

ARTICLES

NON-REFOULEMENT AND *JUS COGENS*: LIMITING ANTI-TERROR MEASURES THAT THREATEN REFUGEE PROTECTION

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This article argues that we must insist on strict limits to the exceptions to non-refoulement articulated in the 1951 Convention on the Status of Refugees, given current obligations under international law. As seen in evolving US policy, there is great potential for refugee-receiving states to rely heavily on the exceptions to non-refoulement in enacting anti-terrorism policies, to the detriment of refugee protection. And yet, non-refoulement—the doctrine central to refugee protection that prohibits return of an individual to a country in which he or she may be persecuted—is emerging as a new *jus cogens* norm. Non-refoulement as articulated in the 1951 Convention contains exceptions; yet these exceptions are inconsistent with the emergent *jus cogens* norm. Accepting the arguments that non-refoulement is *jus cogens*, this paper examines what becomes of these exceptions. Relying on laws and scholarly opinion on treaty interpretation and the effects of emerging *jus cogens* norms, as well as on comparisons to articulations of non-refoulement in the torture context, this paper argues that the exceptions must be read in a very limited manner indeed. Strict limits to the exceptions to non-refoulement inform the balance between national security and refugee rights, and uphold the new *jus cogens* norm while safeguarding the underlying refugee protection regime.

INTRODUCTION

Non-refoulement, the doctrine central to refugee protection that prohibits return of an individual to a country in which he or she may be persecuted,¹ has taken on an increasingly fundamental character. Indeed, non-refoulement has attained the status of customary international law² or, as many recent commentators have asserted, is now considered a *jus cogens* norm³ – that is, a peremptory norm of international law from which no derogation is

1. GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 117 (1996). See also Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in *REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION* 87, 89 (Erika Feller et al. eds., 2003) (“*Non-refoulement* is a concept which prohibits States from returning a refugee or asylum-seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.”).

2. See, e.g., U.N. High Comm’r for Refugees [hereinafter UNHCR], Executive Comm. Programme, *Non-Refoulement*, Conclusion No. 6 (XXVIII) (1977) [hereinafter Executive Committee Conclusion No. 6]; (“[T]he fundamental humanitarian principle of *non-refoulement* has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States.”) Lauterpacht & Bethlehem, *supra* note 1, at 158 (stating the essential content of the principle of non-refoulement as customary law); Jean Allain, *The jus cogens Nature of non-refoulement*, 13(4) INT’L J. REFUGEE L. 533, 538 (2002) (“[I]t is clear that the norm prohibiting *refoulement* is part of customary international law, thus binding on all States whether or not they are party to the 1951 Convention.”).

3. Allain, *supra* note 2.

permitted.⁴ Yet, non-refoulement as articulated in the 1951 Convention on the Status of Refugees (“1951 Convention”) sets forth in Article 33(2) two potentially broad exceptions that the receiving state may exercise to protect the community or defend national security.⁵ These exceptions have the potential to gut non-refoulement and leave refugees vulnerable to violations of underlying human rights. Accepting as valid the arguments that assert the emergence of non-refoulement as a *jus cogens* norm, what effect does this have on the Article 33(2) exceptions?

This paper argues that if non-refoulement in the refugee context has emerged as a *jus cogens* norm, in effect moving beyond treaty law, then the treaty-based exceptions to non-refoulement must be re-examined and strictly limited. The character of non-refoulement as a *jus cogens* norm must be determined by looking not only to the 1951 Convention, but also to customary international law, arguments of scholars, state practice, and comparable articulations of the norm in other areas of international law, such as torture. If we accept the premise that non-refoulement is now *jus cogens*, we must see the norm as absolute, unconditional, and assuming a place in the hierarchy of international law above that of treaties. The effects of a new *jus cogens* norm can be controversial and unexpected: here, the characterization of non-refoulement as *jus cogens* prohibits a broad application of the Article 33(2) exceptions even though those exceptions articulate state intent. Yet, such a characterization also places non-refoulement above treaty law, superceding state consent.

The precise scope of the Article 33(2) exceptions is a particularly pressing issue in light of the potential for states to rely heavily on these exceptions in enacting anti-terrorism measures.⁶ In partial response to the attacks of September 11, 2001, the United States in particular has relied on the language in Article 33(2) to enact legislation and policies that prioritize anti-terrorism measures above refugee protection.⁷ Measures that limit the applicability of

4. Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, (*entered into force* Jan. 27, 1980) [hereinafter Vienna Convention] (“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.”).

5. Convention Relating to the Status of Refugees, *adopted* July 28, 1951 art. 33(2), U.N. Doc. A/CONF.2/108 (1951), 189 U.N.T.S. 150 (*entered into force* 22 April 1954) [hereinafter 1951 Convention].

6. This paper makes no effort to define the terms “terrorism,” “terrorist group,” “terrorist” or other related concepts, but rather acknowledges that there are no clear meanings of these terms articulated in international law. *See, e.g.*, Rene Bruin & Kees Wouters, *Terrorism and the Non-Derogability of Non-refoulement*, 15(1) INT’L J. REFUGEE L. 5, 7 (2003) (“[N]o uniform international definition of terrorism exists.”). Precisely because these terms are not clearly defined, the potential for abuse in asylum and refugee law is tremendous.

7. *See, e.g.*, Stephen H. Legomsky, *The Ethnic and Religious Profiling of Non-Citizens: National Security and International Human Rights*, 25 B.C. THIRD WORLD L. J. 161, 162-177 (2005) (giving a detailed overview of security-related initiatives that the United States has taken in relation to immigration and non-citizens since September 11, 2001); Andrew Schoenholtz, *Refugee Protection in*

refugee law to non-citizens who are thought to have links to terrorism—even if those measures are overbroad—are deeply appealing to states under pressure to respond to the threat of global terrorism.⁸ Yet a broad application of the Article 33(2) exceptions could have a catastrophic effect, excluding legitimate refugees from protection, weakening the foundations of the refugee law regime, and undermining the legitimacy of the new peremptory norm.

The first section of this paper examines the recent history of non-refoulement to establish its broad acceptance in the refugee context. The section argues that the principle of non-refoulement in the refugee context has gained wide acceptance, but that the exceptions to the norm articulated in Article 33(2) have not garnered similar consensus. Next, this section examines emerging state practice around the Article 33(2) exceptions since September 11, 2001, arguing that there is potential for states to rely heavily on these exceptions in enacting anti-terror policies. Finally, this section examines the absolute nature of non-refoulement in the context of norms prohibiting torture and cruel, inhuman or degrading treatment, arguing that this provides a persuasive framework for interpreting non-refoulement in the refugee context.

The second section of this paper turns to non-refoulement as *jus cogens*. First, this part of the paper examines and accepts arguments that non-refoulement in the refugee context has acquired the status of a *jus cogens* norm. Second, this section asks: what becomes of the exceptions to Article 33(2), if we accept the premise that non-refoulement is *jus cogens*? This section argues that the effect of characterizing non-refoulement as a new *jus cogens* norm is to prescribe an extremely limited reading of the Article 33(2) exceptions, pursuant to law on treaty interpretation, state practice, customary international law, and an examination of the norm of non-refoulement in comparable areas of international law. This section notes, however, that such an interpretation demonstrates the manner in which emergent *jus cogens* norms supercede state consent. Finally, this paper concludes that, as the Article 33(2) exceptions must be interpreted in an extremely limited manner, states must not rely on these provisions in their anti-terrorism policies.

the United States Post-September 11, 36 COLUM. HUM. RTS. L. REV. 323 (Spring 2005) (discussing national security measures taken since September 11, 2001, which damage refugee protection in the U.S.); Eleanor Acer, *Refugees in an Insecure Time: Seeking Asylum in Post September 11 United States*, 28 FORDHAM INT'L L. J. 1361, 1363 (2005) (arguing that the process of obtaining asylum has become more difficult for all asylum seekers because of "unsubstantiated claims that terrorists are trying to abuse the asylum system").

8. See, e.g., Erika Feller, *Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come*, 18 INT'L J. REFUGEE L. 509, 511 (2006) ("From a perspective indelibly marked by the attacks of 11 September 2001 in the United States, migration carries with it the spectre of terror exported, transnational crime proliferating, national borders abused with impunity and host community ways of life under serious threat. The result has been increasingly restrictive, control-oriented and indiscriminate migration policies, at times at the expense of core human rights protections.").

I. THE HISTORY OF NON-REFOULEMENT AS A FUNDAMENTAL NORM OF REFUGEE LAW

A. *Broad Acceptance of the Principle of Non-Refoulement*

Non-refoulement is considered a fundamental principle of international refugee law.⁹ It existed as a prominent legal concept for more than fifty years before it was codified during the post-World War II period.¹⁰ Throughout these early years, some exceptions to the concept were acknowledged, but never in a consistent or comprehensive way.¹¹ Non-refoulement was formally codified in the 1951 Convention Relating to the Status of Refugees which, in Article 33, provides that:

(1) No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of the 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.

(2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.¹²

The principle of non-refoulement as articulated in Article 33 is broad in scope, offering expansive protection to refugees.¹³ Elihu Lauterpacht and Daniel Bethlehem detail the content of this broad scope, noting that the phrase "expel or return ('refouler') a refugee in any manner whatsoever" has been taken to prohibit any act of removal (including rejection, expulsion, deportation, and return) that would place the individual at risk, regardless of the formal description of the act given by the removing state.¹⁴ The expression "in any manner whatsoever" indicates that the concept of refoulement must be construed expansively and without limitation, and as such

9. See, e.g., *id.* at 523 (calling non-refoulement "the most fundamental of all international refugee law obligations").

10. GOODWIN-GILL, *supra* note 1, at 117-19 (providing a detailed description of early non-refoulement provisions, ranging from the United Kingdom's 1905 Aliens Act, to interwar agreements with respect to refugees from Germany).

11. *Id.*

12. 1951 Convention, *supra* note 5, at art. 33.

13. See David Weissbrodt & Isabel Hortreiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 1, 18 (1999) (noting that the "Convention's drafters' intention to expand the scope of protection accorded by earlier international agreements relating to the status of refugees is emphasized in the preamble").

14. Lauterpacht & Bethlehem, *supra* note 1, at 112.

includes no exceptions for other treaty obligations such as extradition.¹⁵ The phrase “where his life or freedom would be threatened” is also interpreted broadly to encompass any well-founded fear of persecution as per Article 1 of the 1951 Convention,¹⁶ and arguably broader threats such as generalized violence.¹⁷ The principle of non-refoulement applies to a wide spectrum of people, including those seeking asylum as well as those already granted asylum, regardless of whether the individual entered the host state legally.¹⁸ Furthermore, non-refoulement is commonly regarded as a right which extends through time, applying to the individual as soon as he arrives and throughout his stay in the country of refuge.¹⁹

International documents that followed the 1951 Convention promulgate the same—or in some cases, an even more expansive—definition of non-refoulement.²⁰ The 1967 Protocol relating to the Status of Refugees (“1967 Protocol”) revisits the 1951 Convention and confirms its essential terms, among them the definition of non-refoulement.²¹ Most of the regional agreements on refugee law from this period follow a well-founded fear of persecution (defined in similar terms as in the 1951 Convention) as the standard for determining protection from refoulement.²² In addition, in keeping with the 1951 Convention, numerous regional documents state that expulsion can constitute refoulement, and some specifically identify rejection at the frontier as refoulement.²³ These documents have been used to

15. *Id.*

16. *Id.* at 124.

17. *Id.* at 124-25.

18. *Id.* at 115-16.

19. Jean-Francois Durieux & Jane McAdam, *Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies*, 16(1) INT'L J. REFUGEE L. 4, 13 (2004) (noting that non-refoulement extends through time).

20. Lauterpacht & Bethlehem, *supra* note 1, at 90-93 (providing an overview and discussion of different articulations of non-refoulement promulgated after the 1951 Convention).

21. 1967 Protocol Relating to the Status of Refugees, art. I, 606 U.N.T.S. 267 (*entered into force* Oct. 4, 1967) [hereinafter 1967 Protocol] (noting that States Parties to the 1967 Protocol undertake to apply Articles 2 to 34 inclusive of the 1951 Convention, and adopting essentially the same definition of a ‘refugee’ with the exception that the geographical limitation in the Convention is removed).

22. *See, e.g.*, OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, art. II(3), Sept. 10, 1969, 1001 U.N.T.S. 45 (*entered into force* June 20, 1974) [hereinafter OAU Convention] (“[T]he term ‘refugee’ shall mean every person who, 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”); American Convention on Human Rights, art. 22(8), Nov. 22, 1969, 9 I.L.M. 673 [hereinafter American Convention] (“In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.”); Organization of American States, Cartagena Declaration on Refugees, O.A.S. Ser.L/V/II.66, doc. 10, rev.1, § III(5), referring to § II(b) (Nov. 22, 1984) [hereinafter Cartagena Declaration] (agreeing “to adopt the terminology established in the Convention and Protocol referred to in the foregoing paragraph [the 1951 Convention and the 1967 Protocol relating to the Status of Refugees] with a view to distinguishing refugees from other categories of migrants”).

23. *See, e.g.*, Declaration on Territorial Asylum, G.A. Res. 2312 (XXII), art. 3(1), 22 U.N. GAOR Supp. No. 16, U.N. Doc. A/6716 (Dec. 14, 1967) [hereinafter Declaration on Territorial Asylum]

interpret the 1951 Convention, suggesting that there, too, exists an obligation to refrain from rejection at the frontier.²⁴ These strong, consistent rearticulations of non-refoulement underscore the broad nature of the principle.

