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## **Non-Refoulement in Comparative Study: Do Canada, Australia and Belgium Comply with International Conventions?**

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**Abstract:** The principle of non-refoulement is seen by most in the international law arena as fundamental to refugee law. Since its expression in the Refugee Convention in 1951, it has played a key role in how states deal with refugees and asylum seekers. Scholars and Experts in refugee law define it as the idea that ‘no refugee should be returned to any country where he or she is likely to face persecution or torture’. This paper discusses the non-refoulement in Canada, Australia, and Belgium—three western States knowing for their constant reference to international law. When deporting a person can lead to torture and arbitrarily deprivation of life, that deportation potentially violates an international obligation or a State’s constitution. It is now well established that International Human Rights treaties impose obligations on States to protect persons from refoulement beyond the terms of the Refugee Convention. The paper expresses its concerns for the violation of international conventions from these Western States. I argue that these developed States’ application of these norms reflects partial compliance with its obligations, as it acknowledges important humanitarian concerns regarding international protection. This paper argues that these States’ application of these norms reflects partial compliance with their obligations, as it acknowledges important humanitarian concerns regarding international protection. The paper offers suggestions, which might assist their respective governments in developing a more effective approach to the assumption and implementation of international human rights obligations.

**Keywords:** Human Rights, Refugee Law, Humanitarian Law, Deportation, Non-Refoulement; International Commitment.

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### **INTRODUCTION**

Non-refoulement is a fundamental principle of international law which forbids a country receiving asylum seekers from returning them to a country in which they would be in likely danger of persecution based on “race, religion, nationality, membership of a particular social group or political opinion [1]. The Principle of non-refoulement in the refugee context is increasingly acquiring the status of a *jus cogens* norm [2] (a norm that is accepted by “the international community of States as a whole” as a “norm from which no derogation is permitted”) [3], as argued by scholars who focus on customary international law and relevant State practice. The non-refoulement as a *jus cogens* norm enforces observance of the basic human rights that underlie refugee protection, because it fundamentally prevents refugees from being returned to situations where they would face violations of those rights [4].

Developed in international refugee law under 1951 Convention Relating to Status of Refugees (hereinafter the 1951 Convention) and the 1967 Protocol Relating to the Status of Refugees (hereinafter the 1967 Protocol) [5], it has also been supplemented by human rights instruments like, inter alia, United Nations

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) [6] and European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) [7]. The development of international refugee law since the Second World War [8] has established, prima facie, a structure allowing refugees to be defined, protected and guaranteed key human rights. The protection of refugees has its origin in a human-rights perspective and the General Assembly has acknowledged international protection as the principal function of the United Nations High Commission for Refugees (UNHCR [9]. In the refugee law context, the notion of protection encompasses, not only a prescribed class of persons, but also an unrestricted human rights competence [10].

The history of refugee law reveals that it is not founded purely on the principles of humanitarianism or the advancement of human rights, but on compromises designed to reconcile the sovereign prerogative of States to control immigration with the reality of forced migrations of people at risk [11]. It has been designed not so much to meet the needs of refugees themselves, but to govern the disruptions of States. Many perceived shortcomings of the convention regime are therefore

reflections of the resistance of States to cede their right to sovereignty over immigration matter to any significant degree [12] Due to such compromises, there are serious gaps in this structure, which lend it to manipulation by States in their struggle to balance international obligations with national interests. The qualifications and differences between the 1951 Statute of the Office of the UNHCR [13] and the 1951 Convention Relating to the Status of Refugees [14] conspire to introduce ambiguities of interpretation or grey areas whereby loopholes in the applicable international law can be found. Goodwin-Gill succinctly presents the opposing tensions in this system, by observing that: the legal framework within which the refugee is located remains characterized on the one hand, by the principle of State sovereignty and the related principles of territorial supremacy and self-preservation; and on the other, by competing humanitarian principles derived from general international law (including the purposes and principles of the United Nations) and from treaty [15].

Since refugee law is designed and administered by States, the availability and quality of protection afforded to refugee varies from country to country, depending on the way admission of refugee is perceived to be in keeping with national interests [16]. Refusing to grant asylum does nothing to end human-rights violations. Refugees are simply returned to danger and persecution. However, international guarantees for the protection of refugees are in themselves largely without much effect unless supported by parallel guarantees within the domestic structures of the various States, which comprise the international community. This suggests the need for a certain convergence between international law and domestic law. Thus, realistically, the protection enshrined in the provisions of international refugee conventions may only be enjoyed by the refugee through parallel provisions in the municipal laws enacted by the host States [17].

As mentioned, the purpose of this article is to examine legal systems of the selected States to see the level of compatibility and sufficiency of mechanisms of protection from refoulement. The prohibition against refoulement provides refugees and asylum seekers with protection against being forcibly *refouled* or returned to a State where he or she might be subjected to persecution, torture or other ill-treatment.

## **LEGAL BASIS OF NON-REFOULEMENT**

### **General Provisions**

Non-refoulement has been defined in a number of international refugee instruments, both at the universal and regional levels. At the universal level, the most important provision in this respect is Article 33 (1) of the 1951 Convention relating to the Status of Refugees, which states that:

No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

This provision constitutes one of the basic Articles of the 1951 Convention, to which no reservations are permitted. It is also an obligation under the 1967 Protocol by virtue of Article I (1) of that instrument [18]. Unlike some provisions of the Convention, its application is not dependent on the lawful residence of a refugee in the territory of a Contracting State. As to the words "where his life or freedom would be threatened", it appears from the *travaux préparatoires* that they were not intended to lay down a stricter criterion than the words "well-founded fear of persecution" figuring in the definition of the term "refugee" in Article 1 A (2).

The different wording was introduced for another reason, namely to make it clear that the principle of non-refoulement applies not only in respect of the country of origin but to any country where a person has reason to fear persecution. Also at the universal level, mention should be made of Article 3 (1) of the UN Declaration on Territorial Asylum unanimously adopted by the General Assembly in 1967 [res. 2312 (XXII)]. "No person referred to in Article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution."

At the regional level the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 gives expression in binding form to a number of important principles relating to asylum, including the principle of non-refoulement. According to Article II (3):

"No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2."

Again, Article 22 (8) of the American Human Rights Convention adopted in November 1969 provides that:

"In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions."

In the Resolution on Asylum to Persons in Danger of Persecution, adopted by the Committee of Ministers of the Council of Europe on 29 June 1967, it is recommended that member governments should be guided by the following principles:

They should act in a particularly liberal and humanitarian spirit in relation to persons who seek asylum on their territory.

They should, in the same spirit, ensure that no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.

Finally, Article III (3) of the Principles concerning the Treatment of Refugees adopted by the Asian-African Legal Consultative Committee at its Eighth Session in Bangkok in 1966, states that:

"No one seeking asylum in accordance with these Principles should, except for overriding reasons of national security or safeguarding the populations, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty of that territory."

In addition to statements in the above international instruments, the principle of non-refoulement has also found expression in the constitutions and/or ordinary legislation of a number of States. Because of its wide acceptance, it is UNHCR's considered view, supported by jurisprudence and the work of jurists, that the principle of non-refoulement has become a norm of customary international law [19]. This view is based on a consistent State practice combined with recognition on the part of States that the principle has a normative character.

As outlined above, the principle has been incorporated in international treaties adopted at the universal and regional levels to which a large number of States have now become parties. Moreover, the

principle has also been systematically reaffirmed in Conclusions of the Executive Committee and in resolutions adopted by the General Assembly, thus demonstrating international consensus in this respect and providing important guidelines for the interpretation of the aforementioned provisions [20].

