

Court File Nos. 35677
35685
35688
35388
35958

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

Between:

Court File No. 35677

JESUS RODRIGUEZ HERNANDEZ

APPELLANT
(Respondent in the Court Below)

-and-

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

RESPONDENT
(Appellant in the Court Below)

Between:

Court File No. 35685

B306

APPELLANT
(Respondent in the Court Below)

-and-

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

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(Appellant in the Court Below)

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J.P. ET AL

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MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

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(Appellant in the Court Below)

Between:

Court File No. 35388

B010

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(Appellant in the Court Below)

-and-

MINISTER OF CITIZENSHIP AND IMMIGRATION

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(Respondent in the Court Below)

Between:

Court File No. 35958

FRANCIS ANTHONIMUTHU APPULONAPPA ET AL.

APPELLANTS
(Respondents in the Court Below)

-and-

HER MAJESTY THE QUEEN ET AL.

RESPONDENTS
(Appellants in the Court Below)

**MOTION FOR LEAVE TO INTERVENE OF
AMNESTY INTERNATIONAL (CANADIAN SECTION, ENGLISH BRANCH)**

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**NOTICE OF MOTION FOR LEAVE TO INTERVENE OF
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Counsel for Amnesty International (Canadian Section, English Branch)

TAKE NOTICE that Amnesty International Canada (English Branch) (“AI Canada”) hereby applies to a Judge of this Court, pursuant to rules 55 to 57 of the *Rules of the Supreme Court of Canada* for an order:

- (a) granting AI Canada leave to intervene in this appeal;
- (b) permitting AI Canada to file a factum in support of our intervention;
- (c) permitting AI Canada to make oral submissions at the hearing of this appeal; and
- (d) granting any further relief as the said Judge may deem appropriate.

AND FURTHER TAKE NOTICE that the Affidavit of Alex Neve, sworn 2 October 2014 and such further or other material as counsel may advise, will be referred to in support of the present motion.

AND FURTHER TAKE NOTICE that said motion shall be made on the following grounds:

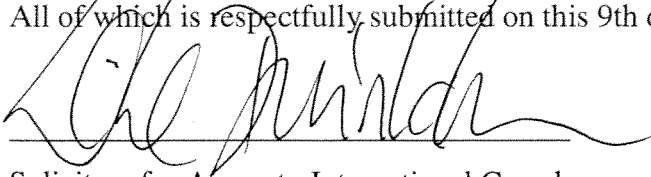
1. AI Canada seeks leave to intervene in this appeal with respect to Canada’s international human rights obligations in the context of people smuggling.
2. If granted leave to intervene, AI Canada will submit that sections 37(1)(b) and 117 of the *Immigration and Refugee Protection Act (IRPA)* must be construed in accordance with Canada’s international human rights and obligations. Such an approach is required by Canada’s commitments under the *United Nations Convention against Transnational Crime (CATOC)*, the *Protocol against the Smuggling of Migrants by Land, Sea and Air (Migrant Smuggling Protocol)*, and the *Convention Relating to the Status of Refugees (Refugee Convention)*.
3. AI Canada is the English Canadian section of Amnesty International, a worldwide voluntary movement founded in 1961 that works to prevent some of the gravest violations of people’s fundamental rights.
4. AI Canada has a significant interest in this Court’s interpretation of sections 37(1)(b) and 117 of the *IRPA*. AI Canada is concerned about ensuring the right of all refugees to seek and receive asylum, including when refugees resort to people smugglers as a means to flee persecution or other human rights violations. Such refugees should not be penalized by being inappropriately found to be people smugglers, and should not be exposed to a risk of

refoulement because of their manner of escape. There are also circumstances in which individuals assist refugees in attaining safety out of compassion and not for financial or material gain. AI Canada also has an interest in ensuring that such persons are not penalized for their actions, as it may impede refugees' ability to exercise their right to seek and receive asylum.

5. AI Canada has a unique expertise in international human rights and refugee law. AI Canada regularly intervenes in judicial proceedings, including before this Court, to provide assistance with respect to the interpretation of international norms and treaties.
6. AI Canada recently intervened before this Court in *Luis Alberto Hernandez Febles v. Minister of Citizenship and Immigration* (judgment reserved) and *Rachidi Ekanza Ezokola v. Minister of Citizenship and Immigration*, 2013 SCC 40, [2013] 2 SCR 678, both of which concerned the scope of permitted exclusions from refugee protection under the *Refugee Convention*.
7. AI Canada has also provided guidance to this Court with respect to international legal norms relevant to Canada's immigration and refugee system in several other cases, including: *Minister of Citizenship and Immigration and Minister of Safety and Emergency Preparedness v. Harkat*, 2014 SCC 37, 23 Imm LR (4th) 1; *Gavrila v. Canada*, 2010 SCC 57, [2010] 3 SCR 342; *Charkaoui v. Canada (Citizenship and Immigration) No. 2*, 2008 SCC 38, [2008] 2 SCR 326; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 SCR 44, and *Suresh v. Canada (Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3.
8. If granted leave to intervene, AI Canada would argue the interpretation of people smuggling under sections 37(1)(b) and 117 of the *IRPA* must conform to Canada's international human rights obligations. The *CATOC* and the *Migrant Smuggling Protocol* have a dual purpose – to combat people smuggling *while* protecting human rights. An interpretation of people smuggling that achieves both of these goals distinguishes between refugees in need of protection and those who assist them in reaching safety on the one hand, and smugglers who profit from this human suffering on the other. An interpretation that fails to recognize this distinction is incorrect and has serious human rights consequences. It

denies refugee claimants their right to seek and receive asylum, penalizes them for their manner of arrival to Canada, and exposes them to a risk of *refoulement*.

All of which is respectfully submitted on this 9th day of October 2014

A handwritten signature in black ink, appearing to read 'The Solicitors', written over a horizontal line.

Solicitors for Amnesty International Canada

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AFFIDAVIT OF ALEX NEVE
(in support of the application for intervention of Amnesty International
(Canadian Section, English Branch))
(Rule 57(1) of the Rules of the Supreme Court of Canada)

I, **ALEX NEVE**, of the City of Ottawa, in the Province of Ontario, make oath and state as follows:

I am the Secretary General of Amnesty International (Canadian Section, English branch) (AI Canada) and have knowledge of the matters contained in this affidavit.

1. I was hired as Secretary General of AI Canada in January 2000. Prior to assuming this position I had been an active member of Amnesty International (AI) for 15 years, during which time I was employed by AI Canada and by AI's International Secretariat in London, England for 3 years. My activities with AI have included numerous research missions to monitor and report on human rights abuses, preparing international and national reports on issues of concern to AI, and participating in AI national and international meetings.
2. In addition to my experience with AI, I hold a Master of Laws degree in International Human Rights Law, with distinction, from the University of Essex in the United Kingdom.
3. For my human rights work in Canada and abroad, I was appointed an Officer of the Order of Canada in 2007.
4. As Secretary General for AI Canada, I am responsible for overseeing the implementation of AI's mission in Canada. This includes supervising staff and ensuring there is a national network of volunteers to carry out AI's work in the country. My responsibilities also include ensuring AI's expertise is available to decision-making bodies and the general public, communicating and cooperating with others who are interested in advancing international human rights issues, and educating the public on human rights.

Amnesty International and Amnesty International Canada: The Organizations

5. AI is a worldwide voluntary movement founded in 1961 that works to prevent some of the gravest violations of people's fundamental human rights.
6. AI is impartial and independent of any government, political persuasion, or religious creed. AI and AI Canada are financed by subscriptions and donations from their membership, and receive no government funding.
7. There are currently more than 3 million AI members in over 162 countries. There are more than 7,500 AI groups, including local groups, youth or student groups, and professional groups, in more than 90 countries and territories throughout the world. In 55 countries and territories, the work of these groups is coordinated by national sections like AI Canada.
8. AI Canada is the English Canadian branch of the global AI movement.
9. The organizational structure of AI Canada includes a board of 10 directors elected across the country. There are specific country and issue-coordinators in each region and province. AI Canada has a staff of about 50 employees and membership of approximately 60,000 people.

The Vision and Work of Amnesty International

10. AI Canada shares the vision of AI: a world in which every person enjoys all of the human rights enshrined in the *Universal Declaration of Human Rights (UDHR)* and other international instruments.
11. In pursuit of this vision, AI's mission is to conduct research and take action to prevent and end grave abuses of all human rights – civil, political, economic, social and cultural.
12. In 1977, AI was awarded the Nobel Peace Prize for its work in promoting international human rights.
13. AI seeks to advance and promote international human rights at both the international and national levels. As part of its work to achieve this end, the organization:
 - (a) monitors and reports on human rights abuses;

- (b) participates in domestic judicial proceedings;
- (c) participates in national legislative processes and hearings; and
- (d) participates in international committee hearings and other international human rights processes.

a) Monitoring and Reporting on Human Rights Abuses

14. AI's investigative work is carried out by human rights researchers who receive, cross-check, and corroborate information from many sources, including prisoners and their families, lawyers, journalists, refugees, diplomats, religious groups, and humanitarian and other human rights organizations. Researchers also obtain information through newspapers, web-sites, and other media outlets. AI also sends approximately 130 fact-finding missions to some 70 countries each year to assess what is happening on the ground.

15. AI uses its research to prepare reports, briefing papers, newsletters, and campaigning materials. Among its publications is the annual Amnesty International Report on human rights in countries around the world. AI Canada has participated in preparing these reports and has assisted distributing them in Canada. AI's research is recognized around the world as accurate, unbiased, and credible, which is why AI reports are widely consulted by governments, intergovernmental organizations, journalists, and scholars.