Not only is non-refoulement seen as a principle with broad application, but it has also gained acceptance as a fundamental principle of refugee protection.²⁵ In 1984, through the Cartagena Declaration, Central American states, Panama, and Mexico together labeled the principle of non-refoulement as a “cornerstone of the international protection of refugees” and stated that “[t]his principle is imperative in regard to refugees and in the present state of international law should be acknowledged as *jus cogens*.”²⁶ Both Executive Committee Conclusions from the Office of the United Nations High Commissioner for Refugees (UNHCR) and U.N. General Assembly Resolutions have repeatedly affirmed the fundamental importance of non-refoulement within the scheme of refugee protection.²⁷ The fundamental nature of the principle is underscored by its non-derogable nature, as emphasized in Article 42 of the 1951 Convention and affirmed by Article VII(1) of the 1967 Protocol.²⁸

Over the last fifty years of state practice, non-refoulement in the refugee context has provided a broad foundation for state practice.²⁹ For instance, Goodwin-Gill observes that virtually all states accept that the principle of non-refoulement as articulated in Article 33 of the 1951 Convention applies to refugees as defined by Article 1 of the Convention.³⁰ In addition, most go further: they do not limit the principle of non-refoulement to those who have formally been recognized as refugees,³¹ they also apply the principle to asylum seekers while determining their status, regardless of the legality of the migration of the asylum seeker.³² When considering the standard required to demonstrate that there is a risk of persecution as a result of refoulement, state practice has broadly established the notion that the well-founded fear criterion articulated in Article 1 of the 1951 Convention applies also to

(“No person . . . shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subject to persecution.”); OAU Convention, *supra* note 22, at art. II(3) (“No person shall be subjected by a Member State to measures such as rejection at the frontier, return, or expulsion . . .”); Cartagena Declaration, *supra* note 22, at sec. III, para. 5 (emphasizing the “importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier)”).

24. Lauterpacht & Bethlehem, *supra* note 1, at 113-14.

25. See, e.g., UNHCR, Executive Committee Conclusion No. 6, *supra* note 2 (“[T]he fundamental humanitarian principle of *non-refoulement* has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States.”); Allain, *supra* note 2, at 538 (“[I]t is clear that the norm prohibiting refoulement is part of customary international law, thus binding on all States whether or not they are party to the 1951 Convention.”).

26. Cartagena Declaration, *supra* note 22, at sec. III, para. 5.

27. Lauterpacht & Bethlehem, *supra* note 1, at 107 (discussing a number of Executive Committee conclusions and referring to General Assembly resolutions that underscore this point).

28. 1951 Convention, *supra* note 5, at art. 42; 1967 Protocol, *supra* note 21, at art. VII(1).

29. GOODWIN-GILL, *supra* note 1, at 123.

30. *Id.* at 137.

31. *Id.* at 121.

32. *Id.* at 137.

Article 33.³³

Though there has been some debate as to the applicability of non-refoulement at the outside edge of the refugee definition, there is consensus on the fundamental nature of the norm. For instance, certain states have consistently maintained that normal immigration controls and visa policies do not amount to non-refoulement, whereas others have countered that the refusal of admission at the border for purely administrative reasons vitiates the principle of non-refoulement.³⁴ Likewise, some debate has arisen when applying the 1951 Convention (as expanded by the 1967 Protocol) to people fleeing war without a specific persecutory impetus, as some states resisted “borrowing terminology” from the Convention for use in “new refugee situations,” and disagreed with the suggestion that there was a legal right to non-refoulement for non-Convention refugees.³⁵ Nonetheless, even dissenting states agreed that “in relation to this group, it was felt that the entitlement of such persons was to minimum standards of protection[.]”³⁶

These disagreements are at the margin of the debate; there is near-universal consensus that non-refoulement is a central, foundational norm in the refugee protection regime. For decades, as discussed below, it has been considered a principle of customary international law,³⁷ and is emerging as a *jus cogens* norm.³⁸ Non-refoulement’s fundamental character and broad application suggest that any exceptions to the principle should be extremely limited.

B. *The Lack of Historical Consensus toward Exceptions to Non-Refoulement*

Whereas non-refoulement has gained broad acceptance as a fundamental norm of refugee law, the exceptions to non-refoulement have not garnered similar status. The presence of exceptions to non-refoulement had long been

33. *Id.* at 138.

34. *Id.* at 131 (discussing the British and Argentinean approaches to non-refoulement in the late 1980s).

35. The Executive Comm. of the High Comm’r’s Programme, *Report of the Sub-Comm. of the Whole on Int’l Prot.*, ¶¶ 16-17, delivered to the General Assembly, U.N. Doc. A/AC.96/802 (Oct. 6, 1992).

36. *Id.*

37. See, e.g., Allain, *supra* note 2, at 538 (“[I]t is clear that the norm prohibiting refoulement is part of customary international law, thus binding on all States whether or not they are party to the 1951 Convention.”); GOODWIN-GILL, *supra* note 1, at 167 (arguing that state practice since the Convention is persuasive evidence of the concretization of a customary rule, even in the absence of any formal judicial pronouncement); Lauterpacht & Bethlehem, *supra* note 1, at 149 (“The view has been expressed . . . that ‘the principle of non-refoulement of refugees is now widely recognized as a general principle of international law’ . . . in view also of the evident lack of expressed objection by any State to the normative character of the principle of non-refoulement, we consider that non-refoulement must be regarded as a principle of customary international law.”).

38. Allain, *supra* note 2. See Section II.A, *infra*, for further discussion.

subject to varied state practice prior to the norm's codification.³⁹ However, even in their earliest conceptualizations, some limitations on return included narrow exceptions for public order or national security in the host state.⁴⁰

As codified in the 1951 Convention, Article 33(2) has two exceptions: for public order and for national security.⁴¹ The public order exception applies to "a refugee . . . who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."⁴² The requirement of a conviction at final judgment establishes an initial threshold before the exception can be applied. Once the final conviction has been established, the Article on its face calls for a determination that the individual poses a future threat to the community.⁴³ In practice, some states have used a prior conviction as presumptive evidence that a threat to the community exists, thus eliminating the second step of the test.⁴⁴ The danger must be to a community in the country of refuge, not to any community elsewhere.⁴⁵ The phrase "community" refers to the population in question, as opposed to the national security exception, which refers to threats to the state as a whole.⁴⁶

The national security exception contains a single test: are there "reasonable grounds for regarding the refugee in question as a danger to the security of the country" of refuge?⁴⁷ This standard is less exacting than the public order exception, as it requires only "reasonable grounds" as opposed to a final judgment of conviction, and imposes only a one-step test. Article 33(2) does not identify the types of acts that could trigger the national security exception but rather leaves that to the discretion of the states, allowing for the possibility of broad application.⁴⁸ The text of the Article does little to reign in

39. GOODWIN-GILL, *supra* note 1, at 117 (discussing how many years prior to any formal codification of non-refoulement, bi-lateral agreements between sovereigns allowed for the reciprocal surrender of subversives, dissidents, and traitors).

40. See, e.g., Convention Relating to the International Status of Refugees, art. 3, Oct. 28, 1933, 159 L.N.T.S. 3663 (1935-1936) (prohibiting States from taking police measures against refugees unless dictated by national security or public order); Convention concerning the Status of Refugees coming from Germany, art. 5, Feb. 10, 1938, 192 L.N.T.S. 4461 (1938); see also GOODWIN-GILL, *supra* note 1, at 118 (giving a general discussion of these early international agreements concerning non-refoulement).

41. 1951 Convention, *supra* note 5, at art. 33(2).

42. *Id.* ("The benefit of the present provision may not, however, be claimed by a refugee . . . who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.").

43. *Id.*

44. See, e.g., In re Y-L-, 23 I. & N. Dec. 270, 270 (A.G. 2002) (establishing that in the U.S. a particularly serious crime is presumptive of danger to the community); see also James C. Hathaway and Anne K. Cusick, *Refugee Rights are Not Negotiable*, 14 GEO. IMMIGR. L.J. 481, 537 (2000) (arguing that the United States has collapsed the two part test impermissibly by creating this presumption).

45. Lauterpacht & Bethlehem, *supra* note 1, at 138.

46. *Id.* at 140.

47. 1951 Convention, *supra* note 5, at art. 33(2) ("The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is[.]").

48. Lauterpacht & Bethlehem, *supra* note 1, at 135.

the scope of the state's discretion: yes, the state must have "reasonable grounds" for regarding a refugee as a danger to national security, but that only limits the state from acting in an arbitrary or capricious manner.

The inclusion in the 1951 Convention of exceptions to non-refoulement was controversial. The 1951 Convention grew out of an ad hoc committee convened by the United Nations Economic and Social Council in 1949.⁴⁹ When the committee met in 1950 and drew up a draft provision on refoulement,⁵⁰ the principle was considered so fundamental that no exceptions were proposed.⁵¹ Both the Israeli and the British delegates emphasized that the prohibition on refoulement should apply to refugees seeking admission as well as to those already admitted to residence.⁵² The U.S. delegate stated that "whatever the case might be . . . he must not be turned back No consideration of public order should be allowed to overrule that guarantee, for if the State concerned wished to get rid of the refugee at all costs, it could send him to another country or place him in an internment camp."⁵³ However, as Goodwin-Gill notes, states during this period showed considerable reluctance to acknowledge a right to be granted asylum, and correspondingly such a right was excluded from both the 1948 Universal Declaration on Human Rights and the 1951 Convention.⁵⁴ These concerns carried over to the 1951 Conference of Plenipotentiaries, when the exceptions to non-refoulement were added to the 1951 Convention's language.⁵⁵

The 1951 Convention did, of course, establish mechanisms for excluding those judged to be dangerous from refugee status, and some argue that this removes any need for states to rely heavily on Article 33(2). Article 1(F) excludes from refugee status an individual for whom there are serious reasons for considering that he or she has committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime outside of the country of refuge prior to his admission as a refugee, or "has been guilty of acts contrary to the purposes and principles of the United Nations."⁵⁶ To the extent that an individual who may have committed one or more of the

49. Economic and Social Council [ESCOR] Res. 248B (IX), at 60, U.N. Doc. E/1553 (Aug. 8, 1949). See also Lauterpacht & Bethlehem, *supra* note 1, at 98-99 (discussing the origins of the 1951 Convention in the ad hoc committee); GOODWIN-GILL, *supra* note 1, at 119-20 (discussing the work of the ad hoc committee).

50. Second Session of the Ad Hoc Comm. on Refugees and Stateless Persons, Geneva, Switz., Aug. 14-25, 1950, *Report*, at 25, U.N. Doc. E/1850, E/AC.32/8 (Aug. 25, 1950). ("No contracting State shall expel or return 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 or political opinion.")

51. GOODWIN-GILL, *supra* note 1, at 120.

52. First Session of the Ad Hoc Comm. on Statelessness and Related Problems, Lake Success, N.Y., Feb. 1, 1950, *Summary Record of the Twentieth Meeting*, ¶ 60, U.N. Doc. E/AC.32/SR.20 (Feb. 10, 1950).

53. *Id.* at paras. 54-5.

54. GOODWIN-GILL, *supra* note 1, at 120.

55. *Id.*

56. 1951 Convention, *supra* note 5, at art. 1(F).

crimes enumerated above may be considered a “danger to the security” of the country of refuge, that person would also fall within Article 33(2). Commentators have observed that terrorist acts may fall within the ambit of the Article 1(F) exclusion provisions.⁵⁷ Because Article 1(F) gives states the ability to exclude individuals who are threats, Article 33(2) need not be applied expansively.

Article 1(F)’s specificity allows for a more precise refugee protection regime than one that relies broadly on Article 33(2).⁵⁸ Article 1(F)(b) specifically refers to crimes committed outside of the country of refuge prior to admission, whereas the public order exception in Article 33(2) is silent as to where and when the crime in question has been committed, and consequently can apply to more situations. Whereas Article 1(F) requires “serious reasons to consider” that an individual has committed a bad act, the national security exception in Article 33(2) requires only “reasonable grounds” for regarding a refugee as a danger to national security. The low bar in Article 33(2) provides ample opportunity for states to paint exclusion regimes with broad brushstrokes, to the great detriment of the refugee law regime.

Despite the potential breadth of the language of Article 33(2), international law indicates that the exceptions should be interpreted restrictively.⁵⁹ Articles 31 and 32 of the Vienna Convention, which are generally accepted as being declaratory of customary international law,⁶⁰ lend credence to the notion that the exceptions have limited scope.⁶¹ The object and purpose of the 1951 Convention (the protection of refugees), the restrictive exclusion clauses in Article 1(F), and the fundamental nature of non-refoulement must all be taken into account when interpreting the exceptions to non-refoulement, suggesting they must be read in a restrictive manner.⁶²

Regional documents that followed the 1951 Convention tend to have more

57. The Secretary-General, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, ¶ 65, delivered to the General Assembly, U.N. Doc. A/62/263 (Aug. 15, 2007) [hereinafter *Report of the Special Rapporteur*]; European Council on Refugees and Exiles, Position on Exclusion from Refugee Status, ¶ 29, Doc. PP1/03/2004/Ext/CA (March 2004) [hereinafter ECRE Position on Exclusion].

58. See, e.g., *ECRE Position on Exclusion*, *supra* note 57, at ¶ 7 (arguing for a narrowly-focused application of Article 1(F) even in light of increased scrutiny for terrorism).

