a century (primarily emerging after World War II), its importance within the context of national and border security has become increasingly pronounced in the years following the end of the Cold War—especially in the post-9/11 era when the threat of global terrorism has become a paramount concern for nations throughout the world (Brotherton & Kretsedemas, 2008). Many scholars have identified that over the past two decades, there has been a bifurcated experience in relation to how western democracies address border security and immigration enforcement concerns—in particular how nations conduct the screening of non-citizens at ports of entry and how they operationally approach internal immigration enforcement (Brotherton & Kretsedemas, 2008; Givens et al., 2009).

Most notably in the post-9/11 era, the manner by which western democracies select, approve, and manage requests from non-citizens to enter and remain within their sovereign territory has increasingly been influenced by the applicant's place of birth and citizenship (Bosworth & Flavin, 2007; Givens et al., 2009). Progressively over the past two decades, non-citizens born in developing nations and/or who have close ties to Islamic states generally experience increased security screening when seeking to cross into and remain within a western democracy's territory (Bosworth & Flavin, 2007; Brotherton & Kretsedemas, 2008).

Conversely, non-citizens born within western democracies and/or who are involved in global trade and commerce generally are afforded the privilege to obtain pre-clearance from the immigration authorities of the western democracy they are seeking entry to, allowing them the ability to transition borders with relative ease and minimal inspection (Bosworth & Flavin, 2007; Givens et al., 2009; Salter, 2010).

Figure 1:

Spectrum of Post-9/11 Approaches to Border Security and Internal Immigration Enforcement Among Western Democracies*



* Used with permission and as cited in Sundberg, Trussler, and Winterdyk (2012).

As identified within the literature concerning contemporary border security and internal immigration enforcement (see II-3-e below), and as depicted in Figure 1 above, since 9/11, a spectrum of approaches to border security (including approaches to internal immigration enforcement) has emerged. Along the whole of this spectrum, public safety and security concerns receive paramount attention, yet the approaches to addressing these concerns are scaled. On the right side, borders have become fortified with a focus on policing. On the left side, borders have remained relatively open to transnational trade and commerce, with border authorities applying a heightened focus on issues concerning national security. In essence, post-9/11, all western democracies have transformed the way they operationally approach border security and internal immigration enforcement; however, each nation's approach differs in scale, scope, and magnitude.

Specific to the western democracies, there are a number of common characteristics associated with the gradation from a non-policing to policing approach to border security and internal immigration enforcement. On the right side of the spectrum sits the United States. In 2003, the United States amalgamated all its federal agencies with border security duties, national emergency management responsibilities, and internal customs and immigration enforcement undertakings, into the Department of Homeland Security (Heyman & Ackleson, 2010). In addition to organisational reforms, the United States also implemented new laws and policies aimed at allowing the federal government to quickly respond to terrorist threats, national emergencies, and transnational crime (most significant of these new laws and policies is the ratification of the *US PATRIOT ACT*).

Canada follows closely behind the United States on this spectrum, in that it also amalgamated its traditional border services into a single policing agency (the Canada Border Services Agency). The principal difference between post-9/11 border security reforms in Canada and United States is that Canada did not implement laws and policies as sweeping in

scope as those instituted by the United States—for example, Canada’s *Anti-Terrorism Act* is limited in its surveillance and enforcement powers when compared to the *US PATRIOT ACT* (Heyman & Ackleson, 2010; Winterdyk & Sundberg, 2010a). The United Kingdom falls to the left of both Canada and the United States in that it created an unarmed quasi-policing border agency tasked with border and immigration enforcement responsibilities (UK Border Agency, 2010). British border agency officers have limited policing powers, and in many regards, remain reliant on the police and intelligence agencies to carry out enforcement activities on their behalf.

Australia follows to the left of the United Kingdom, Canada, and the United States in that it has maintained its traditional non-policing customs,⁴ immigration, and agricultural inspection services. After carefully reviewing the creation of the Department of Homeland Security in the United States (as well as similar agencies found elsewhere around the world), the Australian Government opted to enact legislation that enhanced the interplay between existing policing, security intelligence, customs, and immigration authorities while retaining their organisational autonomy (Smith, 2008). Although the Australian Government acknowledged a need to enhance its capacity to address contemporary transnational crime and terrorism concerns, it was decided its traditional approach coupled with new laws and policies could achieve Australia’s national security goals in a more cost effective manner (Smith, 2008).

Archick, Ek, Gallis, Miko, and Woehrel (2006) support the notion two predominant post-9/11 approaches have emerged among western democracies (in particular within Europe and North America) in relation to how border security and internal immigration enforcement are operationally approached—namely, a policing approach and a non-policing approach. As

⁴ The Australian Customs and Border Protection Service does have specially designated officers who are armed located at various sea ports (Maritime Units); however, these officer are restricted performing customs, immigration, and agricultural inspection-related duties and are armed so as to apprehend illegal operators of fishing vessels in the Southern Ocean patrol region (ACBP, 2001).

depicted in Figure 1 above, and as discussed by Archick et al. (2006), a *policing* approach generally involves traditional (pre-9/11) customs, immigration, and agricultural enforcement agencies being amalgamated into single organisations having both policing and security intelligence capabilities. Within this approach, immigration law is generally enforced by specialised law enforcement officers tasked with investigating immigration law violations, yet administered by a separate non-policing government body. Conversely, a *non-policing* approach generally involves traditional border security and internal immigration organisations and processes being maintained, while at the same time introducing new laws and policies that enhance the interplay between police, security intelligence, border security, and immigration enforcement agencies (Archick et al., 2006). Within this approach, immigration law is generally administered and enforced by public servants with limited enforcement powers.

To facilitate a comparative study, a policing approach in the context of this thesis will mean an approach whereby internal immigration enforcement is carried out by officials considered as either law enforcement officers under the Australian *Crimes Act 1914* (Cth) or peace officers under the Canadian *Criminal Code* [RSC 1995, C-46]. A non-policing approach will mean an approach whereby internal immigration enforcement is carried out by public servants having the authority to enforce immigration law, yet who have a limited capacity to use techniques and methods typically employed by law enforcement officers. As will be discussed, both Australia and Canada identify, arrest, detain, and remove suspected unlawful non-citizens using comparable modes within analogous programs. However, in Canada, immigration authorities are armed, have policing powers, and are trained in the same fashion as police, whereas in Australia, immigration authorities are public servants with limited enforcement training and capabilities.

Another consideration that will be addressed is whether or not, and to what extent, Canada's constitutional bill of rights-type doctrine (the *Canadian Charter of Rights and Freedoms*⁵) safeguards against potential erroneous or unlawful internal immigration enforcement actions. Since the enactment of the *Canadian Charter of Rights and Freedoms* in 1982, all persons in Canada—irrespective of their citizenship or lawful immigration status—have been afforded the right to have any form of detention determined by way of *habeas corpus*, as well as to be protected against unreasonable search and seizure. Considering Australia does not have a constitutional bill of rights similar to that of the *Canadian Charter of Rights and Freedoms*, this thesis will explore if the protections included within Australia's *Migration Act 1958* (Cth) affords comparable safeguards for non-citizens as found in Canada.

Prior to 2003, both Australia and Canada shared parallel non-policing approaches to internal immigration enforcement. Neither immigration authority was considered a law enforcement body, both had unarmed public servants administering and enforcing their domestic immigration laws, and each had stand-alone immigration departments responsible for all aspects of immigration and citizenship (Tascón, 2010; Winterdyk & Sundberg, 2010a). This shared approach diverged in 2003 when Canada (in a similar fashion to what transpired in the United States post-9/11) implemented a policing approach for its border security programs—including its internal immigration enforcement program (Sundberg, 2004).

Although Australia has maintained a non-policing approach to border security in the post-9/11 era, between 2002 and 2005, the Australian Parliament did introduced a number of new laws and amended several existing ones as a means of enhancing the frequency and level of interplay its customs, immigration, police, and intelligence organisations had with one

⁵ The *Canadian Charter of Rights and Freedoms* is found in Part I of the *Constitution Act, 1982*, being schedule B of the *Canada Act 1982* (UK), 1982, c.11. In addition to this constitutional bill of rights-type doctrine, Canada also has a statutory bill of rights, the *Canadian Bill of Rights* [S.C. 1960, c.44], that unlike the *Canadian Charter of Rights and Freedoms*, does not constitute a supra-legislative doctrine.

another (Tascón, 2010). These reforms allowed Australia's traditional border security organisations to better share information and conjointly protect Australia from external security and public safety threats. Like Australia, Canada also introduced new legislation and amended existing laws to enhance its national and border security capabilities. Of particular importance is Canada's enactment of the *Canada Border Services Act* [2005, c.38]—the Act that effectively formalised Canada's decision to adopt a policing approach for its border security programs (Winterdyk & Sundberg, 2010a). Yet prior to this Act coming into force, on December 12, 2003, the Parliament of Canada (by way of Order in Council) created the Canada Border Services Agency (CBSA)—an armed border security agency comprised of the former enforcement components traditionally found within the Canada Revenue Agency, Citizenship and Immigration Canada, and Canada Food Inspection Agency (Sundberg, 2004).

On December 4, 2008, the Australian Customs Service (ACS) was renamed as the Australian Customs and Border Protection Service (ACBP) (ACBP, 2011). However, despite its new name, little else changed in the way Australian customs operated. The ACBP remained a designated law enforcement agency under the *Australian Crimes Act 1914* (Cth), with no new significant responsibilities being added to its duties. During this same year, the Australian Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) was also renamed to become the Australian Department of Immigration and Citizenship (DIAC, 2011b). As was the case with the ACBP, aside from being renamed, little else changed in how Australia's immigration authority operates. The DIAC continued being a non-law enforcement agency and retained its traditional responsibilities for administering and enforcing Australia's *Migration Act 1958* (Cth).

As will be discussed (see II-5 below), despite organisational and legislative changes in both Australia and Canada, few studies exist that explore how these reforms have impacted border security in either Australia or Canada. Moreover, there is an apparent gap in the

literature exploring global post-9/11 internal immigration enforcement reforms, with a noticeable dearth of literature specific to the Australian and Canadian realities. Of the literature that does exist, most focuses on the study of asylum seekers, border security technologies, human trafficking/smuggling, counter-terrorism, and matters concerning unauthorised foreign workers (Castles & Miller, 2008; Cornelius, Tsuda, Martin, & Hollifield, 2004; Pratt, 2005; Andreas & Biersteker, 2003; Pickering & Weber, 2006; Zureik & Salter, 2006; Brotherton & Kretsedemas, 2008; Cole & Lobel, 2007; Condon & Sinha, 2003; Drache, 2004; Brunet-Jailley, 2007; Givens et al., 2009; Jupp, 2002; Meyers, 2004; Winterdyk & Sundberg, 2010a). This thesis aims to address this gap in the literature by specifically examining and comparing how Australia and Canada operationally approach internal immigration enforcement through the lens of peacemaking criminology—specifically how suspected unlawful temporary non-citizens are identified, arrested, detained, and removed by immigration authorities in both Australia and Canada (see IV-1-a).

I-3) Question

As aforementioned, this thesis examines whether or not the utilisation of either a policing or non-policing approach for internal immigration enforcement has an operational impact on how suspected unlawful temporary non-citizens (hereinafter referred to as *suspected unlawful non-citizens*) are identified, arrested, detained, and removed within the context of analogous internal immigration enforcement programs—specifically the Australian and Canadian programs. Additionally, the thesis explores whether or not the *Canadian Charter of Rights and Freedoms* (a national constitutional bill of rights doctrine) affords non-citizens facing internal immigration enforcement actions greater safeguards against erroneous or unlawful state actions when compared to Australia (which does not have a national constitutional bill of rights). Considering the aforementioned, this thesis aims to answer:

*Does a **policing** versus **non-policing** operational approach to internal immigration enforcement impact how suspected unlawful temporary non-citizens are identified, arrested, detained, and ultimately removed from either Australia or Canada? If so, to what extend? Furthermore, does the presence of a national constitutional bill of rights type doctrine afford greater safeguards to suspected unlawful non-citizens subject to internal immigration enforcement actions?*

I-4) Rationale and Significance

I-4-a) Rationale

Within the post-9/11 era, the topic of border security (including internal immigration enforcement) has become commonplace within international news media headlines, popular culture, political rhetoric, and academic discourse. In Australia, cases such as the 2001 wrongful removal of Vivian Alvarez Solon, 2005 wrongful detention of Cornelia Rau, and 2007 investigation of Dr. Mohammed Haneef all provide examples where the news media began reporting on how the DIAC conducts its internal immigration enforcement program (Bryant, 2008; “Inquiry Finds Haneef,” 2008; Skelton, 2006). These cases also have resulted in academic studies that specifically examine how the DIAC takes enforcement actions against suspected non-citizens believed to be in violation of the *Migration Act 1958* (Cth)⁶ (hereinafter referred to as the *Migration Act*) (Harris-Rimmer, 2005; Tascón, 2010; Pickering & McCulloch, 2010). Although Canada has not experienced similar high-profile cases, issues surrounding internal immigration enforcement have nonetheless started to emerge within Canadian news media reports and scholarly research (“Maher Arar,” 2006; Pratt, 2005; Winterdyk & Sundberg, 2010b). Further to the attention given to internal immigration

⁶ The case of Dr. Mohammad Haneef, a Queensland doctor wrongfully accused of being involved in the 2007 Glasgow Airport bombing, has caused Australia to review the means it collects and acts on information from external security services in relation to non-citizens living within its borders (“Inquiry Finds,” 2008; Tascón, 2010; Pickering & McCulloch, 2010). The cases of Solon and Rau resulted in the Australian Government to commission the *Comrie* and *Palmer Reports* which examine how the DIAC identifies and removes suspected unlawful non-citizens (Commonwealth Ombudsman, 2007). These case are discussed in detail within Chapters V and VII.

enforcement by the media, the fact that every major Australian and Canadian national political party has referenced border security and internal immigration enforcement within their platforms demonstrates how this topic has developed into a pivotal political topic of interest (Parti du Bloc Québécois, 2008; Conservative Party of Canada, 2008; Green Party of Canada, 2008; Liberal Party of Canada, 2008; New Democratic Party of Canada, 2008; Australian Greens, 2008; Australian Labor Party, 2008; Liberal Party of Australia, 2008; The Nationals, 2008).

Another indicator that internal immigration enforcement has emerged as a notable topic of interest is its increasing presence within the realm of popular culture. The popular Canadian television drama *The Border* (CBC, 2008) and Australian reality show *Border Security—Australia's Frontline* (Yahoo! Pty Limited, 2008) were both created in the post-9/11 period and represent for the first time immigration enforcement (although not specifically internal immigration enforcement) being chosen as a theme for television programming. In January 2009, the American television network ABC launched its reality program *Homeland Security USA*, which depicts American officers stopping unlawful non-citizens, drugs, and weapons from entering the United States (ABC, 2009). On a more global level, the 2009 drama *Crossing Over* represented the first major motion picture to use internal immigration enforcement as the basis of its storyline (Weinstein Company, 2008). Prior to 9/11, virtually no television or cinematic productions featured border security or internal immigration enforcement as a main storyline or theme.

Conceivably, as internal immigration enforcement continues to develop as a topic of interest among the media, politicians, and the public, it will also continue to attract scholarly attention. Yet, at the time of writing this thesis, only a handful of books (Brunet-Jailley, 2007; Cornelius et al., 1994; Pratt, 2005; Winterdyk & Sundberg, 2010a), documentaries (Raymont, 2002), and articles (Gillespie, 2009; Hataley, 2007; “Maher Arar,” 2006) exist that

specifically address Canada's internal immigration enforcement program. In reviewing the literature specific to Australia, in particular the literature surrounding the cases of Solon and Rau (Crowley-Cyr, 2005; Grewcock, 2005; Harris-Rimmer, 2005; Metcalfe, 2007; Newman, Dudley, & Steel, 2008), it would appear the issue of internal immigration enforcement (especially detention) has gained more attention than within Canada—albeit the combined literature for both Canada and Australia pales in comparison with that for the United States or the European Union (Givens et al., 2009; Winterdyk & Sundberg, 2010a).

Despite the increasing frequency of public discourse surrounding the issue of internal immigration enforcement, there are still very few academic studies that specifically examine either the Canadian or Australian realities. Moreover, there are currently no studies that examine or compare the internal immigration controls and enforcement practices utilised by either nation. In view of the possible negative impact the acts of identifying, arresting, detaining, and removing suspected unlawful temporary non-citizens from a nation can have on both the individual and the community at large (see Brotherton & Krestsedemas, 2008; Chowdhry & Beeman, 2006; Freilich, Opresso, & Newman, 2006; Hassan, 2002; Poynting, Noble, Tabar, & Collins, 2004), there is little question that a need exists for more comprehensive academic studies surrounding internal immigration enforcement.

I-4-b) Significance of Thesis

The general assumption that 9/11 was the principal catalyst for border security reform within the United States and other western democracies (including internal immigration enforcement reform) has been firmly established by both the academic community and global news media (Cole & Lobel, 2007; Givens et al., 2009). Specific to Canada and Australia, it is generally agreed that the U.S. response to 9/11 acted as a significant impetus for contemporary border security and internal immigration enforcement reforms in both nations (Freilich et al., 2006; Winterdyk & Sundberg, 2010c). Whereas, before 9/11, western

democracies were principally working toward opening their borders with the aim of maximising the free flow of global commerce and trade, in today's reality (and greatly influenced by new security protocols and policies imposed by the United States), security concerns have in many respects trumped efforts to promote free trade and relax border controls (Brunet-Jailley, 2007; Givens et al., 2009).

Most notably in the aftermath of 9/11, many western democracies have become increasingly sensitive of the possible national security threat some non-citizens living within their borders may pose (Cole, 2002; Pickering & Weber, 2006; Zureik & Salter, 2005). In addition, the rise in official concerns about transnational crime has also resulted in western democracies paying closer attention to how they manage their borders and non-citizens living within their territory. Moreover, borders themselves have evolved from being physical boundaries between nation-states, to obscure and intangible barriers of digitised information (Bennett & Lyon, 2008; Brunet-Jailley, 2007; Lyon, 2005; Weber, 2006; Weber & Bowling, 2004).

Throughout the western world, governments have complemented their physical border security with new surveillance technologies that identify, classify, and monitor non-citizens crossing and living within their borders (CBSA, 2008d; DIAC, 2008b; Schengen Joint Supervisory Authority [JSA], 2008). Considering the significant amount of public funds being spent on border security; the increased collection, analysis, and dissemination of personal information as a standard part of border security; and the recent amplified attention given to non-citizens as being possible security threats, there is an obvious need for border security (in particular integral immigration enforcement) related issues to be studied through a criminological lens. Furthermore, in the aftermath of 9/11 and subsequent global terrorist attacks, the immigration authorities of most western democracies (including Australia and

Canada) have become integral components of their respective national security apparatuses (Tascón, 2010; Winterdyk & Sundberg, 2010b).

Prior to 9/11, Australian and Canadian immigration authorities were not entrenched elements of either nation's national security plan—rather, they acted more as a peripheral supports for their respective national security organisations.⁷ Although immigration legislation in both nations has traditionally had provisions to deal with non-citizens suspected of posing a threat to national security, these provisions were principally reactive in focus and operated on a case-by-case basis. Today, both Australian and Canadian immigration authorities routinely collect traveller information for intelligence, surveillance, and law enforcement purposes, and share this information with domestic and international intelligence organisations, police, and customs services as a means of proactively addressing threats. In essence, Australia and Canada have embarked on both a physical and virtual fortification of their borders in an attempt to maximise their ability to quickly and effectively conduct internal immigration enforcement actions and support national security initiatives (Tascón, 2010; Winterdyk & Sundberg, 2010b).

As noted, immigration authorities in Canada, Australia, and throughout the western world routinely employ technologies and practices meant to identify and interdict high-risk travellers and settlers who are seen as potential threats to national security (Gibbs Van Brunschot & Kennedy, 2008). Within Canada, the intertwining of the traditional physical border with a new digital one is known as the *Smart Border* (CBSA, 2008c); in Australia this same concept is called the *Smart Gate Border Processing System* (DIAC, 2008b). Both the Canadian Smart Border and Australian Smart Gate involve a traveller's digitised information (digital shadow) preceding their physical presence prior to their being allowed entry to either

⁷ Prior to Australia's *National Counter Terrorism Plan* (June 2003) and Canada's *Securing an Open Society: Canada's National Security Policy* (April 2004), neither country specifically listed their respective immigration authorities as being part of their listed government departments having national security responsibilities.

nation. This shadow can consist of a person's biometric and personal data (e.g., fingerprints, photograph, age, address, frequency of travel, place of residence, etc.), and grows longer and denser the more they interact with government services (Brunet-Jailley, 2007; Bennett & Lyon, 2008; Parenti, 2003).

Even after a person has physically passed through a port of entry (POE), government authorities maintain biometric and personal information should it be required at a later time for internal immigration enforcement purposes (Bennett & Lyon, 2008). Considering that Australia and Canada now incorporate internal immigration enforcement as part of their national security strategies, it would appear that Cole's (2002) depiction of the "enemy aliens" within the United States has in essence been transposed—albeit to a much lesser degree—into the Australian and Canadian realities.

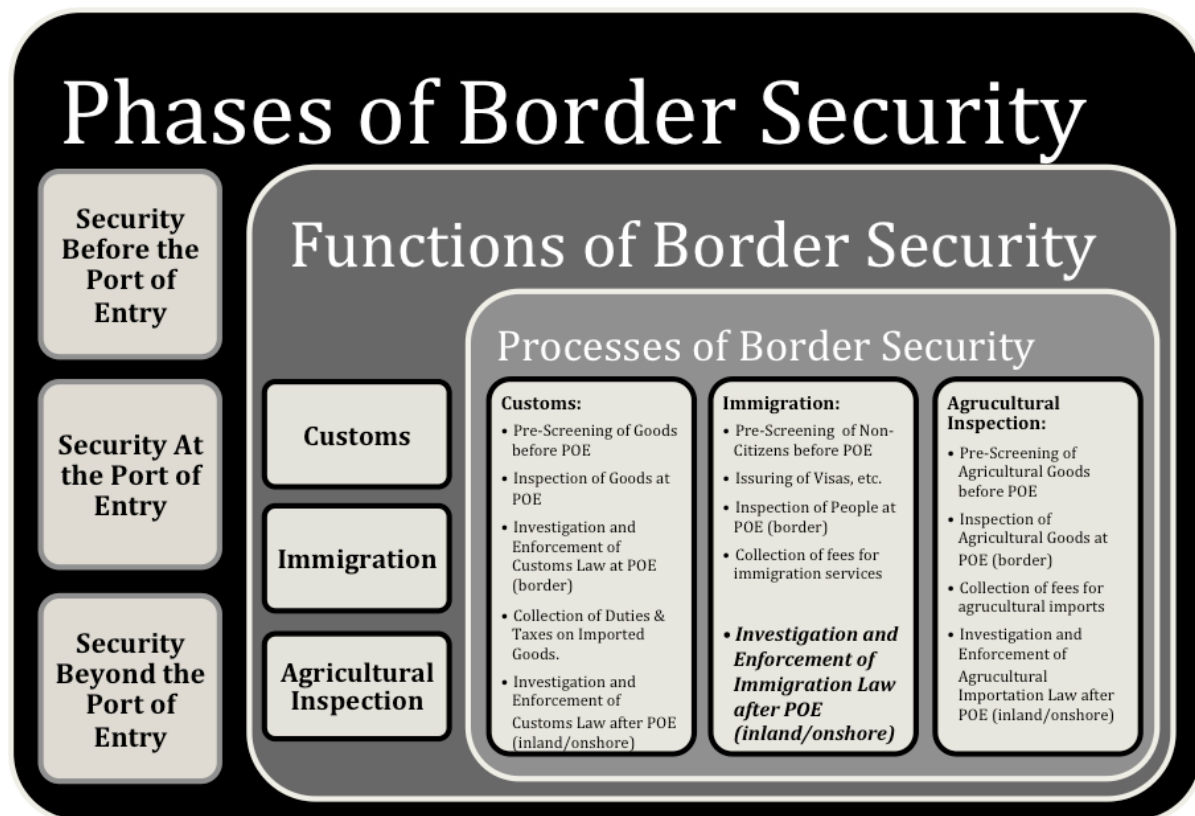
I-5) Scope and Structure

I-5-a) Scope

To address the thesis questions, this study presents a comparative criminological examination of the differing operational approaches to internal immigration enforcement taken by Australia and Canada for the years 2003 through to the end of 2010 with a specific focus on temporary non-citizens (see *temporary non-citizen* in glossary). It will also examine whether or not the presence of a national constitutional bill of rights type doctoring affords suspected unlawful non-citizens greater safeguards against erroneous or unlawful internal immigration enforcement actions—and if so, to what extent. As will be identified within the literature review, the scope of this thesis corresponds with the observed gap in literature concerning internal immigration enforcement as it relates to temporary non-citizens. Considering that until 2003 Australia and Canada shared analogous approaches to internal immigration enforcement, the scope of this study is intended to describe and articulate the

progression of internal immigration enforcement from the point when Canada initially began utilising a policing approach (specifically, when the CBSA was established), through to the end of the period when the most recent and complete statistics, data, and information were available. To afford a focused inquiry, this thesis will primarily examine and compare how Australia and Canada operationally approach internal immigration enforcement.

As described in the literature review (see II-2-f below), there are three general phases within the border security paradigm (border security before, at, and beyond the POE), three general functions of border security (customs, immigration, and agricultural inspection), and numerous processes associated with each of these functions (e.g., POE inspection of people and goods, internal immigration/customs enforcement, maritime vessel inspection, etc.). Furthermore, each process involves several unique sub-components (i.e., identification, arrest, detention, and removal). For example, internal immigration enforcement is a process of the immigration function of border security, which is located within the third phase of the border security paradigm. Included within the internal immigration enforcement process are the four fundamental sub-components of identification, arrest, detention, and removal of suspected unlawful non-citizens. Of principal importance for this thesis is the understanding that the internal immigration enforcement sub-components of identification, arrest, detention, and removal can each be approached in either a policing or non-policing manner.

Figure 2:***Phases, Functions, and Processes of Border Security in Australia and Canada***

I-5-b) Structure

To afford a comparative criminological study of the operational approaches taken by Australia and Canada in relation to internal immigration enforcement, this thesis is structured with the aim of affording each principal internal immigration enforcement sub-components (i.e., identification, arrest, detention, and removal) to be examined and reviewed separately, yet be reflective of each other. By taking this approach, each principal sub-component associated with internal immigration enforcement can be better examined, allowing greater insight into whether or not a policing or non-policing operational approach noticeably influences how internal immigration enforcement is administered. Additionally, this thesis will explore whether or not the presence of a national constitutional bill of rights (such as the *Canadian Charter of Rights and Freedoms*) impacts how (if at all) suspected unlawful non-

citizens subjected to internal immigration enforcement are safeguarded against erroneous or unlawful state actions.

Following the introduction chapter are the literature review and methodology chapters. The literature review first provides a general background to internal immigration enforcement as a vital process within the general border security paradigm. Subsequent to this background is the literature concerning how border security and internal immigration enforcement have evolved over the past six decades. The literature review then concludes by identifying the gap in literature specific to internal immigration enforcement, and opens the discussion on how this thesis contributes to addressing this gap. Being reflective of the common methods of inquiry used within the existing literature, the methodology chapter outlines how this thesis aims to compare internal immigration enforcement within Australia and Canada (see III-1-b, III-1-c, and III-1-d). Specific reference is given to Weber (2009), who suggested many elements within contemporary border security have come to resemble the warlike elements observed by peacemaking criminology (e.g., para-militarisation of borders, naval blockades, and administrative detention of non-citizens). Considering border security has in many ways come to resemble policing activities traditionally found with the criminal justice system, it is fitting that this thesis follow the approach of Weber (2009) and explore internal immigration enforcement through the lens of peacemaking criminology (see IV-1-a and IV-1-b).

Subsequent to the literature review and methodology chapters are four chapters addressing each of the principal internal immigration enforcement sub-components. Within the first two of these chapters (identification and arrest) are three case studies intended to support the comparative review of internal immigration enforcement within Australia and Canada. Accepting that, in Canada, internal immigration enforcement is conducted within the milieu of a national constitutional bill of rights (whereas in Australia it is not), each of these

chapters offers a discussion regarding whether or not the *Canadian Charter of Rights and Freedoms* affords greater safeguards against erroneous or unlawful internal immigration enforcement actions—including an examination of how and to what extent (if at all).

Finally, the summary chapter provides an overview of the key findings, compares these to the existing literature, and sets out the original contribution this thesis makes to the field of criminology—specifically in relation to internal immigration enforcement as being a criminological topic of interest. As will be identified in this final chapter, no studies exist that specifically explore how either Australia or Canada operationally approach internal immigration enforcement. The summary chapter will also identify potential future research considerations that can flow from this research and outlines how this research might be built upon.

II-6) Chapter Summary

This chapter identifies the intended goals of this thesis and articulates its central focus and scope. It also affords a rationale for its commencement and underscores the significance of the study. Finally, it opens discussion on whether or not the study of internal immigration enforcement logically fits within the study of criminology. As discussed, since the tragic events of 9/11, internal immigration enforcement has become a more pronounced issue within general public discourse, political debate, news reports, and academic study. Moreover, the manner by which many western democracies operationally approach internal immigration enforcement has begun to resemble the way traditional policing organisations approach crime and criminal justice concerns—this in itself justifying review. In short, internal immigration enforcement has very much become a security and intelligence activity, and non-citizens in violation of immigration law have come to be viewed similar to persons suspected of committing criminal offences.

Subsequent to 9/11, the Government of Australia has enhanced the ability of internal immigration enforcement officers to interact and share information with their long-standing police and intelligence partners. Since early 2003, Australian immigration officers, police, and intelligence officers routinely will work together to identify, arrest, detain, and remove suspected unlawful non-citizens. However, unlike their police and intelligence counterparts, Australian immigration officers conduct their more recent security and intelligence responsibilities in a more administrative manner. These officers are unarmed, are not trained in the use of force, and rely on police assistance to carry out their internal immigration enforcement duties (see BCO, 2011).

Conversely, in 2003, the Government of Canada established an armed policing agency (the CBSA) which assumed the internal immigration enforcement responsibilities traditionally held by Citizenship and Immigration Canada—a non-policing agency of the Government of Canada. The CBSA has armed officers with policing powers tasked with identifying, arresting, detaining, and removing suspected unlawful non-citizens (as well as other law enforcement duties) independent of the police (Winterdyk & Sundberg, 2010b). Prior to 2003, Canadian immigration officers (like today's Australian immigration officers) were reliant on police assistance to carry out enforcement actions. Since 2003, Canadian internal immigration enforcement officers work in tandem with police and intelligence officers to address security and intelligence concerns associated with non-citizens.

In essence, this thesis examines whether or not a policing versus non-policing approach influences how internal immigration enforcement is operationally administered in relation to the identification, arrest, detention, and removal of suspected unlawful temporary non-citizens. Moreover, this thesis aims to identify if an approach reflective of peacemaking criminology (i.e., a non-policing approach) results in similar internal immigration enforcement outcomes (e.g., identifications, arrests, and removals of suspected unlawful non-

citizens) when compared to the more aggressive (and potentially violent) policing approach. Finally, this thesis examines if the presence of a national constitutional bill of rights, such as the *Canadian Charter of Rights and Freedoms*, affords suspected unlawful non-citizens who face internal immigration enforcement actions greater legal and human rights protections—and if so, to what extent.

CHAPTER II: LITERATURE REVIEW

Although uneven, the focus of immigration law enforcement has been decidedly at the border, with less emphasis on the enforcement of immigration laws in the interior of the country. (Thronson, 2008, p. 391)

II-1) Introduction

Research examining how governments monitor, regulate, and control non-citizens living within their sovereign territory is relatively recent. It was not until World War I that nations began to formally control the flow of people across their borders and required non-citizens to present identity documents (e.g., national identity cards, passports, etc.) when crossing into another state (Torpey, 2001). Prior to 1914, with the onset of World War I, most European and postcolonial nations viewed non-citizens as being of “tremendous value” and they were “welcomed with open arms” (p. 256). As described by Dowtey (1987), between the 18th to early 20th centuries, European governments, including their colonial territories, had “abolished their passport laws or at least neutralized them through non-enforcement,” and that this period marked “the closest approximation of an open-world in modern times” (as cited in Torpey, 2001, p. 256).

Although many of the European governments during this period (including their colonial territorial governments) had laws in place that addressed the cross-border movement and settlement of non-citizens, these laws were rarely administrated or enforced, resulting in the vast majority of migration being undocumented and unregulated. Prior to World War I, most of these governments considered non-citizens to be economically beneficial to their developing economies and rarely viewed them as possible security risks (Torpey, 2001). It was not until after World War II and the beginning of the Cold War era that concerns regarding internal immigration enforcement became a topic of interest among academics and policymakers (Kelley & Trebilcock, 1998). More specifically, it was not until the later part of

the 1960s that internal immigration enforcement began to emerge as a topic of interest within the United States (Brotherton & Kretsedemas, 2008).

Considering the importance temporary foreign visitors, students, and workers have on a nation's domestic economy, society, and political culture, it is somewhat surprising that few studies exist that specifically examine how post-9/11 internal immigration enforcement practices impact these persons. As acknowledged by Abowd and Freeman (1991), the establishment, expansion, and sustained prosperity of post-British colonial nation-states such as Australia and Canada very much resulted from open immigration policies. The 20th century emergence of Australian and Canadian agricultural and natural resource industries, rail and transportation centres, as well as foundational government infrastructure projects were only possible because of Asian and European migrant workers (Hawkins, 1991; Immigration Museum, 2007; Kelley & Trebilock, 1998). Specific to today, most western democracies depend on temporary foreign workers, technicians, and other foreign professionals to build their economies and contribute to international market demands (Givens et al., 2009). In short, within today's global society, migration is a vital component for a nation's domestic and international economic strategy.

Given the somewhat recent history of internal immigration enforcement (1960s–), it is not surprising that relatively few works exist that review this emerging topic of interest. Despite the limited body of literature available specific to internal immigration enforcement, there is still a significant body of literature that this thesis draws and builds upon (see, e.g., Brotherton & Kretsedemas, 2008; Brunet-Jailley, 2007; Chan, 2005; Cole, 2002, 2005; Cole & Lobel 2007; Cornelius et al., 2004; Freilich & Guerrette, 2006; Givens et al., 2009; Mace & Durepos, 2007; Martin, 2006; Meyers, 2004; Palidda, 2006; Parenti, 2003; Pickering & Weber, 2006; Pratt, 2005; Van Krieken, 2002; Welch, 2007; White, 2002; Winterdyk & Sundberg, 2010a; Zureik & Salter, 2005). Furthermore, in spite of the majority of studies

concerning internal immigration enforcement focusing on the American and European experiences (Zureik & Salter, 2005), the general themes and issues covered in this literature nonetheless contribute to the examination of internal immigration enforcement within the Canadian and Australian context.

Through the review of the literature addressing internal immigration enforcement (most notably the works of Brotherton & Kretsedemas, 2008; Cole, 2005; Cole & Lobel, 2007; Givens et al., 2009; Pratt, 2005), four universal themes can be identified: 1) contemporary internal immigration enforcement is based on racist traditions; 2) non-citizens are particularly vulnerable to state violence and control; 3) established populations tend to dismiss the ill-treatment of non-citizens by industry, government, and other domestic groups; and 4) non-citizens are viewed by security and policing organisations as potential national security threats. Of particular interest to the Canadian and Australian realities are the works of Pratt (2005) and Jupp (2009). Jupp provides a comparative review of the pre- and post-9/11 approaches to border security in Australia, Britain, Canada, and New Zealand. In his review, Jupp identifies that impact America's "War on Terror" has had on the way these nations approach internal immigration enforcement today.

Pratt (2005) and Jupp (2009) both identify how prior to 9/11, Canada and Australia based their approaches to border security on administrative models originating from a British tradition. Jupp describes how prior to 9/11 Australia, Britain, Canada, and New Zealand shared similar approaches to the management of their national and border security strategies, which were reconsidered in the wake of 9/11. In reviewing Canada, Pratt suggests that the combination of a racist tradition of immigration policy and moral panic surrounding immigrants of Islamic heritage has caused non-citizens who violate immigration law to be dealt with as if they have committed a criminal offence rather than simply failing to observe an administrative regulation. Pratt observes that post-9/11, a disproportionate number of

Muslim non-citizens found in violation of Canada's immigration law have been detained and deported when compared to those of other religious beliefs or who are from non-Islamic nations (§9). Moreover, Pratt also observes that the Australian Government has taken an "exceptionally punitive approach to immigration, refugee, and border-related issues" in the years subsequent to 9/11 (p. 7).

In addition to reviewing the literature specific to internal immigration enforcement, there is also a need to provide a historic context for this thesis. As such, this chapter first provides a general overview of the contemporary notions of sovereignty and citizenship, and also discusses the historic evolution of modern nation-states. The chapter then examines the construct of geo-political borders among nation-states and the ensuing developments in border security that correspond with these developments. From this point, a discussion regarding how internal immigration enforcement fits within the contemporary border security paradigm is afforded. Finally, building on the aforementioned, the limited literature specific to Australian and Canadian internal immigration enforcement is reviewed.

II-2) The Evolution of Border Security and Immigration Enforcement

The comprehensive study of immigration enforcement first requires a historic review of how geo-political borders have developed, how migration trends have evolved, and ultimately how governments have come to develop programs specifically focused on taking enforcement action against non-citizens living within their territory who are believed to pose a threat to national security and/or public safety. Internal immigration enforcement has emerged as a result of the maturing of nation-states as well as the increased global movement of people connected to modern transportation and communication technologies.

As already discussed, there are limited scholarly works specifically examining border security in relation to regions outside of the United States and Europe, let alone the specific study of internal immigration enforcement (Brunet-Jailley, 2007; Winterdyk & Sundberg,

2010a; Zureik & Salter, 2005). Furthermore, as Mountz (2010) indicates, the study of internal immigration enforcement has only recently received minimal attention from the academic community—especially works examining the Canadian reality. Concerning the dearth of studies addressing immigration enforcement and the rights of non-citizens, M. Lee (2005) notes that “how states’ interests in migration control and migrants’ rights to fair treatment can be accommodated remains a vexed question” (p. 12). In short, much more research is needed in this area.

As identified in the edited work of Brunet-Jailly (2007), to comprehensively understand the complexities of contemporary border security systems (including internal immigration enforcement programs), there first must be an understanding of how borders historically developed:

The Westphalian state system developed from the establishment of sovereign powers within the confines of borderlines recognized by international agreements. During the construction of the modern state, the nationalist period resulted in the development of center-periphery economies and politics. Today, however, globalization appears to make borders irrelevant in many ways—as exemplified by our increasing awareness that trade, migration, environmental, and health issues cross over borders of many states—and to include large regions of world, while, on the contrary, security and terrorism seem to reassert the borders of each states. (p. ix)

II-2-a) The Evolution of Nation-States, Sovereignty, and the Control of Non-Citizens

Deciding who may enter, remain, and ultimately leave a nation’s territory is one of the most common means of demonstrating and exerting sovereignty (Salter, 2005). However, in order to study this exertion of state power, there first must be a review of how the nation-state system itself emerged and the concept of sovereignty developed. In essence, the study of internal immigration enforcement requires an understanding of statehood, sovereignty, and citizenship. In order for a national government to take enforcement action against a non-

citizen living within its territory, there first must be a collective recognition by other nations that the government has authority to act as it wishes within the confines of its own geo-political boundaries (sovereignty) and an accepted acknowledgement among nation-states as to what constitutes an individual's right to enter, remain within, and exit a state's sovereign territory (citizenship).

The following section provides a basic overview of how borders, and concurrently state control of non-citizens living within these borders, have historically developed and evolved since the *Peace of Westphalia* in 1648. Acknowledging the vast body of literature that exists examining the development of the modern nation-state system, this section draws primarily on the works of scholars such as Gross (1948), while also citing the principal Australian and Canadian works of Hawkins (1991), Hodgins, Wright, and Heich (1978), Jupp (2001, 2006), as well as MacMillan and McKenzie (2003).

Weber (2006) observes that contemporary borders have become "malleable and fluid" (p. 24) as a result of globalisation, yet at the same time resemble "porous dams" (Pickering & Weber, 2006, p. 24) whereby low risk visitors are welcomed and high-risk "undesirables" stopped. Salter (2005), while initially reflective of Pickering and Weber's (2006) notion of borders being "porous dams," suggests that in the aftermath of 9/11, the openness and fluidity of modern borders have transformed into highly fortified and regulated barriers (at least for some) (p. 2). Reflective of the observations made by Pickering and Weber (2006) as well as Salter (2005), Bosworth and Flavin (2007) observe that although 9/11 has caused most western democracies to be increasingly concerned about border security, these same nations have for decades restricted non-citizens from the developing world from crossing into their territories.

Irrespective of 9/11, advances in surveillance, policing, and intelligence technologies have caused the act of securing borders to evolve from the physically fortification of geo-

political boundaries to now include the virtual screening of trans-border travellers before they even depart their nation of origin (Zureik & Salter, 2005). Moreover, these same modern technologies allow border security and immigration authorities to continually monitor non-citizens once they enter their respective territory. In short, border security has moved from securing a physical geographic line to now include surveillance and a capability to enforce domestic customs and immigration conventions both external to a nation's jurisdiction and continually within its sovereign territory.

The contemporary notion of a nation's right to control its borders and assert law within its territory first emerged with the *Peace of Westphalia* in 1648 (Pagden, 2003). The *Peace of Westphalia*, which emerged from the Treaties of Osnabrück (May 15, 1648) and Münster (October 24, 1648), brought an end to decades of conflict between warring Protestant and Catholic governments within continental Europe.⁸ Protestant and Catholic state leaders agreed that religious freedoms such as private worship, belief, and rights of religious minorities would be afforded to those Protestants and Catholics living within each other's principality. Furthermore, it was agreed that Protestants and Catholics living within these mixed principalities would be permitted to share political offices (Gross, 1948; Krasner, 2001). The principles of the *Peace of Westphalia*, specify that states have the right to establish their own laws and traditions which other states should respect (despite disagreement), have guided the modern context for state sovereignty and international relations for over five centuries (Bratt, 2006; Gross, 1948; Krasner, 2001; Pagden, 2003).

From the *Peace of Westphalia* emerged the premise of the modern nation-state system and the contemporary context for national sovereignty and territorial integrity (Gross, 1948; Krasner, 2001). Central to this notion are the modern concepts of state, sovereignty, and

⁸ The conflict between Protestant and Catholic states refers to the Thirty Years' War (1618–1648) in continental Europe (Germany) where Princes within the Holy Roman Empire were in conflict over their right to assert a set religious doctrine for their respective principalities (Krasner, 2001).

citizenship. As Krasner (1995–1996) suggests, “the *Peace of Westphalia*, which ended the ‘Thirty Years War’ in 1648, is taken to mark the beginning of the modern international system as a universe composed of sovereign states, each with exclusive authority within its own geographic boundaries” (p. 115). Krasner further asserts that the *Peace of Westphalia*, and the subsequent modern concept of sovereignty, “has been comprehended as if it were synonymous with the degree of control exercised by public authorities over trans-border movements” (p. 118).

The *Peace of Westphalia* offers the launching point from which most nation-states, including Canada and Australia, have evolved their public authorities to regulate, monitor, and take enforcement actions against non-citizens living within their geo-political boundaries. During the early 1800s to late 1900s, states forged “policies to rule inside a territory, attempted to exclude other authorities from interfering in ‘domestic politics,’ developed strong controls over their own borders, and actively participated in the construction of citizenship and nationalism” (Caporaso, 2000, p. 1). The *Peace of Westphalia* launched the nation-state system we observe today, and its tradition remains the historic foundation for organisations such as the United Nations (UN), European Union (EU), North Atlantic Treaty Organisation (NATO), and other longstanding international unions (Falk, 2002). Furthermore, the Westphalian tradition provided the framework by which European states divided their colonial holdings within the “New World.”⁹

⁹ The “New World” refers to those lands outside of the European continent that were “discovered” by European explorers and ultimately colonised (Love, 2006). The reality of the Age of Discovery (15th through to the 18th centuries) and subsequent years of European exploration (18th through to the 20th centuries) was that European nations occupied lands throughout Africa, Asia, and the Americas claiming them as extensions of their European sovereignty so as to produce and extract commodities for export back to Europe (e.g. spices, tobacco, precious metals, etc.). The indigenous populations living within these occupied territories often were used as forced labour in the European based industries and expected to convert to Christianity. The era of New World was mired with the exploitation of indigenous populations and resources, yet often heralded as a romanticised period of adventure and exploration.

II-2-b) From Colonialism to Immigration Control

The era of European exploration, expansion, and colonisation of the New World from the 15th through to the 19th centuries brought about the formalisation of international border and migration policies and laws (Buchanan & Moore, 2003). As the nations of Europe actively extended their colonial interests to include much of Africa, Asia, as well as the Americas, they proclaimed the “new” territories they discovered as extensions of their sovereign homeland (Buchanan & Moore, 2003; Ferro, 1997; Lloyd, 2006; Love, 2006). As identified by Russell (2003), these European settlers constituted the first wave of globally mobile migrants and set the stage for the permanent occupation of the New World colonial territories (§3). Furthermore, as Chowdhry and Beeman (2007) state,

The epoch of imperialism, and its offshoot, European colonialism, have had a profound effect on the modern world. Global material inequalities and cultural hierarchies, the social construction of race, gender, and class, and systems of crime and punishment have been shaped in meaningful ways by imperialism and European colonialism. Although European colonialism focused mainly on territorial expansion and material accumulation, the durability of conquest rested in large part on imperial constructions of culture in which the social constructions of race and the inscribing of a world racial order provided legitimacy to the imperial enterprise and convinced otherwise “decent men and women to accept the notion that distant territories and their native people should be subjugated.” (p. 13)

It was during the era of European colonialism that modern nation-states were defined, the contemporary notion of citizenship was established, and mass global migration began.

Following the Age of Discovery (early 15th to early 17th centuries), and during the period of European colonialism (early 17th to early 20th centuries), came the Industrial Revolution (late 18th to mid-19th centuries) (Love, 2006). It was during the later part of the Industrial Revolution that border and migration issues emerged as important considerations

for the new postcolonial nation-states in their efforts at nation building (Calavita, 2007; Cornelius et al., 2004). Technological advancements such as steam power, mechanised manufacturing, and steel production resulted in a demand for new supplies of natural resources, commodities, and labour (Lloyd, 2006). The European colonial territories, including Canada and Australia, became centres through which European industries were fuelled and stores were stocked.

They have internationalist aims, and at the same time they struggle to keep up a standard of life with which those aims are incompatible. We all live by robbing Asiatic coolies, and those of us who are "enlightened" all maintain that those coolies ought to be set free; but our standard of living, and hence our "enlightenment," demands that the robbery shall continue. A humanitarian is always a hypocrite. (George Orwell in *Horizon* February 1942, as cited in Lloyd, 2006, p. 216)

Ultimately, the European settlers that span the globe beginning in the 17th century became the established citizenry of postcolonial nations such as Canada and Australia with the indigenous populations being treated as foreigners within their own lands.¹⁰ Despite the fact that today's technologies and societal comforts are derived from the colonial era and Industrial Revolution, the dark reality of this period is that it was based on acts of slavery, forced labour, and the exploitation of indigenous peoples (Lloyd, 2006; Love, 2006; MacMillan & McKenzie, 2003). From the 17th century through to the later part of the 18th century, plantations, factories, and mines throughout the colonies prospered because of the constant importation of slaves and other exploited labourers from Africa, Asia, the Caribbean, and Americas (Lloyd, 2006; Love, 2006). Considering that these slaves and other exploited labourers (including indigenous peoples already living within the colonial

¹⁰ The indigenous peoples of Canada did not obtain recognition as citizens until 1960, and in Australia not until 1962. In the case of Australia, the discrimination toward Australian Aboriginals was so significant, that the original Constitution stipulated that "aboriginal natives" were not be recorded in the national census (Russell, 2003, p. 76). Similarly in Canada, Aboriginals were seen as "savages" and unworthy of being recognised as citizens—often being displaced onto reserves and/or residential schools to be "reformed" (Russell, 2003; Warry, 2007).

territories) were not viewed by their owners/employers as being equally “human” as themselves (Anderson & Perrin, 2008), the notion by the power elite was that these people had no political or societal rights (Heater, 2004).

It is important to note that between the 17th and 19th centuries, the notion of citizenship was evolving from the Westphalian concept of the principality to the more contemporary view of the nation-state. Prominent British scholar Derek Heater (2004) explains in his work *A Brief History of Citizenship* that “until the eighteenth century the word ‘nation’ had different connotations from those associated with it today” (p. 89), as did the concept of citizenship. As Heater explains, prior to the 17th century, one’s citizenship was informally tied to their place of birth, residence, social ties (e.g., employment, religious belief, language, ethnic heritage, etc.), and land ownership—a passive status not normally determined or dictated by the state. It was during the 17th and 18th centuries, with the onset of the French and American Revolutions, that the contemporary understanding of citizenship emerged (Heater, 2004; Tilly, 1996). During this period, a person’s¹¹ citizenship became tied to his or her allegiance to a national government, willingness to provide military service, and right to vote (Tilly, 1996, pp. 223–236). As both Heater and Tilly describe, the notion of citizenship moved from being a passive informality to that of a prescribed rights.

Attached to the new concept of citizenship was that of race and ethnicity. Evolving from the 18th century and becoming defined within the 19th and 20th centuries, citizenship not only became tied to a person’s place of birth, allegiance to a nation-state, or willingness to fight in the national military; it was also tied to being perceived as “civilised.” In reviewing the Australian reality during the mid-19th century, Anderson and Perrin (2008) identify that “the idea of race underwent a radical shift in the mid-nineteenth century” (p.

¹¹ Although during this period woman, criminals, homeless, and others viewed as lower class (e.g. indigenous people, slaves, disabled, persons of colour, those of non-European ancestry, etc.) were not afforded the right to vote, if they maintained some social tie to the nation (e.g. born in the territory, married or otherwise related to a male afforded the right to vote, etc.), the state still recognised them as having limited legal and political rights akin to citizenship rights (see Tilly, 1996).

962), being that “all civilized people had been savages and all savages are destined to become civilized” (p. 967). It was during this period that European colonialists began to alter their view of what constituted “human beings” and, as such, also their idea of what constituted being a citizen (Chesterman & Galligan, 1997; Heater, 2004). However, until the European colonial powers viewed either the indigenous populations or those people brought to their occupied territories as being “civilized,” they would never be viewed as equals or granted the same social privileges or political and legal rights—especially recognition as being a citizen (Chesterman & Galligan, 1997).

The period from the mid-18th century through to the beginning of the 20th century constituted a period when nation-states were emerging from their colonial roots, the concept of citizenship was becoming more formalised, and the first wave of the global migration (both voluntarily and forced) began. Starting in the early 19th century with the introduction of scheduled oceangoing steamships, legislation meant to deal specifically with citizens and non-citizens (immigrant groups) became a priority for European, colonial, and postcolonial governments (Jupp, 2002; Kelley & Trebilcock, 1998; Meyers, 2004). At the beginning of this period, there were very few requirements for entering or living within a European colonial or postcolonial state. In essence, the only border or migration control that existed prior to the early to early 19th century was a steamship ticket. For this reason, initial immigration records and statistics consisted primarily of ship passenger logs, land titles, and census records (Hawkins, 1991; Immigration Museum, 2007; Kelley & Trebilcock, 1998).

With this first wave of global migration came the enactment of legislation by colonial and postcolonial nations which defined what it was to be a citizen, outlined the legal processes associated with immigration, and also included rudimentary provisions for prohibiting specific groups of people from entering into a territory (Hawkins, 1991; Immigration Museum, 2007; Kelley & Trebilcock, 1998). In 1790 the United States

proclaimed its first immigration law, the *Naturalization Act*; in 1792, the United Kingdom enacted the *Aliens Act*; in 1869, the Dominion of Canada introduced its first *Immigration Act*; and in 1901, the Commonwealth of Australia brought in its *Immigration Restriction Act* (Jupp, 2002; Meyers, 2004). Further to these initial pieces of legislation, many nations attempted to control the settlement of non-whites within their territories by enacting overtly racist laws such as the British *Registration of Aliens Act* (1836), American *Chinese Exclusion Act* (1882), and Canadian *Chinese Immigration Act* (1885) (Meyers, 2004). It was during the later part of the 19th and early 20th century that the contemporary notions of citizenship and immigration emerged, and when internal immigration enforcement began.

II-2-c) The Age of Global Conflicts to the Emergence of Globalisation

With the introduction of transoceanic passenger steamships in the early to mid-19th century came the beginning of mass global migration (Hawkins, 1991). It was also during the late 19th and greater part of the 20th centuries that competing interests and ambitions between rival imperial and state powers resulted in major international conflicts and wars (Best, 2008). Earlier regionalised conflicts such as the Franco-Prussian War (1870–1871), Boer War (1899–1902), and Russo-Japanese War (1904–1905), followed by the global conflicts of World War I (1914–1918) and World War II (1939–1945), and subsequently with Cold War (1947–1991), all provide examples of how advancements in transportation and weapons technologies and increased and intensified international relations resulted in what once would have been localised conflicts turning into global ones (Best, 2008; R. Cohen, 1995). Colonial and postcolonial powers were allied with their motherland states in Europe, and as such were obligated to contribute forces during times of military conflict. With advances in manufacturing and transportation technologies, colonial and postcolonial states were able to ship weapons, food, troops, and other needed war supplies to their motherland in Europe within a matter of days or weeks (Best, 2008).

Furthermore, it was during the 20th century that colonial powers gained independence (Hodgins et al., 1978; Jupp, 2001; Kelley & Trebilcock, 1998) and when global state unions such as the Imperial Conferences (1911–1931), League of Nations (1919–1946), Commonwealth of Nations (1931–present), and UN (1945–present), were formed (Caporaso, 2000). Resulting from the emergence of new postcolonial nation-states, increased tensions and alliances between European states, World War I, and the creation of the League of Nations, international standardisation of border crossing protocols began to be established. Since the beginning of the 20th century, border and immigration enforcement have come to include passports, armed border officers, and militarised structures along geo-political boundaries (Torpey, 2001).

II-2-d) The Emergence of Contemporary Border and Immigration Controls

Starting in the early 1900s, Britain and other European nations began to utilise identity documents to categorise their own national citizens and establish the nationality of those seeking to enter their territory (UK Home Office, 2008). In 1920, the practice of recording and identifying citizenship was formalised by the newly established League of Nations with the introduction of an international standard for passports. With the international passport standard also came the agreement between members of the League of Nations on what constituted one's nationality (Torpey, 2001). In 1921, the United States became the first nation to implement a quota for the number of foreign-born migrants allowed to settle within their borders,¹² ultimately launching the practice whereby nations not only restricted who could enter their borders, but also how many persons would be allowed to come in during a set period. Initiated during the 1920s and accelerating through the Cold War era, nations enacted immigration legislation that defined inadmissible immigrant groups, set

¹² In 1921, the United States became the first nation to impose monthly quotas on the number of settlers of foreign origin; however Canadians and Latin Americans were exempt from this law (Higham, 2002).

quotas for the number of immigrant and refugee admitted to a nation, restricted a non-citizens allotted periods of stay, and provided for the removal of non-citizens who violated the law (Meyers, 2004).

Specific to the Cold War period (1947–1991), nations allied with either the Soviets or Americans established immigration laws specifically to address issues such as espionage, sabotage, and subversion of government by foreign nationals (Meyers, 2004). It was also during this period that physical barriers such as the Berlin Wall were erected, border-monitoring technologies were introduced, and geo-political boundaries became militarised. Specific to immigration enforcement, this period saw governments beginning to utilise their immigration and national police services to monitor the activities and take enforcement action against non-citizens deemed to be a threat to national interests (Winterdyk & Sundberg, 2010b). It is significant that these early to mid-20th century immigration laws, policies, and practices remain the basis for most of today's contemporary border and immigration enforcement systems throughout the world (Winterdyk, 2010).

II-2-e) The Post–Cold War Period, Globalisation, and Era of Global Terror

Starting with the dismantling of Berlin Wall in 1989 and unification of Germany in 1990, followed by the 1991 signing of the *Belavezha Accords*, came the ending of the Cold War (Brunet-Jailley, 2007; Buchanan & Moore, 2003; Givens et al., 2009; Lake & Morgan, 1997). When the Soviet Union collapsed in 1991 and democracy and free market capitalism replaced the communist systems of the Eastern Bloc, a new era of global migration and trade began (Brunet-Jailley, 2007). Matters concerning trade, commerce, and migration were no longer impacted by the suspicions or competing interests of the Soviet and American superpowers. Globalisation brought an interconnected world economy, acceleration of international migration, and a liberalisation of national border and migration controls (Andreas, 2003; Zureik & Salter, 2005).

The most significant development during the later part of the 20th century was the initial enactment of the *Schengen Accord* in 1985 and subsequent expansion of this agreement in 1990 (Brunet-Jailley, 2007; Meyers, 2004). Furthermore, as a result of agreements such as the 1994 *North America Free Trade Agreement* (NAFTA) and establishment of organisations such as the 1995 World Trade Organisation (WTO), the years between 1985 and 1995 saw the most rapid and robust increase in global trade and migration in history. To accommodate globalisation, nations around the world began to amend their Cold War migration laws to allow for increased numbers of temporary workers, students, and tourists to cross and live within their respective territories (Meyers, 2004).

The period between the late 1990s through to 9/11 marked the second¹³ brief period when contemporary border and migration controls began to liberalise and the international free movement of people and goods accelerated to unprecedented levels (Andreas, 2003; Zureik & Salter, 2005). However, all the headway made to open border and promote international migration came to an abrupt halt on 9/11 with the al-Qaeda terrorist attacks (Zureik & Salter, 2005). Just as World War I resulted in the use of passports, the Cold War caused border militarisation, and post-Cold War globalisation resulted in border and migration control liberalisation, 9/11 saw nations around the globe rapidly reform both their border security and migration policies (Winterdyk, 2010).

Today, with rapid trans-global transportation, robust international trade, high-speed communications and exponentially advancing technologies, a ballooning world population, widespread economic disparity, conflict, and environmental degradation, the importance of controlling the trans-border movement of people and goods has never been more complicated or important (Andreas & Biersteker, 2003; Brunet-Jailly, 2007; Drache, 2004; Zureik & Salter, 2005). In the era of globalisation, especially in the aftermath of 9/11, the process of

¹³ As mentioned earlier, the first period of border control liberalisation among modern nation-states was during the beginning of the 20th century up to the beginning of World War I (Torpey, 2001).

crossing another nation's threshold and entering into their territory has become a highly sophisticated, regulated, and monitored process. Further to this, the control of non-citizens who reside within a foreign territory has gained greater official attention (Brunet-Jailley, 2007; Givens et al., 2009; Pickering & Weber, 2006; Pratt, 2005). Once inside the territory, those non-citizens suspected of breaching the conditions of entry can become subjected to similar enforcement actions traditionally taken by police against suspects.

II-2-f) The Contemporary Development of the Three-Phase Border Security Paradigm

As porous and open as today's borders have become for trade and travel, the question of how nations safeguard and sustain their sovereignty with a constant cross-border flow of people and goods, along with large populations of temporary non-citizens, remains of the utmost importance to policymakers and political leaders (Wade, 2010b). Beginning in 1985 with the opening of borders within Western Europe through the *Schengen Agreement*, and followed in 1989 with ending of the Cold War as a result of the *Malta Summit*, the world has experienced unprecedented global expansion in migration, commerce, trade, and communications (Volgy, Fausett, & Grant, 2005). The *Schengen Agreement* and *Malta Summit* acted as catalysts for the unmatched global networking of economies, societies, and governments (Banchoff, 2008; Europol, 2007; Perkmann & Sum, 2002). With this networking came a need for governments to redefine how they view their national geopolitical boundaries (Buchanan & Moore, 2003). In the two and a half decades subsequent to the *Schengen Agreement*, borders shifted from being nationally defined to being more regional in nature (Banchoff, 2008). Yet, despite this shift, nations still maintain control of their specific security and immigration processes—including control of internal immigration enforcement activities (Buchanan & Moore, 2003).

To accommodate post-Cold War expansion and the corresponding acceleration of globalisation, nations began developing complex and technologically sophisticated means to

facilitate trans-border commerce, investment, trade, and migration (Brunet-Jailley, 2007). At the same time, these nations also identified ways to effectively control, regulate, and monitor the rapidly increasing levels and frequency of people and goods moving through their ports of entry and into their sovereign territories (Salter, 2005). Even in regions such as the Europe Union (EU), where border checkpoints have all but disappeared, the significance and importance of national boundaries remains a paramount concern (Buchanan & Moore, 2003). Within the framework of the EU, the governments of Europe continually work to maintain and develop their distinct identities, ensure their national sovereignty, and overall improve the lives of their citizens, while at the same time promoting open borders and transnational trade and commerce (Europol, 2007). The same efforts can be observed in other regions where multinational trade blocs¹⁴ exist, such as North America (NAFTA), South America (MERCOSUR), the Caribbean (CARICOM), South East Asia (ASEAN), and Southern Africa (SADC).

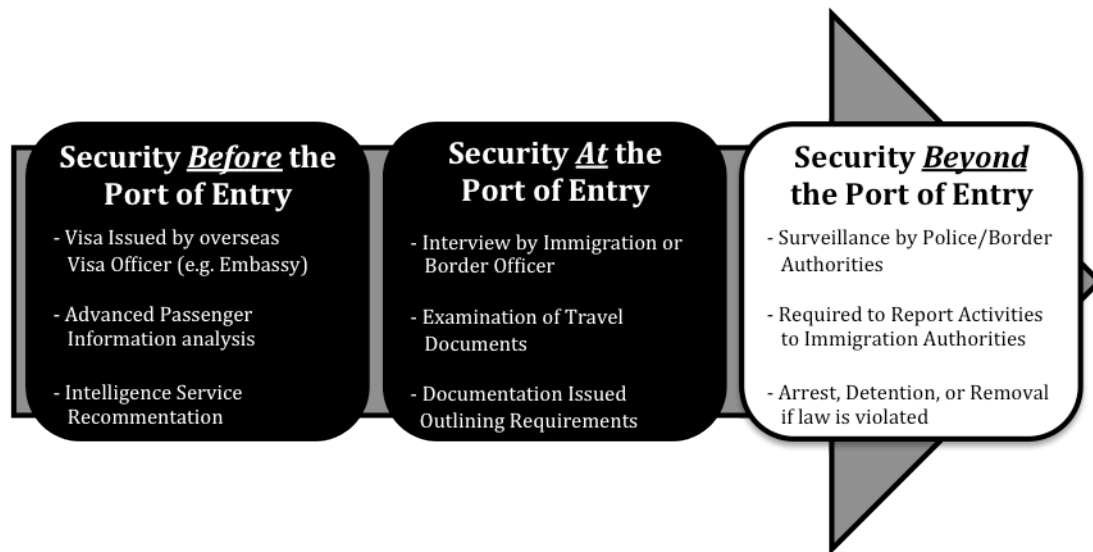
Zureik and Salter (2005) offer one of the more widely accepted and comprehensive description of how border and migration security around the world have manifested over the past quarter century into a three-phase paradigm: security *before*, *at*, and *beyond* the POE. The first phase involves the assessment of a non-citizen's admissibility prior to their appearance at a POE. During this phase, non-citizens may be required to apply to the foreign representative of the nation they wish to enter for a visa or other travel documents. If commercial transportation is utilised, the carrier is often required to electronically forward the personal information of its passengers to the border authorities of the nation they are travelling to for security screening and analysis. During this first phase, border authorities can conceivably prevent an undesirable non-citizen from appearing at their border by having commercial carriers prohibit the person from boarding their vehicle.

¹⁴ For the purpose of this thesis, *trade blocs* will refer to international economic and monetary unions, common market agreements, customs unions, and free trade zones (see Volgy, Fausett & Grant, 2005).

The second phase involves the nation assessing a non-citizen's admissibility at a POE. Within this phase, non-citizens are required to present themselves, their passport, and other supporting documents to an officer of the nation they are seeking entry. According to Salter (2005), inspection at the POE constitutes the most certain and immediate phase of the border security process. It is during this phase that nations exert their sovereign authority in the most immediate and certain manner. The POE officer makes the ultimate decision whether travellers will be permitted to cross through their nation's threshold or whether they will be turned away. In making this decision, officers utilise the information collected during the first phase of the border security screening process and review this information at the time the traveller is seeking entry.