International human rights law provides additional forms of protection in this area. Article 3 of the 1984 UN Convention against Torture stipulates that no State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture [21]. Similarly, Art. 7 of the International Covenant on Civil and Political Rights (ICCPR) have been interpreted, as prohibiting the return of persons to places where torture or persecution is feared [22]. In the regional context, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms has been interpreted by the European Court of Human Rights (ECtHR) as implicitly prohibiting the return of anyone to a place where they would face a "real and substantiated" risk of ill-treatment in breach of the prohibition of torture or inhuman or degrading treatment or punishment [23]. While Art. 33 (2) of the 1951 Convention foresees exceptions to the principle of non-refoulement, international human rights law and most regional refugee instruments set forth an absolute prohibition, without exceptions of any sort.

### **Beneficiary of Non-Refoulement**

Article 33(1) of the 1951 Convention explicitly mentions refugees as persons who should be protected from refoulement. However, it makes no reference to asylum seekers. Thus, the issue in this regard is whether the protection granted under the article 33(1) is limited to recognized refugees or extends to asylum seekers as well. Just to clarify the difference between these two categories, the asylum seeker is the person who has requested refugee status although has not yet been formally recognized as one, his/her refugee claim being under consideration. And refugee is a person who has formally been granted asylum (i.e. recognized as a refugee) following the refugee status determination procedure. In other words, the main difference in formal recognition – all asylum seekers have potential to be recognized as refugees.

As mentioned above, article 33(1) itself refers only to refugees. The refugee definition on the other hand is provided for in the article 1(A)2 of the 1951 Convention, which stipulates that refugees are persons who are outside their country of origin or habitual residence and because of well-founded fear of being persecuted on one of the five different grounds listed (race, religion, nationality, membership of a particular social group or political opinion) are unable or

unwilling to return to their countries of origin or habitual residence [24].

The absence of formal recognition as a refugee does not preclude that the person concerned possesses refugee status and is therefore protected by the principle of non-refoulement. In fact, respect for the principle of non-refoulement requires that asylum applicants be protected against a return to a place where their life or freedom might be threatened until it has been reliably ascertained that such threats would not exist and that, therefore, they are not refugees. Every refugee is, initially, also an asylum applicant; therefore, to protect refugees, asylum applicants must be treated on the assumption that they may be refugees until their status has been determined. Without such a rule, the principle of non-refoulement would not provide effective protection for refugees, because applicants might be rejected at the frontier or otherwise returned to persecution on the grounds that their claim had not been established.

The principle of non-refoulement applies to refugees, irrespective of whether they have been formally recognized as such - that is, even before a decision can be made on an application for refugee status - has been specifically acknowledged by the UNHCR Executive Committee in its Conclusion No. 6 on Non-Refoulement. And indeed, where a special procedure for the determination of refugee status under the 1951 Convention and the 1967 Protocol exists, the applicant is almost invariably protected against refoulement pending a determination of his or her refugee status.

There are, however, a number of situations in which the observance of the principle of non-refoulement is called for, but where its application may give rise to difficulties. Thus the person concerned may find himself in a State, which is not a party to the 1951 Convention or the 1967 Protocol, or which, although a party to these instruments has not established a formal procedure for determining refugee status. The authorities of the country of asylum may have allowed the refugee to reside there with a normal residence permit or may simply have tolerated his or her presence and not have found it necessary formally to document his or her recognition as a refugee. In other cases, the person concerned may have omitted to make a formal request to be considered a refugee. In situations of this kind, it is essential that the principle of non-refoulement be scrupulously observed even though the person concerned has not - or has not yet - been formally documented as a refugee. Again, this flows from the fact that, first, the recognition of a person as a refugee, whether under UNHCR's mandate or under the 1951 Convention or the 1967 Protocol, is declaratory in nature, and, second, that the principle of non-refoulement is a norm of customary international law.

### **Exceptions to the Prohibition under Article 33**

Under the 1951 Convention, no reservations can be made to the article 33 [25]. However, the protection granted under the article is not absolute since the article 33(2) provides for the exceptions to the protection from refoulement. It stipulates that the protection of the principle does not cover the people who pose a threat to the national security of the country of asylum or have been convicted by the final court judgment for committing a particularly serious crime and are dangerous for the community.

The wording of this provision leaves up to States' discretion to define what constitutes danger either to national security or the community. The wording of the provision makes it clear though that the danger should be prospective and should be directed to the state and/or community hosting the refugee, not the refugee's country of origin or habitual residence. As to the nature of the danger, it has been asserted that the danger should be very serious putting under threat the constitutional order, territorial integrity, and/or peace of the country concerned. In this regard the danger to the community is believed should entail threats of similar gravity [26]. In other words, the threshold requirement for the return to qualify for as an exception under article 33(2) is high.

Moreover, the article 33(2) does not provide a clear definition of the "particularly serious crime" either. As it has been interpreted, the offenses that would fall under the scope of the article 33(2) would include serious crimes like murder, rape, armed robbery, etc. A principal element in this regard is that the person convicted of such a crime should be posing a danger to the host community. The existence of conviction is an indicator or pre-condition for the existence of danger: "The commission of, and conviction for, a particularly serious crime ...constitutes a threshold requirement for operation of the exception. Otherwise, the question of whether the person concerned constitutes a danger to the community will not arise for consideration" [27].

Important element here is that the person must be convicted of a crime of high gravity by court's final judgment all appeal mechanisms being exhausted and provided the criminal proceedings have been conducted with full observance of the law in place; although the place of committing the crime is irrelevant, it is decisive that the person in question poses a threat to the host community [28]. When deciding on whether a particular person should be subjected to the article 33(2) exception could be returned, a balancing exercise is usually carried out by the States.

The issue of proportionality also comes into play in this exercise. In other words, the decision on return

would be made after examining the nature of the crime and level of danger to the host community on the one hand and the level of risk of persecution in case of return on the other. The more serious the crime is and the less serious the risk, the more probable that the person will be returned [29]. It should be noted in general that there is a trend of restrictive interpretation and practice of the exceptions under the article 33(2) of the 1951 Convention [30]. Thus, protection from refoulement under the 1951 Convention is non-derogable but non-absolute: article 33(2) defines the categories of refugees/asylum seekers excluded from the protection. The threshold requirement in relation to the nature of the national security threat or gravity of the crime/threat to community is high and for the refugees/asylum seekers to be excluded from the protection, the threat they pose and/or the crime they have been convicted for should be of serious gravity; the threat should be directed against the host country/community. Exceptions set forth in article 33(2) are subject to strict and narrow interpretation/practice.

#### **Measures of Refoulement**

Measures of non-refoulement are various and include expulsion/deportation orders against refugees, a return of refugees to countries of origin or unsafe third countries, electrified fences to prevent entry, non-admission of stowaway asylum-seekers and push-offs of boat arrivals or interdictions on the high seas. Whenever refugees - or asylum-seekers who may be refugees - are subjected, either directly or indirectly, to such measures of return, be it in the form of rejection, expulsion or otherwise, to territories where their life or freedom are threatened, the principle of non-refoulement has been violated.

Furthermore, having regard to the nature and purpose of the principle, it also applies to extradition. Indeed, the protection of a refugee cannot be regarded as complete unless he or she is also protected against extradition to a country where he or she has reason to fear persecution. Insofar as their actual wording is concerned, statements of the principle of non-refoulement figuring in various international instruments are wide enough to cover extradition. This applies in particular as regards the wording of Article 33 (1) of the 1951 Convention. Most extradition conventions also foresee a safeguard against extradition to countries of persecution [31].

