National Defence Défense nationale

Canadian Forces College

Collège des Forces Canadiennes

THE SECURITIZATION OF MIGRATION AND THE NAVY'S EMERGING ROLE

Lieutenant-Commander Sandra MacLeod

JCSP 38

Master of Defence Studies

Disclaimer

Opinions expressed remain those of the author and do not represent Department of National Defence or Canadian Forces policy. This paper may not be used without written permission.

PCEMI 38

Maîtrise en études de la défense

Avertissement

Les opinons exprimées n'engagent que leurs auteurs et ne reflètent aucunement des politiques du Ministère de la Défense nationale ou des Forces canadiennes. Ce papier ne peut être reproduit sans autorisation écrite.

Canada

CANADIAN FORCES COLLEGE - COLLÈGE DES FORCES CANADIENNES
JCSP 38 - PCEMI 38

Masters of Defence Studies (MDS)

The Securitization of Migration and the Navy's Emerging Role

By LCdr Sandra MacLeod
Par le capc Sandra MacLeod

Word Count: 15,900

Compte de mots : 15,900

TABLE OF CONTENTS

Abstract

Through the lens of the securitization model developed by the Copenhagen school, this paper examines the post-9/11 maritime security landscape placing a special emphasis on the use of naval vessels to interdict vessels suspected of carrying illegal migrants. It examines the evolution of critical security studies and explains how academic scholars have facilitated an expanded notion of security. It highlights the maritime security initiatives within the 2004 Canadian National Security Policy (NSP) and the Canada First Defence Strategy (CFDS) and examines the legal bases under which the Canadian government can take exceptional measures to mitigate a perceived threat.

The paper argues that the current circumstances that Canada faces with migration do not substantiate the exceptional measures proposed. As a result, efforts to implement the proposed measures into legislation both challenge the rule of law and undermine Canada's legal obligations both internationally and domestically. Through a comparative analysis of the lessons learned in the securitization of migration in Australia and the United States, a critical analysis of Canada's ongoing securitization process is conducted. Finally, the paper argues that if securitization of maritime threats is becoming the norm, then Canadian law must evolve to ensure that the RCN has the legal capacity to operate as an integral dimension in the larger security picture.

LIST OF ACRONYMS AND ABBREVIATIONS

ADF	Australian Defence Force
CAT	Convention Against Torture
CCC	Criminal Code of Canada
CF	Canadian Forces
Charter	Canadian Charter of Rights and Freedoms
CBSA	Canadian Border Security Agency
CFDS	Canada First Defence Strategy
HMAS	Her Majesty's Australian Ship
IRPA	Immigration and Refugee Protection Act
ICCPR	International Covenant on Civil and Political Rights
LEA	Law Enforcement Authorities
MND	Minister of National Defence
MV	Motor Vessel
MP	Member of Parliament
NDA	National Defence Act
NSP	2004 National Security Policy
RCMP	Royal Canadian Mounted Police
RCN	Royal Canadian Navy
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNHCR	United Nations High Commissioner for Refugees
SAR	Search and Rescue
SAS	Special Air Service – Special Forces unit of the Australian Army
SCC	Supreme Court of Canada
SOLAS	International Convention for the Safety of Life at Sea
SS	Steam Ship
UDHR	Universal Declaration of Human Rights
US	United States
USCG	United States Coast Guard

> Canada must meet both the requirements of security and the requirements of democracy: we must never forget that the fundamental purpose of the former is to secure the latter.[1]

The above 1981 caution from the McDonald Commission provides a prophetic glance foreshadowing recent struggles reconciling security with our democratic principles. The attacks of 9/11 introduced a new transnational threat, very different from traditional threats posed by military forces penetrating borders or traditional forms of terrorism. As Peter Avis argues, the sophistication of the 9/11 attacks introduced a new paradigm for which states were not prepared:

> By coming from nowhere and attacking civilians using civilian transport as weapons, and in a military way, terrorists have altered the way we must think about domestic security. Before 11 September, it was a simple matter to separate military from civilian security concerns; it will never be so again. A consequence of this new form of asymmetric warfare has been the necessary binding together of various branches of government as they react to this 'threat without a flag."[2]

A vulnerable exposure of threats operating "without a flag" is found in the maritime environment. The enforcement challenges that flow from the multi-jurisdictional legal framework combined with the unique obligations for mariners at sea and flag states provide a fundamental test of the character of a nation.

Ninety percent of world trade moves by ships into ports where sophisticated supply chains interconnect both the commerce and

---

[1] *Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, Freedom and Security Under the Law*, Second Report, Vol. 1 (Ottawa: Minister of Supply and Services Canada, 1981), 43-44.

[2] Captain (N) Peter Avis, "Surveillance and Canadian Maritime Domestic Security," *Canadian Military Journal*, Vol. 4, No. 1 (Spring 2003): 6.

economies of states.[3] The importance of the security of our oceans is well described by the Navy League of Canada:

> The oceans are the great highways upon which much of the world depends and the sea remains a key means of communication between states as well as communities.[4]

As a country dependent on trade, Canadian exports of goods and services account for 40% of the economy and maritime shipping accounts for one fifth of Canadian exports to the United States as well as 95% of exports to other countries.[5] Consequently, the oceans matter greatly to Canada and unmonitored maritime activities increase our vulnerability to security threats arriving by sea.

Recognizing their vulnerability to maritime threats, states have invested immense efforts in improving maritime awareness, monitoring the transit of vessels passing through their sovereign waters or arriving in their ports. A response to a maritime security incident demands decisive action and must be exercised under tight timelines. As Dwight Mason concludes:

> There may be very little warning of attack from the sea, ... the warning time for sea-launched cruise missiles may be as little as 10 minutes. These events and threats can also pose exceedingly complex consequence-management problems that must be considered ahead

---

[3] Association of Canadian Port Authorities. "Industry Information, Canadian Port Industry," (The Association of Canadian Port Authorities was founded in 1958 and groups together ports and harbours and related marine interests into one national association) Website: http://www.acpa-ports.net/industry/industry.html; Internet; accessed 22 February 2012.

[4] Navy League of Canada, "Canada, An Incomplete Maritime Nation," *Maritime Affairs* (Ottawa: The Navy League of Canada, 2003), 42.

[5] Association of Canadian Port Authorities. *Supra* Note 3.

> of time, as there will probably not be sufficient time to consider them during the event.[6]

Although the views of Avis and Mason were expressed post-9/11, given the multi-jurisdictional aspect of oceans, the increased threats posed by non-state actors and non-flagged vessels operating outside the jurisdiction of any state, the concern has only intensified. Efforts to develop countermeasures to maritime threats have led to the development of a comprehensive security framework as well as an increasing trend of securitization in the maritime environment. Specific efforts to improve maritime security aimed at deterring criminals and terrorists is also compromising Canada's obligations to refugees fleeing through the maritime environment.

The securitization of migration in Canada has long been recognized and critically commented on by esteemed academic scholars such as Sharryn Aiken, Scott Watson, Catherine Dauvergne, and Audrey Macklin.[7] Profiting from their insight, this paper examines the most recent attempt to securitize migration specifically in the maritime environment. The maritime environment provides freedom of the seas, but also provides exclusive

---

[6] Dwight N. Mason, Center for Strategic and International Studies (CSIS), "Canadian Defense Priorities: What Might the United States Like to See?" *Policy Papers on the Americas*, Volume XV, Study 1: (March 2004).

[7] On securitization, the following published work of the above mentioned legal scholars have been relied upon: Sharryn Aiken, "Of Gods and Monsters: National Security and Canadian Refugee Policy," (2001) 14.2 *Revue quebecoise de droit international* 1; Scott Watson, Manufacturing Threats: Asylum Seekers as Threats or Refugees. 3 *J. Int'l L & Int'l Rel* 103 2007, 103-104; Catherine Dauvergne "Security and Migration Law in the Less Brave New World," *Social and Legal Studies* 16(4), 533; Audrey Macklin, Disappearing Refugees: Reflections on Canada-US Safe Country Agreement" 36 *Colum. Hum. Rts. L. Rev*. 365 2004-2005.

jurisdiction to flag states of vessels. At the same time, there are vessels operating without registering their vessel in any state. Depending on location, there may be multiple competing jurisdictions and when obligations under the law of the sea and safety of life at sea are overlaid, the circumstances are inimitable in many ways.

This exceptionality of the maritime environment must be reconciled with the Canadian government's right to protect its borders. This paper will examine the political and legal considerations in improving maritime security without setting conditions for Canada's strategic failure in compromising its obligations to refugees.

The paper argues that the circumstances surrounding illegal migration into Canada (by sea) do not substantiate the exceptional measures proposed. As a result, ongoing efforts to implement proposed measures into legislation both challenge the rule of law and undermine Canadian legal obligations both internationally and domestically. Through a comparative analysis of the lessons learned in the securitization of migration in Australia and the United States, a critical analysis of Canada's ongoing securitization process is conducted. Finally, the paper argues that if securitization of maritime threats is becoming the norm, then Canadian law must evolve to ensure that the RCN has the legal capacity to operate as an integral dimension in the larger security picture.

Through the lens of the securitization model developed by the Copenhagen school, it focuses on the illegal migration by sea within the

post-9/11 maritime security landscape. In conducting the above analysis, this paper focuses on the increased tendency of the Canadian government to deploy its naval forces in responding to non-traditional security threats within the maritime environment.

Under an international legal regime that respects the exclusive responsibility of states over its flagged vessels, naval vessels sail as an instrument of a state's power and as such hold special status. Although most state warships and their weaponry are designed to respond to traditional military threats, there has been increased expectation for the RCN to respond to non-traditional maritime security threats. As a case study, this paper focuses specifically on the use of naval vessels to interdict vessels suspected of carrying illegal migrants.

This paper is divided into seven chapters. Chapter 1 examines the evolution of critical security studies and explains how scholars have facilitated an expanded notion of security. As this paper is focused on maritime security, it highlights the maritime security initiatives within the 2004 Canadian National Security Policy (NSP) with a special emphasis on a comprehensive government response. Chapter II introduces the securitization model developed by the Copenhagen school and using this model, assesses the Canadian government's current approach to deterring illegal migration by sea. In addition, it examines the right of states to impose exceptional measures to mitigate threats to the state.

As this paper argues that the ongoing securitization of migration challenges the exercise of the rule of law, Chapter III examines Canada's legal obligations both internationally and domestically. Chapter IV focuses on the government's legislative amendments in Bill C-31 as the final stages of the securitization process. In doing so, it provides a very brief overview of the legislation and highlights concerns raised by critics challenging the ongoing securitization process. Chapter V provides a comparative analysis of the securitization of migration in both Australia and the US and compares the exceptional circumstances that existed in both Australia and the United States prior to securitization.

Profiting from the lessons learned from Australia and the US, Chapter VI conducts a critical analysis of Canada's ongoing securitization process and reviews the legal mechanisms that permit the government to react to a threat based incident, rather than adopting a blanket approach.

Finally, Chapter VII argues that if the securitization of maritime migration succeeds and becomes the norm, then Canadian law must evolve to ensure that the RCN has the legal capacity to operate as an integral player in the larger security picture.

CHAPTER I – SHIFTING THOUGHT[8]

Firstly, it is helpful to contrast traditional military threats to the broader security threats existing today. In responding to traditional military threats

[8] Lieutenant Commander S.M. MacLeod, "The Team in Comprehensive Operations" (Toronto: Canadian Forces College Command and Staff Course Decisive Manoeuvre Paper, 2012). Within this Chapter, the author has relied upon paragraphs and research from the author's own unpublished work.

that threaten state borders, military forces have always been a fundamental resource deployed at the discretion of state executive power. Historically, war formed the boundaries of states and in turn, states shaped the advancement and motives for war. As a result of this mutual co-dependence, traditional military response focussed on preserving the nation state. Moreover, military threats were predictable. The core ingredient of a state's power flowed from its' military strength so military forces were pivotal to the survival of the state.[9]

As the Cold War waned and without the fear of a military clash between the two great super powers, security studies traditionally synonymous with the defence of sovereignty needed an overhaul. Although attack from another state remained the most obvious threat to state sovereignty, it was no longer recognized as the sole overriding concern. Internal ethnic disputes, civil wars, the flow of refugees, violations of human rights, poverty and social inequities were increasingly considered problems that threatened security. Traditionally, realist academics, such as Walt, viewed security studies as focussed exclusively on military force:

> Security studies may be defined as the study of the threat, use, and control of military force. It explores the conditions that make the use of force more likely, the ways that the use of force affects individuals, states, and societies, and the specific policies that states adopt in order to prepare for, prevent, or engage in war.[10]

---

[9] Alan Collins. *Contemporary Security Studies* (New York: Oxford University Press, 2007), 24.

[10] S. Walt, "The Renaissance of Security Studies," *International Studies Quarterly*, Vol. 35(2), (1991): 211-39, 212.

Consequently, with the traditional concept of security focussed entirely on countering external military threats, a gap emerged. The gap was further aggravated when the threats and atrocities increasingly unfolded inside states. Genocide and ethnic cleansing in Rwanda and Bosnia were not inflicted by foreign military forces, but by warring ethnic factions within their respective states. In essence, just because foreign military forces do not cross a state's borders, does not mean that a security problem does not exist.

Emergence of Critical Security Studies

In May 1994, York University in Toronto hosted a conference bringing together scholars concerned about the post-Cold War direction of security studies. This conference served to launch the concept of "Critical Security Studies" which would later be elaborated as a book by edited Keith Krause and Michael Williams.[11] This book would later facilitate an expanded notion of security where the "state" was no longer considered the only "object" of security.[12]

It might be argued that if the state is secure then the people within the state would automatically be secure. However, such a simplistic approach leaves people who are unable to receive protection from state officials very vulnerable. For example, the May 2009 end to the protracted civil war in Sri Lanka led to massive displacement of persons seeking

[11] Collins, *Supra* Note 9, 56.

[12] Keith Krause and Michael C. Williams, *Critical Security Studies: Concepts and Cases.* (Minneapolos: University of Minnesota Press, 1997).

refuge.[13] Estimates of displaced persons flowing from that war were approximately 300,000 persons and the government in power at the time was unable and or unwilling to protect these individuals.[14]

Nye's Soft and Hard Power

Well known Harvard scholar, Joseph Nye Jr. examined the effects of globalization or the "worldwide network of interdependence" which includes terrorist networks as "a new form of military globalization" and migration as an example of social globalization.[15] In his writings, Nye addresses the pressures emanating from cross border movement within a transnational global society.

He argues that the level and pattern of people, goods and services that cross state borders resembles the society that predated the establishment of the state system under the 1648 Treaty of Westphalia.[16] Although he predicts the continued dominance of sovereign states, he argues that our previously understood concept of sovereignty is changing

---

[13] Sri Lankan Ministry of Defence. "LTTE defeated; Sri Lanka liberated from terror." http://www.defence.lk/new.asp?fname=20090518_10; Internet; accessed 22 January 2012.

[14] Amnesty International. "Unlock the Camps in Sri Lanka, Safety and Dignity for the Displaced Now," 10 August 2009. http://www.amnesty.org/en/library/asset/ASA37/016/2009/en/5de112c8-c8d4-4c31-8144-2a69aa9fff58/asa370162009en.html#1.Unlock%20the%20Camps%20in%20Sri%20Lanka|outline; Internet; accessed 22 January 2012.

[15] Joseph S. Nye, *The Paradox of American Power: Why the World's Only Superpower Can't Go it Alone* (New York: Oxford University Press, 2002), 80 and 83.

[16] *Ibid.,* 54.

and so states must also adapt the nature of their power. Nye emphasizes the requirement for states to exercise both "hard" and "soft" power.

According to Nye, hard power is based on the traditional concept of military power, but also includes economic power.[17] He describes hard power as that "… used to induce others to change their position. Hard power rests on inducements (carrots) or threats (sticks)."[18] Complimenting this hard power, Nye argues that states need a concerted approach and policy on projecting and managing soft power. He describes soft power as the ability to persuade and shape the preferences of others.[19] He contends that it is associated with intangible concepts such as values, culture, ideology and membership in institutions and organizations.

To compliment this, Nye recently developed the concept of "smart power."[20] He describes the inter-relationship of the three powers as follows:

> Power is one's ability to affect the behaviour of others to get what one wants. There are three basic ways to do this: coercion, payment, and attraction. Hard power is the use of coercion and payment. Soft power is the ability to obtain preferred outcomes through attraction. If a state can set the agenda for others or shape their preferences, it can save a lot on carrots and sticks. But rarely can it totally replace either. Thus the need for smart strategies that combine the tools of both hard and soft power.[21]

---

[17] *Ibid.,* 8.

[18] *Ibid*.

[19] *Ibid.*

[20] Joseph S. Nye, "Get Smart: Combining Hard and Soft Power," *Foreign Affairs*, July/ August 2009, 1; http://www.foreignaffairs.com/articles/65163/joseph-s-nye-jr/get-smart; Internet; accessed 15 April 2012.

[21] *Ibid.,* 1.

Although the focus of Nye's work is primarily on the American experience, Nye specifically acknowledges Canada's ability to exude immense soft power in terms of political clout in an amount far greater than its military and economic weight.[22] As an example, he explains that in the aftermath of the Cold War, more states emulated the Canadian example on democratic constitution building then they did from larger countries such as the United States.[23] Arguably, it is because Canada's Constitution and Charter of Rights have been developed more recently and therefore are contemporary and within modern social norms.

Nonetheless, Nye concludes that Canada's soft power arises primarily from Canadian leadership on attractive causes. In short, it is conceivably Canada's reputation in establishing "… a set of favourable rules and institutions that govern areas of international activity that are critical sources of power." Canada's early approach to the plight of refugees is one example of Canada's positive international leadership. Aiken succinctly describes Canada's reputation in the early days:

> In 1986 the people of Canada were awarded the Nansen medal by the UNHCR in recognition of exceptional contributions to refugee protection. Between 1976 and 1986 Canada had resettled over 150,000 refugees from camps overseas - more per capita than any other country. Canadian citizens across the country also had been instrumental in responding to the Indochinese "boat people" crisis after the fall of Saigon in 1975. With the aid of private sponsorships,

---

[22] Nye, *The Paradox of American Power*…, *Supra* Note 15, 10.

[23] *Ibid.,* 97. Nye indicates that underlying reason states were interested in Canadian leadership was due to Canadian views on how to deal with contentious issues such as hate crimes etc.

> Canada was able to admit approximately 60,000 Vietnamese, Laotian and Kampuchean refugees between 1979 and 1980 alone.[24]

There are many other types of Canadian soft power but few are as helpful for this analysis as the work by Canadians in advancing the concept of "human security."

Human Security

In 1994, the term "*human security*" was introduced and gained traction when the United Nations (UN) introduced it in its *Human Development Report*.[25] The new concept of "human security" drew traditional thought away from the belief that an external military threat was the sole "security concern" a state needed to confront. Human security is an expanded concept which also recognizes threats posed by multiple actors which threaten the livelihood of its citizens.[26]

Under this context, Lloyd Axworthy, Canada's Minister of Foreign Affairs from 1996 to 2000 adjusted Canadian government priorities when he promoted a notion of security that included concern for individuals. He stated:

---

[24] Aiken, Of Gods and Monsters…, *Supra* Note 7, 12-13. In providing her overview, Aiken cites Valerie Knowles, *Strangers at our Gates* (Toronto: Dundurn Press, 1997), 181.

[25] United Nations Development Programme. *United Nations Human Development Report 1994*, "New Dimensions of Human Security." (New York: Oxford University Press, 1994). "The 1994 Report introduces a new concept of human security, which equates security with people rather than territories, with development rather than arms. It examines both the national and the global concerns of human security." http://hdr.undp.org/en/reports/global/hdr1994/chapters/; Internet: accessed 10 January 2012.

[26] Collins. *Contemporary Security Studies*, *Supra* Note 9, 26.

> The alternately transnational and interstate nature of human security threats calls into question exclusive notions of state sovereignty. It compels us to adapt and complement—but by no means discard—our traditional state-centered theories and approaches to the world with another perspective that puts people at the forefront. State sovereignty is not an end in itself—it exists to serve citizens and to protect their security... where human security is imperiled on a massive scale within state borders, the challenge for all of us is to consider the limits of sovereignty and the conditions for humanitarian intervention.[27]

Although Axworthy was not the first to refer to "human security," his leadership was pivotal in promoting the concept to other state governments while promoting the notion within Canada. Axworthy proposed "human security" as a priority for the Chretien Liberal government when his department captured it within a 1999 concept paper. New Canadian foreign policy focussed on "human security" which marked a shift from the government's previous strategy:

> It is an alternative way of seeing the world, taking people as its point of reference, rather than focusing on the security of territory or governments. Like other security concepts - national security, economic security, food security - it is about protection. Human security entails taking preventive measures to reduce vulnerability and minimize risk and taking remedial action where prevention fails. [28]

Hence, security threats are no longer confined to military forces challenging the borders of states and as such military forces may not be required to respond. On the other hand, military forces may now be tasked to respond

---

[27] Notes for an Address by the Honourable Lloyd Axworthy, Minister of Foreign Affairs to the Atlantic Diplomatic Forum," DFAIT Statement 99/55, November 5, 1999.

[28] Canada, Department of Foreign Affairs and International Trade, *Human Security: Safety for People in a Changing World* (Ottawa: DFAIT, April 1999), 5. Joe Jockel and Joel Sokolsky, "Lloyd Axworthy's Legacy: Human Security and the Rescue of Canadian Defence Policy," *International Journal* Vol. 56, No. 1 (Winter, 2000/2001), 1.

to non-traditional security threats as well as to provide assistance to humanitarian disasters both domestically and internationally.

This changing focus on human security has been a catalyst for international organizations requesting the assistance of military forces in situations short of war. Hence, the Canadian Forces (CF) have deployed internationally on more diverse operations than ever before. In addition, Canada's engagement efforts in complex operations have included the collaborative efforts of other key Canadian government departments.

In addition, the changing tide in security studies is reflected not only in changing political thought but also in the actions of the United Nations (UN). Previously, article 2(7) of the 1945 Charter of the UN was viewed as a mechanism to protect the sovereignty of individual states. It reads "nothing contained in the present Charter shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any state…."[29] The 2011 UN Security Council Resolution (UNSCR) authorizing intervention into Libya is a recent example of the UN intervening in matters within a state.[30]

Fundamentally, it is now undeniable that a shift has occurred in the

---

[29] The Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945; http://www.un.org/en/documents/charter/chapter1.shtml; Internet; accessed 15 April 2012.

[30] UNSCR 1973 (2011) Adopted by the Security Council at its 6498th meeting, on 17 March 2011; http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/268/39/PDF/N1126839.pdf?OpenElement; Internet; accessed 15 April 2012.

way that states view national security both domestically and internationally. That shift pragmatically affects how states deploy military force. As the following discussion will show, the Canadian government's approach in responding to non-military security threats has also evolved.

Executive Direction on Maritime Security

In April 2004, Prime Minister Paul Martin's government published a national security policy for Canada. The Policy entitled, *Securing an Open Society: Canada's National Security Policy* (NSP) remains policy today.[31] In responding to perceived threats to marine security arising from either military or non-military sources, the government set out a "six point plan" in the NSP aimed at strengthening marine security. Although the NSP refers to "marine threats," "marine security threats," "threats to Canada," "threats to our shared security" throughout the document, it doesn't provide specific definitions for these terms. Within the six-point plan, the government clarified responsibilities for the various government departments, and made an investment of $308,000.[32] With this six-point plan, the government revealed its commitment to rely upon naval forces to coordinate the "on water" response to a developing security crisis evolving outside of Canada's territorial waters (TTW).

---

[31] Canada. Privy Council Office. *Securing an Open Society : Canada's National Security Policy,* (NSP). (Ottawa: Queen in Right of Canada, 2004; http://www.pco-bcp.gc.ca/docs/information/publications/natsec-secnat/natsec-secnat-eng.pdf; Internet; accessed 8 January 2012.

[32] *Ibid*., pp. 38-39.

The Maritime security concerns addressed within the 2004 NSP flowed from a great deal of study of potential threats. A Canada - United States, Bi-National Planning Group (BPG) was created in 2002, with an agreement signed by the Canadian Minister of Foreign Affairs and the U.S. Secretary of State.[33] Designed to enhance bi-national military planning, surveillance and support to civil authorities, the BPG aimed to prevent and mitigate threats or attacks by terrorists or other armed groups against either country. The BPG examined the threats and agreed upon a number of recommendations designed to enhance Canada-U.S. defence cooperation in protecting both their citizens and their mutual commerce.[34]

The *BPG Final Report on CANUS Enhanced Military Cooperation* acknowledges potential threats in the maritime context.[35] Given the evolving nature of marine threats, there are significant parallels that can be drawn to

---

[33] *The Enhanced Military Cooperation Agreement*, concluded on 5 December 2002 reaffirmed the value of NORAD and provided for broadening bi-national defense arrangements between Canada and the United States. It also established the Bi-National Planning Group (BPG). The Agreement was scheduled to expire on 5 December 2004, but it was extended until 12 May 2006.

