

ARTICLES

Terrorism and the Non-derogability of Non-refoulement

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Abstract

After the terrorist attacks on 11 September 2001, is it permitted to strike a balance between the national security of a State and the obligation to provide protection against *refoulement*? In the war on terrorism, this option seems to be open for discussion. Although no uniform or single definition of terrorism in international law exists, it is clear that the *opinio communis* wants the perpetrators, planners or facilitators to be prosecuted. If they flee prosecution, no safe haven should be granted. Membership of a terrorist organization cannot in itself be qualified as a terrorist act. Nevertheless, the danger exists that mere membership will suffice to be excluded from refugee status or from protection against *refoulement*. The European Commission has stated in a Working Document that the European Court of Human Rights should reconsider the decisions in which the absolute character of Article 3 ECHR was laid down. In the *Suresh* case, the Canadian Supreme Court deemed a decision to expel to be possible even if there is a chance the alien will become a victim of a human rights violation as proscribed in Article 3 Convention Against Torture. If there are reasonable grounds for regarding a refugee a danger to the national security or the community of the country of refuge, he is not protected against *refoulement* under Article 33 (1) Refugee Convention. This rule needs to be interpreted restrictively and applied with particular caution. The assessment of the danger needs to be individual and *ex futuro*. Article 33 (2) Refugee Convention allows *refoulement* if a provable danger to the national security or community of the country of refuge exists, unless *refoulement* entails a risk of the individual being subjected to torture or inhuman or degrading treatment or punishment. In such cases *refoulement* is prohibited. The obligation of *non-refoulement* under Article 3 of the European Convention on Human Rights, Article 7 International Covenant on Civil and Political Rights and Article 3 Convention Against Torture is absolute. No exceptions and no derogations are permitted, not even if an alleged terrorist constitutes a

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danger to the national security of a country. In search of a way to derogate from the obligations of *non-refoulement*, States may look for safety guarantees to allow expulsion. In cases involving the imposition or the carrying out of legal sentences, for example the death penalty, the issue of guarantees is clear. However, cases involving extra-judicial acts like torture are much more complicated. There is a real risk that a balancing act can be avoided and will be 'found' in the assessment of the risk of being subjected to prohibited treatment by trying to expel an alien after guarantees have been obtained. We believe exclusion is no solution and prosecution of alleged terrorists may be a better solution than co-operating with further violations of human rights by refraining to give protection. The possibility of prosecuting perpetrators of serious human rights violations is quickly gaining ground. The legal tension between absolute protection against *refoulement* and the States' responsibility for national security can be reduced, now that States can hold those who have perpetrated serious violations of human rights and humanitarian law criminally accountable. We strongly urge States to uphold the non-derogability of *non-refoulement* and to take those steps necessary to prosecute perpetrators of serious human rights violations.

1. Introduction

The attack on the World Trade Center and the Pentagon on 11 September 2001 has led to serious world-wide discussions. Many changes have been suggested, especially in the field of migration and asylum. The fear of new attacks has led to new case law and a number of proposals in which the issue of national security is gaining momentum. The attacks on the United States could mean a turning point in applying obligations of *non-refoulement*.

This article addresses the balance between issues of national security and the protection against *refoulement*. We will discuss several developments that have a direct influence on obligations of *non-refoulement*. These include both global as well as European developments. Within the United Nations several resolutions have been adopted, both by the General Assembly as well as the Security Council.¹ Security Council resolution 1373 (28 September 2001) is of major importance regarding asylum law.

Within Europe, the European Commission of the European Communities has adopted a Working Document entitled: 'The Relationship between safeguarding internal security and complying with international protection obligations and instruments'. In this document a 'balancing act' between the protection needs of the individual, set off against the security interests of a State, is mentioned. Of further interest is the proposal for a Council Directive on minimum standards for the qualifications and status of third country nationals and stateless persons as refugees or as persons who otherwise need international

¹ UNGA res. 56/1, 18 Sept. 2001; SC res. 1368, 12 Sept. 2001; SC res. 1373, 28 Sept. 2001; SC res. 1377, 12 Nov. 2001.

protection. We will focus on the negotiations and redrafting of articles 14, 17 and 19 of this proposal, dealing with the exclusion from a protection status and the principle of *non-refoulement*.

Furthermore, to illustrate the political debate concerning terrorism, the judgment of the Canadian Supreme Court in the Suresh case will also be discussed. With explicit reference to the events of 11 September 2001 the Court considered a fair balance not in violation of the obligation of *non-refoulement*. The focus of this article will be on the non-derogability of some of the most important obligations of *non-refoulement*. Finally, we will describe the possibility of expulsion after having received assurances regarding the safety of the person to be deported and the possibility of prosecution to eliminate the dangers of terrorist activities.

2. The war on terrorism: global and European developments

2.1 UN Security Council Resolution 1373

In Security Council resolution 1373, States are called upon to:

(f) take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;

(g) ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists.²

The text indicates that Member States are called upon to exclude terrorists from refugee status under Article 1F of the 1951 Refugee Convention even though their actions may be politically motivated. In this resolution terrorism is conceptualized as acts that can be defined as terrorism. Excludable are those persons that have committed, planned or one way or the other contributed to these acts. However, no uniform international definition of terrorism exists. It remains the prerogative of States to decide who is excludable from refugee status as a terrorist. Based on this resolution, could it be that a member of an alleged terrorist organization solely because of his membership be excluded from refugee status? One can argue, only if being a member

² SC res. 1373 28 Sept. 2001. Contrary to UNGA res. 51/210, 17 Dec. 1996 with Annex 'the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Protection', SC res. 1373 has no explicit reference to the obligation of *non-refoulement* as laid down in the 1951 Refugee Convention.

in itself is a terrorist act. However, that rule is nowhere to be found. The relevant question is whether or not membership of and/or sympathizing with an alleged terrorist organization is a legitimate ground for excluding a person from refugee status. In the U.N. Draft Comprehensive Convention on International Terrorism, currently under preparation, membership of a terrorist organization in itself is not listed as an offence within the meaning of this Convention.³ Even though exclusion does not seem to be in accordance with this draft convention or resolution 1373, there is a genuine danger that the listing of an organization as a terrorist organization will have a significant impact on exclusion cases. Yet, the international community has no uniform idea which organization should be characterized as a terrorist organization. For example, Canada and the United States have both listed the Tamil opposition group in Sri Lanka, the LTTE, as a terrorist organization. However, the LTTE is not mentioned on a list prepared by the European Union.⁴ It is obvious that characterizing an organization as terrorists is to a large extent based on a political motivation and can have profound political impact.

