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To Transfer or Not to Transfer: Identifying and Protecting Relevant Human Rights Interests in Non-Refoulement

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To Transfer or Not to Transfer: Identifying and Protecting Relevant Human Rights Interests in Non-Refoulement

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Abstract

Human rights law imposes upon States an absolute duty not to transfer an individual to another State where there are substantial grounds for believing he or she will be tortured or subjected to cruel, inhuman or degrading treatment. This protection, called non-refoulement, emanates from a theory of human rights that recognizes rights fulfillment requires States to protect those within their jurisdiction from rights violations perpetrated by third parties, including other States. Generally human rights law recognizes that resource constraints and/or competing rights restrict protection duties. But such limitations have not been recognized in the non-refoulement context with limited theorization as to the reason.

In recent years the obligation to provide non-refoulement protection has run into conflict with the State’s obligation to protect its public from aliens suspected of involvement in terrorism. Expulsion is the traditional tool available to States to mitigate the threat posed by dangerous aliens. With this tool removed, States often lack an alternative route to mitigate this threat, with criminal prosecution and indefinite detention pending deportation not available for various reasons. The result has been numerous cases where States have been forced either to release dangerous aliens back onto the street, consistent with international law, or to find alternative means to deal with the threat in the shadow of human rights law.

This Article argues that human rights law should recognize the clash of human rights duties that arises in these transfer situations: the State’s duty protect aliens from post-transfer mistreatment clashes with its duty to protect members of the public from rights violations committed by dangerous private persons within society. Human rights law has in recent years recognized a duty on the part of States to take reasonable operational measures to protect the public from private person harms where the State knows or should know of the risk. In the case of dangerous aliens, these operational measures would presumably include expulsion. By depriving the State of the ability to expel dangerous aliens, non-refoulement protection places the human rights of dangerous aliens and the public into direct conflict.

Recognition of this rights competition is important for two reasons. First,
for too long human rights scholars and bodies have dismissed the security consequences of non-refoulement as outside the concern of human rights. Acceptance that these security consequences themselves affect human rights requires consideration of how the law should address the conflict. Second, once a rights competition is accepted, human rights law prescribes a methodology for mediating between conflicting rights: balancing. A balancing approach would allow States a margin of appreciation to determine in the first instance how to choose between competing duties. The role of human rights apparatus, including national courts, international institutions and non-governmental organizations is to monitor this balance and to push States where the balance chosen appears over or under rights protective.

This Article contends that moving toward a balancing approach has at least three major advantages. First, it brings within the law both relevant sets of human rights, ensuring that the rights competition in which States are engaged is recognized by the law. This recognition allows for better monitoring by the human rights apparatus, and reduces the incentives of States to act outside of the law in protecting the public. Second, balancing reduces the security consequences for States of accepting additional categories of post-transfer mistreatment merit non-refoulement protection—a major goal of the human rights movement—thereby increasing the likelihood States will accept such future obligations. Third, by balancing the need to protect rights between both the transferring and receiving States, a balancing approach may actually lead to a more comprehensive anti-torture strategy, and therefore reduced occurrence of the practice.
# Table of Contents

I. **INTRODUCTION** ......................................................................................... 3

II. **NON-REFOULEMENT RULE: HISTORY, TENSION ADJUSTMENT** .... 11

   A. Development of the Modern Non-Refoulement Rule........... 11
   B. Terrorism Raises the Stakes......................................................... 17
   C. States Push Back................................................................. 23

III. **DUTY TO PROTECT: REFRAMING THE NON-REFOULEMENT DEBATE** .... 30

   A. Understanding the Protection Competition..................... 30
   B. Is Torture Different?,......................................................... 35

IV. **MEDIATING BETWEEN COMPETING RIGHTS: BALANCING** .......... 40

   A. Features of Human Rights Law Balancing Tests.............. 40
   B. Concerns about Balancing: Bias and Uncertainty .......... 45

V. **CONCLUSION** .................................................................................. 49
I. INTRODUCTION

In April 2009 British police detained 10 Pakistani men in the United Kingdom on student visas for alleged involvement in a plot to bomb a British shopping center in a “mass casualty operation” on behalf of al Qaida. British police had the 10 men under surveillance based on intercepted e-mails and other intelligence information suggesting an imminent attack on a Manchester mall, but were forced to move to detain the suspects immediately after the details of the plot and the police plans to thwart it were discovered by the press. The resulting premature raids turned up no explosives or bomb-making equipment, leading Her Majesty’s Government (HMG) to conclude terrorism charges could not be brought against the suspects.1

Instead, HMG moved to deport the men to Pakistan, including Abid Naseer, alleged plot ringleader, whose presence in the United Kingdom was deemed “a threat to national security.”2 Naseer contested the finding that he posed a threat to the national security of the United Kingdom. He also opposed removal on grounds that he faced a real risk of torture or inhuman and degrading treatment in Pakistan. Transfer under such circumstances would violate Article 3 of the European Convention on Human Rights (ECHR).3 The European Court of Human Rights (ECtHR) has interpreted this provision to include an implicit obligation not to transfer individuals to a State where they face real risk of torture or inhuman and degrading treatment after transfer, which is the principle of non-refoulement.4

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1 See John F. Burns, Deportation Case Presents Test of British Government, N.Y. TIMES, May 19, 2010, at A8 (summarizing facts of the Naseer case).

2 See Immigration Rule 322(5) (U.K.) (allowing denial of leave to remain in the United Kingdom because of “the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his character, conduct or associations or the fact that he represents a threat to national security”).

3 See Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Sep. 3, 1953, 213 U.N.T.S. 222 (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”) [hereinafter ECHR].

4 See infra notes 39-46 & accompanying text (discussing ECtHR case law). Traditionally, the term refoulement refers only to summary refusal to admit an alien who has no lawful right of entry into the State and summary repatriation of an alien found illegally in the territory of the State (reconduction). Refoulement can be contrasted to expulsion or deportation, which requires lawfully present aliens to be removed after a legal process. GUY S. GOODWIN-GILL & JANE MCDAM, THE REFUGEE IN INTERNATIONAL LAW 201 (3rd ed., 2007). For purposes of this paper, non-refoulement refers more broadly to the prohibition of all kinds of transfer based on risk of post-transfer...
The Special Immigration Appeals Commission (SIAC) ruled in favor of Naseer. After evaluating intelligence and other closed materials as well as an extensive e-mail correspondence between Naseer and an al Qaida member in Pakistan, SIAC credited HMG’s allegations that Naseer was in the final stages of planning an attack on a shopping mall in northwest England. This led Justice Mitting to conclude that “Naseer was an al Qaeda operative who posed, and still poses, a serious threat to the national security of the United Kingdom.” Nevertheless, Mitting held that deportation to Pakistan was not permissible consistent with the principle of non-refoulement. SIAC noted the history of Pakistani intelligence officials mistreating alleged Islamic militants, and refused to accept HMG’s argument that the public notoriety of the case would ensure Naseer’s safety.

The decision left HMG with few options to mitigate the “serious threat to the national security of the United Kingdom” posed by Naseer. Prosecution in the case was not possible because of the lack of physical evidence linking Naseer to the bomb plot. Preventive detention pending deportation in similar circumstances was found to violate the ECHR by the British Law Lords. And deportation to a country other than Pakistan was virtually impossible because no State would accept a suspected al Qaida terrorist for resettlement. HMG was left imposing control orders, or parole-like restrictions, on Naseer’s movement and employment, with the knowledge similar restrictions have been easily evaded by others in the past.

The Naseer case is an example of the serious security consequences that may result from providing non-refoulement protection in a post 9/11 world. The principle of non-refoulement has in recent years been justified by human rights bodies and advocates as a part of the jus cogens prohibition on torture and cruel, inhuman or degrading treatment. While these prohibitions

7 See MIRIAM GANI & PENELope MATHews, FREsh PERSPECTIVES ON THE WARe ON TERROR 343 (2008) (describing failures of the control order system).
8 For shorthand purposes, this Article will refer to the “jus cogens torture norm” to encompass both torture and cruel, inhuman and degrading treatment. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702 cmt. n (1987) (describing as jus cogens prohibition on “torture, or other cruel, inhuman or degrading treatment or punishment”). As is discussed below, the criteria for concluding a norm is jus cogens is unclear, infra notes 158-159 & accompanying text, and scholars and courts have contested whether cruel, inhuman and degrading treatment rises to the level of jus cogens. See Forti v. Suarez-Mason, 672 F.Supp. 1531, 1543 (N.D. Cal. 1987) (refusing to recognize cruel, inhuman and degrading treatment as a cognizable violation of the Alien Tort Statute because of lack of consensus on meaning of the terms); THE TROSUTERS PAPERS THE ROAD TO ABU GIIRAIb 1146 (Karen Greenberg & Joshua J. Dratel eds., 2005) (“While many international agreements expressly prohibit both torture and cruel, inhumane and degrading treatment, it remains an open question as to
are traditionally thought to forbid a State from employing torture or cruel, inhuman or degrading treatment, human rights bodies have explained that if a State cannot subject an individual to these forms of mistreatment, neither may they send the individual to a State where that mistreatment may occur. Because there are no exceptions to the torture or cruel, inhuman or degrading treatment prohibitions in human rights law, these bodies have concluded that there are no exceptions to non-refoulement either. In recent years, human rights bodies also have sought to expand the scope of non-refoulement protection to other human rights abuses, seeking to prohibit transfer where there is a real risk to the transferee of enforced disappearance, unfair post-transfer trial, or recruitment as a child soldier.

