Legal Responses Towards Persons Suspected of International Crimes:

An examination of four cases in the Canadian courts

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Abstract

Canada's War Crimes Program pursues varying criminal and immigration responses towards individuals suspected of international crimes. The existing, but limited, literature on international crimes explores different state responses and the increasing use of immigration responses over criminal responses. Specifically, scholars have written on state adherence to the No Safe Haven approach where measures that prevent the entry of suspected individuals are being used more than measures that finds suspected individuals criminally responsible through prosecution. Commonly when scholars write on legal cases that include an individual suspected of international crimes, there is a sole focus on the response being sought and not the presentation of the response within courts that may provide insight into the responses.

This thesis uses the legal cases of *Seifert*, *Munyaneza*, *Skomatchuk*, and *Ezokola* to analyze four different legal responses sought in Canadian courts. By conducting a thematic analysis on my dataset of court judgments and intervener factums, my analysis found legal documents to reveal Canada's practice of No Safe Haven within the courts. Despite the assumption that a presence of international crimes in a case will lead to a criminal response, my findings suggest that state actors present cases in a way that adhered more to preventing Canada from being a safe haven to suspected individuals as opposed to having Canada be at the forefront of preventing the impunity of suspected individuals. The importance of what I revealed contributes to understanding the actions of the War Crimes Program, and of legal actors' practices in responding to this social and moral concern.

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Acronym List

BCCA	British Columbia Court of Appeal
BCSC	Supreme Court of British Columbia
CAHWCA	*Crimes Against Humanity and War Crimes Act*
CanLII	Canadian Legal Information Institute
CBSA	Canada Border Services Agency
CCIJ & CLIHR	Canadian Centre for International Justice and the Canadian Lawyers for International Human Rights
CCIJ & IHRP	Canadian Centre for International Justice and the International Human Rights Program at the University of Toronto Faculty of Law
CCLA	Canadian Civil Liberties Association
CCR	Canadian Council for Refugees
DoJ	Department of Justice
DRC	Democratic Republic of Congo
FC	Federal Court
FCA	Federal Court of Appeal
ICC	International Criminal Court
IRB	Immigration and Refugee Board
IRCC	Immigration, Refugees, and Citizenship Canada
IRPA	*Immigration and Refugee Protection Act*
NIMBY	Not in My Backyard
QCCA	Court of Appeal of Quebec
QCCS	Superior Court of Quebec
RCMP	Royal Canadian Mounted Police
SCC	Supreme Court of Canada
UNHCR	United Nations High Commissioner for Refugees
WWII	World War II

Introduction

International crimes consist of crimes against humanity, war crimes, genocide, and crimes of aggression. The International Criminal Court (ICC) (n.d.) labels these large-scale afflictions as the "gravest crimes". Within the global fight against impunity, Canada, along with many states, addresses the issue concerning the lack of justice and responsibility faced by those who commit international crimes. Specifically, Canada's response includes the enactment of the *Crimes Against Humanity and War Crimes Act* (CAHWCA) and the formation of the War Crimes Program. Canada's response, however, is not limited to just seeking criminal prosecutions towards suspected individuals of international crimes. There are different criminal and immigration-based responses that the state pursues. I sought to explore the use of these different responses, and to understand the presentation of these responses in court. As such, my research question was, "*what do legal documents reveal on how various parties respond to persons suspected of international crimes*?"

In my research question, the "legal documents" I refer to are court judgement documents and intervener reports. The expression "various parties" includes a range of actors. Specifically, these "parties" are the legal actors present in my dataset which include interveners, judges, prosecutors, defence counsels, and, in one case, Immigration and Refugee Board (IRB) members.

My research question also mentions "international crimes", which by definition are the four crimes of crimes against humanity, war crimes, genocide, and crimes of aggression. For the purposes of my thesis, however, I exclusively use "international crimes" as referring only to the mass atrocity crimes of crimes against humanity, war crimes, and genocide. Despite my literature review referencing the ICC which has jurisdiction on all four international crimes, I do not focus

on crimes of aggression. This crime was a late addition to the ICC's jurisdiction, and the court can only prosecute crimes of aggression since 2018. Therefore, scholars often exclude this crime in the literature that I draw on in this thesis. Also, I am exclusively looking at cases in the Canadian context, and this crime is absent from the CAHWCA and from the mandate of the War Crimes Program.

This thesis examines the different legal approaches present in Canadian courts and, to answer my research question, I focused on four legal cases with four legal approaches. These include the legal cases of *Seifert* (extradition), *Munyaneza* (criminal prosecution), *Skomatchuk* (post-factum immigration fraud and citizenship revocation), and *Ezokola* (refugee exclusion) which I analyzed using thematic analysis. I chose this method of analysis for its ability to identify the meaningful themes that characterized the frames at play in each legal approach. I applied thematic analysis to my dataset consisting of court judgment documents and intervener reports. Since I was interested in the ways legal actors address these cases, I used the conceptual tools of legal framing, ad hoc instrumentalism, jurisdictional games, and discretionary decision-making to make sense of and explain the socio-legal construction and presentation of my cases. Ultimately, I found that there was no one way to address individuals suspected of international crimes as the four cases had different presentations and constructions as per the legal frame of the case. The framing of the case is dependent on what legal actors were presenting in court either implicitly or explicitly.

The importance of my research on how legal actors respond to individuals suspected of international crimes extends beyond contributing to and filling the gaps within the criminological literature on this topic. There is indeed very limited criminological scholarship on this topic. My research help us understand how suspected individuals of such grave crimes are being addressed

and why there are different ways of addressing them. More broadly, my research contributes to responsibilizing criminology on matters concerning international crimes and human rights violations. There is a dearth of research within the field on these topics – which reflects traditional criminology's historically limited interest in crimes of the powerful, state crimes, and human rights violations - and my project acknowledges the responsibility and obligation of the discipline to address these topics. There is also a social and moral concern to addressing such suspected individuals and delving deeper into how these cases are being presented. The rise of immigration-based measures can explain the extent to which the incorporation of international law into domestic law is being practiced and enforced. By focusing on the reality of how such cases are addressed, this research can also help with our perception on how these cases can be addressed. Additionally, this research is important by drawing attention to the challenges and limitations faced by the War Crimes Program and how these challenges and limitations can result in differential state responses towards individuals suspected of international crimes.

In Chapter 1, I explore the literature and present what scholars have written in the field of international crimes and international law, particularly the obligations of the Rome Statute under domestic law. In the literature review, I begin the overview on what Canada's commitments are and on the tools that the state implemented to address suspected individuals of international crimes, namely the War Crimes Program and the CAHWCA. I then expand my presentation of the literature to include an international focus on how other states are approaching international crimes. The literature presents a Global Enforcer approach and a No Safe Haven approach. Of these two approaches, I bring forth scholars' claims and studies that demonstrate how Canada adheres to the latter approach. The aim of my literature review is to establish the current state of

the scholarship to situate how my research will contribute to the literature on international crimes.

In Chapter 2, I explain my theoretical framework. In this chapter, I present my conceptual tools of legal framing, ad hoc instrumentalism, jurisdictional games, and discretionary decision-making. Specifically, I identify and explain my choice of using legal framing as my overall framework that is complemented by other concepts. My decision to use legal framing as the primary framework stems from its ability to explain the processes behind legal decision-making and to identify competing frames of a case that can lead to varying responses. I also draw a connection between the remaining concepts and explain how the connection led these concepts to be secondary within my conceptual framework and supplementary to legal framing.

In Chapter 3, I outline my methodology which includes how I selected the four legal cases, why I specifically chose *Seifert, Munyaneza*, *Skomatchuk*, and *Ezokola*, and why I opted to analyze the different approaches as opposed to the most commonly occurring approaches. In this chapter, I breakdown each case by providing a synopsis of the legal facts and of the documents I included and excluded from my analysis. This breakdown is summarized in Appendix 1. I finish the discussion in this chapter by explaining my use of thematic analysis and presenting my coding process. In particular, I justify my selection of 'dangerousness', 'no safe haven', 'responsibility towards others', 'global leadership', and 'justice' as deductive codes for my analysis.

In Chapters 4 through 6, I present my findings and analysis. In Chapter 4, I argue that state actors put a varying emphasis on an individual's criminality to pursue an immigration sanction. To demonstrate this, I analyzed the legal cases of *Ezokola* and *Skomatchuk* to examine how state actors were either strongly emphasizing or downplaying the individual's suspected

criminal activities as part of their strategy to pursue either a frame of refugee exclusion or post-factum immigration fraud.

In Chapter 5, my argument is based on my identification of the 'no safe haven' theme within the data. I noticed a pattern where legal documents revealed presentations by actors about the importance of preventing individuals suspected of international crimes from seeking refuge in a new country, or about Canada not wanting to become a safe haven country. The presence of this pattern does not mean there had to be a real practice of No Safe Haven as I found this pattern in all four of the legal cases. More so, identifying this pattern in both immigration and criminal cases led me to argue that the criminal/immigration binary that is described in the literature is in fact an exaggeration.

Finally, in Chapter 6, I discuss my findings on two patterns related to responsibility and how these patterns let me to discover the two themes of 'international concerns' and 'national concerns'. In actors' presentation of the frames, legal documents revealed a difference between a responsibility to *whom* and a responsibility to *what*. This difference led me to identify two themes and argue the relevance of 'national concerns' in relation to Canada's practice.

1. Literature Review

State incorporation of the Rome Statute into domestic law impacts state actors' responses to international crimes. More so, unequal incorporation can result in varying legal strategies both within the country and across different countries. As such, depending on how a state incorporates international law under domestic law, different legal responses towards individuals suspected of crimes against humanity, war crimes, and genocide will occur.[1]

In this chapter, I first provided the Canadian context surrounding the CAHWCA and Canada's War Crimes Program to set a historical basis and describe the particularities of Canada's approach. After providing this context, I then situate Canada's program within the literature and look at how scholars write about universal jurisdiction, both generally and specifically in the Canadian context. I then broaden this discussion beyond the Canadian context by looking at the scholarship on how other states respond to international crimes and incorporate the obligations of the Rome Statute into their domestic law. To conclude I wrote about a consequence that arises from certain responses which the literature sometimes labels as "crimmigration".

1.1 The *Crimes Against Humanity and War Crimes Act* and Canada's War Crimes Program

Canada signed the Rome Statute on December 18, 1998. The Rome Statute is an international treaty created during the 1998 Diplomatic Conference in Rome. Most importantly,

[1] In this thesis I use "individuals suspected of …" or "suspected individuals" when referring to people are are suspected of being perpetrators of international crimes. The use of the word "criminal" when referring to individuals involved in international crimes is representative of the scholarship and so I use that term when engaging with scholars, especially in this chapter. Many scholars who use the "criminal" label may have difficulties acknowledging the separation between the seriousness of the offence and the individual. Not relying on the label "criminal" in my thesis was a conscious decision that recognizes the social construction of the criminal label and attempts to avoid applying the harmful label to individuals who have not yet been found criminally guilty, and who are more than just the crime that they may have committed.

the Rome Statute established and outlined the conditions of the International Criminal Court (ICC). The ICC is the first permanent international criminal court and is a complementary court of last resort to hold individuals accountable for committing genocide, war crimes, crimes against humanity, and crimes of aggression by investigating and prosecuting such criminals. The Rome Statute also defines these crimes. Adopting the Rome Statute in domestic law and being a signatory that means states recognize these severe crimes, support the ICC, and join the ICC in its fight against impunity towards criminals of international crimes (Government of Canada, 2019; International Criminal Court, n.d.; Newton, 2001). Although Canada was the 14th state to sign the Rome Statute, it became the first state to implement the Rome Statute's obligations under domestic law through the CAHWCA, which received royal assent on June 29, 2000 (Government of Canada, 2019).

The CAHWCA grants Canada jurisdiction over crimes against humanity, war crimes, and genocide and the ability to prosecute suspected criminals for these crimes. There are four types of jurisdictions granted to Canada through the CAHWCA as described by both Lafontaine (2010b) and the Government of Canada (2019). Territorial jurisdiction provides Canada with jurisdiction over crimes committed on Canadian territory. Next, active personality/nationality jurisdiction consists of jurisdiction over crimes committed by Canadians regardless of where they took place. Third, passive personality/nationality jurisdiction refers to jurisdiction over crimes committed against Canadians. Lastly, universal jurisdiction involves jurisdiction over any individual in Canada for crimes under the CAHWCA regardless of where these crimes took place or if they involved Canadians. This form of jurisdiction will be further explained in section 1.2 of this literature review. Lafontaine (2010b) noted that having different forms of jurisdiction

is consistent with Canada's desire to be at the forefront of the fight against the impunity of those who commit international crimes.

Of note, a temporal limit to the practice of jurisdiction exists. Lafontaine (2010b) writes that Canada may retrospectively prosecute crimes committed outside the country only if during the time and place of the act, it was considered an international crime under international customary or conventional law. Additionally, the temporal limit prevents individuals from prosecuting international crimes that took place in Canada prior to October 23, 2000.

Canada's commitment to the ICC is outlined on the Government of Canada's (2019) webpage, which details the state's participation in the development of the court and participation during the Rome Conference. The Canadian delegation at the conference helped in formulating the proposal that concerned the Court's jurisdiction and procedures. Additionally, Canadian Philippe Kirsch was chair of the Committee of the Whole during the Rome Conference. The committee was a "pivotal negotiating body at the conference." (Government of Canada, 2019, para. 2). Since the conference, the Canadian government has sponsored Canadian organizations to develop a manual to assist states in legislating the obligations of the Rome Statute into their domestic laws. Additionally, there is a Canadian presence within the operation of the ICC as Philippe Kirsch was an elected judge and president of the ICC between 2003 and 2009, and currently, Kimberly Prost has been an elected judge to the ICC since 2017 (Government of Canada, 2019).

Before the Rome Statute and Canada's commitment to the ICC, Canada had another response to international crimes. This took the form of the 1985 Commission of Inquiry on War Criminals, also known as the Deschênes Commission after a Quebec judge who led the investigation, that responded to the allegations of Canada harbouring Nazi war criminals

(Department of Justice, 2016). The Deschênes Commission investigated the claims that up to 3,000 Nazi war criminals were living in Canada (Weiss, 2012). Despite this high number, the Deschênes Commission only investigated 774 people and concluded in its report in 1986 that there had been an overestimation of the number of Nazi war criminals residing in Canada (Hamlin & Rowen, 2020). Following their report, efforts to prosecute or deport these suspected war criminals took place through a unit that included the Department of Justice (DoJ) and the Royal Canadian Mounted Police (RCMP) (Department of Justice, 2016). In 1987, Parliament amended the *Criminal Code* to give Canada jurisdiction over international crimes and to allow for the prosecution of suspected criminals of international crimes; however, only four prosecutions took place. Moreover, Weiss (2012) directly called the *Criminal Code* amendments a "failure" (p. 585) for the legislation's inability to lead to many convictions.

The most notable of the four prosecutions was the case of Imre Finta, who was acquitted under the 1987 *Criminal Code* provisions. Hamlin and Rowen (2020) detailed this case and wrote on the great impact it had on how Canada would subsequently respond to suspected criminals of international crimes. Finta was a Hungarian police officer accused of assisting the Nazis in their crimes during World War II (WWII). In March of 1994, the Supreme Court of Canada (SCC) acquitted Finta due to the defence of obedience to superior orders. As per the defence, Finta could not be found guilty because he was forced to obey orders and had no other moral choice in his situation. Hamlin and Rowen (2020), Weiss (2012), and Lafontaine (2010b) noted the precedent caused by this verdict that would make further criminal prosecutions of international crimes difficult to pursue. As a result, Finta's acquittal was the last attempt to prosecute suspected criminals of international crimes under the 1987 *Criminal Code* provisions. Lafontaine (2010b) further elaborates that since acquittal represented a "death warrant" (p. 4) for

criminal prosecutions, immigration-based responses became the preferred measure until the enactment of the CAHWCA.

Following *Finta* in 1998, the same year as the Rome Statute Conference, the Government of Canada announced the creation of the War Crimes Program to expand the previous unit's sole focus on Nazi war criminals to include contemporary war criminals. The new War Crimes Program currently involves the DoJ, the RCMP, Immigration, Refugees, and Citizenship Canada (IRCC), and the Canada Border Services Agency (CBSA) (Department of Justice, 2016). According to the Department of Justice (2016a), the War Crimes Program has four objectives: to prevent the entry of individuals suspected of the core international crimes, to detect these suspected individuals if they are already in Canada, to revoke the citizenship of these suspected individuals and deport them, and lastly, to pursue criminal prosecution when appropriate. These objectives ensure that Canada's "commitment" to international justice and against impunity are being "support[ed]" (Department of Justice, 2016, para. 1). The program relies on the CAHWCA's definition of crimes against humanity,[2] war crimes,[3] and genocide[4]. The enactment of the CAHWCA marked a renewed chance for criminal prosecutions in Canada after what

[2] Defined as, "murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission" (CAHWCA, 2000, s.4(3) & s.6(3)). The Quebec Court of Appeal clarified in 2014 that this list of what may constitute a crime against humanity is not exhaustive and other acts may be considered an offence of crime against humanity (*Munyaneza c. R*, 2014).

[3] Defined as, "an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission" (CAHWCA, 2000, s.4(3) & s.6(3)).

[4] Defined as, "an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that, at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission" (CAHWCA, 2000, s.4(3) & s.6(3)).

Lafontaine (2010b) and many analysts viewed as the failure of the 1987 *Criminal Code* provisions. According to Weiss (2012), the announcement of the new War Crimes Program coupled with the CAHWCA and Canada's participation in the Rome Conference provided an opportunity for the country to be seen on the international stage as seriously committed against the issue of individuals suspected of international crimes in Canada.

In addition to the CAHWCA, actors of the War Crimes Program utilize other relevant legislation. Examples include the *Mutual Legal Assistance in Criminal Matters Act,* which was amended to grant Canada the ability to aid in ICC investigations (Government of Canada, 2019). Amendments to the *Extradition Act* granted Canada the ability to arrest and surrender suspects to the ICC, and to prevent such suspects from claiming immunity in Canada to evade their arrest (Government of Canada, 2019). The CAHWCA also led to amendments in other *Criminal Code* provisions, specifically those concerning parole eligibility, witness protection, and proceeds of crime (Government of Canada, 2019). The *Citizenship Act* makes direct reference to the CAHWCA when stating who should and should not be granted citizenship as well as including that those who obtain citizenship by false representation, fraud, or knowingly concealing material circumstances may have their citizenship revoked. Lastly, the *Immigration and Refugee Protection Act* (IRPA) also makes direct reference to the CAHWCA when stating that those who commit international crimes are inadmissible to Canada. Also, section 98 of the IRPA incorporates Article 1F(a) of the Refugee Convention, thus making it possible for the IRB to exclude individuals if there are serious reasons for considering that they committed international crimes. Consequently, other Canadian legislation complements the CAHWCA and contributes to the War Crimes Program's cooperation with the ICC.

Following this contextual presentation of Canada's efforts, both past and present, against international crimes and its suspected individuals, I will now discuss how these efforts are analyzed within the scholarly literature. I will draw out the discussions about Canada's War Crimes Program in relation to universal jurisdiction and the incorporation of the Rome Statute into domestic law.

1.2 Scholarship on Canada's War Crimes Program

The CAHWCA ascribes Canada the universal jurisdiction to prosecute suspected perpetrators of international crimes regardless of where the crime was committed and of whether the perpetrator or victim is Canadian (Government of Canada, 2019). In his study on universal jurisdiction, Langer (2015) identifies the Global Enforcer approach and the No Safe Haven approach as two ways of exercising jurisdiction. The Global Enforcer approach centres on preventing international crimes by prosecuting and punishing those responsible for committing international crimes. This form of exercising universal jurisdiction emphasizes anti-impunity, and Langer (2015) highlights that this is the primary reason for why many human rights centred litigants, advocates, and NGOs favour the approach. In contrast, Langer (2015) writes that states exercise the No Safe Haven approach to prevent themselves from becoming safe havens for individuals suspected of international crimes seeking refuge. Likewise, Hamlin and Rowen (2020) argue that the No Safe Haven approach intertwines with the politics of "Not in My Backyard" (NIMBY). The intertwinement occurs because viewing such suspected criminals as unwanted people in a country may result in the use of immigration-based measures, such as screening practices for incoming immigrants and refugees, to prevent their entry into the country and provide a sense of border security against those deemed underserving of a safe haven.

Most scholars agree that, of these two approaches, Canada is more aligned with the No Safe Haven approach. Within the literature, scholars write more about the immigration-focused and exclusionary measures that Canada imposes instead of the criminal prosecutions that Canada conducts against suspected criminals of international crimes (Bond et al., 2020; Simeon, 2015; Lafontaine, 2010b; Hamlin & Rowen, 2020; Weiss, 2012; Bond, 2017). The state's reliance on immigration measures is seen in Bond's (2017) analysis where statistics between 2004 and 2014 demonstrated that the IRB issued 476 removal orders based on individuals either excluded under Article 1F(a) or inadmissible for security reasons. Additionally, there were 78 findings of removal orders issued for human or international rights violations which reflects section 35 of the IRPA that outlines perpetrators of international crimes as inadmissible to the country. This contrasts with how, in that same time period, Canada has only had one criminal conviction under the CAHWCA, and this was in 2009 (Lafontaine, 2010a). Alongside Bond (2017), Lafontaine (2010b), Hamlin and Rowen (2020), and Langer (2015) also directly mentioned Canada as exercising the No Safe Haven approach. I will now present the scholarship that goes more in depth into Canada's No Safe Haven approach to international crimes.