The third and final phase of the border security paradigm begins at the point the non-citizen is permitted passage through the POE and into the nation. This final phase has taken on a new significance in the post-Cold War and post-9/11 eras. Although all nations historically have had processes in place for expelling non-citizens from within their borders, in the post-Cold War period, and especially in the aftermath of 9/11, nations have become highly cognisant of the activities and movements of non-citizens living among their citizens (Andreas, 2003; Salter, 2005). During this third phase, non-citizens may be subject to surveillance and required to report their activities to the immigration authority and declare their place of residence within their host nation (Brotherton & Kretsedemas, 2008; Cole, 2005). Moreover, non-citizens wishing to remain in their host nation beyond their allotted period of stay, or wishing to change their initial immigration status, often must first apply to an immigration authority for permission.

Figure 3:
The Three Phases of Border Security (Before, At, and Beyond the Port of Entry)



The aforementioned phases of contemporary border security have emerged in parallel with the evolution and expansion of globalisation (Zureik & Salter, 2005). Aside from the rise in global migration and the upsurge in the free market economies, the emergence of globalisation in the post–Cold War era has also had many unfortunate and unintended consequences. In particular, since the late 1980s, there has been a dramatic increase in concerns surrounding transnational crimes such as human trafficking and smuggling, narcotics trafficking and smuggling, and global terrorism (Reichel, 2005; Thachuk, 2007). Nations have been continually developing and expanding their border security strategies and internal immigration enforcement efforts to address these concerns.

These contemporary challenges associated with globalisation came to an apex with the 9/11 terrorist attacks and subsequent November 12, 2002 threat by al-Qaeda to launch future attacks against Australia, Canada, France, Germany, Israel, Italy, and the United Kingdom (Stevenson, 2003). Shortly after 9/11, all of the aforementioned nations took visible steps to safeguarding their citizens from possible future terrorist attacks by fortifying their borders and increasing the control of non-citizens seeking entry and living with their territory

(Givens et al., 2009). This increased level of monitoring, controlling, and regulating the activities of non-citizens residing within their sovereign territory has come to be commonly referred to as *internal immigration enforcement* (Brotherton & Kretsedemas, 2008). It is this act of internal immigration enforcement that constitutes the third and final phase of the border security process—security beyond the POE.

II-2-g) The Transposition of Criminal Justice Controls on to Immigration Controls

Non-citizens are expected to obey the laws and regulations, and accept their host nation's general social norms. Failing to comply with these expectations can result in a non-citizen being arrested, detained, and ultimately forcibly returned to their nation of origin (Salter, 2005). In addition, and as was observed within many western democracies in the months following 9/11, non-citizens can at times find themselves viewed as being a potential threat simply because of their place of birth, nationality, or ethnic origins (Poynting & Perry, 2007). Cole and Lobel (2007) noted that in the months following 9/11, hundreds of thousands of non-citizens from Islamic states, who were temporarily living lawfully within the United States to study and work, found themselves required to report to immigration authorities for fingerprinting, photographing, and follow-up security interviewing by immigration officers. This discriminatory practice not only transpired in the United States, but also in other western democracies such as Australia and Canada—albeit in a less visible and more discreet fashion (Poynting & Perry, 2007). In short, some non-citizens have come to be viewed as potentially threatening outsiders whom governments have increasingly sought to monitor, control, or expel from their sovereign territory (Brotherton & Kretsedemas, 2008).

In most western democracies, new technologies have been introduced to assist in the monitoring, controlling, and regulating of non-citizens living abroad. As Pratt (2005) states, “criminal justice technologies have come to resemble immigration technologies—[in] that they are less transformative than exclusionary, less oriented towards integration and

rehabilitation than toward segregation and management, less about discipline than about risk” (p. 37). Dorais (2006), building on Pratt (2005), argues that nations such as Canada have surreptitiously introduced means of immigration control synonymous with those used in policing, justifying these actions as a means of protecting and maintaining their sovereignty:

This criminalization [of non-citizens] is part of a broader European, American, and harsher Australian tendency. . . . These measures include specific "technologies of power" (in Foucault's terminology) such as safe third country provisions. In Canada, the Immigration and Refugee Protection Act, enacted in 2002, constitutes the latest and most noticeable demonstration of this blurring. It emphasises the protection of national sovereignty and security, as well as administrative integrity, rather than the protection of refugees [or other non-citizens]. (p. 204)

It is apparent that in the post-9/11 era, an international trend has emerged whereby governments utilise criminal justice technologies and techniques to protect their borders and criminalise non-citizens suspected of violating immigration law (Andreas, 2003; Meyers, 2004; Zureik & Salter, 2005). Despite the obvious parallels between contemporary internal immigration enforcement and criminal justice practices, many western democracies (including Australia and Canada) argue that their internal immigration enforcement practices are simply means to ensure their sovereignty and are not intended to be punitive (Dorais, 2006). Yet, the reality is that any action whereby a person's mobility and freedom is curtailed (especially in an immigration detention facility) is essentially punitive (Grewcock, 2005). In the aftermath of 9/11, internal immigration enforcement has become the newest frontier where once administrative regulatory controls are becoming increasingly blurred with new policing powers.

II-3) Contemporary Developments in Border Security and Immigration Enforcement

Sparked by the evolution of modern terrorism, the study of borders has moved from primarily socio-economic in focus to a focus on how states exert their sovereignty and secure their frontiers (Andreas & Biersteker, 2003; Condon & Sinha, 2003; Drache, 2004; Givens et al., 2009; Winterdyk & Sundberg, 2010b; Zureik & Salter, 2005). Since the collapse of the Soviet Union in 1989, through to the early 21st century, the major literature addressing border security dealt with the smuggling of nuclear and conventional weapons from the former Eastern Bloc (Dörte, 2005), the “War on Drugs” and smuggling of narcotics from the developing world (Marcy, 2008), immigrant-related crimes such as illegal migration, human trafficking, and people smuggling (Briggs, 1992; K. Lee, 1998; Lynch, 1999; Shuck, 1998; Zucker & Zucker, 1996), as well as with the establishment of the *Schengen Agreement* in Europe during the 1990s (Zureik & Salter, 2005).

Although a limited number of pre-9/11 studies address the threat of trans-border terrorism by non-citizens (Philip, 1994), these studies are limited when compared with other border security research of the time. It is apparent from reviewing the literature that 9/11 served as the impetus for the majority of contemporary studies addressing border security and internal immigration enforcement reforms. Of the studies that do exist, the vast majority focus on enforcement actions taken against asylum seekers and refugees claimants (see Cole, 2005; Cole & Lobel, 2007; Pratt, 2005) with very little attention given to enforcement actions taken against temporary non-citizens who lawfully entered a country and subsequently violated the law (Brotherton & Kretsedemas, 2008).

Of the post-9/11 literature, only a handful of works examine issues surrounding internal immigration control and enforcement (see, e.g., Brotherton & Kretsedemas, 2008; Brunet-Jailley, 2007; Cole, 2002, 2005; Cole & Lobel, 2007; Cornelius et al., 2004; Freilich & Guerrette, 2006; Givens et al., 2009; Mace & Durepos, 2007; Martin, 2006; Meyers, 2004;

Palidda, 2006; Parenti, 2003; Pickering & Weber, 2006; Pratt, 2005; Van Krieken, 2002; Welch, 2007; White, 2002; Winterdyk & Sundberg, 2010a; Zureik & Salter, 2005). Of these works, most focus on the United States, some on Europe, and only Givens et al. (2009), Pickering and Weber (2006), Pratt (2005), Winterdyk and Sundberg (2010b), and Zureik and Salter (2005) explore either the Canadian or Australian reality in any depth. Pickering and Weber¹⁵ (2006), Pratt (2005), and Winterdyk and Sundberg (2010) constitute the only studies that take a criminological perspective to immigration enforcement in Canada and Australia. Weber (2006) points out that “[t]he voluminous literatures on sovereignty, citizenship and globalisation are unfamiliar and perhaps forbidden territory for most criminologists” (p. 36).

II-3-a) The Initial Emergence of Internal Immigration Enforcement: America and Beyond

The concept of internal immigration enforcement first emerged within the United States in large part because of the *Bracero Programs* (Bosworth & Flavin, 2007). Between 1942 and 1964, the U.S. Government enacted a number of laws and policies (commonly known as the *Bracero Programs*) to encourage Mexican nationals to temporarily enter the United States to assist with the development and expansion of American agricultural production (Bosworth & Flavin, 2007). These programs involved diplomatic agreements between the American and Mexican Governments aimed at facilitating the seasonal cross-border movement of thousands of Mexican nationals so they could work on American farms. Although hailed as a successful economic development initiative for American farmers (Gutierrez, 2001), the *Bracero Programs* have also come to be known as the catalyst that sparked the concept of immigration enforcement (Bosworth & Flavin, 2007; Brotherton & Kretsedemas, 2008; Givens et al., 2009).

¹⁵ In addition her co-authored/edited works with Bowling (2004) and Pickering (2005), Weber (2002, 2006) is the only writer meaningfully contribute the study of immigration enforcement within Australia from a criminological perspective, whereas Pratt (2005) is the only writer specifically contribute to the Canadian study.

Mexicans who had worked and lived in the United States under the *Bracero Programs* during the 1940s through 1960s established themselves within American communities and were reluctant to return to Mexico (Givens et al., 2009). Although these Mexicans were legally required to leave the United States at the end of the *Bracero Programs*, they felt socially and economically connected to America and remained (Givens et al., 2009).

With the ending of the *Bracero Programs* in 1964, the United States realised significant numbers of “illegal immigrants” were living within their borders. As Givens et al. (2009) described,

Three contextual changes beginning in the 1960s redefined the national [American] interest in immigration. First, with the termination of the Bracero Program in 1964 and the exhaustion of Latin-American import substitution during the 1970s, these years saw the beginning of a secular increase in undocumented immigration in the United States which has continued into the present period. Second, the Nixon administration launched Operation Intercept in 1969, initiating a “war on drugs” which also continues to this day. Third, in the aftermath of the Cuban Revolution, hemispheric migration relations took on greater strategic importance within the context of the Cold War. (pp. 17–18)

Subsequently, the United States expanded the enforcement capacity of its immigration officials to include the ability to actively seek out non-citizens (mainly Mexicans) living within their territory in violation of immigration law (Givens et al., 2009). Whereas immigration officers were traditionally located at POEs, after the *Bracero Programs* period (1942–1964), officers began to work within American cities and townships, actively investigating, locating, and taking enforcement actions against non-citizens in violation of immigration law.

Initially sparked by the 1959 Cuban Revolution, followed with by the ending of the *Bracero Programs* in 1964, and accelerated with President Nixon’s “War on Drugs” and

establishment of the U.S. Drug Enforcement Agency in 1973, the concept of the “illegal immigrant” emerged within the lexicon of American governmental and social discourse (Brotherton & Kretsedemas, 2008; Givens et al., 2009). Shortly after this period, other nations aligned with the United States, including Canada and Australia (Jepp, 2009), began viewing non-citizens who violated their immigration law as being possible national security risks (Givens et al., 2009). By the mid-1970s, most western nations had established organisations specifically tasked with immigration enforcement duties.

II-3-b) Transnational Crime and Terrorism as the Impetus for Modern Border Security

As identified, since the early 1900s through to the beginning of the 1950s, most western democracies primarily focused their border security efforts toward customs and agricultural inspection related issues (e.g., intercepting contraband goods, assessing duties and taxes on imported and exported goods, inspecting agricultural imports, etc.) (McIntosh, 1984). It was not until the mid-1940s, with the ending of World War II and subsequent emergence of the Cold War, that issues surrounding immigration came to the forefront of border security concerns (Buchanan & Moore, 2003; Kelley & Trebilcock, 1998).

As previously identified, starting in the 1940s, labour unions throughout the post-industrialised world began demanding that foreign workers be restricted from working in jobs traditionally occupied by unionised workers (Jacobson & Geron, 2008). Stemming from this pressure, in particular the assertion by many union leaders that World War II veterans were being denied employment because of an influx of cheaper foreign labourers, most western democracies strengthened their immigration laws concerning foreign workers, and also began deploying immigration officers traditionally situated at ports of entry to conduct inspections at factories, farms, and other domestic employment locations, seeking out “illegal” workers (Brotherton & Kretsedemas, 2008). It was also during this period (especially during the Cold War era) that many western democracies began having their internal immigration

enforcement authorities assist the police and intelligence organisations identify and arrest non-citizens suspected of being involved in activities such as transnational crime, subversion of government, espionage, and, to a lesser degree, terrorism (Brotherton & Kretsedemas, 2008). Although current internal immigration enforcement authorities in most western democracies view counter-terrorism as a vital operational focus (Givens et al., 2009), it has only been since 9/11 that this focus emerged (Sheridan, 2005).

Prior to 9/11, most western democracies (including Australia and Canada) viewed the threat of terrorism as being limited to groups having specific political, ethnic, or religious objectives they wished to achieve within a specific geographic region (e.g., the Red Army Faction in Germany, Red Brigades in Italy, Front de Libération du Québec in Canada, etc.). Although the activities of these initial contemporary terrorist groups at times involved transnational movements, the police and intelligence agencies investigating them generally addressed their counter-terrorism strategies independently. It was only during a few rare circumstances (most notably the 1972 Munich Olympics massacre and 1973 KLM Malta hijacking) that national policing and intelligence agencies came together to address transnational incidents of terrorism (Martin, 2006). As such, the perceived threat terrorist groups posed during the 1970s through to the 1990s had little impact on the way nations controlled their borders or enforced their immigration laws (Welch, 2007). Although during the mid-1960s to early 1980s, many European and other developed nations, such as Canada and Australia, amended or began to interpret their existing immigration legislation to address terrorist threats from non-citizens,¹⁶ as will be discussed in detail within the following sub-sections, it has only been since 9/11 that internal immigration enforcement authorities have actively investigated suspected foreign terrorists (Sheridan, 2005).

¹⁶ In Canada, §19(1) of the *Immigration Act* [S.C. 1976, s.4] included for the first time, provisions for non-citizens engaged in “acts of espionage, subversion, terrorism, or violence” to be deemed inadmissible. Similarly in Australia, §501 of the *Migration Act 1958* (Cth), has been utilised to deny, detain, and remove non-citizens believed to be involved in terrorist related activities (UN, 2006).

II-3-c) Evolution of the Australian and Canadian Border Security Strategies

Being former British colonies, Canadian and Australian border security strategies are historically tied to British laws and were administered by Her Majesty's Customs until the later part of the 1800s (Heick, 1978; Norris, 1978). Her Majesty's Customs first commenced tax collection duties within the Dominion of Canada in 1869 and acted as Canada's customs service until the establishment of Canada Customs in 1873 (McIntosh, 1984). With the passing of Canada's first *Immigration Act* in 1906, the responsibility for the selection and settlement of newcomers moved from the Canada Customs portfolio into the newly established Immigration Department under Canada's first Immigration Minister (Knowles, 2000). With the birth of the Commonwealth of Australia in 1901 came the establishment of the nation's first two federal government departments—the Department of Trade and Customs (Australian Customs Service [ACS], 1999) and Department of External Affairs (MacKirdy, 1959). Both these federal departments took responsibility for administering and enforcing Australia's first immigration legislation, the *Immigration Restriction Act* (1901) (known today as the *White Australia Policy*) (York, 2003).

Prior to each nation gaining independence from Britain, Her Majesty's Customs was responsible for all matters concerning the entry of people and goods into Australia and Canada (ACS, 1999; McIntosh, 1984). It was not until 1869 with the establishment of the Dominion of Canada and the 1901 establishment of the Commonwealth of Australia that the two nations gained independent control of their borders. Australia has always maintained separate immigration and customs services, whereas, until 1906, Canada had its Customs department manage both customs and immigration related responsibilities (Knowles, 2000; McIntosh 1984).

Since their respective independences and through the post-*Statute of Westminster* period (1931–1986), both Canada and Australia have had their Customs Officers as the

primary examiners of people seeking entry to their territories and have had their immigration authorities reserved for secondary examination and internal immigration compliance and enforcement duties (ACS, 1999; Hawkins, 1991; Knowles, 2000). As Hawkins identified, both Canada and Australia had very similar administrative and regulatory approaches, laws, and policies for their respective immigration programs (p. 256).

Until the creation of the CBSA in 2003, the immigration programs of Canada and Australia remained virtually identical since the early 1900s (Sundberg, Trussler, & Winterdyk, 2012). The establishment of the CBSA marked the first time Canada deviated from its British history to create what is very much an American-style border-policing agency—namely, having armed officers having policing powers enforce its customs and immigration laws (Winterdyk & Sundberg, 2010b). Although in the first few years following 9/11, many within Prime Minister John Howard’s cabinet called for the creation of a homeland security department for Australia similar to that in the United States (Jupp, 2006), after completing a subsequent comprehensive review of its existing border security programs, the cabinet of Prime Minister Kevin Rudd decided to maintain Australia’s traditional immigration, customs, and agriculture departments (see sections *II-3-e* and *V-3-a* below for full discussion).

II-3-d) The Emergence of Immigration Enforcement in Australia and Canada

As former British colonies, Australia and Canada share many common economic, social, and political aspects. Specific to issues surrounding the management of their borders, over the past half century, both Australia and Canada have made significant efforts to open their borders to foreign people and goods, with the aim of developing their domestic economies and societies within the ever expanding globalised world. As will be discussed, since the early 1900s, Australia and Canada have in many ways developed in parallel trajectories. In respect to their approaches to border security and internal immigration

enforcement, since the early 1900s up until 2003, both Australia and Canada maintained similar immigration, customs, and agricultural inspection agencies based on the historic British model of having public servants administering their agricultural, customs, and immigration laws (Tascón, 2010 & Winterdyk & Sundberg, 2010b).

The function of identifying, arresting, detaining, and ultimately removing non-citizens who lawfully or unlawfully enter Canada and subsequently violate immigration legislation is commonly referred to in Canada as *inland immigration enforcement* (CBSA, 2008a). In Australia, this synonymous function is referred to as *onshore immigration compliance* (DIAC, 2011b). Despite the differing terminology, both programs involve immigration authorities identifying and taking enforcement action against non-citizens living within their territory who are believed to have violated immigration law. For both Canada and Australia, this concept slowly emerged in the post-war period of the 1950s with the creation of laws in both nations that imposed specific entry and residency requirements on non-citizens (Hawkins, 1991).

From the end of World War II through to the mid-1960s, concerns and corresponding actions surrounding “illegal immigrants” were primarily limited to the United States (Givens et al., 2009). Although the Canadian *Immigration Act* of 1952 and Australian *Migration Act* of 1958 both included provision to arrest, detain, and remove non-citizens deemed to be in violation of the law, neither nation specifically tasked an organisation to enforce these laws, and they were rarely enforced (Hawkins, 1991; Jupp, 2001; Meyer, 2004). Nations such as Canada and Australia were more focused on nation building and establishing their economies within a global context than with unlawful immigration (Jupp, 2009, p. 2). Canada and Australia primarily viewed non-citizens as being key to the development of their newly emerging and expanding industries. If a non-citizen violated the law, it was seen more as an

administrative infraction, and normally the non-citizen was simply asked to leave the country or pay a fine (Jupp, 2009).

Beginning in the later part of the 1950s and continuing through to present, national and multinational industries in what today are the G20 nations began to develop and expand on a global scale (Abowd & Freeman, 1991). It was during this period that the Canadian and Australian economies began to realise significant growth thanks in part to their success in integrating into world markets. As a result, demand for foreign workers increased and both governments began to actively recruit workers from around the globe to complement their domestic labour forces (Hawkins, 1991; Jupp, 2001).

Identifying the ways national and multinational industries in both Canada and Australia were exploiting foreign workers by paying them less than their domestic counterparts, failing to ensure workplace safety, and denying basic benefits, unions and labour groups began to aggressively lobby government to enact laws protecting the interests of both unionised and non-unionised domestic workers. At the same time, many Canadians and Australians began to view migrants as a threat to their ability to secure higher pay, job security, and benefits (Cornelius et al., 2004). In addition, rhetoric concerning the communist threat, especially during the years of the Vietnam War (1959–1975), fuelled anti-immigration sentiments in many of the western developed nations (Givens et al., 2009). During the 1950s and 1960s, the governments of Canada and Australia restricted industries from hiring non-citizens before exhausting domestic labour markets. In addition, Canada and Australia began using immigration officers to seek out non-citizens who were working without authorisation and started to penalise employers who hired them (Givens et al., 2009; Hawkins, 1991; Jupp, 2001).

By the late 1960s, Canada, followed by Australia, had created immigration programs designed to encourage the influx of foreign workers and investment while keeping out refugees and asylum seekers. As described by Cornelius et al. (2004)

the Australian government [had] fashioned a carefully managed immigration program modelled on the Canadian system, one that [admitted] skilled immigrants based on a qualification points test and [generated] a low proportion of family-based and humanitarian immigrations (refugee and asylum seekers). . . [Government] policies [had] taken a restrictive turn, marked by a draconian tightening of refugee and asylum policy and stronger border controls. (p. 24)

Furthermore, by the beginning of the 1970s, Canada and Australia had permanently established their immigration enforcement programs. Although the enforcement branches of both the Canadian and Australian immigration programs were modest in size,¹⁷ they nonetheless reflected many of the same elements found within the U.S. immigration system (Meyer, 2004); all three systems have immigration officers deployed internally within the territory, allow for the arrest and detention of non-citizens in violation of immigration law, and can result in the non-citizen being forcibly removed to their home nation (Givens et al., 2009). Whereas prior to the 1970s, non-citizens who violated immigration law were rarely arrested, detained, or required to exit the nation, since the 1970s, both Canada and Australia have routinely arrested, detained, and forcibly removed non-citizens (Global Detention Project, 2009; Jupp, 2001; Meyer, 2004).

II-3-e) Contemporary Immigration Enforcement in Australia and Canada

Despite nearly a century of approaching border security in the same fashion, in the aftermath of 9/11, Canada diverged from its century long shared path with Australia for a

¹⁷ Between 1971 and 2001, the percentage of officers specifically tasked with internal immigration enforcement never exceeded 20% of the total number of immigration officers working for either Citizenship and Immigration Canada or the former Australian Department of Immigration and Multicultural Affairs (Director Inland Immigration Enforcement (Canada)—S. Krammer, personal communication, June 18, 2008; Director Onshore Immigration Compliance (Australia)—D. Tanner, personal communication, July 14, 2008).

policing approach similar to that of the United States. Conversely, Australia maintained its traditional approach to border security, albeit with new provisions allowing increased information sharing with police and intelligence. This shared approach diverged in 2003 when Canada reformed its internal immigration enforcement program to include armed officers having policing powers enforce its immigration law (Winterdyk & Sundberg, 2010b). Considering many nations around the world implemented noticeable border security reforms in the aftermath of 9/11, in February 2008, former Australian Prime Minister Kevin Rudd asked his Defence Secretary Ric Smith to conduct a full review of Australia's national and border security programs (Maley, 2008). On December 4, 2008, after reviewing Smith's report which suggested Australia maintain its established approach to border security, Prime Minister Rudd announced that his government would retain its traditional approach to border security, thus continuing Australia's tradition of enforcing immigration law by way of a non-policing approach (Rudd, 2008).

Over the past two decades, especially in the aftermath of 9/11, non-citizens seeking entry to Canada and Australia have increasingly been subjected to government review, scrutiny, and suspicion (Brunet-Jailley, 2007; Cole, 2002; Givens et al., 2009; Jupp, 2009; Weber, 2006, 2007). In 2001, Canada introduced the *Immigration and Refugee Protection Act* and subsequently, in 2003, created the CBSA, the law enforcement agency now responsible for majority of immigration enforcement activities within Canada¹⁸ (CBSA, 2007b). In Australia, it was enactment of *The Border Security Legislation Amendment Act* (2002); July 14, 2005 *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* (commonly referred to as the *Palmer Report*); and October 6, 2005 *Inquiry into the Circumstances of the Vivian Alvarez Solon Matter* (commonly referred to as the *Comrie*

¹⁸ In addition to the CBSA, the Royal Canadian Mounted Police (RCMP) also enforce the *Immigration and Refugee Protection Act* when there is evidence showing a person unlawfully crossed the border between established POE's (border jumping) and in cases involving human trafficking and smuggling (Pratt, 2005).

Report)¹⁹ that caused the DIAC to reform the way cases involving the detention of non-citizens are handled (Australian Senate, 2006).

Although the terrorist attacks of 9/11 did not directly result in the enactment of *Immigration and Refugee Protection Act* or establishment of the CBSA, nor did they invoke the *Palmer and Comrie Reports*, there is little question that 9/11 resulted in Australia and Canada to view non-citizens with increased suspicion and as potential threats to national security:

[The Department of Immigration and Citizenship (DIAC)] assists counter-terrorism efforts by ensuring that all non-citizens seeking visas, passage and entry to Australia are checked against the Movement Alert List (MAL) of known individuals or profiles of security concern (National Counter-Terrorism Committee [NCTC], 2005, n.p.).

The Immigration Intelligence network of the Canada Border Services Agency (CBSA) is an important component of Canada's public safety and anti-terrorism initiatives. (CBSA, 2004, n.p.)

Whereas the Canadian and Australian immigration authorities traditionally have been departments responsible for facilitating the entry of settlers, encouraging the influx of foreign workers, and promoting international trade and commerce (Hawkins, 1991), in the post-9/11 period, these authorities are now increasingly responsible for security screening and identifying possible risk to national security. Advances in security monitoring technologies, investigative case management systems, and other enforcement-focused computerised databases have become common elements of each nation's immigration program (CBSA, 2009a; DIAC, 2009a).

¹⁹ The *Palmer and Comrie Reports* documented the wrongful detentions of Australian citizen Vivian Alvarez Solon and Australian permanent resident Cornelia Rau. The *Palmer Report* discussed the case where Solon wrongfully detained and subsequently deported from Australia, and the *Palmer Report* discussed how Rau, who suffered from mental illness, was mistaken for an unlawful non-citizen and detained for several months before being released from immigration custody (see VI-3-b below).

In Canada, Citizenship and Immigration Canada (CIC) is the primary organisation that advises parliament on immigration- and citizenship-related matters, processes permanent resident and citizenship applications, and issues visas to non-citizens seeking entry to Canada as temporary visitors, students, or workers.²⁰ The CBSA works under the guidance and policies of CIC and is responsible for all enforcement-, intelligence-, and security-related matters concerning non-citizens. Additionally, the CBSA also manages the immigration program at POEs (e.g., issuing work permits, student authorisations, and visitor records). In Australia, the DIAC is responsible for all matters concerning immigration and citizenship. Despite the similar administrative processes used by the CBSA and DIAC to take enforcement action against non-citizens, the operational means which Canada uses to compel a non-citizen to participate in its process is very different.

The CBSA approaches immigration enforcement in much the same way a police service approaches a criminal investigation. Canadian officers are armed with semi-automatic handguns and intermediate weapons (e.g., batons and pepper spray), carry and use handcuffs, and are trained to use physical force to gain compliance and arrest non-citizens believed to be in violation of *Immigration and Refugee Protection Act* (CBSA, 2007b). Conversely, as discussed in greater detail in the subsequent chapters, Australian officers are not armed, receive no police-style training, and have limited powers when detaining non-citizens suspected of violating the *Migration Act* (DIAC, 2009a).

Subsequent to 9/11, concerns regarding how foreign al-Qaeda terrorists lawfully entered the United States, establish themselves within American communities, compromised airport security, hijacked commercial airplanes, and ultimately murdered 2,819 innocent

²⁰ CIC is responsible for issuing visas to those persons from visa-required countries and for assessing all inland applications for permanent residency or extensions or change to the original status that a non-citizen was granted upon entry (CIC, 2008b). CBSA officers at POEs assess and admit persons who are from visa exempt nations (CBSA, 2008a). All persons, other than Canadian citizens or permanent residences, who have been granted entry to Canada as tourists, students, or workers (with or without a visa) are considered to be “temporary visitors” who may only remain in the territory for a limited and specified period of time, are limited in their ability to work and study, and do not have a right to remain or re-enter Canada without authorisation by a CBSA or CIC officer (CBSA, 2008b).

civilians have dominated the discourse among security professionals, media, and academics alike (National Commission on Terrorist Attacks Upon the United States [9/11 Report], 2004). Since 2001, there have been numerous studies examining these concerns and reviewing how the United States and others nations manage, control, and take enforcement actions against non-citizens living within their territory (Andreas & Biersteker, 2003; Brunet-Jailley, 2007; Freilich et al., 2006; Zureik & Salter, 2005).

Specific to Canada, initial reports shortly after 9/11 indicated that the al-Qaeda operatives permeated the U.S. border from Canada. These reports suggested that the Canada–U.S. border was a weak link in America’s border security strategy due to Canada’s liberal immigration laws and lack of trained and armed law enforcement personnel guarding their side of the 49th parallel (Struck, 2005). Although this allegation was unfounded, it nonetheless resulted in Canadian officials reviewing, and ultimately reforming, the management of non-citizens seeking to enter and living in Canada (Biswas, 2007; Kruger, Mulder, & Korenic, 2004). This in turn resulted in a number of studies that analysed Canada’s response to 9/11, including in part how Canada conducted its immigration enforcement activities (Bell, 2004; Pratt, 2005; Hamilton & Rimsa, 2007).

In a similar manner to Canada, after 9/11, Australian officials changed the way they managed the movement and settlement of non-citizens seeking to enter and live within their nation (Jupp, 2009; Poynting et al., 2004; Weber, 2002, 2007). Although Australia has subjected non-citizens deemed to be in violation of Australian law to mandatory detention since 1991 (Jupp, 2009), the interception of the Norwegian ship *Tampa* on August 27, 2001,²¹ followed days later by 9/11, played a large part in how the former government of Prime Minister John Howard dealt with asylum seekers. Since these two events, research has started

²¹ In August 2001, the Australian Navy diverted the Norwegian ship *Tampa* to Nauru after it had rescued 433 asylum seekers from a sinking vessel off the coast of Australia. This event became a major theme of the 2001 Australian federal election when it was obscurely coupled with the terrorist attacks of 9/11 (Jupp, 2009).

to emerge addressing how Australia deals with asylum seekers and other non-citizens deemed a “threat” to Australia—in particular, how Australia manages immigration enforcement before, at, and beyond its ports of entry (Freilich et al., 2006; Givens et al., 2009; Pickering & Weber, 2006; Weber, 2002).

As Jupp (2009) identifies,

Before the rapid increase of Islamist terrorism at the turn of the century, intelligence work in the four states [United Kingdom, Canada, Australia, and New Zealand] was concentrated on Soviet espionage, producing several major successes in Britain and Canada but a more limited effect in Australia and virtually none in New Zealand. Intelligence agencies such as the British MI5 or the Australian Security Intelligence Organisation were trained and equipped to deal with foreign intelligence and deal with East European expatriate communities. British police and military intelligence was most useful in coping with the IRA. The London Metropolitan Police and Royal Canadian Mounted Police had the most experience dealing with immigration issues, but, while all permanent immigration applications were theoretically vetted, the likelihood of foreign infiltration for terror was very limited. (p. 198)

Jupp goes on to discuss that none of the Commonwealth nations were equipped to deal with global terrorism at the magnitude it emerged during the beginning of the 21st century, and as such were left scrambling to either reform or realign their national security apparatus:

The experience of the four Commonwealth democracies suggests that it is no easy task to provide adequate physical protection and empower security agencies while simultaneously protecting civil and human rights, alleviating community tensions and treating immigrants and asylum seekers fairly. Restructuring the British Home Office and the Australian Immigration Department and the rapid expansion of MI5 and ASIO were urgently necessary to avoid serious errors and weaknesses. At the same time many personal rights and liberties were limited and community relations damaged. This was, perhaps, the ultimate terrorist victory (p. 205).

While acknowledging that 9/11 was a major impetus for national security reform, Pratt (2005) accurately identifies that in Canada government focus on the non-citizen as a threat has existed years before:

While it is often claimed that everything changed after September 11th, that it is a brand-new world, the crime-security nexus coupled with emerging and powerful neoliberal concerns about fraud have guided and justified the promotion and development of extensive enforcement measures for some time.
(p. 161)

Starting in America during the 1960s and expanding to include Canada and Australia, non-citizens have for decades been viewed as a possible threat. In her work *Australia and Border Protection: Morphing Racial Exclusion into Terror[ism]*, Tascón (2010) identifies that “Australia has been developed around a homogeneity that relied heavily on fear of the other as a possible invasive force, which then went on to feed the ‘terror’ of terrorism” (p. 286). Pratt (2005) reflects a similar reality within the 1970s Canadian context in her observation that

[t]he growing number of non-white new immigrants and refugees was not paralleled by growing social acceptance. Onshore refugees in particular were the targets of negative representations and attitudes. Refugees were increasingly regarded as a multifaceted threat—a numerical threat to be limited and managed in the name of administrative efficiency, fiscal restraint, and economic growth; a threat to the “integrity” of the system due to fraudulent claims made by unscrupulous, “bogus” refugee claimants; and a threat to the national security and public safety posed by criminals and terrorists. (p. 95)

The negative view of refugees was held toward non-citizens in general, especially those of colour who arrived from the developing world (Pratt, 2005; Tascón, 2010). Just as Tascón described that many in Australia felt that Asian immigrants constituted a “yellow peril” (see p. 277), a similar notion was felt among Canadians in regard newcomers from the developing

world (Pratt, 2005). These negative views arguably became manifested within the immigration policies of Australia and Canada, resulting in immigration officials focusing the majority of their enforcement efforts on suspected non-citizens who were non-white and who originated from areas other than the western world.

II-4) Bill of Rights and Internal Immigration Enforcement

II-4-a) The Emergence of Bills of Rights Among Western Democracies

One distinct difference between the otherwise analogous Australian and Canadian political and legal systems is that Australia lacks a supra-legislative bill of rights-type. Robertson (2009) identifies the conception of a bill of rights²² as originating with the original 1215 drafting of the *Magna Carta* between King John and his barons; later to be redefined by the British Parliament in 1628 (p. 19). Emerging from Clause 29 of the original 1215 *Magna Carta*, “to no man will we deny, to no man will we delay, justice or right,” came the notion that subjects (citizens) should be afforded fundamental rights. In 1628, British Parliamentarians resurrected the 1215 doctrine in an effort to counter the tyranny of King Charles I—ultimately introducing the notion of *habeas corpus*²³ (Radin, 1947). Radin describes this 1628 resurrection of the *Magna Carta* as being “an ancient fetish, a sort of medicine bag, pulled out of the dust of the record room by Coke and made into the symbol of the struggle against arbitrary power” (p. 1062). Although a very cynical account, the *Magna Carta* nonetheless constitutes the basis of all contemporary bills of rights (Robertson, 2009).

²² Contemporary bills of rights are either in the form of a national constitutional bill of rights (whereby the rights are entrenched within a national constitution and thus constitute supreme national law), or in the form of a statutory bill of rights (which is a standalone piece of legislation that is not a sub-component of a nation’s constitution). As such, a statutory bill of rights has limited application and can be amended or repealed by the government of the day, whereas a constitutional bill of rights is an integral part of a nation’s constitution and can only be amended through an explicit amending formula; a constitutional bill of rights when compared to a statutory bill of rights, is generally viewed as a superior doctrine (Banfield, 2010). Specific to the study of Australia and Canada, the state bills of rights found within Victoria and Tasmania would represent statutory bills of rights, and Canada’s *Charter of Rights and Freedoms*, being part of the *Canada Act*, would constitute a constitutional bill of rights. Of important consideration for Canada is that a national statutory *Bill of Rights* exists, however is rarely used post-*Charter* (MacIvor, 2006).

²³ Habeas corpus, also known as the *great writ*, guarantees persons detained by the ruling government to be informed of the reason for their arrest and be given the opportunity to challenge the legitimacy (legality) of the government’s action before a court (Robertson, 2009).

In contemporary terms, a bill of rights establishes a national “charter” that ensures the fundamental rights of people are protected against discriminatory or otherwise unjust government actions by an independent judiciary (Robertson, 2009). Generally, a bill of rights establishes a check against subjective and arbitrary state power, establishes parameters which guide and limit the actions of elected officials in their formulation and administration of law, and can only be suspended or amended through a complex and arduous legal process (Brennan, 1989). Furthermore, for a *bill of rights* to be meaningful and effective, it must be enforceable and entrenched. As Brennan states, “without some effective means of vindication, legal rights are apt to become little more than moral claims, readily ignored when the forces of government find it convenient to do so” (p. 426). He goes on to state that “it is crucial to the durability and efficacy of a [bill of rights] that it not be subject to easy alteration or suspension” (p. 227).

The first contemporary example of a constitutional bill of rights came on December 15, 1791 with the ratification of the *U.S. Bill of Rights*²⁴ (Sunstein, 2003). On September 25, 1789, James Madison of the U.S. House of Representatives proposed to the U.S. Congress a series of amendments to the *U.S. Constitution*. These amendments were meant to enshrine “natural rights” within the constitution and protect individuals, groups, and state legislatures from potential misconducts perpetuated by the newly established federal government and its institutions (Brennan, 1986). Based on the ideas of the British Age of the Enlightenment philosopher and physician John Locke, Madison proposed a series of 12 constitutional amendments (of which 10 were accepted) that would guarantee American citizens the right to free speech, the right to peaceful assembly, freedom of the press, the right to bear arms, the right to natural justice and *habeas corpus*, and the right to be protected against unreasonable

²⁴ The *U.S. Bill of Rights* constitutes the original 10 amendments made to the *United States Constitution* and ratified by a two-thirds vote of the 13 original United States on December 15, 1791. Once ratified, these original ten constitutional amendments became known as the *U.S. Bill of Rights*—although it is not officially titled as such (Brennan, 1986).

search and seizure—among other basic legal and political rights (Sunstein, 2003). Today, these first 10 constitutional amendments have come to be commonly known as the *U.S. Bill of Rights*.

Madison intended the *U.S. Bill of Rights* to act as a cautionary reminder for the newly formed federal government that it represents the people of the United States, derives its powers from the will of these people, and therefore must at all times act in their best interests of these people (Bernstein & Agel, 1993; Brennan, 1986)—this is exemplified in the preamble to the *U.S. Bill of Rights* which states,

The conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its power, the further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institutions. (Preamble to U.S. Bill of Rights as cited in Sunstein, 2003, p. 43)

In the aftermath of the U.S. Civil War—especially in the years following the 1950s and 1960s civil rights movement—the *U.S. Bill of Rights* came to exemplify what President Abraham Lincoln described as a “government of the people, by the people, for the people” (President Abraham Lincoln’s November 19, 1863 Gettysburg address, as cited in Bernstein & Agel, 1993, p. 86). Although the *U.S. Bill of Rights* has always contained language that encompasses the rights of all Americans, the reality is that for well over a century, these rights were only afforded to white male Americans (Sunstein, 2003). It was only through the creation of new laws (most which were enacted between the 1950s and 1990s) that the protections afforded by the *U.S. Bill of Rights* were extended to all Americans (Bernstein & Agel, 1993, pp. 303–308).

In 1873, subsequent to being arrested for “illegally” voting in the 1872 U.S. federal election,²⁵ suffragist pioneer and civil rights activist Susan B. Anthony expressed her frustration and dismay with the limited application of the *U.S. Constitution* (including the constitutional amendments that comprise the *U.S. Bill of Rights*) as it applies to woman and people of colour. During her famous speech “Is It a Crime for a U.S. Citizen to Vote?” Anthony argued that denying woman (and other marginalised groups) to right to vote was a violation of the constitutional, in that “it was we, the people, not we, the white male citizens, nor yet we, the male citizens; but we, the whole people, who formed this Union” (as cited in Hammond, Hardwick, & Lubert, 2007, p. 41). Resulting from Anthony’s efforts, in 1920, the right to vote became entrenched within American law with the ratification of the Nineteenth Amendment to the *U.S. Constitution*. Yet, despite the effort of civil rights pioneers like Susan B. Anthony, it was not until the 1950s and 1960s when the natural rights afforded by the *U.S. Constitution* and *U.S. Bill of Rights* began being applied to all persons and groups (Brennan, 1986).

II-4-b) The Australian and Canadian Debates Surrounding Constitutional Bills of Rights

As discussed by Banfield (2010), during the late 1800s and early 1900s, when Australia and Canada incrementally began gaining independence from Britain,²⁶ legislators in both nations were fully aware of the debate surrounding the ratification of the *U.S. Bill of Rights*. Yet, unlike what transpired within the United States, when Australia and Canada began establishing their respective constitutions, both decided to model their federal

²⁵ At this time in American history, only white male American citizens were permitted to vote in municipal, state, and federal elections (Hammond, Hardwick, & Lubert, 2007).

²⁶ Resulting from the July 1, 1867 royal assent of *British North America Act*, Canada was afforded limited independence from United Kingdom through the creation of a Canadian parliament, senate, and judiciary (Cardinal & Headon, 2002). Resulting from this Act, on November 6, 1867 Canada held its first parliament under Prime Minister Sir John A. McDonald of the Conservative Party. Similarly, on July 9, 1900, when the *Commonwealth of Australia Constitution Act* was enacted, Australia gained limited independence from the United Kingdom through the creation of its own parliament, senate, and judiciary. Resulting from this Act, on May 9, 1901 Australia held its first parliament under Sir Edmond Barton of the Protectionist Party. Although both Australia and Canada attained their own governments in 1867 and 1901, respectively, the United Kingdom continued to have both legislative and judicial supremacy over both nations. It was not until 1982 with the passing of the *Canada Act* that Canada gained its full independence from the United Kingdom, and 1986 with the passing of the *Australia Act* that Australia gained its full independence.

parliaments on the *Westminster Parliamentary System* without having separate constitutional bill of rights (Byrnes, Charlesworth, & McKinnon, 2009).

The founding legislators of Australia and Canada viewed having separate bill of rights as unnecessary, in that their respective constitutions included provisions that protected rights of citizens, organisations, as well as municipal and provincial/state governments (Banfield, 2010). Moreover, these founding legislators viewed the *U.S. Bill of Rights* as emulating the revolutionary foundation of the United States (and in essence denounced the *Westminster Parliamentary System*), and therefore felt a similar doctrine was not suitable for nations such as Australia and Canada that peacefully progressed from British colonies to key dominions within the modern British Commonwealth system (Cardinal & Headon, 2002). It was not until the 1982, when Canada enacted its *Canadian Charter of Rights and Freedoms*, that this shared sentiment changed (Banfield, 2010).

Since the time Australia and Canada established their original constitutions, up until 1982, when Canada introduced its the *Canadian Charter of Rights and Freedoms*, the courts in both nations interpreted their respective constitutions as being *implied* bill of rights (Cardinal & Headon, 2002, p.18). As discussed by Cardinal and Headon, individual and political rights in Australia and Canada were approached from a natural law perspective, where collective rights generally took precedence over those of individuals (p. 41). It was not until after World War II that individual rights became a principle topic of discussion among politicians, the media, and general public—causing parliamentarians in both Australia and Canada to reopen the debate surrounding whether or not to establish constitutional bill of rights (Banfield, 2010). To date, the Australian Parliament has maintained that its constitution adequately protects the rights of individual, groups, and municipal/state governments, and that a constitutional bill of rights is not necessary (Charlesworth, 2008). Conversely, in 1982,

Canada departed this once-shared position and began the process of codifying rights through the enactment of the *Canadian Charter of Rights and Freedoms* (Banfield, 2010).

As Williams (2004) discusses, despite Australia not having a constitutional bill of rights, individual rights, to a certain degree, have always been protected by the *Australian Constitution* s 51 (xxix). Over time, individual rights in Australia have become reinforced through the establishment of jurisprudence as well as through the enactment and amendments of legislation. Banfield (2010) echoes Williams' (2004) observation, in that prior to the 1982 enactment of the *Canadian Charter of Rights and Freedoms*, individual rights in Canada were also protected, to a certain degree, through Canada's constitution and common law tradition.

Individual rights in Australia and Canada have traditionally been residual in nature—meaning everything *generally* was permitted that was not expressly prohibited. Subsequent to the enactment of *Canadian Charter of Rights and Freedoms*, this shared tradition changed when Canada codified its rights through its constitutional bill of rights—meaning everything generally is prohibited that is not expressly permitted (Foster, 2012). Orend (2002) observes that opponents to the codification of rights claim such doctrine to be anti-democratic in that it diminishes the authority of a democratically elected government to represent the interests of the majority and assure the public good. Conversely, Orend asserts that a reliance on residual rights has in many historic instances resulted in what Alexis de Tocqueville (1808–1859) coined as the *tyranny of the majority*, and that supporters of codified rights assert the need for individuals to be “protection not only from criminals and dictators but also from a malign majority abusing its democratic control over core social institutions” (p. 184). While not as dramatic as the debate Orend suggests, the debate surrounding the protection of individual rights in Australia and Canada is nonetheless one of residual versus codified rights.

Cardinal and Headon (2002) suggest that the codification of rights are best protected when parliament cannot alter them easily or when the common law is vague or unclear—such as in the case of a constitutional bill of rights. Moreover, individual rights are best preserved when courts are task with interpreting these rights in accordance with established legal principles rather than by politicians who often are guided by subjective and partisan pressures. Commenting on the limitations of Australia’s constitution to definitely defend human rights, Williams (2004) acknowledges,

The protection the [Australian] constitution gives to human rights is deficient. Constitutional freedoms are few, and many basic rights receive no protection. A quick comparison between the Australian constitution and other like instruments, such as the Canadian Charter of Rights and Freedoms, makes this clear. As well as failing to protect many basic rights, the constitution fails to guarantee that all Australians are entitled to the rights it does offer. Several important “gaps” exist. (p. 45)

Conversely, those opposed to the codification of rights argue that rights become restricted to those that are specifically stated, often are misunderstood to be infeasible, and ultimately contradict the tenets of the *Westminster Parliamentary System* in that an appointed judiciary, as opposed to elected parliament, interprets, defines, and enforces the rights within society. Bob Carr (2001), former Premier of New South Wales, exemplifies this common opposition in his January 9, 2001 opinion piece published in *The Australian*:

Parliaments are elected to make laws. In doing so, they make judgments about how the rights and interests of the public should be balanced. Views will differ in any given case about whether the judgment is correct. However, if the decision is unacceptable, the community can make its views known at regular elections. This is our political tradition. A bill of rights would pose a fundamental shift in that tradition, with the Parliament abdicating its important policy-making functions to the judiciary. . . . A bill of rights is an admission of the failure

of parliaments, governments and the people to be behave in a reasonable, responsible and respectful manner. (p. 17)

Reflecting on the common notion that a bill of rights for Australia would abdicate Parliament's policy-making function, Charlesworth (2008) writes,

This bipartisan faith in the convention of responsible government and the traditions of majoritarian parliamentary sovereignty to protect individual rights has not been justified in practice in Australia. Our legal history is littered with laws that discriminate against particular groups. . . . Political majorities and the majority of the community are unlikely to be concerned if the rights of an unpopular minority group are infringed. . . . The claim that "robust parliamentary debate" operates to protect rights has little empirical basis in Australian history. . . . Political debate is strictly governed by party allegiance, and rare attempts by individual politicians to pursue human rights issues have almost always been muzzled. (p. 38)

Considering the aforementioned, there is value in exploring how Australia's absence of a bill of rights and Canada's enshrined *Canadian Charter of Rights and Freedom* [1982] (commonly referred to as the *Charter*) impact the study of internal immigration enforcement for both nations. When Canada introduced the *Charter*, it became the supreme law (supra-legislative doctrine) that all other Canadian legislation must observe (Brennan, 1989). In Australia, where no similar national legislation exists, the traditional British notion of supremacy of parliament remains in place (Evans, Evans, & Evans, 2008; King & Winterdyk, 2011; Robertson, 2009; Williams, 2004). Because Canada's *Charter* assists in guaranteeing the rights and freedoms of all persons who are within Canadian territory (regardless of citizenship or immigration status), cases involving suspected unlawful non-citizens must be dealt with in the same manner as cases involving Canadian citizens who are suspected of violating the law. Conversely, Australia's lack of a similar constitutional bill of rights

essentially means that laws enacted by the Parliament of Australia²⁷ can be applied differently depending on a person's citizenship (Robertson, 2009).

II-4-c) Canadian Charter of Rights and Freedoms

With the enactment of the *Canada Act* [1982], which includes the *Canadian Charter of Rights and Freedoms* [1982], came a momentous shift in the Canada's political culture (Foster, 2012). In regard to how the *Charter* impacts internal immigration enforcement, the Government of Canada may not initiate or take actions against a suspected unlawful non-citizen without first ensuring that the individuals *Charter* rights and freedoms are observed, respected, and protected (Morton, 1987). Canada's *Charter* affords all persons, regardless of their citizenship or immigration status, fundamental rights and freedoms (Larsen & Piché, 2009). This is of paramount importance in the study of Canada's approach to internal immigration enforcement, in that regardless of the fact a non-citizen may be within the nation unlawfully, they are afforded the same legal protections and rights as a Canadian citizen.

Because the *Charter* ensures individual rights and freedoms are protected, at times the interests of the state may be superseded. Brennan (1989) identifies that nations having bills of rights have political and legal systems that focus more on the protection of individual rights as opposed to the state's interests. An example of this involves the issuance of security certificates (warrants) by the Minister of Public Safety against suspected non-citizens involved in terrorist activities (Larsen & Piché, 2009). Pursuant to §77 of the Act, suspected non-citizens involved in terrorist activities can be arrested, detained, and ordered removed based on secret evidence collected by Canadian intelligence services. Public Safety Canada (PSC, 2009) stated that it was imperative that evidence collected by intelligence agencies be

²⁷ Though Australia has a Human Rights Commission tasked with protecting specific rights of individuals, the findings of this commission are not binding and are limited to matters associated with the *Age Discrimination Act 2004*, *Disability Discrimination Act 1992*, *Race Discrimination Act 1975*, and *Sex Discrimination Act 1984* (Robertson, 2009).

kept secret and not disclosed during deportation hearings, in that if released intelligence operations could be compromised and national security jeopardised (Larsen & Piché, 2009).

The practice of using secret evidence was addressed within the landmark case *Charkaoui v Canada* [2007] SCR 350. In *Charkaoui*, the Supreme Court of Canada unanimously found that the government's existing practice of not disclosing secret evidence in the issuance of a security certificate and subsequent arrest, detention, and removal of non-citizens on the grounds of terrorist activities violated §7 of the *Charter* in that it negated the appellant's right to a fair hearing (Banfield & Zekulin, 2008). In their ruling, the court affirmed that any evidence used to issue a security certificate and subsequently arrest, detain, and remove a non-citizen on the grounds terrorist activities must be fully disclosed to the appellant and be made available during a judicial review. Resulting from this case, the Government of Canada has amended the Act's regulations to allow secret evidence to be disclosed to lawyers within special closed hearings whereby all present are sworn not to disclose specifics of the case publicly (Larsen & Piché, 2009). Through this example, it is evident that even when the state fears that the disclosure of secret evidence may inhibit their intelligence operations, the rights of an individual must still be considered and respected.

Stemming from the *Charter*, an officer wanting to take action against a suspected unlawful non-citizen, must first lawfully²⁸ collect evidence to develop reasonable and probable grounds that an individual has in fact violating the *Immigration and Refugee Protection Act* (Citizenship and Immigration Canada [CIC], n.d., Ch. 7). Even after evidence is collected, reasonable and probable grounds attained, and the suspected unlawful non-citizen is arrested and detained, the validity of this enforcement action and detention must be determined by way of *habeas corpus* pursuant to §9(c) of the *Charter* (Larsen & Piché,

²⁸ In accordance with the *Charter*, evidence collected to support an allegation that an individual is unlawfully in Canada must be obtained pursuant to the *Evidence Act* (1985). The *Evidence Act* requires that any information used to take enforcement action against an individual be collected in compliance with the *Charter* and that this evidence be disclosed to the person whom the enforcement action is being taken against so it can be assessed within a judicial or quasi-judicial proceeding (Foster, 2012).

2009). If, during judicial or quasi-judicial review, it is determined that the non-citizen's arrest and detention was made contrary to the *Charter*, they must be released (CIC, n.d., Ch. 9). Furthermore, if the court finds an officer violated the *Charter* in their taking enforcement action against a non-citizen, pursuant to §24(1) of the *Charter*, the non-citizen "may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances" (§24(1) of the *Charter* as cited in CIC, n.d., Chs. 3, 7, 9).

The *Charter* has a significant impact on how internal immigration enforcement is conducted within Canada. Not only are the CBSA and other Canadian law enforcement agencies obligated to ensure the rights and freedoms of non-citizens, should they violate these rights, they themselves may have enforcement action taken against them by the courts. Resulting from this, the policies and procedures governing internal immigration enforcement are structured to ensure the *Charter* rights of those subject to the *Immigration and Refugee Protection Act* are safeguarded (see CIC, n.d.).

II-4-d) Australia's Absence of a National Bill of Rights

Reflecting on the influence the *Charter of Rights and Freedoms* has on Canada's internal immigration enforcement program, the absence of a similar national constitutional bill of rights in Australia affords an interesting issue for discussion when comparing internal immigration enforcement in both nations. As noted by Vrachnas et al. (2008), through a number of amendments to the *Migration Act* (most notably the Privative clause amendment of Part 8, §474 of the Act), decisions made under this Act are generally final and conclusive²⁹. In the absence of a constitutional bill of rights, the administration and enforcement of Australia's *Migration Act* allows for non-citizens to be treated differently

²⁹ Although the High Court upheld the constitutional validity of the privative clause in *S157/2002 v Commonwealth* [2003] HCA 2 (February 4, 2003), the court nonetheless maintained that the privative clause did not apply to "judicial review of decisions affected by jurisdictional error" (Vrachnas et al., 2008).

than citizens (Williams, 2004). Whereas in Canada, all detained persons (regardless of their citizenship or immigration status) must have the validity of their detention determined by way of *habeas corpus*, in Australia, this is not the case. Under §189 of the *Migration Act*, all unlawful non-citizens must be detained until they are removed, deported, or granted a visa (Glass, 2008; Vrachnas et al., 2008).

As discussed earlier, the Australian Government's ability to automatically detain all unlawful non-citizens under §189 of the *Migration Act* was affirmed with the 1992 case of *Chu Kheng Lim v. Minister of Immigration, Local Government and Ethnic Affairs*. With the *Lim* case, the Australian High Court affirmed that the rights afforded to Australian citizens did not automatically transfer to non-citizens (Williams, 2004). In the subsequent case of *Al-Kateb v Godwin* [2004] HCA 37,³⁰ the High Court of Australia also affirmed that indefinite detention of a stateless person was lawful, as long as immigration authorities continued to make reasonable efforts to remove the non-citizen in the future (Gelber, 2005).

Even with the right to judicial review of administrative decisions, in the absence of a constitutional bill of rights, an individual's rights and freedoms potentially are jeopardised. As identified by Gelber (2005), "in the absence of a clearer statement of rights from the legislature in the form of a statutory *bill of rights*, or more directly from the people in the form of a constitutional *bill of rights*, the High Court has shown that it will not always protect the rights of some the most vulnerable members of our society" (p. 321).

³⁰ Ahmed Al-Kateb was a stateless non-citizen who was born in Kuwait of Palestinian parents. Due to the being the son of Palestinian parents, he was negated from obtaining Kuwaiti citizenship. In 2000, Al-Kateb arrived in Australia, without first obtaining a visa, aboard a vessel that was unauthorised to disembark passengers on Australian territory. Because of his mode of travel and the fact he did not have a required visa, Al-Kateb was detained by Australian immigration officials. Because of his stateless status, neither Lebanon nor Kuwait agreed to the Government of Australia removing Al-Kateb to their nation. Subsequently, Al-Kateb was unable to be removed, and argued that his detention under s. 189 of the *Migration Act* was thus indefinite. It was not until 2007 that he was released from detention upon the granting of a visa by the Minister on humanitarian grounds.

II-5) Chapter Summary

This chapter identifies the predominant gap in literature specific to the study of internal immigration enforcement within Australia and Canada. In particular, this chapter identifies a noticeable lack of comparative criminological literature specific to the differing approaches utilised by both Australia and Canada to conduct internal immigration enforcement. Considering that internal immigration enforcement has become a more common issue within academic, political, and public discourse, this thesis seeks to provide new insight into whether or not a policing or non-policing approach has any discernible impact on how internal immigration enforcement is delivered. What's more, this thesis also seeks to provide insight into if the presence of a bill of rights effects the way suspected unlawful non-citizens are identified, arrested, detained, and removed from a nation.

As the literature suggests, 9/11 provided a rationalisation for Canada to create the CBSA and approach immigration enforcement similar to that of a police force dealing with criminals, and a justification for Australia to continue its security focused approach utilising existing means. While the literature shows how a historic fear of the other has resulted in governments to approach non-citizens in a manner akin to how criminals are dealt with by the criminal justice system, there is an apparent gap in the literature identifying how differing organisational approaches (i.e., policing vs. non-policing approaches) affect these vulnerable non-citizen groups.

Although immigration enforcement is regarded as an administrative process as opposed to a criminal one, the fact remains that those subjected to an immigration authority's actions may find themselves arrested, detained, and possibly removed to their country of origin (Pratt, 2005). The act of suspending a person's freedom through arrest and detention in itself warrants criminological inquiry (Weber, 2007). Since 9/11, there has been an increase in the number of studies specifically addressing internal immigration enforcement within the

United States, United Kingdom, Canada, and Australia, yet in comparison to the plethora of post-9/11 studies addressing the more broad issues of border security (in particular physical border security along a geo-political boundary), much work is still warranted and needed.

CHAPTER III: METHODOLOGY

Documents, both historical and contemporary, are rich sources of data for social research. A distinguishing feature of our society may well be the vast array of 'documentary evidence' which is routinely compiled and retained, yet much of this is neglected by researchers, perhaps because the collection of other sorts of social data (experiments, surveys, interviews, observations) has become more fashionable. This is ironic, since the development of society depended greatly on documentary research. (MacDonald & Tipton, 1996, p. 187)

III-1-a) Overview of Methodological Approach

This thesis utilises a documentary research methodology and takes a comparative criminological approach through the lens of peacemaking criminology. The use of a documentary research method in the social sciences “involves a *systematic* collection of data . . . for the purpose of finding and or understanding patterns and regularities [concerning a specific social phenomenon]” (Mogalakwe, 2006, p. 221). Comparative criminology involves the study and description of two or more nations’ law, criminal proceedings, justice processes, and/or criminal justice organisations, with the goal of building on the knowledge of one country by investigating and evaluating another (Nelken, 2010). The peacemaking criminology paradigm of Pepinsky and Quinney (1991) suggests that nations often promote and endorse crime and violence by criminalising non-violent offences, enacting inflexible laws, and enforcing laws in an aggressive and paramilitary manner (Akers & Sellers, 2009; Fuller, 2003). Pepinsky and Quinney (1991) further suggest that states that endorse and adopt peaceful and restorative responses to criminal justice concerns will ultimately realise safer and more cohesive communities (Ame & Alidu, 2010; Fuller, 2003). By taking a comparative criminological approach, utilising a documentary research methodology, and using peacemaking criminology as a guiding philosophical construct, this thesis reflects many of the other works that explore post-9/11 border security and immigration enforcement reforms (Brunet-Jailley, 2007; Cole & Lobel, 2007; Pratt, 2005).

III-1-b) International Comparative Criminology

As identified by Fairchild and Dammer (2001), Bennet (2004), Winterdyk and Cao (2004), as well as Reichel (2008), the terms *international criminology* and *comparative criminology* can have subtle differences in connotation and use. In essence, international criminology describes “one country’s law, criminal procedures, or justice process” (Fairchild & Dammer, 2001, p. 5) and assumes that when a difference is identified between two nations, “[the] difference is a difference, not that one element is somehow either better or worse than the other” (Winterdyk & Cao, 2004, p. 2). On the other hand, comparative criminology refers to the “systematic study of crime and its related activities in more than one society” (p. 2). Winterdyk and Cao observe that “because of its long history and its wide use, it has become difficult to avoid the word comparative in studies of two or more cultures/nations,” and go on to assert that the terms “international criminology” and “comparative criminology” can be used interchangeably (pp. 2–4). Today, the common definition of comparative criminology refers to an approach whereby data concerning the criminal justice system of two separate nations is systematically compiled and analysed, so as to identify both similarities and differences, the end goal being to suggest why certain relationships exist (Nelken, 2010).

As Reichel (2008) states, “To understand better one’s own circumstance it is often beneficial to have a point of contrast and comparison” (p. 4). Reichel describes three general approaches to comparative criminology: 1) a historic approach whereby an understanding and appreciation of history provides information about the present and future state of a criminal justice system; 2) a political approach that explains how and why a country treats criminal justice concerns in a certain way; and 3) a descriptive approach that explores the differences among standard components of similar criminal justice systems. This thesis takes the third approach described by Reichel, in that a descriptive analysis of the Australian and Canadian internal immigration enforcement programs is made through a documentary review method.

Specific attention is given to whether or not two differing organisational approaches influence the way suspected unlawful temporary non-citizens are identified, arrested, detained, and removed. Additionally, the question of whether or not the presence of a national constitutional bill of rights affords greater safeguards against erroneous or unlawful internal immigration enforcement actions is also explored.

To accurately and meaningfully conduct this comparative criminological study, the common elements of each immigration enforcement program must be identified. As already discussed, internal immigration enforcement is a process found within the immigration function of the third phase of the border security paradigm—border security *beyond* the POE (see Figure 3 above). Within this process are found the synonymous sub-components of identifying suspected unlawful non-citizens, arresting suspected unlawful non-citizens, detaining suspected unlawful non-citizens, and removing suspected unlawful non-citizens. In both Australia and Canada, suspected non-citizens are identified, arrested, detained, and removed by immigration officials; however, in Australia, a non-policing approach is taken, whereas in Canada a policing one is used.

An important consideration when using a descriptive approach for a comparative criminological study is the identification of common elements that result in organisations within two jurisdictions taking similar actions. As described by Reichel (2008), these elements can either be legislative in nature or more procedural—depending on the similarity of the law in each jurisdiction being studied. To provide an example of a legislative versus procedural comparative review, Table 2 below describes how Australia and Canada each prohibit non-citizens having criminal records (either domestic or foreign) from entering or remaining within their respective territories. In Australia, §501(6) and §501(7) of the *Migration Act 1958* (Cth) (hereinafter referred to as the *Migration Act*) address matters related to non-citizens with criminal histories, and in Canada, §36(1) and §36(2) of the

Immigration and Refugee Protection Act [S.C. 2001, c.27] (hereinafter referred to as the *Immigration and Refugee Protection Act*) address non-citizens having criminal histories.

Table 3:
Provisions of Australia and Canada Immigration Law Concerning Criminality

<i>Migration Act 1958 (Cth)</i>	<i>Immigration and Refugee Protection Act (S.C. 2001, c.27)</i>
<p>501(6) For the purpose of this section, a person does not pass the character test if:</p> <ul style="list-style-type: none"> (a) The person has a substantial criminal record (as defined by subsection (7)); or (b) The person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonable suspects has been or is involved in criminal conduct; or (c) Having regard to either or both of the following: <ul style="list-style-type: none"> i. the person's past and present criminal conduct; ii. the person's past or present general conduct; the person is not of good character; or (d) in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would: <ul style="list-style-type: none"> i. engage in criminal conduct in Australia; or ii. harass, molest, intimidate or stalk another person in Australia; or iii. vilify a segment of the Australian community; or iv. incite discord in the Australian community or in a segment of that community; or v. represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way. <p>501(7) a person will have a substantial criminal record if:</p> <ul style="list-style-type: none"> (a) the person has been sentenced to death; or (b) the person has been sentenced to imprisonment for life; or (c) the person has been sentenced to a term of imprisonment of 12 months or more; or (d) the person has been sentenced to 2 or more terms of imprisonment (whether on one or more occasions), where the total of those terms is 2 years or more; or (e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution. 	<p>36(1) A permanent resident or foreign national is inadmissible on grounds of serious criminality for:</p> <ul style="list-style-type: none"> (a) Having been convicted <i>in Canada</i> of an offence under an Act of Parliament <i>punishable by a maximum term of imprisonment of at least 10 years</i>, or of an offence under an Act of Parliament <i>for which a term of imprisonment of more than six months has been imposed</i>; (b) Having been convicted of an offence <i>outside Canada</i> that, if committed in Canada, would constitute an offence under an Act of Parliament <i>punishable by a maximum term of imprisonment of at least 10 years</i>; or (c) Committing [a conviction is not required] an act <i>outside Canada</i> that is an offence <i>in the place where it was committed</i> and that, if committed in Canada, would constitute an offence under an Act of Parliament <i>punishable by a maximum term of imprisonment of at least 10 years</i>. <p>36(2) A foreign national is inadmissible on grounds of criminality for:</p> <ul style="list-style-type: none"> (a) Having been convicted <i>in Canada</i> of an offence under an Act of Parliament <i>punishable by way of indictment</i>, or of two offences under any Act of Parliament <i>not arising out of a single occurrence</i>; (b) Having been convicted <i>outside Canada</i> of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences <i>not arising out of a single occurrence</i> that, if committed in Canada, would constitute offences under an Act of Parliament; (c) Committing [a conviction is not required] an act <i>outside Canada</i> that is an offence <i>in the place where it was committed</i> and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or (d) Committing [a conviction is not required], <i>on entering Canada</i>, an offence under an Act of Parliament prescribed by regulations [Section 19 of the IRPR prescribes the following Acts of Parliament: (i) the <i>Criminal Code</i>; (ii) the <i>IRPA</i>; (iii) the <i>Firearms Act</i>; (iv) the <i>Customs Act</i>; and (v) the <i>Controlled Drugs and Substances Act</i>].

