DIFFERENT PERCEPTIONS OF THE OBLIGATION NOT TO *REFOULE*: THE EUROPEAN AND THE CANADIAN APPROACH

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Abstract

The existence of a variety of sources containing the *non-refoulement* principle results in differing legal positions to *refoulement* among individual jurisdictions, depending on which legal sources are applicable. The interaction between these sources is displayed in the divergent approach to the obligation not to *refoule* a person to the risk of ill-treatment between the Supreme Court of Canada and the European Court of Human Rights, as manifested in the cases *Suresh* v. *Canada* and *Saadi v. Italy*. Subsuming the prohibition to deport a person to ill-treatment under the State's negative obligation not to engage in such ill-treatment by the ECtHR is another factor explaining this divergence, as is the fundamental justice concept of the Canadian Charter of Rights and Freedoms in the Canadian context. While *refoulement* where a real risk of ill-treatment exists is absolutely prohibited under the ECHR, deportation to torture could be found as justified by the Supreme Court of Canada given exceptional circumstances.

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INTRODUCTION

The changed international security landscape after the terrorist attacks of 9/11 has led states to undertake various steps, including *refoulement* of individuals perceived to pose a threat to national security. Returning individuals is contentious especially when there is a risk that they would face ill-treatment upon return. The issue at stake is how to reconcile the protection of national security with the protection against *refoulement* to ill-treatment, and indeed, whether certain circumstances could ever justify deportation to face torture or other forms of ill-treatment.

This thesis deals with the approach of the European Court of Human Rights (ECtHR) and the Supreme Court of Canada to the issue of the legality of deportation to torture. Even though the "European approach" could refer also to the European Union jurisdiction or to the jurisdictions of individual European countries, the scope of this thesis is restricted to the ECtHR jurisdiction, with sporadic references to the UK House of Lords decisions. Canada and the ECtHR have been chosen as the leading jurisdictions for comparison because of the divergence of their attitude on this issue. As will be argued with reference especially to the case *Saadi v. Italy*[1], the ECtHR refused to adopt a balancing approach in which the risk of ill-treatment to the individual could be balanced against the threat that this person poses to national security of a state. By contrast, in the case *Suresh v. Canada (Minister of Citizenship and Immigration)*[2] the Supreme Court of Canada has showed readiness to engage in the proportionality analysis and the balancing of respective interests even as regards the right so absolute as is the right to be free from torture.

Following developments in jurisprudence in other countries is often accompanied by the use by the courts of judgments from various jurisdictions. They can be used either in

[1] *Saadi v. Italy* (Application no. 37201/06), Judgment of 28 February 2008, ECHR.
[2] Suresh *v.* Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002, SCC 1

binding or persuasive authority, i.e. they can be used either "in the context of conclusions based on authority or substantive reasoning".[3] The use of foreign judgments can serve various purposes – they can be mentioned, followed or distinguished[4] or they can be used as a warning.[5]

It is, however, also telling if the courts go silent on each other despite knowing of the developments in the other jurisdiction. This was the case between the ECHR and the Supreme Court of Canada in cases involving *refoulement*[6] and the risk of torture or other ill-treatment, as Audrey Macklin mentions - *Suresh* did not mention *Chahal* and *Saadi* did not mention *Suresh*, preventing thus any engagement with the reasoning of another court.[7] Despite this, the *Suresh* decision has been looked to especially by the UK in an attempt to incite the ECtHR to overturn its decision in *Chahal* and to change its resolute rejection of any balancing test in cases when an individual posing a national security threat might face torture or ill-treatment when deported.[8]

Responses to the changed security environment after the terrorist attacks of 9/11 came, among others, from the European Union, challenging the non-derogability of Article 3 ECHR. In the Working Document from December 2001,[9] the European Commission invited the ECtHR to reconsider the absolute nature of Article 3 ECHR. The European Commission

[3] Christopher McCrudden. "A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights." *Oxford Journal of Legal Studies*, vol. 20, no. 4 (2000), pg. 516.
[4] *Ibid.*, pg. 512
[5] *Ibid.*, pg. 518
(Subscribing to the point of view that "the foreign law is 'the other', which must be avoided".)
[6] For the definition of the term see Chapter 1.
[7] Audrey Macklin. "Transjudicial Conversations about Security and Human Rights." *CEPS Special Report*/ March 2009, pg. 17.
Chahal was a case that preceded *Saadi* and in which the ECtHR laid down the Article 3 *non-refoulement* obligation which was reconfirmed in *Saadi*.
On another place (pg. 18), Macklin calls it "the errors of omission arising from the refusal of the Supreme Court of Canada and the European Court of Human Rights to engage one another on the issue of deportation to torture".
[8] Taken from: David Jenkins. "Rethinking *Suresh*: Refoulement to Torture under Canada´s *Charter of Rights and Freedoms*." *Alberta Law Review*, Vol. 47, No. 1, October 2009, pg. 135.
Third party interventions of also the UK government in *Saadi* and *Ramzy*
[9] Commission of the European Communities. "Commission Working Document: The Relationship between Safeguarding Internal Security and Complying with International Protection Obligations and Instruments". COM(2001) 743 final, 5 December 2001, Brussels.

stated that the ECtHR would in the future have to consider the possibility of a "balancing act" between the individual´s rights and the state´s security interests.[10] With regard to legal guarantees and extradition, the Document states that "[e]xtradition must be considered legal when it is possible to obtain legal guarantees from the State that is going to trial the person, addressing the concerns connected to the potential violations of the European Convention of Human Rights."[11] The European Commission was referring here to capital punishment, but omitted mentioning legal guarantees when the risk of torture is involved.

Among further questions implied is that of the proper role of courts in reviewing the national security decisions of the executive and the standard of review that should be applied. The proponents of judicial deference to ministerial decisions in the present context emphasize that decisions implicating security of the community should be made by those who are democratically elected and so directly responsible to the population.[12] In the *Rehman* case (House of Lords), Lord Hoffmann expressed the view that what the interests of national security require is not a question of law and, therefore, not for the courts to adjudicate on. However, as Adam Tomkins argues, despite the rather deferential standard as formulated by the House of Lords in cases *Rehman* and *Belmarsh*, the lower courts have tended to robustly review government decision.[13] The ECtHR does not support the approach of judicial restraint

[10] Commission of the European Communities. "Commission Working Document: The Relationship between Safeguarding Internal Security and Complying with International Protection Obligations and Instruments". COM(2001) 743 final, 5 December 2001, Brussels, para. 2.3.1, pg. 14.
[11] *Ibid.*, para. 2.3.2, pg. 14.
[12] This point was made by Lord Hoffmann in the famous postscript to his speech in the case *Secretary of State for the Home Department v. Rehman*, cited also in the *Suresh* judgment. After referring to the high cost of failure in matters of national security, he continues:
"This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process."
Secretary of State for the Home Department v. Rehman (AP), [2001] UKHL 47, United Kingdom: House of Lords (Judicial Committee), 11 October 2001.
[13] Adam Tomkins. "National Security and the Role of the Court: A Changed Landscape?" *Law Quarterly Review*, 126 (Oct.), 2010, pp. 562 and 567.

even in cases where the danger to national security has to be addressed. The approach of the Supreme Court of Canada is proposing the adoption of a test of reasonableness by the courts while attaching weight to the discretionary power of the Minister.[14]

The first part of the thesis deals with the place of the *non-refoulement* principle in international law. The scope and application of *non-refoulement* protections in international human rights law and international refugee law will be discussed. After addressing the main international treaties containing this principle, attention is turned to *non-refoulement* as a norm of customary international law. The question will be discussed whether *non-refoulement* has attained the character of a peremptory norm (*jus cogens*), which would mean that it could not be transgressed under any circumstances. The second chapter looks at the *Suresh* (Supreme Court of Canada) and *Saadi* (ECtHR) cases in order to capture the divergence regarding the absolute nature of the prohibition of *refoulement* and the possibility of balancing the respective interests. While in the Canadian context, the concept of fundamental justice leaves open the possibility of balancing the risk of ill-treatment against the danger to national security, the rigid approach of the ECtHR is contingent on several factors including the status of Article 3 ECHR in the Convention system of protection.