Lafontaine (2010b) identifies three categories within the War Crimes Program's approach towards suspected criminals of international crimes and two of these categories align with the frameworks provided by Bond et al. (2020) and Bond (2017). The first category by Lafontaine (2010b) is the prevention of admission into Canada through denying visas and/or entry into the country. This coincides with the framework of inadmissibility analyzed by Bond et al. (2020) and Bond (2017), which they define as barring non-Canadian citizens from entering or staying in Canada due to reasons of security, criminality, health, or finance as per sections 34 through 39 of the IRPA (Bond, 2017; Bond et al., 2020). The second category by Lafontaine (2010b) is

prosecution under the CAHWCA or extradition to a foreign government or international court/tribunal upon request. Lastly, the third category by Lafontaine (2010b) includes any other remedy focused on national interests such as citizenship revocation or exclusion from refugee protection. This category relates to the framework of exclusion by Bond et al. (2020) and Bond (2017) that centres directly on Article 1F(a), which provides for the exclusion of a claimant from refugee protection if there is serious reason for considering that they committed a serious crime. This is similar to Lafontaine's (2010b) third category because state actors practice exclusion for what they see as the best interest for Canada. Whereas Lafontaine (2010b) organizes the different responses in a categorical and open-ended way, Bond et al. (2020) and Bond's (2017) frameworks are direct retellings of the inadmissibility and exclusionary provisions in the IRPA. These categories and frameworks are also aligned with the War Crimes Program's objectives described in the previous section.

The War Crimes Program's use of the No Safe Haven approach has much to do with the funding of the program, as noted by Hamlin and Rowen (2020), Lafontaine (2010b), and Baker et al. (2020). The latest online report on the War Crimes Program is from 2016 which revealed the program's shared annual budget of $15.6 million across the CBSA, DoJ, IRCC, and RCMP. This budget has remained stagnant since 1998 and the report cited the financial strain inflicted on the program due to inadequate funding (Department of Justice, 2016b).[5] In their comparative analysis of war crime units, Baker et al. (2020) noticed how limited funding is a problem for many other national war crimes units as well, including in the USA and across Europe. Lafontaine (2010b) views the reliance on the No Safe Haven approach as resulting from a

[5] Although this information is from the 2016 program evaluation report, this is the latest report I could access. I do believe that since this report there has not been a change in funding as Hamlin and Rowen is a source cited from 2020 and the authors reiterate the same numbers from the 2016 report.

stagnant budget unable to keep up with the rising costs of responding to suspects of international crimes. For instance, the 2016 evaluation report on the War Crimes Program indicated the cost of criminal investigation and prosecution as over $6 million whereas the cost in challenging refugee status is $55,162, the cost of challenging admissibility is $122,908, and the cost of citizenship revocation is $1.58 million (Department of Justice, 2016b). Having a budget disproportional to the costs needed for criminal prosecutions leads to a decreasing use of this legal tool, and, thus, an increase in immigration measures (Lafontaine, 2010b).

Alternatively, Hamlin and Rowen (2020) explain how prosecution is not a priority and so resources can be better used elsewhere. Ensuring national security via administrative and immigration-focused measures is an example of where redirected resources could go as this has become a rising priority since 9/11 and the War on Terror. For this reason, they argue that Canada prioritizes security over accountability. The literature, especially Baker et al. (2020) and Lafontaine (2010b), presents a consensus that the War Crimes Program has limited funding, but there are differing opinions on whether the use of immigration measures stems from a concern for cost efficiency or from prioritizing national security. In either case, the use of immigration measures is also the reason for critiques about the program.

Critiques within the scholarship on the War Crimes Program primarily revolve around the inadequate justice when practicing the No Safe Haven approach to international crimes. The critique focuses on Canada's unwillingness to honor its obligations as signatory of the Rome Statute and the international agreements that Canada has made to fight impunity by bringing justice in the form of criminal prosecutions against suspected criminals of international crimes (Weiss, 2012; Amnesty International, 2020; Lawyers Rights Watch, 2011). Firstly, in his critique on Canada's failure to prosecute, Weiss (2012) writes that the War Crimes Program has been

more effective in deporting suspected criminals of international crimes instead of ensuring justice and protecting human rights by prosecuting and holding accountable these suspected criminals. Further, he insists that legislating the jurisdictional power to prosecute, but not acting upon it, is the bare minimum that Canada can do to fulfill its international obligations and incorporate the Rome Statute.[6] However, van de Wilt (2015) writes that critiquing a country like Canada for not exercising its jurisdiction and prosecuting these criminals as per international obligations "exaggerates" the "strictness" (p. 240) of such treaties. In addition, Megret (2015) writes that the goal of international criminal justice to benefit humanity, which critics like Weiss (2012) draw on when states do not prosecute, is also an exaggeration. Both counterarguments thus criticize the primary critique Canada receives concerning its lack of prosecution.

Weiss (2012) also distinguishes between treaty provisions and customary international law. Unlike the former, customary international law does not carry a responsibility to prosecute in the same way (Lafontaine, 2010b). Furthermore, if customary international law does not necessitate states to extradite or prosecute, then states may use this reasoning to not do so despite treaty obligations (Weiss, 2012). This reasoning is also what Weiss (2012) considers when specifically calling out Canada as "say[ing] one thing, yet do[ing] another" (p. 603). Canada, however, is not the only state to 'say one thing but do another' as Weiss (2012) extends his criticism to the USA.

While Canada is mentioned in much of the literature that covers international responses to these crimes, the scholarship specific to Canada's response to international criminals and its

[6] The obligations that Weiss (2012) refers to are in the Rome Statute, but also the Geneva Conventions (i.e., the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment) of which Canada is a party. In addition, Weiss (2012) and Lafontaine (2010b) highlight the duty to prosecute as implied within the preamble of the Rome Statute.

exercise of universal jurisdiction is limited. The scholarship often repeats information on the history and formation of the War Crimes Program and criticisms against it concerning insufficient funds and reliance on immigration responses. Thus, much scholarship on this topic is descriptive. Although some literature does provide analyses into the operation of the program, only a few scholars provide extensive analysis, which is why my literature review thus far has contained repeated mentions of the same authors.

Given this limited scope, I will now expand the literature to include a presentation of the scholarship on other countries. I will present the varying approaches that other states have taken to show the many ways that states can legislate the Rome Statute into domestic law and exercise universal jurisdiction.

1.3 Universal Jurisdiction and the Unequal Incorporation of the Rome Statute in Domestic Law

In an article on accountability for international crimes, Rikhof (2009) compiles various prosecution cases brought forth in various countries. In this compilation, there were many examples of prosecutions both in relation to national/territorial jurisdiction and to universal jurisdiction. For example, Rikhof (2009) highlighted that there have been over 10,000 convictions for international crimes in just 20 countries[7] who have exercised either territorial or active nationality jurisdiction. In relation to exercising universal jurisdiction, Rikhof (2009) also highlighted that between 1992 and 2008, there have been 21 convictions for international crimes in thirteen countries in Europe. Despite what may seem like many states practicing prosecution and engaging in the Global Enforcer approach, Langer (2015) notes that most states adhere to the

[7] Specifically, the regional breakdown of these 20 countries is: six in Europe, seven in Latin America, two in Asia, and five in Africa (Rikhof, 2009).

No Safe Haven approach due to being against the other approach's 'global vigilantism'.[8] Palmer (2021) also notices an "emerging pattern" (p. 2) with more states focusing on immigration prosecutions than criminal prosecutions against those suspected of international crimes. The following examples will demonstrate how other states have incorporated obligations of the Rome Statute into domestic laws, and/or are exercising their jurisdiction over international crimes. These examples will contribute to situating Canada's engagement with the Rome Statute in a wider context and amongst the practices of other states.

The first example is the USA, which is not a party to the Rome Statute but still has jurisdiction over international crimes. When presenting the background history of the approach in the USA, Weiss (2012), Hamlin and Rowen (2020), and Rowen and Hamlin (2018) all write about the country's long history of using immigration measures. There is also much similarity to Canada as both approaches are rooted in finding Nazis (Hamlin & Rowen, 2020). In addition, the No Safe Haven approach in the USA is commonly achieved through what Rowen and Hamlin (2018) dubbed the "Al Capone method", that is charging an individual with a lesser crime if the Human Rights Violators and War Crimes Unit does not have enough evidence or resources to prosecute for international crimes. For example, in the case of Jean Léonard Teganya, despite his alleged involvement in crimes committed during the Rwandan genocide, prosecutors convicted him for immigration fraud and perjury (Palmer, 2021). This lesser charge thus prevails over the greater charges that would have had him prosecuted for genocide.

The pragmatic approach taken by the unit in the USA parallels Canada's. The similarity is especially so with how civil immigration charges, like the lesser charge of immigration fraud,

[8] Although Langer does not exactly specify what he means by "global vigilantism", I take this as meaning that states do not want to go out of their way by taking upon themselves the duty to prosecute especially when it may create a strain on international relations and an increasing use of resources (Langer, 2015).

are pursued in Canada if the greater charge of an international crime under the CAHWCA cannot be pursued (Baker et al., 2020). These similarities to Canada also lead the USA to face the same criticisms as Canada. For example, Vienna Colucci, a senior policy advisor at Amnesty International, remarked that the USA's focus on immigration "isn't ideal" and "doesn't help to stop atrocities" because the country is "sending back someone who is a severe abuser to those countries where they are committing those crimes" (cited in Esquivel, 2011, para. 11). This echoes the same criticism that Weiss (2012), Amnesty International (2020), and Lawyers' Rights Watch (2011) made against Canada for not ensuring justice and anti-impunity as per its international obligations by criminally prosecuting. Thus, the American approach is similar to the Canadian one.

Another national example that Hamlin and Rowen (2020) write about is the Netherland's strong practice of NIMBY, through the state's prioritization of exclusionary measures. Unlike the USA and Canada, the international crimes unit in the Netherlands is not focused on tracking down Nazis in the country. Instead, the focus is mainly on excluding individuals as per Article 1F(a). Hamlin and Rowen (2020) explain that this is due to the lower standard of proof present in the exclusion process as compared to the criminal prosecution process. In their overview of the Dutch legal framework, the authors do not detail inadmissibility but do mention the ethical concerns policymakers in the Netherlands have with post-factum deportation. Therefore, with a heavy focus on exclusion as per Article 1F(a), there is a strong NIMBY approach of excluding individuals from the country for reasons of security, protecting access to other European Union states, and preventing the social integration of excluded individuals within the country. To specify, Hamlin and Rowen (2020) identify that in the Netherlands, there is a distinction between exclusion and removal whereby a group called the '1F'ers have been denied refugee status but

still remain in the Netherlands without being able to access any social services or attain any employment opportunities. Thus, these individuals are socially excluded from society but still physically present in the country. Despite the exclusionary focus, Rikhof (2009) considers the Netherlands to be at the forefront of international criminal justice because the ICC is located in The Hague, and the domestic courts have successfully been able to convict five criminals for international crimes since 2001.

In Europe, states may take varying approaches towards universal jurisdiction, but most follow the No Safe Haven approach as per Langer's (2015) assertion. This is true even for both Spain and Belgium that were once seen as the top Global Enforcer countries.[9] Langer (2015) also characterizes the early efforts of the United Kingdom as part of the No Safe Haven approach. In addition, Baker et al. (2020) found that the United Kingdom shares a budget across both the units of international crime and terrorism, and that this creates a strain on prosecuting international crimes because prioritization lies with preventing terrorism. As a result, most of the funding in the shared budget goes towards the goal of preventing terrorism. Elsewhere in Europe, Laursen (2012) reviews Denmark's approach to international crimes and how it incorporates the Rome Statute[10] and exercises universal jurisdiction. In this review of Danish law, Laursen (2012) describes Danish administrators as wanting to be on the "right side of history" (p. 1015) and for this, they try to enforce more anti-impunity measures for criminals of international crimes.

[9] Langer (2015) described how both Spain and Belgium exemplified the Global Enforcer approach by exercising broad universal jurisdiction and conducting constant criminal prosecutions of non-nationals for international crimes committed outside their respective countries. Both states eventually were pressured to limit the scope to which they could prosecute, and this led them to abandon the Global Enforcer approach and favour the No Safe Haven approach (Langer, 2015). Taking part in the Global Enforcer approach also harmed Belgium's relations with other states (Lafontaine, 2010b).

[10] Denmark enacted the *Genocide Act* in 1955 after the 1948 Convention on the Prevention and Punishment of Genocide of which they ratified on May 25, 1951, and so when Denmark ratified the Rome Statute on June 21, 2000, there was already legislation in place for decades (Laursen, 2012).

Despite this, Laursen (2012) finds that although Danish law allows for the prosecution of international crimes on the basis of universal jurisdiction, the courts in Denmark do not have the resources to do so. Through the examination of these European states, the literature is consistent in bringing forth the limitations that national war crimes units face as well as the difficulties and constraints that arise when trying to act upon Rome Statute obligations.

There is also scholarship focusing on regional implementation of the Rome Statute. Birkett (2019) examined the incorporation throughout Asia where only 13 states are signatories,[11] and Chigara and Nwankwo (2015) wrote about the African Union's participation to the ICC on behalf of its 33 African member states that are signatories. Birkett (2019) notes how there is an underrepresentation of Asian states among the Rome Statute signatories and argues that this creates concern in the broader issue of ICC co-operation and effective functionality within Asia, especially considering that not all the 13 states have incorporated the Rome Statute in their domestic laws. The limited presence of the ICC in Asia has spread to Africa as a result of rising sentiment against the ICC.

Indeed, Chigara and Nwankwo (2015) draw attention to the anti-ICC culture growing in Africa despite many states in the region being signatories. The growing anti-ICC culture has led Burundi to withdraw from the Rome Statute and has led Kenya, Namibia, and Uganda to consider withdrawal (Ssenyonjo, 2018). An example of anti-ICC culture is when South Africa, despite being a signatory and incorporating the Rome Statute, refused to co-operate with the ICC when asked to arrest President Omar al-Bashir of Sudan. South Africa refused because,

[11] In Birkett's (2019) analysis, the 13 Asian countries refer only to the countries located in Asia, and does not include countries located in the Pacific which the ICC groups together as Asian-Pacific countries. The classification of Asian countries used in Birkett's (2019) analysis is according to the UN Statistics Division. In addition, at the time of the study, Birkett (2019) acknowledges that the Philippines withdrew its signature and was in the withdrawal process but despite this, still wrote as if there were 13 Asian countries since the withdrawal was not officialised. Currently and as per Birkett's (2019) classification, there are 12 Asian countries that are signatories to the Rome Statute.

alongside the African Union, it is against arrest warrants for African heads of state for reasons relating to sovereign immunity (Chigara & Nwankwo, 2015). In their analysis, the authors identified this emerging culture as stemming from wanting an international legal system that is fair, unbiased, and does not disproportionately target Africa.

The African Union's call for a just legal system is accentuated by the ICC's label as a 'Western' court which is evident when Mills (2012) pointed out that all ICC prosecutions have included cases in Africa.[12] The label of a Western court is related to the 'responsibility to protect' doctrine. The United Nations (n.d.) defines the doctrine as a political commitment for member states to end extreme violence, such as the violence faced during times of international crimes. Bellamy (2006) expands on the doctrine and writes how it justifies the assumed responsibility that powerful states have in preventing human rights violations. Such intervention is why many African states oppose the doctrine and opt for the African Union's own regional practice of the 'right to intervene'. The intervention of powerful states contributes to the rising anti-ICC culture.

Palmer (2021) described the rise in anti-ICC culture as relating to neocolonialism. In her article, she wrote that when international criminal law targets African states, this stems from international law being a tool to 'civilize' these countries. She further wrote about how international law is inherently racist because of its use as a bridge between the 'civilized' and the 'uncivilized'. Further, the ICC acts as this 'bridge' because former imperial states and other states in the Global North hold on to the desire to use legal tools, like the obligations of the Rome Statute, to intervene and fix the 'uncivilized', racialized, and previously colonized states

[12] Despite this article being published in 2012, I checked the cases on the official ICC site and all 31 cases have remained to include and involve only African states: Sudan, the Democratic Republic of the Congo, Kenya, Libya, Central African Republic, Côte d'Ivoire, Mali, and Uganda, although there have been investigations in non-African countries.

(Palmer, 2021). As a result, the African Union notes how it does not appreciate the ICC interfering in and disrupting peace initiatives, such as when it requested the arrest of President al-Bashir (Chigara & Nwankwo, 2015). Thus, when looking at regional implantation, different patterns emerge which affect the influence of the ICC in these areas.

The scholarship on how states incorporate and exercise the Rome Statute's obligations demonstrate diversity in the implementation of such measures. In their research, Rikhof (2009) and Raleigh (2019) both categorize the ways states can incorporate international law. The first category Rikhof (2009) identifies is 'static implementation', which is when domestic law fully adheres to the definitions of international crimes as per the Rome Statute. This model resembles the model of 'complete incorporation' by Raleigh (2019), who defines this as when domestic law wholly resembles that of customary international law and states incorporate the measures of the Rome Statute in their entirety. The opposite of static implementation and complete incorporation would be what Raleigh (2019) terms 'non-incorporation', which refers to states not legislating the Rome Statute into domestic law. Instead of prosecuting crimes as international crimes under the Rome Statute, these states would instead prosecute them as regular crimes under national law (Raleigh, 2019). In their study about Japan's implementation of the Rome Statute, Meierhenrich and Ko (2009) provide an example for this model, describing Japan as taking the 'ordinary crime approach'. This means that instead of convicting individuals for international crimes, the state will convict them for less serious crimes such as multiple homicides, instead of genocide. Meierhenrich and Ko (2009) further describe Japan as taking a minimalist approach to the Rome Statute that favours under-criminalizing instead of over-criminalizing such acts.

The ensuing two categories by Rikhof (2009) and one by Raleigh (2019) are more complex. These are a mixed form of incorporation which Rikhof calls the 'dynamic model' and

the ‘hybrid model’, and which Raleigh refers to solely as ‘modified incorporation’. The dynamic model is when the states incorporate the Rome Statute under domestic law but reword the initial phrasing either for better clarification or to incorporate even stronger provisions (Rikhof, 2009). Additionally, Rikhof (2009) describes the hybrid model which is a combination of static implementation and the dynamic model. The hybrid model consists of both specific definitions of a crime and references to international law for other definitions of crimes. Raleigh’s (2019) last model of modified incorporation is similar to Rikhof’s hybrid model because states are incorporating international legal norms within their domestic laws while also maintaining the states’ legal culture by allowing for state interpretation on the application of these legal norms. Just like with the dynamic and hybrid models, modified incorporation is not an all-or-nothing approach to the incorporation of the Rome Statute into domestic law, instead states can adjust certain parts to better reflect the Rome Statute’s obligations.

Within this typology, Canada is an example of a hybrid model. Rikhof (2009) and Amnesty International (2020) note how Canada extends the Rome Statute’s definition of war crimes and genocide. For instance, the definition of war crimes under the CAHWCA also includes references to customary international law and conventional international law (Rikhof, 2009; Amnesty International, 2020). In addition, the definition of genocide in the CAHWCA goes beyond the definition by the Rome Statute by replacing the victim group from, “a national, ethnical, racial or religious group” (International Criminal Court, 2011, p. 3) to a broader consideration of victims being any “identifiable group of persons” (CAHWCA, 2000, s. 4(3) & s. 6(3); Rikhof, 2009; Amnesty International, 2020).

The literature here concerning other countries and their responses and incorporation of the Rome Statute is extensive. This scholarship covers a wide number of regions and countries

and varies from comparative analyses to descriptive presentations. This scholarship is too broad to be discussed here and, as such, I focused on articles that also provide typologies or conceptual tools that may help me better understand the Canadian approach.

1.4 No Safe Haven and Crimmigration

Since the No Safe Haven approach to international crimes is prominent in most states, including Canada, the scholarship on this approach also includes criticisms of what may occur when the use of immigration measures and laws become a response to international crimes (Baker et al., 2020; Hamlin & Rowen, 2020; Palmer, 2021). The entwining of immigration and criminal matters is what many scholars refer to as "crimmigration", which many scholars describe as the merging of criminal law and immigration law (Stumpf, 2006; Sklansky, 2012; Brouwer et al., 2017; Rowen & Hamlin, 2018).

Rowen and Hamlin (2018) are one of the few authors who specifically related the concept of crimmigration to international crimes. By doing so, they write that this strategy has led to the increased use of immigration measures as a punishment for crimes, and the use of criminal charges as a punishment for immigration violations. The concept of crimmigration is often present when discussing forms of overcriminalization whereby attributing criminal responses to matters of immigration leads to criminal charges in instances where there otherwise would not be (van der Woude & van der Leun, 2017; Sklansky, 2012). Specifically, Rowen and Hamlin (2018) analyzed the increased use of criminal matters in immigration matters as especially prominent after 9/11 and the beginning of the War on Terror when security measures focused on keeping 'bad people' out. Brouwer et al. (2017) also notes that within the crimmigration literature, scholars have used the concept to explain the heightened criminalization of immigration after

9/11. On the other hand, crimmigration can also describe a distinct, yet complementary, intersection between immigration law and criminal law. In addition to the criminalization of immigration strategies, there is what Legomsky (2009, p. 482), following Miller (2003), has called the "immigrationization of criminal law", which is the imposition of immigration law consequences for acts typically dealt with through criminal law.