59. Vienna Convention, *supra* note 4, at arts. 31 and 32. See also Lawyers Committee for Human Rights, *Safeguarding the Rights of Refugees under the Exclusion Clauses: Summary Findings of the Project and a Lawyers Committee for Human Rights Perspective*, 12 INT’L J. REFUGEE L. (Special Supplementary Issue) 317, 324 (2000) [hereinafter LCHR, *Safeguarding the Rights of Refugees*] (discussing the necessity of interpreting exclusion clauses in the 1951 Convention in a restrictive manner by referring to the general rule that exceptions to human rights standards must be interpreted restrictively); Lauterpacht & Bethlehem, *supra* note 1, at 133-34 (arguing that international law dictates that the exceptions to non-refoulement must be interpreted restrictively and applied with particular caution).

60. Lauterpacht & Bethlehem, *supra* note 1, at 103-04.

61. Vienna Convention, *supra* note 4, at arts. 31 and 32 (providing that a treaty shall be interpreted according to its ordinary meaning and in light of its object and purpose, taking into account subsequent state practice, among other things, and if a term is ambiguous or obscure, with some reference to the preparatory work of the treaty and the circumstances of its conclusion).

62. Lauterpacht & Bethlehem, *supra* note 1, at 105-06.

limited exceptions to non-refoulement, or, in some cases, no exceptions at all, indicating reluctance to endorse exceptions to the norm.⁶³ The Organization of African Unity's 1969 Convention on the Specific Aspects of Refugee Problems in Africa ("OAU Convention"), for instance, contains no exceptions to the principle of non-refoulement.⁶⁴ Likewise, the OAU Convention does not acknowledge that national security concerns can excuse a state from its asylum responsibilities, though it does allow a state to appeal to other member states in times of emergency.⁶⁵ The Cartagena Declaration also has no exceptions to non-refoulement.⁶⁶ The American Convention on Human Rights has no exceptions to the norm, but does permit derogation.⁶⁷ The documents that permit exceptions to non-refoulement use relatively narrow language: the Asian-African Refugee Principles permit exceptions "for overriding reasons of national security or safeguarding the populations,"⁶⁸ and the 1967 Declaration on Territorial Asylum observes that "exception may be made to the foregoing principle [non-refoulement] only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons."⁶⁹

State practice demonstrates considerable lack of consensus with respect to legitimate use of the exceptions articulated in Article 33. As Goodwin-Gill observes, for instance, mass influxes—or large-scale population movements—have repeatedly triggered the national security exception to non-refoulement, particularly among states that share borders with historically unstable states, such as Thailand, Turkey, and with respect to Haitians, the United States.⁷⁰ The 1967 Declaration on Territorial Asylum formally recognizes the possibility of reservations to the non-refoulement principle "for overriding reasons of national security . . . as in the case of a mass influx of persons."⁷¹ Yet even this assertion has not led to consensus on mass influx; UNHCR global consultations, for example, emphasize absolute respect for non-refoulement in mass influx situations.⁷²

Limiting mechanisms have arisen to counter the dialogue on mass influx, demonstrating the debate among states as to the extent to which mass influx exceptions can apply. The "principle of first asylum"—the notion that an

63. See *id.* at 90-93 (providing an overview and discussion of different articulations of the principle of non-refoulement promulgated after the 1951 Convention).

64. OAU Convention, *supra* note 22, at art. II(3).

65. *Id.* at art. 27(1). See also Weissbrodt & Hortreiter, *supra* note 13, at 42 (reviewing arguments emphasizing that the OAU Convention is an instrument that offers particularly broad protection from refoulement).

66. Cartagena Declaration, *supra* note 22, at sec. III, para. 5.

67. American Convention, *supra* note 22, at art. 22(8). See also Weissbrodt & Hortreiter, *supra* note 13, at 47 (1999) (discussing the manner in which derogation from art. 22 is permitted).

68. Asian-African Legal Consultative Committee [AALCO], 1966 *Asian-African Refugee Principles*, at 335, Eighth Session (Bangkok, Aug. 8-17, 1966).

69. Declaration on Territorial Asylum, *supra* note 23, at art. 3.

70. GOODWIN-GILL, *supra* note 1, at 132.

71. Declaration on Territorial Asylum, *supra* note 23, at art. 3(2).

72. Durieux & McAdam, *supra* note 19, at 5-6.

asylum seeker should request asylum in the first safe country he or she reaches—has been strongly endorsed by many states,⁷³ and can be seen as a limit on the use of the national security exception in mass influx situations. Essentially, the principle of first asylum can be implemented with the aid of resettlement guarantees and substantial financial contributions from distant states to the border states, in order to relieve some of the border states' concerns.⁷⁴ The principle of first asylum asserts that mass influx does not diminish a state's obligation to offer asylum and non-refoulement, and has arguably become settled law.⁷⁵ In this manner, international law and state practice have evolved to limit the use of the national security exception to non-refoulement in mass influx situations. Mass influx, and the limiting mechanism of the principle of first asylum, underscore the notion that while there is consensus on the nature of non-refoulement, that consensus is far less clear for the exceptions.

1. *The Threat of Broad Application of the Article 33(2) Exceptions in Anti-Terrorism Policy*

The appropriate scope of application of the Article 33(2) exceptions is a particularly pressing question in light of the potential for states to use these exceptions in anti-terror measures. Since September 11, 2001, national security has become an increasingly important issue for host states,⁷⁶ many of whom have promulgated counter-terror policies that negatively impact protection offered to refugees and asylum-seekers.⁷⁷ States may seek to use

73. GOODWIN-GILL, *supra* note 1, at 132-33.

74. *Id.* at 132-33 and 141.

75. See U.N. High Comm'r for Refugees, Executive Comm. Programme, *Functioning of the Sub-Committee and General Conclusion on International Protection*, Conclusion No. 2, ¶¶ (f) and (h) (1976); U.N. High Comm'r for Refugees, Executive Comm. Programme, *Refugees Without an Asylum Country*, Conclusion No. 15 (XXX), ¶ (g) (1979); U.N. High Comm'r for Refugees, Executive Comm. Programme, *Protection of Asylum-Seekers in Situations of Large-Scale Influx*, Conclusion No. 22 (XXXII), ¶ II(A)(1) (1981); U.N. High Comm'r for Refugees, Executive Comm. Programme, *General Conclusion on International Protection*, Conclusion No. 61 (XLI), ¶ (g) (1990); U.N. High Comm'r for Refugees, Executive Comm. Programme, *Note on International Protection*, Conclusion No. 62 (XLI), ¶ (a)(iii) (1990); U.N. High Comm'r for Refugees Executive Comm. Programme, Conclusion No. 100 (LV), *Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations*, para. (b) (2004).

76. Feller, *supra* note 8, at 514. The events of 11 September 2001, in conjunction with the Bali bombings in October 2002, the Madrid explosions in March 2004, and the attacks in London in July 2005, have heightened states' security concerns, *id.* at 519, concerns which have been partly reinforced by statements suggesting a link between asylum and terrorism issued by various organs of the United Nations itself. *Id.* at 520.

77. See, e.g., Acer, *supra* note 7, at 1363 (arguing that the process of obtaining asylum has become more difficult for all asylum seekers because of "unsubstantiated claims that terrorists are trying to abuse the asylum system"); Schoenholtz, *supra* note 7, at 364 ("Since September 11, the United States has focused on fighting terrorism at serious cost to our humanitarian programs."); Gregor Noll, *International Protection Obligations and the Definition of Subsidiary Protection in the EU Qualification Directive*, in CONSTANCA DIAS URBANO DE SOUSA AND PHILLIPE DE BRUYCKER, *THE EMERGENCE OF A EUROPEAN ASYLUM POLICY*, 183, 191 (2004) (discussing EU Member States' attempts to extend Article 33(2) to the area of subsidiary protection, "apparently to accommodate counterterrorist sentiments"). Policies that favor national security above refugee protection have been

Article 33(2) to exclude from refugee status those suspected of connections to terrorism, even though Article 33(2) refers to refoulement, not exclusion from refugee status.⁷⁸ The United States has already used Article 33(2) in this manner.⁷⁹ By reading the Article 33(2) exceptions broadly, there is great potential to prioritize national security concerns at the expense of refugee protection, as demonstrated by U.S. practice.⁸⁰ The potential for the explosive use of the Article 33(2) exceptions emphasizes the need for a resolution to the debate over the continuing legitimacy of their use.

The changes in immigration law, policy, and practice that have been wrought in the name of counter-terrorism have profoundly affected refugees and asylum seekers.⁸¹ For instance, the United States completely shut down the refugee resettlement program for months after September 11, 2001.⁸² Schoenholtz argues that asylum in particular has changed gradually since the World Trade Center bombings in 1993, and the cumulative effect of these changes on the caliber of refugee protection in the United States has been considerable.⁸³ Since September 11, 2001, a “pervasive” focus on enforcement in U.S. immigration policy may have further damaged the asylum system in the United States.⁸⁴

The United States is not alone in placing increasingly strict limitations on

adopted in both the U.S. and Europe. Joanne Van Selm, *Refugee Protection in Europe and the U.S. after 9/11*, in PROBLEMS OF PROTECTION: THE UNHCR, REFUGEES AND HUMAN RIGHTS 237, 250-260 (Niklaus Steiner, Mark Gibney, & Gil Loescher, eds., 2003); Sophie Robin-Olivier, *Immigration Law and Human Rights: Legal Line Drawing Post-September 11: Citizens and Noncitizens in Europe: European Union Measures Against Terrorism After September 11*, 25 B.C. THIRD WORLD L.J. 197, 209-212 (2005).

78. See ECRE Position on Exclusion, *supra* note 57, at ¶ 5 (distinguishing between exclusion and cases covered by Article 33(2)).

79. Hathaway and Cusick, *supra* note 44, at 535-36 (discussing ways in which US law excludes refugees, and stating that some “[i]neligibility criteria rely upon the right of states to expel certain particularly dangerous refugees under Articles 32 and 33(2) of the Convention.”).

80. *Report of the Special Rapporteur*, *supra* note 57, at paras. 66-67 (“[T]he Special Rapporteur wishes to caution against overly broad interpretations of the exclusion clauses and to emphasize that the exclusion clauses should be applied in a restrictive and scrupulous manner . . . [S]ome States have included in their national counter-terrorism legislation a broad range of acts which do not, in terms of severity, purpose or aim, reach the threshold of objectively being considered terrorist acts.”).

81. Acer, *supra* note 7, at 1361 (“[T]hose who seek refuge in the United States have been profoundly affected by the many new immigration policies and practices that were initiated in the months and years following the attacks.”). See also Legomsky, *supra* note 7, at 162-177 (giving a detailed overview of security-related initiatives that the United States has taken in relation to immigration and non-citizens since September 11, 2001); Schoenholtz, *supra* note 7, at 364 (“The overall U.S. protection picture for asylum seekers since September 11th is disturbing. Fewer asylum seekers are reaching the United States. Approval rates in the first instance have seriously declined. The Attorney General has politicized and severely restricted the review function. The rights of many asylum seekers are disrespected, whether they make it to the United States or are intercepted on the high seas.”).

82. Acer, *supra* note 7, at 1368-69 (discussing the dramatic drop in refugee resettlement after September 11, but noting that the numbers rebounded in 2004).

83. Schoenholtz, *supra* note 7, at 325-32. For example, expedited removal procedures—which shorten asylum applications at ports of entry, placing genuine refugees at risk of refoulement—which were expanded considerably in 2002 and 2004. *Id.* at 325-26. Over much the same period, there has been a significant decrease in the number of asylum seekers identified in expedited removal procedures, calling into question whether genuine refugees are being turned away. *Id.* at 332.

84. *Id.* at 332.

access to asylum and refugee status as part of an anti-terror strategy.⁸⁵ Over the past seven years, European nations have instituted counterterrorism policies that damage refugee protection.⁸⁶ The promulgation of restrictive policies is not limited to states: intergovernmental organizations such as the European Union⁸⁷ and the United Nations Security Council⁸⁸ have also articulated positions limiting access to asylum on terrorist grounds.⁸⁹ The pervasive increase in anti-terror measures that affect refugees and asylum seekers makes it all the more important that the limits of Article 33(2) are clearly delineated in international law.

The United States' mechanisms for refugee status determination⁹⁰ rely heavily on the Article 33(2) exceptions to determine who is ineligible for protection, even though those determinations should be based on Article 1 criteria. In the U.S., an individual may be barred from asylum or refugee status under several different provisions, which are cumulatively broader than those articulated in the 1951 Convention.⁹¹ The United States is, in effect, considering refugee status determination and protection from refoulement.

85. See, e.g., Robin-Olivier, *supra* note 77, at 197, 199 (comparing European and American approaches to immigration and terror policies after September 11, 2001); ECRE Position on Exclusion, *supra* note 57, at ¶ 1 (“Growing internal security concerns are added to an already unfavourable climate vis-à-vis refugees and asylum seekers in many European asylum countries.”).

86. Robin-Olivier, *supra* note 77, at 206 (arguing that Sweden, for instance, has been criticized for allowing the deportation of asylum seekers to their country of origin without sufficient guarantees that their human rights will be respected). See also *Report of the Special Rapporteur*, *supra* note 57, at para. 51 (finding it “extremely worrying” that various European governments appear to be seeking to weaken the established caselaw of the European Court of Human Rights related to the principle of non-refoulement).