In the above example, it is important to note that Australia views a criminal record as being defined as a criminal history, and that Canada views the same as being criminality—both mean a person who has been convicted by a court of law and have an official record of the conviction and corresponding sentence. This subtle difference in legal terminology exemplifies the need to identify reasonable and logical commonalities, and to assess if it is more suitable to forgo a legislative comparison for a procedural one (Nelken, 2010; Reichel, 2008).

Considering the noticeable differences between the *Migration Act* and *Immigration and Refugee Protection Act*, and reflecting on the merits and challenges associated with both

the comparative criminological legislative and procedural review approaches, this thesis uses the procedural comparison approach. It is important to acknowledge that within any comparative criminological study, there can never be a perfect and equal comparison, because every nation has differing laws and takes differing approaches to enforcing these laws (Fairchild & Dammer, 2001). However, despite these differences, social science researchers can still gain important meaning by identifying general similarities to achieve their review (Fairchild & Dammer, 2001; Reichel, 2008). Despite the differences between Australian and Canadian immigration law, there remains enough similarities between the organisations that enforce these laws to justify a procedural comparison.

Further to deciding between a legislative or procedural comparison (Reichel, 2008), and in addition to identifying comparable elements for each jurisdiction, rates for analysis must be achieved so that population differences can be accounted for (Nelken, 2010). As will be described in more detail within the following section, the classification of criminal justice elements is paramount in achieving an accurate, meaningful, and reflective comparative study (Nelken, 2010). This assertion is supported by Reichel (2008) in his identification that

[b]ecause it [classification] is a creation of reason based on accumulation of experienced data, a classification can be neither right nor wrong. It is merely an intelligible summary of information. Its value is determined by its usefulness to others. Importantly, saying that a classification is neither right nor wrong is not the same as saying that it cannot or should not be changed. If it ceases to be useful, it should be modified or discarded. (p. 24)

A comparative study never observes an exact parallel between the elements of two or more criminal justice systems; however, the classification of these elements can be made so a meaningful comparison can be achieved (Nelken, 2010). As mentioned, despite the differences in Australian and Canadian immigration law, both systems are based on a British common-law system, and as such, the sub-components associated with both nations internal

immigration enforcement functions are synonymous. Considering this, and drawing from Nelken (2010) and Reichel (2008), this thesis focuses more on the processes, functions, and sub-components associated with internal immigration enforcement, as opposed to legislative differences (or, as Reichel identifies, a procedural vs. legislative comparison).

Notwithstanding the differences in their laws, there remains rich value in comparing how Australia and Canada each operationally approach internal immigration enforcement—especially the procedural and operational differences in how they administer and enforce their respective immigration laws as they relate to suspected unlawful temporary non-citizens (see Nelken, 2010; Reichel, 2008). As MacMillan and McKenzie (2003) identify, the comparison of Australia and Canada is particularly fitting in that both nations share similar histories, societies, economies, as well as political and legal systems. Regarding the comparison of Australia and Canada in relation to trends and issues surrounding immigration issues, MacMillan and McKenzie observe,

Because Canada and Australia have common legal and political systems, parallel economic development, and similar demographics and patterns of settlement, as well as interconnected histories with the British Empire and Commonwealth, scholars in many disciplines have long realized the benefit of using these two countries as comparators across a wide range of subjects, including immigration. (p. 272)

Drawing on this observation, and reflecting on the benefits associated with comparative criminological research, this thesis aspired to broaden the understanding of how internal immigration enforcement is operationally approached within Australia and Canada, and explores the possible implications Australia's non-policing approach and Canada's policing one have on internal immigration enforcement.

III-1-c) Justification for a Comparative Review of Australia and Canada

Australia and Canada represent nations of vast geography with relatively small populations. They share similar cultural, governmental, historical, and legal traditions through their parallel emergences as former British colonies (Cornelius et al., 2004; Hodgins et al., 1978). Both Australia and Canada are viewed internationally as contemporary examples of democratic, tolerant, multicultural, and free societies with standards of living among the highest in the world (“Country Profiles,” 2008; UNWTO, 2010). Adding to the long list of similarities, Australia and Canada have comparable population sizes, including comparable foreign-born citizen populations and temporary non-citizen populations.

According to 2006 census data for Australia and Canada, Australia had the largest foreign-born population in the world at 22.2%, with Canada following closely behind at 19.8%. The United States, which lags well behind in third place, had a foreign-born population of 12.5%, nearly half that of Australia or Canada (Chui, Tran, & Maheux, 2007). Regarding their temporary and permanent non-citizen populations, the census data showed Australia having 3,747,388 permanent non-citizens and 203,874 temporary non-citizens, and Canada having 6,186,950 permanent non-citizen and 265,360 temporary non-citizens. To allow for an equal analysis of these two nations, Chapters IV through VII provide a detailed explanation of how population rates were achieved to afford a comparative analysis.

As similar as Canada and Australia are, there are also significant differences that support the rationale for this comparative study. Arguably, geography presents the most notable difference between Australia and Canada. The continent of Australia is an island nation with no shared national borders. Its population is primarily concentrated along its 59,736 kilometre-long southern and eastern coastline (“Country Profiles,” 2008). In contrast, Canada is one of 20 countries on the continent of North America, possessing the longest coastline in the world at 243,042 kilometres. As well, the 8,893 kilometres of shared land

border between Canada and the United States constitutes the world's longest undefended bi-national border (Winterdyk & Sundberg, 2010b). Furthermore, the fact that over 90% of Canada's population lives within 200 kilometres of the United States has caused a strong interconnectedness between the two nations ("Country Profiles," 2008).

Canada and the United States are each other's largest trading partners, share the military air defence responsibilities for North America, have the highest level of daily cross-border movement of people and goods in the world, and both hold seats on the G8—the international organisation comprising the eight historically most prosperous nations (Winterdyk & Sundberg, 2010a). In comparison, the closest neighbouring states to Australia are Papua New Guinea, East Timor, Indonesia, and, at a distance of over 2,250 kilometres, New Zealand (Google Earth, 2009). In relation to its neighbours, Australia is the dominant nation with the most developed and robust economy ("Country Profiles," 2008). In many respects, Australia's relationship with its neighbouring nations is similar to the United States' relationship with Canada.

Canada's vast and primarily unmonitored land border with the United States contributes to a number of significant border security and immigration control challenges. Whereas Australia has the majority of foreign travellers moving through its airports (DIAC, 2008a), Canada has the majority of its foreign travellers crossing at various ports of entry along the Canada/United States land border (CBSA, 2008c). As a result of these two differing geographic realities, Australia is much better situated to record both the entry and exit of travellers passing through its ports of entry and thus can better identify and control its non-citizen population (DIAC, 2008a). In contrast, Canada can only accurately record the entry of non-citizens who enter through either its seaports or airports, with a limited capacity to record entries at land ports of entry. Because of this, Canada unlike Australia has no reliable means

to identify, monitor or control its non-citizen populations using border-crossing records (see Mayeda, 2008).

As a result of Canada's inability to accurately monitor the entry and exit of non-citizens, border officials depend on pre-clearance efforts of non-citizens prior to their arrival as well as on the voluntary compliance of those living temporarily within its borders (Mayeda, 2008). Moreover, because of Canada's vast land border and coastline, there are greater challenges associated with monitoring the movements of people and goods along and across its land and sea borders. Although Australia also has a vast coastline, its navy and customs service have had relatively greater success in effectively patrolling the areas where unauthorised entry can transpire (ACS, 2007). In short, geography has resulted in Australia having an advantage over Canada in controlling, monitoring, and regulating its borders.

Another aspect of geography that affects how Canada and Australia manage their borders is their proximity to other nation-states. International agreements such as the *North American Free Trade Agreement* (NAFTA), *North American Aerospace Defence Command* (NORAD), and the *Smart Border Declaration* all significantly influence how Canada manages its border security strategy—including its selection, management, and attempt to control its non-citizen population. Although Australia also has strong diplomatic, economic, and social ties with the United States, its society is not nearly as influenced by American interests or foreign policy when compared to Canada. Australia has greater autonomy in formulating, administering, and enforcing its immigration interests compared to Canada. As much as Canada tries to distinguish itself from the United States, it is impossible for Canadians not to be impacted by their American neighbours in virtually every aspect of their lives. Former Canadian Prime Minister Pierre Elliott Trudeau illustrated this notion when he addressed the National Press Club in Washington, DC on March 25, 1969. During his speech, Trudeau commented to the audience of Americans, "Living next to you [the United States] is

in some ways like sleeping with an elephant. No matter how friendly and even-tempered is the beast, if I can call it that, one is affected by every twitch and grunt” (CBC, 1969).

Because of Australia’s place in the southern hemisphere, and considering its position as a leading economy within Oceania, it has not had to take a subservient role toward its neighbouring states. Additionally, geography has resulted in Australia being able to control its energy production, transportation, water and food supply, communications, and natural resources largely independent from other nations. Conversely, under NAFTA and other long-established bilateral agreements, Canada and the United States have fully integrated energy grids, air, road and rail systems, water and food supplies, and communication systems, and share open access to each other’s natural resources (Andreas & Biersteker, 2003; Dowhaniuk, 2004; Drache, 2004).

III-1-d) The Documentary Research Method

As discussed, this thesis takes a comparative criminological approach and utilises the documentary research method as its principal means of collecting information. Documentary research involves the review and analysis of documents containing information about the phenomenon being studied (Bailey, 1994). As identified by Payne and Payne (2004), the documentary method describes the principal technique of categorising, investigating, and interpreting private and public documents as a means of unobtrusively studying individuals or organisations. Although the use of documentary research methods within the social sciences has at times been viewed as inferior to the more mainstream methods that use surveys, interviews, and observational activities, documentary research has in recent years become more commonplace within the realm of social sciences (Mogalakwe, 2006). As observed by Hammersley and Atkinson (1995), the drift away from documentary research began in the 1970s, while some of the first social scholars such as Durkheim, Marx, and Weber based much of their work on the review of documents. Drawing on the insight of Bailey (1994),

Hammersley and Atkinson (1995), Mogalakwe (2006), Payne and Payne (2004), and Punch (2005), this thesis uses documentary research methods as a reliable, valuable, and comprehensive means of conducting social science research specific to the analysis of the operations of government departments.

Being the first comparative, exploratory, and descriptive study of internal immigration enforcement in Australia and Canada, this thesis aims to provide a foundation from which future internal immigration enforcement research can develop. Reflective of the similar single-nation analysis Pratt (2005) conducted on Canada's immigration enforcement program, this thesis primarily draws on a open-source data from the Australian and Canadian governments, official government department annual reports, non-government organisation (NGO) reports, as well as government oversights reports/reviews such as commission, parliament, senate, and ombudsman reports. Information not readily available through open sources was obtained through *Access to Information* requests submitted to the specific government organisations being studied (see III-1-g).

By taking a comparative criminological approach and using documentary research, this thesis is mindful that internal immigration enforcement is very much a micro-level study of globalisation. As Pakes (2010) recently identified, “the ‘why’ of comparative research is regularly viewed with suspicion . . . [and] many commentators have argued that globalisation has been given insufficient attention within the field of comparative criminology” (p. 17). McDonald (1997) describes the document method approach as being “global” comparative criminology, in that it draws on data and information obtained from both the direct and peripheral participants involved in the administration of a specific government program. Regarding border security–related studies (which include studies that examine internal immigration enforcement), others such as Zureik and Salter (2005), Cole and Lobel (2008), and Brunet-Jailly (2009) (all of whom have used document review for their own research)

identify the benefits of comparative research by illustrating that issues and concerns specific to one nation are often shared by another, yet the approach frequently differs.

By using a comparative approach that draws on a documentary research method to analyse differing approaches to internal immigration enforcement, policymakers can identify best practices used in numerous jurisdictions and ultimately create laws and policies that are reflective of domestic needs yet also mindful of global concerns (Fairchild & Dammer, 2001; Punch, 2005; Reichel, 2008). Specific to the study of government institutions, the use of a document review method can often prove the most insightful and accurate means of gaining an in-depth understanding and analysis of their operations (Punch, 2005). The combination of comparative criminology and documentary review is not only in keeping with similar studies concerning immigration enforcement, but also lends itself well to my own strengths and experiences as a former public servant and federal investigator.

III-1-e) Case Study Analysis

Case study analysis is commonly used within the social sciences when comparing two phenomena where generalisations beyond the topic of study are not essential (Neuman, Wiegand, & Winterdyk, 2004). As discussed by Lijphart (1971), “the great advantage of the case study is that by focusing on a single case, that case can be intensively examined even when the research resources at the investigator’s disposal are relatively limited” (p. 691). Speaking specifically of social science research, Smith (1990) and Gerring (2004) suggest using case studies when empirical data is limited for a quantitative assessment of social phenomena, yet a descriptive occurrence exists whereby the phenomena can still be explored.

Specific to the examination of internal immigration enforcement in Australia and Canada, both governments are reluctant to allow researchers to survey, interview, or conduct focus groups of their personnel. Moreover, variances between Australian and Canadian laws, policies, and procedures present challenges when comparing how each operationally

approaches internal immigration enforcement. Though some aspects of internal immigration enforcement can be quantitatively compared (such as how Australia and Canada identify, detain, and remove suspected unlawful non-citizens), others aspects (such as how Australia and Canada arrest suspected unlawful non-citizens) can still be examined through qualitative means—with case study analysis being one of these means. Gerring (2004) suggests that the use of a *ceteris paribus* clause³¹ within the case study method is “generally more useful . . . when the strategy of research is exploratory, rather than confirmatory” and applied in conjunction with another method (p. 352). This use of a mixed method approach is also suggested by Smith (1990), who advocates using a mix of qualitative and quantitative methods when conducting a study when limited data is available.

One useful technique when using a case study analysis is to include a *ceteris paribus* clause. Directly translated from Latin, *ceteris paribus* means “all other things being equal” (Gerring, 2004). When used within social science research, the term *ceteris paribus* clause has come to mean a descriptive inference whereby a single-unit/cross-unit comparison is conducted with the assumption that “all *other* things [are generally] equal” (p. 347). In Merton’s (1949) observation that “research typically deals with abstract predictions,” the use of a *ceteris paribus* clause within a case study analysis is seen as “an indispensable concept in basic research” (p. 175). This approach is used when general themes being compared are similar enough to allow one variable to be explored where the others remain largely constant—such as in the case of comparing the concept of *arrest* in relation to internal immigration enforcement (see Chapter VII).

Accepting the utility case study analysis can provide within social science research (including the use of a *ceteris paribus* clause), this thesis presents three specific cases that

³¹ The term *Ceteris Paribus* directly translates in Latin to mean ‘all other things being equal’ and as described by Sayer (1997) describes, can be used in social science research when “situations where there is a conflicting and overriding need which makes it unwise to remove the initial problem and its sources” (p.475).

aim to complement the comparative criminological approach using documentary research in the study of internal immigration enforcement within Australia and Canada. The first two case studies (the Australian cases of Vivian Alvarez Salon and Cornelia Rau) provide examples whereby Australia's approach in identifying suspected unlawful non-citizens can potentially result in erroneous enforcement actions being taken (see VI-3-b). The third case study (the Australian case of Dr. Mohamad Haneef) uses a *ceteris paribus* clause to suggest how the absence of a national constitutional bill of rights potentially impacts the way suspected unlawful non-citizens are arrested in Australia when compared to Canada (see VII-4-a). Considering there currently are no comparable Canadian cases to those of Salon, Rau, or Haneef, a *ceteris paribus* clause is used to hypothesis how a similar terrorist related case would likely unfold within a Canadian context.

By using these three case studies, the discussion surrounding how Australia and Canada each approach internal immigration enforcement can include examples of how the lives of those subjected to enforcement action potentially are impacted. Additionally, when used in conjunction with quantitative analysis, the use of these case studies strengthen the overall methodological approach taken (Gerring, 2004; Smith, 1990). Finally, the use of case study analysis (including one case study explored using a *ceteris paribus* clause) and quantitative analysis is in keeping with the methods commonly used in similar comparative criminological studies (Fairchild & Dammer, 2001; Bennet, 2004; Winterdyk & Cao, 2004; Reichel, 2008).

III-1-f) Measurement Synthesis

In order to accurately compare two different national immigration authorities that operate analogous internal immigration enforcement programs, units of assessment had to be made equal after the document review was concluded. The first step of this process involved the identification of data and information related to the key sub-components found in both

nations' internal immigration enforcement functions (e.g., how each nation identifies, arrests, detains, and removes suspected unlawful non-citizens). Furthermore, using information from Statistics Canada, the Australian Bureau of Statistics, the UN Statistics Division, Organisation for Economic Co-Operation and Development, U.S. Central Intelligence Agency, and Bank of Canada, the data and information collected was adjusted to per-capita rates based on the most recent census data for Australia and Canada at the time this thesis commenced, and to the Australian dollar.

The final methodological consideration for this thesis was addressing the issue of time. Because this thesis compares the Australian and Canadian organisations primarily responsible for internal immigration enforcement, and reflecting on the fact the CBSA was established in 2003 (the agency primarily responsible for internal immigration enforcement for Canada), the period for study focuses on the years 2003 through to the end of 2010. So as to conduct this comparison using the most meaningful and accurate data, an analysis of annual department report statistics was used, yet for information dependent on population, a per-annum snapshot approach was chosen. In choosing the year for the snapshot analysis, and reflecting on the work of Champion (2006) who addresses the importance of selecting an appropriate "fixed point in time" (pp. 131–137), the most current census year for both Australia and Canada was chosen—that being 2006.

One significant challenge faced by social science researchers who utilise demographic and population data is that these values are dynamic in nature and constantly adjusting as a result of uncontrollable variables such as births and deaths, immigration and emigration, and other similar natural and uncontrollable occurrences (Champion, 2006). Champion suggests that researchers using demographic and population data find a "reasonable fixed point for analysis" (such as the most recent census data available) and conduct their analysis by reflecting on a "snapshot" specific to this "fixed point" (pp. 150–153). As Champion and

others (Pakes, 2010; Winterdyk & Cao, 2004) identify, a contemporary, consistent, and applicable comparative snapshot can offer a sound alternative to a more robust time-series design, especially when the period of analysis is limited to only a few years—as is the case for this thesis.

Reflecting on the aforementioned, the following formula was used to acquire the rates for comparing the various internal immigration processes used by Australian and Canadian internal immigration authorities:³²

$$Rate = \left(\frac{x}{N} \right) 10,000$$

In all cases, N represents the total population of either Australia or Canada based on the most recent census data for each nation. The value for x represents the levels associated with the various internal immigration enforcement processes related to identification, detention, and removal as follows:

Where rates were calculated in relation to the identification:

- x = number of at-large suspected unlawful non-citizens
- x = number of calls received by a department's call centre
- x = number of suspected unlawful non-citizens identified

Where rates were calculated in relation to the detention:

- x = number of non-citizens detained
- x = number of non-citizen detained compared to those identified

Where rates were calculated in relation to the removal:

³² Although the values used to calculate the rates are were collected at slightly different periods (maximum of a six-month variance in date of data collection), they nonetheless remain statistically acceptable in that the values are large enough to negate a statistically significant difference (see Neuman, Wiegand, & Winterdyk, 2004).

x = number of non-citizens removed

x = number of non-citizens removed under escort

x = number of non-citizens removed compared to those identified

The above equation and comparative approach is standard within social science research, and also consistent with the approaches used by the Australian Bureau of Statistics, Statistics Canada, UN Statistics Division, and Organisation for Economic Co-Operation and Development. Furthermore, because official government documents were used for the document review, and accepting that Australia and Canada use the same approach to census data collection and calculation, the findings can be assumed consistent and reliable.

III-1-g) Collection of Data and Information Source

In order to obtain statistical data and other information regarding Canada's internal immigration enforcement program, an application pursuant to the *Access to Information Act* (Canada) had to be made. Initially, this application was rejected by the Government of Canada (CBSA) on the grounds this information was protected under §16(1)(b): namely, the CBSA asserted that the records sought contained information obtained and prepared by a government institution deemed an investigative body, and that if released could jeopardise lawful investigations concerning law enforcement techniques and activities. An appeal to the Privacy Commission of Canada was made and ultimately accepted on the grounds that under §16.1(2) of the *Access to Information Act*, the information sought was not related to a specific investigation or enforcement activity, and as such should be released pursuant to §4(1)(a), in that the request was from a Canadian citizen regarding records under the control of the CBSA.

Taking into consideration that no other criminological studies exist that specifically compare the internal immigration enforcement processes of Australia and Canada, it was

decided that data and information obtained through a document review method would still afford a comprehensive and original thesis (see Table 4 below for list of main data sources). As such, this thesis relies entirely on statistics, information, and reports obtained through Canada's *Access to Information Act* or available through open sources such as the CBSA and DIAC websites. Taking into account that the information collected through the *Access to Information Act* is now made public through this thesis, it is hoped other researches can use this information in their own studies.

Table 4:
Main Data and Information Sources Used for Thesis

Type	Source	Content
Gvt. Report	DIAC Annual Reports	<i>Overview of the DIAC operations (2002 to 2010)</i>
Gvt. Report	CBSA Annual Report	<i>Overview of the CBSA operations (2002 to 2010)</i>
Audit Report	AUS Ombudsman	<i>Audit of DIAC onshore immigration compliance program (2005)</i>
Audit Report	CAN Auditor Gen.	<i>Audit of CBSA inland immigration enforcement program (2008)</i>
Parl. Report	AUS Parliament	<i>Smith Report assessing Australia's approach to border security (2009)</i>
Sen. Report	CAN Senate	<i>Kenny Report assessing Canada's approach to border security (2005)</i>
NGO Report	Amnesty International	<i>Country profile reports concerning both Australia and Canada (2010)</i>
NGO Report	Human Rights Watch	<i>Country profile reports concerning both Australia and Canada (2010)</i>
Intl' Report	United Nations	<i>Review of Australia's human right record in post-9/11 era (2006)</i>
Statistics	United Nations	<i>Country specific statistics for Australia and Canada (2009)</i>
Statistics	OECD	<i>Country specific statistics for Australia and Canada immigration (2010)</i>
Statistics	DIAC Online	<i>Australian statistics concerning immigration program (2002 to 2009)</i>
Statistics	CAN Access Act	<i>Canadian statistics concerning immigration program (2002 to 2009)</i>
Gvt. Manual	PAM (DIAC)	<i>Australian Department of Immigration and Citizenship Operations Manual</i>
Gvt. Manual	ENF (CIC & CBSA)	<i>Citizenship and Immigration Canada Operations Manual (also used by CBSA)</i>

III-1-h) Limitations and Other Considerations

Being the first comparative study of its kind, a lack of certain empirical data that could afford a more robust review exists (e.g., data derived through the interviewing of officers and/or non-citizens who have had enforcement action taken against them, or detailed government statistics that are not readily available, published, or otherwise inaccessible). Reflecting on the fact that internal immigration enforcement reforms in both Australia and

Canada are comparatively recent,³³ it is understandable that limited data exist, and in turn, only a handful of academics have studied this issue. Regarding the access to stakeholders involved within the internal immigration enforcement process, the Australian Government (Department of Immigration and Citizenship) was open to having their officers interviewed; however, the Government of Canada (CBSA) was adamant in denying access to their personnel, arguing that law enforcement concerns could be jeopardised if access were granted.

Of particular frustration was the differing level of transparency between the Australian Government and Government of Canada. The DIAC in Australia publishes the vast majority of their research, statistics, and other department information on their website; any information not available was provided freely once an email request was sent to the DIAC headquarters in Canberra. Regarding the ability to access official government information and data, the Australian Government is more transparent in their dissemination of information than Canada. A total of 18 *Access to Information Act* requests were made to the CBSA requesting comparable data openly accessible on the DIAC website. The CBSA initially refused the requests for data and information based on their assertion that such information could jeopardise the department's ability to conduct investigations; it was only upon a formal appeal to the Privacy Commissioner of Canada that annual national statistics were provided. Yet, aside from statistical information, the Privacy Commissioner maintained that it was reasonable for the CBSA not to allow their personnel to be interviewed in relation to their personal thoughts on internal immigration enforcement.

³³ As identified in the literature review, Australian internal immigration enforcement (onshore immigration compliance) underwent its most significant reform as a result of the *Border Security Legislation Amendment Act* (2002) and the July 14, 2005 *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* (commonly referred to as the *Palmer Report*) and October 6th, 2005 *Inquiry into the Circumstances of the Vivian Alvarez Solon Matter* (commonly referred to as the *Comrie Report*). In Canada, internal immigration enforcement underwent its most significant reform as a result of the *Canada Border Services Agency Act* (2003) and subsequent creation of the CBSA, which included the Inland Immigration Enforcement Division previously located with Citizenship and Immigration Canada (see II-3-d).

Unfortunately, without having the ability to survey and/or interview Canadian officers, the comparative nature of the study is limited to a review of the general operational approaches taken by Australia and Canada in relation to internal immigration enforcement (based on a review of each nation's operations manual), and involves a comparison of the annual counts of suspected unlawful non-citizens who were identified, detained, and removed from each nation between 2003 and 2010. Pratt's (2005) work, *Securing Borders: Detention and Deportation in Canada*, met similar challenges associated with accessing official government information; however, it still resulted in a comprehensive review of how Canada approaches the detention and removal sub-components of its internal immigration enforcement program.

As identified by Wortley (2009) in the introduction to the special edition of *Journal of International Migration and Integration*, "The Immigration-Crime Connection,"

If these research questions [concerning immigration and the criminal justice system] are to be thoroughly examined, a stronger alliance needs to be developed between academic researchers on the one hand and representatives from Western justice systems on the other. Policy-makers within the justice system, I believe, can greatly benefit from the objective and research expertise that is present within the academic community. On the other hand, academics would greatly benefit from greater access to criminal justice data and research opportunities. Hopefully this form of cooperation will develop in the near future. (p. 356)

Although having the aforementioned limitation, this thesis nonetheless continues the ongoing effort by criminologists to have governments increase access to data and other information concerning internal immigration enforcement for academic review.

III-2) Chapter Summary

This chapter describes the methodological approaches employed for this thesis, explains the measures of synthesis used, identifies how data and other information was

obtained, and identifies its key limitations. As with similar studies that explore internal immigration enforcement in the United States, Europe, and other western democracies (see Andreas & Biersteker, 2003; Brunet-Jailley, 2007; Givens et al., 2009; Winterdyk & Sundberg, 2010a), this thesis takes a comparative criminological approach to examine internal immigration enforcement in Australia and Canada. Though findings based on survey studies involving key stakeholders within the DIAC and CBSA could render more robust quantitative results, the quantitative datasets obtained through document analysis when combined with case studies still provide meaningful insight into internal immigration enforcement for both Australia and Canada. Considering this thesis constitutes the first comparative examination of internal immigration enforcement in Australia and Canada, and accepting that the CBSA was unwilling to allow its officers and leadership to be surveyed or otherwise investigated, it was decided this thesis would follow the earlier approach used by Pratt (2005) in the examination of immigration enforcement within Canada.

As identified by Weber (2011), there is a dearth of research concerning internal immigration enforcement in Australia. Cole (2005) and Pratt (2005) echo this observation in their studies of the United States and Canada. All three suggest that because many who are subjected to internal immigration enforcement are temporary or undocumented non-citizens, a lack of interest on behalf of both law enforcement and the public to track or otherwise record incidents of interaction between government agents and non-citizens results in very little data being recorded. Considering the challenges in both collecting and identifying data for this thesis, it is plausible the observations of Weber (2011), Cole (2005), and Pratt (2005) are correct. However, despite limited data, enough information was attainable through the review of government and non-government organisation sources to conduct a meaningful analysis.

CHAPTER IV: THEORETICAL APPROACH

No inquirer can investigate a problem from all perspectives simultaneously. And that is what a logical structure of theoretical framework is all about. It establishes a vantage point, a perspective, a set of lenses through which the researcher views the problem. In this sense, the selection of a logical framework is both a clarifying and exclusionary step in the research process. While it sharpens focus and consequently increases clarity brought to the problem area, it excludes from the view of the inquirer other perspectives that might be brought to bear on a problem, but does so in explicit recognition of those perspectives and the rationale for their rejection. (Cline, n.d.)

IV-1-a) Peacemaking Criminology

Beginning in the late 1960s, gathering momentum during the 1970s and 1980s, and continuing through to today, a number of criminologists have explored how contemporary global forces impact regional concerns of crime, social control, and criminal justice practices (see Carrington & Hogg, 2002). Notably, it was during this period that critical/radical criminology emerged as a theoretical construct. Dating back to the initial works of Marx, followed by the original conflict criminology theorists Thomas Sellin in the 1930s–1940s and George Vold and Austin Turk in the 1950s–1970s, criminologists have increasingly become concerned with “the real suffering created by crime” (Akers & Sellers, 2009, p.182). From the 1960s onward, critical criminology³⁴ began to emerge and explore how various approaches to corrections, policing, and the legislation of criminal law result in various groups (in particular woman, visible minorities, and those from lower socio-economic backgrounds) becoming victimised by the criminal justice system itself (MacLean & Milovanovic, 1991). Today, with a number of conflict criminologists framing “their critique of border controls in terms of *criminalisation of asylum seekers* and *war on immigrants*,” there has been a movement toward using peacemaking criminology as a way of exploring

³⁴ *Critical criminology* is an umbrella term often used to reflect a series of evolving and emerging criminological perspectives, namely, left realism, feminism, postmodernism, and peacemaking criminology (MacLean & Milovanovic, 1991).

issues related to border security—including internal immigration enforcement (Weber, 2002, p. 10).

Derived from the critical/radical school of criminological, and “emerging out of religious, humanist, feminist, and critical/Marxist traditions” (Akers & Sellers, 2009, p. 261), Pepinsky and Quinney’s (1991) notion of *peacemaking criminology* emerged. Through their work, Pepinsky and Quinney identify elements within the criminal justice system to be based on “warlike principles in which punishment is used to avenge wrongdoing” (as cited in Winterdyk, 2006, p. 209). This critical criminological theory “advocates mediation, conflict resolution, reconciliation, and reintegration” as a means to alleviating the suffering associated with crime and thus reducing crime itself (Akers & Sellers, 2009, p. 261).

Reflecting on the work of Pepinsky and Quinney (1991), Fuller (2003) suggests six facets that peacemaking criminology can bring to critically assessing aspects of the criminal justice system: 1) non-violence, 2) social justice, 3) inclusion, 4) correct means, 5) ascertainable criteria, and 6) categorical imperative (pp. 86–88). The first facet (non-violence) suggests that peacemaking criminology is primarily concerned with the notion that, typically, a violent act met with a violent state response will likely result in future violence. Facet two (social justice) suggests that any response to crime must include social justice considerations. The third facet (inclusion) proposes that the criminal justice system needs to be inclusive of the community it serves. Facet four (correct means) asserts that criminal justice practitioners must safeguard the civil and legal rights of the accused to ensure due process is respected and that outcomes are fair and just. Facet five (ascertainable criteria) proposes that all participants within the criminal justice system, such as offenders, victims, and other stakeholders, must be afforded the opportunity to comprehend how the process operates in a language they understand so they can make informed decisions and gain a respect for the final outcome of a case. Finally, the sixth facet (categorical imperative) “aims

at developing a consistent and predictable viewpoint” that promotes a philosophy of non-violence and also “aims at providing true equality under the law that is tempered by a positive view of humankind” (p. 88).

As noted by Weber (2009), many elements within contemporary border security approaches have also come to resemble the warlike elements observed by peacemaking criminology (e.g., para-militarisation of borders, naval blockades, and administrative detention of non-citizens). Yet, as governments, economies, and societies increasingly become interconnected as a result of globalisation, it is favourable for all concerned that peace (or at least *détente*) be sought in the apparent *war on immigrants* that has been declared against suspected unlawful non-citizens living within many western democracies (Aas, 2011; Brotherton & Kretsedemas, 2008; Cole, 2005; Cole & Lobel, 2007; Pratt, 2005; Weber, 2009). Reflecting on Fuller’s (2003) six-facet approach, peacemaking criminology lends itself as a viable guiding philosophy through which internal immigration enforcement activities can be reflected upon and policy implications explored.

IV-1-b) Rationale for Utilising Peacemaking Criminology

Drawing on Pepinsky and Quinney’s (1991) notion of peacemaking criminology in relation to internal immigration enforcement, this thesis will reflect on how the facets of peacemaking criminology as described by Fuller (1998) apply to the analysis of the differing practices utilised by Canada and Australia in regard to internal immigration enforcement. As Young (2007) states, post-9/11 actions by many western democracies in regard to the perceived national security threat certain immigrant groups pose to western societies has resulted in the “immigrant other” to become an addition to the narrative of the “war on χ .”³⁵

³⁵ The War on χ refers to the Young’s (2007) notion that many western governments faced with social challenges (i.e., crime, drugs, terrorism, illegal immigration, etc.) will declare war on the specific social ill (e.g., the War on Crime, War on Drugs, War on Terrorism, War on Illegal Immigration), which ultimately can result in what moral panic developing with a community. Young (2007) identifies that the reaction to these “wars” often results in quasi-militarised solutions being implemented by government.

As such, non-citizens have come to be viewed “not [as] a problem of the social order but a problem group imported into society” (p. 142). Others such as Cole (2005), Pratt (2005), and Weber and Pickering (2011) have identified that many western governments have launched a silent war against certain immigrant groups, ultimately causing once regulatory immigration law violations to become criminalised.

Fuller (1998), Young (2007), and others observe that many western governments have responded to the perceived security threat some non-citizens allegedly present by developing quasi-military organisations and/or employing enforcement focused policies against non-citizens suspected of violation immigration law. Fuller goes on to state that these responses, although often formulated with good intentions, rarely realise positive results. Cole (2005), writing of the post-9/11 reality within the United States, observes that since the declaration of the War on Terror and establishment of the Department of Homeland Security, America’s “illegal alien” population has actually increased in size, despite enhanced border security and heightened immigration enforcement processes being implemented—in short, Cole argues that more immigration enforcement does not necessarily mean less immigration violations.

Comparing the *war* and *peace* perspectives described by Pepinsky and Quinney’s (1991) peacemaking criminology in relation to the criminal justice system, Barak (2005a) suggests that peacemaking criminology has the potential to “provide lasting solutions to the problems that lead individuals [and states] to commit harms” (p. 132). Barak goes on to identify that in the absence of peacemaking criminology, whereby the root societal causes of crime are addressed, offenders will simply adapt their actions to avoid punishment, fail to understand the harm they may be imposing on their community, and ultimately perpetuate the “war on crime” perspective (pp. 132–133). Speaking of his original co-authored work with Pepinsky, Quinney (1991) asserts that peacemaking criminology offers a unique opportunity

for policymakers to finding solutions to criminal justice challenges that “promote peaceful and just communities and societies” (p. 26).

To compare and assess the operational approaches Australia and Canada each take in relation to internal immigration enforcement, this thesis reflects on Fuller’s (2003) six-facet approach for peacemaking criminology (pp. 86–88). As will be described later in more detail, the internal immigration enforcement processes of identifying, arresting, detaining, and removing unlawful, or suspected unlawful, non-citizens often are what Pepinsky and Quinney (1991) would refer to as being “warlike” (p. 317); this is particularly true for temporary non-citizens, who because of their short-term presence within a nation may be more vulnerable than other immigrant groups due to their lack of connection and familiarity with the community they are residing. Despite these actions at times being warlike, the Australian and Canadian organisations responsible for internal immigration enforcement each have peaceful mandates noted within their respective organisational Charters:

We [DIAC] promote the value of citizenship and cultural diversity. Our work is underpinned by our guiding principle of “people our business”. We are committed to having well trained and supported staff, and to developing and maintaining an open and accountable culture that is fair and reasonable in dealing with our clients. (DIAC, 2010a, p. 2)

Our [CBSA] commitment to service excellence:

- *Respect and Courtesy*
- *Bilingual Service*
- *Fair Application of the Law*
- *Accurate Information*
- *Privacy and Confidentiality*
- *Review of our Actions and Decisions*

(CBSA, 2010a, p. 1)

Although Australia and Canada engage in warlike activities against non-citizens who violate their immigration laws (such as arrest, detention, and removal), both have peace-focused mandates that allude to the establishment of long lasting solutions that are

community focused. Considering this, the use of Fuller's (2003) six-facet model for addressing criminal justice system issues from a peacemaking criminology perspective affords a logical theoretic perspective for this thesis. Although all six facets are reflected upon in the identification of possible implications for each enforcement process, specific attention will be given to Fuller's view that effective solutions to criminal justice issues must take into account social justice concerns (facet two), be inclusive of community needs (facet three), and also safeguard the civil and legal rights of the accused so as to ensure due process is respected and that the outcomes are fair and just (facet four).

IV-2) Chapter Summary

This chapter aims to clearly define the theoretic perspective taken for this thesis. As discussed, few studies explore how nations approach internal immigration enforcement—with none offering a comparative examination for Australia and Canada. Moreover, concerns related to internal immigration enforcement outcomes (i.e., identification, arrests, detentions, and removals) are often excluded from public releases of government reports and other documents—arguably resulting in these issues having limited discussion within the criminological literature (Cole, 2005; Pratt, 2005; Weber & Pickering, 2011). Accepting the limitations associated with accessing official data sources, and acknowledging the reluctance of government agencies to allow their personnel to be surveyed by external researchers, exploring this issues through a critical criminological lens not only seems appropriate, but one of the only means possible.

By taking a critical comparative criminological approach (namely, using peacemaking criminology as the guiding criminological perspective), this thesis closely reflects other similar studies (see Cole, 2005; Pratt, 2005; Weber & Pickering, 2011; Winterdyk & Sundberg, 2010a). Drawing from existing literature concerning internal immigration enforcement, and identifying the gap in literature regarding internal immigration enforcement

within Australia and Canada, this thesis aims to build on existing studies and further contribute to this emerging and important area of study. Though the study of internal immigration enforcement is relatively new within the criminological literature, since 9/11, the issue has gained much attention (Weber, 2002; Weber & Pickering, 2011). While many criminologists exploring this emerging issue of criminological inquiry have used security theories more commonly within the disciplines of international relations and strategic studies to conduct their work (McCulloch & Pickering, 2012), the critical criminological perspective continues as a common lens of analysis (Sundberg, Trussler, & Winterdyk, 2012).

CHAPTER V: ORGANISATIONAL COMPARISON

If criminal justice-like powers are escaping from the confines of the criminal justice system, then criminologists interested in accountability should follow. (Weber, 2002, p. 24)

V-1) Chapter Overview

This chapter compares the two differing organisational approaches used by Australia and Canada in the carrying out of their respective internal immigration enforcement programs—specifically the *non-policing* approach used in Australia and *policing* approach used in Canada. By offering a descriptive comparison of these two differing organisational approaches, this chapter aims to provide a comprehensive background from which the subsequent chapters can develop. Considering that the following four chapters address the internal immigration enforcement sub-components of identification, arrest, detention, and removal, this chapter provides the contextual backdrop from which the subsequent four chapters can be better understood and reviewed. Furthermore, by first providing a summative background of the organisational approaches used to conduct internal immigration enforcement, this chapter further aids in establishing a context from which the findings of the comparative procedural study can be reflected upon.

Since 9/11, there have only been two pertinent studies that review how Australia and Canada each approach border security (including how they address internal immigration enforcement). In 2008, former Ambassador and Secretary of the Department of Defence Ric Smith was commissioned by the Australian Parliament to review and make suggestions on how Australia could best address post-9/11 border security concerns. In Canada, Senator Colin Kenny, through his role as Chair of the Senate Committee on National Security and Defence, completed his 2005 report, which reviewed Canada's newly established CBSA.

Smith's December 4, 2008 *Report of the Review of Homeland and Border Security* (unclassified version) recommended that Australia not follow the United States or Canada by establishing a single authority responsible for border security, but rather maintain its existing border security agencies (e.g., immigration, customs, and quarantine services) and work toward further improving the sharing of national security information among government departments. As noted by Smith (2008), "large organisations tend to be inward-looking, siloed and slow to adapt, and thus ill-suited to the dynamic security environment" (p. 1). Smith's report goes on to suggest that by maintaining the existing immigration, customs, and quarantine departments, Australia

[w]ould recognise that our existing arrangements are generally effective and that for the most part our departments and agencies are working well with each other. Above all, the smaller, separate agencies which comprise this model are likely to be more agile and accountable than large agencies.
(p. 1)

The June 2005 Report *Borderline Insecure: Canada's Land Border Crossings Are Key to Canada's Security and Prosperity: Why Lack of Urgency to Fix Them? What Will Happen if We Don't?* published by the Canadian Senate Committee on National Security and Defence (chaired by Senator Colin Kenny) outlined several deficits that resulted from Canada's decision to amalgamate its border security agencies into the CBSA. Of particular importance is Kenny's opening assertion that Canadians do not "have a sufficient understanding of how well or poorly border initiatives work" (p. 5). Kenny goes on to suggest that "because they [Canadians] are paying for these [border security] systems, [they] deserve an accounting for their effectiveness" (p. 14). All of the possible shortcomings that the Smith report identified with amalgamated border security programs, Kenny identified as problems with Canada's CBSA.

V-2) Two Approaches to Internal Immigration Enforcement

V-2-a) The Non-Policing Approach to Internal Immigration Enforcement

When describing a non-policing approach to internal immigration enforcement, this thesis refers to a government body not considered a law enforcement agency (such as the DIAC), yet whose officers still possess limited enforcement powers specific to the Act they are responsible for administering and enforcing (such as the *Migration Act 1958* (Cth)). These officers are unarmed, are not trained or equipped as law enforcement officers, and rely on the police or other law enforcement bodies to take physical control of persons who resist their authority (BCO, 2011). In essence, officers working for a department that takes a non-policing approach are public servants having narrow regulatory duties and powers—including the ability to suspend an individual’s freedom through an administrative (as opposed to criminal) detention process (D. Flynn, 2005).

Specific to Australia, DIAC onshore immigration compliance officers derive their limited enforcement powers from the *Migration Act*. These officers can take limited actions against suspected unlawful non-citizens and Australians who have employed them, harboured them, or otherwise contributed to their alleged violation of this Act. Pursuant to §188 of the *Migration Act*, officers have the power to ascertain a person’s lawful immigration status and, under §189 of this Act, are also authorised to arrest and detain suspected unlawful non-citizen. Furthermore, §198 grants officers the authority to remove an unlawful non-citizen from Australia and physically return them to their nation of citizenship (Vrachnas et al., 2008). Because the process of taking a suspected unlawful non-citizens into custody can at times present risks (e.g., the non-citizen may resist the officer’s authority physically), DIAC officers conduct a risk assessment prior to the arrest/detention of a non-citizen to determine if they should solicit the assistance of the police (PAM3).

V-2-b) Policing Approach to Internal Immigration Enforcement

When describing a policing approach to internal immigration enforcement, this thesis refers to a government body considered to be a law enforcement agency (such as the CBSA). Within a policing approach, officers are recognised by statute to be law enforcement agents, are armed, receive specialised law enforcement training, and have broad enforcement powers (including the ability to use force in the execution of their duties).

Specific to Canada, the CBSA is considered a law enforcement agency and its officers identified as law enforcement officers (peace officers) pursuant to §2 of the *Criminal Code of Canada* (R.S., c. C-46)—meaning CBSA officers have full policing powers in relation to federal laws. Moreover, pursuant to §25(4) of the *Criminal Code of Canada*, CBSA officers taking enforcement action authorised by federal law are “justified in using force that is intended or is likely to cause death or grievous bodily harm to a person [being] arrested” (including using justified force, up to the level of deadly force, when making arrests pursuant to the federal *Immigration and Refugee Protection Act* [S.C. 2001, c.27]). In cases where a detained persons attempts to escape a federal correctional facility (including an immigration detention facility operated by the Correctional Service of Canada), an officer (either a correctional officer or CBSA officer) is justified in the use of deadly force pursuant to §25(5) if “the escape cannot be prevented by reasonable means in a less violent manner” (ENF-7). When compared to Australia’s non-policing approach, it is apparent that Canada’s policing approach has the potential of being more aggressive in nature and tantamount to the approach police agencies take in relation to the arrest and detention of suspected criminals.

V-3) Internal Immigration Enforcement in Australia and Canada

V-3-a) Australia's Onshore Immigration Compliance Program

Australia has its immigration services delivered by the DIAC, customs services delivered by the ACS, and food/plant inspection services delivered by the Australian Quarantine and Inspection Service (AQIS) (Attorney-General's Department [AGD], 2008a). The DIAC administers Australia's onshore immigration-compliance program in addition to all other immigration matters. However, similar to what was found in Canada prior to 2003, the ACS assists the DIAC by performing immigration primary examinations at ports of entry. The Compliance Division of the DIAC is responsible for all matters concerning non-citizens believed to be in violation of the *Migration Act* (DIAC, 2008a). DIAC officers approach their duties in an administrative and non-policing manner. Furthermore, officers of the DIAC are unarmed and receive very limited enforcement-type training. Likewise, the DIAC itself is not considered a law enforcement agency, despite having quasi-enforcement capabilities (AIC, 2008).

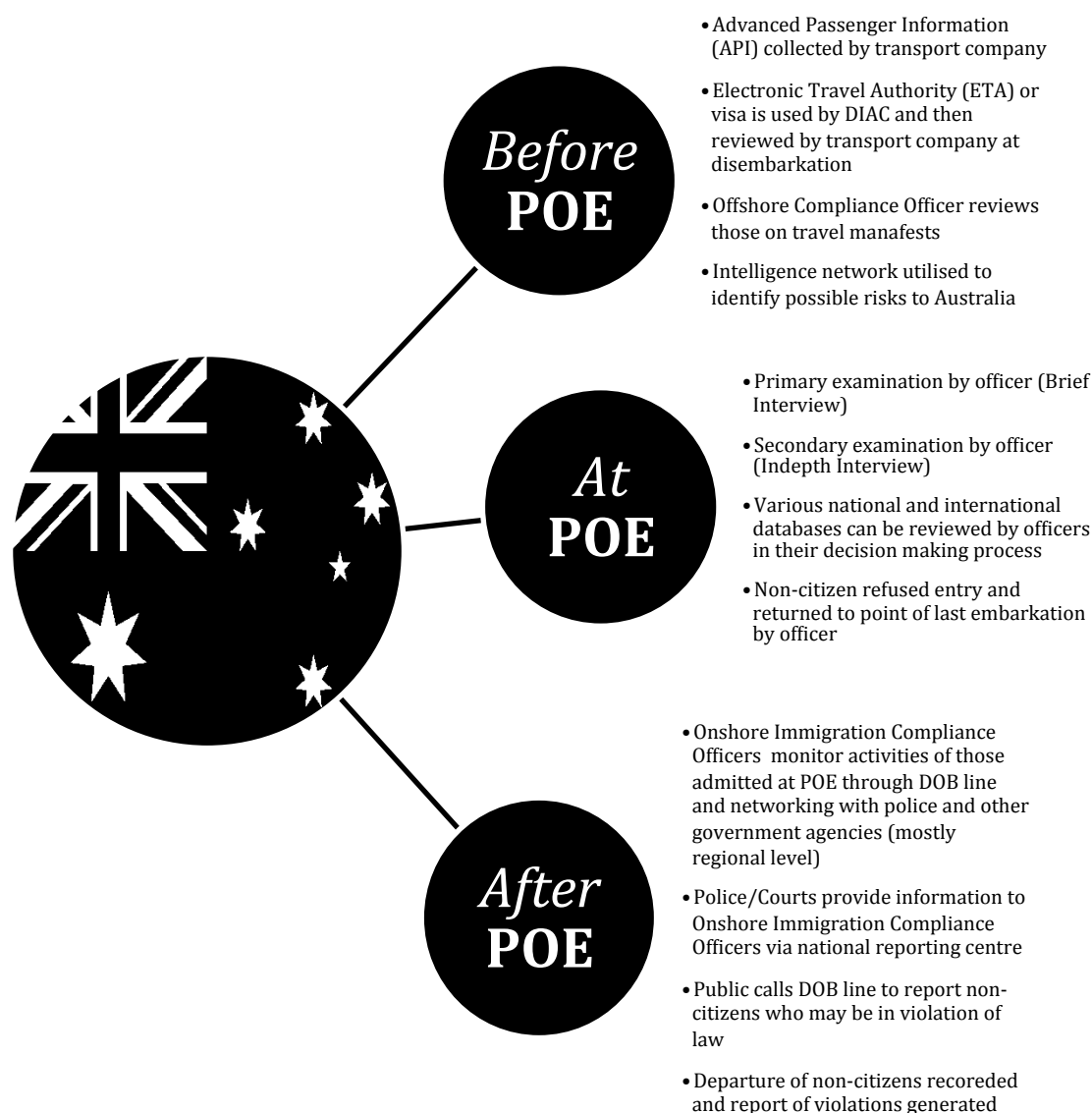
There are approximately 230 Onshore Immigration Compliance Officers who work in various metropolitan centres throughout Australia, and another 30 Offshore Immigration Compliance Officers stationed at strategic locations abroad (DIAC, 2008a). These officers work closely with domestic and foreign policing agencies, government departments, and security intelligence organisations to identify, locate, arrest, detain, and remove non-citizens living in Australia who are suspected of contravening the *Migration Act* (DIAC, 2011). Similar to Canada's NRAC, Australia's DIAC operates a 24-hour national call-centre (known as the *Dob-In Line*), through which law enforcement and the public can report suspected immigration violations to the DIAC for investigation (DIAC, 2008b).

Like the CBSA's Criminal Investigations Section, the DIAC has investigators who review major cases that merit prosecution. These investigators work in conjunction with

Compliance Officers to investigate violations of the *Migration Act* and decide when a person should be prosecuted as opposed to having an administrative penalty given. Just as in Canada, these cases usually involve repeat violators, cases where individuals have been harmed, or when the integrity of Australian law has significantly been affected (e.g., trafficking persons, creating fraudulent documents, hiring large numbers of unauthorised workers, etc.) (DIAC, 2008b). As with the Canadian system, the numbers of prosecution cases dealt with by investigators are much less than the number of administrative cases handled by Compliance Officers.

If Compliance Officers or investigators within Australia require information from overseas, they can request their foreign-based colleagues to conduct field investigations on their behalf. Overseas Compliance Officers also provide intelligence to their domestic counterparts on possible unlawful entries of non-citizens into Australia, trends in fraudulent documents, along with common techniques used by human traffickers and smugglers. Similar to the CBSA's Migration Integrity Officers, DIAC's overseas Compliance Officers participate in the decision making process in relation to whether or not a potentially high-risk applicant is granted an entry visa (DIAC, 2008b).

Figure 4:
Overview of Australia's Approach to Admitting and Controlling Non-Citizens



In matters of national interest, major cases involving human trafficking and smuggling, or in cases where the DIAC wishes to pursue criminal charges against a non-citizen for violating the *Migration Act*, the DIAC may seek the assistance of the Australian Federal Police (AFP) (DIAC, 2008a). The DIAC and AFP have a long-standing memorandum of understanding through which each agency can provide assistance to the

other.³⁶ However, unlike in Canada where the RCMP has a dedicated Immigration and Passport Section, the AFP does not maintain dedicated officers assigned to immigration cases (DIAC, 2008a). Should DIAC officers deem a case to be potentially dangerous (e.g., the arrest of a violent unlawful non-citizen), the AFP or state police service will accompany the DIAC officers to assist.

V-3-b) Canada's Inland Immigration Enforcement Program

Canada has traditionally maintained an independent immigration authority responsible for developing, maintaining, administering, and enforcing its immigration legislation (Kelley & Trebilcock, 1998; Knowles, 2000). Under this traditional system, immigration officers were responsible for investigating and taking action against non-citizens who violated immigration law. These officers would work alongside Customs Inspectors at ports of entry (POEs) as well as at foreign missions (e.g., high commissions, embassies, and consulates) and within inland immigration offices. Although immigration officers had limited powers to arrest, detain, and remove non-citizens deemed in violation of their conditions of stay, they were restricted to only enforcing immigration legislation.³⁷ They primarily focused on assessing applications and liaising with law enforcement agencies to assist them in administering and enforcing their Act (Kelly & Trebilcock, 1998). CIC, and its former entities which were responsible for immigration matters, have never been considered to be law enforcement organisations (see *Privacy Act R.S.C. 1985*).

Although CIC still exists today, the December 12, 2003 establishment of the CBSA resulted in all immigration POE, intelligence, overseas integrity, and inland enforcement

³⁶ In addition to the memorandum of understanding between the AFP and DIAC, similar agreements exist between the DIAC and Australia's state and territorial police to provide assistance in high risk and potentially dangerous cases (see DIAC, 2001, 2010b, p. 125).

³⁷ Through a number of amendments to the *Immigration Act* between 1906 and 1910, the Government of the Dominion of Canada introduced a number of inadmissibility provisions of its Act that would preclude a person from entering the Dominion and provided Officers the North West Mounted Police (NWMP) (along with Immigration Officers) with powers to arrest and remove people considered undesirable. Although Immigration Officer had limited powers to reject people at a port of entry, the Act specifically authorized the NWMP to carry out the internal immigration enforcement of the Act (see Kelley & Trebilcock, 1998, pp. 142–163).

programs to be transferred from CIC to the CBSA (Sundberg, 2004). In addition to the immigration enforcement functions that once resided within the CIC, the CBSA also absorbed the former Canada Customs and Revenue Agency's customs program and the Canada Food Inspection Agency's POE food inspection service. The Government of Canada justified the creation of a single border authority to demonstrate its commitment to the *Smart Border Declaration* signed December 12, 2001 between Canada and the United States, as well as an attempt to expedite the low-risk cross-border movement of people and goods while at the same time improving its ability to prevent high-risk people and goods from entering Canada (CBSA, 2008b).

The CBSA, unlike CIC, is considered a law enforcement organisation (CBSA 2008b; CIC, 2008c). In its effort to enhance its enforcement capacity, the CBSA currently is equipping its officers with firearms and cross-training them to enforce a wide array of federal laws, including *Criminal Code* offences (CBSA, 2007b, 2008a). This is a stark contrast from the Government of Canada's traditional approach of having separate and primarily administrative immigration, customs, and food inspection organisations collectively responsible for border related services (Sundberg, 2004).

Part of Canada's transition to a police approach for internal immigration enforcement involves both temporary and permanent non-citizens suspected of violating immigration law being dealt with in a more enforcement as opposed to facilitative manner. The Inland Immigration Enforcement program, which was once the responsibility of CIC, is now under the Enforcement Branch of the CBSA (2008a). The approximately 320 officers tasked with internal immigration enforcement are known as Enforcement Officers; the same title formerly used by CIC (Winterdyk & Sundberg, 2010b). Under CIC, these officers were given the dual responsibility of taking enforcement actions against non-citizens as well as assessing and granting immigration status to those against whom enforcement action was not warranted

(Pratt, 2005). Today, under the CBSA, Enforcement Officers are restricted to enforcement actions only, and must refer all cases they believe warrant a more facilitative or compassionate approach to a CIC Immigration Officer (CBSA, 2008d).

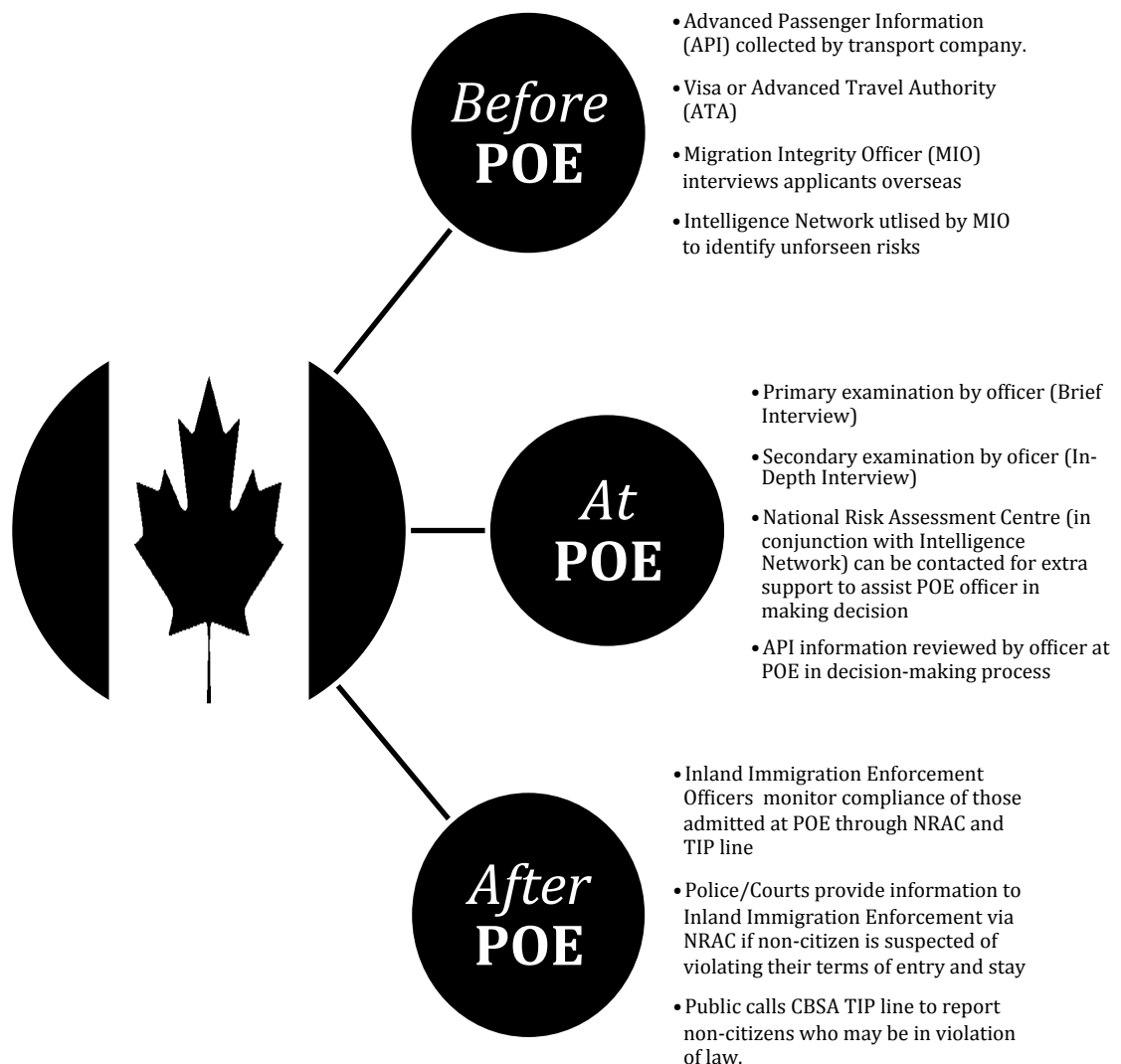
There is little question that under the CBSA and within Canada's heightened security environment, the means by which non-citizens are treated once they enter Canada and subsequently violate immigration law (or are suspected of violating immigration law) is similar to how police deal with incidents of crime. Freilich et al. (2006) observe that when compared to Australia, Canada (and the United States) have taken a more pronounced, para-military, and enforcement-focused approach to "increased security at the border, pre-clearance checks, and harmonization of visa and asylum policies" (p. 62). Moreover, the tactics used by the CBSA when enforcing immigration law are similar to those of police enforcing criminal law—this was not the case when CIC was responsible for internal immigration enforcement. Officers under CIC never carried firearms and received limited law enforcement training. In contrast, CBSA officers receive the same training as police officers (e.g., training in the use of firearms, physical force, surveillance techniques, pursuit tactics, and other investigative skills) (CBSA, 2007b, 2008a).

The CBSA also has a Criminal Investigators Section that works with Immigration Enforcement Officers to prosecute individuals who have violated the provisions of the *Immigration and Refugee Protection Act* and where an administrative remedy would not be enough to deter future violations. Criminal Investigators usually only pursue criminal charges under the *Immigration and Refugee Protection Act* when an individual has previously been dealt with through an administrative process (e.g., removed from Canada, been denied the ability to sponsor a non-citizen, etc.), and subsequently violated the law again (CBSA, 2008c). The only exceptions are cases involving human trafficking, which are handled exclusively by the Royal Canadian Mounted Police (RCMP, 2009a). Although Criminal

Investigators work independently of Immigration Enforcement Officers, both consult with each other on shared cases and often will gain consensus whether or not a person should be charged. The numbers of prosecution cases managed by investigators are much lower than the number of administrative cases handled by Immigration Enforcement Officers (CBSA, 2008c).

The CBSA also maintains an international presence to assist with its overall program delivery. CBSA Migration Integrity Officers work in overseas missions to pre-screen non-citizens applying for entry visas. These officers work alongside CIC Immigration Visa Officers to review cases where visa applicants may pose a risk to the public of Canada or who may be attempting to circumvent Canada's immigration law (CBSA, 2008b). In addition to reviewing overseas visa applications, Migration Integrity Officers also conduct overseas field investigations on behalf of Enforcement Officers and Criminal Investigators requiring information and evidence from domestic investigations. Although the CBSA has Intelligence Officers working within its Intelligence Division, Migration Integrity Officers are tasked with providing intelligence to the Division in relation to trends in human trafficking, smuggling, and fraudulent documents (CBSA, 2004).

Figure 5:
Overview of Canada's Approach to Admitting and Controlling Non-Citizens



The final aspect of the CBSA's immigration enforcement program involves the National Risk Assessment Centre (NRAC). Located in Ottawa, ON, NRAC "operates 24-hours a day, 7-days a week, acts as a focal point and an interface between intelligence agencies at the international, national, and local levels to protect Canadians against current and emerging threats" (CBSA, 2008d, ¶ 1). All warrants issued for the arrest of non-citizens wanted for violations of the *Immigration and Refugee Protection Act* are housed in the sub-unit of NRAC known as the Immigration Warrant Response Centre (IWRC). Tips from the both the public and law enforcement agencies are received through *Border Watch*; a 24/7 toll-

free phone service operated by the CBSA. Immigration related information received by *Border Watch* is referred to an Immigration Enforcement Officer for follow up investigation.

The interconnectedness of CBSA Inland Immigration Enforcement Officers, Criminal Investigators, Migration Integrity Officers, Intelligence Officers, and NRAC personnel cumulate the Government of Canada's principal immigration enforcement program. Although the RCMP has specialised Immigration and Passport Section officer that investigate human smuggling and trafficking cases (RCMP, 2009a), it is principally CBSA officers who manage the day-to-day cases concerning non-citizens in violation of the *Immigration and Refugee Protection Act*.

V-4) Australia and Canada Compared

Although the process of internal immigration enforcement in Australia and Canada are very similar (see Appendix Two), the organisational approach each uses is very different. Both Australia and Canada have dedicated immigration authorities tasked with internal immigration enforcement duties, both have overseas officers who assess the admissibility of travellers *before* the POE, and both utilise a centralised “dob-in/tip” call centre to receive information from the public and law enforcement concerning suspected unlawful non-citizens living within the nation (CBSA, 2008d; DIAC, 2008b). Yet despite having very similar processes, the organisational approach used to carry out internal immigration enforcement is distinct—specifically, Australia uses a non-policing approach whereas Canada used a policing one.

Appendix Two provides a comparison of how Australia and Canada each collect information regarding suspected unlawful non-citizens, analyse this information, and decide on appropriate enforcement action (if any), and also identifies possible outcomes from this process. Within this comparison, it is important to note that in Australia, the DIAC is the only organisation involved in determining whether or not a non-citizen has violated the *Migration*

Act, and in Canada, there are two organisations: CIC takes responsibility for non-enforcement cases, and the CBSA takes responsibility for enforcement ones.

The dichotomy of responsibility within the Canadian process is a result of Canada's policing approach to internal immigration enforcement. Because enforcement actions within Canada must be in compliance with the *Charter*, and because the CBSA is considered a law enforcement agency, non-citizens who are the subject of enforcement action are dealt with in virtually the same manner as persons dealt with by the police during criminal matters (Pratt, 2005). As is discussed in the chapter summary, Australia examined whether or not to take a similar policing approach to Canada, and decided to continue with its traditional administrative approach, using the police to assist in higher risk cases (Smith, 2008).