This assessment has been made with regard to Article 6 ECHR cases concerning national security in which in the absence of judicial review "there is otherwise liable to be a violation of art. 6" and, therefore, "[s]uch matters have to come before the courts in order to comply with art. 6." (pg. 567)

[14] Rene Bruin and Kees Wouters. "Terrorism and the Non-derogability of *Non-refoulement.*" *International Journal of Refugee Law*, Vol. 15, No. 1 (2003), pg. 14.

1 STATUS AND NORMATIVE FORCE OF THE PRINCIPLE OF *NON-REFOULEMENT* IN INTERNATIONAL LAW

The status of the principle of *non-refoulement* in international law is important for the discussion of the European context, as the obligations of States under the ECHR are to be respected besides States' obligations under other sources of international law. The Vienna Convention on the Law of Treaties (VCLT) stipulates in Article 31(3)(c) that besides context also "any relevant rules of international law applicable in the relations between the parties" need to be taken into account when interpreting international treaties.[15] This Article enshrines the so-called "principle of systemic integration in international law", according to which "international rules must be interpreted as being part of a whole and in accordance with general principles of international law."[16] The ECtHR reiterates this principle in its judgments when stating that international law rules need to be taken into account when interpreting the underlying principles of the Convention.[17]

The international norm prohibiting *refoulement* to torture is relevant also in the Canadian context despite the limits that international law has for the discussion of domestic constitutional questions. Even though international law may inform the courts when interpreting the Canadian Constitution, norms formulated in international treaties are binding in Canada only after having been enacted into Canadian law.[18] The issue in *refoulement* cases is in particular the reconciliation of Canada´s obligations under the ICCPR and CAT which

[15] United Nations. *Vienna Convention on the Law of Treaties*. 23 May 1969, United Nations, Treaty Series, vol. 1155.
[16] Magdalena Forowicz. *The Reception of International Law in the European Court of Human Rights*. International Courts and Tribunals Series. Oxford University Press, New York, 2010, pg. 43.
For the discussion of the principle, see:
Campbell McLachlan. "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention." *International and Comparative Law Quarterly* 54 (2005), pp. 279 – 280.
[17] See for example: *Loizidou v. Turkey* (Application No. 15318/89). Judgment of 18 December 1996, ECHR, para. 43.
[18] *Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002, SCC 1, para. 60.

both prohibit the deportation to torture and the Refugee Convention which provides for the national security exception.

1.1 *Non-refoulement* in International Treaties and International Customary Law

The principle of *non-refoulement* constitutes one of the cornerstones of refugee law, but is found also in international human rights law. It is "an essential component of asylum and international refugee protection".[19] Its content, however, needs to be further specified. Jari Pirjola sees this concept as ambiguous given the lack of a common definition of terms such as persecution or specific forms of ill-treatment, which creates, in the author's view, a paradoxical situation that even though the States have subscribed to the principle by ratifying the Refugee Convention, its content is indeterminate.[20] *Refoulement* differs from expulsion or deportation; whereas the term *refoulement* is used in the context of returning persons including also those found illegally in the territory, expulsion or deportation refers to lawfully resident aliens required to leave.[21]

Uncertainty about the protection against *refoulement* stems from the fact that *non-refoulement* obligations of States are found in several sources of international law which influence each other and the actual practice of *non-refoulement* is the result of their interaction. Refugee law, human rights law and international customary law are considered to

[19] UN High Commissioner for Refugees. "The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93" (31 January 1994), para. 2.

[20] Jari Pirjola. "Shadows in Paradise — Exploring *Non-Refoulement* as an Open Concept." *International Journal of Refugee Law*, Vol. 19, Issue 4 (Dec2007), pg. 639.

[21] Guy S Goodwin-Gill. "The Refugee in International Law (Second Edition)". Oxford University Press (1996). Chapter 4: "*Non-refoulement*.", pg. 117.
("In the context of immigration control in continental Europe, *refoulement* is a term of art covering, in particular, summary reconduction to the frontier of those discovered to have entered illegally and summary refusal of admission of those without valid papers. *Refoulement* is thus to be distinguished from expulsion or deportation, the more formal process whereby a lawfully resident alien may be required to leave a State, or be forcibly removed.")

be the main fields of international law in which the principle of *non-refoulement* is found.[22] This section looks at the *non-refoulement* principle formulated in international refugee law in Article 33 of the 1951 Convention Relating to the Status of Refugees ("the Refugee Convention"), also at *non-refoulement* obligations in international human rights law emerging from Article 3 of the European Convention on Human Rights, Article 7 of the International Covenant on Civil and Political Rights ("the ICCPR") and Article 3 of the *Convention against Torture* and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the CAT"), and at *non-refoulement* as a norm of customary international law.

In international refugee law, the principle of *non-refoulement* is formulated in Article 33(1) of the 1951 Refugee Convention, according to which "[n]o Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." The formulation of this principle in the Refugee Convention is specific with regard to five grounds on which persecution must be based. Protection through this provision is secured only to refugees and asylum-seekers, even though asylum-seekers are not expressly mentioned in the Refugee Convention. The definition of *non-refoulement* in the Refugee Convention is thus rather restrictive, not only concerning the reasons for persecution but also as regards its personal scope.

Article 33 contains in the second paragraph a limitation clause which states that *refoulement* is possible if there are reasonable grounds for regarding a person as a danger to the security or community of the country.[23] However, if there is a risk that the individual

[22] Aoife Duffy. "Expulsion to Face Torture? *Non-refoulement* in International Law." *International Journal of Refugee Law*, Vol. 20, Issue 3 (2008), pg. 373.

[23] Article 33(2) of the 1951 Refugee Convention reads:
"The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

would be subjected to torture, inhuman or degrading treatment or punishment, *refoulement* is prohibited.[24] Article 32 constraints Article 33(2) by requiring procedural legal safeguards for an Article 33(2) to apply.

Besides Article 33(2) which denies the enjoyment of the right to *non-refoulement* to refugees convicted for particularly serious crimes in the country of refuge, there is also Article 1F which excludes certain persons from the protection by the Refugee Convention altogether. While Article 1F aims at defining persons excludable from refugee status, Article 33(2) was designed to protect the country of refuge; in the former case based on crimes committed before the entry to the country of refuge and in the latter case because of crimes committed while already in the country of refuge.[25] However, even those offences that were committed outside the country of refuge can come within the scope of Article 33(2) if the threat to national security is present.[26]

The obligation of *non-refoulement* is nowhere explicitly stated under the ECHR but Article 3 has been interpreted as preventing Contracting States from *refoulement* of an alien to face treatment prohibited by this Article abroad. The obligation of *non-refoulement* can arise as well under other Articles of the ECHR, for example under Article 8 securing private and family life, but protection claims against *refoulement* are typically based on Article 3, which reads that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." This principle thus emerged out of the interpretation of obligations under the ECHR.[27] Based on Article 53 ECHR, interpretation of the ECHR must be in line with the

[24] Rene Bruin and Kees Wouters. "Terrorism and the Non-derogability of *Non-refoulement.*" *International Journal of Refugee Law*, Vol. 15, No. 1 (2003), pg. 5.
[25] *Ibid.*, pg. 16.
[26] ("However, offences committed outside the country of refuge do not necessarily fall outside the scope of Article 33 (2) if the perpetrator constitutes a danger to the security of the country of refuge.")
Rene Bruin and Kees Wouters. "Terrorism and the Non-derogability of *Non-refoulement.*" *International Journal of Refugee Law*, Vol. 15, No. 1 (2003), pg. 16.
[27] Agnès G.Hurwitz. *The Collective Responsibility of States to Protect Refugees*. Oxford University Press, Oxford, 2009, pg. 189.

other obligations of states to safeguard the rights and freedoms under other agreements. In particular, *the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)* and jurisprudence of the Committee against Torture played a significant role in the interpretation of the Article 3 ECHR by the Court.