87. See, e.g., Human Rights Watch, *Fifty Years On: What Future for Refugee Protection?* 3-5, December 12, 2000, <http://www.hrw.org/en/reports/2000/12/12/50-years-what-future-refugee-protection> (discussing increasingly restrictive immigration policies promulgated by the European Union).

88. See, e.g., S.C. Res. 1373, ¶ 3(f)-(g), U.N. Doc. S/RES/1373 (Sept. 28, 2001) (encouraging states to take all appropriate measures for ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts and that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts).

89. See Allain, *supra* note 2, at 544-57 (discussing measures taken by the Security Council and the European Union with respect to terrorism and asylum largely since 2001). Allain argues that tampering with the definition of “non-political” crimes, as he asserts the Security Council did in Resolution 1373, has broad ramifications: “if so-called ‘terrorist’ acts are to be considered as grounds for the denial of refugee status . . . then the content of the norm of *non-refoulement* is deprived of much of its content, thereby opening the door to the possibility of a return to persecution.” *Id.* at 556.

90. The United States requires both resettled refugees and asylum seekers to meet the statutory definition of a refugee articulated in the Immigration and Nationality Act (INA). Immigration and Nationality Act §101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B) (2006). This standard essentially incorporates the definition found in Article 1(a) of the 1951 Convention as expanded by the 1967 Protocol. IRA KURZBAN, IMMIGRATION LAW SOURCEBOOK, 327 (9th ed. 2004).

91. James Sloan, *Application of Article 1F of the 1951 Convention in Canada and the United States*, 12 INT’L J. REFUGEE L. 222, 224 (2000) (LCHR Supplementary Volume) (noting that the United States has not incorporated the exclusion regime established in the 1951 Convention, but rather has created its “own exclusion regime based in part on the CSR51 [1951 convention] and in part on its own domestic concerns”). See also Hathaway and Cusick, *supra* note 44, at 487 (arguing that the Immigration and Nationality Act of 1996 established bars to asylum which are not compatible with international law articulated in the 1951 Convention); DEBORAH ANKER, LAW OF ASYLUM IN THE UNITED STATES 415 (3d ed. 1999) (“Exclusion from protection is an area in which U.S. and international law diverge significantly.”). U.S. federal courts have rejected challenges claiming that

ment (referred to as ‘withholding of removal’) at the same time, in a manner that improperly conflates two parts of the 1951 Convention.⁹² The U.S. relies on five bars to asylum⁹³ that are distinct from the three categories in Article 1(F) of the Convention, but which overlap with those categories.⁹⁴ Two of the five bars follow the language in Article 1(F): the denial of asylum for individuals who have persecuted others, and for those who are believed to have committed a serious, non-political crime outside of the United States prior to arrival.⁹⁵

The other three bars in the United States regime stem from the Article 33(2) exceptions.⁹⁶ First, the United States bars an individual who, “having been convicted by a final judgment of a particularly serious crime in the United States, constitutes a danger to the community.”⁹⁷ This language clearly mirrors Article 33(2).⁹⁸ Second, the basic national security bar, which applies when “there are reasonable grounds for regarding the alien as a

the U.S. violates treaty obligations with its exclusion regime. *Id.* at 415; *see, e.g., Ahmetovic v. INS*, 62 F.3d 48 (2d Cir. 1995).

92. Sloan, *supra* note 91, at 224. Whereas the U.S. scheme drastically limits the individual’s future options for protection, under international law, a person who falls within the exceptions in Article 33(2) would nonetheless be considered a refugee, and as such may be able to claim the protection of another state in which he did not pose a similar risk. Hathaway and Cusick, *supra* note 44, at 535.

93. The United States mandates denial of asylum for an individual: who has ordered, incited, assisted or otherwise participated in the persecution of others; who has been convicted by final judgment of a particularly serious crime in the United States and constitutes a danger to the community; about whom there are serious reasons for believing that the individual has committed a serious, non-political crime outside of the United States prior to arrival; about whom there are reasonable grounds for regarding as a danger to the security of the United States; or who is inadmissible as a terrorist under INA § 212(a)(3)(B)(i)(I)-(IV) and (VI). INA § 208(a)(2) and (b)(2); 8 U.S.C. § 1158 (a)(2) and (b)(2). There are four additional procedural barriers to asylum (as opposed to substantive bars): firm resettlement (if the applicant is found to be “firmly resettled” in a third country prior to arriving in the United States), INA § 208(b)(2)(A)(vi); safe third country (if it is determined that he or she may be removed to a “safe third country” with an adequate asylum determination process where he or she would not face persecution, INA § 208(a)(2)(A); the one-year-deadline (the applicant must file for asylum within one year of his or her last arrival in the United States), INA § 208(a)(2); and previous asylum denial (if the applicant has previously been denied asylum and cannot show that circumstances affecting his or her eligibility for asylum have materially changed), INA § 208(a)(2)(C) and (D).

94. Sloan, *supra* note 91, at 224-25. *See also* Hathaway and Cusick, *supra* note 44, at 487 (asserting that the Immigration and Nationality Act of 1996 established bars to asylum which are not compatible with international law articulated in the 1951 Convention).

95. Sloan, *supra* note 91, at 225 (arguing that the persecution of others bar is close to Article 1(F)(a), and the serious non-political crime bar resembles Article 1(F)(b)). *See also* ANKER, *supra* note 91, at 415 (arguing that the persecution of others bar in U.S. law is roughly parallel to Article 1(F)(a), and to Article 1(F)(c), to the extent that Article 1(F)(c) may apply to those who have restricted the human rights of others); Hathaway and Cusick, *supra* note 44, at 535 (“Many of the U.S. ineligibility criteria mirror grounds for cessation of, or exclusion from, refugee status under Article 1(C)-(F) of the Refugee Convention. Imposition of an eligibility bar on these terms clearly raises no concern.”).

96. Hathaway and Cusick, *supra* note 44, at 535-36 (“Other ineligibility criteria rely upon the right of states to expel certain particularly dangerous refugees under Articles 32 and 33(2) of the Convention.”).

97. INA § 208(a)(2) and (b)(2), 8 U.S.C. § 1158(a)(2) and (b)(2).

98. 1951 Convention, *supra* note 5, at art. 33(2) (excluding an individual from protection against refoulement if that individual, “having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”).

danger to the security of the U.S.,”⁹⁹ also closely resembles Article 33(2).¹⁰⁰ Finally, the bar to those associated with terrorism or terrorist groups¹⁰¹ covers very similar grounds as the basic national security bar and also relies heavily on the language in Article 33(2).¹⁰²

The terrorist bar under current U.S. law uses remarkably broad language. An individual is barred from asylum if he is inadmissible under certain sections of the Immigration and Nationality Act,¹⁰³ including any non-citizen who:

- (I) has engaged in a terrorist activity;
- (II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable grounds to believe, is engaged in or is likely to engage after entry in any terrorist activity . . . ;
- (III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;
- (IV) is a representative . . . of (aa) a terrorist organization . . . or (bb) a political, social, or other group that endorses or espouses terrorist activity; . . .
- (VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization¹⁰⁴

The terrorist bar is an example of the overly broad use of Article 33(2) that may allow persons who are victims of terrorism to be excluded from protection.¹⁰⁵ Phrases such as “terrorist activity” and “terrorist organizations” cast a very wide net.¹⁰⁶ In fact, there is no definition of terrorism or related terms in international law, making it an imprecise ground on which to base an exclusionary bar.¹⁰⁷

99. INA § 208(a)(2) and (b)(2), 8 U.S.C. § 1158(a)(2) and (b)(2).

100. 1951 Convention, *supra* note 5, at art. 33(2) (excluding from the protection of non-refoulement an individual for whom “there are reasonable grounds for regarding as a danger to the security of the country in which he is”).

101. INA § 208(a)(2) and (b)(2), clause (5).

102. Sloan, *supra* note 91, at 226. *See also* KURZBAN, *supra* note 90, at 356 (2004) (discussing the terrorism bar as intrinsically linked to the notion that “there are reasonable grounds to believe the alien is a danger to the security of the U.S.”).

103. INA § 208(a)(2) and (b)(2); 8 U.S.C. § 1158 (a)(2) and (b)(2) (barring from asylum individuals who are inadmissible under INA § 212(a)(3)(B)(i)(I)-(IV) and (VI)). The terrorism bars may be waived in certain circumstances: The Secretaries of State and Homeland Security, in consultation with the Attorney General, have the authority to decline to apply § 212(a)(3)(B) (with limited exceptions), INA § 212(d)(3)(B).

104. INA § 212(a)(3)(B)(i)(I)-(IV), (VI) and (VII).

105. *Report of the Special Rapporteur*, *supra* note 57, at para. 68. *See also* Hathaway and Cusick, *supra* note 44, at 536 (noting the terrorist bar is broad and that the 1951 Convention requires a great deal more precision for exclusion).

106. Sloan, *supra* note 91, at 226; Georgetown University Law Center Human Rights Institute, *Unintended Consequences: Refugee Victims of the War on Terror* 28 (May 2006).

107. LCHR, *Safeguarding the Rights of Refugees*, *supra* note 59, at 333 (2000) (supplementary issue) (“Terrorism as such does not lend itself to being used as a separate ground for exclusion,

While the bars based on Article 33(2)—including the terrorist bar—have been part of successive immigration acts since the 1980s, the bars became stricter pursuant to the USA PATRIOT Act passed shortly after September 11, 2001.¹⁰⁸ Germain argues that the terrorist bar in place before the USA PATRIOT Act was sufficient, and that the new legislation has made it more likely that genuine refugees will be refouled.¹⁰⁹ The REAL ID Act of 2005¹¹⁰ further expanded bars to asylum such that people who bear no personal responsibility for terrorist acts can be denied protection based on overly broad definitions of “terrorism” and “supporting” terrorism.¹¹¹

The U.S. terrorism bar demonstrates a particularly broad use of the Article 33(2) exceptions. The U.S., like other refugee-receiving states, has a clear interest in national security. Yet relying on the Article 33(2) exceptions to provide national security at the expense of refugee protection is unnecessary. Article 1(F) provides ample opportunities to exclude from refugee protection those who have already committed terrorist acts.¹¹² As non-refoulement takes on an increasingly fundamental character in international law, the Article 33(2) exceptions—and state practice that relies on them—should become more and more limited. It is crucial to move forward with a legal regime that applies Article 33(2) in an appropriately limited context.

C. *Non-Refoulement Without Exceptions: Protection Against Torture and Cruel, Inhuman or Degrading Treatment*

Non-refoulement protects fundamental rights in numerous international human rights treaties.¹¹³ However, exceptions to the norm are found only in refugee treaties.¹¹⁴ The Convention Against Torture (CAT) contains an absolute prohibition on refoulement in torture cases, subject to no exceptions.¹¹⁵ Likewise, the International Covenant on Civil and Political Rights

particularly given the lack of consensus within the international community as to its exact definition and constituent elements.”).

108. Regina Germain, *Rushing to Judgment: The Unintended Consequences of the USA PATRIOT Act for Bona Fide Refugees*, 16 GEO. IMMIGR. L.J. 505, 518-19 (2002). See also Acer, *supra* note 7, at 1364 (discussing the provisions relating to asylum in the USA PATRIOT Act).

109. *Id.* at 509.

110. Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005). See also Acer, *supra* note 7, at 1391-92 (discussing the legislative history of the REAL ID Act).

111. Acer, *supra* note 7, at 1392.

112. See Section I.B., *supra*, for further discussion of exclusion under Article 1(F).

113. Weissbrodt & Hortreiter, *supra* note 13, at 6-48 (discussing and comparing non-refoulement in the Convention Against Torture, the 1951 Convention, the European Convention for the Protection of Human Rights and Fundamental Freedoms, The Organization for African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, The International Covenant on Civil and Political Rights, The American Convention on Human Rights, and The African [Banjul] Charter on Human and Peoples' Rights).

114. *Id.* at 61 (“The refugee treaties differ considerably from other human rights treaties to the extent that they allow limitations on the principle of refoulement.”).

115. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, art. 3, G.A. Res. 39/46, U.N. GAOR 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (*entered into force* 26 June 1987), *reprinted in* 23 *I.L.M.* 1027 (1984),

(ICCPR)¹¹⁶ and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)¹¹⁷ protect individuals from refoulement in cases of torture or cruel, inhuman or degrading treatment without exception.¹¹⁸ In effect, non-refoulement in these contexts provides absolute protection for fundamental rights. Non-refoulement in the refugee context provides far less complete protection for norms that are equally fundamental, such as the right to life.¹¹⁹

CAT's absolute prohibition of refoulement in situations where the individual may face torture provides an enforcement mechanism for the underlying norm: the prohibition on torture itself.¹²⁰ Likewise, the prohibitions on refoulement detailed in jurisprudence related to the European Convention and to the ICCPR protect the underlying norms of freedom from torture and cruel, inhuman or degrading treatment, including in the context of the death penalty.¹²¹ The European human rights system has consistently protected those norms by reading the European Convention as imposing a provision on non-refoulement broader than that in the 1951 Convention.¹²²

substantive changes noted in 24 I.L.M. 535 (1985) [hereinafter Convention Against Torture] (The Convention Against Torture explicitly prohibits refoulement "where there are substantial grounds for believing that he would be in danger of being subjected to torture."). See also Weissbrodt & Hortreiter, *supra* note 13, at 16 ("The prohibition of 'refoulement' under Article 3 is guaranteed in absolute terms.").

