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**The American University in Cairo**

**School of Global Affairs and Public Policy**

**BALANCING REFOULEMENT TO TORTURE AGAINST  
SECURITY INTERESTS –  
THE PITFALLS OF THE *SURESH* EXCEPTION**

**A Thesis Submitted to the**

**Department of Law**

**in partial fulfillment of the requirements for  
the LL.M. Degree in International and Comparative Law**

**By**

**Amira Hetaba**

**December 2017**

The American University in Cairo  
School of Global Affairs and Public Policy

BALANCING REFOULEMENT TO TORTURE AGAINST SECURITY  
INTERESTS – THE PITFALLS OF THE *SURESH* EXCEPTION

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BALANCING REFOULEMENT TO TORTURE AGAINST SECURITY  
INTERESTS – THE PITFALLS OF THE *SURESH* EXCEPTION

Amira Hetaba

Supervised by Professor Usha Natarajan

ABSTRACT

This thesis examines whether the balancing of security interests against refolement to torture, as advanced by the Canadian Supreme Court in the *Suresh Case*, is a helpful legal development for negotiating the complex security and protection challenges in the post 9/11 era. This thesis assesses the controversial issues raised by the balancing approach in *Suresh* and finds the following. Firstly, by allowing refolement to torture under exceptional circumstances, the Court ignored Canada's obligations under the Convention against Torture and the absolute prohibition of torture as a norm of *ius cogens*. This violation of international law through the *Suresh* exception was influential in foreign jurisdictions. The erosion of the absolute prohibition of torture, in Canada and internationally, is not only illegal but is particularly troubling at a time when security measures infringing human rights, such as extraordinary rendition, are proliferating. Secondly, this thesis analyzes the difficulties of determining who is a threat to national security. Terrorism remains undefined in international law and the *Suresh* attempt to define the scope of threat domestically raises considerable legal difficulties. For example, it gives rise to the controversial issue of whether an indirect threat to a state is sufficient to justify refolement to torture, and leaves open what degree of association to a terrorist organization qualifies an individual as a security threat. These debates expose how susceptible the term terrorism is to political manipulation and misuse. Thirdly, this work considers whether there are legal alternatives to the *Suresh* exception that could better protect national security without undermining the prohibition of refolement to torture – alternatives better suited to meeting contemporary challenges. This thesis concludes that the *Suresh* exception is not only unhelpful legally, it is a highly troubling decision that unnecessarily undermines important human rights laws at a time when the opposite is needed.

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## I. Introduction

Since the attacks of 11 September 2001, the concerns of states on how to protect themselves from possible security threats have intensified. As a consequence, this led to an increase in security measures and stricter sanctions against potentially dangerous individuals. However, these measures cease to be rational when states sacrifice human rights, often targeting particularly the rights of migrants, for the sake of national security. When such trends occur, we return to a legal question repeatedly raised in human rights law: How far may states go in order to protect their security interests?

The *Suresh* decision<sup>1</sup> was a particularly controversial example of the periodic reconsideration of this legal question, and the case challenged previous understandings of non-refoulement to torture.<sup>2</sup> Canada had granted Manickavasagam Suresh refugee status to protect him from persecution in his country of origin. Later he was identified as being a security threat due to his alleged involvement with a terrorist organization. The Minister of Immigration ordered the deportation of Suresh who claimed that he would be subjected to torture upon return to Sri Lanka. The Canadian Supreme Court faced the task of balancing Canada's security interests against the refoulement of Suresh to the risk of torture. In its decision, the Court prioritized the state's security interests and declared that under exceptional circumstances it would be possible to deport a refugee even if s/he faces the risk of torture upon return.

There are several controversial issues in *Suresh*. Firstly, the *Suresh* exception violates the absolute prohibition of torture under international law. The risk of torture should never be balanced against security interests, it is a red line states may not cross. With terrorist attacks being a common concern these days, states go to great lengths to protect national security. It is critical to navigate complex security challenges while at the same time safeguarding individuals' human rights. However, many security measures taken by states border on the illegal, while some of them, such as refoulement to torture and extraordinary rendition for instance, clearly violate the absolute prohibition of torture. Nevertheless, states tried using the *Suresh* exception on different

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<sup>1</sup> *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 (Can. S.C.C.).  
[hereinafter *Suresh*]

<sup>2</sup> The principle on non-refoulement derives its name from the French word "*refouler*", meaning to repel or drive back.

occasions on the basis of fending off dangers to national security. But how can a court or state determine who is a threat to national security? This relates closely to the issue that terrorism remains undefined in international law. The *Suresh* attempt to define the scope of threat domestically raises considerable legal difficulties and exposes how susceptible the term terrorism is to political manipulation and misuse.

To prevent this practice from spreading, it is necessary for the Canadian Supreme Court to overturn *Suresh* at next opportunity, and for the courts of other jurisdictions not to entertain the argument of exceptional circumstances allowing for refoulement to torture. Bringing the *Suresh* case back to readers' attention is essential because it raises many questions on how refugee law and protection against torture relate to each other and what position they hold in face of rising security concerns. This thesis argues that the *Suresh* exception was not a helpful legal development to solve security problems, but a highly troubling decision that unnecessarily undermined important human rights laws. To establish this, I assess the problematic aspects of the balancing process in *Suresh*, the negative example the *Suresh* exception has set for other cases and the legal difficulty of basing the *Suresh* exception on the existence of a danger to national security, as this is a term which lacks clear definition in international law.

For the purpose of this analysis, I adopt a positivist approach. Although one may at times wish for a law that is objective, clear, and free from external influence, I utilize the positivist approach with an understanding that in reality law is never independent from politics.<sup>3</sup> All norms result from political choices. However, there is value in relying on norms established and crystalized through decades of debate and adjudication, such as the absolute prohibition of torture. Such norms have a long history of confirmation and support by legal scholars and jurisprudence and have withstood the test of changeable political circumstances. In comparison, recent legal developments that prioritize security interests, such as the *Suresh* exception, are an immediate and ill-advised answer to threat of terrorism, and are knee-jerk band-aid solutions that can contribute to exacerbating security problems in the long term. These

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<sup>3</sup> Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT'L L. 4, 9 (1990).



norms of the post-9/11 era should not supersede carefully considered, evolved, and long-standing norms such as non-refoulement and the absolute prohibition of torture.

I begin with a background on the prohibition of refoulement to torture in international law and a summary of the *Suresh* case history in chapter II. Chapter III deals with the erosion of the absolute prohibition of torture through the *Suresh* exception. It shows how the Canadian Supreme Court endorsed Canada's violation of its obligations under international law by ignoring the absolute character of the prohibition against torture. It illustrates the negative impact the *Suresh* decision has had on other cases by providing states with an argument and precedent to prioritize security interests over the human right to be protected from torture. I contextualize the *Suresh* decision alongside other security measures targeting migrants, looking particularly at the proliferation of extraordinary rendition as an example of such measures getting out of hand. Here, states did not rely on measures bordering on the illegal but actually crossed the line by violating the prohibition of torture, as the Canadian Supreme Court did in *Suresh*. Chapter IV is dedicated to the difficulty of determining who constitutes a security threat. The first sub-section discusses the lack of a clear definition of terrorism in international law and how *Suresh* tried to define domestically what constitutes a danger against national security. The second sub-section analyzes the problematic attempt to expand the scope of threat to include even indirect risks. And lastly the chapter elaborates the question of what degree of association with a terroristic organization, without direct participation in an act of terror, is sufficient to declare somebody a danger to national security. Finally, chapter V suggests alternative ways of protecting security interests without exposing an individual to the risk of torture, such as domestic prosecution and possible imprisonment if found guilty of terrorism-related charges.

## II. Background

Before discussing the legal arguments in the *Suresh* decision, I begin with some general background. In this chapter, I first introduce the concept of non-refoulement and its underlying legal framework in international law. Then I focus on the history of the *Suresh* decision itself: who is Suresh, how did the case arrive at the Canadian Supreme Court, which issues the Court concerned itself with, and how it was influenced by the political events occurring during the time of the judges' deliberations.

### A. International Legal Framework of Non-Refoulement

#### 1. Non-Refoulement in the Refugee Convention 1951

After the Second World War, Europe faced an immense number of displaced persons. Those who could not be repatriated were resettled through the International Refugee Organization (IRO). From 1947 until 1951, its program transferred over 1 million European refugees to North America, Israel, South Africa or Oceania. However, the mandate of the IRO was set to end in June 1950 and the international community had to come up with a different solution for how to deal with the remaining war refugees.<sup>4</sup> On 8 August 1949, the United Nations Economic and Social Council passed Resolution 248 (IX) to create the “Ad Hoc Committee on Statelessness and Related Problems”,<sup>5</sup> whose mandate was to prepare a draft Convention on the Status of Refugees and Stateless Individuals. This draft Convention was later discussed in the conference of plenipotentiaries in July 1951 and resulted in the adoption of the Convention Relating to the Status of Refugees,<sup>6</sup> which entered into force on 22 April 1954.<sup>7</sup> The Refugee Convention introduces the definition of a refugee to determine who may enjoy the protection of the Convention and outlines the refugee's rights and obligations. But for the purposes of this thesis, only the articles related to non-refoulement are relevant, as

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<sup>4</sup> JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 91 (2005).

<sup>5</sup> ECOSOC Res. 248 (IX), ESCOR, 4th year, 9th Sess., Supp. No. 1, U.N. Doc. E/1553 (Aug. 8 1949).

<sup>6</sup> Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150, *entered into force* April 22, 1954. [Hereinafter, *Refugee Convention*]

<sup>7</sup> Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-refoulement*, in *REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION* 78, para. 30 (2003).

they outline the non-refoulement protection and the exceptional circumstances under which a refugee may be expelled for security reasons.

Article 33 of the Refugee Convention is the main legal source for the prohibition of refoulement in international refugee law. It reads:

1. 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.

This article protects refugees, as well as asylum seekers before they completed the refugee determination status,<sup>8</sup> and creates several obligations for States Parties. First, states are not allowed to directly refoule somebody to a country where s/he might face a threat to his/her life or freedom. But in addition to this, states are obliged to refrain from all measures that would amount to indirect refoulement. For example, refusing entry to asylum seekers at the border, inciting non-state actors to force out refugees back to their home countries, or to coercing refugees and asylum seekers into accepting seemingly "voluntary" repatriation.<sup>9</sup> Also, when a state transfers a refugee or asylum seeker to a different country, based on a bilateral or multilateral agreement for instance, it is still responsible for any foreseeable consequences the person in question faces in this other jurisdiction. This was established by the European Court of Human Rights in its decision *TI v. United Kingdom*,<sup>10</sup> as well as in *Soering v United Kingdom*.<sup>11</sup> In these cases, the UK planned to return asylum seekers to Germany under the Dublin Convention,<sup>12</sup> which establishes that the first country within the European Union the asylum seeker arrived to is responsible for the refugee status determination. At the time, Germany offered protection only from persecution by state actors, while the UK

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<sup>8</sup> Lauterpacht & Bethlehem, *supra* note 7, at para. 161.

<sup>9</sup> HATHAWAY, *supra* note 4, at 317-318.

<sup>10</sup> *T.I. v. The United Kingdom*, Eur.Ct.H.R. (2002).

<sup>11</sup> *Soering v. The United Kingdom*, Eur.Ct.H.R. (1989).

<sup>12</sup> Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention, EU Regulation 97/C 254/01, 1997 O.J. (C 254). Article 8 reads: "Where no Member State responsible for examining the application for asylum can be designated on the basis of the other criteria listed in this Convention, the first Member State with which the application for asylum is lodged shall be responsible for examining it." Replaced in 2003 by the Dublin II Regulation (Council Regulation (EC) No. 343/2003, O.J. (L 50) and in 2013 by the Dublin III Regulation (Council Regulation (EU) No. 604/2013, O.J. (L 180).

already followed the nowadays-accepted standard of granting asylum when the persecution was carried out by non-state actors. As a consequence, Germany would have denied refugee status to the individuals in question and deported them. The Court clarified that the UK would be responsible for indirect refoulement if Germany refouled them to their country of origin. Thus, the state must not transfer these refugees to Germany.<sup>13</sup> The same was confirmed by the House of Lords decision *R v. Secretary of State for the Home Department; Ex parte Adan*.<sup>14</sup>

The prohibition of refoulement does not only apply when the refugee will face a threat to life and freedom. Through different Conventions the content has expanded to include more situations. For example, non-refoulement applies to facing a risk of torture upon return through the Convention against Torture<sup>15</sup>, or a risk from persecution for political opinions or religious beliefs during times of armed conflict under the Fourth Geneva Convention.<sup>16</sup> I discuss these additional aspects to non-refoulement, that go beyond what the Refugee Convention protects, in the following sub- chapters.

Originally the *Ad hoc* Committee that drafted the Refugee Convention did not envision an exception to the prohibition of refoulement but regarded it as an absolute right.<sup>17</sup> By the time the Convention was being adopted, this stance had significantly changed. The non-refoulement provision still held a place of special importance, as Article 42(1) of the Convention forbids States Parties to make any reservations to this Article. Nonetheless, a second paragraph was added to Article 33 introducing an exception based on security reasons:

2. 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 judgement of a particularly serious crime, constitutes a danger to the community of that country.

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<sup>13</sup> JAMES C. HATHAWAY & MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS* 36-37 (2<sup>nd</sup> ed. 2014).

<sup>14</sup> *R v. Secretary of State for the Home Department; Ex parte Adan*, [2001] 2 A.C. 477 (H.L.), Dec. 19, 2000 (UK).

<sup>15</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 4 February 1985, 1465 U.N.T.S. 85, *entered into force* June 26, 1987. [hereinafter, *CAT*]

<sup>16</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War (4<sup>th</sup> Geneva Convention), 12 August 1949, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950.

<sup>17</sup> GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 204 (3<sup>rd</sup> ed. 2007).

This security exception is the main idea the *Suresh* decision is based on. Usually a state is not allowed to deport an individual after s/he was granted protection as a refugee. But Article 33(2) theoretically enables it to disregard the prohibition of refoulement and remove refugees that pose a security threat.

Another important provision is the exclusion clause of Article 1F of the Refugee Convention. It is relevant in this context, as it also closely relates to issues of national security and danger to the community and is used in cases similar to the ones dealing with Article 33(2). However, it differs from the previously discussed article in an essential aspect. While Article 33(2) applies to people that were granted refugee status and fell under the protection of the Refugee Convention, Article 1F excludes individuals from receiving protection under the Convention altogether. Article 1F reads:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

In applying these two articles, states often wrongly blend this provision with the one of Article 33(2) and exclude asylum seekers for security reasons based on Article 1(F).<sup>18</sup> This conduct has two reasons. Firstly, from the point of view of states it is a benefit to deny protection peremptory without entering the detailed requirements of refugee status determination. Secondly, there is a part in the UNHCR handbook that creates confusion on this point when it says “the aim of this exclusion clause is to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime”.<sup>19</sup>

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<sup>18</sup> James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in the New World Disorder*, 34 CORNELL INT’L L.J. 257, 260 (2001).

<sup>19</sup> HATHAWAY, *supra* note 4, at 539.

However, the purpose of the exclusion clauses is actually not to protect a state's security interests, but to exclude those unworthy of the protection of the Refugee Convention.<sup>20</sup> Many of the highest courts of states such as Canada, the US, and the UK have confirmed this approach.<sup>21</sup> According to *Pushpanathan*,<sup>22</sup> the purpose of 1(F) "is not the protection of the society of refuge from dangerous refugees", for this Article 33(2) would be applied. "Rather, it is to exclude *ab initio* those who are not *bona fide* refugees."<sup>23</sup> The same reasoning was followed by the European Court of Justice in *Bundesrepublik CJEU 2010*,<sup>24</sup> where the Court stated that 1F(b) is not related to state security concerns.<sup>25</sup> The foundation for this understanding can be found in the Convention's *travaux préparatoires*. According to them, state representatives had mainly two aspects in mind while creating Article 1F. One being to avoid the sheltering of criminals who could not be tried in the state of refuge, the other concerning the compliance with certain extradition obligations. By including the exclusion clause in the Convention, states would not be compelled to grant refuge to a person who should be extradited according to a different treaty.<sup>26</sup> Thus, it is clear that UNHCR's view that Article 1F serves the security interests of the States Parties is not legally sound.

Due to the similarity to Article 1F (b), it seems logical that Article 33(2) was intended to cover different situations, otherwise the provision would be redundant. While the exclusion clause refers to crimes committed before receiving refugee status outside the country of refuge, the non-refoulement exception gives no reference to where and when the crime must have taken place. It is argued that it covers crimes committed either in the country of refuge or in another state, but after refugee status was awarded to the individual.<sup>27</sup> In comparison to Article 1F of the Convention, the exception for non-refoulement in Article 33(2) includes a higher threshold because they require the

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<sup>20</sup> Hathaway & Harvey, *supra* note 18, at 259.

<sup>21</sup> Hathaway & Harvey, *supra* note 18, at 260-261.

<sup>22</sup> *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 (Can. S.C.C.).

<sup>23</sup> HATHAWAY, *supra* note 4, at 349.

<sup>24</sup> Case C-57/09 and C-101/09, *Bundesrepublik Deutschland v. B and D*, 2010 E.C.R. I-10979.

<sup>25</sup> HATHAWAY & FOSTER, *supra* note 13, at 540.

<sup>26</sup> Hathaway & Harvey, *supra* note 18, at 278.

<sup>27</sup> *Lauterpacht & Bethlehem*, *supra* note 7, at para. 148.

presence of danger to the security or community. Thus, there needs to be an evaluation of a future threat as an additional element.<sup>28</sup>

These differences between the two legal provisions have to be taken into account during their application, so as not to confuse them. If we consider the Refugee Convention alone (for the moment, we will not consider the Convention against Torture or customary international law), then both Article 33 and Article 1F can allow refoulement to torture: Article 33(2) because it allows an exception to non-refoulement, and Article 1F because the Refugee Convention excludes certain individuals who then cannot enjoy protection under Article 33 in the first place. However, Article 33(2) is more relevant for this thesis, as its wording includes an assessment of security interests, and balancing those against the negative consequences of refoulement to torture is what makes the *Suresh* decision so troublesome.