Article 3 CAT protects against expulsion, return or extradition not only persons falling within the definition of "refugee" under the Refugee Convention, but everyone who faces the risk of being subjected to prohibited ill-treatment. Article 3(1) of the CAT states that "[n]o 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." The CAT has influenced a lot the jurisprudence of the ECtHR on Article 3 refoulement cases. The interpretation of the CAT provisions by the Committee against Torture has played and plays "not only informative but also…a legal role in the interpretation of the ECHR."[28]

There are also differences in protection afforded by the ECHR and the CAT. One difference concerns the prohibited treatment. While all levels of ill-treatment contained in Article 3 ECHR are equally prohibited in absolute terms, only certain articles of the UNCAT apply besides torture also to inhuman and degrading treatment. [29] Only acts of ill-treatment inflicted by public officials or with their consent or acquiescence are covered by the CAT (Article 1 CAT), with the exception of "acts by groups exercising quasi-governmental authority".[30]

From one point of view, protection against *refoulement* to ill-treatment by Article 3 ECHR is considered to be greater than that offered by the Refugee Convention. This is so because its protection extends to everyone within the States´ jurisdiction and not just refugees

In : Vincent Chetail. "Le droit des réfugiés à l´épreuve des droit de l´homme: Bilan de la Cour européenne des droits de l´homme sur l´interdiction du renvoi des étrangers menacés de torture et de traitements inhumains ou dégradants." Revue belge de droit international, Vol. 37, No. 1 (2004), pp. 160 – 164.

[28] Nuala Mole and Catherine Meredith. "Asylum and the European Convention on Human Rights." *Council of Europe Publishing*, Human rights files No. 9 (2010), pp. 81-82.

[29] *Ibid.*, pg. 83.

[30] *Ibid.*, pg. 83.

and asylum-seekers.[31] Moreover, the character of Article 3 is unconditional because it contains no limitation clause such as the one in Article 33(2) of the Refugee and derogation from it is expressly prohibited by Article 15(2).[32] While the non-existence of a limitation clause in Article 3 ECHR might be only seen as a formal feature, its substantiveness is recognizes in the case-law of the ECtHR. Furthermore, the fear of persecution does not have to be based on one of five grounds enumerated in the Refugee Convention as the reasons for fear of ill-treatment for attracting the ECHR protection are "immaterial".[33] From the other point of view, the ECHR is considered as narrower in its scope of application, as it covers only ill-treatment and not "the five broad categories of persecution enshrined in the 1951 Refugee Convention."[34]

Non-refoulement obligations following from the International Covenant on Civil and Political Rights are based on Article 7, which is almost identical to Article 3 ECHR.[35] These obligations are specified by the UN Human Rights Committee, a body monitoring compliance of States with the ICCPR, in General Comment No. 20, paragraph 9 as follows: "In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement."[36] Similarly like under the ECHR, a breach of the article prohibiting ill-treatment might be established not only if a State itself engages in the acts of ill-treatment, but also if a State places a person at risk of ill-treatment by another country.

[31] Article 1 ECHR secures Convention rights to everyone within the jurisdiction of the High Contracting Parties.
[32] Among further distinctions is that for claiming protection of the Refugee Convention, a person "must...be outside the country of his or her nationality or habitual residence".
Nuala Mole and Catherine Meredith. "Asylum and the European Convention on Human Rights." *Council of Europe Publishing*, Human rights files No. 9 (2010), pg. 24.
[33] *Ibid.*, pg. 25.
[34] Magdalena Forowicz. *The Reception of International Law in the European Court of Human Rights*. International Courts and Tribunals Series. Oxford University Press, New York, 2010, pg. 238.
[35] Article 7 of the ICCPR: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."
[36] UN Human Rights Committee (HRC). *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel or Degrading Treatment or Punishment)*, 10 March 1992, para. 9.

The rule of *non-refoulement* is generally recognized as part of international customary law. This is "based on a consistent practice combined with a recognition on the part of States that the principle has a normative character."[37] Determining the emergence of this rule in customary law is significant for various reasons, including whether it is binding also on non-party states to the Refugee Convention or also whether incorporation through a legislative act is needed.[38] Furthermore, as the ICJ stated in the *Nicaragua* judgment, rules which are based both on treaty law and customary international law exist independently of each other and their interpretation and application might differ.[39] Uncertainties about the exact scope of *non-refoulement* as a customary norm persist, including whether it applies only to torture or also to any cruel or inhuman or degrading treatment, with Lauterpacht and Bethlehem arguing in favor of the wider scope of application to cover also forms of ill-treatment falling short of torture.[40]

Even though State practice together with opinion juris is needed for a rule to emerge as a binding custom, the State practice does not need to be completely consistent. The *Nicaragua* case before the International Court of Justice is often referred to as a confirmation that for a rule to be established as part of customary international law, perfect compliance by all states is not needed and any practice inconsistent with the rule should be considered as a breach of the rule rather than the emergence of a new rule.[41] Moreover, even if a State breaks the rule but provides justifications, this should be perceived as confirming rather than

[37] UN High Commissioner for Refugees. "The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93" (31 January 1994), para. 3.

[38] Agnès G.Hurwitz. *The Collective Responsibility of States to Protect Refugees*. Oxford University Press, Oxford, 2009, pg. 207.

[39] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America) (Merits) ICJ Reports, Judgment of 27 June 1986, 1986 I.C.J. 14, para. 178.

[40] Agnès G. Hurwitz: *The Collective Responsibility of States to Protect Refugees*. Oxford University Press, Oxford, 2009, pg. 208. In: Elihu Lauterpacht and Daniel Bethlehem. "The Scope and Content of the Principle of *Non-refoulement*: Opinion", para. 253.

[41] *Ibid.*, para. 186.

weakening the rule since the State considered it necessary to justify deviation from the rule.[42] Violations of a rule thus do not affect its legal standing, even more so given the likelihood with which violations in the field of human rights are likely to occur.

1.2 Normative Status of the Principle of *Non-Refoulement* in International Law: *Non-Refoulement* as Jus Cogens?

In order for a *jus cogens* norm to emerge, first, it is required to establish the existence of a rule of general international law and then the acceptance of the peremptory character of a norm by community of states.[43] Article 53 of the Vienna Convention on the Law of Treaties ("VCLT") also declares void any treaty that goes against such a peremptory norm. Article 64 VCLT codified the same principle with respect to the conflict between newly emerged norms of *jus cogens* and existing treaties.[44] *Jus cogens* norms need to be based on custom or treaties, which "is particularly so in view of the hostile attitude of many states to general principles as an independent source of international law and the universality requirement of *jus cogens* formation."[45]

Elevating the *non-refoulement* principle to *jus cogens* status would mean that no exceptions from it would be allowed, no matter what circumstances would arise. *Jus cogens* rules enjoy a higher status as such.[46] Pursuant to Article 53 VCLT, *jus cogens*, i.e. "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is

[42] *Ibid.*, para. 186.
[43] Malcolm N. Shaw. *International Law: Sixth edition*. Cambridge University Press, 2008, pg. 126.
[44] Article 64 of the Vienna Convention on the Law of Treaties: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."
[45] See reference 43, pg. 127.
[46] *Ibid.*, pg. 124.

permitted and which can be modified only by a subsequent norm of general international law having the same character."

The status of *non-refoulement* is, among others, informed by whether it is conceived of as a corollary to the prohibition on torture or whether it is regarded as a principle on its own, as a free-standing principle of international law. This distinction is likely to have implications on whether prohibition of *non-refoulement* is seen as absolute or not.