116. International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, art. 7, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/63616 (1966), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR]. See also U.N. Human Rights Committee, *General Comment No. 20*, para. 9 (1992), HRI/HEN/1/Rev.1 (1994) ("States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion, or refoulement.").

117. European Convention for the Protection of Human Rights and Fundamental Freedoms art 3, *opened for signature* Nov. 4, 1950, Europ. T.S. No. 5 (*entered into force* 3 Sept. 1953), *amended by* Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 1, 1998, Europ. T.S. No. 155 [hereinafter European Convention].

118. Weissbrodt & Hortreiter, *supra* note 13, at 61-62 (comparing the refugee treaties to these two treaties and finding that Article 3 of the European Convention is absolute). Article 3 of the European Convention and Article 7 of the ICCPR contain almost the same wording and their interpretation is consistent. *Id.* at 49. Like its counterpart in the European Convention, Article 7 of the ICCPR is non-derogable. *Id.* at 45.

119. See GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 90 (3d ed. 2007) (discussing the content of the term "persecution," and citing UNHCR's *Handbook on procedures and criteria for determining refugee status* to support the notion that it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership in a particular social group is always persecution); see also Jari Pirjola, *Shadows in Paradise: Exploring Non-Refoulement as an Open Concept*, 19 INT'L J. REFUGEE L. 639, 648-52 (discussing Hathaway's characterization of four different types of obligations protected by the prohibition on persecution).

120. See, e.g., ALEXANDER ORAKHELASHVILI, *PEREMPTORY NORMS IN INTERNATIONAL LAW* 55 (Oxford University Press 2006) (discussing the manner in which non-refoulement gives meaning to the peremptory nature of other norms such as the right to life and the prohibition on torture).

121. Weissbrodt & Hortreiter, *supra* note 13, at 30-39 (discussing the scope of protection under the ECHR) and 43-46 (discussing the scope of protection under the ICCPR).

122. *The Chalal Family v. United Kingdom*, 1996-V Eur. Ct. H.R. 1831, 1900-01 (stating that Article 3 guarantees are "of an absolute character, permitting no exception" and to "this extent the Convention provides wider guarantees than Articles 32 and 33 of the 1951 Convention"); see also Lauterpacht & Bethlehem, *supra* note 1, at 92 (providing a list of more than a decade's worth of jurisprudence at the European Court of Human Rights upholding this proposition).

In the refugee context, non-refoulement provides incomplete protection for a broad range of underlying norms. The text of the 1951 Convention provides protection where a refugee's "life and freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion."¹²³ The phrase "life and freedom" of a refugee has been interpreted to be synonymous with the definition of refugee status in Art. 1(a) of the Convention.¹²⁴ Non-refoulement therefore protects individuals from persecution, a term which lacks a universally accepted definition,¹²⁵ but which includes norms ranging from the right to life to the right to be free from discrimination.¹²⁶ The exceptions to non-refoulement leave these rights with incomplete protection. UNHCR suggests that states should use a balancing test to weigh the degree of persecution against the severity of the crime triggering exclusion under Art. 1(F)—so that it is harder to exclude from refugee status someone who faces a violation of a particularly serious norm – but there is no comparable balancing test in use when states use Art. 33(2) to exclude refugees.¹²⁷ Despite the serious nature of the underlying norms, the protection offered by non-refoulement in the refugee context is incomplete.

Non-refoulement in the torture context protects norms that are as serious as some norms protected by refugee law, such as the right to life. Unlike refugee law, however, non-refoulement in the torture context offers unqualified protection. The prohibition on torture is so fundamental as to be considered *jus cogens* and to permit no derogation.¹²⁸ CAT's absolute protection from refoulement for torture gives meaning to the fundamental nature of this norm, by permitting no exceptions or derogations.¹²⁹ Non-refoulement in the refugee context protects similarly fundamental norms, including the right to life.¹³⁰ Yet, pursuant to the 1951 Convention, that protection is circumscribed by the exceptions to non-refoulement.

123. 1951 Convention, *supra* note 5, at art. 33(1).

124. GOODWIN-GILL, *supra* note 1, at 137-38 ("[A]t the international level, no distinction is recognized between refugee status and entitlement to non-refoulement.").

125. UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees 10 (1979), www.unhcr.org/publ/PUBL/3d58e13b4.pdf.

126. See GOODWIN-GILL & MCADAM, *supra* note 119, at 90-92 (discussing the content of the term "persecution," arguing that it at minimum includes threats to "life and freedom," and noting that "a margin of appreciation is left to the States in interpreting this fundamental term, and the jurisprudence, not surprisingly, is sometimes inconsistent").

127. Weissbrodt & Hortreiter, *supra* note 13, at 62.

128. Barcelona Traction (Belg. v. Spain), 1970 I.C.J. 3, 32. See also ORAKHELASHVILI, *supra* note 120, at 54 (discussing the prohibition of torture as a *jus cogens* norm).

129. Weissbrodt & Hortreiter, *supra* note 13, at 16 (noting that Article 33(1) of the 1951 Convention served as a model for the Convention Against Torture's non-refoulement provision, and suggesting that "it was a deliberate decision of the drafting committee not to adopt the limitations" of the 1951 Convention).

130. 1951 Convention, *supra* note 5, at art. 1(a). See also GOODWIN-GILL & MCADAM, *supra* note 119, at 90-92 (discussing the content of the term "persecution," and stating that it at minimum includes threats to "life and freedom"); Pirjola, *supra* note 119, at 648-652 (discussing Hathaway's characterization of four different types of obligations protected by the prohibition on persecution).

In fact, in the context of cruel, inhuman or degrading treatment, non-refoulement offers absolute protection to norms that are less accepted in international law than some forms of persecution given incomplete protection by refugee law. For instance, where the imposition of the death penalty could amount to cruel, inhuman or degrading treatment, the European Court of Human Rights finds that return is prohibited, with no exceptions.¹³¹ Essentially, the case falls under Article 3 of the European Convention, which permits no exceptions to non-refoulement.¹³² Yet, there is no prohibition on the death penalty itself under international law.¹³³ Here, the protection offered by non-refoulement is far broader than that offered in the refugee context, in which exceptions are permissible, even where the underlying norm (such as the right to life) is unquestionably a fundamental norm of international law.

State practice, as demonstrated through UNHCR operation, shows considerable overlap in the application of the various articulations of the principle of non-refoulement.¹³⁴ In fact, torture is one of the main alternative sources of non-refoulement aside from refugee law.¹³⁵ Implementation of the Convention Against Torture (as seen in the statements of the Committee Against Torture) shows that refugee practices are frequently considered when commenting on states' adherence to the principle of non-refoulement in the context of torture.¹³⁶ Indeed, in the U.S., petitions for refugee status are frequently heard concurrently with petitions for relief from deportation under the non-refoulement provisions in the Convention Against Torture.¹³⁷ Likewise, extradition provides a relevant body of law when seeking to balance state security concerns with refugee protection.¹³⁸ The overlap of torture and

131. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. 1, 34-36 (holding that extradition to face cruel, inhuman or degrading treatment, which could arise from the imposition of the death penalty in certain circumstances, would be contrary to the spirit and intent of Article 3). See also Richard B. Lillich, *The Soering Case*, 85 AM. J. INT'L L. 128, 138-139 (1991) (commenting on the reach of the European Court of Human Rights's judgment).

132. Weissbrodt & Hortreiter, *supra* note 13, at 36-37 (1999) (discussing the absolute character of Article 3).

133. European Convention, *supra* note 117, at art. 2 (allowing the death penalty). See also Lillich, *supra* note 131, at 138-139 (noting that the death penalty is still permissible under international law even after the *Soering* case).

134. Lauterpacht & Bethlehem, *supra* note 1, at 96 (stating that UNHCR "is not limited in the exercise of its protective functions to the application of the substantive provisions of these two treaties [the 1951 Convention and the 1967 Protocol]. The UNHCR may therefore rely on whatever instruments and principles of international law may be pertinent and applicable to the situation which it is called upon to address.").

135. *Id.* at 89-90 ("There are, in addition, other contexts in which the concept is relevant, notably in the more general law relating to human rights concerning the prohibition of torture, cruel, inhuman, or degrading treatment or punishment.").

136. Brian Gorlick, *The Convention and the Committee Against Torture: A Complementary Protection Regime for Refugees*, 11(3) INT'L J. REFUGEE L. 479 (1999).

137. See, e.g., U.S. Citizen and Immigration Services Form I-589 (permitting a non-citizen to file a petition for asylum and withholding of removal under Article 3 of the Convention Against Torture).

138. Feller, *supra* note 8, at 522 ("Extradition is a growing feature of the asylum/ security equation."). See also Sibylle Kapferer, *The Interface between Extradition and Asylum*, UNHCR Legal

refugee law in the context of non-refoulement leaves considerable room for cross-fertilization in the interpretation of Article 33 of the 1951 Convention.¹³⁹

Despite this clear potential for cross-fertilization between refugee law and law on torture, the current status of non-refoulement in the refugee context diverges significantly from non-refoulement in the torture context. The exceptions to non-refoulement in the refugee context allow for incomplete protection of the fundamental norms at stake. UNHCR's suggested balancing test—used to weigh the degree of persecution feared against the severity of the individual's offence—is useful for exclusion under Article 1(F) but does not circumscribe broad use of the Article 33(2) exceptions, leaving non-refoulement incomplete.¹⁴⁰ And yet, in the torture context, no such move would be possible: there is, in fact, no place in international law that permits limitation or derogation from non-refoulement in that setting.¹⁴¹

II. NON-REFOULEMENT AS *JUS COGENS*: LIMITING THE ARTICLE 33(2) EXCEPTIONS

Non-refoulement in the refugee context is increasingly acquiring the status of a *jus cogens* norm¹⁴² (a norm that is accepted by “the international community of States as a whole” as a “norm from which no derogation is permitted”¹⁴³), as argued by scholars who focus on customary international law and relevant state practice. As such, it exists beyond the treaty regime, superseding state consent.¹⁴⁴ It is not just binding, but operates in an absolute and unconditional way.¹⁴⁵ If we accept as valid the arguments that non-refoulement has acquired the status of a *jus cogens* norm, the scope of the Article 33(2) exceptions is called into question.

Non-refoulement as a *jus cogens* norm enforces observance of the basic

and Protection Policy Research Series, Department of International Protection, 74-112, PPLA/2003/05 (Nov. 2003) (discussing in detail the interaction between asylum and extradition).

139. See Lauterpacht & Bethlehem, *supra* note 1, at 106 (arguing that the concept of the cross-fertilization of treaties means that the wording and construction of one treaty can influence the interpretation of another treaty containing similar wording or ideas).

140. Weissbrodt & Hortreiter, *supra* note 13, at 62.

141. Lauterpacht & Bethlehem, *supra* note 1, at 131. See also GOODWIN-GILL, *supra* note 1, at 126 (giving further discussion on the unqualified nature of non-refoulement in the human rights context).

142. See, e.g., Allain, *supra* note 2, at 533-38; GOODWIN-GILL & MCADAM, *supra* note 119, at 218 (“[C]omments . . . have ranged from support for the idea that *non-refoulement* is a long-standing rule of customary international law and even a rule of *jus cogens*, to regret at reported instances of its non-observance of fundamental obligations . . .”).

143. Vienna Convention, *supra* note 4, at art. 53 (“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.”).

144. Allain, *supra* note 2, at 537. See also Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT’L L. 101, 102 (2008) (stating that determinations of *jus cogens* “obviate state consent altogether”).

145. ORAKHELASHVILI, *supra* note 120, at 67.

human rights that underlie refugee protection, because it fundamentally prevents refugees from being returned to situations where they would face violations of those rights.¹⁴⁶ Comparisons to non-refoulement in the torture context demonstrate the powerful protection non-refoulement can give to the underlying norm. Yet the Article 33(2) exceptions, with their low thresholds for application, have enormous potential to undermine that protection and permit states to violate fundamental norms of refugee protection.¹⁴⁷ Accepting the emergence of non-refoulement as a *jus cogens* norm, the scope of the Article 33(2) exceptions must be seriously limited, in order to preserve both the fundamental character of non-refoulement and the integrity of the underlying rights.

A. *Non-Refoulement as an Emerging Jus Cogens Norm*

Public order does not necessarily require the existence of a fixed, exhaustive catalogue of *jus cogens*, or peremptory, norms.¹⁴⁸ Instead, certain criteria exist to identify these norms: they must be accepted by the international community as a whole, as norms from which no derogation is permitted.¹⁴⁹ Orakhelashvili emphasizes that the establishment of peremptory norms does not require judicial pronouncement; rather, *jus cogens* norms are created when a consensus emerges on two levels: first, on a categorical level focusing on the basic nature of peremptory norms and factors that make those norms peremptory, and second, at a normative level, examining whether a norm that categorically qualifies as part of *jus cogens* is so recognized under international law.¹⁵⁰ *Jus cogens* norms are considered a central part of the international legal order, and as such, they are beyond the law of treaties and supersede agreements between states.¹⁵¹ Orakhelashvili argues that a true international public order cannot operate in a differentiated way;¹⁵² indeed, *jus cogens* engages the whole community and cannot be limited to regional or bi-lateral norms.¹⁵³ Ultimately, what is created is a norm considered so

146. *Id.* at 55 (arguing that non-refoulement is a peremptory norm because of “its inseparable link with the observance of basic human rights such as the right to life, freedom from torture and non-discrimination”).

