

# THE USE OF INTERNATIONAL LAW INSTRUMENTS IN CANADIAN IMMIGRATION AND REFUGEE LAW

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## Foreword

In the weeks following the speech I delivered on international law instruments at the recent IARLJ Conference in Mexico, I reviewed my notes, the Canadian case law on the subject, as well as the other panellists' material and sat down with Ms. Pauline Lin, law clerk at the Federal Court, to prepare a more comprehensive document that would give the participants a broad view of the use of international law instruments in Canadian law. I wish to thank Ms. Lin for her meticulous work in compiling my notes and capturing in a paper, which I later reorganized and edited, the views and comments respecting the case law I spoke about during the long meeting we had together.

[1] There are several situations that arise where the Federal Court will be called upon to interpret international law instruments. An understanding of the challenges faced by the Court in interpreting and applying such instruments in these situations requires an explanation of their legal effect within Canada. With that in mind, I will begin with a few observations on Canadian law with respect to treaty ratification and implementation. I will then explain the different contexts in which the Federal Court might be called upon to interpret an international law instrument. I will then turn to consider, by way of illustration, the debate in Canada with regards to the lawfulness of deportation to torture and the use of international law instruments on this issue by the Canadian courts.

## I. Treaty implementation in Canada

[2] Canada has taken a transformationist approach to treaty law. Consequently, the signature or ratification of an international instrument does not have any legal effect within the country itself.<sup>2</sup> This discontinuity reflects the separation of powers between the execu-

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<sup>2</sup> John H. Currie, *Public International Law* (Toronto: Irwin Law, 2001) at 205.

tive and legislative branches of government in Canada. Indeed, while the executive branch has sole jurisdiction over the negotiation and ratification of international treaties, the law-making branch has sole jurisdiction over the implementation of these treaties domestically. This is further complicated by the fact that Canada is a federal state and that legislative powers are distributed between the federal authority and the provincial authorities. As such, the federal and provincial legislatures have exclusive or concurrent authority over certain subjects. For example, Parliament (the federal authority) has exclusive legislative jurisdiction over “naturalization and aliens” pursuant to subsection 91(25) of the *Constitution Act, 1867*. It also has concurrent legislative authority with provincial authorities over immigration, although the federal legislation will be paramount in situations of conflict.

[3] Given the distribution of legislative powers in Canada, the subject matter of the treaty will determine which of the legislative authorities – federal or provincial – will have jurisdiction to implement the treaty in question. Therefore, a treaty will only have legal effect within Canada once it has been implemented by the appropriate legislative body.

[4] The most forthwith and direct manner of implementing an international instrument is by passing a law that contains an implementing provision referring to the treaty in question and that includes it as a schedule to the implementing statute.<sup>3</sup> For example, section 3 of the *Foreign Missions and International Organizations Act*<sup>4</sup> provides that articles 1, 22 to 24 and 27 to 40 of the *Vienna Convention on Diplomatic Relations* have the force of law in Canada in respect of all foreign states, regardless of whether those states are parties to those conventions. This convention is included as Schedule I of the act. Similarly, section 3 of the *United Nations Foreign Arbitral Awards Convention Act*<sup>5</sup> provides that the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* is to have the force of law in Canada during such period as, by its terms, the Convention is in force. It also sets out this convention as a schedule.

[5] In refugee and human rights matters –unlike trade and commercial agreements– the incorporation of international instruments has been less straightforward. It has mostly been done by adopting various substantive legislative provisions that more or less mirror provisions contained in various treaties or conventions. For example, section 96 of *Immigration and Refugee Protection Act*<sup>6</sup> incorporates the definition of refugee as found under article 1 of the of the *United Nations Convention Relating to the Status of Refugees*, signed at Geneva on July 28, 1951, and the *1967 Protocol Relating to the Status of Refugees*, signed at New York on January 31, 1967 (Refugee Convention):

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a 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 themselves of the protection of each of those countries; or

3 J.-Maurice Arbour & Geneviève Parent, *Droit international public*, 5th ed. (Cowansville, Qc : Yvon Blais, 2006) at 179.

