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Dr. Tania Reneaum Panszi
Executive Secretary
Inter-American Commission on Human Rights
Organization of American States
1889 F Street N.W.
Washington, D.C. 20006

January 19, 2022

Re: Request for a Thematic Hearing Addressing Canada's Systemic Rights Violations of Long-Term Permanent Residents Facing Deportation due to Criminality under the *Immigration and Refugee Protection Act*

Dear Secretary Reneaum Panszi:

In accordance with Articles 61, 62, and 66 of the Rules of Procedure of the Inter-American Commission on Human Rights, the undersigned groups request a thematic hearing during the 183rd Session from March 7th to 18th, 2022, to address the lack of proportionality in Canada's criminal inadmissibility and deportation scheme. Canada removes long-term permanent residents (**LTPR**) found inadmissible due to criminality without a proportionality assessment taking place at any stage. This removal amounts to cruel and inhumane treatment. The scheme and its impact on LTPR violate the following articles of the *American Declaration of the Rights and Duties of Man*:

- Article I: Right to life, liberty, and security of the person
- Article II: Right to equality before the law
- Article V: Right to protection against abusive attacks upon one's family and private life
- Article XVII: Right to recognition of juridical personality and civil rights
- Article XVIII: Right to a fair trial
- Article XXVI: Right to due process of law

Although the criminal inadmissibility and deportation scheme only affects a small number of individuals, the significance of the rights engaged outweighs this fact. In evaluating Canada's deportation regime, the IACHR recognized in 2000 that "given the interests at stake, [the *Immigration and Refugee Protection Act* (***IRPA***)] requires prompt and serious attention."[1] Today, Canada's deportation scheme captures more LTPR than ever before by prohibiting humanitarian and compassionate relief and a right of appeal for those found inadmissible on the grounds of security, violating human or international rights, or organized criminality.[2] The Canadian Parliament has refused to heed calls to amend *IRPA* despite critique. A thematic hearing would reilluminate the enduring and systemic violations of human rights by the deportation scheme. The IACHR would be able to provide guidance to Canada on how to align its laws and policies with respect to its international law obligations.

1 Canada's Deportation and Criminal Inadmissibility Scheme

The distinction between citizens and non-citizens is recognized in the *Canadian Charter of Rights and Freedoms*: only citizens have the "right to enter, remain in and leave Canada."[3] The current criminal inadmissibility and deportation scheme has been in place since June 2013 through the *Faster Removal of Criminals Act* (**Bill C-43**), which amended *IRPA*, the primary immigration legislation in Canada.[4] *IRPA* prohibits humanitarian and compassionate relief and does not provide a right of appeal for persons found inadmissible on security grounds (section 34), for violating international human rights (section 35), or for organized criminality (section 37).[5] Bill C-43 was promoted as necessary to stop "foreign criminals" who exploited legal "loopholes" by delaying their deportation through appeals while continuing their criminal behaviour—a view that is unsupported by empirical evidence.[6]

1.1 Overview of Criminal Inadmissibility

The criminal inadmissibility process consists of several steps. First, a Canada Border Services Agency officer writes a report that outlines the offences committed, relevant grounds of inadmissibility, the officer's evaluation of the case, and any recommendations. The person in question is notified about the

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[1] Inter-Am CHR, *Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System*, OEA/Ser L/V/II.106, Doc 40 rev (2000) at para 117 [IACHR, *Canada Report*].
[2] *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 25(1), 25.1(1), 64(2) [*IRPA*]. See **Appendix B** for other selected provisions.
[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 6(1).
[4] Bill C-43, *An Act to amend the Immigration and Refugee Protection Act*, 1st Sess, 41st Parl, 2011 (assented to 19 June 2013), SC 2013, c 16.
[5] *IRPA*, *supra* note 2, s 34, 35, 37.
[6] Canadian Bar Association, "Bill C-43, Faster Removal of Criminals Act" (November 2012) at 1, 6, online (pdf).

report through a 'fairness letter' and that they may make submissions on why deportation should not be ordered, including humanitarian and compassionate reasons.[7] The officer's report is then presented to the Minister's Delegate. There is conflicting case law on whether officers have any discretion. While the processing manual suggests that officers have a very limited scope, in reality, the exercise of discretion belongs to the Delegate.[8] It is the Delegate who decides whether or not to refer the case to an admissibility hearing. The discretion of the Delegate is limited; there is no obligation for them to consider humanitarian and compassionate considerations.[9] The decision to recommend referral to the Immigration Division is informed by a non-exhaustive list of factors, including length of residence in Canada, age at the time of arrival, and the conditions in the country of origin.[10] However, the exercise of discretion in favour of the person concerned is extremely rare. In fact, between November 2015 and August 2017, discretion was only exercised twice.[11] Thus, although it is theoretically possible for the Minister's Delegate to decide not to proceed with the referral to an Admissibility Hearing, realistically, it is fair to presume that once the person is convicted of a serious criminal offence, the matter will proceed to a hearing.