For Elihu Lauterpacht and Daniel Bethlehem, the principle of *non-refoulement* "is a fundamental component of the customary prohibition of torture or cruel, inhuman or degrading treatment or punishment."[47] Prohibition on torture, cruel, inhuman or degrading treatment is in the list of the human rights, besides systemic racial discrimination, genocide, slavery and others, which are generally considered to have acquired with time the force of customary law.[48] Lauterpacht and Bethlehem thus view the *non-refoulement* in customary international law as a corollary of the prohibition of torture established in customary international law rather than ascribing to it an independent status. Such perception of the status of *non-refoulement* leaves open the scope of protection in situations when "the threat of persecution does not equate to and would not be regarded as being on a par with a danger of torture or cruel, inhuman or degrading treatment or punishment and would not come within the scope of other non-derogable customary principles of human rights."[49]

Non-refoulement can be also seen as a concept decoupled from the prohibition of torture or inhuman or degrading treatment. Seeing *non-refoulement* as "a manifestation of the duty to protect" has been proposed by Vijay M. Padmanabhan.[50] According to Padmanabhan, it is necessary to acknowledge a rights competition involved in *non-refoulement* which

[47] Elihu Lauterpacht and Daniel Bethlehem. "The Scope and Content of the Principle of *Non-refoulement*: Opinion", pg. 158 – para. 237.
[48] James C Hathaway. *The Rights of Refugees under International Law*. Cambridge University Press, Cambridge, 2005, pg. 36.
[49] See reference 47, pp. 163-164 – para. 253(c).
[50] Vijay M. Padmanabhan. "To Transfer or not to Transfer: Identifying and Protecting Relevant Human Rights Interests in Non-Refoulement". *Fordham Law Review*, Vol. 80 (October 2011).

implies that the appropriate approach is that of balancing, as is usual in the case of conflicting rights.[51] This perception is informed by the view that the protection needs of the individual cannot be *a priori* placed before the protection needs of the population as a whole.

Viewing *non-refoulement* separately from the absolute right to freedom from ill-treatment makes it possible to see *non-refoulement* other than in absolute terms. Padmanabhan criticizes the HRC and the ECtHR for failing to recognize the potential difference between State´s negative and positive obligations.[52] Rather, *non-refoulement* could and should be seen as similar to a State´s duty of protection of individuals against mistreatment by private parties, for which limitations are provided for in law.[53] The underlying rationale of such view is that "there is no normative justification for imposing upon States an absolute *non-refoulement* obligation."[54] Thus, while the starting point of this approach is the same as that of, for example, the ECtHR, namely the absolute prohibition on ill-treatment, the approach to *non-refoulement* as described above makes possible the conclusion that *non-refoulement* duties are not absolute and that a balancing approach should be adopted.

The assessments of legal scholars as to whether *non-refoulement* has acquired the character of a peremptory rule in international customary law diverge. Aoife Duffy argues that *non-refoulement* has not acquired the *jus cogens* status, given the existence of national security exceptions to *non-refoulement* including in the Refugee Convention and the use of balancing tests in some countries.[55] By contrast, Jean Allain argues that the *jus cogens* status has been attained, with reference especially to the Conclusions of the Executive Committee of the UNHCR.[56] Whereas, as stated in 1982, *non-refoulement* was said to be "progressively

[51] *Ibid.*, pg. 1.
[52] Vijay M. Padmanabhan. "To Transfer or not to Transfer: Identifying and Protecting Relevant Human Rights Interests in Non-Refoulement". *Fordham Law Review*, Vol. 80 (October 2011), pg. 8.
[53] *Ibid.*, pg. 17.
[54] *Ibid.*, pg. 19.
[55] Aoife Duffy. "Expulsion to Face Torture? *Non-refoulement* in International Law." *International Journal of Refugee Law*, Vol. 20, Issue 3 (2008), pg. 390.
[56] Jean Allain. "*The* Jus Cogens *Nature of* Non-Refoulement." *International Journal of Refugee Law*, Vol. 13 No. 4 (2002).

acquiring the character of a peremptory rule of international law,"[57] in a Conclusion from 1996 the Committee recalled that this principle "is not subject to derogation,"[58] suggesting its *jus cogens* status.

Despite the general desirability among human rights advocates of attaining the *jus cogens* status of *non-refoulement*, it has been suggested that this shift might have some negative repercussions for the status of the Refugee Convention. Aoife Duffy proposes that such elevation could contradict some provisions of the Refugee Convention, thus nullifying the Convention based on Article 53 of the Vienna Convention of the Law of Treaties, according to which a treaty conflicting with a peremptory norm of general international law is void.[59] This would possibly be the case because any limitation of the *non-refoulement* obligation, such as the one found in Article 33 (2) of the Refugee Convention, would be incompatible with the absolute character of the newly emerged peremptory norm.

Another argument, more policy-oriented than a legal one, against the desirability of the *jus cogens* status of *non-refoulement*, would be an argument about the duty of the state to provide for national security the protection of the lives of citizens. It is generally recognized that "[t]he State has an overarching duty to protect citizens."[60] This argument is probably the most resonating argument of governments in *refoulement* cases. Elevation of this principle to a peremptory norm could thus possibly seen as not desirable given the nature of this principle itself and the fact that it might prevent the states from being able to provide for safety of their citizens.

[57] Executive Committee (EXCOM) Conclusion No. 25: General Conclusion on International Protection (20 October 1982), (b).
[58] Executive Committee (EXCOM) Conclusion No. 79: General Conclusion on International Protection (11 October 1996), (i).
[59] Aoife Duffy. "Expulsion to Face Torture? *Non-refoulement* in International Law." *International Journal of Refugee Law*, Vol. 20, Issue 3 (2008), pp. 389 – 390.
[60] Arvinder Sambei, Anton du Plessis, Martin Polaine: *Counter-Terrorism Law and Practice: An International Handbook*. Oxford University Press, 2009. Chapter 8: *Human Rights in the Context of Counter-Terrorism*, pg. 352 (8.44).

Conclusion

The prevailing perception is to view *non-refoulement* as a corollary of the prohibition of ill-treatment. In the ECtHR jurisdiction, the *jus cogens* prohibition of torture informs the interpretation and application of Article 3 ECHR. Still, proposals are being made to decouple the *non-refoulement* principle from the prohibition of torture or other forms of ill-treatment. The aim of such proposals is to make it possible to see *refoulement* to a risk of torture not necessarily in absolute terms. The peremptory character of the norm prohibiting *refoulement* to ill-treatment in international customary law has not yet been clearly established. What this implies for the State practice of *refoulement*, and the acceptability of the balancing of respective interests involved in it, is discussed in the next chapter for the jurisdictions of Canada and the ECtHR.

2 CANADIAN AND EUROPEAN COURT OF HUMAN RIGHTS JURISPRUDENCE

The European-Canadian judicial dialogue about national security and human rights is being led about both procedural and substantial issues. Audrey Macklin gives account of the communication between the Supreme Court of Canada, the ECHR and partly the UK House of Lords, which besides the procedural issue of the proper advocate scheme for cases involving classified information, dealt with the substantial issue of the legality of deportation to torture.[61] On the basis of the cases *Chahal v. the United Kingdom*, *Suresh v. Canada*, *Saadi v. Italy* and *Charkaoui v. Canada*, Macklin identified the divergence between Canadian and European jurisprudences as to what necessarily constitutes a violation of human rights.[62] This chapter discusses and compares the two leading cases in these jurisdictions, namely the *Suresh* and the *Saadi* cases, keeping in mind the underlying question of whether deportation to a risk of ill-treatment is permissible.

2.1 Supreme Court of Canada: *Suresh v. Canada*

In the case *Suresh v. Canada*, the Supreme Court of Canada addressed the constitutional question whether deportation to torture violates the Canadian Charter of Rights

[61] Audrey Macklin. "Transjudicial Conversations about Security and Human Rights." *CEPS Special Report*/ March 2009, pg. 14.
As procedural issue has been addressed the dilemma between keeping national security confidentiality and being able to respond to the case against oneself. The result of this dialogue has been the adoption of a special advocate scheme by the Canadian government modeled on the UK scheme, which drew on the Canadian experience.
("Nevertheless, the Canadian government's response to the Supreme Court's decision in Charkaoui was to adopt the UK model. And that is what Canada has today: a special advocate scheme that mimics a deficient UK model that is itself a copy of a non-existent Canadian precedent.")

