Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection

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Abstract:
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 state obligations under international law. 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 broad exceptions to the norm. 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.

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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, many recent commentators have asserted that non-refoulement has attained the status of customary international law2 or even a *jus cogens* norm3—that is, a peremptory norm of international law from which no derogation is 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 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?

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1 GUY GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 117 (1996). See also Lauterpacht and Bethlehem, The Scope and Content of the Principle of Non-Refoulement: Opinion (UNHCR), ¶ 2 (2001) (“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., Conclusion on the International Protection of Refugees: Non-Refoulement, Conclusion No. 6 (XXVIII), U.N. High Comm’r for Refugees, Executive Comm. Programme (1977) (“[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.”); Elihu Lauterpacht and Daniel Bethlehem, The Scope and Content of the Principle of Non-Refoulement: Opinion (UNHCR), ¶ 253 (2001) (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. REF. L. 533, 538 (2001) (“It 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.

4 Vienna Convention on the Law of Treaties, Art. 53, 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.”)

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.

The limited 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. Since 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. Measures that limit the applicability of 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

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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 and Kees Wooters, *Terrorism and the Non-Derogability of Non-refoulement*, 15(1) INT’L J. REF. L. 5, 7 (2003) (“no 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.

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. Initially, the section argues that 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 over the last fifty years. 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 broadly on these exceptions in enacting anti-terror policies. Finally, this section examines the absolute nature of non-refoulement in context of norms prohibiting torture and cruel, inhuman or degrading treatment, arguing that this provides an instructive framework for examining non-refoulement in the refugee context.

The second section of this paper turns to non-refoulement as \textit{jus cogens}. First, this section examines arguments put forward by others that non-refoulement in the refugee context has acquired the status of a \textit{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 \textit{jus cogens}? This section argues that the effect of characterizing non-refoulement as a new \textit{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. 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.

\section{I. The State of Non-Refoulement in Recent History}

\footnote{\textit{See, e.g.,} Erika Feller, \textit{Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come}, 18 INT’L J. REF. L. 509, 511 (“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.”).}
A. Non-Refoulement’s Acceptance as a Fundamental Norm of Refugee Law

Non-refoulement – now considered a fundamental principle of international refugee law\(^9\) – existed as a prominent legal concept for more than fifty years before it was codified in refugee law 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.\(^13\) Lauterpacht and Bethlehem detail 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

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\(^9\) 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 117-119 (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 and 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 and Bethlehem, supra note 2, at ¶ 69.
“whosoever” indicates that the concept of refoulement must be construed expansively and without limitation, and as such includes no exceptions for other treaty obligations such as extradition. 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, and arguably broader threats such as generalized violence. The principle of non-refoulement applies to a broad spectrum of people, including those seeking asylum as well as those already granted asylum, regardless of whether the individual entered the host state legally. 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.

International documents that followed the 1951 Convention promulgate the same – or in some cases, an even more expansive – definition of non-refoulement, supporting a broad reading of the norm. The 1967 Protocol relating to the Status of Refugees revisits the 1951 Convention and confirms its essential terms, among them the definition of non-refoulement. 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. In addition, in keeping with the 1951 Convention,

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15 Id. at ¶ 71.
16 Id. at ¶ 126.
17 Id. at ¶ 128.
18 Id. at ¶¶ 85, 89.
20 Lauterpacht and Bethlehem, supra note 2, at ¶¶ 4–10 (providing an overview and discussion of different articulations of non-refoulement promulgated after the 1951 Convention).
22 See, e.g., The Convention Governing Specific Aspects of Refugee Problems in Africa, Organization for African Unity, adopted 1974, Art. II(3), referencing Art. I (paras. 1 and 2), 1001 U.N.T.S. 45 (entered into force June 20, 1974) [hereinafter “OAU Convention”] (“the 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…”); 1969 American Convention on Human Rights, “Pact of San Jose, Costa
numerous regional documents state that expulsion can constitute refoulement, and some specifically identify rejection at the frontier as refoulement. These documents have been used to interpret the 1951 Convention, suggesting that there, too, exists an obligation to refrain from rejection at the frontier. These strong, constant rearticulations of non-refoulement emphasize the broad nature of the principle.

Not only is non-refoulement seen as a principle with broad application, it has also gained acceptance as a fundamental principle of refugee protection. 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.” 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

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23 See, e.g., 1967 Declaration on Territorial Asylum, A/RES/2132 (XXII), Art. 3(1) [hereinafter “Declaration on Territorial Asylum”] (“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 Section III, para. 5 (emphasizing the “importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier”).