In an Admissibility Hearing, the Immigration Division focuses on the facts and nature of the conviction or sentence. Extenuating circumstances or humanitarian and compassionate factors are not considered here.[12] If the Immigration Division finds the person inadmissible, it must issue a removal order. Between 2002 and 2017, deportation was ordered in 12,644 out of 12,674 hearings. This represents an overwhelming 99.77 percent.[13] Per section 64(1) of *IRPA*, persons found inadmissible under sections 34, 35, 36(1) if the sentence is more than six months, and 37 do not have access to an appeal to the Immigration and Refugee Board. As such, there is no post-hearing review of the equitable factors. In addition, persons found inadmissible under sections 34, 35, and 37 do not have the right to apply for humanitarian and compassionate considerations under section 25(1), meaning this stage marks the end of

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[7] Sasha Baglay, "Collateral Immigration Consequences in Sentencing: A Six-Year Review" (2019) 82:1 Sask Law Review 47 at 53.
[8] Canadian Border Services Agency, "Processing Manual ENF 5: Writing 44(1) Reports" (21 November 2019) at 17, online (pdf); *Melendez v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 1363 at para 34 [*Melendez*].
[9] *Melendez*, *supra* note 8 at para 34. The jurisprudence on this issue is summarized in paras 16-31. The case law following *Melendez* has reinforced the notion that Minister's Delegates have limited discretion and no obligation to consider humanitarian and compassionate considerations: see e.g. *Zhang v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 746 at para 20; *Khan v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1029 at para 25; *Singh v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1170 at para 23.
[10] Other factors include the person's potential for rehabilitation, current attitude (such as being remorseful, cooperative, or accepting responsibility), and establishment in Canada. See *Melendez*, *supra* note 8 at para 33; Baglay, *supra* note 7 at 54; Canadian Border Services Agency, "Processing Manual ENF 6: Review of Reports under A44(2)" (12 February 2020) at 20-22, online (pdf).
[11] Baglay, *supra* note 7 at 54.
[12] *Ibid*. See also *Canada (Minister of Citizenship and Immigration) v Fox*, 2009 FC 987 at para 42; *Wajaras v Canada (Minister of Citizenship and Immigration)*, 2009 FC 200 at para 11.
[13] Baglay, *supra* note 7 at 55, note 34.

the process and the person must proceed straight to removal. A person may request a Pre-Removal Risk Assessment, but this process only considers the likelihood that a person will experience torture, a risk of persecution, a risk to life, or risk of cruel and unusual treatment upon return to the country of origin.[14]

Ultimately, a person is effectively only permitted to raise humanitarian and compassionate concerns before the Minister's Delegate. However, the Delegate has limited discretion and no formal obligation to consider the person's submissions. In effect, once a person is found inadmissible for serious criminality under sections 34, 35, and 37 of *IRPA*, a removal order is a near certainty.

1.2 Reasons of Significance and Urgency

The law is unjustified. As the Bill made its way through Parliament, numerous lawyers and organizations argued against most of its proposed changes, particularly the loss of appeal rights and the limits to humanitarian relief. Bill C-43 markedly expanded the classes of individuals who would not receive any kind of discretion within the criminal inadmissibility scheme to consider humanitarian and compassionate grounds.[15] The Bill eliminated due process and concentrated the power in the hands of the Minister, with few procedural safeguards and little opportunity for judicial oversight.[16] Many advocates concluded that the Bill was excessive, harmful, and unnecessary in the face of little to no supporting evidence, and should be withdrawn or substantially amended.[17]

Amendments to *IRPA* have greatly limited the opportunities for non-citizens to challenge their deportation. In fact, the United Nations Human Rights Committee found that Canada's deportation of the LTPR in *AHG v Canada* was an affront to human dignity, given the lack of proportionality assessment involved.[18] Yet, the criminal inadmissibility scheme remains the same. Politicians are reluctant to appear "soft on crime," but this public policy stance on the perceived issue of "immigrant crime" has become dangerous and draconian in its punitiveness. Given that the deportation regime has grown increasingly unfair, a thematic hearing on Canada's compliance with international law and the principle of proportionality for non-citizens is a necessary first step towards greater accountability.

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[14] *IRPA*, *supra* note 2, s 112(1); Government of Canada, "Pre-Removal Risk Assessment: What It's For" (last modified 8 October 2020).
[15] House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, 41-2, No 057 (5 November 2012) at Barbara Jackman.
[16] Canadian Bar Association, *supra* note 6 at 1.
[17] *Ibid* at 1, 9; Amnesty International, "Accountability, Protection, and Access to Justice: Amnesty International's Concerns with Respect to Bill C-43 (Submission to the House of Commons Standing Committee on Citizenship and Immigration)" (31 October 2012) at 6, online (pdf).
[18] UN HR Committee, *AHG v Canada*, (2011) CCPR/C/113/D/2091/2011 [UNHRC, *AHG*].

2 Deportation Scheme Violates Articles I, II, V, XVII, XVIII, and XXVI of the *American Declaration*

IRPA's criminal admissibility scheme infringes on LTPR's rights protected in Articles I, II, V, XVII, XVIII, and XXVI of the *American Declaration*. LTPR face deportation without the guaranteed opportunity to illustrate that their connection to Canada outweighs their alleged threat to public order. Although Canada has a legitimate interest in ensuring public order,[19] its deportation scheme does not balance State and individual interests. Once a LTPR is found inadmissible under sections 34, 35, or 37, they are not provided with an opportunity to illustrate that their connection to Canada outweighs their alleged threat to public order.