4 S.C. 1991, c. 41.

5 R.S.C. 1985 (2nd Supp.), c. 16.

6 S.C. 2001, c. 27 [IRPA].

(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.

[6] In sum, unlike in the United States, the ratification of a treaty does not have any legal effect domestically unless it is implemented by an act of Parliament or of the provincial legislature. Therefore, an international instrument cannot be invoked before the Federal Court unless it has first been implemented domestically.

[7] In contrast, Canada has taken a more adoptionist approach with regards to customary international law, including *jus cogens*, meaning that customary norms do not have to be implemented in order to have domestic legal effect. As discussed hereunder, this Canadian approach to international law has affected the extent to which the Federal Court will take into account international law instruments in their decisions.

## II. Jurisdiction of the Federal Court

### A. Judicial review

[8] The Federal Court is a statutory court without inherent jurisdiction. As such, its jurisdiction must be conferred by a federal statute. Under section 18.1 of the *Federal Courts Act*,<sup>7</sup> the Court has judicial review jurisdiction over the decisions of federal boards, commissions or tribunals, including those of the Immigration and Refugee Board. This is the context in which the Court will most likely be called upon to interpret an international law instrument. For example, the Court may be called upon to interpret the scope of an international convention, in order to determine whether the tribunal has committed an error of law pursuant to paragraph 18.1(4)(c) of the *Federal Courts Act*.

[9] To illustrate, section 98 of the *Immigration and Refugee Protection Act* explicitly excludes from the definition of Convention refugee or a person in need of protection persons referred to in section E or F of Article 1 of the Refugee Convention, which read as follows:

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

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

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

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<sup>7</sup> R.S.C. 1985, c. F-7.

[10] The wording of these provisions makes international instruments determinative of what kinds of acts can amount to a crime against peace, a war crime or a crime against humanity. Accordingly, the Federal Court, as well as the Federal Court of Appeal, have had to interpret the meaning of this convention. A case in point is *Harb v. Canada (Minister of Citizenship and Immigration)*.<sup>8</sup> In that decision, a refugee claimant had been excluded by the Refugee Division from the scope of the Refugee Convention, on the basis of his membership in the Amal movement and his complicity in the South Lebanon Army, two organizations that in its view had been engaged in crimes against humanity. A Federal Court judge affirmed the decision. The claimant appealed to the Federal Court of Appeal. At the hearing, counsel for the Minister of Citizenship and Immigration argued that although the crimes alleged to have been committed by the claimant had occurred between 1986 and 1993, the *Rome Statute of the International Criminal Court*, which had been adopted on July 17, 1998 and had come in effect on July 1, 2002, could still be taken into account in defining “a crime against peace, a war crime or a crime against humanity” for the purposes of the application of Article 1F(a). In coming to its conclusion, the Federal Court of Appeal referred to *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*,<sup>9</sup> in which the Supreme Court of Canada had stated that the words “purposes and principles of the United Nations” in article 1F(c) should be given “a dynamic interpretation of state obligations, which must be adapted to the changing international context”. According to the Federal Court of Appeal, the same approach should be applied to the exclusion described in article 1F(a). By not including a definition of “international instruments” in the Refugee Convention, its authors had ensured that the definitions of crimes would not be fixed at any point in time.

[11] Under paragraph 18.1(4)(f) of the *Federal Courts Act*, the Federal Court may also review the decision of a federal board, commission or tribunal when it acts in a way that is contrary to law. This may occur when the federal board acts in a way that is contrary to its constituent statute or to the Canadian constitution, which includes the *Canadian Charter of Rights and Freedoms*.<sup>10</sup> In this regard, it is important to note that under section 52 of the *Constitution Act, 1982*,<sup>11</sup> the Constitution of Canada is the supreme law of Canada. Accordingly, any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect.

[12] Two steps are involved when deciding whether there has been infringement of the *Charter*. The first step is to determine whether there has been a breach of a section of the *Charter*. Sometimes, however, this breach may be qualified by another requirement. For example, section 7 of the *Charter* provides that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice, which are illustrated at sections 8 to 14 of the *Charter*.