24 Lauterpacht and Bethlehem, supra note 2, at ¶ 76-78.

25 See, e.g., Conclusion on the International Protection of Refugees: Non-Refoulement, Conclusion No. 6 (XXVIII), U.N. High Comm’r for Refugees, Executive Comm. Programme (1977) (“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 (“It 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 Section III, para. 5 (1984).
importance of non-refoulement within the scheme of refugee protection.\textsuperscript{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.\textsuperscript{28}

Over the last fifty years of state practice, non-refoulement in the refugee context has been consistently applied more broadly than its articulation in the 1951 Convention.\textsuperscript{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.\textsuperscript{30} In addition, most go further: they do not limit the principle of non-refoulement to those who have formally been recognized as refugees,\textsuperscript{31} they also apply the principle to asylum seekers while determining their status, regardless of the legality of the migration of the asylum seeker.\textsuperscript{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 Article 33.\textsuperscript{33}

There has been some debate as to the applicability of non-refoulement at the outside edge of the refugee definition; nonetheless, 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.\textsuperscript{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

\begin{itemize}
\item[-] \textsuperscript{27} Lauterpacht and Bethlehem, supra note 2, at ¶ 53 (discussing a number of Executive Committee conclusions and referring to General Assembly resolutions that underscore this point).
\item[-] \textsuperscript{28} 1951 Convention, supra note 5, at Art. 42; 1967 Protocol, supra note 21, at Art. VII(1).
\item[-] \textsuperscript{29} GOODWIN-GILL, supra note 1, at 123.
\item[-] \textsuperscript{30} Id. at 137.
\item[-] \textsuperscript{31} Id. at 121.
\item[-] \textsuperscript{32} Id. at 137.
\item[-] \textsuperscript{33} Id. at 138.
\item[-] \textsuperscript{34} Id. at 131 (discussing the British and Argentinean approaches to non-refoulement in the late 1980s).
\end{itemize}
non-refoulement for non-Convention refugees.\textsuperscript{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[.]”\textsuperscript{36}

These disagreements are at the margin of the debate; there is broad 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,\textsuperscript{37} and is emerging as a \textit{jus cogens} norm.\textsuperscript{38} Non-refoulement’s broad application and fundamental character suggest that any exceptions to the principle should be limited and applied with caution.

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

\textsuperscript{36} Id.
\textsuperscript{37} See, e.g., Allain, supra note 2, at 538 (2002) (“It 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 and Bethlehem, supra note 2, at ¶ 216 (“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.”).
\textsuperscript{38} Allain, supra note 2. See Section II. A, infra, for further discussion.
\textsuperscript{39} GOODWIN-GILL, supra note 1, at 117 (discussing that 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).
\textsuperscript{40} See, e.g., 1933 Convention on the Status of Refugees, Art. 3 (prohibiting States from taking police measures against refugees unless dictated by national security or public order), 159 LNTS No. 3663 (official text in French); 1938 Convention concerning the Status of Refugees coming from Germany, Art. 5, 192 LNTS No. 4461 (official texts in English and French); see also GOODWIN-GILL, supra note 1, at 118 (giving a general discussion of these early international agreements concerning non-refoulement).
As codified in the 1951 Convention, Article 33(2) has two exceptions: for public order and for national security. 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.” 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. 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. The danger must be to a community in the country of refuge, not to any community elsewhere. 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.

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? This standard is even 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. The text of the Article does little to reign in 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.

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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. 270 (BIA 2002) (establishing a particularly serious crime as 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 and Bethlehem, supra note 2, at ¶ 182.
46 Id. at ¶ 192.
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 and Bethlehem, supra note 2, at ¶ 167.
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

\(^{49}\) ECOSOC res. 248(IX)B, 8 Aug. 1949. See also Lauterpacht and Bethlehem, supra note 2, at ¶ 30 (discussing the origins of the 1951 Convention in the ad hoc committee); GOODWIN-GILL, supra note 1, at 119-120 (discussing the work of the ad hoc committee).

\(^{50}\) UN doc. E/1850, para. 30. (“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.

\(^{52}\) Ad hoc Committee on Statelessness and Related Problems: UN doc. E/AC.32/SR.20, paras. 16, 60-1 (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).
or more of the 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 these exclusion provisions. Because Article 1(F) has powerful 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). 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. Articles 31 and 32 of the Vienna Convention, which are generally accepted as being declaratory of customary international law, lend credence to the notion that the exceptions have limited scope. The


58 See, e.g., ECRE Position on Exclusion, supra note 57, at para. 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 an LCHR Perspective, 12 INT’L J. REF. L. 317, 324 (2000) (LCHR Supplementary Volume) [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 and Bethlehem, supra note 2, at ¶ 159(iii) (arguing that international law dictates that the exceptions to non-refoulement must be interpreted restrictively and applied with particular caution).