The dynamics captured by the concept of 'crimmigration' are inherent in the No Safe Haven approach. The relationship between them stems from how the approach intentionally combines both immigration and criminal law for a response focused on making sure criminals of international crimes cannot immigrate or seek refuge in another country that can serve as their 'safe haven' (Hamlin & Rowen, 2020; Rowen & Hamlin, 2018). This convergence leads to, as Baker et al. (2020) points out, the beginning of xenophobic attitudes towards immigrants as criminals. These attitudes are not necessarily the result of immigrants committing more crime but rather the general rising concern about immigration and immigrants especially after 9/11 (Sklansky, 2012). Legomsky (2007) and van der Woude and van der Leun (2017) add that immigrants are also racially profiled which is why they face criminal charges. Brouwer et al. (2017) also note that the framing of immigrants as criminals creates a moral panic, due to the supposed threat that immigrants may pose, and argue that this panic is "exaggerat[ed]" (p. 103). Thus, the literature presents crimmigration as a useful tool to analyze the No Safe Haven approach and presents this trend as problematic due to the negative attitudes it encourages towards immigrants.[13]

[13] This is only a brief overview of the concept of crimmigration, to introduce it solely as how the scholars in the literature write about it in relation to the No Safe Haven approach. This term is more nuanced, and I provide a more in-depth discussion of crimmigration in my theoretical framework.

Conclusion

In this chapter, I introduced what is present in the literature about the topic of international crimes and Canada's participation in addressing international crimes. By doing so, I detailed a brief history of Canada's role in addressing individuals suspected of international crimes which I followed by an overview of the state's current practices, including the formation of the War Crimes Program and enactment of the CAHWCA. The scholarship on Canada's jurisdiction and legal responses indicated that Canada has mostly a No Safe Haven approach to international crimes, meaning that there is a focus on immigration-based measures. I then expanded the literature's discussion on Canada to also cover scholarship on jurisdiction and ways of incorporation to other regions and states. The literature on international crimes and the incorporation of international law into domestic law is vast but the scholarship reveals that there is no one way to fulfill the Rome Statute's obligations, and that Canada is only one of many states adopting a No Safe Haven approach. The literature review was useful in making sense of the existing scholarship and in identifying emerging issues in this topic.

With my thesis on the topic of international crimes and the responses towards suspected individuals in Canada, I hope to contribute to the literature in different ways. I contribute to the existing but limited work of scholars from the disciplines of law, sociology, immigration studies, and political science that have already written on Canada's approach to international crimes. Specifically, and more importantly, I aim to join the handful of criminologists contributing to the criminological literature on this topic by providing a new analysis on the different responses sought towards individuals suspected of international crimes. This aim is especially important because scholars like Cohen (2001), Green and Ward (2000), and Hagan and Greer (2002) have noted the field of criminology has historically neglected to study the harms caused by large-scale

crimes and crimes of the powerful. Criminologists' neglect stems from viewing international crimes as more of a political than criminal act, from their inability in engaging, recognizing, and understanding the harm caused by such crimes, and from a generalized methodological nationalism that limits their interest in studying crimes that exceed state borders (Laufer, 1999; Maier-Katkin, Mears, & Bernard, 2009; Green & Ward, 2000; Greer & Hagan, 2002). The absence of such scholarship in criminology was why I drew on various disciplines and on a limited number of authors. In acknowledging such crimes in my thesis, I am hoping to help responsibilizing criminology in recognizing these crimes and filling the gap that results from this blind spot.

Apart from contributing to the general gap in the literature, my research on international crimes may also fill a specific gap in regard to international crimes in the Canadian context. More so, there is limited scholarly material that so thoroughly examines the different Canadian responses that authors like Lafontaine (2010b) have identified. More specifically, few studies examined the different legal cases and the legal decisions within the cases. By comparing cases of individuals suspected of international crimes and drawing connections or distinctions amongst them, I can contribute to this scholarship.

Based on what the scholarship tells us about Canada's War Crimes Program and the incorporation of international law, specifically the obligations of the Rome Statute, under domestic law, I developed a research design that would allow me to respond to my research question, which is: "*what do legal documents reveal on how various parties respond to persons suspected of international crimes*?" In the following chapters, I present the theoretical framework and methodological strategy used to answer this question.

2. Theoretical Framework

As mentioned, my research examined how various parties address individuals suspected of international crimes in the courts. I looked at how actors frame cases in court and how actors characterize each legal approach. I analyzed actors' framing of a case because I am interested in the ways they address the cases through their presentation in court. To shed light onto these dynamics, I decided to mobilize a number of compatible theoretical concepts instead of a single theory, but the theory of legal framing provides the key concept. This chapter presents the conceptual tools of legal framing, ad hoc instrumentalism, jurisdictional games, and discretionary decision-making that I used to answer my research question. The concepts were useful in understanding the socio-legal construction of cases regarding individuals suspected of international crimes, and in helping me explain how these cases are presented and adjudicated through applying different laws.

The conceptual tools I chose are all connected to each other, and together they helped me to make sense of the socio-legal construction of cases and to answer my research question. Legal framing was the overarching framework that I drew upon because the theory provided me with a typology of different approaches that actors seek, which I used to categorize the different cases. The other concepts complemented this framework and provided ways to make sense of the actors' selection of frames and laws.

2.1 Legal Framing as a General Theoretical Framework

The theory of legal framing provides scholars with an explanation of the processes behind legal decision-making. For instance, Wedeking (2010) mobilizes this theory in his analysis of the strategic use of frames in courts and identifies a typology within the practice of

framing by legal actors which I present below. Similarly, Raleigh (2019) mobilizes the framework of legal framing in her analysis of the Wouter Basson case[14] to make sense of the different decisions that took place concerning the charges brought forth against the accused. Since I studied similar cases of individuals suspected of international crimes and the practice of prosecutorial discretion in applying either domestic or international law, this framework appeared promising.

In general, Wedeking (2010) defined frames as "a small collection of related words that emphasize some aspect of an issue at the expense of others" (p. 617). Further, frames are used to characterize an issue and the practice of framing is the process of choosing one frame over another. Depending on the context, the selection of one frame over another is determined by public opinion and/or by elites, particularly political elites (Wedeking, 2010). A non-related example to understand framing before situating legal framing in my thesis is how an individual's harmful words can be framed as hate speech or as free speech. Within this framework, neither framing is objectively truer than the other. Instead, both framings are the result of selection and interpretation, and the decision to frame words as hate speech or free speech leads to very different ways of responding to them socially, politically, and legally.

The use of legal framing in my thesis drew on Wedeking (2010) and Raleigh (2019). Wedeking (2010) wrote that legal framing has a typology consisting of a prevailing frame and alternative frames. The prevailing frame is the dominant frame that becomes the "go-to" way of looking at an issue as this frame is based on the views of the majority (Wedeking, 2010; Raleigh,

[14] Wouter Basson was charged with multiple violent offences in South Africa including six counts of conspiracy to commit murder on anti-apartheid activists abroad. The state originally framed his offences as 'ordinary crimes' under domestic law but later reframed them as war crimes and crimes against humanity during the state's appeal of the trial judge's original quashing of his charges for reasons relating to jurisdiction (Raleigh, 2019). Raleigh (2019) sees this case as one to explore the practice of prosecutorial decision-making and analyzes the changing framing of the charges from crimes under domestic law to crimes constituting international crimes throughout the case.

2019). On the other hand, alternative frames are the other frames that emerge and exist alongside the prevailing frame and offer a less dominant way of looking at an issue. Alternative frames can be seen in opposition or as a supplement to the prevailing frame (Wedeking, 2010). In this theory, the imposition of a frame as a prevailing frame, or its relegation as an alternative frame, is the result of the practices of those with power such as political elites and the media. Having power means having the ability to promote a frame and influence public opinion to such an extent that it becomes the common-sense view of looking at an issue (Raleigh, 2019). Thus, the prevailing frame is the dominant frame considered as such by the influence those with power have in the framing process.

More so, Druckman (2001) does not view an elite's promotion of a frame as the go-to way of viewing an issue as elite manipulation. He clarifies that there is no willful manipulation by those with power to enforce their frames and beliefs onto people. Instead, he suggests that the ability of one frame to be promoted over another is the result of the public seeking guidance from elites and trusting their selection of frames because their status grants them credibility. Further, Druckman (2001) includes that an elite's choice of frames reflects the public and is not manipulation because the elite is representing the public and are being trusted to pick frames. As a result, the public believes the frames of the elite as the elite are helping to guide the public on how to view an issue.

How legal actors frame a case will influence how other legal actors will also frame their cases (Wedeking, 2010). Raleigh (2019) states that once the prevailing frame "becomes embedded in a legal decision" (p. 213), it becomes difficult for alternative frames to arise in courts since they are less favourable in comparison to the already established prevailing frame (Wedeking, 2010; Raleigh, 2019). Also, Wedeking (2010) explains that keeping with the

prevailing frame in courts does not contribute to policy change because selecting the same frame means keeping consistent with how similar cases have been handled instead of trying to handle the case differently. Despite this, choosing an alternative frame over the prevailing one is risky because of how normalized a response the dominant framing has become. This is why the selection of frames in courts must be strategic (Wedeking, 2010). Thus, the framing process heavily influences how a case is seen within the courts and how it will be adjudicated.

My thesis studied the construction of cases involving individuals suspected of international crimes within Canadian courts. The concept of legal framing helped in this endeavour because different frames offer different constructions and ways of looking at the cases, which then helped me to identify the different responses to them. In addition, legal framing also allowed me to identify the prevailing and the alternative frames which helped to identify the most common way to respond to individuals suspected of international crimes, alongside other possible responses. I read Bond et al.'s (2020) and Bond's (2017) frameworks of inadmissibility and exclusion, and Lafontaine's (2010b) categories of preventing admission, prosecution/extradition, and national interest through this theoretical lens. Indeed, since framing is a way of looking at and responding to a case, then the literature's description of these frameworks and categories provided me with an initial presentation of the different response frames. Further, since the concept of legal framing is common in the scholarship on international crimes, it suggests that this concept has been helpful in explaining and categorizing the different legal approaches. Thus, the concept of legal framing in my thesis helps me explain how similar acts may lead to different legal approaches.

As helpful as legal framing was to my thesis, this theory is broad. For instance, in Raleigh's (2019) study, legal framing assisted in the different interpretations of case information.

More so, legal framing explained how actors can perceive a crime under either an international law frame or a domestic law frame. In my studies, legal framing assisted by categorizing the different responses legal actors sought. Legal framing also provided a limiting explanation for the greater processes at play, namely the decision-making process and the articulations between different realms of law that determined the legal actors' selection of a particular response. My use of additional concepts helped in further making sense of the choices actors make between addressing the case through a criminal lens or an immigration lens, or as a national concern or international concern. As a result, I complemented my use of legal framing with the concepts of ad hoc instrumentalism, jurisdictional games, and discretion which further directed my analysis and understanding of the cases.

2.2 Ad Hoc Instrumentalism and Related Concepts

Ad hoc instrumentalism was another concept that I used to explore the specific roles that immigration and criminal law played in framing an issue. Sklansky (2012) opposed ad hoc instrumentalism to legal formalism. Sklansky (2012) defines ad hoc instrumentalism as a way of thinking about law and legal procedures as a "set of interchangeable tools" (p. 161). This means there is an inconsistency in the application of the law and its procedures as the tools that actors choose in that situation are likely only the ones considered most effective. This reduces the formality of legal tools as there is no systematic application but rather a case-by-case consideration (Sklansky, 2012). In this way, ad hoc instrumentalism provides a way of thinking about the process of framing which also occurs on a case-by-case basis. Further, the selection of different frames, including between the prevailing frame and the alternative frames, can be a result of the limited formalism of the legal system. This would also explain why multiple legal

responses towards a same violent act occurs because due to informality, this act can be governed as a crime through different types of law. As I will explain below, the concept is particularly useful for understanding the intersections between immigration and criminal law.

2.2.1 Intersections of Criminal Law and Immigration Law

Crimmigration, as mentioned in the literature review, is a concept developed to make sense of the joining of criminal law, procedures, and control, with immigration law, procedures, and control (Sklansky, 2012; Rowen & Hamlin, 2018; Brouwer et al. 2017; van der Woude & van der Leun, 2017). For Sklansky (2012), crimmigration relates to ad hoc instrumentalism because the unclear boundary between criminal and immigration law requires the interchangeability allowed by ad hoc instrumentalism. This led him to argue that selectivity is a characteristic of crimmigration because the blurred boundary between both fields of law allows officials to choose between immigration measures or criminal measures (Sklansky, 2012). This would thus allow legal actors to switch between them, and use immigration measures for traditionally criminal matters or criminal measure for traditionally immigration matters.

Scholars within the fields of political science, immigration studies, and criminology consider the blur between immigration and criminal law to be problematic. Rowen and Hamlin (2018) and Brouwer et al. (2017) argue that policy changes in the post 9/11 period led to the increasing criminalization of immigrants. Specifically, Rowen and Hamlin (2018) write that because of crimmigration, "immigrants [are] easier to deport" (p. 248) due to the discursive and legal association of immigration and crime. With this consequence, Sklansky (2012) wrote that there is no consensus as to whether crimmigration is the expansion of criminal matters to immigration matters which would lead to the criminalization of immigrants, or vice versa leading

to immigration responses being a punishment for crime, or both. In other words, Sklansky (2012) noted that the blur between these two realms of law makes it difficult to identify which is "colonizing the other" (p. 195). With this, he suggested that the increasing blur between the two realms could be the result of a cultural fixation on crime control, which switched the narrative from a "freeloading foreigner" to a "criminal alien" (p. 196). Crimmigration as a result of the fixation on crime control and not only as the use of criminal law for immigration violations could provide a frame that neatly applies to the No Safe Haven approach. Indeed, it could help to explain the use of immigration measures with the objective of preventing criminals from finding a safe haven in Canada.

Apart from the critiques on the empirical situation concerning the blur between immigration and criminal lines, Moffette (2018) provided a critique of the concept of crimmigration that led him to opt for the concept of jurisdictional games. This concept is more nuanced by being able to better explain the intersections of governance including in the use of criminal law and immigration law. He emphasizes that what matters is not the convergence of criminal law and immigration law, but rather the distinction between both because distinction allows for flexibility. Further, the concept helps us to be attentive to the interchangeable and case-by-case selection of laws and procedures because they are two separate jurisdictional matters that allow for the use of the more effective legal frame (Moffette, 2018). Moffette's way of looking at the cherry-picking of laws and his argument about how crimmigration is not a fully satisfactory concept is similar to the point made by Sklansky (2012), where he argues that it is unclear which realm of law is 'colonizing the other' and insists on the instrumentalist selection of legal tools.

With the above critique in mind, I utilized the concept of jurisdictional games in my research instead of the concept of crimmigration, although I see them as related. The concept of jurisdictional games is still relevant to ad hoc instrumentalism and legal framing, but it is broader and extends beyond just the realm of criminal and immigration matters. As such, it is more helpful to explore, for instance, the reliance on extradition law in some cases. Jurisdictional games as a practice of choosing legal ways to govern is also consistent with the concept of ad hoc instrumentalism, which provides another way of thinking about this practice. What is important here is the role that legal framing (as a matter of immigration law, criminal law, extradition law, human rights law, etc.) plays in regulating the presence of non-citizens. The concepts of ad hoc instrumentalism and of jurisdictional games helped in understanding the practical reasons that may inform the framing of cases on individuals suspected of international crimes.

2.2.2 Discretionary Decision-Making

The last concept I used was discretionary decision-making. Discretion is a form of governance that officials exercise when confronted with choices (Pratt, 1999). Sklansky (2012) wrote on prosecutorial discretion in relation to ad hoc instrumentalism because prosecutors can choose a sanction they want to pursue for their case. Also in the crimmigration scholarship, van der Woude and van der Leun (2017) expanded on prosecutorial discretion by writing about discretionary decision-making. This concept is similar to prosecutorial discretion but is expanded to include enforcement officials. For example, discretion is present in cases with immigrants where officials have the decision to either pursue such a case as a criminal case or as an immigration case. Discretion here gives much power to decision-makers, as either response has

varying consequences (van der Woude & van der Leun, 2017). This example of discretion further shows how the legal system is flexible and not bound by strict formalism (Sklansky, 2012; van der Woude & van der Leun, 2017). The practice of discretion is important because if officials are not careful with their decisions, immigrants can be over-criminalized, especially as this group is often racially profiled and at risk of facing criminal responses (van der Woude & van der Leun, 2017).

While I conceptually understand discretionary decision-making to be central to the process of legal framing, mobilizing the concept of discretion in my thesis was difficult, and to a certain extent limiting, because the decision-making process was not present in my dataset. Instead, my dataset composed of court judgments and interveners' reports only showed the final decisions made by actors. To analyze the process of decision-making would have required interviews with legal actors, ethnographic observations, or access to drafts or internal memos. Regardless of this limitation, I kept this concept as a way to recognize the ability of actors to practice discretion and make decisions, and conceptually link these practices to legal framing. In my analysis chapters, I was able to generally infer that legal actors made decisions about different possible options, but I only did so to the extent that the data would allow. Thus, the concept of discretion helped in making known that legal actors, particularly prosecutors, are confronted with choices, but did not help in analyzing the actual reasoning behind why actors were making their decisions. The discretion of judges was more clearly presented in the court judgment documents as this form of data often shares the reasons for judgment that detail why the judge made their decision.

Conclusion

The concepts of legal framing, ad hoc instrumentalism, jurisdictional games, and discretion were used to provide a framework that helped make sense of the different legal approaches. Ad hoc instrumentalism, jurisdictional games, and discretion worked compatibly under legal framing because they provided ways of understanding the framing process that led to the adoption of frames. More specifically, ad hoc instrumentalism is the way of thinking about the cherry-picking of law that actors practice through the concept of jurisdictional games. I then applied these concepts to cases of individuals suspected of international crimes in the courts where legal actors exercise their discretion when responding to the case based on how they choose to frame the case. Before presenting this analysis, I dedicate the next chapter to outlining my methodological strategy.

3. Methodology

The main goal of my research was to explore and understand the different frames used within the courts for cases involving individuals suspected of crimes against humanity, war crimes, and genocide. The use of a qualitative analysis helped me achieve this main goal as well as my specific goals, which were: (1) to map out the relevant laws in my selected cases, (2) to identify how actors present different framings of a case, (3) to compare cases to see what makes them different enough to warrant different responses, (4) to identify the actors who address suspected individuals, and (5) to establish whether Canada's responses to suspected individuals in my four cases are coherent to both what the literature describes and how Canada may present its strategy. This chapter centres on the methodological approach that I adopted in my research to address my goals and answer my research question, which is "*what do legal documents reveal on how various parties respond to persons suspected of international crimes*?"

I answered my research question through conducting a qualitative analysis that included selecting various cases that featured different legal responses to individuals suspected of international crimes. The corpus for my research consisted of court judgment documents and intervener reports for the four legal cases I selected. Court judgments are documents detailing a judge's decision in criminal, immigration, and appeal proceedings. Intervener reports are documents submitted by parties not directly involved in the legal case but considered to have a direct interest in the case. These parties submit reports to share their view of the issue at hand. Analyzing these documents allowed me to look at how legal actors like interveners, judges, prosecutors, defence counsel, and IRB members were responding to suspected individuals because their positions were revealed within the data. Although the War Crimes Program consists of many different legal and non-legal actors and policy tools, my focus on cases in the

courts narrowed my analysis to centre only on the actors involved in the legal proceedings. Doing so led to the inclusion of actors not involved in the War Crimes Program, such as interveners or defence counsels. The diversity of actors explains why I refer to "various parties" in my research question.

In this chapter, I clarified exactly how I answered my research question and achieved my research goals by outlining and explaining the decisions and steps I made to analyze my data. More specifically, this chapter covers how I approached the issue, how I selected the four cases, and how I conducted my analysis.

3.1 Data Selection

During my preliminary exploration of the cases discussed in the scholarship on the Canadian War Crimes Program, I noticed that there were four general legal approaches. The cases I selected are thus representative of these four types of legal treatments of individuals suspected of international crimes in Canada. The four legal cases and four distinct legal responses I analyzed are of Michael Seifert's extradition, Désiré Munyaneza's criminal prosecution, Jura Skomatchuk's immigration fraud and citizenship revocation, and Rachidi Ekanza Ezokola's refugee protection exclusion. I analyzed a total of 15 documents that consisted of court judgment documents and intervener reports. With these documents, I analyzed a total of 810 pages. An overview of these legal approaches, cases, and documents will be presented below.

I am aware of the limitations in using court judgment documents and intervener reports. The use of this dataset reveals actors' final understanding and strategic presentation of the case in the courts because these documents do not reveal the private decisions that legal actors make

about what legal approach to pursue. Such discussions take place outside of the proceeding (for instance, when prosecutors decide whether to press criminal charges) and thus, there is no documentation of these choices in my dataset. Despite this, the documents still provided excellent data to analyze frames, including disagreements about the selected frames, as well as allow me to infer some decisions on why particular frames were adopted. This limitation affected my interest in decision-making practices described in the theoretical framework. Exploring these dynamics would have required ethnographic work or interviews with those involved in making these decisions. The concepts of ad hoc instrumentalism, jurisdictional games, and discretion remain important in my conceptualization of the framing process, despite legal documents silencing this active process.

Although I may not have had a clear indication of the defence or state counsel's positions, as court judgments are a written reflection of the judge's verdict, the information being presented still provided a sufficient summary of the arguments by the different counsels. To a certain extent, the analysis of these summaries was how I could infer the defence or state counsel's position. For the most part, the judge seemed to be more aligned with the prosecutor's positions as most cases, except *Ezokola*, contained a verdict that was consistent with the Crown or Minister's position. When I was unable to clearly make out the defence or state counsel's positions, I based my analysis on the judge's position or that of the interveners if they submitted factums. Regardless of the limitation, court judgments still remained useful as they revealed the different and final presentations and applications of legal responses of the case within the courts.