The principle of non-refoulement is viewed in two different contexts: refugee law and human rights law more generally. In both contexts, the principle of non-refoulement should be applied with an observance of the rule of non-discrimination. Principle of non-refoulement prohibits States to reject at the border, return, extradite or remove in any other form refugees or asylum seekers to territories where they may fear

persecution on grounds of race, religion, nationality, membership of a particular social group or political opinion (the 1951 Convention definition); or expel, return, extradite or otherwise return any person (including but not limited to asylum seekers/refugees) when there are substantial grounds to believe that the person may be subjected to torture (definition under the Torture Convention) or face real risk of torture or inhuman or degrading treatment or punishment (definition under ECHR) upon return; the non-refoulement prohibition also extends to indirect refoulement, i.e. sending person to a place from where s/he may be subjected to onward refoulement to places prescribed by the principle.

As for the exceptions to the principle, exceptions are permitted only in refugee law context when asylum seekers and/or refugees being returned pose danger to national security of the sending state or having been convicted of a particularly serious crime constitute a danger to the host community. Such asylum seekers/refugees are exempted from the non-refoulement protection. Protection from refoulement is absolute when return involves a risk of torture or inhuman or degrading treatment or punishment. The duty of non-refoulement is non-derogable in both contexts.

#### **NON-REFOULEMENT IN CANADA: CASES STUDIES**

One of the most important ways of evaluating the extent of Canada's obligations as well as compliance with these obligations is to look into the legal opinions expressed by domestic courts. In relation to the prohibition of refoulement to a State where there is a risk of torture, the *Pushpanathan* [32] and *Suresh* [33] cases are fundamental, as they reflect the Supreme Court's (SCR) opinion on both Canada's international obligations and the way they should be implemented domestically.

##### **Pushpanathan Case**

In *Pushpanathan*, of particular interest, is the court's majority opinion on the difference between article 33 of the Refugee Convention and article 1F of the same Convention. Article 1F(b) contains a balancing mechanism in so far as the specific adjectives "serious" and "non-political" must be satisfied, while Article 33(2) as implemented in the Act by ss. 53 and 19 [34] provides for weighing of the seriousness of the danger posed to Canadian society against the danger of persecution upon refoulement.

This approach reflects the intention of the signatory States to create a humanitarian balance between the individual in fear of persecution on the one hand, and the legitimate concern of States to sanction criminal activity on the other. The presence of Article 1F(b) suggests that even a serious non-political crime

such as drug trafficking should not be included in Article 1F(c). This is consistent with the expression of opinion of the delegates in the Collected *Travaux Préparatoires* of the 1951 Geneva Convention Relating to the Status of Refugees, vol. III, 86, at p. 89 [35].

Hence, it would appear that article 1(F) distinguishes itself from article 33 by adding criteria to the process of determining whether a person is a refugee or a person in need of protection. Since the status granted to both categories of claimants under Immigration and Refugee Protection Act (IRPA) is the same [36], it would appear logical to create an alternative protection mechanism without compromising on the requirement that the protected person cannot be a persecutor. Adversely, article 33 would be concerned with the refoulement of refugees (or protected persons, since they benefit from the same legal status) once protection has been granted. Unfortunately, the SCR has not yet had the opportunity to analyze section 97 IRPA's compliance with Canada's international obligation of non-refoulement. The Federal Court has nevertheless made a brief statement on the relationship between section 97 IRPA and article 3 CAT.

Paragraph 97(1)(a) of the Act refers specifically to the notion of torture contained in Article 1 of the Convention and therefore integrates the principles contained in Article 3 of the Convention. Consequently, the answer to this question is contained in the law itself and does not require certification [37]. This statement has then been incorporated into subsequent judgments by the Federal Court [38]. It reflects a position that had been adopted before the enactment of section 97 IRPA, according to which article 3 of CAT is only concerned with individuals who have gone through the determination process and have been denied refugee status [39]. In practice, this means that claimants who are denied a hearing to decide whether they are refugees or persons in need of protection, based on the exclusions of section 98, cannot claim that their right to non-refoulement has been violated. Finally, in this case the Federal Court violated the principle of non-refoulement.

#### **Suresh Case**

In *Suresh* case, the appellant had already gained refugee status and was facing deportation due to his allegiance to an allegedly terrorist organization. His contention was that he would face torture if he were returned to Sri Lanka. Despite his refugee status in Canada, the reasoning of the court with regards to non-refoulement may be equally applicable to persons seeking protection in Canada. Interestingly, the court addresses the apparent contradiction between the exclusions in the Refugee Convention and the preemptory nature of non-refoulement in the CAT and seems to conclude that the latter prevails. The court thus

presented its analysis of the scope of the CAT: It is not apparent to us that the clear prohibitions on torture in the CAT were intended to be derogated. First, the absence of an express prohibition against derogation in Art.3 of the CAT together with the "without prejudice" language of Art.16 [40] seem to permit derogation.

Nor does it follow from the assertion in Art. 2(2) of CAT [41] that "[n]o... exceptional circumstances . . . may be invoked as a justification of torture," that the absence of such a clause in the Art.3 refoulement provision permits acts leading to torture in exceptional circumstances. Moreover, the history of Art.16 of the CAT suggests that it was intended to leave the door open to other legal instruments providing greater protection, not to serve as the means for reducing protection. During the deliberations of the Working Group that drafted the CAT, Art.16 was characterized as a "saving clause affirming the continued validity of other instruments prohibiting punishments or cruel, inhuman, or degrading treatment": Convention against Torture, *travaux préparatoires*, at p. 66. This undermines the suggestion that Art. 16 can be used as a means of narrowing the scope of protection that the CAT was intended to provide [42]. Further on, the affirms, based on these arguments as well as recommendations from the UN Committee Against Torture, that the CAT should be considered as the prevailing international instrument over the Refugee Convention.

It would indeed make little sense to deny refugees rights that the CAT provides to all individuals without discrimination [43]. From this, the court reaches the conclusion that international law prohibits deportation to torture regardless of national security interests [44]. Following the court's insightful analysis on the contradictions of international law on non-refoulement, their analysis under the Canadian Charter of Rights and Freedoms opens the door to exclusions to that principle.

We conclude that generally to deport a refugee, where there are grounds to believe that this would subject the refugee to a substantial risk of torture, would unconstitutionally violate the Charter's s.7 guarantee of life, liberty, and security of the person. This said, we leave open the possibility that in an exceptional case such deportation might be justified either in the balancing approach under ss.7 or 1 of the Charter [45]. This particular passage has been the subject of vehement criticism [46]. One of the voices that rose up against it is the UN Committee Against Torture, which expressed concern at the court's failure to recognize the absolute nature of the principle of non-refoulement in this case [47]. In the Committee's opinion, no deportation to torture can be justified under section 1265 or 7266 of the Charter, which makes the court's analysis an open door to violations of international law.

The court's reasoning may be linked with the UNHCR's involvement as an intervener in *Suresh* case. [48]. Its participation was justified by its mandate in overseeing the application of treaties relating to refugees. In the factum submitted to the SCR, the UNHCR emphasizes the need to apply the Refugee Convention along with the CAT and the International Covenant of Civil and Political Rights (ICCPR), thus underlining the interplay between refugee law and human rights. The UNHCR contends that an interpretation of international law is the key to interpreting domestic law within this case [49]. The right to non-refoulement is almost absolute, as determined in the *Suresh* case, for persons who are allowed to present their refugee claims.