60 Lauterpacht and Bethlehem, supra note 2, at ¶ 40.

61 Vienna Convention supra note 4, at Arts. 31 and 32 (providing that a treaty shall be
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.\textsuperscript{62}

Regional documents that followed the 1951 Convention tend to have more limited exceptions to non-refoulement, or, in some cases, no exceptions at all, indicating reluctance to endorse exceptions to the norm.\textsuperscript{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.\textsuperscript{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.\textsuperscript{65} The Cartagena Declaration also has no exceptions to non-refoulement.\textsuperscript{66} The American Convention on Human Rights has no exceptions to the norm, but does permit derogation.\textsuperscript{67} The regional 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,”\textsuperscript{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.”\textsuperscript{69}

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).

\textsuperscript{62} Lauterpacht and Bethlehem, supra note 2, at ¶¶ 44-47.

\textsuperscript{63} See id. at ¶ 4 – 10 (2001) (providing an overview and discussion of different articulations of the principle of non-refoulement promulgated after the 1951 Convention).

\textsuperscript{64} OAU Convention, supra note 22, at Art. 2(3).

\textsuperscript{65} Id. at Art. 2(4). See also Weissbrodt and Horteiret, supra note 13, at 42 (reviewing arguments emphasizing that the OAU Convention is an instrument that offers particularly broad protection from refoulement).

\textsuperscript{66} Cartagena Declaration, supra note 22, at Section III, para. 5.

\textsuperscript{67} American Convention, supra note 22, at Art. 22(8). See also Weissbrodt and Horteiret, supra note 13, at 47 (1999) (discussing the manner in which derogation from Art. 22 is permitted).


\textsuperscript{69} Declaration on Territorial Asylum, supra note 23, at Art. 3.
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 instable states, such as Thailand, Turkey, and with respect to Haitians, the United States. The 1967 UN 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.” 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.

Limiting mechanisms have arisen to counter the dialogue on mass influx. The “principle of first asylum” – or the notion that an asylum seeker should request asylum in the first safe country he or she reaches – has been strongly endorsed by many states, 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. The principle of first asylum states that mass influx does not diminish a state’s obligation to offer asylum and non-refoulement, and has arguably become settled law. 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 principle of first

70 Goodwin-Gill, supra note 1, at 132.
71 Declaration on Territorial Asylum, supra note 23, at Art. 3(2).
72 Durieux and McAdam, supra note 19, at 5-6.
73 Goodwin-Gill, supra note 1, at 132-133.
74 Id. at 132-133 and 141.
asylum are just one example of 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, many of whom have promulgated counter-terror policies that negatively impact protection offered to refugees and asylum-seekers. States may seek to use Article 33(2) to exclude from refugee protection those suspected of connections to terrorism, even though Article 33(2) refers to refoulement, not refugee status determination. The United States has already used Article 33(2) in this manner. There is great potential, as demonstrated by U.S. practice, to read the Article 33(2) exceptions broadly and by doing so

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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”); Schoenholz, 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 DIAU RBANO DE SOUSA AND PHILIPPE 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 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, 251-259 (Niklaus Steiner, Mark Gibney, and Gil Loescher, eds., 2003); Sophie Robin-Olivier, Immigration law and Human Rights: Legal Line Drawing Post September 11: Symposium Article: Citizens and Noncitizens in Europe: European Union Measures Against Terrorism After September 11, 25 B.C. THIRD WORLD L. J. 197, 197-198 (2005).

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

79 Hathaway and Cusick, supra note 44, at 535-536 (discussing ways in which US law excludes refugees, and stating that some “[i]ineligibility criteria rely upon the right of states to expel certain particularly dangerous refugees under Articles 32 and 33(2) of the Convention.”).
prioritize national security concerns at the expense of refugee protection. 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. For instance, the United States completely shut down the refugee resettlement program for months after September 11, 2001. Schoenholz argues that asylum in particular has changed gradually since the World Trade Center bombings in 1993, but the cumulative effect of these changes on the caliber of refugee protection in the United States has been considerable. 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.

The United States is not alone in placing increasingly strict limitations on access to asylum and refugee status as part of an anti-terror strategy.

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80 Secretary General’s Note on Fundamental Freedoms and Countering Terrorism, 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... some 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); Schoenholz, supra note 7, at 364 (“The overall U.S. protection picture for asylum seekers since September 11 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 1368-1369 (discussing the dramatic drop in refugee resettlement after September 11, but noting that the numbers rebounded in 2004).

83 Schoenholz, supra note 7, at 325-332. 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 325-326. 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.