147. *Id.* (criticizing Goodwin-Gill’s 1995 assertion that non-refoulement has not acquired the status of a *jus cogens* norm based on lack of state practice, and stating that, “[T]his position is difficult to sustain, because if this principle is not peremptory, then it is open to States to override it by treaties in which they will provide for the legality of the return of persons to the countries where serious violations of human rights may be faced.”).

148. *Id.* at 43.

149. Vienna Convention, *supra* note 4, at art. 53. *See also* Allain, *supra* note 2, at 538 (applying these criteria to non-refoulement).

150. ORAKHELASHVILI, *supra* note 120, at 36. For general discussion of the identification of peremptory norms, *see id.* at 36-50. Many sources can be used to identify *jus cogens* norms, including judicial rulings, state practice, and the merits of the substantive content of the norm. *Id.* at 42-43.

151. *Id.* at 29-30.

152. *Id.* at 31.

153. *Id.* at 38-40 (discussing whether bi-lateral or regional *jus cogens* norms can exist peremptorily).

essential to the international system that its breach places the very existence of the norm in question.¹⁵⁴

For several decades, authorities have held that non-refoulement is a principle of customary international law, and is binding on all states regardless of specific assent, an assertion that demonstrates the acceptance of non-refoulement by the international community of states as a whole.¹⁵⁵ While commentators initially differed on the extent to which non-refoulement should be considered a principle of customary international law,¹⁵⁶ it is now settled that the principle is of a fundamentally norm-creating character such that it can be used to form the basis of a general rule of law.¹⁵⁷ No formal or informal objections to the principle of non-refoulement have been noted.¹⁵⁸ UNHCR, itself an expression of state practice, is warranted in relying on the customary international law nature of the principle of non-refoulement.¹⁵⁹ This affects interpretation of the 1951 Convention, as a treaty's interpretation cannot remain unaffected by subsequent developments in the law, in particular, through the development of customary law.¹⁶⁰

The Executive Committee of UNHCR, composed of member states, has repeatedly issued statements concluding that non-refoulement constitutes a fundamental principle of international law. Executive Committee conclusions do not have the force of law and do not, of themselves, create binding obligations.¹⁶¹ Nonetheless, they contribute to the formation of *opinio juris*, and should be reviewed in the context of States' expressed opinions, and in light of state practice, as probative of the views of the international community as a whole.¹⁶² The Executive Committee first commented on the

154. Allain, *supra* note 2, at 535.

155. *See, e.g., id.* at 538 (“[I]t is clear that the norm prohibiting refoulement is part of customary international law, thus binding on all States whether or not they are party to the 1951 Convention.”); GOODWIN-GILL, *supra* note 1, at 167 (arguing that state practice since the 1951 Convention entered into force is persuasive evidence of the concretization of a customary rule, even in the absence of any formal judicial pronouncement); Lauterpacht & Bethlehem, *supra* note 1, at 149 (“The view has been expressed . . . that ‘the principle of non-refoulement of refugees is now widely recognized as a general principle of international law’ . . . in view also of the evident lack of expressed objection by any State to the normative character of the principle of non-refoulement, we consider that non-refoulement must be regarded as a principle of customary international law.”); *Report of the Special Rapporteur*, *supra* note 57, at para. 69 (stating that non-refoulement is “a rule of customary international law”).

156. GOODWIN-GILL, *supra* note 1, at 134 (discussing arguments that non-refoulement was largely recognized in non-socialist states, and that in the 1970s and early 1980s states had frequently made reservations to the principle in cases of mass emergencies).

157. *Id.* (discussing the standards articulated by the International Court of Justice in the *North Sea Continental Shelf* cases).

158. *Id.* at 168.

159. Lauterpacht & Bethlehem, *supra* note 1, at 96.

160. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, at 19-20 (June 21).

161. GOODWIN-GILL, *supra* note 1, at 128. *See id.* at 98 (“While Conclusions of the Executive Committee are not formally binding, regard may properly be had to them as elements relevant to the interpretation of the 1951 Convention.”).

162. GOODWIN-GILL, *supra* note 1, at 128-29.

universal nature of non-refoulement in 1977, stating that “the fundamental humanitarian principle of *non-refoulement* has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States.”¹⁶³ In 1982, the Executive Committee “reaffirmed . . . the principle of *non-refoulement* which was progressively acquiring the character of a peremptory rule of international law.”¹⁶⁴ Since then, the Executive Committee has repeatedly and consistently referred to non-refoulement as a “fundamental principle” of international refugee protection.¹⁶⁵

Further support for the fundamental nature of non-refoulement comes from its status as a non-derogable part of the 1951 Convention.¹⁶⁶ If a right is denoted as non-derogable under a human rights treaty, that fact can provide evidence for clarifying whether the given right is a *jus cogens* norm.¹⁶⁷ The non-derogability of a norm emphasizes the special status of the right, holding that it cannot be set aside, even in circumstances that would justify derogation from other rights. The drafters of the 1951 Convention, in keeping with guiding opinions of the states concerned, found that non-refoulement was such a right. Of course, as Orakhelashvili points out, the categorization of rights into non-derogable and derogable is not the same as dividing rights into *jus cogens* and *jus dispositivum*.¹⁶⁸ The fact of the non-derogability of non-refoulement serves not as conclusive proof, but as support for its status as a *jus cogens* norm.

Allain presents a forceful argument stating that non-refoulement in the

163. U.N. High Comm’n for Refugees, Executive Comm. Programme, *Conclusion on the International Protection of Refugees: Non-Refoulement*, Conclusion No. 6 (XXVIII), para. (a) (1977).

U.N. High Comm’r for Refugees, Executive Comm. Programme, *Functioning of the Sub-Committee and General Conclusion on International Protection*, Conclusion No. 2, ¶¶ (f) and (h) (1976); U.N. High Comm’r for Refugees, Executive Comm. Programme, *Refugees Without an Asylum Country*, Conclusion No. 15 (XXX), ¶ (g) (1979).

164. U.N. High Comm’r for Refugees, Executive Comm. Programme, *Conclusion on the International Protection of Refugees: General*, Conclusion No. 25 (XXXIII), para. (b) (1982).

165. See, e.g., U.N. High Comm’r for Refugees, Executive Comm. Programme, *Conclusion on the International Protection of Refugees: General*, Conclusion No. 33 (XXXV), para. (c) (1984); U.N. High Comm’r for Refugees, Executive Comm. Programme, *Conclusion on the International Protection of Refugees: General*, Conclusion No. 71 (XLIV), para. (g) (1993); U.N. High Comm’r for Refugees, Executive Comm. Programme, *Conclusion on the International Protection of Refugees: General*, Conclusion No. 74 (XLV), para. (g) (1994); U.N. High Comm’r for Refugees, Executive Comm. Programme, *Comprehensive and Regional Approaches Within a Protection Framework*, Conclusion No. 80 (XLVII), para. (e)(iii) (1996); U.N. High Comm’r for Refugees, Executive Comm. Programme, *Conclusion on the Civilian and Humanitarian Character of Asylum*, Conclusion No. 94 (LIII), para. (c)(i) (2002); U.N. High Comm’r for Refugees, Executive Comm. Programme, *Conclusion on the International Protection of Refugees: General*, Conclusion No. 99 (LV), para. (l) (1984).

166. 1951 Convention, *supra* note 5, at art. 42 (“At the time of signature, ratification or accession, any State may make reservations to Articles of the Convention other than to Articles 1, 3, 4, 16(1), 33, 36-46 inclusive.”).

167. ORAKHELASHVILI, *supra* note 120, at 58.

168. *Id.* at 59.

refugee context should be viewed as *jus cogens*.¹⁶⁹ He argues that non-refoulement meets both of the requirements for a *jus cogens* norm: it is accepted by “the international community of States as a whole” as a “norm from which no derogation is permitted.”¹⁷⁰ To demonstrate acceptance by the international community, he relies on the arguments that the norm prohibiting refoulement is part of customary international law. He also points to state practice in Latin America (including the Cartagena Declaration), to the work of other scholars, and to Executive Committee conclusions, which he labels as relevant because they “reflect the consensus of states.”¹⁷¹ He argues that “any lingering doubt as to the *jus cogens* nature of *non-refoulement* due to the increased violations of the norm should be set aside as irrelevant to its legal standing,” citing to the ICJ *Nicaragua* ruling to assert that state practice need not be in rigorous conformity with the rule for a *jus cogens* norm to emerge.¹⁷²

Other sources support Allain’s argument that non-refoulement has acquired the status of a *jus cogens* norm.¹⁷³ Orakhelashvili calls non-refoulement a “firmly established peremptory norm,” the peremptory character of which is “reinforced by its inseparable link with the observance of basic human rights such as the right to life, freedom from torture, and non-discrimination.”¹⁷⁴ The 1984 Cartagena Declaration refers to non-refoulement as a “cornerstone of the international protection of refugees” and states that “[t]his principle is imperative in regard to refugees and in the present state of international law should be acknowledged as *jus cogens*.”¹⁷⁵ Allain expends much of his article arguing for the importance of considering non-refoulement as *jus cogens*. He observes that if it were demonstrated that non-refoulement were *jus cogens*, states would be precluded from implementing any sort of legislation that results in refoulement.¹⁷⁶ In his opinion, inter-governmental organizations such as the United Nations Security Council and the European Union should be bound to respect non-refoulement as a *jus cogens* norm, which would preclude those organizations from taking anti-terrorism measures which threaten the underlying fundamental rights protected by asylum.¹⁷⁷

Though the trend over recent years, as demonstrated by Allain and

169. Allain, *supra* note 2.

170. *Id.* at 538.

171. *Id.* at 539.

172. *Id.* at 540.

173. See, e.g., ORAKHELASHVILI, *supra* note 120, at 55; Cartagena Declaration, *supra* note 22, at sec. III, para. 5.

174. ORAKHELASHVILI, *supra* note 120, at 55.

175. Cartagena Declaration, *supra* note 22, at sec. III, para. 5.

176. Allain, *supra* note 2, at 533-534 (“If it can be demonstrated that the notion of *non-refoulement* has attained the normative value of *jus cogens*, then States are precluded from transgressing this norm in anyway whatsoever. Much can be gained by insisting on the *jus cogens* nature of *non-refoulement*.”).

177. *Id.* at 543-57.

Orakhelashvili, is to consider non-refoulement as a *jus cogens* norm, it would be a mistake to assert that all commentators are universally in agreement on this point.¹⁷⁸ Bruin and Wouters, in reviewing Allain's argument, argue that the "major practical problem remains the burden of proof to be able to actually characterize the obligation of *non-refoulement* as a peremptory norm of general international law and to claim this in a court of law."¹⁷⁹ Meanwhile, some commentators argue that state practice does not yet support full acceptance of non-refoulement as *jus cogens*.¹⁸⁰ Nonetheless, as Orakhelashvili points out, this position is hard to sustain in light of the fact that state deviation from the principle of non-refoulement permits serious violations of other peremptory norms – including many fundamental principles of human rights.¹⁸¹ Yet, the relevant question for this article is what effect this debate will have: if we accept as valid the arguments that non-refoulement is *jus cogens*, what impact does that have on the exceptions in Article 33(2)?

It is of course true that articulations of the principle of non-refoulement that have led to the establishment of the *jus cogens* norm have often included exceptions, most notably those in Article 33(2) of the Convention. Yet according to some scholars and jurists, the existence of exceptions to a rule can have the effect of strengthening rather than undermining the rule's characterization as a fundamental norm.¹⁸² The exceptions in Article 33(2) may fall into exactly this category; Allain, for example, argues that the existence of these exceptions demonstrates an acceptance by states of the non-derogable nature of non-refoulement.¹⁸³ Historically, the existence of exceptions to non-refoulement may initially have prevented the norm from becoming universal; for instance, early discussions of non-refoulement as having a fundamental character were tempered by considerations that some states have made reservations in the case of threats to national security or in situations of mass influx.¹⁸⁴ Goodwin-Gill, however, argues that the existence of exceptions to the principle of non-refoulement indicate the boundaries of discretion as opposed to any fundamental objections to the principle

178. See, e.g., Aoife Duffy, *Expulsion to Face Torture? Non-refoulement in International Law*, 20(3) INT'L J. REFUGEE L. 373, 389-390 (2008) (examining non-refoulement in refugee law and human rights law, and arguing that while a prohibition on refoulement is part of international human rights law and international customary law, the evidence that non-refoulement in the refugee context or otherwise has acquired the status of a *jus cogens* norm is less than convincing).

179. Bruin and Wouters, *supra* note 6, at 26.

180. See, e.g., Duffy, *supra* note 178, at 382-384 (arguing that state practice in the context of terrorism undermines the notion that non-refoulement has acquired the status of a *jus cogens* norm).

181. ORAKHELASHVILI, *supra* note 120, at 55.

182. See, e.g., *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) ("If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.")

183. Allain, *supra* note 2, at 540.

184. See generally GOODWIN-GILL, *supra* note 1, at 135 (giving an overview of the literature on this point).

itself.¹⁸⁵ Furthermore, as discussed above, states have accepted the fundamental character of non-refoulement itself, but have historically differed considerably on the applicability of the exceptions. The establishment of non-refoulement as a *jus cogens* norm necessitates that those exceptions are circumscribed or limited: by helping create a norm that reaches beyond treaty law, the exceptions have become virtually obsolete.