There is the question whether non-refoulement has become a norm of customary international law and would therefore give protection to individuals even when the Refugee Convention does not apply to them. Two elements have to be fulfilled for a norm to count as customary law: state practice and *opinio iuris*. State practice refers to the actual behavior of states while the *opinio iuris* relates to the “subjective belief” of states that their behavior is in correspondence with the law.<sup>29</sup> The International Court of Justice specified the element of state practice on numerous occasions. For example, in the *Asylum* case<sup>30</sup> it established that state practice should be constant and uniform,<sup>31</sup> while in the *North Sea Continental Shelf* cases<sup>32</sup> it elaborated that state practice needs to be “both extensive and virtually uniform.”<sup>33</sup> However, it is important to note that in *Nicaragua*<sup>34</sup> the Court clarified that state practice does not need to be perfect. For a rule to be established as customary law it is sufficient “that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct

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<sup>28</sup> *Id.* at para. 147.

<sup>29</sup> MALCOLM N. SHAW, INTERNATIONAL LAW 70 (5<sup>th</sup> ed. 2003).

<sup>30</sup> *Asylum* (Colombia v. Peru), 1950 I.C.J. 266 (November 1950).

<sup>31</sup> SHAW, *supra* note 29, at 72.

<sup>32</sup> *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), 1969 I.C.J. 3 (February 1969). [hereinafter, *North Sea Continental Shelf*]

<sup>33</sup> SHAW, *supra* note 29, at 73.

<sup>34</sup> *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), 1986 I.C.J. 14 (June 1986). [hereinafter, *Nicaragua*]

inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.”<sup>35</sup>

The second element, the *opinio iuris*, can be found in the “verbal statements of government representatives to international organisations, in the content of UNGA resolutions, declarations and other normative instruments adopted by such organisations, and in the consent of states to such instruments”.<sup>36</sup> This was clearly mentioned in the *Nicaragua* case where the Court states that the subjective element of customary international law can be “deduced from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions”, in particular the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States for instance.<sup>37</sup> It is also important to note that the codification of a rule or its embodiment in multilateral conventions “does not mean that they cease to exist and to apply as principles of customary law”.<sup>38</sup> Therefore, it is possible that a rule of customary law exists also as a rule of international treaty law.<sup>39</sup>

As established in the *North Sea Continental Shelf* cases, a conventional rule can pass into “the general *corpus* of international law” and become binding for all states as a norm of customary international law.<sup>40</sup> For this, three elements need to be fulfilled according to the Court. Firstly, the conventional rule needs to be of fundamentally norm-creating character.<sup>41</sup> Secondly, “even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice” if it includes those states whose interests are especially affected.<sup>42</sup> And thirdly, state practice in accordance with the conventional rule has to be “extensive and

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<sup>35</sup> *Nicaragua*, *supra* note 34, at para. 186.

<sup>36</sup> BIRGIT SCHLÜTTER, DEVELOPMENTS IN CUSTOMARY INTERNATIONAL LAW: THEORY AND THE PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE AND THE INTERNATIONAL AD HOC CRIMINAL TRIBUNALS FOR RWANDA AND YUGOSLAVIA 153 (2010).

<sup>37</sup> *Nicaragua*, *supra* note 34, at para. 188. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/RES/25/2625 (Oct. 24, 1970). [hereinafter, *Friendly Relations Declaration*]

<sup>38</sup> *Id.* at para. 174.

<sup>39</sup> *Id.* at para. 177.

<sup>40</sup> *North Sea Continental Shelf*, *supra* note 32, at para. 71.

<sup>41</sup> Lauterpacht & Bethlehem, *supra* note 7, at para. 200.

<sup>42</sup> *North Sea Continental Shelf*, *supra* note 32, at para 73.



virtually uniform" and "show a general recognition that a rule of law or legal obligation is involved".<sup>43</sup>

With regards to the non-refoulement provision of the Refugee Convention the majority of scholars see these requirements for a conventional rule to pass into customary law as fulfilled.<sup>44</sup> The non-refoulement provisions in the Refugee Convention and other international instruments are of norm-creating character, which has been confirmed by various declarations adopted by the UN General Assembly or by statements of the Council of Europe, for instance.<sup>45</sup> Also the second element of widespread and representative state support is fulfilled, as the extent of participation in treaties with non-refoulement provisions shows an almost universal acceptance of this principle.<sup>46</sup> For example, the Refugee Convention and its 1967 Protocol<sup>47</sup> were ratified by 148 states.<sup>48</sup> Lauterpacht and Bethlehem conducted a comprehensive study on this aspect and also included states that did not sign the Refugee Convention but are parties to other (regional) treaties including a prohibition of refoulement. They came to the conclusion that about 90% of the UN member states have thus accepted norms of non-refoulement.<sup>49</sup> The third element of consistent practice and general recognition of the rule is for one part fulfilled through the above mentioned near universal participation by states in treaties including non-refoulement provisions. However, this alone would not be enough. A further evidence for general recognition can be found in the high number of states who have internalized non-refoulement into their domestic legal order.<sup>50</sup> In addition, the States Parties to the Refugee Convention explicitly declared in 2001 that the non-refoulement provision is to be considered a norm of customary

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<sup>43</sup> Lauterpacht & Bethlehem, *supra* note 7, at para. 200.

<sup>44</sup> GOODWIN-GILL & MCADAM, *supra* note 17, at 354.

<sup>45</sup> Lauterpacht & Bethlehem, *supra* note 7, at para. 203.

<sup>46</sup> Lauterpacht & Bethlehem, *supra* note 7, at para. 209.

<sup>47</sup> Protocol Relating to the Status of Refugees, 31 January 1967, 606 U.N.T.S. 267, *entered into force* Oct. 4, 1967.

<sup>48</sup> See UNHCR record of state parties as of April 2015:

<http://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>

<sup>49</sup> Lauterpacht & Bethlehem, *supra* note 7, at para. 209. Their study shows that 135 states are party to the Refugee Convention and its Protocol, 121 to the CAT and 146 to the ICCPR. When one includes other legal instruments with a non-refoulement provision, such as ECHR or the OAU Refugee Convention, this adds up to 170 states, which clearly forms a majority regarding that the UN has 193 member states.

<sup>50</sup> Lauterpacht & Bethlehem, *supra* note 7, at paras. 212-213.

international law.<sup>51</sup> All these elements combined show that non-refoulement has indeed become to a norm of customary international law.<sup>52</sup> The more difficult part is to identify what exactly is the content of this customary rule. Most of the time, states, courts, international organizations, and scholars refer to non-refoulement as it is understood in the Refugee Convention, as a prohibition of return to any territory that poses a threat to life or freedom. However, this scope of protection has been extended to include the risk of torture, due to the customary character of the non-refoulement provision in the Convention against Torture (see chapter III.A.2). Whether customary law also prohibits refoulement to a place where the individual might face cruel, inhuman or degrading treatment still leaves some room for debate.<sup>53</sup>

## 2. Non-Refoulement in the Convention Against Torture

In December 1984, the UN General Assembly adopted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter abbreviated CAT)<sup>54</sup> that is aimed at improving the protection against torture and other cruel, inhuman or degrading treatment.<sup>55</sup> It not only established obligations for the States Parties, but also creates rights for individuals,<sup>56</sup> for instance in the area of non-refoulement which can be found in Article 3 of the Convention:

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State

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<sup>51</sup> HATHAWAY, *supra* note 4, at 364. Citing the "Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees" UN Doc. HCR/MMSP/2001/09, Dec. 13, 2001, at para. 4.

<sup>52</sup> Phil Chan, *The Protection of Refugees and Internally Displaced Persons: Non-Refoulement Under Customary International Law?*, 10 THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 231, 234 (2006). Lauterpacht & Bethlehem, *supra* note 7, at para. 216.

<sup>53</sup> Costello & Foster, *supra* note 29, at 305-306.

<sup>54</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 4 February 1985, 1465 U.N.T.S. 85, *entered into force* June 26, 1987. [hereinafter, *CAT*]

<sup>55</sup> KEES WOUTERS, INTERNATIONAL LEGAL STANDARDS FOR THE PROTECTION FROM REFOULEMENT: A LEGAL ANALYSIS ON THE PROHIBITIONS ON REFOULEMENT CONTAINED IN THE REFUGEE CONVENTION, THE EUROPEAN CONVENTION ON HUMAN RIGHTS, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, AND THE CONVENTION AGAINST TORTURE, 426 (2009).

<sup>56</sup> *Id.* at 427.

concerned of a consistent pattern of gross, flagrant or mass violations of human rights.<sup>57</sup>

Article 3 applies to individuals under the control of a State Party, be it within its territory or outside.<sup>58</sup> Substantially it only encompasses those under the threat of torture, while acts of cruel, inhuman or degrading treatment do not trigger protection. With accordance to the definition of torture in Article 1 of the CAT, the protection from refoulement applies to conduct that causes severe mental or physical pain or suffering, that was inflicted intentionally for purposes that relate to the interests of the state. Therefore, there needs to be a certain involvement from state authorities or at least acquiescence through refraining from preventing the act.<sup>59</sup> In addition, the risk of being subjected to torture must be based on substantive grounds.<sup>60</sup> This means the personal risk of torture has to be found to extend “beyond mere theory or suspicion”<sup>61</sup> but the threat does not need to be “highly likely to occur”.<sup>62</sup> This makes the burden of proof for the individual less strict than according to other human rights treaties like the European Convention on Human Rights,<sup>63</sup> for instance, where the test of high probability needs to be fulfilled.<sup>64</sup> Furthermore, the general human rights situation in the country of origin has to be considered too<sup>65</sup> which can give extra support to the individual’s claim that s/he will face torture after refoulement.

The prohibition of refoulement in the CAT is a powerful regulation for two reasons. Firstly, it is not open to any exceptions or derogations out of national security reasons or other public emergencies, which makes it an absolute provision.<sup>66</sup> Secondly, individuals have the possibility to lodge complaints with the Committee against Torture when their rights based on Article 3 are being infringed by a state. This Committee was established by Article 17 of the CAT as an independent institution within the United

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<sup>57</sup> CAT, *supra* note 58, at Art 3.

<sup>58</sup> WOUTERS, *supra* note 59, at 520.

<sup>59</sup> *Id.* at 521.

<sup>60</sup> *Id.*

<sup>61</sup> Aoife Duffy, *Expulsion to Face Torture? Non-refoulement in International Law*, 20 INT J REFUGEE LAW 373, 380 (2008).

<sup>62</sup> JANE MCADAM, COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW 123 (2007).

<sup>63</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953. [hereinafter, *ECHR*]

<sup>64</sup> Duffy, *supra* note 65, at 380.

<sup>65</sup> MCADAM, *supra* note 66, at 123.

<sup>66</sup> WOUTERS, *supra* note 59, at 523.

Nations, with the task to interpret the Convention.<sup>67</sup> However, it is only possible to bring a case before it when the concerned state has accepted the Committee's competence in this area.<sup>68</sup> Also its decisions are not binding on the States Parties, they are only recommendations. Nevertheless, they are an essential source for finding authoritative interpretations of the non-refoulement provision of the CAT,<sup>69</sup> and the negative publicity of being found in violation with the CAT can persuade states to comply with the Committee's decision.

### 3. Non-Refoulement in Other International Treaties

Besides the Refugee Convention and the CAT, there are other international treaties that incorporate provisions of non-refoulement. The International Covenant on Civil and Political Rights<sup>70</sup> includes a provision in Article 7 that not only prohibits torture but also cruel, inhuman and degrading treatment or punishment. Although there is no specific mentioning of refoulement, this article has been interpreted as including a duty not to deport anyone to a country where s/he would face this kind of treatment.<sup>71</sup> The Fourth Geneva Convention 1949<sup>72</sup> establishes in its Article 45 a prohibition of transferring a person to a country "where he or she may have reason to fear persecution for his or her political opinions or religious beliefs" during armed conflict.<sup>73</sup> In addition, many regional agreements such as the OAU Refugee Convention,<sup>74</sup> the American Convention on Human Rights,<sup>75</sup> and the African Charter of Human and Peoples' Rights,<sup>76</sup> also contain forms of non-refoulement.<sup>77</sup> For the purpose of this thesis it is not necessary to discuss all these legal instruments in detail as the most significant legal sources on an international level are the Refugee Convention and the

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<sup>67</sup> *Id.* at 429.

<sup>68</sup> *Id.* at 431.

<sup>69</sup> *Id.* at 520.

<sup>70</sup> International Covenant on Civil and Political Rights, 19 Dec. 1966, 999 U.N.T.S. 171, 1057 U.N.T.S. 407, *entered into force* March 23, 1976. [hereinafter, *ICCPR*]

<sup>71</sup> GOODWIN-GILL & MCADAM, *supra* note 17, at 209.

<sup>72</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War (4<sup>th</sup> Geneva Convention), 12 August 1949, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950.

<sup>73</sup> GOODWIN-GILL & MCADAM, *supra* note 17, at 209.

<sup>74</sup> Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 Sept. 1969, 1001 U.N.T.S. 45, *entered into force* June 20, 1974.

<sup>75</sup> American Convention on Human Rights "Pact of San José, Costa Rica", 22 Nov. 1969, 1144 U.N.T.S. 123, *entered into force* July 18, 1978.

<sup>76</sup> African Charter on Human and Peoples' Rights, 27 June 1981, 1520 U.N.T.S., *entered into force* Oct. 21, 1986.

<sup>77</sup> GOODWIN-GILL & MCADAM, *supra* note 17, 209-210.

CAT. However, there is one more regional treaty that is useful for this thesis: the European Convention on Human Rights (ECHR).<sup>78</sup>

The ECHR plays a significant role in the protection from refoulement due to its binding character for the European states that signed it and the extensive jurisprudence that was rendered by the European Court of Human Rights (ECtHR) on this topic. Decisions by the ECtHR are of high importance as they are binding on the parties to the dispute, and also constitute precedents.<sup>79</sup> Individuals are able to lodge a complaint with the Court whenever they find their rights guaranteed by the ECHR infringed.<sup>80</sup> This is a huge advantage over courts that are only open to petitions by states, as it improves access to legal remedies and makes states more likely to comply with their obligations.

Article 3 of the European Convention on Human Rights reads: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”<sup>81</sup> In itself, this provision does not directly mention the issue of refoulement, however landmark cases by the ECtHR confirmed that this rule encompasses the extradition or deportation of individuals. Therefore, sending them to a state where they would face any of the described treatment, would constitute a breach of Article 3.<sup>82</sup> This prohibition of torture and degrading treatment is of absolute character. Many other articles of the ECHR allow for exceptions out of national security reasons, morals or public health. Article 3 does not include such exceptions.<sup>83</sup> The Convention even goes one step further by explicitly forbidding any derogations to this article even “in times of war or other public emergencies threatening the life of the nation”.<sup>84</sup> This has been confirmed by the ECtHR, therefore states cannot justify the use of torture, nor the refoulement to it, based on security issues such as counter-terrorism.<sup>85</sup>

This overview of the legal framework of non-refoulement has illustrated the three most relevant laws, all of them slightly different. Article 33 of the Refugee Convention as a

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<sup>78</sup> ECHR, *supra* note 67.

<sup>79</sup> WOUTERS, *supra* note 59, at 195.

<sup>80</sup> *Id.* at 194.

<sup>81</sup> ECHR, *supra* note 67, at Art. 3.

<sup>82</sup> GOODWIN-GILL & MCADAM, *supra* note 17, at 310.

<sup>83</sup> WOUTERS, *supra* note 59, at 307.

<sup>84</sup> *Id.* at 308. *See* ECHR, *supra* note 67, at Art. 15(2).

<sup>85</sup> WOUTERS, *supra* note 59, at 308.

prohibition that leaves room for security exceptions, Article 3 of the CAT as an absolute prohibition of refoulement to torture, and Article 3 of the ECHR as a very strong legal norm with the ECtHR to enforce it, but with only limited regional application. In the next section, I introduce the *Suresh* decision, to pave the way for subsequent chapters that will consider the arguments judges used for assessing the prohibition of refoulement to torture.

### **B. The *Suresh* Case History**

In 2002, the Canadian Supreme Court heard the case of Manickavasagam Suresh from Sri Lanka. He fled his home country and came to Canada in 1990 as an asylum seeker claiming persecution due to being of Tamil descent. In April 1991, he was accepted as a refugee. In the summer of the same year, he applied for immigrant status but did not complete the process, because the Minister of Citizenship and Immigration and the Solicitor General of Canada initiated deportation proceedings against him based on security grounds.<sup>86</sup>

In 1995, a security certificate was issued under section 40.1 of the Canadian Immigration Act that identified Suresh as a threat to Canada, and declared him inadmissible to the country.<sup>87</sup> The certificate stated that he is a member of the LTTE,<sup>88</sup> which supports violent Tamil uprisings in Sri Lanka. Based on findings of the Canadian Security Intelligence Service (CSIS), this group was involved in terrorist activities against the democratically elected government of Sri Lanka.<sup>89</sup> Suresh was detained in October of the same year when the security certificate was submitted to the Federal Court of Canada to be examined on its reasonableness.<sup>90</sup> Two years later Judge Teitelbaum upheld the security certificate and confirmed that Suresh was a member of the LTTE and that it is reasonable to believe this organization was involved in terrorist

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<sup>86</sup> *Suresh*, *supra* note 1, at paras. 7-8.

<sup>87</sup> *Id.* at para. 9.

<sup>88</sup> Liberation Tigers of Tamil Eelam, also known as the Tamil Tigers.

<sup>89</sup> *Suresh*, *supra* note 1, at para. 10.