85 See, e.g., Robin-Olivier, supra note 77, at 197-198 (comparing European and
Over the past seven years, European nations have instituted counterterrorism policies that damage refugee protection.\textsuperscript{86} The promulgation of restrictive policies is not limited to states: intergovernmental organizations such as the European Union\textsuperscript{87} and the United Nations Security Council\textsuperscript{88} have also articulated positions limiting access to asylum on terrorist grounds.\textsuperscript{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 determination\textsuperscript{90} rely heavily on the Article 33(2) exceptions to determine who is ineligible for protection. An individual may be barred from asylum or refugee status under several different provisions, which are cumulatively broader than American approaches to immigration and terror policies after September 11, 2001); ECRE Position on Exclusion, \textit{supra} note 57, at para. 1 (“Growing internal security concerns are added to an already unfavourable climate vis-à-vis refugees and asylum seekers in many European asylum countries.”).

\textsuperscript{86} Robin-Olivier, \textit{supra} note 77, at 198 (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). \textit{See also} Secretary General’s Note on Fundamental Freedoms and Countering Terrorism, \textit{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).


\textsuperscript{88} \textit{See}, e.g., UN Security Council Resolution 1373 (“On Threats to International Peace and Security Caused by Terrorist Acts”), 28 Sept. 2001, UN doc. S/RES/1373, paras. 3(f)-(g), (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).

\textsuperscript{89} \textit{See} Allain, \textit{supra} note 2, at 544-557 (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.” \textit{Id}. at 556.

\textsuperscript{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). INA § 101(a)(42)(B), 8 U.S.C. 101(a)(42)(B). This standard essentially incorporates the definition found in Article 1(a) of the 1951 Convention as expanded by the 1967 Protocol. \textsc{Ira Kurzban, Immigration Law Sourcebook}, 327 (9th ed. 2004).
those articulated in the 1951 Convention.\textsuperscript{91} The United States is, in effect, considering refugee status determination and protection from refoulement (referred to as ‘withholding of removal’) at the same time.\textsuperscript{92} The U.S. relies on five bars to asylum\textsuperscript{93} that are distinct from the three categories in Article 1(F) of the Convention, but which overlap with those categories.\textsuperscript{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.\textsuperscript{95}

\textsuperscript{91} James Sloan, Application of Article 1F of the 1951 Convention in Canada and the United States, 12 INT’L. J. REF. 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 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 the U.S. violates treaty obligations with its exclusion regime. Id. at 415, see, e.g., Ahmetovic, 62 F.3d 48 (2d Cir. 1995).

\textsuperscript{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 536.

\textsuperscript{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).

\textsuperscript{94} Sloan, supra note 91, at 224-225. 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).

\textsuperscript{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); James 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.”).
The other three bars in the United States regime stem from the Article 33(2) exceptions. 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.” This language clearly mirrors Article 33(2). Second, the basic national security bar, which applies when “there are reasonable grounds for regarding the alien as a danger to the security of the U.S.,” also closely resembles Article 33(2). Finally, the bar to those associated with terrorism or terrorist groups covers very similar grounds as the basic national security bar and also relies heavily on the language in Article 33(2).

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

“(I) has engaged in a terrorist activity;
“(II) a consular officer or the attorney general 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 foreign terrorist organization or (bb) a political or other similar social group whose public endorsement of acts of terrorist activity the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities;…

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96 Hathaway and Cusick, supra note 44, at 535-536 (“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”).
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)).
“(IV) has used the alien’s position of prominence within any country to endorse or espouse terrorist activity, or to persuade others to support terrorist activity or a terrorist organization, in a way that the secretary of state has determined undermines United States efforts to reduce or eliminate terrorist activities.”

The terrorist bar is an overly broad example of the use of Article 33(2) that may allow persons who are victims of terrorism to be excluded from protection. Phrases such as “terrorist activity” and “terrorist organizations” cast a very wide net. 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.

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. 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. The REAL ID Act of 2005 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.

The U.S. terrorism bar demonstrates a particularly broad use of the Article 33(2) exceptions. The United States, like other refugee-receiving

104 INA § 212(a)(3)(B)(i)(I)-(IV) and (VI).
105 Secretary General’s Note on Fundamental Freedoms and Countering Terrorism, 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, 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, 518-519 (2002). See also Acer, supra note 7, at 1364 (discussing the provisions relating to asylum in the USA PATRIOT Act).
109 Id. at 509.
111 Acer, supra note 7, at 1392.
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, the Article 33(2) exceptions 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, broad exceptions to the norm are found only in refugee treaties.\(^{114}\) The Convention Against Torture (CAT) contains an absolute prohibition on refoulement, subject to no exceptions.\(^{115}\) Likewise, the International Covenant on Civil and Political Rights (ICCPR)\(^{116}\) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)\(^{117}\) protect individuals from

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\(^{112}\) See Section B., supra, for further discussion of exclusion under Article 1(F).