16. Canadian courts, including the Supreme Court, have recognized AI's research as credible. The following judgments have emphasized the important evidentiary role of AI reports: *Mahjoub (Re)*, 2010 FC 787, 373 FTR 36; *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1503, [2007] 4 FCR 247; *Thang v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 457, 35 Imm LR (3d) 241; *Shabbir v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 480, 250 FTR 299; *Ertuk v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1118, 250 FTR 299; and *Suresh v. Canada (Minister of Citizenship and Immigration, et al)*, 2002 SCC 1, [2002] 1 SCR 3.

b) Participation in Judicial Proceedings

17. AI Canada has appeared before the Supreme Court as an intervener in cases involving Canada's obligations towards refugees in the following cases:

- (a) *Luis Alberto Hernandez Febles v. Minister of Citizenship and Immigration*, Court File No. 35215 (judgment reserved) (presented submissions with respect to the interpretation of the Article 1F(b) exclusion provision of the *Convention Related to the Status of Refugees (Refugee Convention)*);
- (b) *Rachidi Ekanza Ezokola v. Minister of Citizenship and Immigration*, 2013 SCC 40, [2013] 2 SCR 678 (proposed guiding principles to help ensure that Canadian decision-makers' application of Article 1F(a) of the *Refugee Convention* is consistent with international law);
- (c) *Gavrila v. Canada (Justice)*, 2010 SCC 57, [2010] 3 SCR 342 (presented submissions with respect to the interplay between extradition and refugee protection); and
- (d) *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 (submitted that the absolute prohibition on torture is a peremptory norm of customary international law).

18. AI Canada has also intervened before the Supreme Court of Canada regarding other international human rights issues in the following cases:

- (a) *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, 24 Imm LR (4th) 1 (argued the *Immigration and Refugee Protection Act (IRPA)*'s Special Advocate regime violates international norms and constitutional principles of procedural fairness);
- (b) *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, 241 ACWS (3d) 2 (submitted that section 35 of the *Constitution Act, 1982* can only achieve its basic purpose of genuine reconciliation if the framework for Aboriginal rights respects the principles of international human rights law);
- (c) *Estate of the late Zahra (Ziba) Kazemi, et al v. Islamic Republic of Iran, et al*, Court File No. 35034 (judgment reserved) (presented submissions regarding the non-applicability of jurisdictional immunity under the *State Immunity Act* to state-sanctioned acts of torture);

- (d) *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 SCR 572 (presented submissions with respect to the forum of necessity doctrine and international standards of jurisdiction and access to justice);
- (e) *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 SCR 44 (intervened with respect to what triggers a Canadian citizen's section 7 life, liberty, and security of the person interests, and the content of the principles of fundamental justice);
- (f) *Charkaoui v. Canada (Minister of Citizenship and Immigration) No. 2*, 2008 SCC 38, [2008] 2 SCR 326 [*Charkaoui 2*] (intervened with respect to whether the systematic destruction of interview notes and other information by the Canadian Security Intelligence Service in the context of security certificate proceedings violates international norms and the constitutional principles of procedural fairness);
- (g) *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 [*Charkaoui 1*] (presented submissions on the constitutionality of the procedural protections in the *IRPA*'s security certificate regime and on the arbitrary detention of foreign nationals under that regime).
- (h) *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 SCR 269 (argued the right to the protection of mental integrity and to compensation for its violation has risen to the level of a peremptory norm of international law, which prevails over the doctrine of sovereign immunity);
- (i) *United States v. Burns*, 2001 SCC 7, [2001] 1 SCR 283 (presented submissions regarding the international movement towards the abolition of capital punishment);
- (j) *Reference Re Ng Extradition (Can.)*, [1991] 2 SCR 858, 84 DLR (4th) 498 (presented submissions regarding the international movement towards the abolition of capital punishment); and

- (k) *Kindler v. Canada (Minister of Justice)*, [1991] 2 SCR 779, 84 DLR (4th) 438 (presented submissions regarding the international movement towards the abolition of capital punishment).

19. In addition to advocacy before the Supreme Court of Canada, AI Canada has appeared before other Canadian courts as an intervener or applicant in the following cases:

- (a) *France v. Diab*, 2014 ONCA 374, 120 OR (3d) 174 (submitted that Canada's obligations under international human rights law compel Canada to refuse extradition for anyone for whom there is a real risk of admission of evidence derived from torture at the trial following extradition);
- (b) *The Attorney General of Canada v. Pictou Landing Band Council and Maurina Beadle*, Court File No. A-158-13 (leave to intervene before the Federal Court of Appeal granted, but government discontinued the appeal) (prepared submissions as Canada's international human rights obligations to ensure that the level of health care services and funding available to a First Nations child living on reserve is equal to that received by a child living off reserve);
- (c) *Tanudjaja et al v. Attorney General of Canada and Attorney General of Ontario*, Court File No. C57714 (Ontario Court of Appeal, judgment reserved) (presented submissions regarding the nature of Canada's international human rights obligations and the justiciability of social and economic rights);
- (d) *Attorney General of Canada v. Canadian Human Rights Commission et al*, 2013 FCA 75, 76 CRR (2d) 233 (intervened with respect to the nature of Canada's international human rights obligations and the best interests of the child principle);
- (e) *Tanudjaja et al v. Attorney General of Canada and Attorney General of Ontario*, 2013 ONSC 1878, 281 CRR (2d) 220 (presented submissions regarding the nature of Canada's international human rights obligations and the justiciability of social and economic rights);
- (f) *Choc et al v. HudBay et al*, 2013 ONSC 1414, 116 OR (3d) 674 (made arguments regarding corporate accountability for human rights abuses overseas);

- (g) *Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe v. Canada*, 2008 FCA 229, [2009] 3 FCR 136 (intervened with respect to the validity of the US-Canada *Safe Third Country Agreement*, considering the United States' failure to comply with its international human rights obligations, particularly the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*);
 - (h) *Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of the Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada*, 2008 FCA 401, [2009] 4 FCR 149 (submitted that Canada breached its obligations under the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* when it transferred Afghan detainees into the custody of Afghan officials, where they were at serious risk of torture or cruel, inhuman or degrading treatment);
 - (i) *Bouzari v. Islamic Republic of Iran*, (2004) 71 OR (3d) 675, [2004] OJ No 2800 (intervened regarding the right of a torture victim to sue for compensation from the offending government); and
 - (j) *Ahani v. Canada (Minister of Citizenship and Immigration)*, (2002) 58 OR (3d) 107, [2002] OJ No 431, (presented submissions regarding Canada's international obligations in response to the UN Human Rights Committee's request that Canada not deport the appellant pending consideration of his complaint to the Committee).
20. Further, AI Canada was granted intervener status in the following inquiries:
- (a) The Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (Arar Inquiry) (submissions on the subject of security and human rights); and
 - (b) The Internal Inquiry into the Actions of Canadian officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin (Iacobucci Inquiry) (submissions on several issues, including the prohibition against torture,

prohibition against the use of information obtained through torture, and the presumption of innocence of Canadians detained abroad).

21. In other national and international judicial fora, AI and its national branches have presented submissions on a variety of important matters, including:

- (a) *Hirsi Jamaa and others v. Italy*, [2012] ECHR 27765/09 (presented submissions regarding Italy's violation of its refugee protection and human rights obligations under the *European Convention on Human Rights* when it intercepted a boat of smuggled refugees seeking asylum and diverted them to Libya);
- (b) *Boumediene v. Bush; Al Odah v. United States*, 128 S Ct 2229 (2008) (intervened regarding the *Military Commission Act* of 2006 as an unconstitutional suspension of *habeas corpus* under United States law and in violation of the United States' international obligations);
- (c) *Al-Skeini and others v. the Secretary of State*, [2007] UKHL 26 (made submissions regarding the applicability of the *European Convention on Human Rights* and the UK's *Human Rights Act* 1998 to the actions of British armed forces in Iraq);
- (d) *A and others v. Secretary of State for the Home Department (No. 2)*, [2005] UKHL 71 (presented arguments regarding the inadmissibility of evidence obtained through torture);
- (e) *A and others v. Secretary of State for the Home Department*, [2005] 2 AC 68 (made submissions regarding the indefinite detention of suspected terrorists under the *Anti-Terrorism, Crime and Security Act* 2001);
- (f) *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [2000] 1 AC 147 (UKHL) (intervened with respect to exceptions for state immunity for international crimes); and
- (g) *Chahal v. United Kingdom*, (1997) 23 EHRR 413 (presented arguments regarding the absolute prohibition against returning an individual to face a risk of torture).

c) Participation in Legislative Proceedings

22. AI Canada has also sought to advance international human rights directly through the legislative process. On many occasions, the organization has provided written and oral submissions to government officials, legislators and House and Senate committees. Submissions include:

- (a) *Accountability, Protection and Access to Justice: Amnesty International's Concerns with respect to Bill C-43* (brief to the House of Commons' Standing Committee on Citizenship and Immigration, outlining the ways in which Bill C-43 would lead to violations of Canada's international obligations and the *Canadian Charter of Rights and Freedoms*), October 31, 2012;
- (b) *Unbalanced Reforms: Recommendations with respect to Bill C-31* (brief to the House of Commons' Standing Committee on Citizenship and Immigration, outlining the ways in which Bill C-31 violates Canada's international obligations towards refugees and asylum-seekers), May 7, 2012;
- (c) *Fast and Efficient but not Fair: Recommendations with respect to Bill C-11* (brief to the House of Commons' Standing Committee on Citizenship and Immigration, regarding recommendations with respect to changes brought to the refugee determination process by Bill C-11), May 11, 2010;
- (d) Oral submissions before the Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development (regarding the repatriation of Omar Khadr), May 2008;
- (e) Oral submissions before the House of Commons' Public Safety Committee in December 2007 and the Senate Special Committee on Anti-Terrorism (regarding Bill C-3, the proposed amendment to the security certificate regime), February 2008;
- (f) Oral submissions before the House Defence Committee (regarding the transfer by Canadian troops of Afghan detainees in Afghanistan), December 2006;
- (g) Oral submissions before the House Committee on Citizenship and Immigration (regarding security certificates), November 2006;

- (h) Oral submissions before the Senate and House of Commons' *Anti-Terrorism Act* Review Committees, May and September 2005 (regarding security certificates);
- (i) *Security through Human Rights* (submission to the Special Senate Committee on the *Anti-Terrorism Act* and House of Commons' Sub-Committee on Public Safety and National Security, as part of the review of Canada's *Anti-Terrorism Act*), May 16, 2005 (regarding security certificates);
- (j) Brief on Bill C-31 (*IRPA*), March 2001; and
- (k) Oral submissions before the House of Commons' Standing Committee on Foreign Affairs and International Trade with respect to Bill C-19 (a bill to implement Canada's obligations under the *Rome Statute* of the International Criminal Court).

d) Participation with International Organizations

23. AI has formal relations with the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organization, the Council of Europe, the Organization of American States, the Organization of African Unity, and the Inter-Parliamentary Union.