2.1 Deportation Scheme Violates the Right to Security of the Person

The removal of LTPR without adequate consideration of the proportionality of the deportation violates Article I of the *American Declaration.* First, the scheme threatens the mental integrity of individuals by subjecting them to psychological harm that may rise to the level of torture, cruel, inhuman, or degrading treatment. Second, it disrespects the inherent dignity of LTPR by reducing them to abstract threats to public safety. Although the *American Declaration* does not include a distinct prohibition on torture, the protection of security of the person under Article I encompasses the right to be free from torture, cruel, inhuman, and degrading treatment or punishment.[20]

2.1.1 Disproportionate Deportation Threatens the Mental Integrity of LTPR and Constitutes Cruel, Inhuman, or Degrading Treatment

Deportation without consideration of the individual's connection to Canada engages Article I of the *American Declaration* by exposing LTPR to psychological harm. Those who are integrated into their host countries and cannot be easily reintegrated into their country of origin are likely to experience harm.[21]

Article I of the *American Declaration* guarantees the right to physical and psychological security of the person. It protects against psychological and emotional damage,[22] emotional trauma and anxiety,[23]

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[19] I/A Court HR, *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 (2003) at 57 [IACtHR, *Undocumented Migrants*].
[20] IACHR, *Canada Report*, *supra* note 1 at para 118. See also Inter-Am CHR, Case 9437, Report No 5/85, *Case of Juan Antonio Aguirre Ballesteros (Chile)*, OEA/Ser L/V/II.66 doc 17 (1985).
[21] Barbara Buckinx & Alexandra Filindra, "The Case Against Removal: Jus noci and Harm in Deportation Practice" (2015) 3:3 Migration Studies 393 at 395.
[22] I/A Court HR, *Case of Castillo Páez v Peru*, Series C No 34 (1997) at paras 63, 66 [IACtHR, *Castillo Páez*].
[23] Inter-Am CHR, Case 11.436, Report No 47/96, *Case of Victims of the Tugboat '13 de Marzo' v Cuba* , OEA/Ser L/V/II.05 doc 7 (1997) at para 106; Inter-Am CHR, Case 10.553, Report No 32/96, *Case of Maria Mejia v Guatemala*, OEA/Ser L/V/11.95 doc 7 at para 60 [IACHR, *Maria Mejia*]; Eur Court HR, *Kurt v Turkey*, (1998) ECHR 44, 27 EHRR 373 at para 133.

and intimidation or panic.[24] The reintegration of LTPR into the country of origin is likely to be difficult and result in concrete psychological harm. For example, LTPR may not have the requisite skills, qualifications, or social networks to secure employment because their education has best prepared them for work in the host country.[25] Job insecurity is exacerbated if LTPR do not speak the language of their country of origin.

Outside of the employment context, LTPR are likely to experience social alienation and discrimination. Many LTPR view their host country as their home rather than their country of origin.[26] Upon arrival in the country of origin, "they may suffer greatly from a lack of social acumen and savoir faire, not to mention social discrimination."[27] For LTPR captured by the inadmissibility scheme, their past criminality augments the likelihood of social isolation. There is often an assumption that those who are deported to their country of origin are criminals or a threat to public safety.[28] In the Canadian context, individuals were thought to have engaged in criminal activity and are supposedly a threat to public safety. This ostracization and stigmatization constitutes a threat to mental integrity and may result in psychological or physical trauma.

In some situations, these threats to security of the person may rise to the level of torture or cruel, inhuman, or degrading treatment or punishment. While they may not constitute torture *per se*, they engage—and, ultimately violate—Article I's protection against torture. The IACHR has adopted a flexible and liberal interpretation of torture; the intensity, seriousness, duration, physical and mental effects on the victim, and the sensitivities of the victim are factors that influence a finding of torture.[29]

The individualized and flexible inquiry establishes that Article I can be infringed in two situations:[30] (a) torture *per se*[31] and (b) contextual torture. The latter violates Article I because the treatment "under the ruling circumstances represents a disproportionate response to the need to respect or ensure the rights of others or to protect the general interest of the public."[32] This accurately characterizes

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[24] IACHR, *Maria Mejia, supra* note 23 at para 61.
[25] Buckinx & Filindra, *supra* note 21 at 399; Kelly Birch Maginot, "Survival or Incorporation: Immigrant (Re)Integration After Deportation" in Steven J Gold & Stephanie J Nawyn, eds, *Routledge International Handbook of Migration Studies*, 2nd ed (London: Routledge, 2019) 512 at 515.
[26] Maginot, *supra* note 25 at 516.
[27] Buckinx & Filindra, *supra* note 21 at 400.
[28] *Ibid* at 400-401.
[29] Inter-Am CHR, Case 10.832, Report No 35/96, *Case of Luis Lizardo Cabrera v Dominican Republic*, OEA/Ser L/V/II.94 doc 7 rev (1998) at paras 82-83. See also Inter-Am CHR, *Case of Loayza Tamayo v Peru*, Series C No 33 (1997) at para 57; I/A Court HR, Case of *Gómez-Paquiyauri Brothers v Peru*, Series C No 110 (2004) at para 113.
[30] Inter-Am CHR, Case 12.354, Report No 63/08, *Case of Andrea Mortlock v United States*, (2008) at paras 82-85. See e.g. UNHRC, *AHG*, *supra* note 18 at para 3 (per Member Shany).
[31] UNHRC, *AHG*, *supra* note 18 at para 3 (per Member Shany).
[32] *Ibid*.