[62] *Ibid.*, pg. 4. ("At this point, Canadian and European jurisprudence diverge on the issue of whether deportation of a non-citizen to a place where he faces a substantial risk of torture always and necessarily violates fundamental human rights.")

and Freedom[63] and so is unconstitutional. This case is significant from the point of view that the Supreme Court of Canada was willing to resolve the conflict between the obligation of *non-refoulement* and the protection of national security through the balancing of interests at stake. Besides the broader issue of the application of the *non-refoulement* principle in Canada, the Supreme Court had to deal with, among others, "the standard to be applied in reviewing a ministerial decision to deport; [and] whether the *Charter* precludes deportation to a country where the refugee faces torture or death."[64]

The facts of the *Suresh* case are as follows. The appellant from Sri Lanka, Mr. Suresh, a Convention refugee, had applied for "landed immigrant status" which was denied to him because of his membership in the group Liberation Tigers of Tamil Eelam, a group considered by Canadian authorities to be a terrorist group. Based on the information from the Canadian Security Intelligence Service, the Minister of Citizenship and Immigration issued a deportation certificate declaring Mr. Suresh a danger to the security of Canada under s. 53(1)(b) of the *Immigration Act*. Mr. Suresh appealed to the Federal Court on the grounds that he would be exposed to the risk of torture if deported to Sri Lanka. In particular, the appellant claimed that "the Minister's decision was unreasonable; that the procedures under the Act, which did not require an oral hearing and independent decision-maker, were unfair; and that the Act unconstitutionally violated ss. 7 and 2 of the *Charter*."[65]

Among the requirements of fundamental justice is the principle formulated in *Burns*,[66] "namely, that the guarantee of fundamental justice applies even to deprivations of life, liberty

[63] *Canadian Charter of Rights and Freedoms*, Part I of the Constitutional Act, 1982
[64] *Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002, SCC 1, para. 2.
[65] *Ibid.*, para. 17.
Section 2 of the Canadian Charter of Rights and Freedoms reads:
"Everyone has the following fundamental freedoms: (*a*) freedom of conscience and religion; (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (*c*) freedom of peaceful assembly; and (*d*) freedom of association."
Section 7 of the Canadian Charter of Rights and Freedoms reads:
"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."
[66] *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7.

or security effected by actors other than our government, if there is a sufficient causal connection between our government's participation and the deprivation ultimately effected."[67] This principle pertains to the main issue, namely, to what extent Canada is responsible for human rights violations abroad. In *Suresh*, the Court reaffirmed the *Burns* principle specifying that the guarantee of fundamental justice is involved "[a]t least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation."[68]

When dealing with the constitutional issue whether deportation to torture would violate the principles of fundamental justice expressed in s. 7 of the Charter, the Supreme Court had to answer whether this would be "conduct that would 'shoc[k] the Canadian conscience'."[69] In the domestic context, torture is seen as unfair, incompatible with justice and, therefore, fundamentally unjust. In the *non-refoulement* context, s. 7 of the Charter may be involved depending on the above-mentioned *Burns* principle. Once the nexus has been established, the balancing approach comes into play. Most importantly, the Court came to the conclusion that "Canadian jurisprudence does not suggest that Canada may never deport a person to face treatment elsewhere that would be unconstitutional if imposed by Canada directly, on Canadian soil."[70] Even though this balance is likely to be resolved in favor of not expelling a person,[71] this changes nothing to the fact that the approach to be adopted is one of balancing.

Subsequently, the Supreme Court turned to the discussion of the obligation of *non-refoulement* to torture from the international perspective, in particular how to reconcile

The main issue addressed in the *Burns* case has been whether "[t]he Minister is constitutionally bound to ask for and obtain an assurance that the death penalty will not be imposed as a condition of extradition." (Burns, para. 143) This question has been answered by the Court in the affirmative, concluding that in this case, the infringement of the s. 7 rights of the respondent could not be justified under s. 1.

[67] *Suresh v. Canada*, para. 54.

[68] *Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002, SCC 1, para. 54.

[69] *Ibid.*, para. 49.

[70] *Ibid.*, para. 58.

[71] As the Court states further in the same paragraph 58.

Canada´s obligations under the ICCPR, CAT and the Refugee Convention, which differ in the standard of protection of the individual. The CAT expressly prohibits the expulsion of a person to face torture elsewhere.[72] The ICCPR does not expressly address the expulsion scenario. However, taken in conjunction with *General Comment 20* to the ICCPR, Article 7 of the ICCPR should be read to foreclose such an expulsion.[73] Even though the national security exception in Art. 33(2) of the Refugee Convention might seem to go against the categorical rejection of the expulsion to torture as expressed in the CAT, the dominant status of the CAT was acknowledged.[74] The Supreme Court´s reasoning was based on the argument that it would be illogical to use the Refugee Convention which protects only refugees to deny the non-derogable rights that the CAT guarantees to everyone.[75] The conclusion is that the prohibition of deportation to torture should be taken as an international norm informing s. 7 of the Charter even when national security considerations are engaged.[76]

The *Suresh* case is significant also with respect to the standard of judicial review of the administrative action - here the decision of the Minister that the refugee should be deported on national security grounds. In the view of the Supreme Court, the assessment of whether the appellant was facing a substantial risk of torture required deference by the court to the Minister´s decision. The purpose of judicial review is to ensure that the decision was made within constitutional limits, in this case in compliance with the principles of fundamental justice, and not to reweigh the factors relevant for the decision. Deferential standard of review is substantiated, among others, given that the assessment of risk is to a great extent based on facts and dependent on the context and also given the Minister´s access to classified information about national security.[77]

[72] *Suresh v. Canada*, para. 68.
[73] *Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002, SCC 1, para. 67.
[74] *Ibid.*, para. 73.
[75] *Ibid.*, para. 72.
[76] *Ibid.*, para. 75.
[77] *Ibid.*, para. 31.

A violation of s. 7 could be justifiable under s. 1 of the Charter, the so-called general saving clause which subjects the rights and freedoms to reasonable limits.[78] As long as a s. 7 violation cannot be justified under s. 1, deportation to face torture would be unconstitutional.[79] As to when s. 1 could save a s. 7 violation, the Court states this would be possible "only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like".[80]

Suresh raised the question whether mere membership in a terrorist organization suffices for a deportation to be justified. Mr. Suresh was found to constitute a danger to Canadian security because of his membership and fundraising activities for the LTTE (Liberation Tigers of Tamil Eelam).[81] LTTE is listed in Canada among terrorist organizations, even though the answer to the question whether the LTTE threatens the security of Canada might not be so clear-cut.[82] The applicant´s fundraising activities were not considered by the Court to have reached the level needed for considering them as exceptional conditions.[83]

While the Supreme Court left unnoticed the ECtHR *refoulement* cases, it did refer to the House of Lords decision in the *Rehman* case, however, selectively. The Supreme Court included in *Suresh* part of Lord Hoffmann's speech advocating for judicial deference to ministerial discretion in national security decisions and suggesting the weighing of relevant factors, seemingly supportive of balancing national security against torture.[84] However, the part in which Lord Hoffmann states that Article 3 ECHR rights cannot be curtailed even when

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As stated in para. 45, factors making up the context include " the circumstances or conditions of the potential deportee, the danger that the deportee presents to Canadians or the country's security, and the threat of terrorism to Canada."

[78] S. 1 of the Charter: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[79] *Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002, SCC 1, para. 44.

[80] *Ibid.*, para. 78.

[81] *Ibid.*, para. 10.

[82] LTTE is considered to be a terrorist organization in Canada and in the U.S., while the European Union does not categorize it as a terrorist organization.

[83] *Suresh v. Canada* para. 128.

[84] *Ibid.*, paras. 33-34, citing Rehman (para. 62)

in the interests of national security, thus ruling out the possibility that national security interests could justify deportation to torture as made clear in *Chahal*, was not quoted.[85]

The conclusion in *Suresh* is that, generally, deportation to torture is unconstitutional. "[B]arring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice protected by s. 7 of the *Charter*."[86] There are, however, some "exceptional circumstances, [when] deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the *Charter* or under s. 1."[87] While generally deportation to face a risk of torture is unconstitutional under the *Canadian Charter of Rights and Freedoms*, the possibility is left open that if exceptional circumstances arise, such deportation would not be unconstitutional.