2.2 The European Commission Working Document

On 20 September 2001 the European Council on Justice and Home Affairs adopted several conclusions (SN 3926/6/01). In these conclusions, the Council requests the competent authorities of Member States: to strengthen controls at external borders (conclusion 24); request Member States to apply procedures for the issue of visas with maximum rigour (conclusion 26); invites those States participating in the Schengen Information System (SIS) to provide more systematic input into the system of alerts under Articles 95, 96 and 99 of the Schengen Convention (conclusion 27); and invites the Commission to examine urgently the relationship between safeguarding internal security and complying with international protection obligations and instruments (conclusion 29). According to the European Commission, consideration is being given on how existing EU legislation can be made 'terrorism proof' (Report from the Commission, 17 October 2001 (COM (2001) 611)).

Furthermore, the European Commission has presented a proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States (COM (2001) 522) and a proposal for a Council Framework Decision on combating terrorism (COM (2001) 521).

³ Article 2 Draft Comprehensive Convention on International Terrorism, UN doc. A/C.6/56/L.9, 29 Oct. 2001.

⁴ European Council Common Position, 17 June 2002, Official Journal of the European Communities, L 160/32.

On 5 December 2001 the European Commission finalized a Working Document entitled: ‘The relationship between safeguarding internal security and complying with international protection obligations and instruments’ (COM (2001) 743 final).

A Common Position of the Council of the European Union on the application of specific measures to combat terrorism was adopted on 27 December 2001 (Official Journal of the European Communities, 28 December 2001, L 344/70). The adopted measures include the freezing of funds and other financial assets or economic resources of persons, groups and entities listed in the Annex. The Annex contains a list of persons, groups and entities that are involved in terrorist acts (29 individuals and 13 groups). Updated lists have been published on 2 May 2002 (Official Journal of the European Communities, 3 May 2002, L116/75), 17 June 2002 (Official Journal of the European Communities, 18 June 2002, L 160/32) and 28 October 2002 (Official Journal of the European Communities, 30 October 2002, L 295/1). The list now comprises 35 individuals and 32 groups.

The Working Document of 5 December 2001 clearly indicates that the European Commission wants to nullify the non-derogability of Article 3 of the European Convention on Human Rights (ECHR). This stems from the following text: (paragraph 2.3.1, p. 16):

The European Court of Human Rights has repeatedly affirmed that the European Convention on Human Rights, even in the most difficult circumstances, such as the fight against terrorism and organised crime, prohibits, in absolute terms, torture and inhuman or degrading treatment or punishment. The European Court of Human Rights has emphasised that, unlike most of the substantive clauses of that particular Convention, Article 3 makes no provision for exceptions and no derogation from it is permissible even in the event of a public emergency threatening the life of the nation. Following the 11th September events, the European Court of Human Rights may in the future again have to rule on questions relating to the interpretation of Article 3, in particular on the question in how far there can be a “*balancing act*” [emphasis added, authors] between the protection needs of the individual, set off against the security interests of a state. “And in paragraph 2.4 (p. 17)” In addition to their possible criminal prosecution it may also be necessary to harmonise the basic rights granted to this category of excludable but non-removable persons, and to assess the different means for dealing with these persons if they pose a security risk.

It is clear that the Commission wants to initiate an investigation to examine possible measures other than prosecution that can be adopted against terrorists and other serious criminals. In paragraph 2.3.2 of the document the Commission writes:

Extradition must be considered legal when it is possible to obtain legal guarantees from the State that is going to try the person, addressing the

concerns connected to the potential violations of the European Convention of Human Rights. Such ‘guarantees’ by third States could for instance relate to the non-application of capital punishment in that particular case, though the law of that State allows for such punishment.

Surprisingly, there is no mention of guarantees regarding the risk of being subjected to torture, inhuman or degrading treatment or punishment.

Several important legal questions arise from reading the Working Document. First, how will the European Court of Human Rights deal with the political pressure in adopting a ‘balancing act’ between the protection needs of the individual and the security interests of a State? Second, a more fundamental question is whether or not Article 3 ECHR leaves any room for adopting a ‘balancing act’. In the *Ahmed*⁵ and *Chahal*⁶ cases, the European Court considered that the respective applicants could not be expelled under Article 3 ECHR even though Article 33 (2) of the Refugee Convention was applicable and the applicants could not claim protection under the obligation of *refoulement* laid down in Article 33 (1) Refugee Convention. A final question concerns the influence of legal (safety) guarantees regarding the obligation of *refoulement*.

Articles 14 and 17 of the proposal for a Council Directive on minimum standards for the qualifications and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection (COM (2001) 510 final, d.d.12 September 2001) have been changed drastically.⁷ Both articles deal with the exclusion of persons in need of protection. Articles 14 and 17 oblige Member States not to grant refugee status or subsidiary protection to applicants if undeserving. In previous drafts, paragraph 4 of both Articles stated that not granting international protection to those undeserving of it, ‘is without prejudice to Member States’ obligations under international law, in particular under the European Convention on Human Rights’. Both paragraphs are of the utmost importance in the context of this article. The Commission upheld the absolute character of Article 3 ECHR. However, since then the Commission has changed its attitude. We have noticed above the text of the Working Document of December 2001. In the last version of the proposal for a Council Directive on minimum standards for the qualifications and status of third country nationals and stateless persons as

⁵ *Ahmed v. Austria*, (17 Dec. 1996), European Court of Human Rights, Appl.no. 25964/94.

⁶ *Chahal v. United Kingdom*, (15 Nov. 1996), European Court on Human Rights, Appl.no. 22414/93.

⁷ See Council of Europe, Asylum Working Party, Document ASILE 45, Brussels 25 September 2002.

refugees or as persons who otherwise need international protection, dated 25 September 2002, paragraph 4 has been deleted for both Articles. In addition, the first paragraph of Article 19 stipulates that Member States shall respect the principle of *non-refoulement* in accordance with their international obligations. In spite of that, paragraph 2 reads as follows:

Without prejudice to paragraph 1, a Member State may refoule a refugee or a person eligible for subsidiary protection when there are reasonable grounds for considering:

- (a) him or her as a danger to the security of the country in which he or she is; or
- (b) having been convicted by a final judgement of a particular serious crime, he or she constitutes a danger to the community of that country.

It is obvious that the absolute character of Article 3 ECHR, Article 3 Convention against Torture and Article 7 of the International Covenant on Civil and Political Rights is not reflected in this proposal.

2.3 The *Suresh* case

In the *Suresh* case,⁸ the Supreme Court of Canada considered whether expulsion or deportation of an alien is prohibited if there is a substantial risk of torture except if the alien constitutes a serious danger to the national security of Canada. An alien involved in terrorist activities could not claim protection.