8 2003 FCA 39. This decision was decided under the *Immigration Act*, R.S.C., 1985, c. I-2, the predecessor of the *IRPA*.

9 [1998] 1 S.C.R. 982 at para. 62.

10 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter].

11 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[13] The second step is to determine whether the infringement is justified under section 1 of the *Charter*, which reads as follows:

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

[14] Accordingly, once the infringement of a right or freedom is established, the responding party must justify the limit under section 1.

[15] Some of the rights enshrined in the *Charter* can be found in certain international conventions. In this regard, other speakers at the conference have referred to the “hierarchy” of rights, a model used by Professor James C. Hathaway to determine the existence of persecution. He proposes that within the *International Bill of Rights*, which comprises the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR), four distinct types of obligation exist.<sup>12</sup>

[16] Level 1 of the hierarchy consists of rights enshrined in the ICCPR from which no derogation is permitted. These include freedom from arbitrary deprivation of life, protection against torture or cruel, inhuman, or degrading punishment or treatment. The second level of rights comprises those rights from which states may derogate during a public emergency. These include freedom from arbitrary arrest or detention, the right to equal protection for all, the right in criminal proceedings to a fair and public hearing, as well as the right to be presumed innocent. In Canada, Level 1 and Level 2 rights are protected by either the *Charter* or quasi-constitutional statutes such as the *Canadian Bill of Rights*<sup>13</sup> and the *Quebec Charter of Human Rights and Freedoms*.<sup>14</sup>

[17] The third level of rights comprises those carried forward in the ICESCR. They are not absolute and are essentially economic. They include the right to work, entitlement to food, and protection of the family. They are not necessarily protected under the federal *Charter* and are more likely to fall within provincial jurisdiction.

[18] The fourth level of rights encompasses property rights, such as the right to own and be free from arbitrary deprivation of property. They are not protected by the *Charter*. However, they are recognized in the *Canadian Bill of Rights*.<sup>15</sup>

[19] In sum, many of the rights found in international conventions are protected in Canada by the *Charter* or quasi-constitutional statutes. As such, the *Charter* will often be invoked along with international instruments before the Federal Court in immigration and refugee matters.

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12 James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 108.

13 S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.

14 R.S.Q. c. C-12.

15 *Supra* note 13.

### ***B. Special jurisdiction***

[20] Apart from its powers of judicial review under the *Federal Courts Act*, the Federal Court also exercises special jurisdiction under *IRPA* in the matter of “security certificates”. Under section 80 of *IRPA*, the Chief Justice or a judge designated by him must make a determination as to the reasonableness of a security certificate signed by the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness rendering a person inadmissible. In such a context, the judge may be called upon to consider Canada’s international obligations.

[21] Another particular case in which the Court may be called upon to interpret an international instrument is when it must determine whether a stay should be granted pending an application for judicial review. For example, in *Adviento v. Minister of Citizenship and Immigration*,<sup>16</sup> the applicant had applied for a stay of removal pending an application for judicial review of the removal officer’s decision, on the basis that she would be unable to receive proper dialysis treatment in the Philippines. The stay was granted. In that decision, no international instrument was invoked, but this would be an instance where such an instrument might be argued in support of a party’s submissions.

[22] That being said, as we shall see, even when an international law instrument is invoked, Canadian courts have preferred to use international instruments merely as an interpretive aid.

### **III. Paragraph 3(3)(f) of *IRPA***

[23] Paragraph 3(3)(f) of *IRPA* provides that the Act “be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory.” To date, no litigant has succeeded in convincing a Canadian court that where an inconsistency arises between a provision found in *IRPA* and a right conferred by an international human rights instrument ratified by Canada, the latter should prevail, which would have the effect of rendering the incompatible legislative provision of no force or effect. However, international instruments will still be used as an interpretative aid, as “the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review”.<sup>17</sup>

[24] In *Re Charkaoui*,<sup>18</sup> the Federal Court of Appeal affirmed a decision wherein a judge had dismissed an application to have sections 33 and 77 to 85 of *IRPA*, which deal with security certificates, declared unconstitutional and in contravention of Canada’s international obligations, particularly in light of paragraph 3(3)(f) of *IRPA*. It was also argued that these provisions contravened *Charter* rights with respect to a fair and public hearing before an independent and impartial tribunal. The Federal Court of Appeal noted that the *Charter* provided rights and guarantees that were for all practical purposes iden-

<sup>16</sup> 2002 FCT 543.