However, courts have found that it can be subject to exceptions in the context of Pre-removal Risk Assessment (PRRA). PRRA is a process by which a person may apply for protection when they are about to be returned [50], and the determination of risk is made based on the criteria in sections 96 to 98 IRPA [51]. There are also circumstances under which the application for protection may only result in stay of removal, such as serious criminality or a violation of human rights [52]. The Federal Court's opinion in *Xie* is that individuals excluded under section 98 IRPA, which provides for rejection based on article 1(F) of the Refugee Convention, can make a claim for protection under section 112 and obtain a stay of removal, but they are meant to be rejected from refugee protection [53]. This opinion was followed and referred to with approbation in several other cases [54]. This means that a person who is excluded under section 98 IRPA can demonstrate that they should not be returned, but they are not allowed protection as herein defined. From these observations, it appears that the Federal Court is trying to minimize Canada's international obligations in order to reconcile them with the structure of the IRPA, rather than reassess the validity of the IRPA as part of an international legal framework.

The SCR judgments in *Suresh* and *Pushpanathan* are also flawed as they open to the possibility of individuals being returned to torture. They were based on legislation which was repealed with the adoption of the new IRPA in 2001, but these findings have not been readjusted by the Federal Court in light of the legislative reform and the adoption of sections 97 and 98 IRPA, which have added new protection provisions. This adds difficulty to the interpretation and application of these new provisions.

### **Conclusion**

Canada's approach in refoulement, as indicated in the two cases, is an examination on its domestic law in compliance with its constitution. The court has examined fundamental justice in both domestic law and

international law, with recognition that prohibition on torture is *jus cogens*. The court has noted that Canada is not bound by the provisions stated in the CAT, where lies the most stringent rules on non-refoulement. However, fundamental justice, as valued by its constitution must be complied. In deciding whether or not fundamental justice will be violated in deporting a person to torture, the court has concluded that both Canadian law and international norm prohibits deportation to torture.

### **NON-REFOULEMENT IN AUSTRALIA: CASES STUDIES**

Australia has international obligations to protect the human rights of all asylum seekers and refugees who arrive in Australia, regardless of how or where they arrive and whether they arrive with or without a visa. While asylum seekers and refugees are in Australian Territory (or otherwise engage Australia's jurisdiction), the Australian Government has obligations under various international treaties to ensure that their human rights are respected and protected.

Australia also has obligations not to return people who face a real risk of violation of certain human rights, and not to send people to third countries where they would face a real risk of violation of their human rights under these instruments. These obligations also apply to people who have not been found to be refugees. The Australian immigration system is in large part based on the Migration Act 1958. Over recent years, through amendments and regulations, changes have been made to this system to make it harder for asylum-seekers to obtain either a Permanent Visa or a Temporary Protection Visa. Some of these changes include the Migration Reform Act 1992, and the more recent Border Protection Legislation Amendment Act 1999. The latter was passed mainly to deal with the increasing numbers of boat people leaving from Indonesia for Australia [55]. Many of the reforms were designed to curb the judicial activism, which saw judges overturning decisions of the Refugee Review Tribunal, allowing more refugees to obtain visas [56].

The Australian Government has persisted with its reforms of the asylum system despite the UNHRC decision against it in 1997 [57]. I will now look to the case study of *Elmi v. Australia* [58], and *CPCF v Minister for Immigration and Border Protection* [59], some cases which sadly illustrates the irrationality of Australia's current system.

### **Case of Elmi v. Australia**

In *Elmi*, a Somalian asylum seeker from a persecuted minority clan claimed refugee status in Australia. While in detention, his claim was rejected on the grounds that any harm he would face upon return to Somalia would be because of a situation of generalized violence from civil war, rather than a specific Refugee

Convention reason. Thus, even though there was a clear case that Mr. Elmi would be subjected to torture upon return, his claim failed, as it did not fall within the strict legal definition. While Mr. Elmi was still in detention, the appeal finally reached the stage of Ministerial Discretion where the Minister refused to exercise his discretion. Due to the non-reviewable nature of the system, Mr. Elmi could not know if his particular protection needs under the CAT had even been assessed.

A complaint was subsequently made to United Nations Committee Against Torture (UNCAT) arguing that Mr. Elmi's deportation would be in breach of the non-refoulement provision under Article 3 of CAT. UNCAT outlined that these non-refoulement obligations did in fact come into play, and declared Australia thus had an obligation to refrain from returning the applicant home. As outlined above, the committee's decision does not bind governments, and thus Australia was legally free to ignore its ruling. Instead of granting a protection visa in response to the UNCAT ruling, the Minister outlined that he would have to apply through the whole system again. Thus, after a ruling by an international committee that this person is in need of protection under obligations which Australia is "duty-bound to respect under international law, the Australian government's response was to put that person through the whole drawn-out procedure again. Clearly if a proper legislated mechanism was in place for assessing complementary protection grounds, Mr. Elmi could have had his claim assessed on the ground of torture from the start, and would not have to have spent such a long and ultimately pointless length of time in detention. In this case, Mr. Elmi in fact left Australia "voluntarily" rather than face more prolonged detention. It is clear that under the current system, the failure to implement effective domestic measures results in a lack of accommodation for those in need of international protection. While the Minister may give consideration to the obligations in his discretionary assessment, his decision in the end is not reviewable, and thus without accountability or transparency, there is no guarantee that Australia is in fact meeting its obligations.

Australia has ratified these commitments to international protection, and it is time a system is put in place to prevent cases like this one from occurring again. I will now look to the proposed Draft Model for Complementary Protection in Australia, which will, it is hoped, be part of the new era in the Australian immigration system. If this Draft Model system was in place for Mr. Elmi, perhaps there may have been a different outcome. Assessing his claim under the Complementary Protection system could have saved a prolonged period of detention, and could have resulted in a protection visa being granted to someone who was deserving of international protection.

### **CPCF v. Minister for Immigration and Border Protection**

In *CPCF V Minister for Immigration and Border Protection* the court had to determine the extent to which certain powers of detention and removal by maritime officers were constrained by Australia's non-refoulement obligations (the duty not to return a person to a country in which he or she claims to have a well-founded fear of persecution). The judgment has since been legislatively overtaken by clarifying, for example, that the failure by these officers to consider such obligations did not invalidate the exercise of statutory power [60]. Nevertheless, the court traversed several issues of broad international interest, in particular the extraterritorial application of these obligations and a State's ability in the contiguous zone to prevent and punish infringements of specific laws applicable in the territorial sea.

CPCF was a man of Tamil ethnicity who feared persecution in Sri Lanka, his country of nationality. He and 156 other persons were on board an Indian vessel bound for Christmas Island that was intercepted in the Indian Ocean on 29 June 2014 by an Australian border protection vessel within Australia's declared contiguous zone. The Indian vessel became unseaworthy. The passengers were detained and transferred to an Australian vessel that then sailed towards India while diplomatic negotiations occurred. The Australian government decided on 22 July 2014 that it was not practicable to discharge the passengers in India within a reasonable time. The vessel then sailed to Australian Territory at Cocos (Keeling) Islands, where the individuals were put into immigration detention. CPCF initiated proceedings in the High Court, alleging unlawful detention and seeking damages for wrongful imprisonment.

Section 72(4) of the *Maritime Powers Act 2013* (the Act) relevantly provided that a maritime officer may detain a person on a detained vessel and take the person to a place outside Australia. Under Section 74, the officer must be satisfied on reasonable grounds that it is safe for the person to be in that place [61]. The plaintiff contended that the power conferred by Section 72(4) did not extend to taking a person to a place if that would occasion a breach of Australia's non-refoulement obligations. These obligations arise from Article 33 of the 1951 Convention relating to the Status of Refugees (Refugee Convention) [62] and other human rights instruments [63]. The Australian government responded that the non-refoulement obligation under the Refugees Convention applies only to receiving States in respect of refugees within their Territory, citing national judicial decisions [64]. The High Court held by majority (4 to 3) that Section 72(4) authorised an officer to take certain steps by way of implementing an executive decision to detain the plaintiff and take him to

India. For example, Chief Justice French concluded that the terms of Section 72(4) did not support a construction limiting the power “by reference to Australia’s non-refoulement obligations assuming they subsist extra-territorially.”