Suresh is a Sri Lankan citizen of Tamil descent. In 1990 he entered Canada and was recognized as a Convention refugee in April 1991. In the summer of 1991, Suresh applied for landed immigrant status in Canada. His application was not finalized and in late 1995 Canada started proceedings to deport Suresh to Sri Lanka on security grounds.

Since his youth, Suresh was a member of the LTTE and is now a member of the LTTE executive. He is well-known within the LTTE and is mainly involved in fundraising for the LTTE. The Canadian authorities acknowledged the fact that Suresh has not personally committed any acts of violence either in Canada or Sri Lanka. His activities on Canadian soil were non-violent in nature. However, they concluded that membership of the LTTE, an organization listed as a terrorist organization by Canada, was a sufficient ground for deportation. The Canadian authorities recognized that Suresh would be at risk on returning to Sri Lanka, but that this risk was difficult to assess and that it might be tempered by his high profile. They

⁸ *Suresh v. Canada*, (11 Jan. 2002), Supreme Court of Canada, 2002 SCC 1, File no. 27790, published on [www/lexum.umontreal.ca/csc-scc/en/rec](http://www.lexum.umontreal.ca/csc-scc/en/rec).

concluded that expulsion or deportation of Suresh was legitimate. Both the judicial review as well as the appeal were dismissed. Eventually Suresh appealed to the Supreme Court of Canada.

The main legal issue in the *Suresh* case was whether Canadian Law precluded deportation to a country where Suresh ran a risk of being tortured. Related questions were concerned with when there is a danger to the national security of Canada (regarding combating terrorism) and whether mere membership of an alleged terrorist organization sufficed.

The main legal issue indicated a balancing act between the protection needs of Suresh (that is, the risk of being tortured upon return) and the security interests of Canada. According to the Canadian Supreme Court, a balancing act is permitted but needs to be in accordance with the principles of fundamental justice. These principles are defined by Canadian municipal law and applicable international law.

From the Canadian domestic perspective, the Supreme Court concluded that:

The outcome [of the balancing act] will depend not only on considerations inherent in the general context but also on considerations related to the circumstances and condition of the particular person whom the government seeks to expel. (. . .) Canadian jurisprudence suggests that this balance will usually come down against expelling a person to face torture elsewhere (paragraph 58).

After careful consideration, the Supreme Court seems to conclude that only a small or theoretical possibility exists for deporting a recognized refugee to face torture. The Supreme Court went on:

We have examined the argument that from the perspective of Canadian law to deport a Convention refugee to torture violates the principles of fundamental justice (paragraph 59)

and in paragraph 75:

We conclude that the better view is that international law rejects deportation to torture, even where national security interests are at stake. This is the norm which best informs the content of the principles of fundamental justice under s. 7 of the Charter.

Here, the Supreme Court referred to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (CAT) and the International Covenant on Civil and Political Rights (ICCPR).

In spite of this small, and in our opinion, rather theoretical possibility to apply a balancing test the Supreme Court leaves the door open that ‘in an exceptional case such deportation might be justified (. . .) in the balancing approach (. . .)’ (paragraph 129).

In this regard the Canadian Supreme Court raises the question how terms like ‘danger to the security of Canada’ and ‘terrorism’ need to be

defined. According to the Supreme Court, the security of Canada is in danger if there is a real and serious possibility of adverse effect to Canada. However, the threat need not be direct; rather it may be grounded in distant events that indirectly have a real possibility of harming Canadian security (paragraph 88). The term terrorism has no single internationally accepted definition. The Supreme Court referred to the recently adopted International Convention for the Suppression of the Financing of Terrorism.⁹ This Convention defines terrorism in two ways. First, it employs a functional definition in Article 2 (a) by defining terrorism as ‘any act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex’ (consisting of nine treaties that are commonly viewed as relating to terrorist acts) and second, this offence-based definition is supplemented by a stipulative definition in Article 2 (1) (b):

any act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, 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.

The Supreme Court concluded that both the terms ‘danger to the security of Canada’ and ‘terrorism’ are not defined as unconstitutionally vague. It was concluded that deportation of Suresh was *prima facie* permitted provided the Minister certified him to be a substantial danger to Canada and provided he was found to be engaged in terrorism or a member of a terrorist organization (paragraph 99).

In the end, the Supreme Court concluded that Suresh made a *prima facie* case that he might be tortured on return if expelled to Sri Lanka and that accordingly he should have been provided with the necessary procedural safeguards. Because these safeguards were not provided for, the case was remanded to the Minister for reconsideration (paragraph 130).

With regard to the standard that should be adopted with respect to the Minister’s decision that a refugee constituted a danger to the security of Canada, the Supreme Court considered that the reviewing court:

should adopt a deferential approach to this question and should set aside the Minister’s discretionary decision if it is patently unreasonable in the sense that it was made arbitrarily or in bad faith, it cannot be supported on the evidence, or the Minister failed to consider the appropriate factors. The Court should not reweigh the factors or interfere merely because it would have come to a different conclusion (paragraph 29).

⁹ UNGA res. 54/109, 9 Dec. 1999, entry into force 10 April 2002.

Clearly, according to the Supreme Court, the Minister has a discretionary power and the courts should adopt a test of reasonableness. The Supreme Court emphasized this in the following quote (paragraph 33):

(. . .) the recent events in New York and Washington. They 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 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. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove. [Emphasis added.]

Like the European Court of Human Rights, we do not see any reason for judicial restraint in assessing a possible danger to national security.

Finally, we note that the Canadian Supreme Court considers deportation of a refugee to face torture should only be permitted in exceptional cases. However, it did not, in our opinion, make clear why the *Suresh* case was exceptional.

3. Terrorism in international law

There is no uniform or single definition of terrorism in international law. Since 1963 a number of global and regional treaties have been drafted and adopted in which specific crimes have been defined that are commonly viewed as terrorist acts.¹⁰ Among these offences are hijacking, kidnapping and bombing. It stems from these treaties that terrorism is a collective term for a number of serious offences for which

¹⁰ Global Conventions: 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, 1979 International Convention against the Taking of Hostages, 1980 Convention on the Physical Protection of Nuclear Material, 1988 Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation, 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1997 International Convention for the Suppression of Terrorist Bombings and the 1999 International Convention for the Suppression on the Financing of Terrorism. Regional Conventions: 1971 OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, 1977 European Convention on the Suppression of Terrorism, 1987 SAARC Regional Convention on Suppression of Terrorism, 1998 Arab Convention on the Suppression of Terrorism, 1999 Convention of the Islamic Conference on Combating International Terrorism, 1999 OAU Convention on the Prevention and Combating of Terrorism and the 1999 Treaty on Co-operation among States Members of the Commonwealth of Independent States Combating Terrorism.

persons should be prosecuted. By focusing on the act rather than the actor, an objective legal concept is created by which the difficult issue of terrorism versus freedom fighting can be resolved.