<sup>17</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 70.

<sup>18</sup> *Re Charkaoui*, 2004 FCA 421, aff’d 2003 FC 1418.

tical to those guaranteed under article 14 of the ICCPR, article 6(1) of the *European Convention on Human Rights* (European Convention) and article 10 of the *Universal Declaration of Human Rights* (Universal Declaration). Accordingly, only the ICCPR was directly relevant, as Canada was one of its signatories. On the other hand, the Universal Declaration, which is a resolution of the General Assembly of the United Nations, was of no binding effect (although it played an important role in international customary law). With regards to the European Convention, its role was limited in Canada's domestic law and would only be useful insofar as its provisions were similar to those of the ICCPR and the *Charter*. In any event, according to the Federal Court of Appeal, the *Charter* was not outdone by any of those instruments in terms of equality before the courts and tribunals, procedural fairness, judicial independence and the impartiality of the courts.<sup>19</sup>

[25] Recently, in *De Guzman v. Canada (Minister of Citizenship and Immigration)*,<sup>20</sup> the Federal Court of Appeal held that paragraph 3(3)(f) does not incorporate international human rights instruments to which Canada is signatory into Canadian law, but merely directs that *IRPA* be construed and applied in a manner that complies with them.<sup>21</sup> Nevertheless, they must be given more than a persuasive or contextual significance in the interpretation of *IRPA*.<sup>22</sup> Indeed, the Federal Court of Appeal observed that the wording of this paragraph makes this approach mandatory and if interpreted literally, makes international human rights instruments determinative of the meaning of the Act, in the absence of a clear legislative intent to the contrary. Furthermore, in its view, paragraph 3(3)(f) of *IRPA* did not require that each and every provision of the Act and the *Immigration and Refugee Protection Regulations*,<sup>23</sup> considered in isolation, comply with international human rights instruments. As the Federal Court of Appeal stated, at paragraph 81:

Rather, the question is whether an impugned statutory provision, when considered together with others, renders *IRPA* non-compliant with an international human rights instrument to which Canada is signatory.

[26] Therefore, the "international human rights instruments to which Canada is signatory" have more than mere ambiguity-resolving, contextual significance. On its face, paragraph 3(3)(f) is clear: "*IRPA* must be interpreted and applied consistently with an instrument to which paragraph 3(3)(f) applies, unless, on the modern approach to statutory interpretation, this is impossible".<sup>24</sup> However, the Federal Court of Appeal drew a distinction between "binding" and "non-binding" international human rights instruments, stating that a legally binding international human rights instrument to which Canada is a signatory is determinative of how the Act must be interpreted and applied, in the absence of a con-

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<sup>19</sup> *Ibid.* at para. 142.

<sup>20</sup> 2005 FCA 436, leave to appeal to S.C.C. refused.

<sup>21</sup> *Ibid.* at para. 73.

<sup>22</sup> *Ibid.* at para. 75.

<sup>23</sup> SOR/2002-227.

<sup>24</sup> *Ibid.* at para. 83.

trary legislative intention.<sup>25</sup> It refrained from deciding the effect of paragraph 3(3)(f) with respect to non-binding international human rights instruments, as the only international instruments relevant at issue in that case were legally binding on Canada.

[27] As seen above, due to Canada's dualistic approach to international law, the Canadian courts have preferred to use international law instruments as a context rather than as the determining factor in a decision. The debate in Canada over the lawfulness of deportation to torture is a case in point.

#### IV. Lawfulness of deportation to torture

[28] Subsection 97(1) of *IRPA* provides that a person in need of protection is a person whose removal would subject them personally to a danger of torture, as defined by Article 1 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT):

##### *IRPA*

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 Article 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 themselves 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.

##### Convention Against Torture

##### Article 1

1. For the purposes of this Convention, 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 capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

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<sup>25</sup> *Ibid.* at para. 87.