[34] *BPG Final Report on CANUS Enhanced Military Cooperation.* March 13, 2006 Backgrounder to Final Report; http://canada.usembassy.gov/content/can_usa/pdfs/bpg_backgrounder_040606.pdf; Internet; accessed 15 April 2012.

[35] United States State Department, *Quadrennial Defense Review Report* dated 6 Feb 2006. At page 33, the Report stated: "Based on the demonstrated ease with which uncooperative states and non-state actors can conceal WMD programs and related activities, the United States, its allies and partners must expect further intelligence gaps and surprises." http://www.globalsecurity.org/military/library/policy/dod/qdr-2006-report.pdf; Internet; accessed 23 April 2012.

the North American Aerospace Defense Command (NORAD).[36] NORAD, a joint organization of Canada and the United States provides aerospace warning and defense for North America. NORAD receives its leadership from the respective militaries from both Canada and the United States, and serves as an excellent example of how military and civilian law enforcement agencies work together to counter potential threats to our respective national security.[37] The new NORAD agreement also broadened NORAD functions to include a "maritime warning" component.

For the first time on official record, the 2004 NSP described the expanded notion of national security which includes elements of personal or human security, military security and non-traditional threats:

> National security deals with *threats that have the potential to undermine the security of the state or society*. These threats generally require a national response, as they are beyond the capacity of individuals, communities or provinces to address alone.[38]

In other policy instruments, the executive authority provides direction to the CF on its roles and responsibilities. The 2008 *Canada First Defence*

---

[36] Governments of Canada and the USA 2006, *Agreement between the Government of Canada and the Government of the United States of America on the North American Aerospace Defense Command*, 28 April 2006. http://www.treaty-accord.gc.ca/text-texte.aspx?id=105060; Internet; accessed 15 March 2012.

[37] See: http://www.norad.mil/about/index.html; Internet; accessed 24 April 2012. Part of the NORAD Missions is described as follows: “In close collaboration with homeland defense, security, and law enforcement partners, prevent air attacks against North America, safeguard the sovereign airspaces of the United States and Canada by responding to unknown, unwanted, and unauthorized air activity approaching and operating within these airspaces, and provide aerospace and maritime warning for North America.”

[38] *NSP, Supra* Note 31, 3.

Strategy (CFDS) directs the CF to be available to assist other government departments and civil authorities in "addressing such security concerns as over-fishing, organized crime, drug- and people-smuggling and environmental degradation."[39] An excellent example of inter-governmental collaboration and cooperation in Maritime security was the August 2010 coordinated response to the arrival of the *MV Sun Sea* on Canadian shores.

Government Response to Illegal Migration

In August, 2012, when the Canadian Government learned that the *MV Sun Sea*, carrying 493 asylum seekers was headed to Canada, it searched for mechanisms to deter future arrivals. The MV Sun Sea was the second vessel carrying asylum seekers to Canada in less than a year. In September 2009, the *Ocean Lady* had arrived with 76 passengers seeking refuge. More importantly, the *MV Sun Sea* was suspected of carrying Liberation Tigers of Tamil Eelam (LTTE) war criminals from Sri Lanka. As such, their unannounced arrival invoked immediate national security concerns. A response to this type of maritime security threat was fundamentally different than a traditional military threat posed by foreign forces threatening the coast of a sovereign state. The Canadian government reacted aggressively based on the belief that the entire boatload of migrants posed a security threat to Canada:

---

[39] Canada. Department of National Defence. *Canada First Defence Strategy,* (CFDS). (Ottawa: Canada Communications Group, 2008): 7. http://merln.ndu.edu/whitepapers/Canada_First_2008.pdf; Internet; accessed 19 April 2012.

> Human smuggling undermines Canada's security. Large scale arrivals make it difficult to properly investigate whether those who arrive, including the smugglers themselves, pose risks to Canada on the basis of either criminality or *national security* [emphasis added].[40]

The Canadian government's approach to the arrival of the *MV Sun Sea* demonstrates how its primary focus was on thwarting a "national security" threat rather than focusing on the humanitarian concerns for the refugees. The government's approach to the arrival of the *MV Sun Sea* was a marked departure from previous government responses to migrants arriving by vessel over the last twenty-five years.

The government's treatment of the *MV Sun Sea* as a "security threat" epitomizes a shift away from an emphasis on respect for individual rights, towards the projection of a state's right to exercise sovereignty over its borders. The next chapter will provide critical commentary on how the Canadian government relied upon fear and uncertainty generated within the Canadian public to begin the process of securitizing its borders. After enacting a number of exceptional measures to react to the arrival of migrants in 2010, the government is now at the stage of proposing new legislation to reflect its desired response.

---

[40] Public Safety Canada. Posted on Public Safety Website; http://www.publicsafety.gc.ca/hmn-smgglng-eng.aspx; Internet; accessed 15 December 2012.

CHAPTER II – SECURITIZATION OF MIGRATION[41]

The increasing tendency of the Canadian government to rely upon its naval warships to assist other government departments in responding to maritime security threats reflects an undeniable conflation of military and general security threats into a broader notion of security. Hence, it is helpful to examine the supporting trends in academia that mirror this shift in the political environment. From the early 1990s, a number of academic scholars worked diligently in redefining the notion of "security." As early as 1991, Ken Booth described security as:

> If people, be they government ministers or private individuals, perceive an issue to threaten their lives in some way and respond politically to this, then that issue should be deemed to be a security issue.[42]

Booth argued that governments should have the authority to identify a security threat that necessitates its political response. Recognizing the need to develop a broader set of tools to assess security threats, the Copenhagen School of study (under the direction of Barry Buzan and Ole Waever) evolved at the Conflict and Peace Research Institute (COPRI) of Copenhagen.

Copenhagen Securitization Model

In 1998, Buzan, Waever and de Wilde adopted Booth's underlying concept when they published: *Security: A New Framework for Analysis*

---

[41] MacLeod, *Supra* Note 8. Within this Chapter, the author has relied upon paragraphs and research from the author's unpublished Decisive Manoeuvre paper.

[42] Ken Booth. "Security and Emancipation," *Review of International Studies*, 17/4 (October 1991): 319.

which set an analytical framework ("Securitization Model") of "non-military" issues that pose a threat to security.[43] Within the Securitization Model, they developed and depicted the figure below where the military is no longer the dominant center piece. The model includes non-military threats.

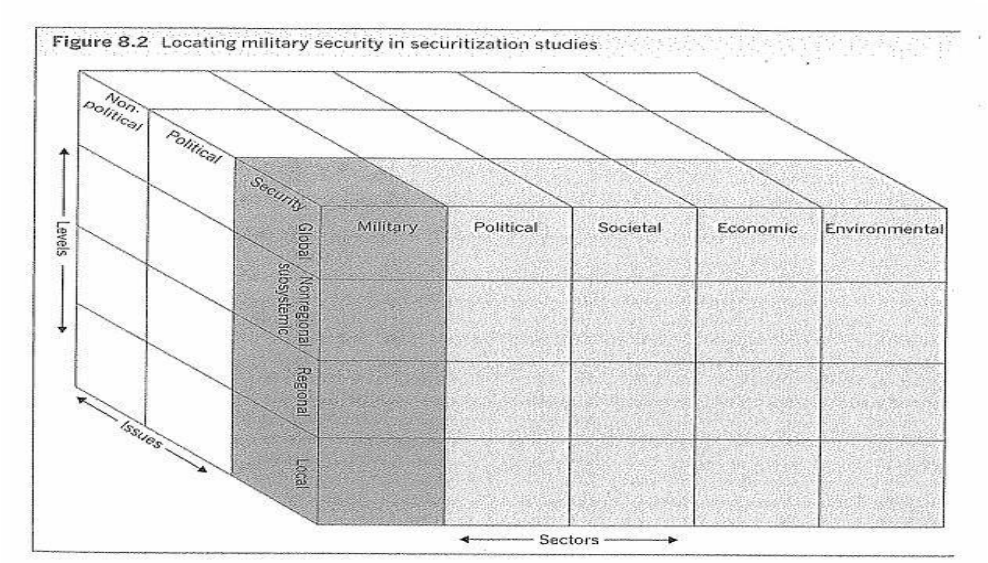


Figure 1: Locating Military Security in Securitization Studies.[44]

The Copenhagen framework broadened the traditional notion of security that exclusively included the military. It added four additional sectors: political, societal, economic and environmental. The five sectors link to four levels of analysis based on regions: global, regional, non-regional, systemic

[43] Barry Buzan, Ole Waever and Jap de Wilde. *Security: A New Framework for Analysis*. (Boulder, CO: Lynne Rienner Publishers, 1998); Barry Buzan and Lene Hansen, *The Evolution of International Security Studies* (New York: Cambridge University Press, 2009); Barry Buzan, *People States and Fear*, Second Edition (Boulder, CO: Lynne Reinner Publishers, 1991).

[44] Collins, *Contemporary Security Studies*, *Supra* Note 9, 135, Figure 8.2.

and local. Finally, the framework transposes the issues across the cube based on whether their underpinnings are political, non-political or security based.

The introduction of a broader securitization framework set an important precedent. It permitted states to identify and politicize threats it perceived to threaten the state. In effect, it removed the fixation that only the state could be the "object" of security. The securitization process begins when the actors (political elite) determine that a particular issue poses a security threat to the state. By garnering the support of the public, this determination permits the state to implement exceptional measures to mitigate the perceived threat. Finally, the securitization process is completed when the exceptional measures designed to confront the threat become normalized and successfully implemented into legislation.

The securitization process is not without its critics. Since it permits states, regional organizations or alliances to subjectively determine their own security threats, concerns are apparent. However, much can be gained from reviewing the process of securitization together with its criticism. Olav Knudsen provided the following critique:

> A key aspect of the securitization idea is to create awareness of the (allegedly) arbitrary nature 'threats', to stimulate the thought that the foundation of any national security policy is not given by 'nature' but chosen by politicians and decisionmakers who have an interest in defining it just that way. That interest (according to this line of reasoning) is heavily embodied not just in each country's military establishment, but also in the power and influence flowing from the

> military's privileged position with respect to the network of decisionmakers and politicians serving the establishment.[45]

As Knudsen warns, reliance on subjective or arbitrary decision making without considered regard for objective factors can be problematic. Scott Watson proposed a threshold test for when governments or organizations may legitimize emergency or exceptional measures. He suggests:

> …. that the successful end of the securitization spectrum is marked by the ability of political elites to implement emergency measures without the need to legitimize their actions – this seems a better criteria of successful securitization than that proposed by Buzan et al. and fits more appropriately with the continuum of episodic-institutionalized securitization.[46]

Increasingly, post-9/11 governments are relying upon an "exception" paradigm to justify the implementation of exceptional or emergency measures to protect their borders.

State of Exception

In analysing exceptional measures, it is instructive to review Giorgio Agamben's, *State of Exception* wherein he builds upon the work of Carl Schmitt to examine the power of a sovereign to impose exceptional measures in the name of a greater public purpose.[47] Agamben illuminates and analyzes on the exceptional measures available to a sovereign

---

[45] Olav F. Knudsen. "Post-Copenhagen Security Studies: Desecuritizing Securitization," *Security Dialogue* 2001 32: 355; http://sdi.sagepub.com/content/32/3/355; Internet: accessed 2 January 2012.

[46] Scott D. Watson, *The Securitization of Humanitarian Migration: Digging moats and sinking boats* (London and New York: Routledge, 2009), 27.

[47] Giorgio Agamben, *State of Exception*, Trans. Kevin Attell (Chicago: University of Chicago Press: 2005); Carl Schmitt, *Politische Theologie*. Trans George Schwab as *Political Theology* (Cambridge: MIT Press, 1985); Carl Schmitt. *Die Dikatur*, (Munich-Leipzig: Duncker & Homblot, 1921).

authority to suspend the legal protections to individuals that they would otherwise be entitled to under the rule of law. Exceptional state measures subordinate individual legal protections of individuals to the greater interest of protecting the state. As a result, the law is held in abeyance until the emergency or crisis has been resolved. However, in Agamben's work, the concern lies where the "state of exception" effectively becomes normalized or routine and is no longer "exceptional." Normally, such measures are implemented and promoted as both necessary and exceptional, but they often quickly become the "new normal" which in most cases is not be defensible under the normal state of the law.

Canada's Ongoing Migration Securitization Process

The securitization process advances to the next level when the public demands political leaders implement special measures to either neutralize or counter a perceived threat. For example, in 2010, prior to the arrival of the *MV Sun Sea*, a Leger Marketing Poll surveyed Canadians on "what should be done with the ship, which may include members of the banned Tamil Tiger terrorist group." The survey found that 60% of Canadians agreed with the statement: "They should be turned away -- the boat should be escorted back to Sri Lanka by the Canadian Navy."[48] The majority response expressed the desire for Canadian warships to turn the

[48] Brian Lilley, QMI Agency Parliamentary Bureau. Leger Marketing Poll, "Poll: Most say send Tamils home" http://cnews.canoe.ca/CNEWS/Canada/2010/08/20/15083191.html It is noted within the *Art* that: "The poll of 1,500 adult Canadians was taken online between Aug. 2-4. It was estimated that a probability sample of the same size would yield a margin of error of plus or minus 2.5 percentage points."

vessel away which confirmed for the government that the public believed that Canada's security was somehow threatened.

This type of public response signals the government that the implementation of coercive methods to deter and prevent future arrivals is legitimate. In August 2010, the government tasked the CF to detect and assist in responding to the security threat posed by the arrival of the MV Sun Sea. In analyzing the ongoing securitization of migration, with specific focus on the involvement of Canadian warships, it is important to review Canada's international and domestic legal obligations.

CHAPTER III – CANADA'S INTERNATIONAL AND DOMESTIC LEGAL OBLIGATIONS RELATED TO MIGRATION[49]

According to Buzan, migration is a legitimate security issue. Migration imposes change upon established norms and newcomers arriving from different ethnic and political backgrounds challenge the composition of our societal norms.[50] Migration law focuses on borders as well as a state's approach to monitoring its borders thereby reinforcing the fact that security and migration have always been inextricably linked. In a securitization process political and/or community leaders play a pivotal role in magnifying an issue and promulgating discourse that influences the public. Through

[49] Sandra M. MacLeod, "Bill C-4: Stalled – A Fortuitous Pause." (LLM Master's Project, Queen's University, 2012). Parts of this Chapter have been extracted or redrafted from the above referenced unpublished project completed under the supervision of Professor Sharryn Aiken.

[50] Barry Buzan, *People,States and Fear…, Supra* Note 43, 93-93.

powerful messaging from key actors, public sentiment can shift in a specific direction.

For example, in 2010, Prime Minister Stephen Harper reinforced his government's right to respond to security threats at Canada's borders: "We will not hesitate to strengthen the laws if we have to, because ultimately — as a government, as a fundamental exercise of our sovereignty — we are responsible for the security of our borders."[51] This principle was established in Canada over a hundred years ago in the case of *Privy Council in Attorney-General for Canada* v. *Cain* which recognized the Canadian government's right to exercise sovereignty to control its borders.[52] However, as Lassa F.L. Oppenheim summarizes, the exercise of state sovereignty is not absolute: " **…** immigration restrictions establishing controls on entry, … cannot be accomplished at the expense of violating laws that protect refugees."[53]

The debate on how a government should respond to an unannounced arrival of migrants by boat is complex as it involves the complex inter-play of Canada's international obligations, domestic law and

---

[51] Stephen Harper, "Government Takes Hard-Line Stance After Arrival of Migrant Ship," *Canada Immigration News*. See: http://www.immigration.ca/news-all.asp?id=167; Internet; accessed 27 April, 2012.

[52] *Privy Council in Attorney-General for Canada* v. *Cain* [1906] AC 542. At p. 546, the court held: "One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien especially if it considers his presence in the State opposed to its peace, order and good government, or to its social or material interests."

[53] Lassa F.L. Oppenheim, *International Law: A Treatise*, 8th ed., Hersch Lauterpacht, ed. (London: Longman, 1955) at 675-76.

political considerations. However, when a debate is subject to securitization, it can limit a government's options in finding the appropriate balance. In order to get an accurate appreciation of Canada's approach to securitization on migration, two specific cases will be examined to reflect the difference in the political discourse.

1986 Response to Asylum Seekers

Firstly, it is important to reconsider the processing of the 1986 arrival of 152 asylum seekers who arrived from Sri Lanka off the coast of Newfoundland and then secondly, the most recent arrival of the 2010 MV Sun Sea will be examined. These two cases were selected because they both involved the arrival of vessels suspected of carrying Sri Lankan Tamils. In both cases, there was implication that the asylum seekers had potential involvement with the Tamil Tigers liberation movement and therefore were unworthy of any protection.

A boatload of migrants may contain a broad mix of persons: economic migrants, legitimate refugees, suspected terrorists or war criminals. An appropriate government response to managing an influx of unannounced persons arriving by sea requires a complex strategy reflecting an appropriate balance of law, policy and compassion to ensure that the individuals onboard receive the appropriate screening. When a vessel arrives unannounced in Canada or is intercepted, authorities must respond as effectively to the "objects" of the smuggling operation as it does to persons suspected of criminal conduct. For clarity of terms, the "object"

of the smuggling operation is an asylum seeker who is "someone who says he or she is a refugee, but whose claim has not yet been definitively evaluated."[54] Aiken describes the confusion within public discourse that often equates genuine refugees with illegal migrants:

> Public narratives of 'illegal migration' were tending to conflate genuine refugees with economic migrants; and 'undocumented' refugees - people who arrived without valid passports and visas in hand - with criminality.[55]

Asylum seekers may be viewed from either a humanitarian perspective or as a threat to security or in some cases both. In the securitization context, asylum seekers are cast as criminals or a threat to the state which in turn incites a reaction from the public such as that received from the Leger Marketing Survey above. Although security and humanitarian concerns are inseparable, over the past fifty years, Canadians have generally viewed the plight of refugees primarily from a humanitarian perspective while making exceptions for national security concerns when clearly evident. The 11 August, 1986 rescue of 155 Sri Lankan Tamils by fishermen off the coast of Newfoundland is an example of a response to a migration situation. Upon their arrival in Canada, the RCMP interviewed the asylum seekers extensively before providing them with temporary accommodation at Memorial University. They were then permitted to travel to Toronto and

---

[54] UNHCR, *Protecting Refugees and the Role of the UNHCR 2008-2009*: http://www.unhcr.org/4034b6a34.html. Internet: accessed; 15 October, 2011.

[55] Aiken, Of Gods and Monsters…, *Supra* Note 7, 14.

Montreal to connect with Tamil communities.[56]

Notwithstanding the security issues prevalent in the 1986 response, humanitarian concern dominated the government's underlying approach.[57] Scott Watson conducted a comprehensive examination of both news and editorial content found in Canada's largest newspapers as well as political speeches and parliamentary debates on the issue from July 1986 until August 1987. He categorized the representations made as emphasizing either a humanitarian or securitized perspective.[58] In general Watson concluded:

---

[56] Joseph Hall and Alan Story, "Refugees standing by story they came on ship from India," *Toronto Star* (13 August 1986).

[57] Extensive Samples of Media have been reviewed. Fraser, G. (1986, Aug 13). 152 can stay if nationality is confirmed. *The Globe and Mail,* pp. A.1-A.1. http://search.proquest.com/docview/386250090?accountid=6180; Internet; accessed 27 April 2012; David Vienneau, T. S. (1986, Aug 14). No more adventures ottawa tells refugees. *Toronto Star,* pp. A.1-A1. http://search.proquest.com/docview/435461701?accountid=6180; Internet; accessed 27 April 2012. Tamils involved in criminal acts will be deported, minister vows. (1986, Aug 20). *The Gazette (Index-Only),* pp. A1-A1, A2. http://search.proquest.com/docview/753023704?accountid=6180; Internet; accessed 27 April 2012; Joe ODonnell, T. S. (1986, Aug 15). Public outraged that refugees beat system, MPs say. *Toronto Star,* pp. A.16-A16. http://search.proquest.com/docview/435462540?accountid=6180; Internet; accessed 27 April 2012; Joe ODonnell, T. S. (1986, Aug 20). No evidence tamils tied to militants ottawa says. *Toronto Star,* pp. A.1-A1. http://search.proquest.com/docview/435460213?accountid=6180; Internet; accessed 27 April 2012; Joe ODonnell, T. S. (1986, Aug 17). Ottawa bungled on refugees, government insiders say. *Toronto Star,* pp. A.1-A1. http://search.proquest.com/docview/435472498?accountid=6180; Internet; accessed 27 April 2012; Large, B. (1986, Aug 14). The tamil refugees. *Kingston Whig - Standard,* pp. 1-1. http://search.proquest.com/docview/353384502?accountid=6180; Internet; Internet; accessed 27 April 2012.

[58] Watson, Manufacturing Threats…, Supra Note 7, 103-104. Major Newspapers surveyed were Globe and Mail, the Toronto Star, the Vancouver Sun, the Montreal Gazette and Macleans.

> …the asylum seekers were portrayed as individuals with legitimate refugee claims, characterized as refugees fleeing persecution in Sri Lanka. According to the newspaper coverage at the time, 'the Tamil minority in Sri Lanka fear persecution'; 'conflict (had) turned Sri Lanka into a killing ground' and Sri Lanka was a country that was 'embroiled in civil war'.[59]

He found, in general, the media portrayed Canada as humanitarian:

> … that offered protection to those fleeing danger. In the news articles, editorials and letters to the editor, Canada's action in permitting entry to the152 Tamil refugee claimants was described as 'welcoming', 'sympathetic and understanding', 'humanitarian and generous', 'commendable' and 'morally responsible'.[60]

Further, despite growing opposition and concerns on national security, Prime Minister Brian Mulroney repeatedly emphasized Canada's humanitarian responsibility in dealing with refugees and asylum seekers, when he urged “Canadians to show compassion” to the Tamil refugees and reinforced “Canada's humanitarian traditions dictate that they not be turned away.”[61]

Canada’s International Obligations Regarding Refugees

Canada’s international obligations for the protection of refugees extend back to its agreement to the *Universal Declaration of Human Rights* (UDHR).[62] Although the UDHR is not a treaty, many of its provisions are

---

[59] *Ibid*., 103.

[60] *Ibid*., 104.

[61] Joe ODonnell, T. S, (1986, Aug 18), “Show compassion for tamil refugees mulroney urges,” *Toronto Star,* pp. A.1-A1. http://search.proquest.com/docview/435461005?accountid=6180; Internet; accessed 20 April 2012.

[62] *Universal Declaration of Human Rights* (UDHR) was adopted by the General Assembly on 10 December 1948 by a vote of 48 in favour, 0 against, with 8 abstentions. Canada voted in favour of the final draft of the UDHR.

generally regarded as customary international law.[63] More importantly, the UDHR served as the foundation for two legally binding UN human rights Covenants; the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) both of which Canada is a party.[64] Both of these Conventions, together with their Optional Protocols and the UDHR form the *International Bill of Human Rights*. *Article* 14 (1) of the UDHR, (adopted with the full support of Canada) states: "Everyone has the right to seek and enjoy in other countries asylum from persecution." [65]

---

[63] Most if not all of the provisions of the UDHR are now reflective of customary international law. Hurst Hannum. "The UDHR in National and International Law. *Health and Human Rights* Vol. 3, No. 2, Fiftieth Anniversary of the Universal Declaration of Human Rights (1998), pp. 144-158. At page 156 of her article, Hannum cites a number of scholars in summarizing the view: ""Few claim that any state that violates any provision of the Declaration has violated international law. Almost all would agree that some violations of the Declaration are violations of international law. Almost no state has specifically rejected the principles pro-claimed in the Universal Declaration, and the Declaration constitutes a fundamental part of what has become known as the International Bill of Human Rights." Hannum citing Accord, B. Graefrath, "Universal Declaration of Human Rights-1988," *GDR Committee for Human Rights Bulletin* 14:(1988): 167-168. ("Undoubtedly, the Universal Declaration has contributed to the becoming customary law of some basic human rights."); J. Humphrey, "The International Bill of Rights: Scope and Implementation," *William & Mary Law Review* 17(1976): 526, 529 at 165.

[64] The *International Covenant on Civil and Political Rights* (ICCPR) was signed in New York and adopted by the United Nations General Assembly on December 16, 1966. It entered into force on March 23, 1976. Canada is a Party to this Convention. (See Canada Treaty Series 1976 / 47). Available from http://www2.ohchr.org/english/law/ccpr.htm; Internet; accessed 23 January, 2012.

The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) was signed in New York and adopted by the United Nations General Assembly on December 16, 1966. It entered into force on January 3, 1976. Canada is a Party to this Convention (See Canada Treaty Series 1976/47).

[65] A Canadian, John Peters Humphrey was Director of the Division of Human Rights within the UN Secretariat.