Canada's inadmissibility scheme. It exposes LTPR to acute psychological harm and social isolation for a wide range of criminal offences regardless of their severity or time passed. In *Jama Warsame v Canada*, the United Nations Human Rights Committee recognized that a person can experience irreparable harm that amounts to torture when they have no family or community support in the country of origin.[33] Similarly, the European Court of Human Rights found that the risk of debilitating social isolation in the country of origin would constitute, for the particular individual, cruel, inhuman, or degrading treatment.[34]

Besides the psychological impacts, deportation may equally result in physical harm that amounts to contextual torture. For LTPR with medical conditions, deportation risks interfering with or halting treatment. LTPR must manage their conditions in an unfamiliar country, where access to treatment may be variable, and without the support of family and their communities. The European Court of Human Rights has recognized that deportation may amount to torture for individuals who require medical treatment.[35] When removal entails the abrupt loss of medical treatment, deportation is in direct violation of Canada's obligations under the *American Declaration*. This obligation to protect individuals from torture or cruel, inhuman, or degrading treatment overrides any interest in expelling criminals. The prohibition on torture is guaranteed "irrespective of the reprehensible nature of the conduct of the person in question."[36] Past criminality cannot justify torture, cruel, inhuman, or degrading treatment.

2.1.2 Conceptualization of LTPR as Abstract Threats to Safety Violates the Principle of Human Dignity

The *American Declaration*'s preambulatory clauses acknowledge that the principle of dignity animates human rights.[37] The essence of the right to security of the person, protected by Article I, is broad and encompasses affronts to the "inherent dignity of the human person."[38] Canada's inadmissibility scheme seeks to expel individuals viewed as threats to public security and order. In conceptualizing LTPR as 'threats,' Canada reduces human beings to a source of abstract risk and thus strips them of their dignity.

An individual's risk of deportation is tied entirely to their past actions— with no opportunity to illustrate their value and place in Canada. When LTPR are not permitted to describe their social and

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[33] UN HR Committee, *Jama Warsame v Canada*, (2011) CCPR/C/102/D/1959/2010.
[34] Eur Court HR, *D v United Kingdom*, (1997) ECHR 25, 24 EHRR 423 at paras 52-53, 40.
[35] The Court notes that "There is a serious danger that the conditions of adversity which await him in St Kitts will further reduce his already limited life expectancy and subject him to acute mental and physical suffering… The implementation of the decision to remove him to St Kitts would amount to inhuman treatment": *ibid* at para 40.
[36] *Ibid* at para 47, citing Eur Court HR, *Ahmed v Austria*, (1996) ECHR 63, 24 EHRR 278; Eur Court HR, *Chalal v the United Kingdom*, (1996) ECHR 54, 23 EHRR 413**.**
[37] Paolo G Carozza, "Human Dignity" in *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013) 345 at 354, citing I/A Court HR, *Case of Cabrera García and Montiel Flores v Mexico*, Series C No 220, Preliminary Objection, Merits, Reparations, and Costs (2010) at para 110; I/A Court HR, *Case of Maritza Urrutia v Guatemala*, Series C No 103, Merits, Reparations, and Costs (2003).
[38] IACtHR, *Castillo Páez*, *supra* note 22 at para 66.

emotional ties to Canada, they are treated as depersonalized risks in need of removal. Member Seibert-Fohr, concurring in *AHG v Canada*, describes this depersonalization: "Such treatment is not in accordance with the *ICCPR*, which is based on the inherent dignity of the human person and requires that the dignity of every individual be respected and for all persons to not be treated as mere objects of State authority."[39]

2.2 Deportation Scheme Violates the Right to Family and Private Life

Canada's deportation of LTPR to countries where they have few or no family or community networks violates Article V. Although the protection from interference with family or private life can be justifiably infringed, the risk of forced disruptions to family unity far outweighs Canada's interest in public safety and order.[40] Although family unification in Canada is a purported objective of *IRPA*,[41] the criminal inadmissibility scheme promotes the arbitrary and disproportionate separation of families.

2.2.1 Disproportionate Deportation Interferes with the Right to Family and Private Life

Canada's inadmissibility scheme infringes Article V of the *American Declaration* by imposing near-certain deportation without guaranteed consideration of family concerns. Article V protects against deportation where it would amount to unjustified interference with one's personal relationships with other human beings.[42]

The possible disruption of established personal connections by deportation is a lived reality of LTPR in Canada. LTPR, by their very nature, have strong and long-standing links with Canada. Although their immigration status limits their legal rights, it does not

> ban marriage, childbearing, school attendance, acceptance of employment, formation of relationships with friends and neighbours, religious observance, or many other forms of community…. The forcible, enduring, and possibly permanent severing of these ties is frequently 'heartbreaking,' and it is a 'savage penalty' in the everyday sense of the word. [43]

Revell v Canada (Citizenship and Immigration) is an example of the debilitating impacts of deportation on a LTPR's family life. Mr. Revell has lived in Canada for almost 46 years, after arriving at the age of

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[39] UNHRC, *AHG*, *supra* note 18 at para 2 (per Member Shany).
[40] UN HR Committee, *Canepa v Canada*, (1997) CCPR/C/59/D/558/1993 at para. 11.4 [UNHRC, *Canepa*].
[41] *IRPA*, *supra* note 2, s 3(1)(d).
[42] Eur Court HR, *Niemietz v Germany*, (1992) ECHR 80, 16 EHRR 97 at para 29; UN HR Committee, *Hendrick Winata and So Lan Li v Australia*, (2000) CCPR/C/72/D/930/2000 at para 7.2.
[43] Michael J Wishnie, "Immigration Law and the Proportionality Requirement" (2012) 2 UC Irvine Law Review 415 at 430.