2.2 European Court of Human Rights: *Saadi v. Italy*

The jurisprudence of the ECtHR in *refoulement* cases reaches back to its decision in *Soering v. the United Kingdom*.[88] In *Soering*, the ECtHR ruled that Article 3 ECHR protects against extradition not only when the extradited person would face a real risk of torture, but also of inhuman and degrading treatment, irrespective of the acts that the person has committed.[89] Article 3 protection was extended to expulsion cases in *Chahal v. the United Kingdom*[90], which was followed by the case *Ahmed v. Austria*.[91] The question in *Chahal* was

[85] *Secretary of State for the Home Department v. Rehman (AP)*, [2001] UKHL 47, United Kingdom: House of Lords (Judicial Committee), 11 October 2001, para. 54.
[86] *Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002, SCC 1, para. 76.
[87] *Ibid.*, para. 78.
[88] *Soering v. the United Kingdom* (Application No. 14038/88), Judgment of 7 July 1989, ECHR.
Soering, the German national, was to be extradited to the U.S. and face likely death penalty for the offence of murder. The U.S. "death row phenomenom", when those convicted are waiting years for the execution of the judgment, was found by the Court to constitute inhuman and degrading treatment or punishment.
[89] *Ibid.*, para. 88.
[90] *Chahal v. The United Kingdom* (Application No. 22414/93). Judgment of 15 November 1996, ECHR.
In *Chahal*, the applicants were a family of Sikhs, who feared persecution if returned to India because of anti-government activities.
[91] *Ahmed v. Austria* (Application no. 25964/94), Judgment of 17 December 1996, ECHR.

whether deportation of persons would infringe their Article 3 ECHR rights if there was a real risk of ill-treatment. The Court held that "[t]he prohibition provided by Article 3 (art. 3) against ill-treatment is equally absolute in expulsion cases." (para. 80.) From among the post-*Saadi refoulement* cases is significant the case *Salah Sheekh v. The Netherlands*, which indicates "a less individualized approach" when assessing the risk to the applicant. [92] Even though already *Chahal* raised national security issues, this part concentrates on the *Saadi* case, which came after *Suresh* and in which the ECtHR could have reassessed its position regarding the absolute prohibition of *refoulement* to ill-treatment.

The *Saadi* case concerned a Tunisian national who was sentenced by the Milan Assize Court for criminal conspiracy to commit acts of violence outside Italy, falsification of identity documents and receiving stolen goods. Meanwhile, he was sentenced in abstentia by a military court in Tunis for membership of a terrorist organization. A deportation order on the applicant, a suspect terrorist, was issued by the Italian Minister of the Interior based on the suspect's conduct disturbing public order and threatening national security. His request for political asylum was declared inadmissible as he was seen as constituting a danger to the national security of Italy. Before the ECtHR, the applicant claimed that his deportation would expose him to the risk of treatment contrary to Article 3, as he feared the risk of torture and reprisals on political as well as religious grounds.

A case before the ECtHR similar to *Saadi* was, besides *A. v. The Netherlands*,[93] the case *Ramzy v. The Netherlands.*[94] Despite the fact that the ECtHR struck this case out of the

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The applicant in *Ahmed* was a Somali national with a refugee status in Austria, which the Austrian authorities decided to strip him of for attempted robbery. The applicant alleged that he would be subjected to ill-treatment if expelled because of the general situation in Somalia as well as his opposition activities. In this case, the Court reconfirmed the absolute prohibition formulated in Article 3 as well as the State´s obligation not to expel a person if this would mean a real risk of ill-treatment.

[92] Agnès G.Hurwitz. *The Collective Responsibility of States to Protect Refugees*. Oxford University Press, Oxford, 2009, pg. 193.

The Court held in para. 148 that where the applicant belongs to a targeted minority, no "special distinguishing features" that the applicant personally is at risk have to be established. (Case of *Salah Sheekh v. The Netherlands* (Application no. 1948/04), Judgment of 11 January 2007, ECHR.)

[93] *A. v. The Netherlands* (Application No. 4900/06), Judgment of 20 July 2010, ECHR.

Court´s docket because of the impossibility to determine the applicant´s whereabouts and so to proceed with the case, the observations of the subjects which were granted leave to intervene bring forward further arguments about the States´ obligations with respect to *non-refoulement*. The main concern brought forward jointly by the Governments of Lithuania, Portugal, Slovakia and the United Kingdom in *Ramzy* related to the inability of the States to provide for safety of their citizens. The rigidity of the approach which does not enable to weigh the prohibition in Article 3 ECHR against the protection of national security, prevents States from enforcing expulsion measures[95] and other forms of protection of the population, besides expulsion such as criminal sanctions or surveillance is insufficient.[96] Among other submissions, the Governments claimed that since Article 3 also contains the concept of degrading treatment which is rather general, a consistent assessment of the existence of the risk in the receiving country is rather difficult.[97]

In *Saadi* and *Ramzy*, the UK Government proposed to weigh Article 3 rights of the applicant against Article 2 rights of the community. This was based on the argument that since the prohibited ill-treatment would be inflicted by a state other than the signatory State, only implied positive obligations follow for the signatory State. Where positive obligations are engaged, rights of the applicant "must be weighed against the interests of the community as a whole".[98] The ECtHR rejected in *Saadi* such a balancing test because assessment of the level of risk to the applicant must be carried out independently of the assessment of danger to the community. The ECtHR noted that the "concepts of 'risk' and 'dangerousness' in this

[94] *Ramzy v. The Netherlands* (Application No. 25424/05), Judgment (Striking out) of 20 July 2010, ECHR.
In *Ramzy*, the applicant, an Algerian national was charged before Rotterdam Regional Court of involvement in the Dutch branch of Islamic fundamentalist movement and was acquitted. He applied for asylum but his request was rejected. An exclusion order was issued against him by the Minister for Immigration and Integration in the interests of national security and international relations of the Netherlands. Before the ECtHR, Ramzy complained that his removal to Algeria would violate Article 3 ECHR as there was a real risk that upon deportation he would be subjected to torture or ill-treatment.
[95] *Ramzy v. The Netherlands* (Application No. 25424/05), Admissibility decision, Third Section, ECHR, para. 125.
[96] *Ibid.*, para. 126.
[97] *Ibid.*, para. 129
[98] *Saadi v. Italy* (Application no. 37201/06), Judgment of 28 February 2008, ECHR, para. 120

context do not lend themselves to a balancing test" and continued that this is so because "assessment of the level of risk is independent of such a test".[99]

The message of *Saadi* is clear: the danger of terrorism cannot challenge the absolute nature of Article 3 ECHR and prohibition in Article 3 ECHR allows for no limitations or derogations even in the event of a public emergency threatening the life of the nation, and applies irrespective of the person´s conduct (referring to *Chahal v. the United Kingdom*).[100] Therefore, where substantial grounds have been shown that the person, if deported, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment, a State has an obligation not to deport the person (referring to *Soering v the UK*, para. 91).[101] In order for the ECtHR to depart from its case-law, a "cogent reason" would have to be present.[102] The argument about the change of international climate requiring different rules of the game was not such a cogent reason for the ECtHR.

In *Saadi*, the ECtHR saw no reasons to depart from the established case law not only as far as the absolute nature of Article 3 ECHR prohibition was concerned, but also regarding the required standard of proof of the existence of a risk to the applicant. In its submissions, the UK Government proposed that a different standard of proof should be required from the applicant when national security considerations are present. The standard of proof in Article 3 non-refoulement cases before the ECtHR is rather high.[103] Despite this, the UK Government argued in favor of a higher standard, namely, the applicant should "prove that it was 'more likely than not' that he would be subjected to treatment prohibited by Article 3."[104] However, the ECtHR upheld the standard which requires the showing of substantial grounds for believing that the person faces a real risk. Otherwise, it would mean saying that unless there is

[99] *Ibid.*, para. 139.
[100] *Saadi v. Italy* (Application no. 37201/06), Judgment of 28 February 2008, ECHR, paras. 137-138.
[101] *Ibid.*, para. 125.
[102] Daniel Moeckli. "*Saadi* v Italy: The Rules of the Game Have *Not* Changed". *Human Rights Law Review*, Vol. 8, Issue 3 (2008), pg. 548.
[103] Aoife Duffy. "Expulsion to Face Torture? *Non-refoulement* in International Law." *International Journal of Refugee Law*, Vol. 20, Issue 3 (2008), pg. 378.
[104] *Saadi v. Italy* (Application no. 37201/06), Judgment of 28 February 2008, ECHR, para. 122.