Elaborating on Article 14, the *1951 Convention on the Status of Refugees* turned the principles of the UDHR into legally binding obligations. Canada is party to the 1951 *Convention Relating to the Status of Refugees and its 1967 Protocol* ("*Refugee Convention*").[66] In addition, Canada is party to the *Convention Against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment* ("*Convention Against Torture*") as well as the *Convention on the Rights of the Child*.[67] Domestically, the *Immigration and Refugee Protection Act* (*IRPA*) is the current instrument implementing Canada's immigration and refugee commitments from the *Refugee Convention* within domestic legislation.[68]

Canadian domestic law draws its definition of a refugee from the *Refugee Convention*. S. 96 of the *IRPA* defines a "Convention Refugee" as follows:

> … a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a

---

[66] *Convention related to the Status of Refugees*, July 28, 1951, 189 UNTS 150, as amended by *Protocol Related to the Status of Refugees* (*Refugee Convention*), July 28, 1967, 16 UNTS 267. Canada Treaty Series 1969/6 and See: Canada Treaty Series 1969/29 (For the Protocol). Canada acceded to both on 04 June 1969.

[67] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishments*, 1465 UNTS 85 ("*Convention Against Torture*" or "CAT"). Entered into force in Canada on 24 July 1987. See: E104009 - CTS 1987 No. 36.

Convention on the Rights of the Child, Nov 20, 1989, 1577 UNTS 3. Canada Ratified it on 13 December 1991, Canada Treaty Series 1992/3 including amendment 43(2) with Consent to be Bound and Acceptance on 17 September 1997.

[68] *Immigration and Refugee Protection Act*. ("*IRPA*"), SC 2001, C.27.

particular social group or political opinion:

> (*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or
> (*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.[69]

Section 97 expands the coverage in the *Refugee Convention* to include a "person in need of protection" which includes persons at "risk of torture" as defined in the *Convention Against Torture.*[70] It is described as

---

[69] *Ibid.*, *Convention Refugee* is defined at s. 96.

[70] *Ibid.*, *s.* 97 of the *IRPA* provides additional protection, to the Convention Refugee. It reads as follows:

> s. 97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally
> (*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of *Art* 1 of the *Convention Against Torture*; or
> (*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
> (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,
> (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
> (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
> (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.
> (2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

Article 1 in Convention Against Torture, defines the term torture as follows: "the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official

including “persons who are at risk of cruel and inhumane treatment upon deportation to their country of nationality or former residence.”[71] Pursuant to Article 31 of the *Refugee Convention*, refugees who present themselves directly to authorities “without delay” and “show good cause for their illegal entry or presence” are not to be punished for entering the country illegally.[72]

The principle of immunity for travelling with no or otherwise improper documentation is implemented domestically in s. 133 of the *IRPA* which exempts refugees from prosecution under both the *IRPA* as well as *Canada’s Criminal Code* for a number of offences, including entering Canada with false documents.[73] Section 133 of the *IRPA* provides further

---

capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

[71] Waldman, Lorne, *Canadian Immigration and Refugee Law Practice 2011*, (Markham, ON: Lexus Nexus, 2011) at p. 15.

[72] *Refugee Convention*, *Supra* Note 66, Art. 31 provides the following protection for Refugees unlawfully in the country of refuge:

> 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
> 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

[73] *Criminal Code*, RSC 1985, c C-46; *IRPA*, *Supra* Note 68, s. 133 reads as follows: A person who has claimed refugee protection, and who came to Canada directly or indirectly from the country in respect of which the claim is made, may not be charged with an offence under section 122, paragraph 124(1)(*a*) or section 127 of this Act or under section 57, paragraph 340(*c*) or section 354, 366, 368, 374 or 403 of the *Criminal Code*, in relation to the coming into Canada of the person, pending disposition of their claim for refugee protection or if refugee

protection since there is no requirement for the claimant to show "good cause" for being in the country illegally. The immunity exists automatically for the claimant as soon as a claim for asylum is made and continues until the claim has been assessed.

International Law on Transnational Crime of Smuggling

However, the refugee is only one part of the smuggling equation. Although the refugees are eager customers, it is the entrepreneurs and organizers who exploit the vulnerability of asylum seekers who are the real focus of the Canadian government. On 15 November 2003, with UN Resolution 55/25, the international community recognized that a "legal lacuna" existed in addressing transnational crimes such as illegal smuggling and adopted the UN Convention Against Transnational Organized Crime (UNTOC) in New York.[74] UNTOC entered into force 29 September 2003 and is the "main international instrument in the fight against transnational organized crime."[75] The Convention is augmented by three protocols the most relevant one for the analysis of this paper being

---

protection is conferred.

[74] UN Convention Against Transnational Organized Crime (UNTOC), Signed in New York. Entered into force 29 September 2003. Registration number: No. 39574.

[75] As quoted on the United Nations Office on Drugs and Crime (UNDOC) website. See: http://www.unodc.org/unodc/en/treaties/CTOC/index.html; Internet; accessed 15 April 2012. See also: http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en; Internet; accessed 15 April 2012.

the *Protocol against the Smuggling of Migrants by Land, Sea and Air.*[76] (*Migrant Smuggling Protocol*)

On 13 May 2002, Canada ratified the *UNTOC* as well as the *Migrant Smuggling Protocol.*[77] The *Migrant Smuggling Protocol*, Article 6 of the Protocol requires signatories such as Canada to criminalize offences related to smuggling.[78] Both provide guidance to assist and inform state authorities in criminalizing illegal migrant smuggling and strengthening border controls.

Canadian Domestic Law

Canadian legal obligations for both holding criminal networks responsible for smuggling as well as for protecting refugees are found within the same legislation, the *IRPA*. Having one statute to manage the competing tension between two obligations is effective, however Bill C-31 proposes changes that frustrate the required balance. As the upcoming

---

[76] *The Protocol against the Smuggling of Migrants by Land, Sea and Air*, Supplementing the *United Nations Convention against the Transnational Organized Crime* 2000, 15 December 2000, UN Doc. A/55/383 (Annex III), 40 International Legal Materials 384 (2001) (*Migrant Smuggling Protocol*) entered into force 28 January 2004.

[77] Migrant smuggling has been an internationally recognized crime since 2004. See: http://www.treaty-accord.gc.ca/details.asp?id=103847; Internet; accessed 12 April 2012. Canada ratified *Migrant Smuggling Protocol* on 13 May 2004. See: http://www.treaty-accord.gc.ca/details.asp?id=103849; Internet; accessed 12 April 2012.

[78] Taken from UNDOC, *"Legislative Guide for the Implementation of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organised Crime"* (2003). See: http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf; Internet; accessed 15 April 2012.

analysis will demonstrate, the coercive measures proposed within Bill C-31 are focused exclusively on "security" and aimed at countering transnational crime. Given this emphasis, the proposed provisions run at cross-purposes to the protection of refugees as well as humanitarians who assist refugees fleeing persecution.

Domestic Interpretation of International Obligations

The issue of the domestic enforceability of Canada's international obligations under the ICCPR is of particular note. Canada operates under a dualist model that means that when it ratifies a treaty, it must incorporate the treaty into domestic law in order for it to be enforceable in Canada.[79] Although Canadian law does not directly incorporate the ICCPR in its Convention form, most of the obligations are considered implemented into broader guarantees and protections provided under the *Canadian Charter of Rights and Freedoms (Charter)*.[80]

Although the UNHRC has taken the view that the ICCPR applies both domestically and extraterritorially for signatory states, Canadian courts have not accepted the UNHRC's position. In *Slaight Communications Inc*. v. *Davidson*, *Baker* v. *Canada* and Ontario Court of Appeal decision in *Ahani (Ont C.A.)* (where the leave to appeal to the SCC was refused), the

---

[79] Barnett, Laura. Department of Foreign Affairs, Legal and Legislative Affairs Division. *Canada's Approach to the Treaty-Making Process*, PRB 08-45E, 24 November, 2008. Relying upon *Capital Cities Communications Inc*. v. *Canadian Radio-Television Commission* (CRTC) (1977), [1978] 2 S.C.R. 141 and *Canada (A.G.)* v. *Ontario (A.G.)* [1937] A.C. 326, "Labour Conventions Case."

[80] *Constitution Act*, 1982, Pt I (Canadian Charter of Rights and Freedoms), (*Charter*).

courts found that International Human Right's Treaties signed and ratified by Canada do not give rise to enforceable obligations in Canada unless they have been implemented by domestic legislation. [81] However, these cases did affirm the relevance of human rights treaties in informing the courts on the interpretation of the content of domestic law, including the Charter.[82]

Of particular note is the case of *Ahani* where after exhausting all of his domestic remedies to stay in Canada, *Ahani* made a communication to the UNHRC as permitted under the Optional Protocol. He believed he would face a significant risk of torture if returned to Iran and applied to stay his deportation until such time as the UNHRC could review his case. Notwithstanding the fact that the UNHRC had not yet considered Ahani's case, his application to stay his deportation from Canada was denied and he was deported before the UNHRC could render its decision. Laskin, J.A. writing for the majority, relied on the SCC decision in *Baker* when he stated "international treaties and conventions not incorporated into Canadian law have no domestic legal consequences…."*[83]* In her analysis, Joanna

---

[81] *Slaight Communications Inc.* v. *Davidson*, [1998] 1 SCR 1038 at 1056-57; *Baker v. Canada (1999),* 2 S.C.R. 817, 174 D.L.R. (4th) 193, 243 N.R. 22, 14 Admin L.R. (3d) 17; *Ahani v.Canada (A.G.)* (2002), 58 O.R. (3d) 107,91 C.R.R. (2d) 145 (Ont. C.A.), leave to appeal to S.C.C. refused, [2002] S.C.C.A. No. 62 (Q.L.) *[Ahani* (Ont. C.A.)]

[82] Aiken and Scott. "*Baker v. Canada* (Minister of Citizenship and Immigration) and the Rights of Children" (2000) 15 JL & Soc Pol'y 211-254. See also: s. 3(2)(f) of the *IRPA*, (enacted after the court's decision in Baker), states: 3(2) This Act is to be construed and applied in a manner that… (f) complies with international human rights instruments to which Canada is signatory.

Harrington points out: "the division between domestic and international law is a constant theme throughout the majority's reasons in *Ahani*."[84] Laskin, J.A. repeatedly emphasizes that the ICCPR, the Optional Protocol and the decisions of the UNHRC are not binding in Canadian courts. Consequently, the SCC affirms that Canada's international obligations cannot be relied upon in granting redress under Canadian domestic law.

Brunnée and Toope describe the hesitancy of Canadian domestic courts to apply international law in Canadian courts as follows:

> Canadian courts, … are grappling more and more with the 'practical application" of international law. However, for all their declared openness to international law, they are not yet meeting all the challenges that domestic application poses. We venture to say that our courts are still inclined to avoid deciding cases on the basis of international law. [85]

---

[83] *Ibid.* at para 34. Although the *Baker* decision was highly criticized, the case did confirm the importance of human rights treaties to the interpretation of the content of domestic law, including the Charter. Aiken and Scott, co-counsel in the *Baker* case as intervenors commented at p. 228: By making reference to the values underlying an unimplemented treaty in the course of a contextual analysis to statutory interpretation and administrative law, he [Iacobucci, J.] held that the majority had allowed the appellant to achieve indirectly what she could not achieve directly. In other words, it indirectly gave force and effect in domestic Canadian law to an international treaty that had not been implemented; See also Joanna Harrington, "Punting Terrorists, Assassins and Other Undesirables: Canada, the Human Rights Committee and Requests for Interim Measures of Protection" 48 *McGill L.J*. 55 (2003) at 82 citing, Stephen J. Toope, "Inside and Out: The Stories of International Law and Domestic Law" (2001) *50 U.N.B.L.J. 11* at 18-22; William A. Schabas, "Twenty-five Years of Public International Law at the *SCC*" (2000) 79 Can. Bar. Rev. 174 at 182; Hugh M. Kindred, "The Use of Unimplemented Treaties in Canada: Practice and Prospects in the Supreme Court," in Chi Carmody et al., ed., *Trilateral Perspectives on International Legal Issues: Conflict and Coherence* (Washington, D.C., American Society of International Law, 2003).

[84] *Ibid*., Harrington, Punting Terrorists…, 82.

[85] Jutta Brunnée & Stephen J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) *Can. Y.B. Int'l Law 3* at 5.

In describing the "nuanced" approach, Brunnée and Toope describe the current state of judicial interpretation as follows: "Canadian courts seem to be embracing international law, employing fulsome words of endearment, but the embrace remains decidedly hesitant and the affair is far from consummated." [86] An excellent example of the transition from a hesitant embrace to a full grip is the SCC recent decision in Khadr II.[87] Although it is generally accepted law that the *Charter* does not apply to the actions of Canadian government officials in another country, the SCC left open an exception based on host state consent or another basis in international law.[88] As a result, the courts must first to determine if the actions of the Canadian officials have violated international law before contemplating whether an exceptional circumstance exists. In *Khadr I*, the SCC found that Canadian officials had violated international law and as a result ordered the Canadian government to remedy the situation.[89] As David Rangaviz describes, the SCC relied upon its finding in *Khadr I*, that a violation of international law had occurred and from that in its decision in *Khadr II,* it

---

[86] *Ibid*., 4.

[87] Canada (Prime Minister) v. Khadr (*Khadr II*), 2010 SCC 3, [2010] 1 S.C.R. 44.

[88] *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 para 65 which reads: "[I]t is a well-established principle that a state cannot act to enforce its laws within the territory of another state absent either the consent of the other state or, in exceptional cases, some other basis under international law."

[89] *Canada (Justice)* v. *Khadr* **(***Khadr 1*), 2008 SCC 28, [2008] 2 S.C.R. 125.

decided the extraterritorial application of the *Charter* was now relevant.[90] However, regardless of the SCC finding in *Khadr II* that a breach of the *Charter* had occurred, the court stopped short of ordering a remedy under s. 24(1) of the *Charter.* Rather, the SCC deferred to the executive decision made by the Prime Minister which was not to seek Khadr's repatriation. In essence, despite the SCC's desired intention to uphold Canada's international obligations, the court refused to interfere with the executive's power to deal with matters of international affairs under the Crown prerogative.[91]

Notwithstanding this gradually firming grip, balancing respect for state sovereignty with a state's obligations to respect an individual's human rights, the protection of the individual rights of refugees is achieved through the principle of *non-refoulement*. The term *non-refoulement* is derived from the French word "refouler" which means to force back or turn away someone approaching. This principle was enshrined in the 1951 *Refugee Convention* to ensure "no refugee should be returned to any country where he or she is likely to face prosecution, other ill treatment, or torture."[92]

---

[90] *Khadr II*, 2010 SCC 3, *Supra* Note 87 at paras. 16-18. David Rangaviz. "Dangerous Deference: The Supreme Court of Canada in Canada v. Khadr." 46 *Harvard Civil Rights-Civil Liberties Law Review*, 253 2011. Also, for a more detailed discussion of the "human rights exception" for the extra-territorial application of the *Charter*, see: Maria L. Banda, On the Water's Edge? A Comparative Study of the Influence of International Law and the Extraterritorial Reach of Domestic Laws in the War on Terror Jurisprudence, *41 GEO. Journal of International Law* 525, 540-43 (2010).

[91] *Khadr II*, 2010 SCC 3, *Supra* Note 87 at para 35.

[92] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, Third Edition, (Oxford University Press: 2007). See Chapter 5 at 201.

Articles 32 and 33 of the *Refugee Convention* set out the principles of *non-refoulement* in context with several agreed upon exceptions.[93] The purpose of the exceptions is to respect the territorial sovereignty of the Party states. Domestically, *s.* 115[94] of *IRPA* has codified the fundamental principle of

---

[93] *Refugee Convention, Supra* Note 66*,* Article 32 reads as follows:

Expulsion
1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
3.The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Art 33 of the Refugee Convention
Prohibition of expulsion or return ("refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, member- ship of a particular social group or political opinion.
2. The benefit of the present provision may not however,be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

[94] *IRPA, Supra Note 68.* Principle of *Non-refoulement* is found at s. 115:
(1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.
Exceptions

non-refoulement in Canadian domestic law permitting exceptions on the basis of national security. Nevertheless, the *IRPA* does not define what constitutes a danger "to the security of Canada" thus it is not always clear how the exceptions are to apply in each case scenario which makes for intriguing litigation in applying the provisions of *IRPA*.

International Law of the Sea

Although a domestically proposed solution might appear acceptable from a national political context, should action be proposed or taken outside of Canada in international waters, then it affects other state interests. The actions of a Canadian warship are governed by the direction given to it by Canadian Executive authorities. In implementing this direction, a warship must always conduct its operations in compliance with international law (including the United Nations Convention on the Law of the Sea (UNCLOS)).[95]

---

(2) Sub*s.* (1) does not apply in the case of a person
(*a*) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or
(*b*) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.
Removal of refugee.
(3) A person, after a determination under paragraph 101(1)(*e*) that the person's claim is ineligible, is to be sent to the country from which the person came to Canada, but may be sent to another country if that country is designated under sub*s.* 102(1) or if the country from which the person came to Canada has rejected their claim for refugee protection.

[95] *United Nations Convention on the Law of the Sea* (UNCLOS), UNTS vol 1833 p 3, CN 236.1984, CN 202.1985, CN 17.1986, CN 166.1993, vol 1904 p.

UNCLOS encapsulates customary international law and deals with a broad range of provisions related to the conduct of vessels. UNCLOS is implemented into Canadian domestic law through the *Oceans Act*.[96] The conduct of vessels at sea is also augmented by the *International Convention for the Safety of Life at Sea* (SOLAS), which monitors the safety of vessels.[97] Canada is also a party to the *International Convention on Search and Rescue at Sea* (SAR Convention), which provides comprehensive guidance on search and rescue.[98]

Two of the fundamental underpinnings of the law of the sea are the freedom of navigation, which includes freedom from interference on the high seas as well as the principle of flag state jurisdiction. A suspect flagged vessel transiting on the high seas is subject to the exclusive jurisdiction of its flag state.[99] In assessing a potential interdiction involving the use of a warship, two factors must be always considered. Firstly, the

---

320, Entered into Force on 16 November 1994, Ratification by Canada on 07 November 2003.

[96] *Oceans Act*, (S.C. 1996, c. 31). For the purposes this paper, legal authorities within UNCLOS will be used when describing the rights and freedoms in international waters. When referring to the domestic implementation of UNCLOS for the purposes of interacting Canadian legislation, provisions of the *Ocean's Act* will be relied upon.

[97] *Convention for Safety of Life at Sea* (SOLAS) 1974, Canada Treaty Series 1980/45. Accession on 08 May 1978;

[98] *Search and Rescue Convention*, (SAR). Entered into force 1986, As Amended in 1998, See Canada Treaty Series 1985/27.

[99] UNCLOS, *Supra* Note 95, Art. 92(1) stipulates that "[s]hips shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas."

location of the suspect vessel must be determined. If the suspect vessel is located outside Canada's sovereign territorial waters and/ or contiguous zone and sailing in international waters, then Canadian authorities will have no jurisdiction under which to act.[100] Secondly, a determination must be made as to whether the suspect vessel is flagged or not.

Although the government may believe that a vessel poses a security threat, absent evidence of a pending "armed attack" to trigger a national defence mandate, a warship has limited authority.[101] In Canada's internal or territorial waters, Canadian law enforcement officials may board a vessel to suppress potential criminal activity. However, an order directing the vessel

---

[100] *Oceans Act*, *Supra* Note 96. The Definition of Territorial Waters is set out in s. 4: The territorial sea of Canada consists of a belt of sea that has as its inner limit the baselines described in *s.* 5 and as its outer limit.

> *(a)* subject to paragraph (*b*), the line every point of which is at a *distance of 12 nautical miles* from the nearest point of the baselines;

*S*s 10 and 12(1) define the Contiguous zone of Canada:

> **10.** The contiguous zone of Canada consists of an area of the sea that has as its inner limit the outer limit of the territorial sea of Canada and as its outer limit the line every point of which is at a *distance of 24 nautical miles* from the nearest point of the baselines of the territorial sea of Canada, but does not include an area of the sea that forms part of the territorial sea of another state or in which another state has sovereign rights.
>
> **12.** (1) Where there are reasonable grounds to believe that a person has committed an offence in Canada in respect of a federal law that is a customs, fiscal, immigration or sanitary law, every power of arrest, entry, search or seizure or other power that could be exercised in Canada in respect of that offence may also be exercised in the contiguous zone of Canada. Limitation (2) A power of arrest referred to in sub*s.* (1) shall not be exercised in the contiguous zone of Canada on board any ship registered outside Canada without the consent of the Attorney General of Canada.

[101] The federal department mandated to deal with immigration and refugee issues is that of Canadian Border and Security Agency ("CBSA") which operates under the shared jurisdiction of *S.* 95 of the *Constitution Act, 1867,* the *Citizenship Act,* and the *IRPA*.

not to enter Canadian territorial waters must be done pursuant to a law enforcement mandate.

Although *Article* 25 of UNCLOS provides that "… the coastal state may take the necessary steps in its territorial sea to prevent passage which is not innocent," absent appropriate authority, a Canadian warship does not have independent legal authority to enforce Canadian domestic law. The interdiction of a vessel pursuant to Canadian domestic law requires action by the Customs and Border Security Agency (CBSA) and the Royal Canadian Mounted Police (RCMP) but they do not have the capacity to do so in most cases.

As a result, the intergovernmental collaborative national security strategy as envisaged within the NSP is activated. When the Minister of Public Safety feels that a security situation exists that requires a warship to assist either the CBSA or the RCMP, then pursuant to *s.* 273.6(2) of the *National Defence Act* (NDA), he may make a request to the Minister of National Defence (MND). If authorized, the MND will direct the Chief of Defence Staff (CDS) to order a warship to comply with the government's direction. In most cases, when CF assistance is authorized, the warship provides the platform for the RCMP and the CBSA to launch a law enforcement operation.[102]

---

[102] *National Defence Act* (NDA), R.S.C., 1985, c. N-5. If a Canadian warship is directed to provide assistance to the appropriate law enforcement authorities (LEA) it is actioned under *s.* 273.6(2) under the NDA.

Domestically, under Article 11 of the *Oceans Act*, a CBSA enforcement officer or RCMP "who has reasonable grounds to believe that a person *in the contiguous zone of Canada* would, if that person were to enter Canada, commit an offence under that law may, subject to Canada's international obligations, prevent the entry of that person into Canada or the commission of the offence … [emphasis added]."[103] Similarly, the Minister of Transportation can direct a vessel to stay out of Canadian territorial waters if it believes that the vessel poses a security threat:

> Section 16 of the *MTSA* provides the Minister of Transport with the discretion to direct any vessel not to enter Canada, or to leave Canada or travel to another area in Canadian waters in accordance with any instructions the Minister may give regarding the route and manner of proceeding. Ministerial directions to vessels may be made when there are reasonable grounds to believe the vessel is a threat to the security of any person or thing, including any goods, vessel, or marine facility.[104]

Pragmatically, this provision permits the Minister to order a vessel suspected of carrying asylum claimants not to enter Canada's territorial waters. However, this type of action places a vessel into "orbit" sailing around the high seas seeking entry by another state. Referring back to the historical case of the Jewish refugees on the S.S. St. Louis, who were placed "in orbit" when Canada rejected their claims leaving the Captain of

---

[103] *Oceans Act*., Supra Note 96, s.11.

[104] Béchard, Julie and Sandra Elgersma, Social Affairs Division Parliamentary Information and Research Service, "Bill C-31: An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act" Publication No. 41-1-C31-E 29 February 2012 Revised 16 April 2012, 17. http://parl.gc.ca/Content/LOP/LegislativeSummaries/41/1/c31-e.pdf; Internet; accessed 21 April, 2012. Amended MTSA Regulations, s. 159.93 [not yet in force].

the vessel sailing in search of a state willing to provide refuge to the Jewish refugees onboard. In the next Chapter, an Australian comparison is particularly helpful in examining this type of deterrence.

The ability of a state to take action on the high seas in international waters is not straightforward. Respecting the freedom of the seas and the jurisdiction of the flag state, UNCLOS permits a warship the customary right to approach a vessel sailing on the high seas to ascertain its identity and nationality and requesting the vessel to show its flag.[105] If the suspect vessel is stateless or the warship is suspicious regarding its identity, the warship may conduct a "right of visit, pursuant to Article 110 of UNCLOS to verify the ship's identity and registered flag state. After the visit, if suspicion remains, the boarding party could conduct further examination, but such examination is restricted to activity to verify the vessel's identity and flag state registration.

Unseaworthy vessels appear to be the standard for transporting refugees so the mode of "rescue" is often the norm. In addition, when a rescue is required, it serves to circumvent the logistics of acquiring flag state consent.[106] A pre-emptive interdiction will most likely find the suspect vessel unseaworthy or alternatively, the operators of the suspect vessel

---

[105] Report of the International Law Commission to the General Assembly, U.N. Doc. A/2934 (1955), Findings of International Law Commission, Mr. J. P. A. Francois as Special Rapporteur http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1955_v2_e.pdf; Internet; accessed 12 April, 2012.