This legal concept does not seem to correspond with the current political train of thought. For example, the European Union, Canada and the United States have all drafted lists of terrorist groups. The mere fact that a person is a member of a listed organization suffices to characterize this person as a terrorist. It will not be necessary to determine whether or not this person is responsible for any act described in the above mentioned treaties. At most one can argue that members of the listed groups have committed terrorist acts in the past. Therefore, the suspicion might exist that this person was one way or the other involved in these acts. Nevertheless, an individual assessment needs to be made whether or not this person can be held criminally responsible for a certain terrorist act. In this respect the presumption of innocence is very important.¹¹

The thin line between fighting for freedom or self-determination and terrorism became clear during the negotiations on drafting a Statute for the International Criminal Court (ICC). Talks were held to include terrorism as one of the crimes for which the ICC should have jurisdiction. However, no agreement was reached on a definition of terrorism. A number of States suggested defining terrorism as a crime against humanity.¹² This proposal was rejected, among others, by the United States, for the following reasons: (a) the offence (terrorism) was not clearly defined; (b) the inclusion of terrorism as a crime would politicize the ICC; (c) some terrorist acts would not be sufficiently serious to warrant prosecution by an international court; (d) prosecution and punishment by national courts was considered more efficient and (e) the ICC Statute does not make any difference between terrorism and the struggle for self-determination.¹³

We share the criticism of the United States: Terrorism is a political term and not a legal term.

4. The obligations of *non-refoulement* and national security interests of states

4.1 Articles 1F and 33 (2) of the 1951 Refugee Convention

There are several ways by which States can refuse entry to individuals who constitute a danger to the security of the State. Within Europe, for

¹¹ See Article 14 (2) ICCPR, Article 6 (2) ECRM, Article 7 (1) African Charter on Human and Peoples' Rights and Article 8 (2) American Convention on Human Rights.

¹² UN doc. A/CONF.183/C.1/L.27.

¹³ Antonio Cassese, 'Terrorism is also disrupting some crucial legal categories of international law', (2001) *European Journal of International Law* website (www.ejil.org), World Trade Center Forum.

example, States parties to the Schengen Agreement can issue an alert in the joint Schengen Information System for the purpose of refusing entry (Article 96 Schengen Agreement). In practice, States can also simply stop an alien from entering the country or refrain from giving access to asylum procedures, for example, by strictly applying the concept of safe third countries. In its Working Document of 5 December 2001 the European Commission proposed the immediate suspension or *freezing* of the actual examination of the asylum request in two situations (paragraph 1.4.2.1): first, ‘in cases in which an international criminal tribunal has indicted the individual who has claimed asylum’, and secondly, ‘where an extradition request from a country other than the country of origin of the asylum seeker, relating to serious crimes, is pending’.

These measures could all be taken by States when confronted with an asylum seeker who might fall under Article 1F Refugee Convention, by which asylum seekers are excluded from refugee status because there are serious reasons for considering that they have committed particularly serious crimes. However, it is also possible for States to apply Article 33 (2) of the Refugee Convention. Contrary to Article 1F, this Article applies to persons who are recognized as refugees.

The relationship between Article 1F and Article 33 (2) of the Refugee Convention is complex, both in terms of offences that fall within the scope of the Articles as well as the applicable standard of proof. We believe that Article 1F applies to those persons who have committed certain offences outside the country of refuge and before they have applied for asylum. On the other hand, Article 33 (2) Refugee Convention in principle applies to those persons who have committed offences or are planning to commit offences within the country of refuge. 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. The objective of Article 33 (2) is the protection of the country of refuge, whereas the objective of Article 1F is to define who should be excluded from refugee status. Excludable persons cannot claim protection against *refoulement* under Article 33 (1) of the Refugee Convention.

According to Article 33 (2) of the Refugee Convention, a refugee is not protected against *refoulement* if there are *reasonable grounds* for regarding the refugee as a danger to the security of the country in which he or she is, or who, having been convicted by a final judgment of a particular serious crime, constitutes a danger to the community in that country. The threshold for applying Article 33 (2) is high. The standard of proof is higher than when applying Article 1F. Hathaway and Harvey write: ‘In particular, the evidentiary standard for denying protection under Article 33(2), “reasonable grounds”, is higher than that for exclusion under Article 1F(b), “serious reasons for

considering”’.¹⁴ Contrary to excludable persons under Article 1F, Article 33 (2) applies to refugees who in principle have a right to be protected. Therefore, the exception needs to be applied restrictively. In the 1997 Note on the Principle of *Non-refoulement*, UNHCR wrote that: ‘14. In view of the serious consequences to a refugee of being returned to a country where he is in danger of persecution, the exception provided for in Article 33(2) should be applied with the greatest caution. It is necessary to take fully into account all the circumstances of the case (. . .)’.¹⁵ Furthermore, Lauterpacht and Bethlehem write: ‘given the humanitarian character of *non-refoulement* and the serious consequences to a refugee or asylum seeker of being returned to a country where he or she is in danger, the exceptions to *non-refoulement* must be interpreted restrictively and applied with particular caution’.¹⁶

4.1.1 Danger to the security of the country

When does a refugee constitute a danger to the national security of a country? The text of Article 33 (2) Refugee Convention indicates that there needs to be a danger to the country of refuge. Therefore, danger to other States or to the international community falls outside the scope of this Article. Lauterpacht and Bethlehem write:

It does not address circumstances in which there is a possibility of danger to the security of other countries or to the international community more generally. While there is nothing in the 1951 Refugee Convention which limits a State from taking measures to control activity within its territory or persons subject to its jurisdiction that may pose a danger to the security of other States or of the international community, they cannot do so, in the case of refugees or asylum seekers, by way of *refoulement*.¹⁷

In the *Suresh* case, the Canadian Supreme Court indicates it knows the history of Article 33 (2) Refugee Convention by considering that there needs to be a danger to Canada (paragraph 90). However, the Supreme Court believes this approach is no longer valid. According to the Supreme Court, the security of one State depends on the security of other States. The Supreme Court further considers: ‘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’ (paragraph 87).