10.[44] He has since established a family in Canada: three children, three grandchildren, and a partner of two years.[45] Mr. Revell has no ties to England and stated that "it would 'kill him' to be away from his family."[46] The Immigration Division, in determining if deportation should proceed, noted that the impacts of deportation on Mr. Revell would be "profound."[47]

However, Mr. Revell was convicted of drug trafficking in 2008, rendering him inadmissible under sections 36 and 37 of *IRPA*. He thus has no right of appeal to the Immigration Appeal Division and cannot raise humanitarian and compassionate concerns to dispute the removal order.[48] Deportation for Mr. Revell—and many others in his same position—represents a monumental disruption to his family and private life. For many LTPR, deportation is effectively exile.[49]

2.2.2 Canada's Interest in Maintaining Public Order Cannot Justify the Infringement

Although LTPR captured by sections 34, 35, and 37 of *IRPA* are thought to have engaged in criminal activity, deportation in the name of public safety is not always a proportionate response. An infringement of Article V can only be justified where two conditions are satisfied: (1) there is a "pressing need to protect public order," and (2) the infringement is proportionate to the State's objective.[50] For many LTPR, neither condition is satisfied.

Looking to the European jurisprudence, the Court of Human Rights has found that the State's interest in maintaining public order can be overridden by an individual's connection with the country of residence.[51] These considerations are counterbalanced by the State's interest in maintaining public order, the seriousness of the individual's criminal activity, and the length of time since the last criminal offence.[52]

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[44] *Revell v Canada (Citizenship and Immigration)*, 2017 FC 905 at para 27, 30 [*Revell* FC], aff'd 2019 FCA 262 [*Revell* FCA].
[45] *Revell* FC, *supra* note 44 at para 30.
[46] *Ibid*.
[47] *Ibid*.
[48] *Ibid* at para 25.
[49] Maginot, *supra* note 25 at 516.
[50] IACHR, *Canada Report*, *supra* note 1 at para 166. See also Eur Court HR, *Boultif v Switzerland*, (2001) ECHR 497, 33 EHRR 50 at para 46; Eur Court HR, *Lamguindaz v The United Kingdom*, (1993), (1994) 17 EHRR 213, ECHR 26 at 217. See also IACtHR, *Undocumented Migrants*, *supra* note 19 at 57.
[51] See e.g. Eur Court HR, *Beldjoudi v France*, (1992) ECHR 42, 14 EHRR 801; Eur Court HR, *Berrehab v The Netherlands*, (1988) ECHR 14, 11 EHRR 321**;** Eur Court HR, *Moustaquim v Belgium*, (1991) ECHR 3, 13 EHRR 802**;** Eur Court HR, *Nasri v France*, (1995) ECHR 24, 21 EHRR 458 [ECtHR, *Nasri*]; Eur Court HR, *C v Belgium*, (1996) ECHR 28, (2001) 32 EHRR 2; Eur Court HR, *Slivenko v Latvia*, (2004) ECHR 298, 39 EHRR 24; UN HR Committee, *Madafferi v Australia*, (2004) UN Doc CCPR/C/81/D/1011/2001 at para 9.8; UN HR Committee, *XHL v The Netherlands*, (2007) UN Doc CCPR/C/102/D/1564/2007 at para 11.
[52] Eur Court HR, *Boujlifa v France*, (1997) ECHR 83, 30 EHRR 419 at para 44.

Canada's deportation scheme considers none of these factors. It fails to appraise a LTPR's *real* risk to public safety or order. *IPRA* authorizes deportation on criminality grounds for an overly broad class of individuals. There is a wide range of seriousness. For example, "organized criminality" under section 37 can include a relatively low level of participation in a series of more minor offences such as shoplifting or be based on events that took place many years earlier when the person was in their youth.[53] The burden of proof for admissibility is lower than the regular legal standard in Canada. All that is required are 'reasonable grounds to believe' that an individual committed an act or was a member of a group that committed an act that is prescribed by law.[54] Thus, *IRPA* captures broad classes of persons[55] whose offences do not reach the level of particularly serious crime and are thus not indicators of risk to public safety.[56]

Furthermore, the process does not consider whether the person is unlikely to reoffend or whether the sentence is unusually more severe, given variations in sentencing patterns across jurisdictions.[57] For example, in *AHG v Canada*, the individual's criminality is tied to their health. The individual's 'risk' is minimized when they adhere to their medication and have support to manage their condition.[58] Thus, deportation to an unfamiliar country where a LTPR has inadequate medical and social support increases the risk of criminality and thus threat to public safety.[59]

In some extreme circumstances, however, the individual's criminality or other actions in Canada may justify their deportation.[60] It is not the deportation itself that violates the *American Declaration*. Rather, it is deportation in the absence of consideration of family unity and the LTPR's real risk that interferes with protected rights. Such concerns *may* be considered by the Minister's Delegate, but evidence illustrates that this rarely occurs.

The ties of these individuals to Canada create, according to the interpretation of Article V, a strong presumption against deportation. Canada cannot justify this violation on public safety grounds, as the inadmissibility scheme does not undertake an individualized inquiry on the likelihood of recidivism.