However, Section 74 embraced risks of the kind to which those obligations were directed [65]; that is, both the statutory provision and non-refoulement obligations aim to protect the safety of people. Justice Keane considered the terms of the Act clear: the power conferred by Section 72(4) was not subject to observing Article 33 of the Refugee Convention. Using compulsion to prevent the unauthorised entry into Australia of non-citizens outside Australia was consistent with both Australian legislation and the Convention, which concerns rights afforded to persons only within State Territory [66]. A minority of the justices concluded that the plaintiff’s detention was not authorized. Australia and India had no agreement about the plaintiff’s disembarkation, and he had no right or permission to enter India [67]. It was therefore unnecessary to decide whether the officer was empowered to act on the high seas contrary to Australia’s obligations [68].

The prospect of national authorities intercepting asylum seekers in international waters and taking them to third countries is important to many States. CPCF contains judicial reflections on the question whether non-refoulement obligations apply to conduct beyond a State’s own Territory. The judgment moreover focuses attention on the practice of coastal States in exercising control measures within the contiguous zone and conforming with their obligations under international law for the safety of life at sea. These topics raise compound issues of refugee law, international human rights law, and the law of the sea, which are intrinsic to the relations between nations and the welfare of individuals.

In other way, the Australian Government has been accused by the UNHCR and more than fifty Australian legal scholars of violating the principle of non-refoulement by returning 41 Tamil and Sinhalese refugees to the Sri Lankan Navy in June or July 2014, as part of Operation Sovereign Borders immigration and border protection policy [69]. This action was followed in September 2014 by a Bill tabled in the Australian Parliament that would remove Australia’s non-refoulement obligations, and sought to reinterpret Australia’s international treaty obligations. The scholars said returning the asylum seekers would breach Australia’s obligations under international refugee and human rights law, including the 1951 Refugees Convention, 1948 Universal Declaration on Human Rights, and the 1966 International Covenant on Civil and Political Rights.

## **Conclusion**

Similar to Canada, the Australia’s approach in refoulement is based on its domestic law. If deporting a person when the requirements in Article 33(2) of the Refugee Convention are met, it will still be a violation if there is a substantial ground for believing there will be torture on return. Australia cannot deport a person to torture when a serious risk of torture is established. The cases show clearly the Australian courts violated the international conventions in deporting refugees.

## **NON-REFOULEMENT IN BELGIUM: CASES STUDIES**

Belgium is a member of ECHR, which is an international treaty to protect human rights and fundamental freedoms in Europe. Drafted in 1950 by the then newly formed Council of Europe [70]. The convention entered into force on 3 September 1953. All Council of Europe member States are party to the Convention and new members are expected to ratify the convention at the earliest opportunity [71]. Also, Belgium has historically implemented its obligations under the Refugee Convention in a manner that attains international best practice. The Belgium refugee determination system have accumulated substantial experience in the application of the Inclusion and Exclusion provisions of the refugee definition contained in Article 1A(2) of the Convention relating to the Status of Refugees 1951 and the Protocol relating to the Status of Refugees, 1967 (“the Refugee Convention”).

Belgium’s legislative regime of refugee protection has suffered from a limitation, namely, that it has traditionally restricted protection only to those whose claims fall within the Refugee Convention, and not to those whose claims for protection are based on other express or implied norms of non-refoulement at international law. Parliament is, therefore, the rectification of this lacuna in international protection. The Bill recognizes, as a “protected person”, a person who has a claim for Complementary Protection under the CAT.

### **M.S.S. v. Belgium and Greece**

The case *M.S.S. v. Belgium and Greece* [72] concerned an Afghan national, who had first entered the EU through Greece. Upon arrival in Greece the applicant had been registered and detained for a week before being released with an order to leave the country. The applicant then travelled to Belgium where he applied for asylum, which he had not done in Greece. Upon discovering that the applicant had first entered the EU through Greece, the Belgian authorities then requested Greece to take charge of the application based on the “first country of asylum”.

When the Greek authorities failed to reply within the two month deadline, the Belgian authorities considered this to be a tacit acceptance of the request

pursuant to article 18 (7) of the Regulation and initially transferred the applicant back to Greece, after finally receiving confirmation from Greece of their acceptance of responsibility and assurance that the applicant could seek asylum there. The applicant then filed complaints against both Belgium and Greece for allegedly violating the ECtHR, article 3, due to his exposure to detention and his dire living conditions in Greece, as well as the deficiencies of the procedure in his case. The Grand Chamber of the Court concluded by clear majority, at some points even unanimously, that both countries had violated their obligations under article 3 and article 13.

The court first examined the claim regarding his detention in Greece, where it held that detention accompanied by appropriate safeguards was acceptable to prevent unlawful immigration, the conditions of the detention the applicant had experienced was unacceptable. It also noted that this systematic placement of asylum seekers in detention centers in which the conditions amounted to degrading had been confirmed by numerous international organisations. The ECtHR has also in several previous cases ruled that Greece had subjected asylum seekers to degrading treatment in violation of article 3 due to the country's use of detention and appalling reception conditions [73]. The court held that owing to the absolute character of article 3, such circumstances did not absolve the contracting States of their responsibilities under that provision. This view has also been reaffirmed in a later case before the court [74].

As to the living conditions the applicant experienced in Greece, the court found that the Greek authorities had through inaction exposed the applicant to degrading treatment because he had lived on the streets without any means to provide for his most essential needs, thus arousing in him "... feelings of fear, anguish or inferiority capable of inducing desperation..." which attained the level of severity required after article 3 [75]. In this regard considerable importance had to be placed on the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable group in need of special protection [76].

Regarding the deficiencies of the applicant's asylum procedure in Greece, the court maintained that it does not examine the substance of the applicants' asylum claims after the Geneva Convention or other relevant law, as the ECHR does not, as such, contain any right to asylum. The task of the court is rather to consider whether effective guarantees exist to prohibit direct or indirect refoulement to a country where the applicant may risk being subjected to treatment contrary to article 3 [77]. Relying on reports by UNHCR and several other international organisations, the ECtHR concluded that the Greek asylum laws complied with the standards required after the Convention, statistically

the applicant had no chance of being offered any form of protection and that the merits of his claim *de facto* had not been seriously examined, thus establishing that Greece had also violated article 13 in conjunction with article 3 [78].

After establishing violation of article 3 by the Greek authorities, the court then had to examine the applicant's complaints against the Belgian authorities for exposing him to the risks connected with the deficiencies of the Greek asylum system and the treatment he had experienced there. The court reiterated that the ECHR did not prevent the contracting States from transferring sovereign powers to international organisations, as long as these organisations provided protection of fundamental rights equivalent to that of the Convention.

Moreover, such transfers of powers did not affect the State parties obligations under the Convention, and a State would consequently be fully responsible for "... all acts falling outside its strict international legal obligations, notably where it exercised State discretion"[79]. The ECtHR held that the sovereignty clause provided the Belgian authorities with the opportunity to examine the applicant's claim if they considered that the receiving State did not comply with its obligations under the Convention. With such an option in place, the transfer of the applicant did not necessarily fall within Belgium's international legal obligations, thus the presumption of equivalent protection did not apply in the present case [80].