V-5) Chapter Summary

In both Australia and Canada, elements of the internal immigration enforcement programs resemble those traditionally found within the criminal justice system—especially in the case of Canada. In both systems, violators are discovered through surveillance efforts, court and police reports, as well as dob-ins/tips received from the public. Once discovered, officers may arrest, detain, and remove non-citizens found to be in contravention of their respective immigration laws. Although not as developed in Australia, both nations use quasi-judicial hearings to make determinations in immigration enforcement cases (Immigration and Refugee Board of Canada [IRB], 2012; Migration Review Tribunal, 2008). Under Australia's system, an officer given the delegated authority of the Minister is tasked with assessing the validity of an immigration violation case and either deems the non-citizen's visa as cancelled, considers the visa still valid, or if cancelled issue a bridging visa,³⁸ in Canada a member of

³⁸ Under the Australian immigration system, all non-citizens are required to obtain a visa to enter the nation. Should this visa expire or the non-citizen fail to comply with the provisions of the *Migration Act*, the visa can be deemed cancelled by an Immigration Officer given the delegated authority of the Minister. Once a non-citizen's visa has been cancelled, he or she may be issued a bridging visa by the office, allowing the person to either leave Australia or make arrangements so as they can reinstate his or her legal status, or must be detained

the IRB's Immigration Division renders a decision.³⁹ Under both systems, the consequence of being found in violation of immigration law may result in the non-citizen being detained and ultimately removed to their country of origin.

Speaking about the United States, but equally true for most western democracies, Welch (2007) states, "civil liberties attorneys remain critical of the government for misusing immigration law to circumvent its obligations under the criminal justice system" (p. 159). Scholars, legal professionals, and human justice advocates throughout the world share in Welch's concern that laws never intended to be punitive or criminal in nature are being utilised in cases involving non-citizens as a means of avoiding traditional criminal justice processes. In essence, immigration violations are becoming criminalised, and in the case of Canada and the United States, immigration officials are becoming police officers.

If we broaden our perspective and examine [a government's] power over migrants' lives and the way in which they are integrated into society, unauthorized migration in fact reveals the strong power of the state, which has a capacity to deprive migrants of their rights. (Yamamoto, 2007, p. 95)

Considering the parallels that exist between the internal immigration enforcement processes of Australia and Canada, and those traditionally found within the criminal justice system, there is no wonder that groups such as Amnesty International (2009), Human Rights Watch (2009), and others (e.g., Palidda, 2006) are concerned immigrant violations are becoming criminalised. This concern is even more so true for Canada, where CBSA officers derive their powers from the *Criminal Code of Canada*, have the power to use deadly force, and operate in the same manner as police.

pending removal. Should the non-citizen feel there was an error in the cancelling of the visa, he or she may appeal the Minister's Delegate decision to the Migration Review Tribunal (see Bagaric, Boyd, Dimopoulos, Tongue, & Vrachnas, 2007, Ch. 13).

³⁹ In cases where a non-citizen (who has not been granted Permanent Resident status) is convicted of a criminal offence within Canada, a CBSA officer may issue a removal order against (see ENF-3).

With a decade having past since the tragic events of 9/11, most governments have taken great efforts to assess and reform their respective border security programs—Australia and Canada included. Unquestionably, governments must respond to the threat of terrorism and protect their citizens from foreign threats, yet they must also ensure their efforts respect the tenets of a just and civil society. Governments must be ever vigilant to ensure security efforts ultimately results in safer communities—failing to do so may not only waste scarce public funds, but also unintentionally could result in governments losing public confidence in their abilities to protect national interests.

CHAPTER VI: IDENTIFICATION

To be governed is to be kept in sight, inspected, spied upon, directed, law-driven, numbered, regulated, enrolled, indoctrinated, preached at, controlled, checked, estimated, valued, censured, commanded, by creatures who have neither the right nor the wisdom nor the virtue to do so. (Pierre-Joseph Proudhon, 1851, p. 294)

VI-1) Chapter Overview

This chapter examines and compares the first sub-component of internal immigration enforcement as it relates to suspected unlawful temporary non-citizens (see *temporary non-citizen* in glossary)—namely, how Australian and Canadian internal immigration enforcement officers operationally approach the identification of suspected unlawful temporary non-citizens (hereinafter referred to as *suspected unlawful non-citizens*). Taking a comparative criminological approach through the lens of peacemaking criminology, this chapter provides the findings from the analysis of how Australia and Canada each attempt to identify suspected unlawful non-citizens living within their respective territories. Considering that the subsequent chapters that examine the internal immigration enforcement sub-components of arrest, detention, and removal all stem from the identification of suspected unlawful non-citizens, it is necessary the first sub-component of identification be thoroughly examined and understood.

As aforementioned in the background section of this thesis, many of the sub-components associated with internal immigration enforcement closely resemble those traditionally found within the criminal justice system (Dorais, 2006; Weber, 2007)—namely, both involve persons suspected of violating the law to be identified, arrested, and detained. Immigration authorities and police utilise dob-ins/tips from the public, analyse government databases, and conduct field investigations as a routine part of their investigative processes (Mitchell & Casey, 2007). As will be discussed, the *Migration Act 1958* (Cth) of Australia

(hereinafter referred to as the *Migration Act*) and *Immigration and Refugee Protection Act* [S.C. 2001, c.27] of Canada (hereinafter referred to as the *Immigration and Refugee Protection Act*), both empower immigration authorities to identify suspected unlawful non-citizens through a variety of information collection modes.

VI-2) Overview of Identification

VI-2-a) General Approaches to Identifying Unlawful Non-Citizens

The Australian DIAC *Procedures Advice Manual*, National Compliance Operational Instructions section [PAM3], and the CIC *Enforcement Manual*,⁴⁰ Investigations and Arrest [Arrest] section [ENF-7], both suggest the following means immigration officers can identify suspected unlawful non-citizens:

- *Analysis of fingerprints, photographs, and other biometric records*
- *Examination of identity/travel documents*
- *Information from electronic immigration records and/or databases*
- *Reports and/or records held by other government agencies (including police)*
- *Dob-ins/Tips from the public and law enforcement officers*
- *Intelligence/surveillance investigative actions*

To afford a legal basis for the identification of suspected unlawful non-citizens, both the *Migration Act* of Australia and *Immigration and Refugee Protection Act* of Canada include provisions addressing how officers can collect personal identifiers⁴¹ from non-citizens when they are applying for a visa abroad (security *before* the POE), when they are at the POE seeking entry (security *at* the POE), or after they have entered the nation and either are applying for an extension or change to their immigration status or have been detained

⁴⁰ The CBSA's inland immigration enforcement officers use the ENF manual to guide their operations, yet Citizenship and Immigration Canada retains control over all policies concerning the administration and enforcement of the *Immigration and Refugee Protection Act*.

⁴¹ Physical identifiers include the recording of physical descriptors such as eye colour, height, weight, marks/scars, and race. In addition, physical identifiers can include the collection and recording of biometric data such as fingerprints, photographs, and iris scans (see *Migration Act* §5A and *Immigration and Refugee Protection Act* §16(3)).

(security *beyond* the POE). During all three phases of border security, information available from travellers' identity and travel documents can also be collected and electronically stored by Australian and Canadian immigration authorities for identification and security screening purposes (PAM3; ENF-7). Considering that this thesis specifically focuses on the way suspected unlawful non-citizens are identified *beyond* the POE (those living inside the nation), this chapter will only examine the processes associated with identifying suspected unlawful non-citizens within the context of internal immigration enforcement.

Traveller information is collected and electronically stored during all three phases of the border security process (security before, at, and beyond the POE—see Figure 2 in Chapter II). This information is principally meant to help policymakers and others identify and understand general migration trends, and to ensure the ongoing effectiveness and integrity of the their immigration programs. However, in reviewing the policy manuals of both nations (PAM3; ENF-7), it is apparent that the collection of traveller information is also a paramount factor in the internal immigration enforcement sub-component of identifying suspected unlawful non-citizens believed to residing within each nations respective territory.

VI-2-b) General Operational Techniques Used to Identify Unlawful Non-Citizens

In addition to collecting and analysing personal identifiers, Australian and Canadian immigration authorities also record information pertaining to travellers' identity and travel documents⁴² as part of their respective national security strategies. Since 9/11, both nations have required commercial transportation companies to collect the personal information and ticketing details of all persons entering or exiting their territories. This information is known in both Australia and Canada as Advance Passenger Information (API) (CBSA, 2008c; DIAC, 2007). API records are used to detail a traveller's passport information and ticket

⁴² Identity documents include passports, national identity cards, and other government-issued photo identification. Travel documents include transportation tickets, travel loyalty program cards, and other documents issues by a travel company or transportation carrier.

itinerary, to outline the traveller history (how often they have crossed the border, how many tickets they have purchased, and what passports they have used), and also to identify when, where, and how their tickets were purchased, and what other travellers were connected to these purchases (e.g., friends, family members, business associates whose tickets were purchased using the same payment method at the same time; including their seating information, and details regarding checked luggage) (DIAC, 2007; CBSA, 2010a).

Officers use both personal identifiers and API identity/travel document information to conduct risk analyses by comparing this traveller data with domestically produced watch-lists⁴³ and international ones such as the INTERPOL Stolen and Lost Travel Documents (SLTD) database. Additionally, officers at both POE and internal immigration enforcement offices are granted access to these personal identifiers and API identity/travel document records so they can identify and locate suspected violators of both immigration and criminal law (INTERPOL, 2007). For example, should an internal immigration enforcement officer in either Australia and Canada come across a person they suspect is an unlawful non-citizen and who does not have an identity document, they can ascertain the person's identity by taking fingerprints and comparing them against those previously collected through visa and other immigration application processes (Lewis, 2005). What's more, this information can also be compared against citizenship records, domestic and international criminal records, and also domestic and international terrorist watch-list records to ensure immigration enforcement action is not erroneously taken and, conversely, to ensure a person who poses a possible threat to national security and safety does not pass through a POE without first being detected (CBSA, 2010a; DIAC, 2009b).

⁴³ In Australia, the *Movement Alert List* is the primary database used in the *Advanced Passenger Information* (API) screen process (DIAC, 2009b), and in Canada the *Passenger Name Record* (PNR) is the primary database used by the synonymous *Advanced Passenger Information* (API) screen process (CBSA, 2010a).

Just as electronic data is collected from travellers via their travel document (e.g., embedded digital biometric information located in passports or data provided from the transportation company); immigration records collected at POEs are also used to identify possible unlawful non-citizens who entered the nation and are living within the territory. All travellers arriving in Australia and Canada by air or sea must complete a declaration form that asks about their identity, citizenship, country of residence, anticipated duration of stay, purpose of visit, as well as customs and agricultural importation questions (see Appendix Two). This information, which is originally collected in hardcopy, is transposed into an electronic format for future reference (CBSA, n.d.; DIAC, 2008b). Likewise, both Australian and Canadian immigration authorities maintain records of all information collected before the POE, through the recording of visas applications or other immigration processes such as applications for permanent residence, foreign student authorisations, or temporary worker applications. Should a non-citizen have an internal immigration enforcement investigation initiated against them, officers can access these electronic immigration records to assist in subsequently identifying and locating them (CBSA, 2010a; DIAC, 2008b).

In addition to records stored by Australian and Canadian immigration authorities, both the DIAC and CBSA have memorandums of understanding (MOUs) with their local, state/provincial, and federal police, and intelligence services (and, in the case of Australia, taxation service) that afford investigators access to their electronic data and reciprocates this sharing of information with their partner agencies. If either the DIAC or CBSA require information from partner agencies in their efforts to identify a potential unlawful non-citizen, or if their partners require information concerning a non-citizen from either immigration authority, these standing MOUs afford this investigative ability (CBSA, 2006; DIAC, 2010a).

Further to the information collected by either Australian or Canadian immigration authorities and their partner government agencies, both nations have 24-hour toll-free

telephone call centres⁴⁴ through which members of the public or law enforcement can provide dob-ins/tips concerning suspected unlawful non-citizens (CBSA, 2009a; DIAC, 2011b; CBSA, 2005). Information from these dob-in/tip lines can result in the DIAC or CBSA launching new investigations concerning possible immigration law violations. Additionally, information received through both the DIAC and CBSA dob-in/tip lines can be used to confirm the identity and location of suspected unlawful non-citizens who are already the subject of an ongoing investigation (CBSA, 2006; DIAC, 2010a).

The final means of identifying suspected unlawful non-citizens are through active field investigations (see PAM3; ENF-7). Field investigations involve officers physically going into the community in an attempt to identify and locate possible violators of immigration law. Often, field investigations involve officers using and developing intelligence concerning employers who have a history of hiring non-citizens, accompanying police on investigations where non-citizens are involved in criminal activities, and conducting surveillance activities at uncontrolled points along a border where undocumented non-citizens are believed to gain entry to the territory—in Australia, this is primarily done along the northern coastline of the Northern Territory by both police and customs officers, and in Canada along the Canada–U.S. border by Integrated Border Enforcement Team⁴⁵ officers (Winterdyk & Sundberg, 2010b). During the course of field investigations, officers will at times utilise search warrants to gain access to businesses, residences, as well as electronic mediums that are not publicly accessible (e.g., mobile phone company records, internet service provider records, and other private companies holding digitised information that could assist in the location of a suspected unlawful non-citizen) (see PAM3; ENF-7).

⁴⁴ Australia established its call centre in February 2004, followed by Canada in 2005 (see CBSA, 2009a; DIAC, 2011b; CBSA, 2005).

⁴⁵ Integrated Border Enforcement Teams (IBET's) are comprised of members from the Canada Border Services Agency, Royal Canadian Mounted Police, U.S. Customs Border Protection agency, and United States Immigration and Customs Enforcement agency (Winterdyk & Sundberg, 2010b).

VI-2-c) General Technologies Used to Identify Unlawful Non-Citizens

Over the past several decades, especially in the post-9/11 period, sophisticated technologies have been developed and implemented by western democracies to assist in the identification and location of suspected unlawful non-citizens. Of these new technologies, the use of biometric identity and travel documents such as the ePassport⁴⁶ or eCard are the most widely used and recognisable (Wilson & Weber, 2008; Zureik & Salter, 2005). Today, most western nations have embedded microchips within their national passports or identity cards, on which the holder's biometric information is electronically stored. Information collected from eCards or ePassports can be used for identification purposes both at the port of entry and during future internal immigration enforcement activities (Givens et al., 2009).

In addition to the ePassports/eCards, sophisticated computer databases, such as INTERPOL's SLTD database, provides immigration authorities around the world real-time information concerning the validity of travel documents. Officers can also gain the assistance of INTERPOL document experts through the internet (email or live online messaging) to ascertain whether or not a travel document is a forgery (INTERPOL, 2007). Further to INTERPOL's human and electronic document verification resources, member nations⁴⁷ of the Electronic Documentation Information System on Network (EDISON), an electronic database containing samples of virtually every national passport ever produced (including the security features of these passports), can also check suspicious travel documents to establish their validity. Aside from screening of documents by officers at ports of entry, internal immigration enforcement officers will often use INTERPOL or EDISON to confirm the

⁴⁶ An ePassport/eCard is a national identity document (passport or identity card) that containing electronically stored biographical and biometric information on an imbedded microchip. Emerging from machine readable passport and national identity cards, which only contained biographical information stored in the form of a barcode, ePassports/eCards have become the standard for most western democracies and even many developing nations. Today these ePassports/eCards have become the standard identity document needed to a cross a national border (see Zureik & Salter, 2005; Givens et al., 2009; Wilson & Weber, 2008).

⁴⁷ As of August 2010, the EDISON member nations include Australia, Canada, the European Union, Hong Kong, Singapore, United States, and the United Arab Emirates (Dubai Naturalization and Residency Department [DNRD], 2010).

identity of suspected unlawful non-citizens with suspicious identity documents (General Directorate of Residency and Foreigners Affairs Dubai, 2010; INTERPOL, 2007; PAM3; ENF-7).

Finally, officers attempting to identify and locate suspected immigration violators can access third-party technologies (usually through the acquisition of a search warrant). Most telecommunications service providers and other industries that integrate radio-frequency identification technologies (RFID) in their products (such as smart-cards, toll booth transmitters, and other similar devices) possess sophisticated electronic locator technologies⁴⁸ that monitor and track their clients' spending and usage activities. This information is used by companies to identifying new markets, adjust advertising campaigns, and customise services to their clients by "tracking" how, when, and where their clients use their services (Clarke & Wigan, 2008).

The aforementioned tracking abilities are possible as a result of most portable electronic devices (such as notebook computers, mobile phones, portable navigation devices, and most recently smart-cards), having built-in RFID technologies that transmit and receive data associated with the registered user of the device. Internal immigration investigators, if granted access to the third-party service providers tracking technology (usually through the issuing of a warrant), can access the RFID data held by the third party to assist in ascertaining the whereabouts of suspected unlawful non-citizen in possession of a RFID-enabled device (Mock & Rohs, 2008).

⁴⁸ Electronic locator technologies are used to identify the location and frequency of access clients have with a service providers' electronic network. These technologies identify the hardware (e.g., all electronic devices that access the internet or other electronic network have a unique identification number identifying the devices presence on a network), and users (e.g., most network administrators require users of hardware connected to their network to use a login ID and password that authorises their access) of a specific network (Mock & Rohs, 2008). This means any cellular/mobile phone, computer, or other device that accesses a network can be located electronically through this technology. Even items such as bankcards or loyalty cards that are "swiped" through a machine connected to a network can be tracked. Both Australian and Canadian government agencies have the capability to access telecommunications data, radio-frequency identification (RFID), and other electronic locator technologies to identify and ascertain persons believed to be a threat to national security or who are otherwise sought by a government agency (p. 236).

Although using this information is highly effective in the identification and location of suspected unlawful non-citizens, because warrants are often required to access this information, third-party technologies are normally only accessed in the case of high-profile cases concerning non-citizens with violent criminal histories (personal communication, Richard Huntley—CBSA Director of Inland Enforcement (Alberta), August 6, 2010).

VI-3) How the DIAC Identifies Suspected Unlawful Non-Citizens

Although Australia and Canada take similar approaches to identifying and locating suspected unlawful non-citizens, the Australian model is more reliant on suspected unlawful non-citizens voluntarily self-reporting their possible unlawful status compared to Canada. According to the Australian Government publication *Managing the Border* (DIMIA, 2006), the DIAC's strategy for identifying and locating persons suspected of violation of the *Migration Act* is "largely non-intrusive and supported by substantial voluntary compliance" (p. 51). The non-intrusive component of this strategy involves employers, educational institutions, police departments, and government agencies (such as Centrelink and the Australian Taxation Office) routinely and voluntarily providing information concerning non-citizens they interact with (DIAC, 2011a). The DIAC then reviews this information to determine if a non-citizen dealing with an external organisation is unlawful. To encourage and facilitate external information concerning suspected unlawful non-citizens, the DIAC frequently delivers educational workshops regarding immigration law to groups such as chamber of commerce, school administrators, law enforcement officers, and government service providers (DIAC, 2006). The voluntary compliance component of this strategy involves having a program in place whereby unlawful non-citizens who voluntarily self-report their possible unlawful status to the DIAC (and who meet the criteria set out in §31(3) of the *Migration Act*), can obtain a "bridging visa" that in essence reinstates their lawful status and thus negates them having to be detained (Vrachnas et al., 2008).

There are currently five classes of bridging visa that afford immigration officers the ability to avert detaining and removing unlawful non-citizens who meets the prescribed criteria set out in the *Migration Act*.⁴⁹ In essence, bridging visas provide an alternative to detention and removal in “low risk” cases involving non-citizens who entered Australia legally but subsequently became unlawful. By having a system in place that allows unlawful non-citizens to identify themselves, the DIAC is able to avert the need to actively seek out, identify, and locate unlawful non-citizens, and also reduces the need to conduct field investigations—ultimately saving millions of dollars in investigation and detention costs (Vrachnas et al., 2008).

Aside from unlawful non-citizens voluntarily self-reporting to the DIAC, there are three other principal means by which information concerning the identification and location of suspected unlawful non-citizens is collected and reviewed—field investigations, government electronic records, and information obtained through the DIAC’s toll-free and anonymous dob-in/tip line. As will be discussed, the dob-in/tip line is the most common means by which information from the public is collected, whereas field investigations and government electronic records constitute the primary means official information pertaining to unlawful non-citizens is obtained.

There are three government electronic record systems that Australia uses to identify suspected unlawful non-citizens: 1) the Movement Record, 2) the Movement Alert List, and 3) the Regional Movement Alert System. The first of these systems (Movement Record) is a registration database that records the information pertaining to all persons who enter or exit through a POE. This system is the primary electronic record system used by the DIAC to identify unlawful non-citizens (DIAC, 2009b). Because all non-citizens seeking entry to

⁴⁹ Section 31(3) of the *Migration Act* authorises a DIAC officer to issue one of five classes of bridging visas to unlawful non-citizens who lawfully entered Australia and who have applied for another substantive visa that would allow them to remain in Australia (either permanently or temporarily) (Vrachnas et al., 2008, §9).

Australia must apply abroad and receive a visa before being permitted to board a commercial mode of transportation destined for Australia, and because Australia records the entry and exit of all persons through its POEs using the movement record, Australian immigration authorities are able not only to know who crosses its borders, but also to identify non-citizens who entered, who exited, and who failed to depart once their status expired (DIAC, 2008b). The movement records provide an expedient means of assessing a person's identity, and ascertaining whether or not they are an "overstay" (DIAC, 2009b).

Further to the movement records, the DIAC also uses its Movement Alert List and Regional Movement Alert System to identify non-citizens who potentially pose a security risk or public safety threat to Australia. When the DIAC receives information from either its own officers or from another Australian government agency (including intelligence and law enforcement agencies) concerning a non-citizen who, if they sought entry or entered Australia, would be in violation of the *Migration Act*, detailed information regarding the person is added to the Movement Alert List (DIAC, 2009b). In addition to the Movement Alert List, the DIAC also uses the Regional Movement Alert System, which is a jointly administered by Australia, New Zealand, and the United States (DIAC, 2008a). The Regional Movement Alert System is specifically designed to allow the participating governments to both input and access information about persons who are suspected of being involved in terrorism. Although the Regional Movement Alert System is limited to cases involving persons suspected of terrorist related activities, the information added to this system is automatically downloaded to Australia's domestic Movement Alert List. Both systems also include information related to possible stolen, lost, or otherwise invalid travel documents and is cross referenced with the INTERPOL SLTD database (DIAC, 2008a, 2009; INTERPOL, 2007).

Aside from the identification and location of suspected unlawful non-citizens via official government electronic records, the DIAC also obtains information from the public through its toll-free dob-in/tip line—a telephone call centre through which information pertaining to suspected unlawful non-citizens is voluntarily and anonymously received from members of the public (DIAC, 2008a). As indicated in the DIAC *Annual Report* for 2003–2004 through 2008–2009, the dob-in line is hailed as a meaningful way the community can assist the DIAC “support the government in its efforts to maintain the integrity of its immigration programs” (see DIAC Annual Report, 2010).

During FY 2003–2004 through to the end of FY 2009–2010,⁵⁰ the DIAC dob-in line received 176,433 calls from the public concerning suspected unlawful non-citizens (see DIAC Annual Report, 2005, 2006, 2007, 2008, 2009, 2010, 2011). Additionally, there were a total of 97,600 unlawful non-citizens identified, of which 63,619 non-citizens voluntary self-reported their potentially unlawful status, 23,731 suspected unlawful non-citizens were identified through field investigations by DIAC officers, and another 9,842 were identified by the police or other Australian Government agencies. During this same period, the estimated unlawful population of Australia remained relatively similar at a means value of 49,164. As will be examined in the findings section of this chapter through a standardised comparison of the different modes used by the DIAC to identify suspected unlawful non-citizens (see Chart 1), voluntary compliance is the most common way unlawful non-citizens are identified.

VI-3-a) Legal Authority and Restraints in Relation to Identifying Unlawful Non-Citizens

Section 5 of the *Migration Act* provides that an authorised officer (including and immigration officer, customs officer, police officer, or other person authorised by the

⁵⁰ The Australian fiscal year (which corresponds with the DIAC’s annual reports) runs July 1 of the first year to June 30 of the following year (as indicated by the dates stipulated within each annual report). Conversely, Canada’s fiscal year (which corresponds with the CBSA’s annual reports) runs from April 1 of the first year to March 31 of the following year (as indicated by the dates stipulated within each annual report).

Minister of Immigration to administer and enforce the *Migration Act*) may carry out an “identification test” in order to obtain a “personal identifier” (see footnote 42). Section 5D indicates that the identification test and resulting personal identifier are limited to processes prescribed by the Minister and found in the Act and its Regulations.

Part 2, division 2, §18 through §27 of the *Migration Act* describe the powers of officers to obtain information and documents about unlawful non-citizens. Division 3, subdivision F, §140V through §140XJ,⁵¹ further provides officers the power to actively obtain information and documents through an inspection/investigative process both at a POE and within Australian territory—this includes limited powers to enter a place where a suspected unlawful non-citizen is located as well as collect information from third parties that will assist in locating suspected unlawful non-citizen. Part 2, division 11, §225 through §228, further compels the master of a conveyance to produce and provide identity documents to officers upon landing in Australia; Part 2, division 12, subdivision A, §234 and §234A, provide penalties related to the possession and uttering of false documents; Part 2, division 13AA, subdivisions A through AB, addresses the powers and procedures for identifying persons detained under this Act; and Part 4A, §336A through to §336L, outline the obligations relating to identifying information. Within these sections, issues related to obtaining, modifying, accessing, and sharing a non-citizen’s personal identifiers are addressed, and §336B stipulates that violating these provisions may result in an offence under §15.4 of the *Criminal Code Act 1995* (Cth).

VI-3-b) Case Studies: Vivian Alvarez Solon and Cornelia Rau

Two cases that have significantly impacted the way Australia conducts its internal immigration enforcement program (in particular how it identifies suspected unlawful non-

⁵¹ Division 12A, §245F and §245FA also provides authorised officers specific powers to board and search a ship, and division 13, §251 through §252AA and §258 through §258G provide officers specific powers to board and search vessel (including aircraft); in both the search of a boat or vessel, the authorised officers may conduct an identity test of passengers and crew.

citizens) are those of Vivian Alvarez Solon and Cornelia Rau. The first of these cases is that of Vivian Alvarez Solon, an Australian citizen who, in 2001, was wrongfully deported to the Philippines by the DIAC for erroneously being determined to be an unlawful non-citizen. The second case is that of Cornelia Rau, a citizen of Germany and lawful permanent resident of Australia who was unlawfully detained by Australian immigration officials for over 10 months between 2004 and 2005, for erroneously being suspected as an unlawful non-citizen. These two cases, which today are commonly and jointly associated with the *Palmer* and *Comrie Reports* (2005),⁵² address a number of significant procedural and operational deficits in the way Australian internal immigration enforcement authorities identify, detain, and remove suspected unlawful non-citizens.

The Case of Vivian Alvarez Solon and the Comrie Report (2005)

Regarding the case of Vivian Alvarez Solon, the 2005 *Inquiry into the Circumstances of the Vivian Alvarez Matter* (hereinafter referred to the *Comrie Report*) identifies her as being born in the Philippines in 1962 and, through marriage to an Australian, becoming a naturalised Australian citizen in 1986 under the name Vivian Young. The couple divorced in 1993, at which time Vivian Young reverted back to her maiden name of Vivian Alvarez Solon. Subsequent to her divorce, Ms. Solon had a son and established a residence in Brisbane, Queensland. During the 1990s, Ms. Solon was diagnosed with a mental illness that resulted in periodic episodes of disorientation and aberrant behaviour—which contributed to her having a number of interactions with the Queensland Police (including her being taken into protective custody, having her fingerprints taken and stored on the national police fingerprint system administered by the Australian Federal Police, and being assessed and treated for mental illness).

⁵² The *Palmer Report* (July 2005) refers the report produced by former Australian Federal Police Commissioner Mick Palmer for the Minister of Immigration concerning the case of Cornelia Rau, and the *Comrie Report* (September 2005) refers to the Ombudsman of Australia's inquiry into the case of Vivian Alvarez Solon by former Victoria Police Commissioner Neil Comrie.

The *Comrie Report* (2005) found that on the morning of February 16, 2001 in Brisbane, Ms. Solon dropped her son off at day care but failed to collect him at the end of the day. Resulting from this incident, Ms. Solon's son was taken into protective custody by the Queensland Department of Child Safety, yet it was not until July 17, 2001 that the Queensland Police officially declared Ms. Solon as a missing person. On March 30, 2001, Ms. Solon was discovered by paramedics in a public park in Lismore, New South Wales suffering from a head injury. After being transported to the Lismore Base Hospital and treated for her wounds, Ms. Solon reportedly began acting aberrantly and was transferred to a psychiatric unit for assessment. From the point that the paramedics found Ms. Solon in the park, to the point she was referred for psychiatric assessment, Ms. Solon's identity had not been established. In May 2001, after being contacted by a Queensland social worker, onshore immigration compliance officers attended the hospital to interview Ms. Solon, and erroneously determined that she was an unlawful non-citizen from the Philippines.

On July 12, 2001, Ms. Solon (whose identity still had not been established) was taken into immigration detention and declared by officers to be an unlawful non-citizen. As suggested in the *Comrie Report* (2005), the onshore immigration compliance officers were at a disadvantage in their attempt to identify Ms. Solon in that the Queensland Police had not broadcast her photo or details as a missing person until five days after she was taken into custody. Nonetheless, the report did acknowledge that the Queensland Police had taken Ms. Solon's fingerprints as a result of their interaction with her years earlier, and that immigration authorities could have established her identity using these records. Failing to cross-reference immigration records with police ones, the onshore compliance officer arranged for Ms. Solon to be interviewed by an official from the Pilipino embassy. *Comrie Report* discovered that Ms. Solon had in fact stated to the Pilipino embassy official that she was an Australian citizen and did not wish to be returned to her country of birth—this information was not shared with

immigration officials. On July 20, 2001, Ms. Solon was removed from Australia to the Philippines.

Suffering from untreated mental illness, destitute, alone, and separated from her son, Ms. Solon spent the subsequent five years in the care of a Philippines catholic mission. According to the *Comrie Report* (2005), it was not until July 14, 2003, when detectives from the Queensland Police Missing Persons Bureau cross-referred their records against those of the now DIAC, that it was discovered that Ms. Solon had been erroneously removed from Australia as an unlawful non-citizen. Yet, despite several DIAC officers reviewing immigration records as a result of requests from the Queensland Police, it was not until September 9, 2003 that officials from the Australian Department of Foreign Affairs formally acknowledged that, based on information from the Queensland Police and immigration officials, Ms. Solon was in fact erroneously removed.

In June 2005, as a result of Ms. Solon's unlawful removal from Australia being discovered, the Ombudsman's Office initiated the *Inquiry into the Circumstances of the Vivian Alvarez Matter* (this report was made public on September 25, 2005). The report outlined several scathing observations including that the Australian immigration authorities involved were unprofessional and poorly trained, and that the department had serious cultural concerns. The report also identified that the DIAC's case management and technology systems were ineffective. Of all the findings, the most damaging was that onshore compliance officers failed to adequately carry out their legal duty to first establish "reasonable suspicion" prior to detaining and removing a suspected unlawful non-citizen (see p. 68 of the *Comrie Report*). *Comrie Report* (2005) stressed the importance of officers establishing reasonable suspicion by identifying that under the *Migration Act*, detention is absolute with no statutory or legislative requirement compelling officers to review a detainee's detention after their initial arrest.

Since the release of the *Comrie Report* (2005), DIAC officers now undergo months of training with regard to administration and enforcement of the *Migration Act* (DIAC, 2010). Furthermore, the DIAC has mandated that all its managers, supervisors, and officers continually review and reflect upon the department's new case management protocols. As will be discussed within the findings section of this chapter, it is apparent that the Solon case and the Rau case (through the release of the *Palmer Report* (2005)) have resulted in the department improving its overall operations. Yet, as suggested in the implications section of this chapter, training and new protocols still fall short of determining the lawfulness of detention by way of *habeas corpus*, and the power of detention within the *Migration Act* remain absolute and potentially error prone.

The Case of Cornelia Rau and the Palmer Report (2005)

Regarding the case of Cornelia Rau, the *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* (hereinafter referred to as the *Palmer Report* (2005)) identifies Ms. Rau as being a German citizen and permanent non-citizen of Australia who is fluent in both the German and English. She first moved to Australia in 1967 with her parents, who subsequently returned to Germany in the 1980s, leaving Rau in Australia. Ms. Rau has suffered from mental illness for most of her life, and on multiple occasions has had episodes where she became disoriented and delusional. As indicated in the *Palmer Report*, Ms. Rau has been in and out of mental health faculties for decades as a result of schizophrenia.

As reported by the *Palmer Report* (2005), on March 17, 2004, Ms. Rau left psychiatric care at the Manly Hospital without being formally discharged. Upon discovering her disappearance, hospital staff reported Ms. Rau as missing to the New South Wales Police. Because Ms. Rau had a long history of leaving treatment prior to being officially discharged and always had subsequently returned without incident, neither the hospital staff nor police viewed her disappearance as a serious concern. Unbeknown to either the Manly Hospital or

New South Wales Police, Ms. Rau had made her way to Queensland, and, on March 30, 2004, was detained by Queensland Police and placed at the Brisbane Woman's Correctional Centre for being suspected as an unlawful non-citizen.

Once detained in Brisbane, onshore immigration compliance officers were contacted to assess Ms. Rau's lawful status in Australia. During this assessment, Ms. Rau continued to refer to herself as "Anna," a German tourist on vacation in Australia. As a result of her statements to authorities, Ms. Rau was erroneously identified as an unlawful non-citizen and transferred to the Baxter Immigration Detention Facility, where she was held for approximately 10 months pending her removal back to Germany.

On January 31, 2005, a reporter for the Melbourne-based newspaper *The Age* wrote an article concerning an unidentified woman who was being held in immigration detention and who was possibly mentally ill (Jackson, 2005). Ensuing from this publication, friends and family of Ms. Rau contacted the New South Wales Police with concerns that the article concerned Ms. Rau. Upon review, the New South Wales Police and immigration authorities confirmed that the woman being detained at the Baxter Immigration Detention Facility known as "Anna" was in fact Ms. Rau—a lawful Australian permanent resident. Ms. Rau was released from immigration detention and, on February 4, 2005, committed to the Glenside Hospital for psychiatric care.

Considering the media attention the case of Rau raised, on February 9, 2005, the Minister of Immigration commissioned former Australian Federal Police Commissioner Mick Palmer to conduct the *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* (commonly known as the *Palmer Report* (2005)). Within this report were 34 identified concerns associated with the way Ms. Rau (and other suspected unlawful non-citizens such as Ms. Solon) were identified, arrested, and ultimately detained by DIAC

officers. The following key findings of the *Palmer Report* (2005) are highlighted as particularly relevant:

- *The Department of Immigration and Citizenship was too focused on identifying Ms. Rau for the purpose of removal, and failed to place equal effort into first establishing reasonable suspicion that she was in fact an unlawful non-citizen (see Finding #3).*
- *Because no statutory provision exists within the Migration Act requiring immigration officials to review the lawfulness of a detention or to review a person's detention subsequent to the initial arrest, there is a lack of confidence that all immigration detentions are in fact lawful (see Finding #4).*
- *The DIAC had a serious cultural problem whereby officers were too focused on enforcement activities, were overly self-protective and defensive of their actions, and were unwilling to engage in self-criticism or analysis. Resulting from these organisational cultural problems, the department become inconsistent in their application of the Migration Act and prone to the making of administrative error (see Finding #8).*
- *DIAC officers were inadequately trained, had poor management oversight, used deficient information and case management systems, and lacked genuine quality assurance mechanisms to safeguard against administrative errors (see Finding #9).*
- *DIAC officers lacked the appropriate training needed to responsibly assess the identity of a suspected unlawful non-citizen, or competently undertake detention processing in a lawful and professional manner (see Finding #15).*

Reflecting on the Palmer and Comrie Reports (2005) from a Canadian Perspective

There is no known case in Canada where a non-citizen was erroneously or unlawfully removed as a result of mistaken identity⁵³ (including being wrongfully being identified as an unlawful non-citizen). This likely is because any person who is arrested or detained in Canada (regardless if they are a non-citizen or citizen) must be afforded *habeas corpus* as per

⁵³ Although there are several reports in the public domain that suggest several persons have been erroneously and/or unlawfully removed from Canada, the only case that has been upheld by the court since the coming into force of the *Canadian Charter of Rights and Freedoms* in 1982 is the case of Cassell (see *Cassells v. Canada (Minister of Citizenship and Immigration)*, [1999] 4 F.C. D-19). In 1994, Cassell was found by a federal tribunal to be an unlawful non-citizen based on his being convicted of a criminal offence. The Federal Court found that Cassell's 1994 removal from Canada was unlawful based on the fact the Provincial Court of Ontario, Criminal Division had issued a summons for him to testify in a criminal proceeding. This summons constituted a stay of removal; however, CIC mistakenly effected the lawfully issued deportation order without first consulting with the Ontario Court. After learning of the error, CIC located Cassell and returned him to Canada to appear before the Ontario Court.

§10 of the *Canadian Charter of Rights and Freedoms*. Moreover, in accordance with §503 of the *Criminal Code of Canada*, all persons arrested and temporarily detained must be brought before a justice of the peace or provincial court judge within a maximum of 24 hours from the time they were first arrested.

The *Immigration and Refugee Protection Act* is the only Act of Parliament that authorises this time period to be extended by another 24 hours. Regardless, in all cases of detention (both criminal and immigration cases), an arrested and detained person must be released from detention, unless the Crown Prosecutor or Minister's Delegate can demonstrate on reasonable and probable grounds before a court or tribunal that 1) the arrested/detained person's identity is unconfirmed, and reasonable efforts are being made to establish identity; 2) the arrested/detained person poses a danger to the public (or to him/herself); or 3) the arrested/detained person is unlikely to appear for a lawful purpose under an Act of Parliament. The one exception to this standard is when a person has been arrested under §469 of the *Criminal Code* for murder, treason, or a comparable indictable offence for which life imprisonment may be imposed. Yet, even in such cases, a review of the information related to these charges must first be assessed by a provincial court judge within a 24-hour period. Furthermore, should the judge agree with the information related to the charge, the detention is again reviewed during the first trial appearance, and reasonable consideration must be given to the issuance of bail.

In addition to all detentions being reviewed by way of *habeas corpus*, any person arrested in Canada for an indictable offence or an offence under the *Immigration and Refugee Protection Act* or *Citizenship Act* must have their fingerprints compared without delay against the national fingerprint databases maintained by the RCMP (ENF-7). In cases involving immigrants, these fingerprints may also be checked against international databases through either the U.S. Federal Bureau of Investigation and/or through INTERPOL (ENF-7).

Should an officer fail to comply with the aforementioned requirements associated with the arrest and detention of a person, they can be charged under §128 of the *Criminal Code for Misconduct of Officers Executing Process*, and face up to a two years imprisonment. What's more, under §24(1) of the *Canadian Charter of Rights and Freedoms*, any person whose rights have been violated has the right to seek remedies from the court from the person and/or body that violated their rights—thus, a person arrested can sue the arresting office and their law enforcement agency for violating his or her rights. Additionally, resulting from §45 of the *Immigration and Refugee Protection Act*, any immigration proceeding during which the person concerned asserts he or she is a Canadian citizen, must be halted so that the citizenship claim can be determined by a Citizenship Officer. Finally, in all cases where a court or tribunal has rendered a decision, the person concerned has a right to apply within 30 days to the Federal Court for judicial review.

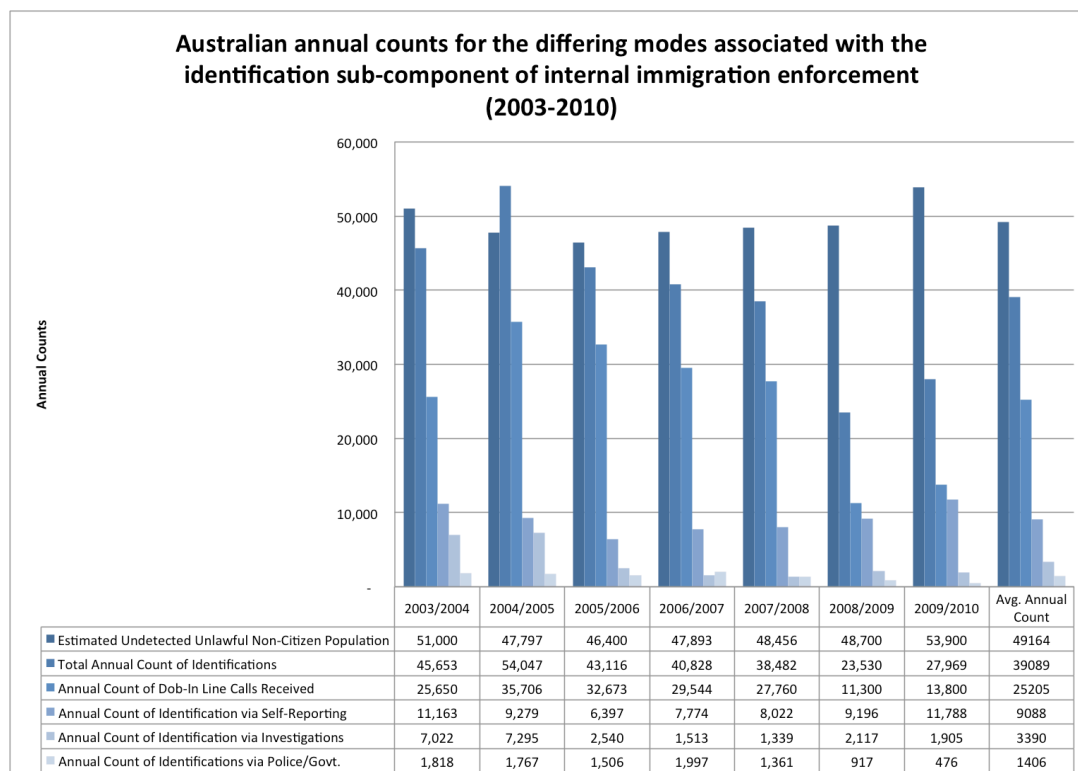
In considering the aforementioned, and considering the findings of the *Palmer* and *Comrie Reports* (2005), it is apparent that persons in Canada, when compared to Australia, are far less vulnerable to an abuse of state power or an administrative error, because the *Canadian Charter of Rights and Freedoms* affords all persons the right to *habeas corpus* and also provides remedies should these rights be violated. Though rare, Canadian officers who are found to have violated an arrestee's or detainee's rights not only can face disciplinary action by their agency, but they can also have both civil and criminal proceedings brought against them that ultimately could result in their being imprisoned for up to two years.

VI-3-c) Australia Findings

By reviewing the principal modes used by the DIAC to identify suspected unlawful non-citizens, three key findings were made. As will be discussed in more detail below, the DIAC's dob-in/tip line (although potentially having some public relations usefulness) appears to have no discernible operational utility. Second, the most frequent mode of identifying

suspected unlawful non-citizens was through the voluntary self-reporting of non-citizens who believed they were in violation of the *Migration Act*. Finally, field investigation by DIAC officers, as well as identification by government agencies (primarily by the police), constituted the second most common mode by which suspected unlawful non-citizens were identified in Australia.

Chart 1⁵⁴:



Source: *Compilation of Australian "raw counts" obtained from the DIAC Annual Reports for 2003–2004 through 2009–2010.*

When viewed through the lens of peacemaking criminology, these findings (as they apply to the identification sub-component of internal immigration enforcement) support the supposition that it more favourable to gain compliance of the law through peaceful, rather than enforcement focused means (Pepinsky & Quinney, 1991). This argument is supported by finding that voluntary self-reporting (which constitutes the least invasive means of

⁵⁴ See Chart 2 (p.144) which shows the rate analysis for the differing modes of 'identification' in Australia based on the counts provided in Chart 1. Also see Chart 3 (p.146) which compares the modes of identification in Australia based on the counts provided in Chart 1.

identification) yielded the highest number of identifications. Yet, as identified in the *Palmer* and *Comrie Reports* (2005), that suspected unlawful non-citizens are not afforded a review of their detention by way of *habeas corpus* exemplifies that even when a more peaceful approach to internal immigration enforcement is utilised, in the absence of legislative safeguards such as found within the *Canadian Charter of Rights and Freedoms*, suspected unlawful non-citizens remain vulnerable to injustices.

Australian Finding One: The Dob-In/Tip Line Has Very Limited Operational Utility

As identified by the Auditor-General of Australia, the DIAC does not analyse the dob-ins/tips it receives from the public and the records associated with the dob-ins/tips received are maintained in stand-alone computer files located in local offices (Auditor-General of Australia, 2004–2005, pp. 17–18). Nevertheless, despite this data not being compiled and analysed to identify significance, the DIAC still maintains the dob-in/tip line program is a vital and important component of its overall internal immigration enforcement strategy (p. 18). This argument becomes suspect when only one out of the past seven DIAC Annual Reports pinpoints the ratio of tips received to the number of enforcement actions taken by officers, and that nowhere is a description of the relationship between dob-ins/tips received and the enforcement actions taken provided (see DIAC, 2009a).

Although this thesis is unable to provide a quantified finding for the numbers or rates of suspected unlawful non-citizens located by way of dob-ins/tips received by the DIAC (as mentioned, the DIAC does not routinely keep records of this information), a descriptive observation is nevertheless provided. As illustrated in Charts 1 and 2, the information provided by the public through the DIAC's dob-in/tip line has no apparent impact on the overall unlawful non-citizen population, nor does it appear to make a meaningful contribution to the number of unlawful non-citizens identified. As observed, the volume of dob-ins/tips

received each year has no apparent impact on the number or rate of suspected non-citizens identified—this is especially true for the periods between 2003–2005 and 2007–2009.⁵⁵

An important consideration when assessing the DIAC's argument that information received to the dob-in/tip line is effective in identifying suspected unlawful non-citizens is that nowhere within any of the DIAC Annual Reports is there a cautionary note identifying anonymous information may not be credible in all cases. The practice of using dob-in/tip information becomes increasingly troubling when the legal standard of proof required to establish suspicion that a non-citizen is in violation of immigration law is lower than that required in cases concerning violations of criminal law (see Cole, 2002; Hing, 2006; Van Harten, 2009). Both Australia and Canada address internal immigration enforcement from administrative rather than criminal legal proceedings—meaning that the evidence required to establish suspicion that they are in violation of immigration law is less than that needed to establish suspicion they are in violation of criminal law (PAM3; ENF-7). As a result, suspected unlawful non-citizens can become vulnerable to unwarranted enforcement actions when anonymous information from the public is used (Cole, 2005).

As discussed by Van Harten (2009), the usefulness of anonymous and confidential information received by Canadian and British police should always be viewed with great caution. Research has shown that information concerning violations of law via government call-in centres often is “insufficient to demonstrate reasonable and probable grounds... [because] the credibility of the information cannot be assessed because the informer is anonymous or untried” (p. 13). Similarly, Challinger (2004), Cole (2002), and Hing (2006) also caution that internal immigration enforcement can often be initiated as a result of anonymous informants who purposefully inform on non-citizens they resent or fear based on

⁵⁵ Resulting from the fact the DIAC fails to conduct an ongoing analysis of the number of dob-in/tip calls received and number of identifications that result directly from dob-ins/tips (with the exception of the year 2007/08), the only means to observe this mode of identification is by way of a descriptive observation.

racist and xenophobic views. In their observation of post-9/11 American society, Cole and Lobel (2007) identify that many of the immigration enforcement actions taken by the Department of Homeland Security's Immigration and Customs Enforcement were based on prejudiced reports from the public as opposed to sound investigative efforts. Just as in the United States, other nations (including Australia and Canada) may also be susceptible to unintentionally initiating enforcement actions that result from anonymous information from the public rooted in racist or xenophobic attitudes. Yet, to definitively quantify the extent immigration enforcement actions in Australian and Canadian are unknowingly initiated as a result of such views, is impossible to ascertain.

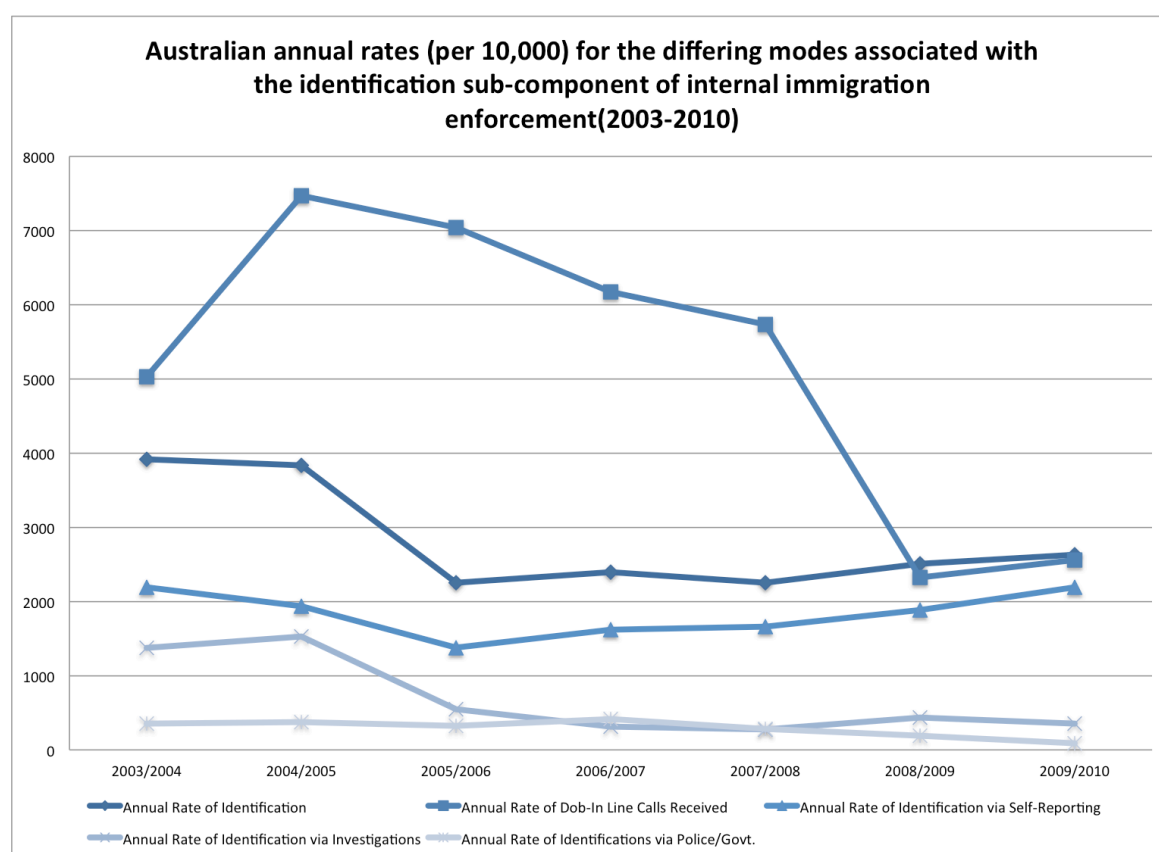
Australian Finding Two: Voluntary Self-Reporting is Principal Means of Identification

As a consequence of the *Palmer* and *Comrie Reports* (2005), Australia has had to seriously re-evaluate and reform how it administers its internal immigration enforcement program. In 2006, the DIAC reformed its strategy for administering Australia's internal immigration enforcement program in an effort to make it more accountable, fair, and non-intrusive (see DIAC Annual Report, 2007). A major component of this reform involved the DIAC focusing on having suspected unlawful non-citizens voluntary self-report their possible violation of the *Migration Act* to the DIAC. In reviewing Chart 2 below (also see Chart 1 above), it is apparent that although the rate of unlawful non-citizens identified has declined, voluntary self-reporting by suspected unlawful non-citizens has actually been gradually increasing. Moreover, as indicated in Chart 3 below, the overall unlawful population in Australia has remained fairly constant for the past seven years. In total, over the past seven years, identification by self-reporting has constituted approximately 65% of all identifications.

From a peacemaking criminology perspective, these findings are positive in that the DIAC is maintaining the integrity of its immigration program while at the same time

reflecting the principles of Fuller's (2003) six-facet model for addressing criminal justice concerns. As will be discussed in the comparative section of this chapter, and in keeping with the *Smith Report* (2008), Australia's decision not to adopt a policing model for its internal immigration enforcement program has resulted in similar rates of unlawful non-citizens being identifying when compared to Canada. However, as mentioned above, the fact Australia does not afford suspected unlawful non-citizens the right to have their detention reviewed by a court or tribunal continues to raise serious concerns—especially considering Fuller's (2003) assertion that criminal justice practitioners must be committed to safeguarding the civil and legal rights of the accused, and must also work diligently to ensure due process is respected and that outcomes are fair and just (pp. 86–88).

Chart 2:⁵⁶



Source: Rates calculated to 10,000 of population as per values obtained from the DIAC Annual Reports for 2003–2004 through 2009–2010.

⁵⁶ The rate calculation formulas can be reviewed in Chapter III (methodology), section III-1-f.

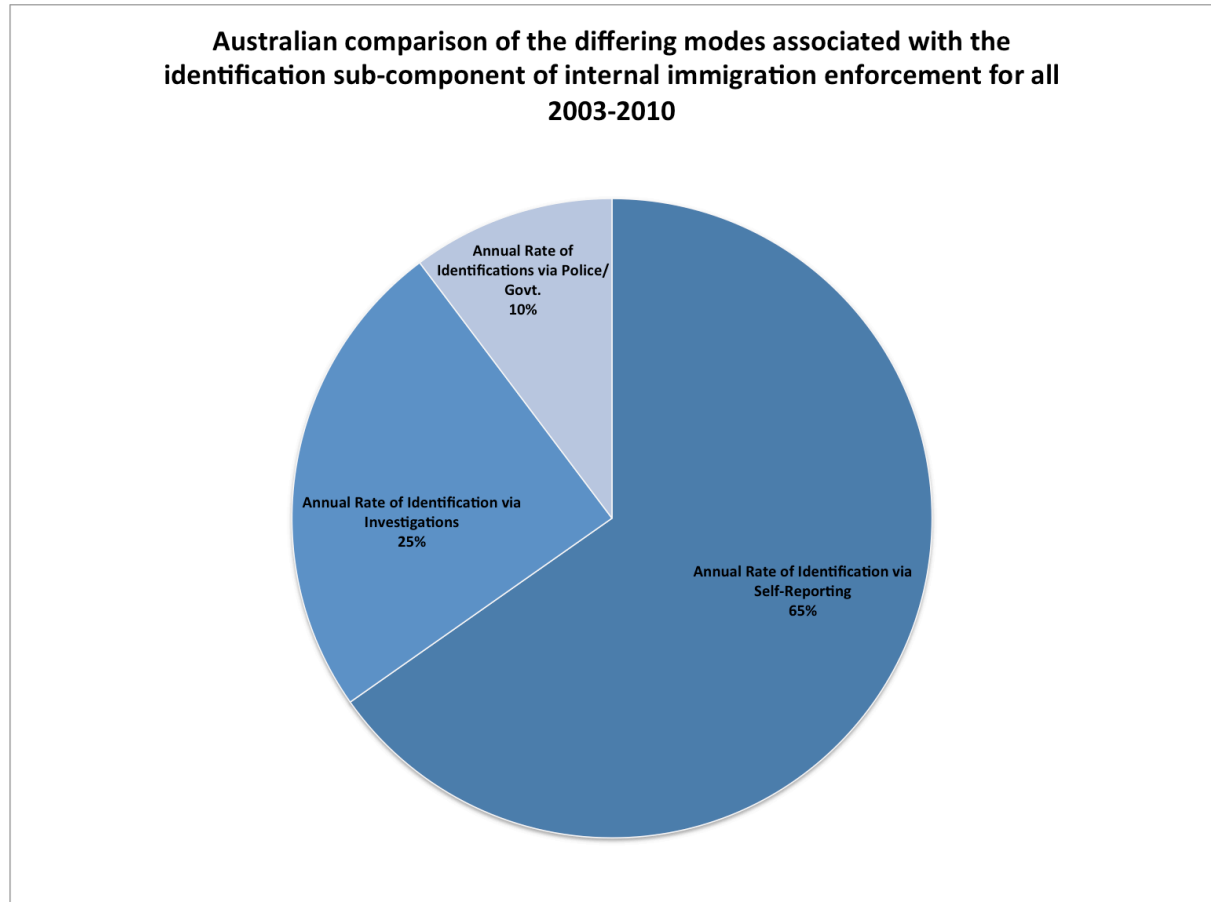
Australian Finding Three: Field Investigations/Agency Reports Useful Mode of Identification

Finally, as illustrated in Chart 2 above (also see Chart 1 above), the rates of identification through DIAC field investigations and identifications by government agencies (primarily by the police) are noticeably less than identifications made by way of voluntary self-reports. However, field investigations are still a consistent means by which suspected unlawful non-citizens are identified (on average 10% of all identifications over the past seven years). Of particular interest is that rates of identification by field investigations sharply dropped off between 2003 and 2006, yet have remained relatively consistent since this period. Moreover, the rates of identification by government agencies (mainly by the police) have been the most consistent over the past seven years. As mentioned previously, these two trends arguably are a result of the DIAC adjusting its approach to internal immigration enforcement in the years subsequent to the *Palmer* and *Comrie Reports* (2005).

It seems reasonable to argue that the 2006 decline and subsequent stabilisation of identifications made by DIAC field investigations is because prior to the release of the *Palmer* and *Comrie Reports* (2005), the DIAC was less accountable. This conclusion is supported by the observation that identifications of suspected unlawful non-citizens made by other government agencies (mostly by the police) have remained consistent over the past seven years. Accepting that the DIAC earnestly responded to the findings of the *Palmer* and *Comrie Reports* by training officers how to better conduct investigations (see DIAC, 2009a), it is reasonable to argue that the post-2006 stabilisation in rates specific to identifications made by DIAC field investigations is a result of operational reforms made by the DIAC in response to these reports. Additionally, this argument is also supported by the findings that since 2006, the rates of identification by other government agencies (primarily by police) and identifications by DIAC field investigations are very much parallel—suggesting that the

DIAC has since improved its capacity to conduct field investigations in a manner similar to the police.

Chart 3:



Source: Percentages calculated using the average rate values obtained from the DIAC Annual Reports for 2003–2004 through 2009–2010.

In summary, these findings support the argument that the *Palmer* and *Comrie Reports* (2005) did improve the means by which DIAC officers establish reasonable suspicion when conducting internal immigration enforcement activities. Assuming that prior to 2006 police officers had superior training, knowledge, and skills in relation to identifying persons suspected of violating the law when compared to DIAC officers, it is reasonable to argue that the post-2006 stabilisation in rates of identifications by way of field investigations is a result of DIAC investigative reforms implemented as a result of the *Palmer* and *Comrie Reports*.

VI-3-d) Summary of Australia Findings

In summary, Chart 1 illustrates the raw count for the differing modes associated with the identification of suspected unlawful non-citizens in Australia, Chart 2 illustrates the calculated rate differences between these various modes, and Chart 3 illustrates the percentage difference for the various modes associated with the identification sub-component of internal immigration enforcement in Australia. By reviewing these findings through both a raw count and rate comparison, it is evident voluntary self-reporting accounts for the majority of suspected unlawful non-citizens being identified, followed by identification via DIAC field investigations, and finally by identifications made by other government agencies and the police. Furthermore, it is observed that calls received from the DIAC dob-in/tip line, although slightly reflective of the rates of identifications achieved through field investigations, do not appear to correspond with the overall identification and location of unlawful non-citizens.

Specific to the findings that dob-in/tip calls have no apparent impact on the overall unlawful non-citizen population or the number of unlawful non-citizens identified, it can still be argued that the dob-in/tip line has limited utility in that it provides a vehicle by which the public can feel they are “[supporting] the government in its efforts to maintain the integrity of its immigration programs” (see DIAC Annual Report, 2010, Output 1.4.1). As King’s Bench (UK) Justice McCarthy’s stated, “not only must justice be done; it must also be seen to be done” (*R. v Sussex Justices; Ex parte McCarthy* [1924] 1KB 256, [1923] All ER 233). Justice McCarthy’s suggestion that governments must be seen to be working toward maintaining the integrity of their systems (even if this means their attempts are fruitless), there is still value for governments to engage the community in these efforts.

Despite the fact the DIAC promotes the dob-in/tip line as a useful means to identify unlawful non-citizens, the only acknowledgement of its (apparent) success is found in the DIAC’s 2007–2008 Annual Report (2009). Section 1.4.1 of this report identifies that 27,760

calls were received from the dob-in/tip line, which in turn resulted in 154 field investigations being initiated (a rate of referral of 0.006%). Of these field investigations, the Commonwealth Prosecutors office accepted a total of 15 briefs of evidence in relation to cases involving violations of the *Migration Act* (a rate of calls to accepted brief of evidence of 0.0005%). Unfortunately, the DIAC fails to identify how many (if any) successful prosecutions arouse from these dob-ins/tips. When asked to provide similar information for the other years being studied, the DIAC indicated that no such statistical information was available, and that the detailed analysis of 2007–2008 was a result of a special review of the dob-in/tip line program for that fiscal year (personal communication, Jeanie Bruce—DIAC Director of Compliance Policy Section (Canberra), March 7, 2011).

Considering the finding that in 2007–2008 the dob-in/tip line only resulted in a referral rate of 0.006% field investigations to calls received, it is reasonable to question whether or not the dob-in/tip line in fact is a meaningful way for the public to provide “important support to the department in its efforts to maintain the integrity of Australia’s borders and immigration programs” (DIAC, 2011b, ¶ 4). Further to this point, if the utility of the dob-in/tip line is derived from it being a way for the DIAC to engage the public in ensuring the legitimacy and integrity of Australia’s immigration program, there must also be an acceptance that the public who call this line are doing so in an ethical, fair, and unbiased manner. Reflecting on Hing’s (2006) observation that anonymous dob-ins/tips from the public often are “completely unreliable” and sometimes motivated by ignorance, racism, and fear (p. 206), this thesis argues that the dob-in/tip program actually has no operational utility, and calls into question the value of the entire dob-in/tip program.

VI-4) How the CBSA Identifies Suspected Unlawful Non-Citizens

As already stated, Australia and Canada use similar means to identify and locate suspected unlawful non-citizens; however, one significant difference between the two nations

is that Canada approaches internal immigration enforcement in a much more enforcement-focused manner—specifically, Canada relies more on identification through field investigations and identifications by other government agencies (primarily the police). What's more, because Canadian officers are in many ways restrained by the provisions of Canada's *Charter of Rights and Freedoms* (see II-4-a above), they must approach the process of identifying suspected unlawful non-citizens in a more private and discreet manner (e.g., limited reliance on information provided from the public). Moreover, in cases where personal information concerning a suspected unlawful non-citizen is not readily available in an open-source format, Canadian officers generally require a search warrant issued by a judge or justice of the peace to collect and analyse the information—this normally is not the case for Australian officers (Cooley, 2005).

Resulting from the protections afforded to all persons living within Canada (including suspected unlawful non-citizens) by the *Canadian Charter of Rights and Freedoms*, law enforcement and other government agencies must ensure their actions do not infringe the fundamental rights and freedoms of those they are investigating and taking enforcement actions against. This includes any actions that could lead to a person (including a suspected unlawful non-citizen) having an enforcement action taken against him or her—in particular, arrest or detention. As such, despite utilising the same modes for identifying suspected unlawful non-citizens as the DIAC, Canadian officers must be more cautious about *when* and *how* they use the information collected. As will be discussed further, the laws and associated protocols that empower Canadian officers to identifying suspected unlawful non-citizens must comply with the provisions of the *Canadian Charter of Rights and Freedoms* at all times.

As aforementioned in the reflection of the *Palmer* and *Comrie Reports* (2005), from a Canadian perspective, Canadian officers operate within a more restrained legal environment

when compared to their Australian counterparts. Despite the fact that officers of the CBSA also utilise dob-ins/tips from the public, collect information from other government agencies and the police, as well as conduct surveillance and field investigation operations, they must first establish solid legal footing that respects not only the provisions of the *Immigration and Refugee Protection Act*, but also the provisions of the *Canadian Charter of Rights and Freedoms* before acting.

VI-4-a) Legal Authority and Restraints in Relation to Identifying Unlawful Non-Citizens

Divisions 1, 2, and 3 of the *Immigration and Refugee Protection Act* [S.C. 2001 c. 27] provide various authorities for officers (as described in §6(1) of this Act) who are tasked with establishing a person's identity. Specific to internal immigration enforcement, §16(1) of this Act states,

A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.

Furthermore, §16(3) states,

An officer may require or obtain from a permanent resident or foreign national who is arrested, detained or subject to a removal order, any evidence—photographic, fingerprint or otherwise—that may be used to establish their identity or compliance with this Act.

The broad nature of these sections were intentionally drafted to both allow officers significant latitude when attempting to ascertain an individual's identity and lawful immigration status within Canada, as well as comply with the *Canadian Charter of Rights and Freedoms* (Pratt, 2005). As Pratt observes, the post-9/11 provisions of the *Immigration and Refugee Protection Act* were strategically designed to achieve "security through enforcement" (p. 69). Pratt identifies that under the Act, anyone who is without status is automatically subject to a

removal order, and thus can be made to prove their identity. Likewise, §122 through §128 of the Act provide that persons who present false or fraudulent documents, who misrepresent their identity, or who otherwise violate the provisions of Division 1 through 3 of the Act can face fines up to \$50,000 CAN and/or receive a term of imprisonment up to five years.