<sup>90</sup> Obiora Chinedu Okafor & Pius Lekwuwa Okoronkwo, *Re-configuring Non-refoulement? The Suresh Decision, "Security Relativism", and the International Human Rights Imperative*, 15 INT J REFUGEE LAW 30, 34 (2003).

acts. However, he also stated that Sri Lanka mistreats Tamils they arrest to an extent that might amount to torture.<sup>91</sup>

The deportation process followed and in 1997 the Minister issued an opinion declaring Suresh a danger to Canadian security. According to Canadian legislation, the Minister was allowed to deport Suresh for security reasons, even if his “life or freedom” would be threatened upon return.<sup>92</sup> The Federal Court of Appeal confirmed the decision to deport Suresh and claimed that a state’s right to expel individuals for security concerns overrides the international law to be free from torture.<sup>93</sup> The Court referred to the Refugee Convention as providing exceptions to the prohibition of refoulement and explained that domestic Canadian law also allows for derogations based on certain security reasons.<sup>94</sup>

Afterwards, Suresh appealed to the Canadian Supreme Court, which decided to deal with four issues in its deliberations: It examined whether the Canadian Charter of Rights and Freedoms<sup>95</sup> forbids refoulement of refugees to places they might face torture and death. Secondly, it looked at whether it is a violation of the rights of free expression and association if the deportation is merely based on the membership to a terrorist organization. Thirdly, it asked whether the terms “terrorism” and “danger to the security to Canada” are too vague; and lastly, whether there are sufficient procedural safeguards in the deportation process.<sup>96</sup> Ultimately, the Court decided in favor of Suresh based on procedural irregularities and ordered a new deportation hearing. However, what made the decision so controversial and what makes it the subject of this thesis, is the Court’s arguments on the balancing between security interests and refoulement to torture. It claims that deporting a refugee to a place where s/he will not only face persecution but specifically torture is possible under certain circumstances. This has since been referred to as the *Suresh* exception. I argue that the *Suresh* exception entails violations of Canada’s obligations under international law and

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<sup>91</sup> *Suresh*, *supra* note 1, at para. 13.

<sup>92</sup> *Id.* at para. 15.

<sup>93</sup> *Id.* at para. 20.

<sup>94</sup> Okafor & Okoronkwo, *supra* note 94, at 36.

<sup>95</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (UK). [hereinafter, *Canadian Charter*]

<sup>96</sup> *Suresh*, *supra* note 1, at para. 2.

numerous other problematic legal issues that will be discussed in detail in the following chapters.

When analyzing the *Suresh* case, it is essential to keep in mind that this decision was rendered during a politically highly sensitive time. The proceedings that started against Suresh in 1995 were prolonged until the turn of the millennium. While the judges of the Supreme Court deliberated on their decision, the attacks of 9/11 happened and changed the way states approached security threats. In a response to the now promulgated ‘War on Terror’, the US passed the US Patriot Act,<sup>97</sup> the UK introduced the Anti-terrorism, Crime and Security Act 2001<sup>98</sup> and Canada issued its Anti-Terrorism Act.<sup>99</sup> Many other states followed this example and enacted legislation that authorize the curtailing of personal rights for the sake of security protection. The *Suresh* case indicates that the judiciary did not remain unaffected by these policy changes but was influenced by them in its decision making. For Suresh himself, these new Acts could not apply retroactively, but the Supreme Court openly refers to this political context in its judgement, for example when analyzing the threat Suresh’s membership in the LTTE poses for Canada: “International conventions must be interpreted in the light of current conditions. It may once have made sense to suggest that terrorism in one country did not necessarily implicate other countries. But after the year 2001, that approach is no longer valid.”<sup>100</sup>

Another evidence that *Suresh* was influenced by the political circumstances at that time, is the reference to the House of Lords decision *Secretary of State for the Home Department v. Rehman*<sup>101</sup> which stated: “They [*the events of 9/11*] are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of

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<sup>97</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Public Law No 107-56, 107<sup>th</sup> Congress, Oct. 26, 2001.

<sup>98</sup> United Kingdom: Anti-terrorism, Crime and Security Act 2001 [United Kingdom of Great Britain and Northern Ireland], 2001, c. 24, Dec. 14, 2001.

Available under <http://www.legislation.gov.uk/ukpga/2001/24/contents/enacted>

<sup>99</sup> Michel Coutu & Marie-Hélène Giroux, *The Aftermath of 11 September 2001: Liberty vs. Security before the Supreme Court of Canada*, 18 INTERNATIONAL JOURNAL OF REFUGEE LAW 313, (2006); Anti-Terrorism Act, S.C. 2001, c. 41, Dec. 18, 2001(Can.).

<sup>100</sup> *Suresh*, *supra* note 1, at para. 87.

<sup>101</sup> *Secretary of State for the Home Department v. Rehman*, [2001] A.C. 47 (H.L.), Oct. 11, 2001 (UK). [hereinafter, *Rehman*]



ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security.”<sup>102</sup> This statement implies that the House of Lords, as well as the Canadian Supreme Court, see it as necessary in times of security threats that the judiciary subordinates itself under the governmental decisions on this matter. This is a worrying approach that endangers the impartiality and independence of the judiciary and can lead to the erosion of fundamental human rights, such as the prohibition of torture, at a time when the opposite is needed, as argued in the next chapter.

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<sup>102</sup> Coutu & Giroux, *supra* note 103, at 328.

### III. Erosion of the Absolute Prohibition of Torture

#### A. Violating Obligations Under International Law

In *Suresh*, the Canadian Supreme Court revisited the old question of how far a state may go in protecting its security interests and specifically dealt with whether refoulement to torture is a valid security measure. It had been long-established that the prohibition of torture is an absolute human right in international law that states must never violate. However, scholars such as Upendra Baxi observe that the terror attacks of 9/11 formed a turning point in international law. States reacted to this ‘War on Terror’ by introducing stricter domestic security measures and by initiating military operations such as in Afghanistan and Iraq. This made it necessary to reevaluate understanding of various international legal concepts to determine whether acts to combat the threat from global terrorism as part of the ‘War on Terror’ were within the borders of legality.<sup>103</sup> It is in this context that the Supreme Court had to decide on the legality of Suresh’s possible refoulement to torture under the security certificate.

#### 1. Balancing Security Interests against Refoulement to Torture

At the beginning of the *Suresh* judgment, we find a passage explaining the core dilemma grappled with in the decision. The Court takes into account all the external influences that have to be considered and need to be balanced against each other. On the one side, it acknowledges the role the fight against terrorism plays in governments’ policies and how high the price can be if security threats are not dealt with properly:

The issues engage concerns and values fundamental to Canada and indeed the world. On the one hand stands the manifest evil of terrorism and the random and arbitrary taking of innocent lives, rippling out in an ever-widening spiral of loss and fear. Governments, expressing the will of the governed, need the legal tools to effectively meet this challenge.<sup>104</sup>

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<sup>103</sup> Upendra Baxi, ‘Operation Enduring Freedom’: Towards a New International Law and Order?, 2 Law, Social Justice & Global Development Journal (LGD), (2001). Retrieved from [https://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2001\\_2/baxi/](https://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2001_2/baxi/) on 26 October 2017.

<sup>104</sup> *Suresh*, *supra* note 1, at para. 3.

In the following paragraph, it mentions the constitutional values and international instruments that function as limitation to security policies and are supposed to make sure fundamental human rights will not be infringed:

On the other hand stands the need to ensure that those legal tools do not undermine values that are fundamental to our democratic society – liberty, the rule of law, and the principles of fundamental justice – values that lie at the heart of the Canadian constitutional order and the international instruments that Canada has signed. (...) [I]t would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those values.<sup>105</sup>

This describes the Court's dilemma but in the end the Court did sacrifice its commitment to the value of fundamental justice in its reasoning and prioritized protecting Canada's security interests over their obligations under international law.

As a first step, the Court dealt with two conflicting laws within domestic Canadian legislation. According to Section 53(1) b of the Canadian Immigration Act,<sup>106</sup> the Minister of Immigration had declared Suresh to be a risk to Canada's security. Consequently, she had used her right to issue a deportation order on these grounds which make it possible to expel a refugee even if his life or freedom would be at risk upon return.<sup>107</sup> Opposing this provision, Section 7 of the Canadian Charter states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."<sup>108</sup> It was the task of the Supreme Court to solve this conflict of laws.

The Canadian Charter applies to everyone. That means refugees are included in its protection. However, this protection is not absolute and is subject to exceptions. The requirement for a deviation from the rights to life, liberty and security is that the conduct has to be in accordance with fundamental justice. To determine what fulfills this condition, the Court relied on a process of balancing.<sup>109</sup> The main factors that are to be examined according to the Court in cases of refoulement to torture are "the conditions of the potential deportee, the danger that the deportee presents to Canadians

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<sup>105</sup> *Id.* at para. 4.

<sup>106</sup> Immigration Act, R.S.C. 1985, c. I-2, ss. 2 (Can.).

<sup>107</sup> *Suresh*, *supra* note 1 at para. 15.

<sup>108</sup> *Id.* at para. 24.

<sup>109</sup> *Id.* at para. 45.

or the country's security, and the threat of terrorism to Canada.”<sup>110</sup> The Supreme Court itself admitted that the balance might not be decided uniformly in every similar case. Often the same general considerations are taken into account when finding a balance, however the specific circumstances around the respective refugee can tip the scale differently.<sup>111</sup> The most important aspect when deciding whether deportation to torture is an adequate response to fight the security threat, is for the deportation to be consistent with the principle of fundamental justice. However, the term fundamental justice lacks a clear definition. In attempts to identify what constitutes a violation of it, Canadian courts, including the Supreme Court, resorted to describing it as an act that would “shock the Canadian conscience”.<sup>112</sup> To understand how the Supreme Court performs this test of what shocks the Canadian conscience, it is best to look at two decisions rendered before *Suresh*.

*Kindler*<sup>113</sup> and *Burns*<sup>114</sup> are both cases that dealt with the extradition of individuals to the United States where they might face the death penalty. This is a valid legal sanction in the US but at that time Canadian criminal law no longer allowed for it. Therefore, the Court had to consider the scope of the right to life in the Canadian Charter and whether extradition to a life sentence would violate it. In *Kindler*, the appellant had been convicted of first degree murder in the US but fled to Canada. When he was captured there, the Minister of Justice decided to extradite Kindler despite the fact that he would face the death penalty. In 1991, it came upon the Canadian Supreme Court to decide whether this would be a violation of fundamental justice. It took into consideration that the death penalty had been abolished in Canada, except in some military cases, but the public was torn on the issue. Also, there was no clear international position against the death penalty, only a trend towards its abolishment, and Canada should not become a safe haven for fugitives from prosecution. And lastly, the Court observed that the US followed detailed due process regulations. All these arguments were considered in the balancing process and finally tipped the scale to the detriment of Kindler. The Supreme Court decided that returning the appellant to the

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<sup>110</sup> *Id.* at para. 45.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at para. 49.

<sup>113</sup> *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 (Can. S.C.C.). [hereinafter, *Kindler*]

<sup>114</sup> *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7 (Can. S.C.C.). [hereinafter, *Burns*]

US, even without seeking a diplomatic assurance that the death penalty would not be applied, would not shock the Canadian conscience and was thus in line with the requirement of fundamental justice.<sup>115</sup>

Ten years later *Burns* dealt with the extradition of two Canadian citizens, Sebastian Burns and Atif Rafay, who were wanted by the US police for the murder of Rafay's family. After the crime, they had fled to Canada and were arrested in British Columbia.<sup>116</sup> The Minister of Justice wanted to extradite the fugitives, but in case of a conviction in the US they would face the death penalty. The case was brought before the Canadian Supreme Court to decide whether extradition would be in violation of the right to life in the Canadian Charter. The Court examined the same factors as in *Kindler* but came to a different result. This time it concluded that the Canadian conscience regards the death penalty as unjust and that Canada had supported initiatives to abolish capital punishment worldwide.<sup>117</sup> The Court admitted that it cannot go as far as claiming that an international law against the death penalty exists, but at least there is a movement towards regarding the abolition of it as a principle of fundamental justice also on an international level.<sup>118</sup> Eventually, the decision stated that extraditing Burns and Rafay without asking for the assurance from the US that the death penalty will not apply, was found to be in violation of fundamental justice.<sup>119</sup> Thus, the balance tilted in favor of the appellants this time. It is important to note that the Court did not absolutely decide against extradition to death penalty. Instead it left room open for an exception under specific circumstances. The extradition has to serve a pressing and substantial purpose, this purpose has to be likely achieved through the extradition and not go further than necessary, and the risk of death penalty does not outweigh the importance of this purpose.<sup>120</sup>

Looking at the changes that happened from *Kindler* until the decision of *Burns*, we can observe a trend to forbidding extradition if it infringes the right to life. In *Suresh*, the Court referred to these previous decisions and affirmed that death penalty was

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<sup>115</sup> David Jenkins, *Rethinking Suresh: Refoulement Under Canada's Charter of Rights and Freedoms*, 47 ALBERTA LAW REVIEW 125, 141 (2009).

<sup>116</sup> *Id.* at 142.

<sup>117</sup> *Id.* at 143.

<sup>118</sup> *Burns*, *supra* note 118, at para. 89.

<sup>119</sup> *Id.* at para. 144.

<sup>120</sup> *Id.* at para. 132.

abolished in Canada in 1998 and had not been executed since the early 1960s because it is regarded as a violation to the right of life. Also, it stated that with regards to domestic law, Canada clearly rejects torture as it is forbidden under the Criminal Code.<sup>121</sup> This opposition to the use of death penalty or torture is a view that has been maintained over a long period of time and remained constant despite changes in governments and their policies. It reflects where the Canadian public opinion sees the limits of their state's criminal justice system.<sup>122</sup> Therefore the Court did come to the conclusion that torture is seen as fundamentally unjust and refouling somebody to torture would shock the Canadian conscience.<sup>123</sup> In addition, the Supreme Court in *Suresh* disagreed with the Court of Appeal's claim that by deporting a refugee to the risk of torture, Canada would only be an "involuntary intermediary".<sup>124</sup> Instead it emphasized that it would still constitute a breach of fundamental justice if a different state carried out the act of torture after the refoulement.<sup>125</sup>

So far, the reasoning of the Court is logical. Deciding that refouling somebody to torture would be against the Canadian conscience and that Canada cannot escape its responsibility by claiming it is not the one carrying out the torture, is in accordance with Canada's international law obligations. But then the Court went on to establish an exception when refoulement to torture would not be a violation of fundamental justice. It stated that its decision does not mean Canada may never deport a refugee to a country he/she would face fundamentally unjust treatment. Under certain exceptional circumstances it is possible to expel an individual to torture. Namely when the balancing approach ends in favor of Canada's interest to protect public security by not becoming a safe haven for terrorists.<sup>126</sup> This is what has come to be known as the *Suresh* exception.

Balancing approaches might be helpful whenever it is necessary to weigh opposing interests against each other, but when it comes to absolute rights as the prohibition of torture, there is no room for balancing. This opinion is shared by Hathaway and

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<sup>121</sup> *Suresh*, *supra* note 1, at para. 50.

<sup>122</sup> *Id.* at para. 50.

<sup>123</sup> *Id.* at para. 51.

<sup>124</sup> *Id.* at para. 55.

<sup>125</sup> *Id.* at para. 54.

<sup>126</sup> *Id.* at para. 58.

Harvey<sup>127</sup> who add that a balancing test might open up a loophole for states to interpret relatively small problems as a major security threat, which should not be sufficient to expel a refugee to where her or his life or freedom would be threatened.<sup>128</sup> Lauterpacht and Bethlehem agree to this but introduce an additional differentiation. They concur that in cases where the individual would face a risk of torture upon return, the prohibition of refoulement is absolute.<sup>129</sup> But with regards to other threats, they do not rule out the usage of the described balancing test. Thus, there is consent among scholars that in a situation like for Suresh, where he would face the risk of torture upon return to Sri Lanka, security exceptions to non-refoulement should not apply. The *Suresh* exception violates a peremptory norm of international law, as explained in the following section.

## 2. Denying the *ius cogens* Character of the Prohibition of Torture

The previous debate solely focused on Canadian law but Canada's obligations under international law by being State Party to the Refugee Convention and the CAT cannot be ignored. In *Suresh*, the Supreme Court acknowledged that the balancing approach concerning fundamental justice is not limited to Canadian domestic law, but also includes the state's international human rights obligations, which can be found in conventions, customary norms, and decisions of international tribunals.<sup>130</sup> According to the CAT, the prohibition of refoulement to torture is absolute and therefore Canada is not allowed to consider exceptions to it under special security circumstances. Sending somebody to torture is a red line that states long ago have agreed not to cross. When Amnesty International intervened as a third party in *Suresh*, they brought up exactly this argument and emphasized that the prohibition of torture is a norm of *ius cogens*.<sup>131</sup> According to Article 53 of the Vienna Convention on the Law of Treaties,<sup>132</sup> *ius cogens* is a norm that is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can

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<sup>127</sup> Rene Bruin & Kees Wouters, *Terrorism and the Non-derogability of Non-refoulement*, 15 INT J REFUGEE LAW 5, 20 (2003).

<sup>128</sup> Hathaway & Harvey, *supra* note 18, at 295.

<sup>129</sup> Lauterpacht & Bethlehem, *supra* note 7, at para. 175.

<sup>130</sup> *Suresh*, *supra* note 1, at para. 46.

<sup>131</sup> *Id.* at para. 61.

<sup>132</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, *entered into force* Jan. 27, 1980.

be modified only by a subsequent norm of general international law having the same character.”<sup>133</sup>

It is difficult to pinpoint when a norm has actually reached this general acceptance by the international community. The Court in *Suresh* suggests three indicia to determine that the prohibition of torture is *ius cogens*. Firstly, the large number of ratifications of international treaties that include a prohibition of torture are a sign that the majority of states condemn this practice.<sup>134</sup> For example, most states have ratified the Geneva Conventions, the CAT and the ICCPR and voted in favor of the Universal Declaration of Human Rights.<sup>135</sup> Secondly, states never officially endorse torture as a legitimate state practice.<sup>136</sup> Even if they resort to acts of torture, it is always done in secrecy and no state would publicly admit to rightfully using it. And lastly, international scholars and international tribunals have confirmed the peremptory character of the norm, such as the ICTY in *Prosecutor v. Furundzija*<sup>137</sup> for instance.<sup>138</sup> Despite all these indications in favor of the absolute prohibition of torture being *ius cogens*, the Court does not deliver a clear conclusion on it. Rather it merely recognizes that it is a norm that “cannot be easily derogated from”.<sup>139</sup>

In the end, the Canadian Supreme Court came to the result that “international law rejects deportation to torture, even where national security interests are at stake.”<sup>140</sup> However, it also regarded international law as not binding in Canada unless the specific norms were “incorporated into Canadian law by enactment”.<sup>141</sup> For *Suresh* it only looked at the domestic criteria of fundamental justice and used international norms as a way to interpret Canadian constitutional law, not as binding provisions.<sup>142</sup> In conclusion, the Court remained of the opinion that deportation to torture is allowed in exceptional circumstances. It is not clear on what basis it decided to ignore its

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<sup>133</sup> Bruin & Wouters, *supra* note 131, at 25.