¹⁴ James C. Hathaway and Colin Harvey, ‘Framing Refugee Protection in the New World Disorder,’ (2001) 43:2 *Cornell International Law Journal*, 288; see also Sir Elihu Lauterpacht and Daniel Bethlehem, ‘The Scope and Content of the Principle of *Non-refoulement*’ (2001), *Opinion for UNHCR’s Global Consultations*, 147.

¹⁵ UNHCR ‘Note on the Principle of *Non-refoulement*,’ UN doc. EC/SCP/2, August 1997.

¹⁶ Cf. Sir Elihu Lauterpacht and Daniel Bethlehem, above, n. 14, at 52.

¹⁷ *Ibid.* at 54.

The Supreme Court of Canada concludes that since the terrorist attacks of 11 September 2001 ‘courts may now conclude that the support of terrorism abroad raises a possibility of adverse repercussions on Canada’s security’ (paragraph 87). Nevertheless, the text of Article 33 (2) Refugee Convention still indicates that even in these situations a provable danger to the security of Canada needs to exist. The mere ‘possibility of adverse repercussions’ will be insufficient. The threshold indicated by the text of Article 33 (2) needs to be applied. Therefore, there needs to be a danger to the security of the country of refuge or its international relations. The danger needs to be proven and cannot be based on assumptions. Hathaway and Harvey write in a comment on previous decisions in the *Suresh* case: ‘In line with the general evidentiary standard of Article 33(2), the connection between an impact on the integrity of Canada’s international relations and Canada’s essential welfare should have been proved, not simply assumed.’¹⁸ We conclude that ‘possible adverse repercussions’ are insufficient.

Although Article 33 (2) Refugee Convention does not specify the facts and circumstances that constitute a danger to the national security and leaves a margin of appreciation for States, the Article does demand a level of risk substantiated by proof. The threshold is high. It applies to persons who try to overthrow the government by force or other illegal means, who are endangering the constitution, the territorial integrity, the independence or the peace of the country of refuge.¹⁹

4.1.2 *Danger to the community of the country*

The second part of Article 33 (2) Refugee Convention applies to refugees who have been convicted in the country of refuge. According to the text and history of Article 33 (2) a provable danger to the community of the country of refuge needs to exist and the Article needs to be applied with great caution. The mere fact that a refugee has been convicted will not be sufficient to apply Article 33 (2) Refugee Convention. First, the text makes clear it only applies in cases of particularly serious crimes. Second, the assessment of the danger needs to be *ex future*, namely it concerns a future risk. Once again we quote Hathaway and Harvey (p. 292):

Third and finally, the nature of the conviction and other circumstances must justify the conclusion that the refugee constitutes a danger to the community from which he or she seeks protection. Because the danger flows from the

¹⁸ Cf. James C. Hathaway and Colin Harvey, above, n. 14, at 290.

¹⁹ A. Grahl-Madsen, *The Status of Refugees in International Law* (Sijthoff, 1966), 235–236; W. Kalin, *Das Prinzip des non-refoulement* (Peter Lang, 1982), 131; Thomas Spijkerboer and Ben Vermeulen, *Vluchtelingenrecht* (NCB, 1997), 302; cf. Sir Elihu Lauterpacht and Daniel Bethlehem, above, note 14, 56.

refugee's criminal character, it does not matter whether the crime was committed in the state of origin, an intermediate state or the asylum state.

We believe a refugee who has been convicted, punished and served his time should not beforehand be excluded from protection under Article 33 (1) Refugee Convention. If in this situation deportation of the refugee is still in violation of the obligation of *non-refoulement*, and the refugee constitutes no danger to the community of the country then granting the refugee a residence permit will contribute to the safety of the individual and of the community. Not granting him any form of legal status within the country will be an extra punishment.

4.1.3 Assessing the Suresh case

According to the Canadian Supreme Court in the *Suresh* case, Suresh constitutes a danger to the national security of Canada because of the mere fact that he is a member and fundraiser of the LTTE, listed by Canada as a terrorist organization. According to the judgment, Suresh is a well-known LTTE member and part of the LTTE executive. No further details are given. For example, it does not become clear how much money Suresh contributes to the LTTE. On the other hand, it does become clear that Suresh himself has never been directly involved in any terrorist or otherwise violent act in Sri Lanka or Canada (paragraphs 13, 14 and 16).

The fact that Suresh did financially contribute to the LTTE could mean that the International Convention for the Suppression of the Financing of Terrorism is applicable, if it was known to Suresh that his contributions were allocated to acts prohibited under the Convention (Article 2). Because of the high profile of Suresh within the LTTE organization it is not unlikely that he knew what his contributions were used for. The question then is whether the destination of the money is in violation of the Convention. If so the LTTE can be characterized as a terrorist organization according to the International Convention for the Suppression of the Financing of Terrorism. However, with regard to the question whether Suresh has a right to be protected against *refoulement*, it still needs to be assessed if Suresh constitutes a provable danger to the security of Canada. From the facts and circumstances of the case, this is far from clear.

Does the LTTE constitute a danger to the security of Canada? It is well known that the LTTE limits its actions largely to Sri Lanka. It certainly has not committed any violent actions in Canada. Furthermore, it needs to be seen whether the LTTE constitutes a future danger. Recently the first round of peace negotiations between the LTTE and the Sri Lankan authorities has taken place in Thailand in which

a cease-fire has been agreed upon. We believe no real or provable danger to the national security of Canada exists.

4.1.4 *The possibility of a balancing act?*

Does Article 33 (2) Refugee Convention leave any room for a balancing act between the national security of a State and the protection needs of the individual? Hathaway and Harvey believe that no room is available. They write: ‘If compelling evidence exists that the refugee is a danger to asylum-state security or safety of the community of that country, there is no additional proportionality requirement to satisfy.’ However, they continue: ‘Refoulement is instead authorized only where genuinely necessary to protect the asylum-state community from an unacceptably high risk of harm.’²⁰ Hathaway and Harvey believe that a balancing act may lead to an interpretation of Article 33 (2) Refugee Convention in which disputable dangers to the national security might be weighed more heavily than the protection needs of a refugee.

Lauterpacht and Bethlehem approach Article 33 (2) Refugee Convention in the context of developments regarding *non-refoulement* that have occurred after the adoption of the Refugee Convention. They, for example, refer to Human Rights Committee General Comment 20 regarding ICCPR. Lauterpacht and Bethlehem do not seem to exclude a balancing act. In cases where danger to the national security exists, the obligation of *non-refoulement* is only applicable if there is a risk of torture or other cruel, inhuman or degrading treatment or punishment: ‘(. . .) the State proposing to remove a refugee or asylum-seeker to his or her country of origin must give specific consideration to the nature of the risk faced by the individual concerned’. This is because exposure to some forms of risk will preclude *refoulement* absolutely and without exception. This applies notably to circumstances in which there is a danger to torture, cruel, inhuman or degrading treatment or punishment.²¹ In such cases, the obligation of *non-refoulement* is non-derogable or absolute. If there is a risk of other forms of persecution a balancing act is possible.