[106] Andrew Brouwer and Judith Kumin, "Interception and Asylum: When Migration Control and Human Rights Collide," *Refuge*, Volume 21, Number 4 at 14.

could create a hazardous situation demanding immediate intervention by the warship. If this occurs, the Commanding officer of the warship would be under a duty to render assistance and any follow up action could lead to further engagement of Canadian authorities.[107]

International law obliges Canada to provide rescue and assistance to vessels in distress absent flag state permission.[108] Applying the analysis of Richard Barnes, in his *Article* "Refugee Law at Sea" persons rescued and brought onboard a Canadian warship would fall under Canadian jurisdiction.[109] In addition, according to Brouwer:

> The exercise of jurisdiction, whether motivated by rescue, anti-trafficking, or anti-smuggling criminal law enforcement, or migration control, brings with it the range of responsibilities all states have at international law. It is clearly within the scope of *Art*s 4 or 5 on State Responsibility and so triggers international refugee and human rights law obligations for the state.[110]

Although Canada is not obliged to grant rescued persons asylum under international law, it must comply with the principle of *non-*

---

[107] UNCLOS, *Supra* Note 95, *Art* 98 as well as Regulation V-7(3) under the SOLAS 2000.

[108] SAR Convention, *Supra* note 98, para 1.3.2: Definition of Rescue operation is "an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety." UNCLOS, Arts 58(2) and 86.

[109] Richard Barnes, "Refugee Law at Sea," *53 Int'l & Comp. L.Q. 47 (2004)*, 63.

[110] Brouwer, Interception and Asylum…, *Supra* Note 106. As Brouwer states at page 14: "The exercise of jurisdiction, whether motivated by rescue, anti-trafficking, or anti-smuggling criminal law enforcement, or migration control, brings with it the range of responsibilities all states have at international law. It is clearly within the scope of *Art*s 4 or 5 on State Responsibility and so triggers international refugee and human rights law obligations for the state."

refoulement.[111] Recalling that the recognition of refugee status is declaratory, migrants making such a declaration must be screened to assess the validity of their claim.[112]

Now that the underpinnings of the domestic and international law have been reviewed, an analysis of the government's attempt to legislate can be done. When a situation, such as migration is being securitized and the public has accepted the government's violations of the norm, then the next step in the process is for the government to implement the extraordinary measures into legislation.

CHAPTER IV – BILL C-31 AND THE SECURITIZATION PROCESS

On October 21st 2010, in efforts to send a strong message of deterrence, the Department of Public Safety moved quickly introducing

---

[111] Principle of Non-refoulement is considered Jus Cogens by most legal scholars and states. For example, European Court of Human Rights ruling in *Chahal v. United Kingdom*, (1996), V Eur. Ct. H.R. Rep. Judgements & Dec. 1831, 23 E.H.R.R. 413. created an absolute prohibition against deportation to face torture or inhuman or degrading treatment. See also: Allain, Jean, *The* jus cogens *Nature of* non-refoulement*,* 13(4) INT'L J. REF. L. 533, 538 (2001). However, the SCC in the case of *Suresh v. Canada (Minister of Citizenship and Immigration),* 2002 SCC 1, [2002] 1 S.C.R. 3 *(Suresh)*, left the door open that there might be a possible exception when a state would deport an individual to torture. Within the Suresh decision SCC accounted for the application of international law in their analysis of fundamental justice. It doing so, it "recognized the peremptory norm against torture and the protective principle of non-refoulement as indicators of Canadian values."[111] However, the Suresh decision has received criticism for the fact that the decision left room for an "exceptional case" of return to torture under either s. 7 or s. 1 of the *Charter*. See also: Jenkins, David, "Rethinking Suresh: Refoulement to Torture Under Canada's Charter of Rights and Freedom, 47 *Alta. L. Rev.* 134 (2009-2010).

[112] UNHCR, Handbook, para 28. http://www.unhcr.org/refworld/pdfid/3f4cd5c74.pdf; Internet; accessed 15 November 2012.

legislation, Bill C-49 designed to mitigate the perceived security risk.[113] The urgent drafting and aggressive promotion of the Bill emphasized its importance to the government's agenda. Further to the tabling of the Bill, Toews exhibited persuasive discourse to convince Canadians that they were the ones demanding tough action. For example, without citing any evidence, on January 20th, 2011 Vic Toews was quoted in *The Globe and Mail*: "I see a hardening of the attitude of many Canadians in respect to the immigration system.…It's clear something must be done because after the arrival of migrant vessels like the Ocean Lady and MV Sun Sea, Canadians are losing faith in the refugee system."[114] Bill C-49, under the short title of *Preventing Human Smugglers from Abusing Canada's Immigration System Act* was at second reading before it died on 26 March 2011 with the fall of the Conservative Government.[115] On June 16th 2011, as a top priority, the

---

[113] See: Ending the Abuse of Canada's Immigration System by Human Smugglers, http://www.publicsafety.gc.ca/media/nr/2010/nr20101021-5-eng.aspx Internet: (Accessed August 2011).

[114] Vic Toews, as quoted by Sunny Dhillon in "Canadians 'hardening' on refugee process, Vic Toews says." Globe and Mail as Published Thursday, Jan. 20, 2011 12:05AM. http://www.theglobeandmail.com/news/national/british-columbia/canadians-hardening-on-refugee-process-vic-toews-says/article1876659/; Internet; accessed 27 April, 2012.

[115] Bill C-49, http://www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?Language=E&Session=23&query=7122&List=toc Internet: Accessed October 2011; Bill C-49 at; Daphne Keevil Harrold and Danielle Lussier, Social Affairs Division Parliamentary Information and Research Service. Library of Parliament Publication No. 40-3-C49E, Legislative Summary of Bill C-49: *An Act to amend the Immigration and Refugee Protection Act*, the *Balanced Refugee Reform Act* and the *Marine Transportation Security Act*, 8 November 2010.

newly elected Conservative government re-introduced the earlier proposed legislation under a new Bill C-4.[116]

Although Bill C-4 passed the First Reading in the House of Commons, members of opposition Parties stalled the Government's effort to seek unanimous consent of the House in expediting the Bill through the Second Reading.[117] As Parliament broke for its Christmas recess on December 16th 2011, six months after the Government attempted to expedite the Bill's passage, Bill C-4 was stalled at second reading.

As the government was making huge efforts to securitize the migration process by implementing extraordinary measures into legislation, community advocates and leaders of institutions fought zealously to de-securitize the bill. In effect, this group of opponents became "actors" seeking to de-securitize the ongoing securitization process. Specifically, the Canadian Council for Refugees, the Canadian Bar Association, the Canadian Civil Liberties Association, Amnesty International as well as Members of Parliament in Opposition submitted written concerns and launched advocacy campaigns against the Bill.[118]

---

[116] Bill C-4 *Preventing Human Smugglers from Abusing Canada's Immigration System Act*. http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5093718; For status of Bill C-4 see: http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?billId=5089199&Language=E&Mode=1; Internet; accessed 15 December, 2012.

[117] *Ibid*.

[118] See: Canadian Council for Refugees, Bill C-49: Key concerns (1 November 2010), online: http://ccrweb.ca/ en/c49-key-concerns; Internet; accessed November 2011; (CCR C-49 Key Concerns).

The common themes of criticism from the above key actors are based on the fact that the Bill establishes a two-tier system where refugees arriving en masse (usually by boat) are subjected to different standards of treatment than refugees arriving by other modes of entry, such as by aircraft. For refugees arriving en masse, the Bill proposes compulsory "arbitrary detention" for a period up to one year, without the possibility of independent review. Importantly, critics of the Bill, including the Canadian Bar Association strongly contend that the arbitrary detention and bar from procedural fairness violate the *Charter*.[119]

On 19 August 2011, in an interesting twist, Kenney surprisingly announced that the implementation of Bill C-11, the *Balanced Refugee Reform Act* (BRRA)[120] scheduled to come into effect on December 1, 2011

---

http://www.cba.org/CBA/submissions/pdf/10-78-eng.pdf (CBA C-49 Report). Noa Mendelsohn Aviv Director, Equality Progam Canadian Civil Liberties Association launches photo advocacy campaign including letters to both the Prime Minister and Minister of Immigration and Minister Jason Kenny, Minister of Citizenship, Immigration and Multiculturalism http://ccla.org/2011/09/18/stop-c-4-ccla-launches-new-advocacy-campaign; Internet; accessed 15 April 2012. Alex Neve, O.C, the Secretary General of Amnesty International Canada and Tiisetso Russell, Amnesty International Canada's 2010/2011 Law Foundation of Ontario Public Interest Articling Fellow have advocated for support in ensuring that Bill C-4 is not passed. (*Amnesty Report on Bill C-4*) See: http://www.amnesty.ca/writeathon/resources/2011/cases/Canada.pdf; Internet; accessed 15 December, 2011. Additionally, Neve and Russell co-authored the Article: "Hysteria and Discrimination: Canada's Harsh Response to Refugees and Migrants Who Arrive By Sea."

[119] Bill C-4 Key Concerns of the Canadian Council for Refugees: Punishes refugees, Violates the Charter and Canada's International Human Rights obligations, Discriminatory as it Creates two classes of Refugees, Penalizes Refugees based on "mode of arrival" and imposes arbitrary detention. Available from: www.ccrweb.ca/en/c4-key-concerns; Internet, accessed 29 January 2012.

[120] *Balanced Refugee Reform Act*. S.C. 2010, c. 8, Assented to 2010-06-29. Not yet in Force.

was postponed until June 29, 2012.[121] When implemented, the BRRA was intended to alter the process of reviewing refugee claims in Canada.[122]

The inability of the controversial Bill C-4 to gain sufficient support and the government's decision to postpone the coming into effect of Bill C-11 originally indicated that the efforts focused on de-securitization may have been working.[123] However, on 16, February 2012, after the Conservatives returned with a majority government, Kenny tabled a new omnibus Bill C-31 (entitled *Protecting Canada's Immigration System Act*) that subsumes the provisions within Bill C-4 (formerly Bill C-49) as well as the proposed changes within Bill C-11.[124]

By introducing the current omnibus government Bill C- 31, which subsumes Bill C-4 (previously Bill C-49, the predecessor to Bill C-4) as well as Bill C-11, the government intends to send a strong message of

---

[121] News release available from http://www.cic.gc.ca/english/department/media/releases/2011/2011-08-19.asp; Internet; accessed 20 January, 2012.

[122] Available from http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=4383517&View=6; Internet accessed 20 January, 2012.

[123] Peter Showler, "Expect A Stormy Session Around Refugee Policy in Ottawa." Maytree BLOG. Director of the Refugee Forum and former chairperson of the Immigration and Refugee Board (IRB) of Canada; Available from http://maytree.com/blog/tag/bill-c-4/; Internet; accessed 20 January, 2012.

[124] The details and specific provisions of the new omnibus Bill C-31 can be found here: http://www.parl.gc.ca/LEGISInfo/BillDetails.aspx?Language=E&Mode=1&billId=5383493; Internet; accessed 10 March 2012. Also, see legislative summary: Béchard, *Supra* Note 104. http://parl.gc.ca/Content/LOP/LegislativeSummaries/41/1/c31-e.pdf; Internet; accessed 21 April, 2012.

deterrence. Although the stated intention of the Bill is to crack down on suspected criminals, by grouping refugees together with suspected criminals under a mandatory detention regime, in effect, Bill C-31 penalizes refugees in specific violation of protections flowing from the *Refugee Convention*.

Notwithstanding, Toews claims the proposed plan of automatically detaining all persons arriving irregularly by vessel (both suspected criminals and refugee claimants) is acceptable because migrants arrive with no identification, or the paperwork they carry is false. Speaking for the government, Toews stated:

> …, the difficulty is that when a ship arrives at the border of our country at a port and there are 100, 200, or 300 people without identification. There is no way of determining who is the criminal, who is the legitimate refugee and who is an economic immigrant. That determination has to take place over a period of time. These measures are designed in order to ensure that Canadian authorities can determine who these individuals are. That is what Canadians expect, that those who arrive at our borders, if they do not have appropriate documentation for one reason or another that in fact there is a mechanism for ensuring that those who come to our country do not come with evil intent.[125]

Yet such an approach improperly imposes deterrence and punishment on persons claiming asylum contrary to the spirit of the *Migrant Smuggling Protocol*. Canada has a legal obligation to ensure that migrants are not penalized for being the "object" of the criminal conduct of the smuggler or

---

[125] Hon. Vic Toews (Minister of Public Safety, CPC). 41st Parliament, 1st Session, Edited Hansard • Number 012, Tuesday, June 21, 2011 regarding An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act and the Marine Transportation Security Act: http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=12&Parl=41&Ses=1&Language=E&Mode=1#int-3919005; Internet; accessed 15 December, 2012.

for their illegal entry or presence in Canada.[126]

Canada's requirement to provide protection begins when the refugee arrives in Canada and makes a declaration:

> The duty to protect refugees arises as soon as the individual or group satisfies the criteria set out in the definition (flight from State territory for relevant reasons) and comes within the territory or jurisdiction of another state. This duty to protect exists regardless of whether refugee status has been formally determined.[127]

Simply put, although Canada is not forced to provide refuge to claimants *outside* of Canada, once the claimants are within Canadian territory, Canada has an obligation not to return persons seeking asylum to face persecution.

Unfortunately, the revised legislation tabled in omnibus Bill C-31 does not address the concerns previously raised by advocacy groups and more importantly fails to heed the lessons learned from relevant securitization experience learned from Australian and American authorities. The upcoming Chapter will examine these experiences and lessons learned.

---

[126] *Migrant Smuggling Protocol*, *Supra* Note 76, Article 2 "Statement of purpose - "The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, *while protecting* the rights of smuggled migrants." [Emphasis added]; *Refugee Convention*, Art. 31

[127] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, Third Edition, (Oxford University Press: 2007) at 244.

CHAPTER V: COMPARATIVE ANALYSIS WITH AUSTRALIA AND US[128]

Australia

One type of migration deterrence operation is the now defunct "Pacific Solution" practiced by the Australian Government. The Pacific Solution was an exceptional policy authorized by the Australian government to deny entry into its waters vessels suspected of carrying migrants.

Earlier Australian policy had limited its naval warships to intercepting irregular migrant vessels to escort them into an Australian port "for reception and processing by relevant agencies."[129] However, after 2001, the Australian government changed its policy and deployed its warships on migration tasks of deterrence and prevention under Operation Relex. Australian warships were used "to detect, intercept and deter vessels transporting unauthorized arrivals from entering Australia through the North-West maritime approaches" and where possible to return the vessels back to the high seas.[130]

The Naval Operation Relex was designed specifically to prevent unauthorized vessels from crossing into Australia's so-called 'contiguous

---

[128] MacLeod, "Bill C-4: Stalled …," *Supra* Note 49.

[129] Senate of Australia, Senate Select Committee for an inquiry into a Certain Maritime Incident: Report (Canberra: Commonwealth of Australia, 2001), (Australian Senate Report), http://aph.gov.au/senate/committee/maritime_incident_ctte/report; Internet; accessed 15 Dec, 2012. See also: Executive Summary: http://aph.gov.au/senate/committee/maritime_incident_ctte/report/a06.pdf; internet; accessed 15 Dec, 2012.

[130] See Department of Defence (Australia), 'Operation Relex', www.defence.gov.au/oprelex2/index.cfm and http://aph.gov.au/senate/committee/maritime_incident_ctte/report/c02.pdf; internet; accessed 15 Dec, 2012.

zone.'"[131] The tasks provided to the Royal Australian Navy were described as follows:

> … to reinforce the warning and turn the vessel around and either steam it out of our contiguous zone ourselves under its own power or - as had happened on a number of occasions - if the engine had been sabotaged in our process or boarding, we would then tow the vessel outside our contiguous zone into international waters. At that point, our boarding party withdrew as we had no jurisdiction in international waters. Our initial policy was to do that up to three times and, after having done it the third time, to seek further advice from government with the view to those vessels then being taken to Ashmore Island or to Christmas Island. But that was a government decision through the IDC process.[132]

Although Canadian warships have not yet been given any tasking similar to the Australian warships in Operation Relax, CF assistance may be requested by either CBSA or RCMP. As discussed briefly above, under *s.* 11 of the *Oceans Act,* a CBSA officer sailing on a Canadian warship *can* take action and use force to prevent the entry into Canada's territorial waters of a vessel suspected of carrying illegal migrants (activity that is not innocent), however, such action *must be* reconciled with the duty to provide assistance if the same vessel is in distress. In providing evidence to the Australian Senate Committee, Rear Admiral Chris Ritchie from the ADF described the approach of the Australian navy:

> The safety of ADF personnel and the well being of the unauthorised boat arrivals and the Indonesian crew members is to be held paramount. That is an extant direction that overrides everything. We

---

[131] Aus Senate Report, *Supra* Note 129, Chapter 2, Para 2.7.

[132] *Ibid*., Chapter 2, para 2.66 quoting, Rear Admiral Smith see: *Transcript of Evidence*, CMI 504.

> are talking about people coming to Australia illegally. It is not World War III.[133]

A description of the legal and practical tension that arises after rescuing a refugee at sea is best described by James Pugwash in his article, *The Dilemma of the Sea Refugee: Rescue without Refuge*:

> The refugee and the ships captain who could save them are victims of an anomaly growing out of two well known principles of international law. It is well settled law that the master of a ship is duty bound to rescue anyone who is in danger of being lost at sea. It is equally well settled that a sovereign state is under no duty to take the refugees once they have been rescued.[134]

A short summary of the case of the MV Tampa reflects the sensitive balance in managing a master's obligations to come to the rescue of persons at sea and the obligations of a state to provide refuge. The case reflects how far the Australian government went in imposing exceptional measures to deter migration. Fortunately, the conflict was resolved and a potential humanitarian disaster was averted:

> On 26 August, 2001, Australia coordinated search and rescue operations for a sinking Indonesian-flagged vessel, *Palapa 1*, carrying 433 irregular migrants and five crew men….. the Norweigian container vessel MV Tampa successfully rescued those on board. …. Although first steaming for Merak, the Tampa's master changed course for Christmas Island when several passengers threatened suicide otherwise. Australian authorities informed him that if he entered Australia' territorial sea intending to disembark rescued persons he would be prosecuted under the Australian Migration Act for 'people-smuggling'.[135]

---

[133] Rear Admiral Chris Ritchie, Commander Australian Theatre (COMAST) *Transcript of Evidence*, CMI 405 See Senate Report at: http://aph.gov.au/senate/committee/maritime_incident_ctte/report/c02.pdf; Internet; accessed 15 December, 2012.

[134] Pugash, James Z., The Dilemma of the Sea Refugee: Rescue without Refuge, *18 Harv. Int'l. L. J. 577 (1977),* 578.

[135] Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, (Cambridge University Press: 2009) at 199. Guilfoyle is relying upon UNCLOS

Despite the fact that MV Tampa was in distress after rescuing 433 migrants, the Master was ordered not to enter Australian waters. Concerned for the safety and welfare of the refugees, he did so anyway.[136] Upon entry, the Master of the MV Tampa was immediately advised that he was in breach of Australian law and forty-five Australian SAS troops boarded the vessel demanding the Master return to the high seas.[137] The master declined as he lacked food and the "safety equipment and the toilet facilities [needed] to make it seaworthy for so many passengers."[138] The Australian government eventually directed the warship, HMAS Manoora to take the asylum seekers for processing on the Pacific island of Nauru.[139]

In the case of the MV Tampa, the Master acted lawfully in terms of rescuing the irregular migrants. There was no doubt that the

---

Article 98(1)(b). See also the critical commentary of D. Rothwell, "The Law of the Sea and the MV Tampa Incident: reconciling maritime principles with coastal state sovereignty" (2002) 13 Public Law Review 118 and M. White, "Tampa incident: shipping, International and maritime legal issues (2004) 78 ALJ 101.

[136] The actions of the Australian government were challenged domestically in *Victoria Council for Civil Liberties* v. *Minister for Immigration and Multicultural Affairs* ("VCCL v. Minister") [2001] FCA 1297 (11 September 2001) at www.austlii.edu.au/au/cases/cth/federal_ct/2001/1297.html at para 18.

[137] White, "Tampa incident…," Supra Note 135, 103 and Guilfoyle, *Shipping Interdiction*…, Supra Note 135, 200.

[138] *VCCL v. Minister*, *Supra* Note 136 at paras 18 and 22.

[139] Background Note from Australian Parliamentary Library, "Boat arrivals in Australia since 1976" Updated 11 February 2011 by Janet Phillips and Harriet Spinks, Social Policy *S.* (Background Note). http://www.aph.gov.au/library/pubs/bn/sp/boatarrivals.htm#_Toc285178607; Internet; accessed 15 December, 2012.

additional 438 persons rendered his vessel unsafe. With Australia ordering him to stay out of its territorial waters, his rescued passengers threatening to commit suicide, combined with the lack of food and equipment, he pursued a viable and defensible course of action from a humanitarian perspective.

The US Experience

Due to its location and status, the US has confronted migrants and asylum seekers arriving by sea for decades. International law provides no authority for US warships, the United States Coast Guard (CSCG) or other US law enforcement agencies to exercise jurisdiction over foreign flagged vessels outside of US territorial waters. However, international law does permit states "to pass jurisdiction to one another."[140] In fairness, the US approach to managing migration has reflected both flexibility and innovation.[141] On a few occasions, safety concerns were an impetus for exceptional measures to be ordered.[142] On 29 September 1981, in direct response to increased safety concerns, President Reagan issued Executive

---

[140] Cryer, R et al., *An Introduction to International Criminal Law and Procedure,* (Second Edition) (Cambridge University Press: 2010) at p. 46 (*S.* 3.3.2).

[141] Guilfoyle, *Shipping Interdiction*…, Supra Note 135, 187. Referring to Mariel Boatlift from 1 April 80 to 25 Sep 80 (regarding approximately 125,000 Cuban immigrants); Operation 'Able manner' from 15 Jan 93 to 26 Nov 1994 involving 25,000 migrants; and Operation Able Vigil of 31,000 Cuban migrants (19 Aug -23 Sept 1994).

[142] See: http://www.uscg.mil/hq/cg5/cg531/amio.asp "The hazards of illegal maritime migration were highlighted in 1981, when the bodies of 30 Haitian migrants washed ashore on Hillsboro Beach, FL."

Order 12324 authorizing the Secretary of State to enter into cooperative arrangements with "appropriate foreign governments for the purpose of preventing illegal migration to the United States by sea."[143] Pursuant to this authority and in an attempt to manage the exploding numbers of asylum seekers seeking refuge in the US, the US entered into a number of bilateral agreements with neighbouring countries to facilitate screening of asylum seekers.[144]

The US Coast Guard (USCG) is the US agency responsible for conducting interdictions outside of the US Territorial waters.[145] Pursuant to both international and US law, the USCG may interdict US flagged vessels, stateless or assimilated vessels as well as foreign vessels when they have the consent of the flag state.[146]

The Exchange of Notes negotiated between Haiti and the US authorized the USCG to board Haitian flagged vessels suspected of

---

[143] Ronald Reagan: Executive Order 12324 - Interdiction of Illegal Aliens; http://www.presidency.ucsb.edu/ws/index.php?pid=44317#ixzz1sJa7G4pG; Internet; accessed 17 April 2012.

[144] M. Nash, "Contemporary practice of the United States relating to international law," (1995) 89 *AJIL*. 96 at 102. Agreements entered into with Grand Turk Island, Dominica, St. Lucia, Suriname and Panama. See Guilfoyle, *Supra* Note 135, 191.

[145] 8 USC §§ 1185(a)(1) and 1324. See also http://www.uscg.mil/hq/cg5/cg531/amio.asp.

[146] According to the Executive Committee of UNHCR, Interception or interdiction occurs when mandated authorities representing a State:

> i) prevent embarkation of persons on an international journey,
> ii) prevent further onward international travel by persons, who have commenced their journey; or
> iii) assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law.

smuggling people to the US on the high seas.[147] From 1981 until 1994, under this Exchange of Notes, the US agreed not to return individuals deemed to be refugees and Haiti agreed not to prosecute or punish individuals that the US returned to Haiti.[148] Pursuant to the Exchange of Notes with Haiti, preliminary screenings of persons interdicted at sea were done on board USCG vessels at sea and persons having a "credible" refugee claim were sent to the US for further screening while those who did not were returned to Haiti. Shortly after the 1991 coup in Haiti, there was a dramatic increase in persons fleeing Haiti for the US seeking asylum.[149] US officials scrambled to process the mass numbers of asylum claims on vessels at sea, before establishing a processing centre at Guantanamo Bay, Cuba.[150] With the exploding numbers of refugees fleeing Haiti, in May 1992, US President George Bush Sr. issued a new Executive Order 12807, referred to as the "Kennenbunkport Order," which authorized the Coast Guard "… to enforce the suspension of the entry of undocumented migrants by interdicting them at sea, and return them to their country of origin or

---

[147] Exchange of Diplomatic Letters Between E.H. Preeg, US Ambassador to Haiti, and E. Francisque, Haiti's Secretary of State for Foreign Affairs, TIAS No. 10241 (23 Sept. 1981); (US) Presidential Proclamation 4865, 46 Fed. Reg. 48107 (29 Sept. 1981); Exec. Order 12324, 46 Fed. Reg. 48109-10 (29 Sept. 1981); Agreement to Stop Clandestine Migration of Residents of Haiti to the United States, (1981) 20 ILM 1198 (Haitian Migrant Agreement).