24. AI has made submissions to various international organizations and UN monitoring bodies regarding Canada's compliance with its international human rights obligations, including:

- (a) *Canada: Submission to the United Nations Human Rights Committee*, Amnesty International's submissions to the UN Human Rights Committee regarding matters to raise in the List of Issues it will adopt in October 2014 as a first step in the review of Canada's compliance under the *International Covenant on Civil and Political Rights*;
- (b) *Canada: Human rights abuses prevalent among vulnerable groups*, Amnesty International Submission to the Universal Periodic Review, April-May 2013;
- (c) *Canada: Submission to the UN Universal Periodic Review*, Amnesty International's submission to the second review of Canada's human rights record by the UN Human Rights Council, October 2012;

- (d) *Canada: Briefing to the UN Committee Against Torture*, Amnesty International's submission to the Committee's review of Canada, May 2012;
- (e) *Canada: Briefing to the UN Committee on the Elimination of Racial Discrimination*, Amnesty International's submission to the Committee's review of Canada, February 2012;
- (f) *Canada: Submission to the UN Universal Periodic Review*, Amnesty International's submission to the first review of Canada's human rights record by the UN Human Rights Council, February 2009;
- (g) *Human Rights for All: No Exceptions*, Amnesty International's submission to the United Nations Committee on the Elimination of Racial Discrimination on the occasion of the examination of the 17th and 18th Periodic Reports submitted by Canada, February 2007;
- (h) *Protection Gap: Strengthening Canada's Compliance with its International Human Rights Obligations*, AI Canada's submission to the United Nations Human Rights Committee on the occasion of the consideration of the Fifth Periodic Report of Canada, 2005;
- (i) *Redoubling the Fight Against Torture: Amnesty International Canada's Brief to the UN Committee against Torture with respect to the Committee's Consideration of the Fourth Periodic Report for Canada*, October 8, 2004; and
- (j) *It's Time: Amnesty International's Briefing to the United Nations Committee against Torture with respect to the Third Report of Canada*, November 2000.

25. These international bodies recognize and trust AI's experience, objectivity, and distinctive perspective. As Jean-Pierre Hocke (former United Nations High Commissioner for Refugees) noted, "It's a worn cliché, but if Amnesty did not exist, it would have to be invented. It is simply unique."

AI Canada's Distinct Perspective as a Proposed Intervener

26. AI Canada has a strong record as a credible and objective organization, and brings a distinct approach to the issues raised in this appeal. AI Canada has a significant expertise in

international human rights in general, and in Canada's obligations to protect refugees in particular. AI Canada also has extensive knowledge of the relevant international human rights instruments, such as the *Refugee Convention*, *UDHR*, *International Covenant on Civil and Political Rights (ICCPR)*, and *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention)*. As the Canadian section of an international non-governmental organization, it is uniquely positioned to undertake an international analysis of Canada's human rights obligations towards refugees in the context of people smuggling.

27. AI Canada's interest in the issues raised in this appeal is legitimate and longstanding, as they engage core international principles relating to the human rights of migrants and refugees – issues that have long formed an integral part of AI's work. AI has undertaken extensive legal and policy research on refugee protection and its interaction with other fields of international law in jurisdictions around the world. As set out in paragraph 17, AI Canada has intervened in two recent Supreme Court of Canada cases contemplating the parameters for exclusion of individuals from refugee status (*Febles, Ezokola*), and cases assessing Canada's obligation to refrain from subjecting individuals to a risk of torture or other ill treatment (*Gavrila, Suresh*). Further, AI Canada has commented on the *IRPA*'s compliance with international law before several parliamentary committees, participated as an intervener or applicant in numerous cases related to fundamental human rights, and regularly takes part in international review processes that monitor Canada's compliance with its international obligations.

Overview of AI Canada's Proposed Intervention

28. AI Canada seeks leave to intervene in this appeal with respect to Canada's international human rights obligations in the context of people smuggling. If granted leave, AI Canada will be mindful of submissions made by the parties and other interveners in this appeal, and will seek to avoid duplication of arguments and materials before the Court. We do not propose to take a position on the facts particular to the appellants, nor on other issues raised in this appeal.

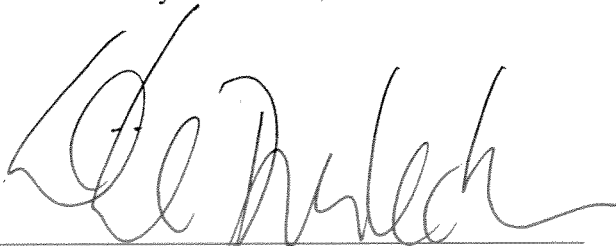
29. If granted intervener status, AI Canada will submit that a correct interpretation of people smuggling in sections 37(1)(b) and 117 will respect Canada's international human rights

obligations towards refugees. In particular, AI Canada proposes to make the following submissions:

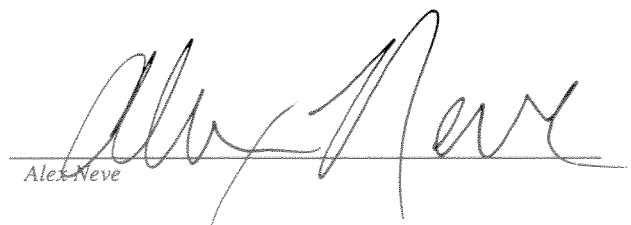
- (a) Domestic legislation such as the *IRPA* must be interpreted and applied in conformity with international human rights law;
- (b) The *CATOC* and *Migrant Smuggling Protocol* have a dual purpose: to combat people smuggling while protecting the human rights of smuggled persons. This dual purpose must be reflected in the interpretation of sections 37(1)(b) and 117 of the *IRPA*;
- (c) Canada's commitments under the *CATOC*, the *Migrant Smuggling Protocol*, and the *Refugee Convention* – to combat people smuggling *and* to protect human rights – must all be given full effect; and
- (d) An interpretation of sections 37(1)(b) and 117 that fails to accurately distinguish between people in need of protection and those assisting them in reaching safety, and smugglers who profit from this human suffering, is incorrect and has serious human rights consequences.

30. I make this affidavit in support of AI Canada's application to intervene and for no other or improper purpose.

SWORN BEFORE ME at the City of
Ottawa, in the Province of Ontario
on this 2 day of October, 2014



Commissioner for Taking Affidavits
(or as may be)



Alex Neve

Court File Nos. 35677
35685
35688
35388
35958

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

Between:

Court File No. 35677

JESUS RODRIGUEZ HERNANDEZ

APPELLANT
(Respondent in the Court Below)

-and-

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

RESPONDENT
(Appellant in the Court Below)

Between:

Court File No. 35685

B306

APPELLANT
(Respondent in the Court Below)

-and-

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

RESPONDENT
(Appellant in the Court Below)

Between:

Court File No. 35688

J.P. ET AL

APPELLANTS
(Respondents in the Court Below)

-and-

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

RESPONDENT
(Appellant in the Court Below)

Between:

Court File No. 35388

B010

APPELLANT
(Appellant in the Court Below)

-and-

MINISTER OF CITIZENSHIP AND IMMIGRATION

RESPONDENT
(Respondent in the Court Below)

Between:

Court File No. 35958

FRANCIS ANTHONIMUTHU APPULONAPPA ET AL.

APPELLANTS
(Respondents in the Court Below)

-and-

HER MAJESTY THE QUEEN ET AL.

RESPONDENTS
(Appellants in the Court Below)

**MEMORANDUM OF ARGUMENT IN SUPPORT OF THE APPLICATION FOR
INTERVENTION OF
AMNESTY INTERNATIONAL (CANADIAN SECTION, ENGLISH BRANCH)**
(Rule 56(b) of the *Rules of the Supreme Court of Canada*)

AMNESTY INTERNATIONAL, PROPOSED INTERVENER

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Counsel for Amnesty International (Canadian Section, English Branch)

PART I - FACTS

A. Overview

1. The English Branch of Amnesty International Canada (AI Canada) seeks leave to intervene in this appeal. Amnesty International (AI) has a strong record as an objective organization with a unique expertise in international human rights. AI Canada has a legitimate interest in this appeal, as it engages international legal principles relating to the movement of people across borders, and has a profound impact on the rights of refugees. We submit sections 37(1)(b) and 117 of the *Immigration and Refugee Protection Act (IRPA)*¹ must be interpreted in accordance with Canada's international human rights obligations under the *United Nations Convention against Transnational Organized Crime*² (CATOC), the *Protocol against the Smuggling of Migrants by Land, Sea and Air*³ (Migrant Smuggling Protocol), and the *Convention Relating to the Status of Refugees*⁴ (Refugee Convention). An interpretation that fails to distinguish between people in need of protection and those who assist them in reaching safety on the one hand, and smugglers who profit from this human suffering on the other, is incorrect because it violates international law and has severe consequences; It denies refugees the right to seek and receive asylum, penalizes them for their method of arrival, and exposes them to a risk of *refoulement*.