"evidence meeting a higher standard, protection of national security justifies accepting more readily a risk of ill-treatment for the individual".[105]

2.3 Divergence with Regard to the Absolute Nature of the Prohibition of Refoulement to Face Ill-treatment

After the ECtHR *Saadi* decision, the skeptics of the *Suresh* decision repeated their calls for revoking the "*Suresh* exception". David Jenkins called for re-examination of the *Suresh* exception in light of ensuing international judicial developments. [106] According to Jenkins, this re-examination could take the form of a ruling by the Canadian Supreme Court that it either left the issue open for later consideration, or that it did not strike the right balance, or that in light of recent developments return to torture would always violate s. 7 and would never be justifiable under s. 1.[107]

Even though the *Suresh* decision has been criticized for allowing for any national security exception, arguably it also represented a positive input for the regime of *non-refoulement* as codified in the immigration law of Canada. By comparing the legal position before and after *Suresh*, Okafor and Okoronkwo found that while before, the Canadian refugee law had greatly reflected the position to *non-refoulement* under the Refugee Convention, thus not rejecting categorically deportation to torture, after *Suresh*, this position reflects more the categorical prohibition on deportation to torture expressed in the CAT.[108] It

[105] *Ibid.*, para. 140.
[106] David Jenkins. "Rethinking *Suresh*: Refoulement to Torture under Canada´s *Charter of Rights and Freedoms*." *Alberta Law Review*, Vol. 47, No. 1, October 2009, pg. 135.
Under these international developments Jenkins means, inter alia, the rejection of a *Suresh* kind of exception by the ECHR in the case *Saadi v. Italy* and by U.N.C.A.T. in *Sogi v. Canada* (where the U.N.C.A.T. considered the risk assessment by the Canadian authorities involving the deportation of the applicant to India was flawed and so in breach of the *C.A.T.*).
[107] *Ibid.*, pg. 144.
[108] Obiora Chinedu Okafor and Pius Lekwuwa Okoronkwo. "Re-configuring Non-refoulement? The Suresh Decision, 'Security Relativism', and the International Human Rights Imperative." *International Journal of Refugee Law*, vol. 15, no. 1 (2003), pp. 62 and 64.

can, therefore, be said that after *Suresh* deportation decisions of the Minister are more restrained based on s. 7 of the Charter.[109] With regard to the place of Article 33(2) of the Refugee Convention under Canadian law, this Article "must now be construed as much more restrictive of the ability of states to deport refugees."[110]

In *Suresh*, the Supreme Court of Canada has left open the issue of what the exceptional circumstances are justifying deportation to face torture. The judgment has been criticized for not specifying what these exceptional circumstances might be.[111] Among others, the Federal Court cases – *Mahjoub*[112] and *Jaballah*[113] address under what circumstances and whether at all could the *Suresh* exception be invoked. In *Mahjoub*, the court avoided addressing the constitutional issues raised by the applicant, but expressed doubts about whether any exception would be possible at all.[114] In *Jaballah*, the Federal Court was also

[109] David Jenkins. "Rethinking *Suresh*: Refoulement to Torture under Canada´s *Charter of Rights and Freedoms*." *Alberta Law Review*, Vol. 47, No. 1, October 2009, footnote 65, pg. 135.

[110] Obiora Chinedu Okafor and Pius Lekwuwa Okoronkwo. "Re-configuring Non-refoulement? The Suresh Decision, 'Security Relativism', and the International Human Rights Imperative." *International Journal of Refugee Law*, vol. 15, no. 1 (2003), pg. 64.

[111] Rene Bruin and Kees Wouters. "Terrorism and the Non-derogability of *Non-refoulement.*" *International Journal of Refugee Law*, Vol. 15, No. 1 (2003), pg. 14. ("However, it did not, in our opinion, make clear why the *Suresh* case was exceptional.")

[112] *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 156, [2005] 3 F.C.R. 334.
In *Mahjoub*, the Federal Court was invited to decide whether the Minister´s delegate concluded correctly that "exceptional circumstances " have arisen justifying Mr. Mahjoub's refoulement from Canada to Egypt (para. 9(2)). Refoulement was to be based on a security certificate declaring Mr. Mahjoub, a Convention refugee of Egyptian nationality, a threat to national security because of his membership in a faction of Al Jihad which has as its goal the subversion of the Egyptian government (para. 2b).

[113] *Jaballah* (Re), 2006 FC 1230, [2007] 58 Imm. L.R. (3d) 267.
In the *Jaballah* case, the issue was whether the applicant could be removed to a "place where he faces torture, or possible death or cruel and unusual punishment".[113] (Jaballah 2006, para. 76).
In the 2010 *Jaballah* case (*Jaballah (Re)*, 2010 FC 79, [2011] 2 F.C.R. 145), a security certificate was issued against the applicant, who had beforehand applied for the refugee status, declaring the applicant "inadmissible to Canada on national security grounds" (para. 6). The Court addresed what are the requirements of security certificate proceedings for them to comply with the principles of fundamental justice of s. 7 of the Charter. "In security certificate proceedings, the overarching principle of fundamental justice is that persons named in security certificates must be accorded a fair judicial process." (para. 70) With regard to the use of testimonial evidence which was prior before the Court, the Court stated that "[a]bsent exceptional circumstances that are difficult, if not impossible, to envision, where the receipt of evidence would violate the principles of fundamental justice it would not be appropriate to receive such evidence." (para. 71)

[114] *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 156, [2005] 3 F.C.R. 334, para. 64:
"There are, however, powerful indicia that deportation to face torture is conduct fundamentally unacceptable; conduct that shocks the Canadian conscience and therefore violates fundamental justice in a manner that can not be justified under section 1 of the Charter."

doubtful about the constitutionality of any *Suresh*-type exception, and reconfirmed that any such exception must be construed restrictively.[115]

Unlike in the Strasbourg Court´s analysis, in which a person´s conduct plays no role in the assessment of the *non-refoulement* obligation under Article 3 ECHR, in Canadian cases the conduct of a person can have an impact on whether "exceptional circumstances" within the meaning of *Suresh* arise. In *Jaballah*, the Court found that no exceptional circumstances were present which would justify the applicant´s deportation to a risk of torture. This was because of the fact that the applicant "has [not] been personally involved in violence".[116] In Canadian cases the person´s conduct could be the factor on which the analysis, as to whether deportation to torture is justified, could turn. This is in sharp contrast with the pronouncement of the ECtHR in *Chahal* signaling that the person´s conduct is to be disregarded in Article 3 analysis.[117]

The approach of the Supreme Court of Canada and the ECtHR to diplomatic assurances from countries to which a person is to be expelled is rather similar. The objective sought through these assurances is to reduce the risk of ill-treatment to a level that would permit deportation. As regards the diplomatic assurances that Italy had sought from Tunisia in *Saadi*, the ECtHR observed that the Tunisian authorities failed to give any since they only referred to the existence of domestic law and international treaties, which in itself is not a sufficient guarantee that ill-treatment would not occur especially in the light of reported

[115] *Jaballah* (Re), 2006 FC 1230, [2007] 58 Imm. L.R. (3d) 267, para. 81.
("That judgment's reference to exceptional cases left open for future consideration cannot have been intended to leave many cases to be classed as exceptional. Rather, the general principle, as I read *Suresh*, is that deportation to a country where there is a substantial risk of torture would infringe an individual's rights, in this case Mr. Jaballah's rights, under s. 7 of the *Charter*, and, in my view, infringement generally would require that the exceptional case would have to be justified under s. 1.")
[116] *Jaballah* (Re), 2006 FC 1230, [2007] 58 Imm. L.R. (3d) 267, para. 82.
[117] After referring to the difficulties that States face in the fight against terrorism, the Court continued that "even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct."
(*Chahal v. The United Kingdom* (Application No. 22414/93). Judgment of 15 November 1996, ECHR, para. 79.)

practices of ill-treatment.[118] In *Suresh* the Supreme Court has been just as reluctant to attach much weight to the diplomatic assurances sought from the country to which a person is to be deported. Torture is an illegal process, as opposed for example to the death penalty which is a legal process, and also because of the unreliability of such assurances by a country which has engaged in such ill-treatment in the past.[119]

Framing *non-refoulement* either as a positive or a negative obligation is significant for evaluating the possibility of adopting a balancing approach by the ECtHR. Viewing *non-refoulement* as a positive obligation, as the UK Government proposed in *Saadi*, could have the effect of watering down the absolute nature of Article 3 prohibition. A contrast to this position is that of, for example, Hemme Battjes, according to whom the positive-obligation approach does not negatively prejudice protection by Article 3.