2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

[29] Subsection 115(1) of *IRPA* recognizes the principle of non-*refoulement* by prohibiting the removal of a protected person to a country where they would be at risk of persecution or at risk of torture.

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.

[30] However, subsection 115(2) creates an exception to this rule, by providing that the non-*refoulement* principle does not apply in the case of a person who has been deemed inadmissible on grounds of serious criminality, security, violating human or international rights or organized criminality or who constitutes a danger to the public in Canada:

115. (2) Subsection (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.

[31] Recently, in *Almrei v. Canada (Minister of Citizenship and Immigration) (F.C.A.)*,<sup>26</sup> the Federal Court of Appeal examined section 115 of *IRPA* in light of paragraph 3(3)(f) of *IRPA*. In doing so, in the name of the Court, Justice Gilles Létourneau observed that there was a contradiction between paragraph 3(3)(f) and paragraph 115(2)(b), as Canada was signatory to both the ICCPR and to the CAT, which both prohibit deportation to torture, without any possibility of derogation. In particular, Article 3 of the CAT explicitly prohibits deportation to torture:

Article 3:

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

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<sup>26</sup> 2005 FCA 54.

[32] Justice Létourneau noted that the Refugee Convention seems to conflict with both the ICCPR and the CAT, as Article 33(2) allows the *refoulement* of 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 of a serious crime, constitutes a danger to the community of that country. It observed, however, that following the decision of the Supreme Court of Canada in *Suresh v. Canada (Minister of Citizenship and Immigration)*,<sup>27</sup> the Canadian position on the issue of deportation to torture was still uncertain.

[33] Indeed, in *Suresh*, the Supreme Court of Canada acknowledged that there were indicia that the prohibition on torture had reached the status of a peremptory norm of customary international law, or *jus cogens*, from which no derogation was acceptable. Nevertheless, it did not completely close the door on deportation to torture. It held that “barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice protected by s. 7 of the *Charter*.”<sup>28</sup> Accordingly, deportation to torture might be saved by the balancing process mandated under section 7 of the *Charter* or under section 1 of same.

[34] What is important to note here is that in coming to its conclusion, the Supreme Court remained faithful to Canada’s dualistic treatment of international law:

Insofar as Canada is unable to deport a person where there are substantial grounds to believe he or she would be tortured on return, this is not because Article 3 of the CAT directly constrains the actions of the Canadian government, but because the fundamental justice balance under s. 7 of the *Charter* generally precludes deportation to torture when applied on a case-by-case basis.

[35] Interestingly, although Article 3 of the CAT has not been explicitly incorporated into *IRPA*, the Federal Court of Appeal recently held that paragraph 97(1)(a) of *IRPA* was adopted in order to give effect to Article 3 of the CAT. Indeed, in *Li v. Canada (Minister of Citizenship and Immigration)*,<sup>29</sup> the Court of Appeal observed that the wording of paragraph 97(1)(a) of *IRPA* closely mirrored the words in Article 3 of the CAT. The Court stated:

It is apparent that the words in paragraph 97(1)(a):

would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture ... [Emphasis added.]

mirror closely the words in Article 3 of the Convention Against Torture:

...where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Because the words used in Article 3 and paragraph 97(1)(a) are almost identical and because paragraph 97(1)(a) was adopted by Parliament to give effect to Article 3, the jurisprudence that interprets Article 3 is of assistance in interpreting paragraph 97(1)(a) [emphasis added].

27 2002 SCC 1, [2002] 1 S.C.R. 3.

28 *Ibid.* at para. 76.

29 2005 FCA 1 at para. 18.

[36] On this basis, the Federal Court of Appeal held that the jurisprudence that interprets Article 3 of the CAT is of assistance in interpreting paragraph 97(1)(a), even though *IRPA* does not explicitly incorporate Article 3 of the CAT. Therefore, the issue of whether Article 3 of the CAT is incorporated into *IRPA* seems somewhat unclear.