[148] Guilfoyle, *Shipping Interdiction*…, Supra Note 135,189.

[149] See Protecting Refugees and the Role of the UNHCR 2008-2009: http://www.unhcr.org/4034b6a34.html; internet; accessed 20 April, 2012.

[150] Guantanamo Bay Camp held as many as 12,000 Migrants.

departure."[151]

In the order, US authorities were directed to repatriate interdicted Haitian migrants back to Haiti without conducting a refugee determination hearing assessing whether they had "credible" claims. Executive Order 12807 was based on the US Government's belief that the principle of "*non-refoulement*" obligations did not apply in international waters, outside of US territory. The Haitian interdiction program continued under the administration of Bill Clinton and although successfully defended before the U.S. Supreme Court in *Sale v. Haitian Centers Council*, both the court decision and Executive Order 12807 became the subject of significant criticism.[152] According to Legomsky who extensively studied the Haitian Interdiction programme, Haitians are still routinely intercepted and returned to Haiti, "the policy of refraining from advising the Haitians of their right to request asylum remains in effect.…"[153]

---

[151] Executive Order 12807 of 24 May 1992, 57 Fed. Reg 23 133 (1992).

[152] The following articles are a sample of the scholarly criticism challenging the legitimacy of the US position on *non-refoulement*: *Aliens and the Duty of Non-refoulement: Haitian Centers Council* v. *McNary*, The Lowenstein International Human Right's Clinic, 15 Immigr & Nationality L. Rev 333 1993-1994; James C. Hathaway, *The Rights of Refugees under International Law* (2005) 336-9; Daniel J. Steinbock, 'Interpreting the Refugee Definition' (1998) 45 *UCLA L. Rev.* 733, 755-6; cf. Andrew I. Schoenholtz, 'Aiding and Abetting Persecutors: The Seizure and Return of Haitian Refugees in Violation of the UN *Refugee Convention* and Protocol' (1993) 7 *Georgetown Immigration L.J.* 67.

[153] Legomsky, S., "The USA and the Caribbean interdiction program" (2006) 18 IJRL 677, 683.

Critical Comment on Australian Position

Currently, Bill C-31's two-tier approach in dealing with migration, treats asylum seekers who arrive by vessel different from those who arrive via other means and imposes both mandatory detention and the denial of procedural safeguards.

The original draft of Canada's Bill C-31 (then C-49) tabled on October 21, 2010 predated a unanimous High Court Australian decision (*Plaintiff M61/2010E v Commonwealth* ('*Plaintiff M61*') that calls into question much of the underlying rationale of Australia's new offshore processing policy for persons seeking to migrate to Australia by vessel.[154] Similarly, scholarly criticism and a decision of the Inter-American Commission on Human Rights of the Organization of American States (OAS) extensively criticizing the US policy are equally instructive. Although there is not much teeth to the OAS decision, by interpreting it with the lessons learned from both the Australia and US experiences, the analysis proves invaluable in assessing the Canadian situation.

In 2008, the Australian government moved its refugee processing to an offshore centre at Christmas Island and passed legislation to remove Christmas Island from the Australian migration zone. The effect of the legislation was to deny asylum seekers access to the procedural fairness

[154] (2010) 272 ALR 14 "*Plaintiff M61.*"

protection mechanisms within Australia's *Migration Act*.[155] Essentially, the government set up "excised offshore places," where the protections afforded within Australia's *Migration Act* were denied.[156] In effect, persons arriving by boat were denied the same fair treatment and due process that persons arriving by air or other means receive.[157] This new process was a "non-statutory" regime and had no oversight mechanism. The *Migration Act* and its relevant case law served as guidance in informing decision makers and were not binding.[158]

Importantly, when being screened at Christmas Island, asylum seekers were automatically "detained" on the island and prohibited from applying for a visa, unless the bar to filing a visa application was lifted personally by the Minister.[159] However, the Minister did not have to consider requests to lift the bar for application nor exercise any discretion in

---

[155] *Migration Act 1958* (Cth), s 5(1); *Migration Amendment Regulations 2005 (No. 6)* (Cth), reg 5.15C. The amendments were made pursuant to the *Migration Amendment (Excision from the Migration Zone) Act 2001* (Cth). Further islands were excised by the *Migration Amendment Regulations 2005 (No. 6)* (Cth), reg 5.15C.

[156] *Ibid.*

[157] *Ibid.* Section 494AA(1)(c)*;* states: 'The following proceedings against the Commonwealth may not be instituted or continued in any court: (c) proceedings relating to the lawfulness of the detention of an offshore entry person during the ineligibility period, being a detention based on the status of the person as an unlawful non-citizen.'

[158] Hannah Stewart-Weeks. "Out of Sight but Not out of Mind: *Plaintiff M61/2010E v Commonwealth,"* Case Note *Sydney Law Review,* Vol 33: 831 (2011) at 435. See also: Daniel Flitton. "Safe Haven," *The Age*. 12 November 2012. Available from http://www.theage.com.au/national/safer-haven-20101111-17pex.html#ixzz1kmtvMnz7; Internet; accessed 26 January 2012.

[159] *Migration Act*, *Supra* Note 155, s. 189(3), s. 46A(1) and s. 46A(2).

considering requests.[160] Furthermore, under the same *Migration Act*, an Immigration Officer was required to remove "as soon as practicable an unlawful non-citizen detained, who has not been immigration cleared and who has not made a valid application for a visa.[161]

Fundamentally, the offsite processing and corresponding mandatory detention requirements along with no guarantee of procedural fairness in applying for a Visa put persons seeking asylum into an untenable situation. As Stewart-Week's described, the objective of the processing of refugee claimants in "excised areas" was as follows:

> The objective behind processing asylum seekers offshore in 'excised areas' is to limit access to Australian law and Australian courts. The same objective lay behind the Howard government's Pacific Solution'. The asylum seekers' isolation is both physical, cutting them off from legal advice and other services, and metaphorical, disallowing access to the safeguards and checks provided by the Australian system of judicial review.[162]

On 11 November, 2010, in the unanimous decision in *Plaintiff M61*, the High Court "upheld the rights of asylum seekers to have their applications decided according to the law and rules of procedural fairness."[163] The implication of the High Court's decision in *Plaintiff M61* was the emphatic message it sent to the current Australian Government that the High Court would go to great lengths to ensure its role in overseeing the rule of law is

---

[160] *Ibid.,* s. 46A(7).

[161] *Ibid.,* s. 198(2).

[162] Stewart-Weeks., "Out of Sight …," Supra Note 158, 839.

[163] "*Plaintiff M61," Supra* Note 154; Stewart-Weeks, "Out of Sight …," *Supra* Note 158, 831.

not beyond its reach.[164] In essence, the High Court Decision was a direct assault on the Australian government's approach to using offshore refugee processing centers with the specific aim of barring asylum seekers from the procedural fairness available under the rule of law. However, the Australian policy is not alone in receipt of scathing criticism of its exceptional measures. The US has similarly received similar criticism and scholarly commentary from courts, international organizations and legal scholars.

Critical Comment of US Position

Much of the resistance to the US-Haitian interdiction policy relates to the US interpretation that the principle of *non-refloulement* does not apply to the US in international waters. The most poignant criticism on the US-Haitian interdiction program is found in the comments of Judge Hatchett writing in dissent in *HRC* v. *Baker*:

> Jewish refugees seeking to escape the horror of Nazi Germany sat on ships in New York Harbor, only to be rebuffed and returned to Nazi Germany gas chambers. Does anyone seriously contend that the United State's responsibility {under the protocol} for the consequences of its inaction would have been any less if the United States had stopped the refugee ships *before* they reached our territorial waters … Such a contention makes a sham of our international treaty obligations and domestic laws for the protection of refugees.[165]

As well, academics Elihu Lauterpact and Daniel Bethlehem were quick to point out that the US position on *non-refoulement* runs contrary to settled international law:

---

[164] Stewart-Weeks, "Out of Sight …," Supra Note 158 at 847.

[165] *HRC* v. *Baker,* 949 F.2d 1109, 112 (11th Cir. 1991) (Hatchett, J., dissenting).

> The responsibility of the Contracting State for its own conduct and that of those acting under its umbrella is not limited to conduct occurring within its territory. Such responsibility will ultimately hinge on whether the relevant conduct can be attributed to that State and not whether it occurs within the territory of the State or outside it.[166]

Arthur Helton argued that *non-refoulement* "becomes a hollow promise if nations can circumvent it by stopping… refugees before arrival."[167] Academics across the world criticized and aggressively refuted the decision of the US Supreme Court.[168] The Inter-American Commission on Human Rights of the Organization of American States (OAS) found that the US interdiction program contradicted international law.[169] However, the non-binding nature of the court's decision and the differing priorities of the American legal and political system prevented changes to the US Policy.[170]

Despite the protests, and the fact that the US position on *non-*

---

[166] Elihu Lauterpacht & Daniel Bethlehem, "The Scope and Content of the Principle of *Non-refoulement*" in Erika Feller, Volker Türk & Frances Nicholson, eds. *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003) at 110.

[167] Arthur Helton, "The United States government program of intercepting and forcibly returning Haitian boat people to Haiti" (1993) 10 *New York Law School Journal of Human Rights* 325, 341; Legomsky, The USA and the Caribbean…, *Supra* Note 153, 688-93.

[168] Barnes, Refugee Law at Sea*.., Supra* Note 109*;* See also: Jon L. Jacobson, 'At-Sea Interception of Alien Migrants: International Law Issues' (1992) 28 *Willamette L. Rev.* 811; Gerald L. Neuman, 'Extraterritorial Violations of Human Rights by the United States', Am. U. J. Int'l L. & Pol'y 213 1993-1994.

[169] See: Organization of American States Press Release, 'OAS Human Rights Committee Calls Clinton Haitian Interdiction Policy a Violation of International Law' (19 Mar. 1993) describing Precautionary Measures taken by Inter-American Commission. Jessica C. Morris, "The Spaced in Between: American and Australian Interdiction Policies and their Implications for the Refugee Protection Regime," Volume 21, Number 4, *Refuge*, 51 at 58.

[170] Legomsky, The USA and the Caribbean…, *Supra* Note 153, 692.

refoulement was ruled contrary to international law, on 25 February 2005, President George W. Bush responded to another exodus surge from Haiti by reinforcing the policy in Executive Order 12807. He stated: "I have made it abundantly clear to the Coast Guard that we will turn back any *refugee* that attempts to reach or shore [emphasis added]."[171] In referring to the Haitian boat people as 'refugees,' in complete contradiction of law and policy, he directed that they be returned to Haiti without any assessment."[172] Given that the direction emanated from an Executive Order based on exceptional circumstances, it could be argued that the circumstances may have merited the exercise of the US executive authority. In order to get a fair appreciation on whether the circumstances are exceptional or not, it is helpful to do a comparison on the numbers of vessels Canada, US and Australia receive.

COMPARING NUMBERS

On 19 January 2011, Toews reiterated the urgency of passing Bill C-49 before a mass influx of asylum seekers arrive at Canada's doorstep.[173] Based on this statement, one might assume that "exceptional" numbers of unannounced arrivals were destined for Canadian shores. In truth, the

---

[171] Jerry Seper, 'Coast Guard Repatriates Haitians', *Wash. Times* (28 Feb. 2004), A4);

[172] Legomsky, The USA and the Caribbean…, *Supra* Note 153, 682 citing Frelick, Bill "'Abundantly Clear": Refoulement' (2005) 19 *Georgetown Immigration L.J.* 2 245 citing Jerry Seper, *Ibid*.

[173] Vic Toews, Statement, http://www.publicsafety.gc.ca/media/nr/2011/nr20110119-1-eng.aspx; Internet: Accessed April 2012.

Ocean Lady arrived with 76 passengers and the *MV Sun Sea* transported 492 migrants to Canada for a total of 568 claimants arriving by sea over a one-year period.[174] In contrast to the approximate total of 33,200 refugee claimants who arrived in Canada in 2009, 568 persons arriving in Canada by boat amounts to a meager 1.7% of all refugee claims, a statistically insignificant number in comparison with the yearly total.[175] Alex Neve and Tiisetso Russell detailed a trend of only modest arrivals over a twenty-five year period:

> So there we have it: eight boats, carrying approximately **1500** people over a span of twenty-five years. Not exactly an invasion. It is not even a drop in the bucket compared to the total number of refugees arriving in Canada through other modes of transport. Taking a ballpark estimate of **25,000** refugee arrivals per year in Canada over those twenty-five years, the **1500** who have arrived on these eight ships reflect just over **1/5** of **1%,** .2% of the total. It is as many as would otherwise arrive over the course of just three weeks in any one of those twenty-five years.[176]

By comparison, in the US, the numbers of migrants transiting to its shores interdicted have varied. A historical overview of interdictions reveals that the number of interdictions escalated almost ten-fold between 1991 and

---

[174] See Website of the Prime Minister of Canada: *MV Ocean Lady Tour: Preventing the Abuse of Canada's Immigration System by Human Smugglers* 21 February 2011**,** Vancouver, British Columbia at http://pm.gc.ca/eng/media.asp?id=3969

[175] Although the number of people arriving in Canada (with the intention to seek asylum) varies from year to year. In 2009, more than 33,200 people came to Canada seeking asylum. See: http://www.cic.gc.ca/english/refugees/canada.asp Internet: (accessed Apr 11)

[176] Alex Neve, Tiisetso Russell. "Hysteria and Discrimination: Canada's Harsh Response to Refugees and Migrants Who Arrive by Sea" *62 U.N.B.L.J. 37 (2011*) p 40.

1992.[177] In 1991, the USCG intercepted 4990 persons, while the number jumped to 40,627 in 1992 before it rebounded back to 10584 in 1993 and then skyrocketed again to 64,443 in 1994. The variance of the interdictions between 1993 and 1994 was approximately 50,000 persons. Recent figures for the year 2011 reveal a return to more modest numbers; 2,474 alien migrant interdictions a slight increase from 2088 interdictions in the year 2010.[178] Arguably, it was the massive increase in the 1990s that precipitated the extreme measures taken by the United States to manage the influx.

By comparison, in Australia, the number of interdicted vessels carrying asylum seekers has varied over the last three decades. Unlike the insignificant numbers of Canadian arrivals by sea, it could be argued that the "exceptional" numbers of arrivals in Australia substantiated why its government took such extraordinary action. In 1989, approximately 200 migrants arrived in Australia unannounced by boat, but the numbers jumped ten years later in the year 1999 to 3,721 claimants before climbing in the year 2001 to 5516 asylum seekers arriving on 43

---

[177] Alien Migrant Interdiction, Total Interdictions - Fiscal Year 1982 to Present, as of Monday, January 23rd, 2012. See: breakdown of USCG Interdictions: Available from; http://www.uscg.mil/hq/cg5/cg531/AMIO/FlowStats/FY.asp; Internet; accessed 24 January, 2012.

[178] *Ibid.*

boatloads.[179] According to advice provided by the Australian Department of Immigration and Citizenship (DIAC) to the Australian Parliamentary Library, the numbers of arrivals from 2001 to 2008 were relatively consistent.

However, in 2008, when the Australian government suspended its Pacific Solution in favour of an offshore processing system the arrivals escalated back up into the thousands.[180] Based on the numbers that the authors of an updated Parliamentary Background Note could determine, (shown in Figure 1 below), a noticeable spike occurred in 2010 with 6879 asylum seekers arriving on 134 boats.[181]

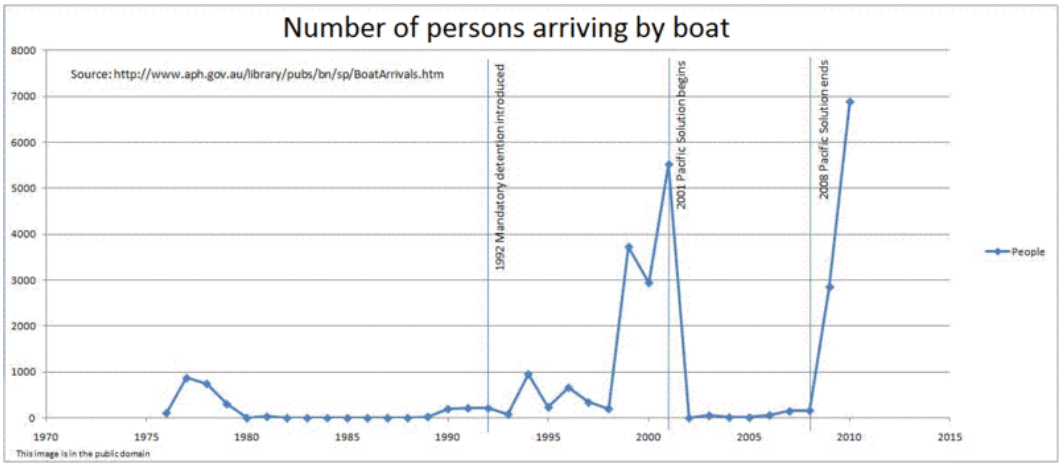
---

[179] See Appendix A of Background Note of Australian Parliament; Available from,: http://www.aph.gov.au/library/pubs/bn/sp/boatarrivals.htm#_Toc285178607; Internet, accessed 22 January, 2012. (*Background Note*)

[180] Chris Evans (Minister for Immigration and Citizenship), *Last refugees leave Nauru*, media release, Canberra, 8 February 2008, Available from, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FYUNP6%22; Internet; accessed 29 January, 2012.

[181] *Background Note, Supra* Note 179.

Figure 1: Numbers of Persons arriving in Australia by boat.[182]



It is important to keep in mind that the Australian government abandoned the Pacific Solution in 2008 due to public pressure and criticism from academic scholars, lawyers, NGOs and the international community. Essentially, their advocacy was influential in convincing the new Australian government to abandon the exceptional policies. As Watson concluded, "…the successful end of the securitization spectrum is marked by the ability of political elites to implement emergency measures without the need to legitimize their actions."[183] If opposition leaders and key stakeholders become influential actors in the process in de-securitizing a government's decision, then the successful securitization of a decision can either be halted or reversed.

The press release of the Minister for Immigration and Citizenship,

---

[182] Figure 1 – Figure Produced by Australian Parliamentary Library as created by reported statistics; http://www.aph.gov.au/library/pubs/bn/sp/boatarrivals.htm#_Toc285178607; internet; accessed 20 January, 2012.

[183] Watson. *The Securitization of Humanitarian Migration…, Supra* Note 44, 27.

Senator Chris Evans succinctly describes the reasons for this change in policy:

> The Pacific solution was a cynical, costly and ultimately unsuccessful exercise introduced on the eve of a Federal election by the Howard Government.
>
> The Department of Immigration and Citizenship expended $289 million between September 2001 and June 2007 to run the Nauru and Manus OPCs. A total of 1637 people were detained in the Nauru and Manus facilities, of whom 1153 (or 70 per cent) were ultimately resettled from the OPCs to Australia or other countries. Of those who were resettled, around 61 per cent (705 people) were resettled in Australia.
>
> The bulk of the refugees housed on Nauru and Manus had fled Iraq and Afghanistan — two countries where Australia still has troops committed. …
>
> Australia will continue to honour its commitment to a generous aid and capacity development program for Nauru and Papua New Guinea. The asylum claims of future unauthorised boat arrivals will be processed on Christmas Island. Christmas Island will soon have an increased capacity for offshore processing of unauthorised arrivals with the opening of the new immigration detention centre built by the former Government. The new centre on Christmas Island will have the capacity to house 400 people with a surge capacity of a further 400 people.[184]

The UNHCR welcomed Australia's decision to close Nauru, a tiny island processing refugee claims for asylum.[185]

CHAPTER VI: CRITICAL ANALYSIS: SECURITIZATION/ STATE OF EXCEPTION/ EXCEPTIONAL MEASURES

A successful securitization process is completed when the government's exceptional measures have been effectively passed into legislation. However, measures considered acceptable in the short term due to the circumstances may not be defensible under more enduring

---

[184] Chris Evans (Minister for Immigration and Citizenship, Australia), *Last refugees leave Nauru*, media release, Canberra, 8 February 2008, Available from, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FYUNP6%22; Internet; accessed 29 January, 2012.

[185] UNHCR. "UNHCR welcomes close of Australia's Pacific Solution"; Briefing Note, 8 February 2008. http://www.unhcr.org/47ac3f9c14.html; Internet; accessed 26 January, 2012.

formal legislation that must comply with Canada's commitment to the rule of law, its domestic laws and international legal commitments. There are a number of factors that come into play, including the humanitarian dimension.

Keeping in mind, refugees willing to assume significant personal risk to embark on a journey over thousands of miles on an unseaworthy vessel seeking hope, employment and freedom will adapt. As states such as Canada and Australia tighten their policies making it more difficult for asylum seekers to seek refuge, then such action only aggravates the problem. The behaviour of legitimate persons seeking refuge will adapt thereby increasing risk to life. For example:

> The new Australian response led to a corresponding change in the behaviour of the asylum seekers. From being cooperative and compliant, their behaviour changed to include threatened acts of violence, sabotage and self-harm, designed to counter the Navy's strategies.[186]

Exceptional policies inconsistent or in violation with principles considered acceptable and in compliance with state and international commitments provide evidence of the process of securitization.[187] Successful securitization occurs when emergency measures are imposed as legislation.

Current resistance to the Canadian government's efforts to impose its new measures into legislation reveals that the public may no longer be

---

[186] See: Executive Summary: http://aph.gov.au/senate/committee/maritime_incident_ctte/report/a06.pdf

[187] Watson, *The Securitization of Humanitarian Migration...*, *Supra* Note 44, 31.

accepting of the ongoing securitization process. Referring back to exceptional conduct imposed by the Australian, there have been few western government policies as strongly criticized by academic scholars, policy makers and lawyers as the Pacific Solution.[188]

Bill C-31 and Charter Scrutiny

Criticisms offered on earlier versions of Bill C-31 could have been heeded, however, the government chose not to. As a result, objections to Bill C-31 continue.[189] Most recently, on the 23rd of April 2012, Don Davies, Member of Parliament for Vancouver Kingsway, of the National Democratic Party (NDP), proposed a motion requesting the House to decline the second reading of Bill C-31. In short, it was based on objections that Bill C-31:

> (*a*) places an unacceptable level of arbitrary power in the hands of the Minister;
> (*b*) allows for the indiscriminate designation and subsequent imprisonment of bone fide refugees for up to one year without review;

---

[188] A few of the critical academic articles critiquing the Australian Government's response to the Tampa Incident include: Joan Fitzpatrick, "Australia's Tampa Incident: The Convergence of International and Domestic Refugee and Maritime Law in the Pacific Rim: Introduction to Refugee Law Forum, *12 Pac. Rim L. & Pol'y J* 1 2003; Peter D. Fox, "International Asylum and Boat People: The Tampa Affair and Australia's "Pacific Solution," *25 Md J Int'l L 356* (2010); Goodwin-Gill, Guy, S., "Refugees and Responsibility in the Twenty-First Century: More Lessons Learned From the South Pacific," *12 Pac Rim L. & Pol'y 23* (2003); Guilfoyle, White, Rothwell, Supra Note 135 and *VCCL v. the Minister*, Supra Note 136.

[189] See objections raised by Members of Parliament in Motions on Bill C-31 (23 April, 2012). http://openparliament.ca/bills/41-1/C-31/ ; Internet; accessed 27 April, 2012. See also open letter of objection to Bill C-31: http://rabble.ca/news/2012/04/open-letter-jason-kenney-bill-c-31-must-be-rejected ; Internet; accessed, 27 April, 2012; Toronto Star, "Migrants need protection from Bill C-31," http://www.thestar.com/opinion/editorialopinion/article/1169015--migrants-need-protection-from-bill-c-31 ; Internet; accessed, 27 April 2012.

> (*c*) places the status of thousands of refugees and permanent residents in jeopardy;
> (*d*) punishes bone fide refugees, including children, by imposing penalties based on mode of entry to Canada;
> (*e*) creates a two-tiered refugee system that denies many applicants access to an appeals mechanism; and
> (*f*) violates the Canadian Charter of Rights and Freedoms and two international conventions to which Canada is signatory.[190]

Capitalizing on their majority representation, the Conservatives defeated Motion 182 and on the same day took advantage of their majority in moving Motion 183 to advance Bill C-31 through Second reading. Vote 183 was passed by the same distribution of votes that defeated Motion 182.[191] Accordingly, if the government relies upon its majority and proceeds with implementing Bill C-31, it seems inevitable the legislation will fail *Charter* scrutiny.