B. *Reading Strict Limits to Article 33(2) if Non-Refoulement is Jus Cogens*

Accepting as valid the arguments that non-refoulement has attained the status of *jus cogens*, there is a limiting effect on the exceptions to the principle articulated in Article 33(2). Despite its prominent role in the international legal hierarchy, *jus cogens* has long been a controversial concept, both in defining which norms fall under its scope, and in defining its effect on other areas of law.¹⁸⁶ The question that concerns us here—the effect of a new *jus cogens* norm on pre-existing treaty law—is particularly contentious.¹⁸⁷ Nonetheless, a reading of treaty interpretation, relevant case law, and comparable sources of law demonstrates that the Article 33(2) exceptions must be read in an extremely limited manner in order to preserve the character of non-refoulement as a *jus cogens* norm.

Essentially, a new *jus cogens* norm of non-refoulement has emerged since the 1951 Convention came into existence, conflicting with the Convention itself. That norm stems from one of the foundational principles of the 1951 Convention itself.¹⁸⁸ In other words, the characterization of non-refoulement as *jus cogens* causes an inconsistency within the Convention: on one hand, the Convention provides some of the evidentiary foundation for the new *jus cogens* norm,¹⁸⁹ and on the other hand, the exceptions in Article 33(2) have the capacity to undermine that norm. Because the exceptions are written in broad language,¹⁹⁰ states can rely on this language to establish regimes that virtually eviscerate the norm itself. This is especially true for the national security exception, which allows states to construct wide-reaching anti-terror policies,¹⁹¹ even though states can effectively balance national security

185. GOODWIN-GILL, *supra* note 1, at 168.

186. CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS *ERGA OMNES* IN INTERNATIONAL LAW 141 (2005) (“[T]he conceptual difficulties surrounding *jus cogens* can hardly be overstated.”).

187. *Id.* at 143-144 (“Difficulties multiply when analyzing the legal effects of *jus cogens* beyond the Vienna Convention . . . [N]early all of the alleged *jus cogens* effects have remained controversial.”).

188. *See, e.g.*, Feller, *supra* note 8, at 523 (calling non-refoulement “the most fundamental of all international refugee law obligations”).

189. *See* ORAKHELASHVILI, *supra* note 120, at 111 (“The ILC has endorsed the idea that general multilateral treaties can give rise to peremptory norms, and that there is some doctrinal and practical support for the view that multilateral treaties can be among the sources of *jus cogens*.”).

190. *See* Section I.B, *supra*.

191. *See* 1951 Convention, *supra* note 5, at art. 33(2) (“The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is . . .”).

concerns by relying instead on Article 1(F).

If non-refoulement is considered a *jus cogens* norm, then it forms part of the international public order, and there is a fundamental conflict between that public order and certain exceptions in the 1951 Convention. Considering non-refoulement as a *jus cogens* norm establishes an extremely strong shield around the underlying norm of protection against persecution, a breach of which would amount to objective illegality.¹⁹² A *jus cogens* norm operates in an absolute and unconditional way.¹⁹³ And yet, the exceptions to non-refoulement undermine the unconditional scope of the norm. The emergence of non-refoulement as a *jus cogens* norm therefore calls into question the enduring scope of those exceptions.

In effect, non-refoulement is becoming extra-conventional, superseding the wishes expressed by states in Article 33(2). *Jus cogens* norms exist beyond treaty law, despite the fact that treaty law expresses state consent.¹⁹⁴ *Jus cogens* “enjoys a higher rank in the international hierarchy than treaty law and even ordinary customary rules.”¹⁹⁵ The emergence of a new *jus cogens* norm that exists beyond consensual treaty provisions can lead to unpredictable consequences,¹⁹⁶ such as the limiting of state intent as expressed through the Article 33(2) exceptions. Yet, superseding state consent may be appropriate in the human rights context. As de Wet argues, *jus cogens* norms in the human rights context protect fundamental rights of individuals: “As these rights by their very nature are directed at the protection of individuals within the territory of state parties, as opposed to regulating the relationship between states, one is forced to rethink the scope of application of the concept of *jus cogens*.”¹⁹⁷

A breach of *jus cogens* is viewed as a wrong to the international community from which there is no derogation;¹⁹⁸ while the exceptions to non-refoulement are not technically derogations, the logic prohibiting derogation from *jus cogens* is analogous. Non-refoulement, as a *jus cogens* norm, permits no derogation. This is in keeping with Article 42 of the 1951 Convention, which forbids state parties from making reservations to the Convention’s non-refoulement provisions.¹⁹⁹ The rationale for prohibiting

192. See ORAKHELASHVILI, *supra* note 120, at 72 (arguing that the concept of objective illegality applies when the community is wronged, independently of the attitudes of individual States).

193. ORAKHELASHVILI, *supra* note 120, at 67.

194. See Neuman, *supra* note 144, at 102 (discussing the broad impact of the Inter-American Court’s determinations of *jus cogens*, “which obviate state consent altogether”).

195. Prosecutor v. Anto Furundzija, Case No. IT 95-17/1-T10, Trial Chamber Judgment, ¶ 153 (Dec. 10, 1998), available at www.icty.org.

196. See Neuman, *supra* note 144, at 122 (arguing that the risk of elevating a norm to *jus cogens* “above all merely consensual treaty provisions could lead to unpredictable and detrimental consequences across the entire range of international law”).

197. Erika de Wet, *The Prohibition of Torture as an International Norm of jus cogens and its Implications for National and Customary Law*, 15 EUR. J. INT’L L. 97, 99-100 (2004).

198. ORAKHELASHVILI, *supra* note 120, at 72.

199. 1951 Convention, *supra* note 5, at art. 42.

derogation from a *jus cogens* norm is clear: It prevents states from treating objectively illegal behavior as legal, thereby excluding the possibility that *jus cogens* norms will be violated, fragmented, or subject to regional adaptation.²⁰⁰

Under this logic, overbroad application of the exceptions to non-refoulement should also be prohibited to prevent impermissible regionalization of the norm. New *jus cogens* norms come at a considerable price: They prohibit states from establishing individual or regional objections to the norm.²⁰¹ An overbroad application of the exceptions to non-refoulement—while not a derogation by name—could have the same practical effect as derogation: that is, fragmentation and regionalization. Regionalization is a very real threat in light of emerging U.S. and European anti-terror policies, as discussed above.²⁰² If these states, or any group of states, were to be permitted to apply the exceptions broadly and with regional variation, all teeth would be ripped from the fundamental norm.²⁰³

The inherent conflict between the emergent *jus cogens* norm of non-refoulement and the Article 33(2) exceptions forces reexamination of those provisions. The Vienna Convention on the Law of Treaties (“Vienna Convention”) provides incomplete guidance on the effects of *jus cogens* norms.²⁰⁴ If non-refoulement had existed as a *jus cogens* norm at the time of the conclusion of the 1951 Convention, the Article 33(2) exceptions would have been scrutinized for their incompatibility with the supervening norm. As codified in Article 53 of the Vienna Convention, a treaty which conflicts with *jus cogens* is considered to have illegal object and would typically be void.²⁰⁵ This essentially preserves the notion that the validity of the international public order transcends the agreement of the states involved.²⁰⁶ Whereas a treaty can violate international law in various ways that do not lead to invalidity,²⁰⁷ once *jus cogens* is implicated, the community interest is

200. ORAKHELASHVILI, *supra* note 120, at 72.

201. Neuman, *supra* note 144, at 117 (“The universally binding effect of a *jus cogens* norm is the antithesis of ‘state voluntarism.’ States cannot exempt themselves from such a norm by declining to ratify a treaty, or by persistent object. Nor can a region of states contract to modify a *jus cogens* norm.”).

202. See Section I.B.1, *supra*.

203. See Pirjola, *supra* note 119, at 644 (discussing the risks to individual determinations of relying on treaty-based law for a definition of the norm of non-refoulement).

204. TAMS, *supra* note 186, at 142-143.

205. Vienna Convention, *supra* note 4, at art. 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 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.”).

206. ORAKHELASHVILI, *supra* note 120, at 133.

207. *Id.* at 134 (arguing that treaties that affect the rights of third parties and treaties that conflict with previous treaty obligations, for example, can violate international law without leading to invalidity).

triggered such that invalidity is the only acceptable result.²⁰⁸

At the time of drafting, there was some discussion of the possibility of severability for treaties falling under Article 53 of the Vienna Convention – that is, for treaties that conflict with *jus cogens* at the time of their conclusion.²⁰⁹ Nonetheless, the Vienna Convention is clear: Article 44 specifically states that “[i]n cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.”²¹⁰ Orakhelashvili argues that both Article 53 and Article 71(1) (dealing with the consequences of a treaty invalidated by Article 53)²¹¹ refer to the treaty in its totality, excluding the possibility of severability.²¹² However, he notes that some question whether such a strict approach to severability in Article 53 cases is warranted.²¹³ He further notes that “the reason for repudiating the entire treaty is that peremptory norms are of such fundamental and humanitarian character that none of them can form an unimportant and secondary provision of a treaty[,]” but with regard to treaties concluded before the Vienna Convention entered into force, “severability could perhaps apply as it does not hamper the effects of *jus cogens* with regard to provisions conflicting with it.”²¹⁴

Because non-refoulement arguably emerged as a *jus cogens* norm after the conclusion of the 1951 Convention, the Convention does not fall under Article 53 of the Vienna Convention, and strict rules prohibiting severability may not apply. Article 64 of the Vienna Convention provides a more appropriate framework, as it addresses the emergence of a new peremptory norm after the creation of a treaty.²¹⁵ Like Article 53, the function of Article 64 is to “protect the general interests of the international community through safeguarding the uniform operation of *jus cogens*[.]”²¹⁶ Tams observes that under the express terms of Article 64, whole treaties may be void if they

208. *Id.* Orakhelashvili notes that when the Vienna Convention was drafted, the ILC suggested that the invalidating capacity of *jus cogens* should not apply to general multilateral treaties; nonetheless, the ultimate text of Article 53 is clear in not admitting any such exceptions. *Id.* at 136.

209. *See, e.g., id.* at 147-149 (discussing this debate in the context of the drafting of the treaty). Special Rapporteur Lauterpacht, for instance, considered that provisions containing illegalities that did not constitute essential parts of the treaty should not lead to complete nullity of the treaty, while Special Rapporteur Waldock also considered it misplaced to void an entire treaty because of a minor inconsistency with a *jus cogens* rule. *Id.* at 147.

210. Vienna Convention, *supra* note 4, at art. 44(5).

211. *Id.* at art. 71(1) (“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.”).

212. ORAKHELASHVILI, *supra* note 120, at 137-138 (arguing that the word “it” in Article 53 refers to the treaty as a whole).

213. *Id.* at 138.

214. *Id.* at 149.

215. Vienna Convention, *supra* note 4, at art. 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.”).

216. ORAKHELASHVILI, *supra* note 120, at 150.

conflict with an emerging peremptory norm.²¹⁷ Yet the 1951 Convention does not fundamentally conflict with the emergence of non-*refoulement* as a *jus cogens* norm. Article 64 prescribes termination if “any existing treaty” is “in conflict” with “a new peremptory norm.” The vast bulk of the 1951 Convention is not in conflict with the new peremptory norm; rather, non-*refoulement* is a fundamental part of the Convention. Only the Article 33(2) exceptions create conflicting obligations in light of the emergence of the peremptory norm.

Orakhelashvili argues that nullity *ab initio* is clearly not appropriate in many cases that fall under Article 64, as the invalidity may arise after the treaty provisions in conflict have been valid for some period of time.²¹⁸ He examines ILC documents that admit the possibility that situations resulting from previous application of the treaty retain their validity after the emergence of the new rule of *jus cogens*, to the extent that they do not conflict with the new rule.²¹⁹ In Article 64 cases, neither the text of the Vienna Convention nor its preparatory materials exclude the possibility of using severability to remedy the conflict with the international public order.²²⁰ Orakhelashvili points to the ILC’s Final Report, which emphasizes that if provisions of the treaty conflicting with *jus cogens* “can properly be regarded as separable from the rest of the treaty . . . the rest of the treaty ought to be regarded as still valid.”²²¹ In Orakhelashvili’s terms, this means that “severability may perhaps be presumed.”²²² Indeed, the Vienna Convention itself does not include Article 64 among the cases for which severability is forbidden.²²³

Article 71(2) of the Vienna Convention²²⁴ supports the idea that further maintenance of the situation is permissible so long as it does not conflict with the new *jus cogens* norm.²²⁵ Article 71(2) provides that that the rights and obligations are maintained but not the treaty provisions themselves.²²⁶ Orakhelashvili argues that “a strict application of the principles of nullity would hardly suit situations where a treaty was not intended to conflict with

217. TAMS, *supra* note 186, at 142.

218. ORAKHELASHVILI, *supra* note 120, at 150.

219. *Id.* at 149 (discussing ILC Final Report, 2YBILC 1963, 216-217).

220. *Id.* at 153.

221. *Id.* at 153 (discussing ILC Final Report, 2YBILC 1963, 261).

222. *Id.*

223. Vienna Convention, *supra* note 4, at art. 44(5) (“In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.”).

224. *Id.* at art. 71(2) (“(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.”).