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[53] Canadian Bar Association, *supra* note 6 at 15.
[54] House of Commons, *supra* note 15 at at Angus Grant.
[55] Amnesty International, *supra* 17 at 6.
[56] *Ibid* at 5.
[57] Canadian Bar Association, *supra* note 6 at 1-2.
[58] UNHRC, *AHG*, *supra* note 18 at para 2 (per Member Shany).
[59] See also ECtHR, *Nasri*, *supra* note 51 at para 3 (per Member Morenilla): "Where such social integration fails, and the result is antisocial or criminal behaviour, the State is also under a duty to make provision for their social rehabilitation instead of sending them back to their country of origin, which has no responsibility for the behaviour in question and where the possibilities of rehabilitation in a foreign social environment are virtually non-existent."
[60] See e.g. Eur Court HR, *El Boujaïdi v France*, (1997) ECHR 76, (2000) 30 EHRR 223.

2.3 Deportation Scheme Violates the Right to Equality, Juridical Personality, Fair Trial, and Due Process

The *American Declaration* aims to assure the Principle of Equal Protection, in which all persons, including migrants and aliens, are equal before the law and are entitled to equal protection of the law without discrimination of any kind or on any ground. This protection extends to migrants, which the Inter-American Court considers a part of *jus cogens*.[61] LTPR's inability to file a constitutional claim challenging the lack of proportionality assessment within the inadmissibility regime is therefore both discriminatory and against the right to a fair trial.[62]

3 Request Under Articles 61, 62, and 66 of the IACHR's Rules of Procedure for a Thematic Hearing on Canada's Systemic Rights Violations of Long-Term Permanent Residents under the *IRPA*

The requesters respectfully propose a thematic hearing during the March 7th to 18th, 2022 session on the rights of LTPR facing deportation due to criminal inadmissibility. We request that the IACHR provide recommendations to Canada on how to align its laws and policies to respect the rights protected under the *American Declaration*.

If this request is granted, the requesters will supplement the information provided herein with additional written submissions relevant to the request. We anticipate that we will require approximately 30 minutes for a hearing.

Thank you in advance for your consideration of this request.

Respectfully submitted,

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[61] Inter-Am CHR, *Due Process in Procedures for the Determination of Refugee Status and Statelessness and the Granting of Complementary Protection*, OEA/Ser L/V/II.255 (2020) at paras 96, 99.
[62] See e.g. *Revell* FCA, *supra* note 44.

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4 Appendix A: History of Canada's Criminal Inadmissibility and Deportation Scheme

Canada's immigration regime has changed considerably since its inception, with increasing limitations and restrictions on non-citizens' rights. There are five distinct periods within this regime, with particular attention to appeal rights, humanitarian and compassionate review, deportation, and criminal inadmissibility:

1. **Pre-April 1, 1978**: Achieving Domicile Status and Canadian Citizenship
2. **1978–1995**: Equitable Jurisdiction and Proportionality in Deportation Decision-Making
3. **1995–2002**: Bill C-44's Expansion of Ministerial Discretion and Limitation of Appeal Rights
4. **2002–2013**: *IRPA* and the Further Reduction of Appeal Rights
5. **2013–present**: Bill C-43's Elimination of Appeal Rights and Humanitarian Consideration

4.1 Achieving Domicile Status and Canadian Citizenship

(Pre - April 1st, 1978)

A provision in the 1910 *Immigration Act* created a pathway to citizenship and permanent residency, or 'domicile' status. An immigrant could achieve domicile status by making Canada their permanent home for at least three years, later increasing to five years in 1919.[63] Until domicile was granted, an immigrant could be deported if they became classified as undesirable, which could include reasons of morality, mental illness, criminality, and more.[64] Throughout the 1950s and 1960s, the *Immigration Act* was amended several times in an attempt to address the inherent racism present within Canada's immigration policies. These amendments ushered in the Immigration Appeals Boards in 1952, limitations to Ministerial power in 1962, the removal of "preferred classes" and European bias in sponsorship regulations in 1962, and the extension of due process to all in 1962.[65]

4.2 Introduction of Equitable Jurisdiction and Proportionality in Deportation Decision-Making

(April 1st, 1978 – July 10th, 1995)

The period following April 1st, 1978, saw the abolition of the domicile principle and the introduction of the automatic appeal to the Immigration and Refugee Board. Besides allowing all permanent residents, except for those under security certificates, with a right to an appeal to the Immigration Appeal Division

[63] Dennis Molinaro, "Deportation From Canada" (2018) at 5 and 7, online (pdf): *The Canadian Historical Association Immigration and Ethnicity in Canada Series*.
[64] Erica Gagnon et al, "Immigration Act, 1910", online: *Canadian Museum of Immigration at Pier 21*.
[65] Kathryn Ungard, *Moral Panic and Embodied Threat: The Discourse on Criminal Deportation and Youth Experiences of Violence in Canada* (Master in Environmental Studies, York University, 2014) [unpublished] at 30.