[37] A series of recent decisions with regards to security certificates have also addressed the issue of the lawfulness of deportation to torture. I have already mentioned the Federal Court of Appeal decision in *Re Charkaoui*.<sup>30</sup> In another *Charkaoui* decision,<sup>31</sup> the same applicant argued before the Federal Court that *Suresh* was not applicable, as it had been decided under the former Act, which did not contain paragraph 3(3)(f). In this regard, he argued that return to a country where there is a risk of torture is contrary to Article 3 of the CAT and accordingly, provisions relating to protection applications were invalid.

[38] Justice Simon Noël disagreed. He upheld the approach set out in *Suresh* and held that paragraph 3(3)(f) of *IRPA* is a general, interpretative provision that does not operate to incorporate international law into domestic law. He stated at paragraph 40:

In my opinion, Parliament has chosen to give special treatment to persons who are named in a security certificate, and the clarity of the provisions challenged by Mr. Charkaoui illustrates that intention. I find it hard to see why Parliament would have been at pains to enact very specific and precise provisions relating to persons named in a security certificate if it intended to neutralize or cancel them out by paragraph 3(3)(f) of the *IRPA*.

[39] Further on, he stated:

Mr. Charkaoui further submits that in addition to its interpretive role, paragraph 3(3)(f) must also guide the application of the *IRPA*. Even if Mr. Charkaoui is correct on this point, I do not believe that it is impossible to reconcile article 3 of the Convention against Torture with the "application" of the weighing process provided for in the *IRPA*. On this point, I believe that we must apply what the Supreme Court said in *Suresh*, *supra*, in which it clearly upheld the weighing exercise set out in the *IRPA*, taking into account the Convention against Torture on which Mr. Charkaoui relies. In this case, the "application" of the *IRPA* could not operate in such a way as to violate article 3 of the Convention against Torture, even if that Convention were incorporated in domestic law, because to date, no action has been taken against Mr. Charkaoui that might violate article 3 of the Convention against Torture. The applicable Canadian law (the impugned provisions of the *IRPA* and *Suresh*, *supra*) is in complete harmony with the Convention against Torture, as long as no decision has been made to remove to a country where there is a risk of torture. Only then could a violation occur.

[40] Recently, in *Re Jaballah*,<sup>32</sup> Justice W. Andrew Mackay determined that the certificate at issue was reasonable and accordingly, the order setting out that determination became a removal order. Given the finding that Mr. Jaballah faced a serious risk of

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<sup>30</sup> *Supra* note 18.

<sup>31</sup> 2005 FC 1670 at para. 44, Noël J.

<sup>32</sup> 2006 FC 1230.

torture if he were removed to Egypt, Justice Mackay held that it was time to decide whether Mr. Jaballah could be removed from Canada. In order to resolve the issue, he based himself on the *Charter*, stating that “[deporting Mr. Jaballah] to Egypt or to any country where and so long as there is a substantial risk that he would be tortured or worse would violate his rights as a human being, guaranteed by s. 7 of the *Charter*”.<sup>33</sup> He also concluded that his finding was consistent “not merely with the decision in *Suresh* but also with Canada’s international obligations...”<sup>34</sup>

[41] Further developments on the application of paragraph 3(3)(f) of *IRPA* may be coming in the near future. In June 2006, the Supreme Court of Canada heard appeals in a trilogy of cases. The first was an appeal of the aforementioned 2004 Federal Court of Appeal decision in *Charkaoui*,<sup>35</sup> the second, its decision in *Almrei*,<sup>36</sup> above, and the third, its decision in *Harkat*.<sup>37</sup> All three cases related to non-citizens named in security certificates. In their written submissions, both the appellants Charkaoui and Almrei raised the possible application of paragraph 3(3)(f) in support of their respective arguments. In particular, in his appeal, Mr. Almrei has pointed out the contradiction between *IRPA* and the CAT and the possible application of paragraph 3(3)(f), which came into force after the *Suresh* decision. Decisions have not yet been rendered in these cases. Therefore, further developments in this area may be on the horizon.

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33 *Ibid.* at para. 84.

34 *Ibid.* at para. 86.

35 *Supra* note 18.

36 *Supra* note 26.

37 2005 FCA 285.