The question the court therefore had to examine was whether the Belgian authorities not should have relied upon the presumption that the Greek authorities would uphold their international obligations regarding asylum matters. With the transfer of M.S.S. to Greece taking place less than six months, Belgium however held that their actions had been pursuant to ECtHR case law and that the applicant had not been able to substantiate that he had personally been a victim of ill treatment in Greece [81]. This, held together with the assurances of the Greek authorities given to the court in the case regarding the asylum seekers possibilities to apply for asylum there, and that the ECtHR itself had not found it necessary to indicate an interim measure after rule 39 of the rules of court to the Belgian Government to suspend the applicant's transfer, the Belgian authorities concluded that there had been no reason to invoke the sovereignty clause in order to ensure the applicant sufficient protection under the Convention. This view was supported by the partly dissenting judge Bratza, who concluded that the contracting parties were "...legitimately entitled..." to base their decisions in the absence of clear evidence of a change in the situation for asylum seekers in Greece which had been considered by the ECtHR, or in the

absence of "...special circumstances affecting the position of the particular applicant" [82].

When all the remaining judges of the Grand Chamber however found that Belgium had violated its obligations under article 3. Although not expressly contradicting its previous case law, the court also found that the possibility of appeal in Greece did not provide the applicant with sufficient protection [83]. The court concluded consequently that the Belgian authorities knew, or ought to have known, the risks connected with the applicant's removal to Greece and that Belgium thus could not rely on the assumption of Greece being a safe country.

### **Conclusion**

The transfer to Greece and the subsequent exposure of the applicant to the degrading detention and living conditions in itself was contrary to article 3, thus establishing both direct and indirect violation of the principle of non-refoulement [84]. Finally the court, pertaining to Belgium's unreasonably high standard of proof found that Belgium had also violated article 3 and 13 of ECHR [85].

### **RECOMMENDATIONS FOR IMPROVEMENT IN RESPECTING INTERNATIONAL COMMITMENT**

This paper argues that these States' application of these norms reflects partial compliance with their obligations, as it acknowledges important humanitarian concerns regarding international protection. The paper offers suggestions, which might assist their respective governments in developing a more effective approach to the assumption and implementation of international human rights obligations.

The following recommendations could be made for improving implementation of the principle of non-refoulement in these States legal system:

a) The adoption of national refugee legislation that is based on international standards is the key to strengthening asylum, making protection more effective and providing a basis for seeking solutions to the plight of refugees. Incorporating international law into national legislation is particularly important in areas on which the Refugee Convention is silent, such as procedures for determining refugee status.

b) Parliaments and their members have a crucial role to play in ensuring protection to refugees both in law and in practice. The Key to that effect are the following steps:

Incorporate the principle of non-refoulement into national legislation. To do so, laws concerning the entry of foreigners and border-control requirements must reflect the difference between those seeking asylum and

others who may want to enter a country for other reasons. Review of national legislation on immigration may be necessary. Asylum-seekers should be offered a fair and efficient procedure in which to present their claims for asylum.

c) Broaden the refugee definition. Parliaments and their members may wish to consider incorporating an expanded refugee definition, such as that found in the OAU Convention and the Cartagena Declaration, in national legislation. Parliamentarians may also wish to review the situation of internally displaced persons in their country, if any, to facilitate their protection and to bring their plight to the attention of the international community.

d) Review reservations and restrictive interpretations. The validity of reservations and restrictive interpretations ought to be reviewed periodically. In the absence of any steps to that effect by the Executive, Members of Parliament may put questions to the Government or even present a private Member bill.

e) Implement international standards. In addition to the treaties mentioned above, inspiration can be drawn from a significant body of international standards - including the Conclusions adopted by UNHCR's Executive Committee and guidelines, produced by UNHCR, on a range of refugee-related issues - in devising national systems of refugee protection. UNHCR offices can assist parliamentarians by providing information on these standards and commenting on proposed legislation.

f) Encourage cooperation with UNHCR. Parliamentarians can ensure that their government provides UNHCR with information on the number and condition of refugees on the national territory, the implementation of the Refugee Convention, and the laws, regulations, and decrees in force related to refugees. Parliamentarians can also seek UNHCR's views on matters related to refugee protection, including proposed or pending legislation, court cases, and policy decisions.

g) Reformulation of the non-refoulement rule in the Asylum Act and Alien Act to include "provinces" as prescribed places of return and lifting the limitation to return to countries of origin would also help to strengthen the non-refoulement protection in the country and make the national legal system more compatible with the 1951 Convention.

h) Special legal procedure for expulsion of refugees/asylum seekers would be advisable to be worked out which should be very narrow and in line with exceptions to non-refoulement rule provided for in the 1951 Convention. Legal mechanisms for protection

from removal to places where persons returned may be at risk of torture or inhuman or degrading treatment or punishment would be necessary to be put in place.

i) Provision of the Criminal Procedure Code on the exemption of refugees from extradition would be good to amend to include asylum seekers as well.

j) Abolishing of prescreening of asylum seekers would make it possible to start asylum procedure and make benefits/protections under the law available to asylum seekers immediately after submission of the application.

### **CONCLUDING REMARKS AND RECOMMENDATIONS FOR IMPROVEMENT**

Examining practices by Canada, Australia and Belgium on deporting a refugee back to potential torture, the international obligation on prohibition on torture is absolute. The Regulations have certain systemic flaws, which have resulted in the member States violation of their obligations proscribed by the principle of non-refoulement after fundamental human rights provisions. According to the human rights treaties, the member States have a positive obligation to not transfer an applicant to another member state if the applicant could risk being subjected to torture, persecution or other ill-treatment after being transferred, either directly in the receiving state or indirectly due to further refoulement to a third State.

To summarize the facts, Canada, as a member State of the Refugee Convention and other international conventions, decided to derogate from the absolute prohibition on torture provided by the ICCPR and the CAT, with the court in Suresh's finding that international obligations are not binding unless Canada has incorporated it into its legislation. Returning a person to torture is lawful as long as it is in accordance with the constitution, notwithstanding a breach or a potential breach of the ICCPR and the CAT.

Australia, as a signatory to many significant international conventions, which were established to provide fundamental protections for individual human rights, Australia, is bound to deal with those who seek asylum from persecution in accordance with a number of specific standards. These standards should support the Law Council's fundamental policy position that those persons legitimately seeking recognition as refugees, or complementary protection, must be treated with fairness, humanity and respect.

Belgium, as a member State of the Refugee Convention, the ICCPR, the CAT and more importantly, the ECHR, has to bind the prohibition on torture rule as it has incorporated the ECtHR into its domestic law. No derogation is allowed in Article 3 of the ECHR and no reservation is allowed. Therefore,

Belgium cannot refoule a person back to his home country if there is a risk that person facing torture or arbitrarily deprivation of life in return.

This paper has addressed that Article 1(F) of the Refugee Convention is to bar the entry of refugee status, as persons who have committed particular serious crimes that the Refugee Convention refuses to protect. That said, the crimes against humanity now includes a large numbers of crimes [86], but the listed crimes are only crimes against humanity if "committed as part of a widespread or systematic attack directed against any civilian population, which knowledge of the attack" [87], defined to mean "a course of conduct involving the multiple commissions of acts ...against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack" [88]. In which case, Article 1(F) bars fairly small amount of dangerous fugitives.

In all circumstances, deportation to torture may deprive a refugee of the right to liberty, security and perhaps life, which is against many States' domestic laws and international instruments such as the ICCPR, CAT, and other International or regional instruments. When deporting a person who poses threat to national security can lead to torture and arbitrarily deprivation of life and the deportation potentially violates an international obligation or a State's constitution.