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


refoulement in cases of torture or cruel, inhuman or degrading treatment without exception.\textsuperscript{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.\textsuperscript{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.\textsuperscript{120} Likewise, the prohibitions on refoulement found in jurisprudence related to the European Convention and to the ICCPR protect not only the underlying norm of torture but also that of cruel, inhuman or degrading treatment, including in the context of the death penalty.\textsuperscript{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.\textsuperscript{122}

In the refugee context, non-refoulement provides incomplete protection


\textsuperscript{118} Weissbrodt and 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.

\textsuperscript{119} See GUY GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 90 - 92 (3d ed. 2007) (discussing the content of the term “persecution,” and citing UNHCR’s \textit{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, \textit{Shadows in Paradise: Exploring Non-Refoulement as an Open Concept}, 19 INT’L J. REF. L.639, 648-652 (discussing Hathaway’s characterization of four different types of obligations protected by the prohibition on persecution).

\textsuperscript{120} See, e.g., ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW, 55 (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).

\textsuperscript{121} Weissbrodt and Hortreiter, supra note 13, at 648-652 (discussing criteria for assessing torture and cruel, inhuman or degrading treatment in individual cases determining protection from non-refoulement).

\textsuperscript{122} In \textit{The Chalal Family v. United Kingdom}, the European Court of Human Rights states 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.” ECHR (22414/93), paras 103-104, 27 June 1995. See also Lauterpacht and Bethlehem, supra note 2, at ¶ 8 (providing a list of more than a decade’s worth of jurisprudence at the European Court of Human Rights upholding this proposition).
for a broad range of 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 severity 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 \textit{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.\(^ {129}\)

\(^{123}\) 1951 Convention, \textit{supra} note 5, at Art. 33(1).

\(^{124}\) \textit{GOODWIN-GILL, supra} note 1, at 137-138 (“[A]t the international level, no distinction is recognized between refugee status and entitlement to non-refoulement.”).


\(^{126}\) \textit{See} \textit{GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW} 90 - 92 (3d ed. 2007) (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 and Hortreiter, \textit{supra} note 13, at 62.

\(^{128}\) \textit{Barcelona Traction (Belgium v. Spain),} 1970 I.C.J. 3, paras. 33-34. \textit{See also} \textit{ORAKHELASHVILI, supra} note 120, at 54 (discussing the prohibition of torture as a \textit{jus cogens} norm).

\(^{129}\) Weissbrodt and Hortreiter, \textit{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).
refoulement in the refugee context protects similarly fundamental norms, including the right to life. Yet pursuant to the 1951 Convention, that protection is circumscribed by the broad exceptions to non-refoulement.

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. Essentially, the case falls under Article 3 of the European Convention, which permits no exceptions to non-refoulement are possible. Yet, there is no prohibition on the death penalty itself under international law, unlike, say, persecution that amounts to death. Here, the protection offered by non-refoulement is far broader than that offered in the refugee context, in which broad 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. In fact, torture is one of the premier alternative sources of non-refoulement aside from refugee law.

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130 1951 Convention, supra note 5, at Art. 1(a). See also GUY GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 90 - 92 (3d ed. 2007) (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).


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

133 European Convention, supra note 117, 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 and Bethlehem, supra note 2, at ¶ 20 (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 Lauterpacht and Bethlehem, supra note 2, at ¶ 3 (“There are, in addition, other
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. 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. Likewise, extradition provides a relevant body of law when seeking to balance state security concerns with refugee protection. 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 Convention.

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. 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.

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.

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 S. Kapferer, The Interface between Extradition and Asylum, UNHCR Legal 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 and Bethlehem, supra note 2, at ¶ 46 (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 and Hortreiter, supra note 13, at 62.
141 Lauterpacht and Bethlehem, supra note 2, at ¶ 154 (2001). See also GOODWIN-GILL, supra note 1, at 126 (giving further discussion on the unqualified nature of non-refoulement in the human rights context).
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* norm,\(^{142}\) in that it is accepted by “the international community of States as a whole” as a “norm from which no derogation is permitted.”\(^{143}\) Focusing in part on customary international law and relevant state practice, scholars argue, as discussed below, that non-refoulement is a new *jus cogens* norm. 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 basic human rights: 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 bars to application, have enormous potential to undermine that protection and permit states to violate fundamental norms of refugee protection.\(^{147}\) Given the emergence of non-

\(^{142}\) See, e.g., Allain, *supra* note 2, at 533-538; GUY GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW, 218 (3rd ed., 2007) (“comments… 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.”).


\(^{145}\) ORAKHELASHVILI, *supra* note 120, at 67.