Combining Hathaway/Harvey and Lauterpacht/Bethlehem it can be concluded that Article 33 (2) Refugee Convention allows deportation if a provable danger to the national security of the country of refuge exists or if the refugee is convicted for a particularly serious crime and constitutes a provable danger to the community of the country of refuge, irrespective of the persecution the refugee might be subjected to, unless the persecution can be qualified as torture or inhuman or

²⁰ James C. Hathaway and Colin Harvey, above n. 14, 294.

²¹ Sir Elihu Lauterpacht and Daniel Bethlehem, above n. 14, 57.

degrading treatment or punishment. In those cases, deportation is not permitted.

4.2 Article 3 European Convention on Human Rights (ECHR)

According to Article 3 ECHR no one shall be returned to a country where he or she runs a real risk of being subjected to torture or inhuman or degrading treatment or punishment. In its Working Document of 5 December 2001 the Commission of the European Union has stated that the European Court of Human Rights on several occasions has confirmed the non-derogability and the absolute and fundamental character of Article 3 ECHR. Under no circumstances are exceptions or derogations under Article 3 ECHR allowed. That includes dangers to the national and public security. Even in cases of a ‘public emergency’ (Article 15 ECHR) no derogation is permitted. Regarding alleged terrorists, the European Court has also confirmed the non-derogability of Article 3 ECHR. In *Chahal v. United Kingdom*,²² the applicant, an Indian national belonging to the Sikh population, was suspected of having committed terrorist acts. He had asked for asylum in the United Kingdom. Although the British authorities considered a balancing act between the national security of the United Kingdom and the protection needs of Chahal to be necessary, the European Court ruled that the absolute character of Article 3 does not permit deportation to India if there is a real risk of being subjected to torture or inhuman or degrading treatment or punishment, irrespective of the conduct of the applicant or a possible danger to the national security of the United Kingdom. The Court concluded that if returned to India, Chahal would run a real risk of being subjected to torture or inhuman or degrading treatment or punishment. Therefore, deportation would lead to a violation of Article 3 ECHR. We conclude that Article 3 ECHR does not allow any balancing act between the security interests of State parties and the protection needs of individuals.²³

Contrary to the Supreme Court of Canada in the *Suresh* case, the European Court concluded in the *Chahal* case that a test of reasonableness should not be applied. In paragraph 131 the Court:

recognizes that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved. With reference to Canada, the European Court considers a more effective form of

²² *Chahal v. United Kingdom*, (15 Nov. 1996), European Court of Human Rights, Appl.no. 22414/93; See also *Ahmed v. Austria*, (17 Dec. 1996), Appl.no. 25964/94.

²³ The Dutch Minister of Justice has stated that he wants to know to what extent deportations are possible in cases in which this may violate Article 3 ECHR; see the Official Parliamentary Publication ‘TK 2001–2002, 27 925, nr. 58, p. 6’.

judicial control has to be adopted ‘which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice’ (paragraph 131).

The Court reiterated this opinion in the case of *Al-Nashif v. Bulgaria*.²⁴ In paragraphs 123 and 124 the Court stated:

Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information (see the judgements cited in paragraph 119 above). The individual must be able to challenge the executive’s assertion that national security is at stake (. . .).

4.3 The International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

Like the ECHR, the Convention against Torture includes an absolute or non-derogable obligation of *non-refoulement*, in Article 3. Under this Article no exception or derogation is allowed. In the case of *Paez v. Sweden*, the Committee Against Torture has explicitly stated that the activities of Paez as a member of the alleged terrorist organization *Sendero Luminoso* in Peru, cannot be a material consideration in determining his right to be protected under Article 3 of the Convention against Torture. The Committee considered:

the text of article 3 of the Convention is absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention.²⁵

The relationship between the non-derogable character of Article 3 and the fight against terrorism became clear in the case of *Arana v. France*. The applicant, a member of the Basque separatist movement ETA, was about to be extradited to Spain.²⁶ The Committee Against Torture adopted its view on 5 June 2000, long before the attacks on New York and Washington. It is an important view as the Committee confirms

²⁴ *Al-Nashif v. Bulgaria*, (20 June 2002), European Court of Human Rights, Appl. no. 50963/99.

²⁵ *Paez v. Sweden*, (28 April 1997), Committee Against Torture, no. 39/1996, at 14.5.

²⁶ *Arana v. France*, (5 June 2000), Committee Against Torture, no. 63/1997 at 11.5.

the importance of procedural safeguards:

The Committee recognizes the need for close co-operation between States in the fight against crime and for effective measures to be agreed upon for that purpose. It believes, however, that such measures must fully respect the rights and fundamental freedoms of the individuals concerned.

No exceptions or derogation as to the obligation of *non-refoulement* are permitted under Article 7 of the International Covenant on Civil and Political Rights (ICCPR). Similar to Article 3 ECHR, Article 7 ICCPR prohibits torture and other forms of cruel, inhuman or degrading treatment or punishment. This prohibition contains an implicit obligation of *non-refoulement*, according to the Human Rights Committee in its General Comment number 20 (1992).²⁷ In this General Comment the Human Rights Committee confirms the non-derogability or absolute character of Article 7 ICCPR.²⁸

4.4 The African Charter on Human and Peoples' Rights and the American Convention on Human Rights

An obligation of *non-refoulement* can also be found in Article 5 of the African Charter on Human and Peoples' Rights and in Articles 5 (2) and 22 (8) of the American Convention on Human Rights.

According to Article 5 of the African Charter: 'Every individual shall have the right to the respect of the dignity inherent in human beings and to the recognition of his legal status. All forms of exploitation and degradation of a man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.' This provision is absolute and contains an implicit obligation of *non-refoulement*.²⁹ Likewise, Article 5 (2) of the American Convention reads: 'No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment (. . .)'.

An explicit obligation of *non-refoulement* can be found in Article 22 (8) of the American Convention on Human Rights: 'In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal

²⁷ General Comments number 20, (1992), Human Rights Committee, at 9; see also *Kindler v. Canada*, (18 November 1993), Human Rights Committee, no. 470/1991 at 13.2: 'If a State extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant,' and *C v. Australia*, (13 November 2002), Human Rights Committee, no. 900/1999 at 8.5.