The authority for CBSA officers to obtain search warrants to assist in their efforts to locate suspected unlawful non-citizens or search for records that will assist in the location of a suspected unlawful non-citizen, are first derived from §138(1) of the *Immigration and Refugee Protection Act*, which refers to the powers derived from §487 through §490.01 of the *Criminal Code of Canada* [R.S.C. 1985, c.46]. Notwithstanding the provisions of both these Acts, officers must also observe and respect §8 of the *Canadian Charter of Rights and Freedoms* which states “everyone has the right to be secure against unreasonable search and seizure.” This protection was further defined in the case of *R. v. Dyment* [1988] 2 S.C.R. 417 in which the Supreme Court of Canada ruled that search and seizure constituted “taking of a thing from a person by a public authority without that person’s consent.” In the 2002 Laroche case (*Quebec (Attorney General) v. Laroche*, [2002] 3 S.C.R. 708), the Supreme Court of Canada further narrowed this definition to include “a thing from a person” taken in the furtherance of administration or criminal investigation.

Specific to the sub-component of internal immigration enforcement, Canadian officers are only permitted to collect, store, and use information in a manner specified within the *Immigration and Refugee Protection Act*. Alternatively, should an officer wish to identify a suspected unlawful non-citizen using information not collected under the authority of an Act of Parliament, they are compelled to first establish reasonable and probable grounds to believe the information will assist in the administration and enforcement of an Act, and subsequently apply for a search warrant from a justice of the peace or judge to then secure this information (see *R. v. Debot* [1989] 2 S.C.R. 1140). This is an important consideration

when comparing how a Canadian officer goes about establishing a person's identity when compared to an Australian officer.

VI-4-b) Canadian Findings

By reviewing the different modes by which the CBSA identifies suspected unlawful non-citizens, three key findings are identified. First, it was found that the CBSA's border-watch tip line, like the DIAC's dob-in line, had no discernible operational utility. Second, it was found that the most evident mode for identifying suspected unlawful non-citizens was through field investigation conducted by CBSA officers, as well as identifications made by the police and other government agencies. Finally, unlike in the case of the DIAC, few suspected unlawful non-citizens voluntarily identify themselves to the CBSA.

Reflecting on the principles of peacemaking criminology, and accepting that field investigations conducted by the CBSA involved armed internal immigration enforcement officers (who are both trained and empowered in the same manner as police) actively seeking out suspected unlawful non-citizens in the community, Canada's principal approach to the sub-component of identification can be viewed as non-peaceful (see photo below showing an armed CBSA officer entering a corner store to conduct a field investigation). Yet, despite the obvious icons of force exhibited by CBSA officers while conducting field investigations (namely, the brandishing of handgun, expandable police baton, and handcuffs), CBSA officers do operate within a legal framework grounded on the supposition that all persons regardless of their lawful status or citizenship, must have their rights and freedoms protected. This fact in part supports Fuller's (2003) fourth facet (correct means) for applying Pepinsky and Quinney's (1991) peacemaking criminology, in that CBSA officers must safeguard the civil and legal rights of the suspected unlawful non-citizens (pp. 86–88).



Source: Used with permission by Jay Black (Vancouver, British Columbia, Canada) © Jaybird Photography.

Canadian Finding One: The Dob-In/Tip Line Has Very Limited Operational Utility

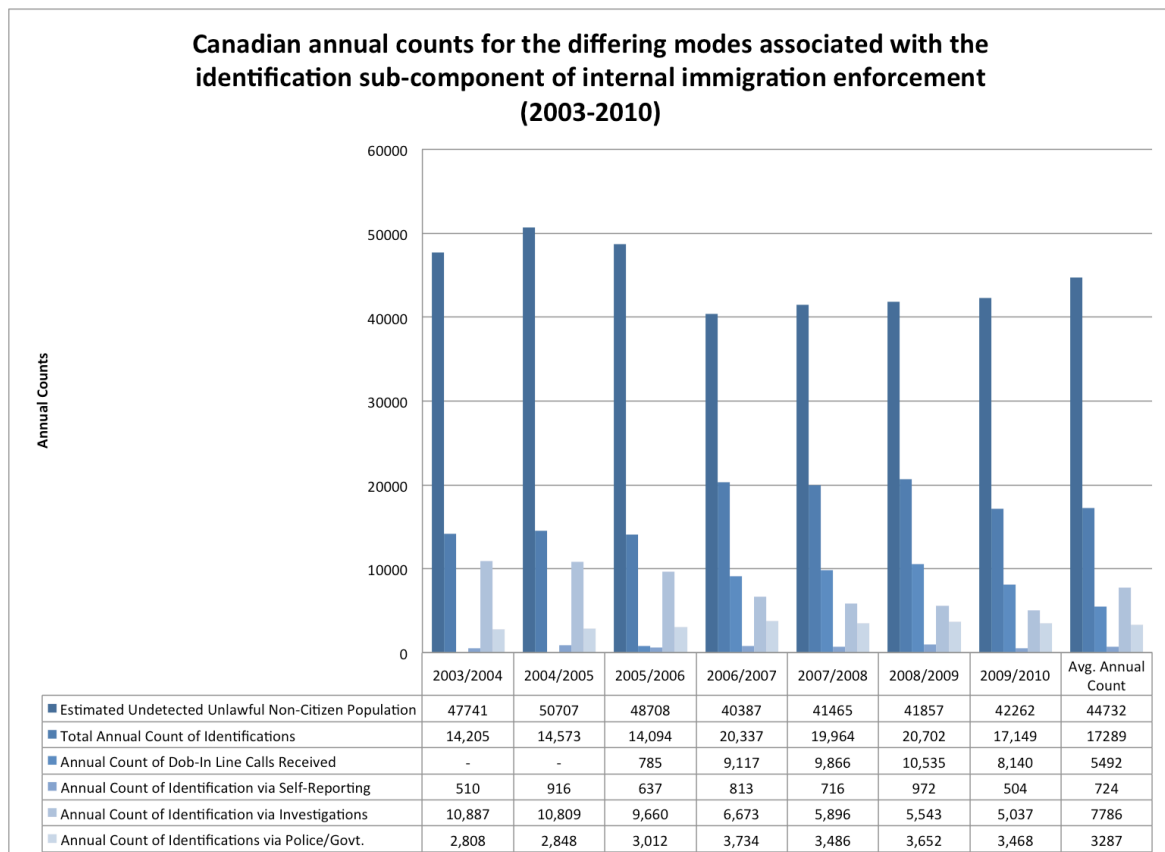
As evident in reviewing the CBSA annual performance, and as supported by the findings of this thesis, the CBSA focuses minimal attention on its border-watch tip line program. Aside from a single page located on the CBSA website that briefly describes the program and provides a toll-free phone number to call, no other mention of the program can be found within the department's last seven years of official literature (including its annual performance reports). In 2011, an *Access Act* request was made to the CBSA seeking data on the number of calls received by the border watch tip line, along with data regarding how many of these calls resulted in field investigations. From this request, it was learned that the CBSA keeps record of the total number of calls received, but does not analyse how many calls result in investigations. As detailed in Chart 4 below, between FY 2005–2006 and FY 2009–2010, the CBSA received a total of 38,443 calls to its border-watch tip line (an average of 7,688 calls per year).

Just as in the case of Australia, Charts 4 and 5 indicate that the information provided by the public through the CBSA's border-watch tip line have no obvious impact on the overall unlawful non-citizen population, nor do they meaningfully contribute to the number of unlawful non-citizens identified. Moreover, the volume of calls received for the years 2005 through 2009 had no apparent impact on the number or rate of suspected non-citizens annually identified by the CBSA.⁵⁷ Even in the 2009–2010 period where a slight correlation is evident, when considering the total number of calls received and total number of suspected unlawful non-citizens identified through other modes, it appears the program has little impact.

Considering the aforementioned, and reflecting on the finding for Australia that dob-in/tip line type programs have little reliability or utility, this thesis argues that there is little value in having a dob-in/tip line program. As indicated earlier, anonymous tips from the public to government authorities often are motivated by ignorance, racism, and fear (Hing, 2006, p. 206). Moreover, a conservative estimate of the employee cost (not including overhead) associated with running the border-watch tip line means that each call received to the tip line cost Canadian taxpayers approximately \$20.00 AUS.⁵⁸

⁵⁷ Resulting from the fact the CBSA fails to conduct an ongoing analysis of the number of border-watch tip line calls received and number of identifications that result directly from these tips, the only means to observe this mode of identification is by way of a descriptive observation.

⁵⁸ Estimate based on calculating the number of calls when compared to the overall cost for employees to deliver the border-watch tip line program using the December 21, 2010 Treasury Board Secretariat *Collective Agreement* for federal public servants classified as Clerical Reception (the position responsible for answering calls at the border-watch tip line). Under Article 25, the minimum full-time employee (FTE) hours required for a 24/7 call centre would be three, and this position pays \$50,755 per year (plus benefits). As such, the minimum estimated cost per call is: $((38,443 \text{ calls per year} \div 5 \text{ years}) \div 365 \text{ days}) \div ((\$50,755 \text{ FTE} \times 3 \text{ employees}) \div 365 \text{ days}) = \19.86

Chart 4⁵⁹:

Source: *Compilation of "raw counts" obtained through Access Act requests to the CBSA (A-2009-15462).*

Canadian Finding Two: Most Unlawful Non-Citizens are Identified via Field Investigations

The second finding in relation to how Canada identifies suspected unlawful non-citizens was that between 2003 and 2010, 65% of all suspected unlawful non-citizens were identified as a result of CBSA field investigations (see Chart 5 below). Reflecting on the fact the CBSA is a policing organisation whose officers are trained and equipped the same as other Canadian police and law enforcement agencies, these findings are not surprising considering field investigations are the principal way most police identify persons suspected of violating the law (Mitchell & Casey, 2007). What's more, and as will be discussed in detail within the following chapter, third-party information provided or obtained by Canadian

⁵⁹ See Chart 5 (p.158) which compares the modes of identification in Canada based on the counts provided in Chart 4. Also see Chart 6 (p.160) which shows the rate analysis for the differing modes of 'identification' in Canada based on the counts provided in Chart 4.

police officers (including information received from the public via the CBSA's border-watch tip line) is of limited use when being used to establish reasonable and probable grounds for effecting an arrest or detain of a suspected unlawful non-citizen or person who is believed to have committed an offence (see chapter addressing *arrest*, as well as Supreme Court of Canada ruling in *R. v. Storrey* [1990] 1 S.C.R. 241 in which Canadian courts discuss minimum legal basis for affecting an arrest).

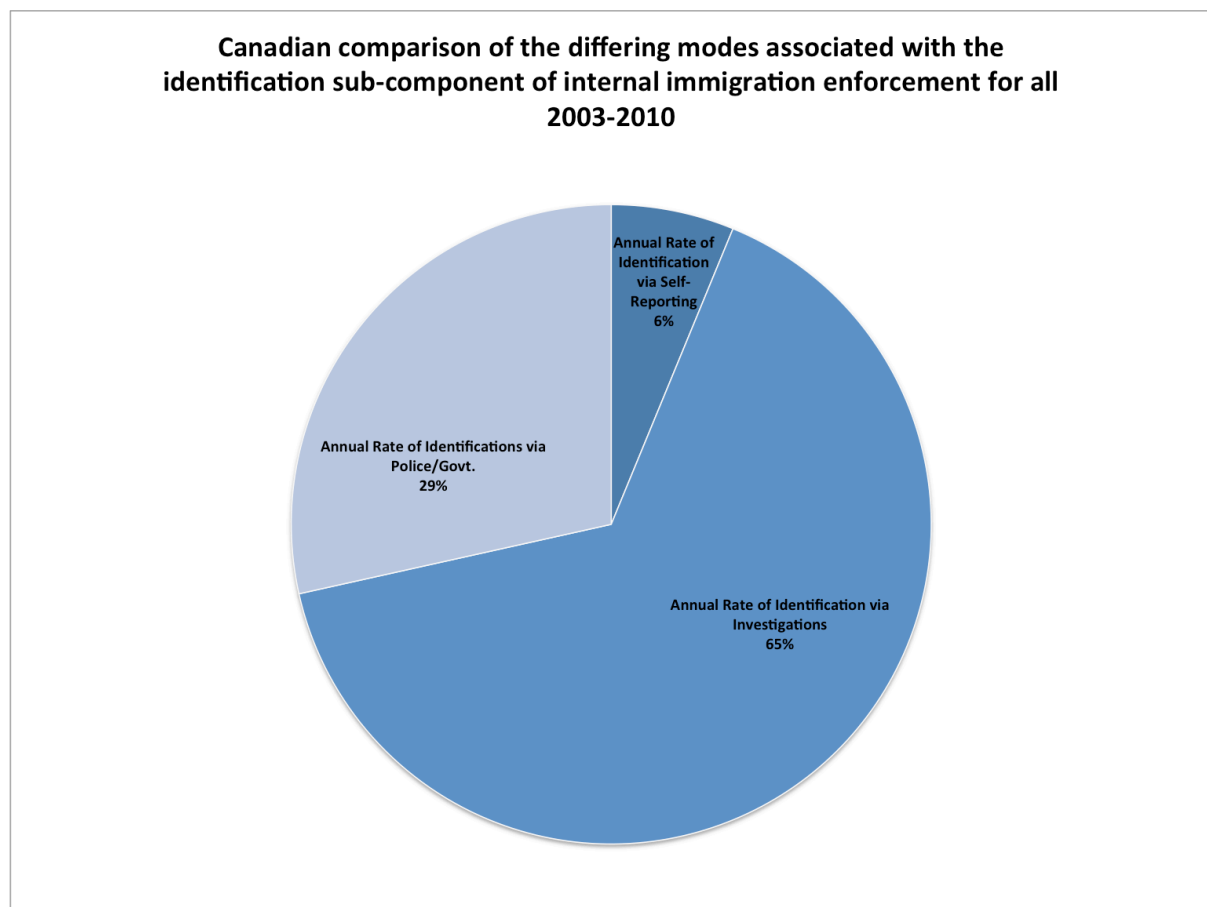
In addition to field investigations by CBSA officers, 29% of all identification for the past seven years have been made by the police and other government agencies (see Chart 5 below). Because the CBSA is a law enforcement agency, it utilises the Canadian Police Information Centre⁶⁰ (CPIC) to broadcast information to other Canadian policing and government agencies regarding suspected unlawful non-citizens (CBSA, 2006; CPIC, 2010). In Canada, any time a law enforcement officer (or government agent having access to CPIC) has contact with a member of public in an enforcement or investigative capacity, they must query the individual through CPIC (CPIC, 2010; ENF-7). As a result of this centralised police information centre, it is understandable that 29% of suspected unlawful non-citizens are identified by police or other government agencies having access to the CPIC system.

To further explain these findings, it is important to identify that CBSA internal immigration enforcement officers received noticeably more training on how to conduct field investigations when compared to their DIAC counterparts. CBSA officers undergo approximately five months of training, of which six weeks are dedicated to use of force training, firearms training, arrest and detention training, emergency vehicle operator training, and surveillance operations training. The remaining portion of this training program is focused on understanding the various laws that officers are required to administer and enforce, gaining operational knowledge of government computer systems, as well as general

⁶⁰ The Canadian Police Information Centre (CPIC) is used by all law enforcement agencies in Canada and is operated, maintained, regulated, and administered by the Royal Canadian Mounted Police (RCMP) in Ottawa, Ontario (CPIC, 2010).

administration skills. All of the aforementioned training takes place at the CBSA Learning Centre in Rigaud, Quebec and at various regional RCMP firearms and driver training facilities throughout Canada (CBSA, 2007b). Considering all CBSA officers are trained as law enforcement officers, it is understandable they are more reliant on using investigative approaches (such as conducting field investigations and surveillance operations) to identify suspected unlawful non-citizens, rather than relying on the more unobtrusive and passive approach of encouraging suspected unlawful non-citizens to self-report their possible immigration law violation to the CBSA.

As will be further discussed in the following comparison section of this chapter, Australian DIAC onshore immigration compliance officers, although also provided basic skills in conducting field investigations, are not trained in the use of force or firearms (DIAC, 2011b). Additionally, DIAC officers are not considered law enforcement officers as defined within the Australian *Crimes Act*, whereas CBSA officers are authorised as peace officers (law enforcement officers) under the *Criminal Code of Canada* (see footnotes 3 and 4). As such, CBSA officers who are responsible for identifying and locating unlawful non-citizens have the training, equipment, and legal authority to independently take enforcement action based on information they receive, whereas DIAC officers often will request the police or other law enforcement officers to assist them enforce the *Migration Act* (DIAC, 2010). It is also noteworthy that under both the *Migration Act* and *Immigration and Refugee Protection Act*, police officers in both countries are specifically referred to in both acts as being authorised to enforce immigration law.

Chart 5:

Source: Percentages calculated using the average rate values obtained through Access Act requests to the CBSA (A-2009-15462).

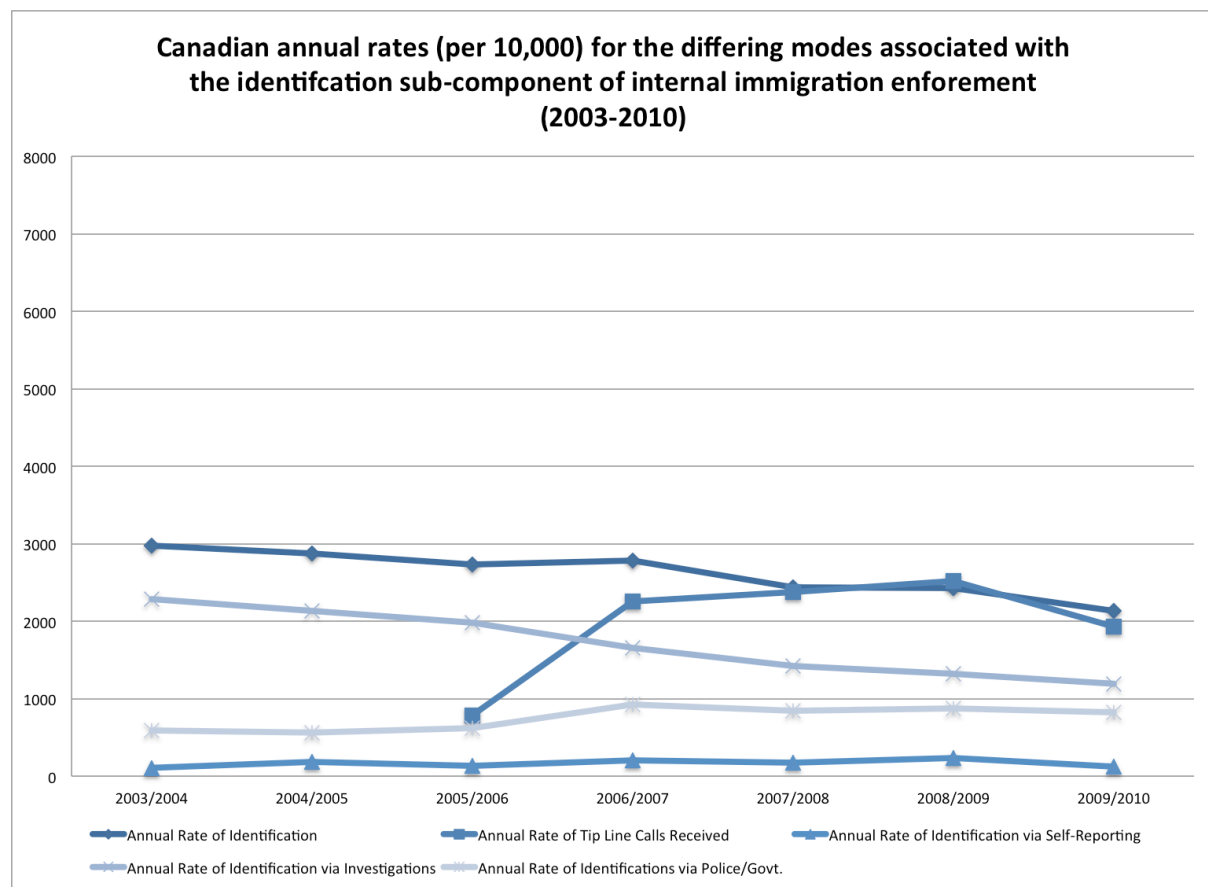
Canadian Finding Three: Self-Reporting Least Common Means of Identification

The final finding in relation to how suspected unlawful non-citizens are located in Canada was that self-reporting only accounted for 6% of all identifications between 2003 and 2010 (see Chart 5 above). Unlike the *Migration Act* of Australia, there is no provision within the *Immigration and Refugee Protection Act* to allow a CBSA officer to grant a bridging visa or other immigration document to a person who is identified as an unlawful non-citizen. Although a CBSA officer can elect not to take an enforcement action, should persons be identified as unlawful non-citizens and not have enforcement action taken against them, they still would be unlawfully within the nation and required to apply to Citizenship and Immigration Canada (CIC) to remain in the nation (ENF-7).

Under §185(a) of the *Immigration and Refugee Protection Act Regulations* [SOR/2002-227], a temporary non-citizen whose period of lawful stay expires, and who applies to CIC within 90 days of the date of expiry to have their status reinstated or otherwise changed, will not be considered unlawful until a final decision concerning this application is made by a CIC officer (see *Sui v. Canada (Minister of Public Safety)* (F.C.), 2006 FC 1314, [2007] 3 F.C.R. 218). Furthermore, an application to reinstate immigration status is made through the mail or via the CIC website, and can only be assessed by a CIC officer and not a CBSA officer (CIC, 2011; ENF-7; ENF-11).

With regard to the number of suspected unlawful non-citizens who voluntarily self-reported to the CBSA, all of these cases involved non-citizens who reported to the CBSA more than 90 days after their authorised period of stay expired, and who were granted a voluntary departure notice and issued an “Allowed to Leave” document.⁶¹ In making the decision to grant this non-enforcement process, an officer must be satisfied the non-citizens have not had prior criminal or immigration enforcement action taken against them, do not pose a threat to the public, and are likely to arrange for their own departure from Canada without delay (ENF-7; ENF-11). The alternative to this process is to arrest the non-citizens and initiate a (non-voluntary) removal process against them. As this is an infrequently used provision, and not one that is made public in either the CIC or CBSA literature, it is understandable that only 6% of the total identifications made in the past seven years were as a result of suspected unlawful non-citizens reporting to the CBSA.

⁶¹ A voluntary departure document can be issued to an unlawful non-citizen who is in Canada without authorisation, however on the opinion of an officer, can affect his or her own departure without delay, has not had prior immigration enforcement action taken against him or her, and who do not pose a risk or threat to Canada. A person who voluntarily agrees to depart Canada will be issued an “Allowed to Leave” document, and the departure will be confirmed by an officer “without delay”—this is not an enforcement process (ENF-11).

Chart 6:⁶²

Source: Percentages calculated using the average rate values obtained through Access Act requests to the CBSA (A-2009-15462).

VI-4-c) Summary of Canadian Findings

In summary, Chart 4 illustrates the raw count for the differing modes associated with the identification of suspected unlawful non-citizens in Canada, Chart 5 illustrates the calculated rate differences between these various modes, and Chart 6 illustrates the percentage difference for the various modes associated with the identification sub-component of internal immigration enforcement in Canada. By reviewing these findings through both a raw count and rate comparison, it is evident field investigations accounts for the majority of suspected unlawful non-citizens being identified, followed by identification by the police and other government agencies, and finally by suspected unlawful non-citizens voluntarily self-

⁶² The rate calculation formulas can be reviewed in Chapter III (methodology), section III-1-f.

reporting. Finally, it is observed that calls received from the CBSA border-watch line do not appear to correspond with the overall identification and location of unlawful non-citizens.

VI-5) Comparison: Identification of Unlawful Non-Citizens

VI-5-a) Comparative Findings

In a review of the official government statistics for Australia and Canada, it was discovered that both nations have similar rate of officers to population,⁶³ have comparable temporary non-citizen populations,⁶⁴ and also have moderately similar populations of temporary non-citizens suspected of living within their territories unlawfully whose whereabouts is unknown.⁶⁵ Accepting the many similarities that exist between Australia and Canada, this chapter aims to explore how Australia and Canada each identify suspected unlawful non-citizens and provide insight into their similarities and differences. Moreover, and reflecting upon the principles of peacemaking criminology, this chapter also explores why one approach results in a noticeable difference when compared to the other with regard to a nation's ability to identify and locate suspected unlawful non-citizens.

What was found through the comparative analysis of how Australia and Canada each identify suspected unlawful non-citizens was that Australia take a less enforcement-focused (more peaceful) operational approach to the identification sub-component of the internal immigration enforcement process when compared to Canada. However, it was also found that Canadian law is far more accountable and fair when compared to the *Migration Act* of Australia. As identified in the Australian findings, the DIAC has a strategy focused on

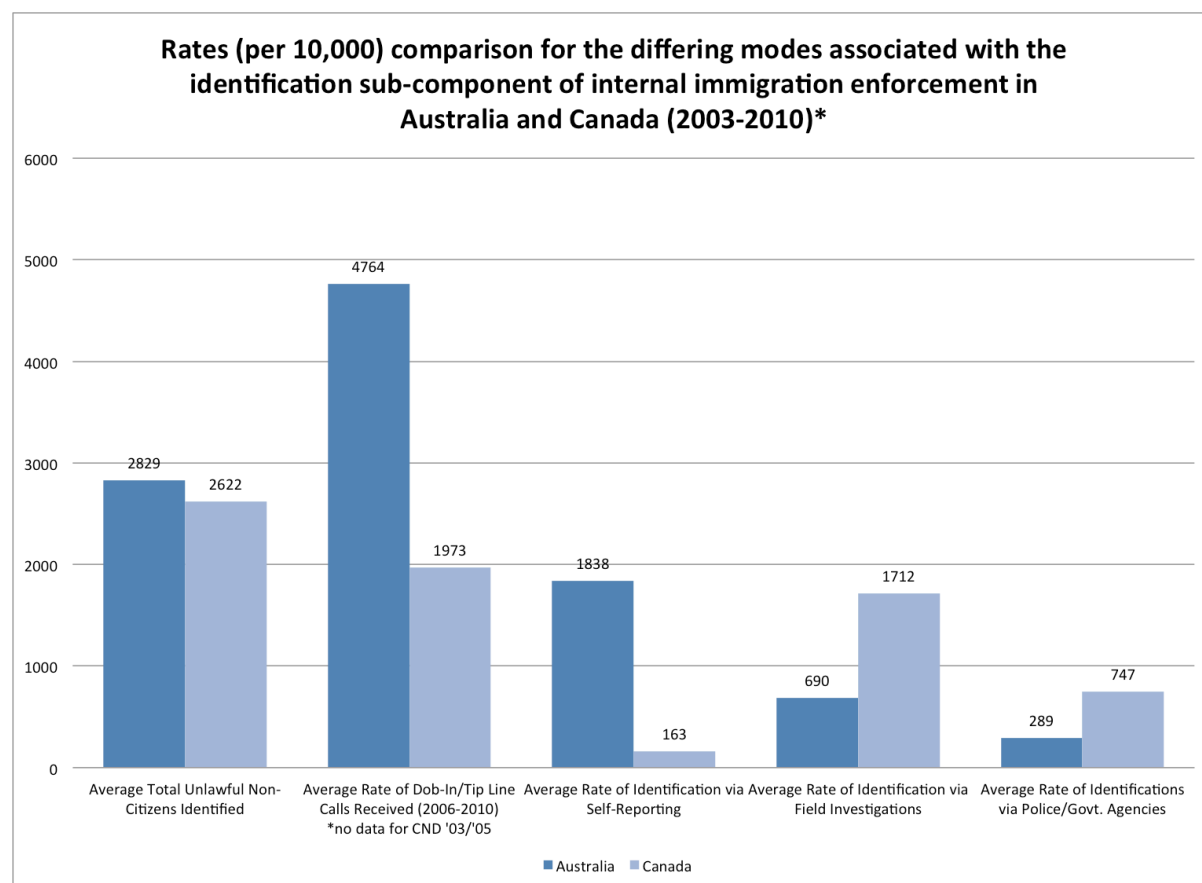
⁶³ As of 2008, Australia has approximately 430 officers tasked with internal immigration enforcement duties (rate of 0.15 officers per 100,000 of the total population), whereas Canada had approximately 480 officers (rate of 0.14 officers per 100,000 of the total population) (Director Inland Immigration Enforcement (Canada)—S. Krammer, personal communication, June 18, 2008; Director Onshore Immigration Compliance (Australia)—D. Tanner, personal communication, July 14, 2008).

⁶⁴ According to the Australia's 2006 census, Australia had a total population of 19,855,288 people, of which 203,874 were temporary non-citizens; a rate of 1,027/100,000 population (1.0% total population). According to Canada's 2006 census, Canada had a total population of 31,612,897 people, of which 265,360 were temporary non-citizens; a rate of 839/100,000 population (0.8% total population).

⁶⁵ See Charts 1 and 4.

voluntary compliance, whereas found in the Canadian findings, the CBSA is focused on security and enforcement. These findings are supported by the fact Canadian officers have law enforcement (policing) authority and Australian officers do not.

Chart 7:⁶⁶



Arguably, because Canadian officers are trained and equipped the same as police, they approach their duties in a manner akin to how police investigate criminal acts. Although both the DIAC and CBSA utilise the same modes to identify suspected unlawful non-citizens, the rates of use are noticeably different. As evident in Chart 7, there is only a 7.3% difference in the total rate of suspected unlawful non-citizens identified by Australia and Canada over the past seven years. Yet, despite these similar rates of total identifications, during this same

⁶⁶ The rate calculation formulas can be reviewed in Chapter III (methodology), section III-1-e.

period in Australia, 91.2% more suspected unlawful non-citizens were identified through their voluntary self-reporting when compared to rates in Canada. Conversely, Canada identifies 59.7% more suspected unlawful non-citizens through field investigations when compared to Australia. Regarding identification by government agencies and the police, 61.3% more identification were made in Canada when compared to Australia. Finally, regarding the difference in calls received to the DIAC dob-in line and CBSA border-watch line, between 2006 and 2010, 58.6% more calls were received by the DIAC.

VI-5-b) Implications

By conducting this analysis through the lens of peacemaking criminology, it is apparent Australia's operational approach to identifying suspected unlawful non-citizens is more reflective of Fuller's (2003) proposed six-facet approach to applying Pepinsky and Quinney's (1991) peacemaking criminology when compared to Canada. As discussed, the DIAC's strategy for identifying and locating persons suspected of violation of the *Migration Act* is "largely non-intrusive and supported by substantial voluntary compliance" (DIAC, 2006, p. 51), whereas Canada's is to "ensure Canada's security" (CBSA, 2011, ¶ 3). Yet, in reviewing the legal authorities and restraints associated with the identification sub-component of the internal immigration enforcement process for Australia and Canada, it appears Canada is more reflective of Fuller's (2003) suggested approach.

Fuller's (2003) fourth-facet for applying peacemaking criminology to criminal justice challenges (correct means) identifies the importance of safeguarding the civil and legal rights of persons governments take enforcement actions against. Moreover, Fuller stresses the importance of due process and adherence to fair and just outcomes. Although Australia has adopted a strategy of attaining voluntary compliance by offering bridging visas to qualified unlawful non-citizens who self-report to the DIAC, that there is no provision within the *Migration Act* affords the right to *habeas corpus* is of concern. Without such a provision, all

the reforms and progressive steps taken by the DIAC since the *Palmer and Comrie Reports* (2005)—including the decision in 2008 not to adopt an armed policing approach to onshore immigration compliance (Smith, 2008)—non-citizens will still remain susceptible to abuse, injustice, and potential force—as Ms. Solon and Ms. Rau were.

VI-5-c) Discussion

Although it may seem obvious that a policing approach to internal immigration enforcement results in the more enforcement-focused modes being used, it is still important to acknowledge that Australia and Canada have comparable populations of suspected unlawful non-citizens (see Charts 1 and 4) and that, during the period of this study, had very comparable rates for identifying suspected unlawful non-citizens. Yet, as obvious as these findings are, there still remain significant policy implications—especially economic ones.

In the CBSA's 2010 interagency evaluation of its arming initiative, it is indicated that between 2006 and 2016, \$780 million AUS have been earmarked for the purchase of handguns, ballistic vests, firearms storage containers, and training for officers in the use of force (including deadly force) when carrying out their duties (CBSA, 2010a). As discussed in the literature review, much of the impetus for Canada moving to a policing model for its overall border security program was a result of pressure from the United States to become more reflective of American post-9/11 border security strategies (Pratt, 2005; Winterdyk & Sundberg, 2010b). Furthermore, it was discussed that the Australian Government reviewed its own border security strategies in the post-9/11 era and decided to maintain its traditional organisational and operational approaches—although taking new steps toward reforming legislation that promoted more interagency collaboration and assistance (Smith, 2008).

Resulting from the differing post-9/11 border security policy reforms in both Australia and Canada, there remains noteworthy discussion surrounding the economic consequences associated with post-9/11 internal immigration enforcement reforms. Specific to the internal

immigration enforcement sub-component of identification, both Australia and Canada have established dob-in/tip lines heralded as being useful means of identifying violators of immigration law. As argued, both the Australian and Canadian dob-in/tip line programs appear to have no operational utility, although allowing public engagement in the immigration enforcement program. In relation to the field investigation mode (whereby officers actively seek out suspected unlawful non-citizens living within either Australia or Canada), those Canadian officers are armed means that Canada incurs a substantially higher operational cost when conducting field investigation compared to Australia.

Considering that both nations have comparable populations of suspected unlawful non-citizens and also realise similar rates in the identification of suspected unlawful non-citizens, it is reasonable to argue that taking a policing rather than non-policing approach yields no discernibly higher operational outcomes—despite the higher costs associated with the policing approach. Accepting this, policymakers arguably should consider if the cost associated with taking a policing approach is worth the social and financial costs. Specific to Canada, there is much room for legitimate debate whether or not having enforcement focused policies and organisations similar to those in the United States is worth the financial cost—if by having enforcement focused internal immigration enforcement and border security programs results in the easing of bilateral economic relations with the United States, these costs very well may be worthwhile. Finally, and as discussed in the following chapter, there have been numerous occasions when officers faced physical harm from persons being arrested, which in part justifies their being armed (CBSA, 2010a).

VI-6) Chapter Summary

As mentioned at the beginning of this chapter, it is paramount that the internal immigration enforcement sub-component of identification first be thoroughly understood, in that the subsequent sub-components of arrest, detention, and removal all stem from first

identifying suspected unlawful non-citizens. Moreover, the aim of this chapter was to identify how Australia and Canada each go about identifying suspected unlawful non-citizens, and then provides a comparative analysis of both. Reflecting on the research question of this thesis, there is compelling evidence supporting that Canada's policing approach results in more enforcement focused modes being used to identify suspected unlawful non-citizens when compared to Australia. Despite both nations using the same modes to identify suspected unlawful non-citizens, the rates of identification through each mode varied notably. As will be identified in the following three chapters (arrest, detention, and removal), taking a policing approach does result in noticeable difference in enforcement outcomes—even when the systems are similar.

CHAPTER VII: ARREST

An unjust law is itself a species of violence. Arrest for its breach is more so.
(Mohandas Karamchand Gandhi, 1962, p. 144)

VII-1) Chapter Overview

Following the identification chapter, this chapter examines and compares the second sub-component of internal immigration enforcement—namely, how Australian and Canadian internal immigration officers each operationally approach *arresting* suspected unlawful temporary non-citizens (see *temporary non-citizen* in glossary). In both Australia and Canada, internal immigration enforcement officials are authorised to suspend the freedoms and liberties of suspected temporary unlawful non-citizens (hereinafter referred to as *suspected unlawful non-citizens*) to 1) confirm identity and ascertain immigration status; 2) compel participation within an administrative or criminal immigration process; 3) protect the public from exposure to disease or physical harm; 4) mitigate threats to national security; and 5) facilitate removal from the nation (PAM3; ENF-7). Under Canada's *Immigration and Refugee Protection Act* [S.C. 2001, c.27] (hereinafter referred to as the *Immigration and Refugee Protection Act*), the initial suspension of a suspected unlawful non-citizen's freedoms and liberties prior to formal custody is referred to *arresting*; under Australia's *Migration Act 1958* (Cth) (hereinafter referred to as the *Migration Act*), this same act is referred to as *detaining*. As will be discussed, terminological differences, especially when compared to the lay use of the term *detain*, require a synonymous term to be applied when comparing how each nation arrests suspected unlawful non-citizens.

In lay terms, detaining (as opposed to arresting) refers to the temporary suspension of one's freedoms and liberties for investigative purposes (Black & Garner, 2009). Common examples include a motorist being stopped by police for an alleged traffic violation, a bylaw officer stopping a person believed to have violated a city ordinance, or an individual being

stopped and questioned by a detective at a crime scene (Stribopoulos, 2007, p. 301). For a temporary detention to be lawful, an authorised authority must be lawfully placed and sanctioned by law before they can temporarily detain someone (Pue & Diab, 2010). Once this authority has concluded his or her duty, the temporarily detained person typically is free to continue with their regular activities without further delay or impediment—even in cases when an enforcement action has been taken (e.g., a traffic citation, bylaw ticket, or other non-criminal violation notice is levied). Because a temporary detention normally does not engage constitutional protections, nor does it imply custody, the act of temporary detaining is not considered *arresting* (see Canadian Legal Information Institute [CanLii], 2005).

As described by Stribopoulos (2007), the principal difference under common law between detaining and an arresting is duration of time and the perception of custody. When a person is detained, he or she is briefly “delayed or kept waiting” by a lawfully placed and empowered authority for a specific purpose that normally is limited to the ascertaining of one’s identity and/or collecting specific information related to the enforcement or administration of law—in limited cases, this may include a “pat-down” search by an officer for safety purposes (pp. 300–302). Conversely, an arrest is when “significant physical or psychological restraint” is asserted which could lead a “reasonable and prudent person” to believe custody is imminent (pp. 302—304). Generally, a person can only be arrested when a court or other empowered body has issued a warrant for the arrest or when he or she has committed an offence for which an arrest without warrant is authorised (Skinnider & Gordon, 2001).

The common law authority to detain stems from the *ancillary powers doctrine* which emerged from the two-part test established in the English Court of Appeal case of *R. v. Waterfield* [1964] 1 Q.B. 164 (C.C.A.)—commonly referred to as the *Waterfield Test* (Skinnider & Gordon, 2001). According to the *Waterfield Test*, a detention is only lawful

when 1) the person causing the detention is exercising their lawful duty and 2) the detention is directly related to the execution of this duty (CanLii, 2005). Moreover, the *Waterfield Test* stipulates that “the power to detain cannot be exercised on the basis of a hunch, nor can it become a de facto arrest” (¶ 1). When comparing how Australia and Canada initially place suspected unlawful non-citizens into immigration detention, distinguishing between the terms detaining and arresting is of vital importance.

As described by Lord Diplock in the British case of *Holgate-Mohammed v. Duke*, [1984] A.C. 437 (H.L.), at ¶ 441,

The word “arrest”. . . is a term of art. First, it should be noted that arrest is a continuing act; it starts with the arrester taking a person into his custody [by action or words restraining the person from moving anywhere beyond the arrester’s control], and it continues until the person so retrained is either released from custody or, having been brought before a magistrate, is remanded in custody by the magistrate’s judicial act.

Lord Diplock’s description of *arrest* being a term of art is particularly fitting for this chapter—especially considering the terminological differences between Australian and Canadian immigration law. Yet, when the actual act of initially placing a suspected unlawful non-citizen into immigration detention is examined, it is clear both Australian and Canadian immigration authorities effect arrests prior to initiating formal detention and custody.

As observed by Reichel (2008), within a comparative criminological study, laws, practices, and operational processes rarely can be exactly compared. Because of the distinct differences that often exist between two jurisdictions being compared, criminologists at times must be content with finding the closest units and/or elements of a specific issue that still allow for an informed evaluation. Although authorities in Australian and Canadian both arrest suspected non-citizens believed to be in violation of immigration law, the subtle terminological differences in each Act nonetheless cause a direct comparison to be

methodologically problematic. Of specific concern is that under Australia's *Migration Act* the term arrest is not specifically noted; rather, the act of suspending a suspected unlawful non-citizen's freedoms and liberties is referred to as detaining. Under Canada's *Immigration and Refugee Protection Act*, arrest refers to the first step of the immigration detention process—namely, physically taking control of a person who is believed to be in violation of the Act prior their being detained.

Considering the aforementioned, an arrest in the context of this thesis refers to the period of time between when 1) a suspected non-citizens has been identified as being present within Australia or Canada and is suspected of contravening either the *Migration Act* or *Immigration and Refugee Protection Act*; 2) the suspected unlawful non-citizen is confronted by an officer based on this identification and supposition; and 3) the suspected unlawful non-citizen reasonably formulates the belief that he or she no longer can freely leave the presence of an officer; through to the point when 4) an officer suspends the freedoms and liberties of the suspected unlawful non-citizen under the authority of either Act⁶⁷ for a period that exceeds what ordinarily would be construed as being a temporary duration of time (see *arrest* in glossary).

Unlike the identification, detention, and removal chapters, all of which use parallel empirical data to examine and compare these internal immigration enforcement sub-components, this chapter relies on a case study analysis⁶⁸ and *ceteris paribus* clause as its principal means of assessing and comparing how Australia and Canada each operationally approach the arresting of suspected unlawful non-citizens. Since limited data exists to adequately conduct an empirical assessment and comparison of how Australia and Canada

⁶⁷ The definition for *arrest* in relation to this thesis is based on the Australian and Canadian departmental policy manuals used by both the DIAC and CBSA (see PAM3; ENF-7), as well as on the cases of: *R. v. Waterfield* [1963] All E.R. 659 (English Court of Appeal); *Goldie v. Commonwealth* [2002] 188 A.L.R. 708 (Australia); *R. v. O'Donoghue* [1988] 34 A.C.R. 397 (Australia); *R. v. Therens* [1985] 1 S.C.R. 613 (Canada); and *R. v. Simpson* [1993] 79 C.C.C. (3d) 482 (Canada).

⁶⁸ For more information on the use of case study analysis (including *ceteris paribus* clauses), see III-1-d.

operationally approach arrests, and reflecting on Reichel's (2008) observation that criminologists at times must use alternative methodological approaches when comparing processes in differing jurisdictions, it is both justifiable and appropriate to use the case study method as the primary means of inquiry (see III-1-d above).

Considering the aforementioned, the frequently cited 2007 case of Dr. Mohamed Haneef's émigré from Australia has been selected to aid in conceptualising how Australia—and, through the use of a *ceteris paribus* clause, Canada—operationally approaches the arresting of suspected unlawful non-citizens (see Clarke & Wigan, 2008; Siddique, 2008; Tascón, 2010; M. Taylor, 2008). Dr. Haneef is a physician who worked in Queensland, Australia and was wrongfully accused of having assisted in the 2007 terrorist plot to bomb the Glasgow International Airport. By reviewing the case of Dr. Haneef through the lens of peacemaking criminology, and by applying a *ceteris paribus* clause exploring how this case likely would have been dealt within a Canadian context, this chapter aims to identify if one nation operationally approaches arrest in a more peaceful manner than the other—and if so, why. Additionally, this chapter explores whether or not the *Canadian Charter of Rights and Freedoms* potentially affords greater protection to suspected unlawful non-citizens who are arrested in Canada when compared to those arrested in Australia. Finally, this chapter provides insight and context for the subsequent chapters comparing how Australia and Canada each operationally approach the internal immigration enforcement sub-components of detention and removal.

VII-2) Grounds Resulting in a Non-Citizen Becoming Unlawful and Subject to Arrest

Although this thesis does not specifically focus on the legal provisions that can result in a suspected unlawful non-citizen being arrested—rather, it examines and compares how each nation operationally approaches internal immigration enforcement actions against those believed to be in violation of these laws—it nonetheless is important to recognise that in

order for an internal immigration enforcement action to be lawful, a specific violation of immigration law must first be alleged to have occurred. Through a review of both the *Migration Act* and *Immigration and Refugee Protection Act*, it is evident that vastly the same number of reasons exists under both Acts which could result in lawful non-citizen becoming viewed as unlawful (in particular, temporary non-citizen). Considering the complexity and multitude of specific comparable sections of immigration legislation in Australia and Canada where a non-citizen could be found unlawful, and accepting that such a comparison would be better addressed within a thesis emerging from the discipline of law, this section is meant to describe in broad terms the that immigration violations generally are the same in both Australia and Canada.

As aforementioned, in order for a temporary detention to transition into an arrest, the detaining/arresting authority must be lawfully placed and empowered by law to both detain and arrest. Specific to violations described within either Australia's *Migration Act* or Canada's *Immigration and Refugee Protection Act*, the arresting authority must first be authorised to enforce one of these Acts, and second have established grounds that support a provision of the Act for which they are authorised to enforce has been violated, and this violation authorises an arrest.

For both Australia and Canada, the types of violations that could result in a temporary non-citizens (see *temporary non-citizen* in glossary) becoming unlawful or inadmissible,⁶⁹ and thus becoming subject to an arrest, generally are analogous. Both Acts stipulate that non-citizens may be arrested when they 1) violate a term of the visa or lawful status they were granted upon initial entry to the nation; 2) remained in the nation beyond their authorised period of stay (commonly referred to as an overstay); 3) gained entry to the nation as a result of misrepresentation or fraud; 4) were untruthful about their identity and/or utilised a

⁶⁹ Under the *Migration Act* of Australia, a temporary non-citizen who has violated this Act is referred to as an *unlawful non-citizen*; under the *Immigration and Refugee Protection Act* of Canada, the synonymous term is an *inadmissible foreign national* (PAM3; ENF-7).

fraudulent identity document to gain entry to the nation; 5) were convicted of a criminal offence subsequent to their entry to the nation; 6) committed a criminal offence abroad that, if committed in the nation they entered, would constitute a criminal offence; 7) were found to be a member of a criminal or terrorist organisation; 8) are wanted in a comparable jurisdiction in relation to a criminal offence that, if committed in the nation they entered, would constitute a criminal offence; or 9) are a threat to the health or safety of the nation they entered (PAM3; ENF-7).

VII-2-a) Australian Law Specific to Becoming an Unlawful Non-Citizen

Under the *Migration Act*, anyone in Australia, other than an Australian citizen, must be in possession of a valid visa. Moreover, in cases involving the issuance of a temporary visa, the DIAC retains the right to cancel a visa if it is believed the holder has violated the Act (Vrachnas et al., 2008). Should a temporary non-citizen's visa expire, become nullified as a result of non-compliance with the terms of the visa, or be cancelled because of a violation of the Act, or if no visa was actually issued, the non-citizen automatically becomes deemed an unlawful non-citizen and consequently is subject to mandatory arrest, detention, and removal. The most common example of when lawful non-citizens become unlawful is when they fail to depart Australia by the time the visa expires (commonly referred to as *overstaying*). Under §82(7) of the *Migration Act*, any non-citizen who fails to leave the nation by the date specified on the visa automatically becomes regarded as unlawful. Other examples when temporary non-citizens' visas are cancelled include when, under §501, the visa is cancelled because they failed the character test,⁷⁰ or when, under §15, they violated a

⁷⁰ Under §500(6) of the *Migration Act*, a visa can be cancelled by an authorised officer if the non-citizen 1) has a substantial criminal record as described under §500(7) of the Act; 2) is associated with an individual, group, or organisation, whom the Minister reasonable suspects has been (or is) involved in criminal acts; 3) was or is involved in criminal conduct or general conduct that represents poor character; 4) is at significant risk of engaging in criminal activity; 5) is at significant risk of harassing, molesting, intimidating, or stalking a citizen; 6) is at significant risk of vilifying a segment of a community; 7) is at significant risk of inciting discord in the community; or 8) is at significant risk of endangering a community by becoming involved in activities that are disruptive or violent (see Vrachnas et al., 2008, pp. 164–165).

condition of their temporary visas⁷¹ and are not in possession of another visa. As described by Vrachnas et al. (2008), in cases where a temporary visa is cancelled by the Minister or delegate, the lawfulness of this decision may only be reviewed through a judicial review process (p. 165). In cases where an officer cancels their temporary visa, the lawfulness of the decision may be reviewed by one of three administrative tribunals, as well as being subject to judicial review.⁷²

Under the *Migration Act*, there are four possible ways an administrative decision can be reviewed and potentially overturned: 1) by the Minister or their delegate; 2) by the Migration Review Tribunal (MRT); 3) by the Refugee Review Tribunal (RRT); or 4) by the Administrative Appeals Tribunal (AAT). Typically, the first level of review is made by the Minister or delegate, and in many instances, is subsequently reviewed by one of the three aforementioned tribunals. Immigration review tribunals are meant to reconsider decisions made by officers or by the Minister or delegate with the aim of formulating a “correct or preferable decision based on the facts before it, and in accordance with the applicable law” (Vrachnas et al., 2008, p. 318). Although these three tribunals have the authority to substitute their decisions for that of the original decision maker, their decisions are still subject to judicial review.

Of the three immigration tribunals responsible for reviewing decisions made pursuant to the *Migration Act*, the MRT is responsible for reviewing visa refusals made within Australia (with the exception of protection visas), visa cancellations in relation to certain

⁷¹ Under §116 through §118 of the *Migration Act* an authorised officer may cancel a temporary visa if they believe 1) the circumstances which permitted the granting of the visa have changed; 2) the conditions of the visa were violated; 3) the person whom the visa was issued did not enter Australia or entered without being cleared by an officer; 4) the person whom the visa was issued does or could pose a risk to the health, safety, or good order of Australia; or 5) the visa should not have been granted because the non-citizen was in contravention of another law. In cases involving the cancellation of a business visa, under §134, the non-citizen’s visa can be cancelled if it is found that the non-citizen 1) failed to establish the requisite ownership of the business they proposed to start; 2) did not utilise the skills in the day-to-day management of the business; or 3) does not intend to continue managing/operating the business.

⁷² In both Australia and Canada, judicial review constitutes a court reviewing an administrative decision made by a government authority to ensure the decision was achieved in a manner that adheres to the law, natural justice, and statutory requirements. Upon judicial review, the decision being reviewed is either held to be lawful or is found to have been made in error—in which case the court will require the body which made the decision to reflect upon its finding and render a new decision. If either party feels the court conducting the judicial review erred in their finding, an application to a higher court may be made.

work visa applicants, or visa refusals made outside Australia concerning non-citizens who are being sponsored by either Australian citizens, businesses, or organisations. The RRT is responsible for reviewing refugee/asylum applications made within Australia, but has no jurisdiction to comment on applications made abroad or outside the migration zone described under §5 of this Act. Finally, the AAT is responsible for reviewing decisions related to the refusal and cancellations of visas in relation to criminal and character grounds; cases involving exclusions made pursuant to Articles 1F, 32, or 33 of the *United Nations Convention Relating to the Status of Refugees*, Treaty Series Vol. 189 [1951] (hereinafter referred to as the *UN Convention Relating to the Status of Refugees*); and decisions to refuse or cancel visas related to business/investor class applications. Considering that this thesis in part examines cases related to temporary non-citizens who initially entered Australia lawfully and subsequently became alleged to have violated the *Migration Act*, the tribunals most likely to review these types of cases would either be the AAT or MRT.

VII-2-b) Canadian Law Specific to Becoming an Unlawful Non-Citizen

Under Division Four of Canada's *Immigration and Refugee Protection Act*, a foreign national (non-citizen) becomes inadmissible (unlawful) after an authorised officer has reported them to the Minister or delegate pursuant to §44 of the Act, and subsequently has been found by either the Minister, the delegate, or a member of the Immigration Division to be a person described under §34 though §42⁷³ of this Act. As in Australian cases, non-citizens in Canada found to be inadmissible may become subject to arrest, detention, and removal—the difference being that in Canada, the detention of unlawful non-citizens is not mandatory (see Chapters VII and VIII of this thesis; Pratt, 2005; Vrachnas et al., 2008).

⁷³ Under Division Four of the *Immigration and Refugee Protection Act*, temporary non-citizens are inadmissible if they 1) pose a threat to national security; 2) violate human or international rights; 3) commit in Canada or abroad, a criminal offence that constitutes a crime under Canadian law; 4) are involved in organised criminal activities; 5) pose a risk to public health or may cause an undue burden to Canada's health care system; 6) are unable or unwilling to support themselves financially, or may cause an undue burden to Canada's social welfare system; 7) misrepresent themselves in their application to enter or remain in Canada; or 8) fail to comply with the Act.

Unlike in Australia, where, in the majority of instances, an officer has the authority to determine whether or not a non-citizen is unlawful, in Canada, the authority to determine inadmissibility (unlawfulness) generally is restricted to a member of the Immigration Division. The only exceptions are when a temporary non-citizen 1) has been convicted in Canada of a criminal offence described under §36(1)(a) or §36(2)(a) of the *Immigration and Refugee Protection Act*; 2) has misrepresented a material fact as described under §40(1)(c) of the Act; 3) has failed to appear for further examination or an immigration hearing described under Part 1 of the Act; 4) has failed to obtain authorisation to return to Canada after having been removed as described under §52(1) of the Act; 5) has failed to establish that he or she holds a visa or other document as required by §20 of the Act; or 6) is a person described under §42 of the Act as being a non-citizen who is the dependent of a person against whom a removal order is enforceable. In any case, a non-citizen in Canada is not considered unlawful until a removal order has been made by the Minister, the delegate, or a member of the Immigration Division.

As in Australia, most decisions in Canada that result in lawful temporary non-citizens becoming unlawful are subject to review by either a tribunal (specifically the Immigration Appeals Division (IAD) of the Immigration and Refugee Board⁷⁴) or through judicial review. In limited circumstances, a temporary non-citizen is negated the ability to appeal to the IAD if they have been found to be 1) a threat to national security as described under §34(1) of the Act; 2) a person who has violated human or international rights as described under §35(1) of the Act; 3) a person who has been convicted of a serious criminal act as described under §36(2) of the Act; or 3) a person involved with an organised crime group as defined under

⁷⁴ The Immigration Division is one of three divisions (Immigration Division, Refugee Protection Division, and Immigration Appeals Division) of the Immigration and Refugee Board—an independent quasi-judicial body having the same authority as the Federal Court of Canada. The *Immigration and Refugee Protection Act* specifically authorises the Immigration Division to render all initial administrative decisions under the Act unless otherwise stated (i.e., when a person is criminally charged under the Act, the authority is transferred to a Provincial Court judge). Appeals of Immigration Division decisions may be appealed to the Immigration Appeals Division (IAD) of the Immigration and Refugee Board if permitted by the Act (IRB, 2012).

§37(1) of the Act. The IAD is the only tribunal which reviewed administrative decisions made under the *Immigration and Refugee Protection Act* and, like the MRT, RRT, and AAT, is empowered to substitute their decisions for those of the original decision makers (IRB, 2012). Moreover, and as with decisions rendered by Australian immigration tribunals, all IAD decisions may be subject to judicial review.

VII-3) Comparing Approaches to Arrest in Australia and Canada

As aforementioned, Australia's *Migration Act* is void of the terms arrest, whereas §4(2)(b) of Canada's *Immigration and Refugee Protection Act* refers to an arrest as being the first stage in the enforcement of this Act—namely, that officers authorised by this Act, through their verbal communication, physical presence, or actions, establish reasonable and probable grounds⁷⁵ to believe the person they are confronting has violated the Act in a manner that allows for an arrest, and as a result take initial custody of the person with the intention of placing him or her into immigration detention (see ENF-7). In contrast, once Australian officers have established reasonable suspicion⁷⁶ that the person identified is an unlawful non-citizen, they are authorised to detain the suspected unlawful non-citizen under §189 of the *Migration Act*. When suspected unlawful non-citizens are detained under the authority of the *Migration Act*, they have limited rights for the legitimacy of the detention to be determined by way of *habeas corpus*; typically, their only term of release comes from being removed from Australia or being issued a new visa (Vrachnas et al., 2008). Conversely, in Canada, an officer is compelled under §10 of the *Canadian Charter of Rights and Freedoms* to bring the arrested suspected unlawful non-citizen (or any other person arrested)

⁷⁵ The term *reasonable and probable grounds* refers to the legal burden needed for an officer authorised to enforce the *Immigration and Refugee Protection Act* to *arrest* a suspected unlawful non-citizen under the authority of the Act. This burden is based on the supposition that a reasonable and prudent person presented with the same facts and information, would achieve the same belief that the person is a non-citizen who has violated the Act in a manner for which an arrest would be justified (ENF-7).

⁷⁶ The term *reasonable suspicion* refers to the legal burden needed for an officer authorised to enforce the *Migration Act* to *detain* a suspected unlawful non-citizen under the authority of this Act. This burden requires an officer to demonstrate they made efforts to obtain facts and information that are reasonable in all the circumstances to support a suspicion beyond mere idle wondering that a person is an unlawful non-citizen (see *Goldie v. Commonwealth* [2002] 188 A.L.R. 708).

before a justice of the peace, judge, or a presiding member of a quasi-judicial tribunal having the authority of a Federal Court; in cases where a person is arrested under the authority of *Immigration and Refugee Protection Act*, the quasi-judicial tribunal tasked with determining the validity of an arrest is the Immigration Division of the of Canada (ENF-7).

The examination of how Australia and Canada each arrest suspected unlawful non-citizens is based on an examination of how these people are first identified by immigration authorities and subsequently transitioned from freedom into immigration detention. In the Australian (NSW) case of *R. v. O'Donoghue* [1988] 34 A.C.R. 397 and Canadian (Supreme Court) case of *R. v. Therens* [1985] 1 S.C.R. 613, both courts ruled that implied words, explicit statements, or physical actions of an officers during a contact with a person suspected of contravening the law, could constitute an arrest if the person confronted reasonably formulates the belief that he or she is no longer free to leave the presence of the officers.

In *R. v. Therens*, Canadian Supreme Court Justices Dickson, McIntyre, and Le Dain ruled that the word detention (in the meaning of §10 of the *Canadian Charter of Rights and Freedoms*) constitutes “a restraint of liberty of varying duration other than arrest in which a person may reasonably require the assistance of counsel and might be prevented or impeded from retaining and instructing counsel without delay” (§ 3). Conversely in Australia, suspected unlawful non-citizens detained under §189 of the *Migration Act* do not have the statutory right to retain legal counsel without delay; rather, under the *Migration Act*, detainees are permitted to communicate with their family, national representative, and legal advocate pursuant to the *United Nations International Covenant on Civil and Political Rights*, Treaty Series Vol. 999 [1979] (hereinafter referred to as the *UN Convention of Civil and Political Rights*) (see Prince, 2005). Considering this, it is evident that the *Canadian Charter of Rights and Freedoms* affords suspected unlawful non-citizens a higher level of

legal protection when compared to Australia, in that these potentially vulnerable individuals are guaranteed immediate (and free) legal representation.

VII-3-a) Legal Authorities and Restraints in Relation to Making an Arrest

Just as the internal immigration enforcement sub-component of identification resembles the way police identify suspected criminal offenders, the sub-component of arrest resembles the way police take suspected criminal offenders into custody (Dorais, 2006). As the previous chapter discussed, there are three principal modes by which suspected unlawful non-citizens are identified by both Australian and Canadian internal immigration authorities—namely, 1) identification by the voluntary self-reporting of suspected unlawful non-citizens; 2) identification of suspected unlawful non-citizens via field investigations; and 3) identification of suspected unlawful non-citizens via police or other government agencies. Bearing in mind that identification constitutes the first step toward establishing grounds for arresting a suspected unlawful non-citizen, it is understood that these three principal modes of identification are also the principal periods when suspected unlawful non-citizens may be, and are, arrested.

Once a suspected non-citizen has been identified and confronted by either an Australian or Canadian officer on the supposition that the person has contravened immigration law, and the officer has established the requisite legal grounds to take him or her into immigration detention, the suspected unlawful non-citizen may be arrested (PAM3; ENF-7). In Canada, this authority is derived under §55 of the *Immigration and Refugee Protection Act*, and in Australia under §189 of the *Migration Act*. As discussed, an arrest transpires when an officer either informs the suspected unlawful non-citizen that the person is being placed in immigration detention, or when the suspected unlawful non-citizen reasonably formulates the belief that he or she is no longer free to depart the presence of the officer and detention is imminent (see PAM3; ENF-7; CBSA, 2008c; *Goldie v.*

Commonwealth [2002] 188 A.L.R. 708 (Australia); *R. v. O'Donoghue* [1988] 34 A.C.R. 397 (Australia); and *R. v. Therens* [1985] 1 S.C.R. 613 (Canada)). It is this duality of perception (the officers' belief they have the grounds to arrest and the suspected unlawful non-citizen's belief he or she is no longer free to depart the officer's presence) that results in an arrest being a difficult action to conceptualise. Yet, as was identified in the previous quote of Lord Diplock (see p.169) the word arrest is a term of art and the act itself is very much a fluid and continuing one—an arrest starts when the officer take the person into custody, and continues until the person arrested is either remanded to custody or release. In short, because it is the officer who is empowered to physically make the arrest, it is irrelevant if the person being arrested understands whether or not they are free to depart the officer's presence—if the officer physically makes an arrest (lawfully or unlawfully), then the person concerned is arrested.

Adding to the difficulty in conceptualising arrest is that, at times, suspected unlawful non-citizens resist an officer's authority. Australian and Canadian officers both are authorised to use reasonable force when arresting a person if they are lawfully placed, have the requisite grounds to make the arrest, and if their authority is met with resistance (PAM3; ENF-7). Under §5(1) of Australia's *Migration Act*, an officer has the power to use reasonable force when taking a suspected unlawful non-citizen into immigration detention. Similarly, §138(1) Canada's *Immigration and Refugee Protection Act* identifies those authorised to enforce this Act as having the powers of a peace officer (law enforcement officer) as defined under §2 of the *Criminal Code of Canada*, and thus having the authority to use reasonable force under §25 of the *Criminal Code of Canada* when carrying out an arrest.

Yet, despite both Australian and Canadian internal immigration enforcement officers having the authority to use reasonable force when arresting suspected unlawful non-citizens, Australian immigration officers are not considered law enforcement officers, whereas

Canadian officers are (see footnotes 3 and 4). Moreover, CBSA officers are specifically trained in the use of force (including lethal force) and issued defensive weapons to carry out their duties (including firearms); DIAC officers are not. As a result, Australian officers who face resistance when attempting to arrest suspected unlawful non-citizens are mandated by policy to solicit the assistance of police (PAM3).

Figure 6: Canada Border Services Agency—Use of Force Continuum



Source: *Canada Border Services Agency—Use of Force Policy Manual (CBSA, 2008c, Appendix A)*.

As indicated in Figure 6 above, the *CBSA Use of Force Policy Manual* instructs officers who meet resistance to respond with a tempered, yet higher level of force (CBSA, 2008c). As also indicated in Figure 6, if a suspected unlawful non-citizen “actively resists” being arrested (i.e., they physically pull away from the officer or attempt to flee), the officer is justified in using an intermediate/defensive weapon⁷⁷ to gain his or her compliance. Furthermore, if a person being arrested exhibits resistance that the officer reasonably believes may cause “grievance bodily harm or death” to him/herself, another officer, the person being arrested, or a member of the public (generally meaning the person confronted is in the

⁷⁷ Intermediate/defensive weapons as described in the *CBSA Use of Force Policy Manual* (2008d) include oleoresin capsicum spray (pepper spray), expandable baton (ASP baton), conductive energy device (Taser® gun), or another issued device that are not a firearm.

possession of a weapon or item that could be used as a weapon), the officer is justified in using lethal force to “stop the threat” (CBSA, 2008c, ¶43).