Ever-expanding non-refoulement duties deprive States of a traditional tool used to protect its population from security threats posed by aliens: expulsion. Unlike nationals of a State, who are legally entitled to be present in the State, aliens are present at the prerogative of the host State. States have traditionally used this plenary authority over the presence of aliens to exclude or expel dangerous aliens. Depriving States of this tool may leave them, as in the Naseer case, with no real option to mitigate real threats. This concern, magnified by the threat of terrorism, has led a variety of States to advocate a change in the non-refoulement rule to permit States to consider the security risk the alien poses to the State as a factor in determining whether transfer is possible.9 Such a change would hark back to the origins of non-refoulement protections, which included security exceptions. The security consequences of accepting non-refoulement duties also have led States to resist expansion of non-refoulement protection to lesser forms of mistreatment as advocated by human rights institutions.

The human rights apparatus has resisted such a change for two reasons. First, they argue that the prohibition on torture and cruel, inhuman and degrading treatment are absolute, and non-subject to exception. Opening non-refoulement protection to exceptions, advocates worry, will lead to similar exceptions to the basic prohibition on States torturing or otherwise severely mistreating individuals. The result, they fear, are policies like enhanced interrogation and rendition used by the Bush Administration to combat terrorism. Second, they contend that even if human rights law wanted to account for the threat posed by the alien to the host State, it could not do so

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given the incomparable nature of the threat posed by the alien and the threat alien himself faces. The result would be apples to oranges comparisons outside the scope of human rights law.

These arguments ignore, however, the human rights costs of the current rule. Allowing dangerous aliens to remain free within society risks their commission of acts that constitute serious violations of human rights. This reality has led States to take measures to mitigate the security consequences of granting non-refoulement protection that have negative second-order human rights effects. States have refused to capture or admit aliens from countries where repatriation will be difficult, in the process harming those aliens or those at threat from their actions. Some States also have misused diplomatic assurances, or promises from the receiving State not to mistreat transferred persons, to feign compliance with existing non-refoulement rules, while in fact subjecting the transferred person to substantial risk of mistreatment, without assessment of whether the threat in question merits such a harsh result. The resulting distortions in the law have led officials of at least one State to consider withdrawing from its non-refoulement obligations entirely. At minimum, it has led to State opposition to further expansion of non-refoulement protections.

The full range of human rights equities at issue in non-refoulement has not been captured because of the failure to identify the relevant State duties and rights at issue in non-refoulement. It has been thirty years since Henry Shue identified three duties that exist with all human rights obligations, the duty to avoid harm, the duty to protect from the harm, and the duty to aid individuals in fulfillment of their right. Properly understood, States making transfer determinations with respect to dangerous aliens face a conflict between two competing duties to protect.

One such duty is well developed. States have a duty to protect aliens from the risk of serious human rights abuses perpetrated by another State after transfer. Such a duty has already been recognized with torture and cruel, inhuman and degrading treatment by most States and human rights actors, and may in the future be accepted for other, less serious human rights violations.

10 The Conservative Party’s winning manifesto in the recent elections called for the repeal of the Human Rights Act, which implemented the ECHR into British law, in part because of concerns regarding non-refoulement protection. See Andrew Sparrow & Patrick Wintour, Coalition Reconsidering Tory Plan to Scrap Human Rights Act, GUARDIAN (U.K.), May 19, 2010 (quoting Conservative Party manifesto). See also David Stringer, UK: European Law Hampering Terrorism Fight, WASH. POST, Feb. 3, 2011 (describing report by Lord Carlisle, House of Lords terrorism monitor arguing ECHR is turning the U.K. into a refuge for international terrorism). Coalition partners the Liberal Democrats forced the Tories to abandon this campaign pledge as part of the coalition agreement.

11 Shue explained the three distinct State duties as follows: (1) the duty to avoid: negative duty not to violate the right in question; (2) the duty to protect: positive duty to prevent third parties from violating the right; and (3) duty to aid: positive duty to take steps to allow individuals to realize their right. HENRY SHUE, BASIC RIGHTS 60 (1980).
Less developed is the growing recognition by human rights bodies that a State has a duty to protect those within its jurisdiction from human rights violations committed by non-State actors, including dangerous aliens present within the State’s territory. Such an obligation has been recognized by the ECtHR, the Inter-American Court of Human Rights, the Human Rights Committee (HRC), and various national courts as emanating from the right to life and the right to be free of torture and cruel, inhuman and degrading treatment. It is these two duties, and the corresponding human rights, that conflict in transfer determinations regarding dangerous aliens.

Recognizing this rights competition is important for three reasons. First, a change in rhetoric has the potential to alter the non-refoulement debate. Human rights bodies and scholars for too long have elided over the security consequences of the current non-refoulement rule because they believed these costs were outside the provenance of human rights law. In fact, human rights are threatened when dangerous aliens are permitted to remain free to commit rights violations. Determining how the State should mediate between these two conflicting protection duties is very much a task for human rights law.

Second, understanding non-refoulement as a protection duty provides an intellectual architecture to separate it from the jus cogens prohibition on committing acts of torture or cruel, inhuman or degrading treatment. Protection duties in human rights law are traditionally limited by competing resources and conflicting rights, restrictions which are anomalously missing here. Recognizing such constraints on non-refoulement would bring the State’s non-refoulement obligation into accord with the duty to protect from torture or cruel, inhuman or degrading treatment perpetrated by private persons. And it would align the law with the traditional legal view that greater duties are owed with respect to preventing intentional actions as opposed to unintentional actions taken with disregard of substantial risk of harm.

Third, human rights law uses a balancing approach to mediate between competing rights. Balancing is used in human rights law to weigh such diverse interests as the right to free speech versus freedom of religion; the right to assemble versus the State’s interest in protecting public order; and the State’s obligation to provide health care versus other competing obligations for State resources. A balancing approach allows States a margin of appreciation to strike a balance between competing rights consistent with national priorities, recognizing differences in how States may value different rights. Human rights monitoring bodies, including national courts, then police this balance, using different tools to pressure States whose balance drastically under-protects or

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12 The United States has been a conspicuous laggard in accepting these developments. See supra notes 133-136 (describing U.S. opposition to most positive human rights).

13 See, e.g., Emanuela Chiara-Gillard, There’s No Place Like Home: States’ Obligations in Relation to Transfers of Persons, 90 INT’L REV. RED CROSS 703, 707 (2008) (addressing in a cursory fashion the security consequences created by granting non-refoulement protection).
over-protects a set of rights.

This article will proceed in three parts. Part II develops the narrative of non-refoulement today. States have traditionally had plenary authority to protect State interests through expulsion of aliens. But human rights law has slowly chipped away at that right through recognition of ever greater State obligations to retain aliens when facing risk of post-transfer mistreatment. This legal evolution, always under-theorized, has been subjected to ever greater resistance by some States because of the serious danger implementation of the rule creates with alien terrorist suspects. The failure of the law to adjust has led States to use different methods to evade the non-refoulement rule, including opposing further expansion of its protections.

Part III explains that the non-refoulement debate is properly conceived as a conflict between two competing State duties to protect human rights. States are required to protect those within its jurisdiction from the threat of human rights violations committed by other States. States also are required to protect those within the State’s jurisdiction from rights violations committed by non-State actors, including dangerous aliens. These duties tare in tension in non-refoulement. Understanding both relevant duties as protection duties highlights the extent to which non-refoulement is an outlier in human rights law, which otherwise recognizes limitations on protection duties. This Part argues that that non-refoulement should be treated like other protection duties, and be subject to limitations and exceptions. It also refutes the argument that the power of the torture norm compels the existing rule.

Part IV explains that human rights law generally uses balancing to mediate between conflicting rights. Human rights law balancing gives States discretion to strike a balancing between competing duties consistent with cultural values and national priorities, thereby giving States some flexibility to remain within a human rights law framework while protecting its population. But this discretion is not unbridled, as human rights institutions, including national courts, monitor States to push them to strike balances that are consistent with the values underlying human rights law. The effectiveness of this monitoring is improved when human rights groups can engage with the rights-trade off driving State action, not permissible under the current rule. This Part concludes by considering the problems of bias and uncertainty created by use of a balancing approach.

Ultimately, international law, as a system largely dependent upon voluntary State compliance, functions best where the law captures the interests of States. Rules which produce outcomes recognized by States as “incoherent, unfair or absurd” are unlikely to pull States toward voluntary compliance.14 By

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14 Thomas Franck, The Power of Legitimacy Among Nations 84 (1990). Using Franck’s terminology, the current non-refoulement rule may be thought of as an “idiot rule,” meaning a simple rule that creates unreasonable and illegitimate demands at the margins. Franck explains that such results tend to undermine the rule’s overall legitimacy, a phenomenon that this Article supports. See
moving to a new non-refoulement rule that recognizes the duty of the State to protect its own people, enhanced rights protection and more stable rule compliance are likely outcomes.

II. NON-REFOULEMENT RULE: HISTORY, TENSION, ADJUSTMENT

A. Development of the Modern Non-Refoulement Rule

International law recognizes the absolute sovereignty of a State over its territory, which includes the right to decide whether to admit or expel aliens, except where otherwise restricted by treaty commitments or customary international law. 15 This authority gives States the ability to use admission and expulsion to combat threats to national security posed by dangerous aliens. Through World War II, concerns about the risk of post-transfer mistreatment generally did not restrict State discretion with respect to aliens. 16 Prior to the war, a small number of European States did enter into agreements restricting expulsion of Russian or German refugees who faced risk of mistreatment upon repatriation, if they had been granted the right to reside in a Contracting State. But these treaties had few adherents, and allowed States to remove refugees where required by national security or public order. 17 As a result, States that fought World War II retained plenary control over admission and deportation of aliens.