²⁸ General Comment number 20, (1992), Human Rights Committee, at 3 and General Comment number 29, (2001), Human Rights Committee, at 7.

²⁹ Joan Fitzpatrick (ed.), *Human Rights Protection for Refugees, Asylum-seekers and Internally Displaced Persons, A Guide to International Mechanisms and Procedures* (Transnational Publishers Inc., New York, 2002), 264–265.

freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.’ However, this obligation is not absolute. In times of ‘public emergency’ a State party may derogate (Article 27 American Convention).

Finally, the OAU Convention governing specific aspects of refugee problems in Africa (1969) also includes an obligation of *non-refoulement* in Article II (3).

4.5 Charter of Fundamental Rights of the European Union

It is important to note that within the European Union, the Charter of Fundamental Rights of the European Union — a non-binding document — contains an explicit and absolute obligation of *non-refoulement*. According to Article 19 (2) ‘no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.’

4.6 The *jus cogens* nature of *non-refoulement*

Protection against *refoulement* based on several treaty obligations cannot be seen separately. There is mutual influence of the different obligations of *non-refoulement*. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (Article 31 Vienna Convention on the Law of Treaties). Treaties need to be interpreted in light of their current juridical context and in the juridical context of subsequent agreements by State parties, including human rights treaties and related case law.³⁰ Article 33 (2) Refugee Convention needs to be interpreted in light of the other *non-refoulement* obligations.³¹ In the case of *Paez v. Sweden*, for example, the Committee Against Torture considered that if an alien is excludable under Article 1F Refugee Convention from refugee status, he still can have a right to be protected against *refoulement* under Article 3 of the Convention Against Torture.³²

A step further is the question if the obligation of *non-refoulement* can be qualified as a peremptory norm of general international law, or ‘*jus cogens*’ (Articles 53 and 64 Vienna Convention on the Law of Treaties).

The object and purpose of asylum law is the protection of individuals against violations of fundamental human rights. This objective is not

³⁰ Tom Clark and François Crépeau, ‘Mainstreaming Refugee Rights: The 1951 Refugee Convention and International Human Rights Law’ (1999) 17:4 *Netherlands Quarterly on Human Rights*, 389–390.

³¹ EXCOM Conclusion number 79, (1996); Tom Clark and François Crépeau, above note 30, p. 390.

³² *Paez v. Sweden*, (28 April 1997), Committee Against Torture, no. 39/1996.

subject to discussion, at least not until the attacks of 11 September 2001. After this date the objective seems to be no longer that clear. To characterize the obligation of *non-refoulement* as *jus cogens* might therefore be a powerful weapon to guarantee protection of individuals and their human rights. Therefore, it is important to see if the obligation of *non-refoulement* is accepted and recognized as a peremptory norm of international law. If so, every treaty, every treaty obligation and every unilateral, bilateral or multilateral act by a State or international organization that is in conflict or violation with this norm, is void.

According to Article 53 of the Vienna Convention on the Law of Treaties, a norm can be characterized as *jus cogens* if it 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 be modified only by a subsequent norm of general international law having the same character.' Although we have already concluded that the obligations of *non-refoulement* stemming from Article 3 ECHR, Article 3 CAT and Article 7 ICCPR are non-derogable, it is still useful to examine if *non-refoulement* can be characterized as *jus cogens*, irrespective of treaty obligations. The relevant question is: is the obligation of *non-refoulement* a non-derogable norm and as such accepted and recognized by the international community of States as a whole? In other words, is the obligation of *non-refoulement* part of international customary law? Goodwin-Gill and Allain believe *non-refoulement* is part of international customary law.³³ According to Goodwin-Gill, it is especially important to note that international organizations like the United Nations General Assembly and UNHCR have regularly confirmed *non-refoulement* as a rule of international customary law, without any objection of States. Furthermore, Allain³⁴ considers that mainly because of different EXCOM Conclusions (Conclusions of the Executive Committee of UNHCR),³⁵ and because of the State practice which has emerged in Latin America on the basis of the 1984 Cartagena Declaration on Refugees, the obligation of *non-refoulement* can be characterized as *jus cogens*.³⁶ It is not relevant that in practice States do not always act according to the obligation.³⁷ Allain concludes that 'as long as there is an insistence on the non-derogable nature of *non-refoulement*, its status is secure'.³⁸

³³ Guy S. Goodwin-Gill, *The Refugee in International Law* (OUP 1996), 167; Jean Allain, 'The *Jus cogens* Nature of *Non-refoulement*,' 13 *IJRL* 538 (2001).

³⁴ Jean Allain, above note 33.

³⁵ EXCOM Conclusions on International Protection No. 25 (1982), No. 55 (1989), No. 79 (1996).

³⁶ See also e.g. Sir Elihu Lauterpacht and Daniel Bethlehem, above n. 14, 62.

³⁷ Military and Paramilitary Activities in and against Nicaragua, ICJ Rep. 1986.

³⁸ Allain, above n. 33.

Besides the obligation of *non-refoulement*, the prohibition on torture can also be characterized as a peremptory norm of general international law.³⁹ In General Comment 24 (1994) the Human Rights Committee has recognized the prohibition on torture and other cruel, inhuman or degrading treatment or punishment also as a peremptory norm of general international law.⁴⁰

Recognizing and accepting the obligation of *non-refoulement* as a peremptory norm of general international law (*jus cogens*) means that States and international organizations such as the United Nations and the European Union cannot just derogate from the norm. This is only possible by a subsequent norm of general international law having the same character (Article 53 Vienna Convention on the Law of Treaties).

The major practical problem remains the burden of proof to be able to actually characterize the obligation of *non-refoulement* as a peremptory norm of general international law and to claim this in a court of law.

5. The future of the non-derogable nature of *non-refoulement*

5.1 Safety guarantees

It is not unthinkable that the European Commission will come up with a proposal for a Directive in which the Commission will interpret Article 3 ECHR in such a manner that expulsion will be possible after having obtained safety guarantees. If there is a request for extradition this certainly will be a possibility.⁴¹ If no extradition request has been received, the State willing to send back the alleged terrorist can, until now, not obtain any guarantee because it is forbidden to contact the authorities of the country of origin.⁴²

In the Canadian *Suresh* case, the Sri Lankan authorities gave assurances that on return Suresh would not be subjected to torture. The Supreme Court of Canada considered these assurances to be insufficient. They considered it difficult to rely:

too heavily on assurances by a State that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its

³⁹ Sir Elihu Lauterpacht and Daniel Bethlehem, above n. 14, 73.

⁴⁰ General Comment number 24, (1994), Human Rights Committee, at 8: 'Accordingly, provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment (. . .).'