Unlike their Canadian counterparts, Australia’s DIAC officers are neither trained nor equipped to confront resistance exhibited by a suspected unlawful non-citizen during an arrest (Director Onshore Immigration Compliance (Australia)—D. Tanner, personal communication, July 14, 2008). As such, the DIAC has entered into Memorandums of Understanding with various law enforcement agencies (i.e., the Australian Customs and Border Protection Service, Australian Federal Police, and each state and territorial police force) to assist them in placing resistant suspected unlawful non-citizens into immigration detention (see DIAC, 2001; DIAC Annual Report, 2010, p. 125). As a result, arrests made pursuant to the *Migration Act* often involve multiple government agencies being involved, whereas in Canada, arrests pursuant to the *Immigration and Refugee Protection Act* generally are made independently by the CBSA.⁷⁸

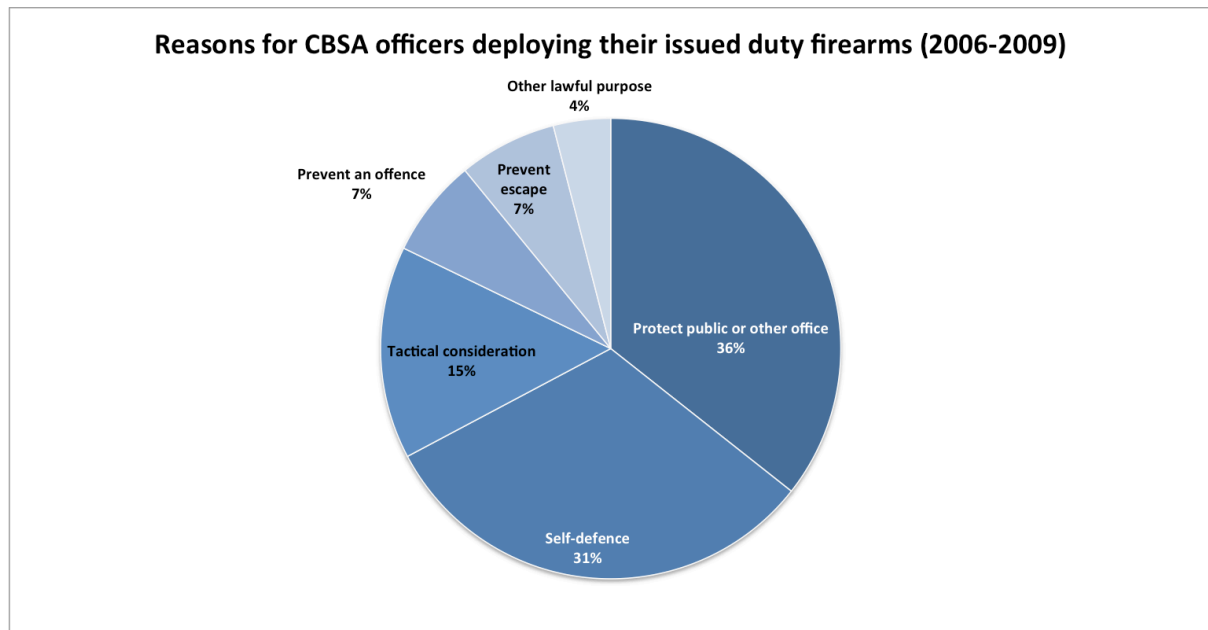
VII-3-b) General Approaches to Arresting Suspected Unlawful Non-Citizens

As aforementioned, the modes for identifying suspected unlawful non-citizens also act as the points during which suspected unlawful non-citizens are confronted and possibly taken into immigration detention. Bearing in mind that the DIAC identifies the majority of suspected unlawful non-citizens through voluntary self-reporting, and that suspected unlawful non-citizens who self-report normally are eligible for a new visa being issued (typically a bridging visa), it is reasonable to assume that the DIAC has less incidents when force is required to effect an arrest (see Chart 1 above). On this same note, because the CBSA identifies the majority of suspected unlawful non-citizens through field investigations, it is

⁷⁸ Under §138(1) of Canada’s *Immigration and Refugee Protection Act* members of the RCMP are considered immigration officers, and at times arrest suspected unlawful non-citizen under this Act.

equally reasonable to assume that they have more incidents when force is required (see Chart 4 above).

Chart 8:



Source: Percentages calculated using the average rate values obtained through Access Act requests to the CBSA (A-2009-15462).

In reviewing the CBSA *Use of Force Incident Reports* obtained through an Access to Information Request made to the CBSA in 2010, it was discovered that CBSA officers deployed their firearms 174 times between 2006 and 2009. These reports indicated six causes for CBSA officers to display lethal force (drawing their firearm) 1) to protect a member of the public or another officer; 2) for self-defence; 3) for tactical consideration (drawing the weapon prior to entering a dwelling where a person known to be prone to violence is believed to be situated); 4) to prevent an offence from transpiring; 5) to prevent an escape from custody; and 6) other lawful purposes⁷⁹ (see Chart 8 above). The only incident which resulted in a CBSA officer discharging their firearm and causing death was in British Columbia in

⁷⁹ Nowhere within either the reports provided by the CBSA or within the CBSA policy manuals is “other lawful purpose” defined.

2009 when an injured moose was found dying on a provincial highway and consequentially was euthanized by the officer and an accompanying member of the RCMP (Beeby, 2009).

Although there are no statistics available for use of force incidents involving DIAC officers, and the statistics provided by the CBSA are limited to only interactions where a firearm was deployed by an officer, enough information exists to support that the CBSA's policing approach results in higher levels of enforcement-type confrontations when compared to the DIAC. Accepting that the majority of suspected unlawful non-citizens who are prone to violence while being taken into immigration detention are arrested by an Australian police force (on behalf of the DIAC), there is value in examining general citizen-police interactions for Australia. As discussed by D. Baker (2009), "despite the hazards of trying to estimate police violence against citizens, it must be emphasised that the vast majority of citizen-police interactions in Australia do *not* involve the use of force or even the threat of force" (pp. 140–141). What's more, in their literature review addressing use of force by various policing agencies around the world, Leyton-Brown and Jones (2009) identify that Canadian law enforcement officers are more prone to using firearms as a means of control when compared to officers in Australia.

VII-4) The Potential Impact a Bill of Rights Has on the Arrest of Non-Citizens

As discussed within the literature review, Australia's lack of a constitutional bill of rights has resulted in the High Court to at times render decisions that negate the rights of "some of the most vulnerable members of [Australian] society" (Gelber, 2005, p. 321). Reflecting on post-9/11 Australian legislative reform, Williams (2004) observes that Australia's lack of a constitutional bill of rights has resulted in the "only check on the power of parliaments and governments [to derive] from political debate and the goodwill of [Australian] political leaders" (p. 5). Williams—echoed by Gelber (2006) and Robertson

(2009)—argues that “[political debate and goodwill of politicians] is not a safeguard that is regarded as acceptable or sufficient in other comparable nations” (p. 5).

To present a meaningful assessment of whether or not the presence or absence of a bill of right impacts the way suspected unlawful non-citizens are arrested, a *ceteris paribus* clause is applied to the case of Dr. Haneef which assumes that aside from Canada having the *Canadian Charter of Rights and Freedoms* and Australia being void of an equivalent federal doctrine, all other things are equal. This *ceteris paribus* clause holds that law enforcement (police), intelligence, and immigration authorities of Australia and Canada are generally equal in their mandate, structure, and approach, as are the Australian and Canadian judiciaries and parliaments. This assumption is supported by Simester and Sullivan (2007) in their work *Criminal Law: Theory and Doctrine* through their observation that nations that have emerged from the British legal and political tradition today share many commonalities in their development and application of criminal law—including allowing jurisprudence among these jurisdictions to act as authorities within each other’s criminal proceedings. Finally, the study of Dr. Mohamed Haneef’s émigré from Australia as a means of comparing human rights in Australia against other international jurisdictions (including a study of the human rights of non-citizens) is in keeping with recent works addressing human rights and immigration within an international context (see Harris-Rimmer, 2008; Robertson, 2009; Tascón, 2010).

VII-4-a) The Case of Dr. Mohamed Haneef

The case of Dr. Mohamed Haneef provides an opportunity to postulate whether or not the absence of a bill of rights affects how suspected unlawful non-citizens are arrested in Australia when compared to Canada⁸⁰. Dr. Haneef is an Indian citizen who in 2006 was

⁸⁰ Also see the case studies of Vivian Alvarez Solon and Connelia Rau presented in VI-3-b. Arguably, if Australia had a bill of rights in place that ensured everyone arrested under the *Migration Act* had the right to have their detention reviewed way of *habeas corpus* (or had other legislation requiring all immigration detention cases to be reviewed in an objective and comprehensive manner), neither Solon nor Rau would have been kept in immigration detention for prolonged periods of time, let alone had removal processes taken against them.

granted a long-stay business visa (subclass 457 visa) to work as a medical doctor in Southport, Queensland (Clarke & Wigan, 2008). He was employed by the Queensland Department of Health and worked at the Gold Coast Hospital from September 2006 till July 2007.

In the early hours of June 29, 2007, a vehicle was discovered by police in London, England containing an improvised explosive device. A few hours later, Dr. Bilal Talal Samad Abdullah (a British-born medical doctor) and Mr. Kafeel Ahmed (an Indian-born engineer and British doctoral student) drove another vehicle containing explosives into the main entrance of the Glasgow International Airport—causing an explosion that ultimately killed Mr. Ahmed and injured five others (Siddique, 2008; Taylor, 2008). Following the Glasgow bombing, British police and intelligence services began an international search for others believed to be involved in the attack, with the aim of bringing these suspects before a British court for prosecution (Clarke & Wigan, 2008).

On July 2, 2007, information was provided to the Australian Federal Police by the London Metropolitan Police suggesting that a mobile phone registered to Dr. Haneef had been used by Dr. Abdullah in the planning and implementation of the Glasgow bombing. Based on this information, members of the Australian Joint Terrorism Team (lead by the Australian Federal Police with members from the Queensland Police) began surveillance of Dr. Haneef. On this same day, police followed Dr. Haneef from his residence in Southport, Queensland to the Brisbane International Airport, at which time he was arrested pursuant to §3W1 of the Australian *Crimes Act 1914* (Cth)⁸¹ while attempting to board a Singapore Airlines flight to India (Clarke & Wigan, 2008).

⁸¹ Under §3W1 of the *Crimes Act*, an officer can arrest a person without warrant if he or she believe on reasonable grounds that the person has committed an offence and that the person would be unlikely to appear before the court upon the issuance of a summons.

On July 14, 2007, 12 days subsequent to his initial arrest, and following a series of interrogations and detention reviews, Dr. Haneef was formally charged for recklessly providing support or resources to a terrorist organisation contrary to §102.7(2) of the *Criminal Code Act 1995* (Cth).⁸² On this same day, Dr. Haneef appeared before a Brisbane Magistrates Court for a pre-trial bail hearing, and was released by Magistrate Payne pending his first court appearance on August 31, 2007. In her decision, Magistrate Payne stated she did not feel the prosecution had demonstrated a direct connection between Dr. Haneef and the Glasgow bombers, yet still acknowledged that Dr. Haneef “may be the subject of surveillance if released into the community” (Clarke & Wigan, 2008, p. 147).

On July 16, 2007, the Hon. Kevin Andrews MP, Minister of Immigration and Citizenship, cancelled Dr. Haneef’s visa on the pursuant to §501(3) of the *Migration Act*,⁸³ ultimately causing Dr. Haneef to become an unlawful non-citizen and subject to immigration detention once his criminal case was concluded. In light of the Ministerial visa cancellation, and considering the weak case against Dr. Haneef, on July 27, 2007 the Commonwealth Director of Public Prosecutions withdrew the charge—the following day, Dr. Haneef voluntarily returned to India (Clarke & Wigan, 2008).

Subsequent to Dr. Haneef leaving Australia, on August 21, 2007, the Australian Federal Court set aside Minister Andrews’ decision to cancel Dr. Haneef’s visa⁸⁴ on grounds that the Minister erred in applying the *Migration Act* character test. Yet, in this finding, the court still found that if the Minister had applied the test correctly, he would have been

⁸² As identified in the *Clarke Report* (2008), the charge read, “On or about 25th day of July 2006 in the United Kingdom, Mohamed Haneef did, contrary to Section 102.7(2) of the Criminal Code (Cth) intentionally provide resources, namely a subscriber information module (SIM) card to a terrorist organisation consisting of a group of persons including Sabeel AHMED and Kafeel AHMED, being reckless as to whether the organisation was a terrorist organisation” (p. 145).

⁸³ Under §501(3) of the *Migration Act*, the Minister is empowered to cancel a non-citizen’s visa, regardless of natural justice considerations, if the Minister reasonably suspects that the person concerned does not pass the character test and if the Minister is satisfied that the cancellation is in the nation’s best interest. Section 501(6) stipulates that the character test fails if 1) the person has a substantial criminal record; 2) the person has been associated with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct; or 3) the person’s past and present criminal or general conduct suggests they are not of good character (see §501(6) of the *Migration Act 1958* (Cth)).

⁸⁴ See *Haneef v. Minister of Immigration and Citizenship* [2007] FCA 1273.

justified in attaining the same decision. However, since this period, the circumstances had changed—on December 21, 2007 the Full Federal Court upheld the Federal Court’s original decision.⁸⁵ Upon the ruling of the Full Federal Court, the new Minister of Immigration and Citizenship (Senator Chris Evans) decided not to revisit his predecessors decision, ultimately resulting in Dr. Haneef’s original work visa to be deemed *not* cancelled.

Finally, on September 10, 2007—after the Federal Court ruling but before the Full Federal Courts decision—the Australian Security Intelligence Organisation (ASIO) released a report that determined the following: 1) Dr. Haneef had no prior knowledge of the Glasgow terrorist attack or attempted London bombing; 2) although an associate of the two Glasgow bombers, Dr. Haneef had not been in contact with either since moving to Australia; 3) no evidence supported the allegation Dr. Haneef’s SIM card was used in the planning of the Glasgow bombing nor that he had direction connection to the bombers; 4) Dr. Haneef’s decision to depart for India prior to being arrested did not constitute fleeing from authorities; and 5) no evidence collected during the investigation supported that Dr. Haneef was at anytime involved with a terrorist or transnational crime organisation (Clarke & Wigan, 2008, pp. 119–121).

VII-4-b) Using Canada as the Basis for the Ceteris Paribus Clause in the Case of Dr. Haneef

The case of Dr. Mohamed Haneef provides an example whereby internal immigration enforcement was used to circumvent legal safeguards present within Australia’s traditional criminal justice system⁸⁶. Through the misapplication of the *Migration Act*, the government of Prime Minister John Howard erroneously labelled Dr. Haneef as a suspected terrorist, deeming him as an unlawful non-citizen, and ultimately caused him to depart Australia based on unsubstantiated and subjective information. What has become apparent since this case

⁸⁵ See *Minister of Immigration and Citizenship v. Haneef* [2007] FCAFC 203.

⁸⁶ Also see VI-3-b and footnote 80 which reference the cases of Vivian Alvarez Solon and Cornelia Rau.

became public is that the Howard government recklessly used unsubstantiated and subjective information concerning Dr. Haneef as a way to demonstrate that the Australian Government takes a swift and hard-line approach to acts of global terrorism (Tascón, 2010).

Specific to this thesis, the case of Dr. Haneef affords an opportunity to hypothetically examine how a bill of rights likely would have resulted in a noticeably different outcome if, all other things being equal (*ceteris paribus*), Dr. Haneef were living in Canada during this same period. By using Canada as the basis for the *ceteris paribus* clause, the likely influence the *Canadian Charter of Rights and Freedoms* on internal immigration enforcement can be explored. Considering that immigration authorities in both nations identify, arrest, detain, and removal suspected unlawful non-citizens in much the same manner, the fact that all persons in Canada are afforded the same rights and legal safeguards (regardless of citizenship or lawful immigrant status) arguably could result in a noticeable difference in how suspected unlawful non-citizens are arrested—especially in a alleged terrorist cases.

This *ceteris paribus* clause holds that the RCMP, Canadian Security Intelligence Service (CSIS), and CBSA would make comparable conclusions based on the same information received by their Australian counterparts. The only difference is that Canadian officials would make their decisions based on comparable Canadian laws and respective of the tenets of the *Canadian Charter of Rights and Freedoms*. Additionally, this clause holds that an Australian subclass 457 visa (long-stay business visa) is equivalent to a Canadian temporary work permit (see DIAC, 2011b; CIC, 2011)—both apply to medical professionals, have a maximum duration of four years, and do not confer permanent residency privileges or rights.

The first aspect of this comparison involves a discussion of whether or not Dr. Haneef would have been identified and ultimately arrested in Canada in the same manner he was in Australia. If, on July 2, 2007, the London Metropolitan Police contacted the RCMP, CSIS, or

CBSA with suspicion that Dr. Haneef was associated with the Glasgow International Airport attack, these agencies likely would have proceeded in the same manner the Australian Federal Police (AFP) did. Considering the AFP investigated and ultimately charged Dr. Haneef for “recklessly providing support or resources to a terrorist organisation” contrary to §102.7(2) of the *Criminal Code Act 1995* (Cth), Canadian authorities likely would have commenced their investigation and ultimately charged Dr. Haneef for “participating in the activities of a terrorist group” contrary to §83.18⁸⁷ of the *Criminal Code of Canada* [R.S.C., 1985, c. C-46].

On July 14, 2007, after reviewing the AFP evidence against Dr. Haneef, Brisbane Magistrate Payne granted bail based on her assessment that no definitive connection between Dr. Haneef and the Glasgow bombers existed (Clarke & Wigan, 2008). It is plausible that given the same circumstances during the same period in time, Canadian authorities would have vigorously and zealously pursued a criminal case against Dr. Haneef in the same manner as did the AFP. Moreover, if Canadian authorities based their investigation, arrest, and charge on the same circumstantial evidence as the AFP, the Director of Public Prosecution for Canada likely would have dismissed the charges on the same basis as the Commonwealth Director of Public Prosecutions did on July 27, 2007. As indicated by Bostedt (2007) and supported by Simester and Sullivan (2007), generally, there are few differences in the way criminal proceedings develop and unfold in Australia and Canada—irrespective of the *Canadian Charter of Rights and Freedoms*, both criminal justice systems are based on British common law traditions and observe comparable legal procedures.

The second aspect of this comparison involves the argument whether or not Canadian immigration authorities would have taken internal immigration enforcement actions against Dr. Haneef in the same manner as Australian authorities did. Again, this argument requires

⁸⁷ Section 83.18 of the *Criminal Code of Canada* states that everyone who 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 is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years.

the acceptance that Canadian authorities, if presented with the same information as their Australian counterparts, would have arrived at the same conclusions, only their decision would have had to be respectful of the *Canadian Charter of Rights and Freedoms*. This second aspect is where the influence of a bill of rights such as the *Canadian Charter of Rights and Freedoms* becomes most apparent. In Canada, any immigration enforcement action against a suspected unlawful non-citizen must be based on reasonable and probable grounds, be decided in accordance with procedural fairness and natural justice (meaning a judicial or quasi-judicial hearing would be invoked from which a decision would be made), and comply with the *Canadian Charter of Rights and Freedoms* (Pratt, 2005).

Considering the aforementioned, and assuming that in this *ceteris paribus* clause all other things are equal in Canada as they are in Australia, there would be no legal means by which the CBSA (or RCMP) could have initiated an internal immigration enforcement action other than identifying Dr. Haneef and commencing surveillance (ENF-2; ENF-7). This assumption is based on the fact that in the actual Australian case, Magistrate Payne and the Commonwealth Director of Public Prosecutions both felt there was not enough evidence or information to support on reasonable grounds that Dr. Haneef participated in the Glasgow bombing (Clarke & Wigan, 2008). Yet, assuming the CBSA erred in justifying their actions and nevertheless arrested Dr. Haneef under §34(1)(c) of the *Immigration and Refugee Protection Act* for being a foreign national who engaged in terrorism, Dr. Haneef would still have been afforded the right to have his arrest and temporary detention reviewed by way of *habeas corpus* within a 48-hour period (ENF-3; ENF-9; ENF-19; and ENF-28). Furthermore, the allegation that Dr. Haneef was involved in terrorism would have had to be adjudicated before a member of the Immigration Division and would also be subject to judicial review by

the Federal Court. Moreover, even if the CBSA sought a security certificate⁸⁸ to be issued against Dr. Haneef pursuant to §77, the matter still would have to be adjudicated by a Justice of the Federal Court in a manner adherent to the fundamentals of procedural fairness, natural justice, and respective of the tenets of the *Canadian Charter of Rights and Freedoms* (see King & Winterdyk, 2011).

VII-4-c) Discussion Concerning the Ceteris Paribus Case Study of Dr. Mohamed Haneef

The case of Dr. Haneef raised a number of concerns regarding Australia's treatment of suspected unlawful non-citizens⁸⁹. In particular, this case highlights how in the absence of a bill of rights (such as the *Canadian Charter of Rights and Freedoms*), non-citizens in Australia are vulnerable to "unfair procedures and false accusations" (Robertson, 2009, p. 100). As argued by Tascón (2010), the case of Dr. Haneef clearly exposes how post-9/11 internal immigration enforcement in Australia has become a surreptitious tool by which contentious criminal justice matters can be addressed with expedience and minimal oversight. Also referring to the case of Dr. Haneef, Harris-Rimmer (2008) suggests that "safeguards are necessary to prevent further erosion of the rule of law by unchecked executive power. [The case of Dr. Haneef] shows that when migration laws and counter-terrorism measures rely on the subjectivities of character testing, these laws can go awry" (p. 19).

Initially, Dr. Haneef was dealt with under the auspices of Australia's criminal justice system, and as such had the right to have his detention reviewed by way of *habeas corpus* and his charges adjudicated by a court. Yet, when it became apparent Dr. Haneef would not be convicted for involvement in terrorist activities, the government utilised the provisions of its

⁸⁸ Under §77 of the *Immigration and Refugee Protection Act*, a security certificate can be issued jointly by the Minister of Citizenship and Immigration Canada and Minister of Public Safety, to seek the expedited removal of a non-citizen they both believe poses a significant risk to the public safety and security of Canada. Once signed, the certificate is forwarded to the Federal Court of Canada for a hearing. Although the hearing is kept confidential, the person concerned is afforded a special advocate (lawyer) who is privy to all the secret evidence being levied against his client (Hudson, 2010).

⁸⁹ Also see VI-3-b and footnote 80 which reference the cases of Vivian Alvarez Solon and Cornelia Rau

Migration Act to continue enforcement action against him, meaning his detention no longer had to be reviewed by way of *habeas corpus*. Notwithstanding the Commonwealth Director of Public Prosecutions' determination that not enough grounds existed to proceed with terrorism-related charges against Dr. Haneef, and irrespective of the Australian judiciary's view that he was not involved in terrorism, the Howard government nonetheless aggressively pursued his removal from Australia (Tascón, 2010). To achieve this goal, the Minister of Immigration and Citizenship, Hon. Kevin Andrews MP, utilised his authority under the *Migration Act* to further his government's political agenda (Harris-Rimmer, 2008).

Under §501(3) of the *Migration Act*, the Minister of Immigration is empowered to autonomously decide if a non-citizen lacks the requisite "character" to remain in Australia (Harris-Rimmer, 2008). Under this provision, the Minister has the right to apply the character test and cancel a non-citizen's visa—ultimately causing them to become an unlawful non-citizen and subjecting them to detention and removal. This ministerial power in and of itself provides an example where a bill of rights could likely provide a safeguard against an unjust and arbitrary administrative decision. As discussed by Robertson (2009), "the judicial enquiry into Dr. Haneef's case showed how easily an individual's right to liberty could turn to putty in the hands of a panicked and unthinking government minister" (p. 68).

Unlike in Australia, the only means to revoke a non-citizen's lawful immigrant status is for a process adherent to the principles of fundamental justice to transpire—in most cases, revocations of status are made by a member of the Immigration Division of the Immigration and Refugee Board (a federal quasi-judicial tribunal having the same authority as a court and operating under Federal Court rules) or by a justice of either the Federal or Supreme Court of Canada (Blanchard, 2009). Under §7 of the *Canadian Charter of Rights and Freedoms*, everyone (regardless of their citizenship or lawful status in Canada) has the right to life, liberty, and security of the person respective of the principles of fundamental justice.

Furthermore, under §10 everyone also has the right to have the validity of their arrest or detention determined by way of *habeas corpus*.⁹⁰ As found by the Ontario Superior Court in the case of *Cadeddu v. The Queen* (1982), 4 C.C.C. (3d) 97 (Ont. S.C.), administrative processes (including immigration processes) that violate the principles of fundamental justice and that fail to embrace the notion of *habeas corpus* violate the *Canadian Charter of Rights and Freedoms*. Moreover, in the landmark case of *Singh v. Minister of Employment and Immigration* [1985] 1 S.C.R. 177, the Supreme Court of Canada ruled that “everyone,” as described by the *Canadian Charter of Rights and Freedoms*, means all persons physically present in Canada regardless of their citizenship or lawful immigrant status.

Although the Australian High Court ultimately ruled that the Minister of Immigration erred in his application of the *Migration Act* character test by deeming Dr. Haneef a threat to Australian society (ultimately resulting in Dr. Haneef’s visa to be upheld), he nonetheless was pressured to leave Australia under a cloud of suspicion and publicly labelled as a terrorist supporter (Tascón, 2010). Arguably, the unlawful identification, arrest, and detention of Dr. Haneef resulted in him deciding to simply leave the jurisdiction within which he was being prejudicially and aggressively pursued. If this case transpired in Canada, Dr. Haneef likely would not have been detained for 11 days pending criminal charges (see Clarke & Wigan, 2008), nor would his visa have been quashed by the Minister. As Robertson (2009) suggests, if a constitutional bill of rights existed in Australia during the time of this case, Dr. Haneef likely would not have been treated by police and immigration authorities in the same aggressive and subjective manner.

Although it is plausible to assume from this *ceteris paribus* clause that Dr. Haneef would likely still have been identified, arrested, and detained in Canada based on information

⁹⁰ As found in the case of *Cadeddu v. The Queen* (1982), 4 C.C.C. (3d) 97 (Ont. S.C.), “section 10(c) cannot be limited to *habeas corpus* simpliciter, but also embraces *habeas corpus* with *certiorari* in aid and with affidavit material in support. That being the case, it follows that if a privative clause purports to immunize a [administrative tribunal or other quasi-judicial body] from judicial review, it cannot operate so as to preclude the exercise of the §10(c) right.”

presented by the London Metropolitan Police, it is equally plausible to assume he would have been released from detention within a 24-hour period.⁹¹ What's more, if a case similar to that of Dr. Haneef transpired in Canada, the person concerned likely would be awarded damages pursuant to §24 of the *Canadian Charter of Rights and Freedoms* in that their protected rights were violated.⁹² In summary, although a bill of rights does not automatically negate a government's violation of an individual's human rights, it does provide a framework by which fundamental human rights can be protected. In his assertion that in the aftermath of 9/11, Australia needs a bill of rights more than ever before, Robertson (2009) suggests,

enforceability of the fair trial and treatment provisions in the charter [bill of rights], and its promises of non-discrimination, will provide some security for peaceful Islamic communities in Australia, more confident that their own rights will be protected and their members will not, as Dr. Haneef was, be made the victims of unfair procedures and false accusations. (p. 100)

VII-5) Comparison: Arrest of Unlawful Non-Citizens

As mentioned in the opening of this chapter, the notion of arrest can be a difficult one to conceptualise and compare. Although Australian and Canadian immigration authorities both arrest suspected unlawful non-citizens, the legal parameters by which these arrests are made noticeably differ. Moreover, the Australian *Migration Act* is void of the term arrest, whereas the Canadian *Immigration and Refugee Protection Act* refers to an arrest as the initial stage in the enforcement of this Act. Irrespective of terminology, it is evident both nations arrest suspected unlawful non-citizens, in that they both suspend the freedom of suspected unlawful non-citizens by placing them into immigration detention (PAM3; ENF-7). Furthermore, the means by which immigration authorities suspend the freedom of suspected

⁹¹ As mentioned earlier in this thesis, all persons arrested must be brought before a justice of the peace or provincial court judge within 24 hours of their initial apprehension.

⁹² On December 23, 2010, the Australian Government formal and public apologised to Dr. Haneef, admitting that his fundamental human rights were compromised as a result of the investigation brought against him in 2007 (Rosner, 2010).

unlawful non-citizens and place them in to a detention, very much mirrors the way police suspend the freedom of suspected criminals and place them into remand centres pending trial (Pratt, 2005; Weber, 2002).

In Australia, where there is an absence of a federal bill of rights, the authority to arrest a suspected unlawful non-citizen at times can be highly subjective and arbitrary—as was in the case of Dr. Haneef (Harris-Rimmer, 2008; Robertson, 2009)⁹³. In Canada, where a federal bill of rights does exist, officers approach the arresting of suspected unlawful non-citizens in the same manner police arrest suspected criminals (Cooley, 2005). In considering the question of whether or not a policing versus non-policing approach impacts the way immigration enforcement is carried out, the data suggests that regardless of a bill of rights being present, a policing approach still results in arrests being made in an aggressive and potentially violent manner. Yet, it is also apparent from the data that taking a non-policing approach within a system void of a bill of rights, still can result in arrests being based on highly prejudicial, discriminatory, and subjective grounds—ultimately ignoring the principles of fundamental justice. Future research specific to the issue of whether or not a policing versus non-policing approach impacts how immigration enforcement conducted would provide greater support for the findings of this study.

Keeping with Fuller’s (2003) six-facet approach for applying Pepinsky and Quinney’s (1991) notion of peacemaking criminology, Fuller’s first and sixth facets are most applicable to the review of arrest. Facet one (non-violence) advocates that violent state responses ultimately result in future violence. Facet six (categorical imperative) “aims at developing a consistent and predictable viewpoint” that promotes a philosophy of non-violence and also “aims at providing true equality under the law that is tempered by a positive view of humankind” (p. 88). With both of these facets, the underlining principle of peacemaking

⁹³ Also see VI-3-b and footnote 80 which reference the cases of Vivian Alvarez Solon and Cornelia Rau.

criminology remains that peace approaches to criminal justice challenges likely will result in peaceful outcomes (Pepinsky & Quinney, 1991).

Facet one (non-violence) proposes that the more violent a state response is to a criminal justice concern, the higher the probability that future violence will occur (Fuller, 2003). Considering that, prior to 2003, CBSA officers were neither training nor equipped to exhort force when making an arrest, it is reasonable to assume that prior to 2003, incidents where force was used to arrest suspected unlawful non-citizens were rare. As evident in the CBSA's recent review of its arming initiative, since 2006, there have been over 174 incidents when officers have deployed firearms in the course of their duties (see Chart 8 above). Although no studies current exist that examine CBSA use of force incidents, the fact CBSA officers have deployed firearms in at least 174 incidents over the span of four years in itself suggests the possibility for violent interactions between CBSA officers and the public has increased considerably since Canada adopted its policing approach for border internal immigration enforcement (and border security in general).

Facet six (categorical imperative) proposes that when government authorities have consistent and predictable visions and goals that promote a philosophy of non-violence and equality, greater community peace will be achieved (Fuller, 2003). Since the 2005 release of the *Palmer* and *Comrie Reports*, the DIAC has made noteworthy efforts to improve the way it conducts internal immigration enforcement (especially its commitment to observe and respect the fundamental human rights and civil liberties of people it deals with) (Proust, 2008). Yet, despite substantial criticism in the wake of the *Palmer* and *Comrie Reports*, and irrespective of its pledge to be more accountable, professional, and adherent to human rights and civil liberties, in 2007, the DIAC again drew substantial criticism for its treatment of Dr. Haneef (Harris-Rimmer, 2008). Conversely, the CBSA, which has spent considerable effort and expense in branding itself as a policing agency committed to combating transnational crime,

international terrorism, and upholding the integrity of Canada's immigration program, has received little criticism since being established in 2003. Despite its purposeful hard-line/law-and-order public image, the CBSA has consistently been viewed in public opinion polls as an effective, responsive, and fair government agency (Winterdyk & Sundberg, 2010a).

Considering the aforementioned, and reflecting on the principles of peacemaking criminology, there should be no surprise if the number of violent encounters between CBSA officers and suspected unlawful non-citizens during arrests increases in the years subsequent to the CBSA's arming initiative.⁹⁴ Likewise, considering that Australia has decided to continue with its traditional non-policing approach to internal immigration enforcement (Smith, 2008), it is just as likely that violent encounters between DIAC officers and suspected unlawful non-citizens during arrests will remain rare. Yet, until Australia improves upon its existing legislation so as to better safeguard the fundamental human rights of suspected unlawful non-citizens, there likely will be numerous future cases whereby individuals are unjustly identified, arrested, detained, and removed from Australia (Harris-Rimmer, 2008). As identified by Mitchell and Casey (2007):

While the direct effect of incorporating rights [bill of rights] may not be dramatic, it would be wrong to understate the indirect effects. Informed commentators on Britain and Canada point to the entwined changes in process and culture which have flowed from incorporating rights. In terms of process, legal change has to include consideration of the human rights implications of legislative proposals. (p. 33)

VII-6) Chapter Summary

Reflecting on the research question, and accounting for the limited information concerning how Australian and Canadian internal immigration enforcement officers conduct

⁹⁴ The CBSA has set aside over \$700m AUS to arm its over 4,800 officers with semi-automatic handguns by 2016 (CBSA, 2007b).

arrests, there remains compelling information supporting the supposition that Canada's approach to arresting suspected unlawful non-citizens results in a higher propensity for force to be used when compared to Australia. At a minimum, the potential for force to be displayed during the arresting of suspected unlawful non-citizens is much higher in Canada considering that DIAC officers are not armed and CBSA officers are. Furthermore, when viewed through the lens of peacemaking criminology, Australia seemingly takes a more peaceful operational approach to arresting, despite having less legal safeguards in place to prevent potential wrongful enforcement actions.

Of importance when comparing how CBSA and DIAC officers *arrest* suspected unlawful non-citizens, is understanding that the *Canadian Charter of Rights and Freedoms* does not safeguard against reasonable force being use during an arrest. Unlike in Australia where DIAC officers are unarmed and are not considered law enforcement officers, CBSA officers carry defensive weapons (including firearms) and are empowered as law enforcement officers (see VII-3-b). As Leyton-Brown and Jones (2009) observe, because Canadian law enforcement officers are specially trained to use defensive weapons (including firearms) when making arrests, they characteristically use greater force during arrests when compared to officers in Australia. Leyton-Brown and Jones (2009) suggest that when officers are trained and authorised to use force as a means to expedite the arrest process, and as long as the force used is considered reasonable (see Figure 6 above), officers typically will gravitate to the highest level of force allowed when making arrests. Arguably, because CBSA officers are trained and equipped to use a higher level of force during an arrests when compared to DIAC officers, and considering that the use of reasonable force during an arrest does not in itself constitute a violation of the *Canadian Charter of Rights and Freedoms*, CBSA officers are more likely to use force when arresting suspected unlawful non-citizens when compared to DIAC officers.

CHAPTER VIII: DETENTION

Detention and deportation are the most extreme, coercive, and bodily sanctions of immigration penalty and do manifest the contemporary persistence of sovereign power. (Pratt, 2005, p. 52)

VIII-1) Chapter Overview

This chapter examines the third sub-component of internal immigration enforcement—namely, how Australia and Canada each operationally approach *detaining* suspected unlawful temporary non-citizens (see *temporary non-citizen* in glossary). Continuing with the use of a comparative criminological approach through the lens of peacemaking criminology, this chapter provides the findings from the analysis of how Australia and Canada each place suspected unlawful temporary non-citizens (hereinafter referred to as *suspected unlawful non-citizens*) into immigration detention. Considering that detention follows identification and arrest, and that immigration detainees generally are only released upon their removal from a nation's territory, this chapter also provides important insight for the subsequent chapter addressing removal.

Generally, Australian and Canadian immigration authorities place suspected unlawful non-citizens into detention once it is believed they are 1) a threat to public health or safety; 2) using a fraudulent identity document or otherwise concealing their true identity; 3) unlikely to appear for a lawful administrative purpose (i.e., appearing for an immigration hearing, visa application process, or other obligation required by the immigration legislation); 4) unlikely to appear for removal or deportation; 5) serving a criminal sentence and/or are a fugitive from a foreign jurisdiction; or 6) a risk to national security (Pratt, 2005; Vrachnas et al., 2008; Wilsher, 2004).

Under §5(1) of the *Migration Act 1958* (Cth) (hereinafter referred to as the *Migration Act*), the term *detention* refers to a suspected unlawful non-citizen being physically taken into

the custody of an immigration authority and placed in a designated immigration detention centre (see *detention* in glossary). Likewise, under §4(2)(b) of the *Immigration and Refugee Protection Act* [S.C. 2001, c.27] (hereinafter referred to as the *Immigration and Refugee Protection Act*), the term refers to the second stage of enforcing this Act—namely, placing a suspected unlawful non-citizen into a designated detention centre after their initial arrest has been determined lawful and reasonable by a member of the Immigration Division (see *detention* in glossary, footnote 67, VII-2-b, as well as ENF-7 and ENF-20).

Australia and Canada each consider immigration detention an administrative function, and approach the act of detention in much the same way (Wilsher, 2004)—typically confining suspected unlawful non-citizens in an immigration detention facility subsequent to being identified and arrested on the supposition they violated immigration law (Phillips, 2009; Pratt, 2005). For the purpose of this thesis, the term *detention* will refer to the time a suspected unlawful non-citizen in Australia has been taken into immigration detention and subsequently denied a new visa; and in Canada, when a suspected unlawful non-citizen has been taken into immigration detention subsequent to being arrested and after a determination to keep the person in detention has been made by a member of the Immigration Division.

Unlike the terminological differences identified within Chapter VII (specifically differences in the meaning of detain and arrest), the term *detention* as found in both the Australian and Canadian Acts has synonymous meaning. As a result, this chapter compares and analyses how Australia and Canada each operationally approach immigration detention using the methodological approach employed in Chapters VI (identification) and IX (removal)—specifically, using a mixed methods approach which includes quantitative data collected through document review and a corresponding qualitative assessment of the data.

VIII-2) Overview of Detention

Detention commonly refers to the placing of a person within either a secured facility (such as a gaol, prison, correctional centre, or other type of detention facility) or imposing community-based controls (such as requiring a person to report to a government official, being subject to guardianship within the community, or wearing an electronic monitoring device) as a means of controlling and monitoring their movements and limiting their contact with others in a community (Black & Gardner, 2009; M. Flynn, 2011). Generally, detention is imposed by either a law enforcement or other government agency, court, or quasi-judicial tribunal empowered through legislation to exert control over individuals' movements and freedoms prior to the commencement of a criminal or administrative hearing, with the aim of 1) preventing them from causing harm to themselves, others, or the community in general; 2) ascertaining their true identity; or, 3) ensuring their participation in either a criminal or administrative process (Flynn, 2011). Irrespective of being detained in a secured facility or in a community, detainees characteristically are limited in their mobility and subjected to conditions imposed by an authority which subject them to surveillance, search, and/or regular reporting of their activities to a designated official (see Phillips, 2009; Pratt, 2005).

Extra-judicial confinement (administrative detention), as opposed to imprisonment (criminal detention), is meant as a control measure rather than a punitive act (Flynn, 2011). Australia and Canada both identify immigration detention (the extra-judicial confinement of a suspected unlawful non-citizen) as being a necessary step in maintaining the integrity of their respective immigration programs, and stress that holding non-citizens in detention is not a punitive measure (CBSA, 2009b; DIAC, 2010). Yet despite this view, immigration detention typically involves a person who is neither charged nor sentenced for a criminal act, being held in a secured facility where their freedom and liberty are significantly restrained—an act which for all intents and purposes is punitive (Flynn, 2011; Phillips, 2009; Pratt, 2005).

VIII-2-a) General Approaches to Detaining Unlawful Non-Citizens

Of particular importance in comparing how immigration detention is operationally approached by Australian and Canadian authorities is that pursuant to §189 of the *Migration Act*, all non-citizens without a valid visa must be detained. Only under limited circumstances can an Australian immigration officer or other designated person release a suspected unlawful non-citizen from detention; typically through the issuing of new visa (commonly referred to as a *bridging visa*) pursuant to §196 of this Act (Vrachnas et al., 2008; Wilsher, 2004). In cases where a suspected unlawful non-citizen is subject to deportation pursuant to §200, §201, §202, §203, §204, or §205 of this Act, a State or Territory Supreme Court, or the High Court after ruling that the deportation order is not valid, may order the person released pursuant to §253 of this Act (Wilsher, 2004). However, as will be discussed further within this chapter and in the subsequent chapter addressing removal, most detained suspected unlawful non-citizens are only released from detention upon their removal from Australia.

In Canada, all detained persons regardless of their citizenship or immigration status have the right under §10 of the *Canadian Charter of Rights and Freedoms* to 1) be informed of the reason for their detention; 2) retain and instruct counsel without delay at the expense of the government; and 3) have the validity of their detention determined by way of *habeas corpus* (Pratt, 2005; Wilsher, 2004). Furthermore, §58(1) of the *Immigration and Refugee Protection Act* states that a non-citizen shall be ordered released from immigration detention unless 1) they pose a danger to the public; 2) their legal identity cannot be established; or 3) they are unlikely to appear for a lawful purpose prescribed by this Act (IRB, 2012).

Annually in both Australia and Canada, thousands of suspected unlawful non-citizens are held within designated immigration detention facilities on the supposition they violated immigration law (Pratt, 2005; Vrachnas et al., 2008). In Australia, immigration detainees are confined within facilities that only house persons suspected of violating the *Migration Act*

(Phillips, 2009). Conversely, in Canada, the majority of immigration detainees are housed in provincial remand centres or provincial correctional centres alongside others who are awaiting criminal court proceedings or serving criminal sentences (Pratt, 2005). In cases involving either low-risk detainees⁹⁵ or detainees whose removal is anticipated to transpire within a short period of time, Canada has established three facilities in the large metropolitan centres, reserved solely for non-citizens—these being in Burnaby, British Columbia (Greater Vancouver Region); Mississauga, Ontario (Greater Toronto Area); and Laval, Québec (Greater Montréal Area) (Pratt, 2005).

With respect to immigration detention facilities exclusively occupied by suspected unlawful non-citizens, both Australia and Canada contract private security firms (supervised by immigration department officials) to oversee facility security as well as guard and transport detainees; a practice widely criticised for potentially exposing vulnerable immigration detainees to health risks and human rights infringements. With respect to suspected unlawful non-citizens held in either Australian or Canadian federal or state/provincial correctional centres, government correctional staff are responsible for the guarding and transporting of detainees. Regardless if held within a facility specially designed for immigration detention or a centre typically used for criminal detention, immigration detainees are subject to the search of their person, restricted in the personal items they can possess, and also are limited in their ability to communicate with family, friends, counsel, and others (Phillips, 2009; Pratt, 2005). Also, in both administrative and criminal detention facilities, all detainees are guarded, their movements controlled, and activities significantly regulated—with legal provisions in place to penalise those who do not observe the rules, laws, and policies governing the facility.

⁹⁵ In accordance with Canada's immigration policy manual (ENF-20) low risk detainees are considered those persons who do not have a criminal history, have no prior enforcement actions taken against them, are considered minors (12 years to 18 years in age), or are accompanying their family.

VIII-2-b) General Operational Techniques Used to Detain Unlawful Non-Citizens

In Australia and Canada, the principal responsibility for detaining suspected unlawful non-citizens falls to each nation's respective internal immigration authority—the DIAC in Australia, and CBSA in Canada. Although police⁹⁶ in each nation have the authority to identify, arrest, and detain non-citizens suspected of violating immigration law, this authority generally is only exercised on the request of an internal immigration enforcement officer (see BCO, 2011; Pratt, 2005).

As discussed within the *arrest* chapter, the DIAC and CBSA both have personnel authorised to physically take suspected unlawful non-citizen into immigration detention, including the power to use force when a person being detained presents resistance. The noticeable difference between Australia and Canada is that in Canada officers are considered peace officers (law enforcement officers), whereas in Australia they are not (see VII-5 above). As identified by the Border Crossing Observatory (2011), it is common for Australian police to assist the DIAC in their enforcement of the *Migration Act*. Conversely, in Canada, requests for police assistance by the CBSA are rare, yet requests from the police to have CBSA officers assist in their investigations are fairly common (Sundberg, 2004).

VIII-2-c) General Technologies Used to Detain Unlawful Non-Citizens

The act of detention itself generally does not involve the use of technologies. Yet since 9/11, and in light of public concern that Australian citizens and lawful non-citizens have mistakenly and unlawfully been placed in immigration detention (see VI-3-b above), all persons in Australia and Canada who are placed in immigration detention are identified and monitored through the use of national immigration case management systems, fingerprint-

⁹⁶ Under §188 and §189 of the *Migration Act* in Australia and §138 of the *Immigration and Refugee Protection Act* of Canada, government officials deemed as either law enforcement officers (Australia) or peace officers (Canada) have the authority to investigate and/or detain suspected unlawful non-citizens—including federal, provincial/state, or municipal police officers, customs officers, or other policing professionals empowered to enforce federal and/or criminal law.

recording technologies, and computerised record systems used to produce annual government reports. Since the mid-2000s, and as described in the identification chapter (see VI-3 and VI-4 above), files concerning enforcement actions against suspected non-citizens initiated by immigration officers overseas, at POEs, or inland are electronically stored in national databases and made available to all personnel tasked with immigration enforcement duties. This approach allows immigration authorities in both Australia and Canada the ability to identify previously removed persons and monitor the movements of non-citizens living within the nation's territory. These abilities have become particularly important post-9/11, when the DIAC and CBSA both assumed the responsibility for assisting policing, security, and security intelligence agencies identify and track non-citizens suspected of being involved in terrorist activities or participating in transnational criminal enterprises (Phillips, 2009; Pratt, 2005).

Whereas Canada has had electronic immigration record management systems in place at a national level since 1978 (ENF-29), it was not until after the 2005 release of the *Palmer* and *Comrie Reports* that Australia's DIAC fully embraced the use of similar system (in conjunction with advanced biometric technologies) to identify and monitor suspected unlawful non-citizens held in immigration detention (see VI-3-a above). Prior to 2005, these records were typically held locally and inaccessible to officers in other regions or overseas. Today, immigration detainees in both Australia and Canada routinely are fingerprinted, photographed, and identified, with these records being available to a multitude of agencies tasked with analysing and managing the potential risks associated with non-citizens seeking entry or living within each nation's respective territory (Winterdyk & Sundberg, 2010a).

VIII-3) How the CBSA Detains Suspected Unlawful Non-Citizens

In Canada, immigration detention is achieved in one of two ways; suspected unlawful non-citizens are 1) identified as being potential unlawful non-citizens by either provincial or

federal correctional officials while awaiting trial or serving a criminal sentence and consequently reported to the CBSA; or 2) detained subsequent to being identified and arrested by officials authorised to enforce the *Immigration and Refugee Protection Act* (ENF-20). As described within Chapter VI (identification), all suspected unlawful non-citizens are identified through the examination of identity documents, search of national immigration records, or through the utilisation of biometric technologies (see VI-4 above). In most cases, when a correctional service identifies a suspected unlawful non-citizen, the person remains within the respective federal or provincial correctional facility until they are eligible for release, and subsequently transferred into the custody of an internal immigration enforcement officer for immigration enforcement processing and potential immigration detention (ENF-20).

Once a suspected unlawful non-citizen has been identified and arrested by a CBSA officer, the office must forthwith write a report to the Minister of Public Safety's delegate⁹⁷ pursuant to §44 of the *Immigration and Refugee Protection Act*. This report details the specific section(s) of the Act believed on reasonable and probable grounds to have been violated (ENF-5). Upon receipt of this report, the Minister's delegate makes a determination whether or not the officer's grounds and allegation(s) are founded, and consequently decides if the person should be referred to a hearing before the Immigration Division. During the Immigration Division hearing, the presiding member reviews the Minister's delegate determination, and if in agreement, will issue a removal order.⁹⁸

⁹⁷ Under §6(1) of the *Immigration and Refugee Protection Act*, the Minister of Public Safety may designate officers and other government officials to serve as their delegate to administer and enforce the Act. Delegates are identified within the appendix of each respective ENF manual.

⁹⁸ Under §223 of the *Immigration and Refugee Protection Act Regulations* there are three types of removal orders: 1) departure orders, 2) exclusion orders, and 3) deportation orders. *Departure orders* require non-citizens to leave Canada forthwith, yet permit subsequent re-entry as per normal admission requirements (failure to comply with a departure order may result in the order being deemed a deportation order if the person fails to confirm their departure within 30 days of the date the departure order came into force). *Exclusion orders* require non-citizens to leave Canada forthwith, and stipulate they may not seek entry to Canada for either a one year or two year period (depending on the reason the order was issued). *Deportation orders* require non-citizens to leave Canada forthwith and prohibit subsequent re-entry for life (see IX-3-a for more information).

In limited cases when it is alleged the suspected unlawful non-citizen is a temporary visitor (see footnote 20) who remained in Canada without lawful status for more than 90 days from the date he or she was initially required to leave, or who was convicted in Canada of an offence described under §36 of the Act, the Minister's delegate may issue a removal order (ENF-5; ENF-20). In all cases when a removal order is issued, the person whom the order names may within 15 days seek leave from the Federal Court of Canada to have the order stayed pending judicial review (see Pratt, 2005, pp. 149–159).

Once a removal order has been issued by either the Minister's delegate or a member of the Immigration Division, the non-citizen named in order may be subject to immigration detention. As outlined in *Enforcement Manual 20* (ENF-20), a member of the Immigration Division may only order a suspected unlawful non-citizen detained prior to a removal order being issued if the member believes on reasonable grounds that a removal order would likely be issued once the CBSA obtained further supporting evidence (i.e., the identity or lawful status of a suspected unlawful non-citizen cannot be conclusively confirmed, yet reasonable and probable grounds exist that support the person is a non-citizen who is in violation of the Act). In all immigration detention cases, the authority to continue detention pursuant to the Act is limited to a member of the Immigration Division (ENF-20).

All suspected unlawful non-citizen arrested (and temporarily detained) under the *Immigration and Refugee Protection Act* must be brought before the Immigration Division within 48 hours to have the lawfulness and reasonableness of the detention reviewed (ENF-20)—only in exceptional circumstances, when a suspected unlawful non-citizen is arrested in a remote location and the officer can justify that he or she reasonably was unable to comply with the 48-hour rule due to challenges associated with transportation, is this requirement waived. When the Immigration Division orders a continuation of detention during the initial 48-hour period, the detention must again be reviewed within seven days. If during the seven-

day period detention is again continued, the Immigration Division must review detention every 30 days thereafter (ENF-20). As stipulated in Part 14 of the *Immigration and Refugee Protection Act Regulations* [SOR/2002-227], a detainee's detention may only be continued if reasonable and probable grounds support that he or she is a person whose circumstances are described under §248 of these regulations—namely, that reasonable and ongoing efforts are being made to confirm identity; the detainee poses a threat to the health, safety, and security of the Canadian public; and/or the detainee fails to have significant ties to the community to justify release (ENF-20).

Of particular noteworthiness in the comparison of immigration detention in Canada and Australia is that prolonged or potentially indefinite immigration detention is implicitly prohibited under the *Canadian Charter of Rights and Freedoms*. In the case of *Sahin v. Canada (Minister of Citizenship and Immigration)* [1995] 1 F.C. 214 (T.D.), the Federal Court of Canada ruled that in addition to deciding if whether or not acceptable grounds for detention exists, pursuant to §7 of the *Canadian Charter of Rights and Freedoms*, decision makers tasked with reviewing immigration detention must also consider whether the length of detention is likely to be reasonable. If immigration detention is unreasonably prolonged, and when it becomes clear the detention risks becoming indefinite, the detainee must be released from detention forthwith (Silverman & Massa, 2012).

VIII-3-a) Legal Authority and Restraints in Relation to Detaining Unlawful Non-Citizens

Under §55 of the *Immigration and Refugee Protection Act*,⁹⁹ a suspected unlawful non-citizen may be arrested with or without a warrant, and subsequently detained if on

⁹⁹ Arrests of suspected unlawful non-citizens without a warrant are authorised under §55(1) of the *Immigration and Refugee Protection Act*, whereas arrests with a warrant are authorised under §55(2)—in rare cases concerning suspected unlawful non-citizens arrested based on the supposition they are actively involved in terrorist related activities, the Minister of Public Safety may issue a Security Certificate pursuant to §77 of this Act, which holds the same force as a §55(2) immigration arrest warrant yet limits the terms of release a member of the Immigration Division can normally exercise (Pratt, 2005). *Because the complexity and rarity of internal immigration enforcement cases which involve the issuing of Security Certificates by the Minister of Public Safety, these cases are not addressed within this thesis.*

reasonable grounds the person is believed to be in violation of this Act, and is 1) believed to be a danger to the public; 2) unlikely to appear for a lawful purpose under the Act (i.e., for an immigration hearing, visa application process, or removal); and/or 3) unable to satisfy an officer as to his or her true identity (ENF-20, §5.3). In regards to the allegation that a suspected unlawful non-citizen poses a danger to the public, under §246 of the *Immigration and Refugee Protection Act Regulations*, the officer must establish reasonable grounds that the suspected unlawful non-citizen 1) is associated with a criminal organisation; 2) has engaged in human smuggling or trafficking; 3) has been convicted in Canada of an indictable offence related to a sexual offence, an offence involving a weapon, an offence involving violence, or an offence related to the production, trafficking, importing, or exporting of a controlled drug; 4) has been charged and/or convicted of an offence outside of Canada that is comparable to one of the aforementioned offences; 5) has been involved in crimes against humanity or war crimes; and/or 6) at the time of arrest, exhibited violent or threatening behaviour (ENF-20, §5.6).

As described in the previous chapter concerning arrest, pursuant to §10 of the *Canadian Charter of Rights and Freedoms*, all persons arrested in Canada (irrespective of their immigration status or reason for arrest) must have the lawfulness of their arrest and initial detention reviewed without delay by way of *habeas corpus*; during the review of their detention, they also have the right to be represented by counsel at the government's expense. As mentioned, those arrested under the authority of the *Immigration and Refugee Protection Act* must have the lawfulness of their arrest and initial detention reviewed by a member of the Immigration Division no more than 48 hours from the time of their initial arrest¹⁰⁰ (ENF-20, §5.3). Furthermore, in accordance with Article 36 of the *Vienna Convention on Consular Relations*, Treaty Series Vol. 95 [1961] (hereinafter referred to as the *Vienna Convention*),

¹⁰⁰ Aside from arrests made pursuant to the *Immigration and Refugee Protection Act*, all persons arrested must have their detention reviewed by a Justice of the Peace, Judge, or Justice of a provincial criminal court within 24 hours of the arrest (ENF-20).

any persons detained in a foreign country must be advised of their right to contact the consular officials of their own country without delay (this is applicable in both Canada and Australia). Typically, if an officer fails to bring an arrested and temporarily detained suspected unlawful non-citizen before the Immigration Division within 48 hours, the latter must be released forthwith—however, under §56 of the Act, conditions may be imposed which limit the detainee’s activities within the community, restricts his or her mobility within Canada, and requires him or her to regularly report place of residence and activities to an officer (ENF-20, §5.14).

In cases when a minor (those under 18 years of age) has been arrested and initially detained, CBSA policy recognises that the *Immigration and Refugee Protection Act* “does not allow a minor child to be detained for their protection” and directs officers to utilise the services of provincial youth protection agencies to manage minors suspected of violating the Act (ENF-20, §5.10). This policy goes on to state, “where safety is not an issue, the detention of minor children is to be avoided . . . however, is not precluded when the minor is considered a security risk or danger to the public” (ENF-20, §5.10). In cases when a minor poses either a security risk or danger to the public, the policy indicates that detention “should be for the shortest period of time and should be primarily focused on supporting removal” (ENF-20, §5.10). All minors detained under the authority of the *Immigration and Refugee Protection Act* must be held within a provincial youth detention facility, provided with schooling, and required to meet regularly with a youth social worker and counsellors to ensure their emotional, physical, and developmental needs are adequately addressed (ENF-20, §5.10).

Under the *Immigration and Refugee Protection Act*, officers must consider if reasonable alternatives to detention exist, and if so, act upon these alternatives prior to the commencement of a detention review before the Immigration Division (ENF-20, §5.9).

Moreover, members of the Immigration Division must order the release of detained suspected unlawful non-citizen, unless they are satisfied all possible and reasonable alternatives to detention have been exhausted by the arresting agency (typically the CBSA). It is only in rare cases when the Minister of Public Safety has issued a Security Certificate pursuant to §77 of the Act that alternatives to detention may be disregarded. Considering the rarity and legal complexity of cases involving §77 Security Certificates, this thesis does not include Security Certificates within its inquiry.

VIII-3-b) Canadian Finding

Access to Canadian data specific to the immigration detention is very limited (see III-1-f above). Yet despite limitations, enough data was secured to examine whether or not the CBSA proportionately increased the number of suspected unlawful non-citizens it detained between 2003–2004 and 2009–2010 when compared to those identified during this same period. Taking a similar approach to Pratt (2005), this section uses the annual counts for suspected unlawful non-citizens detained in Canada for the period 2003–2004 through 2009–2010 to identifying if an increase in immigration detention levels occurred. An important difference between the methodology used by Pratt (2005) and that used in this section is that this section uses simple linear regression to examine the annual rates for suspected unlawful non-citizens detained when compared to the total number identified.

As evident in Chart 9 below, between 2003–2004 (the period when the CBSA was established) and 2009–2010, the number of suspected unlawful non-citizens detained in Canada annually increased. During this period, the total number of Canadian immigration detention cases increased by 68%, closely reflecting Pratt's (2005) finding that between 1998 and 2003 immigration detention numbers increased by 69% (p. 44). While any consistent annual increase in immigration detention counts warrants concern (this is particular true for Canada where detention numbers have increased annually since 1998), it is important to

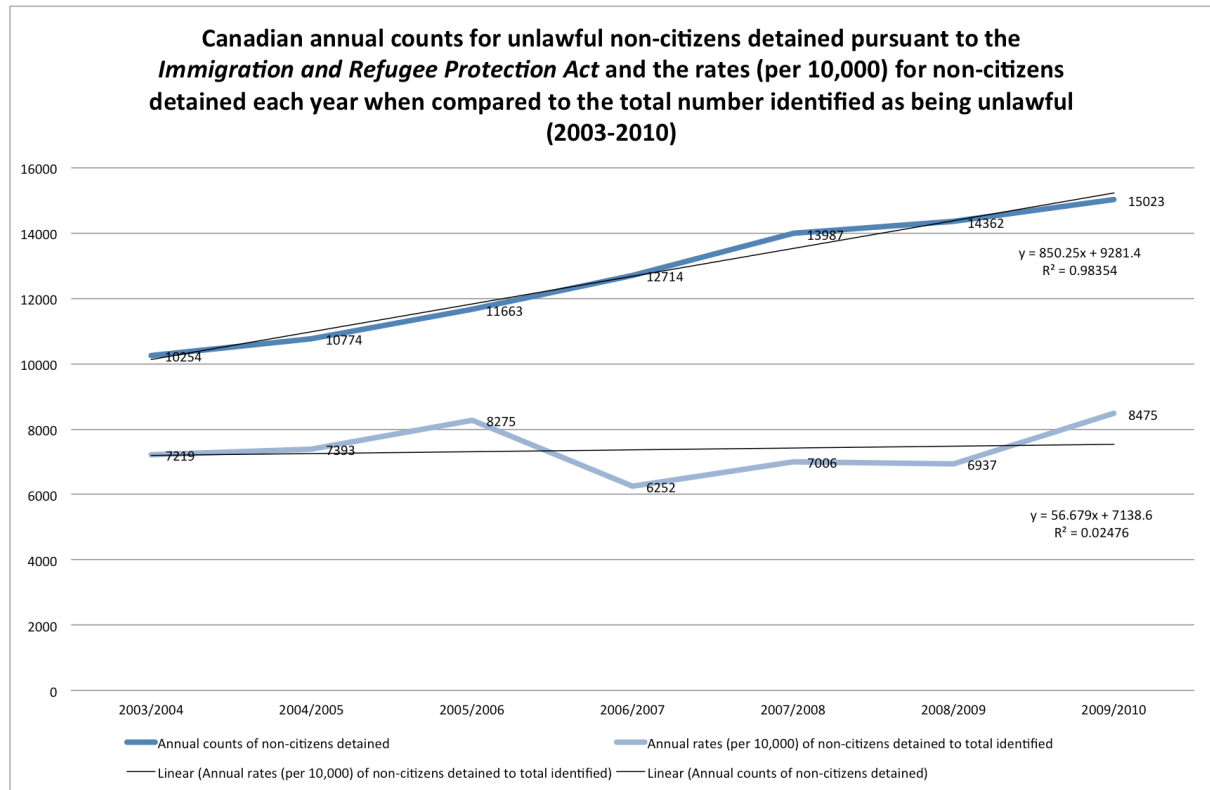
acknowledge findings based on counts only often are of limited value. Though currently unattainable due to the Government of Canada's reluctance to release detailed data concerning immigration detention, future studies would benefit from robust analysis of annual variances in estimated unlawful non-citizen populations and deviations in how suspected unlawful non-citizens are identified—including having more points of analysis that cover a greater period of time (i.e., gender, age, nationality, and monthly as opposed to annual counts).

An example where findings based on counts alone fail to full identify the reality of immigration enforcement is the 2010 case of the MV Sun Sea. The dilapidated MV Sun Sea arrived off the coast of British Columbia in May 2010, carrying 492 Sri Lankan asylum seekers. Resulting from its arrival, the CBSA dispatched dozens of officers from across western Canada to assist in the processing of asylum claims (Sundberg, 2010). While only constituting 3% of the total suspected unlawful non-citizens identified during 2010, these 492 asylum seekers nevertheless resulted in a substantial stress on the CBSA's immigration enforcement resources and cost in excess of \$25 million (Lautens, 2012). Accepting significant CBSA resources were diverted from across Manitoba, Saskatchewan, Alberta, and British Columbia, it is reasonable to assumed that the numbers of identifications, arrests, detentions, and removals in these provinces decreased as a result of the MV Sun Sea arrival.

Expanding on the work of Pratt (2005), this section explores whether or not Canadian rates for suspected unlawful non-citizens detained each year increased when compared to the numbers identified. As important as it is to identify that Canada annually detains more suspected unlawful non-citizens than the year prior, it is equally important to consider if this increase represents a heightened propensity to detain suspected unlawful non-citizens once identified. This analysis takes into account the year-to-year differences in the number of

suspected unlawful non-citizens identified, and through linear regression analysis, identifies if there is an increase in the proportion of those identified who are detained.

Chart 9:



Source: Count and rates calculated using the values obtained through Access Act requests to the CBSA (A-2009-15462).

As indicated by the linear regression line in Chart 9 relating to the annual counts for unlawful non-citizens detained pursuant to the *Immigration and Refugee Protection Act*, between 2003–2004 and 2009–2010, there was a constant increase ($R^2 = 0.984$). While limited in statistical significance, this finding nevertheless supports Pratt's (2005) assertion that each year Canada detains more suspected unlawful non-citizens than the year previous. Though important to observe the CBSA detains more suspected unlawful non-citizens each year, it is equally important to note the linear regression line showed no statistically significant increase in the annual rates for suspected unlawful non-citizens detained when compared to the total number identified. In short, despite there being a substantial annual increase in the counts for non-citizens detained between 2003–2004 and 2009–2010, the

linear regression line for rates ($R^2 = 0.025$) clearly indicates no significant increase for this same period.

VIII-3-c) Summary of Canadian Findings

Of the two Canadian findings obtained regarding immigration detention, the finding that no significant increase exists in the rates of suspected unlawful non-citizens detained when compared to the total identified between 2003–2004 and 2009–2010 is important. Using linear regression to explore whether or not Canada has increased its rates for detaining non-citizens in violation of the *Immigration and Refugee Protection Act*, a noteworthy limitation in the analysis conducted by Pratt (2005) was discovered. In *Securing Borders: Detention and Deportation in Canada*, one of the most highly regarded and frequently cited scholarly contributions to the study of immigration detention in Canada, raw count data was relied on to support that Canada's propensity to detain unlawful non-citizens has been annually increasing (pp. 43–45). Although Figure 2.2 in Pratt (2005) clearly shows an increase in the actual counts for non-citizens detained year-to-year, by not using comparable rates of measure or linear regression analysis, Pratt's assumptions must be taken with a certain degree of caution.

Arguably, if Pratt (2005) had conducted a linear regression model in the analysis for annual rates for suspected unlawful non-citizens detained when compared to the total number identified (as was done in Chart 9), it is highly unlikely a statistically significant increase would have been observed.¹⁰¹ Moreover, although agreeing with Pratt (2005) that the annual escalations in the counts of non-citizens detained in itself warrants concern, the use of Figures 2.1 and 2.2 (p. 44) to support such a position is statistically problematic (see III-1-e

¹⁰¹ Unfortunately, the estimated unlawful non-citizen populations for 1998–2003 are not available to run a linear regression analysis. However it is generally understood that Canada's population increases each year, as does its lawful and unlawful non-citizen populations. Considering this, it is logical to assume that if Pratt (2005) had used rate comparison in conjunction with a linear regression model the findings would likely have been reflective of those derived from Chart 9.

above). Even though the finding of this section expand on the level of analysis used by Pratt, it too must be viewed with some degree of caution, in that a limited number of points of analysis were used, time-series data was not controlled for, and simple linear regression analysis is only able to provide basic statistical assumptions. Considering this, future studies of Canada's immigration detention program likely would benefit from a multiple regression analysis, which includes more years for analysis, demographic variables, controls for time-series data, and a qualitative account for variances such as periodic large-scale influxes of suspected unlawful non-citizens.