\(^{146}\) *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 “this 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.”).
refoulement as a *jus cogens* norm, the scope of the Article 33(2) exceptions must be seriously limited, in order to preserve both the 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. 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. 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. *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. Orakhelashvili argues that a true international public order cannot operate in a differentiated way; indeed, *jus cogens* engages the whole community and cannot be limited to regional or bi-lateral norms. Ultimately, what is created is a norm considered so essential to the international system that its breach places the very existence of the norm in question.

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 helps demonstrate the acceptance of non-refoulement by the international community of States as a whole. Furthermore, a treaty’s interpretation cannot remain unaffected

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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.
151 Id. at 29-30.
152 Id. at 31 (2006).
153 Id. at 38-40 (discussing whether bi-lateral or regional *jus cogens* norms can exist peremptorily). 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.
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
by subsequent developments in the law, in particular, through the
development of customary law. While commentators initially differed on
the extent to which non-refoulement should be considered a principle of
customary international law, 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. No formal or informal objections to the
principle of non-refoulement have been noted. UNHCR, itself an
expression of state practice, is warranted in relying on the customary
ternational law nature of the principle of non-refoulement.

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. 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. The Executive Committee first
commented on the 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

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
and Bethlehem, supra note 2, at ¶ 216 (“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.”); Secretary
General’s Note on Fundamental Freedoms and Countering Terrorism, supra note 57, at
para. 69 (stating that non-refoulement is “a rule of customary international law”).

156 Legal Consequences for States of the Continued Presence of South Africa in
Namibia (South West Africa) notwithstanding Security Council Resolution 276, 1971 I.C.J.
16 (para. 53).

157 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).

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

159 Id. at 168.

160 Lauterpacht and Bethlehem, supra note 2, at ¶ 20.

161 GOODWIN-GILL, supra note 1, at 128. See also Lauterpacht and Bethlehem, supra
note 2, at ¶ 29 (“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 128-129.
regional levels and is generally accepted by States.” In 1982, the Executive Committee “reaffirmed... the principle of non-refoulement which was progressively acquiring the character of a peremptory rule of international law.” Since then, the Executive Committee has repeatedly and consistently referred to non-refoulement as a “fundamental principle” of international refugee protection.

Further support for the fundamental nature of non-refoulement comes from its status as a non-derogable part of the 1951 Convention. 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. 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. 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.

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163 Conclusion on the International Protection of Refugees: Non-Refoulement, Conclusion No. 6 (XXVIII), U.N. High Comm’r for Refugees, Executive Comm. Programme (1977).
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.
Allain presents a forceful argument stating that non-refoulement in the refugee context should be viewed as *jus cogens*.\(^{169}\) He argues that non-refoulement meets both 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 *Nicaragua* case to observe 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 to be 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, international governmental organizations

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\(^{169}\) Allain, *supra* note 2.

\(^{170}\) *Id.* at 538.

\(^{171}\) *Id.* at 539.

\(^{172}\) *Id.* at 540.

\(^{173}\) *See, e.g.*, Mr. Mponda (Observer for Malawi): UN doc. A/AC.96/SR.431, para. 32 (1988); ORAKHELASHVILI, *supra* note 120, at 55; Cartagena Declaration, *supra* note 22, at conclusion 5.

\(^{174}\) ORAKHELASHVILI, *supra* note 120, at 55.

\(^{175}\) Cartagena Declaration, *supra* note 22, at Section 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.”).
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 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 The relevant question here 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)

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¹⁷⁷ *Id.* at 543-557.
¹⁷⁸ See, e.g., Aoife Duffy, *Expulsion to Face Torture? Non-refoulement in International Law,* Int’l. J. Ref. L. (June 25, 2008; cite pending) (examining non-refoulement in refugee law and human rights law, and arguing that that while a prohibition on *refoulement* is part of international human rights law and international customary law, the evidence that *non-refoulement* has acquired the status of a *jus cogens* norm is less than convincing).
¹⁸⁰ See, e.g., Duffy, *supra* note 178 (June 25, 2008; cite pending) (finding that the evidence that *non-refoulement* has acquired the status of a *jus cogens* norm is less than convincing).
¹⁸¹ ORAKHELASHVILI, *supra* note 120, at 55.
¹⁸² See, e.g., Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. 98 (1986) (“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
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. On the other hand, the existence of the Article 33(2) exceptions may be seen as arguments against the fundamental character of the principle of non-refoulement; for instance, early discussions of non-refoulement as having a fundamental character were tempered by considerations that many States have made reservations in the case of threats to national security or in situations of mass influx. 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 itself. And yet, the establishment of non-refoulement as a *jus cogens* norm indicates that those exceptions are circumscribed or limited: by helping create a norm that reaches beyond treaty law, did the exceptions become obsolete?