<sup>134</sup> *Suresh*, *supra* note 1, at para. 62.

<sup>135</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

<sup>136</sup> *Suresh*, *supra* note 1, at para. 63.

<sup>137</sup> *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T (Int’l Crim. Trib. for the Former Yugoslavia, Trial Chamber) Dec 10, 1998.

<sup>138</sup> *Suresh*, *supra* note 1, at para. 64.

<sup>139</sup> *Id.* at para. 65.

<sup>140</sup> *Id.* at para. 75.

<sup>141</sup> *Id.* at para. 60.

<sup>142</sup> *Id.*



international legal obligations when in previous decisions such as *Kindler* developments in international law were important for guiding the Court in its view on the death penalty.

There are several flaws in the decision of the Court with regards to not applying the relevant international law provisions. Canada signed the CAT on 23 August 1985 and ratified it on 24 June 1987.<sup>143</sup> Therefore, Canada is bound to the absolute prohibition of torture stipulated in Article 3 of the Convention. Art 2(2) CAT emphasizes that “no exceptional circumstances whatsoever (...) may be invoked as a justification of torture”, which bars Canada from introducing an exception to refoulement to torture such as the *Suresh* exception.<sup>144</sup> Article 26 of the Vienna Convention on the Law of Treaties clearly states that international treaties are “binding upon the parties to it and must be performed by them in good faith”.<sup>145</sup> In addition, Article 27 forbids States Parties to use domestic law as an excuse not to perform their obligations under an international treaty. Thus, there is no justification for Canada to act in violation of the CAT as it is a party to this treaty. Furthermore, the Court itself listed a number of reasons and sources confirming that the prohibition of torture is a peremptory norm of customary international law.<sup>146</sup> It is startling that the Court refused to follow its argument to the end to avoid an explicit statement on the prohibition of torture being *ius cogens*. Instead, it evaded the fact that the *Suresh* exception is illegal under both international treaty law and customary law. There are many voices in international law confirming this. For example, Lauterpacht leaves no doubt that from his point of view, refoulement of a refugee to torture is never allowed, because the national security exception must not apply to non-derogable human rights like the prohibition of torture.<sup>147</sup> The UN Committee against Torture criticized the Canadian Supreme Court for failing to recognize this and condemned any balancing against security threats (see *Agiza v Sweden*).<sup>148</sup> By now also the International Court of Justice has confirmed that

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<sup>143</sup> See the United Nations Treaty Collection under [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-9&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en)

<sup>144</sup> WOUTERS, *supra* note 59, at 502.

<sup>145</sup> Vienna Convention on the Law of Treaties, *supra* note 136.

<sup>146</sup> *Suresh*, *supra* note 1, at 64.

<sup>147</sup> Lauterpacht & Bethlehem, *supra* note 7, at 58.

<sup>148</sup> Jenkins, *supra* note 119, at 145-146; Ahmed Hussein Mustafa Kamil Agiza v. Sweden, UN Committee Against Torture, CAT/C/34/D/233/2003, May 24, 2005. [hereinafter, *Agiza v. Sweden*]

the prohibition of torture is customary law and a norm of *ius cogens*.<sup>149</sup> This means that any treaty or act by a state or international organization that violates the prohibition of torture is automatically void.<sup>150</sup> Thus, with creating the *Suresh* exception, Canada clearly violated a binding norm of international law. If the issue of refoulement to torture comes before the Supreme Court again it needs to remedy this violation by accepting the prohibition of torture in international law.

## **B. Negative Impact of the *Suresh* Exception on other Cases**

### **1. The Use of the *Suresh* Exception in Canada**

When the Canadian Supreme Court introduced the idea of exceptional circumstances that would make it possible to refoule somebody to torture, it maybe did not expect that this exception would be invoked very often. But unfortunately, the Canadian government used it in several cases concerning refoulement out of security reasons.<sup>151</sup> One examples for this is *Dadar v. Canada*.<sup>152</sup> Mostafa Dadar had taken part in a failed coup d'état in his home country Iran and was subjected to torture during his detention by the Iranian authorities. He managed to flee to Pakistan where he was granted refugee status under the Refugee Convention. Later he travelled on to Canada and became a permanent resident.<sup>153</sup> In 2004, the Minister of Citizenship and Immigration found him to be a danger to the Canadian public as he had been convicted of aggravated assault against his wife and Canada intended to deport him.<sup>154</sup> When the case was referred to the Federal Court, Dadar claimed that he would face torture upon return to Iran.<sup>155</sup> The Minister countered that even if there were a risk of torture upon the deportation of Dadar, the case would fall under exceptional circumstances as established in the *Suresh* decision and refoulement to torture would be justified.<sup>156</sup> The Court affirmed the Ministry's opinion that the danger Dadar poses to the Canadian public would outweigh

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<sup>149</sup> Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, 2012 I.C.J. 422, para. 99 (July 2012).

<sup>150</sup> Bruin & Wouters, *supra* note 131, at 25.

<sup>151</sup> Audrey Macklin, *The Canadian Security Certificate Regime*, (CEPS Special Report, 30 March 2009) available at <http://aei.pitt.edu/10757/> (last visited Sep 25, 2017).

<sup>152</sup> *Dadar v. Canada* (Minister of Citizenship and Immigration), 2004 F.C. 1381, 42 Imm. L.R. 3d 260, para. 1. [hereinafter, *Dadar v. Canada*]

<sup>153</sup> *Id.* at para. 1.

<sup>154</sup> *Id.* at para. 3.

<sup>155</sup> Jenkins, *supra* note 119, at 132.

<sup>156</sup> *Dadar v. Canada*, *supra* note 156, at para. 12.

the personal risks he faces in Iran.<sup>157</sup> But it also came to the conclusion that the appellant cannot provide sufficient evidence that he would be subjected to torture upon return in Iran.<sup>158</sup>

It is highly troubling that once again the Canadian government was willing to ignore the absolute prohibition of torture (as discussed above) and that it used the *Suresh* exception in a case in which the applicant was not suspected of terrorism related charges. Of course, aggravated assault is a serious crime, but this does not fall under the requirement of exceptional circumstances as established in *Suresh*. There, the Court dealt with cases threatening Canadian security. Assault, on the other hand, is a criminal offense against an individual that is usually regulated by domestic criminal laws and procedures in the case of Canadians. It is not exceptional and grave enough to justify refoulement to torture. Unfortunately, the Court refrained from rendering a decision on widening the scope of the *Suresh* exception. Once it found Dadar not to be in danger of torture, it did not consider it necessary to examine whether exceptional circumstances exist.<sup>159</sup> The Court failed to clearly speak out against the attempt of extending the *Suresh* exception from extraordinary national security threats to include less severe cases of ordinary crimes. Additionally, Canada's torture assessment might not have been thorough enough. The Committee against Torture came to the conclusion that a serious risk would indeed exist for Dadar upon return to Iran and that refouling him would constitute a breach of Article 3 of the CAT. Nevertheless, Canada ignored its request for halting the deportation.<sup>160</sup>

*Mahjoub v. Canada*<sup>161</sup> is a similar case in which the *Suresh* exception was also raised. Mohamed Mahjoub is an Egyptian national who was accepted as a Convention refugee in Canada in 1996.<sup>162</sup> In 2000, a security certificate was issued against him for being a member of a faction of Al Jihad that might engage in terrorism in Egypt.<sup>163</sup> Mahjoub claimed that upon return to Egypt he would be at risk of torture, as he had been tortured

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<sup>157</sup> *Id.* at para. 11.

<sup>158</sup> *Id.* at para. 31.

<sup>159</sup> *Id.* at para. 37.

<sup>160</sup> Jenkins, *supra* note 115, at 133.

<sup>161</sup> *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2005 F.C. 156, 3 F.C.R. 334. [hereinafter, *Mahjoub v. Canada*].

<sup>162</sup> *Id.* at para. 1.

<sup>163</sup> *Id.* at para. 2.

before for when he was suspected of being a member of the Muslim Brotherhood.<sup>164</sup> Once again the government argued that Mahjoub may be refouled nevertheless, because of the exceptional security circumstances of *Suresh*. Here, the Court came to the conclusion that the security evaluation of the Minister was not reasonable and Mahjoub was not a security risk for Canada.<sup>165</sup> Theoretically, this is a good result, as the Court refrained from using the *Suresh* exception and interpreted security risk in a restrictive way to not apply it on Mahjoub. However, it would had been better to have a clear statement against the validity of the *Suresh* exception in general to prevent it from being applied this freely. This can only be achieved if the Supreme Court overturns the *Suresh* exception in a future decision. Until this happens, it is reassuring that at least some Federal Courts try to limit the application of the exception, like in *Mahjoub* or also in *Jaballah*.<sup>166</sup>

Mahmoud Jaballah is an Egyptian citizen who left his country because of recurring arrests and mistreatment on the allegation of being a Muslim fundamentalist.<sup>167</sup> With his wife and children he first travelled to Saudi Arabia and then stayed in Pakistan, Yemen and Azerbaijan before finally arriving in Toronto and applying for refugee status in Canada.<sup>168</sup> During the ongoing procedures for the refugee status determination, a security certificate was issued against Jaballah. It declared him to be a member of Al Jihad, a terror organization associated with Al Qaida, and accused him of having engaged in acts of terrorism.<sup>169</sup> The Court confirmed that Jaballah poses a security risk to Canada but also that he would be at risk of being subjected to torture upon return to Egypt.<sup>170</sup> With regards to the *Suresh* exception, it decided that the Supreme Court intended for the exception to be applied only in very few special cases. It found that as there was no evidence that Jaballah's case created exceptional circumstances, it was not legitimate to refoule him to a place he might face torture.<sup>171</sup> The Federal Court used a very restrictive interpretation of exceptional circumstances and curbed the government's attempt to use *Suresh* in as many security cases as

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<sup>164</sup> *Id.* at para. 28.

<sup>165</sup> Jenkins, *supra* note 119, at 134.

<sup>166</sup> *Re Jaballah*, 2006 F.C. 1230, 58 Imm. L.R. 3d 267. [hereinafter, *Jaballah*]

<sup>167</sup> *Id.* at para. 16.

<sup>168</sup> *Id.* at paras. 16-20.

<sup>169</sup> *Id.* at para. 14.

<sup>170</sup> Jenkins, *supra* note 119, at 134.

<sup>171</sup> *Jaballah*, *supra* note 170, at paras. 81-83.

possible. It even highlighted that halting the deportation is in compliance with Canada's obligations under international law.<sup>172</sup>

It is a good step in the right direction that, in both these cases, the Federal Court prevented refoulement to torture from taking place. However, this did not stop the government from violating the absolute prohibition of torture. The Committee against Torture criticized Canada on several occasions for its flawed risk assessment and for ignoring the Committee's request for a stay of deportation in cases the refugee would have been refouled to torture.<sup>173</sup> This happened for example in *Khan v. Canada*,<sup>174</sup> *Dadar v. Canada*,<sup>175</sup> and *Sogi v. Canada*.<sup>176</sup> The government was outraged whenever the Committee found Canada guilty of breaching the prohibition of torture. By not following the interim measures that were ordered by the Committee it wanted to emphasize that it considers questions of deportation to fall under issues of public security and their sovereignty and that the suggestion of an international human rights treaty body may not interfere in these cases.<sup>177</sup> It is not worthy of a state such as Canada, that prides itself in safeguarding human rights, to continue to ignore its international obligations by leaving the vaguely phrased exception of "exceptional circumstances" as a loophole for deporting refugees to torture. Instead the Supreme Court should acknowledge the absolute prohibition of torture as *ius cogens* and clearly overrule the exception to refoulement to torture.

## 2. The *Suresh* Exception's Influence on Foreign Jurisdictions

The *Suresh* exception was also influential in foreign jurisdictions. This brings with it the danger that, in cases of refoulement, the absolute prohibition of torture might be eroded on an international scale, instead of just within the domestic jurisdiction of Canada. The most striking examples can be found in cases before the European Court of Human Rights where states tried to introduce the *Suresh* exception. In *Saadi v.*

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<sup>172</sup> *Jaballah*, *supra* note 170, at para. 86.

<sup>173</sup> Jenkins, *supra* note 119, at 133.

<sup>174</sup> Tahir Hussain Khan v. Canada, UN Committee Against Torture, CAT/C/13/D/15/1994, Nov. 15, 1994.

<sup>175</sup> *Dadar v. Canada*, *supra* note 156.

<sup>176</sup> Bachan Singh Sogi v. Canada, UN Committee Against Torture, CAT/ C/39/D/297/2006, Nov. 16, 2007.

<sup>177</sup> F. Cr peau, *Anti-Terrorism Measures and Refugee Law Challenges in Canada*, 29 REFUGEE SURVEY QUARTERLY 31, 38 (2010).

*Italy*<sup>178</sup> in 2008, the European Court of Human Rights dealt with a case where a refugee was to be deported back to Tunisia after being found guilty of terrorism-related charges. Saadi claimed that he would face torture upon return. The UK intervened in this trial as a third party and brought up an argument similar to the *Suresh* decision. They asked for a balancing between the security threat a state is confronted with and the seriousness of the risk of torture the refugee faces which would make it possible to refoule Saadi if the threat is exceptionally big. Unlike the Canadian Supreme Court, the European Court of Human Rights did not entertain this suggestion but decided that Article 3 of the European Human Rights Convention entails an absolute prohibition of refoulement to torture.<sup>179</sup>

The European Court of Human Rights based its judgement on its previous decision *Chahal v. United Kingdom*<sup>180</sup> This landmark case took place in 1996 and established that refoulement of refugees is not possible in exceptional security circumstances. In *Chahal*, the UK wanted to deport an Indian Sikh for his alleged involvement in plans to assassinate the Indian Prime Minister Rajiv Gandhi on an official visit to the state.<sup>181</sup> Chahal claimed to have a well-founded fear of persecution under the Refugee Convention,<sup>182</sup> while the UK insisted that Article 3 of the ECHR is not absolute but limited by security grounds which would make refoulement possible even if he faces the risk of ill-treatment.<sup>183</sup> Already back then, before the *Suresh* decision had been rendered, the UK suggested to take the degree of ill-treatment into account and balance it against security interests. “The greater the risk of ill-treatment, the less weight should be accorded to the threat to national security.”<sup>184</sup> However, when there is doubt about the severity of the ill-treatment the individual will face, then national security should outweigh it in the balancing approach.<sup>185</sup> The Court clearly rejected this and enunciated

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<sup>178</sup> Saadi v. Italy, App. No. 37201/06, 2008-II Eur.Ct.H.R. 145. [hereinafter, *Saadi v. Italy*]

<sup>179</sup> Jenkins, *supra* note 119, at 126.

<sup>180</sup> Chahal v. United Kingdom, App. No. 22414/93, 1996 Eur.Ct.H.R. 54. [hereinafter, *Chahal v. United Kingdom*]

<sup>181</sup> Saskia Maria Hufnagel, Clive Harfield & Simon Bronitt, Cross-border law enforcement: regional law enforcement cooperation - European, Australian and Asia-Pacific Perspectives 215 (2013). Available at [https://books.google.at/books?id=2NMKX-JWMFoC&printsec=frontcover&hl=de&source=gbs\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](https://books.google.at/books?id=2NMKX-JWMFoC&printsec=frontcover&hl=de&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false)

<sup>182</sup> *Chahal v. United Kingdom*, *supra* note 184, at para. 26.

<sup>183</sup> Jens Vedsted-Hansen, *The European Convention on Human Rights, Counter-Terrorism, and Refugee Protection*, 29 REFUGEE SURVEY QUARTERLY 45, 47 (2010).

<sup>184</sup> *Chahal v. United Kingdom*, *supra* note 184, at para. 76.

<sup>185</sup> *Id.*

that torture or inhuman or degrading treatment are absolutely forbidden under the ECHR, irrespective of whether somebody poses a threat to national security.<sup>186</sup> The Court confirmed this position the same year in its decision *Ahmed v. Austria*.<sup>187</sup>

Unfortunately, the events of 9/11 gave new impetus to the security exception to non-refoulement to torture and with the rendering of the *Suresh* decision it became law. Now states had a solid example from a Supreme Court that security reasons could outweigh the absolute prohibition of torture in deportation cases. This explains why the UK brought it up again in *Saadi v. Italy*, but unlike the Canadian Supreme Court, the European Court of Human Rights remained consistent in its jurisprudence. In the following years, the arguments of the *Suresh* exception would be used in front of the European Court of Human Rights several times. It coincided with the political trend of limiting the inflow of refugees as much as possible and to expel everybody who might pose a security threat. While implementing new measures and laws to reach this goal, states suddenly found themselves constrained by human rights provisions and the existing case law in Europe. In 2005, Lithuania, Portugal, Slovakia and the UK intervened in *Ramzy v. The Netherlands*<sup>188</sup> and tried to convince the Court to deviate from the established *Chahal* doctrine.<sup>189</sup>

Mohammed Ramzy is an Algerian national who sought asylum in the Netherlands. His application was denied and instead he was to be deported on grounds of being involved in the terrorist activities of an Islamist extremist group. Ramzy took legal action against the Netherlands at the European Court of Human Rights, claiming that in Algeria he would be subjected to ill-treatment or torture because of his alleged membership in this organization.<sup>190</sup> Four intervening states argued that in light of international terrorism and the threat it poses, the *Chahal* decision needs to be altered.<sup>191</sup> Individuals should not benefit from an absolute protection of Article 3 ECHR if it contradicts the fundamental rights of the citizens of a state who need to be protected from terrorism.<sup>192</sup>

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<sup>186</sup> *Id.* at para. 79.