(**IAD**), the *Immigration Act* contained the first comprehensive revision of immigration legislation and laid the foundations of the current system.[66] Permanent residents had the right to appeal a removal order on the basis of a question of law, fact, mixed law and fact, or on the ground that, with regard to all the circumstances of the case, they should not be ordered removed from Canada. This latter ground has been the most common basis for appeals and is known as the IAD's "equitable jurisdiction."[67] In 1992, the Supreme Court of Canada in *Canada (Minister of Employment and Immigration) v Chiarelli* held that the deportation of a permanent resident was not a breach of the principles of fundamental justice, as most individuals still had an opportunity to appeal.[68] In the case of *Canepa v Canada (Minister of Employment and Immigration)*, the Federal Court of Canada emphasized that circumstances both in favour and against the appellant must be considered, effectively introducing a proportionality analysis into deportation decision-making.[69]

4.3 Bill C-44's Expansion of Ministerial Discretion and Limitation of Appeal Rights

(July 10th, 1995 – June 28th, 2002)

In 1995, Bill C-44 introduced a new limitation on access to the IAD for persons whom the Minister declared a danger to the public. Bill C-44 was colloquially known as the "Just Desserts" Bill, as it was introduced amid a moral panic following two high-profile shootings. The first incident was an attempted robbery at a bakery that resulted in the death of a young White woman. Four young Black men were charged.[70] The second incident that spurred Bill C-44 was the shooting of Todd Baylis, a White police officer, by Clinton Gayle, a Black Jamaican national who had been under a deportation order and had lost his appeal at the IAD. The delay in Gayle's deportation was due to Citizenship and Immigration Canada, as it was then called, losing and then mismanaging his removal file. It was not due to overly lax deportation policy, as the media inaccurately portrayed.[71]

The Government responded by implementing tougher conditions for non-citizens convicted of crime to fix the perceived "criminal immigrant" problem.[72] Bill C-44 enabled the deportation of any non-citizen (including permanent residents and *Refugee Convention* refugees, and regardless of how long

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[66] John A Dent, "No Right of Appeal: Bill C-11, Criminality, and the Human Rights of Permanent Residents Facing Deportation" (2002) 27 Queen's LJ 749 at 753-754; Baglay, *supra* note 7 at 57.
[67] Dent, *supra* note 66 at para 7 (QL).
[68] *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711, 90 DLR (4th) 289.
[69] *Canepa v Canada (Minister of Employment and Immigration)*, [1992] 3 FC 270, 93 DLR (4th) 589.
[70] Anna Pratt, *Securing Borders: Detention and Deportation in Canada* (Vancouver, BC: UBC Press, 2005) at 140-141.
[71] Canadian Bar Association, *supra* note 6 at 6, note 3. See also House of Commons, *supra* note 15 at Jinny Jogindera Sims.
[72] Pratt, *supra* note 70 at 140-41.

they had been living in Canada) without right of appeal where the Minister issued an "opinion" that the person was a "danger to the public."[73] However, permanent residents facing deportation but were not designated a "danger to the public" kept their full appeal rights.[74] Subsequently, access to an appeal became more unpredictable and dependent on ministerial opinion.[75]

Criticism of Bill C-44 was widespread.[76] Critics argued the Bill failed to adequately define "danger to the public," while also granting the Minister extensive discretionary powers. The Bill also did not account for variations in sentencing across different jurisdictions.[77] Bill C-44 thus relocated this discretion from the IAD to the Minister and amended the nature of the discretion to allow a permanent resident to remain on equitable grounds. These changes "represented a shift from the adjudicative to the political end of the spectrum."[78]

4.4 The New IRPA and Further Reduction of Appeal Rights

(June 28th, 2002 – June 19th, 2013)

Following on the heels of Bill C-44, Bill C-11 established the new *Immigration and Refugee Protection Act*. Bill C-11 represented the first major change to immigration law in Canada since 1976. Leading up to the introduction of the Bill, advocates and lobbyists recommended greater access to appeals and consideration of the individual's length of residency.[79] Instead, Bill C-11 allowed the automatic loss of appeal rights for individuals found inadmissible on the grounds of serious criminality, security, violating human or international rights, or organized criminality.[80] The legislation expressly ignored other considerations, such as time spent living in Canada, humanitarian or compassionate reasons, or the likelihood of recidivism.[81]

A three-person panel conducted a legislative review beginning in 1996, resulting in the "Not Just Numbers" report, which found that public perception of immigrant criminality was blown out of proportion. The report explicitly emphasized the importance of a right of review for persons facing

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[73] Ungard, *supra* note 65 at 37.
[74] Dent, *supra* note 66 at para 12.
[75] Baglay, *supra* note 7 at 57.
[76] Dent, *supra* note 66 at 750; Pratt, *supra* note 73 at 141.
[77] Pratt, *supra* note 70 at 142-43.
[78] Dent, *supra* note 66 at 757.
[79] Ungard, *supra* note 65 at 39.
[80] Bill C-11, *An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger*, 1st Sess, 37th Parl, 2001 (assented to 1 November 2011), SC 2001, c 27, ss 64(1-2).
[81] *Ibid*. See also *Medovarski v Canada (Minister of Citizenship and Immigration); Esteban v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51.

removal.[82] Furthermore, a June 1998 Standing Committee on Citizenship and Immigration report titled "Immigration Detention and Removal" recommended that the federal government provide certain protections for LTPR, especially if they arrived in Canada at a young age.[83] The Government agreed to consider this recommendation the following year and critically examined the "danger to the public" clause in "Building on a Strong Foundation for the 21st Century (White Paper)."[84] Despite the various recommendations put forth as well as the Standing Committee's findings, the Government published the proposed regulations that removed the right of non-citizens to appeal their deportation order if sentenced to two years or more for a crime carrying the maximum sentence of 10 years or more. The law contained none of the Senate recommendations about the right of appeal for long-term residents in Canada who receive such a sentence.[85]