**B. Reading Article 33(2) As Limited 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). *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. The question that concerns us here – the effect of a new *jus cogens* norm on pre-existing treaty law – is particularly contentious. 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 has emerged since the 1951 Convention came into existence. That norm stems from one of the

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

184 See, e.g., P. Hyndman, *Asylum and Non-Refoulement – Are These Obligations Owed to Refugees Under International Law?* 57 PHILIPPINE L. J. 43, 68-69 (1982), see also Goodwin-Gill, *supra* note 1, at 135 (giving a general overview of the literature on this point).

185 Goodwin-Gill, *supra* note 1, at 168.

186 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 (2005) (“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.”).
foundational principles of the 1951 Convention itself. And yet, 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, 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, states can rely on this language to establish regimes that virtually eviscerate the norm of non-refoulement. This is especially true for the national security exception, which allows states to construct wide-reaching anti-terror policies. 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 obligations in the 1951 Convention.

In the refugee context, considering non-refoulement as a *jus cogens* norm has the potential to establish an extremely strong shield around the underlying norm of protection against persecution, a breach of which would amount to objective illegality. A *jus cogens* norm operates in an absolute and unconditional way. And yet, the exceptions to non-refoulement undermine the protection of those underlying norms. The mere fact that non-refoulement has emerged as a *jus cogens* norm does not, in itself, eliminate the existence of the exceptions, but it does call into question their limits.

*Jus cogens* norms exist beyond treaty law, despite the fact that treaty law expresses state consent. It is a norm that “enjoys a higher rank in the international hierarchy than treaty law and even ordinary customary

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188 See, e.g., Feller, *supra* note 8, at 511 (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…”).
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 fn1 (page number pending) (discussing the broad impact of the Inter-American Court’s determinations of *jus cogens*, “which obviate state consent altogether”).
rules.” Yet, the emergence of a new *jus cogens* norm that exists beyond consensual treaty provisions can lead to unpredictable consequences. In effect, non-refoulement is becoming extra-conventional, superseding the wishes expressed by states in Article 33(2). 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*.”

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

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 considerable price: they prohibit states from establishing individual or regional objections to the norm. An overbroad application of the exceptions to


196 See Neuman, *supra* note 144, at fn123 (page number pending) (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”).


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

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

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

201 Neuman, *supra* note 144, at fn84 (page number pending) (“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.”).
non-refoulement – while not derogations 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. If these states were to be permitted to apply the exceptions broadly and with regional variation, all teeth would be ripped from the fundamental norm.

The Vienna Convention on the Law of Treaties ("Vienna Convention") provides incomplete guidance on the effects of Jes cogens norms. If non-refoulement had existed as a Jes 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 Jes cogens is considered to have illegal object and would typically be void. This essentially preserves the notion that the validity of the international public order transcends the agreement of the states involved. Whereas a treaty can violate international law in various ways that do not lead to invalidity, once Jes cogens is implicated, the community interest is triggered such that invalidity is the only acceptable result. Orakhelashvili notes that when the Vienna Convention was drafted, the ILC suggested that the invalidating capacity of Jes cogens should not apply to general multilateral treaties; nonetheless, the ultimate text of Article 53 is clear in not admitting any such exceptions.

When the Vienna Convention was drafted, there was some discussion of the possibility of severability for treaties falling under Article 53 of the Vienna Convention – that is, treaties that conflict with Jes cogens at the

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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 (Jes 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).
208 Id.
209 Id. at 136.
time of their conclusion. 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.”

Orakhelashvili argues that both Article 53 and Article 71(1) (dealing with the consequences of a treaty invalidated by Article 53) refer to the treaty in its totality, excluding the possibility of severability. However, he notes that some question whether such a strict approach to severability in Article 53 cases is warranted. 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.”

Indeed, it is clear that the 1951 Convention does not fall under Article 53 of the Vienna Convention, and as such strict rules prohibiting severability may not apply to Article 33(2). 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. 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[.]”

Tams observes that under the express terms of Article 64, whole treaties may be void if they conflict with an emerging peremptory

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210 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.

211 Vienna Convention, supra note 4, at Art. 44(5).

212 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.”).

213 ORAKHELASHVILI, supra note 120, at 137-138 (2006) (arguing that the word “it” in Article 53 refers to the treaty as a whole).

214 Id. at 138.

215 Id. at 139.

216 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.”).

217 ORAKHELASHVILI, supra note 120, at 149.
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 1951 Convention embraces non-refoulement as a fundamental concept that forms the basis for the vast bulk of the rest of the treaty; it is only the exceptions that 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. 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. In Article 64 cases, neither the text of the Vienna Convention nor its preparatory materials exclude the possibility using severability to remedy the conflict with the international public order. 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.” In Orakhelashvili’s terms, this means that “severability may perhaps be presumed.” Indeed, the Vienna Convention itself does not include Article 64 among the cases that for which severability is forbidden.