B. Amnesty International and Amnesty International Canada: The Organizations

2. AI is a worldwide voluntary movement founded in 1961 that works to prevent some of the gravest violations of people's fundamental human rights. It is impartial and independent of any government, political persuasion, or religious creed. AI Canada is the organization's English Canadian section. AI and AI Canada are financed by subscriptions and donations from their membership, and receive no government funding. AI currently has over 3 million members in over 162 countries, including 60,000 supporters across Canada. AI envisions a world in which every person enjoys all the human rights enshrined in the *Universal Declaration of Human Rights* and other international instruments. In pursuit of this vision, AI's mission is to conduct research and take action to prevent and end grave abuses of all

¹ SC 2001, c 27 [IRPA].

² 15 November 2000, 2225 UNTS 209 art 34(3), 40 ILM 335 [CATOC].

³ 15 November 2000, 2241 UNTS 507, 40 ILM 384 [Migrant Smuggling Protocol].

⁴ 28 July 1951, 189 UNTS 137, Can TS 1969 No 6 [Refugee Convention].

human rights – civil, political, economic, social, and cultural. In 1977, AI was awarded the Nobel Peace Prize for its work.⁵

C. Amnesty International's expertise and experience

3. AI's research is recognized in Canada and globally as accurate, credible, and unbiased, and its reports are widely consulted by governments, intergovernmental organizations, journalists, and scholars. The organization has made submissions regarding international human rights to courts, legislatures, and international bodies around the world. AI's documentation has been relied upon by Canadian courts and Tribunals. Further, AI Canada has been granted intervener status at numerous inquiries and judicial proceedings at different levels of court, including this Court. AI Canada has also sought to advance international human rights directly through the legislative process.⁶

PART II – QUESTION IN ISSUE

4. The question on this motion is whether AI Canada should be granted leave to intervene in this appeal.

PART III – ARGUMENT

5. Leave to intervene may be granted where a party has an interest in the subject matter before the Court and will be able to make unique submissions that are useful to the Court.⁷ Any interest in an appeal is sufficient to support an application for intervener status, subject to the discretion of the judge hearing the motion.⁸

A. Amnesty International's interest in this appeal

6. AI Canada's interest in the issues raised in this appeal is legitimate and longstanding. AI has undertaken extensive legal and policy research on refugee protection in jurisdictions worldwide. AI Canada has acted as intervener or applicant in numerous cases and inquiries

⁵ Affidavit of Alex Neve, O.C., sworn 2 October 2014 at paras 10-12 [Neve Affidavit].

⁶ *Ibid* at paras 15-25.

⁷ *Rules of the Supreme Court of Canada*, SOR/2002-156, ss 55, 57; *Reference re Worker's Compensation Act*, [1989] 2 SCR 335, at 339-340, 76 Nfld & PEIR 185 [*Worker's Compensation*]; *R v Finta*, [1993] 1 SCR 1138 at 1142, 61 OAC 321 [*Finta*].

⁸ *Workers Compensation*, *supra* note 7; *Finta*, *supra* note 7 at 1143-44.

regarding Canada's international human rights obligations. AI Canada has also commented on the *IRPA*'s compliance with international law before several parliamentary committees.⁹

B. Amnesty International will make unique, useful submissions

7. AI Canada has a strong record as a credible and objective organization, and brings a distinct approach to the issues raised in this appeal. It is uniquely positioned to undertake an international analysis of Canada's human rights obligations in the context of people smuggling. If granted leave to intervene, AI Canada will be mindful of submissions made by the parties and other interveners in this appeal, and will seek to avoid duplication of argument and materials before the Court. We do not propose to take a position on the facts specific and personal to the appellants themselves.
8. If granted intervener status, AI Canada will submit that a correct interpretation of people smuggling in sections 37(1)(b) and 117 will respect Canada's international human rights obligations. In particular, AI Canada proposes to make the following submissions:
 - (a) Domestic legislation such as the *IRPA* must be interpreted and applied in conformity with international human rights law;
 - (b) The *CATOC* and *Migrant Smuggling Protocol* have a dual purpose: to combat people smuggling while protecting the human rights of smuggled persons. This dual purpose must be reflected in the interpretation of sections 37(1)(b) and 117 of the *IRPA*;
 - (c) Canada's commitments under the *CATOC*, the *Migrant Smuggling Protocol*, and the *Refugee Convention* – to combat people smuggling *and* to protect human rights – must all be given full effect; and
 - (d) An interpretation of sections 37(1)(b) and 117 that fails to accurately distinguish between people in need of protection and those assisting them in reaching safety, and smugglers who profit from this human suffering, is incorrect and has serious human rights consequences.

⁹ Neve Affidavit, *supra* note 5 at para 28.

(a) International human rights inform the interpretation and application of the *IRPA*

9. Canadian courts have long recognized that the values and principles enshrined in international law are “relevant and persuasive” sources for the interpretation of domestic statutes.¹⁰ Canada’s international obligations are set out in binding treaties, including the *Refugee Convention*, the *CATOC*, and the *Migrant Smuggling Protocol*. They are also found in the principles of customary international law, which form part of the Canadian common law.¹¹ Also persuasive are the views of the UN treaty bodies and agencies charged with promoting and reviewing the implementation of treaties, such as the United Nations (UN) High Commissioner for Refugees (UNHCR).¹²
10. Parliament affirmed its intention to abide by Canada’s international commitments in section 3(3)(f) of the *IRPA*, which provides: “This Act is to be construed and applied in a manner that [...] complies with international human rights instruments to which Canada is signatory.”¹³ Absent express derogation by the legislature, treaty commitments and principles of customary international law are legally binding on Canada,¹⁴ and determinative of how the *IRPA* must be interpreted and applied.¹⁵

(b) The dual purpose of the *CATOC* and the *Migrant Smuggling Protocol* must be reflected in the interpretation of sections 37(1)(b) and 117 of the *IRPA*

11. The *CATOC* and *Migrant Smuggling Protocol* are products of careful negotiations between States Parties and an Inter-Agency Group comprised of the UNHCR, Office of the UN High Commissioner for Human Rights, International Organization for Migration, and

¹⁰ *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at 348, 38 DLR (4th) 161, Dickson CJ, dissenting on other grounds; *R v Hape*, 2007 SCC 26 at paras 35-39, 53-56, [2007] 2 SCR 292 [*Hape*]; *Divito v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 47 at paras 22-28, [2013] 3 SCR 157; *R v Sharpe*, 2001 SCC 2 at paras 175, 178, [2001] 1 SCR 45.

¹¹ *Hape*, *supra* note 10 at para 39.

¹² *Republic of Guinea v Democratic Republic of the Congo*, [2010] ICJ Rep 2010 at paras. 66-68. The views of the UNHCR have assisted this Court in several cases, e.g. *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40 at paras 35, 76-77, [2013] 2 SCR 678 [*Ezokola*]; *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 103 DLR (4th) 1; *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593, 128 DLR (4th) 213.

¹³ *IRPA*, *supra* note 1, s 3(3)(f)

¹⁴ *Hape*, *supra* note 10 at para 39; *de Guzman v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 at para 87, [2006] 3 FCR 655.

¹⁵ *Ibid* at para. 87; *Okoloubu v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 326 at para 35, [2009] 3 FCR 294.

UNICEF, which wanted to ensure that in addressing people smuggling, the vulnerability of smuggled persons was recognized, and the protection of their human rights guaranteed.¹⁶

12. The resulting *CATOC* and *Migrant Smuggling Protocol* aim to achieve two fundamental goals: combatting transnational organized crime, including people smuggling, while protecting the human rights of smuggled persons.¹⁷ Accordingly, the *CATOC* and the *Migrant Smuggling Protocol* contain a number of articles requiring States Parties to criminalize transnational organized crime, including people smuggling,¹⁸ and numerous provisions to protect and assist smuggled persons¹⁹ rather than impose penalties for their manner of arrival.²⁰ Article 19 emphasizes States Parties' obligations towards refugees:

Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.²¹

According to Professor Tom Obokata, this dual purpose “reinforces a notion that smuggled people are also victims of human rights abuses, and [...] has the effect of redirecting smuggling into a human rights discourse.”²²

13. The interpretation of people smuggling under sections 37(1)(b) and 117 of the *IRPA* must conform to Canada's international human rights obligations. Fulfilling the dual purpose of combatting people smuggling and protecting human rights requires States Parties to adopt a definition of people smuggling that clearly distinguishes between those in genuine need of protection and persons assisting them to reach safety, and smugglers profiting from the suffering of refugees. According to the UN Office on Drugs and Crime (UNODC), the Agency charged with promoting and reviewing the implementation of the *CATOC* and the *Migrant Smuggling Protocol*, it was

¹⁶ Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Note by the Office of the United Nations High Commissioner for Human Rights, the United Nations Children's Fund and the International Organization for Migration on the draft protocols concerning migrant smuggling and trafficking in persons*, 8th Sess, UN Doc A/AC.254/27 (8 February 2000).

¹⁷ *Migrant Smuggling Protocol*, *supra* note 3 art 2.

¹⁸ *CATOC*, *supra* note 2 art 5(1); *Migrant Smuggling Protocol*, *supra* note 3 art 6(1)-(2).

¹⁹ *Ibid* art 16; *CATOC*, *supra*, note 2 art 25

²⁰ *Migrant Smuggling Protocol*, *supra* note 3 art 5.