As Philippe Lagassé highlighted on the thirtieth anniversary of the *Charter,* the judiciary has an important role in holding the government accountable, using the Charter to interpret the legitimacy of legislation and to review the affairs of government:

> Thanks to the Charter, the judiciary is now coequal with Parliament, the legislative power, and the Crown, the executive power, in a system of government that operates under a separation of powers doctrine. Under this arrangement, the courts are expected to rely on the Charter to review and remedy possible abuses of legislative or

---

[190] 41st Parliament, 1st Session, Sitting No. 108, Motion No. 182 (related to C-31) defeated by 25 votes - 121 votes in support and 146 Nays. Monday, April 23, 2012; http://parl.gc.ca/HouseChamberBusiness/ChamberVoteDetail.aspx?Language=E&Mode=1&Parl=41&Ses=1&Vote=182&GroupBy=party&FltrParl=41&FltrSes=1 Internet; accessed 27 April, 2012.

[191] 41st Parliament, 1st Session, Sitting No. 108, Motion No. 183 (To advance C-31 to Second Reading). http://parl.gc.ca/HouseChamberBusiness/ChamberVoteDetail.aspx?FltrParl=41&FltrSes=1&Vote=183&Language=E&Mode=1; Internet; accessed 27 April, 2012.

> executive authority in order to guarantee the individual rights of Canadians.[192]

This example highlights the potential risk of a government executing such exceptional measures. Lord Hoffman captures this concern perfectly in the United Kingdom case of *A v. Secretary of State for the Home Department* (2004 [2005])[193] where the House of Lords reviewed the legal basis for the "indefinite" detention of nine foreign nationals deemed a security risk under the UK *2001 Anti-Terrorism, Crime and Security Act*.[194]

Although the House of Lords ruled in favour of the detainees, citing the incidents of September 11th, seven of the eight Law Lords ruled that there was a public emergency that threatened the life of the nation. Nonetheless, it still held the government was accountable to ensure that measures it takes proportionately reflect the exigencies of the situation.[195] Although Lord Hoffman also ruled in favour of the detainees, he saw the issue of emergency security differently. His language captures a powerful message that can assist the Canadian perspective on securitization:

---

[192] Philippe Lagassé. "Crown's prerogative powers remain as vigorous as ever" *Ottawa Citizen.* April 14, 2012. http://www.ottawacitizen.com/news/Crown+still+King/6458473/story.html; Internet; accessed April 14, 2012.

[193] *A v. Secretary of State for the Home Department* (2004), [2005] 2 A.C. 68 (H.L.)

[194] UK *2001 Anti-Terrorism, Crime and Security Act* ((UK), 2001, c.24, s.21.

[195] *A. v. Secretary of State for the Home Department*, *Supra* Note 193, at paras 96-97.

> This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt we shall survive Al Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence serious as it is, does not threaten our institutions of government or our existence as a civil community....
>
> The real threat to the life of the nation, in the sense of a people living in accordance with the traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.[196]

In short, as Dauvergne suggests this decision unmasks a fiction that detention of non-nationals as an immigration matter is held to a lower threshold.[197] She further argues that if we were to apply this case here, it would reject the basis for immigration detention provisions in both Australia and Canada.[198] As Bill C-31 proposes arbitrary detention for up to one year for all persons arriving by vessel, this case would suggest that the critical factor governing detention should be focussed on the actual threat that the individual poses to Canada's national security and not the simple fact that the individual arrived by vessel.

Notwithstanding the ongoing tension surrounding Bill C-31, it is important to emphasize that the government retains exceptional powers to control its borders if required, but that such control must be appropriately measured. Arguably, the answer does not lie in imposing exceptional

---

[196] *Ibid*.

[197] Dauvergne, *Security and Migration* …, *Supra* Note 7, 536.

[198] *Ibid*., 536.

measures into legislation, but rather, using exceptional measures to respond to specific situations where specific national security threats are identified.

Drawing from Agamben's *State of Exception*, if the sovereign is the authority charged with both creating and enforcing laws, it is functionally able to operate both "inside" and "outside" of the legal system in a state of emergency or when exceptional circumstances exist. In Canada, there are a number of mechanisms that enable the government to take exceptional action outside of legislative norms.

Emergencies Act

In Canada, under the *Emergencies Act,*[199] a state of emergency can be declared by Parliament. The Preamble to the Emergencies Act reads as follows:

> AND WHEREAS the fulfilment of those obligations in Canada may be seriously threatened by a national emergency and, in order to ensure safety and security during such an emergency, the Governor in Council should be authorized, subject to the supervision of Parliament, *to take special temporary measures that may not be appropriate in normal times;*
>
> AND WHEREAS the Governor in Council, in taking such special temporary measures, would be subject to the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights and must have regard to the *International Covenant on Civil and Political Rights, particularly with respect to those fundamental rights that are not to be limited or abridged even in a national emergency* [Emphasis Added].[200]

Essentially, the *Emergencies Act* permits temporary measures and empowers the Governor in Council to declare four types of emergencies:

---

[199] *Emergencies Act*, R.S.C. , 1985, c. 22.

[200] *Ibid.,* Preamble.

public welfare, public order, international and war emergencies, which are all defined within the Act itself. The Act limits the specific powers that the government can exercise, but provides lawful authority for the government to take exceptional action in an emergency.

Crown Prerogative

Authority may also lie within the Crown prerogative of the executive authorities of a state in exceptional circumstances. The Crown prerogative is comprised of miscellaneous powers, privileges and duties accepted under the law as vested in the Crown and exercised by the Governor in Council (GiC). In *Schrieber* v. *Canada*, the Federal Court described the prerogative power as the "residue of powers inherent in the Crown."[201] The courts have recognized that the prerogative power is subject to the doctrine of parliamentary supremacy and Parliament may, by statute, regulate the exercise of the prerogative power.[202] Crown prerogative captures all those powers of the Crown that have not been displaced by statutory authority. Importantly, it is the common law that determines the extent of the Crown prerogative that remains and whether or not it has been extinguished by statute or non-use.

Under section 91(7) of the *Constitution Act, 1867,* the Parliament of Canada has legislative authority over matters coming within the subject of

---

[201] *Schrieber v. Canada* [2001] 1 F.C. 427 (T.D.) (QL).

[202] *Vancouver Island Peace Society* v. *Canada*, [1994] 1. F.C. 102 (T.D.).

"Militia, Military and Naval Service, and Defence."[203] Accordingly, the Executive of the federal government exercises the prerogative powers and privileges related to the CF and Defence. Sections 9 and 15 of the Constitution Act (1867) confirm the legal foundation for the use of the Crown prerogative in relation to matters of the national defence in Canada.[204] Although the Crown prerogative in Canada has increasingly been disappearing, it has nonetheless remained the primary legal authority authorizing the use and disposition of the armed forces.

Although some of the prerogative powers have been lost through the years and with the passage of statute law, Paul Lordon accurately describes the prerogative that remains:

> Even though most of the Sovereign's powers were transferred to Parliament and to the Executive with the passage of time, the Sovereign kept certain powers that are said to be 'royal prerogative. These prerogatives include, for example, decisions in matter of armed forces, domestic and external affairs, emergency, and so on.[205]

Consider a response to an approaching civilian cargo vessel preparing to launch a terrorist attack falls under the law enforcement jurisdiction of RCMP. A pending attack that is so large that it would undermine the security of the state is akin to an armed attack, demands the action of the

---

[203] *Constitution Act, 1867.*

[204] s. 9 – The Executive Government and Authority of and over Canada is hereby declared to continue and vest in the Queen;
s. 15 – The Commander in Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada, is hereby declared to continue and be vested in the Queen.

[205] Paul Lordon, *Crown Law*, (Toronto and Vancouver: Butterworths, 1991), 61.

CF under the defence of Canada. It should be noted that the courts have not required a crisis to arise before the Crown can utilize the prerogative for defence purposes.

However, the situation is not as clear when it comes to responding to a "national security" crisis that does not immediately engage a defence of Canada mandate. Despite the evolution of critical security studies and the evolution of the concept of national security which includes more than defence, there is no specific Canadian case law providing definitive guidance that "national security" exists as a specific power under the Crown prerogative.

Few would suggest that authorities must await the arrival of a foreign cargo vessel carrying a dirty bomb before the government can respond.[206] As a result of the shifting notion of "national security," it is helpful to consider whether the Crown prerogative for "defence" includes the broader notion of "national security."

Some courts appear to have "read in" national security as part of the Crown prerogative. For example, in describing the Crown prerogative, the Federal Court in *Vancouver Island Peace Society* v. *Canada*, includes

---

[206] In *Burmah Oil Co. v. Lord Advocate*, [1964] 2 All E.R. 348, the House of Lords ruled that the Crown did not have to wait for imminent peril before invoking the defence prerogative. The conclusion is fully supported by later Canadian cases such as *Operation Dismantle Inc. et al. v. The Queen*, [1985] 1 S.C.R. 441 (S.C.C.) (dealing with the approval of American Cruise Missile testing in Canada) and *Vancouver Island Peace Society v. Canada*, *Supra* Note 202. (involving the approval of military visits by nuclear powered and nuclear weapon carrying vessels from the US and the UK). Both cases involved Cabinet decisions authorizing specific defence activity.

"security" in its description:

> The royal prerogative is comprised of the residual of the miscellaneous powers, rights, privileges, immunities and duties accepted under our law as vested in Her Majesty and under our Constitution exercised by the Governor in Council acting on advice of Ministers. Orders in Council may express the decisions of the Governor in Council in relation to matters within the discretionary authority of prerogative powers. Traditionally the courts have recognized that within the ambit of these powers the Governor in Council may act in relation to matters concerning the conduct of international affairs including the making of treaties, and the conduct of measures concerning *national defence and security* [emphasis added].[207]

If the interpretation of the Crown prerogative is subject to the common law, then it would follow that its interpretation is also a living tree and must be adapted to fit the modern day threat to the security of a state. Arguably, this seems to be the trend exhibited by common law courts.

The United Kingdom case of *R. v. Secretary of State for the Home Department, ex parte Northumbria Police Authority* is helpful as the court accepts the use of the prerogative in making decisions on keeping peace within the realm as opposed to addressing it as an issue of waging or fighting war.[208]

Additionally, the House of Lords decision in *Council of Civil Service Unions and others v. Minister for the Civil Service* went a little further when it recognized the existence of a "national security trump" which insulates the government from judicial review.[209] This House of Lords decision suggests

---

[207] *Ibid*., *Operation Dismantle*…, 141.

[208] *R. v. Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1988] 1 All E.R. 556 (C.A.).

[209] *Council of Civil Service Unions and others v. Minister for the Civil Service* [1984] 1 All E.R. 935; [1984] 3 W.L.R. 1174 (HL). "Judicial Review, the

that when the Executive (such as the Prime Minister) makes a decision based on national security, then the courts will not intervene. Lord Diplock summed it up as follows:

> … the crucial point of law in this case is whether procedural propriety must give way to national security when there is a conflict between … the prima facie rule of "procedural propriety" in public law… and … action that is needed to be taken in the interests of national security…. To that there can … be only one sensible answer. That answer is yes.[210]

In the end, this case suggests that the rules of natural justice could be suspended if the executive powers of government rely upon national security as justification in making its decisions. This may help explain why the Canadian government continues to emphasize "national security" as the underlying basis for its strategies on immigration and border control.

The message garnered from the SCC in *Operation Dismantle* was that the exercise of the Crown Prerogative must comply with the *Charter*.[211] However, in 2010 *Khadr II*, the SCC suggests that this approach in Operation Mantle is not conclusive. Although it found the Canadian government complicit in violating Omar Khadr's rights, it stopped short of ordering a specific remedy. In the *Khadr II* decision, the court clearly defers to the executive's prerogative power to make decisions on matters of foreign and international affairs even in a situation where the individual's

---

Royal Prerogative and National Security." *Northern Ireland Legal Quarterly*, [Spring 1985] Vol. 36, No. 1.

[210] *Ibid.,* 952.

[211] *Operation Dismantle* …, Supra Note 206.

Charter rights were violated.[212]

International law does recognize the power of states to deviate from the operational norms or institute exceptional policies in the event of a crisis. For example, within section 4 of the ICCPR, there is specific provision made that permits exceptional measures in "times of emergency." Although ICCPR does allow for emergency measures that infringe on some basic human rights, it does not permit an absolute disregard for legal norms. Section 4 reveals that a right is derogable in a time of emergency unless it is intertwined with other rights that provide guarantees against discrimination such as "race, colour, sex, language, religion or social origin."[213]

It should also be noted that this ruling in *Khadr II* seems consistent with the powers bestowed on government pursuant to s. 33 of the *Charter* under the "notwithstanding Clause." Pursuant to section 33 of the *Charter*, either the federal or provincial governments can suspend for up to five years, the fundamental freedoms in section 2 of the Charter, legal rights in sections 7 through 14, and to equality rights in section 15. There appears to be no threshold test, as long as it is achieved by a simple majority vote of the legislature. In effect, the *Charter* specifically provides a mechanism that permits the government to authorize an "exceptional policy" that falls

---

[212] For more extensive discussion on the SCC deference to the Executive under the Crown Prerogative see: David Rangaviz. "Dangerous Deference: The Supreme Court of Canada in *Canada* v. *Khadr*." 46 *Harvard Civil Rights-Civil Liberties Law Review*, 253 2011.

[213] *ICCPR*, *Supra* Note 64, s. 4.

outside compliance with the *Charter*. Essentially, by implementing the notwithstanding clause, a level of exceptional powers may be instituted without invoking the *Emergencies Act.*

Now that the traditional concept of "security" has evolved to include more than traditional military threats, then pressure exists on the traditional legal construct. As threats such as migration are increasingly being securitized, Canadian warships are increasingly tasked to assist government departments. With the blurring of the two types of tasks (defence and non-defence), then the traditional legal construct is strained.

Traditionally, governments rely upon their executive authority or prerogative in tasking military forces to conduct military operations. Conversely, law enforcement agencies obtain most of their authority through statutory and regulatory law. Now that some criminal offences, such as terrorism, can be serious enough to constitute an attack on the state, then a response will require a dual effort of both the CF and law enforcement authorities. As such, reconciling the requisite legal authority is not as straightforward as it would appear.

Generally, the activities of the CF are legally authorized based on two legal sources: Statutory law including the *National Defence Act* (NDA); and/or the exercise of the federal government's Crown prerogative. The NDA does not provide underlying legal authority for the activities that the government assigns to the CF and the Canadian Navy; however s. 4 of the NDA does set out the process whereby decisions of the government are

given effect. The tasks and activities assigned to the CF and the Canadian Navy are often assigned from sources outside the department through the exercise of the Crown prerogative.[214]

The authority for the CF and the Canadian Navy to respond to "marine threats" or "threats to the security of Canada" may or may not fall under the defence mandate. If the matter involves a suspected vessel carrying migrants falling short of an attack on Canada, then under the statutory mechanism of s. 273.6 of the NDA, a CF warship can be directed to assist another government department in responding to a matter not related to national defence.

While one could make the argument that the statutory provisions of the *Emergencies Act* may have displaced the Crown prerogative in responding to emergencies in Canada, this would only become an issue to consider if an actual declaration of emergency has been made. Aside from this, the prerogative exists outside of these circumstances and even then,

---

[214] T Lordon, *Crown Law*., at 71. The exact manner in which the Crown prerogative is exercised depends on which arm of the executive is doing the exercising. The lawful exercise of the Crown prerogative belongs to the executive of government. By law and convention, the Prime Minister, the cabinet or in some cases, individual cabinet ministers may exercise the Crown prerogative.[214] When either the Prime Minister or an individual minister issues such direction, it may be in the form of a letter, such as letter of strategic direction issued to the CDS tasking the CF to deploy internationally.

When the Cabinet as a whole body or a Cabinet Committee makes a decision drawing its authority from the Crown prerogative, such decision may be formalized in an Order in Council (OiC). Also, Cabinet, through one of its committees may consider business brought to it through Memorandum to Cabinet ("MC,"), being "the key instrument of written policy advice to Cabinet." If an MC is referred to Cabinet Committee in the first instance, Cabinet will issue a "Record of Decision" ("RD") to the relevant department for implementation. It is this RD that stands as the evidence of the formal exercise of the Crown prerogative power.

the wording of the Act does not confine the government to how it intends to employ the CF, thereby leading one to suspect that it would be at the discretion of the Crown.

In the realm of migration, Catherine Dauvergne suggests states are influenced by specific threat markers that support the implementation of exceptional measures or activity.[215] She argues that markers assist states in making sense of what appears to be "nonsensical" to others. Referring to Buzan et al, she states "This understanding of security focuses on how states, nations, peoples or others come to understand something as an important threat to their existence or way of being."[216] For example, she explains that it helps to explain why Australia felt threatened by the 433 rescued asylum seekers aboard the MV Tampa or as Lord Hoffman suggests how a state can believe that four bombs killing 56 people threatens the future of the United Kingdom.[217] In referring to Buzan et al, Dauvergne highlights:

> … Migration is becoming normalized as a security threat at this point in time, and that the present political threat is the consequence of this normalization. The shift means that it is more and more normal to treat migration, and asylum seeking, as a policing matter rather than a question of economic redistribution, social composition, or humanitarianism. The long-time twinning of migration and security remains, but its contents have shifted. Fear of migration is no longer predominantly a fear of loss of cultural or linguistic hegemony (Buzan et al., 1998, Ch 6). It is instead a fear of guns and bombs, anthrax and sarin. *This is key to the normalizing effect, the perceived threat itself*

---

[215] Catherine Dauvergne "Security and Migration Law…," *Supra* Note 7, at 542.

[216] *Ibid.,* 542

[217] *Ibid*.

> *now takes a form that we understand in military terms*. Fears that migrants will bring crime (in an ordinary sense), contagion, or social dilution remain, but pale beside this new dimension. This shift makes the threat of migration easier to normalize because it is similar to already normalized security settings [emphasis added].[218]

The execution of the securitization process has a great consequence on the operation of the rule of law. Basically, it means that a government has determined that an issue is so fundamentally important to its viability as a nation state, that the routine operation of the law should be suspended. Exceptions are exactly as the word suggests; action that falls outside of the normal operational policies.

Arguably if securitization of maritime security is becoming the norm, then the directed assistance of Canadian warships will continue. As such, Canadian law should be amended to ensure that the Canadian navy is capable of operating as an integral dimension in the larger security picture.

CHAPTER VII: GAPS IN CURRENT LAW

Lack of Jurisdiction to Enforce Laws

Consider a situation where a vessel suspected of smuggling, sets anchor approximately twenty-five kilometers from the Canadian coastline and the smugglers abandon the ship fleeing to the high seas. In this sort of situation, Canadian law enforcement authorities have no jurisdiction to act and the smugglers will easily escape repercussions of the law. However, Canadian officials will certainly have a responsibility to assist the migrants abandoned and in distress.

---

[218] *Ibid*., while referring to Buzan et al., 1998, Ch 6.

Aside from a few exceptional laws related to fisheries and customs, Current *Criminal Code* provisions do not authorize Canadian law enforcement authorities to exercise enforcement jurisdiction over foreign flagged vessels outside of Canadian territorial waters. Similarly, even if flag state has consented to its vessels being subject to the jurisdiction of Canadian law enforcement authorities and / or the prosecution under Canadian law, unlike the US domestic law, Canadian domestic law does not permit such a transfer. The prescriptive jurisdiction for the application of the law outside Canada is restricted to offences occurring "on board or by means of a ship registered or licensed, or for which an identification number has been issued, pursuant to an Act of Parliament."[219] The extra-territorial limitations of the jurisdiction of Canadian law enforcement officials are set out within the *Criminal Code,* but they do not permit Canadian authorities to receive a transfer of jurisdiction.[220]

As recognized under international law, effective law enforcement to confront transnational crime requires a cooperative and collaborative approach to bridge jurisdictional challenges. International law that entrenches the right of states to exercise its state sovereignty within its own

---

[219] *Criminal Code*, *Supra* Note 73, s. 477.1 (c).

[220] *Ibid*. Under Canadian law, extra-territorial enforcement jurisdiction is limited to s. 477.1, s. 477.3, 481.1 and 481.2 of the *Criminal Code*. The equivalent of a flag state vessel is defined as: "a ship registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament." This is reinforced under ss. 22(2) (4) of the *Ocean's Act*, "The jurisdiction and powers of courts with respect to offences under any federal law are determined pursuant to sections 477.3, 481.1 and 481.2 of the *Criminal Code*."

borders and on its flagged vessels also permits the “transfer of jurisdiction” based on consent. Flag states are “entitled to pass jurisdiction to one another” for either full or limited purposes.[221]

For example, if a vessel suspected of illegal conduct is transiting in international waters, the flag state of that vessel may consent to the transfer of jurisdiction to a state of warship or government vessel located in the closest proximity to the suspect vessel to affect an arrest. The transfer of jurisdiction may be broad or provided with restrictions requiring the boarding state to report back to the flag state for further guidance.

In international law, although the transfer of jurisdiction may be lawful, in order to exercise law enforcement jurisdiction domestically, the state receiving the jurisdiction must have legislative power to assume the jurisdiction and exercise enforcement. To obtain the appropriate extraterritorial reach on vessels sailing on the high seas, the authority to receive another state’s jurisdiction must be granted in statute in a format similar to that of the United States law on drug enforcement.[222]

---

[221] Cryer, R et al., *An Introduction to International…, Supra* Note 140, 46 (Section 3.3.2).

[222] 46 USC 101 et. Seq. (*New Jones Act*), Chapter 705 on Maritime Drug Enforcement. Under the Definitions of § 70502:

> (c) Vessel Subject To The Jurisdiction of the United States.
> (1). In this chapter, the term "vessel subject to the jurisdiction of the United States" includes:
> (a) a vessel without nationality;
> (b) a vessel assimilated to a vessel without nationality under paragraph (2) of article 6 of the 1958 Convention on the High Seas;
> (c) a vessel registered in a foreign nation *if that nation has consented or waived objection* to the enforcement of United States law by the United States;
> (d) a vessel in the customs waters of the United States;

Examples of pre-authorized agreements for the transfer of jurisdiction are plentiful, particularly as negotiated by the United States. To date, most of the US agreements have focused on addressing security-related concerns such as the interdiction of vessels suspected of carrying weapons of mass destruction under the Proliferation Security Initiative (PSI) or to facilitate the boarding of vessels suspected of drug trafficking.[223]

Given the current void in Canadian law, Canadian officials should consider legislative amendments to permit Canadian officials to accept a transfer of another state's jurisdiction in responding to an emergency. This

---

(e) a vessel in the territorial waters of a foreign nation if the nation consents to the enforcement of United States law by the United States; and

(f) a vessel in the contiguous zone of the United States, as defined in Presidential Proclamation 7219 of September 2, 1999 (43 U.S.C. 1331 note), that

(i) is entering the United States;

(ii) has departed the United States; or

(iii) is a hovering vessel as defined in section 401 of the Tariff Act of 1930 (19 U.S.C.1401).

[223] Proliferation Security Initiative (PSI) is not a legal framework, but rather a cooperative and collaborative international counterproliferation effort that " relies on voluntary actions by states that are consistent with their national legal authorities and relevant international law and frameworks." (see website of US State Department which describes the primary focus of PSI. http://www.state.gov/t/isn/c10390.htm; Internet; accessed 28 April 2012. Examples of PSI Agreements are as follows: *Agreement Between the Government of the United States of America and the Government of the Republic of Liberia Concerning Cooperation To Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials By Sea*, Signed February 11, 2004; provisionally applied from February 11, 2004; entered into force December 9, 2004. (PSI Agreement) http://www.state.gov/t/isn/trty/32403.htm ; and *Agreement between the United States of America and the Government of Barbados concerning Cooperation in Suppressing Illicit Maritime Drug Trafficking*, 1997. (http://www.caricom.org/jsp/secretariat/legal_instruments/agreement_us_barbados_drugtraffic.jsp?menu=secretariat); Internet; accessed 18 April, 2012.

is particularly important in the event a Canadian warship or Canadian law enforcement agency is required to enforce proscribed conduct for a "national security" incident against criminals on a flagged state vessel in international waters before it reaches Canadian shores.

Furthermore, as discussed earlier, military personnel on Canadian warships have no law enforcement authority to charge either vessels or individuals found in violation of criminal activity in either domestic or international waters. Although UNCLOS provides specific privileges and obligations for warships, Canadian warships do not have independent law enforcement authority aside from that which belongs to any citizen under a citizen's arrest.[224]

Information Sharing

Compounding the jurisdictional gaps associated with the Canadian comprehensive inter-government approach to maritime security is a perceived disconnect frustrating the sharing of information. Current information sharing practices within government departments are grounded in the protection of private information. Although there is no explicit "right" to privacy enshrined in the *Charter* nor is there a specific right to the protection of Privacy set out within *Canada's Human Right's Act* (CHRA), a "right to privacy" is established in section 8 of the *Charter.*[225] Section 8

---

[224] *Criminal Code*, Supra Note 73, under s. 494(1) CF Personnel have the enforcement powers of private Canadian citizens to arrest any person found committing an indictable offence or a person who, on reasonable grounds, he believes has committed an indictable offence, and is escaping from and has been freshly pursued by person with the lawful authority to arrest the individual.

guarantees “Everyone has the right to be secure against unreasonable search or seizure.”[226] Although the SCC has flirted with the concept that section 7 of the *Charter* may provide some protection, it stops short of recognizing that any privacy right exists under section 7.