States used this authority during and after the War in a manner that resulted in many innocent deaths. In some instances States refused admission to individuals fleeing severe mistreatment at home, forcing them to return to their home countries and near certain death. Switzerland, for example, refused entry to nearly 20,000 French Jews who sought asylum there after the Nazi take-over of France. The Swiss argued the “boat is full” with respect to refugees during the War, and they were not obligated under existing law to

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16 See also U.N. Comm. on Human Rights (CCPR), General Comment 15/27: Position of Aliens, ¶ 5, U.N. Doc. No. ___ (1986) (“The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory.”)
17 See Convention Relating to the International Status of Refugees, art. 3, Oct. 28, 1933, 159 L.N.T.S. 3663 (“Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsion or non-admittance at the frontier (refoulement), refugees who have been authorized to reside there regularly, unless the said measures were dictated by reasons of national security or public order.”); Provisional Arrangement Concerning the Status of Refugees Coming from Germany, art. 4, July 4, 1936, 171 L.N.T.S. 3952 (same for German refugees); Convention Concerning the Status of Refugees Coming from Germany, art. 5, Feb. 10, 1938, 192 L.N.T.S. 4461 (same).
accept French Jews for resettlement.\textsuperscript{18} As a result the Jews were forced to return to France, and where most were killed. In 1939 a ship with hundreds of Germans seeking refuge was turned away summarily by the United States because of a policy not to admit anyone into the country that lacked a valid visa for admission. The ship returned to Europe, and predictably many of the passengers ended up dead.\textsuperscript{19}

In other instances, States transferred aliens who were already present within their territory to their home government, again resulting in severe mistreatment or death. Wartime and post-war transfers to the Soviet Union resulted in the death or severe mistreatment of over two million people.\textsuperscript{20} The United States and the United Kingdom committed to repatriating all Soviet prisoners after the war, with no provision made for prisoners who expressed fears of mistreatment after transfer.\textsuperscript{21} True to the agreement, the Western Allies transferred to the Soviets prisoners who expressed fears of mistreatment. Tragically, these fears of mistreatment came true, with Stalin subjecting many repatriated prisoners to Siberian labor camps, or even execution.\textsuperscript{22} The British also made forcible returns to the Soviets of civilians who fell outside the Yalta agreement, including women and children.\textsuperscript{23}

These wartime practices highlighted the need for treaty-based regimes restricting the transfer of persons who face the risk of post-transfer mistreatment. This need was augmented by the large number of displaced and stateless people in Europe after the War. But States resisted recognition of an absolute duty to grant safe haven to aliens present in their territory who faced mistreatment after transfer. States wished to retain the right to use admission and expulsion of aliens for a range of policy purposes, including protecting the population from the threat posed by dangerous aliens, and would not agree to non-refoulement protection that did not prioritize their security concerns.\textsuperscript{24}


\textsuperscript{20} NIKOLAI TOLSTOY, VICTIMS OF YALTA 3 (1977).

\textsuperscript{21} See Agreement Relating to Prisoners of War and Civilians Liberated by Forces Operating Under Soviet Command and Forces Operating Under United States of America Command art. 1, U.S.-Soviet Union, Feb. 11, 1945 (“All Soviet citizens liberated by the forces operating under United States command...will, without delay after their liberation, be separated from enemy prisoners of war and will be maintained separately from them in camps or points of concentration until they have been handed over to the Soviet...authorities....”)

\textsuperscript{22} See CHRISTIANE SHIELDS DELESSERT, RELEASE AND REPATRIATION OF PRISONERS OF WAR AT THE END OF ACTIVE HOSTILITIES 151-156 (1977) (describing Soviet atrocities).

\textsuperscript{23} See TOLSTOY, supra note 20, at 26 (detailing British post-war practice).

\textsuperscript{24} See Note, Kathleen M. Keller, A Comparative and International Law Perspective on the United States (Non) Compliance with its Duty of Non-Refoulement, 2 YALE H.R. & DEV. L.J. 183, 186 (1999) (contending purpose of exceptions was to strengthen norm of non-refoulement by making compliance more “realistic”).
Thus, treaties negotiated in the immediate aftermath of World War II limited State obligations to retain aliens to situations where the alien did not pose a risk to security.

States negotiating the Third Geneva Convention [3rd GC], regulating treatment of prisoners of war [POW], or captured combatants in international armed conflict, rejected formal restrictions on transfer based on fears of mistreatment. A proposal to allow POW “to apply for their transfer to any other country which is ready to accept them,” was rejected by States in large part out of concern about the imposition of a duty to accept POW who feared repatriation.25 Instead, the 3rd GC includes an absolute obligation to release and repatriate POW at the end of hostilities.26

Nevertheless, State practice since 1949 reflects a general unwillingness, at least in the West, to return prisoners to face mistreatment. After the Korean War, U.N. forces, led by the United States, resisted Soviet, Chinese and North Korean demands that prisoners who feared post-transfer treatment be forcibly repatriated to the North, resettling some prisoners in South Korea and the United States instead.27 Similar practices followed the Iran-Iraq War, the First Gulf War, and the wars in the former Yugoslavia.28 This practice has led Theodor Meron to argue prisoners now have the “right of free choice” with respect to post-conflict repatriation, albeit one conditioned on the consent of States to accept POW for resettlement.29

The Fourth Geneva Convention (4th GC) leans farther forward, restricting States from transferring protected persons, who are civilians in occupied territory or in the territory of a Party to an armed conflict, to face persecution. Article 45 of the Fourth Geneva Convention prohibits the transfer of protected persons in the territory of a Party to the conflict “to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.”30 But Article 45 allows transfer of “aliens in individual cases when State security demands such action.”31 The 4th GC also

26 See Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 75 U.N.T.S. 135 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”)
29 Id.
31 See INT’L COMM. RED CROSS, COMMENTARY TO THE GENEVA CONVENTIONS RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 266 (Jean S. Pictet, ed., 1960) (explaining that Article 45 does not restrict expulsions of “undesirable foreigners” from State territory).
expressly refuses to allow fears of persecution to restrict extraditions for ordinary crimes conducted pursuant to treaties in place prior to the conflict.\textsuperscript{32}

The 1950 Convention Related to the Status of Refugees (Refugee Convention) provides still more extensive non-refoulement protection for refugees, or non-nationals fleeing persecution in their home States. Article 33(1) prohibits States from expelling or returning refugees “where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”\textsuperscript{33} The initial draft of the Convention included no restrictions on this obligation.\textsuperscript{34} The British objected to the lack of a security exception in the draft provision, and together with the French proposed language retaining for the State the right to use admission and expulsion to protect security interests.\textsuperscript{35} Article 33(2) denies non-refoulement protections to refugees if there are reasonable grounds for regarding the detainee 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.”\textsuperscript{36} Like the other post-War non-refoulement provisions, this one is generally interpreted as granting States an absolute right to expel refugees who fall within 33(2).\textsuperscript{37}

\textsuperscript{32} 4\textsuperscript{th} GC, supra note 30, art.45(5) (“The provisions of this article do not constitute an obstacle to the extradition, in pursuance of extradition treaties concluded before the outbreak of hostilities, of protected persons accused of offenses against ordinary criminal law.”)


\textsuperscript{34} Paul Weis, THE REFUGEE CONVENTION, 1951, 325 (Julian Weis, ed., 1995).

\textsuperscript{35} Id. at 328.

\textsuperscript{36} Article 1(F) of the Refugee Convention exempts from refugee protection individuals who have committed war crimes, crimes against the peace, serious non-political crimes, or acts contrary to the purposes and principles of the United Nations outside the country of refuge. Refugee Convention, supra note 33, art. 1(F). The purpose of this provision was to ensure that individuals who do not deserve protection based on their past conduct do not abuse the refugee system. Individuals falling into these categories may additionally pose a threat to the security of the State where they are present, making security a secondary benefit of these restrictions.

While these post-war instruments viewed non-refoulement protection as a stand-alone right, the European Commission on Human Rights (“Commission”), a human rights expert body with responsibility for determining which cases would be heard by the ECtHR, in the 1960s began to write that this protection was a manifestation of the broader prohibition on torture and inhuman and degrading treatment.\(^{38}\) The Commission provided little justification for this assertion. But this shift in conception was important because the prohibition on torture and inhuman and degrading treatment is absolute under human rights law. By categorizing non-refoulement as a manifestation of these absolute rights, the legal status of the security exceptions to this duty was drawn into question.

The ECtHR formally adopted this interpretation of ECHR Article 3 in its decisions in *Soering v. United Kingdom*\(^{39}\) and *Chahal v. United Kingdom*.\(^{40}\) Article 3 prohibits State Parties from engaging in torture or inhuman or degrading treatment under any circumstances, but contains no express restrictions on transfer.\(^{41}\) In *Soering* the Court held that Article 3 includes an implied obligation for State Parties not to extradite an individual to a State where there are substantial grounds for believing the person will be subjected to torture or inhuman or degrading treatment after transfer.\(^{42}\) While the Court acknowledged that there was no such express requirement in the treaty, it noted that the object and purpose of the treaty is to protect human rights and to “promote the ideals and values of a democratic society.”\(^{43}\) The Court asserted without reasoning that it would be incompatible with these purposes to allow extradition where the individual faced the real risk of post-transfer torture or inhuman or degrading treatment.\(^{44}\)

In *Chahal* the Court extended *Soering* by holding that the threat posed by the alien to the State where he is located is irrelevant to non-refoulement analysis. In rejecting a request by the British for recognition of a national security exception to non-refoulement, the ECtHR relied on the fact that


\(^{41}\) ECHR, supra note 3, art. 3 (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”)


\(^{43}\) Id. ¶ 87.

\(^{44}\) See id. ¶ 88 (“Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would clearly be contrary to the spirit and intendment of the article….“)
Article 3 does not recognize national security as a justification for a State Party to torture anyone itself.\(^45\) If Article 3 did not permit a State Party to excuse torture on national security grounds, neither, the Court reasoned, could non-refoulement be subject to security considerations.\(^46\) The Court did not discuss whether identical interests were protected by the duties to avoid torturing and to protect from acts of torture committed by others. And no discussion was had of the risks to the human rights of the British people if Chahal were allowed free within the United Kingdom.