²¹ *Ibid* art 19

²² Tom Obokata, “Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law” (2005) 17:2 Int'l J Refugee L 394 at 408.

the intention of the drafters that the sanctions established in accordance with the Protocol should apply to the smuggling of migrants by organized criminal groups and not to mere migration of migrants, even in cases where it involves entry or residence that is illegal under the laws of the State concerned.²³

14. In order to distinguish smugglers from refugees, and to ensure protection for those legitimately in need of it, the international definition of people smuggling requires two elements: (a) intentional procurement of illegal entry, in order to (b) obtain a financial or other material benefit.²⁴ By requiring financial or material profit as a central facet of organized criminality, the drafters intended “to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties.”²⁵ According to the UNODC, the *Migrant Smuggling Protocol* does not “criminalize altruistic or charitable groups who smuggle people for purposes other than financial or other material gain.”²⁶

(c) Canada’s obligations under the CATOC, the Migrant Smuggling Protocol, and the Refugee Convention must all be given full effect

15. Pursuant to the principle of *pacta sunt servanda*²⁷ set out in the *Vienna Convention on the Law of Treaties* (VCLT) – which codifies customary international law²⁸ – Canada’s obligations under the CATOC, the *Migrant Smuggling Protocol*, the *Refugee Convention*, and other human rights instruments, must all be given full effect. The VCLT requires treaties to be interpreted in good faith and in light of their object and purpose.²⁹ According to the

²³ United Nations Office on Drugs and Crime, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (New York: United Nations, 2004) at 340 para 28 [Legislative Guides].

²⁴ *Ibid* at 341, footnote 9; See also Andreas Schloenhardt and Jessica E Dale, “Twelve years on: revisiting the UN Protocol against the smuggling of Migrants by Land, Sea and Air” (2012) 67 *Zeitschrift für öffentliches Recht* 129 at 140.

²⁵ United Nations General Assembly, *Interpretive notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols thereto*, 55th Sess, UN Doc A/55/383/Add.1 (3 November 2000) at paras 88, 92.

²⁶ United Nations Office on Drugs and Crime, *Toolkit to Combat Smuggling of Migrants: Tool 8: Protection and assistance measures* (Austria: United Nations, 2010) at 38.

²⁷ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 art 26, Can TS 1980 No 37 [VCLT].

²⁸ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, [1997] ICJ Rep 7 at para 46.

²⁹ VCLT, *supra* note 27 art 31(1).

International Law Commission, where norms appear to conflict, “they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.”³⁰

16. The dual purpose of the *CATOC* and *Migrant Smuggling Protocol* demonstrates these instruments were intended to be interpreted harmoniously with international human rights treaties. Thus, while Article 34(3) of the *CATOC* permits States Parties to “adopt more strict or severe measures [...] for preventing and combating transnational organized crime[.]”³¹ such measures cannot be undertaken at the expense of States Parties’ human rights obligations, which must all be given full effect. The UN General Assembly and the European Court of Human Rights have affirmed that efforts to manage migration cannot undermine States’ refugee protection obligations.³² According to the UNODC, “States parties have agreed to ensure that these rights are not compromised in any way by the implementation of anti-smuggling measures.”³³ Professor Anne Gallagher and Fiona David add that while the human rights guaranteed in article 19 may appear to collide with efforts to combat people smuggling,

the correct outcome has been clearly articulated: a State that acts against the letter or spirit of international law, including international refugee law, in implementing its obligations under the *Migrant Smuggling Protocol* is in violation of one of [the latter’s] central provisions.³⁴

(d) An interpretation of sections 37(1)(b) and 117 that fails to distinguish people in need of protection from those who profit from such suffering is incorrect and has serious human rights consequences

17. States Parties to the *Refugee Convention* must pay special attention “to situations where the system of administration may produce results incompatible with [applicable principles]

³⁰ “Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law” in *Yearbook of the International Law Commission* 2006, vol 2, part 2 (New York: UN, 2006) at 183 (UN Doc A/CN.4/SER.A/2006/Add.1 (Part 2)).

³¹ *CATOC*, *supra* note 2 art 34(3).

³² United Nations General Assembly, *Resolution Adopted by the General Assembly: Prevention of the smuggling of aliens*, 48th Sess, UN Res A/RES/48/102 (8 March 1994); *Hirsi Jamaa and others v Italy*, No 27765/09, [2012] ECHR 1845 at para 179, 55 EHRR 21.

³³ United Nations Office on Drugs and Crime, *Model Law against the Smuggling of Migrants* (Vienna, UN Office on Drugs and Crime, 2010) at 8 [*Model Law*].

³⁴ Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (New York: Cambridge University Press, 2014) at 65 [Gallagher and David].

of international law.”³⁵ The consequences of a section 37(1)(b) inadmissibility finding are severe. They deny refugee claimants their right to seek and receive asylum, penalize them for their manner of arrival to Canada, and expose them to a risk of *refoulement*.

18. Refugee claimants found to be inadmissible to Canada for people smuggling are ineligible to appear before the Refugee Protection Division (RPD).³⁶ Moreover, such refugee claimants are limited to a risk assessment under section 97 of the *IRPA* during the Pre-Removal Risk Assessment (PRRA) process, which involves determining whether they would face a danger to their life, or a danger of torture or cruel or unusual treatment or punishment if deported.³⁷ During PRRA consideration under section 97, even if a danger of torture or other ill-treatment is found to exist, inadmissible refugee claimants are still exposed to *refoulement* to torture or other ill-treatment if it is determined their actions were sufficiently severe or if they constitute a danger to Canada.³⁸
19. Such refugee claimants are permanently barred from accessing protection as *Convention* refugees under section 96 of the *IRPA*. This means that a person with a well-founded fear of persecution for any of the grounds enumerated in section 96 will not receive refugee protection, including protection from *refoulement* to persecution or other serious human rights abuses.³⁹ A positive PRRA for such persons does not result in refugee protection but rather a stay of removal.⁴⁰ That stay of removal is tenuous and can be cancelled at the discretion of the Minister of Citizenship and Immigration if he or she is of the opinion the circumstances surrounding the stay have changed.⁴¹
20. An interpretation of people smuggling that results in a denial of the right to seek and receive asylum and exposes refugee claimants to a risk of *refoulement* simply because of the means they have chosen to escape persecution is a significant curtailment of rights,

³⁵ Guy S Goodwin-Gill, “Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection” (paper prepared at the request of the Department of International Protection for the UNHCR Global Consultations, October 2001) at para 102 online: <<http://www.refworld.org/docid/470a33b10.html>> [Goodwin-Gill].

³⁶ *IRPA*, *supra* note 1, s 101(1)(f).

³⁷ *Ibid* s 113(d).

³⁸ *Ibid* s 113(d)(ii).

³⁹ *Ibid*, s 112(3); *Covarrubias v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 365 at para 18, [2007] 3 FCR 169.

⁴⁰ *Ibid*.

⁴¹ *IRPA*, *supra* note 1, s 114(2).

amounting to a penalty prohibited by the *Refugee Convention*. Article 31(1) of the *Refugee Convention* provides that States Parties “shall not impose penalties [...] on refugees who, coming directly from a territory where their life or freedom was threatened [...] enter or are present in their territory without authorization[.]”⁴² The UNHCR has stressed the prohibition against penalization must be construed broadly, stating:

Any punitive measure, that is, any unnecessary limitation to the full enjoyment of rights granted to refugees under international refugee law, applied by States against refugees who would fall under the protective clause of Article 31(1) could, arguably, be interpreted as a penalty.⁴³

The prohibition against penalizing refugees recognizes that in seeking asylum, refugees may enter countries of refuge unlawfully. The UNODC has recognized “the criminal smuggling of migrants may involve the movement of legitimate refugees or asylum-seekers.”⁴⁴ Because of this, “it is vital that smuggled migrants falling within this category not be penalized for their unlawful entry.”⁴⁵

21. The UNODC has stated “it is essential that smuggled migrants who are in need of international protection are given a genuine opportunity to seek it.”⁴⁶ There are circumstances where individuals assist refugees to reach safety out of compassion and not for financial or material gain. According to Professor James Hathaway, the drafters of the *Refugee Convention* assumed “that governments would not exercise their authority to penalize those assisting refugees to enter an asylum country absent evidence that they had acted in an exploitative way, or otherwise in bad faith.”⁴⁷ Penalizing individuals for assisting refugees may impede refugees’ ability to exercise their right to seek and receive asylum. The international community’s “profound concern for refugees”⁴⁸ and commitment to grant them the widest scope of protection possible⁴⁹ require sections 37(1)(b) and 117 to be interpreted in a way that prohibits the penalization of individuals who help refugees reach safety.

⁴² *Refugee Convention*, *supra* note 4 art 31(1).

⁴³ UNHCR Department of International Protection, internal note, May 2000, as cited in Goodwin-Gill, *supra* note 35 at 9, footnote 15.

⁴⁴ *Legislative Guides*, *supra* note 23 at 340 para 28.

⁴⁵ *Model Law*, *supra* note 33 at 57.

⁴⁶ *Model Law*, *supra* note 33 at 100.

⁴⁷ James C. Hathaway, *The Rights of Refugees under International Law* (New York: Cambridge University Press, 2005) at 405.

⁴⁸ *Refugee Convention*, *supra* note 4, preamble.

⁴⁹ *Ibid*; *IRPA*, *supra* note 1, s 3(2); *Ezokola*, *supra* note 12 at para 32

22. Sections 37(1)(b) and 117 must be interpreted consistently with the object and spirit of the *Refugee Convention*, the *IRPA*, and this Court's jurisprudence, to ensure the widest possible scope of fundamental rights and freedoms and protection to refugees.⁵⁰ That concern is reflected in the *IRPA*, which recognizes that Canada's "refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted[.]"⁵¹ Sections 37(1)(b) and 117 must be interpreted in light of the *Refugee Convention*'s "overarching and clear human rights object and purpose"⁵² in order to accurately distinguish between refugees fleeing persecution and those who assist them, and those profiting from their suffering. As stated by Gallagher and David, "[t]he international system of refugee protection is not reserved solely for the virtuous: it is only under exceptional circumstances that entitlement to seek and receive asylum from persecution may be peremptorily withheld."⁵³ The type of situation before this Court does not qualify as one of those exceptional circumstances.