Article 71(2) of the Vienna Convention corresponds with the Orakhelashvili’s reading that further maintenance of the situation is permissible so long as it does not conflict with the new *jus cogens* norm.
Article 71(2) provides that that the rights and obligations are maintained but not the treaty provisions themselves. Nonetheless, Orakhelashvili argues that “a strict application of the principles of nullity would hardly suit situations where a treaty was not intended to conflict with jus cogens but came into contradiction with it only after the latter emerged.” 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.”

Jurisprudence and scholarly opinion that has followed the Vienna Convention supports 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.”

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. 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, states should be relieved from the obligations triggered by the exceptions in Article 33(2). 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

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227 Id. at 153.
228 Id. at 151.
229 Erika de Wet, supra note 197, at 98.
231 Erika de Wet, supra note 197, at 99.
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.” Broad use of the exceptions would invalidate the norm itself in a way that is out of step with the newly established international public order.

**C. Influence on the Article 33(2) Exceptions of Other Articulations of Non-Refoulement**

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 Rights, under these conventions and the 1951 Convention, the overwhelming majority of the international community is bound by provisions on non-refoulement. 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.” In fact, there are no exceptions to the prohibition on 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. The overlap of torture and

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232 Lauterpacht and Bethlehem, *supra* note 2, at ¶ 158.
233 Id.
235 Lauterpacht and Bethlehem, *supra* note 2, at ¶ 10.
236 *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T10, para. 155, Trial Chamber, Judgment (10 December 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).
237 *See, e.g.*, Lauterpacht and Bethlehem, *supra* note 2, at ¶ 75; *see also* Weissbrodt and Hortreiter, *supra* note 13, at 63 (1999) (“wherever possible, the treaties with the same basic objective should be read consistently with one another.”).
refugee law in the context of non-refoulement leaves considerable room for cross-fertilization in the interpretation of Article 33 of the 1951 Convention. It is a settled principle that Article 3 of the Convention Against Torture – articulating the principle of non-refoulement – is of fundamentally norm creating character such that it can be used to form the basis of a general rule of law. As Lauterpacht and Bethlehem assert, an interpretation of Article 33 that does not acknowledge the influence of the laws on torture and instead relies on the conceptions of the drafters of the 1951 Convention would be “significantly out of step with more recent developments in the law.”

The prohibition on refoulement in the torture context derives from the prohibition on torture itself: essentially, non-refoulement functions to ensure full adherence 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. For that reason, it is logical that non-refoulement is too considered a peremptory norm, lest states override non-refoulement and violations of the underlying norms follow. 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 little if any use of exceptions.

There are strong suggestions that the trend against exceptions to non-refoulement in both regional refugee documents and in human rights law reflect an evolution towards the exclusion of any exceptions to non-

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238 See Lauterpacht and Bethlehem, supra note 2, at ¶ 46 (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).

239 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.”).

240 GOODWIN-GILL, supra note 1, at 134 (1996) (discussing the standards articulated by the International Court of Justice in the North Sea Continental Shelf cases).

241 Lauterpacht and Bethlehem, supra note 2, at ¶ 157.

242 ORAKHELASHVILI, supra note 120, at 55.

243 Id.
refoulement in any context. 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. 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.” 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, cruel, inhuman or degrading treatment or punishment. 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-refoulement. Domestic legislation of many states provides for the complementary protection of the Convention Against Torture in the routine processing of asylum cases. Furthermore, practices developed under the Convention Against Torture have informed refugee status determination hearings in several countries.

Given the overlap of torture and refugee law in the context of non-refoulement, the two treaties have essentially a cross-fertilization effect.

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244 See, e.g., OAU/UNHCR Working Group, Guidelines for National Refugee Legislation, 9 December 1980 (published by UNHCR), Section 6(2); Lauterpacht and Bethlehem, supra note 2, at ¶ 157.


246 Lauterpacht and Bethlehem, supra note 2, at ¶ 151 (discussing in particular the Asian-African Refugee Principles and the Declaration on Territorial Asylum).

247 Id. at ¶ 159(ii).

248 Id. at ¶ 20 (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.”).


250 See Gorlick, supra note 136, at 487.

251 See 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 and Bethlehem, supra note 2, at ¶ 46.
Indeed, the prohibition on refoulement in international law derives both from refugee-related sources and from other areas. 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. 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.

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The characterization of non-refoulement as *jus cogens*, a premise gaining increasing support, 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 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. The obligations that conflict with that principle – the Article 33(2)

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252 Lauterpacht and Bethlehem, *supra* note 2, at ¶ 20 (“[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 protection 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.”).


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

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