By applying Fuller's (2003) sixth facet (categorical imperative) when considering Pepinsky and Quinney's (1991) notion of peacemaking criminology, the findings of this section, to a certain degree, support that Canada takes a relatively peaceful operational approach to immigration detention (see IV-1-a above). Linear regression analysis also suggested Canada operationally approaches immigration detention in a consistent and predictable manner—an important consideration when assessing categorical imperative (Fuller, 2003). Yet, as observed by Pratt (2005), Canada nonetheless detains more suspected unlawful non-citizens year after year—a shared finding that raises concern. Despite the CBSA viewing immigration detention as a non-punitive form of administrative detention, the act of confining a person nevertheless is inherently punitive—an act described by Pepinsky and Quinney as being non-peaceful and warlike in nature.

Pursuant to §10(c) of the *Canadian Charter of Rights and Freedoms*, all persons detained in Canada (irrespective of their immigration status) have the right for the lawfulness and reasonableness of their detention to be decided by way of *habeas corpus*. Reflecting on this, Canada can be viewed as observing Fuller's (2003) fourth facet (correct means), in that the *Canadian Charter of Rights and Freedoms* generally affords guaranteed safeguards against civil and legal rights abuses (see II-4-a above). Moreover, the *Canadian Charter of*

Rights and Freedoms also ensures due process is respected, with enforcement outcomes generally being fair and just—a principal consideration when assessing this facet.

VIII-4) How the DIAC Detains Suspected Unlawful Non-Citizens

According to the DIAC's publicly accessible information regarding immigration detention in Australia, those detained under the *Migration Act* are either held in designated immigration detention facilities (rather than facilities where other detainees are awaiting criminal trials or serving criminal sentences) or detained within the community under one of two community detention programs (DIAC, 2009d, 2010). The only exceptions to the aforementioned are when detained suspected unlawful non-citizens are viewed as security threats, potential risks to public health, or are serving sentences in a state, territorial, or federal correctional centres—in these cases, detention takes place within either an Australian state, territorial, or federal correctional facility or hospital (Phillips, 2009; PAM3). Found within most of the DIAC's public information concerning immigration detention are words to the effect that administrative detention for immigration purposes constitutes a necessary, non-punitive step in ensuring the integrity of Australia's immigration program.

As with Canada, suspected unlawful non-citizens in Australia are detained in one of two ways: 1) they are identified as potentially being unlawful non-citizens by either federal, territorial, or state correctional officials while awaiting trial or serving a criminal sentence and consequentially reported to the DIAC; or 2) they are detained subsequent to being identified and arrested by officials authorised to enforce the *Migration Act* (PAM3). Also, as in Canada, all suspected unlawful non-citizens are identified through the examination of identity documents, search of national immigration records, or through the use of biometric technologies (see VI-4 above). Once a DIAC officer has identified and arrested a suspected non-citizen on the supposition of being in violation of immigration law, the officer must either restore the person's lawful status by issuing a new visa (commonly referred to as a

bridging visa) or detain him or her pursuant to §189 of the *Migration Act*. As stated earlier, one major distinction in the way Australia and Canada operationally approach immigration detention, is that in Australia detention is mandatory for all non-citizens who fail to possess a valid visa (Vrachnas et al., 2008; Wilsher, 2004). Moreover, detainees may be held liable for detention costs (Vrachnas et al., 2008).

Despite Australia's long-standing policy of mandatory immigration detention, the manner by which this policy has been implemented over the years greatly differs depending if under the Liberal-National Coalition Government (1996–2007) or Labor Government (2007–present). Between 1996 and 2007, the Liberal-National Coalition Government of Prime Minister John Howard largely focused on barring non-citizens from accessing social welfare services, promoting the settlement of skilled workers and professionals, and, between 2001 and 2007, combating the unauthorised marine arrivals of undocumented asylum seekers (see Betts, 2003, 2007, 2010; Opeskin, 2012). Though community-based detention programs for low-risk immigration detainees were introduced under the Liberal-National Coalition Government in 2005, it was not until after the Labor Government of Prime Minister Kevin Rudd took power in 2007 that these programs fully developed and became more frequently used (Coleman, 2012).

Under the Labor Governments of Prime Minister Kevin Rudd (2007–2010) and Prime Minister Julia Gillard (2010–present), Australia has noticeably shifted its focus on mandatory detention from keeping most detainees in secured detention facilities, to allowing flexibility community-based detention alternatives to emerge, which to a certain degree reflect established international human rights standards. Additionally, new policies and procedures have been introduced under the Labor Government that aims to prevent cases of unlawful and/or prolonged immigration detention (Opeskin, 2011). Yet despite these efforts, in the absence of a constitutional bill of rights, Australian immigration detainees remain vulnerable

to potential abuses of administration powers—as observed in the cases for Solon and Rau (see VI-3-b above).

The majority of detained suspected unlawful non-citizens in Australia are held in one of 11 designated immigration detention facilities (for full list of facilities, see Global Detention Project, 2012)—with a small minority being detained in the community under one of two community based detention programs. Emerging in 2005 under the Liberal-National Coalition Government of Prime Minister John Howard, however expanding in 2008 under the Australian Labor Governments of Prime Minister Kevin Rudd and Julia Gillard, the DIAC has taken steps to divert low-risk immigration detainees from secured immigration detention centres through their *Alternative Temporary Detention in Community* and *Community Detention* programs (DIAC, 2009d; Global Detention Project, 2012). Under these programs, immigration detainees are permitted to reside in locations, which include: private residences, hotels, apartments, foster care homes, hospitals, or other locations deemed appropriate by the DIAC (Global Detention Project, 2012). Under the program, detainees must be accompanied by an authorised person¹⁰² anytime they leave their residence—this is not required under the *Community Detention* program (DIAC, 2009d). According to the DIAC’s *2010–2011 Annual Report* (2012), “no persons who were known or reasonably suspected to be minors were accommodated in immigration detention centres” (Program Output 4.2). Furthermore, it was identified that approximately 23% of unlawful non-citizens detained during 2010–2011 were detained in the community (of which 29% were under 18 years of age). Unfortunately, the actual counts for in community detentions are not identified in the DIAC’s *2010–2011 Annual Report*, or previous years. Moreover, nowhere in any of the DIAC’s annual reports is it articulated how reviews are conducted to ensure minors are not detained.

¹⁰² Under the *Alternative Temporary Detention in Community* program, an authorised person constitutes an Australian citizen who after being security screened and cleared by the DIAC, is authorised to act as the guardian of a suspected unlawful non-citizen being detained within the community (DIAC, 2009b).

Australia's approach to detaining suspected unlawful non-citizens under the age of 18 is noticeably different from Canada's—arguably, in many cases, ignoring the intent of the *United Nations Convention on the Rights of Children* Treaty Series Vol. 1577 [1989] (hereinafter referred to the *UN Convention on the Rights of Children*). As previously noted, under the *Migration Act* all non-citizens without a valid visa are detained—including minors (Vrachnas et al., 2008). Moreover, despite having policies meant to reflect the provisions of the *UN Convention on the Rights of Children*, the DIAC still in limited circumstances detain minors believed a risk to either security or public safety (Global Detention Project, 2012; Phillips, 2009). Though the practice of detaining minors has resulted in much criticism from Australian and international human rights organisations (Amnesty International, 2009; Global Detention Project, 2012), the DIAC maintains this practice complies with the *UN Convention on the Rights of Children* and is a necessity to maintain the integrity of Australia's overall immigration program (DIAC, 2009b).

The principal criticism of the DIAC's approach to detaining minors surrounds the issue of duration of detention. In the case of *Al-Kateb v Godwin & Ors* [2004] HCA 37, the Australian High Court held that prolonged and possibly indefinite immigration detention does not violate Australian law (Crock & Berg, 2011). Although this case involved the detention of an adult, the ruling nonetheless supports the DIAC's practice of detaining minors for lengthily, even indefinite, periods (Amnesty International, 2007; Global Detention Project, 2012; Phillips, 2009). Notwithstanding public criticism and Labor Government efforts to evade cases of prolonged immigration detention (especially cases involving those under 18 years of age), indefinite immigration detention continues in Australia (Hall, 2012).

Prolonged or indefinite detention, coupled with a policy of mandatory immigration detention, raises numerous human rights and child welfare concerns (Amnesty International, 2007; Phillips, 2009). Arguably, suspected unlawful non-citizens (especially those

temporarily within Australia as well as minors and those having mental illness) are acutely vulnerable to having their legal and human rights compromised while being subjected to internal immigration enforcement. Furthermore, prolonged detention of any kind runs the risk of causing a variety of mental and physical ailments to develop—specifically anxiety, depression and potential suicidal tendencies (Phillips, 2009; Silverman & Massa, 2012).

Additional to concerns surrounding Australia's mandatory detention policy, the DIAC has also received much criticism regarding its use of private security firms to administer immigration detention. Starting in 1998, the DIAC began the practice of contracting private security firms to guard and transport immigration detainees (Flynn & Cannon, 2009). Prior to 1998, Australia's respective state, territorial, and federal correctional services assumed these duties. Since 1998, there have been numerous reported incidents of immigration detainees rioting in protest of overcrowded facilities, unhealthy living conditions, lacking human and social services, as well as human rights violations committed by private security officers (Amnesty International, 2007). Many of these incidents have resulted in serious injuries to detainees and detention facility staff; including several reports involving detainee suicide ("Australia Human Rights Commission," 2011). Some of the more high profile international news reports include the following:

1. February 2000 at the Curtin Immigration Detention Centre (Western Australia), 12 asylum seekers sewed their lips together to protest their prolonged detention and delayed refugee claim processing ("Boat People," 2000a);
2. June 2000 at the Woomera Immigration Detention Centre (South Australia) and later at the Curtin Immigration Detention Centre, hundreds of immigration detainees ripped down security fencing and fled in an attempt to escape harsh conditions, human rights violations, and delayed refugee claim processing ("Another Immigrant Breakout," 2000);

3. January 2002 at the Woomera Immigration Detention Centre, over 240 immigration detainees went on a 15-day hunger-strike to protest detention conditions and poor treatment by private security guards (“Australian Hunger Strike Ends,” 2002);
4. New year’s eve 2002 at the Villawood Immigration Detention Centre (New South Wales), 15 immigration detainees attempted an escape custody after setting fire to the centre (“Briton Accused,” 2003);
5. December 2003 at the Nauru Immigration Detention Centre (a sovereign nation that allowed the Australian Government to operate an off-shore immigration detention facility from 2001 to 2008), over 40 immigration detainees participated in a hunger strike to protest the prolonged processing of their refugee claims (“Australia Shifts,” 2003);
6. November 2009 at the Christmas Island Immigration Detention Centre (Western Australia), over one hundred and fifty immigration detainees clashed with private security guards in protest of ill-treatment, inhumane living conditions, and prolonged detention—over forty detainees were seriously injured as were dozens of private security guards (“Refugees Clash,” 2009);
7. September 2010 at the Villawood Immigration Detention Centre, a Fijian asylum seeker committed suicide hours prior to his removal from Australia. Subsequent to this, other detainees ascended to the rooftop and threatened to jump to their deaths unless their refugee claims were heard in a more timely manner (“Fijian Detainee,” 2010).

While the aforementioned incidents captured international news headlines, numerous other reports and studies exist, highlighting how Australia’s policy of mandatory detention has substantially and severely impacted the lives of detainees held in immigration detention facilities. When faced with no lawful alternative, immigration detainees facing indefinite detention often are given no other means to survive as humans other than to escape from their confinement (Grewcock, 2012). As observed by Grewcock (2012) between 1999 and 2008 there have been hundreds of unreported (and often unplanned) incidents where detainees have escaped from DIAC custody to later negotiate their surrender, and in some cases, negotiate obtaining residency status. Though Australia and Canada both operationally approach

immigration detention in very similar manners, substantial evidence exists¹⁰³ suggesting Australia's policy of mandatory detention has resulted in greater detainee hardships when compared to Canada—a reality demanding more in-depth and critical examination by criminologists.

VIII-4-a) Legal Authority and Restraints in Relation to Detaining Unlawful Non-Citizens

Under §189 of the *Migration Act*,¹⁰⁴ suspected unlawful non-citizens must be detained (and removed) if they are known or reasonably suspected to be non-citizens who do not possess a valid visa. Furthermore, under §191 of this Act, a non-citizen whose visa is liable to be cancelled may also be detained. Unlike in Canada, the detention of suspected unlawful non-citizens is mandatory, and no statutory limit to the duration of detention exists (Crock & Berg, 2011). As identified in §191 of this Act, the only terms for release from immigration detention are 1) removal pursuant to §198 or §199 of this Act; 2) deportation pursuant to §200 of this Act; 3) granting of a new visa (i.e., a bridging visa); or 4) pursuant to §191, the person is identified as either an Australian citizen or lawful non-citizen.

In accordance with §194 of the *Migration Act*, all persons detained pursuant to §189 of this Act must (as soon as reasonably practical) be informed of the consequences related to being detained. Part of this information must include notice to the detainee that they have the right under §195 of this Act to apply for a new visa. Once a detainee has been given notice pursuant to §195 of this Act, they are afforded two business days to apply for a new visa—which if issued would result in their release from detention (Vrachnas et al., 2008). In all cases, detained suspected unlawful non-citizens have the right under Article 36 of the *Vienna*

¹⁰³ Also see VI-3-b and footnote 80 which reference the cases of Vivian Alvarez Solon and Cornelia Rau.

¹⁰⁴ Considering this thesis compares how Australia and Canada each operationally approach internal immigration enforcement, only the sections of the *Migration Act* that apply to the DIAC's onshore immigration compliance program (enforcement actions against non-citizens within the Migration Zone—namely, Australian territory identified under §5 of the *Migration Act*) are examined. *Because of the complexity and rarity of cases where under §502 of this Act the Minister of Immigration issues a certificate deeming a non-citizen an excluded person on grounds of national interest and security, these cases are not addressed within this thesis.*

Convention to contact the consular officials of their country of citizenship to seek assistance and counsel.

Pursuant to §4AA of the *Migration Act*, the detention of a suspected unlawful non-citizens under the age of 18 must be of last resort. As such, all minors who are subject to immigration detention must be afforded reasonable access to one of the two community-based immigration detention programs (see VIII-4 above). The only exception to this policy is when a minor is believed to be a risk to the public or to the national interest; in these cases, the minor is either held in a designated immigration detention facility or in a federal, territorial, or state youth correctional centre (Phillips, 2009). While most minors in immigration detention are afforded access to educational opportunities, counselling, and child welfare services, access to such services are not compulsory and typically are provided by community or non-government organisations such as the Red Cross, or through contracted social service providers (DIAC, 2009a, 2010; Phillips, 2009). Moreover, reports by non-government organisations suggest the DIAC's continued practice of detaining minors in secured immigration detention facilities on grounds they pose a risk to national interests unduly is exposing them to mental and physical hardship (Global Detention Project, 2012; Silverman & Massa, 2012). Unfortunately, the DIAC fails to clearly articulate within its official publications how determinations of risk to national interest or security are achieved, or what oversights or legal safeguards were afforded to minors during these determinations.

VIII-4-b) Australian Findings

Converse to the limited data available regarding Canada's immigration detention program, data for Australia's immigration detention program is fairly comprehensive and publically accessible (Luzzi, 2011). Yet, despite there being more available data, it would be methodologically problematic to add variables to the Australian analysis that were not present in the Canadian analysis. As Reichel (2008) observes, when conducting a comparative

criminological study, it is at times justifiable to disregard information limited to only one of the jurisdictions being studied. Considering the Canadian findings mainly focused on whether or not the CBSA proportionately increased the number of suspected unlawful non-citizens it detained when compared to the total number identified within the same year, this section explores if the same was true for Australia. As with the Canadian findings (see VII-3-b above), this section uses the annual counts for suspected unlawful non-citizens detained in Australia for the periods 2003–2004 through 2009–2010 to identify if there has been an increase in immigration detention levels. Further, this section uses simple linear regression to examine the annual rates for suspected unlawful non-citizens detained when compared to the total number identified (see III-1-e above).

On average, Australia annually detains approximately 6,000 suspected unlawful non-citizens. As indicated in Chart 10 below, between 2003–2004 and 2007–2008, this number has fluctuated annually, yet the overall trend was very much even. Of particular interest is that between 2005–2006 and 2009–2010, there was a noticeable consecutive decline in immigration detention counts. Arguably, the increase between 2008–2009 and 2009–2010 was the result of an influx of unexpected asylum seekers arriving by boats off Australia's northern and western coasts (see "Australia Human Rights Commission," 2011). Though recent criticism by pundits suggests the post-2008 increase in undocumented marine arrivals is the result of immigration policy reforms introduced by Prime Minister Kevin Rudd's Labor Government (most notably the decision to abandon the *Pacific Solution*¹⁰⁵ in 2007), and continuing to be acted upon today under Prime Minister Julia Gillard (see Coorey & Allard, 2010; Franklin & Vasek, 2011; Wilson, 2012), evidence suggests this increase more likely is

¹⁰⁵ The *Pacific Solution* is the term commonly used to describe the Liberal-National Coalition Government's immigration policy of deterring unauthorised marine arrivals of undocumented asylum seekers by diverting them to either Nauru or Papua New Guinea (Tascón, 2010). Introduced under Prime Minister John Howard in 2001, this policy emerged shortly after the Norwegian Freighter *MV Tampa* rescued 433 Afghan asylum seekers, who subsequently were refused disembarkation by Australian border officials (Jupp, 2009). Aside from 131 asylum seekers who were admitted to New Zealand, the remaining detainees were transported to a newly established immigration processing and detention facility on Nauru. Between 2001 and 2007, over 1,600 asylum seekers have been diverted from Australia's "Migration Zone" to either Nauru or Papua New Guinea by the Australian Government. It was not until the election of Prime Minister Kevin Rudd and his Labor Government in 2007 that this frequently criticised policy was disband (Jupp, 2009; Tascón, 2010).

the result of global trends in displaced refugees rather than Australia's domestic immigration policy (Luzzi, 2011; UNHCR, 2011b).

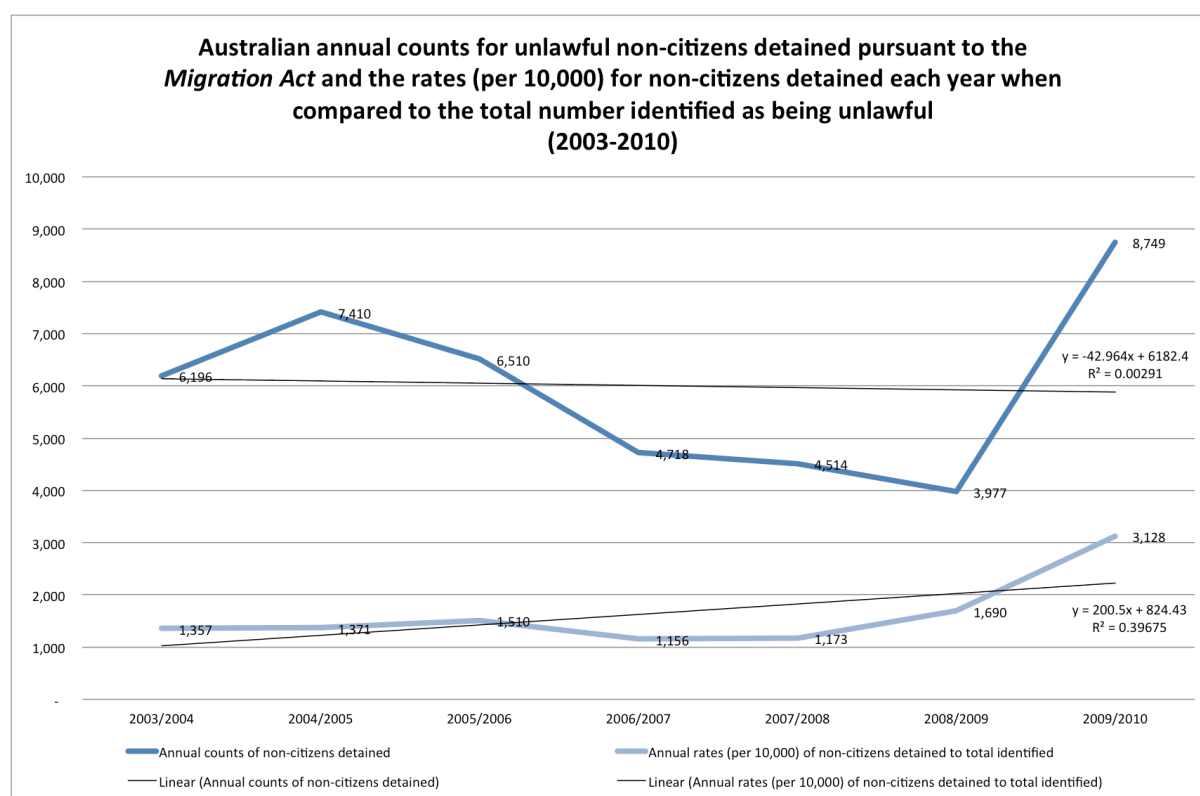
As reported by the UNHCR (2011b), since 2007, there has been a significant global increase in the migration of refugees—including within Southeast Asia, Oceania, and elsewhere in the South Pacific. Considering there is a lack in available time-series data that would allow a more fulsome analysis of post-2007 marine arrivals of undocumented asylum seekers to Australia, and without fully accounting for global refugee migration trends, it is methodologically problematic for these primarily media reports to suggest recent Australian domestic immigration policy reforms are the principal cause of recent boat arrivals (see III-1-e above as well as Luzzi, 2011). As indicated in Chart 10 by the linear regression line for count of suspected unlawful non-citizens detained pursuant to the *Migration Act*, detention counts have been very constant ($R^2 = 0.003$) for the period 2003–2004 through 2009–2010. Though limited in statistical significance, this finding does suggest that between 2003–2004 and 2009–2010, Australia has maintained a relative equilibrium in the number of suspected unlawful non-citizens it detains.

As identified by Luzzi (2011), asylum seekers arriving by sea to Australia constitute a minority of the total number of asylum seekers arriving each year—suggesting the focus on what has come to be known as ‘boat people arrivals’ is misguided and inflammatory rhetoric. Luzzi suggests the increasingly coordinated and effectiveness of human smuggling and trafficking networks across southeast Asia are the cause for the post-2007 rise in marine arrivals of undocumented asylum seekers to Australia. This position is supported by the UNHCR's report *Prevent, Combat, Protect Human Trafficking* (2011a), which also identifies human smuggling and trafficking as major causes for increased levels in the arrival of displaced refugees within the region. Considering this, criticism by pundits who point to the

Labor Government's recent immigration policy reforms appear highly speculative, lacking in empirical validity, and constituting more political rhetoric than informed inquiry.

The second finding for this section indicates that during the period studied, the annual rates of suspected unlawful non-citizens detained when compared to the total number identified noticeably increased ($R^2 = 0.397$). In reviewing this analysis, it is important to consider that between the 2003–2004 and 2008–2009, there was only a 5% variance in rates, whereas between 2008–2009 and 2009–2010, the rate significantly increased by 54%; resulting in the R^2 value for the entire period to skew by nearly 36%. This finding, though limited in statistical significance, still supports that post-2008 marine arrivals of undocumented asylum seekers is the likely resulting factor for this increase.

With the global levels for refugee migration since 2008 increasing, coupled with more active and established human smuggling and trafficking criminal organisations (UNHCR, 2011a), it is plausible to assume Australia would have realised increases in asylum seekers irrespective whether its recent immigration policy reforms were instituted. Likewise, reflecting on Australia's longstanding policy of mandatory detention, it is reasonable to expect that when rates for smuggled refugees increase within Southeast Asia and Oceania, so will the rates for those placed in Australian immigration detention. Understandably, human smugglers and traffickers target Australia because of its economic prosperity and proximity to nations within southeast Asia and Oceania having large displaced refugee populations as well as populations of impoverished people seeking a better life within a western democracy (Luzzi, 2011)—restrictive immigration policy likely has a minimal deterrence effect.

Chart 10:

Source: Rates calculated to 10,000 of population as per values obtained from the DIAC Annual Reports for 2003–2004 through 2009–2010.

Despite a recent increase in Australian immigration detention counts and rates, when compared to other western democracies,¹⁰⁶ Australia has relatively low level of unlawful non-citizens within its borders—including low levels of undocumented asylum seekers (UNHCR, 2010, 2011b; also see VI-5-a above). In 2010 (the year with the highest rate of refugee claims for this study), Australia accepted nearly 22,000 humanitarian entries¹⁰⁷ (including 6,170 UNHCR convention refugees) and was ranked 16th among the top 44 industrialised nations that accept UNHCR convention refugees (UNHCR, 2011b; DIAC, 2011b). In this same year, Canada accepted 47,948 humanitarian entries (including 33,250 UNHCR convention refugees) and was ranked 3rd among these top 44 industrial nations (UNHCR, 2011b; CIC,

¹⁰⁶ Over 600,000 unlawful non-citizens are believed to be living within the United Kingdom (Vollmer, 2011), over 10.8 million living in the United States (Hoefer, Rytina, & Baker, 2011), and in excess of 400,000 in France (S. Baker, 2008).

¹⁰⁷ Humanitarian entries include UNHCR convention refugees as well as other non-citizens granted admission to a nation on humanitarian grounds based on the finding they are lawfully seeking asylum/protection as defined by a nation's domestic immigration law (Sundberg, 2004).

2011). While Australia is an important and active contributors to the UNHCR, it is important to identify its acceptance of UNHCR convention refugees and other humanitarian entries is noticeably lower than other western democracies.

VIII-4-c) Summary of Australian Findings

The findings regarding Australia's immigration detention program suggest Australia's long-standing policy of mandatory immigration detention noticeably impacts how the DIAC manages and administers its immigration detention program. Irrespective of the shift from the highly restrictive immigration policies of the Liberal-National Coalition Government of Prime Minister John Howard (see footnote 98) and the more open and liberal policies of the Labor Government's of Prime Ministers Kevin Rudd and Julia Gillard (Opeskin, 2011), the aggregate counts for suspected unlawful non-citizens detained by the DIAC remained very much level. Moreover, despite recent criticisms that the Labor Government's of Prime Ministers Kevin Rudd and Julia Gillard have failed to take an assertive enough stance on immigration enforcement (Luzzi, 2011), it was found that since the Labor Government took power in 2007, the rates for suspected unlawful non-citizens detained when compared to those identified actually increased by 32% from the time of Prime Minister John Howard's Liberal-National Coalition Government—a finding that is inconsistent with a government taking a soft approach to immigration enforcement.

As discussed, since the 2008–2009 period, Australia has experienced a significant increase in marine arrivals of undocumented asylum seekers. Since Australia detains all suspected non-citizens not in possession of a valid visa, it is reasonable to assume those who arrive by sea to Australia without possessing valid visas will be detained. Accepting this, it is equally reasonable to assume increased numbers of undocumented asylum seekers have resulted in the immigration detention counts and rates to increase.

Considering Fuller's (2003) sixth facet (categorical imperative) for assessing if a criminal justice organisation approaches their duties in a manner reflective of peacemaking criminology (Pepinsky & Quinney, 1991), and reflecting on both the findings of this section and reports concerning immigration detention in Australia, it is apparent Australia's policy of mandatory detention has resulted in what Pepinsky and Quinney would refer to as a warlike approach (see IV-1-a above). Despite counts for immigration detention remaining relatively equal between 2003–2004 and 2009–2010, it was found that during this same period rates for suspected unlawful non-citizens detained when compared to those identified increased.

Further to the quantitative findings concerning immigration detention in Australia, numerous media and human rights organisation reports provide convincing evidence that suggests Australia's longstanding policy of mandatory detention has human rights implications (Amnesty International, 2007; Global Detention Project, 2012; Phillips, 2009). Immigration detainees in Australia have become increasingly vulnerable to physical and mental illness, human rights violations, as well as other mental and physical injuries caused by prolonged immigration processing times and possible administrative errors in the assessment of their immigration status and visa applications (Tatz & Ryan, 2011).

Concerning Fuller's (2003) fourth facet (correct means) for assessing peacemaking criminology (Pepinsky & Quinney, 1991), it is apparent Australia's lack of safeguards regarding civil and legal rights abuses, prolonged times in the processing of refugee claims and visa applications, and overcrowded immigration detention facilities having minimal social and health services, results in immigration detention to also be warlike in nature (see III-2-a above). Unlike in Canada where immigration detainees are afforded protections under the *Canadian Charter of Rights and Freedoms*, Australian immigration detainees have few legal avenues to access when seeking release from detention or filing grievances concerning mistreatment.

As will be discussed in the following chapter concerning removal, the majority of immigration detainees only gain release once they have been physically removed from Australia—a process that can be lengthy, resulting in most suspected unlawful non-citizens identified and arrested being subjected to confinement for the duration of the immigration enforcement process. Moreover, it is important to consider that if errors in the assessment of asylum claims are made which result in the applicants having to return to the countries they claimed persecution, Australia itself arguably will cause the harms, abuses, risks, and threats these people face to continue.

VIII-5) Comparison: Detention of Unlawful Non-Citizens

VIII-5-a) Comparative Findings

Australia and Canada take analogous operational approaches to immigration detention—both have legislated authority to hold suspected unlawful non-citizens in immigration detention, both consider immigration detention an administrative non-punitive function aimed at ensuring the integrity of their respective immigration programs, and both use private security firms to guard and transport immigration detainees (Phillips, 2009; Pratt, 2005). Yet, despite apparent operational similarities, stark differences in policy and legislation result in the administrative outcomes for each nation's immigration detention programs to noticeably contrast.

Australian law requires the mandatory detention of all non-citizens not in possession of a valid visa; in Canada, immigration detention is viewed as a last resort. Suspected unlawful non-citizens who are minors (under the age of 18) commonly are held in secured immigration detention facilities on grounds they are a threat to public safety; in Canada, this rarely occurs. Australia's High Court has ruled that while undesirable, indefinite detention is not a violation of law; in Canada, prolonged or potentially indefinite immigration detention is

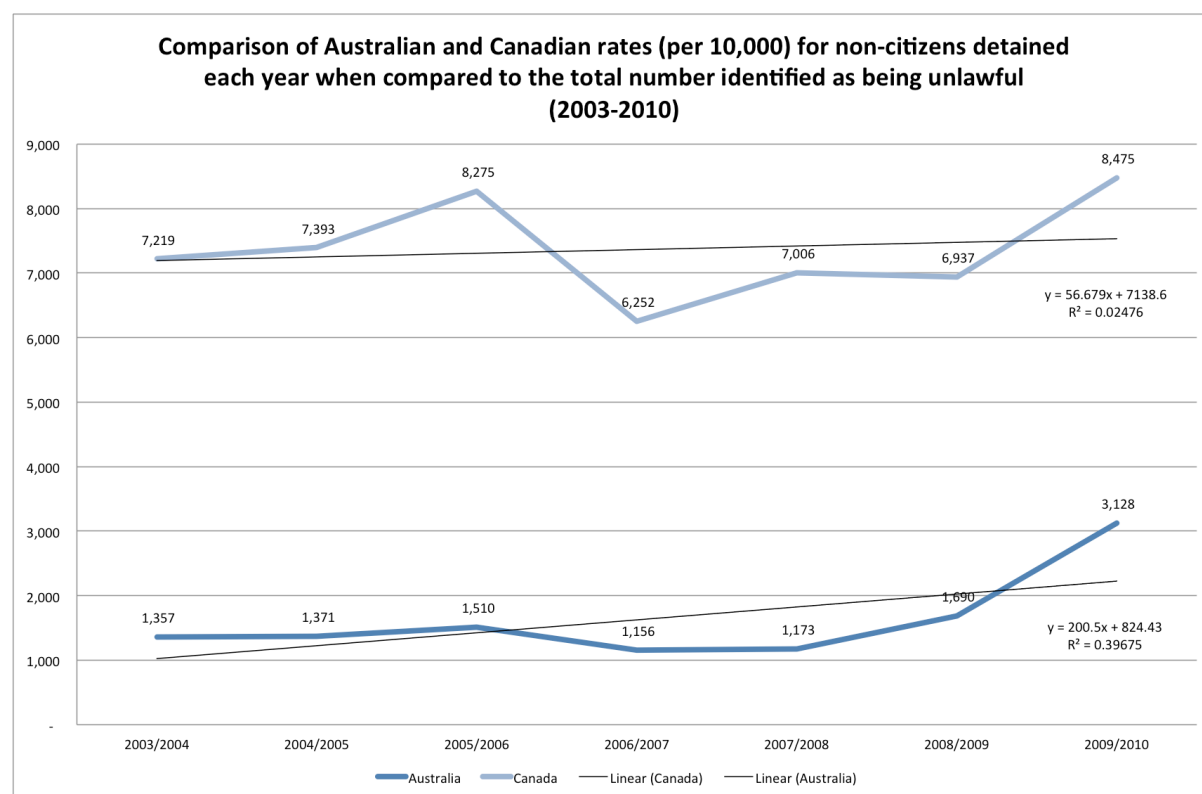
prohibited under the *Canadian Charter of Rights and Freedoms* (Phillips, 2009; Pratt, 2005; Silverman & Massa, 2012).

As indicated in Chart 11 below, suspected unlawful non-citizens identified by Canadian immigration enforcement authorities are over three times more likely to be detained when compared to Australia. Chart 11 also details that between 2003–2004 and 2009–2010, the Canadian annual rates for suspected unlawful non-citizens detained when compared to those identified has remained relatively equal ($R^2 = 0.025$). In Australia, rates have been moderately increasing ($R^2 = 0.397$), most noticeably since 2007–2008. Although limited in their statistical significance, the findings of this section still show Canada has a greater propensity to detain suspected unlawful non-citizens it identifies when compared to Australia, even considering the recent rise in Australian rates. As discussed in Chapter VI (identification), Canada identifies the majority of suspected unlawful non-citizens through field investigations conducted by internal immigration enforcement officers (see VI-4-b above). Considering this, it is reasonable to assume Canada's higher rates for immigration detention when compared to identification are the result Canada's apparent policing approach for identifying and locating suspected unlawful non-citizens, however future research is needed to further explore and explain this apparent anomaly.

While Australia and Canada detain adults suspected of violating immigration law in very comparable ways (specifically they both hold adult immigration detainees in designated immigration detention facilities pending removal), there are the pronounced differences in how each deals with minors (those under the age of 18). Additionally, resulting from the presence of the *Canadian Charter of Rights and Freedoms*, immigration detainees in Canada are mandated to have their detention reviewed relatively frequently; in Australia, only cases involving prolonged detention are reviewed by the Minister's Council on Asylum Seekers

and Detention (MCASD)¹⁰⁸ (Phillips & Spinks, 2012). Finally, immigration detainees in Australia may be held liable for the cost of their detention (Vrachnas et al., 2008); this is not the case in Canada.

Chart 11:



Despite Australia and Canada both being signatories to the *UN Convention on the Rights of Children*, Australia frequently detains children deemed a risk to either security or public safety whereas Canada rarely does (Global Detention Project, 2012; Phillips, 2009; Pratt, 2005). Moreover, in rare cases when Canada does detain a minor, they are held within a facility reserved for youth, afforded schooling, and frequently meet with a youth or social worker (ENF-20); Australia does not afford comparable considerations (Phillips, 2009). Likewise, while both nations have legislation authorising the detention of minors under their respective immigration laws, a review of both government reports and academic studies

¹⁰⁸ The Minister's Council on Asylum Seekers and Detention (MCASD) is a body established by the Minister for Immigration and Citizenship tasked with providing the Minister independent advice on issues of policies, processes, services and programs (DIAC, 2012b).

clearly shows Australia has a much higher propensity to detain minors when compared to Canada (see Phillips, 2009; Pratt, 2005).

Though to a greater degree in Australia, both the DIAC and CBSA contract private security firms to transport and guard detained suspected unlawful non-citizens (Phillips, 2009; Pratt, 2005). While private security officers in Australia and Canada are always supervised by DIAC or CBSA personnel, they nonetheless have delegated authority and responsibility under each nation's respective immigration legislation to ensure custody is maintained and to address possible security concerns. In Australia, and to a lesser degree in Canada, the use of private security firms to administer the detention of suspected unlawful non-citizens has attracted criticism from academics, human rights advocates, and the media alike (see VIII-4 above). Reports of detainee abuse and deficits in the ability of private security officers to respond to medical and mental health concerns have raised worries that private security firms are ill-equipped to adequately manage the detention of vulnerable populations such as immigration detainees (Pratt, 2005; Silverman & Massa, 2012). Yet, despite such criticism, this practice continues in both Australia and Canada as being a cost effective and operationally sound means to manage their respective immigration detention centre operations.

VIII-5-b) Implications

By examining immigration detention in Australia and Canada through the lens of peacemaking criminology, it is apparent Canada operationally approaches detention in a manner more reflective of Fuller's (2003) proposed six-facet approach to peacemaking criminology (Pepinsky & Quinney, 1991). As discussed, evidence suggests Australia's longstanding policy of mandatory immigration detention results in more noticeable hardships for detainees when compared to Canada. Additionally, through a review of the legal

authorities and restraints associated with immigration detention in both Australia and Canada, it very apparent Canada's approach is more reflective of peacemaking criminology.

Specific to Fuller's (2003) fourth-facet (correct means) for applying peacemaking criminology to criminal justice challenges (specifically the importance of having safeguards in place to protect against the civil and legal rights abuses), Canada far exceeds Australia in regard to providing legal protections to immigration detainees. Though both nations have laws in place to prevent civil and legal rights abuses, safeguards present in Australia pale in comparison to the protections guaranteed under the *Canadian Charter of Rights and Freedoms* (see VII-3-a above). As discussed in Chapter VII (arrest), all those detained under the authority of the *Immigration and Refugee Protection Act* must have both the lawfulness and reasonableness of their detention reviewed by way of *habeas corpus*—this is not the case in Australia (see VII-3-a above). Moreover in Canada, immigration detention is reviewed on a regular and ongoing basis to ensure detention is neither arbitrary nor prolonged (ENF-20). In Australia, detention is only reviewed when immigration detainees have been considered held for a prolonged period of time. Even in these cases, the review is conducted by the MCASD, a counsel established by the Minister for Immigration and Citizenship and whose decisions are not legally binding (DIAC, 2012b; Phillips, 2009).

VIII-5-c) Discussion

Though it was found that Canada has higher rates and counts for immigration detention when compared to Australia, it was observed Australia's immigration detention program (particularly its laws and policies governing immigration detention), result in what Pepinsky and Quinney (1991) refer to as warlike. This assessment is derived in part from a review of the numerous media and non-government organisation reports, as well as academic studies suggesting Australia's policy of mandatory immigration detention results in mental and physical strains on detainees. Conversely, in Canada, all detention cases are reviewed on

a frequent basis, and when it is found detention has become prolonged, the detainee is released. Specific to the research question of this thesis, it is also suggested Canada's policing approach to internal immigration enforcement in itself does not cause detention to be warlike; likewise, the non-policing approach taken by Australia does not result in immigration detention to be carried out in a more peaceful manner (Pepinsky & Quinney, 1991).

Finally, and as discussed in the previous chapters (arrest), evidence exists that supports the *Canadian Charter of Rights and Freedoms* affords suspected unlawful non-citizens greater protections during the detention process when compared to Australia. In the absence of such doctrine, Australia is legally able to maintain a policy of mandatory immigration detention, as well as detain suspected unlawful non-citizens for prolonged and even indefinite periods of time. Though Australia has established a counsel tasked with providing the Minister for Immigration and Citizenship independent advice concerning cases where immigration detainees have been detained for extended periods of time, suggestions by this body to the Minister are not binding. In Canada, all immigration detainees have the lawfulness and reasonableness of their detention determined by way of *habeas corpus*, and their ongoing detention is reviewed at least every 30 days. Moreover, it is prohibited under the *Canadian Charter of Rights and Freedoms* for detention to be prolonged or indefinite. Finally, decisions of the Immigration Division are binding, negating the ability of the Minister to overturn Division rulings.

Considering the aforementioned, Australia likely would find that foregoing its policy of mandatory detention would yield less public criticism and result in an overall improvement of immigration detention centre conditions. Regarding Canada, implementing community based detention in a manner similar to what Australia introduced in 2005, likely would decrease the rates for suspected unlawful non-citizens detained when compared to those identified—ultimately reducing the costs associated with immigration detention. For both

Australia and Canada, such changes would still ensure the integrity of their immigration programs are maintained, while also resulting in their operational approaches to become more peaceful (Fuller, 2003; Pepinsky & Quinney, 1991).

Regarding the detention of minors, it is suggestive both nations continually explore how this vulnerable population can best be diverted from immigration detention. Though Canada (and, as of 2008, Australia) view detaining minors as a last resort, minors nonetheless continue to be detained. Arguably, if young offenders in both the Australian and Canadian criminal justice systems can be released from secured custody pending criminal hearings, so can many of the minor non-citizens deemed by both nations to pose risks to the public and national security. While circumstances will always exist where minors must be detained, it is incumbent on Australia and Canada to ensure every possible safeguard is provided to these vulnerable youth, and that detention be concluded as soon as feasible.

VIII-6) Chapter Summary

Accounting for the limited information available to study Canada's immigration detention program, and reflecting on the research questions, there remains convincing evidence supporting the finding Australia's policy of mandatory detention results in a higher propensity for human rights violations, mental and physical illness to develop among detainees, and violence to erupt within detention facilities. When viewed through the lens of peacemaking criminology, Australia seemingly approaches immigration detention in very much a warlike manner (Pepinsky & Quinney, 1991). Comparatively, these findings also support that Canada exhibits many of the peaceful tenets suggested by Fuller (2003). While the CBSA and DIAC operationally approach detention in analogous manners, the findings of this chapter show that differing laws and policies impacting the way immigration detention is operationalised by each nation, results in starkly different outcomes.

CHAPTER IX: REMOVAL

Removal is a controversial and politically sensitive process not only because the removes are usually reluctant or resistant but because the proposed receiving country may be as well. (S. Taylor, 2005, p. 6)

IX-1) Chapter Overview

This chapter examines the fourth and final sub-component of internal immigration enforcement—specifically, how Australia and Canada each operationally approach the *removal* of suspected unlawful temporary non-citizens (see *temporary non-citizens* in glossary). For this thesis, removal refers to the physical expulsion of a non-citizen from either Australia or Canada subsequent to being found in contravention of immigration law (see *removal* in glossary). Continuing with a comparative criminological approach using a peacemaking criminology perspective, this chapter reports the findings from the analysis of how Australia and Canada each remove assumed unlawful temporary non-citizens (hereinafter referred to as *unlawful non-citizens*) to their nations of citizenship. Consequent to a suspected unlawful non-citizens being identified (then possibly arrested and detained), if found to have violated immigration law, they typically are removed except when granted subsequent refugee protection or comparable immigration status.

Australia and Canada operationally approach removal in like manners—both oversee or arrange for unlawful non-citizens to depart their respective territories once found to have violated immigration law in a manner warranting expulsion (DIAC, 2012b; CBSA, 2010b). Considering this thesis specifically examines and compares how Australia and Canada each operationally approach internal immigration enforcement, this chapter purposely focuses on removal cases concerning unlawful non-citizens whose initial entry to either Australia or Canada was lawfully achieved. Contrasting the obscure, abstract, and convoluted issues related to the comparative inquiries regarding identification, arrest, and detention, the issues

related to removal are generally uncomplicated and easily comprehensible. Yet, despite the relative unambiguous nature of removal, very few scholarly works examine this issue in detail—especially ones for Australia or Canada.

Intuitively, removal (in terms of internal immigration enforcement) means the forced expulsion of an unlawful non-citizen from a nation. As cited in the interpretation section of the *Migration Act 1958* (Cth) (hereinafter referred to as the *Migration Act*), “remove” simply means “remove from Australia.” Though not mentioned in the interpretation section of the *Immigration and Refugee Protection Act* or its *Regulations* [SOR/2002-227] (hereinafter referred to as the *Immigration and Refugee Protection Act*), §48(2) of this Act states, “[a] foreign national against whom [a removal order] was made must leave Canada immediately”—implying that *remove* means “to leave Canada.” Considering the clearly synonymous meaning of removal for both Australian and Canadian, the same methodological approach used in Chapters VI (identification) and VIII (detention) can also be used for this chapter.

IX-2) Overview of Removal

Both the DIAC and CBSA operational approach removal in one of three ways; they 1) facilitate unlawful non-citizens to affect their own removal (i.e., assisting them acquire travel documents and transport); 2) arrange transport for removable unlawful non-citizens to their nations of citizenship and oversees their departure in a controlled manner; or 3) arrange transport for removing unlawful non-citizens to their nations of citizenship and physically escort them during transport (DIAC, 2012b; CBSA, 2010b). Once expelled from either Australia or Canada, removed unlawful non-citizens generally are prohibited from re-entry.¹⁰⁹

¹⁰⁹ An example when a removed unlawful non-citizen is explicitly prohibited from returning to Australia or Canada is when the reason they were removed continues to constitute a violation of immigration law and would disqualify them from attaining a new visa or otherwise be granted re-entry to the nation. Regarding an implicit prohibition, those non-citizens who did not arrange and cover the costs associated with removal, typically would be prohibited from re-entry until their debt was paid—even then their re-entry would depend on whether or not the original cause for their removal continued to constitute a violation of immigration law.

This is especially true if an unlawful non-citizen is deported from either Australia pursuant to §200 through §205 of the *Migration Act*, or Canada pursuant to §226 of the *Immigration and Refugee Protection Act Regulations*; in both cases, re-entry is prohibited for life unless permission is granted by either the Australian or Canadian Governments.

Unlike criminal extradition¹¹⁰ (when a foreign government requests that the government where a person they consider a fugitive is residing transport the person back to their jurisdiction to face prosecution or imprisonment), removal is a process initiated by the immigration authority where a non-citizen resides, yet does not have citizenship, after they have been found to have violated immigration law (see *removal* in glossary). Moreover, while the term *deportation* is commonly used in lay terms to describe removal, it is important to distinguish that while a form of removal, deportation in both an Australian and Canadian context constitutes the most serious means of expelling an unlawful non-citizen—ultimately resulting in a permanent prohibition from re-entering the nation (Jones & Baglay, 2007; Vrachnas et al., 2008).

IX-2-a) General Approaches to Removing Unlawful Non-Citizens

Each year, Australia and Canada remove several thousand unlawful non-citizens on the supposition they violated immigration law. Moreover, for both Australia and Canada, removal constitutes the conclusion of the internal immigration enforcement process (DIAC, 2012b; CBSA, 2010b). In cases involving low-risk removals,¹¹¹ both Australia and Canada allow unlawful non-citizens to affect their own removal or assist in their unescorted departure

¹¹⁰ As defined by *Black's Law Dictionary* (Black & Garner, 2009), *extradition* constitutes the surrender of a criminal by a foreign state to which he has fled for refuge from prosecution to the state within whose jurisdiction the crime was committed, upon the demand of the latter state, in order that he or she may be dealt with according to its laws. Extradition may be accorded as a mere matter of comity, or may take place under treaty stipulations between the two nations.

¹¹¹ Both the DIAC and CBSA consider the removal of unlawful non-citizens who have no criminal record or who are required to leave as a result of overstaying their authorised period of stay, being denied asylum/refugee status, and who have not exhibited violence or otherwise resisted arrest/detention, as being low-risk (ENF-10; PAM3).

from their territory; subsequently, DIAC and CBSA officers confirm the departure and register that the non-citizen has left the jurisdiction (see VI-2-c above).

Generally, removals (other than low-risk cases) result in the DIAC or CBSA arranging for the unlawful non-citizens to be physically escorted by either immigration officers or private security personnel (often off-duty police officers or airline security personnel) back to their nations of citizenship (Director Onshore Immigration Compliance (Australia)—D. Tanner, personal communication, July 14th, 2008; Richard Huntley—CBSA Director of Inland Enforcement (Alberta), personal communication August 6, 2010). Likewise, cases that involve a removable unlawful non-citizen who is a fugitive in their home nation, the Australian Federal Police (AFP) or Royal Canadian Mounted Police (RCMP) will typically assume responsibility for the removal.

Both Australia and Canada have provisions that require transporters to arrange, pay for, and undertake the removal of unlawful non-citizens they have transported into the nation. For Australia, this often is the case, in that airline travel constitutes the most common means to enter the nation (DIAC, 2012b). Conversely for Canada, entry through a land border from the United States constitutes the most common means of entry (CBSA, 2010b). Resulting from these geographic differences, far more removals from Australia are performed by airlines when compared to nations having large land borders (Director Onshore Immigration Compliance (Australia)—D. Tanner, personal communication, July 14, 2008).

Both Australia and Canada view the unaccompanied removal of minors as a measure of last resort (see VIII-5 above). In the rare cases when minors are removed from Australia and Canada, both nations make every effort to either remove the minor with accompanying family members, or make pre-arrangements to have the minor received by a family member or non-government organisation focused on youth protection upon their return to their home nation (DIAC, 2012b; CBSA, 2010b). While concerns regarding minors facing internal

immigration enforcement actions generally focus on detention, these concerns justifiably continue after the minor is returned to their nation of citizenship (Taylor, 2005).

IX-2-b) General Operational Techniques Used to Remove Unlawful Non-Citizens

In Australia and Canada, the principal responsibility for removing unlawful non-citizens falls to each nation's respective internal immigration authority—the CBSA and DIAC. As discussed in the Chapters VII (arrest) and VIII (detention), DIAC and CBSA officers are authorised to use force when enforcing their respective immigration laws—for both, these powers include the authorisation to physically restrain unlawful non-citizens being removed if they exhibit resistance (see VII-2-a above). Though minimal publicly available data exists detailing incidents when force has been used by either DIAC or CBSA officers during removals, it can be assumed incidents have and continue to occur (Taylor, 2005). Moreover, and as discussed in Chapter VII (arrest), Australian police often assist the DIAC in their enforcement of the *Migration Act* (BCO, 2011); again, it can be assumed this includes assisting with removals. Conversely, and also discussed in Chapter VII (arrest), because CBSA officers are peace officers, they rarely seek the assistance of other police services when performing their duties (Sundberg, 2004).

IX-2-c) General Technologies Used to Remove Unlawful Non-Citizens

As with the internal immigration enforcement sub-component of detention, the act of removing an unlawful non-citizen generally does not involve the use of technologies. Both Australian and Canadian immigration authorities routinely fingerprint and photograph unlawful non-citizens whom they have taken enforcement action against—including those subject to removal. These, along with other information collected during the internal immigration enforcement process, are maintained in national immigration case management systems to assist in identifying previously removed persons should they attempt future re-

entry. These records are also made available to policing and intelligence agencies to assist in their respective criminal investigations and intelligence activities (see VI-3 and VI-4 above). Additionally, both Australia and Canada routinely forward information to INTERPOL regarding removed unlawful non-citizens who were believed to be involved in criminal or terrorist activities (ENF-10; PAM3).

IX-3) How the CBSA Removes Temporary Unlawful Non-Citizens

As mentioned in the chapter overview, the CBSA operationally approaches removal in one of three ways; it 1) facilitates unlawful non-citizens affect their own removals; 2) arranges transport for removable unlawful non-citizens to their nations of citizenship and oversees their departure in a controlled manner; or 3) arranges transport for removable unlawful non-citizens to their nations of citizenship and physically escort them during transport (see VIII-1 above). Involved in all three of these approaches are the securing of travel documents, obtaining consent from commercial transportation companies to accept unlawful non-citizens being removed aboard their conveyance, and ensuring unlawful non-citizens being removed do not face potential persecution in the nation they are being returned to (ENF-10; CBSA, 2007a).

Once an enforceable removal order has been issued, the CBSA must secure a travel document for the unlawful non-citizens being removed from the nation they are citizens. Often, the CBSA will seize the passports of suspected unlawful non-citizens during arrests and use these documents to facilitate later removal. In the absence of a passport, either a new passport or a single-entry travel document (commonly referred to as an *emergency passport*) must be attained from the nation the unlawful non-citizens are being returned (CBSA, 2012; CBSA, 2010b). As identified by Taylor (2005), some nations (in particular war-torn or developing nations) will initially deny the issuing of a travel document on grounds they do not believe the person is one of their citizens. In these cases, the CBSA (or officials from the

Department of Foreign Affairs and International Trade) will negotiate with the foreign government's consular affairs officials to issue a travel document (Richard Huntley—CBSA Director of Inland Enforcement (Alberta), personal communication, August 6, 2010), at times promising increased foreign aid or other benefits that will entice them to issue the travel document.

After the CBSA has secured a travel document, transport aboard a commercial air carrier typically is arranged.¹¹² When conducting a removal using a commercial air carrier, the CBSA observes the requirements and policies set out by the transportation company to respect their commercial interests and the safety, security, and comfort of their clients and staff (see Air Canada, 2012; ENF-10). Though some unlawful non-citizens being removed are restrained in handcuffs or similar devices, restraints typically are only used as a last resort and in compliance with airline policy (ENF-10). Considering the use of restraints provides evidence of force, efforts were made to ascertain the frequency restraints are used during removals. As well, efforts were made to attain reports for any incidents where force was used during a removal. Unfortunately, neither the CBSA or CIC make such records public—if they exist at all.

Pursuant to §112(1) of the *Immigration and Refugee Protection Act*, all unlawful non-citizens being removed must be afforded the opportunity to apply for a Pre-Removal Risk Assessment (PRRA). Once presented with the PRRA application, the person being removed is given 15 days to submit their application. During this 15-day period, and if PRRA is applied for the time up until a decision has been made, the removal is considered stayed. The basis of the PRRA is to ensure unlawful non-citizens being removed do not face the likely

¹¹² Cases involving citizens of the United States typically result in the unlawful non-citizen being transported via a CBSA vehicle to the Canada–U.S. border and handed over to an officer of the Department of Homeland Security, Customs Border Protection division (personal communication, Richard Huntley—CBSA Director of Inland Enforcement (Alberta), August 6, 2010).

risks of persecution, torture, death, or cruel and unusual treatment or punishment consequent to being removed (ENF-10).

IX-3-a) Legal Authority and Restraints in Relation to Removing Unlawful Non-Citizens

In Canada, only the Immigration Division, or in limited circumstances the Minister's delegate, are authorised to order an unlawful non-citizens removed. Moreover, until one of three removal orders has been issued pursuant to the *Immigration and Refugee Protection Act* and in accordance with the fundamental principles of natural justice, and the order issued becomes enforceable, the non-citizen is not considered removable (Jones & Baglay, 2007). Pursuant to §223 through §225 of the *Immigration and Refugee Protection Regulations*, three types of removal orders can be issued under §45(d) of this Act: 1) departure orders which have no statutory prohibition for re-entry, yet are deemed to be a deportation order if not complied with within 30 days; 2) exclusion orders which prohibit removed non-citizens from re-entering Canada for a one or two-year period depending on the reason the order was issued (§225(1) and §225(2) of this Act's regulations stipulate how the prohibition period is calculated); and 3) deportation orders which prohibit subsequent re-entry for life (Jones & Baglay, 2007).

All of the aforementioned removal orders may be deemed conditional, meaning that although a removal order is issued, the removal itself is stayed pending the outcome of a civil or criminal process authorised under §49 of this Act (including PRRA). If the outcome of a process authorised under §49 of this Act reinstates the status originally afforded to non-citizens, or if they are granted new status, the conditional removal order is quashed (Jones & Baglay, 2007). Likewise, in cases where a removal order was issued subsequent to non-citizens being convicted of a criminal offence, and an appeal of this conviction was made which resulted in it being overturned, the conditional removal order is quashed, and the non-citizens' immigration statuses revert to that which was originally granted. As discussed in

Chapter VIII (detention), any non-citizens subject to a removal order may be held in immigration detention pending their removal—even if the removal order is conditional (see VIII-3-b above).

As discussed, all unlawful non-citizens subject to removal have the right to apply for PRRA. If a positive PRRA determination is rendered, the unlawful non-citizens who were to be removed typically are granted refugee status and afforded the opportunity to attain permanent residence (ENF-10). However, in cases where the PRRA applicant is being removed on grounds they pose a danger to the public, pursuant to §112(3) of this Act, their removal is stayed until such time as the threat against them in the nation they are to be removed no longer exists (CBSA, 2010b). The PRRA program is meant to ensure the CBSA's complies with §7 of the *Canadian Charter of Rights and Freedoms*. Under §7 of the *Canadian Charter of Rights and Freedoms*, the CBSA must ensure the “right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice” are at all times protected—this includes unlawful non-citizens who likely would face such human rights violations if removed (ENF-10; CBSA, 2010b).

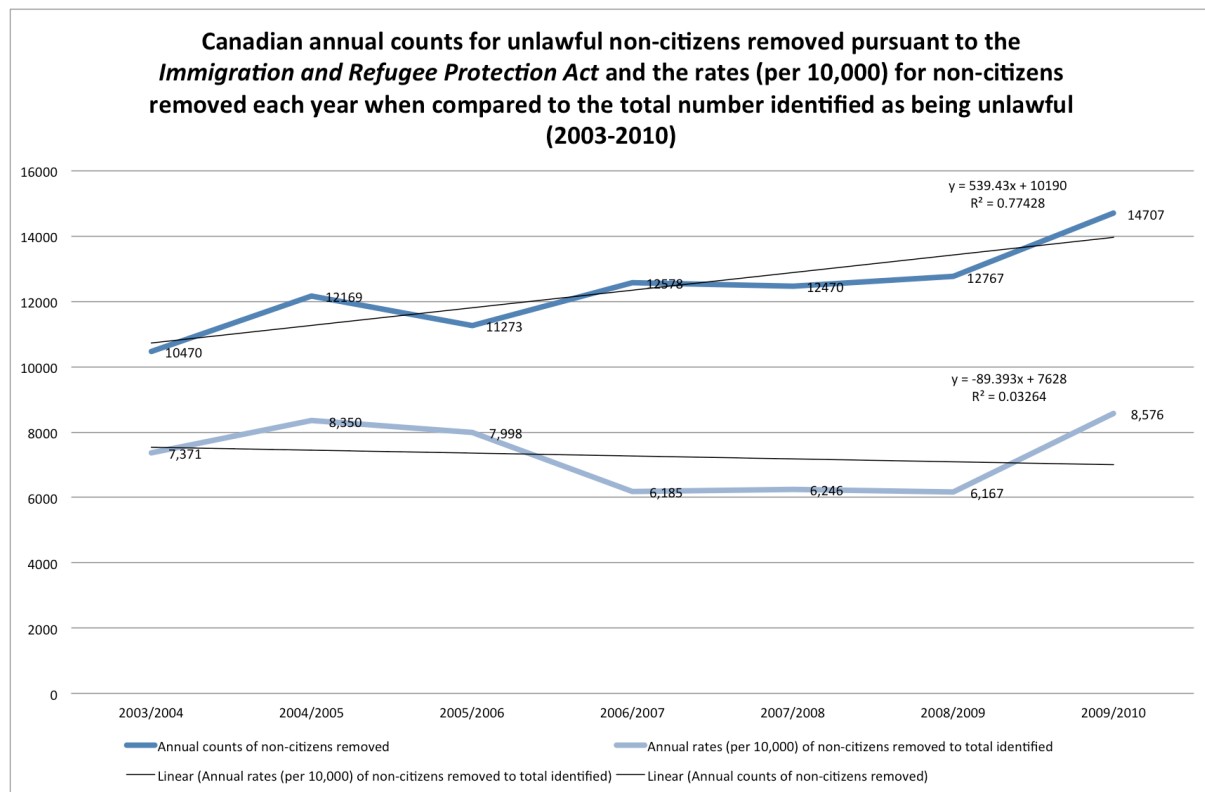
Once a removal order is enforceable, the non-citizen named in the order must leave Canada immediately (see VIII-3-a and VIII-4-a above). Similar to in Australia, anyone removed from Canada who wishes to return must first pay a \$400 AUS fee to off-set the cost of their initial removal (ENF-10). Non-citizens removed as a result of being found criminally inadmissible to Canada pursuant §33 through §42 of this Act may apply to Citizenship and Immigration Canada (CIC) for rehabilitation pursuant to §18 of the *Immigration and Refugee Protection Act Regulations*. Depending if the conviction was indictable or summary, the fee for this application is either \$1000 or \$200 respectively (CIC, 2007). While Australia

explicitly noted that removed unlawful non-citizens are liable for removal costs, Canada nonetheless has the same expectation, only the cost recovery is in the form of processing fees.

IX-3-b) Canadian Finding

As with the Canadian analysis for immigration detention, comprehensive data pertaining to the removal of unlawful non-citizens is very limited (see III-1-f above). Notwithstanding this challenge, enough data was acquired to examine whether or not the CBSA proportionately has increased the number of unlawful non-citizens it removes when compared to the total number identified within the same year. Keeping with the approach utilised in the previous chapter (detention), this section uses the annual counts related to the removal of unlawful non-citizens from Canada for the period 2003–2004 through 2009–2010 to identify if an increase in removals has occurred. Also, to ensure consistency in analysis this section uses simple linear regression to examine the annual rates for unlawful non-citizens removed when compared to the total number identified (see VI-5-a above).

As evident in Chart 12 below, between 2003–2004 and 2009–2010, the number of unlawful non-citizens removed from Canada has fluctuated slightly, with the linear regression line indicating an overall escalation ($R^2 = 0.774$). Considering removal typically constitutes the means by which immigration detainees are released for custody, it is reasonable the linear regression models for detention and removal would both indicate inclines in aggregate annual counts. The only noticeable anomaly observed was between 2004–2005 and 2005–2006, where the annual counts for removal declined by approximately 7% and counts for detention increased by approximately 8%. While limited data is available to fully explore this variance, and accepting the resulting R^2 value was skewed, both linear regression lines nevertheless indicate significant inclines in aggregate annual count.

Chart 12:

Source: Count and rates calculated using the values obtained through Access Act requests to the CBSA (A-2009-15462).

To consistently compare how Australia and Canada operationally approach internal immigration enforcement, this section also explores whether or not the Canadian removal rates for unlawful non-citizens also increased when compared to the total identified. As important as it is to identify that Canada generally has increased the number of removals of unlawful non-citizens it conducts over time, it is equally important to consider if this increase represents a heightened propensity to remove unlawful non-citizens once identified. This analysis takes into account the annual differences in the counts for suspected unlawful non-citizens identified and, through simple linear regression analysis, identifies if an increase in the proportion of those identified who were removed exists.

As indicated by the linear regression line for Chart 12 above relating to the annual counts for unlawful non-citizens removed pursuant to the *Immigration and Refugee Protection Act*, between 2003–2004 and 2009–2010, there has been a cumulative incline (R^2

= 0.774) in removals. While important to observe that the CBSA has on average removed more unlawful non-citizens from its territory each year, it is equally important to identify that the linear regression line showed no statistically significant rates of increase for unlawful non-citizens removed when compared to those identified.

IX-3-c) Summary of Canadian Findings

Considering removal typically constitutes the means suspected unlawful non-citizens are released from immigration detention, it is understandable the findings of this section closely parallel those reported in the corresponding section for detention. Of the two findings reported for removals, the finding that no significant increase exists in the rates for unlawful non-citizens removed when compared to the total identified between 2003–2004 and 2009–2010 is important. This finding further supports that despite an increase in annual removal counts, the linear regression analysis revealed no significant increase in annual removal rates. Reflecting on the findings discussed in Chapter VIII (detention), this section provides further support that Canada operationally approaches internal immigration enforcement in a consistent and predictable manner (see VIII-3-b).

While the findings of this section support those for detention, they still must be viewed with a degree of care. As expressed in the previous chapter, having a limited number of points for analysis, not controlling for time-series data, and using simple linear regression analysis, these findings can only afford an exploratory review. Yet, accepting neither the Australian nor Canadian Governments collect, retain, or disseminate robust information and data pertaining to removals, this analysis nonetheless contributes to the apparent gap in scholarship exploring removals—especially Canadian works.

Keeping with Fuller's (2003) sixth facet (categorical imperative) when considering internal immigration enforcement through the lens of peacemaking criminology (Pepinsky & Quinney, 1991), the findings of this section further support that Canada takes a comparatively

peaceful approach to the internal immigration enforcement sub-component of removal (see IV-2-a above). As observed in the previous section (see VIII-3-b above), Canada takes an operational approach to removals that are both consistent and predictable. Likewise, because the *Canadian Charter of Rights and Freedoms* requires that all persons subject to removal be afforded the right to apply for a PRRA, it can be viewed Canada observes Fuller's (2003) fourth facet (correct means). Considering PRRA aims to safeguard against the possibility unlawful non-citizens could face persecution if removed, Canada can be viewed as taking meaningful steps in safeguards against civil and legal rights abuses (see IV-2-a above)—an important consideration when applying Fuller's (2003) six-facet approach for peacemaking criminology.