PART IV – SUBMISSIONS ON COSTS

23. Amnesty International does not seek or expect to pay costs.

PART V – ORDER SOUGHT

24. Amnesty International requests an order
- a. Granting leave to intervene in this appeal;
 - b. Granting leave to present oral and written arguments at the hearing of the appeal;
 - and
 - c. Such further and other order as this Court may deem appropriate

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 9th DAY OF OCTOBER 2014 BY:


Solicitors for Amnesty International (Canadian Section, English Branch)⁵⁴

⁵⁰ *Refugee Convention*, *supra* note 4, preamble; *IRPA*, *supra* note 1, s 3(2); *Ezokola*, *supra* note 12 at para 32.

⁵¹ *IRPA*, *supra* note 1 s 3(2)(a)

⁵² *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 57, 160 DLR (4th) 193; *Ezokola*, *supra* note 12 at para 32

⁵³ Gallagher and David, *supra* note 34 at 169.

⁵⁴ The solicitors for Amnesty International acknowledge the tremendous work done by AI Canada's articling student, Anna Kwadrans.

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	CANADIAN CASES	PARA.
1.	<i>Canada (Attorney General) v Ward</i> , [1993] 2 SCR 689, 103 DLR (4th) 1.	9
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16.	<i>Republic of Guinea v Democratic Republic of the Congo</i> , [2010] ICJ Rep 2010.	9
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17.	Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, <i>Note by the Office of the United Nations High Commissioner for Human Rights, the United Nations Children's Fund and the International Organization for Migration on the draft protocols concerning migrant smuggling and trafficking in persons</i> , 8th Sess, UN Doc A/AC.254/27 (8 February 2000).	11
18.	"Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law" in <i>Yearbook of the International Law Commission 2006</i> , vol 2, part 2 (New York: UN, 2006) (UN Doc A/CN.4/SER.A/2006/Add.1 (Part 2)).	15
19.	United Nations General Assembly, <i>Interpretive notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols thereto</i> , 55th Sess, UN Doc A/55/383/Add.1 (3 November 2000).	14
20.	United Nations General Assembly, <i>Resolution Adopted by the General Assembly: Prevention of the smuggling of aliens</i> , 48th Sess, UN Res A/RES/48/102 (8 March 1994).	16
21.	United Nations Office on Drugs and Crime, <i>Legislative Guides for the Implementation of the United Nations Convention against Transnational</i>	13, 14, 20

	<i>Organized Crime and the Protocols thereto</i> (New York: United Nations, 2004).	
22.	United Nations Office on Drugs and Crime, <i>Model Law against the Smuggling of Migrants</i> (Vienna, UN Office on Drugs and Crime, 2010).	16, 20, 21
23.	United Nations Office on Drugs and Crime, <i>Toolkit to Combat Smuggling of Migrants: Tool 8: Protection and assistance measures</i> (Austria: United Nations, 2010).	14
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24.	Andreas Schloenhardt and Jessica E Dale, "Twelve years on: revisiting the UN Protocol against the smuggling of Migrants by Land, Sea and Air" (2012) 67 <i>Zeitschrift für öffentliches Recht</i> 129.	14
25.	Anne T Gallagher and Fiona David, <i>The International Law of Migrant Smuggling</i> (New York: Cambridge University Press, 2014).	16, 22
26.	Guy S Goodwin-Gill, "Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection" (paper prepared at the request of the Department of International Protection for the UNHCR Global Consultations, October 2001) online: < http://www.refworld.org/docid/470a33b10.html >.	17, 20
27.	James C. Hathaway, <i>The Rights of Refugees under International Law</i> (New York: Cambridge University Press, 2005).	21
28.	Tom Obokata, "Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law" (2005) 17:2 <i>Int'l J Refugee L</i> 394.	12

PART VII – STATUTORY PROVISIONS

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Immigration and Refugee Protection Act, SC 2001, c 27.

3. (2) The objectives of this Act with respect to refugees are

(a) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;

(b) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;

(c) to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution;

(d) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment;

(e) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for human rights and fundamental freedoms of all human beings;

(f) to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada;

(g) to protect the health and safety of Canadians and to maintain the security of Canadian society; and

(h) to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals.

3. (2) S'agissant des réfugiés, la présente loi a pour objet:

a) de reconnaître que le programme pour les réfugiés vise avant tout à sauver des vies et à protéger les personnes de la persécution;

b) de remplir les obligations en droit international du Canada relatives aux réfugiés et aux personnes déplacées et d'affirmer la volonté du Canada de participer aux efforts de la communauté internationale pour venir en aide aux personnes qui doivent se réinstaller;

c) de faire bénéficier ceux qui fuient la persécution d'une procédure équitable reflétant les idéaux humanitaires du Canada;

d) d'offrir l'asile à ceux qui craignent avec raison d'être persécutés du fait de leur race, leur religion, leur nationalité, leurs opinions politiques, leur appartenance à un groupe social en particulier, ainsi qu'à ceux qui risquent la torture ou des traitements ou peines cruels et inusités;

e) de mettre en place une procédure équitable et efficace qui soit respectueuse, d'une part, de l'intégrité du processus canadien d'asile et, d'autre part, des droits et des libertés fondamentales reconnus à tout être humain;

f) d'encourager l'autonomie et le bien-être socioéconomique des réfugiés en facilitant la réunification de leurs familles au Canada;

g) de protéger la santé des Canadiens et de garantir leur sécurité;

h) de promouvoir, à l'échelle internationale, la sécurité et la justice par l'interdiction du territoire aux personnes et demandeurs d'asile qui sont de grands criminels ou constituent un danger pour la sécurité.

3. (3) This Act is to be construed and applied in a manner that

...

(f) complies with international human rights instruments to which Canada is signatory.

3. (3) L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet:

...

f) de se conformer aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire

37. (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for

...

(b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering.

37. (1) Emportent interdiction de territoire pour criminalité organisée faits suivants:

...

b) se livrer, dans the cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité.

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

(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.

96. A qualité de réfugié au sens de la Convention – le réfugié – la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques:

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

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

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays

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 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.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

101. (1) A claim is ineligible to be referred to the Refugee Protection Division if

...

(f) the claimant has been determined to be inadmissible on grounds of security, violating

dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée:

a) soit au risqué, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risqué de traitements ou peines cruels et inusités dans le cas suivant:

i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

ii) elle y est exposée et tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

iii) la menace ou le risqué ne résulte pas de sanctions légitimes – sauf celles infligées au mépris des normes internationales – et inhérents à celles-ci ou occasionnés par elles,

iv) la menace ou le risqué ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

101. (1) La demande est irrecevable dans les cas suivants:

...

f) prononcé d'interdiction de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux – exception faite

human or international rights, serious criminality or organized criminality, except for persons who are inadmissible solely on the grounds of paragraph 35(1)(c).

des personnes interdites de territoire au seul titre de l'alinéa 35(1)(c) – , grande criminalité ou criminalité organisée.

113. Consideration of an application for protection shall be as follows:

113. Il est disposé de la demande comme il suit:

...

...

(d) in the case of an applicant described in subsection 112(3) – other than one described in subparagraph (e)(i) or (ii) – consideration shall be on the basis of the factors set out in section 97 and

d) s'agissant du demandeur visé au paragraphe 112(3) – sauf celui visé au sous-alinéa e)(i) ou (ii) – sur la base des éléments mentionnés à l'article 97 et, d'autre part:

(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or

i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,

(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada[.]

ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada[.]

117. (1) No person shall organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of this Act.

117. (1) Il est interdit à quiconque d'organiser l'entrée au Canada d'une ou de plusieurs personnes ou de les inciter, aider ou encourager à y entrer en sachant que leur entrée est ou serait en contravention avec la présente loi ou en ne se souciant pas de ce fait.

(2) A person who contravenes subsection (1) with respect to fewer than 10 persons is guilty of an offence and liable

(2) Quiconque contrevient au paragraphe (1) relativement à moins de dix personnes commet une infraction et est passible, sur déclaration de culpabilité :

(a) on conviction on indictment

a) par mise en accusation :

(i) for a first offence, to a fine of not more than \$500,000 or to a term of

(i) pour une première infraction, d'une

- | | |
|--|--|
| <p>imprisonment of not more than 10 years, or to both, or</p> <p>(ii) for a subsequent offence, to a fine of not more than \$1,000,000 or to a term of imprisonment of not more than 14 years, or to both; and</p> <p>(b) on summary conviction, to a fine of not more than \$100,000 or to a term of imprisonment of not more than two years, or to both.</p> <p>(3) A person who contravenes subsection (1) with respect to a group of 10 persons or more is guilty of an offence and liable on conviction by way of indictment to a fine of not more than \$1,000,000 or to life imprisonment, or to both.</p> <p>(3.1) A person who is convicted on indictment of an offence under subsection (2) or (3) with respect to fewer than 50 persons is also liable to a minimum punishment of imprisonment for a term of</p> <p>(a) three years, if either</p> <p>(i) the person, in committing the offence, endangered the life or safety of, or caused bodily harm or death to, any of the persons with respect to whom the offence was committed, or</p> <p>(ii) the commission of the offence was for profit, or was for the benefit of, at the direction of or in association with a criminal organization or terrorist group; or</p> <p>(b) five years, if both</p> | <p>amende maximale de cinq cent mille dollars et d'un emprisonnement maximal de dix ans, ou de l'une de ces peines,</p> <p>(ii) en cas de récidive, d'une amende maximale de un million de dollars et d'un emprisonnement maximal de quatorze ans, ou de l'une de ces peines;</p> <p>b) par procédure sommaire, d'une amende maximale de cent mille dollars et d'un emprisonnement maximal de deux ans, ou de l'une de ces peines</p> <p>(3) Quiconque contrevient au paragraphe (1) relativement à un groupe de dix personnes et plus commet une infraction et est passible, sur déclaration de culpabilité par mise en accusation, d'une amende maximale de un million de dollars et de l'emprisonnement à perpétuité, ou de l'une de ces peines.</p> <p>(3.1) Quiconque est déclaré coupable, par mise en accusation, de l'infraction prévue aux paragraphes (2) ou (3) visant moins de cinquante personnes est aussi passible des peines minimales suivantes:</p> <p>a) trois ans si, selon le cas :</p> <p>(i) l'auteur, en commettant l'infraction, a entraîné la mort de toute personne visée par l'infraction ou des blessures à celle-ci ou a mis en danger sa vie ou sa sécurité</p> <p>(ii) l'infraction a été commise au profit ou sous la direction d'une organisation criminelle ou d'un groupe terroriste ou en association avec l'un ou l'autre de ceux-ci ou en vue de tirer un profit;</p> <p>b) cinq ans si, à la fois:</p> |
|--|--|

- (i) the person, in committing the offence, endangered the life or safety of, or caused bodily harm or death to, any of the persons with respect to whom the offence was committed, and
- (ii) the commission of the offence was for profit, or was for the benefit of, at the direction of or in association with a criminal organization or terrorist group.