<sup>187</sup> Vedsted-Hansen, *supra* note 187, at 48; *Ahmed v. Austria*, App.No. 25964/94, 1996-VI Eur.Ct.H.R..

<sup>188</sup> *Ramzy v. The Netherlands*, App.No. 25424/05, 2005 Eur.Ct.H.R..

<sup>189</sup> GOODWIN-GILL & MCADAM, *supra* note 17, at 311.

<sup>190</sup> Vedsted Hansen, *supra* note 187, at 51-52.

<sup>191</sup> *Ramzy v. The Netherlands* decision, App.No. 25424/05, 2008 Decision Eur.Ct.H.R., para. 130.

<sup>192</sup> GOODWIN-GILL & MCADAM, *supra* note 17, at 312.

The Court decided not to deliver a final judgement in *Ramzy* as the applicant failed to inform his representatives of his whereabouts. The Dutch Intelligence Service reported that Ramzy had apparently returned to Algeria.<sup>193</sup> Nevertheless, it is clear that the Court opposed the suggested modification of the *Chahal* doctrine because at the same time it rendered the above discussed judgement in *Saadi v. Italy*. There, the UK had submitted the same argument as in *Ramzy*, and it was rejected.

Four years later in 2012, attempts to undermine the absoluteness of the prohibition of torture continued. To justify refoulement to torture for security reasons, a new instrument was used: A Memorandum of Understanding (MoU) with the state the individual is to be deported to. This is what happened for instance in the *Abu Qatada*<sup>194</sup> case. Omar Mahmoud Othman, known under the name Abu Qatada, left Jordan and applied for asylum in the United Kingdom in September 1993. He argued that he had been detained and tortured by Jordanian authorities and was granted refugee status in June 1994.<sup>195</sup> When his original permit to stay expired in 1998, Abu Qatada applied for permanent leave to remain in the UK. Before this application was decided, he was taken into custody according to the Anti-Terrorism, Crime and Security Act 2001.<sup>196</sup> The UK decided to deport him after agreeing on a MoU with Jordan, guaranteeing he would not be subjected to torture or ill-treatment there. Abu Qatada appealed against the deportation order, but in the end the House of Lords upheld the previous Courts' order.<sup>197</sup> The claimant was considered a security risk by the UK because in April 1999 he had been found guilty of conspiracy by a court in Jordan. Allegedly he was part of a group carrying out bombings on the American School and the Jerusalem Hotel in Amman a year before and was sentenced in absentia to life imprisonment with hard labor.<sup>198</sup> The evidence against Abu Qatada consisted of a confession by a co-defendant who claimed that he had encouraged the attacks and later congratulated the group for their success. However, there was proof from medical experts and lawyers during the

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<sup>193</sup> Vedsted Hansen, *supra* note 187, at 53.

<sup>194</sup> *Othman (Abu Qatada) v United Kingdom*, App No 8139/09, 2012-I Eur.Ct.H.R. 159. [hereinafter, *Abu Qatada*]

<sup>195</sup> *Id.* at para. 7.

<sup>196</sup> *Id.* at para. 8.

<sup>197</sup> Christopher Michaelsen, *THE RENAISSANCE OF NON-REFOULEMENT? THE OTHMAN (ABU QATADA) DECISION OF THE EUROPEAN COURT OF HUMAN RIGHTS*, 61 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 750, 751 (2012).

<sup>198</sup> *Abu Qatada*, *supra* note 198, at para. 10.



trial that the testifying defendants showed clear signs of torture.<sup>199</sup> When Abu Qatada went before the European Court of Human Rights, he argued that upon his return to Jordan he would face a retrial with lengthy pre-trial detention and the risk of torture to force a confession out of him, which would violate Article 3 of the ECHR and Article 6, the right to a fair trial.<sup>200</sup> The Court came to the conclusion that the applicant would be at risk of ill-treatment in Jordan, but the MoU was specific enough to prevent any ill-treatment from actually taking place.<sup>201</sup> Therefore, Article 3 would not be violated by refouling Abu Qatada.

Obtaining a diplomatic assurance from Jordan is a very controversial idea. States are inclined to use MoUs to silence the argument the individual might be tortured upon return but unfortunately these kinds of assurances are not enforceable. They are a mere promise out of courtesy, not binding contracts. It is also almost impossible to ascertain whether a state is abiding by the promise not to torture. If a delegation visits the refouled individual, there is no way of being sure that s/he has not been pressured by the state of origin to claim that the MoU has been honored, even though in reality torture took place. Especially in the case of Abu Qatada, it seems ridiculous to obtain a MoU from Jordan, when a few years previously the applicant received refugee status because he had been persecuted in that very same state. Also, the case deals with the torture of Abu Qatada's co-defendants during the Jordanian trial, which makes it clear that ill-treatment is likely to take place. A MoU such as the one between Jordan and the UK is not a valid safeguard to ensure Abu Qatada will not be tortured. It should not have been accepted by the Court as enabling his deportation out of security reasons.

All these interventions and arguments to justify refoulement to torture, be it through promoting the security exception of *Suresh* or through providing a MoU, can be traced back to changes in national security policies fueled by the attempts to eradicate terrorism since the events of 9/11. For example, in a policy proposal that leaked to the media in 2003, the UK observed that if Article 3 of the ECHR solely applied to acts taking place inside the territory of a State Party, then the government would only need to be concerned with the torture and degrading treatment occurring inside the UK. To

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<sup>199</sup> *Id.* at paras. 9-14.

<sup>200</sup> *Id.* at para. 25 and para. 3.

<sup>201</sup> Michaelsen, *supra* note 201, at 759.

achieve this, it considered convincing the European Court of Human Rights to reverse its opinion on the absoluteness of Article 3 but admitted that this is very hard to achieve. As a Plan B, they suggested re-negotiating the ECHR to exclude an extraterritorial effect or to limit its protection by at least allowing refoulement to face inhuman or degrading treatment.<sup>202</sup> Here, the UK completely ignored the fact that even if they re-negotiated the ECHR to not include a non-refoulement provision, they are still bound by the one in the CAT. It is an example how states look for ways to undermine the absolute prohibition of torture. In order to pursue their security interests, they are willing to hand over the responsibility to another state and have it take care of the “dirty work” like torture to extract information from suspects. This way of thinking is exactly what led to introducing illegal security measures such as extraordinary rendition and is furthered through using arguments such as in *Suresh*. It is the task of international and domestic courts to curb these attempts by confirming the absoluteness of the prohibition of torture, the way the European Court of Human Rights and the Committee against Torture do. But the more often states argue there is a need for security exceptions to refoulement to torture, the more likely it is that a court may accept it such as in *Suresh*, this may cause a snowball effect and lead other jurisdictions accepting it too.

### **C. Proliferation of Extraordinary Rendition and Securitization of Migration**

In recent years, states interpreted the Refugee Convention very broadly for the sake of implementing their security strategies. Some of the taken measures are verging on the illegal but carefully phrased to make sure they still fall within the borders of international law. For instance, the definition of refugee, the exception clauses to non-refoulement in Article 33(2), and the exclusion provisions of Article 1F are being stretched as far as possible in numerous jurisdictions.<sup>203</sup> The creation of international zones in airports, for instance, is aimed at preventing refugees from entering a state’s territory and applying for asylum, but this would amount to rejection at the frontier and

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<sup>202</sup> Vedsted-Hansen, *supra* note 187, at 50.

<sup>203</sup> Several authors discuss these restrictive trends since 9/11 and the securitization of migration and refugee law. As an example see NIRAJ NATHWANI, *RETHINKING REFUGEE LAW* (2003). The author discusses the relationship between restrictive immigration policies and the interpretation of refugee law. Especially chapter two describes different strategies states currently use to restrict the scope of the refugee concept. See also GOODWIN-GILL & MCADAM, *supra* note 16, at 369-380. Goodwin-Gill lists numerous trends in state practice used to obstruct asylum.

constitute a violation of non-refoulement. To avoid this, states do allow asylum seekers to lodge their applications, however they apply lesser procedural standards for these cases of only legal and not physical presence. The results are often fast-track or summary proceedings that put asylum-seekers at a disadvantage in comparison to those applying regularly.<sup>204</sup> Another example is Australia's Pacific Strategy through which certain islands are excluded from the Australian migration zone. Instead, asylum seekers arriving there are referred to status determination centers in Nauru or Manus Island. Also in this case, Australia took care to phrase its strategy in a way that does not violate international law (namely by emphasizing that the refugees will receive fair asylum procedures in these territories).<sup>205</sup> In other cases, security measures are not merely close to bordering on the illegal, but actually cross the line. Examples of this include the practice of extraordinary rendition.

Rendition traditionally described the process of transferring a person to another state for criminal prosecution based on a previous extradition agreement between the concerned states.<sup>206</sup> The term extraordinary rendition, on the other hand, has no clear definition in international law<sup>207</sup> but became a commonly used expression in connection with the 'War on Terror'. In these cases, suspected terrorists would be transported to a foreign country to conduct coercive interrogation without being in reach of the judicial review of domestic courts.<sup>208</sup> Typically the interrogation techniques would constitute ill treatment or even amount to torture, which is exactly the reason why some states prefer to secretly let other states perform these tasks. This way they can claim not to have broken international law themselves. However, they violate the non-refoulement to torture rule, which is part of the prohibition of torture in the CAT as discussed above. States are bound by it either through being State Party through the CAT or by the prohibition being a norm of *ius cogens*, which includes non-refoulement.

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<sup>204</sup> GOODWIN-GILL & MCADAM, *supra* note 17, at 254.

<sup>205</sup> GOODWIN-GILL & MCADAM, *supra* note 17, at 256.

<sup>206</sup> WILLIAM BANKS, *The United States a decade after 9/11*, in GLOBAL ANTI-TERRORISM LAW AND POLICY 449, 460 (Victor Ramraj et.al.ed., 2012).

<sup>207</sup> Krishma C. Parsad, *Illegal Renditions and Improper Treatment An Obligation to Provide Refugee Remedies Pursuant to the Convention against Torture*, 37 DENV. J. INT'L L. & POL'Y 681, 682 (2008).

<sup>208</sup> BANKS, *supra* note 210, at 460.

The first case of extraordinary rendition that reached an international tribunal was *Agiza v. Sweden*<sup>209</sup> in front of the Committee Against Torture.<sup>210</sup> Ahmed Agiza is an Egyptian citizen who applied for asylum in Sweden in 2000. He claimed that he would be at risk of torture in Egypt as he had previously been tortured by the security police when he was suspected of having been involved in the assassination of President Anwar Sadat. In 1999, a military tribunal sentenced him to 25 years imprisonment with hard labor without possibility of appeal for allegedly being a member of the Islamic Jihad.<sup>211</sup> Sweden denied his application for asylum due to security reasons and ordered his expulsion to Egypt. To free itself from allegations of refouling Agiza to torture, the government obtained an assurance from Egypt that he would not be subjected to any kind of ill-treatment upon return.<sup>212</sup>

In reality, Agiza faced ill-treatment as soon as his deportation began. The Swedish police handed him over to US security personnel that had chartered a plane to transport Agiza and a second asylum seeker suspected of terrorist activities to Cairo. An Ombudsman of the Swedish parliament later investigated the expulsion of Agiza and came to the result that the Swedish Security Police lost control over the situation at the airport, which resulted in the inhumane treatment of the two men in custody. The American personnel that managed the extradition were wearing masks and conducted a “security check” on Agiza that included removing his clothes with scissors, searching his body, binding his hands and feet, pulling a hood over his head and strapping him to a mattress for the entire flight.<sup>213</sup> Upon his return to Egypt, he was held incommunicado for five weeks and later transferred to Tora prison. During visits by his parents and Swedish diplomats he reported having been ill-treated and tortured by the Egyptian security forces.<sup>214</sup> In 2005, the Committee Against Torture dealt with the involvement of Sweden in this case of torture. It came to the conclusion that at the time of Agiza’s expulsion, the Swedish government should have known that Egypt resorted to widespread torture in its prisons and the applicant was facing a particularly high risk

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<sup>209</sup> *Agiza v Sweden*, *supra* note 152.

<sup>210</sup> Michaelsen, *supra* note 201, at 755.

<sup>211</sup> *Id.* at 755.

<sup>212</sup> *Id.*

<sup>213</sup> *Agiza v Sweden*, *supra* note 152, at para. 12.29.

<sup>214</sup> Human Rights Watch, *Cases Involving Diplomatic Assurances against Torture – Developments since May 2005*, Report Number 1, Jan. 2017, at 14. Available at <https://www.hrw.org/sites/default/files/reports/eu0107.pdf>

due to being detained for political and security purposes. Obtaining a diplomatic assurance was not a valid means to protect Agiza from torture. It lacks a mechanism of enforcement and does not suffice to relieve Sweden from its responsibility. Therefore, the refoulement of Agiza by Sweden was a violation of the absolute prohibition of torture of Article 3 CAT.<sup>215</sup>

Unfortunately, Agiza does not stand alone but is just one in a long list of extraordinary rendition cases. A striking case was the extraordinary rendition of Maher Arar. Arar is a Canadian citizen who had left his country of origin Syria at the age of 17. After many years of living and working in Canada with his wife and two children, he passed through JFK airport in the US on his way home from a trip to Tunis. There he was detained for being suspected of having connections to a member of a terrorist organization. Against his will he was transported to Syria where he was held in an underground cell for one year and subjected to horrific torture. Despite the fact that the US had obtained an assurance from Syria beforehand to guarantee Arar's safety.<sup>216</sup> The Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar found that there is no evidence that Arar ever committed a criminal offence, nor that he might be a security threat to Canada. Nevertheless, Canada did not effectively try to obtain Arar's release from US/Syrian custody and failed to protect its citizen from unlawful extraordinary rendition.<sup>217</sup>

Several European states have been involved in extraordinary rendition by cooperating with the US Central Intelligence Agency. They either helped by detaining individuals and handing them over to the CIA for rendition, or by allowing the US to operate in secret detention centers on their territory. Some examples for these incidents can be found in the database of the European Court of Human Rights: *El-Masri v. The former Yugoslav Republic of Macedonia*, *Al-Nashiri v. Poland*, *Husayn (Abu Zubaydah) v. Poland*, *Nasr and Ghali v. Italy*, *Al Nashiri v. Romania* and *Abu Zubaydah v. Lithuania*.

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<sup>215</sup> *Agiza v Sweden*, *supra* note 152, at para. 13.4.

<sup>216</sup> Parsad, *supra* note 211, at 697.

<sup>217</sup> REPORT OF THE EVENTS RELATING TO MAHER ARAR, *Report of the Events Relating to Maher Arar – Analysis and Recommendations* (2006). Available at [http://www.sirc-csars.gc.ca/pdfs/cm\\_arar\\_rec-eng.pdf](http://www.sirc-csars.gc.ca/pdfs/cm_arar_rec-eng.pdf)

The last two cases are not yet decided, but in all others the Court came to the conclusion that the states violated Article 3 ECHR and other articles.<sup>218</sup>

These cases of extraordinary rendition are examples of how measures, taken in the name of security, can very easily get out of hand. There is no doubt that extraordinary rendition violates international law, but states continue to defy the prohibition of torture by conducting it in secret or by claiming that a diplomatic assurance is enough to whitewash them from any allegations of (indirectly) using torture. The Committee Against Torture tries to keep governments in check and condemns states' participation in refoulement to torture in its decisions. Other institutions follow suit. For example, the United Nations Commission on Human Rights stated in one of its reports that practices like extraordinary rendition amount to a violation of the principle of non-refoulement and are a violation of Article 3 of the CAT and also Article 7 of the ICCPR.<sup>219</sup> Regrettably, the decisions of these treaty and intergovernmental bodies are not enforceable and depend on States Parties' willingness to conform to them. Therefore, it is up to domestic courts or regional courts like the European Court of Human Rights that render binding judgements to ensure governments and parliaments will not make executive orders or enact legislation that violate non-refoulement to torture. In their decisions, they set the boundaries of how far states may go when they balance security interests against refoulement to torture and confirm that the absolute prohibition of torture is a red line that may not be overstepped. This is why decisions like *Suresh* are so troublesome. By introducing a vaguely formulated exception for when refoulement to torture is possible, it erodes the absolute prohibition of torture and leaves a loophole for states to justify increasingly harsh security measures at a time when such measures are proliferating. To prevent this idea from spreading it is necessary to bring the problematic aspects of the *Suresh* exception back to attention and to ensure that other courts will not use it. Furthermore, it would be important for the Canadian Supreme Court to overturn the *Suresh* decision to reestablish consistency in its case law and with Canada's international obligations.

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<sup>218</sup> Council of Europe: European Court of Human Rights, *Fact sheet – Secret detention sites*, June 2016, available at [http://www.echr.coe.int/Documents/FS\\_Secret\\_detention\\_ENG.PDF](http://www.echr.coe.int/Documents/FS_Secret_detention_ENG.PDF)

<sup>219</sup> Jenkins, *supra* note 119, at 152.

#### IV. How to Determine Who Constitutes a Security Threat?

The *Suresh* exception was built on the idea that threat to a state's security can justify refoulement to torture. But how can this drastic infringement of human rights be based on such a vague term? What constitutes a security threat is not easily determinable and varies from country to country and on the international level. Article 33(2) of the Refugee Convention states, that posing a "danger to the security" of the asylum granting country, renders the prohibition of refoulement inapplicable to the individual in question.<sup>220</sup> Unfortunately, there is no clear definition in the Convention of which acts would constitute a danger. The *travaux préparatoires* indicate that the delegates at the Conference of Plenipotentiaries had persons in mind who would enter the host state as refugees and then carry out activities against it on behalf of a foreign power.<sup>221</sup> This idea of security threats to justify refoulement has been adopted into domestic legislations, as for example through the security certificate mechanism in Canada. In *Suresh*, the court determined that Suresh's fundraising activity for the Tamil Tigers in Sri Lanka constitutes a danger to the security of Canada and thus it is possible to deport him.<sup>222</sup>

With regards to these findings several problematic issues arise. Firstly, there is no clear definition of the term "danger to national security". Most states use it synonymous with the involvement in terrorism but this does not help to clarify the situation at all as there is no agreement concerning the definition of terrorism. Secondly, the Canadian Supreme Court might have gone too far in declaring Suresh a threat to Canadian security if the Tamil Tigers only operate in Sri Lanka. This leads to the discussion whether there has to be a direct threat to a state's security or whether an indirect threat suffices. And thirdly, there is the question to what degree an individual has to be associated with a terrorist organization, without being actively involved in any terrorist acts, to be labelled a terrorist.