Having examined the Non-refoulement in Canada, Australia, and Belgium, conclusions were made that implementation of the principle of non-refoulement in their national legal systems lacks crucial elements of the international standards of non-refoulement protection, and the major areas of concern in this regard are the incompliance of non-refoulement. Compliance with the Rule of Law also requires States to observe and give effect to the international obligations including the right to seek asylum from persecution, serious human rights violations and other serious harm [89].

As a signatory to many significant international conventions, which were established to provide fundamental protections for individual human rights, Canada, Australia, and Belgium are bound to deal with those who seek asylum from persecution in accordance with a number of specific standards and refugees must be treated with fairness, humanity and respect.

### **REFERENCES**

1. Trevisanut, Dr. Seline (September 1, 2014). "International Law and Practice: The Principle of Non-Refoulement And the De-Territorialization of Border Control at Sea". LEIDEN.J. INT'L LAW.
2. See, e.g., Allain, *supra* note 2, at 533-38; GOODWIN-GILL & MCADAM, *supra* note 119, at 218 ("[C]omments . . . have ranged from support for the

idea that non-refoulement is a long-standing rule of customary international law and even a rule of jus cogens, to regret at reported instances of its non-observance of fundamental obligations...”).

3. Vienna Convention, *supra* note 4, at art. 53 (“For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”).

4. *Id.* at 55 (arguing that non-refoulement is a peremptory norm because of “its inseparable link with the observance of basic human rights such as the right to life, freedom from torture and non-discrimination”).

5. Texts of the documents (online), <<http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>> (last visited Feb. 10, 2017).

6. Text of the document (online), <<http://www.hrweb.org/legal/cat.html>> (last visited 10 February 2017).

7. Text of the document (online), <<http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>> (last visited Feb. 10, 2017).

8. In the Pre-Second World War period, the concept of the international protection of human rights of individuals had no place in the doctrine of international law. For an extended discussion, see R. B. Lillich, ed., *International Human Rights: Problems of Law, Policy and Procedure* (Boston: Little Brown, 1991) at 33.

9. UNGA Resolution 3272 (XXUC), 10 December, 1974; UNGA Resolution 3454 (XXX), 9 December 1975; UNGA Resolution 31/35,30, November 1976.

10. G. S. Goodwin-Gill, “The Language of Protection” (1989) 1 (1) INT’L J.REF.LAW. 6 at 15.

11. For an elaboration of these arguments, see J. Hathaway, “A Reconsideration of the Underlying Premise of Refugee Law” (1990) 3 I(I) HARV.INT’L LAW.J.129 at 143.

12. *Ibid.*

13. Statute of the Office of the United Nations High Commissioner for Refugees, United Nations General Assembly, Dec.14, 1950 (see Appendix F).

14. Convention Relating to the Status of the Refugees, opened for signature July 28, 1951, 189 U.N.T.S. 137 (see Appendix G).

15. G. Goodwin-Gill, *The Refugee in International Law* (Toronto: Oxford University Press, 1983) at 215.

16. J-C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths 1991).

17. Although there is no unanimity on the issue, a number of scholars, perhaps the great majority, argue that certain principles of international refugee law have now crystallized into peremptory norms, which are binding upon all States even in the absence of specific individual assent. The most widely invoked principle in this regard is that of non-refoulement. For a

comprehensive account, see G. Goodwin-Gill, *supra* note 13.

18. 1967 Protocol Relating to the Status of Refugees, at article 1  
<http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>.

19. UNHCR and its Executive Committee have even argued that the principle of non-refoulement is progressively acquiring the character of jus cogens; see Executive Committee Conclusion No. 25 para. (b); UN docs. A/AC.96/694 para 21.; A/AC.96/660 para. 17; A/AC.96/643 para.15; A/AC.96/609/Rev.1 para. 5.

20. See in particular Executive Committee Conclusion No. 6 on Non-Refoulement.

21. See for instance Communications No. 41/1996 (*vs. Sweden*) and No. 21/1995 (*vs. Switzerland*).

22. For more details see M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993), Article 7 para. 21.

23. The European Human Rights Convention does not foresee a right of entry or asylum. The interpretation of Article 3 can, however, be seen as a limit to the power of States to expel aliens. For further information see UNHCR, ‘The European Convention on Human Rights and the Protection of Refugees, Asylum-Seekers and Displaced Persons’, European Series 2 (1996), No. 3. As regards recent jurisprudence, see *Chahal vs. the United Kingdom Judgement* 70/1995/576/662 of Nov.15, 1996.

24. 1951 Convention Relating to the Status of Refugees, *supra*, at article 1.

25. 1951 Convention Relating to the Status of Refugees, *supra*, at article 42.

26. Sir Elihu Lauterpacht and Daniel Bethlehem *supra*, at 135-136.

27. *Id.*, at 139.

28. James C. Hathaway, *supra*, at 350-351.

29. Guy S. Goodwin-Gill, *supra*, at 140.

30. Sir Elihu Lauterpacht and Daniel Bethlehem, *supra*, at 130.

31. See for instance Article 5 of the European Convention on the Suppression of Terrorism.

32. *Pushpanathan v. Canada (Minister of Employment and Immigration)*, (1998) S.C.R. 982, 43 Imm. L.R. (2d) 117 [Pushpanathan].

33. *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, (2002) 1 S.C.R. 3, 18 Imm. L.R. (3d) 1 [Suresh].

34. Immigration Act, R.S.C. 1985, c. I-2, s. 19 and 53, now section 115 IRPA.

35. Pushpanathan, *supra* note 256 ¶ 73.

36. Section 95 IRPA: “(1) Refugee protection is conferred on a person when:

(a) the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons; (b) the Board determines the person to be a Convention refugee or a person in need of protection; or

(c) except in the case of a person described in subsection 112(3), the Minister allows an application for protection.”

37. *Sidhu v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 39, 128 A.C.W.S. (3d) 559 ¶ 26.

38. See *Choudhary v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 412, 166 A.C.W.S. (3d) 1124 ¶ 25: “It cannot, therefore, be said, as argued by the applicants, that the PRRA decision, in this case, violates either the CAT or the *Charter*. This argument does not stand the analysis of subsection 97(1) of the *Act* which refers specifically to torture and is, therefore, the basis of an effective assessment pursuant to Canada's international obligations (Sidhu)”; *Colindres c. Canada (Minister of Citizenship and Immigration)*, 2007 FC 717, 160 A.C.W.S. (3d) 1046 ¶ 25: “As to the applicant's argument that the PRRA officer infringed article 3 of the *CAT*, section 97 of the *IRPA*, which was the basis for the analysis by the PRRA officer under paragraph 113(d), incorporates the principles set out in article 3 of that Convention. In particular, section 97 prohibits the removal of an individual to a country where he or she is at risk of mistreatment, torture or death, which is precisely the kind of protection that article 3 of the Convention requires (see *Li v. Canada (Minister of Citizenship and Immigration)*, 2005 CAF 1 (F.C.A.)).” *Martinez c. Canada (Minister of Citizenship and Immigration)*, 2010 FC 31, [2010] F.C.J. No. 41.