Given the differing mandates that are engaged in responding to a marine security threat, in accordance with the *Privacy Act,* it could be argued that information collected by the CF (under its defence mandate) may not be shared with CBSA and RCMP in furtherance of a law enforcement mandate which is the norm in the interdiction of migrants. Given the ongoing securitization process and the conflation of national security with criminal conduct, the “information sharing” construct is not straight forward. As such, a determination on whether information collected by a government department for one purpose such as defence can be shared with other federal departments such as CBSA who operates under a different mandate is a contentious issue.

Alysia Davies in “Invading the Mind: the Right to Privacy and the Definition of Terrorism in Canada” refers to *Re Privacy Act* to dispel this fear.[227] In *Re Privacy Act,* the Federal Court of Appeal examined a case

---

[225] *Canadian Human Rights Act*, R.S., 1985, c. H-6.

[226] *Hunter* v. *Southam Inc*., [1984] 2 S.C.R. 145 (Hunter and Southam); *R.* v. *Edwards*, [1996] 1 S.C.R. 128 (Edwards); *R.* v. *Tessling*, [2004] 3 S.C.R. 432 (Tessling).

[227] Alysia Davies, “Invading the Mind: The Right to Privacy and the Definition of Terrorism in Canada, 92006) 3:1 UOLTJ 249 at 291; *Re Privacy Act*, [2000] 3 F.C. 82.

where a woman illegally receiving Employment Insurance benefits while living outside of Canada was caught when she crossed back through the Canadian border. The information relied upon was received through a Revenue Canada policy that requires customs officials to share information on Canadians crossing the border. In the Federal Court of Appeal decision, Justice Décary found that the sharing of information between these two government departments was acceptable and the SCC later endorsed the lower court's finding and dismissed the Appeal to the SCC.

Specifically raised in argument by the Privacy Commissioner in *Re Privacy Act,* that a strict reading of ss. 7 and 8(2)(b) of the *Privacy Act,* precluded the disclosure of personal information for a different purpose for which it was collected or for a use inconsistent with that purpose.[228] Justice Décary specifically clarified that the *Privacy Act* is not to be read that way and states very clearly:

> The *Privacy Act* therefore clearly contemplates, and distinguishes between, the collection of information which can only be for purposes related to the activity of the institution…. and the disclosure of

---

[228] *Privacy Act*., R.S.C., 1985, c. P-21, s. 7 reads: Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be used by the institution except:

(a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose; or

(b) for a purpose for which the information may be disclosed to the institution under subsection 8(2).

Privacy Act., s. 8 (2)(b) states: Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.

Where personal information may be disclosed (2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed…. (b) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;

> information, which in most cases, is for purposes other than those for which it was collected and for purposes related to the activity of the requesting institution.[229]

In rendering his judgment, Justice Décary comments that the "wide range of exceptions permitted under subsection 8(2) unquestionably attests to the intention of Parliament to allow disclosure of personal information to persons who have no connection whatsoever with the disclosing institution and for purposes other than those for which the information was collected."[230]

On a strict reading of ss. 8(2)(f), one could conclude that two federal government departments are unable to share private information. Justice Décary specifically interprets the failure of Parliament not to include the two Federal government departments in ss. 8(2)(b) as a simple oversight and says that the failure does not mean "that federal government institutions cannot be authorized under that paragraph to disclose to other federal institutions personal information that, without any express restriction, they can disclose to foreign institutions."[231]

In analyzing the case of *Re Privacy Act* as well as the case of *Smith v. Canada (Attorney General),* Alysia Davies concludes that there is a tendency of the court "to view privacy as a procedural safeguard in and of itself, instead of a right that requires procedural safeguards to enforce it."[232]

---

[229] *Re Privacy Act, Supra* Note 227 at para 17.

[230] *Ibid.,* at para 14.

[232] *Smith* v.*Canada (Attorney-General),* 2001 SCC 88, [2001] 3 S.C.R. 902 and [2000] F.C.J. No. 174; Davies, "Invading the Mind…," Supra Note 227, 292.

With respect to s. 8 of the *Charter*, the courts have acknowledged that Canada has a state interest in preventing the entry of "undesirable persons" and consequently there is a lower expectation of privacy for people crossing international borders.

In other words, when tracking unknown persons approaching the border or conducting screening at the Canadian points of entry, there is a lowering of standards under the "border exception" that would otherwise be required under s. 8 of the *Charter.*[233] In summary, although there is no specific case on point and the issue remains somewhat contentious, based on the diminished expectation of privacy of the "border exception" as well as the court decisions of *Smith* and *Re Privacy Act,* it appears that the law provides sufficient latitude for the CF to share information with other government departments during the conduct of a migrant interdiction operation.

CONCLUSION

This paper focused on maritime security and consequently, Chapter I highlighted the current maritime security initiatives within the 2004 NSP and 2008 CFDS including the emphasis placed on a comprehensive government response. It also examined the evolution of critical security studies and the expanded notion of security. It highlighted Canadian leadership in advancing security studies including the concept of human

---

[233] See *R.* v. *Simmons*, [1988] 2. S.C.R. 495, *R.* v. *Jacques*, [1996] 3 S.C.R. 312, *R.* v. *Monney*, [1999] 1 S.C.R. 652.

security. Importantly, Chapter I examined lessons emanating from Nye's concept of hard, soft and smart power. Recognizing that Canada's soft power (through its support of international institutions and the law) holds more influence then its hard power could ever project, Canadian officials may wish to exercise prudence in the balance of power it projects. Applying Nye's caution, it may be a grave mistake for Canada to invest too heavily in exerting hard military power where such action detracts from more affluent soft power.

Chapter II applied the Copenhagen securitization model against the Canadian government's current approach to deterring migration examining Canada's legal obligations both internationally and domestically. Based on the legal framework presented in Chapter III, Chapter IV focused on the final stage of the securitization process that requires the successful implementation of exceptional measures into legislation. In reviewing the political backdrop and discourse behind the proposed legislation in Bill C-31, it is apparent that there are significant concerns raised by critics, Members of Parliament and advocacy groups seeking to stop the ongoing securitization process.

Chapter V provided a comparative analysis of the lessons learned in the securitization of migration in both Australia and the US. Profiting from the lessons learned from Australia and the US, Chapter VI conducted a critical analysis of Canada's ongoing securitization process. In summary, when Canada's situation is compared to the experiences of states such as

Australia and the US, current Canadian steps to securitize migration by imposing exceptional measures into legislation appear misplaced.

Links between security and migration have always existed, but one must question the true catalyst for the recent imposition of exceptional measures. From a numerical comparison, the numbers of unannounced asylum seekers approaching Canada by vessel are statistically insignificant. When compared to the experiences of Australia and the US who were faced with overwhelming numbers of asylum seekers, with people dying in unseaworthy vessels as they approached their shores, the level of exceptional measures proposed by Canada do not appear merited.

During the peak of their individual crises, Australia and the US received as many as 6,879 and 10,899 asylum seekers respectively in a given year before they instituted exceptional measures. As reported earlier by Neve and Russell, Canada has only received 1,500 arrivals over a 25 year period. Given the extensive criticism that both the US and AUS have received on the legality of their exceptional measures, it is difficult to see how Canada can defend its proposed exceptional measures.

The comparative analysis also unveiled an important distinction between the Canadian and the US situation which is the existence of US bilateral agreements. In international law, without the consent of the flag state of a vessel, interdiction on the high seas is an unlawful use of force as it abrogates the freedom of navigation. As a general rule, a flagged vessel that is not Canadian but is suspected of carrying migrants may not be

boarded, searched, seized or arrested by any state other than the flag state. At this time, Canadian legislation does not permit Canadian officials to engage in a transfer of jurisdiction as envisioned in the US bilateral agreements. It may be an approach that is worthwhile for Canadian officials to explore in advancing options to deter a threat offshore.

The trend in jurisprudence from Australia on the legal complications of deterrence, offshore processing, mandatory detention and denied procedural fairness should be heeded by the Canadian government in refining its approach to Bill C-31. In attempting to implement a blanket strategy directed at apprehending criminals organizing the smuggling, Bill C-31 casts a broad net that captures humanitarians and refugees within it and in doing so actually undermines Canadian obligations for refugee protection.

By attempting to implement the exceptional measures into statute law, they are no longer exceptional. Rather it attempts to codify an unacceptable norm that is difficult to rationalize much less implement. If the government does rely upon its majority and passes the proposed legislation in Bill C-31, there is no doubt that the Canadian judiciary will be asked to rule on whether the legislation complies with the *Charter.*

Chapter VII argued that if the securitization of new maritime security issues such as migration succeed and are becoming the norm, then Canadian law must evolve to ensure that the RCN has the legal capacity to operate as an integral dimension in the larger security picture.

Finally, this paper concluded that conditions simply do not exist to substantiate the exceptional measures proposed within Bill C-31 and a return to proven norms in compliance with international law should be considered to ensure that Canada remains an international leader in responding to refugee matters. Applying the arguments put forward by Nye on power, absent extraordinary circumstances or skyrocketing numbers of illegal migrants flooding Canadian coasts, Canada's attempt to securitize migration may imperil the attractive balance of soft power that Canada currently enjoys.

In reviewing the Canadian government's approach to Bill C-31, Lord Hoffman words echo a resounding message of clarity from across the Atlantic when he said: "the real threat to the life of the nation…. comes not from terrorism but from laws such as these."[234] If the Canadian government continues on this aggressive approach of securitization, then it has essentially given the "security threats" more respect then deserved to the complete detriment of the rule of law upon which this country was founded and our naval ships sail to protect.

[234] *A. v. Secretary of State for the Home Department*., at paras 96-97

BIBLIOGRAPHY

Books:

Abella, Irving and Harold Troper. *None Is Too Many: Canada and the Jews of Europe 1933-1948.* Toronto: Key Porter Books, 1983.

Agamben, Giorgio. *State of Exception*. Translated by Kevin Attell. Chicago: University of Chicago Press, 2005.

Brown, Chris with Kirsten Ainley. *Understanding International Relations*. Third Edition, New York: Palgrave Macmillan, 2005.

Buzan, Barry and Lene Hansen. *The Evolution of International Security Studies*. New York: Cambridge University Press, 2009.

Buzan, Barry. *People States and Fear*. Second Edition. Boulder, Co: Lynne Reinner Publishers, 1991.

Buzan, Barry and R.J. Barry Jones. *Change And The Study Of International Relations: The Evaded Dimension*. London: F. Pinter, 1981.

Buzan, Barry and Richard Little. *International Systems in World History: Remaking the Study of International Relations*. New York: Oxford University Press, 2000.

Buzan, Barry and Ole Wæver. *Regions and Powers: The Structure of International Security*. New York : Cambridge University Press, 2003.

Buzan, Barry, Ole Waever and Jap de Wilde. *Security: A New Framework for Analysis*. Boulder, CO: Lynne Rienner Publishers, 1998.

Carasco, Aiken, Galloway and Macklin. *Immigration and Refugee Law, Cases, Materials and Commentary*. Canada: Emond Montgomery Publications Limited, 2007.

Churchill, RR and A.V Lowe. *The Law of the Sea*, Third Edition. Manchester: Manchester University Press: 1999.

Collins, Alan. *Contemporary Security Studies*. New York: Oxford University Press, 2007.

Cryer, R et al. *An Introduction to International Criminal Law and Procedure.* (Second Edition). Cambridge: Cambridge University Press, 2010.

Dannreuther, Roland. *International Security: The Contemporary Agenda*, Cambridge, UK: Polity Press, 2007.

Dauvergne, Catherine. *Making People Illegal: What Globalization Means for Migration and Law*. Cambridge: Cambridge University Press, 2008.

Goodwin-Gill, Guy S and Jane McAdam. *The Refugee in International Law*, Third Edition. Oxford University Press: 2007.

Guilfoyle, D. *Shipping Interdiction and the Law of the Sea*. Cambridge: Cambridge University Press, 2009.

Hathaway, James C. *The Rights of Refugees under International Law.* Cambridge: Cambridge University, 2005.

Krause, Keith, and Michael C. Williams. *Critical Security Studies: Concepts and Cases*. Minneapolis: University of Minnesota Press, 1997.

Lordon, Paul. *Crown Law*. Toronto and Vancouver: Butterworths, 1991.

McLean, D. *Transnational Organized Crime*, A Commentary on the UN Convention and its Protocols, Oxford University Press: 2007.

Nye, Joseph S. *The Paradox of American Power: Why the World's Only Superpower Can't Go it Alone*. New York: Oxford University Press, 2002.

Oppenheim, Larssa F.L. *International Law: A Treatise*, 8th. Edited by Hersch Lauterpacht. London: Longman, 1955.

Perry, Charles M., Marina Travayiakis, Bobby Andersen, Yaron Eisenberg. "Finding the Right Mix: Disaster Diplomacy, National Security, and International Cooperation." The Institute for Foreign Policy Analysis (January 2009); http://www.ifpa.org/pdf/TheRightMix.pdf; Internet; accessed 9 January 2012.

Poku, N.K, N. Renwick and J. Glenn. 'Human Security in a Globalising World,' in D.T. Graham and N.K. Poku (eds). *Migration, Globalisation and Human Security*, London: Routeledge, 2000.

Shani, Giorgio and Makoto Sato, Mustapha Kamal Pasha. *Protecting Human Security In A Post 9/11 World: Critical and Global Insights*, New York: Palgrave Macmillan, 2007.

Shaw, Malcolm N. *International Law.* (Fifth Edition). Cambridge: Cambridge University Press: 2003.

Schmitt, Carl. *Politische Theologie*. Translated by George Schwab as *Political Theology*. Cambridge: MIT Press, 1985.

Schmitt, Carl. *Die Dikatur*. Munich-Leipzig: Duncker & Homblot, 1921.

Shultz, Richard, Roy Godson; George H Quester. *Security Studies For The 21st Century*. Washington: Brassey's, 1997.

Sloan, Elinor C. *Security and Defence in the Terrorist Era*. Second Edition, Montréal: McGill-Queen's University Press, 2005.

Waldman, Lorne. *Canadian Immigration and Refugee Law Practice 2011*. Markham, On: Lexus Nexus, 2011.

Watson, Scott. *The Securitization of Humanitarian Migration: Digging moats and sinking boats*. London and New York: Routledge, 2009.

Wendt, A. "Identity and Structural Change in International Politics." in Y. Lapid and F. Kratochivil (eds) *The Return of Culture and Identity in IR Theory*, Boulder, Colorado: Lynne Rienner, 1996.

***Article*s:**

Aiken, Sharryn & Sheena Scott. "*Baker v. Canada* (Minister of Citizenship and Immigration) and the Rights of Children." (2000) 15 *JL & Soc Pol'y* 211.

Aiken, Sharryn. "Of Gods and Monsters: National Security and Canadian Refugee Policy." (2001) 14.2 *Revue quebecoise de droit international* 1;

Aiken, Sharryn J. "Manufacturing "Terrorists": Refugees, National Security, and Canadian law." Volume 19, Number 3 *Refuge* 54.

Allain, Jean. "The jus cogens Nature of non-refoulement*."* 13(4) *Int'l J. Ref. L*. 533, (2001).

Allen, Craig H. "Symposium — Australia's *Tampa* Incident: The Convergence of International and Domestic Refugee and Maritime Law in the Pacific Rim." (2003) *12 Pacific Rim L. & Pol'y J*. 97.

Amnesty International. "Unlock the Camps in Sri Lanka, Safety and Dignity for the Displaced Now." 10 August 2009. http://www.amnesty.org/en/library/asset/ASA37/016/2009/en/5de112

c8-c8d4-4c31-8144-2a69aa9fff58/asa370162009en.html#1.Unlock%20the%20Camps%20in%20Sri%20Lanka|outline; Internet; accessed 22 January 2012.

Annan, Kofi A. Secretary General of the United Nations (UN), Forward to the United Nations Convention on Transnational Crime (UNDOC) and its supplementing Protocols. (New York, UN, 2004) http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf; Internet; accessed 26 October 2012.

Ataner, Attila. "Refugee Interdiction and the Outer Limits of Sovereignty." *Journal of Law and Equality*, Vol 3, No. 1, Spring 2004.

Avis, Peter. "Surveillance and Canadian Maritime Domestic Security." *Canadian Military Journal*, Vol. 4, No. 1 (Spring 2003).

Banda, Maria L. "On the Water's Edge? A Comparative Study of the Influence of International Law and the Extraterritorial Reach of Domestic Laws in the War on Terror Jurisprudence." *41 GEO. Journal of International Law* 525, 540-43 (2010).

Barnes, Richard. 'Refugee Law at Sea.' *53 Int'l & Comp. L.Q. 47 (2004).*

Barnett, Laura. *Canada's Approach to the Treaty-Making Process*, PRB 08-45E, 24 November, 2008, Legal and Legislative Affairs Division.

Betts, Richard. "System for Peace of Causes of War?" *International Security* 17, No. 1 (Summer 1992), 5-43.

Bilder, Richard. "The *Canadian Arctic Waters Pollution Prevention Act*: New Stresses on the Law of the Sea." (November 1, 1970). *Michigan Law Review*, Vol. 69, No. 1, 1970; University of Wisconsin Legal Studies Research Paper Series Archival Collection.

Blum, Carolyn Patty. "A question of Values: Continuing Divergences Between US and International Refugee Norms." *15 Berkely J. Int'l L* 38 (1997).

Booth, Ken. "Security and Emancipation." *Review of International Studies*, 17/4 (October 1991).

Bostock, Chantal Marie-Jeanne. "The International legal obligations owed to asylum seekers on the MV Tampa." (2002) *14 IJRL* 279-301 (2002).

Brouwer, Andrew and Judith Kumin. “Interception and Asylum: When Migration Control and Human Rights Collide.” *Refuge*, Volume 21, Number 4.

Brunnée, Jutta & Stephen J. Toope. “A Hesitant Embrace: The Application of International Law by Canadian Courts.” (2002) *Can. Y.B. Int’l Law* 3.

Busby, Scott. “The Politics of Protection: Limits and Possibilities in the Implementation of International Refugee Norms in the United States.” *15 Berkely J. Int’l J L* 27 (1997).

Campagna, Michael. “Effective Protection against Refoulement in Europe: Minimizing Exclusionism in Search of a Common European Asylum System.” *17 U. Miami Int'l & Comp. L. 125* (2009).

Carling, Jorgen. “Migration Control and Migrant Fatalities at the Spanish-AfricanBorders.” 41 *Int'l Migration Rev*. 316, 325 (2007).

Caux, Hélène. “Death on the Mediterranean.” News Stories, 13 May 2011. Accessed online: http://www.unhcr.org/4dcd3b009.html; Internet; accessed 26 November 2012.

Colangelo, Anthony J. “Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law.” *48 Harvard International Law Journal* 121 (2007).

Connor, Collette. “Recent Development: The United States’ Second and Third Periodic Report to the United Nations Human Rights Committee.” *Harvard International Law Journal*, Vol 49, N2 Summer 2008.

Coyne, Andrew. “People willing to endure what the Tamils did are just the kind we want: Call it the ‘bottom of the boat’ test.” *MacLean’s* Magazine, Friday, August 20, 2010.

Crock, M. “In the Wake of Tampa: Conflicting visions of International Refugee Law in the Management of Refugee flows.” *12 Pac Rim L & Pol’y J* 49 (2003).

Currie, Robert J. “Charter without Borders? The Supreme Court of Canada, Transnational Crime and Constitutional Rights and Freedoms.” 27 *Dalhousie L.J*. 238.

Dauvergne, Catherine. “Security and Migration Law in the Less Brave New World.” *Social & Legal Studies* 2007, 16: 533.

Farmer, Alice. "Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection." 2008, ExpressO. http://works.bepress.com/alice_farmer/1; Internet; accessed 20 December 2012.

Fitzpatrick, Joan. "International Dimension of U.S. Refugee Law." *15 Berkeley J. Int'l L.* 1 (1997).

Fitzpatrick, Joan. "Australia's Tampa Incident: The Convergence of International and Domestic Refugee and Maritime Law in the Pacific Rim: Introduction to Refugee Law Forum." *12 Pac. Rim L. & Pol'y J* 1 2003.

Flitton, Daniel. "Safe Haven." *The Age*. 12 November 2012. http://www.theage.com.au/national/safer-haven-20101111-17pex.html#ixzz1kmtvMnz7; Internet; accessed 26 January 2012.

Fox, Peter D. "International Asylum and Boat People: The Tampa Affair and Australia's "Pacific Solution." *25 Md J Int'l L 356* (2010).

Fraser, G. (1986, Aug 13). "152 can stay if nationality is confirmed." *The Globe and Mail,* pp. A.1-A.1. http://search.proquest.com/docview/386250090?accountid=6180; Internet; accessed 26 April 2012.

Frelick, Bill. "'Abundantly Clear': Refoulement." (2005) 19 *Georgetown Immigration L.J.* 2 245.

Gates, Robert. *U.S. Global Leadership Campaign,* Washington, D.C. As Delivered by Secretary of Defense Robert M. Gates, Washington, D.C. , Tuesday, July 15, 2008; http://www.defense.gov/speeches/speech.aspx?speechid=1262; Internet; accessed 9 January 2012.

Green, Dana R. "Navigating North: How the Canadian Approach to Firm Resettlement Should Guide U.S. Implementation of the *Refugee Convention*s." 40 *Colum. Hum. Rts. L. Rev*. 701 (2008-2009).

Goodwin-Gill, Guy, S. "Refugees and Responsibility in the Twenty-First Century: More Lessons Learned From the South Pacific." *12 Pac Rim L. & Pol'y* 23 (2003).

Guzzini, Stefano. "Securitization As A Causal Mechanism." *Security Dialogue* 2011 42: 329; http://sdi.sagepub.com/content/42/4-5/329; Internet; accessed 30 December 2011.

Hannum, Hurst. “The UDHR in National and International Law.” *Health and Human Rights* Vol. 3, No. 2, Fiftieth Anniversary of the Universal Declaration of Human Rights (1998).

Harrington, Joanna. “Punting Terrorists, Assassins and Other Undesirables: Canada, the Human Rights Committee and Requests for Interim Measures of Protection.” *48 McGill L.J. 55* (2003).

Hathaway, James C. “Why is human smuggling vital.” *National Post*, Sep 13, 2010; http://fullcomment.nationalpost.com/2010/09/13/james-c-hathaway-why-human-smuggling-is-vital/; Internet; accessed 22 January, 2012.

Heckman, Gerald. “International Law and Procedural Safeguards in Deportation Proceedings: Ahani v. Canada.” *Rev. quebecoise de droit int'l* 81 (2004).

Helton, Arthur. “The United States government program of intercepting and forcibly returning Haitian boat people to Haiti.” (1993) 10 *New York Law School Journal of Human Rights* 325.

Howard, Jessica. “To Deter and Deny: Australia and the Interdiction of Asylum Seekers.” Volume 21, Number 4 *Refuge*, 35.

Huysmans, J. **“**Revisiting Copenhagen: Or, On the Creative Development of a Security Studies Agenda in Europe.” *European Journal of International;* http://ejt.sagepub.com/content/4/4/479; Internet; accessed 30 December 2011.

International Decisions. 99 *Am. J. Int'l L*. 669 (2005).

Jacobson, Jon L. “At-Sea Interception of Alien Migrants: International Law Issues.” (1992) 28 *Willamette L. Rev.* 811.

Jenkins, David. “Rethinking Suresh: Refoulement to Torture Under Canada’s Charter of Rights and Freedom.” 47 Alta. L. Rev. 134 2009-2010.

Jockel, Joel and Joel Sokolsky. “Lloyd Axworthy's Legacy: Human Security and the Rescue of Canadian Defence Policy.” *International Journal* Vol. 56, No. 1 (Winter, 2000/2001): 1-18.

Knudsen, Olav F. “Post-Copenhagen Security Studies: Desecuritizing Securitization.” *Security Dialogue,* 2001 32: 355.

Lagassé, Philippe. “Crown's prerogative powers remain as vigorous as ever” *Ottawa Citizen.* April 14, 2012. http://www.ottawacitizen.com/news/Crown+still+King/6458473/story.html; Internet; accessed April 14 2012.

Large, B. (1986, Aug 14). The tamil refugees. *Kingston Whig - Standard,* pp. 1-1. http://search.proquest.com/docview/353384502?accountid=6180; Internet; accessed 26 April 2012.

Lauterpacht, Elihu & Bethlehem, Daniel. “The Scope and Content of the Principle of *Non-refoulement.*” in Erika Feller, Volker Türk & Frances Nicholson, eds. *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003). http://www.en.refugeelawreader.org/index.php?option=com_docman&task=cat_view&gid=37&Itemid; Internet: accessed 29 January 2012.

Legomsky, S. “The USA and the Caribbean interdiction program” (2006) 18 *IJRL* 677.

Lowenstein International Human Right’s Clinic. “*Aliens and the Duty of Non-refoulement: Haitian Centers Council* v*. McNary*.” 15 Immigr & Nationality L. Rev 333 1993-1994.