To answer my research question, I sought cases featuring an array of legal approaches to present the different ways legal actors can address suspected individuals. I purposely selected the legal cases of *Seifert*, *Munyaneza*, *Skomatchuk*, and *Ezokola* to represent the legal approaches of

extradition, criminal prosecution, immigration fraud, and exclusion. This methodological decision led me to create a sample that is representative of the different approaches as opposed to a sample that is quantitatively representative of the most frequently occurring legal approaches. Indeed, criminal prosecution and extradition are not common approaches, but I still kept them for my analysis as they have been used, and they allowed me to explore the diversity of possible legal approaches to individuals suspected of international crimes.

The legal approaches I selected are also representative of the cases I saw when searching through the Canadian Legal Information Institute (CanLII) database and of the legal approaches mentioned in the literature. The literature identified the categories of criminal prosecution, extradition, exclusion, and inadmissibility, as well as other responses based on national interests such as citizenship revocation and/or deportation (Bond et al., 2020; Lafontaine, 2010b). In relation to my thesis, although extradition, criminal prosecution, immigration fraud, and exclusion are all mentioned in the literature as potential state responses, they are not always named as such. For instance, Lafontaine (2010b) categorizes Canada's responses as inadmissibility, prosecution/extradition, and any other responses of national interest. Bond et al. (2020), however, explore only the immigration responses of exclusion and inadmissibility. I drew on the categories from the literature for my classification but expanded them to fit with my analysis. Specifically, I drew on Lafontaine's (2010b) categories of prosecution and extradition, and on Bond et al.'s (2020) exclusion category when identifying the responses for my own research. Additionally, my fourth category of immigration fraud is loosely inspired by Lafontaine's (2010b) final category on national interests.

I reworked Lafontaine's (2010b) final category because, in court, judges do not rule on responses like citizenship revocation or deportation. Instead, and in Skomatchuk's case, the

Minister of Citizenship and Immigration uses the judge's ruling of whether citizenship was acquired through false representation, fraud, or by knowingly concealing material circumstances to form a report to the Governor in Council who then takes the report into consideration to determine if further action should be taken.[15] Thus, since revoking citizenship and determining deportation are responses not decided directly in court, I generalized responses of this sort as 'immigration fraud' responses. Immigration fraud relates to the national interest of protecting the country against those who would not have otherwise been lawfully admitted into Canada and granted citizenship if immigration authorities knew of their criminal activities. Also important is that this case is representative of cases of post-factum immigration fraud when fraud has already taken place and citizenship has already been granted. The classification and selection of the cases as representatives of extradition cases, criminal prosecution cases, immigration fraud cases, and exclusion from refugee protection cases thus reflects the diversity of approaches discussed in the literature.

I intentionally selected the four cases most represented in the media and the scholarship as per the legal approach each represents. Apart from wanting an array of different legal

[15] A note of importance is that *Canada (Minister of Citizenship and Immigration) v Skomatchuk*, 2006 (FC 994), which is the case used to represent the case-type of post-factum immigration fraud in my research, occurred in 2006 which is prior to the changes made in the current version of the *Citizenship Act*. At the time of Skomatchuk's 2006 case, the relevant provisions in relation to falsely obtaining citizenship were ss. 10 and 18 with the former being amended and the latter being repealed in 2014. What I wrote here describes how both these sections work in tandem with each other in Skomatchuk's case and cases prior to the changes made in 2014.

Currently in the *Citizenship Act*, for citizenship to be revoked, a court must make a declaration that citizenship was obtained through false representation, fraud, or by knowingly concealing material circumstances. Once the court has made this declaration and the Minister of Immigration, Refugees and Citizenship is satisfied with it, it is the Minister who may revoke the person's citizenship. This process draws on both the current subsections of ss. 10(1) and 10.1. In addition, s. 10.2 is also relevant in current cases of this matter because this section states that for citizenship to have been acquired through false representation, fraud, or by knowingly concealing material circumstances, the person needed to have also been found to have acquired their permanent resident status through false representation, fraud, or by knowingly concealing material circumstances. This is as referenced in *Canada (Citizenship and Immigration) v Kljajic*, 2020 (FC 570). This case would represent a more current approach but was not analyzed because it was ongoing when I began my thesis. The case also does not represent the majority of cases concerning post-factum immigration fraud within the courts as many occurred prior to the amendments.

approaches, I also had other inclusion and exclusion criteria. The main inclusion criterium I had was to omit outdated cases and so, for me, this meant having only cases that had occurred in the last 20 years. By keeping all the cases within the 21st century, I ensured that the cases occurred against the backdrop of the War Crimes Program, which was established in 1998, and the CAHWCA, which was enacted and given royal assent in 2000. Further, although not all the cases I selected drew on the CAHWCA, the cases still took place in a context where legal actors could have drawn on this Act. Also, having cases that took place in the 21st century also means that these cases took place during the renewed and current efforts on behalf of Canada in addressing these suspected individuals as per its Rome Statute obligations. I also made sure that each case had been concluded and was not ongoing by checking that the cases were closed on the Supreme Court of Canada (SCC) website. For *Skomatchuk*, which did not go to the SCC, the last proceeding took place in 2006 and there are no ensuing judgments or appeal proceedings listed in CanLII, which indicated to me the slim likelihood of the case being active.

My main exclusion criterium concerned accessibility of information. For each case, I made sure I could access the court judgment documents and that they were available to read in English, or at least that the document with the judges' final verdict on the case's response was. Thus, I excluded cases with inaccessible documents from my research. This criterium heavily influenced my project and my research question because the most accessible cases were the ones that had reached the courts, therefore excluding from my sample many common cases of inadmissibility discussed by Bond et al. (2020) and Lafontaine (2010b). I therefore did not seek to include an inadmissibility case due to lack of access to case information and documents, mostly due to reasons of privacy. Despite this exclusion, I still acknowledge that inadmissibility constitutes a way of addressing suspected individuals.

Intervener factums were included because of their accessibility. Since these documents could be accessed online, I decided to include them in my dataset because it was another legal document that could provide insight on how legal actors viewed a legal frame and suspected individuals of international crimes. Interveners sought legal advocacy which is why they submitted factums to contribute their expertise to legal decisions. Interveners are selected through an application process that allows the court to determine the relevancy and the interests of the organizations or individuals who want to intervene in a case. If the court grants intervention, a factum is submitted which is the formal presentation of the intervener's view on a legal issue (Goldenberg & Bildfell, 2021). Only the legal cases of *Ezokola* and *Munyaneza* included interveners factums. In both cases, the interveners were non-governmental organizations that were intervening for reasons relating to the protection of international human rights and/or the rights and protection of refugees. Whereas court judgments are a judge's written reflection of the case and their decision, intervener factums are documents that contain comments about a legal issue. In *Ezokola*, this concerned the application of Article 1F(a). In *Munyaneza*, this was in relation to retrospectivity and the legality of convicting him under the CAHWCA despite this Act not being given royal assent until after his crimes were committed. Thus, intervener factums provided an additional source of material concerning the framing process that I could analyze, and their availability was why I included them in my dataset.

The remainder of section 3.1 will explain each of the cases in more detail. This includes a case description and an overview of the documents included and excluded from my analysis. An overview of the included and excluded documents of each case, as well as the page count for each document I analyzed, is compiled in Appendix 1.

3.1.1 Extradition: *Seifert*

A foreign state may request the extradition of an individual for the purpose of standing trial or imposing/serving a sentence. An extradition is only allowed when the alleged crime is recognized as a criminal act in both countries (Department of Justice, 2021a). There are three phases within the extradition process: authority to proceed, judicial phase, and ministerial phase. The first phase is the decision by officials in the DoJ to begin extradition proceedings. The second phase includes the extradition hearings in the provincial or territorial superior court. The last phase is the decision by the Minister of Justice to surrender the individual to the foreign state (Department of Justice, 2021a). Extradition in Canada is permitted under the *Extradition Act*, and is also one of the approaches available to the War Crimes Program.

Michael Seifert immigrated from Italy to Canada in 1951. Canadian authorities arrested Seifert in 2002 after Italy requested his extradition as a result of a trial *in abstentia* which convicted him for nine counts of murder contrary to Italian law. These offences took place while Seifert was an SS guard for the Nazi regime at the Bolzano Transit Camp in Italy between 1944 and 1945 (*Italy v Seifert*, 2003 (BCSC 1317)). Extradition proceedings took place "for the Crown to establish whether the Respondent before the judge is the person who was found guilty by the Italian Court" (*Italy v Seifert*, 2003 (BCSC 398), para. 19). In a 2003 committal hearing at the Supreme Court of British Columbia, Justice Romilly reviewed his convictions and discharged Seifert for two of his nine counts of murder (*Italy v Seifert*, 2003 (BCSC 1371)). After his extradition proceedings were concluded and the Minister of Justice ordered his surrender, Seifert appealed the BCCA decision by Justices Donald, Huddart, and Smith that dismissed his appeal and petition for judicial review to the SCC. His request to be granted leave to appeal from the BCCA judgment was dismissed by the SCC (*Italy v Seifert*, 2008 (BCCA 25); *Michael Seifert v*

Attorney General of Canada on behalf of the Republic of Italy and Minister of Justice of Canada, 2008 (SCC). Seifert was extradited from Canada to Italy in 2008 where he served his life sentence until his death in 2010 (Associated Press, 2010).

Concurrent to Seifert's extradition hearings were his citizenship revocation hearings that the Minister of Citizenship and Immigration brought to the Federal Court. Justice O'Reilly ruled that Seifert had come to Canada and obtained citizenship by knowingly concealing material circumstances (*Canada (Minister of Citizenship and Immigration) v Seifert*, 2007 (FC 1165)).

I analyzed four documents in this case. The first document was *Italy v Seifert*, 2003 (BCSC 1099), which is the judgment on the constitutionality of sections 6 and 47(b) of the *Extradition Act* and whether Seifert's extradition proceedings were in violation of his rights under the *Canadian Charter of Rights and Freedoms*.

The second document was *Italy v Seifert*, 2003 (BCSC 1317). This judgment is where Justice Romilly found Seifert guilty for seven of the nine murder charges by determining whether there was enough evidence to find Seifert guilty if he had hypothetically committed his crimes in Canada contrary to the *Criminal Code*. The purpose of this proceeding was to demonstrate that his trial *in abstentia* in Italy had provided enough evidence to satisfy a Canadian court in convicting Seifert. As a result, Justice Romilly only found him guilty for seven of the nine convictions as there was not enough evidence to prove beyond reasonable doubt his actions for two of the convictions. Additionally, this proceeding also determined that the Seifert before the court was the same Seifert that Italy was requesting for extradition, that committed the crimes in Italy, and that was found guilty *in abstentia*.

The third document was *Italy v Seifert*, 2007 (BCCA 407), which is the judgment on Seifert's appeal of his 2003 convictions. I chose to analyze this judgment because it included a

judicial review by Justices Donald, Huddart, and Smith of Seifert's convictions and provided a further explanation on Justice Romilly's ruling. The documents I excluded are those concerning the fitness of Seifert to stand trial and those where judges dismissed various requests for appeals.

The fourth and final document I analyzed was the judgment by Justice O'Reilly on Seifert's immigration proceeding in *Canada (Minister of Citizenship and Immigration) v Seifert*, 2007 (FC 1165). I included this case because although this is of a different legal approach, this proceeding represented an additional way that legal actors were addressing Seifert. More so, I analyzed this document in case there would be any connection between the two approaches but there was not.

I chose this case because there are not many cases of extradition. Although extradition may not be a common legal approach, it still represents one of four ways that the courts have addressed a suspected individual for war crimes in the past 20 years despite the Italian prosecution strategically pursuing a conviction through the lesser crime of murder. Although the case concerned the extradition of Seifert for the 'normal' crime of murder and not an international crime of war crimes, I still included this case because it was an Italian military tribunal that found Seifert guilty of his crimes as an SS guard during WWII. For this reason, the War Crimes Program, through the DoJ, was involved in the case. More so, the 2007-2008 Annual Report of the War Crimes Program documents Seifert's extradition and immigration proceedings which indicates that this case was associated with or at least monitored by the program (Government of Canada, 2008). Additionally, even though Seifert was extradited for a 'normal' offence, including this case is similar to how I included *Skomatchuk* whose immigration charge is a 'normal' offence and not an offence under the CAHWCA. The use of 'normal' offences against individuals suspected of international crimes demonstrates the diversity in the

legal approaches used towards these suspected individuals. Additionally, including cases with 'normal' offences is consistent with my theoretical framework, that acknowledges the practice of jurisdictional games and the picking of different laws to govern these issues.

Seifert's charge for murder was the result of Italian prosecutors approaching and framing the case in this manner perhaps because murder was easier to prove than war crimes, leading it to become the dominant frame. If this is true, then this would be an example of the Italian prosecutors engaging with what Rowen and Hamlin (2018) dubbed the Al Capone method. The decision by prosecutors to choose between a domestic frame or an international frame also relates to the *Basson* case analyzed about by Raleigh (2019) because it demonstrates the interplay of frames and choices considered by legal actors when laying charges.

3.1.2 Criminal Prosecution: *Munyaneza*

Criminal prosecution under the CAHWCA is another approach available to the War Crimes Program. There have not been many criminal prosecutions in Canada under this legislation, and Munyaneza was one of the few prosecutions.

Désiré Munyaneza was born in 1966 in Rwanda. In 2005, Canadian authorities arrested and indicted him for his crimes during the Rwandan genocide that included two counts of genocide, two counts of crimes against humanity, and three counts of war crimes (*R c Munyaneza*, 2009 (QCCS 2201)). Munyaneza came from an upper-class family and his status in society as a wealthy and respectable elite, alongside his role as a leader of the Hutu-based militia called the Interahamwe, allowed him to participate in and promote violence against the Tutsis (*R c Munyaneza*, 2009 (QCCS 2201); *R c Munyaneza*, 2009 (QCCS 4865)). Justice Denis found Munyaneza guilty under the CAHWCA on all seven counts and thus, of having committed the

offences of genocide, crimes against humanity, and war crimes between April 1 and July 31, 1994, in Butare, Rwanda (*R c Munyaneza*, 2009 (QCCS 2201)).

I included four documents in this case for my analysis. The first was *R c Munyaneza*, 2009 (QCCS 2201) which is the judgment on Munyaneza's criminal trial by Justice Denis who convicted him under the CAHWCA. In addition to the reasoning on the verdict, this judgment explained how prosecutions under CAHWCA occur. The second document included was the judgment by Justice Denis on Munyaneza's sentencing proceeding in *R c Munyaneza*, 2009 (QCCS 4865). I analyzed this judgment because it further revealed how a judge would address a criminal of international crimes under this legal approach after guilt is established. Finally, *Munyaneza, c R*, 2014 (QCCA 906) was analyzed as this is the judgment by Justices Dalphond, Hilton, and Doyon on Munyaneza's appeal of his conviction. I chose to analyze this judgment for two reasons. Firstly, this provided another document relating to his criminal prosecution that could reveal more on the framing process for criminal prosecutions especially as other judges had reviewed the decision, thus providing me with another analysis of the case. Secondly, the appeal included interveners and so, the fourth document I analyzed was an intervener report submitted jointly by the Canadian Centre for International Justice and the Canadian Lawyers for International Human Rights (CCIJ & CLIHR).

For the most part, all the documents I excluded from this case related to various dismissed or granted motions or appeals that actors brought forward but had no great significance to how the courts actually addressed such suspected individuals. Instead, these documents discussed matters relevant to determining what could and could not be allowed in terms of release, evidence, witnesses, etc.

I chose this case because there are not a lot of cases with a successful criminal prosecution under the CAHWCA. Jacques Mungwarere was the only other person criminally charged under the CAHWCA (also for his alleged crimes during the Rwandan genocide); however, the judge at the Ontario Superior Court acquitted him in 2013 (Marin, 2013). As for my inclusion of *Seifert* to represent the legal approach of extradition, I included this case as part of representing the different legal approaches even though there has only been one successful criminal prosecution under the CAHWCA.

3.1.3 Post-Factum Immigration Fraud and Citizenship Revocation: *Skomatchuk*

The War Crimes Program also pursues post-factum immigration fraud and citizenship revocation as a legal approach to individuals suspected of international crimes. This specifically includes charging individuals under the IRPA and/or the *Citizenship Act* for falsifying immigration documents, lying to immigration officials, or fraudulently obtaining citizenship. This is a very common immigration law approach for dealing with individuals suspected of international crimes. Indeed, when searching for legal cases in CanLII, I found that many individuals were charged with having obtained citizenship under false representation, fraud, or knowingly concealing material circumstances. *Skomatchuk* is an example of this legal approach.

Jura Skomatchuk was born in the Ivano-Frankivsk Oblast district which was, at the time of Skomatchuk's birth in 1921, part of Poland but is now part of Ukraine. He immigrated to Canada in 1952 from the United Kingdom and became a Canadian citizen in 1957. Skomatchuk arrived in the United Kingdom from Austria in 1948. The Minister of Citizenship and Immigration brought this case to court because he believed Skomatchuk came to Canada under false representation by hiding his wartime activities. In particular, the Minister insisted that, from

1943 to 1945, Skomatchuk was a camp guard for the Nazis. Skomatchuk, however, asserted he was working for the Nazis as a result of forced labour. The Minister's counsel also clarified that what they were emphasizing in the case was Skomatchuk's engagement with the Nazis to demonstrate his inadmissibility to Canada upon his entry into the country and not to determine whether he committed any acts of violence during his role as a camp guard (*Canada (Minister of Citizenship and Immigration) v Skomatchuk*, 2006 (FC 994)).

During the immigration proceedings, Justice Snider found that Skomatchuk was a concentration camp guard for the Nazis during WWII but did not disclose this information to immigration officials when immigrating to Canada, which would have made him inadmissible. More specifically, Justice Snider ruled that Skomatchuk had obtained his citizenship under false representation, fraud, or knowingly concealing material circumstances (*Canada (Minister of Citizenship and Immigration) v Skomatchuk*, 2006 (FC 994)).

The document I analyzed was the judgment by Justice Snider on Skomatchuk's immigration proceeding that determined whether he had or had not obtained his citizenship through false representation, fraud, or knowingly concealing information. I included the judgment in *Canada (Minister of Citizenship and Immigration) v Skomatchuk*, 2006 (FC 994), because it captured the legal approach of post-factum assessment of alleged immigration fraud that this case represented. The only document I excluded was *Canada (Minister of Citizenship and Immigration) v Skomatchuk*, 2006 (FC 730), which was a judgment about the admissibility of evidence. The decision on evidence did not contribute to the framing process nor was it important to my goal of understanding the ways in which legal actors address international crimes in courts, which is why I excluded it.

Unlike the other categories, there were many cases that concerned post-factum immigration fraud by individuals suspected of international crimes like that of Skomatchuk. Although the specific details of the cases may vary, the majority of them all involved a finding of whether entry into the country and citizenship were granted under false representation. I selected this case to represent the category of post-factum immigration fraud with my inclusion criteria in mind. Thus, wanting to select a case that occurred within my timeframe, that was accessible, and that was mentioned in the media led me to select Skomatchuk's case. I considered a case brought forward after the amendments to the *Citizenship Act,* which changed the way that cases of post-factum immigration fraud were handled. Ultimately, I decided to include an earlier case because more cases of immigration fraud for individuals suspected of international crimes occurred before the amendments, and this made Skomatchuk's case more representative of similar cases of immigration fraud.

3.1.4 Exclusion from Refugee Protection: *Ezokola*

Exclusion from refugee protection entails denying a person from receiving refugee status under the IRPA. Section 98 of the IRPA embodies Article 1(F) of the Refugee Convention which allows states to deny refugee protection to individuals suspected of international crimes, if there are serious reasons to consider that an individual has committed an international crime. Of note, the standard of "serious reasons for considering" that an individual has committed an international crime used to exclude an individual does not imply criminal guilt nor would it lead to a conviction. As such, the standard of proof for exclusion is not based on "proof beyond a reasonable doubt" as in a criminal case. However, because refugee exclusion is very serious, the standard is higher than the "balance of probabilities" used in many civil cases, and since *Ezokola*

v Canada (Citizenship and Immigration), 2013 (SCC 40), the standard is also slightly higher than the "reasonable grounds to believe" used in most immigration matters (Government of Canada, 2021). The IRB determines this decision and typically, the proceedings are private but since Ezokola successfully appealed the initial IRB decision, the judgment became public. Refugee exclusion is another example of an approach pursued by the War Crimes Program.

In 2009, the IRB excluded Rachidi Ekanza Ezokola from refugee protection in Canada under Article 1(F) of the Refugee Convention due to this complicity by association in crimes against humanity and war crimes (*X(Re*), 2009). Ezokola was a diplomat of the Democratic Republic of Congo (DRC) at the United Nations and was residing in New York City in the United States (*Ezokola v Canada (Citizenship and Immigration),* 2010 (FC 662)). After Vice-President Jean-Pierre Bemba resigned in 2006 and President Joseph Kabila won the election in 2006, Ezokola no longer felt safe in New York as it was through Bemba's government that Ezokola became a diplomat, and his Bangala ethnicity further put him at risk. The tension caused by President Kabila's government, including the threats made against Ezokola for his ties to Bemba, led him to resign in 2008 (which the Congolese government considers an act of treason) and to seek refugee protection in Canada (*Ezokola v Canada (Citizenship and Immigration)*, 2010 (FC 662)). As a result, Ezokola's role as a diplomat associated him with the Congolese government, and his contribution to crimes against humanity under Vice-President Bemba is what the IRB based his exclusion on.

In 2010, the Federal Court (FC) reviewed the IRB's 2009 finding of exclusion. Justice Mainville concluded that the IRB cannot exclude Ezokola from refugee protection based on a broad understanding of complicity, and that the IRB should rehear the case (*Ezokola v Canada (Citizenship and Immigration)*, 2010 (FC 662)). In 2011 at the Federal Court of Appeal (FCA),

Justice Noël allowed the appeal by the Minister of Citizenship and Immigration concerning the decision made by Justice Mainville, and ruled that for international crimes, complicity by association of a senior official requires a "personal and knowing" participation test. He ruled for a new IRB panel to rehear the case and for them to apply this test (Canada (*Citizenship and Immigration) v Ekanza Ezokola*, 2011 (FCA 224)). In 2013, the SCC further ruled that guilt by association is not a ground for refugee exclusion and particularly noted the difference between complicity and association, and imposed a standard of "serious reasons for considering" instead of prevalent and slightly lower standard of "reasonable grounds to believe.". The SCC concluded for a new IRB panel to redetermine the case and to conduct a contribution test based on the facts of the case (*Ezokola v Canada (Citizenship and Immigration)*, 2013 (SCC 40)).

The only document I included to analyze for this case was the 2013 SCC judgment in *Ezokola v Canada (Citizenship and Immigration)*, 2013 (SCC 40). This judgment was the latest document as prior documents were judgments from proceedings in lower courts and in previous years. Also, the SCC judgment I selected included the judicial history of the case which included summaries of the 2009 IRB decision, the 2011 FC decision, and the 2011 FCA decision. I relied on these succinct summaries when drawing on the previous proceedings.

The 2013 SCC proceeding also included the submission of six intervener reports. The intervener reports I analyzed were Amnesty International (2012), the Canadian Centre for International Justice and the International Human Rights Program at the University of Toronto Faculty of Law (CCIJ & IHRP) (2012), the Canadian Civil Liberties Association (CCLA) (2012), the Canadian Council for Refugees (CCR) (2012), and the United Nations High Commissioner for Refugees (UNHCR) (2012). The majority of the factums were publicly accessible but for those that were not, I emailed the lawyers that represented each organization to

obtain them. The Canadian Association of Refugee Lawyers also submitted an intervener report, but I was not able to analyze its factum because the online link to the report no longer worked and despite trying to contact the lawyers representing the organization, I received no response. As a result, I had to exclude this intervener report since it remained inaccessible to me when I started my coding process. I do not believe that the exclusion of this document impeded my analysis as all of the intervener reports I included conveyed the same message and I identified similar codes across them as well.

I chose this case because it is a well-known case and because of its legal importance since the judgment led to a reinterpretation of refugee status exclusion/inclusion in Canada. The significance of the case also led legal actors to draw on the ruling in other immigration cases. Thus, the prominence of *Ezokola* contributed to my selection of the case in my research.

3.2 Thematic Analysis

To analyze my data, I used thematic analysis. I chose this method of analysis because it allowed me to code to identify meaningful themes from the data to help me describe the framing process within each legal approach. According to Braun and Clarke (2006), a theme is something that gives meaning to data and, by doing so, ascribes meaning and importance to it in relation to the research question. Further, themes helped me interpret trends in how actors are framing cases. Identifying themes as part of my analysis tied into my coding technique of thematic analysis. Thematic analysis "identif[ies], analyz[es], and interpret[s]" (Clarke & Braun, 2017, p. 297) data to uncover patterns or themes that lie within and across the data. Further, thematic analysis is a systematic approach to making sense of research material and drawing out only what is necessary (Clarke & Braun, 2017). As a qualitative approach, thematic analysis seeks to

produce an understanding of a phenomenon (Vaismoradi & Turunen, 2013). Thematic analysis is advantageous for being a flexible approach (Vaismoradi & Turunen, 2013; Nowell, Norris, White, & Moules, 2017; Braun & Clarke, 2006; Clarke & Braun, 2017), for its ability to actively involve the researcher in coding, for finding themes, and for the adaptability of the approach for researchers to use this method in a range of different studies (Clarke & Braun, 2017; Nowell, Norris, White, & Moules, 2017).

More specifically, I used thematic analysis because analyzing the final presentation of decisions by legal actors to pursue a particular legal approach was my goal through this qualitative research. Interpreting data as part of thematic analysis included identifying how actors presented the individual (e.g. as dangerous, as deserving of protection, as a criminal, etc.) and what kind of problem it represented for Canada (e.g. a question of security, of impunity, of international obligation, etc.). More broadly, the use of thematic analysis helped to see whether any patterns emerged (Braun & Clarke, 2006; Clarke & Braun, 2017). This included identifying patterns based on the similarities and differences being presented across the cases. This allowed me to identify if themes were transversal or if themes were specific to legal approaches. Doing so also allowed me to determine if there were overarching patterns within the legal approaches that I could group together based on their similarities as opposed to viewing them as four separate and distinct approaches. Thus, identifying themes and patterns in my research contributed to answering my research question by revealing how actors construct and govern the issue within the courts.

Indeed, thematic analysis takes place in a series of steps, which Ezzy (2002) and Braun and Clarke (2006) have categorized. The authors describe an initial step of becoming familiar with the data and identifying data to code. The next step involves looking between codes and

comparing them to search for themes. The purpose of discovering themes is to reveal patterns in the data that could explain what is happening, and contribute to answering the research question.

My thematic analysis included multiple rounds of coding. This step involved identifying and characterizing excerpts of data into different code categories. Coding data helped me to interpret and draw meaning from what was being presented. While coding, I would read my documents and would tag excerpts of data that matched one of my pre-determined code groups. Alternatively, if I noticed something important in my data that did not fit into one of my code categories, I developed a new code to tag the data under. Coding my data helped to narrow down the lengthy texts and to focus on what is important. In this sense, codes were important for what they qualitatively represented, as opposed to just how many times they appeared in the data (Braun & Clarke, 2006). More so, the qualitive importance of codes led me to identify patterns and themes across the data as the excerpted data was what I relied on when doing so.

Before coding, I identified five codes that I used when analyzing the data. They included the deductive codes of: 'dangerousness' (centred on both national security and the protection of society), 'no safe haven' (centred on preventing criminals from seeking refuge in a new country),[16] 'responsibility towards others' (centred on states upholding their international obligations and/or treaties), 'global leadership' (centred on states wanting to be at the forefront and seen as committed against this issue), and 'justice' (centred on justice for victims by focusing on the moral and social duty of acting against human rights violators). These codes are

[16] To note, there is a distinction between my deductive code of 'no safe haven' and of the No Safe Haven approach. My code refers to the academic concept and the general practice of preventing suspected criminals from seeking a safe haven whereas the No Safe Haven approach specifically refers to a policy regime that prevents suspected criminals from seeking a safe haven and of Langer's (2015) dichotomy. Although related, my code does not always entail the attached policy regime and can instead, refer to general discussions about the practice or its related legal tools.

deductive as they arose from the literature and my understanding of this issue before data analysis.

The presence of inductive codes, which are the codes that arose from the data, are important as they represent other constructions and understandings of the case that I did not anticipate. When coding, two inductive codes emerged which were 'general immigration concerns' and 'national responsibility'. The first inductive code arose when I realized that there was a key concern for immigration violations and noticed that state actors were emphasizing this through repeated mentions about immigration policy and its objectives. The second inductive code is a variation of my deductive code of 'responsibility towards others' because instead of centring on international obligations (like the scholarship suggests), this code centres on national obligations. Upon finding these codes, I realized that despite the scholars' focus on writing on immigration practices, I did not consider codes that would account for more state-level and non-international concerns apart from 'dangerousness' and 'no safe haven'. The inductive codes further led me to realize that legal actors' presentation of cases does not have to include references to international law, crimes, or commitments. Thus, the identification of inductive codes in my data made me realize I should have accounted for more non-international based preoccupations.

In addition, the coded data primarily reflected what the judges or interveners were making known about the case as these actors were the ones most present in the court judgment and intervener documents. Yu (2020) wrote that a judge's final decision is based on their interpretation of the case and thus, court judgments reflect a judge's understanding of the truth. This further means that the court judgment documents I am reading are a form of reported judicial speech that reflects a judge's understanding, and this is because of the authority a judge

has within the court. As a result, this authority ascribes a judge a higher level of status and, while coding, I was aware that I was reading such a judicially influenced document. I knew that I was reading a form of judicial speech that reflected what the judge understood and wanted to present in their judgments. This is why my research question asks "*what do legal documents reveal*?". I used the word "reveal" to acknowledge that the information presented in the documents was selected either by judges or interveners. More so, these actors may reveal certain aspects of the case and its reasonings while also concealing other aspects. As a result, my data provided me with only a limited access into the position of legal actors, but as mentioned above, the judgments contained succinct summaries that helped to get a sense of actors' positions.

After the preliminary identification of deductive codes, conducting my thematic analysis involved three rounds of coding. I coded court judgment documents and intervener reports similarly. With three rounds of coding, I better understood what legal actors were conveying in their presentation of the case and was more familiar with the text when identifying my codes. The first and second readings of my selected documents were a pre-analysis that provided me with a contextual understanding of the facts of the text before my third reading when I coded for deductive and inductive codes. The first and second readings also helped to familiarize myself with the text, especially with the court judgment documents, and I took the time to understand the legal terms and procedures. As someone not trained in law, the pre-analysis ensured that I knew what was going on in the case, and that I was not disadvantaged when going through such dense, lengthy, and legal texts, so here was when I took the time to seek clarification on any legal aspects of the case if needed.

Specifically, when coding court judgment documents, I first familiarized myself with the case by identifying the legal approach within the case judgment document and the important

facts. This approach allowed me to gain an understanding of the judge's decisions based on the provided reasoning as per the facts of the case. When coding the intervener reports, the first reading was also a contextual reading to gain a better understanding of what interveners were presenting. This step included identifying within the text who the intervener was and their position on whether they are supporting the legal approach taken by the courts or not. In my first reading of each document, I coded relevant data with the contextual codes of 'important facts', 'legal approach', and 'judge's decision/conclusion'.

In my second round of coding, I mapped out and identified the relevant laws in each case. By paying attention to the laws, not only was I fulfilling one of my specific research objectives, but I was also determining what laws actors were making relevant within a legal approach. In my second round of coding the intervener documents, I focused on identifying the reasons for intervening as well as the main reasoning for the submission of an intervening report. Identifying the laws also helped to recognize codes before my third reading of the text. I kept track of the laws by coding relevant mentions of legislation and its sections under the contextual code of 'laws'.

The third round of coding is where I focused entirely on identifying any inductive and deductive codes within the text, and I did so for each type of document. This coding stage was easier because by the third reading, I had a deepened understanding of the text. Reading each document two times prior helped in pre-emptively identifying codes. Despite this, I still took my time to read each document carefully to ensure I did not miss any deductive or inductive codes. Here is where I reflected upon the following questions: *What codes could I identify? How did they appear? Implicitly? Explicitly? How many times did they appear? How does the code relate to the legal approach?* I did not have any key terms to look out for when identifying data to

code, I instead coded data based on the context of what legal actors were presenting and whether the actors were directly or indirectly implying the codes based on what they were mentioning in the documents. Since I coded the intervener reports after the court judgment documents, I kept in mind the differences and similarities in how the legal approaches were discussed, and whether the intervening reports were in synch with the court judgment documents or if the reports conflicted with the judge's decision.

After coding my data, I reviewed what I had coded in each code. I was cognizant of where I had identified codes, where I had not identified codes, in what cases I had identified particular codes, if there were similarities or differences amongst the coded data across the legal cases, of if overlaps of coded data occurred across different codes. In reviewing my data, I discovered the different emphasis put on certain aspects of the case, the presence of certain patterns, and the identification of themes. Searching for themes is a major step in thematic analysis and by spending time to organize and think through the presentation of the codes in the cases, I discovered three themes: no safe haven, international concerns, and national concerns. My ability to identify these themes offers a way to describe how legal actors are viewing, approaching, and presenting individuals suspected of international crimes within the courts.[17]

[17] To clarify my use of terms between frames, codes, and themes:
Frames relate to my theoretical concept of legal framing and so, frames provided a typology to characterize and view the different legal approaches and the framing process that take place in Canadian courts. In my thesis, I am examining the four frames of criminal prosecution, extradition, post-factum immigration fraud, and refugee exclusion. When referring to 'immigration-based framings', I am referring to the frames of post-factum immigration fraud and refugee exclusion. When referring to 'criminal-based framings', I am referring to the frames of criminal prosecution and extradition;
Codes relate to my methodological process of using thematic analysis. A step within my analysis process was the coding stage where I identified codes to help organize, characterize, and narrow down the lengthy material. There are five deductive codes (dangerousness, no safe haven, responsibility towards others, global leadership, and justice) and two inductive codes (general immigration concerns and national responsibility);
Themes relate to my analysis chapters. Themes are labels for patterns that I discovered within my coded data that makes sense of what is occurring within my data and, more broadly, that can help me understand what legal documents are revealing about responses to suspected individuals. I discovered the three themes of no safe haven, international concerns, and national concerns.

To conduct my analysis, I used the NVivo software. In doing so, I organized all the relevant documents into folders that represented each legal cases of *Seifert*, *Munyaneza*, *Skomatchuk,* and *Ezokola*. I was able to code each document within the software and I was able to easily retrieve coded excerpts of my data within the software which was convenient when reviewing my data. Using NVivo made it convenient for me to look across the different legal cases to see if a code was present or absent within a document, or more broadly, within each legal case.

Although thematic analysis was a useful method, some difficulties arose when coding my data. The main disadvantage was the flexibility granted to scholars when using this method of analysis. Despite scholars considering it an advantage, the flexibility of thematic analysis means I had to remind myself to remain consistent and in line with my research question without straying from my research topic (Nowell, Norris, White, & Moules, 2017). To ensure that I kept on track while using thematic analysis, I held myself accountable to conduct the same steps for each document despite how tedious reading a document three times over can be. To ensure that I completed my steps as systematically as possible, I would take breaks when I caught myself not being as rigorous as I ought to be.

Conclusion

This chapter presented my methodological strategy. I started by introducing the data I selected for my project. I presented and outlined the four legal cases of *Seifert*, *Munyaneza*, *Skomatchuk*, and *Ezokola* which I chose to represent the legal approaches of extradition, criminal prosecution, post-factum immigration fraud, and refugee exclusion. I also outlined my practice of coding and thematic analysis to find patterns to analyze in the court judgment documents and

intervener reports I selected. In the subsequent chapters, I present my findings and analyses on how legal actors respond to individuals suspected of international crimes in the courts.

4. The Importance of Criminality in Immigration Cases

The War Crimes Program acts upon Canada's commitment towards international justice and impunity against individuals suspected of international crimes. The War Crimes Program uses an array of legal remedies to address these crimes, including immigration-based measures such as citizenship revocation, exclusion from refugee protection, and inadmissibility proceedings (Department of Justice, 2021b). Of note, while the program's website does list the possibility of pursuing criminal prosecution for immigration fraud under the IRPA and/or the *Citizenship Act*, state actors do not commonly pursue immigration fraud through this measure. The immigration fraud proceedings in *Skomatchuk* were wholly civil and not criminal despite criminal prosecution being an available legal option. As mentioned in my literature review, the use of immigration practices stems from Canada's adherence to the No Safe Haven approach. By excluding refugees, finding people inadmissible, and revoking citizenship of those suspected of international crimes, officials in the War Crimes Program consider that they are preventing Canada from being a safe haven.

Indeed, No Safe Haven is a principle that facilitates the practice of immigration-based responses to address individuals suspected of international crimes. More so, the specific use of immigration practices in this way is part of the No Safe Haven policy regime. To briefly summarize, the policy regime of No Safe Haven combines criminal and immigration law at the domestic and international levels (Hamlin & Rowen, 2020). When put into practice, this regime entails that individuals suspected of having committed international crimes, regardless of whether guilt has been proven, should not be allowed to move to "desirable immigration destinations" (Hamlin & Rowen, 2020, p. 625). Additionally, the literature mentions that this

practice is popular amongst many states, including Canada, for the ability to protect national security while being resource-efficient (Hamlin & Rowen, 2020; Lafontaine, 2010b).

The practice of No Safe Haven in Canadian courts cases involving individuals suspected of international crimes is seen in *Ezokola* and *Skomatchuk*. Of the four cases, these two were more immigration-based because they both only drew from the IRPA and the *Citizenship Act* and led to either refugee exclusion or an inquiry into immigration fraud. Despite this similarity, I discovered a difference in how actors were addressing Ezokola and Skomatchuk in their proceedings. Specifically, I found that legal documents revealed state actors differentially emphasizing legal facts pertaining to the individual's criminality. State actors' ability in doing so highlights the importance of using criminality to maintain a response in accordance with the No Safe Haven approach.

In this chapter, I drew on the legal cases of Ezokola and Skomatchuk to demonstrate how criminality was either being emphasized or downplayed in order to justify either a framing of refugee exclusion or a framing of post-factum immigration fraud.

4.1 Emphasizing Criminality in Ezokola's Refugee Exclusion

In Ezokola's case of refugee exclusion, all legal actors represented in the documents agreed that the refugee system should offer a safe haven to deserving refugees, but not to someone complicit in international crimes. The application of this principle within the frame of refugee exclusion was where there was a divergence. Legal actors strongly emphasized that Article 1F(a) exclusion should be applied when it is justifiable to do so, but legal actors did not agree about whether it should apply in the case at hand. The counsel for the Minister of Citizenship and Immigration viewed Ezokola as undeserving of refugee protection for his

complicity in international crimes, whereas both defence counsel and intervening actors, comprising of non-governmental and non-profit organizations, viewed Ezokola as needing protection. As a result, actors made opposing arguments throughout the proceedings on whether a No Safe Haven response was justified.

State and intervening actors commented on the application of Article 1F(a) and on Ezokola's association with crimes against humanity. Specifically in their judgment, SCC judges recognized the need to balance the protection of refugees against ensuring that criminals are not taking advantage of the refugee system. The Minister's counsel strongly emphasized Ezokola's association to crimes against humanity and used this claim as a basis for denying protection based on the Article 1F(a) exclusion, and to frame the case as a suspected individual attempting to seek a safe haven in Canada by claiming refugee status. Ezokola's association with the DRC government and its crimes against humanity were highlighted as the "serious reasons" in considering that he was complicit in the crimes committed by the government and as a result, he was not "entitled to the humanitarian protection provided by the Refugee Convention" (*Ezokola v Canada (Citizenship and Immigration)*, 2013 (SCC 40), para. 2 & 19). Additionally, the Minister's counsel's argument for applying Article 1F(a) exclusion is to prevent Canada from becoming a safe haven. The state's argument in relation to Article 1F(a) is summarized in the following quote from the introduction of the Supreme Court judgment:

> First, the Refugee Convention embodies profound concern for refugees and a commitment to assure refugees the widest possible exercise of fundamental rights and freedoms. However, it also protects the integrity of international refugee protection by ensuring that the authors of crimes against peace, war crimes, and crimes against humanity do not exploit the system to their own advantage. A strict reading of art. 1F(a) properly balances these two aims (*Ezokola v Canada (Citizenship and Immigration)*, 2013 (SCC 40), p. 680).

Although the SCC quote remarks on a "strict reading", I found that that the interveners assertion of a broad reading that imbalances the two aims as being more of an accurate assessment.

The broad application is especially seen with the emphasis state actors put on not wanting Canada to be a safe haven. Further, SCC judges recognized this concern and made clear in their judgment that "those who create refugees are not refugees themselves" (*Ezokola v Canada (Citizenship and Immigration)*, 2013 (SCC 40), para. 34). As such, this imbalance - as interveners see it - contributed to solidifying Canada as a country focused more on ensuring that it does not become a safe haven, rather than on ensuring an equitable application of Article 1F(a). In relation to my findings on the strong emphasis put on Ezokola's complicity in international crimes to ensure a No Safe Haven response, I argue that although state actors recognized the importance of striking a balance between the protection of refugees and the exclusion of criminals, there was still a heavy emphasis on the need for an exclusionary response because of Ezokola's association with the regime. In their understanding, association meant complicity, but intervening actors opposed this understanding and urged for an alternate way to address the case since Ezokola was a refugee himself and should be granted a safe haven. The SCC accepted the position of the interveners and defence counsel.

In comparison, intervening actors insisted on a narrow application of Article 1F(a) to prevent rightful refugees from being denied a safe haven. Interveners recognized the importance of striking a balance between protecting refugees and excluding criminals, but they assured state actors that upholding Article 1F(a) provisions required a proper application, which they claimed the IRB, the FC, and the FCA failed to recognize (CCLA, 2012, para. 4). Amnesty International (2012) even insisted that a proper application of Article 1F(a) would "never" (para. 13) exclude refugees nor allow criminals into the country. Additionally, in their joint factum, the CCIJ and

IHRP called out state actors, including the Minister's counsel and previous judges who ruled in favour of Ezokola's exclusion, because:

> There is no such thing as organizational, rather than individual, culpability. There is no 'complicity by association'. In light of this, the current, over-inclusive Canadian approach must be revised; at present, it risks excluding individuals from refugee protection who would not be culpable for committing an international crime at ICL. (CCIJ & IHRP, 2012, para. 23)

Here, the CCIJ and IHRP directly denounced the strong emphasis placed on Ezokola's association to international crimes and his criminality by claiming that such an emphasis is irrelevant when determining refugee status. This quote helps us see how intervening actors framed the case differently by viewing it as a wrongful case of refugee exclusion since they viewed Ezokola as a deserving refugee. Therefore, interveners critiqued the state actors' broad application of Article 1F(a) that seemingly *over*-emphasized Ezokola's association to international crimes which, in turn, unrightfully led to a decision that excluded him from refugee protection.

Intervening actors were all adamant about the wrongful application of Article 1F(a) in their factums, and presented the case as an exclusion of a deserving refugee. This is an alternative view because it did not align with that of the initial state actors who viewed the case as one of refugee exclusion of an underserving refugee. Refugee exclusion was still the frame in the case, but actors were debating the construction of the frame on whether to include an association to a crime as a ground for exclusion. The Minister's counsel was presenting this frame as including an association to international crimes whereas intervening actors and the defence counsel were presenting this frame as not requiring this element because they saw it as too broad and excluding rightful refugees like Ezokola.

Wedeking (2010) wrote how alternative frames, in this case the presentation of the frame by the defence counsel and interveners, arise with more difficulties since they are not normalized responses. More so, if Canada is a No Safe Haven country that pursues responses in accordance with this approach, then refugee exclusion, as promoted by the Minister's counsel, was the prevalent frame in the case. Further, previous proceedings to the SCC drew on the IRB's initial framing of the case as one of refugee exclusion and this initial framing remained consistent in the other proceedings, which then formed the basis for the defence and interveners to argue for an alternative construction of the frame. Thus, since these legal actors are challenging not the frame of refugee exclusion but the go-to way of viewing Article 1F(a) exclusion, they hold an alternative understanding to that of the state actors' and how they had been applying the exclusion prior to the challenge.

The ability for the SCC to side with the alternative construction of the frame in relation to the question of complicity is due to the power that SCC legal actors have to decide what construction of the frame they agree is the most reasonable based on what was presented to them in the proceeding. The SCC deciding on the interpretation of the frame that was favoured by the defence counsel and interveners demonstrates how alternative frames and understandings can be favoured over the prevalent frame even though doing so can be difficult.

In brief, the Minister's counsel strongly emphasized Ezokola's association to international crimes which intervening actors were disputing as an irrelevant element and critiquing the state's broad application of Article 1F(a). Instead, interveners urged for a narrow application, which they saw as a more accurate approach to how the state ought to apply the law to prevent deserving refugees, like Ezokola, from refugee exclusion. Actors in this case were on different sides of the argument and presented different constructions for the frame of refugee

exclusion. Thus, the various legal actors had different interpretations of how the IRB should apply Article 1F(a) refugee exclusion but importantly, the strong emphasis of criminality that state actors alluded to in order to pursue this frame was seen as an overreach. In other words, the emphasis on criminality was the driving force for state actors to seek an immigration framing and to prevent Canada from being a safe haven.

4.2 Downplaying Criminality in Skomatchuk's Post-Factum Immigration Fraud

In the second case, the Minister's counsel in *Skomatchuk* downplayed certain legal facts pertaining to Skomatchuk's criminality to justify a No Safe Haven response, a strategy that is opposite to the one deployed in *Ezokola*. Here, a safe haven was not to be granted for those who had worked in concentration camps. More so, a No Safe Haven response was justified because Skomatchuk was inadmissible to Canada upon his entry in 1952 and should face consequences for immigration fraud. Specifically, the Minister of Citizenship and Immigration sought to revoke Skomatchuk's citizenship because the Minister believed he was admitted to Canada and obtained his citizenship by knowingly concealing his occupation. In addition, under section 20(2) of the *Immigration Act* of 1948, which applied at the time of the offence, lying to immigration officials was "sufficient ground for deportation" (*Canada* (*Minister of Citizenship and Immigration) v Skomatchuk*, 2006 (FC 994), para. 19). The case concluded with the FC finding that Skomatchuk had been admitted to Canada and obtained his citizenship through false representation, fraud, or knowingly concealing material circumstances.

The finding by Justice Snider was the result of the Minister's counsel emphasizing Skomatchuk's prohibited entry into Canada. His criminality was only relevant to prove that he was a prohibited person which is why I considered it to be downplayed because it was only

mentioned to support the argument that he committed immigration fraud and was not strongly emphasized like in *Ezokola*. In other words, this case focused a lot more on the immigration rules at the time of Skomatchuk's entry into Canada and how he violated those rules as opposed to specifically focusing on the fact that Skomatchuk was a concentration camp guard during WWII and that he might have committed international crimes. The focus of the case made sense given that this was a civil proceeding but the ability to downplay the possible criminal nature of Skomatchuk's wartime activities to emphasize his immigration violations was how state actors could justify a No Safe Haven response.

The following quote from Justice Snider demonstrates how immigration fraud was much more important than Skomatchuk's wartime activities:

> I have concluded that Mr. Skomatchuk, on a balance of probabilities, was a concentration camp guard. The Minister argues that this fact alone would have made Mr. Skomatchuk inadmissible to Canada in 1952. In brief, the Minister's submissions are that SS concentration camp guards were an absolute prohibited class. According to Dr. Avery's evidence, such persons were considered the most "odious" type of person with respect to an examination of their war time activities. Between 1945 and 1955, the Minister asserts that there was an absolute prohibition on their entry into Canada … (*Canada* (*Minister of Citizenship and Immigration) v Skomatchuk*, 2006 (FC 994), para. 137).

Despite denouncing his character as "odious" for wartime activities, this was still a civil proceeding, and despite establishing on a balance of probabilities that he was a concentration camp guard, the focus remained on the question of fraud concerning his entry into Canada, not on the potential criminal nature of his acts. The ability to recognize both aspects of the case, immigration and criminal elements, and having the discretion to emphasize one over the other, is due to jurisdictional games. This will be discussed more below, but for now, the quote demonstrates how the state's legal team knew of Skomatchuk's wartime activities in so much as to refer to them as "odious" and yet, when faced with this fact, in addition to his immigration

violations, they still only pursued his immigration violations. To note as well, this civil case was the only proceeding regarding Skomatchuk and so the state's legal team did not refer to his wartime activities in what would have been another proceeding focusing on criminal matters. This means that a decision was made to not lay criminal charges for these acts. Instead, post-factum immigration fraud was the only charge Skomatchuk faced in the courts.

Whether Skomatchuk gained unlawful entry into Canada and obtained citizenship through false representation, fraud, or knowingly concealing material circumstances was a finding per the No Safe Haven response. Justice Snider was adamant in that he did not lawfully come into Canada and that camp guards "were not welcome in Canada" (*Canada (Minister of Citizenship and Immigration) v Skomatchuk*, 2006 (FC 994), para. 31). This indicates that if he was not welcome to Canada in 1952, then he likely was not welcome to remain in Canada in 2006 for his wartime activities, and for lying to immigration officials and committing immigration fraud. Thus, framing the case as post-factum immigration fraud allowed the Minister's counsel to emphasize and focus on post-WWII immigration laws to justify a No Safe Haven response.

What the state's legal team viewed as the prevalent frame and how they acted accordingly in court relates to prosecutorial discretion. What mattered most was not what happened prior that led to the individual lying to immigration officials but rather the act of lying to immigration officials, and how the Minister's counsel used their discretion to prioritize this in the case. More so, during the proceeding, Justice Snider remarked: "[i]t should be made clear that the Minister does not assert that, during this period, Mr. Skomatchuk carried out any particular acts of violence" (*Canada (Minister of Citizenship and Immigration) v Skomatchuk*, 2006 (FC 994), para. 72). This demonstrates that although he was a concentration camp guard

and the state's legal team was aware of this, violence was not a concern, and this allowed for the shift of concern to be on violating Canadian immigration law instead. Furthermore, since violence was not a concern, legal actors, through their discretion, chose to emphasize immigration laws and procedures during the post-WWII era, which may have contributed to why the Minister's counsel only pursued a civil proceeding. In this way, the state's legal team practiced prosecutorial discretion by selecting aspects of the case to fit the frame under the No Safe Haven response.

The state's legal team addressed Skomatchuk's immigration violations, and this focus deflected the court's attention away from his suspected criminality. Perhaps these legal actors, through practicing their discretion, chose not to centre on this because that would have alluded to criminal responsibility for international crimes and thus a criminal prosecution. Instead, however, since criminal proceedings are rare and expensive, as discussed in my literature review, an immigration-based strategy was more applicable, feasible, and on par with the No Safe Haven approach. The decision to pursue an immigration law response and focus on what is a 'lesser offences' is an example of what Rowen and Hamlin (2018) call the Al Capone method. This is where the state's legal team would use its discretion to purposely pursue a lesser civil offence if there were not enough evidence or resources for a criminal prosecution (Rowen & Hamlin, 2018). As an immigration-based case was pursued using the Al Capone method, then downplaying Skomatchuk's criminal activities was reasonable given that the state's legal team was intentionally avoiding criminal prosecution to seek a more efficient strategy.

The Al Capone method is not new within the No Safe Haven approach, as the American Human Rights Violators and War Crimes Unit also exercise it (Rowen & Hamlin, 2018). As a practice of No Safe Haven and the politics of NIMBY, this method is relevant because although

there was no criminal prosecution, state actors could still pursue an individual suspected of international crimes in the courts for another violation. The Al Capone method helped to facilitate the No Safe Haven response in *Skomatchuk* because it allowed state actors to centre on and pursue his immigration violations rather than his criminal activities. As a result, the focus on immigration violations contributed to his potential removal from the country even though he had not been found guilty of a crime. Further, charging him with a 'lesser' civil offence led to a sanction that the state's legal team saw as ensuring Canada would not become a safe haven to someone who should not have been allowed entry in 1952. Thus, it is reasonable to assume that the discretion granted to state actors have led them to deliberately pursue a No Safe Haven immigration-based response, and strategically adopt the Al Capone method.

Concludingly, the state's legal team emphasized the different aspects of the case to present the framing of post-factum immigration fraud. As I have discussed, they only mentioned Skomatchuk's role as a concentration camp guard to demonstrate how he violated Canadian immigration law by lying about what would have made him a prohibited person. Beyond justifying a No Safe Haven response, the decision to emphasize immigration aspects and downplay wartime activities may have stemmed from a lack of evidence, a general push for pursuing an immigration concern, a concern over the resources and time that a criminal trial would require, or the strategic practice of the Al Capone method. These are inferences I make from the scholarship and the data I had access to, but I cannot fully demonstrate them. This is where uncertainty and challenges arise from being limited to court documents and not knowing how the decisions that take place outside what is revealed in court judgments are made. Thus, in this immigration case, the Minister's counsel downplayed Skomatchuk's criminality and strongly emphasized his immigration violations to justify the No Safe Haven sanction of post-factum

immigration fraud. The absence of a criminal trial also demonstrates that this option was either never considered or ruled out at some point.

4.3 A Conceptual Understanding on the use of Criminality for a No Safe Haven Response

As I hope I made clear, legal facts concerning an individual's criminality was important in contributing to state actors' pursuit of an immigration framing for a case under the No Safe Haven approach. As shown in research by Bond et al. (2020), Simeon (2015), Lafontaine (2010b), Hamlin and Rowen (2020), Weiss (2012), and Bond (2017), state actors have a strong focus on the use of immigration responses when addressing individuals suspected of international crimes. In relation to my research, I found that despite being different cases, both featured a response that reflected Canada as not being a home to those involved in international crimes and state actors assured this by differentially emphasizing the suspected criminal's criminality. Thus, my analysis on both cases in this chapter thus far, is aligned with the scholarship, and my analysis demonstrates how state actors within the courts act on their desire to keep suspected individuals out of the country.

My analysis of the way legal actors drew on information relating to an individual's participation in international crimes, and especially the varying emphasis placed on criminality contributes to our understanding of how actors construct immigration-based responses, and can be further explained through my conceptual tools. Discretion was used to the advantage of state legal actors to respond to cases however they saw fit under the No Safe Haven approach. In *Ezokola*, the discretion granted to IRB members led to Ezokola's exclusion from refugee protection as they were the ones who initially agreed on his association with international crimes as grounds for refugee exclusion. This further led the Minister's counsel to maintain this

approach by asserting their construction of the frame of refugee exclusion as presented in the courts. Discretionary decision-making granted state actors in *Ezokola* the ability to pick and choose what they wanted to emphasize, and in this case, they chose to strongly emphasize his complicity by association as the ground to exclude him from receiving refugee status.

To expand on the practice of discretionary decision-making in *Skomatchuk* that I mentioned above, discretion led the state's legal team to downplay Skomatchuk's criminality. This was evident in the emphasis on his immigration violations over his criminality to pursue the framing of post-factum immigration fraud. This framing entailed the Minister's counsel to downplay his criminality and participation in wartime activities and to only make it relevant to demonstrate that he was inadmissible to Canada at the time of his entry and not that he was culpable of committing international crimes. The state's legal team also practiced discretion in the decision to pursue a civil proceeding of refugee exclusion in line with the No Safe Haven approach as opposed to pursuing a criminal prosecution for immigration fraud under the IRPA and/or the *Citizenship Act,* or even a criminal prosecution under the CAHWCA for his wartime activities. In both cases, state actors practiced discretion by making choices to govern both individuals through an immigration-based measure as per the No Safe Haven approach.

Only the final choice is presented within the documents which is why understanding the decision-making process was difficult. Despite this limitation, I found that the decision to emphasize or downplay criminality is a strategic one deployed with the objective of preventing an individual involved in or associated with international crimes from remaining in Canada. Interestingly, although this reasoning is the same in both cases, discretion, as conceptualized by Sklansky (2012) and by van der Woude and van der Leun (2017), granted state actors flexibility and choice to frame the cases differently alongside the different facts of the case.

The ability of state actors to pursue different frames, and present divergent constructions of these frames is the result of the role of discretionary power that officials have (Pratt, 1999). Specifically, in *Ezokola,* IRB members and the Minister's counsel did not have to emphasize the guilt of association, but having the discretion to do so seemingly drove their reasoning to exclude Ezokola. Such power to promote a prevalent frame contributed to intervening actors denouncing such discretion in applying refugee exclusion. In *Skomatchuk*, discretion facilitated the state's legal team's ability to downplay Skomatchuk's criminality and pursue a frame of immigration fraud over others while still acknowledging his criminality. The practice of discretion is connected to my other concept of jurisdictional games.

The ability of state actors to view either Ezokola or Skomatchuk through an immigration or criminal lens, and choose between immigration and criminal frame, can be captured by the concept of jurisdictional games (Moffette, 2018). Thus, the state's legal team has the power to pick and choose between the immigration and criminal realms and their instrumentalist approach to law allows such flexibility. More so, these jurisdictional games explain how state actors could pursue an immigration response and still draw on the individual's criminality to ensure and justify a No Safe Haven response. Additionally, the concept of jurisdictional games relates to discretionary decision-making because acting upon a flexibility in governance is the result of the ability of choosing between a criminal or immigration frame, and in what to emphasize in the case to stay consistent with the lens.

In *Ezokola,* state actors practiced jurisdictional games because there was an immigration framing of the case and not a criminal one that focused on his culpability in these crimes. The state's legal team did not try to regulate Ezokola using criminal offences under the CAHWCA, despite having the universal jurisdiction to do so, and so jurisdictional games provided another

domestic law-based response through the IRPA. More so, state actors also cherry-picked which laws to emphasize because by continuing to only focus on immigration law and Article 1F(a), they could respond with a No Safe Haven approach to Ezokola, who they had serious reasons to consider - as per the standard of proof for refugee exclusion - as complicit in a crime. Attempting to exclude Ezokola for his complicity could spare Canada from being a safe haven, and from the cost and difficulty of pursuing a criminal proceeding while still ensuring there is legal response being taken.

In *Skomatchuk*, state legal actors acknowledged and established that Skomatchuk committed wartime criminal activities but still continued to pursue his immigration violations. Here, the state's legal team practiced jurisdictional games in its deliberate choice to focus on immigration violations and not the criminal offences committed while working as a concentration camp guard. The flexibility of jurisdictional games led the state's legal team to pick and choose how to govern Skomatchuk when both types of violations were present. Although the case had an immigration-based framing, facts concerning criminality were still relevant to supplement the response under the No Safe Haven approach. Downplaying his criminality to only demonstrate his inadmissibility led Justice Snider to find that Skomatchuk did unlawfully enter Canada and obtained citizenship through fraud. Using the concept of jurisdictional games therefore helped us make sense of the intersection between criminal and immigration matters that allowed state actors to govern both individuals through immigration measures while still mobilizing their criminality. Thus, the concept explains how actors could pick and choose facets of both immigration and criminality to address Ezokola and Skomatchuk.

My findings here also contribute to the literature. While scholars have discussed their findings on the No Safe Haven approach and Canada's practice of immigration-based measures

in cases of this nature, there is little in-depth analysis that looks beyond official statistics. Further, although authors like Bond (2017), Lafontaine (2010b), Simeon (2015), and Bond, Benson, and Porter (2020) have written about Canada's approach, they have only done so in a very broad way. My analysis of how immigration approaches are presented in court and revealed within legal documents, and of how the state practice the No Safe Haven approach through differentially emphasizing criminality is therefore an original contribution. My analysis thus provided further context to Bond's (2017) research on the IRB's increasing use of exclusion and inadmissibility orders. Additionally, I looked more closely into Lafontaine's (2010b) research that provided a descriptive overview of the responses in Canada but did not specify how each response looks like in practice. Thus, legal documents reveal how state actors apply a No Safe Haven sanction towards individuals suspected of international crimes, and my analysis fills gaps in the literature by further expanding or supporting existing research.

Conclusion

In this chapter, I argued that state actors present a varying emphasis on an individual's suspected criminality in the courts to fit a No Safe Haven approach in cases concerning international crimes. The importance of my finding is discovering how an individual's suspected criminality is made relevant within civil cases and how these immigration cases are constructed in order to facilitate a No Safe Haven response. My analysis of this strategy echoes Hamlin and Rowen's (2020) and Lafontaine's (2010b) view that the No Safe Haven approach is popular amongst states because I demonstrated how a preference for an approach can lead actors to pursue it and favour the use of immigration measures even when other legal actors may think otherwise. More so, as Wedeking (2010) explains, actively pursuing responses under the No Safe

Haven approach would make such responses the prevalent frames within cases of suspected criminals of international crimes thus making criminal-based responses like criminal prosecution an alternative frame since they are not as actively pursued by state actors.

I demonstrated that legal actors either strongly emphasize or downplay an individual's criminality to pursue a No Safe haven response. The ability for state actors to do so resembles the practice of the Al Capone method, where 'lesser offences' are selected. The lesser offence of immigration violations, such as in *Skomatchuk*, focused instead on his ties to international crimes resulting from his role as a concentration camp guard in WWII. On the other hand, in *Ezokola*, state actors were strongly emphasizing his association to international crimes to justify an immigration response. In either case, state actors pursued a non-criminal offence and possibly did so to stay within the practice of the No Safe Haven approach. In both cases, the ability of the state's legal team to vary their emphasis on criminality can be explained through the conceptual tools of prosecutorial discretion and jurisdictional games.

The findings in this chapter concerning the pursuit of an immigration-based sanction in accordance with the No Safe Haven approach recognizes the importance of the policy regime in cases of suspected criminals of international crimes. No Safe Haven in this chapter may have referred to the policy regime and the practice of not wanting suspected criminals in the county, but the legal documents I analyzed also revealed a 'no safe haven' theme that was present in all four cases.

5. The Presentation of No Safe Haven When Framing Cases

As I started looking at my coded data, I discovered my first theme. As mentioned in my methodology, themes draw meaning to the data and help to ascribe meaning to the patterns that emerged. I identified the theme of 'no safe haven' to help explain the preoccupation of the 'no safe haven' code in all four the legal cases I analyzed. In the legal documents I analyzed, I noticed that no safe haven was being presenting in the documents in different ways. This suggested to me a thematic importance to no safe haven as legal documents were commonly revealing legal actors' presentation of no safe haven during the framing process. Identifying the theme of 'no safe haven' in *Ezokola*, *Munyaneza*, *Skomatchuk*, and *Seifert* is of particular importance as it drew a relevance to no safe haven in each of the criminal and immigration framings when responding to individuals suspected of international crimes. In doing so, I argue that the separation between Langer's (2015) Global Enforcer and No Safe Haven approaches, that scholars allude to when referring to the criminal and immigration binary, is not as rigid as the literature describes it to be. My analysis here will thus draw attention to the exaggeration of such separation. In doing so, my analysis also shows how Canada's overall approach to suspected criminal of international crimes gets reflected in the courts.

In this chapter, I present the pattern that emerged that became the 'no safe haven' theme by outlining how documents revealed the preoccupation of no safe haven in each of the cases. In doing so, this demonstrates the flexibility of no safe haven to be made relevant in criminal and civil cases, and will further demonstrate the pervasiveness of this theme when legal actors respond to suspected criminal of international crimes.

5.1 The Theme of No Safe Haven in the Legal Cases

The theme of 'no safe haven' encompasses a pattern within the data that related to preventing individuals suspected of international crimes from seeking refuge in a new country or to Canada not wanting to become a safe haven country. Whether or not there was a real practice of No Safe Haven with immigration measures being sought, state actors still made references to Canada not being a safe haven to indicate that coming to Canada for this reason was unacceptable. As a result, the theme was identified in cases with a criminal response like in *Munyaneza*. My identification of the theme in cases without an immigration response can be analyzed through the concept of jurisdictional games because the same objective can be pursued with different legal tools, it is a matter of discretion on behalf of the legal actors to present no safe haven however relevant to the case. Also, the choice between No Safe Haven as a form of a policy practiced by legal actors or as an ideal mentioned by legal actors is the result of the picking and choosing attributed to ad hoc instrumentalism. The balance between both also lies with the discretion of legal actors in how they present material on immigration and criminal matters in court. To demonstrate my argument that the criminal and immigration division is not as strict a boundary as implied by the scholarship, I will show how I was able to identify the theme in each case and how the theme informed all of the cases.

The theme of 'no safe haven' informed the immigration proceedings of Ezokola, Skomatchuk, and Seifert in a similar way. In these cases, legal documents revealed a presentation of no safe haven in relation to the No Safe Haven policy regime. The presence of the 'no safe haven' theme was expected in these legal cases, especially as state actors often highlighted the intended use of immigration measures to prevent Canada from being a safe haven. Additionally, the 'no safe haven' theme here also aligns with how the scholarship

presents the No Safe Haven approach. In *Ezokola*, I noticed the theme in instances when interveners like Amnesty International (2012) and CCLA (2012) warned against relying on the practice of No Safe Haven and against the wide net that state actors cast in these cases to prevent suspected individuals from seeking a safe haven. In contradistinction, the theme was also present when SCC judges made references to security and the prevention of individuals suspected of international crimes from residing in Canada under the guise of refugees as a justification to the practice of No Safe Haven (*Ezokola v Canada (Citizenship and Immigration)*, 2013 (SCC 40)). Although the two types of actors had varying views on the practice of No Safe Haven in the cases, they all referred to this notion when debating the practice of using immigration measures to prevent a suspected criminal's entry into the country.

For the most part, the 'no safe haven' theme was similarly present in *Skomatchuk* and *Seifert* since both individuals, at the time of entry into Canada, were inadmissible due to their occupation during WWII. Both cases included the same pattern of Canada not being a safe haven. Specifically in *Skomatchuk*, legal documents revealed indirect mentions of the No Safe Haven approach when Justice Snider recounted the rejection criteria of immigrants coming into Canada in 1952, and clarified who the state considered prohibited people that could not enter Canada (*Canada (Minister of Citizenship and Immigration) v Skomatchuk*, 2006 (FC 994)). Interestingly, in Seifert's immigration fraud proceedings, Justice O'Reilly's provided the following response on Seifert's justification for committing immigration fraud:

> Mr. Seifert argues that he was justified in failing to disclose his correct place of birth because of a well-founded fear of being forceably repatriated to the Soviet Union, where he would have been severely punished or killed. Further, he suggests that he had to get out of Germany because of a constant fear of being captured by nearby Soviet forces. Accordingly, he believes he was also justified in failing to disclose his activities during the war because, had he been truthful, he would not have been allowed to enter and live safely in Canada (*Canada (Minister of Citizenship and Immigration) v Seifert*, 2007 (FC

1165), para. 181).

The quote clarifies that lying to immigration officials to protect himself from danger is unacceptable especially because the danger Seifert described was not imminent enough to justify breaking Canadian law. More so, committing immigration fraud to protect oneself is not a recognized defence and so, presenting this information is not relevant to the frame of post-factum immigration fraud nor to the No Safe Haven approach in this case. Thus, in both cases, the 'no safe haven' theme characterized both cases as both individuals were wrongfully allowed into Canada and their respective cases centred on Canada not being a safe haven. Just like in *Ezokola*, the 'no safe haven' theme was expected as these cases had immigration frames.

For criminal proceedings, discovering the pattern that encompasses of the 'no safe haven' theme was unexpected because of the scholarship's separation of criminal and immigration matters, and of the No Safe Haven and Global Enforcer approaches. While reviewing my data after the coding stage, I found the legal documents to reveal mentions of no safe haven and this was when I realized its significance since the preoccupation was present in each case. As a result, I found there to be a nuance between immigration and criminal matters that the scholarship did not account for. By focusing on the framing process, I attributed the theme of 'no safe haven' to cases that scholars would traditionally recognize as responses more aligned with the Global Enforcer approach. The 'no safe haven' theme in the extradition proceedings of Seifert and the criminal proceedings of Munyaneza is an example of how references to the idea and practice can have different meanings but still inform the cases. This is why 'no safe haven' is thematically important.

In Seifert's extradition proceeding, his surrender meant preventing him from living in Canada as his safe haven and preventing him from continuing to live with impunity. In their

judgment, the judges directly used the expression of 'no safe haven' by noting that "it is important that Canada not be a safe haven for fugitives from justice, including its own citizens" (*Italy v Seifert*, 2007 (BCCA 407), para. 99). The quote implies that a response will be taken towards criminals living in Canada, whether it be an immigration response, a criminal response, or both, and that the state will respect extradition treaties even if the individual is a Canadian. Further, even though extradition is not an immigration-based practice recognized within the No Safe Haven approach, the idea of no safe haven was still referred to because its meaning here draws on the notion of anti-impunity whereby part of being a no safe haven state also includes having the legal tools to respond to suspected individuals when they are already in the country. The objective of not having perpetrators of international crimes live in the country is the same as in the immigration proceedings of Munyaneza, Skomatchuk, and Seifert, except the additional meaning of the concept towards justice and anti-impunity is now present.

Similarly, in *Munyaneza*, the pattern continues as the 'no safe haven' theme was more in relation to the legal tools to prevent Canada from being a safe haven as opposed to the practice of immigration measures. Specifically in this case, legal documents revealed how Canada's universal jurisdiction via the CAHWCA prevents criminals from seeking a safe haven in Canada and "seeking immunity from prosecution" while in Canada (*Munyaneza c R*, 2014 (QCCA 906), para. 56). Further, universal jurisdiction "ensures that those who have committed or who commit in the future the most egregious crimes will not find a safe haven in Canada" (*Munyaneza c R*, 2014 (QCCA 906), para. 56, emphasis in original). In other words, universal jurisdiction provided Canada the ability to prosecute individuals suspected of international crimes who sought refuge in the country. The 'no safe haven' theme in this case is another example that recognizes the different means of having the ability to prosecute for international crimes

committed outside Canada as per the Global Enforcer approach but at the same time, still have the same objective within the No Safe Haven approach of keeping perpetrators of international crimes out of the country.

After demonstrating the pattern that emerged in my data and how the 'no safe haven' theme is relevant to all of the legal cases, I will now relate how this theme draws attention to the scholarships, and specifically Langer's (2015), binary between the No Safe Haven approach and the Global Enforcer approach.

5.2 The Theme of No Safe Haven Negating the Criminal and Immigration Binary

From my literature review, Langer (2015) presents two approaches to international crimes, the No Safe Haven approach and the Global Enforcer approach. The two approaches present two ways of addressing cases of individuals suspected of international crimes. One approach centres on the use of immigration measures and the other centres on the use of criminal measures. Langer's dichotomy is part of the overall division in the scholarship of immigration and criminal means as being two separate and distinct ways of addressing perpetrators of international crimes. The division appears as a strict separation in the scholarship where states respond to cases in an immigration-focused way or a criminal-focused way and as such, adhere to either the No Safe Haven approach or Global Enforcer approach. My findings, however, suggests that this strict boundary is an exaggeration and the relevancy of my theme of 'no safe haven' demonstrates that there is a similarity in the presentation of cases regardless of the framing.

Identifying the pattern of the 'no safe haven' theme within the extradition proceedings for Seifert and the criminal proceedings for Munyaneza shows how there is an overlap between criminal and immigration matters, and that this division is not as rigid as how the scholarship may suggest it to be. The same goes for the dichotomy between the No Safe Haven approach and the Global Enforcer approach. My ability to identify concerns for the practice, concept, and approach of no safe haven in cases aligned more with the Global Enforcer approach could also suggest that it is important for state actors to present Canada as a No Safe Haven country. Perhaps, if Canada did not align with the No Safe Haven approach to international crimes, I may not have identified excerpts for the code in each case, but since Canada seemingly is, then this may have influenced state actors' presentation of the case in court.

My finding of the 'no safe haven' theme drawing meaning to the data in each of my cases could also reflect the discretion of actors to refer to 'no safe haven' as based on how it is strategic in each case. My identification of legal documents revealing the different indirect and direct mentions to the notion and practice relates back to its different meanings and how actors draw on these different meanings for their presentation of the case. For instance, I discovered that if the case had an immigration framing, then no safe haven pertained more to how the country is not a refuge and the individual should be excluded, extradited, or stripped of his citizenship. Comparatively, non-immigration frames included no safe haven in relation to anti-impunity and the practice of universal jurisdiction. To do so could be part of the framing of the case or, as mentioned, it could be to present Canada as a No Safe Haven country and making known in the judgment the different legal tools the state has to facilitate this approach. If that is true, then there is not such a hard separation between criminal and immigration matters as the scholarship suggests or between Langer's two approaches. Indeed, legal actors themselves are

presenting cases by directly mentioning ‘no safe haven’ within extradition and criminal prosecution framings. By doing so, legal actors are constructing frames to seemingly include the recognition that Canada is not a safe haven and does not welcome perpetrators of international crimes.

All of this demonstrates how strong a preoccupation ‘no safe haven’ has in cases regarding individuals suspected of international crimes. My identification of the ‘no safe haven’ theme in immigration and non-immigration cases helped me develop a new contribution to the scholarship. Finding this theme seems to confirm that the War Crimes Program is aligned with the No Safe Haven approach to international crimes. Identifying the theme in each of the legal cases also invites us to nuance the No Safe Haven vs. Global Enforcer dichotomy. Indeed, this distinction is not as strict as presented in the literature because even when state actors were addressing cases with a framing of criminal prosecution or extradition, a preoccupation of no safe haven was present. The literature’s dichotomy between immigration and criminal cases does not appear as clearly when closely examining, coding, and analyzing these cases. By relating the ‘no safe haven’ theme to the exaggeration of the immigration vs. criminal binary in the scholarship, I am also drawing attention to the difference between analyzing the framing process as opposed to focusing only on the final frame. The difference is important because the legal documents can reveal similarities in the framing processes of different types of responses that demonstrates how there is no complete separation between immigration and criminal matters. Thus, a case construction per the No Safe Haven approach may be similar to a case construction as per the Global Enforcer approach as they both mobilize similar references to the theme of ‘no safe haven’.

Conclusion

In this chapter, I centred on my theme of 'no safe haven'. This theme was discovered while conducting a thematic analysis of my data and when reviewing my data. I identified this theme as a result of a pattern that emerged in each of the legal cases. The pattern saw that legal documents revealed legal actors' presentation of Canada not wanting to be a safe haven. In each case, this pattern was presented through there being an immigration response that either prevented individuals suspected of international crimes from seeking refuge in a new country, or there being indirect or direct mentions about no safe haven. By recognizing this pattern, developing this theme, and presenting the flexibility of this theme for its ability to be identified in each of the legal cases, I drew attention to the criminal and immigration binary that is present in the scholarship. More so, I argued in this chapter how my theme of 'no safe haven' calls attention to the rigid binary and how the framing process reveals a similarity across case constructions that do not make immigration or criminal cases wholly distinct. In other words, the importance of this chapter is how legal documents reveal a shared construction between cases that the literature would have otherwise viewed separately and differently.

In Chapter 4, I discussed the relevancy of criminality in immigration cases and the extent of how criminality was being presented in order for state actor to pursue a certain No Safe Haven response. In this chapter, I continued discussions about No Safe Haven but do so more generally in order to discuss my findings in relation to what the literature presents. In Chapter 6, I will continue to tie in No Safe Haven with two other themes that emerged from my data. The discussions on No Safe Haven in the next chapter will be situated within the practice of NIMBY and the fight against impunity.

6. International Concerns and National Concerns

When reviewing my data, there were two other themes that I discovered alongside my theme of 'no safe haven'. These two themes are 'international concerns' and 'national concerns'. Both themes have parallel patterns that led them to be two binary concerns, however, I will also expand in this chapter on how this binary is not strict just like the binary mentioned in the previous chapter. The thematic importance of these themes came as I noticed two very distinct and overarching patterns in the data for how cases are being responded to. These patterns that I noticed seemed to have greatly characterize the overall presentation of the case and was strongly aligned with either the criminal or immigration framings of a case. Specifically, the patterns revolved around how legal actors viewed responsibility in each of the cases. This included a consideration for a responsibility to *whom* and a responsibility for *what.* The difference in these questions led one pattern to centre on a responsibility to others and on anti-impunity. This pattern relates more to the Global Enforcer approach, and I thematically labelled it as 'international concerns'. The other pattern is a responsibility to Canadians for reasons relating to safety, security, and protecting rights. This pattern also includes notions relating to NIMBY and thus relates more to the No Safe Haven approach. As such, I thematically labelled this pattern as 'national concerns'. By not viewing responsibility as one big pattern, I instead identified two separate themes with two separate concerns.

In relation to my research question, my identification of the themes demonstrates that when responding to individuals suspected of international crimes, documents reveal that legal actors' present the cases by focusing on either 'international concerns' or 'national concerns'. Since themes contribute to characterizing the data and ascribing meaning to the patterns I find, I argue that these particular concerns are important to the framing process.

In this analysis chapter, I first present the pattern around responsibility that I noticed in the data. Following this, I relate this pattern to my themes of 'international concerns' and 'national concerns'. This will include how I labelled the themes and in what legal cases that I identified these themes in. After establishing the presence of each theme, I relate them to the literature and, more generally, to Canada's position towards individuals suspected of international crimes.

6.1 International Concerns

The theme of 'international concerns' arose when I discovered the pattern of responsibility to others. When reviewing my data, I found a similarity across some of the legal cases which centred on notions surrounding the state's commitment against impunity, the upholding of international obligations, and as a result, the prosecuting and condemning of human rights violators. In this pattern, there is a responsibility to states on the international stage to demonstrate Canada's commitment against international crimes and the individuals who commit these crimes. The underlying connection to international matters is why this pattern is thematically labelled as 'international concerns'. To get a sense of how this pattern was present in the cases, I will briefly review the data before I discuss the thematic importance of 'international concerns' in relation to my research question. Demonstrating how this pattern was presented will contribute to further understanding what the theme encompasses and how there is a difference in the type of responsibility that will illustrate my other theme of 'national concerns'.

The pattern of responsibility to others was identified in *Ezokola*, *Munyaneza*, and *Seifert*. These are three cases where legal documents revealed some sort of commitment to the

international community when legal actors were responding to these individuals in the courts. In *Ezokola*, the pattern was in relation to state actors applying Article 1F(a) and Canada's responsibility in adhering to its international obligation of protecting refugees and excluding suspected individuals. In *Munyaneza,* legal documents revealed many references by legal actors towards international law and how the CAHWCA reflects Canada's commitment in implementing the Rome Statute. This case represented Canada's responsibility to international obligations of prosecuting and condemning human rights violators per the Rome Statute. In *Seifert*, Canada's responsibility was specifically towards Italy and the extradition treaty between the two states. Documents showed judges directly referencing the obligations created by the extradition treaty with Italy and insisted on the importance of honouring this treaty by ensuring the swift and timely completion of proceedings (*Italy v Seifert*, 2003 (BCSC 1317); *Italy v Seifert*, 2003 (BCSC 1099); *Italy v Seifert*, 2007 (BCCA 407)). In this case, adhering to treaty obligations also aligned with Canada's responsibility to fight impunity.

As demonstrated, these cases included a state responsibility for something and to someone, and as I was reviewing my data, this was a responsibility to other states and a responsibility for upholding international obligations. In each case, this responsibility was connected to a concern over international law: the Refugee Convention, the Rome Statute, and a bilateral treaty. Further, the theme of 'international concerns' is important because state actors drew on this concern to justify their legal response. Although not all the above-mentioned cases included a criminal response, legal actors still presented international crimes as grave crimes whose perpetrators should face reprimand by exclusion, criminal prosecution, or extradition.

State actors' insistence on upholding international law as well as seeking reprimand for these individuals through different means is characteristic of Langer's (2015) Global Enforcer

approach. His approach centres on the role states have in "preventing and punishing core international crimes committed anywhere in the world" (p. 247) and so, I drew on this to establish a relationship between 'international concerns' and criminal matters. However, and as mentioned in Chapter 5, Langer's dichotomy in assessing the exercise of universal jurisdiction may be somewhat exaggerated, as I found that in practice there is a blur between the Global Enforcer and the No Safe Haven approaches. Further, I wrote that states do not necessarily adhere to one or the other approach, and can practice facets of both approaches. For instance, I described how there can still be an emphasis on criminality and a duty to fulfill international commitments within an immigration-based frame like the one used in *Ezokola.* The identification of 'international concerns' in more than just criminal cases further supports my argument from Chapter 5 as it suggests a more nuanced and flexible version of Langer's approach.

6.2 National Concerns

The pattern of national responsibility is relevant to the theme of 'national concerns' and offers a new understanding of what I was seeing in the data. Here, responsibility is towards Canadian citizens, and this entailed a responsibility towards national obligations like security, upholding domestic law, and the protection of rights. This pattern is distinct because no connections are being made between Canada and international matters. Instead, this responsibility had more of a domestic focus that centred on Canada as a nation with its own laws and not as an actor on the international stage. Noticing this other way that responsibility was being revealed was how I identified both patterns in distinction of each other. More so, just because international crimes are an international concern, this does not mean that responding to them is understood solely as a matter of international obligations; a national responsibility of

security, upholding domestic law, and the protection of rights is also central especially considering that these proceedings are occurring in Canada. I will now discuss how this pattern for the theme of 'national concerns' was identified within the data. Since this theme is broader in terms of what constituted a national concern and what the pattern identified as a national responsibility, I identified this theme in all of the legal cases.

Security is relevant to the theme of 'national concerns' as it encompasses the concern of keeping the nation and its citizens safe against individuals suspected of international crimes. In my data, this was presented as ensuring that suspected individuals do not pose a threat to the country or as preventing suspected individuals from living in a country undetected and safe from punishment. So long as these individuals do not reside in Canada, actors seemed to believe that they present no risk as analyzed by the politics of NIMBY. Interestingly, I identified the theme of 'national concerns' as it related to a responsibility towards security in Seifert's 2007 immigration proceeding, but not in his extradition proceeding. Not identifying this pattern within the extradition proceedings could suggest that Canadian state actors only viewed his immigration violations as a national issue since his false declarations upon entry into Canada went against security protocols, whereas his criminal acts of murder may be more of a concern to Italy which is where his trial *in abstentia* took place. Despite this, I identified the responsibility towards security pattern in Munyaneza's case, even though his criminal acts were committed in Rwanda and not Canada. Perhaps the case's domestic criminal trial and the application of the CAHWCA led this case to become one of a greater national concern. Thus, the theme of examples of how the theme of 'national concerns' as it related to national security can be identified in both an immigration framing and a criminal framing.

The theme of 'national concerns' also included a responsibility in upholding domestic law. I recognized this in the data primarily in the way that legal documents revealed state actors in immigration cases to present a strong concern over immigration policy, rules, and guidelines in the post-WWII era. Here, there was responsibility to the state and its citizens to respond to the individuals' violation of Canadian law and the need to deal with these individuals accordingly. I identified this in the immigration framings of *Skomatchuk* and *Seifert*. As written in Chapter 4, for Skomatchuk, legal actors focused on his immigration violation so much as to downplay his criminality. When reviewing my data, the strong focus legal documents revealed on this national concern was interesting given the suspected criminal activities the individuals were associated with. More so, this precisely demonstrates how just because there are suspected associations to international crimes, it does not mean 'international concerns' are always apparent and take a primary focus in the framing process. Instead, the theme of 'national concerns' is important as it allows for a different characterization of the data.

Protection of rights is the last form of the pattern that I recognized as part of the 'national concerns' theme. Interestingly, I only identified this aspect of the theme in *Seifert* and *Munyaneza*. Although, legal documents may not have revealed a presentation of protecting constitutional and due process rights in *Skomatchuk* and *Ezokola*, this is not to say that national obligations were not present in the cases. The preoccupation could have mattered outside of what is presented in the documents. In the proceedings for Seifert's extradition, court judgments revealed state actors' due diligence in following the procedures laid out in the *Extradition Act* and of Canada's own commitments in making sure extradition requests were upheld by ensuring that the individual whom Italy was requesting was the same individual as the one in court in Canada, that the crimes committed in Italy would constitute a crime in Canada, and that there

was enough evidence to justify a committal (*Italy v Seifert*, 2003 (BCSC 1317)). In *Munyaneza*, the theme was identified when Justice Denis reiterated Munyaneza's constitutional right to the presumption of innocence and the Crown needing to prove guilt beyond reasonable doubt (*R c Munyaneza*, 2009 (QCCS 2201)). Although this is a given in all criminal trials, the judge felt the need to remind parties of the state's responsibility to uphold Munyaneza's rights especially considering how grave the charges were. Justice Denis insisted that Canada has a national obligation in ensuring a fair trial in addition to having the international obligation to prosecute such crimes. In other words, a responsibility to international commitments and the promise to fight impunity should not impede on the state's national responsibility for protecting constitutional rights. Both cases exemplify how the theme of 'national concerns' is not just tied to immigration matters, just like I have shown how the theme of 'international concerns' is not just tied to criminal cases.

Interestingly, for the theme of 'national concerns' the only reference to protecting rights in immigration proceedings came from Seifert's proceedings. Here, the theme was identified when the judges briefly remarked that citizenship revocation proceedings for an individual suspected of international crimes are a part of "Canadian government policy" (*Canada (Minister of Citizenship and Immigration) v Seifert*, 2007 (FC 1165), para. 20). Although a minor reference to following Canadian policy, it still recognized Seifert as a suspected individual. Although the theme of 'national concerns' is present in *Skomatchuk* as I identified a pattern of a responsibility to uphold domestic law, I did not identify a preoccupation towards protecting rights. Considering that both cases included the same frame, perhaps state actors only referred to such policy in Seifert's case as his extradition proceedings made known his criminality, whereas in

Skomatchuk's case, state actors viewed him less as an individual suspected of international crimes and more as a violator of immigration policy.

As demonstrated by discussing how the theme of 'national concerns' was formed and identified in my data, I discovered that, despite a suspected involvement in international crimes, legal cases are still taking place in Canadian courts and so, state actors are presenting Canadian concerns. Where the previous theme was mentioned in relation to Langer's (2015) Global Enforcer approach, this theme can be seen in relation to the No Safe Haven approach as there are similarities in the approach in how both centre on protecting the state and using immigration measures. Despite defining each theme as two distinct themes, these themes are not mutually exclusive. I write this because each theme of 'national concerns' and 'international concerns' could both be identified in the same cases with the exception being Skomatchuk, as I did not identify 'international concerns' here. More so, since legal actors are presenting 'national concerns' as part of the framing process for cases with both criminal and immigration-based final frames, there is no one way of viewing the cases of individuals suspected of international crimes. These cases are neither wholly of a 'international concern' or 'national concern' nor are they wholly criminal or immigration based. I will now expand on Canada's position practice in relation to the two themes.

6.3 Canada's Position in Practice

There is no clear indication whether certain frames adhere to one concern or another. Only the frame of post-factum immigration fraud fully aligns with the theme of 'national concerns' as I did not identify a responsibility towards international obligations which is characteristic of 'international concerns', but the presentations of other frames do contain

preoccupations relating to both themes. This represents a fluidity in how actors are addressing individuals suspected of international crimes because in practice, Canada's position is not monolithic. Although, on the surface, the state is seemingly more aligned with 'national concerns', immigration responses, and the No Safe Haven approach, upon closer analysis, I was frequently identifying the theme of 'international concerns' where documents were revealing mentions of anti-impunity within the cases despite a limited reliance on criminal law.

Wedeking (2010) and Raleigh (2019) distinguished between prevailing and alternative legal frames. Extending this hierarchization of frames to themes, and despite my argument that Canada's practice draws from both concerns, I could argue that 'national concerns' is the prevailing theme and 'international concerns' is the alternative theme. I write this because although both themes are used flexibly, the theme of 'national concerns' was the more commonly identified theme and was also more encompassing in capturing different national obligations. Additionally, the focus on upholding domestic law and protecting society is consistent with the objectives of the War Crimes Program as presented in my literature review. Although the position of the War Crimes Program, as per its stated objectives, reflects both 'international concerns' and 'national concerns', there seems to be more emphasis on 'national concerns' as three of the four objectives relate to immigration and the protection of Canada. Given the prominence of 'national concerns' in the program's official objectives, protecting national interest seems to be a priority, something that the scholarship already recognizes but that my identification of 'national concerns' as the prevailing theme confirms.

Apart from the War Crimes Program's objectives, the literature also reflects Canada's position in practice in relation to 'national concerns'. Weiss (2015) quotes Vic Toews, the former Minister of Public Safety, who said, "Canada is not the UN. It's not our responsibility to make

sure each one of these [suspected criminals] faces justice in their own countries" (p. 580). The quote is in the context of Canada's failure to prosecute with Toews addressing the criticism by marking the state's position away from Langer's (2015) Global Enforcer approach and from 'international concerns'. By adapting Wedeking's (2010) and Raleigh's (2019) distinction of prevailing and alternative frames, we can say that Towes' response further suggests that 'international concerns' is the alternative theme and not the prevailing theme. More so, Weiss (2015) indicates that in practice, Canada addresses 'national concerns' by being "effective at removing suspected war criminals" (p. 584) rather than addressing 'international concerns' such as dealing with the criminality of individuals and ensuring justice for victims. Just like Weiss (2015), scholars such as Simeon (2015), Lafontaine (2010b), Hamlin and Rowen (2020), and Bond (2017) also similarly studied Canada's practice of immigration measures in response to 'national concerns' since cases with immigration responses include less 'international concerns'.

Scholars focus on the final frame in their research and so, much scholarship focuses on the responses being either based on criminal or immigration law, rather than on the framing process. In doing so, scholars are limited in seeing how even though suspected individuals are being removed from the country, there still may be a discussion in the case about international commitments or the individual's criminality (like in *Ezokola*), a finding which prevents us from classifying the case as being wholly immigration-based as scholars may suggest. Solely classifying the case through its final frame erases the nuances of how actors are actually addressing and presenting the cases in court. More so, by only focusing on the final frame and not the framing process, scholars do not get the full picture on the similarities of data presented across the different types of cases. I found that legal actors in my cases commonly drew on international and national concerns as well as criminal and immigration matters when pursuing a

frame. My finding, thus, is important to the scholarship on this topic because I am filling the gap on scholars' lack of research on the framing process.

My identification of the two themes is also important for pivoting away from the literature's reinforcement of the criminal versus immigration binary. Just because there are the different frames of criminal prosecution, post-factum immigration fraud, extradition, and exclusion does not mean that the framing process is completely different across the cases. Instead, I found that actors similarly address suspected individuals, but the reason that there are different responses is due to a varying emphasis on international and national concerns. This is seen through my discussion of how I identified both concerns in most cases. Such a finding draws attention to Weiss (2015), Simeon (2015), Lafontaine (2010b), Hamlin and Rowen (2020), and Bond (2017) and their research that focuses exclusively on the final frame without acknowledging that there is a connection between immigration and criminal cases.

The cross relationships between international and national concerns, and between immigration and criminal matters, can be analyzed through the concept of jurisdictional games. Moffette (2018) uses the term jurisdictional games because he views a separation between immigration and criminal legal tools which allows actors to pick and choose in both realms. Despite the depiction of 'crimmigration' as a form of convergence in some of the scholarship, these matters are so distinct that during the framing process, components of both become interchangeable and legal actors can choose across each concern. Indeed, the argument about flexibility and blurring is also supported by my identification of 'national concerns' in cases with a criminal framing, and 'international concerns' in cases within an immigration framing. Jurisdictional games can also explain how Seifert underwent his immigration and extradition proceedings at the same time without either proceeding influencing the other, as well as how

state actors could emphasize Skomatchuk's criminal activities without ever laying criminal charges. Thus, the concept of jurisdictional games appears more useful than the interpretation of crimmigration-as-convergence to explain the framing process and how criminal-national concerns and immigration-international concerns interact.

Thus, state actors may speak of their support to the ICC and adoption of the Rome Statute, but at the same time, they are practicing pre-emptive and exclusionary measures, and conducting more immigration proceedings than criminal proceedings. I make this claim in part based on the fact that, although national and international concerns overlap with each other, preoccupations for a responsibility of national obligations were identified more in the data. Further, it is clear that the final frames of most cases, as indicated in the literature and most War Crimes Program objectives, also aligns with 'national concerns'. By linking my findings to the literature, I established how my research contributes to the scholarship. The main way my research does this is by analyzing how legal actors present a frame in the courts through engaging in a framing process. Thus, there is no one way of addressing individuals suspected of international crimes and although the themes contain overlapping relationships within the cases, Canada's position in practice is one characterized more by 'national concerns' than 'international concerns'.

Conclusion

This chapter presented the two themes I identified from conducting my thematic analysis. These themes are based on two responsibility patterns I discovered in the data. The theme of 'international concerns' arose from the pattern of international obligations that saw a responsibility to others and on anti-impunity. The theme of 'national concerns' arose from a

pattern of national obligations that saw a responsibility to Canadians for reasons relating to safety, security, and protecting rights. These themes assist are important to the framing process because by taking what the legal documents were revealing the themes offer a characterization of the data into two grand concerns. Through my identification of these themes, I found that legal actors presented responses towards individuals suspected of international crimes in a way that highlights an 'international concern' and/or a 'national concern'.

Despite each theme having its own pattern, this does not mean they are mutually exclusive. I found that legal actors commonly drew on both concerns within their presentation of a frame and this led to a further identification of international-immigration and national-criminal relationships in addition to the typical international-criminal and national-immigration relationships. The presence of both concerns in cases is why there should be a greater focus on the framing process rather than on the final frame when analyzing such cases, which is something absent in the literature. Each concern is distinct enough to allow for the practice of jurisdictional games to explain how I identified 'national concerns' in criminal cases, and 'international concerns' in immigration cases. Therefore, in identifying the themes, I found that Canada's position in practice leans more towards 'national concerns' and its focus on the security and protection of the state through immigration measures.

Conclusion

My research has explored how legal actors address individuals suspected of international crimes in Canadian courts. To answer my research question, I selected four legal cases that demonstrated a breadth of different approaches. These cases consisted of *Seifert* (extradition), *Munyaneza* (criminal prosecution), *Skomatchuk* (post-factum immigration fraud and citizenship revocation), and *Ezokola* (refugee exclusion). I studied each of the case' presentation in the courts by conducting a thematic analysis of court judgment documents and intervener reports, as well as by utilizing my conceptual tools of legal framing, ad hoc instrumentalism, jurisdictional games, and discretionary decision-making.

Throughout my analysis chapters, I explained my findings and argued that legal documents revealed state actors to be differentially emphasizing an individual's criminality to pursue an immigration-based sanction under the No Safe Haven approach. I also found a thematic importance of 'no safe haven' in legal cases as I was able to identify a pattern relating to keeping suspected individuals of international crimes out of the country in each of my legal cases. As a result, I argued that the presence of this theme throughout all cases – irrespective of whether they were immigration or criminal cases – suggests that the criminal/immigration binary described in the literature is exaggerated. Lastly, I discovered two patterns related to how legal actors were presenting responsibility, which led me to identify the two themes of 'international concerns' and 'national concerns'. Through my discussions of these themes, I argued that although they are distinct, they are not mutually exclusive and legal documents can reveal a presentation of both themes within the cases. I further argued on the relevance of 'national concerns' in relation to Canada's position. My findings can help us explain and understand how

cases with different framings are presented by legal actors as based on what is being revealed in court judgements and intervener reports.

Through this analysis, I successfully answered my research question and fulfilled my research objectives. Methodologically, I used my thematic analysis and coding process to identify relevant laws, frames, and actors, and compared cases in the NVivo software. Although my research question was complex, my findings and analysis provided insight into the different presentations of legal approaches, or frames, in the courts. I found that legal actors' presentation of cases includes greatly emphasizing or downplaying criminality depending on the frame of the case, drawing on the practice of No Safe Haven, and framing the case's response through highlighting concerns relevant to national or to international matters.

My project has implication for the analysis of the intersections between immigration law and criminal law in the scholarship. Throughout my project, I have preferred the use of the concept of jurisdictional games (as cherry-picking) over the use of crimmigration (as convergence). My research showcases how immigration and criminal matters are distinct, and how legal actors use this distinction to pick and choose elements to facilitate their presentation of a case in court. This distinction is exemplified in how I identified both immigration matters in criminal cases and criminal matters in immigration cases. Legal actors can draw on both, but their practice of doing so is not accurately described by scholars' use of the concept of crimmigration. Indeed, the way the concept of crimmigration highlights a convergence between immigration and criminal matters makes our understanding of actors' picking and choosing across both realms difficult. As a result, scholars focus on the final frame of the case to classify them as either a criminal case or an immigration case, which is correct when looking strictly at the type of law being deployed, but it does not acknowledge the complexities and overlaps of

information and matters in the framing process. In contrast, the use of the concept of jurisdictional games helps us account for the differences in the types of preoccupations and matters raised in the case, which is why I prefer this concept over the concept of crimmigration.

One interrogation that arises from my analysis of 'international concerns' and 'national concerns' is whether legal actors were aware of these concerns. We can only speculate, but there is a possibility that actors may have intentionally focused on 'national concerns'. The possibility that actors could have strategically framed a case to their benefit aligns with scholars' writings on Canada and other states favouring the use of immigration policy over criminal policy and measures (Bond et al., 2020; Simeon, 2015; Lafontaine, 2010b; Hamlin & Rowen, 2020; Weiss, 2012; Bond, 2017; Langer, 2015). Indeed, the literature contains studies on external influences that affect how state actors pursue a case, such as feasibility like with the Al Capone method, the cost efficiency of immigration measures that leads state actors to stray away from expensive criminal prosecutions, the general concern of national security in the post-9/11 era, or the avoidance of the 'global vigilante' label (Hamlin & Rowen, 2020; Rowen & Hamlin, 2018; Lafontaine, 2010b; Langer, 2015; Baker et al., 2020). These external influences coupled with my findings imply that policy and litigation are a matter of picking and choosing the most practical option. This implication raises furthers questions about the performative nature of policy which could be another area for future research.

Part of understanding how legal actors address individuals suspected of international crimes includes analyzing what they are presenting in court. I write "part of understanding" because my research was somewhat limited by my use of court judgment documents and intervener reports, a dataset that prevented me from fully understanding the framing process. Since I was limited to this dataset, I could only analyze what was presented in these documents. I

could not study legal actors' decisions outside of these documents, or the decisions that led them to present the cases as they did. Also, I did not have insight into the proceedings of the cases since court judgments are limited to the judge's explanation of their verdict. As a result of this limitation, I utilized my concept of discretionary decision-making sparingly. I still sought to include the concept because acknowledging that decisions took place is important in recognizing the options available to actors in the framing of cases. These limitations open up potential future research endeavours.

Future research could take two forms. One avenue could involve conducting interviews with legal actors to understand their discretion and decision-making. This option would remedy the limitation imposed by court judgments and intervener reports. Conducting interviews with those involved in the cases would offer a richer dataset that would help explain the framing process in more detail, and capture this process as interpreted by those involved. Another area for research would be to analyze different sets of cases, or legal measures that do not reach the courts, like many declarations of inadmissibility that are not contested. If I were to conduct interviews, I would not be limited to seeking cases that were accessible through court judgment documents. Focusing on documents limited me to governmental measures for which there were publicly available legal decisions. Thus, both research endeavours provide options that could remedy the limitations of my current research.

By creating a practical research project, I was able to take my interests and contribute to the literature and to the topic of international crimes. Importantly, my research project is able to contribute to the criminological scholarship and its difficulties in exploring and acknowledging state crimes and human rights violations. Indeed, my project is situated within a field that has historically been under-studied within the discipline. As a result, my research is part of the

literature that seeks to responsibilize criminology in paying attention to state crimes and crimes of the powerful and in studying those responsible for human rights violations.

I hope that my analysis of the legal responses of criminal prosecution, extradition, post-factum immigration fraud, and refugee exclusion can contribute to broader and more critical understandings of the concerns faced by the War Crimes Program in Canada, and the complex reality of addressing individuals suspected of international crimes in court. I also hope that my research offers useful insights into how and why the different responses occur.

Appendix 1

CASE 1: MICHAEL SEIFERT

Case-Type	Extradition
Decision	Convicted for seven of nine murder counts; found that citizenship was obtained by misrepresentation and knowingly concealing material circumstances; and extradited to Italy in 2008.
Year of Decision	2003
Court Judgment Documents Included (and page count)	• *Italy v Seifert*, 2003 (BCSC 1099) (30 pages) • *Italy v Seifert*, 2003 (BCSC 1317) (93 pages) • *Italy v Seifert*, 2007 (BCCA 407) (39 pages) • *Canada (Minister of Citizenship and Immigration) v Seifert*, 2007 (FC 1165) (89 pages)
Court Judgment Documents Excluded	In relation to citizenship revocation proceedings: • *Canada (Minister of Citizenship and Immigration) v Seifert*, 2002 (FCT 859) • *Canada (Minister of Citizenship and Immigration) v Seifert*, 2003 (FC 875) • *Canada (Minister of Citizenship and Immigration) v Seifert*, 2003 (FC 897) • *Canada (Minister of Citizenship and Immigration) v Seifert*, 2004 (FC 1010) • *Seifert v Canada (Minister of Citizenship and Immigration)*, 2004 (FCA 310) • *Seifert v Canada (Minister of Citizenship and Immigration)*, 2004 (FCA 343) • *Canada (Minister of Citizenship and Immigration) v Seifert*, 2004 (FC 1711) • *Seifert v Canada (Minister of Citizenship and Immigration)*, 2005 (FCA 105) • *Canada (Minister of Citizenship and Immigration) v Seifert*, 2006 (FC 223) • *Canada (Minister of Citizenship and Immigration) v Seifert*, 2006 (FC 270) In relation to extradition proceedings: • *Seifert v Canada* (Attorney General), 2002 (BCCA 385) • *Italy v Seifert*, 2002 (BCSC 1715)

	• *Italy v Seifert*, 2003 (BCSC 351) • *Italy v Seifert*, 2003 (BCSC 398) • *Italy v Seifert*, 2003 (BCSC 501) • *Canada (Attorney General of) v Seifert*, 2003 (BCCA 235) • *Italy v Seifert*, 2003 (BCCA 606) • *Italy v Seifert*, 2003 (BCCA 690) • *Italy v Seifert*, 2007 (BCCA 420) • *Italy v Seifert*, 2008 (BCCA 25) • *Michael Seifert v Attorney General of Canada on behalf of the Republic of Italy and Minister of Justice of Canada*, 2008 (SCC)
Intervener Reports Included	N/A
Intervener Reports Excluded	N/A

CASE 2: DÉSIRÉ MUNYANEZA

Case-Type	Criminal Prosecution
Decision	Found guilty of committing war crimes, crimes against humanity, and genocide under the CAHWCA. Sentenced to life imprisonment without parole eligibility for 25 years for each count 1, 3, and 5; life imprisonment without parole for 10 years for each count 2, 4, and 6; time spent in prison for count 7.
Year of Decision	2009
Court Judgment Documents Included (and page count)	• *R c Munyaneza*, 2009 (QCCS 2201) (224 pages) • *R c Munyaneza*, 2009 (QCCS 4865) (14 pages) • *Munyaneza c R*, 2014 (QCCA 906) (79 pages)

Court Judgment Documents Excluded	• *Munyaneza v Canada (Minister of Citizenship and Immigration)*, 2002 (FCT 1203) • *R c Munyaneza*, 2006 (QCCS 8007) • *R c Munyaneza*, 2006 (QCCS 8005) • *R c Munyaneza*, 2006 (QCCS 8008) • *R c Munyaneza*, 2006 (QCCS 8009) • *R c Munyaneza*, 2006 (QCCS 8006) • *R c Munyaneza*, 2006 (QCCS 8010) • *R c Munyaneza*, 2006 (QCCS 8011) • *R c Munyaneza*, 2007 (QCCS 7113) • *R c Munyaneza*, 2007 (QCCS 7114) • *Munyaneza c R*, 2009 (QCCA 1279) • *Munyaneza c R*, 2009 (QCCA 2326) • *Canada (Ministre de la Sécurité publique et de la Protection civile) et Munyaneza*, 2010 (QCCA 579) • *Munyaneza c R*, 2010 (QCCA 1762) • *Munyaneza c R*, 2012 (QCCA 1247) • *Munyaneza c R*, 2012 (QCCA 1829) • *Munyaneza c R*, 2013 (QCCA 1106) • *Munyaneza c R*, 2014 (QCCA 1229) • *Désiré Munyaneza v Her Majesty the Queen*, 2014 (SCC)
Intervener Reports Included (and page count)	Interveners present in *Munyaneza c R*, 2014 (QCCA 906) • Canadian Centre for International Justice and Canadian Lawyers for International Human Rights (22 pages) (link not available)
Intervener Reports Excluded	N/A

CASE 3: JURA SKOMATCHUK

Case-Type	Immigration Fraud (post-factum)
Decision	Found that citizenship was acquired by false representation or fraud or knowingly concealing information because Skomatchuk had failed to disclose his activities during WWII.
Year of Decision	2006
Court Judgment Documents Included (and page count)	• *Canada (Minister of Citizenship and Immigration) v Skomatchuk*, 2006 (FC 994) (81 pages)

Court Judgment Documents Excluded	• *Canada (Minister of Citizenship and Immigration) v Skomatchuk*, 2006 (FC 730)
Intervener Reports Included	N/A
Intervener Reports Excluded	N/A

CASE 4: RACHIDI EKANZA EZOKOLA

Case-Type	Refugee Exclusion
Decision	Guilt by association is not grounds for refugee exclusion. The SCC allowed the case to be reheard by a new IRB panel.
Year of Decision	2013
Court Judgment Documents Included (and page count)	• *Ezokola v Canada (Citizenship and Immigration)*, 2013 (SCC 40) (42 pages)
Court Judgment Documents Excluded	• *X (Re)*, 2009 → IRB review • *Ezokola v Canada (Citizenship and Immigration)*, 2010 (FC 662) • *Ezokola v Canada (Citizenship and Immigration)*, 2010 (FC 725) • *Canada (Citizenship and Immigration) v Ekanza Ezokola*, 2011 (FCA 224) • *Rachidi Ekanza Ezokola v Minister of Citizenship and Immigration*, 2012
Intervener Reports Included (and page count)	Interveners were present during the SCC proceeding. The factums of the interveners I was able to access are listed here: • Amnesty International (20 pages) • Canadian Centre for International Justice and the International Human Rights Program at the University of Toronto Faculty of Law (20 pages) • Canadian Civil Liberties Association (17 pages) (link not available) • Canadian Council for Refugees (23 pages) • United Nations High Commissioner for Refugees (18 pages)

Intervener Reports Excluded	Interveners were present during the SCC proceeding. The only factum I could not get access to was: • The Canadian Association of Refugee Lawyers

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