39. *Sandhu v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 902, 258 N.R. 100, 99 A.C.W.S. (3d) 304 ¶ 2: “In our opinion, Dubé J. was right to conclude that art. 3 of the *Convention Against Torture and Other Cruel or Degrading Treatment or Punishment* [...] is concerned with the return stage, and accordingly a stage of the process which is subsequent to the stage at which refugee status is determined by the Refugee Division (see *Barrera v. Canada (Minister of Employment and Immigration)* (1992), [1993] 2 F.C. 3 (Fed. C.A.)).” *Shephard c. Canada (Ministre de la Citoyenneté et de l'Immigration)*: “The first question was determined by the *Federal Court of Appeal* in *Xie*, *supra*, note 282 ¶ 39, when it found that denying an individual referred to in paragraph 1F of the Convention the right to have a refugee claim heard on the merits before the RPD does not violate section 7 of the *Charter*; a fortiori, therefore, it does not violate article 3 of the Convention against Torture, which applies only, as discussed earlier, at the removal stage.”

40. Article 16 CAT: “1. Each State Party shall undertake to prevent in any Territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to

other forms of cruel, inhuman or degrading treatment or punishment.

41. Article 2(2) CAT: “No exceptional circumstances whatsoever, whether a State of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

42. Suresh, *supra* note 255 ¶ 71.

43. *Ibid.* ¶ 72-73.

44. *Ibid.* ¶ 75.

45. Suresh, *supra* note 255 ¶ 129.

46. Mc. Adam, *supra* note 5 at 130.

47. UN Committee Against Torture, Conclusions, and recommendations of the Committee against Torture: Canada, UNCAT, 34th Sess., UN Doc. 07/07/2005. CAT/C/CR/34/CAN (2005).

48. Suresh, *supra* note 255.

49. UHCR, Manickavasagam Suresh (Appellant) and the Minister of Citizenship and Immigration, the Attorney General of Canada (Respondents). Factum of the Intervenor, UNHCR (March 8, 2001) <<http://www.refworld.org/docid/3e71bbe24.html>> (visited Feb. 5, 2017).

50. Section 112(1) and (2) IRPA: — 112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or is named in a certificate described in subsection 77(1).

(2) Despite subsection (1), a person may not apply for protection if

(a) they are the subject of an authority to proceed issued under section 15 of the Extradition Act;

(b) they have made a claim to refugee protection that has been determined under paragraph 101(1)(e) to be ineligible;

(c) in the case of a person who has not left Canada since the application for protection was rejected, the prescribed period has not expired; or

(d) in the case of a person who has left Canada since the removal order came into force, less than six months have passed since they left Canada after their claim to refugee protection was determined to be ineligible, abandoned, withdrawn or rejected, or their application for protection was rejected.

51. Consideration of an application for protection shall be as follows: (a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;

(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;

(c) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;

(d) in the case of an applicant described in subsection

112(3), consideration shall be on the basis of the factors set out in section 97 and

(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or

(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.

52. Section 112(3) IRPA: “(3) Refugee protection may not result from an application for protection if the person:

(a) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;

(b) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;

(c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or

(d) is named in a certificate referred to in subsection 77(1).”

53. Xie, *supra* note 282 ¶ 36.

54. See *Li v. Canada (Minister of Citizenship and Immigration)*, 2010 FCA 75, 317 D.L.R. (4th) 447; *Liu v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 877, 83 IMM. L.R. (3d) 228; *Altenor c. Canada (Minister of Citizenship and Immigration)*, 2009 FC 563, [2009] F.C.J. No. 732; X, Re (20 May 2005), *IRB Decision VA6-03502*, online: CanL” (IRB); *Ivanov v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1210, 261 F.T.R. 211.

55. Jonathon Hunyor ‘Warra Warra: refugees and protection obligations in relaxed and comfortable Australia’ (2000) 5 ALT.L.J.227, 227.

56. Andrew N. Langham ‘The Erosion of Refugee Rights in Australia: Two Proposed Amendments to the Migration Act’ (1999) 3 PAC.RIM L & Pol’Y.J. 651, 659.

57. *A v Australia* 560/1993, U.N.Doc. CCPR/C/59/D/560/1993, April 30, 1997 cited in *Andrew N. Langham*.

58. *Sadiq Shek Elmi V Australia*, Communication No. 120/1998: Australia. 25/05/99.CAT/C/22/D/120/1998.

59. *CPCF v. Minister for Immigration and Border Protection* [2015] HCA 1 (Austl.) [hereinafter *CPCF*] (Jan.28, 2015).

60. Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014, Schedule 1, No. 135, 2014 (Austl).

61. Maritime Powers Act, No. 15, s 74 (2013) (Austl.).

62. Convention Relating to the Status of Refugees, July 28,1951, 189 U.N.T.S. 150 (entered into force April 22, 1954).

63. E.g., International Covenant on Civil and Political Rights, art. 7, Dec.16, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976).

64. E.g., *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993).

65. *CPCF*, *supra* note 1, French CJ, ¶¶ 11–12.

66. *Id.* Keane J, ¶¶ 461, 463, 492.

67. *Id.* Kiefel J ¶ 323, Hayne & Bell JJ ¶ 135.

68. *Id.* Hayne & Bell JJ, ¶¶ 112, 126.

69. Sri Lankan asylum seekers facing criminal investigation after being handed back by Australian authorities, *ABC News* (July 7, 2014) <<http://www.abc.net.au/news/2014-07-07/morrison-confirms-sri-lankans-returned-after-interception/5575924>> (visited Feb.12, 2017).

70. The Council of Europe should not be confused with the Council of the European Union or the European Council.

71. Resolution 1031 (1994) on the honouring of commitments entered into by member states when joining the Council of Europe.

72. No. 30696/09, E.C.H.R (2011).

73. See *S.D. v. Greece*, no. 53541/07 E.C.H.R (2009); *Tabesh v. Greece*, no. 8256/07 E.C.H.R (2009) & *A.A. v. Greece*, no. 12186/08 E.C.H.R (2010).

74. M.S.S., note 126, paragraph 223.

75. M.S.S., note 126, paragraph 263.

76. *Ibid.*, paragraph 268.

77. *Ibid.*

78. *Ibid.*, paragraphs 320-321.

79. *Ibid.*, paragraphs 155-157.

80. M.S.S., note 126, paragraph 340.

81. *Ibid.*, paragraph 327.

82. *Ibid.*, Partly dissenting opinion of judge Braza, paragraph 6.

83. *Ibid.*, paragraph 357.

84. *Ibid.*

85. *Ibid.*, paragraph 396.

86. See International Criminal Court <[www.icc-cpi.int](http://www.icc-cpi.int)>.

87. *Ibid.*

88. *Ibid.* See James C Hathaway and Colin J Harvey “Framing Refugee Protection in the New World Disorder” 258 (2001) 34 CORNELL INT’L L.J. at 265-266.

89. Canada, Australia, and, Belgium are a party to the seven key international human rights treaties and has also signed or ratified a number of optional protocols to those treaties. The instruments which are most relevant to the detention of asylum seekers include: the Convention relating to the Status of Refugees, opened for signature July 28,1951, 189 UNTS 137 (entered into force April 22, 1954) and the Protocol relating to the Status of Refugees, opened for signature Jan.31, 1967, 606 UNTS 267 (entered into force Oct.4, 1967) (collectively, ‘the Refugee Convention’); the

International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 277 (entered into force March 23, 1976) ('the ICCPR'); the International Covenant on Economic, Social and Cultural Rights, opened for signature Dec.19, 1966, 993 UNTS 3 (entered into force in Jan.3, 1976) ('the ICESCR'); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec.10, 1984, 1465 UNTS 85 (entered into force June 26, 1987); the Optional Protocol to the Convention against Torture, opened for signature Feb.4, 2003, 2375 UNTS 237 (entered into force June 22, 2006); and the Convention on the Rights of the Child, opened for signature Nov.20, 1989, 1577 3 (entered into force Sep.2, 1990) ('the CROC').