The Human Rights Committee (HRC) has used similar reasoning to conclude that Article 7 of the International Covenant on Civil and Political Rights (ICCPR) provides an absolute protection against transfer to face torture or cruel, inhuman or degrading treatment.\(^47\) In General Comment 31, the Committee went further and implied from ICCPR article 2 a broader obligation not to transfer a person “where there are substantial grounds for believing there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant,” without further defining the potential range of post-transfer risk that could limit transfer.\(^48\) The HRC, like the ECtHR, paid no attention to potential differences between negative and positive State duties. The HRC also did not address the impact of the rule on the State’s security interests.

Unlike the ECHR and the ICCPR, the Convention Against Torture includes an express non-refoulement provision. Sweden included what is now Article 3 in its initial draft of the treaty based on the 60s and 70s jurisprudence of the European Commission on Human Rights, discussed above. This provision prohibits transfer of persons to another State “where there are substantial grounds for believing he would be in danger of being subjected to torture,” and includes no express exceptions for state security concerns.\(^49\) Textually is not certain that Article 3 allows for no security exceptions. Article 2, which contains the negative duty not to torture, includes an express prohibition on justifications for torture, a prohibition not replicated in Article 3.\(^50\) This absence led the United Kingdom and Portugal, among other States, to

\(^45\) Chahal, 23 Eur. Ct. H.R. at ¶ 79.
\(^46\) See id. ¶ 80 (“The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases.”)
\(^47\) See U.N. Committee on Human Rights (CCPR), General Comment No. 20 Concerning Prohibition of Torture and Cruel Treatment or Punishment, ¶ 9, U.N. Doc. CCPR/C/21 (Oct. 3, 1992) (“…State parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”)
\(^48\) U.N. Committee on Human Rights (CCPR), General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 12, U.N. Doc CCPR/C/21 (May 26, 2004). Article 6 of the ICCPR guarantees the right to life and includes restrictions on the death penalty. Article 7 prohibits torture or cruel, inhuman or degrading treatment or punishment.
\(^49\) Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment art.3(1), Dec. 10, 1984, 1465 U.N.T.S. 85 (hereinafter “CAT”).
\(^50\) Id. art. 2(2) (“No exceptional circumstances whatsoever, whether a state of war or a threat of
argue that “it was by no means clear” that Article 3 was intended to be absolute.\textsuperscript{51}

Nevertheless, the Committee Against Torture and other human rights actors interpret Article 3 as an absolute manifestation of the right to be free from torture based on the provision’s historical link to the ECHR. The Committee Against Torture has repeatedly stated its view that Article 3 does not allow for any exceptions.\textsuperscript{52} Similarly, the U.N. Special Rapporteur on the Question of Torture has characterized Article 3 as absolute,\textsuperscript{53} viewing the absence of permissible exceptions as derivative of the absolute nature of the negative duty not to torture.\textsuperscript{54} None of these opinions addressed the feasibility of such an interpretation of the rule, nor its impact on State security.\textsuperscript{55}

With these developments in human rights law, the law lurched from categorically preferring State security interests to similar preference for the rights of the transferee. Many scholars have argued that that these developments in human rights law have rendered the security exception in the Refugee Convention “superfluous.”\textsuperscript{56} In the process, States have lost the ability to use admission and expulsion to protect the public from the threats posed by dangerous aliens who come from States with poor human rights records.

Human rights advocates and some States next appear determined to expand the categories of post-transfer mistreatment subject to non-refoulement
protection. The International Convention for the Protection of all Persons from Enforced Disappearance includes an obligation not to transfer someone to a State where there are substantial grounds for believing he will be subjected to enforced disappearance.\(^\text{57}\) The Committee on the Rights of the Child has interpreted the Convention on the Rights of the Child to include an open-ended obligation not to transfer children “where there are substantial grounds for believing there is a real risk of irreparable harm to the child.”\(^\text{58}\) The Committee suggested that a wide-range of potential post-transfer problems should preclude transfer, including inadequate access to food or health care services and real risk of underage recruitment for sexual abuse or military service.\(^\text{59}\) Other human rights bodies have suggested non-refoulement protection should accompany risk of unfair trial.\(^\text{60}\) In all of these instances, it appears these new protections would not include exceptions for security considerations, thereby further restricting the right of the State to determine whether aliens may be admitted to or expelled from its territory.

**B. Terrorism Raises the Stakes**

Throughout this evolution toward greater State non-refoulement duties, States have raised security considerations as an argument against further expansion. In treaty negotiations dating back to the Refugee Convention, States have argued security concerns were a legitimate excuse to non-refoulement protection. In the drafting of the ICCPR, States rejected a proposal limiting expulsion of aliens to situations where the alien had been convicted of one of a list of criminal offenses. The reason was the desire of States to maintain their plenary control over admission of aliens into their territory.\(^\text{61}\) Similar rationale led the United States to argue against including non-refoulement protection from cruel, inhuman and degrading treatment in the CAT. And in *Soering* and *Chahal*, the United Kingdom vigorously opposed reading ECHR article 3 to include absolute non-refoulement protection.

Nevertheless, the unique security concerns created by the modern threat

\(^{57}\) See International Convention for the Protection of all Persons from Enforced Disappearance art. 16, Dec. 20, 2006 (“No State Party shall expel, return ("refouler"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.”)


\(^{59}\) Id. ¶ 27-28.

\(^{60}\) See *Int’l Commission of Jurists, Submission on the 3d Periodic Report of Switzerland to the ICCPR* 3 & n.7, available at [http://www2.ohchr.org/english/bodies/hrc/docs/ngos/ICJ_Switzerland97.pdf](http://www2.ohchr.org/english/bodies/hrc/docs/ngos/ICJ_Switzerland97.pdf) (summarizing international organization support for this view).

of terrorism have heightened worries about the impact of non-refoulement protection on state security. Not surprisingly, States are more concerned when non-refoulement prevents the repatriation of an alien intent on inflicting massive civilian casualties. Given the magnitude of potential harm involved in a terrorist attack, States wish to be able to use the most powerful tools available to combat the threat.

States value repatriation of aliens as a security tool because of the general ease with which repatriation may be achieved. Substantively, human rights law only requires that the expulsion decision not be arbitrary, meaning that the decision is based on the law, and is otherwise consistent with the ICCPR. Procedurally, human rights law only requires that the alien be allowed to submit the reasons against expulsion to a competent authority that need not be a court; to appeal to a higher authority that need not be a court; and to be represented during expulsion proceedings. All of these procedural requirements are subject to waiver in compelling cases of national security. Terrorism related expulsions may fall within this exception. In its communication regarding the case of Karker v. France, the HRC upheld the decision of France to forego providing Karker with process prior to expulsion in a case where the French government sought expulsion because it feared he was involved with an Islamic extremist organization.

When non-refoulement protection prevents repatriation, States often are left without any viable alternative to mitigate the threat. Many writers suggest prosecution is an adequate alternative to expulsion in combating terrorism.


63 Nowak, supra note 61, at 295. This means, for example, that the statute cannot discriminate impermissibly, such as by targeting a particular ethnic group, and cannot call for collective expulsions.

64 ICCPR, supra note 62, art. 13; ECHR Protocol 7, supra note 62, art. 1(a).

65 ICCPR, supra note 62, art. 13; ECHR Protocol 7, supra note 62, art. 1(b)-(c).

66 ICCPR, supra note 62, art. 13.

67 Id.; ECHR Protocol 7, supra note 62, art. 1 (“An alien may be expelled before [procedural rights are provided] when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.”)


But the enhanced substantive and procedural hurdles associated with prosecution often make it a non-starter for States.

State evidence in terrorism cases often consists of intelligence information. To be admitted in criminal trials, this intelligence information must be admissible under local evidentiary rules, which is sometimes entirely impossible. The United Kingdom, for example, will not accept electronic intercepts as evidence in a criminal trial, meaning strong evidence as to the intent and plans of the defendant will not go in front of the fact finder.70 Even where evidence is admissible, States may have real difficulty exposing that evidence to the requirement of confrontation without revealing the sources and methods used to collect the evidence.71 In the United States, where criminal defendants have a constitutional confrontation right, the need to subject all evidence to confrontation has derailed prosecutions out of fear of compromising intelligence sources.72

There must also be a sufficient quantum of evidence to meet the high burden of proof that exists in criminal trials. Terrorism investigations often require action before the plot is completed in order to avoid risks to innocent lives. But the imperative for action can conflict with the need to collect evidence to meet the burden of proof. In the Naseer case, the threat the media would reveal the existence of an investigation compelled the police to act before the plan to blow up a shopping mall had progressed to a stage where the police could collect enough evidence to prove a crime had been committed under British law.73 The need for early action also means that detention may occur before the defendant is deemed to have violated a criminal offense.

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71 See ICCPR, supra note 62, art. 14(3)(e) (granting all criminal suspects the right “to examine, or have examined, the witnesses against him”); ECHR, supra note 3, art. 6(3)(d) (same); American Convention, supra note 62, art. 8(6) (granting all criminal suspects the right “to examine witnesses present in the court”).

72 See Robert Chesney, Terrorism, Criminal Prosecution and the Preventive Detention Debate, 50 S. Tex. L. Rev. 669, 708 (2009) (discussing confrontation clause problems that may arise in terrorism prosecutions). But see United States v. Moussaoui, 382 F.3d 453, 476 (2004) (allowing the government wide latitude to substitute unclassified material for requested witness testimony the Court believed was material to defendant’s case).

73 See Burns, supra note 1 (explaining that accelerated schedule for raids resulted in prosecution problems).
already in the laws of the State at the time the illegal conduct occurred.\textsuperscript{74} This requirement can impede prosecution of terror suspects.

Other times the offense itself is poorly defined. In \textit{Saadi v. Italy}, the Italian government had admissible evidence that the defendant was in communication with Islamic extremists about plans to attack unspecified targets in Europe. While the government charged Saadi with conspiracy to commit terrorism, the court reduced the charge because under Italian law terrorism requires proof that the target of the attack is not a participant in an armed conflict. The Italians lacked specific enough evidence of the planned targets for the attack to make a terrorism case.\textsuperscript{75}

Moreover, while repatriation has the potential to permanently mitigate the threat the alien poses to the host State, depending on actions taken by the alien’s home State, criminal conviction generally does not. Even where the government does secure a conviction of the defendant, the issue of incapacitation arises again at the completion of the sentence. Saadi was convicted of forgery, and served a four and a half year sentence, but Italy was again confronted anew with how to mitigate his threat at the end of the sentence. By contrast, once repatriated an alien may be restricted from further access to the State.

These difficulties with criminal prosecution have led many scholars,\textsuperscript{76} and some States,\textsuperscript{77} to suggest that administrative detention, or detention based on the future dangerousness of a terrorist suspect, be made available. But States may find administrative detention a similarly unavailing alternative to repatriation of aliens for at least three reasons.

First, administrative detention is not permitted under some human rights instruments, except in exceptional circumstances. The ECHR has been

\begin{itemize}
\item \textsuperscript{74} ICCPR, \textit{supra} note 62, art. 15 (1); ECHR, \textit{supra} note 3, art. 7(1); American Convention, \textit{supra} note 62, art. 9.
\item \textsuperscript{75} See \textit{Saadi v. Italy}, App. No. 37201/06, ¶ 17  (Eur. Ct. H.R. Feb. 28, 2008) (describing judgment of Assize Court dismissing terrorism charges because “it was known whether the violent acts the applicant and his accomplices planned to commit…were to be part of an armed conflict or not”).
\item \textsuperscript{77} In his speech at the National Archives in May 2009 President Obama argued that the United States needed to consider new detention authority to prevent “the release of individuals who endanger the American people.” To that end Obama proposed Congress authorize a legal regime that would allow for detention without criminal charge, but with legal process including periodic review. Barack Obama, Remarks by the President on National Security (May 21, 2009) (transcript available in the National Archives). To date nothing has come of the Obama proposal.
\end{itemize}
interpreted to prohibit administrative detention for security purposes, except where the requirements for derogation are met.

Second, while expulsion is by definition limited to aliens, it is difficult to similarly cabin administrative detention to a particular population or type of conduct. In A & Others v. Secretary of State for the Home Department, the British House of Lords struck down an immigration law permitting indefinite detention pending deportation where the Secretary of State certifies that the alien is a suspected terrorist, and that his presence threatens the national security of the United Kingdom. Because the ECHR does not permit indefinite administrative detention pending deportation, the British attempted to derogate from Article 5. The Law Lords rejected the derogation because they did not believe the immigration provision was strictly required by the exigencies of the situation. The Lords refused to accept that indefinite detention of aliens was required to address the terrorist threat posed by aliens when the threat of British nationals was dealt with through less restrictive means, such as monitoring and restrictions on movement. The difficulty in cabining administrative detention has led many human rights advocates to oppose the scheme on grounds it will displace criminal prosecution over time.

Third, even the more lenient procedural requirements for administrative detention may be too onerous to meet. For example, unlike expulsion, the procedural requirements for administrative detention are not subject to security waiver, unless the conditions for derogation from human rights obligations exist.

Thus, without repatriation States may be left with no way to physically counteract the threat posed by a dangerous alien. Expulsion to a third country is a theoretical alternative. Human rights groups and scholars have suggested third-country resettlement as the solution to the problems created by non-

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78 See Hakimi, supra note 76, at 392 (summarizing European Court of Human Rights jurisprudence interpreting Article 5 of the European Convention on Human Rights).

79 See Lawless v. Ireland (No. 3), 3 Eur. Ct. H.R. (ser. A), ¶ 48 (1961) (upholding Irish law allowing for security detention without trial based on proper invocation of Article 15 derogation from Article 5 of the European Convention on Human Rights). Article 15 allows for derogation “in time of war or other public emergency that threatens the life of the nation.” It is doubtful that all conflicts with non-State actors that are the subject of this article would meet this standard.


81 See Anti-Terrorism, Crime, and Security Act, 2001, c.24, § 23 (U.K.) (granting government the power to detain “suspected international terrorists” indefinitely pending deportation where non-refoulement prevents actual expulsion).

82 See ECHR, supra note 3, art. 5(1)(f) (“No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: the lawful arrest or detention of a person … against whom action is being taken with a view to deportation or extradition.”) See also R v. Governor of Durham Prison (Ex Parte Hardial Singh), [1984] 1 W.L.R. 704 (interpreting article 5 as permitting detention only for so long as “reasonably necessary” to effect deportation).

83 See A & Others, [2004] UKHL at ¶11 (describing derogation order).

84 Id. ¶ 44.
refoulement protection. However, recent attempts to repatriate detainees from Guantanamo Bay demonstrate the futility of depending upon States to accept non-nationals for resettlement, especially where the detainee is believed to be dangerous. It is difficult to conceive of the incentives for a State to accept potentially dangerous aliens for resettlement. The States of nationality of these aliens also often pressure third States not to accept their nationals for resettlement. States already reluctant to take such a step do not need much diplomatic arm-twisting to decline to do so.

Thus, removing repatriation from the table often leaves States resorting to measures like control orders to mitigate the risk posed by dangerous aliens. Control orders are parole-like restrictions imposed on a terrorism suspect in order to protect the public from the suspect. The United Kingdom authorized a system of control orders in the Prevention of Terrorism Act of 2005, and they have been used by other States as well. Restrictions imposed include curfews, restrictions on communication and travel, and the right of the police to search the suspect’s premises on demand.

Despite the potential for control orders, they have proven ineffective at least in the United Kingdom. HMG has found it difficult to design lawful control orders because of the numerous restrictions imposed by the ECHR. Control orders must not be so onerous as to amount to a deprivation of liberty without derogation from the ECHR. And they may only be imposed if the terrorism suspect is provided “knowledge of the essence of the case against him,” requiring the State to rely on information it can share with the suspect. These restrictions have led HMG to question whether control orders provided any practical advantages to national security. 45 individuals since 2005 have

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85 See, e.g., Chiara-Gillard, supra note 13 (arguing third-country resettlement is solution to security problems created by non-refoulement); HUM. RIGHTS WATCH, ILL-FATED HOMECOMINGS: A TUNISIAN CASE STUDY OF GUANTANAMO REPATRIATIONS 27 (2007) (calling on Bush Administration to close Guantanamo detention facility through third-country resettlement).


87 See Prevention of Terrorism Act, 2005, c.2, §1(1) (U.K.) (“Control order” means an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism.)

88 See COLUMBIA L. SCHOOL HUMAN RTS. INSTITUTE, PROMISES TO KEEP: DIPLOMATIC ASSURANCES AGAINST TORTURE IN U.S. TERRORISM TRANSFERS 91 (2010) (detailing Canada’s use of similar measures).

89 See Prevention of Terrorism Act, supra note 87 § 1(4) (listing potential restrictions imposed by control orders).

90 For example, HMG may impose a curfew of up to 16 hours per day, but no longer. See Sec’y of State for the Home Dept. v. JJ & Others, ¶105 [2007] UKHL 45 (describing it as “clear” that curfews up to 16 hours are compatible with Article 5, while those longer than 16 hours are not).

91 See Sec’y of State for the Home Dept. v. AF & Another, [2009] UKHL 28, ¶ 65 (interpreting ECtHR decision in A v. United Kingdom).

92 LORD CARLISLE OF BERRIEW, FIFTH REPORT OF THE INDEPENDENT REVIEWER PURSUANT TO
been subjected to control orders, with 7 individuals, having absconded, and 6 more having their control orders quashed by the courts.\textsuperscript{93} Former Home Office Secretary Tony McNulty acknowledged the limited efficacy of control orders, calling them “a second best option” to protect the public.\textsuperscript{94}

Thus, the threat of terrorist acts perpetrated by aliens increases the security consequences of granting non-refoulement protection. When aliens may not be repatriated, detention, whether criminal, pursuant to ongoing immigration proceedings, or preventive, may not be available. Third-country resettlement and release with conditions may also be unachievable or ineffective alternatives. Of course, this result merely places aliens in the same situation as citizen terrorist suspects. As discussed above, the Law Lords in \textit{A \& Others} saw no legitimate reason for treating aliens differently from citizens in this regard.\textsuperscript{95} Whatever the merits of the Law Lords’ view in theory, in practice States are unlikely to be sanguine about allowing dangerous aliens to remain free. The magnitude of the threat involved where the crime contemplated is an act of terrorism makes any additional risk posed by individuals with no legal right to remain within the State intolerable. Because international law largely depends upon voluntary compliance, failure to accept the legitimacy of a rule leads to measures to evade its strictures, as will be described in the next Section.

\textbf{C. States Push Back}

Given the security problems created through enforcement of the non-refoulement rule, it is not surprising that States have sought to mitigate the resulting security consequences. They have done so in part by pushing human rights bodies to accept the right of States to expel aliens despite the threat of post-transfer mistreatment where the alien threatens State security. The human rights apparatus, as well as some States, have resisted these efforts. They view non-refoulement as a bulwark against erosion of the \textit{jus cogens} torture norm and are skepticism of the ability of human rights law to account for State security interests. With the current rule entrenched, some States have taken steps to protect their security interests that are inconsistent with the spirit or even letter of human rights law, moves which are ultimately harmful to human rights.

\textsuperscript{93} \textit{Id.} at 6-8.


\textsuperscript{95} See \textit{A & Others} v. Sec’y of State for the Home Dep’t, ¶ 44, [2004] UKHL 56 (striking down British preventive detention law targeting alien terrorist suspects on grounds that it was unreasonable to treat alien and citizen terrorist suspects differently).

\textsc{Section 14(3) of the Prevention of Terrorism Act 2005 63-64 (Feb. 1, 2010) (reprinting letter from Home Minister to Lord Carlisle requesting considering of whether control orders had use after AF).}
States long have resisted embracing the full import of non-refoulement protections where difficult security consequences result. For example, the United States takes the position that only express treaty obligations can confer non-refoulement rights, rejecting implication of such duties from more general treaty provisions. This position means the United States does not recognize a non-refoulement obligation with respect to transfers to cruel, inhuman or degrading treatment or other lesser forms of mistreatment. The United States also rejects the Committee Against Torture’s view that CAT article 3 applies to transfers not originating in the United States. The U.S. positions on these issues are offered as technical disagreements with the human rights community about negotiating history and methods of interpretation of treaty provisions, consistent with the positivist approach to international law employed by the United States. But the security considerations of accepting broader non-refoulement obligations are a prime policy motivation for the U.S. position.

The aftermath of the 9/11 terrorist attacks has intensified State efforts to seek modifications to the non-refoulement rule. These efforts have generally been rebuffed by the human rights apparatus. Several European States, including the United Kingdom and Portugal, sought reconsideration of the ECtHR ruling in *Chahal* that there were no security exceptions to the non-refoulement rule in *Saadi v. Italy*. Italy had evidence that Saadi was connected with Islamic terrorists, and sought to deport him home to Tunisia after he completed his criminal sentence in Italy. Saadi argued that his deportation to Tunisia would violate Article 3 of the ECHR because of the real risk he would be tortured after his return. The United Kingdom intervened, arguing that *Chahal* wrongly ignored the obligation of States to protect their population from the threat posed by terrorists. Instead, HMG submitted that the Court permit States to weigh the threat posed by the person being...

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96 The United States rejects the HRC’s interpretation of ICCPR Article 7. In support of its view it explained that the vigorous debate over the later-in-time, narrower non-refoulement obligation in the CAT demonstrated the ICCPR did not already include a broad obligation in the area. United States Reply to List of Issues 17-19 (available at: http://www.bayefsky.com/issuesresp/usa_ccpr_2006.pdf).

97 The United States argues the CAT article 3 lacks the clear indicia of extraterritorial application included in other provisions of the treaty. List of Issues to be Considered during the Examination of the Second Periodic Report of the United States of America 34 (available at http://www.bayefsky.com/issuesresp/usa_cat_2006.pdf). The U.S. Supreme Court has adopted this for an identical term in the Refugee Convention. See Sale v. Haitian Centers Council, 509 U.S. 155, 179 (1993) (holding text and negotiating history of Article 33 of Refugee Convention “affirmatively indicate that it was not intended to have extraterritorial effect”).

98 App. No. 37201/06 (Eur. Ct. H.R. Feb. 28, 2008). The Brief calling for overruling *Chahal* was initially filed in *Ramzy v. Netherlands*, but the arguments were later made in *Saadi* because that case came in front of the ECtHR first. Observations, supra note 9.

99 Italy had charged Saadi with conspiracy to commit acts of terrorism, but the trial court rejected that charge. Under Italian law terrorism requires proof that the target of the planned violence is not a participant in an armed conflict, and the government introduced insufficient evidence regarding the target of the plan to prove this point. Saadi, __Eur. Ct. H.R., at ¶ 17.
transferred in its non-refoulement assessment, perhaps by raising the threshold of evidence of mistreatment that must be demonstrated in cases where the individual poses a real threat to the State where he is located.

The ECtHR in *Saadi* fully affirmed its decision in *Chahal*. After noting the real threat terrorism posed to state security, the Court repeated the simple premise that underlies *Chahal*: since ECHR Article 3 provides an absolute prohibition on torture and inhuman and degrading treatment by State Parties, non-refoulement protection must also be absolute.\(^{100}\) No consideration may be made of any factors not related to threat of post-transfer mistreatment. Because the threat the detainee poses to the State that seeks expulsion does not affect the risk of mistreatment after transfer, the ECtHR held this factor may not be considered.\(^{101}\)

Canada, by contrast, has gained some traction with the Canadian Supreme Court with the argument that its security interests are relevant to the determination of whether to provide non-refoulement protection. Canadian immigration law permits deportation “to a country where a person’s life or freedom would be threatened” based on a determination that a person “constitutes a danger to the security of Canada.”\(^{102}\) In *Suresh v. Canada*,\(^{103}\) Canada sought to deport Suresh to his native Sri Lanka because his involvement in the Liberation Tigers of Tamil Eelam (LTTE), a terrorist group seeking an independent Tamil homeland in Sri Lanka, threatened the security of Canada. Suresh sought to block his deportation on grounds that he faced torture if returned to Sri Lanka because of his affiliation with the LTTE. Suresh argued that deportation where substantial risk of torture exists violates the right to life protected in the Canadian Charter of Rights and Freedoms.\(^{104}\)

The Canadian Supreme Court held that the Canadian Charter permitted balancing the State’s interest in combating terrorism against Suresh’s constitutional right not be transferred to face torture.\(^{105}\) While the Court recognized that “barring extraordinary circumstances, deportation to torture” was impermissible, it refused to exclude the possibility that such circumstances

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100  See id. at ¶ 138 (“Since protection against the treatment prohibited by Article 3 is absolute, the provision imposes a [non-refoulement] obligation...[for] any person who, in the receiving country, would run the real risk of being subjected to such treatment.”)

101  See id. ¶ 139 (“The prospect he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment….“)

102  Immigration Act, art. 53(1)(b), R.S.C. 1985 c.1-2 (“[N]o person...shall be removed from Canada to a country where the person’s life or freedom is threatened...unless...the person is [reasonably believed to be engaged in terrorism or part of an organization engaged in terrorism] and the Minister is of the opinion that the person constitutes a danger to the security of Canada.”)

103  Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3 (Can.).

104  Canadian Charter of Rights and Freedoms, § 7 (“Everyone has the right to life, liberty and the security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”)

105  Suresh, 1 S.C.R. at ¶ 58 (explaining Canadian law balances the state’s interest in combating terrorism against its “constitutional commitment to liberty and fair process”)
existed. “The ambit of an exceptional discretion to deport to torture, if any,” the Court explained, “must await future cases.” The Court acknowledged that this decision was contrary to international law.

Nevertheless, lower Canadian courts have yet to find “exceptional circumstances” where transfers are permitted despite the substantial risk of torture. Usually courts have avoided reaching a balancing analysis, instead reversing the factual determinations underlying the government’s removal decision. In the one case where the lower court has directly engaged in Suresh balancing, it refused to authorize deportation. The lower court upheld the finding of the Canadian government that Mahmoud Es Sayyid Jaballah facilitated communications that assisted in the 1998 Embassy bombings in Tanzania and Kenya, trained in al Qaida camps, and was in active contact with senior al Qaida leaders in Canada, the United Kingdom, and Yemen. Nevertheless the Court refused to authorize his deportation to Egypt where there was a substantial risk of torture because his case did not rise to the level of “exceptional circumstances” mandated by Suresh. The Court believed such circumstances did not exist because Jaballah did not himself commit acts of violence.

Despite the unwillingness of the lower Canadian courts to authorize deportation using the Suresh rule, the reaction of the human rights treaty bodies to the Suresh decision is overwhelmingly negative. In 2005 the HRC criticized the decision as a violation of Article 7 of the ICCPR. In its concluding observations to Canada, the HRC wrote, “No person, without any exception, even those suspected of presenting a danger to national security or the safety of any person, and even during a state of emergency, may be deported to a country where he/she runs the risk of being subjected to torture or cruel, inhuman or degrading treatment.” That same year the Committee Against Torture specifically criticized Suresh, writing, “The Committee expresses its concern at the failure of the Supreme Court of Canada in Suresh…to recognize… the absolute nature of the protection of article 3 of the Convention, which is not subject to any exception whatsoever.”

Similarly, the limited scholarship examining Suresh has criticized the

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106 Id. ¶ 76.
107 Id. ¶ 78.
108 See id. ¶ 75 (“We conclude…that international law rejects deportation to torture, even where national security interests are at stake.”)
109 See, e.g., Mahjoub v. Canada, [2005] F.C. 156 (Can.), ¶ 54 (refusing to accept Immigration Ministry finding that Mahjoub posed a threat to Canada without evidence Minister had independently reviewed intelligence information, including source material).
decision for refusing to categorically exclude the possibility of transfer where the risk of torture exists.\footnote{113 See Kent Roach, Constitutional, Remedial and International Dialogues About Rights: The Canadian Experience, 40 TEX. INT’L L. J. 537, 572 (2005) (arguing it would have been preferable for the Canadian Supreme Court to follow established international law).} This scholarship conflates non-refoulement with the \textit{jus cogens} duty not to torture, and therefore fears that \textit{Suresh} undermines the anti-torture norm.\footnote{114 See Robert J. Currie, Charter Without Borders? The Supreme Court of Canada, Transnational Crime and Constitutional Rights and Freedoms, 27 DALHOUSIE L.J. 235, 259 (2004) (arguing against distinction between negative obligation not to torture and non-refoulement protection); David Jenkins, Rethinking Suresh: Refoulement to Torture under Canada’s Charter of Rights and Freedoms, 47 ALBERTA L. REV. 125, 127 (2009) (criticizing \textit{Suresh} for undermining “international peremptory norm against torture and concomitant protective principle of non-refoulement”).} Scholars have also been skeptical of the ability of the Canadian government to balance the relevant equities fairly, fearing that the government will prefer security interests to the human rights of the transferee, thereby expanding the exception.\footnote{115 Currie, \textit{supra} note 114, at 260 (criticizing balancing test for giving too much weight for security concerns); Jenkins, \textit{supra} note 114, at 132-33 (raising concerns about willingness of Canadian government to expand \textit{Suresh} to dangerous aliens not involved in terrorism).} This skepticism is fueled by the specter of extraordinary rendition, defined in this context as transfer for the purpose of interrogation using torture.\footnote{116 Jenkins, \textit{supra} note 114, at 151 (“[R]endition shows that the principle of non-refoulement must be absolutely respected as an outgrowth of \textit{jus cogens}, so that countries cannot unscrupulously avoid their obligation not to inflict torture directly by “shopping out” or “out-sourcing” the dirty work to other willing countries.”)}

Given the unwillingness of the human rights community and some States to reconsider the scope of non-refoulement protection, States have resorted to behavioral adaptations that have negative second-order human rights effects to avoid the security consequences of non-refoulement. In some instances States have been unwilling to capture dangerous aliens out of fear that they could not be repatriated after capture. European navies have released suspected pirates captured off the coast of Somalia back onto their ships or onto Somali beaches out of concern that they would be unable to repatriate them if taken prisoner because of torture concerns.\footnote{117 See Tullio Treves, Human Rights and the Law of the Sea, 28 BERKELEY J. INT’L L. 1, 13 (2010) (describing release of pirates by a Danish naval vessel due to non-refoulement concerns).} The British have gone still further and instructed their ships not to capture pirates at all, out of fear that they could claim the right to remain in the United Kingdom if brought onboard the ship or to British soil for trial.\footnote{118 See Marie Woolf, Pirates Can Claim UK Asylum, SUNDAY TIMES (London), Apr. 13, 2008, at 1 (explaining Foreign Office instruction to the Royal Navy). Julian Brazier, Conservative MP, criticized the British policy to not capture pirates in Somalia, saying “These people commit horrendous offenses. The solution is not to turn a blind eye…It’s a pathetic indictment of what our legal system has come to.” \textit{Id}.} While these policies protect the European public from the risk that captured pirates are freed in Europe, the significant costs of this decision are borne by merchants and ship crews plying
the Red Sea, and Somalis terrorized by the released pirates back on shore.

More perniciously, States have puffed the effectiveness of diplomatic assurances to argue that they may repatriate individuals consistent with their non-refoulement duties. Diplomatic assurances are promises obtained from the receiving State that they will not torture or otherwise mistreat detainees. Assurances are designed to reduce the risk of mistreatment such that transfer is still permissible under international law. Major European States, including the United Kingdom, Italy and Spain, as well as Canada and the United States employ diplomatic assurances regularly.

Generally these assurances are obtained from States with poor human rights records, which have a history of mistreating transferees. Human rights groups are critical of diplomatic assurances because the States asked to give assurances have already violated international commitments not to mistreat their people. These groups ask why these bilateral promises are any more likely to be followed. Advocates of assurances respond that promises from high-ranking foreign ministry or interior ministry officials to their U.S., Canadian or European counterparts may influence the State’s behavior more than multilateral treaty commitments. In the past I have written that assurances can reduce the risk of post-transfer mistreatment where they are standardized, evaluated by appropriate country experts within a State’s foreign ministry, actively monitored, and accompanied by a political commitment to ensure the assurances are followed.

But the risks associated with providing non-refoulement protection motivate States to rely upon assurances they know are faulty. A Columbia Law School Human Rights Institute report concluded that the United States is more likely to use assurances where it has no tenable alternatives to mitigate the threat posed by dangerous aliens. Take the case of Maher Arar, a

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119 The United Kingdom has actively promoted diplomatic assurances as an “effective way forward” to comply with non-refoulement while protecting its public. See HUM. RTS. WATCH, NOT THE WAY FORWARD: THE UK’S DANGEROUS RELIANCE ON DIPLOMATIC ASSURANCES 25-27 (2008) (describing efforts by the British to convince other European states to embrace deportation with assurances).

120 The CAT, for example, permits transfers so long as there are not “substantial grounds” to believe the individual will be tortured. CAT, supra note 49, art. 3. Assurances may allow the State to assess that there are no longer “substantial grounds” to believe the transferee will be tortured, even if the risk greater than zero.

121 See, e.g., HUM. RTS. WATCH, STILL AT RISK: DIPLOMATIC ASSURANCES NO SAFEGUARD AGAINST TORTURE (2005) (arguing mistreatment of Russian detainees after their transfer from Guantanamo Bay demonstrates ineffectiveness of diplomatic assurances).


123 COLUMBIA LAW SCHOOL HUM. RTS. INSTITUTE, supra note 88, at 31.
Canadian-Syrian dual-national, whom the United States suspected of involvement with al Qaida when it detained him at Kennedy Airport in 2002.\textsuperscript{124} U.S. officials were reluctant to release Arar to Canada, his country of residence, because Canadian officials indicated they had no legal authority to detain him if he returned. U.S. officials feared Arar would use the porous U.S.-Canadian border to re-enter the country to commit terrorist attacks.\textsuperscript{125} Rather than bear this risk, the United States decided to remove Arar to Syria, pursuant to immigration law permitting fast-track removal of dangerous aliens.\textsuperscript{126} While that law prohibited transfer where it violated U.S. non-refoulement duties under the CAT, the United States claimed the transfer to Syria complied with this requirement, citing assurances received from the Syrian government.\textsuperscript{127} The United States credited these assurances despite Syria’s notorious history of torturing suspected Islamic radicals, and the poor state of U.S.-Syrian relations that made enforcing assurances difficult. Tragically, Arar was tortured by Syrian officials, and Canada subsequently cleared him of any involvement with radical Islamic groups.

The Arar case is not unique. In 2002 the United States deported suspected Islamic radical Nabil Soliman to Egypt. His removal had been deferred for many years due to fears of post-transfer mistreatment, but in the aftermath of the 9/11 attacks that deferral was lifted on the basis of assurances from Egypt.\textsuperscript{128} Soliman was held incommunicado in Egypt for seven weeks after his return, and the U.S. Embassy in Cairo could not confirm that he had not been tortured.\textsuperscript{129} Similarly, the United Kingdom persisted with deporting terrorist suspects to Algeria pursuant to diplomatic assurances despite reports from detainees who had been repatriated previously that they had been tortured, dismissing those complaints as less reliable than promises from the Algerian government.\textsuperscript{130}

These cases reveal an important reality regarding non-refoulement protection. Even as human rights bodies have held the line against any exceptions to the non-refoulement duty, States concerned about the security consequences of the rule found alternative methods to protect their population. This result is not surprising; as Franck has explained, rules that produce


\textsuperscript{126} See Immigration and Naturalization Act § 235(c) (permitting Attorney General to designate aliens for removal without proceedings in front of an immigration judge).

\textsuperscript{127} See Shane, supra note 125 (quoting testimony by former Attorney General John Ashcroft).

\textsuperscript{128} See Soliman v. United States, 296 F.3d 1237, 1241–42 (11th Cir. 2002) (summarizing facts in case).

\textsuperscript{129} Columbia Law School Hum. RTS. Initiative, supra note 88, at 49.

\textsuperscript{130} See id. at 82–83 (detailing actions by HMG and SIAC in the case).
outcomes at the margins that are viewed as unjust lose some of the legitimacy required to entice voluntary compliance.\textsuperscript{131} But these State work-arounds have important second-order negative repercussions for human rights, which raises questions about the desirability and viability of the current rule.

III. DUTY TO PROTECT: REFRAMING THE NON-REFOULEMENT DEBATE

A. Understanding the Protection Competition

The non-refoulement debate has reached an impasse. From the perspective of human rights bodies, like the ECtHR in \textit{Saadi}, non-refoulement is inseparable from the right to be free from torture or cruel, inhuman and degrading treatment, which are absolute. Even if human rights law wanted to account for security interests, these are viewed as outside the provenance of human rights law. This leads to the accusation that seeking to balance individual rights with security interests in transfer assessments compares apples to oranges. From the perspective of States, a human rights framework that fails to account for the fundamental obligation of States to secure the safety of their people is untenable, not the least because of political pressures to do so. Because international law for the most part depends upon voluntary state enforcement, an untenable rule results in State evasion.