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<sup>220</sup> *Refugee Convention*, *supra* note 5, Article 33(2): "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 judgement of a particularly serious crime, constitutes a danger to the community of that country."

<sup>221</sup> Hathaway & Harvey, *supra* note 18, at 289.

<sup>222</sup> Okafor & Okoronkwo, *supra* note 94, at 40; HATHAWAY, *supra* note 4, at 345.

## A. The Unclear Definition of Terrorism

A common problem with security issues is the lack of a clear, commonly accepted, definition of what exactly constitutes a threat to national security, as well as of the term terrorism. Nevertheless, most states frequently use these expressions in their laws and judgements, especially in the legislation enacted after 9/11.<sup>223</sup> In *Suresh*, the Supreme Court analyzed whether “terrorism” and “danger to the security of Canada” are unconstitutionally imprecise terms.<sup>224</sup> It came to the conclusion that they are not too vague as it is possible to interpret these phrases by looking at norms of international law.<sup>225</sup> But in fact, international law does not provide us with a precise answer either.

The first attempts to codify the crime of terrorism took place in 1937. Under the League of Nations states met to discuss a Convention for the Prevention and Punishment of Terrorism. Here they defined terrorism as “criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons, or the general public.” This attempt for creating a convention was stopped short by the outbreak of the Second World War which led to the dissolving of the League of Nations. After the war, between 1968 and 1972, incidents like the attack and hostage taking during the Munich Olympics and a series of aircraft hijackings brought states together again to discuss an international approach against terrorism.<sup>226</sup> The US introduced the draft Convention on the Prevention of Terrorism to the United Nations in 1972 but it was ultimately rejected, as states failed to come to an agreement on the exact definition of terrorism. Instead, they have issued several resolutions condemning all acts of terrorism and resorted to concluding agreements outlawing specific acts related to terrorism without including an all-encompassing definition.<sup>227</sup> As of today, the international community has agreed upon nineteen international legal

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<sup>223</sup> See the US Patriot Act, *supra* note 101; the UK Anti-terrorism, Crime and Security Act 2001, *supra* note 102; the Canadian Anti-Terrorism Act 2001, *supra* note 103.

<sup>224</sup> *Suresh*, *supra* note 1, at para. 2.

<sup>225</sup> *Id.* at para. 82.

<sup>226</sup> Sharryn J. Aiken, *Manufacturing “Terrorists”: Refugees, National Security, and Canadian Law*, 19 REFUGEE: CANADA’S JOURNAL ON REFUGEES 54, 56 (2000).

<sup>227</sup> *Id.*



instruments to combat certain terrorist acts.<sup>228</sup> This way it was possible to avoid the disputed issues and guarantee a widespread support of these treaties.<sup>229</sup>

In order to have a general definition of terrorism, there would need to be a clear agreement on several elements: the perpetrators, the victim, the type of act qualifying as terrorism, the motive behind it and the place and time it occurs.<sup>230</sup> Some of these elements, however, have been cause for disagreement between states, which is the reason why no universal definition of terrorism has been adopted in an international treaty yet. The most contentious issue is who can be the perpetrator of a terrorist act. Originally, terrorism referred to acts of terror committed by states against their citizens as a form of state control, for example during the Jacobins' "Reign of Terror" after the French Revolution.<sup>231</sup> Over time the focus shifted and also non-state actors were identified as committing terrorist acts. For example, the Bolshevik revolution in Russia was viewed as being run by terrorists. Also, the assassination of Archduke Franz Ferdinand in 1914 by ethnic separatists, which started the First World War, was considered terrorism. In the 1940s, Jewish extremists aiming at Israel's independence as a Jewish state assassinated the British politician Lord Moynes, the UN mediator Count Bernadotte, and executed a bombing attack on the King David Hotel in

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<sup>228</sup> These legal instruments can be accessed on the website of the United Nations Office of Counter-Terrorism under <http://www.un.org/en/counterterrorism/legal-instruments.shtml>

The concluded agreements are the following: the 1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft; the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons; the 1979 International Convention against the Taking of Hostages; the 1980 Convention on the Physical Protection of Nuclear Material; the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; the 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf; the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation); the 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection; the 1997 International Convention for the Suppression of Terrorist Bombings; the 1999 International Convention for the Suppression of the Financing of Terrorism; the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism; the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; the 2005 Protocol to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf; the 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation; the 2010 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft; the 2014 Protocol to Amend the Convention on Offences and Certain Acts Committed on Board Aircraft.

<sup>229</sup> BEN SAUL, *DEFINING TERRORISM IN INTERNATIONAL LAW*, 133 (2008).

<sup>230</sup> See Sami Zeidan, *Desperately Seeking Definition: The International Community's Quest for Identifying the Specter of Terrorism*, 36 CORNELL INT'L LJ 491, 492 (2004).

<sup>231</sup> SAUL, *supra* note 233, at 1.

Jerusalem. All these incidents were carried out by non-state actors, which showed that terrorism was not limited to being exercised by states.<sup>232</sup>

During the Cold War, the international community was split into two factions on this issue. The US and the USSR both secretly supported revolutionary movements aimed at overthrowing their respective opponent.<sup>233</sup> They feared that this meddling in the internal affairs of other states would be labelled as terrorism if the definition was to include acts by states. Therefore, they opposed the inclusion of states as possible perpetrators, while those countries at the receiving end of this interference were in favor of qualifying these acts as terrorism. At the same time, the Third World was struggling to free itself from colonial rule and to fight for every nation's right to self-determination. This right was successfully included in Article 1 of the ICCPR in 1966 and in the Declaration of Principles of International Law Governing Friendly Relations in 1970<sup>234</sup>. When it came to the question of including the conduct of non-state actors in the definition of terrorism, the states that had been affected by colonial rule were worried that the fight for national liberation could be qualified as terrorism.<sup>235</sup> Thus, they wished for a clear exclusion of acts related to the right to self-determination, while the colonial states had an interest in refusing this distinction in order to label any rebellious attacks against their rule as terrorism.

Other elements of the definition of terrorism were also subject of discussion. For example, it needs to be determined whether there are any limitations on the targets of terrorist attacks. Who is the enemy of terrorism? Does it refer to attacks against state institutions and its personnel, or does it target society and refers to violence against civilians?<sup>236</sup> Do only acts which cause serious bodily harm to a large group of civilians count as terrorism, or is damage to property sufficient to qualify a crime as terrorism? There are no straightforward answers to these questions and the Conventions on

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<sup>232</sup> *Id.* at 2.

<sup>233</sup> Zeidan, *supra* note 234, at 495.

<sup>234</sup> Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625, Annex, U.N. GAOR, 25<sup>th</sup> Sess., Supp. No. 28, U.N. Doc. A/5217 at 121 (1970).

<sup>235</sup> Aiken, *supra* note 230, at 56.

<sup>236</sup> Cyrille Begorre-Bret, *The Definition of Terrorism and the Challenge of Relativism*, 27 CARDOZO L. REV. 1987, 1989 (2006).

terrorist related acts differ on these points.<sup>237</sup> Apart from these objective elements of the crime of terrorism, states also have to agree on the subjective aspects of it. Terrorist attacks differ from ordinary crimes because there is a certain motivation behind it. Sometimes the attackers try to coerce the leaders of a state into acting a specific way.<sup>238</sup> In other occasions the aim is to take revenge for certain political acts by the states or to spread fear among the population. It lies upon the international community to decide in how far a certain motivation is required to fulfill the elements of the crime of terrorism.

Theoretically, it should be possible to find an agreement on all these elements in order to create a general definition of terrorism. However, the problem in this context are the political interests of the states involved that influence their decision making. Every state prefers to shape the definition of terrorism in a way that ensures its own conduct will not fall under the definition but the acts of the groups or states they consider their opponents will.<sup>239</sup> The danger with such a highly political concept like terrorism is that it can easily be abused to delegitimize the political opponents of a state and that it can be used to stigmatize and morally judge certain groups.<sup>240</sup> Therefore, the stakes are high with regards to finding a general definition. There must not be any artificial distinctions between certain perpetrators in order to avoid creating double standards. But at the same time, it needs to consider certain struggles that should not fall under the definition of terrorism as they are a form of legitimate violence, such as the right to self-determination or the right to self-defense. A rebellion against a cruel dictator, for instance, can be seen as a struggle for freedom or as a terrorist attack against a rightful government. The international law scholar Ben Saul described the essence of the problem: “There are no clean lines between terrorism and other forms of political violence, and the debate about defining terrorism is also a debate about the classification of political violence in all its myriad forms: riot, revolt, rebellion, war, conflict, uprising, revolution, subversion, intervention, guerilla warfare, and so on.”<sup>241</sup>

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<sup>237</sup> Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, 29 BC INT’L & COMP. L. REV. 23, 53-55 (2006).

<sup>238</sup> Begorre-Bret, *supra* note 240, at 1995.

<sup>239</sup> *Id.* at 1994.

<sup>240</sup> SAUL, *supra* note 233, at 3.

<sup>241</sup> *Id.* at 5.

These underlying political motives, which states bring to the bargaining table, stand in the way of finding a definition of terrorism that fulfills the requirement of the legal discourse of being precise, objective and certain enough.<sup>242</sup>

The non-existence of a universal definition of terrorism leaves states plenty of room to determine for themselves what they consider a terrorist act. As a consequence, no two anti-terrorism law look exactly the same as states opt to use the term terrorism in different ways.<sup>243</sup> The UK, for instance, opted for a very broad domestic definition and considers every individual to be a terrorist who has links to a terrorist group through supporting or assisting it.<sup>244</sup> In the US, supporting somebody who plans to commit a terrorist act through material support or funding, counts as personally engaging in terrorist activity.<sup>245</sup> Often states even use varying definitions in different legal fields within their domestic law.<sup>246</sup> This increases the fragmentation of the terrorism definition and shows how far we are from developing a global consensus if there is not even a uniform definition of the term on a national level. For example, in Canada Section 19 of the Immigration Act refers to the term terrorism as one of the reasons a person would be inadmissible in Canada and refugee status would be denied.<sup>247</sup> However, the Immigration Act does not include a definition of what acts exactly would fall under the expression “engage in terrorism”.<sup>248</sup>

As mentioned at the beginning of this chapter, the Canadian Supreme Court had to deal with this problem in *Suresh* as the security certificate for Suresh’s deportation was based on precisely the accusation of Suresh engaging in terrorism. The Court did not attempt to provide a general definition of terrorism and instead referred to General Assembly Resolution 54/109 from 1999 which adopted the International Convention for the Suppression of the Financing of Terrorism. It defined terrorism as a crime falling in the scope of one of nine treaties annexed to the resolution that dealt with the

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<sup>242</sup> See Saul, *supra* note 233, at 4.

<sup>243</sup> For a detailed comparison of terrorism related legislation in different countries see Ben Golder & Williams George, *What is Terrorism - Problems of Legal Definition*, 27 U.N.S.W.L.J 270 (2004).

<sup>244</sup> Asha Kaushal & Catherine Dauvergne, *The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions*, 23 INTERNATIONAL JOURNAL OF REFUGEE LAW 54, 68 (2011).

<sup>245</sup> *Id.* at 89.

<sup>246</sup> Ben Saul, *Civilising the Exception: Universally Defining Terrorism, in POST 9/11 AND THE STATE OF PERMANENT LEGAL EMERGENCY* 79, 83 (Ancieto Masferrer ed., 2012).

<sup>247</sup> *Suresh*, *supra* note 1, at para. 24.

<sup>248</sup> *Id.* at para. 93.

illegality of specific terrorist acts.<sup>249</sup> From this the Court deducted that terrorism in the Immigration Act shall mean any “act intended to cause death or serious bodily injury to a civilian [...] when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act”.<sup>250</sup> According to the Court, this would provide enough information on how to adjudicate cases of terrorism. Therefore, it declared the term terrorism precise enough to be constitutional.<sup>251</sup>

It is peculiar that in this context the Court relied on international law, more specifically the above mentioned General Assembly Resolution, to determine that the term terrorism is not too vague. As I have illustrated in this chapter, the term terrorism is inherently vague and lacks a clear definition in international law. It is susceptible to being manipulated for political reasons, a fact that the Court acknowledged in *Suresh*.<sup>252</sup> Furthermore, when it came to the absolute prohibition of torture, the same Court refused to resort to international law in its judgement. It ignored the fact that Canada is bound to the CAT as it ratified the Convention. Instead, it only accepted domestic law as basis to examine the legality of refoulement to torture. Following this logic, the Court should have had only considered the Immigration Act in its interpretation, which does not provide a definition of terrorism that would make it possible to clearly qualify Suresh’s behavior as engaging in such acts. A strong and well-established provision of *ius cogens* character like the absolute prohibition of torture was not enough for the Court to declare the illegality of refouling somebody to torture. But at the same time the vague and unclear definition of terrorism in international law was sufficient to trigger the refoulement of Suresh.

As long as there is no clear definition of terrorism and exact guidelines how to qualify someone’s behavior as falling under it, any law dependent on it is prone to manipulation and to be used for disposing of political opponents. Measures that infringe essential human rights, like refoulement to torture, must not be based on such an imprecise term. Due to its vagueness, it is not clear how far governments and courts

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<sup>249</sup> *Id.* at para. 96.

<sup>250</sup> *Id.* at para. 98.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at para. 97.

may go in interpreting it. This can become problematic in the application of the law, as has been shown in *Suresh* with regards to two issues: Can a threat against another country indirectly constitute a threat to Canada's security and thus qualify as an act of terrorism? And what degree of association to a terrorist organization is required to label Suresh as a terrorist and justify his refoulement?

### **B. Direct or Indirect Threats**

The security certificate against Suresh regarded him as a danger to national security for being a fundraiser for the World Tamil Movement, which is associated with the LTTE.<sup>253</sup> It was based on the opinion of the Canadian Security Intelligence Service that the LTTE was a terrorist organization, although it operates only in Sri Lanka and its purpose is to support the Tamils in the ongoing civil war.<sup>254</sup> How can the LTTE be a threat to Canada's security if its operations are limited to the domestic armed conflict in Sri Lanka?

The Canadian Supreme Court accepted that the most qualified refugee scholars are of the opinion that there needs to be a direct connection between the terrorist act and the security of the host country. Also, the *travaux préparatoires* of the Refugee Convention suggest that threats to the security of another state are not sufficient to trigger refoulement.<sup>255</sup> However, the Court claimed that after the events of 2001 this is no longer accurate and indicated that an indirect threat is already enough to endanger Canada's security, as terrorism is a worldwide phenomenon.<sup>256</sup> It concluded that there "must be a real and serious possibility of adverse effect to Canada. But the threat need not be direct; rather it may be grounded in distant events that indirectly have a real possibility of harming Canadian security."<sup>257</sup>

Several issues arise from this statement. As Lauterpacht and Bethlehem already established, interpreting the Refugee Convention's exception to non-refoulement so generously that possible threats to other countries or the international community

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<sup>253</sup> Audrey Macklin, *Mr. Suresh and the Evil Twin*, 20 REFUGEE: CANADA'S JOURNAL ON REFUGEES 15, 16 (2002).

<sup>254</sup> *Suresh*, *supra* note 1, at para. 10.

<sup>255</sup> *Id.* at para. 86. Hathaway & Harvey, *supra* note 18, at 289-90.

<sup>256</sup> *Suresh*, *supra* note 1, at para. 88.

<sup>257</sup> *Id.*

would suffice, is inconsistent with the purpose of this exception.<sup>258</sup> Provisions like Article 33(2) of the Refugee Convention were introduced to allow countries of refuge to return refugees that directly threaten states' security and population. There is consensus between the refugee law scholars Bruin, Wouters, Hathaway, and Harvey, that it was not right for the Court to simply assume that there might be "adverse repercussions" for Canada through the individual's behavior to support a terrorist group abroad, but instead Article 33(2) would require a clear proof of a negative impact on Canada's international relations or welfare.<sup>259</sup> Secondly, threats to other states can be dealt with through other means, less extreme than refoulement to torture. Suspects can be detained and prosecuted in front of domestic courts to establish their involvement in terrorist acts. Deporting a refugee such as Suresh would actually increase the danger to Canada. The conflict he is allegedly involved in so far only takes place in Sri Lanka between the government and the Tamil minority. If Canada interferes by refouling a refugee to torture, it is taking a side in this conflict. Returning rebel fighters to Sri Lanka, where they had been persecuted and tortured, is equal to officially opposing the LTTE, which as a consequence might choose Canada as a target of its operations to take revenge. In this sense, the state's security would be better protected through keeping Suresh in Canadian control and prosecuting him than by resorting to refoulement.<sup>260</sup> Thirdly, the Court failed to mention how exactly Suresh poses an indirect threat to Canada. There were no explanations in the judgement on how the situation in Sri Lanka, and Suresh's involvement in it, will cause serious harm to his country of refuge. It is not very likely that any armed attacks will be carried out against the Canadian population or its democratic institutions. Therefore, the fundraising activities of Suresh are far from constituting a "real and serious possibility of adverse effect to Canada",<sup>261</sup> which the Court had asked for.

All these considerations do not only apply to *Suresh* in specific, but are relevant for all cases of refoulement based on security reasons. The Canadian Supreme Court raised a valid point in claiming that the security interdependence of states can cause events in

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<sup>258</sup> Lauterpacht & Bethlehem, *supra* note 7, at para. 165. Also Goodwin-Gill agrees with this view in GOODWIN-GILL & MCADAMS, *supra* note 17, at 236.

<sup>259</sup> Bruin & Wouters, *supra* note 131, at 18. Hathaway & Harvey, *supra* note 18, at 290.

<sup>260</sup> Okafor & Okoronkwo, *supra* note 94, at 39.