MacDonald, Michael. “New Monument in Halifax Honours Jewish Refugees.” *Canadian Press*: Thursday, January 20, 2011 http://www.globalmaritimes.com/story.html?id=4134223; Internet; accessed; 10 April 2012.

Macklin, Audrey. “Disappearing Refugees: Reflections on Canada-US Safe Country Agreement.” 36 *Colum. Hum. Rts. L. Rev*. 365 (2004-2005).

MacLeod, Lieutenant Commander S.M. “The Team in Comprehensive Operations.” Toronto: Canadian Forces College Command and Staff Course Decisive Manoeuvre Paper, 2012.

MacLeod, Sandra M. “Bill C-4: Stalled – A Fortuitous Pause.” LLM. Master’s Project, Queen’s University, 2012.

Margulies, Peter. “Difference and Distrust in Asylum Law: Haitian and Holocaust Refugee Narratives.” 6 *St. Thomas L. Rev*. 135 1993-1994.

Mooradian, Christopher P. “Protecting Sovereign Rights: The Case for Increased Coastal State Jurisdiction over Vessel-Source Pollution in

the Exclusive Economic Zone." 82 *B.U. L. Rev*. 767 (2002).

Moore, Jennifer. "Restoring the Humanitarian Character of US Refugee Law Lessons from the International Community." *15 Berkeley J. Int'l L*. 51 1997.

Morrissey, John. "Closing the Neoliberal Gap: Risk and Regulation in the Long War of Securitization." *Antipode* Vol. 43 No. 3 2011.

Nash. "Contemporary practice of the United States relating to international law." (1995) 89 *AJIL*.

Navy League of Canada. "Canada, An Incomplete Maritime Nation." *Maritime Affairs,* Ottawa: The Navy League of Canada, 2003.

Nayar. "The right of Asylum in International Law: Its Status and Prospects." 17 *St. Louis U.L.J.* 17 (1972).

Nessel, Lori A. "Externalized Borders and the Invisible Refugee." *40 Colum Hum. Rts. L. Rev. 625* (2008-2009).

Neve, Alex, and Tiisetso Russell. "Hysteria and Discrimination: Canada's Harsh Response to Refugees and Migrants Who Arrive by Sea." *62 U.N.B.L.J. 37 (2011).*

Neuman, Gerald L. "Extraterritorial Violations of Human Rights by the United States." in American Univ. J. L. & Policy & Loyola L.A. Internat'l & Comp. LJ. (eds.). *Immigration Law: International Perspectives on Asylum and Refugee Status* (1994).

Nye, Joseph S. "Get Smart: Combining Hard and Soft Power" *Foreign Affairs*, (July/ August 2009); http://www.foreignaffairs.com/articles/65163/joseph-s-nye-jr/get-smart; Internet; accessed 15 April 2012.

ODonnell, Joe, T. S. (1986, Aug 18). "Show compassion for tamil refugees mulroney urges." *Toronto Star,* pp. A.1-A1. http://search.proquest.com/docview/435461005?accountid=6180; Internet; accessed 26 April 2012.

ODonnell, Joe, T. S. (1986, Aug 15). "Public outraged that refugees beat system, MPs say." *Toronto Star,* pp. A.16-A16. http://search.proquest.com/docview/435462540?accountid=6180; Internet; accessed 26 April 2012.

ODonnell, Joe, T. S. (1986, Aug 20). “No evidence tamils tied to militants ottawa says.” *Toronto Star,* pp. A.1-A1. http://search.proquest.com/docview/435460213?accountid=6180; Internet; accessed 26 April 2012.

ODonnell, Joe, T. S. (1986, Aug 17). “Ottawa bungled on refugees, government insiders say.” *Toronto Star,* pp. A.1-A1. http://search.proquest.com/docview/435472498?accountid=6180; Internet; accessed 26 April 2012.

Pallis, Mark. “Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts between Legal Regimes.” 14 *Int'l J. Refugee L.* 329 (2002).

Parnaby, Andrew and Gregory S Kealey. “The Origins of Political Policing in Canada: Class, Law, and the Burden of Empire.” *41 Osgoode Hall L.J. 211 (2003).*

Passas, Nikos. “Globalization, Criminogenic Asymmetries and Economic Crime.” *1 Eur. J.L. Reform* 399 (1999).

Pastor, Robert. “Forward to the Beginning.” *International Journal* 48, No. 4 (Autumn 1993), 641-667.

Pugash, James Z. “The Dilemma of the Sea Refugee: Rescue without Refuge.” *18 Harv. Int'l. L. J. 577 (1977).*

Rangaviz, David. “Dangerous Deference: The Supreme Court of Canada in Canada v. Khadr.” 46 *Harvard Civil Rights-Civil Liberties Law Review*, 253 2011.

Rothwell, D. “The Law of the Sea and the MV Tampa Incident: reconciling maritime principles with coastal state sovereignty.” (2002) 13 Public Law Review 118.

Schelling, Thomas, “What is the Business of Organized Crime?” *J Pub L*, 1971, 20.

Schoenhardt, A. “The Business of Migration: Organised Crime and illegal Migration in Australia and the Asia Pacific Region.” *Adel LR* 1999, (21,1).

Schoenholtz, Andrew I, “Aiding and Abetting Persecutors: The Seizure and Return of Haitian Refugees in Violation of the UN *Refugee Convention* and Protocol.” (1993) 7 *Georgetown Immigration L.J.* 67.

Seper, Jerry, "Coast Guard Repatriates Haitians." *Wash. Times* (28 Feb. 2004), A4.

Shanahan, Leo. "Asylum-Seeker Influx Sees Detention Bill Rocket." *The Australian* (Sydney), 11 May 2011. Available from, http://www.theaustralian.com.au/national-affairs/treasury/asylum-seeker-influx-sees-detention-bill-rocket/story-fn8gf1nz-1226053615592; Internet; accessed 27 January 2012.

Showler, Peter. "Expect A Stormy Session Around Refugee Policy In Ottawa." Director of the Refugee Forum and former chairperson of the Immigration and Refugee Board (IRB) of Canada; Available from http://maytree.com/blog/tag/bill-c-4/; Internet; accessed 20 January 2012.

Showler, Peter. "Tough Talk on Boats and Refugees." *Ottawa Citizen*, August 20, 2010, www.cdp-hrc.uottawa.ca/projects/.../ToughTalkonBoatsandRefugees.doc; Internet; accessed 20 January 2012.

Showler, Peter. Blog. Director of the Refugee Forum and former chairperson of the Immigration and Refugee Board (IRB) of Canada; http://maytree.com/blog/tag/bill-c-4/; Internet; accessed 20 January, 2012.

Spijkerboer, Thomas. "The Human Costs of Border Control." *9 Eur. J. Migration & L.* 127, 131 (2007).

Steinbock, Daniel. "Interpreting the Refugee Definition." (1998) 45 *UCLA L. Rev.* 733.

Stewart-Weeks, Hannah. "Out of Sight but Not out of Mind: *Plaintiff M61/2010E v Commonwealth."* Case Note *Sydney Law Review,* Vol 33: 831 (2011).

Stritzel, Holger. "Towards a Theory of Securitization: Copenhagen and Beyond." *European Journal of International Relations;* Sep 2007; 13, 357.

Tarnopolsky, Walter S. "The Canadian Experience with the International Covenant on Civil and Political Rights Seen from the Perspective of a Former Member of the Human Rights Committee." (1987) 20 *Akron L. Rev.* 611.

"UN High Commissioner for Refugees Responds to US Supreme Court Decision in *Sale* v. Haitian Centers Council." *32 ILM 1215* (1993).

Vienneau, David. T. S. (1986, Aug 14). “No more adventures ottawa tells refugees.” *Toronto Star,* pp. A.1-A1. http://search.proquest.com/docview/435461701?accountid=6180; Internet; accessed 26 April 2012.

Walt, S. “The Renaissance of Security Studies.” *International Studies Quarterly*, Vol 35(2), 211-239.

Watson, GR, “Passive Personality Principle.” 28 *Tex. Int'l L. J.* 1 (1993)

Watson, Scott D. “Manufacturing Threats: Asylum Seekers as Threats or Refugees.” 3 *J. Int’l L & Int’l Rel* 103 2007.

Williams, Sharon, A. “Extradition and the Death Penalty Exception in Canada: Resolving the Ng and Kindler Cases.” *13 Loy. L.A. Int’l & Comp. L.J.* 799 1990-1991.

Yost, David S. “Enhancing NATO’s Cooperation with International Organizations.” *NATO Review*, (Autumn 2007). http://www.nato.int/docu/review/2007/issue3/english/analysis2.html; Internet; accessed 9 January 2012.

“Judicial Review, the Royal Prerogative and National Security.” *Northern Ireland Legal Quarterly*, [Spring 1985] Vol. 36, No. 1.

Tamils involved in criminal acts will be deported, minister vows. (1986, Aug 20). *The Gazette (Index-Only),* pp. A1-A1,A2. http://search.proquest.com/docview/753023704?accountid=6180; Internet; accessed 25 April 2012.

Media

Abbott, Tony. Interview with Derryn Hinch, Radio 3 AW (9 May, 2011), Tony Abbott. Transcript Available from http://www.tonyabbott.com.au/LatestNews/InterviewTranscripts/tabid/85/articleType/ArticleView/articleId/8059/Interview-with-Derryn-Hinch-Radio-3AW-Melbourne.aspx; Internet; Accessed 27 January, 2012.

Evans, Chris (Minister for Immigration and Citizenship), “*Last refugees leave Nauru*, media release, Canberra, 8 February 2008.” Available from, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FYUNP6%22; Internet; accessed 29 January, 2012.

Brian Lilley. QMI Agency Parliamentary Bureau. Leger Marketing Poll, "Poll: Most say send Tamils home." http://cnews.canoe.ca/CNEWS/Canada/2010/08/20/15083191.html; Internet; accessed 15 April, 2012.

Canadian Caselaw/ Legislation / Reports

Adjei v. Canada (Minister of Employment & Immigration), [1989] 2 F.C. 680 (C.A.)

Ahani v.Canada(A.G.) (2002), 58 O.R. (3d) 107,91 C.R.R. (2d) 145 (Ont. C.A.), leave to appeal to S.C.C. refused, [2002] S.C.C.A. No. 62 (Q.L.) *[Ahani* (Ont. C.A.)].

Amnesty International Canada v. *Canada (Chief of Defence Staff)* [2008] 4 F.C.R. 546 and 2008 FCA 401 (Leave to appeal to the SCC was dismissed on 21 May 2009).

Baker v. Canada (1999), 2 S.C.R. 817, 174 D.L.R. (4th) 193, 243 N.R. 22, 14 Admin L.R. (3d) 17

Canada (A.G.) v. *Ontario (A.G.)* [1937] A.C. 326, "Labour Conventions Case."

Canada (Justice) v. *Khadr* [2008] 2 S.C.R. 125. (*Khadr I*).

Canada (Prime Minister) v. Khadr (*Khadr II*), 2010 SCC 3, [2010] 1 S.C.R. 44.

Capital Cities Communications Inc. v. Canadian Radio-Television Commission (CRTC) (1977), [1978] 2 S.C.R. 141.

Deol v. *Canada (Minister of Citizenship and Immigration)*, [2003] 1 FC 301 (CA).

R. v. *Edwards*, [1996] 1 S.C.R. 128 (Edwards);

R v. *Hape* [2007] 2 S.C.R. 292.

Hunter v. *Southam Inc*., [1984] 2 S.C.R. 145.

R. v. *Jacques*, [1996] 3 S.C.R. 312.

Kindler v. *Canada [1991]* 2 S.C.R. 799.

Lee v. *Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No. 242.

Libman v. *The Queen*, [1985] 2 S.C.R. 178.

The Lotus (1927), P.C.I.J., Ser. A., No. 10.

Németh v. Canada (Justice), 2010 SCC 56.

R. v. *Monney*, [1999] 1 S.C.R. 652.

Operation Dismantle v. *the Queen*, [1985] 1 S.C.R. 441.

Re Privacy Act, [2000] 3 F.C. 82.

Privy Council in Attorney-General for Canada v. *Cain* [1906] AC 542.

Ruparel v. *Canada (Minister of Citizenship and Immigration)*, 1990] 3 FC 615 (TD).

R v. *Schmidt [1987]* 1 S.C.R. 500.

Schrieber v. Canada [2001] 1 F.C. 427 (T.D.) (QL).

Slahi and Zemiri 2009 FCA 259.

Slaight Communications Inc. v. *Davidson*, [1998] 1 SCR 1038.

R. v. *Simmons*, [1988] 2. S.C.R. 495.

Smith v.*Canada (Attorney-General),* 2001 SCC 88, [2001] 3 S.C.R. 902 and [2000] F.C.J. No. 174

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

R. v. *Tessling*, [2004] 3 S.C.R. 432 (Tessling).

Vancouver Island Peace Society v. *Canada*, [1994] 1. F.C. 102 (T.D.).

Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689.

Canadian Legislation:

Balanced Refugee Reform Act. S.C. 2010, c. 8, Assented to 2010-06-29.

Constitution Act, 1982, pt I (Canadian Charter of Rights and Freedoms), ("Charter").

Criminal Code, RSC 1985, c C-46.

Immigration and Refugee Protection Act. ("*IRPA*"), SC 2001, C.27.

Marine Transportation Security Act, S.C. 1994, c. 40 [MTSA].

National Defence Act (NDA), R.S.C., 1985, c. N-5.

Oceans Act, (S.C. 1996, c. 31)

Bill C-4. *An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act and the Marine Transportation Security Act* http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5093718

Bill C-49. *An Act to amend the Immigration and Refugee Protection Act*, the *Balanced Refugee Reform Act* and the *Marine Transportation Security Act*., Available from; http://www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?Language=E&Session=23&query=7122&List=toc ; Internet; accessed December, 2011.

Bill C-31. *Protecting Canada's Immigration System Act.* "Bill C-31: An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act." http://www.parl.gc.ca/LEGISInfo/BillDetails.aspx?Language=E&Mode=1&billId=5383493; Internet; accessed 10 March 2012.

Canadian Reports/ Concept Papers and Government Interpretative Guidance:

Béchard, Julie. Social Affairs Division, Parliamentary Information and Research Service Library of Parliament, 30 August 2011, *Legislative Summary of Bill C-4: An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act and the Marine Transportation Security Act*, Publication No. 41-1-C4-E.

Béchard, Julie and Sandra Elgersma. Social Affairs Division Parliamentary Information and Research Service, "Bill C-31: An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the

Department of Citizenship and Immigration Act." Publication No. 41-1-C31-E 29 February 2012 Revised 16 April 2012. http://parl.gc.ca/Content/LOP/LegislativeSummaries/41/1/c31-e.pdf; Internet; accessed 21 April, 2012.

Canada. Department of Foreign Affairs and International Trade. *Human Security: Safety for People in a Changing World*. Ottawa: DFAIT, April 1999.

Canada. *Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, Freedom and Security Under the Law, Second Report.* Ottawa: Minister of Supply and Services Canada, 1981.

Canada. "*Interpretation of the Convention Refugee Definition in the Case Law*." prepared by Legal Services, Immigration and Refugee Board of Canada, December 31, 2005.

Canada. Privy Council Office. *Securing an Open Society: Canada's National Security Policy.* Ottawa: Queen in Right of Canada, 2004. http://www.pco-bcp.gc.ca/docs/information/publications/natsec-secnat/natsec-secnat-eng.pdf; Internet; accessed, January 8th 2012.

Keevil Harrold, Daphne and Danielle Lussier. Publication No. 40-3-C49E, Legislative Summary of Bill C-49: *An Act to amend the Immigration and Refugee Protection Act*, the *Balanced Refugee Reform Act* and the *Marine Transportation Security Act* by, Social Affairs Division Parliamentary Information and Research Service. Library of Parliament, 8 November 2010.

American Caselaw, Legislation, Agreements and Government Reports

Immigration and Naturalization Service (INS) v. *Stevic*, 467 U.S. 407 (1984);

Immigration and Naturalization Service (INS) v. *Cardoza-Fonseca*, 480 U.S. 421 (1987);

Rasul v. Bush, 542 U.S. 466 (2004)

Sale v. Haitian Centers Council, Inc., 113 S.Ct. 2549, 509 U.S. 155 (1993) (*Sale*)

Omar et al. v. Secretary of the United States Army et al., 479 F. 3d 1 (D.C. Cir. 2007).

46 USC 101 et. Seq. (*New Jones Act*), Chapter 705 on Maritime Drug Enforcement.

Obama, Barack. Remarks on New Pentagon Budget Strategy, January 5, 2012. Available from http://foxnewsinsider.com/2012/01/05/full-text-president-obama-remarks-on-new-pentagon-budget-strategy/; Internet; accessed 06 January 2012.

Agreement to Stop Clandestine Migration of Residents of Haiti to the United States, (1981) 20 ILM 1198 (Haitian Migrant Agreement).

United States of America. *National Security Strategy*, Washington, D.C. US: Government Printing Office, May 2010; available from http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf; Internet accessed 09 January 2012.

Australia Caselaw, Legislation and Reports

Plaintiff M61/2010E v Commonwealth ('*Plaintiff M61*'), (2010) 272 ALR 14.

Victorian Council for Civil Liberties Inc. v. Minister for Immigration & Multicultural Affairs (2001), 182 A.L.R. 617, [2001] F.C.A. 1297 (*VCCL v. Minister*)

Government of Australia, Senate Select Committee for an inquiry into a Certain Maritime Incident: Report (Canberra: Commonwealth of Australia, 2001) Australian Senate Report), http://aph.gov.au/senate/committee/maritime_incident_ctte/report

Background Note from Australian Parliamentary Library, "Boat arrivals in Australia since 1976" Updated 11 February 2011 by Janet Phillips and Harriet Spinks, Social Policy Section, http://www.aph.gov.au/library/pubs/bn/sp/boatarrivals.htm#_Toc285178607

United Nations Development Programme. *United Nations Human Development Report 1994*, "New Dimensions of Human Security." (New York: Oxford University Press, 1994). Available from http://hdr.undp.org/en/reports/global/hdr1994/chapters/; Internet: accessed on 10 January, 2012.

International Caselaw / Legislation

A v. Secretary of State for the Home Department (2004), [2005] 2 A.C. 68 (H.L.)

Al Skeini et al. v. Secretary of State for Defence, [2007] UKHL 26,

Banković v. Belgium, (2001) 11 BHRC 435, 2001–XII Eur. Ct. H.R. 333 (GC).

Burmah Oil Co. v. Lord Advocate, [1964] 2 All E.R. 348

Chahal v. United Kingdom, (1996), V Eur. Ct. H.R. Rep. Judgements & Dec. 1831, 23 E.H.R.R. 413.

Council of Civil Service Unions and others v. Minister for the Civil Service [1984] 1 All E.R. 935; [1984] 3 W.L.R. 1174 (HL).

Giles v. Tumminello, I.L.R 38, 120.

The Haitian Centre for Human Rights et al. v. United States, Case 10.675, 10.675, Inter-American Commission on Human Rights (IACHR), 13 March 1997, available at: http://www.unhcr.org/refworld/docid/3ae6b71b8.html [accessed 2 May 2011]

Issa v. Turkey (2004) 41 EHRR 567.

Naim v. *A.G. for Palestine* [1948] AC 531, Ann Digest, 15 (1948), 115

R. v. Secretary of State for the Home Department, ex parte Northumbria Police Authority [1988] 1 All E.R. 556 (C.A.).

Saadi v. Italy, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, 28 February 2008, available at: http://www.unhcr.org/refworld/docid/47c6882e2.html [accessed 2 May 2011]

Tadic, ICTY A. Ch 2.10.1995

2001 Anti-Terrorism, Crime and Security Act ((UK), 2001, c.24, s.21.

International Conventions/ Agreements/UNSCRs

Universal Declaration of Human Rights. (UDHR) 10 December 1948;

The *International Covenant on Civil and Political Rights* (ICCPR). Signed in New York and adopted by the United Nations General Assembly on December 16, 1966. It entered into force on March 23, 1976.

Canada is a Party to this Convention. (See Canada Treaty Series 1976 / 47);

The *International Covenant on Economic, Social and Cultural Rights*. (ICESCR) signed in New York and adopted by the United Nations General Assembly on December 16, 1966. It entered into force on January 3, 1976. Canada is a Party to this Convention (See Canada Treaty Series 1976/47);

Convention related to the Status of Refugees. July 28, 1951, 189 UNTS 150, as amended by *Protocol Related to the Status of Refugees* (*Refugee Convention*), July 28, 1967, 16 UNTS 267. Canada Treaty Series 1969/6 and See: Canada. See: **http://www2.ohchr.org/english/law/refugees.htm**

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishments. 1465 UNTS 85 ("*Convention Against Torture*"). Entered into force in Canada on 24 July 1987. See: E104009 - CTS 1987 No. 36.

Convention on the High Seas 1958. Done at Geneva on 29 April 1958. Entered into force on 30 September 1962. United Nations, *Treaty Series*, vol. 450, p. 11, p. 82.

Convention on the Rights of the Child, Nov 20, 1989, 1577 UNTS 3. Canada Ratified it on 13 December 1991, Canada Treaty Series 1992/3 including amendment 43(2) with Consent to be Bound and Acceptance on 17 September 1997.

Exchange of Diplomatic Letters Between E.H. Preeg, US Ambassador to Haiti, and E. Francisque, Haiti's Secretary of State for Foreign Affairs, TIAS No. 10241 (23 Sept. 1981); (US) Presidential Proclamation 4865, 46 Fed. Reg. 48107 (29 Sept. 1981); Exec. Order 12324, 46 Fed. Reg. 48109-10 (29 Sept. 1981).

United Nations Convention on the Law of the Sea (UNCLOS). UNTS vol 1833 p 3, CN 236.1984, CN 202.1985, CN 17.1986, CN 166.1993, vol 1904 p. 320, Entered into Force on 16 November 1994, Ratification by Canada on 07 November 2003.

The Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945; http://www.un.org/en/documents/charter/chapter1.shtml; Internet; accessed 15 April 2012.

Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428(V), Annex, U.N. Doc. A/1775, para. 1 (1950).

UNSCR 1973 (2011) Adopted by the Security Council at its 6498th meeting, on 17 March 2011; http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/268/39/PDF/N1126839.pdf?OpenElement; Internet; accessed 15 April 2012.

International Reports and Papers

Australian Human Rights Commission. "2009 Immigration detention and offshore processing on Christmas Island," Report http://www.hreoc.gov.au/human_rights/immigration/idc2009_xmas_island.html; Internet accessed 29 January, 2012.

Boutros-Ghali, Boutros. *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*, report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, New York: United Nations 1992.

Multinational Interoperability Council (MIC). Comprehensive Approach Framework – A Military Perspective, 7 June 2011, Version 2.0; available from https://community.apan.org/mic/m/mic_documents/72530.aspx; Internet; accessed 31 December 2012.

Sri Lankan Ministry of Defence. "LTTE defeated; Sri Lanka liberated from terror." http://www.defence.lk/new.asp?fname=20090518_10; Internet; accessed 22 January 2012.

UNHCR (Executive Committee of the High Commissioner's Programme). *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, UN Doc. EC/50/SC/CRP.17 (9 June 2000).

UNHCR. *Identity Documents for Refugees*. See Document EC/ SCP/33 at: http://www.unhcr.org/excom/EXCOM/3ae68cce4.html; Internet; accessed 22 January 2012.

John Morrison & Beth Crosland. "The Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy?" *UNHCR Working Paper* No. 39 Geneva: UNHCR, April 2001.

UN High Commissioner for Refugees (UNHCR). "Interception of Asylum-

Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach." 9 June 2000, EC/50/SC/CRP.17, available at: http://www.unhcr.org/refworld/docid/49997afa1a.html [accessed 27 April 2011]

UNHCR Cambridge Expert Roundtable. Global Consultations Process, "Summary Conclusions: The Principle of *Non-refoulement."* 9-10 July 2001; http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=3baf3117f&query=summary%20of%20conclusions%20*non-refoulement*; Internet; accessed 20 January 2012.

UNHCR. "UNHCR Manual on Refugee Protection and the European Convention on Human Rights." 2003 (updated August 2006).

UNHCR. "A Thematic Compilation of Executive Committee Conclusions." Office of the United Nations High Commissioner for Refugees (UNHCR) Division of International. Protection Services, 4th edition, August 2009 at http://www.unhcr.org/3d4ab3ff2.html

UNHCR, EXCOM. "Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach." Doc. EC/50/SC/CRP. 17 (9 June 2000). ("UNCHR 2000");

UNHCR. "Advisory Opinion on the Extraterritorial Application of Non-refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol." 26 January 2007; http://www.unhcr.org/refworld/docid/45f17a1a4.html; Internet; accessed 1 April 2012.

UNHCR. "Handbook on Procedures and Criteria for Determing Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees." (Geneva: Office of the UN High Commissioner for Refugees, 1979) (Reedited Geneva 1992) ("Handbook"). See: http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf