Indirect-Refoulement of J.W. to Somalia and the Admissibility of Canada as a Safe Third Country

August 2015

Authors:
Faisa Awad
Ivana Dahl
Lukasz Dziedzic

Supervisor:
Prof. mr. Hemme Battjes

Migration Law Clinic
www.migrationlawclinic.org

Migration Law Clinic and Migration Law Expertise Centre

This is an expert opinion by the Migration Law Clinic. The Migration Law Clinic of the VU University Amsterdam provides legal advice to lawyers, Non-Governmental Organisations, and other organisations on complex legal questions of European migration law. Top students in the last years of their study at the Law Faculty of the VU University Amsterdam carry out research and write legal advice at the Clinic. They are closely supervised by the staff of the Migration Law Section of this Faculty.

The Migration Law Clinic is the responsibility of the Foundation (Stichting) Migration Law Expertise Centre (No. 59,652,969 Chamber of Commerce). For more information see: migrationlawclinic.org

Contents

Executive Summary

J.W. is a Somali national seeking refuge in the Netherlands who faces a potential risk of chain *refoulement* from Canada to Somalia. A particularity of J.W.'s case is that Canada already once attempted to send him to Somalia, thereby ignoring the view of the UN Human Rights Committee (HRC) on his case. The HRC found that J.W. may, due to his personal circumstances, face torture and inhuman, cruel or degrading treatment upon return to Somalia. J.W. complains before the European Court of Human Rights (ECtHR) that his expulsion to Canada would (indirectly) lead to a violation of Article 3 of the European Convention on Human Rights (ECHR).

The present expert opinion deals with the issue whether Canada is a safe third country to return J.W. to. The expert opinion tackles this issue by addressing three sub-aspects in the particular case, which the ECtHR will need to engage with in order to decide in the case pending before it. However first of all Chapter 1 will introduce the case of J.W.

Chapter 2 assesses the current situation in Somalia and analyses whether a return of J.W. to Somalia would constitute a violation of the *non-refoulement* obligation inherent in Article 3 ECHR. This analysis is necessary as there is a risk of chain *refoulement* to Somalia after J.W.´s potential expulsion to Canada. In such a situation an assessment of the risks where to an applicant will be exposed in the country he eventually ends up in, is usually the first step in the ECtHR's analysis. Chapter 2 arrives at the conclusion that there is a considerable risk that, due to his personal circumstances, J.W. will face treatment contrary to Article 3 ECHR in case he would be returned to Somalia.

Chapter 3 engages in more detail with the guarantees that Canada needs to provide in order to be considered safe to return J.W. to. It will address the question whether Canada's human rights record and the fact that it is a party to multiple human rights treaties, which contain a prohibition of *refoulement*[1], are sufficient to consider Canada a safe third country. Canada already tried to send J.W. to Somalia once. Therefore the expert opinion analyses the possibility of the facts of his case being reviewed again through a pre-removal risk assessment under the Canadian Immigration and Refugee Protection Act (IRPA) before his potential consecutive chain *refoulement* to Somalia. We will examine whether there are any potential procedural guarantees protecting J.W. from a direct immediate expulsion to Somalia upon his return to Canada.

We conclude that, although Canada is a party to several international instruments preventing *refoulement* in the sense of Article 3 ECHR, it cannot be considered as a safe third country for J.W. First it can be doubted whether a new pre-removal risk assessment would be conducted in the case of J.W. Secondly, it is possible that, even if the Canada authorities would conclude J.W. would face ill-treatment when returned to Somalia, this would still not halt J.W.'s expulsion. The reason for this is that Canada balances the interest of an individual not to be returned to a country where he faces a real risk of ill-treatment against Canada's public security interests. In the end, this may allow for an individual to be returned to a country where he faces a risk of ill-treatment, contrary to the absolute nature of the prohibition of *refoulement* under the ECHR.

Chapter 4 of the expert opinion deals in more detail with the fact that the HRC already had the chance to give its views on some aspects of the case. The HRC came to the conclusion that Canada should refrain from expelling J.W. to Somalia, as it would otherwise violate its obligations under Article 7 ICCPR. The question arises whether and if so, in how far the ECtHR could and should

[1] Art 7 of the International Covenant on Civil and Political Rights and Art 3 of the Convention Against Torture.

take the HRC´s views into account in its present judgment. This is a novel question, which has in this form never before occurred before the ECtHR. Therefore, we took a somehow wider perspective in order to tackle it. We analysed the ways in which the ECtHR in Article 3 ECHR *refoulement* cases uses materials coming from the HRC and the Committee against Torture (ComAT), two bodies which also oversee *non-refoulement* provisions. We conclude that the ECtHR often relies on HRC and ComAT materials for validations of facts in the cases before it and as sources of inspiration in its reasoning. On the basis of this conclusion Chapter 4 argues that the ECtHR should give due regard to the HRC´s views in regard to J.W.

We conclude in this expert opinion that it is not safe to return J.W. to Canada as there is a good chance that he will be subjected to chain *refoulement* from Canada to Somalia where, due to his particular individual situation, he faces a certain risk of ill-treatment contrary to Article 3 ECHR. The HRC arrived at a similar conclusion and Canada blatantly disregarded it. The HRC's findings and Canada's reaction towards them create certain implications that can be of great use for the deliberations of the ECtHR on this case.

1 Introduction

The case of J.W. came to the attention of the Migration Law Clinic through his attorney who requested the Clinic to write a rapport assessing whether Canada is a safe third country for his client given the risk of ill-treatment in case of expulsion by Canada to Somalia. J.W. was born in Saudi Arabia in 1984. His parents had Somalian nationality. J.W. moved to Canada in 1988. In 1992 permanent residence status was granted to him. After convictions for amongst others robbery, a deportation order was issued in 2006. Appeals to national authorities against this decision failed.

In 2010 J.W. complained to the Human Rights Committee (HRC), that expulsion to Somalia would be in breach of Article 7 of the International Covenant on Civil and Political Rights (ICCPR). In its view issued in 2011, the HRC considered J.W.'s complaints justified. Given his personal circumstances he cannot be sent back to Somalia as he would be likely to face torture and other inhuman, cruel, or degrading treatment upon return.[2] The Canadian authorities disregarded the HRC's view and tried to send J.W. to Somalia. On the way to Somalia his plane stopped over at Schiphol airport in the Netherlands, where J.W. submitted a request for asylum. The request was denied and J.W.'s appeal against this decision failed. J.W. filed an application with the European Court of Human Rights (ECtHR) and the Court issued an interim measure preventing expulsion. Currently J.W. is awaiting the ECtHR's decision in his case in the Netherlands.

The main issue that arises in this case is whether Canada is a safe country for J.W. to be returned to. In this context, Canada may be referred to as a "third country" in order to distinguish it from the first country, the country of nationality (Somalia) and the second country (the Netherlands).

The approach towards expulsion to a third country developed by the ECtHR may be summarised as follows. Before a state party to the European Convention of Human Rights (ECHR) can remove a person to a safe third country it needs to ascertain that this third country has sufficient procedural guarantees in place in order to prevent this person´s direct or indirect removal from this safe third country to his country of origin without a sufficient prior evaluation of the risks this person faces from the standpoint of Article 3 ECHR. If a state party to the ECHR sends an asylum seeker to a safe third country and this country then expels him to his country of origin where there is a risk of ill-treatment, then this amounts to indirect *refoulement*. In such a situation the ECHR state party remains responsible for any Article 3 ECHR violations the returnee may experience.[3]

The ECtHR in indirect *refoulement* cases applies a simple test. It first considers whether a returnee has an "arguable claim" that an eventual expulsion to the country of nationality would violate Article 3 of the Convention.[4] It should be noted that the applicant does not need to show that there are substantial grounds for believing that he faces a real risk of *refoulement* upon return to his country of nationality. It is sufficient if he shows an "arguable claim" of such risk.

In a second step it considers whether the third country is safe in the case at hand. This test may take two forms. In cases where the third country was a member of the Council of Europe and thus bound by the ECHR, the ECtHR started from the presumption that the third country was safe.

[2] HRC 21 July 2011, *Warsame v Canada*, Canada, no 1959/2010.

[3] ECtHR (GC) 23 February 2012, *Hirsi Jamaa and others v Italy*, Appl no 27765/09, paras 146-147 and ECtHR (GC) 21 January 2011, *MSS v Belgium and Greece*, Appl no 30696/09, paras 342-343.

[4] ECtHR (GC) 23 February 2012, *Hirsi Jamaa and others v Italy*, Appl no 27765/09, para 152 and ECtHR (GC) 21 January 2011, *MSS v Belgium and Greece*, Appl no 30696/09, para 345.

Thus, it fell upon the applicant to show that the country was unsafe in his case.[5] In other cases, it did not start from the presumption that the third country was safe, and it fell upon the respondent government to show that the third country offered sufficient guarantees against arbitrary removal.[6]

In Chapter 2 of this expert opinion, we will discuss whether J.W. has an "arguable claim" that upon expulsion to Somalia, Article 3 ECHR will be violated. We conclude that he indeed does have such claim. In Chapter 3 therefore, we will address the question whether Canada is safe for him. Canada is not bound by the ECtHR but it is party to a number of other relevant international obligations. Therefore, it can be argued that to a certain extent a presumption of safety applies. In Chapter 3 we will examine whether this presumption should be considered rebutted in J.W's case.

A quite rare particularity of J.W.'s case is the fact that the HRC already dealt with his claim that expulsion to Somalia would amount to ill-treatment. In Chapter 4 we will assess whether and if so, in how far the ECtHR should take into consideration the views of international bodies dealing with *non-refoulement* provisions, in particular the HRC and the ComAT, when deciding on the same claimant. Finally, some concluding remarks will be made in Chapter 5, summing up the findings of this expert opinion and providing for an answer to the question whether Canada is a safe third country for J.W.

[5] ECtHR 7 March 2000, *TI v UK*, Appl no 43844/98, ECtHR 2 December 2008, *KRS v UK*, Appl no 32733/08 and ECtHR (GC) 21 January 2011, *MSS v Belgium and Greece*, Appl no 30696/09, para 345.
[6] ECtHR (GC) 23 February 2012, *Hirsi Jamaa and others v Italy*, Appl no 27765/09, paras 147-148, ECtHR 22 September 2009, *Abdolkhani and Kamnia v Turkey*, Appl no 30471/08.

2 Assessment of risk faced by J.W. when returned to Somalia by the Canadian authorities

2.1 Introduction

According to the ECtHR's case law the assessment as regards the possible consequences of the removal of an applicant to the country of origin, must be considered in the light of the general situation there as well as the returnee's personal circumstances.[7] If the ECtHR deems it relevant it will examine whether there is a general situation of violence in the country of destination (for example as a result of civil war), which leads to a violation of Article 3 ECHR for each person returning to that country.[8] Such a general risk assessment[9] almost never leads to a breach of Article 3 ECHR.[10] For this reason, in most cases the ECtHR performs an individual risk assessment and special distinguishing features are required.[11] In order to fall within the scope of Article 3, the ill-treatment risked upon return must attain a certain minimum level of severity. The assessment of this is relative, depending on all the circumstances of the case.[12]

In its assessment whether J.W. has an "arguable claim" that removal to Somalia would lead to a real risk of a violation of Article 3 ECHR, the ECtHR may thus take a general or an individual approach. For the country of Somalia, more particular for the capital Mogadishu, a general risk was previously assumed due to the armed conflict in the region.[13] In order to perceive whether J.W. has an "arguable claim" that he will face a real risk of ill-treatment contrary to Article 3 ECHR in the actual event he is returned to Somalia, the situation in Mogadishu and Puntland will have to be analysed in addition to J.W.'s personal circumstances. The situation in Mogadishu and Puntland are both relevant. Puntland was the region where Canada previously intended to send J.W. The situation in Mogadishu is important due to J.W's (expected) travel route. Section 2.2 will address the general situation in Somalia. Section 2.3 will examine whether J.W. has an "arguable claim" of a real risk of ill treatment based on his personal profile.

2.2 General Risk Assessment

Because of the ever-changing situation in Somalia it is difficult to assess the general situation in the light of Article 3 ECHR.[14] In the case of *Sufi and Elmi* the ECtHR outlined which circumstances should

[7] ECtHR 30 October 1991, *Vilvarajah and Others v UK*, Appl nos 13163/87, 13164/87,13165/87, 13447/87, 13448/87, para 108.
[8] ECtHR 28 June 2011, *Sufi and Elmi v UK*, Appl nos 8319/07 and 11449/07, para 216.
[9] See also Migration Law Clinic, *Expert opinion: Assessment of the risk of refoulement under Article 3 ECHR in cases of persons returning to Somalia*, 21 March 2014 , www.migrationlawclinic.org/2014/03/21/advies-somalie/ accessed 17 August 2014, pp 4-19.
[10] ECtHR 5 September 2013, *KAB v Sweden*, Appl no 886/11, para 76.
[11] ECtHR 17 July 2008, Appl no 25904/07, para 116.
[12] ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, Appl no 1948/04, para 137.
[13] ECtHR 28 June 2011, *Sufi and Elmi v UK*, Appl nos 8319/07 and 11449/07.
[14] Migration Law Clinic, *Expert opinion: Assessment of the risk of refoulement under Article 3 ECHR in cases of persons returning to Somalia*, 21 March 2014, www.migrationlawclinic.org/2014/03/21/advies-somalie/ accessed 17 August 2015, p 4.

be taken into account when deciding whether there is a situation of general violence.[15] These circumstances include:

1. Whether the parties to the conflict employ methods and tactics of warfare, which increase the risk of civilian casualties or are directly targeted at civilians;
2. Whether the use of such methods or tactics is widespread among the parties to the conflict;
3. Whether the fighting is localised or widespread; and
4. The number of civilians killed, injured and displaced as a result of the fighting.[16]

The situation in Mogadishu

The situation in Mogadishu has improved in comparison to the situation described in *Sufi and Elmi* in 2011. Indeed, since the case of *KAB v Sweden* the Court has maintained in cases concerning Somali asylum seekers that the situation in Mogadishu no longer amounted to that of general violence because al-Shabaab was no longer in control.[17]

Even so, several NGO reports have expressed their concern of Somali returnees being sent back to southern and central Somalia of which Mogadishu is a part.[18] In its report of 23 October 2014 Amnesty International condemned the return of Somali aliens to southern and central Somalia by the Dutch authorities due to the on-going violence in the country.[19] Amnesty International specifically expressed its concern of the Dutch authorities' policy that under certain circumstances Somali persons can be forced to return to al-Shabaab areas. It considered these actions as 'dangerous', 'irresponsible' and 'in violation of international law'. In the UNHCR's report regarding 'international protection in regard to people fleeing Southern and Central Somalia' of January 2014 the protection needs of individuals originating from southern and central Somalia have been analysed.[20] Although both Amnesty International and UNHCR do not explicitly mention that there is a situation of general violence, both parties maintain that the situation in southern and central Somalia is dangerous and that contracting states should be very cautious when and if returning individuals to these conflict areas.[21] In April 2015 the Dutch authorities decided to refrain from expelling Somali persons to areas controlled by al-Shabaab (which does not include Mogadishu).[22]

The current situation in southern and central Somalia, including Mogadishu, remains volatile. Recent bombings have killed not only civilians but also members of parliament and other politicians.[23] In 2014 and 2015 numerous attacks were committed by the extremist militant group al-

[15] ECtHR 28 June 2011, *Sufi and Elmi v UK*, Appl nos 8319/07 and 11449/07 and ECtHR 5 September 2013, *KAB v Sweden*, Appl no 886/11.
[16] ECtHR 28 June 2011, *Sufi and Elmi v UK*, Appl nos 8319/07 and 11449/07, para 241.
[17] ECtHR 5 September 2013, *KAB v Sweden*, Appl no 886/11.
[18] Appendix I.
[19] Amnesty International briefing: *Forced returns to South- and Central Somalia, including to Al Shabaab areas: a blatant violation of international law (*23 October 2014) www.amnesty.org/en/latest/news/2014/10/netherlands-forced-returns-somalis-al-shabaab-areas-can-amount-death-sentences/ accessed 17 August 2015.
[20] UNHCR, *International Protection Considerations with Regard to People Fleeing Southern and Central Somalia* (17 January 2014) www.refworld.org/docid/52d7fc5f4.html.
[21] Amnesty International briefing: *Forced returns to South- and Central Somalia, including to Al Shabaab areas: a blatant violation of international law (*23 October 2014) and UNHCR, *International Protection Considerations with Regard to People Fleeing Southern and Central Somalia* (17 January 2014).
[22] *Kamerstukken II* 2014/15, 19637, nr 1992.
[23] Reuters, *Al Shabaab kill three people in Somali capital, including politician* (25 July 2015) www.reuters.com/article/2015/07/25/us-somalia-security-idUSKCN0PZ0JO20150725 accessed 17 August 2015

Shabaab contributing to the dangerous situation in southern and central Somalia.[24]

The situation in Puntland

Some concerns have also been voiced for the region of Puntland, which is located in the north-eastern part of Somalia. Two of its major cities are Bossasso and Garoowe.[25] Even though the situation in that region seems to be stable, at times al-Shabaab has carried out attacks.[26] Due to the deteriorating security situation, the main road between Bossasso and Garoowe has become an easy target for al-Shabaab to perform their illegal and inhuman activities, which in turn have affected road movement which may very well affect returnees when travelling these roads.[27]

2.3 Individual assessment

If the Court is not convinced that the general situation of violence leads to a real risk of *refoulement* for the applicant (be it a home region of an applicant or an internal flight alternative), it will turn to the assessment of the real risk on an individual basis. The applicant's personal situation comprising of his membership of a vulnerable group as well as his individual distinguishing features will be considered.[28] In the case of *Vilvarajah and Others v. the United Kingdom*[29] the Court stated that, even if an alien was to be expelled to a country where organised, large-scale human rights violations were committed against a group to which a person belonged, he would have to make out a convincing case that specific facts and circumstances existed relating to him personally, in order to be eligible for the protection offered by Article 3 of the Convention. In the assessment whether special distinguishing features are present, the general situation should be taken into account.

---

and Reuters, *Suicide attack targets Somali officials in hotel, kills 10 people* (20 February 2015) www.reuters.com/article/2015/02/20/us-somalia-security-idUSKBN0LO0RW20150220 accessed 17 August 2015.

[24] BBC, *Somalia blast: Mogadishu hotel rocked by bomb* (26 July 2015) www.bbc.com/news/world-africa-33669610, Al Jazeera, *Deadly car bomb attacks hit Mogadishu hotels* (11 July 2015) www.aljazeera.com/news/2015/07/deadly-car-bomb-attacks-hit-mogadishu-hotels-150710155518540.html, Integrated Regional Information Networks (IRIN), *Security Downturn in Mogadishu* (9 April 2014) www.refworld.org/docid/5379ca534.html, UN News Service, *Somalia: UN Envoy Condemns Recent Outbreaks of Deadly Violence in Baidoa* (24 March 2014) www.refworld.org/docid/533950634.html, IRIN, *Short-term Costs of Military Gains in Somalia* (21 March 2014) www.refworld.org/docid/53394c044.html accessed 17 August 2015, UN Security Council, *Report of the Secretary-General on Somalia* (3 March 2014) www.refworld.org/docid/531ef31f4.html all accessed on 17 August 2015.

[25] Appendix I.

[26] Al Jazeera, *Deadly attack targets UN staff in Somalia's Puntland* (20 April 2015) www.aljazeera.com/news/2015/04/puntland-attack-150420053836792.html, Diplomat News Network, *Somalia: at least two killed in militant attack in Bosaso* (8 February 2015) http://diplomat.so/2015/02/08/somalia-at-least-two-killed-in-militant-attack-in-bosaso/, allAfrica, *Somalia: Suspected Al-Shabaab Gunmen Attack Bosaso Police Station* (4 February 2015) http://allafrica.com/stories/201502050212.html; Committee to Protect Journalists, *Journalists Killed in 2014 - Motive Confirmed: Abdirizak Ali Abdi* (23 December 2014) www.refworld.org/docid/54a3b31115.html, all accessed 17 August 2015.

[27] UN Security Council, *Report of the Secretary-General on Somalia* (23 January 2015) www.refworld.org/docid/54d377d74.html accessed 22 February 2015, p 4.

[28] ECtHR 5 September 2013, *KAB v Sweden*, Appl no 886/11, paras 91-96.

[29] ECtHR 30 October 1991, *Vilvarajah and others v UK*, Appl nos 13163/87, 13164/87,13165/87, 13447/87, 13448/87.

The importance of family ties and clan affiliation

Clan affiliation and tribalism have always been relevant within the Somali community.[30] Somalia has long since been divided into multiple regions where different clans often claim the majority of the population.[31] For this reason having strong clan ties with one's own clan is very important in order to have a safety network to fall back on. The ECtHR has recognised this when it stated that 'clan affiliation has .. been described as the most important common element of personal security across all of Somalia and hence not merely in the "relatively unsafe" areas.'[32]

In the case of J.W., the Canadian authorities planned to remove him to Puntland[33] where the majority of the population is of the Darod clan.[34] The Canadian authorities assume that J.W. is a member of the Darod clan. Indeed his mother was part of the Darod tribe and her clan was that of the Majerteen. However, J.W.'s parents divorced when he was a teenager. Since then he has become estranged with his father and his father eventually disowned him.[35] J.W. claims that, due to this fact, he does not have any knowledge of patrilineal ancestry, proving clan affiliation and obtaining clan protection. J.W. has never lived in Somalia and his parents have never taught him about his family's ancestry.[36]

It should be noted that both of J.W.'s parents were born in Mogadishu and that J.W. has no family living in Puntland.[37] Thus, J.W. has no link whatsoever with Bossasso or Puntland. Furthermore, being raised in Canada from an early age J.W.'s language is essentially English and his Somali is limited and spoken with an English accent.[38] Also due to the fact that he has been living in Canada for most of his life, he is not familiar with clan practices and the Somali culture in general.

In the ECtHR's landmark case of *Salah Sheekh* of 2007 the returnee was a member of the Ashraf clan, a minority group part of the Reer Hamar clan. On the basis of this distinct quality he feared ill-treatment contrary to Article 3 ECHR.[39] It follows from this case that for those who do not originate from Somaliland or Puntland the presence of family members and clan protection are imperative for gaining admittance to and being able to settle in this territory.[40] In fact the three most vulnerable groups in Somalia are said to be IDP's, minorities and returnees from exile.[41] If J.W. is expelled to the "relatively safe" areas in northern Somalia, he would fall into all three categories.

In addition, when discussing family ties, the ECtHR considered in *Sufi and Elmi* that without having close familial ties in the area of relocation the applicant might highly likely end up in an IDP or refugee camp. In case the applicant might find himself in an IDP camp, the Court considered that there would be a real risk of exposure to treatment contrary to Article 3 on account of the humanitarian conditions of these camps.[42]

The United Kingdom Upper Tribunal in its Country Guidance of January 2015 concerning

---

[30] C Besteman, *Unraveling Somalia: Race, Class, and the Legacy of Slavery* (Penn Press, Pennsylvania, 2014), p 147.
[31] Appendix I and II.
[32] ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, Appl no 1948/04, para 139.
[33] HRC 21 July 2011, *Warsame v Canada*, no 1959/2010, para 2.7.
[34] Appendix I and II.
[35] HRC 21 July 2011, *Warsame v Canada*, no 1959/2010, para 5.8.
[36] Ibid, para 5.8.
[37] Ibid, para 3.2.
[38] Ibid, para 5.8.
[39] ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, Appl no 1948/04, paras 55-56.
[40] Ibid, para 139.
[41] Ibid, para 140.
[42] ECtHR 28 June 2011, *Sufi and Elmi v UK*, Appl nos 8319/07 and 11449/07, para 267.

Somalia, in line with the *Salah Sheekh* judgment, further stressed the importance of having clan and family ties.[43] Even though the Upper Tribunal no longer deemed Mogadishu an area lacking safety, it underlined the necessity and importance of having family and clan ties in order to not fall victim to circumstances below that which are acceptable in humanitarian protection terms.[44] Furthermore the Country Report evidence indicated that relocation to Mogadishu for a person of a minority clan with no former links to the city, no access to funds and no other form of clan, family or social support is unlikely to be realistic. This is because, in the absence of means to establish a home and some form of on-going financial support, there will be a real risk of having no alternative but to live in makeshift accommodation within an IDP camp. In such camp there is a real possibility of having to live in conditions that will fall below acceptable humanitarian standards.[45]

Risk of recruitment and risk in al-Shabaab controlled areas

According to J.W., 'as a healthy 26-year-old he would be at a heightened risk of forced recruitment by groups such as al-Shabaab and Hizbul Islam and even the Transitional Federal Government (TFG) and their allied forces.'[46] In *Sufi and Elmi* the Court concluded that a returnee with no recent experience living in Somalia would be at a real risk of being subjected to treatment contrary to Article 3 of the Convention when moving in al-Shabaab controlled areas:

> The Court considers it unlikely that a Somali with no recent experience of living in Somalia would be adequately equipped to "play the game", with the risk that he would come to the attention of al-Shabaab, either while travelling through or having settled in an al-Shabaab controlled area. The Court considers that this risk would be even greater for Somalis who have been out of the country long enough to become "westernised" as certain attributes, such as a foreign accent, would be impossible to disguise.[47]

Accordingly, if a person's area of destination is controlled by al-Shabaab, or if it could not be reached without travelling through an al-Shabaab controlled area, the Court would not consider that person could relocate within Somalia without being exposed to a real risk of ill-treatment.'[48] Additionally people on transport routes report are being interrogated and treated with suspicion by al-Shabaab. Movements need to be justified, particularly if the movement is between al-Shabaab areas and areas controlled by the SFG and allied forces.[49] An unknown person or a person looking slightly westernised may be at increased risk if al-Shabaab stops the vehicle.[50]

With regard to returnees, the Netherlands General country report on Somalia of December 2013 found that al-Shabaab has been increasingly apprehensive of 'foreign' returnees due to purported espionage for the Somali Federal Government, allied troops or for westernisation.[51] The

[43] MOJ& Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC) www.bailii.org/uk/cases/UKUT/IAC/2014/%5B2014%5D_UKUT_442_iac.html accessed 18 August 2015.
[44] Ibid, para 340.
[45] Ibid, para xii.
[46] HRC 21 July 2011, *Warsame v Canada*, no 1959/2010.
[47] ECtHR 28 June 2011, *Sufi and Elmi v UK*, Appl nos 8319/07 and 11449/07, para 275.
[48] Ibid, para 277.
[49] EASO, *Country of Origin Information Report South and Central Somalia Country Overview* (August 2014) www.refworld.org/docid/542e8b9d4.html accessed 17 August 2015, p 107.
[50] Landinfo, *Security and protection in Mogadishu and South-Central Somalia* (May 2013) www.refworld.org/docid/519c9c0b4.html accessed 17 August 2015, p 35.
[51] Dutch Ministry of Foreign Affairs, *General country report Somalia* (Algemeen Ambtsbericht Somalië) (19

report also stated that Somali people from the diaspora abroad continuously try to avoid going to al-Shabaab controlled areas, even if they have family members or clan ties in the area.[52] To further reiterate the danger posed by al-Shabaab for members of the diaspora, a Danish and Norwegian fact-finding mission found that this group of people has a heightened risk of being targeted by al-Shabaab for attacks, particularly those 'who are visible and do not blend in.'[53] Amnesty International urged the Dutch authorities to cease returning Somali asylum seekers to southern and central Somalia, including al-Shabaab controlled areas as the situation in these regions is still unstable and the level of security fragile.[54] Sending back individuals to these areas would be a violation of non-*refoulement* and all states have an obligation to adhere to the principle of *non-refoulement* under international law.[55]

2.4 Conclusion

The ECtHR pronounced in the *KAB v Sweden* that the situation in Mogadishu no longer amounted to that of general violence[56] as a result of al-Shabaab's diminished power in the city. Nevertheless, this chapter has shown that there is still a degree of on-going violence that may put civilians and possibly returnees at risk of ill-treatment or death, notably as a result of the recent attacks carried out by al-Shabaab. This holds true not only for Mogadishu but also for the rest of southern and central Somalia, particularly (former) al-Shabaab strongholds. As a result of this it is dangerous for returnees to travel through these regions.

It should be concluded that J.W. has established beyond any doubt that there is an "arguable claim" that he would be subjected to ill-treatment upon his expulsion to Somalia on the basis of his individual circumstances. J.W. cannot, or only to a very limited extent, rely on clan affiliation or family ties. As a consequence, he lacks protection in Puntland, Mogadishu and elsewhere. Both the ECtHR and the UK High Court accepted that clan affiliation and family ties are essential in avoiding ill-treatment. Furthermore his profile may be perceived as 'westernised' by al-Shabaab due to the fact that he barely speaks Somali and has no notion of (clan) Somali culture in general which puts him at a greater risk of facing treatment contrary to Article 3 ECHR when travelling through areas controlled by al-Shabaab.

December 2013) www.rijksoverheid.nl/documenten-en-publicaties/ambtsberichten/2013/12/19/algemeen-ambtsbericht-somalie-2013-12-19.html accessed 17 August 2015.

[52] Dutch Ministry of Foreign Affairs, *General country report Somalia* (Algemeen Ambtsbericht Somalië) (19 December 2013) www.rijksoverheid.nl/documenten-en-publicaties/ambtsberichten/2013/12/19/algemeen-ambtsbericht-somalie-2013-12-19.html accessed 17 August 2015, p 19. See also Dutch Ministry of Foreign Affairs, General country report Somalia (Algemeen Ambtsbericht Somalië) (December 2014), www.rijksoverheid.nl/documenten-en-publicaties/ambtsberichten/2014/12/18/ambtsbericht-somalie.html accessed 17 August 2015, p 72.

[53] Landinfo, *Security and protection in Mogadishu and South-Central Somalia* (May 2013) www.refworld.org/docid/519c9c0b4.html accessed 17 August 2015, p 31.

[54] UN Security Council, *Report of the Secretary-General on Somalia January 2015* (23 January 2015) www.refworld.org/docid/54d377d74.html accessed 22 February 2015.

[55] Amnesty International, *Forced returns to South- and Central Somalia, including to Al Shabaab areas: a blatant violation of international law* (23 October 2014).

[56] ECtHR 15 November 1996 (GC), *Chahal v UK*, Appl no 22414/93.

3 Is Canada a safe third country for J.W.?

3.1 Introduction

Chapter 2 concluded that there is an "arguable claim" that J.W. would be submitted to ill-treatment upon his expulsion to Somalia. This chapter will address the question whether Canada is a safe third country for J.W. For this purpose it should be examined whether Canada 'offers sufficient guarantees to prevent the person concerned being removed to his country of origin without an assessment of the risks faced'.[57]

The ECtHR differentiates between third countries which are parties to the ECHR and third countries, which are not. In regard to states who are party to the ECHR there is a rebuttable presumption that these states will protect applicants from further chain *refoulement* to their countries of origin, because they are obliged to respect the ECHR. However, in regard to other third countries there cannot be such a presumption. A country wishing to transfer a person to such a third country needs to assess in how far the transferred person would be protected from further *refoulement*.[58]

As the Court showed in *Hirsi Jamaa* one of the factors influencing such an assessment is the human rights record of the intermediary country.[59] In the case of Libya this raised considerable doubts and eventually led to the ECtHR finding a violation of Article 3 ECHR in Italy´s transfer of refugees to Libya. According to the ECtHR Italy could have known that expellees will be certainly sent further from Libya to their countries of origin.[60]

Canada is party to the Universal Declaration of Human Rights, the International Covenant for Civil and Political Rights, the 1951 Refugee Convention and its 1967 Protocol and the Convention against Torture of 1984 (CAT). These treaties place some restrictions on the ability to remove individuals to certain risks of harm. Furthermore section 12 of the Canadian Charter of Rights and Freedoms (the Canadian Charter) conveys that 'everyone has the right not to be subjected to any cruel and unusual treatment or punishment'. This provision is similar to the prohibition of torture laid down in Article 3 ECHR.

It may therefore be argued that the Dutch authorities may depart from the presumption that Canada is safe for J.W., where the issue of expulsion is concerned. However, this chapter shows that this presumption should be considered rebutted in the case of J.W., because the protection offered by Canadian law is not comparable to that offered by the ECHR in two respects. First, the Canadian authorities may balance the interest of an applicant not to be expelled to a country where he faces a real risk of ill-treatment against the Canadian interests to protect public order. Secondly, the procedural guarantees for second applications for international protection are insufficient. Both issues are relevant in the case of J.W. Public order concerns were the reason for the withdrawal of his residence permit and the subsequent attempt to deport him to Somalia. And any protection that J.W. might derive from Canada's treaty obligations would depend from the scrutiny of a subsequent application.

[57] ECtHR (GC) 23 February 2012, *Hirsi Jamaa and others v Italy*, Appl no 27765/09, para 147.
[58] T Kritzman-Amir and T Spijkerboer, 'On the Morality and Legality of Borders: Border Politics and Asylum Seekers' 26 *Harvard Human Rights Journal* (2013), p 17 and further.
[59] ECtHR (GC) 23 February 2012, *Hirsi Jamaa and others v Italy*, Appl no 27765/09.
[60] The Court arrived at a similar conclusion in its only other case dealing with indirect *refoulement* outside of the Council of Europe, *Abdolkhani and Karimnia v Turkey.*

3.2 Public order and balancing

The Canadian authorities and the ECtHR differ in the approach of assessing the legality of the deportation when deporting a non-citizen designated a security risk to a country where he faces a substantial risk of torture. Thus, the ECtHR ruled in *Chahal* as follows:

> The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.[61]

In *Suresh* the Supreme Court of Canada stated that 'international treaty norms are not, strictly speaking, binding Canada unless they have been incorporated into Canadian law by enactment' in for example the Canadian Charter of Human Rights.[62] In this case the Supreme Court opted for a balancing approach in expulsion cases. The threat to national security that the non-citizen poses is balanced against the risk and harm of torture to that person if deported. The balance struck must conform with section 7 of the Canadian Charter.

> Determining whether deportation to torture violates the principles of fundamental justice requires us to balance Canada's interest in combatting terrorism and the Convention refugee's interest in not being deported to torture. Canada has a legitimate and compelling interest in combatting terrorism. But it is also committed to fundamental justice. The notion of proportionality is fundamental to our constitutional system. Thus we must ask whether the government's proposed response is reasonable in relation to the threat.[63]

In *Saadi* the ECHR reaffirmed its judgement in *Chahal* and rejected the balancing test which the Supreme Court of Canada used in *Suresh.*

> Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule. It must therefore reaffirm the principle stated in *Chahal* that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State. In that connection, the conduct of the person concerned, however undesirable or dangerous, cannot be taken into account.[64]

---

[61] ECtHR 15 November 1996, *Chahal v UK,* Appl no 22414/93.
[62] *Suresh v Canada* (Minister of Citizenship and Immigration) [2002] 1 SCR 3, [2002] SCC 1, para 60
[63] Ibid, para 47.
[64] ECtHR 28 February 2008 (GC), *Saadi v Italy*, App no 37201/06, para 138.

Thus, where national security issues are involved the material obligation as regards *non-refoulement* which Canada considers itself to be bound by, differs substantially from the *non-refoulement* obligations under the ECHR, CAT and ICCPR. It should be noted that the (non-binding) supervision by the bodies monitoring compliance with the CAT and the ICCPR does not add any procedural guarantee. On the contrary, in the very case of J.W. himself Canada stuck to its balancing approach although the HRC had stated in clear terms that expulsion was in breach of Article 7 ICCPR.

3.3 The Repeated Pre-Removal Risk Assessment (PRRA)

The pre-removal risk assessment (PRRA) provides an opportunity for individuals facing removal from Canada to seek protection on the basis of a personalized risk they would face if removed. The PRRA acceptance rate from 2005-2010 was 2.1%.[65] Significantly, 914 PRRAs rejected during that period included a danger opinion. A danger opinion considers not only risk upon return, but also, whether someone poses a danger to Canada, and in some circumstances, the severity of the criminality. It thus opens the possibility that the potential impediment of "risk upon return" could be outweighed by other factors as part of the assessment.

This is explicitly expressed through Article 115 of the Canadian Immigration and Refugee Protection Act (IRPA) which states that Canada's commitment to *non-refoulement* may be outweighed by a danger opinion, resulting in removal to risk. Article 115(2)(a) IRPA conveys that *non-refoulement* does not apply to a person with serious criminality who in the opinion of the Minister is a 'danger to the public in Canada'. Article 101(2) IRPA appoints serious criminality to an applicant who has had a conviction for an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years. The danger opinion has not yet been fully subjected to constitutional scrutiny. Therefore it is unclear whether deportation to torture (or death) is ever permissible under the Canadian Charter.

3.4 Canada's non-compliance with the ICCPR and CAT

The decision by the Supreme Court of Canada in *Suresh* and especially the Canadian legislation allowing for a balancing act have been fiercely criticised by both the HRC and the ComAT, with little or no factual reaction from the Canadian side so far.[66] Canada is not only not reacting to the HRC and ComAT Concluding Observations and other requests for it to change its approach on this issue. It is also disregarding both bodies´ views and requests for interim measures in individual complaints brought in against Canada. In accordance to its balancing approach it is still expelling individuals to third countries.[67]

Such a situation occurred also in regard to J.W., as Canada disregarded the HRC´s views not to send him back to Somalia.[68] This issue will once again be brought up on the agenda of the HRC in relation to its review of Canada´s sixth periodic report. Amnesty International in its submission in regard to its briefing with the HRC in relation to Canada´s review has already strongly criticised Canada´s approach in this area with explicitly referring to the J.W.'s case as a bad example of the

[65] J Bond, *Country Specific Report: Canada*, (Ottawa, University of Ottawa, 2015) cites the PRRA statistics available online for members only through Canadian Council for Refugees.
[66] See eg ComAT, Concluding Observations regarding Canada (25 June 2012, CAT/C/CAN/CO/6), para 9 and further and HRC, Concluding Observations regarding Canada (20 April 2006, CCPR/C/CAN/CO/5), para 15.
[67] See eg ComAT 16 November 2007, *Bachan Singh Sogi v Canada*, no 297/2006, paras 1.2-1.4.
[68] HRC 21 July 2011, *Warsame v Canada*, no 1959/2010, para 9

country's disregard for human rights in this area.[69]

Therefore, given the fact that previous HRC and ComAT observations have not changed Canada´s approach in this area, it can also not be expected that this issue is likely to change soon. As the ComAT stated, Canada´s refusal to reform its legislation, particularly the respective provisions in the IRPA, and its continued disregard to respect the Committee, 'might undermine its commitment to the Convention'.[70]

It can be added here, that this can also undermine its general commitment to human rights and make it questionable whether it is a safe third country to return individuals to, who may become subject of such a balancing act.[71] As the ECtHR itself indicated:

> The existence of domestic laws and accession of international treaties guaranteeing respect for fundamental rights in principle are not themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.[72]

In drawing inspiration from the ECtHR´s case law on diplomatic assurances, it can be stated that the fact that the applicant has been previously ill-treated in the receiving state should also be taken into consideration in assessing whether Canada is a safe country for the applicant to be returned to.[73] Given the history of J.W.'s case this has clearly occurred. In addition to that Canada did not use its possibility to provide clearly that the case of the applicant will be reconsidered in light of Canada´s international human rights obligations and instead preferred to solely refer to the applicable national law in its submission to the Dutch government. This once again allows for a balancing act between the prohibition of torture and ill-treatment and public security interests.

3.5 Conclusion

It may be presumed that Canada is safe for J.W., because it is party to human rights treaties which contain a prohibition of *refoulement.* Furthermore the Canadian Charter seems to offer a similar level of protection as Article 3 ECHR. Nevertheless this presumption should be considered rebutted in J.W.'s case due to Canada's lack of procedural safeguards. The main problem is that the Canadian authorities may balance the interest of an applicant not to be expelled to a country where he faces a real risk of ill-treatment against the Canadian interests to protect public security. Therefore the expulsion of J.W. from the Netherlands to Canada may result in his subsequent expulsion to Somalia; even though there is an "arguable claim" that he faces a risk of *refoulement* in that country. In fact the Canadian authorities already tried to expel J.W. to Somalia, while the HRC had concluded that

---

[69] Amnesty International, *Canada – Submission to the United Nations Human Rights Committee – 112th Session of the Human Rights Committee* (2014) www.binternet.ohchr.org/Treaties/CCPR/Shared%20Documents/CAN/INT_CCPR_ICO_CAN_17833_E.pdf accessed 18 August 2015, p 18.

[70] Committee against Torture, supra note 86, para 10

[71] Especially if they have already been subject to such a balancing act, as in the case of J.W.

[72] ECtHR 28 February 2008 (GC), *Saadi v Italy*, App no 37201/06, para 147. See also T Kritzman-Amir and T Spijkerboer, 'On the Morality and Legality of Borders: Border Politics and Asylum Seekers' 26 *Harvard Human Rights Journal* (2013), p 20.

[73] ECtHR 17 January 2012, *Othman (Abu Quatada) v UK*, App No 8139/09, para 189

this expulsion would lead to a violation of the prohibition of *refoulement*.

The ECtHR prohibits direct as well as indirect *refoulement* (via Canada to Somalia).[74] It has held that the prohibition of *refoulement* guaranteed by Article 3 ECHR is absolute and therefore does not allow a balancing test such as that applied in Canada.[75] Therefore J.W.'s expulsion from the Netherlands to Canada will arguably result in a violation of Article 3 ECHR.

[74] ECtHR (GC) 23 February 2012, *Hirsi Jamaa and others v Italy*, Appl no 27765/09, paras 146- 147, ECtHR (GC) 21 January 2011, *MSS v Belgium and Greece*, Appl no 30696/09, paras 342-343.
[75] ECtHR 28 February 2008 (GC), *Saadi v Italy*, App no 37201/06, para 138.

4 Expulsion to Torture: A Case Study on the ECtHR's Reliance on Materials Related to the HRC and the ComAT

4.1 Introduction

A particularity of J.W.'s case is that it has already been dealt with by the HRC in a complaint against Canada[76] and now has to be decided by the ECtHR with the Netherlands being the state party in question. An obvious question therefore is whether, and if so in how far the ECtHR should follow the HRC´s views. This UN body already assessed several facts relevant also in regard to the proceedings before the ECtHR and the risk of torture and ill-treatment J.W. may face if returned to Somalia.[77]

As a starting point, it should be observed that a judicial body, such as the ECtHR, should be careful when referring to non-binding views handed down by quasi-judicial bodies.[78] The ECtHR is not bound by the views of UN bodies, nor are those bodies required to take the ECtHR's judgments into consideration. However, the ECtHR, the Committee against Torture (ComAT) and the HRC are part of the same international legal order and fulfill broadly the same functions in regard to *non-refoulement* to torture or ill-treatment, based on treaty provisions mostly strongly resembling each other.

Given this similarity, coordination between those bodies seems to be necessary to provide for consistency in international human rights protection and doctrinal unity of the international legal system.[79] There is a risk of divergent decisions on the same issue by those bodies.[80] The rules governing the admissibility of cases in both the ECtHR and the two UN bodies allow for some sort of parallel and successive forum shopping and cases such as that of J.W. have the potential to create inconsistencies.[81] Divergent decisions are, given the different backgrounds and mandates of these human rights (quasi-) judicial bodies, neither avoidable nor completely undesirable. However, some mutual consideration of each other's views can contribute to a minimum degree of coherence and transparency in regard to the reasons why those different bodies may take divergent stances on similar issues.[82]

Given these considerations, the aim of this chapter of the expert opinion will be to assess the ways in which the ECtHR relies in its judgments on the materials related to the HRC and ComAT on similar issues and through this contribute to a more convergent human rights application. The overview of the case law presented, shows that the ECtHR often relies on HRC and ComAT materials. Therefore the ECtHR in the J.W. case should give due regard to the HRC´s views in regard to *non-refoulement* of J.W. It was decided to include the ComAT into this short overview, as it is the only

[76] HRC 21 July 2011, *Warsame v Canada*, no 1959/2010, para 9

[77] The fact that several years have passed since the HRC´s decision of course has to be given due regard in the overall assessment.

[78] M Forowicz, *The reception of international law in the European Court of Human Rights* (Oxford, Oxford University Press, 2010), p 188.

[79] C Costello, 'Human rights and the elusive universal subject: immigration detention under international human rights and EU law' 19 *Indiana Journal of Global Legal Studies* (2012), p 301 and LGP Specker, 'Remedying the Normative Impacts of Forum Shopping in International Human Rights Tribunals' 2 *The New Zealand Postgraduate Law E-Journal* (2005), p 30.

[80] C Phuong, 'The Relationship Between the European Court of Human Rights and the Human Rights Committee: Has the 'Same Matter' Already Been 'Examined'?' 7 *Human Rights Law Review* (2007), p 387.

[81] See Art 5(2)(a) of the first Optional Protocol to the ICCPR, Art 35(2)(b) ECHR and Art 22(5)(a) CAT.

[82] LGP Specker, 'Remedying the Normative Impacts of Forum Shopping in International Human Rights Tribunals' 2 *The New Zealand Postgraduate Law E-Journal* (2005), p 33.

human rights body containing an explicit prohibition of *refoulement* to torture in Article 3 CAT and the materials it produces can be of great value in cases such as the one in question here.

The focus of the analysis will be on cases dealing with expulsion or extradition of individuals to a country where the claimant allegedly faces torture or ill-treatment and expulsion to third countries, which may result in the individuals facing torture or ill-treatment upon subsequent expulsion. Although it can be claimed that the scope of protection offered under the respective articles of for example the ECHR and the ICCPR is not always the same, the articles, which are the focus of this inquiry, namely Article 3 ECHR as well as Article 7 ICCPR and Article 3 CAT, seem to be fairly consistent in scope and to a wide extent also in wording.[83]

4.2 Design of the Study

In order to obtain the sample for analysis, a search in the ECtHR HUDOC database was conducted by using specific search terms ('Human Rights Committee'; 'Committee against Torture'). The search was limited to ECtHR cases dealing with violations of Article 3 ECHR, and in a second step even further limited to cases dealing with expulsion or extradition of individuals to their countries of origin or third countries. This delivered 36 expulsion and extradition cases in which some sort of reference to HRC or ComAT materials can be found. In an analysis of the respective cases, two general categories of the ECtHR referring to international materials related to the HRC and the ComAT have been the focus of this research. First, reliance on HRC or ComAT country reports, comments and/or views for *the validation or assessment of the facts* of a case. Second, such reliance by the ECtHR in *its reasoning* in the judgment. The results of this research coded into these two categories will be discussed and analysed in detail in the following sections.

4.3 Reliance on HRC and CAT materials for validation of facts

Within the 36 cases found in the course of this research, 33 offered some sort of a reference to HRC or ComAT materials aiming at assessing the factual situation in countries being the subject of those cases. Most of the cases identified under this category refer to the Concluding Observations, or Conclusions and Recommendations of the HRC or ComAT in regard to country reports of signatory countries to the ICCPR and the CAT. These Concluding Observations of the HRC or ComAT outline deficiencies of the respective countries in regard to the implementation of and the respect for the rights and principles under the ICCPR and the CAT. They are important evidence, which can demonstrate a general lack of respect to the prohibition of torture and ill-treatment in certain countries or outline higher potential risks of such treatment in regard to certain specific groups of individuals if expelled or extradited.[84] However, they do not only demonstrate the situation in regard to torture and ill-treatment in the destination countries of extradition or expulsion measures, but can sometimes also outline human rights deficiencies in regard to the prohibition of *refoulement* to such treatment in the source countries trying to expel or extradite somebody. So for example in the *Al Husin* case there is a reference to ComAT concluding observations on Bosnia stating that the country is too lenient to deport people without a serious prior consideration of the risks they may face in the

[83] Art 3 CAT, however, does not mention the prohibition of inhuman or degrading treatment next to torture in regard to *non-refoulement*.

[84] Such as alleged members of Hizb ut-Tahrir in Uzbekistan. See eg ECtHR 10 April 2012, *Muminov v Russia,* Appl no 42502/06, para 73 and ECtHR 14 November 2013, *Kasymakhunov v Russia,* Appl no 29604/12, para 90.

destination country.[85] All this information can provide valuable insights in a factual case in regard to the extent of the risk of torture that a particular applicant may face after expulsion or extradition.[86]

Next to the Concluding Observations of the ComAT and HRC on country reports the case law and General Comments of those bodies are also occasionally being referred to. ComAT and HRC case law is mostly being relied on in ECtHR cases dealing with similar issues. Therefore it is not surprising that in the *El Masri* case[87] the ECtHR listed the ComAT´s views in *Agiza v Sweden*[88] and the HRC´s views in *Alzery v Sweden*[89] as relevant materials, since all those cases were dealing with the treatment of terrorist suspects by the respective authorities.

As can be seen from this short description HRC and ComAT Concluding Observations on country reports, as well as case law and General Comments by the HRC or the ComAT are being listed as sources for a factual evaluation of the conditions in regard to the situation of torture and ill-treatment in certain countries. Furthermore they serve as sources for the evaluation of the application of similar or identical legal concepts in regard to torture and inhumane or degrading treatment across the globe.

4.4 ECtHR explicitly relying on HRC or ComAT materials in its reasoning in the judgment

The most salient examples of the influence of HRC/ComAT materials on the ECtHR's case law can be found in instances where the Court itself refers to those materials in the reasoning of its judgments. Out of the 36 cases that were subject of this research, the ECtHR in 15 cases explicitly referred to the HRC or ComAT views and reports as support of its reasoning. The Court thereby often explicitly refers to the materials outlined in section 4.3 above. It thereby 'attaches importance to the reports and other international and foreign jurisprudence'.[90] In many cases the ECtHR in questions of law and fact explicitly relies on the 'interpretative assistance'[91] of for example the HRC and the ComAT.

The ECtHR usually relies on materials which serve to outline the generally negative condition of human rights protection in certain countries. In some cases the references target more specific problems and the ECtHR refers to particular procedures or issues having detrimental effects on the protection of the prohibition of torture and ill-treatment.[92] In other cases explicit references to the HRC or ComAT are made to demonstrate more positive human rights developments, such as the acceptance of the complaints mechanisms of these bodies by certain countries as an indicator for

[85] ECtHR 7 February 2012, *Al Husin v Bosnia and Herzegovina,* Appl no 3727/08, para 38.
[86] Concluding observations to country reports can also be used to synthetise the criteria, which are indicators when certain treatment may amount to torture and ill-treatment. A good example is the *Babar Ahmad* case, where the ECtHR on the basis of ComAT Conclusions and Recommendations regarding Luxembourg, Denmark and Switzerland outlined the criteria referred to by the ComAT, which need to be met in order for solitary confinement not to be regarded as torture or ill-treatment. See ECtHR 10 April 2012, *Babar Ahmad and others v UK,* Appl nos 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, para 119.
[87] ECtHR (GC) 13 December 2012, *El-Masri v the former Yugoslav Republic of Macedonia*, Appl No 39639/09, para 108 and further.
[88] ComAT 20 May 2005, *Agiza v. Sweden*, no 233/2003.
[89] HRC 10 November 2006, *Alzery v. Sweden,* no 1416/2005.
[90] ECtHR (GC) 13 December 2012, *El-Masri v the former Yugoslav Republic of Macedonia*, Appl No 39639/09, para 218.
[91] ECtHR 17 January 2012, *Harkins and Edwards v UK*, Appl nos 9146/07 and 32650/07, para 127 and ECtHR 10 April 2012, *Babar Ahmad and others v UK,* Appl nos 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, para 175.
[92] ECtHR 26 April 2007, *Gebremedhin v France*, Appl no 25389/05, para 58 and ECtHR 25 April 2013, *Savriddin Dzhurayev v Russia,* Appl no 71386/10, para 175.

willingness to positive change.[93]

Sometimes the references to HRC and ComAT materials also help the ECtHR to shed some light on and support its arguments in regard to questions of law. This happened in case of the question of the absoluteness of the prohibition of expulsion/extradition to torture in the *Harkins and Edwards* and *Babar Ahmad and others* cases. In *Al Husin* the ECtHR mentioned the HRC and ComAT case law indicating a jus cogens nature of *non-refoulement*.[94]

As can be seen from this short overview of explicit references in the ECtHR's reasoning, it resorts in many instances to the views and opinions of 'such authoritative sources as, for instance, the UN Committee Against Torture and the UN Human Rights Committee […]'.[95] The numbers of references are, however, and understandably lower than the bulk of cases decided upon by the ECtHR in this area. Firstly the ECtHR can rely on any other 'reliable and objective sources'[96] as an aid in regard to the interpretation of facts its interpretation of questions of law, and not necessarily on the HRC or the ComAT. Secondly, sometimes the ECtHR in cases concerning similar issues in the same country once broadly establishes the facts and legal issues on the basis of a variety of international sources. Then, as long as this information is valid, it refers back to this establishment of facts in its own case law in consecutive cases.[97] This is however not a problem, as not in all cases in regard to the prohibition of expulsion or extradition to torture or ill-treatment the HRC and ComAT may be the bodies offering the most suitable materials.

What should be done, and what has already partially been resorted to by the ECtHR, as indicated in this chapter, is that in case of discussions on similar issues before both the ECtHR and the ComAT and HRC, the ECtHR should take the views of these bodies into consideration to ensure a certain coherence in international human rights law. Thereby it should try as much as possible to prevent divergent decisions, which might open the way to further institutional and substantive fragmentation of the regime of human rights law. Such a similarity of issues is to a certain extent definitely indicated in between the HRC´s view in regard to J.W.´s expulsion from Canada and the current case before the Court.

4.5 Conclusion

This chapter showed that the ECtHR currently refers to materials by the HRC and ComAT in its judgments and that it regards these materials as valuable sources in assessing factual and legal questions. Overall it can be stated that the HRC and ComAT, due to their expertise and authority, while not being judicial bodies per se, can still be a fruitful source of insights in regard to human rights protection. A more active interaction of the ECtHR with those UN treaty monitoring bodies can further contribute to more coherence in regard to the international standards of protection. Further enhancing mutual consideration of each other´s decisions and other materials and evidencing this mutual relationship through cross-referencing each other is a right step in this direction. The ECtHR

[93] ECtHR 15 November 2011, *Al Hanchi v Bosnia and Herzegovina*, Appl no 48205/09, para 44 and further.
[94] ECtHR 7 February 2012, *Al Husin v Bosnia and Herzegovina,* Appl no 3727/08, para 48.
[95] ECtHR 19 February 2013, *Yefimova v Russia,* Appl no 39786/09, para 201.
[96] ECtHR 1 April 2010, *Klein v Russia,* Appl no 24268/08, para 100.
[97] See eg ECtHR 5 February 2013, *Zokhidov v Russia,* Appl no 67286/10, para 107, ECtHR 19 February 2013, *Yefimova v Russia,* Appl no 39786/09, para 166, ECtHR 14 November 2013, *Kasymakhunov v Russia,* Appl no 29604/12, para 90, ECtHR 18 September 2012, *Umirov v Russia,* Appl no 17455/11, para 80, ECtHR 25 April 2013, *Savriddin Dzhurayev v Russia,* Appl no 71386/10, para 103 and ECtHR 5 June 2012, *Shakurov v Russia,* Appl no 55822/10, para 100.

has in the J.W. case the chance to continue this tradition of fruitful consideration of materials derived from UN treaty monitoring bodies and can be encouraged to consider the views produced by the HRC in regard to the risks the applicant may face upon *refoulement* to Somalia, given his particular individual condition.

5 Conclusion

The ECtHR already had the chance in a few cases to consider situations of potential indirect *refoulement*.[98] In these cases the ECtHR as a first step looks at the risk in the applicant's country of origin, the country to which the applicant can in the end be expelled to. In this expert opinion it was concluded that given his personal circumstances J.W. has an "arguable claim" that he would be subjected to ill-treatment upon his expulsion to Somalia.

After establishing the risk in the country of origin, the ECtHR in a second step moves on to consider the risk of the intermediary safe third country factually sending the applicant back to the country where he risks ill-treatment. It thereby differentiates between third countries which are parties to the ECHR and third countries, which are not. In regard to states who are party to the ECHR there is a rebuttable presumption that these states will protect applicants from further chain *refoulement* to their countries of origin, because they are obliged to respect the ECHR. However, this is different with regard to other third countries. A country wishing to transfer a person to such a third country needs to assess in how far the transferred person would be protected from further *refoulement*.[99]

Canada is a country, which generally enjoys a good human rights reputation and is party to many international treaties including the ICCPR and the CAT. Article 7 ICCPR and Article 3 CAT require Canada to refrain from extraditing or expelling a person to a country where he faces a real risk of torture or ill-treatment. Therefore it might be implied that Canada offers a similar level of protection as parties to the ECHR and therefore should also enjoy a presumption of safety.

However, this expert opinion argued that, even if such a presumption should be implied, it must be considered as rebutted in J.W.'s case. The reason for this is that the Canadian Supreme Court stated in *Suresh* that the Canadian authorities may balance the Canadian concerns of public security against the interests of the individual concerned, such as his possible *refoulement*. Such a balancing act is also explicitly being referred to in the Canadian Immigration and Refugee Protection Act (IRPA).

Such a balancing act is contrary to the absolute status of the prohibition of torture, applied by the ECtHR, HRC and the ComAT. Even if the applicant´s case would be subject to a new review in Canada and a new pre-removal risk assessment under the Canadian IRPA, the fact that Canada is applying a balancing approach towards its *non-refoulement* obligations makes it very likely that J.W. could still be sent back to Somalia. His clear personal risk of facing torture or ill-treatment in that country, as outlined in this expert opinion, will not change that.

It should be concluded that there is a considerable risk that, upon his return to Canada, J.W. can be further sent back to his country of origin, where he faces the threat of torture or inhuman, cruel and degrading treatment. This would result in chain *refoulement*. For these reasons Canada cannot be regarded as a safe third country to which J.W. can be returned.

---

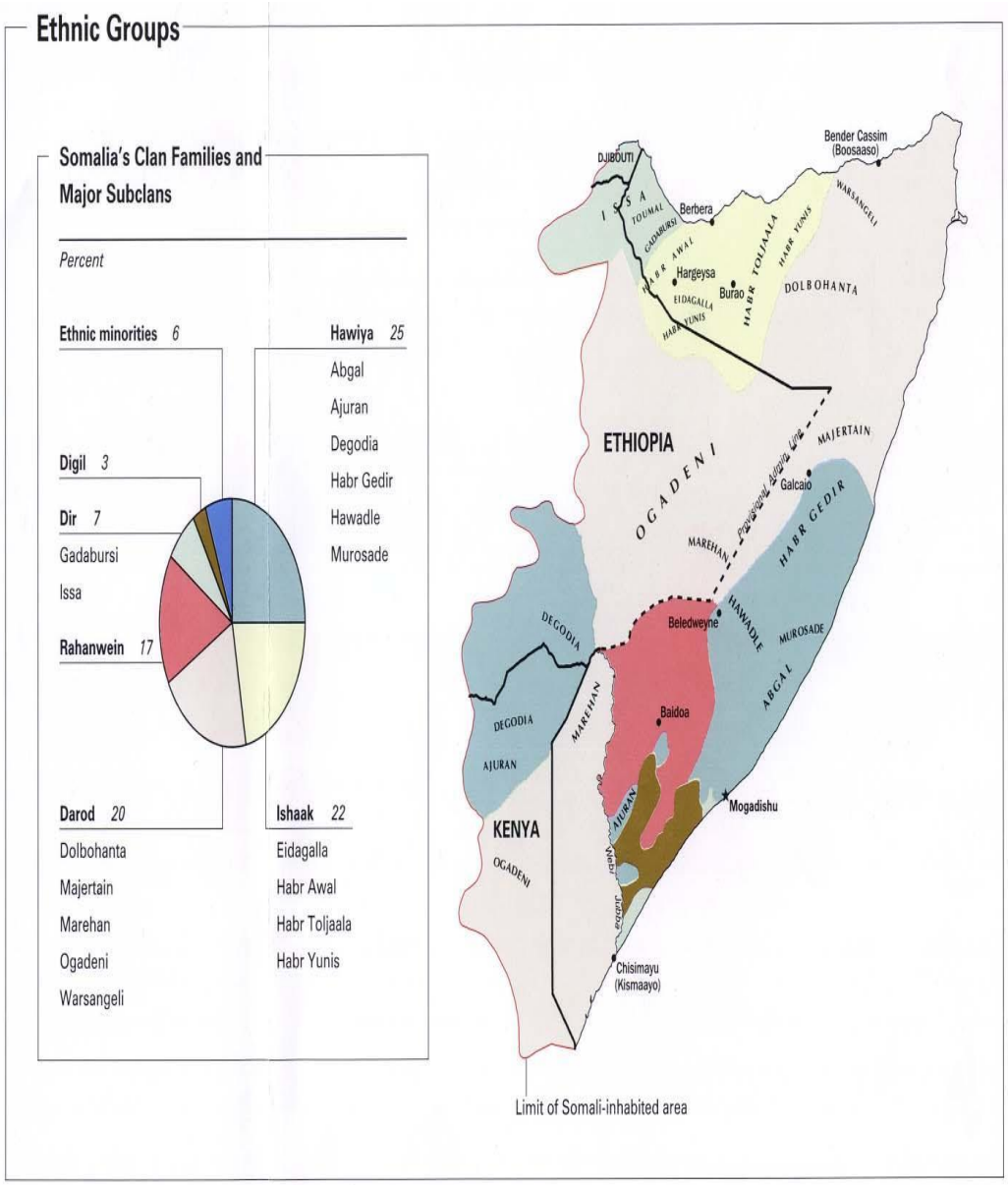
[98] ECtHR 7 March 2000, *TI v UK,* Appl no 43844/98, ECtHR 2 December 2008, *KRS v UK,* Appl no 32733/08, ECtHR 22 September 2009, *Abdolkhani and Karimnia v Turkey,* Appl no 30471/08, ECtHR (GC) 21 January 2011, *MSS v Belgium and Greece*, Appl no 30696/09 and ECtHR (GC) 23 February 2012, *Hirsi Jamaa and others v Italy*, Appl No 27765/09.

[99] T Kritzman-Amir and T Spijkerboer, 'On the Morality and Legality of Borders: Border Politics and Asylum Seekers' 26 *Harvard Human Rights Journal* (2013), pp 17 and further.

Appendices

Appendix I

Appendix II


Ethnic Groups
Somalia's Clan Families and Major Subclans
Percent
Ethnic minorities 6
Digil 3
Dir 7
Gadabursi
Issa
Rahanwein 17
Darod 20
Dolbohanta
Majertain
Marehan
Ogadeni
Warsangeli
Hawiya 25
Abgal
Ajuran
Degodia
Habr Gedir
Hawadle
Murosade
Ishaak 22
Eidagalla
Habr Awal
Habr Toljaala
Habr Yunis
DJIBOUTI
Bender Cassim (Boosaaso)
Berbera
Hargeysa
Burao
ETHIOPIA
OGADENI
Galcaio
Beledweyne
Baidoa
Mogadishu
KENYA
Chisimayu (Kismaayo)
Limit of Somali-inhabited area