(3.2) A person who is convicted of an offence under subsection (3) with respect to a group of 50 persons or more is also liable to a minimum punishment of imprisonment for a term of

(a) five years, if either

- (i) the person, in committing the offence, endangered the life or safety of, or caused bodily harm or death to, any of the persons with respect to whom the offence was committed, or
- (ii) the commission of the offence was for profit, or was for the benefit of, at the direction of or in association with a criminal organization or terrorist group; or

(b) 10 years, if both

- (i) the person, in committing the offence, endangered the life or safety of, or caused bodily harm or death to, any of the persons with respect to whom the offence was committed, and
- (ii) the commission of the offence was for profit, or was for the benefit of, at the direction of or in association with a criminal organization or terrorist group.

(i) l'auteur, en commettant l'infraction, a entraîné la mort de toute personne visée par l'infraction ou des blessures à celle-ci ou a mis en danger sa vie ou sa sécurité,

(ii) l'infraction a été commise au profit ou sous la direction d'une organisation criminelle ou d'un groupe terroriste ou en association avec l'un ou l'autre de ceux-ci ou en vue de tirer un profit.

(3.2) Quiconque est déclaré coupable de l'infraction prévue au paragraphe (3) visant un groupe de cinquante personnes et plus est aussi passible des peines minimales suivantes :

a) cinq ans si, selon le cas :

(i) l'auteur, en commettant l'infraction, a entraîné la mort de toute personne visée par l'infraction ou des blessures à celle-ci ou a mis en danger sa vie ou sa sécurité,

(ii) l'infraction a été commise au profit ou sous la direction d'une organisation criminelle ou d'un groupe terroriste ou en association avec l'un ou l'autre de ceux-ci ou en vue de tirer un profit

b) dix ans si, à la fois :

(i) l'auteur, en commettant l'infraction, a entraîné la mort de toute personne visée par l'infraction ou des blessures à celle-ci ou a mis en danger sa vie ou sa sécurité,

(iii) l'infraction a été commise au profit ou sous la direction d'une organisation criminelle ou d'un groupe terroriste ou en association avec l'un ou l'autre

de ceux-ci ou en vue de tirer un profit.

(4) No proceedings for an offence under this section may be instituted except by or with the consent of the Attorney General of Canada.

(4) Il n'est engagé aucune poursuite pour une infraction prévue au présent article sans le consentement du procureur général du Canada.

Rules of the Supreme Court of Canada, SOR/2002-156.

55. Any person interested in an application for leave to appeal, an appeal or a reference may make a motion for intervention to a judge.

57. (1) The affidavit in support of a motion for intervention shall identify the person interested in the proceeding and describe that person's interest in the proceeding, including any prejudice that the person interested in the proceeding would suffer if the intervention were denied.

(2) A motion for intervention shall

(a) identify the position the person interested in the proceeding intends to take with respect to the questions on which they propose to intervene; and

(b) set out the submissions to be advanced by the person interested in the proceeding with respect to the questions on which they propose to intervene, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.

55. Toute personne ayant un intérêt dans une demande d'autorisation d'appel, un appel ou un renvoi peut, par requête à un juge, demander l'autorisation d'intervenir.

57. (1) L'affidavit à l'appui de la requête en intervention doit préciser l'identité de la personne ayant un intérêt dans la procédure et cet intérêt, y compris tout préjudice que subirait cette personne en cas de refus de l'autorisation d'intervenir.

(2) La requête expose ce qui suit:

a) la position que cette personne compte prendre relativement aux questions visées par son intervention;

b) ses arguments relativement aux questions visées par son intervention, leur pertinence par rapport à la procédure et les raisons qu'elle a de croire qu'ils seront utiles à la Cour et différentes de ceux des autres parties.

***United Nations Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137,
Can TS 1969 No 6.***

Article 1. Definition of the Term "Refugee"

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

...

(2) ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Article 31. Refugees Unlawfully in the Country of Refuge

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Article premier. Définition du Terme "Réfugié"

A. Aux fins de la présente Convention, le terme "réfugié" s'appliquera à toute personne:

...

(2) Qui, ... craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques, se trouve hors du pays dont elle a la nationalité et qui ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de ce pays ; ou qui, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle à la suite de tels événements, ne peut ou, en raison de ladite crainte, ne veut y retourner.

Article 31. Réfugiés en Situation Irrégulière dans le Pays d'Accueil

1. Les Etats Contractants n'appliqueront pas de sanctions pénales, du fait de leur entrée ou de leur séjour irréguliers, aux réfugiés qui, arrivant directement du territoire où leur vie ou leur liberté était menacée au sens prévu par l'article premier, entrent ou se trouvent sur leur territoire sans autorisation, sous la réserve qu'ils se présentent sans délai aux autorités et leur exposent des raisons reconnues valables de leur entrée ou présence irrégulières.

Article 33. Prohibition of Expulsion or Return ("Refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Article 33. Défense d'Expulsion et de Refoulement

1. Aucun des Etats Contractants n'expulsera ou ne refoulera, de quelque manière que ce soit, un réfugié sur les frontières des territoires où sa vie ou sa liberté serait menacée en raison de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques.

***Protocol against the Smuggling of Migrants by Land, Sea and Air, 15 November 2000, 2241
UNTS 507, 40 ILM 384.***

Article 2. Statement of purpose

The purpose of this Protocol is to prevent and combat the smuggling of migrants as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.

Article 2. Objet

Le présent Protocole a pour objet de prévenir et combattre le trafic illicite de migrants, ainsi de promouvoir la coopération entre les États Parties à cette fin, tout en protégeant les droits des migrants objet d'un tel trafic.

Article 6. Criminalization

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:

(a) The smuggling of migrants;

(b) When committed for the purpose of enabling the smuggling of migrants:

(i) Producing a fraudulent travel or identity document;

(ii) Procuring, providing or possessing such a document

(c) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means.

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

(a) Subject to the basic concepts of its legal

Article 6. Incrimination

1. Chaque État Partie adopte les mesures législatives et autres nécessaires pour conférer le caractère d'infraction pénale, lorsque les actes ont été commis intentionnellement et pour en tirer, directement ou indirectement, un avantage financier ou autre avantage matériel:

a) Au trafic illicite de migrants;

b) Lorsque les actes ont été commis afin de permettre le trafic illicite de migrants:

i) À la fabrication d'un document de voyage ou d'identité frauduleux;

ii) Au fait de procurer, de fournir ou de posséder un tel document;

c) Au fait de permettre à une personne, qui n'est ni un ressortissant ni un résident permanent, de demeurer dans l'État concerné, sans satisfaire aux conditions nécessaires au séjour légal dans ledit État, par les moyens mentionnés à l'alinéa b du présent paragraphe ou par tous autres moyens illégaux.

2. Chaque État Partie adopte également les mesures législatives et autres nécessaires pour conférer le caractère d'infraction pénale:

system, attempting to commit an offence established in accordance with paragraph 1 of this article;

(b) Participating as an accomplice in an offence established in accordance with paragraph 1(a), (b)(i) or (c) of this article and, subject to the basic concepts of its legal system, participating as an accomplice in an offence established in accordance with paragraph 1 of this article;

(c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

a) Sous réserve des concepts fondamentaux de son système juridique, au fait de tenter de commettre une infraction établie conformément au paragraphe 1 du présent article;

b) Au fait de se rendre complice d'une infraction établie conformément à l'alinéa a, à l'alinéa b i ou à l'alinéa c du paragraphe 1 du présent article et, sous réserve des concepts fondamentaux de son système juridique, au fait de se rendre complice d'une infraction établie conformément à l'alinéa b ii du paragraphe 1 du présent article;

c) Au fait d'organiser la commission d'une infraction établie conformément au paragraphe 1 du présent article ou de donner des instructions à d'autres personnes pour qu'elles la commettent.

Article 16. Protection and assistance measures

1. In implementing this Protocol, each State Party shall take, consistent with its obligations under international law, all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of this Protocol as accorded under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

2. Each State Party shall take appropriate measures to afford migrants appropriate protection against violence that may be inflicted upon them, whether by individuals or groups, by reason of being the object of conduct set forth in article 6 of this Protocol.

Article 6. Mesures de protection et d'assistance

1. Lorsqu'il applique le présent Protocole, chaque État Partie prend, conformément aux obligations qu'il a contractées en vertu du droit international, toutes les mesures appropriées, y compris, s'il y a lieu, des mesures législatives, pour sauvegarder et protéger les droits des personnes qui ont été l'objet des actes énoncés à l'article 6 du présent Protocole, tels que ces droits leur sont accordés en vertu du droit international applicable, en particulier le droit à la vie et le droit de ne pas être soumis à la torture ou à d'autres peines ou traitements cruels, inhumains ou dégradants.