225. ORAKHELASHVILI, *supra* note 120, at 151.

226. *Id.* at 153.

jus cogens but came into contradiction with it only after the latter emerged.”²²⁷ Indeed, as de Wet argues, where a treaty itself does not violate a *jus cogens* norm, but where the execution of certain obligations in the treaty would have that effect, the state is “relieved from giving effect to the obligation in question,” but “the treaty itself would, however, not be null and void.”²²⁸

Jurisprudence that has followed the Vienna Convention supports a similar interpretation of the legal effects of peremptory norms. Orakhelashvili’s assertion that a treaty is not necessarily nullified by an emerging *jus cogens* norm. The International Criminal Tribunal for the Former Yugoslavia observes, in the *Furundzija* judgment:

It would be senseless to argue, on the one hand that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorizing or condoning torture or absolving its perpetrators through an amnesty law.²²⁹

De Wet observes that this broad view of the legal effects of peremptory norms, while far broader than the Vienna Convention, encompasses the abrogation of intra-state measures that obstruct the effective enforcement of a *jus cogens* norm.²³⁰ Domestic policies providing for broad application of the Article 33(2) exceptions fall under this reading.

In the case of Article 33(2) of the 1951 Convention, where the exceptions would undermine the newly emergent *jus cogens* norm, and where the body of the 1951 Convention is not only in keeping with but helped establish the *jus cogens* norm, nullity is clearly inappropriate; rather, the exceptions in Article 33(2) should be narrowed in keeping with the new norm. Lauterpacht and Bethlehem, in their 2001 summary of non-refoulement in the refugee context, argued that they were not yet “persuaded that there is a sufficiently clear consensus opposed to exceptions to non-refoulement to warrant reading the 1951 Convention without them.”²³¹ However, Lauterpacht and Bethlehem imply that as non-refoulement increasingly acquires the character of a *jus cogens* norm, the exceptions should be further and further limited, stating that they “are therefore of the view that the exceptions to the prohibition of refoulement pursuant to Article 33(2) of the 1951 Convention subsist but must be read subject to very clear limitations.”²³² Broad use of the exceptions would invalidate the new norm itself in a way that is out of step with

227. *Id.* at 151.

228. De Wet, *supra* note 197, at 98.

229. Prosecutor v. Anto Furundzija, Case No. IT 95-17/1-T10, Trial Chamber Judgment, ¶ 153 (Dec. 10, 1998), available at www.icty.org.

230. De Wet, *supra* note 197, at 99.

231. Lauterpacht & Bethlehem, *supra* note 1, at 132-33.

232. *Id.*

international public order.

C. *The Influence on the Article 33(2) Exceptions of Non-Refoulement in the Torture Context*

The body of international law prohibiting torture further supports an extremely limited reading of the Article 33(2) exceptions. The principle of non-refoulement has a particularly broad scope when considered in conjunction with the Convention Against Torture and the International Covenant on Civil and Political Rights²³³; under these conventions and the 1951 Convention, the overwhelming majority of the international community is bound by provisions on non-refoulement.²³⁴ The *jus cogens* character of the prohibition of torture—including the prohibition on non-refoulement in the torture context—is one of the most fundamental standards of the international community; it is an “absolute value from which nobody must deviate.”²³⁵

There are no exceptions to non-refoulement in the torture context, and this colors our approach to the Article 33(2) exceptions to non-refoulement in the refugee context. There is little doubt that articulations of the principle of non-refoulement *outside* the context of refugee law affect the manner in which the principle is interpreted *within* refugee law.²³⁶ It is a settled principle that Article 3 of the Convention Against Torture²³⁷—articulating the principle of non-refoulement—is of a fundamentally norm-creating character such that it can be used to form the basis of a general rule of law.²³⁸ As Lauterpacht and Bethlehem assert, an interpretation of Article 33 that does not acknowledge the influence of the laws on torture and relies solely on the conceptions of the drafters of the 1951 Convention would be “significantly out of step with more recent developments in the law.”²³⁹ The overlap of torture and refugee law in the context of non-refoulement leaves considerable room for cross-fertilization in the interpretation of Article 33 of the 1951

233. ICCPR, *supra* note 116, at art. 7; U.N. Human Rights Committee, *General Comment No. 20*, para. 9 (1992), HRI/HEN/1/Rev.1 (1994); Convention Against Torture, *supra* note 115, at art. 3.

234. Lauterpacht & Bethlehem, *supra* note 1, at 93.

235. Prosecutor v. Anto Furundzija, Case No. IT 95-17/1-T10, Trial Chamber Judgment, ¶ 153 (Dec. 10, 1998), available at www.icty.org. See also ORAKHELASHVILI, *supra* note 120, at 67 (discussing the prohibition of torture as similar to the general concept of public order in that it requires absolute validity and performance).

236. See, e.g., Lauterpacht & Bethlehem, *supra* note 1, at 113; see also Weissbrodt & Hortreiter, *supra* note 13, at 63 (1999) (“wherever possible, the treaties with the same basic objective should be read consistently with one another.”).

237. Convention Against Torture, *supra* note 115, at art. 3 (“1. No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”).

238. GOODWIN-GILL, *supra* note 1, at 134 (discussing the standards articulated by the International Court of Justice in the *North Sea Continental Shelf* cases).

239. Lauterpacht & Bethlehem, *supra* note 1, at 132.

Convention.²⁴⁰

The prohibition on refoulement in the torture context derives from the prohibition on torture itself: essentially, non-refoulement functions to ensure full adherence to the prohibition on torture. In both the torture context and the refugee context, non-refoulement operates in the same way: it is a mechanism that ensures observance of the underlying peremptory norms such as the prohibition on torture or the protection of the right to life.²⁴¹ For that reason, it is logical that non-refoulement is also considered a peremptory norm, lest states override non-refoulement and violations of the underlying norms follow.²⁴² Given this logic, there is no reason why non-refoulement in the torture context should operate without exceptions, whereas non-refoulement in the refugee context should be gutted by the broad use of exceptions. Both norms exist to protect fundamental rights, and as such, both norms should operate with few, if any, exceptions.

The trend against exceptions to non-refoulement in both regional refugee documents and in human rights law may reflect an evolution towards the exclusion of any exceptions to non-refoulement in any context.²⁴³ The 1951 Convention's interpretation cannot remain unaffected by subsequent developments in the law—such as the formation of customary law in the area of torture.²⁴⁴ Lauterpacht and Bethlehem argue that interpretations of Article 33(2) in particular must take into account “the trend, evident in other textual formulations of the principle of non-refoulement and in practice more generally since 1951, against exceptions to the principle of non-refoulement.”²⁴⁵ It is relatively well-settled that the exceptions in Article 33(2) can only be applied in situations which do not encompass a danger of torture or cruel, inhuman or degrading treatment or punishment.²⁴⁶ However, the way the norm is applied in the torture context has broader impact than that.

Refugee law and laws prohibiting torture have long existed side-by-side. State practice, as demonstrated through the operation of the Office of the United Nations High Commissioner for Refugees, shows considerable overlap in the application of the various articulations of the principle of non-

240. See Lauterpacht & Bethlehem, *supra* note 1, at 106 (asserting that the concept of cross-fertilization of treaties means that the wording and construction of one treaty can influence the interpretation of another treaty containing similar wording or ideas).

241. ORAKHELASHVILI, *supra* note 120, at 55.

242. *Id.*

243. U.N. High Comm'r for Refugees, OAU/UNHCR Working Group, *Guidelines for National Refugee Legislation, with Commentary*, § 6(2), HCR/120/41/80 / GE.81-0013 (Dec. 9, 1980), available at: <http://www.unhcr.org/refworld/docid/3ae6b32610.html>; Lauterpacht & Bethlehem, *supra* note 1, at 132.

244. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, at 19-20 (June 21).

245. Lauterpacht & Bethlehem, *supra* note 1, at 130-131 (discussing in particular the Asian-African Refugee Principles and the Declaration on Territorial Asylum).

246. *Id.* at 133-34.

refoulement.²⁴⁷ Domestic legislation of many states provides for the complementary protection of the Convention Against Torture in the routine processing of asylum cases.²⁴⁸ Furthermore, practices developed under the Convention Against Torture have informed refugee status determination hearings in several countries.²⁴⁹

Given the overlap of torture and refugee law in the context of non-refoulement, the two treaties have essentially a cross-fertilization effect.²⁵⁰ Indeed, the prohibition on refoulement in international law derives both from refugee-related sources and from other areas.²⁵¹ UNHCR's Executive Committee acknowledges the considerable overlap between the two different articulations of the principle of non-refoulement, calling on states to strengthen the "institution of asylum" by upholding the principle of non-refoulement both in the refugee context and in the torture context.²⁵² Because non-refoulement in the torture context has no exceptions whatsoever, and because the two bodies of law have worked closely together for some time, this supports the notion derived from analysis of *jus cogens*, above, that exceptions to non-refoulement in the refugee context must be extremely limited indeed.

* * *

The characterization of non-refoulement as *jus cogens*, a premise gaining increasing support,²⁵³ has a profound effect on the Article 33(2) exceptions. An expansive reading of the exceptions has been rendered impossible: if they were to be applied broadly by any state, the effect would be to render the new *jus cogens* norm toothless. Furthermore, an expansive reading of the exceptions would have a damaging effect on the underlying fundamental human

247. *Id.* at 96 (stating that UNHCR "is not limited in the exercise of its protective functions to the application of the substantive provisions of these two treaties [the 1951 Convention and the 1967 Protocol]. The UNHCR may therefore rely on whatever instruments and principles of international law may be pertinent and applicable to the situation which it is called upon to address.").

248. *See, e.g.*, United States Citizenship and Immigration Service Form I-589, www.uscis.gov/files/form/I-589.pdf (permitting the applicant to apply for asylum and relief under the Convention Against Torture simultaneously).

249. *See* Gorlick, *supra* note 136, at 487.

250. Vienna Convention, *supra* note 4, at art. 31(3)(c) (instructing treaty interpretation to encompass "any relevant rules of international law applicable in the relations between the parties"); *see also* Lauterpacht & Bethlehem, *supra* note 1, at 106 (asserting that the concept of the cross-fertilization of treaties means that the wording and construction of one treaty can influence the interpretation of another treaty containing similar wording or ideas; this concept clearly applies to humanitarian treaties); *see generally* Philippe Sands, *Treaty, Custom, and the Cross-Fertilization of International Law*, 1 YALE HUM. RTS. & DEV. L.J. 85 (1998) (giving an overview of the relationship between and the hierarchy among different norms of international law).

251. Lauterpacht & Bethlehem, *supra* note 1, at 96 ("[I]n parallel with reliance on *non-refoulement* as expressed in the 1951 Convention and the 1967 Protocol, the circumstances of particular cases may warrant the UNHCR pursuing the protecting of refugees coming within its mandate by reference to the other treaties mentioned above, as well as other pertinent instruments, including appropriate treaties, or by reference to *non-refoulement* as a principle of customary international law.").

252. U.N. High Comm'r for Refugees, Executive Comm. Programme, *Conclusion on Safeguarding Asylum*, Conclusion No. 82 (XLVIII), ¶ (d)(i) (1997).

253. Allain, *supra* note 2; ORAKHELASHVILI, *supra* note 120, at 55.

rights which are protected by the principles of non-refoulement and freedom from persecution.

In light of the emergence of non-refoulement as a new *jus cogens* norm, the 1951 Convention should be read consistently with that principle. The treaty embraces non-refoulement as one of the foundations of refugee law.²⁵⁴ The obligations that conflict with that principle – the Article 33(2) exceptions – should be read in a very limited manner. This analysis is in keeping with the absolute nature of non-refoulement in the torture context. A broad reading of the exceptions would be inconsistent with the new international public order.

CONCLUSION

Non-refoulement is the cornerstone of the international legal regime for refugee protection, and forms a fundamental part of the 1951 Convention. Since the principle was enshrined in the 1951 Convention, non-refoulement has become an established principle of customary international law, and is considered a fundamental norm. Non-refoulement protects individuals from return to their countries of origin where they face violations of their basic human rights, including the right to life. Yet, the exceptions to non-refoulement articulated in Article 33(2) of the Convention render that international legal protection incomplete. The exceptions have never garnered a similar level of consensus as the norm itself; rather, their implementation has been contentious, fractured, and regionalized.

Since September 11, 2001, states that host refugees have been imposing stricter anti-terrorism measures. Many of those policies come at the expense of refugee protection. The United States, for instance, relies heavily on the language in Article 33(2) to exclude from protection individuals suspected of having links to terrorism. This broad use of the exceptions to non-refoulement leaves genuine refugees at risk of return, reflecting the prioritization of national security above refugee protection. Given the current concerns over terrorism worldwide, there is great potential for other states to follow the U.S. lead and weaken refugee protection by enacting broad policies based on the Article 33(2) exceptions. Yet this would be at odds with current state obligations under international law.

In recent years, scholars have advanced the argument that non-refoulement has emerged as a new *jus cogens* norm, drawing on the consensus of states, and the non-derogability of the principle. If we accept the preemptory character of non-refoulement as valid, then the breadth of the Article 33(2) exceptions is called into question. Relying on laws and scholarly opinion on treaty interpretation and the effects of emerging *jus cogens* norms, and on comparisons to non-refoulement in the torture context, this paper concludes

254. See, e.g., Feller, *supra* note 8, at 523 (calling non-refoulement “the most fundamental of all international refugee law obligations”).

that the Article 33(2) exceptions must be read in a very limited manner indeed.

The strict limits to the Article 33(2) exceptions inform the balance between national security and refugee protection. States must not rely on the language in Article 33(2) to form broad anti-terror policies that exclude legitimate refugees, or otherwise damage refugee protection. Rather, states must rely on the exclusion regime established in Article 1(F) of the 1951 Convention to respond to their legitimate security concerns. Given the current status of international law, we must insist on these strict limits to the exceptions to non-refoulement, in order to avoid contravening the new *jus cogens* norm and safeguard the underlying refugee protection regime.