⁴¹ See 'Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism', 15 July 2002, para. XIII.

⁴² See, for example, Art. 22 of the proposal for a Council directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (COM (2002) 326 final), 3 July 2002: 'Member States shall not disclose the information regarding individual applications for asylum to the authorities of the country of origin of the applicant for asylum.'

territory in the past [(paragraph 124).They further considered:] 125. In evaluating assurances by a foreign government, the Minister may also wish to take into account the human rights record of the government giving the assurances, the government's record in complying with its assurances, and the capacity of the government to fulfil the assurances, particularly where there is doubt about the government's ability to control its security forces.

Safety assurances or guarantees given by the country of origin to which an alien is to be returned can be of influence in the risk assessment. In the case of *Soering v. United Kingdom* before the European Court of Human Rights,⁴³ the question arose whether extradition of the applicant to the United States would lead to a violation of Article 3 ECHR because capital punishment might be imposed and hence the applicant might be subjected to the death row phenomenon. The final decision was influenced by the certainty of guarantees given by US authorities. The US Public Prosecutor for example officially declared that: '(. . .) should Soering be convicted of the offence of capital murder as charged (. . .) a representation will be made in the name of the United Kingdom Government that the death penalty should not be imposed or carried out.' According to the European Court guarantees 'must at the very least significantly reduce the risk of a capital sentence either being imposed or carried out' (paragraph 93). The British authorities admitted that the guarantees given did not significantly reduce the risk. The decision to impose the death penalty and to take into account the wishes of the United Kingdom lay, in this case, with the judge and the governor of the State, not with the federal authorities and they did not give any guarantees.

In the *Soering* case, the issue of guarantees is clear: if significant guarantees would have been given that the death penalty would not be imposed or carried out, then the risk of subjection to the death row phenomenon would have been nullified and a real risk of a violation of Article 3 ECHR would not have arisen. It is much more complicated in cases not involving the imposition or the carrying out of legal sentences, but subjection to extra-judicial torture or inhuman or degrading treatment or punishment. By expelling an alien after guarantees are given, a balancing act can be avoided and will be found in the assessment of the risk of being subjected to prohibited treatment.⁴⁴

⁴³ *Soering v. the United Kingdom*, (7 July 1989), European Court of Human Rights, Appl.no. 14038/88.

⁴⁴ In *G.T. v. Australia*, (4 Dec. 1997), Human Rights Committee, no. 706/1996 at 8.4, the Human Rights Committee considered with respect to a drugs smuggler no significant guarantees are necessary: 'Although the Committee considers that the "assurances" given by the Malaysian Government do not *as such* preclude the possibility of T.'s prosecution for exporting or possessing drugs, (. . .)'

5.2 Applying criminal law in cases involving Articles 1F and 33 (2) of the 1951 Refugee Convention

The documents the European Union has adopted since 11 September 2001 propose deportation and extradition of persons suspected of serious crimes who at the same time may claim their right to be protected against violations of fundamental human rights. It is feared that the European Commission and the EU Member States are trying to balance the interest of the individual in search and need of protection, on the one hand, and the interest of the State and its community on the other hand, by trying to get guarantees from the countries of origin or by expelling the alien to a third country outside the European Union that is willing to admit the alien.

However, would prosecution of alleged terrorists not be a better solution than by refraining to give protection and thereby co-operating with further violations of human rights? The fundraising activities of Suresh might fall within the scope of the International Convention for the Suppression of the Financing of Terrorism. According to Article 4 of this Convention, all State parties are obliged to take all necessary measures: '(a) To establish as criminal offences under its domestic law the offences set forth in article 2; (b) To make those offences punishable by appropriate penalties which take into account the grave nature of the offences.' Hereby an obligation is created for State parties to prosecute alleged terrorists, as defined by this treaty. This is similar to the 1996 UN General Assembly Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Protection.⁴⁵ 'The States Members of the United Nations reaffirm the importance of ensuring effective cooperation between Member States so that those who participated in terrorist acts (. . .) are brought to justice'. Recent developments in international criminal law, such as the creation of an International Criminal Court, have shown that the prosecution of perpetrators of serious human rights violations is quickly gaining ground (in spite of objections by the United States). The legal tension between absolute protection against human rights violations and responsibility mechanisms can be reduced now that the possibility of holding terrorists, war criminals and other perpetrators of serious human rights violations criminally accountable has significantly increased.

The legal procedures to assess cases involving Article 1F Refugee Convention lack the legal guarantees of criminal proceedings. If, like in the Netherlands, the assessment of exclusion under Article 1F Refugee Convention precludes the assessment of inclusion under Article 1A (2)

⁴⁵ UNGA res. 51/210, 17 Dec. 1996, with Annex 'Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Protection'.

Refugee Convention, early co-operation between the Immigration Service that is responsible for status determination of asylum seekers and the Public Prosecutor is of vital importance.

The protection of individuals against *refoulement* should never lead to impunity. Asylum law is not meant to be an escape route to avoid prosecution. Not only should States take responsibility whenever an individual is in need of protection, but they also should hold individuals criminally accountable for their acts. The current measures proposed by States neglect both international responsibilities.

6. Conclusion

On 14 December 1967, the United Nations General Assembly adopted a Declaration on Territorial Asylum. It stated: 'Recognizing that the grant of asylum by a state to persons entitled to invoke article 14 of the Universal Declaration of Human Rights is a peaceful and humanitarian act that as such cannot be regarded as unfriendly by any other State.' Thirty-five years later it becomes clear this objective has not been reached. Over the years, asylum law has been politicized. Since the 1990s States have adopted lists of so-called safe countries of origin and safe third countries. Not being mentioned on such a list can be highly politically significant. The attacks on New York and Washington have led to new lists. This time, lists of wanted persons and forbidden organizations. Not being mentioned on these lists is also highly politically significant. Being mentioned can have far-reaching consequences for members and sympathizers of forbidden organizations and groups. They will probably not be able to claim international protection. Thereby, absolute and fundamental norms such as the prohibition on torture and other cruel, inhuman or degrading treatment or punishment will be balanced.

In sum, the war on terrorism is harmful for human rights. In the *Suresh* case, the Supreme Court of Canada considered the prohibition of torture to be 'less' than absolute. They made clear that States have the power to declare a person to be a terrorist without effective control by the judiciary. The European Commission adopted proposals and asked the European Court of Human Rights to find ways to allow States to refuse a person entry if he constitute a danger to national security. We would strongly urge States to uphold the absolute or non-derogable character of *non-refoulement* and to take those steps necessary, both legal as well as practical, to prosecute suspected terrorists.