<sup>261</sup> *Suresh*, *supra* note 1, at para. 88.

one country to have negative effects on another country.<sup>262</sup> When assessing the threat emanating from an asylum seeker or refugee, courts will inevitably face the question of how direct the danger to the country of refuge needs to be in order to justify a deportation. Even though governments might show a tendency to interpret the concept of threat widely to include indirect threats, the above described counter-arguments still apply. Classifying a threat against another country as sufficient to justify refoulement, is against the purpose of Article 33(2) of the Refugee Convention. It is necessary to provide adequate evidence that an individual's behavior has a direct negative impact on the security of the country of refuge, only then the exception to non-refoulement may apply (if no other issues, such as a risk of torture upon return, stand in the way).<sup>263</sup>

The Canadian Supreme Court's attempt to broaden the application of Article 33(2) of the Refugee Convention to include indirect threats to a state, mirrors the general trend of expanding the exclusion clauses in order to exclude terrorists from refugee protection.<sup>264</sup> Article 1F of the Refugee Convention originally does not include the term terrorism.<sup>265</sup> However, already in 1997 the General Assembly passed a resolution that created a link between refugees and the fight against terrorism. It asked states to "take appropriate measures in conformity with the relevant provisions of national and international law [...] before granting refugee status, for the purpose of ensuring that the asylum-seeker has not participated in terrorist acts."<sup>266</sup> Also it confirmed that acts of terrorism are "contrary to the purposes and principles of the United Nations."<sup>267</sup>

The exclusion grounds in Article 1F are an exhaustive enumeration and no further reasons can be added.<sup>268</sup> Thus, states try to fit terrorist acts under the existing categories. A terrorist can be excluded under Article 1F(a) if his acts amount to a crime against peace, a war crime or a crime against humanity, as defined in international

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<sup>262</sup> Okafor & Okoronkwo, *supra* note 94, at 38.

<sup>263</sup> See *supra* notes 262&263.

<sup>264</sup> For statistics on the increase in exclusion cases in Canada between 1998 and 2008 see Kaushal & Dauvergne, *supra* note 248, at 60.

<sup>265</sup> See chapter II.A.1.

<sup>266</sup> Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, para. 3, annexed to G.A.Res. 51/210, U.N. GAOR, 51<sup>st</sup> Sess., U.N.Doc. A/RES/51/210 (Dec. 17, 1996).

<sup>267</sup> *Id.* at para. 2.

<sup>268</sup> Sameera Singh, *Will Acceptance of a Universally Approved Definition of Terrorism Make Article 1 F of the 1951 Refugee Convention More Effective in Excluding Terrorists*, 2 J. MIGRATION & REFUGEE ISSUES 91, 95 (2006).



instruments such as the Rome Statute of the International Criminal Court.<sup>269</sup> Sub-section (b) excludes individuals who have committed a serious non-political crime outside the country of refuge prior to admission. This ground has been cause for debate in the international community. It has been argued that a terrorist might be able to escape this exclusion clause by claiming s/he had political motives for their crime.<sup>270</sup> However, there are some additional requirements to be fulfilled to benefit from this excuse. The crime has to be committed out of political motives, aimed at changing the political situation in a state, and has to be proportionate. The last requirement is where acts of terrorism would fail the test. Acts of atrocious nature or highly disproportionate crimes do not qualify as political crimes.<sup>271</sup> Therefore, acts of terrorism might fall under this exclusion ground if the crime is serious enough. The last category, 1F(c), leaves the most room for interpretation. It excludes individuals who have been guilty of acts contrary to the purposes and principles of the United Nations. There are countless acts which could be contrary to the purposes of the United Nations, for example violations of human rights by policy makers or individuals who participated in persecution. Also, the UN made it its goal to fight against drug trafficking, to promote democracy, and to oppose colonialism, to only name a few. Any person acting against these purposes could fall under this exclusion clause.<sup>272</sup> The aforementioned General Assembly Resolution opened the door for states to use 1F(c) to exclude anyone suspected of terrorism. Indeed, there is a clear trend towards frequently referring to this article with regards to anti-terrorism measures,<sup>273</sup> which now also makes the exclusion clauses more susceptible to abuse by governments to target opposition groups.<sup>274</sup>

There are three points of critique against such developments. Firstly, it created the impression that refugee law and terrorism are inevitably connected, whereas entering a state illegally or on a student or work visa is much easier for a potential terrorist than going through the refugee status determination process.<sup>275</sup> Also, it is equally possible

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<sup>269</sup> Rome Statute of the International Criminal Court, signed 17 July 1988, 2187 U.N.T.S. 3, entered into force July 1, 2002.

<sup>270</sup> Michiael Kingsley Nyinah, *Exclusion Under Article 1F: Some Reflections on Context, Principles and Practice*, 12 INT'L J. REFUGEE L. 295, 311 (2000).

<sup>271</sup> GOODWIN-GILL & MCADAMS, *supra* note 17, at 177.

<sup>272</sup> *Id.* at 189-90.

<sup>273</sup> *Id.* at 190.

<sup>274</sup> Singh, *supra* note 272, at 96.

<sup>275</sup> Kaushal & Dauvergne, *supra* note 248, at 68.

that a terror attack is committed by a citizen of the state at risk, not by a migrant. Secondly, it increased the risk that somebody suspected of engaging in terrorism will be automatically excluded merely based on the UN Resolutions without an exact application of the exclusion clauses' wording.<sup>276</sup> And thirdly, there is again the possibility of politics influencing what are supposed to be legal and objective decisions. This is due to the political implications with regards to defining terrorism, as described above under chapter IV.B. and the problematic aspects of determining the necessary degree of association to a terrorist organization which will be discussed in the following section.

### **C. Guilt by Association?**

The Security Certificate which had been issued against Suresh stated that, according to the Canadian Security Intelligence Service, the LTTE is engaged in terrorist activity in Sri Lanka and operates in Canada under the cloak of the World Tamil Movement (WTM). Suresh is a member of these organizations and thus a threat to national security.<sup>277</sup> In his defense, Suresh argued that he has only been engaged in fundraising activities and not involved in any actual terrorist acts.<sup>278</sup> The questions arising from this are the following: Is Suresh's mere membership sufficient to link him to the terrorist activities carried out by the LTTE and to identify him as a danger to Canada? And what degree of association to a terrorist organization is necessary to make an individual responsible for the terrorist acts of the group?

When states opt for a too broad definition of who counts as engaging in terrorism, they might include individuals whose conduct is not even remotely dangerous or significant enough to justify being labelled a security threat. Hathaway gives striking examples that show the extreme level such an approach can reach. For example, the US Supreme Court stated that teaching the Kurdistan Workers' Party how to submit a petition with the UN already counts as illegal support to a terroristic group. Citing Fullerton,<sup>279</sup> he remarks that in line with this argument, even lending a bicycle to Nelson Mandela

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<sup>276</sup> *Id.*

<sup>277</sup> *Suresh, supra* note 1, at para. 10.

<sup>278</sup> *Id.* at para. 100.

<sup>279</sup> Maryellen Fullerton, *Terrorism, Torture, and Refugee Protection in the United States*, 29 REFUGEE SURVEY QUARTERLY 4, 16 (2010).

would have been qualified as material support to a terror organization at the time the African National Congress was forbidden under the apartheid regime.<sup>280</sup> Merely this loose association to organizations which are forbidden by their respective states, is considered sufficient proof for engaging in terrorism. This contradicts the principle that every refugee should receive an individual assessment concerning his/her refugee status or the denial of it, not an assessment based on acts committed by others. To avoid any arbitrary conduct in the refoulement process, it would have been necessary to evaluate Suresh's individual behavior to see if he had intent to further the LTTE's terrorist activities. However, regardless of how an evaluation of Suresh would end, whether he knowingly supported terrorist acts or not, the issue at hand is much bigger than Suresh.

It is a general trend that states are widening the net for who qualifies as a terrorist. An example for this is the law on Providing Material Support to Terrorists in Title 18 of the US Code on Crimes and Criminal Procedure,<sup>281</sup> that has been subject to significant changes over the past years. When it was first enacted in 1994, it outlawed the support of terrorists through directly providing them with weapons or money. However, it also included two exceptions: humanitarian assistance and support for the "nonviolent political, religious, philosophical, or ideological goals or beliefs of any person or group" were not forbidden under this law.<sup>282</sup> If the supported organization engaged in terrorist and non-terrorist activities, then the prosecution had to prove that the defendant had the intent to support terrorism. This additional requirement and the exception for nonviolent activities were removed in an amendment in 1996. In 2001, the Patriot Act expanded the dragnet and added "expert advice or assistance" to the outlawed ways of supporting a terrorist group. It was unclear what conduct would exactly fall under this description. The case of Sami Omar Al-Hussayen's was the first to be based on this provision and it shows how these types of laws further the risk of suspecting innocents of having ties to terror organizations.<sup>283</sup>

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<sup>280</sup> HATHAWAY & FOSTER, *supra* note 13, at 560.

<sup>281</sup> Providing Material Support to Terrorists, 18 U.S.C. § 2339A (2009). [hereinafter, *Material Support law*] Available at <https://www.law.cornell.edu/uscode/text/18/2339A>

<sup>282</sup> SUSAN HERMAN, TAKING LIBERTIES: THE WAR ON TERROR AND THE EROSION OF AMERICAN DEMOCRACY 30 (2011).

<sup>283</sup> *Id.* at 30.

Al-Hussayen was a PhD student with Saudi Arabian citizenship who had been living in Idaho in the US for five years with his wife and three sons while completing his degree in computer studies.<sup>284</sup> In 2004, he was accused of providing material support and resources to persons engaged in acts of terrorism and terrorist organizations and put to trial.<sup>285</sup> Al-Hussayen had been volunteering as webmaster for the Islamic Assembly of North America which runs a website to aimed at spreading knowledge of Islam. As part of his work he set up links to different sources on Islam and contemporary political issues in connection to it.<sup>286</sup> In the FBI's theory, Al-Hussayen's PhD studies were only a cover for his mission to raise money for terrorist organizations.<sup>287</sup> In February 2003, hundreds of state officials stormed the campus at 4am, arrested Al-Hussayen and questioned all other Arab students threatening them with withdrawal of their student visa if they did not cooperate.<sup>288</sup> For seventeen months the defendant was locked up in a cell in solitary confinement while the FBI gathered further evidence to open a trial on terrorism-related charges, claiming that the website he had worked on encouraged financial contributions to terror organizations such as Hamas and Al Qaeda.<sup>289</sup> The prosecution argued that the website in question had previously provided links to other websites asking for donations to organizations like Hamas and insisted that it was irrelevant whether the defendant intended to support terrorism or not. According to the amended material support law, this was a correct view. However, the jury decided that the prosecution provided no evidence to sufficiently substantiate the charges of material support.<sup>290</sup>

In connection with the allegations against Al-Hussayen, the FBI arrested another suspect based on farfetched accusations: Abdullah Al-Kidd. Al-Kidd was born under the name Lavoni T. Kidd in Kansas as a US citizen (both his parents were US citizens too), attended the university of Idaho at the same time as Al-Hussayen and was a

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<sup>284</sup> *Id.* at 26.

<sup>285</sup> United States v. Sami Omar Al-Hussayen, Case No. 3:03-cr-00048-EJL, United States District Court for the District of Idaho, 2004, *available at* <http://news.findlaw.com/hdocs/docs/terrorism/usalhussyn304sind2.pdf>

<sup>286</sup> Herman, *supra* note 286, at 26.

<sup>287</sup> *Id.* at 27.

<sup>288</sup> *Id.* at 28.

<sup>289</sup> *Id.* at 29.

<sup>290</sup> *Id.* at 31. *See also* Offices of the United States Attorneys Criminal Resource Manual on 18 U.S.C. §2339A *available at* <https://www.justice.gov/usam/criminal-resource-manual-15-providing-material-support-terrorists-18-usc-2339a>

successful football player for the university team. During his college time, he converted to Islam and changed his first name to fit his new religion. In 2003 he was granted a scholarship at a Saudi Arabian university to study Arabic and Islamic law but shortly before his departure he was arrested at the airport.<sup>291</sup> The allegations against him were that he had met with other Arab students at the university who also knew Al-Hussayen, that he was involved in one financial transaction with Al-Hussayen and had been in touch with the Islamic charity for which Al-Hussayen had worked as a webmaster. As a matter of fact, Al-Kidd was never charged with any specific crime.<sup>292</sup> Despite this, he was detained in a high-security prison for sixteen days where he was subjected to harsh treatment. “He was strip searched [...] denied showers, denied visits by his family, and barely able to sleep under the bright lights that shone twenty-four hours a day.”<sup>293</sup> The FBI justified his arrest by claiming the prosecution had planned to call him as a witness in the Al-Hussayen case but Al-Kidd was about to leave the country. What the agent missed to mention was that Al-Kidd had a wife and children in the US that he would have had returned to after his studies, he had never been informed that his journey to Saudi Arabia might cause any problems, and as he had cooperated with the FBI previously he would have been willing to stay in the US and voluntarily appear as a witness.<sup>294</sup> It is more likely that Al-Kidd had been detained this way due to his suspected association with a terrorist organization merely based on his acquaintance with Al-Hussayen.

From the point of view of the state, such a broad provision like the current form of the Material Support Law<sup>295</sup> might be a desirable tool. Between 2001 and 2006 the material support charge was frequently used, and was the top charge in 162 federal prosecution cases.<sup>296</sup> Not having to clearly prove an intent to support terrorism and being able to base charges on such a loose connection to terrorist activities, as seen in Al-Hussayen’s webmaster task, might help the prosecution to catch terrorists who could not be indicted otherwise. But at the same time, there is a high risk of innocent individuals being caught up in the net of being associated with terrorist organization. In the case of Al-Hussayen

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<sup>291</sup> *Id.* at 33.

<sup>292</sup> *Id.* at 34.

<sup>293</sup> *Id.* at 33.

<sup>294</sup> *Id.* at 35.

<sup>295</sup> *Material Support Law*, *supra* note 285.

<sup>296</sup> Herman, *supra* note 286, at 37.

he was lucky to have been acquitted by the jury. Nevertheless, he had been wrongly imprisoned for more than a year, his wife had to leave the US with the three children and return to Saudi Arabia due to immigration law issues based on the allegations against her husband, and ultimately Al-Hussayen also left the US without completing his PhD.<sup>297</sup> Al-Kidd never got a trial to clear his name from the mark the arrest left on him. It was difficult to find a job due to being considered a criminal, he lost his university scholarship and suffered from medical problems as a result of these events.<sup>298</sup> This is a high price these two men had to pay and shows how problematic a too broadly phrased law can be. It brings with it the risk of criminalizing individuals who are not associated with a terrorist organization.

In Canada, the Anti-Terrorism Act, which was introduced shortly after the events of 9/11, provided a tautological definition for a terrorist group and described it as an “entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity.”<sup>299</sup> Such a group does not even have to have committed a terrorist act by itself, being associated with an entity that has or will engage in terrorism is enough to be indictable. This extends criminal liability beyond personal conduct and knowledge and makes it possible to be guilty of terrorist charges for mere association.<sup>300</sup> This brings with it the same difficulties and risks I have just described with regards to the US legislation on association with terrorist organizations. For practical purposes the Canadian government maintains a list of terrorist entities. The Federal Cabinet decides on which organization to include on the list whenever there are “reasonable grounds to believe that a) the entity has knowingly carried out, attempted to carry out, participated in or facilitated terrorist activity; or b) the entity is knowingly acting on behalf of, at the direction of or in association with an entity referred to in paragraph (a)”.<sup>301</sup> Also in this context there is a risk of errors when a group is mistakenly put on the list. This can have severe consequences for the entity as it will be labelled as a terrorist organization and people will keep their distance from it out of fear of being associated with terrorism. There are not many safeguards in place

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<sup>297</sup> *Id.* at 32.

<sup>298</sup> *Id.* at 34.

<sup>299</sup> KENT ROACH, SEPTEMBER 11: CONSEQUENCES FOR CANADA, 36 (2003).

<sup>300</sup> *Id.* at 36.

<sup>301</sup> *Id.* at 37.

to prevent this from happening. The Cabinet decides on new entries to the list without any judicial supervision, and afterwards there are only limited grounds for a review in front of the Federal Court. A judge will decide based on the information which is available to him/her whether the adding an entity to the list is justified. It is problematic that the government does not have to disclose all the information it used for its determination.<sup>302</sup> A number of organizations, among them charity or labor organizations for instance, have expressed their concern about ending up on the list undeservedly. Then they would have to invest a lot of money and time to fight in front of a court to be taken off again, after being publicly stigmatized as a terrorist entity.<sup>303</sup>

Currently there are 53 organizations listed as terrorist groups with the earliest entries from the year 2002.<sup>304</sup> It is interesting to note for the case of Suresh, that the LTTE was added to the list only in April 2006, four years after the Supreme Court decision. The World Tamil Movement was identified by the Federal Cabinet as a front organization of the LTTE, as raising funds on its behalf and as resorting to measures of intimidation and extortion to collect these funds. However, it was added to the list even later than the LTTE, namely in June 2008.<sup>305</sup> This means that at the time *Suresh* was decided, in January 2002, the Anti-Terrorism Act was already in place but the LTTE and the WTM were far from being listed as one of the terrorist entities. It remains unclear why so many years passed after the Supreme Court, and the lower instances and immigration officials before it, declared those two organizations to be terrorist organizations. Maybe the evidence the Canadian Security Intelligence Service had against the WTM was not as strong as originally assumed. This weakens the argument that Suresh is a terrorist merely through to his membership to these groups. Especially as during the proceedings concerning the security certificate the immigration officer acknowledged that Suresh personally had not committed any violent acts in Canada or Sri Lanka.<sup>306</sup>

When there is such a discrepancy, that an individual is a member of a terrorist organization or at least associated to it, but never engaged in any terrorist acts

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<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 60-63.

<sup>304</sup> Listed Terrorist Entities, available at <https://www.publicsafety.gc.ca/cnt/ntnl-scert/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-en.aspx#2038>

<sup>305</sup> List of terrorist entities, *supra* note 308.