IX-4) How the DIAC Removes Temporary Unlawful Non-Citizens

In Australia, any non-citizen not possessing a valid visa is required to leave the nation forthwith and is subject to mandatory detention (DIAC, 2012b). Pursuant to §198 of the *Migration Act*, when a non-citizen is identified as being without a visa or otherwise in contravention of this Act, the officer must remove them as soon as feasible. Furthermore, if under §198(1) a non-citizen requests to be removed, the officer must facilitate this request forthwith (Vrachnas et al., 2008). Under Division 10 of the *Migration Act*, unlawful non-citizens being removed are liable for their removal costs. Should they be unable or unwilling to pay for their removal, they are considered to owe a debt to the Australian Government—meaning, even if legally admissible to Australia once removed, they are must still pay their debt prior to being re-admitted.

As with the CBSA, the DIAC must secure travel documents for unlawful non-citizens being removed. All suspected unlawful non-citizens who are arrested and detained by the DIAC typically have their passport or other identity documents seized to assist with possible future removal actions. If no passport was seized or a travel document is otherwise

unavailable, the DIAC must apply for a new passport or travel document from the consular officials of the nation to which the unlawful non-citizen is being returned (PAM3; Taylor, 2005). Seeing that some governments often will deny that an unlawful non-citizen being removed is one of their citizens, the DIAC may have to negotiate either providing foreign aid incentives or other benefits in exchange for travel documents (Director Onshore Immigration Compliance (Australia)—D. Tanner, personal communication, July 14, 2008).

Almost all removals from Australia are achieved using commercial air carriers. As in Canada, the DIAC works closely with Qantas Airlines and other transport providers to ensure removals conducted on their flights do not jeopardise commercial interests or the safety, security, and comfort of travellers and airline staff. Though unlawful non-citizens being removed are at times restrained, this practice generally is only used as a last resort—yet reports raised in Australian Senate committee meetings do suggest removal officers at times take liberty with this policy. While the use of restraints does provides evidence of force being used in the carrying out of removals, as with Canada, the DIAC does not release documents pertaining to their use during removals (Taylor, 2005). Yet, despite a denial from the DIAC to provide data, information found in the Parliament of Australia's (2012) *Proof Committee Hansard* regarding the immigration portfolio does confirm the DIAC has on a number of occasions used restraints when removing unlawful non-citizens.

While Australia does provide a limited opportunity for unlawful non-citizens subject to being removed the opportunity to apply for refugee status or at Temporary Protection Visa (TPV), there is no program in Australia that compares to the PRRA program in Canada (see VIII-3-a above). Whereas Australia does not have a national constitutional bill of rights in place, the DIAC generally observe guidance on human rights from the Australian Human Rights Commission. Likewise, Australia is a signatory to the *United Nations Convention on Civil and Political Rights* Treaty Series Vol. 999 [1966] (hereinafter referred to as the *UN*

Convention on Civil and Political Rights), and as such observes its international obligations specific to this convention. Still, notwithstanding its responsibilities and obligations to the Australian Human Rights Commission and *UN Convention on Civil and Political Rights*, the DIAC has on numerous occasions conducted removals that are contrary to domestic and international human rights expectations and standards (Taylor, 2005)—the cases of Cornelia Rau and Vivian Solon provide two such examples (see VI-3-b above).

IX-4-a) Legal Authority and Restraints in Relation to Removing Unlawful Non-Citizens

As identified in the section addressing legal authorities and restraints relating to the detention of suspected unlawful non-citizens in Australia, under §189 of the *Migration Act*,¹¹³ all unlawful non-citizens must be removed if they are known or reasonably suspected to be a non-citizen who does not possess a valid visa. Of paramount importance when studying and comparing Australian immigration detention and removals is that §189 of this Act addresses both mandatory detention and automatic removal. In essence, detention and removal are viewed as symbiotic internal immigration enforcement functions by Australia, both being mandatory processes once a non-citizen has been found to be unlawful.

Divisions 8 and 9 of the *Migration Act 1958* (Cth) (in particular §189 and §200) address the issue of removing non-citizens from Australia. Specifically, §189 of this Act addresses unlawful non-citizens being removed by an officer, whereas §200 concerns non-citizens who have been ordered deported by the Minister of Immigration. Generally, removal is an automatic administrative function that follows detention (see VIII-3 above). Unlike in Canada, where removal only legally occurs once a removal order has been issued through an administrative hearing process (see IX-4-a above) and in turn becomes enforceable after

¹¹³ Considering this thesis compares how Australia and Canada each operationally approach internal immigration enforcement, only the sections of the *Migration Act* that apply to the DIAC's onshore immigration compliance program (enforcement actions against non-citizens within the Migration Zone—namely, Australian territory identified under §5 of the *Migration Act*) are examined. *Because of the complexity and rarity of cases where under §502 of this Act the Minister of Immigration issues a certificate deeming a non-citizen an excluded person on grounds of national interest and security, these cases are not addressed within this thesis.*

PRRA has been offered and decided upon, removal in Australia is an automatic statutory outcome once a non-citizen has been determined unlawful. An exception to this is when under §200 of this Act the Minister orders a non-citizen deported.

Though Australia does provide those being removed the opportunity to apply for refugee status prior to being removed (or TPV pursuant to §36 of this Act), the reality is that applications for protection often result in detainees being kept in detention for prolonged periods of time with the high likelihood their refugee claim or TPV application will not be accepted (Mansouri & Leach, 2009). As Taylor (2005) observes, many detained suspected unlawful non-citizens awaiting removal will request to be “voluntarily” removed after having remained in detention for prolonged periods of time awaiting a disposition to their application. Taylor suggests the DIAC’s claim voluntary removals constitute the majority of removals is misleading. As observed by Taylor, many who seek voluntary removal do so to gain relief from the hardships faced in immigration detention, resulting in them making requests under §198(1) of this Act more as an act of desperation and self-preservation than an earnest willingness to return to their nation of citizenship.

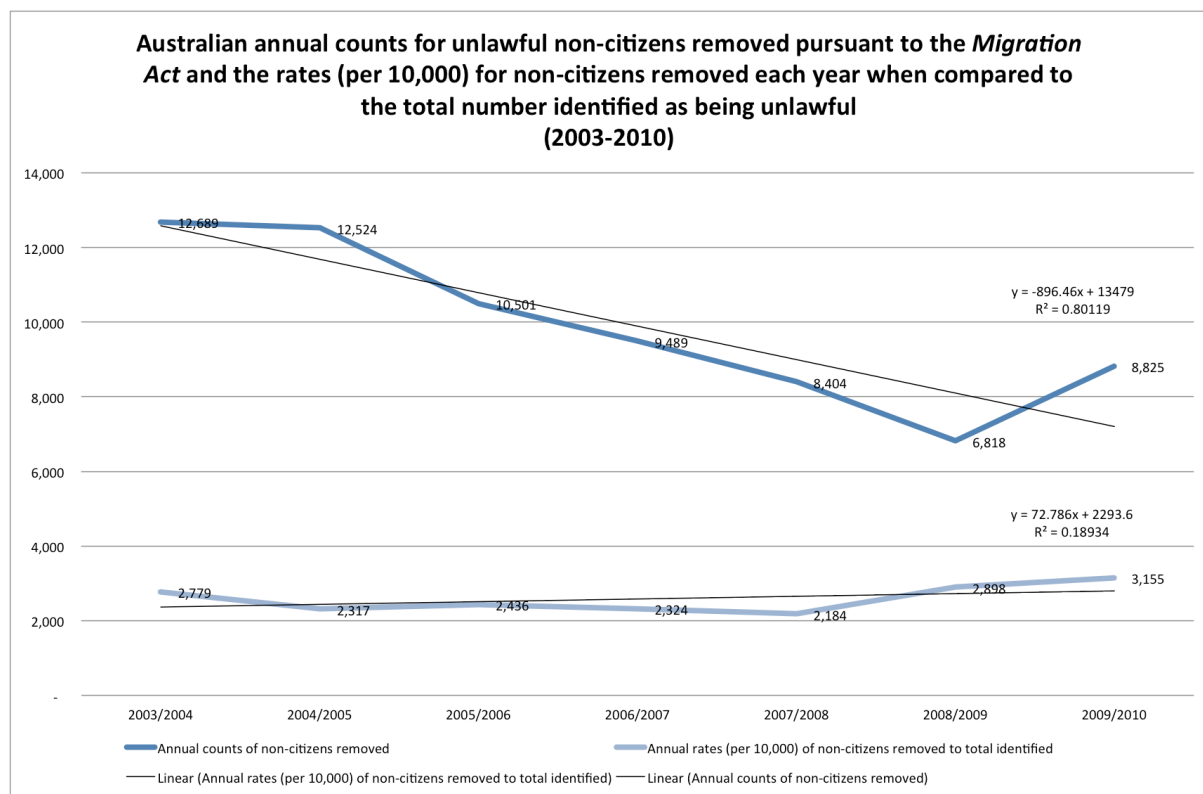
IX-4-b) Australian Findings

As with the analysis of immigration detention in Australia, comprehensive data pertaining to removals for Australia is publicly available via the DIAC and Parliament of Australia Library websites (see III-2-f above). However, keeping with Reichel’s (2008) suggestion that data available for only one jurisdiction being studied within a comparative criminological review can justifiably be set aside, only those variables used to conduct the Canadian analysis were used. Likewise, and in keeping with the methodology employed in Chapter VIII (detention), this section continues to use the annual counts related to the removal of suspected unlawful non-citizens from Australia for the period 2003–2004 through 2009–2010 to identify removal trends. Also, to ensure consistency in analysis this section

uses simple linear regression to examine the annual rates for suspected unlawful non-citizens detained when compared to the total number identified (see IV-1-e above).

As observed from Chart 13 below, between 2003–2004 and 2008–2009, the number of suspected unlawful non-citizens removed from Australia declined by approximately 46%, with an increase of approximately 23% between 2008–2009 and 2009–2010. Yet, despite an increase between 2008–2009 and 2009–2010, the linear regression line indicates an overall decline ($R^2 = 0.801$) during the full period studied. This finding is reflective of that for Canada, in that the Australian removal findings closely resemble those for immigration detention. Seeing removal characteristically results in a suspected unlawful non-citizen being release from immigration detention, it is understandable the linear regression lines for removal and detention both show declines in aggregate annual counts.

To reliably compare the operational approaches Australia and Canada each take when conducting removals, this section explores whether or not Australia's removal rates for unlawful non-citizens also increased when compared to the total identified. Though valuable to identify that there has been a general decline in Australian removal numbers, it is equally important to consider if this decrease represents a lessened propensity to remove unlawful non-citizens once identified.

Chart 13:

Source: Rates calculated to 10,000 of population as per values obtained from the DIAC Annual Reports for 2003–2004 through 2009–2010.

Taking into account the annual differences in counts for suspected unlawful non-citizens identified, this section uses simple linear regression analysis to identify whether or not a corresponding decline exists in the proportion of those identified who were removed. As evident from the linear regression line for Chart 13 concerning the annual counts for unlawful non-citizens removed pursuant to the *Migration Act*, between 2003–2004 and 2009–2010 there has been a very minor incline ($R^2 = 0.189$) in removal rates. Though limited in statistical significance, this finding does suggest that between 2003–2004 and 2009–2010 Australia has maintained a relative equilibrium in the number of suspected unlawful non-citizens it removes—a finding that parallels the finding for rates of immigration detention in Australia.

IX-4-c) Summary of Australian Findings

As a result of Australia's longstanding policy of mandatory detention, coupled with removal being an automatic process following detention, it is understandable the findings for both removals and immigration detention closely mirror one another (see VIII-4-b above). Likewise, because removal typically constitutes the means by which suspected unlawful non-citizens are released from immigration detention (especially considering §189 of the *Migration Act* applies to both the mandatory detention and automatic removal of unlawful non-citizens), it can be assumed the issues and concerns regarding detention equally apply to removals (see VIII-4-c above).

Expanding on the discussion regarding Australia's longstanding policy of mandatory detention causing noticeable hardships for those held in immigration detention, it is important to note new hardships can result from removal. As identified by Taylor (2005), many immigration detainees apply for removal pursuant to §198(1), simply because they want the hardships faced in immigration detention to end. Considering removal is the only expedited means to gain release from detention, it is reasonable to conclude the requests made by detainees for expedited removal are a result of prolonged hardships in detention rather than a true willingness to leave Australia. Though this thesis focuses on how Australia and Canada operationally approach internal immigration enforcement, raising these issues nonetheless is important. Should a unlawful non-citizen face persecution as a result of being removed, arguably the removing nation will have contributed in part to civil and human rights abuse¹¹⁴.

In keeping with the reflection on Fuller's (2003) fourth facet (correct means) when considering peacemaking criminology (Pepinsky & Quinney, 1991), it is apparent Australia's lacking safeguards regarding possible civil and legal rights abuses occurring subsequent to an unlawful non-citizen being returned to their nation of citizenship, results in removals also

¹¹⁴ Also see VI-3-b and footnote 80 which reference the cases of Vivian Alvarez Solon and Cornelia Rau.

being warlike in nature (see IV-1-a above). Unlike in Canada where those being removed are afforded broad protections under the *Canadian Charter of Rights and Freedoms* (including PRRA), unlawful non-citizens removed from Australia are afforded few legal opportunities to have their removal stayed on grounds they face legitimate risk of persecution if returned to their nation of citizenship.

Continuing with Fuller's (2003) sixth-facet (categorical imperative) when considering immigration removal through the lens of peacemaking criminology (Pepinsky & Quinney, 1991), and reflecting on the corresponding findings reported in Chapter VIII (detention), it is apparent Australia's policy of mandatory detention (and in turn automatic removal) again results in what Pepinsky and Quinney (1991) refer to as a warlike approach (see IV-1-a above). Despite rates for removals remaining relatively equal between 2003–2004 and 2009–2010 (suggesting that the DIAC operationally approaches immigration removal in a consistent and predictable manner), evidence suggests removal in itself does not preclude the hardships many unlawful non-citizens face within immigration detention.

IX-5) Comparison: Removal of Temporary Unlawful Non-Citizens

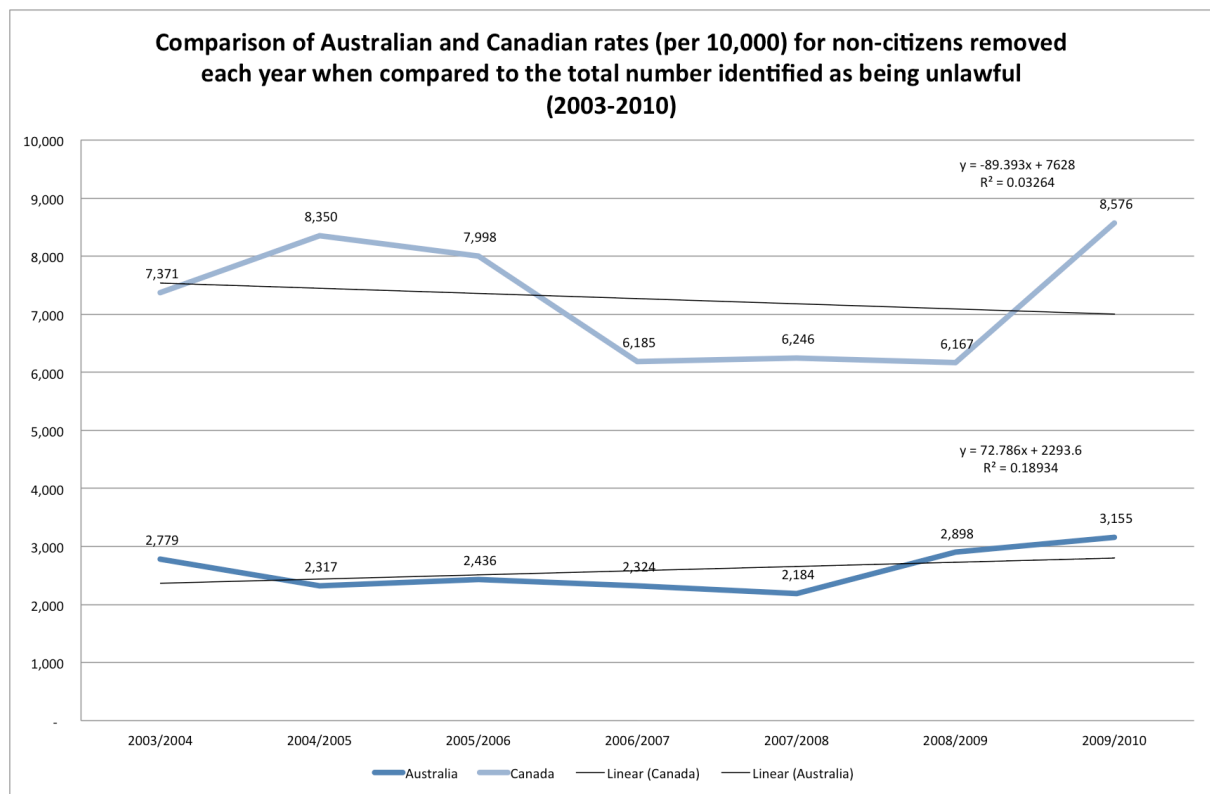
IX-5-a) Comparative Findings

As discussed, Australia and Canada operationally approach removals in very similar manners—both have the legislated authority to remove suspected unlawful non-citizens from their respective territories, both either facilitate unlawful non-citizens in the arranging of their own departure or escort those being removed back to their nations of citizenship, and both view removal as the final phase in the internal immigration enforcement process. Yet, despite their operational similarities, significant differences in immigration laws and policies result in removal being initiated differently. In Australia, removal is mandatory and automatic; in Canada, removals only occur once one of three removal orders has been issued (departure

order, exclusion order, or a deportation order) by either the Minister's delegate or the Immigration Division through a process respectful of the tenets of natural justice. Also, it was found Australia lacks similar safeguards Canada has in place to protect those being removed from possible civil and human rights violations upon being returned to their nation of citizenship.

As indicated in Chart 14 below, unlawful non-citizens in Canada were twice as likely to be removed once identified when compared to Australia. Additionally, Chart 14 details that between 2003–2004 and 2009–2010, the annual rates for suspected unlawful non-citizens removed when compared to those identified in Canada slightly declined ($R^2 = 0.033$), whereas in Australia, annual rates moderately increased ($R^2 = 0.189$). Though limited in their statistical significance, these findings support that Canada has a greater propensity to remove those suspected unlawful non-citizens it identifies when compared to Australia—a finding reflective of those for detention. Considering Canada identifies the majority of suspected unlawful non-citizens through field investigations (see VI-5 above), it is reasonable to assume Canada's higher rates for removal when compared to identification are the result of Canada taking a more policing type approach to internal immigration enforcement when compared to Australia.

Consequential to the presence of the *Canadian Charter of Rights and Freedoms*, the CBSA is required to ensure those scheduled for removal are afforded the opportunity to apply for PRRA. Though Australia provides unlawful non-citizens the opportunity to apply for either refugee status or for a TPV (Mansouri & Leach, 2009), these legal safeguards arguably pale in comparison to those present in Canada. Finally, unlawful non-citizens being removed from Australia are held liable for their removal costs (Vrachnas et al., 2008); in Canada these costs are only recouped through fees associated with applying for re-entry.

Chart 14:

As Taylor (2005) observes, Australia purposefully does not collect robust data concerning removals—this same policy can be assumed to exist in Canada considering limited data was provided by the CBSA through an *Access Act* request. Because removal constitutes the final phase of the internal immigration process, and that once a non-citizen is removed they either are prohibited from re-entry or must subsequently satisfy an immigration official they no longer are in contravention of immigration law, neither nation sees the utility in carefully reviewing their respective removal programs. Likewise, there are few academic studies or non-government organisation reports that examine the issues surrounding removals in detail—this is especially true for studies or reports concerning Canada. Of the scholarship addressing immigration enforcement, the vast majority addresses issues related to refugees or non-citizens viewed as posing a risk to national security (see Cole, 2002; Pickering & Weber, 2006; Pratt, 2005; Winterdyk & Sundberg, 2010a; Zureik & Salter, 2005).

IX-5-b) Implications

Through the examination and comparison of removals for Australia and Canada using the peacemaking criminology perspective, it is apparent Canada operationally approaches removal in a manner most reflective of Fuller's (2003) proposed six-facet approach to peacemaking criminology (Pepinsky & Quinney, 1991). As discussed in this section and also in Chapter VIII (detention), evidence suggests Australia's longstanding policy of mandatory immigration detention and automatic removal results in increased hardships for suspected unlawful non-citizens when compared to Canada. Specifically, Canada's efforts to safeguard unlawful non-citizens scheduled for removal by affording them PRRA, demonstrates this nation's more peaceful approach to the removals when compared to Australia.

Specific to Fuller's (2003) fourth-facet (correct means) as it relates to the application of peacemaking criminology to criminal justice challenges, Canada far exceeds Australia in regard to providing legal protections to unlawful non-citizens subject to removal. While Australia and Canada each have laws in place to safeguard unlawful non-citizens from civil and legal rights abuses, it is evident the *Canadian Charter of Rights and Freedoms* affords much greater protection than those available in Australia (see VII-5 above). While Australia and Canada are both signatories to the *UN Convention on Civil and Political Rights* (and as such are committed to safeguarding basic human rights), Canada's 1982 enactment of the *Canadian Charter of Rights and Freedoms* has noticeably resulted in unlawful non-citizens having greater access to legal safeguards such as PRRA.

IX-5-c) Discussion

While found Canada had higher rates and counts for removals when compared to Australia, it was also found Australia's removals program (particularly its laws and policies governing removals) results in what Pepinsky and Quinney (1991) refer to as being warlike in nature. This assessment stems from the comparative analysis of immigration detention as

found in Chapter VII. Furthermore, this chapter draws from scholarship that suggests Australia's policy of mandatory immigration detention and automatic removal increases the risk civil and human rights abuses can occur subsequent to an unlawful non-citizens being removed. Unlike in Australia, removal is not automatic in Canada. Only once the Minister's delegate or the Immigration Division issue a removal order subsequent to a hearing which observes the tenets of natural justice does removal become authorised. Moreover, unlike in Australia, where unlawful non-citizens are only afforded limited protections against potential civil and human rights violations subsequent to being removed, every unlawful non-citizen who is subject to removal from Canada is afforded a PRRA.

Regarding the research question for this thesis, it was found that despite Canada taking a policing approach to removal, this approach in and by itself did not cause removal to be warlike in nature. Conversely, Australia's apparent non-policing approach to removals did not result in removals being carried out in a more peaceful manner (Pepinsky & Quinney, 1991). Further to the question of whether or not the presence of a national constitutional bill of rights-type doctrine affords suspected unlawful non-citizens greater protections when faced with internal immigration enforcement action, the findings for this section strongly suggest it does. In the absence of a national constitutional bill of rights, suspected unlawful non-citizens in Australia only gain access to very limited, and often time-sensitive, protections (i.e., refugee status or TPV). Conversely, there is no time limit in seeking the robust protections guaranteed under the *Canadian Charter of Rights and Freedoms*.

Though it was found Australian parliamentarians do review and deliberate issues concerning the removal of unlawful non-citizens, case such as those of Cornelia Rau, Vivian Solon, and Mohammed Haneef provide strong evidence that Australia's removals program is far from being immune from errors (see VI-3-b and VII-4-a above). Considering this, it is suggestive that Australia abandon its policy of automatic removal to better reflect and

observe its obligations under the *UN Convention on Civil and Political Rights*, *UN Convention Relating to the Status of Refugees*, *UN Convention on the Rights of Children*, as well as to its own Australian Human Rights Commission. Both Australia and Canada would also benefit by affording greater attention, research, and statistical analysis to removal issues—ultimately benefiting researchers, policymakers, and the public in general. By becoming more open and transparent about data specific to internal immigration enforcement, the DIAC and CBSA likely could increase their legitimacy with the public, resulting in greater support and less criticism (Winterdyk & Sundberg, 2010a).

Specific to the removal of minors, though both nations make efforts to ensure those under the age of 18 are not removed unaccompanied or without reception waiting for them upon their return to their nation of citizenship, incidents still arise where such removals occur. As discussed in Chapter VIII (detention), if alternatives can be identified and implemented within the youth criminal justice system, surely similar alternatives can be found for youth who face immigration enforcement action. While circumstances unavoidably will arise where minors must be both detained and removed, it is obligatory that Australia and Canada take every possible step to safeguard this vulnerable population from undue hardship.

IX-6) Chapter Summary

Overcoming the challenges associated with conducting a comparative assessment of removal with limited data, and in consideration of the research questions, the finding of this chapter clearly support that Australia's policy of mandatory detention and automatic removal increases the risk suspected unlawful non-citizens (especially minors) will face civil and human rights violations upon being removed. By conducting this comparative analysis through the lens of peacemaking criminology, it is apparent Australia's approach to removals in what Pepinsky and Quinney (1991) would consider warlike in nature. Additionally, the findings indicate that despite taking a policing approach to internal immigration enforcement,

Canada achieves enforcement outcomes in a more peaceful manner than Australia (Fuller, 2003). Irrespective if internal immigration enforcement is operationally approached in a policing or non-policing manner, in the absence of laws and policies focused on safeguarding civil and human rights, as well as respecting the tenets of natural justice, enforcement outcomes will innately be warlike and non-peaceful in nature.

CHAPTER X: CONCLUSION

X-1) Chapter Overview

This thesis examines whether or not the utilisation of either a policing or non-policing approach for internal immigration enforcement results in noticeably different operational outcomes emerging from seemingly analogous internal immigration enforcement programs—particularly the Australian *Onshore Immigration Compliance* program and Canadian *Inland Immigration Enforcement* program. Additionally, this thesis examines whether or not the presence of a national constitutional bill of rights-type doctrine (such as the *Canadian Charter of Rights and Freedoms*) better safeguards suspected unlawful temporary non-citizens against the possible risks of erroneous or unlawful internal immigration enforcement actions, or resulting legal, civil, and human rights abuses. Considering this, the four previous findings chapters concerning identification, arrest, detention, and removal all aim to answer the thesis question:

*Does a **policing** versus **non-policing** operational approach to internal immigration enforcement impact how suspected unlawful temporary non-citizens are identified, arrested, detained, and ultimately removed from either Australia or Canada? If so, to what extent? Furthermore, does the presence of a national constitutional bill of rights type doctrine afford greater safeguards to suspected unlawful non-citizens subject to internal immigration enforcement actions?*

This chapter reports the key findings from the examination and comparison of how the Australian DIAC and Canadian CBSA each identify, arrest, detain, and remove temporary non-citizens who initially gained lawful entry to their respective territories and subsequently

were found to have violated immigration law. Vital to this comparative criminological inquiry was the analysis of how Canada's policing approach and Australia's non-policing approach impact internal immigration enforcement outcomes.

X-2) Summary of Immigration Enforcement in Canada and Australia

Since 9/11, virtually every western democracy has shifted its focus on border control and immigration management from facilitating international trade, commerce, and migration to security, fortification, and surveillance. Whereas in the decade prior to 9/11, nations were working toward establishing new bilateral and regional customs and free trade zones which included relaxed border crossing policies related to the admission of skilled workers, students, and visitors, in the aftermath of 9/11, the apparent opening of borders quickly shifted to their fortification. As a result, many critical criminologists began framing "their critique of border controls in terms of *criminalisation of asylum seekers* and *war on immigrants*" (Weber, 2002, p. 21).

Prior to 9/11, Australian and Canadian immigration authorities took analogous non-policing approaches to their internal immigration enforcement programs. Neither was considered a law enforcement agency, both had public servants administering and enforcing their domestic immigration laws, and each assumed full responsible for all aspects of immigration and citizenship (Tascón, 2010; Winterdyk & Sundberg, 2010b). Moreover, in the pre-9/11 period, both Australia and Canada had immigration policies focused on promoting the entry of skilled workers, students, and visitors as a means of promoting economic development (Tascón, 2010). While both immigration agencies maintained enforcement divisions responsible for ensuring the integrity of their respective immigration programs, neither had enforcement as their principal focus or mandate.

It was only in the aftermath of 9/11, in particular 2003, when this shared approach diverged. In 2003, the CBSA was formed—an armed border security agency comprised of

the former enforcement components traditionally found within the Canada Revenue Agency, Citizenship and Immigration Canada, and Canada Food Inspection Agency (Sundberg, 2004). Additionally, Canada introduced new legislation and amended existing laws to enhance its national and border security capabilities. Of particular importance is Canada's enactment of the *Canada Border Services Act*—the Act that effectively formalised Canada's decision to adopt a policing approach for its border security programs (Winterdyk & Sundberg, 2010b).

Conversely in Australia, a non-policing approach to border security was continued, yet between 2002 and 2005, the Australian Parliament did introduce several new laws and amended others in an effort to enhance the frequency and level of interplay its customs, immigration, police, and intelligence organisations had with one another (Tascón, 2010). These reforms allowed Australia's traditional border security organisations to better share information and conjointly protect Australia from external security and public safety threats. Though in 2008 the Australian Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) was renamed, aside from a new name, the DIAC continued being a non-law enforcement agency retaining its traditional responsibilities for administering and enforcing the *Migration Act*.

Notwithstanding post-9/11 reforms relating to internal immigration enforcement in Australia and Canada, both the DIAC and CBSA identify, arrest, detain, and removal non-citizens they believe have violated immigration law. Moreover, and irrespective of Canada adopting a policing approach to internal immigration enforcement and Australia retaining its traditional non-policing approach, both nations have shifted their focus on border security and immigration management from an economic and development perspective to one of security, surveillance, and enforcement. While Australia and Canada continue to encourage the entry of skilled workers, students, and visitors, it nevertheless heightened the level of

scrutiny and surveillance involved in the management of their respective immigration programs.

X-3) Key Research Findings

The most significant finding of this thesis was that irrespective of an immigration authority takes a policing or non-policing approach to internal immigration enforcement, in the absence of laws focused on promoting and safeguarding the innate rights and freedoms of those most vulnerable to legal, civil, and human rights abuses, enforcement outcomes will inevitably resemble what Pepinsky and Quinney (1991) view as being non-peaceful and warlike in nature. Stemming from this finding was the discovery that Canada has surpassed Australia in implementing meaningful and inclusive safeguards aimed at preventing the innate rights and freedoms of all those who visit or permanently reside within its borders (irrespective of their citizenship)—including having legal processes in place that respect the tenets of natural justice in predictable and consistent manners.

Specific to the question whether or not the presence of a national constitutional bill of rights-type doctrine afford greater safeguards to suspected unlawful non-citizens subject to internal immigration enforcement actions, this thesis finds it does. Resulting from the presence of the *Canadian Charter of Rights and Freedoms* is the requirement that all those arrested and detained have the lawfulness and reasonableness of these actions reviewed by way of *habeas corpus* within a 48-hour period—and, if detention is continued, at least every 30 days thereafter. Moreover, the *Canadian Charter of Rights and Freedoms* also requires that all non-citizens subject to removal be afforded the opportunity to have foreseeable risk of persecution if return to their nation of citizenship assessed through a Pre-Removal Risk Assessment. If legitimate risks are identified, the non-citizen is granted refugee protection within Canada—irrespective of the fact they violated immigration law and normally would have to depart Canada. Finally, the *Canadian Charter of Rights and Freedoms* requires that

an impartial hearing be held to determine whether or not a non-citizen has contravened Canada's immigration law in a manner that warrants their expulsion.

While Australia also has legal safeguards in place, pursuant to §189 of the *Migration Act*, arrest, detention, and removal are mandatory and automatic once a suspected non-citizen is believed to be unlawful. Unlike in Canada, suspected unlawful non-citizens in Australia do not have the right for the lawfulness and reasonableness of their arrest and detention to be determined in a timely manner by way of *habeas corpus*. As a result, numerous incidents have resulted whereby Australian citizens and lawful permanent residence have erroneously been removed from Australia. Moreover, convincing evidence exists that Australia's longstanding policy of mandatory detention has resulted in many in immigration detention to suffer mental and physical hardships—including minors.

Specific to the question of whether or not a policing versus non-policing operational approach to internal immigration enforcement impacts how suspected unlawful temporary non-citizens are identified, arrested, detained, and ultimately removed from either Australia or Canada, this thesis finds that although suspected unlawful non-citizens in Canada have a higher likelihood of having enforcement action taken against them once identified, as a result of the *Canadian Charter of Rights and Freedoms*, the outcomes of these actions are typically lawful, justifiable, and reasonable. Conversely, despite Australia taking a non-policing approach, in the absence of a national constitutional bill of rights-type doctrine, suspected unlawful non-citizens experience noticeably more hardships and abuses when subjected to internal immigration enforcement actions—especially in relation to immigration detention.

Irrespective of the CBSA having armed officers empowered as peace officers (law enforcement officers) and trained the same as conventional police to enforce laws, no findings indicated that Canada's policing approach resulted in more warlike internal immigration enforcement outcomes when compared to those achieved by Australia's DIAC

through a non-policing approach. Conversely, this thesis does find that Australia's longstanding policy of mandatory detention and automatic removal of suspected unlawful non-citizens results in heightened risks of legal, civil, and human rights abuses. Moreover, Australia's lack of administrative review processes that adhere to the fundamental tenets of natural justice have resulted in numerous erroneous and unlawful internal immigration enforcement outcomes to occur.

X-4) Key Research Implications

Reflecting on Fuller's (2003) six-facets approach to critically assessing aspects of the criminal justice system from a peacemaking criminology perspective (Pepinsky & Quinney, 1991), this thesis finds that Canada generally takes a more peaceful approach to internal immigration enforcement when compared to Australia. As discussed, the *Canadian Charter of Rights and Freedoms* proves the key element in Canada exhibiting a more peaceful approach. Moreover, irrespective if a nation taking a policing versus non-policing approach to internal immigration enforcement, in the absence of laws and policies focused on ensuring the rights and freedoms of those subjected to enforcement action, enforcement outcomes inevitably will reflect warlike tendencies.

As suggested by Fuller (2003), criminal justice practitioners must safeguard the civil and legal rights of the accused to ensure due process is respected and that outcomes are fair and just. As discussed at length throughout this thesis, it is evident Australia would benefit from adopting a national constitutional bill of rights-type doctrine or, alternatively, ensure that the foundational tenets of doctrine such as the *Canadian Charter of Rights and Freedoms* are observed. As observed through reviewing the case studies of Cornelia Rau, Vivian Solon, and Mohammed Haneef, in the absence of legal, civil, and human rights safeguards, grave injustices can occur. Though only three case studies were provided in this thesis, it is important to note numerous other accounts of similar injustices have occurred as a result of

Australia's policy of mandatory detention and automatic removal, combined with an administrative process that often fails to include hearings that observe the tenets of natural justice.

As governments, economies, and societies become increasingly interconnected as a result of globalisation, it is favourable for all concerned that peace focused laws, policies, and practices be continually sought. Today's reality is that all western democracies, including Australia and Canada, require both permanent and temporary immigrants to sustain their economic prosperity and social stability. Unfortunately, many elements within post-9/11 immigration enforcement programs have come to resemble the warlike elements observed by peacemaking criminology to exist within traditional criminal justice systems. Considering this, the findings of this thesis support the use of peacemaking criminology to guide policymakers in their constructing of future internal immigration enforcement policies, laws, and practices.

X-5) Limitations of Research

As discussed in Chapter III (methodology), a number of limitations are associated with the findings of this thesis (see III-1-g above), specifically a lack of certain empirical data that could afford a more robust review (e.g., data derived through the interviewing of officers and/or non-citizens whom have had enforcement action taken against them, or detailed government statistics that are not readily available, published, or otherwise inaccessible). Yet, notwithstanding significant challenges in obtaining data and other official and scholarly information regarding internal immigration enforcement, enough information was obtained to comprehensively address the intended research questions.

Accepting that the findings of this thesis must be viewed with a certain degree of caution, they nonetheless still provide new insight into how Australia and Canada generally approach the analogous internal immigration enforcement processes. Yet, it is acknowledged

that future studies concerning internal immigration enforcement would benefit from more robust analysis of annual variances in estimated unlawful non-citizen populations and deviations in how suspected unlawful non-citizens are identified, arrested, detained, and removed—including a review which includes more points of analysis covering a greater period of time (i.e., gender, age, nationality, and monthly as opposed to annual counts).

It is suggested future studies be constructed in a less descriptive and more explorative manner. Neuman, et al. (2004) describe social science research in an evolutionary manner. When researchers wish to gain a familiarity with a new social issue, they conduct an exploratory study—“If the issue was new or researchers had written little on it, you begin at the beginning” (p. 21). Once a basic understanding of the issue is established, researchers may want to construct a more accurate assessment of it and expand on the initial exploratory approach—“Descriptive research presents a picture of the specific details of a situation, social setting, or relationship” (p. 22). After there are a number of studies that examine and describe an issue, researchers should embark on a more precise assessment that forces on “why things are the way they are” (p. 23). Explanatory research “builds on exploratory and descriptive research and goes on to identify the reason something occurs” (p. 23).

X-6) Suggested Future Research

To date, few academic studies examine how immigration authorities operationally approach internal immigration enforcement—none exists that specifically examines either the Australian or Canadian realities. This thesis constitutes the first comparative criminological work to examine how the Australian Department of Immigration and Citizenship and Canada Border Services Agency identify, arrest, detain, and remove suspected unlawful temporary non-citizens. As such, this thesis aims to encourage other researchers to study how the DIAC and CBSA undertake internal immigration enforcement, and provides a basis from which future research can emerge.

This thesis is meant as a starting point from which future studies addressing the topic of internal immigration enforcement can develop. While scholarship concerning immigration enforcement is developing, there still is a gap surrounding issues specific to how suspected temporary unlawful non-citizens have enforcement action taken against them. Furthermore, few studies explore or contrast the Canadian and Australian realities. Considering the many similarities between Australia and Canada, yet accepting their distinct differences, value exists in further exploring how the DIAC and CBSA conduct their immigration enforcement activities.

X-7) Summary

While Australia and Canada share noticeable political, legal, economic, demographic, and historical similarities, they nonetheless differ in the way they safeguard the innate human right and freedoms of citizens and others who either temporarily or permanently enter their respective territories to work, study, or visit. While Australia and Canada represent stable, established, progressive, and prosperous modern nation-states that have emerged from a shared British colonial tradition, as of 1982, with Canada's implementation of its *Canadian Charter of Rights and Freedoms*, a pronounced philosophical divergence occurred in how these two fundamentally comparable nations view the notions of citizenship, sovereignty, and global migration.

Likewise, in the aftermath of 9/11, both Australia and Canada have taken pronounced, yet differing, approaches to the securing of their borders and managing of their non-citizen populations. Canada consolidated its traditionally administrative border services into a single policing organisation. Reflecting on the post-9/11 border security and immigration management reforms implemented globally, Australia chose to maintain its traditional customs and immigration agencies while enacting and reforming laws that promote increased interplay and information exchange between immigration, customs, police, and security

intelligence services with the aim of mitigating the risks associated with global terrorism and transnational crime.

Though the risks of global terrorism remain, as do the challenges associated with transnational crime, the reality is immigration constitutes a vital component of every nation's economy and society. Irrespective of a person's citizenship or immigration status, in today's global village, it is paramount that all within a sovereign territory be afforded equal rights and considerations under the law. Embracing diversity, as opposed to fearing those who are foreign, ultimately will result in stronger, more peaceful, and successful nations.

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APPENDIX ONE:

Major Terrorist Incidents Resulting in Global Border Security Reforms Between 1997 and 2007

Date(s)	Summary of Incident	Key Groups Involved	Impact of Incident
February 23, 1997	Shooting of tourists at Empire State Building in NYC by Palestinian gunman who killed Danish national.	Individual action by non-citizen believed by U.S. authorities to have connected to Hamas.	Caused U.S. authorities to question how they screen possible terrorists from entering the U.S.
June 1997	FBI arrest Mir Aimal Kansi in Pakistan after four-year manhunt in connection to shooting at CIA headquarters in Virginia.	Individual action by non-citizen believed by U.S. authorities to have connected to Islamic extremists.	Demonstrated the U.S.'s ability to track terrorist (criminal) suspects from within the U.S. to locations around the world and coordinate with foreign governments in their arrest and extradition.
December 14, 1999 (Millennium Bomber)	Arrest of Ahmed Ressam (coined by the media as the Millennium Bomber) at US/CND border with car full of explosives destined for detonation at LAX on eve of the millennium.	Individual action by non-citizen believed by U.S. authorities to have connections to the GIA and al-Qaeda.	Suggested Canada was a weak link in the U.S.'s border integrity due to liberal immigration and refugee laws. Also demonstrated the ability of U.S. border authorities to detect threats to America at the border.
December 24, 1999	Hijacked an Indian airliner, flew from Nepal, Pakistan, India, UAE, and Afghanistan. Demanded \$200 million dollar ransom and the release of 35 Kashmiri prisoners in India.	Kashmiri nationalists	Incident showed the ability of terrorists to hijack an aircraft and fly between nations despite modern airport security systems, counter-terrorism tactics, and international agreements to prevent the movement of terrorist groups.
August 27, 2001 (Tampa)	Australian Navy intercepts and diverts to the Christmas Islands, the Norwegian ship Tampa that rescued 434 asylum seekers from their sinking ship off of Australia's northern coastline.	Primarily Afghani and Sri Lanka asylum seekers and Australian Government	Became erroneously linked to 9/11 during Australia's federal election as part of P.M. John Howard's get tough on terrorism platform. Howard successfully convinced electorate that asylum seekers could be linked to Islamic extremists and justified Govt actions as national security.
September 11, 2001 (9/11)	Three aircraft were hijacked and two flown into the Twin Towers (NYC), Pentagon (Wash., DC), and field in Pennsylvania. Over 6,000 killed.	al-Qaeda	Marked the largest terrorist attack on U.S. soil and sparked the global "War on Terrorism." Also caused U.S. Govt to review the manner in which it protected its borders and homeland, resulting in the June 2002 creation of the U.S. Dept of Homeland Security (DHS).
November/December 2001 (Anthrax Letter Attack)	Letters containing anthrax sent via U.S. Post to various addresses within the New York and Washington, DC area. Several illness and fatalities were connected to attack. Initially believed to be an al-Qaeda terrorist attack, but later discovered to be result of a deranged U.S. Govt scientist.	Individual (U.S. citizen) Bruce Edwards Ivins, a U.S. Govt. scientist, believed to have committed attack. No ties to terrorism suspected.	Marks the first biological agent attack on U.S. soil. Caused U.S. Customs to investigate how it screened foreign mail and shipments. Also demonstrated that the U.S. Govt, even in the aftermath of 9/11, was not able to prevent subsequent terrorist attacks within its borders.
October 12, 2002 (First Bali Bombing)	Bomb detonated in the tourist district of Bali, Indonesia killing 202 people, of which 164 were tourists (primarily Australian, British, and 51 other foreign tourists).	Jemaah Islamiyah (JI) (group believed to have close ties with al-Qaeda)	Exposed foreign tourists (mostly from western nations) as terrorist targets while visiting primarily Islamic nations. Caused the Australian Govt to develop closer police, intelligence, and social service ties with Indonesian Govt.
March 11, 2004 (Madrid Train Attack)	Ten bombs detonated on commuter trains in Madrid, Spain, killing 191 people and wounded over 1,500 others.	al-Qaeda	Caused Spain and other European nations to examine how non-EU citizens can freely move between borders, and exposed the EU to the threat of terrorism in a similar manner that 9/11 exposed the U.S. Also caused the Schengen Agreement to be reviewed by member states and for more coordination between EU members in area of counter-terrorism (including border security).
March 14, 2004	Hamas and Fatah al-Aqae Martyrs Brigade terrorists hid themselves in containers shipped from the Gaza Strip to the port of Ashdod, Israel then committed a suicide bomb attack killing 10 people.	Hamas and the Fatah al-Aqae Martyrs Brigade	Resulted in the Israeli Govt to examine how it secured its seaports and control shipments between the Gaza Strip and Israel. Incident was used to support the 2002 decision of the Israeli Govt to construct the "Security Wall".
April 3, 2004	Suspects linked to the March 11, 2004 Madrid bombing blew themselves up when Spanish police attempted to arrest them.	al-Qaeda	Demonstrated the dangers associated with attempting to arrest suspected terrorists groups living with the EU.
August 24, 2004	Two Russian airlines exploded simultaneously midair killing all passengers onboard.	Islambouli Brigades of al-Qaeda (Chechen based group)	Exposed Russia to the threat of terrorism in a similar manner as 9/11 did with the U.S. Demonstrated the sophistication of terrorists and also provided an example of how al-Qaeda had emerged into a truly global network with "franchises" throughout the world.
July 7 and 21, 2005 (London Bombings)	On July 7, 2005, bombs detonated within London's subway and bus system simultaneously. The suicide bombers killed over 50 people and injured another 700. On July 21, 2005, a second attack was attempted; however, due to technical difficulties, the bombs failed to explode.	British based terrorist cells who sympathised with al-Qaeda.	Caused concern within the UK as to how "Islamic Terrorists" could have been living among them. Later discovered the people involved were in fact born in the UK. Also caused France to suspend the Schengen Agreement and reinstitute its border controls for a number of months following.
October 1, 2005 (Second Bali Bombing)	Bomb detonated in the tourist district of Bali, Indonesia killing 20 people.	Jemaah Islamiyah (JI) (group believed to have close ties with al-Qaeda)	Seen by Australia as another attack on Australian tourists visiting abroad. Being the second attack by the JI on the tourist island of Bali, tourism (especially from Australia) decreased significantly.
June 30, 2007 (Glasgow Airport Attack)	Bomb detonated at the Glasgow International Airport resulting in two death and four injuries.	Dr. Bilal Abdullah and Kafeel Ahmed, foreign-born Scottish residence who were connected with Islamic extremist cell.	Resulted in the Australian Govt deporting Dr. Mohammed Haneef, a Queensland doctor lawfully living and working within Australia, based on what later was discovered to be an erroneous connection through a SIM card found at the site of the Glasgow bombing.
Sources used to construct table: Bell (2004); Givens, Freeman, and Leal (2009); Hamilton and Rimsa (2007); Martin (2006); NCTC (2008).			

APPENDIX TWO:

Comparison of Australian and Canadian Internal Immigration Enforcement Programs

	Canada	Australia	Comparison								
Information:	<ul style="list-style-type: none">National Risk Assessment Centre (NRAC), including the sub-unit of the Immigration Warrant Response Centre (IWRC) 24/7-call centre receives information.Border Watch report line (part of NRAC) receives information from public.Information obtained via investigation.Information received via Intelligence Network, including information from Migration Integrity Officers (MIO's) posted overseas.Information received locally via police, courts, corrections, and other law enforcement organisations.	<ul style="list-style-type: none">Dob-In Line report line (part of DIAC) receives information from public.Information obtained via investigation.Information received via intelligence network, including information from Immigration Compliance Officer posted overseas.Information received locally via police, courts, corrections, and other law enforcement organisations.Computer generated list of those non-citizens who failed to confirm their departure is produced weekly and forwarded to Onshore Compliance for follow up investigation.	<ul style="list-style-type: none">Both nations have 24/7 call centres that receive tips from both the public and law enforcement community.Both nations have intelligence driven systems that attempt to a great extent to proactively identify non-citizens who are in violation of their conditions of entry/stay.Australia, having both entry and exit controls, have a greater ability to identify those who have remained beyond their allowed period of stay.								
Analysis:	<p>Generally, after information has been forwarded from one of the above sources, a supervisor within an Inland Immigration Enforcement Unit decides if an investigation is warranted. If so, then the supervisor assigned the case to an Immigration Enforcement Officer for investigation, or if it is felt criminal prosecution is warranted, the file is sent to the CBSA's Criminal Investigations Unit (RCMP I&P Section if the case involves human trafficking or smuggling).</p> <table><tr><th>Administrative</th><th>Criminal</th></tr><tr><td><ul style="list-style-type: none">Enforcement Officer investigates if violation of IRPA has occurred. If so, officer writes a report and forwards it either to a Minister's Delegate or to the Immigration Division for Action.If humanitarian or compassionate grounds supersede enforcement action, case forwarded to CIC for action.</td><td><ul style="list-style-type: none">CBSA Criminal Investigator investigates if a chargeable offence has occurred. If charge warranted, officer prepares case for Crown Prosecutor to consider for court.If the case involves human trafficking or smuggling, the RCMP will prepare charges for prosecutor to consider for court.If prosecutor agrees with charge, case is set for court.</td></tr></table>	Administrative	Criminal	<ul style="list-style-type: none">Enforcement Officer investigates if violation of IRPA has occurred. If so, officer writes a report and forwards it either to a Minister's Delegate or to the Immigration Division for Action.If humanitarian or compassionate grounds supersede enforcement action, case forwarded to CIC for action.	<ul style="list-style-type: none">CBSA Criminal Investigator investigates if a chargeable offence has occurred. If charge warranted, officer prepares case for Crown Prosecutor to consider for court.If the case involves human trafficking or smuggling, the RCMP will prepare charges for prosecutor to consider for court.If prosecutor agrees with charge, case is set for court.	<p>Generally, after information has been forwarded from one of the above sources, a supervisor within an Onshore Immigration Compliance Unit decides if an investigation is warranted. If so, then the supervisor assigned the case to an Onshore Compliance Officer for investigation, or if it is felt criminal prosecution is warranted, the file is sent to the DIAC's Investigations Unit (AFP may be involved if the case involves human trafficking or smuggling).</p> <table><tr><th>Administrative</th><th>Criminal</th></tr><tr><td><ul style="list-style-type: none">Compliance Officer investigates if violation of Migration Act has occurred. If so, officer writes a report and forwards it to a Minister's Delegate for Action.If enforcement action is decided against, officer can issue a Bridging Visa to the non-citizen, which in turn allows them to remain temporarily.</td><td><ul style="list-style-type: none">DIAC Investigator investigates if a chargeable offence has occurred. If charge warranted, officer prepares case for Commonwealth Prosecutor to consider for court.If the case involves human trafficking or smuggling, the AFP may prepare charges for prosecutor to consider for court.If prosecutor agrees with charge, case is set for court.</td></tr></table>	Administrative	Criminal	<ul style="list-style-type: none">Compliance Officer investigates if violation of Migration Act has occurred. If so, officer writes a report and forwards it to a Minister's Delegate for Action.If enforcement action is decided against, officer can issue a Bridging Visa to the non-citizen, which in turn allows them to remain temporarily.	<ul style="list-style-type: none">DIAC Investigator investigates if a chargeable offence has occurred. If charge warranted, officer prepares case for Commonwealth Prosecutor to consider for court.If the case involves human trafficking or smuggling, the AFP may prepare charges for prosecutor to consider for court.If prosecutor agrees with charge, case is set for court.	<ul style="list-style-type: none">Analysis of cases where non-citizens may be in violation of each nation's respective immigration law, are virtually identical.Those cases selected for possible criminal charges operate in virtually identical manners.
Administrative	Criminal										
<ul style="list-style-type: none">Enforcement Officer investigates if violation of IRPA has occurred. If so, officer writes a report and forwards it either to a Minister's Delegate or to the Immigration Division for Action.If humanitarian or compassionate grounds supersede enforcement action, case forwarded to CIC for action.	<ul style="list-style-type: none">CBSA Criminal Investigator investigates if a chargeable offence has occurred. If charge warranted, officer prepares case for Crown Prosecutor to consider for court.If the case involves human trafficking or smuggling, the RCMP will prepare charges for prosecutor to consider for court.If prosecutor agrees with charge, case is set for court.										
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Action:	<table><tr><th>Administrative</th><th>Criminal</th></tr><tr><td><ul style="list-style-type: none">Generally, if case involves a non-citizen, Minister's Delegate makes a decision.Generally, if case involves a Permanent Resident, is adjudicated before the Immigration Division.</td><td><ul style="list-style-type: none">Case proceeds to court for trial by either judge or jury.Plea can be presented to the judge for consideration.Case can be stayed.Case can be dismissed.</td></tr></table>	Administrative	Criminal	<ul style="list-style-type: none">Generally, if case involves a non-citizen, Minister's Delegate makes a decision.Generally, if case involves a Permanent Resident, is adjudicated before the Immigration Division.	<ul style="list-style-type: none">Case proceeds to court for trial by either judge or jury.Plea can be presented to the judge for consideration.Case can be stayed.Case can be dismissed.	<table><tr><th>Administrative</th><th>Criminal</th></tr><tr><td><ul style="list-style-type: none">Minister's Delegate makes a decision. If case involves permanent resident, extra criteria considered and ability to appeal is greater.</td><td><ul style="list-style-type: none">Case proceeds to court for trial by either judge or jury.Plea can be presented to the judge for consideration.Case can be stayed.Case can be dismissed.</td></tr></table>	Administrative	Criminal	<ul style="list-style-type: none">Minister's Delegate makes a decision. If case involves permanent resident, extra criteria considered and ability to appeal is greater.	<ul style="list-style-type: none">Case proceeds to court for trial by either judge or jury.Plea can be presented to the judge for consideration.Case can be stayed.Case can be dismissed.	<ul style="list-style-type: none">In Canada, a member of the Immigration Division must decide on cases involving Permanent Residence. The Immigration Division also makes the decision involving more complex cases involving visitors (e.g., unauthorised work, violation of conditions, etc.) in violation of IRPA.In Australia, an appointed officer or the Minister has ultimate decision making powers involving all non-citizens in violation of Migration Act.
Administrative	Criminal										
<ul style="list-style-type: none">Generally, if case involves a non-citizen, Minister's Delegate makes a decision.Generally, if case involves a Permanent Resident, is adjudicated before the Immigration Division.	<ul style="list-style-type: none">Case proceeds to court for trial by either judge or jury.Plea can be presented to the judge for consideration.Case can be stayed.Case can be dismissed.										
Administrative	Criminal										
<ul style="list-style-type: none">Minister's Delegate makes a decision. If case involves permanent resident, extra criteria considered and ability to appeal is greater.	<ul style="list-style-type: none">Case proceeds to court for trial by either judge or jury.Plea can be presented to the judge for consideration.Case can be stayed.Case can be dismissed.										
Decision:	<table><tr><th>Administrative</th><th>Criminal</th></tr><tr><td><ul style="list-style-type: none">The Minister's Delegate or Immigration Division, issue a removal order or reinstate the non-citizen's status.Both can decide if person is detained pending removal.</td><td><ul style="list-style-type: none">Judge will render decision, and if convicted, will apply the sentence.If person convicted is non-citizen, then after sentence they will enter the administrative stream.</td></tr></table>	Administrative	Criminal	<ul style="list-style-type: none">The Minister's Delegate or Immigration Division, issue a removal order or reinstate the non-citizen's status.Both can decide if person is detained pending removal.	<ul style="list-style-type: none">Judge will render decision, and if convicted, will apply the sentence.If person convicted is non-citizen, then after sentence they will enter the administrative stream.	<table><tr><th>Administrative</th><th>Criminal</th></tr><tr><td><ul style="list-style-type: none">The Minister's Delegate cancels visa or issues a bridging visa.If visa cancelled, person is automatically detained pending removal.</td><td><ul style="list-style-type: none">Judge will render decision, and if convicted, will apply the sentence.If person convicted is non-citizen, then after sentence they will enter the administrative stream.</td></tr></table>	Administrative	Criminal	<ul style="list-style-type: none">The Minister's Delegate cancels visa or issues a bridging visa.If visa cancelled, person is automatically detained pending removal.	<ul style="list-style-type: none">Judge will render decision, and if convicted, will apply the sentence.If person convicted is non-citizen, then after sentence they will enter the administrative stream.	<ul style="list-style-type: none">In both Canada and Australia, criminal cases are dealt with in virtually identical manners.In Canada, a removal order is issued against if a non-citizen is found to be in violation of IRPA, whereas in Australia their visa is simply cancelled.In Australia, all non-citizens without a visa are automatically detained.
Administrative	Criminal										
<ul style="list-style-type: none">The Minister's Delegate or Immigration Division, issue a removal order or reinstate the non-citizen's status.Both can decide if person is detained pending removal.	<ul style="list-style-type: none">Judge will render decision, and if convicted, will apply the sentence.If person convicted is non-citizen, then after sentence they will enter the administrative stream.										
Administrative	Criminal										
<ul style="list-style-type: none">The Minister's Delegate cancels visa or issues a bridging visa.If visa cancelled, person is automatically detained pending removal.	<ul style="list-style-type: none">Judge will render decision, and if convicted, will apply the sentence.If person convicted is non-citizen, then after sentence they will enter the administrative stream.										
Affecting:	<table><tr><th>Administrative</th><th>Criminal</th></tr><tr><td><ul style="list-style-type: none">Non-citizen removed from Canada.</td><td><ul style="list-style-type: none">Person serves sentence.</td></tr></table>	Administrative	Criminal	<ul style="list-style-type: none">Non-citizen removed from Canada.	<ul style="list-style-type: none">Person serves sentence.	<table><tr><th>Administrative</th><th>Criminal</th></tr><tr><td><ul style="list-style-type: none">Non-citizen removed from Australia.</td><td><ul style="list-style-type: none">Person serves sentence.</td></tr></table>	Administrative	Criminal	<ul style="list-style-type: none">Non-citizen removed from Australia.	<ul style="list-style-type: none">Person serves sentence.	<ul style="list-style-type: none">Same affect in both Canada and Australia.
Administrative	Criminal										
<ul style="list-style-type: none">Non-citizen removed from Canada.	<ul style="list-style-type: none">Person serves sentence.										
Administrative	Criminal										
<ul style="list-style-type: none">Non-citizen removed from Australia.	<ul style="list-style-type: none">Person serves sentence.										
Appeal:	<table><tr><th>Administrative</th><th>Criminal</th></tr><tr><td><ul style="list-style-type: none">May appeal to Immigration Appeals Division then Federal Court, or to Minister.</td><td><ul style="list-style-type: none">May have right of appeal to a higher court.</td></tr></table>	Administrative	Criminal	<ul style="list-style-type: none">May appeal to Immigration Appeals Division then Federal Court, or to Minister.	<ul style="list-style-type: none">May have right of appeal to a higher court.	<table><tr><th>Administrative</th><th>Criminal</th></tr><tr><td><ul style="list-style-type: none">May appeal to Migration Appeals Tribunal, Minister, or Federal Court.</td><td><ul style="list-style-type: none">May have right of appeal to a higher court.</td></tr></table>	Administrative	Criminal	<ul style="list-style-type: none">May appeal to Migration Appeals Tribunal, Minister, or Federal Court.	<ul style="list-style-type: none">May have right of appeal to a higher court.	<ul style="list-style-type: none">In Canada, because of Charter, non-citizens have more avenues of appeal than in Australia.
Administrative	Criminal										
<ul style="list-style-type: none">May appeal to Immigration Appeals Division then Federal Court, or to Minister.	<ul style="list-style-type: none">May have right of appeal to a higher court.										
Administrative	Criminal										
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APPENDIX THREE:

Australian and Canadian Immigration and Customs Traveller Declaration Forms

Instructions

All travellers must be identified on a Canada Border Services Agency (CBSA) Declaration Card. You may fill up to four people living at the same address on one card. Each traveller is responsible for his or her own declaration.

Under the law, failure to properly declare goods, currency and/or monetary instruments brought into Canada may result in seizure action, monetary penalties and/or criminal prosecution.

Information from this declaration will be used for CBSA control purposes, and may be shared with other government departments to enforce Canadian laws. For more information see Info Source (ref. no. CBSA PPU 018), at a public library or visit <http://info.source.gc.ca>.

Part B – Visitors to Canada

The following duty-free allowances apply to each visitor entering into Canada:

- Gifts (excludes alcohol and tobacco) valued at no more than CAN\$50 each.
- 1.5 L of wine or 1.14 L of liquor or 24 x 355 ml cans or bottles (8.5 L) of beer or ale.
- 200 cigarettes, 200 tobacco sticks, 50 cigars or cigars and 200 grams of manufactured tobacco.

Part C – Residents of Canada

Each resident returning to Canada is entitled to one of the following personal exemptions based on their time absent from Canada (include all goods and/or gifts purchased or received abroad):

- 24 hours – CAN\$50. Not claimable if goods exceed \$50. Alcohol and tobacco cannot be claimed.
- 48 hours – CAN\$400. This includes alcohol and tobacco (see table below).
- 7 days – CAN\$750. This includes alcohol and tobacco (see table below).

Alcohol and tobacco exemption table

Duration of stay	Alcohol	Tobacco
24 hours	1.5 L of wine or 1.14 L of liquor or 24 x 355 ml cans or bottles (8.5 L) of beer or ale. (You must be of legal age in the province of importation.)	200 cigarettes, 200 tobacco sticks, 50 cigars or cigars and 200 grams of manufactured tobacco (Special Duty may apply).
48 hours	1.5 L of wine or 1.14 L of liquor or 24 x 355 ml cans or bottles (8.5 L) of beer or ale.	200 cigarettes, 200 tobacco sticks, 50 cigars or cigars and 200 grams of manufactured tobacco (Special Duty may apply).
7 days	1.5 L of wine or 1.14 L of liquor or 24 x 355 ml cans or bottles (8.5 L) of beer or ale.	200 cigarettes, 200 tobacco sticks, 50 cigars or cigars and 200 grams of manufactured tobacco (Special Duty may apply).

Declaration Card

Canada Border Services Agency / Agence des services frontaliers du Canada

For Agency Use Only

Part A (All travellers) Country of last home address – Please print in capital letters.

Last name, first name and initials

Date of birth: / / Citizenship: /

Part B (Visitors to Canada)

HOME ADDRESS – Number, street, apartment No. City/Town

Prov./State Country Postal/Zip code

Arriving by: Air / Rail / Marine / Highway / Purpose of trip: Study / Business / Other country direct / Other country indirect

Arriving from: U.S. only / Other country direct / Other country indirect

Part C (Residents of Canada)

Duration of stay in Canada: days Do you or any person listed above exceed the duty-free allowances per person? (See instructions on the left.) Yes No

Part D (Personal Exemptions)

Do you or any person listed above exceed the exemptions per person? (See instructions on the left.) Yes No

Complete in the same order as Part A

Date left Canada YY-MM-DD	Value of goods – CAN\$ (purchased or received abroad including gifts, except tobacco)	Date left Canada YY-MM-DD	Value of goods – CAN\$ (purchased or received abroad including gifts, except tobacco)
1		3	
2		4	

Part D (Signatures) Sign and date. I certify that my declaration is true and complete.

1. / / 2. / / 3. / / 4. / /

E311 (08) Protected A when completed B6F311 Do not fold Declaration Card Canada

Incoming passenger card • Australia

PLEASE COMPLETE IN ENGLISH WITH A BLUE OR BLACK PEN

► Family/surname

► Given names

► Passport number

► Flight number or name of ship

► Intended address in Australia

State

► Do you intend to live in Australia for the next 12 months? Yes No

► If you are NOT an Australian citizen:

Do you suffer from tuberculosis? Yes No

Do you have any criminal conviction/s? Yes No

DECLARATION

The information I have given is true, correct and complete. I understand failure to answer any questions may have serious consequences.

YOUR SIGNATURE

Day Month Year

TURN OVER THE CARD English

YOU MUST ANSWER EVERY QUESTION – IF UNSURE, X Yes

► Are you bringing into Australia:

1. Goods that may be prohibited or subject to restrictions, such as medicines, steroids, firearms, weapons of any kind or illicit drugs? Yes No
2. More than 1125ml of alcohol or 250 cigarettes or 250g of tobacco products? Yes No
3. Goods obtained overseas or purchased duty and/or tax free in Australia with a combined total price of more than AUD\$400, including gifts? Yes No
4. Goods/samples for business/commercial use? Yes No
5. AUD\$10,000 or more in Australian or foreign currency equivalent? Yes No
6. All food – includes dried, fresh, preserved, cooked, uncooked? Yes No
7. Wooden articles, plants, parts of plants, traditional medicines or herbs, seeds, bulbs, straw, nuts? Yes No
8. Animals, parts of animals and animal products including equipment, eggs, biologicals, specimens, birds, fish, insects, shells, bee products, pet food? Yes No
9. Soil, or articles with soil attached, ie. sporting equipment, shoes, etc? Yes No
- 10. Have you visited a rural area or been in contact with, or near, farm animals outside Australia in the past 30 days? Yes No
- 11. Have you been in Africa or South America in the last 6 days? Yes No

PLEASE COMPLETE IN ENGLISH

► In which country did you board this flight or ship?

► What is your usual occupation?

► Nationality as shown on passport

► Date of birth: Day Month Year

PLEASE X AND ANSWER A OR B OR C

A Migrating permanently to Australia

B Visitor or temporary entrant

► Your intended length of stay in Australia: Years Months Days

► Your country of residence

► Your main reason for coming to Australia (x one only):

Convention/conference 1 Employment 4 Holiday 7

Business 2 Education 5 Other 8

Visiting friends or relatives 3 Exhibition 6

C Resident returning to Australia

► Country where you spent most time abroad

MAKE SURE YOU HAVE COMPLETED BOTH SIDES OF THIS CARD. PRESENT THIS CARD ON ARRIVAL WITH YOUR PASSPORT.

Information sought on this form is required to administer immigration, customs, quarantine, statistical, health, wildlife and currency laws of Australia and its collection is authorised by legislation. It will be disclosed only to agencies administering these areas and those entitled to receive it under Australian law. The confidentiality of your personal information is available at Australian ports and airports.

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