4.5 Bill C-43's Elimination of Appeal Rights and Humanitarian Consideration

(June 13th, 2013 – Present)

Like Bill C-44, Bill C-43 was introduced in the wake of racialized and immigrant violence. Multiple high-profile shootings in downtown Toronto received heightened media attention, igniting panic about violence in the city by racialized persons.[86] This led to Bill C-43, called the *Faster Removal of Criminals Act*. The Bill amended *IRPA* in two major ways. First, it removed the right of appeal to the IAD for an even larger class of individuals by reducing the minimum sentence for convicted criminals from two years to just six months under section 64(2).[87] Second, Bill C-43 barred individuals found inadmissible under sections 34, 35, or 37 from bringing a humanitarian and compassionate application.[88]

According to the government, Bill C-43 achieved three key goals: (1) facilitate the removal of "dangerous foreign criminals" from Canada; (2) make entry for "those who may pose a risk to Canada" more difficult; and (3) remove barriers for "genuine visitors" in gaining entry to Canada.[89] There was little to no empirical evidence to support the idea of increased immigrant violence. Experts testified that

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[82] Dent, *supra* note 66 at 758-59; Citizenship and Immigration Canada, *Immigration Legislative Review, Not Just Numbers: A Canadian Framework for Future Immigration* (Ottawa: Minister of Public Works and Government Services, 1998) [Citizenship and Immigration Canada, *Not Just Numbers*].
[83] Citizenship and Immigration Canada, *Not Just Numbers*, *supra* 82.
[84] Dent, *supra* note 66 at 760; Citizenship and Immigration Canada, *Building on a Strong Foundation for the 21st Century: New Directions for Immigration and Refugee Policy and Legislation* (Ottawa: Ministry of Public Works and Government Services Canada, 1998).
[85] Paul Copeland, "The Dope Sheet: Dangerous Opinions, Dangers Offenders, and Dangerous Bill C-36" (2001) 22:1 For The Defence 15 at para 5 (QL).
[86] Ungard, *supra* note 65 at 43-44.
[87] *Faster Removal of Criminals Act*, SC 2013, c 16.
[88] *Ibid*.
[89] Immigration, Refugees and Citizenship Canada, News Release, "Introducing the Faster Removal of Foreign Criminals Act" (20 June 2012), online: *Government of Canada*.

sections 34, 35, and 37 were overly broad and deprived a large group of people from an appeal. Given the lower standard of proof and the fact that a criminal conviction is not required, many more people could potentially be wrongfully found inadmissible.[90]

Bill C-43 represented a significant change in immigration law in Canada and a sharp turn away from Canada's overall humanitarian tradition. As some experts testified: "there has always been a broad discretion on the part of the minister or a body like the Immigration Appeal Division to allow people to remain in Canada on humanitarian and compassionate grounds in recognition of the fact that hard and fast rules don't fit with the fact that people are human beings."[91] Now, large groups of people will not be receiving any type of discretion. Prominent Canadian organizations, including the Canadian Bar Association and Amnesty International Canada, expressed serious concerns about the Bill and advocated for it to be withdrawn or substantially amended.

Ultimately, Canada's immigration system today represents a marked departure from the *Immigration Act* in the 1970s, which permitted proportionality and humanitarian consideration in deportation decision-making. The association of criminality and immigration enforcement is not a new concept. But, the policy basis of criminal inadmissibility is reflective of a "conceptual slippage" between criminals and "foreigners" that is becoming more and more pronounced and being used to support exclusionary immigration practices.[92] Under the guise of protecting public safety, *IRPA* facilitates the deportation of a wide class of individuals without opportunities for appeal or consideration of humanitarian grounds.

[90] House of Commons, *supra* note 15 at Angus Grant.
[91] House of Commons, *supra* note 15 at Barbara Jackman.
[92] Pratt, *supra* note 70 at 141.

5 Appendix B: Criminal Inadmissibility Provisions of the *Immigration and Refugee Protection Act*

***Immigration and Refugee Protection Act*, SC 2001, c 27**

Security

34 (1) A permanent resident or a foreign national is inadmissible on security grounds for

(a) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;

(b) engaging in or instigating the subversion by force of any government;

(b.1) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;

(c) engaging in terrorism;

(d) being a danger to the security of Canada;

(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or

(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).

Human or international rights violations

35 (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for

(a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the Crimes Against Humanity and War Crimes Act;

(b) being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the Crimes Against Humanity and War Crimes Act;

(c) being a person, other than a permanent resident, whose entry into or stay in Canada is restricted pursuant to a decision, resolution or measure of an international organization of states or association of states, of which Canada is a member, that imposes sanctions on a country against which Canada has imposed or has agreed to impose sanctions in concert with that organization or association;

(d) being a person, other than a permanent resident, who is currently the subject of an order or regulation made under section 4 of the Special Economic Measures Act on the grounds that any of the circumstances described in paragraph 4(1.1)(c) or (d) of that Act has occurred; or

(e) being a person, other than a permanent resident, who is currently the subject of an order or regulation made under section 4 of the Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law).

[...]

Organized criminality

37 (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for

(a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or

(b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or laundering of money or other proceeds of crime.

Application

(2) Paragraph (1)(a) does not lead to a determination of inadmissibility by reason only of the fact that the permanent resident or foreign national entered Canada with the assistance of a person who is involved in organized criminal activity.