Hemme Battjes views the prohibition of *refoulement* "as a positive obligation, an oligation to prevent ill-treatment", which could be incurred by expelling an alien and the required act "would be assessment of the risk of ill-treatment". [120] The positive-obligation approach might seem justified bearing in mind the State´s duty to protect their citizens. Such duty follows also from Article 1 ECHR, which formulates the duty of the Contracting States to guarantee the Convention rights and freedoms to everyone within their jurisdiction. This requires the protection of the population from terrorist threats, specifically protection of the right to life under Article 2.

A positive-obligation outlook on *non-refoulement* can, however, imply that prohibition in Article 3 is not guaranteed to everyone on an equal footing and so is not absolute. Daniel Moeckli observed that "[w]hat made the attempt to overturn *Chahal* so dangerous is that it would effectively create a distinction between cases of domestic and foreign terrorist

[118] *Saadi v. Italy* (Application no. 37201/06), Judgment of 28 February 2008, ECHR, para. 147.
[119] *Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002, SCC 1, para. 124.
[120] Hemme Battjes. "In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed." *Leiden Journal of International Law*, Volume 22 (2009), pg. 606.

suspects: for the former, the prohibition of torture would still be absolute, whereas the latter could be exposed to the risk of ill-treatment."[121] Judge Zupančič, in his concurring opinion in the *Saadi* case, concluded that if the risk of ill-treatment to the applicant were to be balanced against the threat to the community, this would mean that "such individuals do not deserve human rights" implying that they "are less human".[122]

The meaning and implications of the absolute character of *non-refoulement* under Article 3 ECHR are not unequivocal. The general understanding is that the absolute character precludes any balancing of interests involved. However, Hemme Battjes argues that despite the absolute character of Article 3, certain forms of balancing are possible, in particular carrying out the assessment of risk to the individual might involve balancing of the financial interest, given the scarcity of resources.[123] For Battjes, the significance of the "absoluteness" lies above all in affecting the scope of Article 3, in particular in extending it to *refoulement* and medical cases.[124] Following *Saadi* and *Chahal*, *refoulement* cases do not allow for balancing of interests, and so any limitations or interferences.[125]

The rejection by the ECtHR of the balancing approach with regard to Article 3 might be given due to the text of the Convention itself. As has been proposed by Andrew Ashworth, in its reasoning in the *Suresh* case, the Supreme Court of Canada employs the concept of 'balance' "largely because of the particular structure of the Canadian Charter (notably section 1, which has no counterpart in the ECHR)."[126] The ECHR contains no "general proviso,"[127]

[121] Daniel Moeckli. "*Saadi* v Italy: The Rules of the Game Have *Not* Changed". *Human Rights Law Review*, Vol. 8, Issue 3 (2008), pg. 548.
[122] *Saadi v. Italy*, concurring opinion of Judge Zupančič
[123] Hemme Battjes. "In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed." *Leiden Journal of International Law*, Volume 22 (2009), pg. 605.
[124] *Ibid.*, pg. 598.
[125] *Ibid.*, pg. 598.
It is, however, necessary to note the distinction between the prohibition on expulsion to face torture which allows for no balancing and the prohibition on expulsion to face inhuman or degrading treatment where balancing is allowed, as stated in *Soering*. (pg. 594)
[126] Andrew Ashworth. "Security, Terrorism and the Value of Human Rights." In: Goold, Benjamin J and Lazarus, Liora (eds.): *Security and Human Rights.* Hart Publishing, Oxford and Portland, Oregon, 2007, pg. 211.
[127] *Ibid.*, pg. 211, footnote 37.

such as the general clause in the *Charter* subjecting all rights and freedoms to reasonable limits. The structure of the ECtHR thus can be seen as one of the main obstacles for the ECtHR to adopt a balancing test in Article 3 cases.

Conclusion

The comparison of the *Suresh* and *Saadi* cases displays the difference in approach of the Supreme Court of Canada as opposed to the European Court of Human Rights as regards the absolute nature of the prohibition of deportation to ill-treatment. Several interesting conclusions can be drawn from this comparison. Probably the most important one concerns the acceptability of the balancing approach of the respective interests, in this case of the risk of ill-treatment to the person and the danger to national security. While any such balancing is categorically rejected by the ECtHR, balancing is not a priori excluded in the Canadian jurisdiction, recognizing more explicitly the interests of the population as a whole. The *Saadi* case reconfirmed the absolute nature of the prohibition of *refoulement* to ill-treatment, the significance of which can be fully appreciated especially when compared to the *Suresh* case.

Another important lesson that can be drawn from this comparison goes back to the underlying concern of this whole examination, namely the extent to which the responsibility of the state carrying out the deportation is engaged in *refoulement* cases. The Canadian approach requires the existence of a sufficient connection between the act of the state returning the person and ill-treatment committed by the receiving state and, as referred to in *Suresh*, it must be "entirely foreseeable" that such ill-treatment would be incurred. The ECtHR, on the other hand, does not seem to subscribe to the position manifested in the Canadian jurisprudence that it could be possible to deport a person to face treatment abroad that would be unconstitutional if inflicted in the Canadian setting. The ECtHR thus recognizes that it is the deportation act itself that engages the State responsibility.

CONCLUSION

The principle of *non-refoulement* has a significant place not only in international refugee law, but also in human rights law. In the field of refugee law it fulfills the function of protection of refugees and asylum-seekers against persecution on five specific grounds, whereas in the human rights field its goal is to protect everyone against prohibited ill-treatment. As the *non-refoulement* obligations under various instruments influence each other, the examination of all relevant treaties together with the international customary law is called for in order to determine the *non-refoulement* obligations of states.

Of interest in this thesis was the interaction between the European Convention on Human Rights and the Refugee Convention, as well as between the ECHR and the CAT, as from the point of view of international law it is especially the ECHR that makes the difference between the jurisdictions that were being compared, namely the European Court of Human Rights and Canada. Even though the ECHR is narrower in its application than the Refugee Convention, protection afforded against ill-treatment is higher. This is so since protection against *refoulement* based on Article 3 ECHR is not limited in national security scenarios, as is the case in the Refugee Convention. As regards the CAT, it significantly influenced how the ECtHR interpreted the scope of *non-refoulement* obligations under Article 3 ECHR by the ECtHR. No less importantly, the Canadian Charter of Rights and Freedoms and the concept of fundamental justice contained in its section 7 further explains the divergent conclusions in *refoulement* cases in these two jurisdictions.

While the prohibition of torture is a peremptory norm from which no deviation is allowed, it is not clear-cut what the scope of the obligation of states to prevent that ill-treatment is not inflicted on an alien upon deportation by a receiving country is. Whereas the ECtHR recognized in *Chahal* and later reconfirmed in *Saadi* the absolute prohibition of

refoulement where a real risk of ill-treatment exists, the Supreme Court of Canada in *Suresh* was willing to accept that exceptional circumstances could justify deportation to torture.

The difference in perceptions of the obligation not to *refoule* in the examined jurisdictions leads to different conclusions, in particular as regards the acceptability of the balancing of danger to national security against the risk of ill-treatment. The ECtHR has subsumed the States´ obligation not to deport to ill-treatment to their negative obligation not to engage in such ill-treatment. However, such a clear link is missing in the Canadian jurisdiction, at least as displayed in *Suresh*.

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