2. Chaque État Partie prend les mesures appropriées pour accorder aux migrants une protection adéquate contre toute violence pouvant leur être infligé, aussi bien par des personnes que par des groupes, du fait qu'ils ont été l'objet des actes énoncés à l'article 6 du présent Protocole.

3. Each State Party shall afford appropriate assistance to migrants whose lives or safety are endangered by reason of being the object of conduct set forth in article 6 of this Protocol.

4. In applying the provisions of this article, States Parties take into account the special needs of women and children.

5. In the case of the detention of a person who has been the object of conduct set forth in article 6 of this Protocol, each State Party shall comply with its obligations under the Vienna Convention on Consular Relations, where applicable, including that of informing the person concerned without delay about the provisions concerning notification to and communication with consular officers.

Article 19. Saving clause

1. Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

3. Chaque État Partie accorde une assistance appropriée aux migrants dont la vie ou la sécurité sont mises en danger par le fait qu'ils ont été l'objet des actes énoncés à l'article 6 du présent Protocole.

4. Lorsqu'ils appliquent les dispositions du présent article, les États Parties tiennent compte des besoins particuliers des femmes et des enfants.

5. En cas de détention d'une personne qui a été l'objet des actes énoncés à l'article 6 du présent Protocole, chaque État Partie respecte les obligations qu'il a contractées en vertu de la Convention de Vienne sur les relations consulaires, dans les cas applicables, y compris l'obligation d'informer sans retard la personne concernée des dispositions relatives à la notification aux fonctionnaires consulaires et à la communication avec ces derniers.

Article 19. Clause de sauvegarde

1. Aucune disposition du présent Protocole n'a d'incidences sur les autres droits, obligations et responsabilités des États et des particuliers en vertu du droit international, y compris du droit international humanitaire et du droit international relative aux droits de l'homme et en particulier, lorsqu'ils s'appliquent, de la Convention de 1951 et du Protocole de 1967 relatifs au statut des réfugiés ainsi que du principe de non-refoulement qui y est énoncé.

*United Nations Convention against Transnational Organized Crime, 15 November 2000,
2225 UNTS 209, 40 ILM 335.*

Article 5. Criminalization of participation in an organized criminal group

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:

(i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;

(ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:

a. Criminal activities of the organized criminal group;

b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;

(b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of

Article 5. Incrimination de la participation à un groupe criminel organisé

1. Chaque État Partie adopte les mesures législatives et autres nécessaires pour conférer le caractère d'infraction pénale, lorsque commis intentionnellement:

a) À l'un ou l'autre des actes suivants ou aux deux, en tant qu'infractions pénales distinctes de celles impliquant une tentative d'activité criminelle ou sa consommation:

i) Au fait de s'entendre avec une ou plusieurs personnes en vue de commettre une infraction grave à une fin liée directement ou indirectement à l'obtention d'un avantage financier ou autre avantage matériel et, lorsque le droit interne l'exige, impliquant un acte commis par un des participants en vertu de cette entente ou impliquant un groupe criminel organisé;

ii) À la participation active d'une personne ayant connaissance soit du but et de l'activité criminelle générale d'un groupe criminel organisé soit de son intention de commettre les infractions en question:

a. Aux activités criminelles du groupe criminel organisé;

b. À d'autres activités du groupe criminel organisé lorsque cette personne sait que sa participation contribuera à la réalisation du but criminel susmentionné;

b) Au fait d'organiser, de diriger, de faciliter, d'encourager ou de favoriser au moyen d'une aide ou de conseils la

serious crime involving an organized criminal group.

commission d'une infraction grave impliquant un groupe criminel organisé.

Article 25. Assistance and protection of victims

1. Each State Party shall take appropriate measures within its means to provide assistance and protection to victims of offences covered by this Convention, in particular in cases of threat of retaliation or intimidation.

2. Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention.

3. Each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

Article 25. Octroi d'une assistance and d'une protection aux victimes

1. Chaque État Partie prend, dans la limite de ses moyens, des mesures appropriées pour prêter assistance et accorder protection aux victimes d'infractions visées par la présente Convention, en particulier dans les cas de menace de représailles ou d'intimidation.

2. Chaque État Partie établit des procédures appropriées pour permettre aux victimes d'infractions visées par la présente Convention d'obtenir réparation.

3. Chaque État Partie, sous réserve de son droit interne, fait en sorte que les avis et préoccupations des victimes soient présentés et pris en compte aux stades appropriés de la procédure pénale engagée contre les auteurs d'infractions, d'une manière qui ne porte pas préjudice aux droits de la défense.

Article 34. Implementation of the Convention

3. Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating transnational organized crime.

Article 34. Application de la Convention

3. Chaque État Partie peut adopter des mesures plus strictes ou plus sévères que celles qui sont prévues par la présente Convention afin de prévenir et de combattre la criminalité transnationale organisée.

Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 art 26, Can TS
1980 No 37.

Article 26. "*Pacta sunt servanda*"

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27. Internal law and observances of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

Article 53. Treaties conflicting with a peremptory norm of general international law ("*jus cogens*")

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 64. Emergence of a new peremptory norm of general international law ("*jus cogens*")

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

Article 71. Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law

Article 26. "*Pacta sunt servanda*"

Tout traité en vigueur lie les parties et doit être exécuté par elles de bonne foi.

Article 27. Droit interne et respect des traités

Une partie ne peut invoquer les dispositions de son droit interne comme justifiant la non-exécution d'un traité. Cette règle est sans préjudice de l'article 46.

Article 53. Traités en conflit avec une norme impérative du droit international général ("*jus cogens*")

Est nul tout traité qui, au moment de sa conclusion, est en conflit avec une norme impérative du droit international général. Aux fins de la présente Convention, une norme impérative du droit international général est une norme acceptée et reconnue par la communauté internationale des Etats dans son ensemble en tant que norme à laquelle aucune dérogation n'est permise et qui ne peut être modifiée que par une nouvelle norme du droit international général ayant le même caractère.

Article 64. Survenance d'une nouvelle norme impérative du droit international général ("*jus cogens*")

Si une nouvelle norme impérative du droit international général survient, tout traité existant qui est en conflit avec cette norme devient nul et prend fin.

Article 71. Conséquences de la nullité d'un traité en conflit avec une norme impérative du droit international général

1. In the case of a treaty which is void under article 53 the parties shall:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

(b) bring their mutual relations into conformity with the peremptory norm of general international law

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

1. Dans le cas d'un traité qui est nul en vertu de l'article 53, les parties sont tenues :

a) d'éliminer, dans la mesure du possible, les conséquences de tout acte accompli sur la base d'une disposition qui est en conflit avec la norme impérative du droit international général; et

b) de rendre leurs relations mutuelles conformes à la norme impérative du droit international général.

2. Dans le cas d'un traité qui devient nul et prend fin en vertu de l'article 64, la fin du traité :

a) libère les parties de l'obligation de continuer d'exécuter le traité;

b) ne porte atteinte à aucun droit, aucune obligation, ni aucune situation juridique des parties, créés par l'exécution du traité avant qu'il ait pris fin; toutefois, ces droits, obligations ou situations ne peuvent être maintenus par la suite que dans la mesure où leur maintien n'est pas en soi en conflit avec la nouvelle norme impérative du droit international général.

Court File Nos. 35677
35685
35688
35388
35958

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

Between:

Court File No. 35677

JESUS RODRIGUEZ HERNANDEZ

APPELLANT/RESPONDENT
(Respondent in the Court below)

-and-

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

RESPONDENT/APPELLANT
(Appellant in the Court below)

-and-

AMNESTY INTERNATIONAL (CANADIAN SECTION, ENGLISH BRANCH)

PROPOSED INTERVENER

Between:

Court File No. 35685

B306

APPELLANT/RESPONDENT
(Respondent in the Court below)

-and-

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

RESPONDENT/APPELLANT
(Appellant in the Court below)

-and-

AMNESTY INTERNATIONAL (CANADIAN SECTION, ENGLISH BRANCH)

PROPOSED INTERVENER

Between:

Court File No. 35688

J.P. ET AL

APPELLANT/RESPONDENT
(Respondent in the Court below)

-and-

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

RESPONDENT/APPELLANT
(Appellant in the Court below)

-and-

AMNESTY INTERNATIONAL (CANADIAN SECTION, ENGLISH BRANCH)

PROPOSED INTERVENER

Between:

Court File No. 35388

B010

APPELLANT/RESPONDENT
(Respondent in the Court below)

-and-

MINISTER OF CITIZENSHIP AND IMMIGRATION

RESPONDENT/APPELLANT
(Appellant in the Court below)

-and-

AMNESTY INTERNATIONAL (CANADIAN SECTION, ENGLISH BRANCH)

PROPOSED INTERVENER

Between:

Court File No. 35958

FRANCIS ANTHONIMUTHU APPULONAPPA ET AL.

APPELLANTS
(Respondents in the Court Below)

-and-

HER MAJESTY THE QUEEN ET AL.

RESPONDENTS
(Appellants in the Court Below)

-and-

AMNESTY INTERNATIONAL (CANADIAN SECTION, ENGLISH BRANCH)

PROPOSED INTERVENER

DRAFT ORDER

UPON THE MOTION by Amnesty International (Canadian Section, English Branch)
requesting leave to intervene in the above-mentioned appeal;

AND HAVING READ the material filed;

IT IS HEREBY ORDERED THAT:

1. Amnesty International (Canadian Section, English Branch) be granted leave to intervene in the above-mentioned appeal;
2. Amnesty International (Canadian Section, English Branch) may file a factum; and
3. Counsel for Amnesty International (Canadian Section, English Branch) may make oral argument at the hearing of the above-mentioned appeal.