<sup>306</sup> *Suresh*, *supra* note 1, at para. 16.

him/herself, it raises the question whether mere membership or affiliation to a certain group is enough to presume that s/he poses a risk.<sup>307</sup> We have seen in the cases of Al-Kidd and Al-Hussayen that only relying on the association to a group, without considering the individual behavior, can be cause for wrongly stigmatizing somebody as terrorist. In order to take the different nuances of degree of association into account, it can be helpful to differentiate between three types of organizations: Firstly, the “typical” terrorist organization which has as its sole purpose to commit terrorist acts. Secondly, ancillary organizations, that act in association with the previous category of organizations and indirectly assist in terrorist acts. And thirdly, so-called dual purpose organizations which

in addition to illegal activities also follow legitimate purposes.<sup>308</sup> When somebody is a member of the first group, which without a doubt commits terrorist acts to achieve its goals, then it is clear that the individual is engaging in terrorism, regardless of whether s/he is actively involved in the act or just passively supporting it through the membership.<sup>309</sup> With the other two categories things are more complex. It is possible that these groups have sub-division that follow civil purposes and are not engaged in any terrorist activities. If for example a teacher decides to work for a school run by a charity organization associated with a terrorist entity, or if a dual-purpose group has a sub-division running hospitals and a doctor decides to work there as a volunteer to help the poor, then these people cannot automatically be regarded as terrorists. To avoid any mistakes from happening, mere association should not suffice as proof but additional evidence concerning the individual behavior and intent and knowledge of the suspect should be required to determine whether s/he is engaging in terrorist activities.

The above examples made clear why states should avoid legislation which makes it possible to accuse almost anyone of having ties to terrorist association. Using laws which disregard the different degrees of association to an organization, but automatically declare somebody guilty by association, are prone to lead to misjudgments. They lead to situations where a simple act like buying something at a

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<sup>307</sup> HATHAWAY, *supra* note 4, at 348. WOUTERS, *supra* note 59, at 113.

<sup>308</sup> Liat Levanon, *Criminal Prohibitions on Membership in Terrorist Organizations*, 15 NEW CRIMINAL LAW REVIEW: AN INTERNATIONAL AND INTERDISCIPLINARY JOURNAL 224, 228 (2012).

<sup>309</sup> *Id.* at 256.



charity bazaar to support a suppressed minority in a certain country could suddenly qualify as terrorism, if the organization behind the bazaar has ties to a group using violence in that struggle abroad. This causes a very high level of legal uncertainty and makes it impossible for citizens to foresee which acts could possibly bring them in connection with terrorism. Introducing more detailed guidelines on how to evaluate different degrees of association and to require thorough evidence on the individual's role with regards to the terrorist entity or his/her intent, can help to avoid wrong accusations. In addition, it will not only protect innocents but with the additional evidence requirements it will also be possible to clearly identify those who are really involved in terrorist attacks. Therefore, creating laws which are less broad and do not rely on vague terms, does not stand in the way of combatting security threats but actually improves the safety of a state's citizens.

## V. Alternative Ways of Protecting Security Interests

As seen in the previous chapters, some states consider refoulement the ideal way of dealing with a security threat. They focus only on Article 33(2) of the Refugee Convention and their corresponding domestic legislation to justify this measure even in cases where refugees would be refouled to a risk of torture. However, Article 5 of the Refugee Convention states that “nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.” This confirms that states have to consider their obligations under international human rights treaties when dealing with this issue. For example, Article 3 of the CAT, Article 3 of the ECHR, or Article 7 of the ICCPR all clearly forbid states to refoule somebody to a risk of torture.<sup>310</sup> I argued in chapter three that all states are bound by the absolute prohibition of torture and the principle of non-refoulement to torture due to it being a norm of *ius cogens*. Therefore, refouling any person to torture in order to protect national security interests is not a legal option to address security threats, even if there is no alternative available to address the security issue.

However, when a refugee is suspected of being a security threat, there is an alternative to refoulement to torture: domestic prosecution. For example, the fundraising activities of Suresh could have fallen under the International Convention for the Suppression of the Financing of Terrorism,<sup>311</sup> which under its Article 4 obliges States Parties to create corresponding criminal offences under its domestic law.<sup>312</sup> Canada is a State Party to this Convention and could have prosecuted Suresh under the corresponding domestic provision in its criminal law. If found guilty, he would have received a prison sentence and would no longer be a threat to national security. This way the state protects its security interests without violating its human rights obligations. Even though the Court in *Suresh* regarded refoulement to torture as the right solution to ensure that Canada does not become a safe haven for terrorists, this does not automatically mean that it is the only option to protect the state.<sup>313</sup> When it comes to nationals being suspected of

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<sup>310</sup> See chapter II for details on these norms and chapter III on the status of Article 3 of the CAT as international customary law.

<sup>311</sup> International Convention for the Suppression of the Financing of Terrorism, *signed* 9 Dec. 1999, 2178 U.N.T.S 197, *entered into force* April 10, 2002.

<sup>312</sup> Bruin & Wouters, *supra* note 131, at 28.

<sup>313</sup> *Suresh*, *supra* note 1, at para. 58.

terrorist acts, a domestic trial and imprisonment are considered sufficient to neutralize the threat they are posing. In these cases, the defendant will receive an appropriate sentence according to national criminal law, depending on the seriousness of the crime and this is accepted as protecting a country's population from any security threats. Why should this not apply to refugees too?

States will argue that it is possible to differentiate between residents of a state based on their nationality, especially with regards to expulsion. States have the right to decide freely over who they grant entry into their territory as part of their sovereignty, thus they can deport aliens in accordance with their national laws.<sup>314</sup> Citizens, on the other hand, benefit from their right not to be expelled from their country of nationality, even if they committed a crime. Therefore, domestic prosecution is the only possible option to combat terrorist threats emanating from nationals.<sup>315</sup> This distinction between citizens and non-citizens is in accordance with international law. For example, the International Convention on the Elimination of All Forms of Racial Discrimination forbids all types of racial discrimination "based on race, colour, descent, or national or ethnic origin".<sup>316</sup> However, Article 1(2) clearly states that the Convention does not apply to distinctions made between citizens and non-citizens.<sup>317</sup> Also, Article 13 of the International Covenant on Civil and Political Rights<sup>318</sup> allows for the expulsion of aliens lawfully in the country out of reasons of national security. Therefore, it is legal for states to deport foreigners to their country of origin if they have committed a crime or are considered to be inadmissible for other reasons. However, in cases of refoulement to torture the situation is different. Those refugees lost the protection of their country of origin and will not receive a fair trial for their crimes there, instead they face the risk of torture. In this context, the absolute prohibition of torture restricts

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<sup>314</sup> Veit Bader, *The ethics of immigration*, 12 CONSTELLATIONS 331, 334 (2005).

<sup>315</sup> JEAN-MARIE HENCKAERTS, MASS EXPULSION IN MODERN INTERNATIONAL LAW AND PRACTICE, 22 (1995).

<sup>316</sup> International Convention on the Elimination of All Forms of Racial Discrimination, *signed* 21 Dec. 1965, 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969. [hereinafter, CERD] Article 1(1): In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

<sup>317</sup> CERD, *supra* note 320, at Art. 1(2): This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.

<sup>318</sup> ICCPR, *supra* note 74.

a state's right to deport a non-citizen as it is a non-derogable norm. The only way to contain the security threat without violating this *ius cogens* provision is to try the suspect domestically.

There are several arguments in favor of opting for domestic prosecution. Firstly, opting for the domestic prosecution of a refugee suspected of terrorism does not cause any disadvantage or additional risk to the state but helps to contain a possible threat. Okafor and Okoronkwo illustrate accurately how arbitrary the differentiation based on citizenship is. Let us assume that a Sri Lankan married couple comes to Canada to study for a few years. During their stay, a son is born who receives Canadian citizenship. Shortly afterwards they return to live in Sri Lanka and have a daughter. Many years later the family returns to Canada as refugees but the two grown up children had engaged in activities with the LTTE and are therefore regarded as a security threat to Canada. The *Suresh* exception allows for the daughter to be refouled even if she faces torture upon return. Her brother will under all circumstances remain in Canada even if he would pose a much higher risk to the state than her.<sup>319</sup> This formalist way of differentiating between them based on citizenship not on the seriousness of risk does not contribute to protecting Canada's security.

Secondly, we could draw an analogy from the principle of *aut dedere aut judicare*, which states that when extradition (or in this case, refoulement) is not an option, then domestic prosecution is the right path to follow. The expression *aut dedere aut judicare* was coined by the famous international law scholar Hugo Grotius, though he used a slightly different phrasing.<sup>320</sup> *Dedere* refers to the practice of surrendering or extraditing an individual, while *judicare* is the stem form of the word adjudicate which in this context means to prosecute. This principle is commonly used and incorporated in over 70 international criminal law conventions.<sup>321</sup> It is aimed at "securing international cooperation in the suppression of certain kinds of criminal conduct."<sup>322</sup> It obliges states to either extradite an offender if asked for this, or in case they refuse to

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<sup>319</sup> Similar example in Okafor & Okoronkwo, *supra* note 94, at 41-42.

<sup>320</sup> Michael J. Kelly, *Cheating Justice by Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists-Passage of Aut Dedere Aut Judicare into Customary Law & Refusal to Extradite Based on the Death Penalty*, 20 ARIZ. J. INT'L & COMP. L. 491, 496 (2003).

<sup>321</sup> *Id.* at 497.

<sup>322</sup> M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW*, 3 (1995).

do so, to prosecute him/her in front of the competent court.<sup>323</sup> There is disagreement over to what extent this rule has become customary international law, and whether it includes only the most heinous crimes such as crimes against humanity or genocide, or applies to all international offenses.<sup>324</sup> It is unnecessary for the purpose of my thesis to elaborate on this debate. All the treaties concerning the suppression of terrorism include a provision resembling the following: “The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.”<sup>325</sup> This clearly refers to the principle of *aut dedere aut judicare*.

The reason behind this principle of either extradite or prosecute, is the common interest states have to suppress all forms of crime. One could also describe it as a moral and social order that all states want to achieve, and in order to do so they follow this principle.<sup>326</sup> Usually *aut dedere aut judicare* is applied when a state refuses to extradite an individual to ensure the person will not go unpunished. In the incidents of refoulement to torture, on the other hand, it is a slightly different situation. The state actually wants to deport a refugee and intends to leave it to the state of origin how to deal with the alleged terrorist. However, this is forbidden under international law due to the absolute prohibition of torture. *Aut dedere aut judicare* shows us two possible ways of how to deal with a suspected terrorist. When leaving the prosecution to another state is not an option, then the state needs to domestically prosecute the individual. This way a potential criminal does not go unpunished and the security threat will be neutralized.

Thirdly, domestic prosecution is at the moment the only possibility to ensure the suspected terrorist will not go unpunished while still ensuring his/her human rights will not be infringed. It would be desirable to prosecute terrorists on an international level

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<sup>323</sup> *Id.* at 11.

<sup>324</sup> Kelly, *supra* note 324, at 497.

<sup>325</sup> KIMBERLEY N. TRAPP, STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM: PROBLEMS AND PROSPECTS, 83 (2011). Referring to, for instance, Art. 7 Hague Convention, Art. 7 Montreal Convention, Art. 7 Internationally Protected Persons Convention, Art. 8 Hostages Convention, Art. 10 SUA Convention, Art. 8 Terrorist Bombing Convention, Art. 10. Terrorism Financing Convention, Art. 11 Nuclear Terrorism Convention.

<sup>326</sup> BASSIOUNI & WISE, *supra* note 326, at 26 & 28.

under one uniform criminal law to ensure they will receive the same fair treatment during the trial regardless of where in the world they were detained. Due to the cross-border character of terrorism, some authors suggest to expand the jurisdiction of the International Criminal Court to include acts of terrorism,<sup>327</sup> or even propose the establishment of an International Court for the Prosecution of Global Terrorists.<sup>328</sup> These are laudable propositions but unlikely to be realized due to the lack of consensus within the international community on a definition of terrorism. As there is no international court which could undertake the prosecution, it has to be done on a domestic level. Refouling the refugee to the country of origin is not an option because it would mean a violation of the absolute prohibition of torture, therefore it is left to the country of refuge to deal with the threat.

Once the state has opted for conducting a domestic trial, the court examines the evidence brought against the suspected terrorist and decides whether he is guilty of any crime or not. In case of a conviction s/he will receive the same sentence as a citizen depending on the severity of the crime. It is very important that during this process states abide by the requirements of due process even for non-nationals. Unfortunately, this does not always happen. For example, after the attacks of 9/11, the US applied much lesser standards on trials of aliens. Those foreigners accused of terrorist crimes would be tried in front of military tribunals or simply interrogated, detained and deported under immigration law.<sup>329</sup> The general public in many states often accepts or at least does not question when aliens do not get the same rights as nationals and considers treating them differently legitimate for security purposes. For instance, Dick Cheney, former Vice-President of the United States, stated that aliens threatening to kill innocent Americans “don’t deserve the same guarantees and safeguards that would be used for an American citizen”.<sup>330</sup> This is incorrect from a legal point of view. For the most part, human rights apply to citizens and non-citizens equally. Constitutions often reserve certain rights only to nationals, but these usually concern the political

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<sup>327</sup> Joseph Anzalone, *Extraordinary Times Demand Extraordinary Measures: A Proposal to Establish an International Court for the Prosecution of Global Terrorists*, 16 UC DAVIS J. INT’L L. & POL’Y 273, 338 (2009).

<sup>328</sup> *Id.* at 274.

<sup>329</sup> David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens*, 25 T. JEFFERSON L. REV. 367, 367 (2002).

<sup>330</sup> *Id.* at 367-368.

participation such as the right to vote or to run for an office. All other rights apply to citizens and non-citizens alike. For example, as stated in chapter III.A.1, the Canadian Charter applies to everyone, nationals and foreigners, to the same extent.<sup>331</sup> Also the US constitution grants most of its rights regardless of nationality. In the context of domestic prosecution of terrorists, it is important that, for instance, “the right to a public trial, a trial by jury, the assistance of a lawyer, and the right to confront adverse witnesses” apply to refugees.<sup>332</sup> Unfortunately, these rights are not always complied with.

When it comes to alleged terrorists, the United States and other countries tend to resort to harsh measures which constitute human rights violations. Extraordinary rendition became a popular practice after the attacks of 9/11, as well as the indeterminate detention of suspects in camps like Guantanamo Bay or Abu Ghraib.<sup>333</sup> The list of human rights violations taking place in these camps is long. During the interrogation of the detainees, illegal methods were used, such as waterboarding and other abusive and degrading treatment.<sup>334</sup> The US claimed that these acts were justified until the so-called ‘War on Terror’ ended.<sup>335</sup> To combat security threats, it violated fundamental human rights. Most worrying of all, many individuals were found innocent in the end. They were wrongly detained for several years based on incorrect evidence,<sup>336</sup> raising speculation about how many other cases of miscarriage of justice may have gone undetected. It is essential that domestic prosecution of refugees involved in terrorist activities observes international human rights law and abides by the requirements of due process. Otherwise, it ceases to be a legitimate alternative to refoulement to torture. When conducted with due process, domestic prosecution is the best solution to avert security threats.

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<sup>331</sup> Crepeau, *supra* note 181, at 33. There are only a few rights in the Canadian Charter reserved to citizens: the right to vote and to be elected, the right to enter his/her own country, and the right to education in the language of the minority of the province a citizen resides in.

<sup>332</sup> Cole, *supra* note 333, at 370.

<sup>333</sup> Anzalone, *supra* note 331, at 299.

<sup>334</sup> *Id.* at 300.

<sup>335</sup> Manfred Nowak, *Der Mühsame Kampf gegen die Folter*, 2 *juridikum* 60, 63 (2006).

<sup>336</sup> Anzalone, *supra* note 331, 300.

## VI. Conclusion

The *Suresh* exception is not a helpful legal tool to navigate the complex security and protection challenges in the post 9/11 era and indeed has the potential to create additional legal and protection problems. It includes many flaws that are a reflection of the era of political turmoil in which the decision took place. In a time when the focus of states is on anti-terrorism measures, not on the protection of human rights, the Canadian Supreme Court valued security interests higher than non-refoulement to torture. In face of the absolute prohibition of torture there is no room for a balancing process, and allowing for refoulement to torture under exceptional circumstances violates Canada's obligations under Article 3 of the CAT. The *Suresh* exception is setting a negative precedent. Other states try to rely on it in order to justify refoulement to torture, a conduct which further erodes the prohibition of torture, and undermines international human rights law globally. The European Court of Human Rights was so far successful in preventing the *Suresh* exception from gaining ground, at least regionally on the territory of the States Parties to the ECHR. However, governments continue to find ways around the non-refoulement rule, for example through concluding a Memorandum of Understanding with the migrant's country of origin guaranteeing s/he will not be subjected to torture. This is a troubling trend eroding human rights.

It is particularly concerning that *Suresh* takes place in a context where states are willing to sacrifice fundamental human rights for the sake of national security. Refoulement to torture and extraordinary rendition show how measures taken in the name of security can get out of hand and cross the border into illegality. These drastic infringements of human rights are built on the idea that threat to national security can justify any violations. The weakness of this argument lies in the indeterminacy of what constitutes such a threat. The international community has no uniform definition of terrorism and the political agenda of individual states stands in the way of remedying this deficiency. The vagueness of this term makes it susceptible to political manipulation for stigmatizing opponents and renders it unfit as a legal basis for the possibility of refoulement to torture. States tend to interpret all terrorism-related terms widely, for example by considering an indirect threat to the country of refuge as sufficient to



constitute a security threat. This goes against the purpose of Article 33(2) of the Refugee Convention which asks for a direct negative impact to national security to trigger the exception to non-refoulement. States also go too far in their interpretation when they consider a loose association to a terrorist entity enough to declare a person guilty of engaging in terrorism. The constant widening of the dragnet of who is considered to be a terrorist threat ultimately undermines human rights law, it opens the door for political misuse and heightens the risk of miscarriage of justice. To avoid the violation of the absolute prohibition of torture and the inherent risks presented by an undefined or vaguely defined concept of terrorism, courts should quash the possibility of refoulement to torture, as advanced in the *Suresh* exception, and instead rely on an alternative: domestic prosecution to determine whether somebody poses a security threat and in case of a guilty verdict imprisonment to contain the security threat.