This article contends that this stand-off is due in significant part to a failure to appreciate the human rights competition at issue in transfer determinations regarding dangerous aliens. Henry Shue’s important book BASIC RIGHTS revolutionized human rights thinking by recognizing that every basic human right entails different types of duties for States. The traditional conception of human rights is that they entail negative duties: the State shall avoid actions that constitute a deprivation of the right.\textsuperscript{132} U.S. domestic and international legal interpretation has generally viewed human rights as requiring only negative duties.\textsuperscript{133} In \textit{DeShaney v. Winnebago County} the U.S. Supreme Court rejected a claim that the State had a constitutional duty to protect a boy from abuse by his father when it knew or should have known of the danger. The Court held that all due process requires is that the State not deprive an individual of a protected interest, not that it take any affirmative steps to prevent private deprivations of rights.\textsuperscript{134} This limited conception of rights is reflected in U.S. tort law by the public duty doctrine, which limits

\footnotesize{\textsuperscript{131} See FRANCK, supra note 14 (discussing compliance problems for “idiot rules”).}

\footnotesize{\textsuperscript{132} SHUE, supra note 11, at 52.}

\footnotesize{\textsuperscript{133} Criminal law is a major exception, as U.S. law recognizes affirmative governmental duties to effectuate the right to a fair trial, such as government provision of counsel to the indigent. See \textit{Johnson v. Zerbst}, 304 U.S. 458, 462-63 (1938) (holding 6\textsuperscript{th} Amendment included a government to provide counsel to the indigent for criminal trial).}

\footnotesize{\textsuperscript{134} DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 195-96 (1989).}
government liability for failure to protect to situations where the State itself created the danger at issue.\textsuperscript{135} And it is espoused regularly by the United States in rejecting human rights that require the State to take positive fulfillment measures, such as most economic, social and cultural rights.\textsuperscript{136}

Shue, however, rejects this limited American conception of rights. He instead argues that fulfillment of basic rights requires positive action from States, including the duty to protect those within its jurisdiction from violations committed by others. Shue explains that it would make little sense to speak of a right to physical security, for example, if the State allowed others free reign to violate that security. Such a duty is in accordance with the understanding that a primary purpose of the State is to create the structures required to prevent one member of society or institution from harming another.\textsuperscript{137} Human rights bodies,\textsuperscript{138} treaties,\textsuperscript{139} and most human rights scholars\textsuperscript{140} accept that satisfying human rights obligations mandate protection against violations committed by actors other than the State.

The duty to protect provides the intellectual architecture for non-refoulement protection.\textsuperscript{141} As discussed in the previous Part, a major


\textsuperscript{137}\textit{Shue, supra} note 11, at 56. For a good primer on political theory supporting the view that protection of citizens as a primary purpose of the State, see Steven J. Heyman, \textit{The First Duty of Government: Protection, Liberty and the 14th Amendment}, 41 DUKE L.J. 507 (1991).

\textsuperscript{138} See Velasquez-Rodriguez v. Honduras, ¶ 172, 1988 Inter-Am. Ct. H.R. (ser. C) No.4 (July 29, 1988) (holding Article 1(1) of the American Convention includes a positive obligation “to prevent, investigate and punish” human rights violations committed by private actors); \textit{General Comment No.31, supra} note 48, at ¶ 8 (expressing view that Article 2(1) of the ICCPR includes obligation “to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress” violations of the Covenant); A.R. MOWBRAY, \textit{THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS} 6 (2004) (explaining that ECtHR has recognized State “duties to protect persons from the violation of their Convention rights from both other private individuals and public officials”).

\textsuperscript{139} See, e.g., International Convention on the Elimination of All Forms of Racial Discrimination, art. 2(d), Dec. 21, 1965, 660 U.N.T.S. 195 (“Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.”)

\textsuperscript{140} See Tom Buergenthal, \textit{To Respect and to Ensure: State Obligations and Permissible Derogations, in The International Bill of Rights, The Covenant of Civil and Political Rights} 77-78 (Louis Henkin et al., eds., 1981) (arguing Art. 2(1) of the ICCPR requires States protect against rights violations committed by non-State actors); SARAH JOSEPH, ET AL., \textit{The International Covenant on Civil and Political Rights: Cases, Materials and Commentary} 24 (2000) (same).

development in human rights law of the last thirty years has been recognition of an obligation not to transfer someone where there is a substantial risk of being subjected to torture or cruel inhuman or degrading treatment. While human rights bodies such as ECtHR and the HRC have failed to provide much in the way of meaningful analysis to justify implication of such a duty, especially in the face of evidence such protection was not contemplated during drafting, understanding non-refoulement as a duty to protect provides the normative foundation for their interpretation. The obligation not to torture or seriously mistreat imposes upon States a negative duty to avoid torturing or mistreating anyone. But fully effectuating the right also requires protecting the individual from the torture or mistreatment by others. Non-refoulement is State protection from torture or mistreatment perpetrated by the receiving State.  

Shue’s analysis of duties also explains the desire of human rights actors to expand the categories of post-transfer mistreatment that merit non-refoulement protection. Because fulfilling human rights mandates State protection against the violation of those rights by others, then expansion of non-refoulement duties is inevitable as the law seeks to deepen rights fulfillment. This development is already occurring. As noted above, the Enforced Disappearances Convention includes a non-refoulement obligation. And other human rights bodies are locating non-refoulement duties in ostensibly negative treatment prohibitions.

While this protection duty is well-established in the law, less acknowledged is the competing protection duty at issue in transfer of dangerous aliens. Human rights law has in recent years recognized that the State has a duty to protect the public not only from rights violations committed by other States, but also from rights violations committed by private persons within society which it knows or should know are likely to occur.

The ECtHR first recognized this duty in its landmark decision in

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142 One may object that not all instances where non-refoulement protection is implicated fall within the duty to protect. During the Bush Administration, the United States engaged in a practice of extraordinary rendition, in which aliens were transferred from one State to another for the purpose of interrogation using torture. Rendition involves intent on the part of the transferring State that the receiving State mistreats the individual, usually to obtain information. Such intent means the transferring State incurs responsibility under international law for its complicity in the wrongful act of the receiving State under the principle that a State may not do through another that which it could not do itself. See ILC Draft Articles on State Responsibility (2001), art. 16 (placing responsibility on State for assistance with the wrongful acts of another State where that assistance is provided with “a view to facilitating commission of the act”); Id. art. 17 (imposing State responsibility for wrongful acts of other States where State directed and controlled wrongful act). In those instances, the transferring State is implicated in the commission of torture or other serious forms of mistreatment, thereby violating its absolute duty to avoid committing such acts, as opposed to its duty to protect from those acts committed by others.

143 Supra note 57 & accompanying text.

144 Supra note 58-61 & accompanying text.
Osman v. United Kingdom. In that case plaintiffs argued that the British police violated the right to life of a family member when it failed to take adequate preventive measures to stop a deranged man from killing the family member despite clear warnings regarding the threat. The United Kingdom denied it owed such a broad duty to protect against actions committed by members of society, arguing instead it could only be held liable where the police “assumed responsibility” for the safety of the individual. The Court rejected the British position, holding the right to life includes positive State duties to safeguard the lives of those within its jurisdiction. The Court explained the State has a duty to take “positive operational measures” to combat threats where, “the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party.” The Court explained that the operational measures required went beyond merely creating a criminal justice apparatus to deal with threats, instead sometimes requiring action to mitigate the threat.

While Osman involved a threat to an identified individual, the ECtHR has held this duty extends to society at large. In Mastromatteo v. Italy, petitioner claimed that Italy violated his son’s right to life when it released habitual offenders from prison before the termination of their sentence, and they in turn killed his son. The Court noted that this claim was different from Osman in that the police were not alleged to know that Mastromatteo himself was in danger, but rather should have known the released prisoners posed a danger to society in general. The Court extended Osman and held that the State has a duty to do “all that could be reasonably expected of them to avoid a real and immediate risk to life” of the “public at large,” where they know or should know of the threat.

The ECtHR is not alone in construing the right to life as including a duty to protect the public from the threat posed by non-State actors. While Article 6 of the ICCPR appears on its face to protect only against government interference with the right to life, scholars evaluating the treaty’s negotiating history argue the drafters intended to include a duty to protect against

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146 Id. ¶ 107. This is the rule adopted by the U.S. Supreme Court in DeShaney. DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 195 (1989)
147 Osman, 29 Eur. Ct. H.R. at ¶ 116. The Court found that the right had not been violated because the petitioners failed to demonstrate that the police knew or should have known of the threat the killer posed to the family. Id. ¶ 121.
149 Id. ¶ 74. The Court held this standard was not met here because petitioner failed to demonstrate that Italy’s prisoner release scheme systematically failed to protect the public right to life, nor that it knew or should have known of the threat posed by these prisoners prior to release.
150 ICCPR, supra note 62, art. 6 (“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”)
violations committed by non-State actors.\textsuperscript{151} The Human Rights Committee has accepted this duty in its evaluation of State practice under the treaty, as it refers to State efforts to protect against the threats posed by non-State actors.\textsuperscript{152} The Committee has also recognized a similar duty to protect against torture and cruel, inhuman and degrading treatment committed “by persons acting outside their official capacity, or in a private capacity.”\textsuperscript{153}

Given that the law is still developing in this area, human rights bodies have yet to define precisely which operational acts the public may reasonably expect the State to undertake to protect public rights. In neither \textit{Osman} nor \textit{Mastromatteo} was the Court called upon to determine which operational actions were required because in neither did the Court find that the State knew or should have known of the risk in question. In three cases where the Court did find that the State did not take adequate operational measures to protect life, the burden of reasonable action for the State was heightened by its relationship with the killers.\textsuperscript{154}

Nevertheless, it is reasonable to assume that expulsion would be a reasonable operational measure with respect to dangerous aliens, at least in the ordinary course of events. Expulsion is the traditional tool used by States to mitigate threats posed by aliens. And its importance is heightened where there is an absence of alternative tools to protect the public, which as explained in the previous Part often occurs in terrorism cases. But human rights bodies have recognized that these positive obligations are constrained by two considerations. First, any operational burden is limited by resources, as any burden must not be “disproportionate” to the risk. Second and more important here, the operational burden is limited by conflicting rights.\textsuperscript{155} Thus, the rights of the alien are a relevant limitation on any “duty to expel.”

This analysis recasts the issue facing States in transfer determinations involving dangerous aliens as a competition between conflict State duties. The State’s duty to protect its public from threats to life, torture, and cruel, inhuman and degrading treatment conflicts with the duty to protect the alien from substantial risk of death, torture, or cruel, inhuman or degrading treatment after

\begin{itemize}
  \item \textsuperscript{151} See MARC J. BOSSUYT, GUIDE TO THE TRAVEAUX PREPARATOIRES OF THE ICCPR 120 (1987) (explaining majority of delegates spoke in favor of the right to life including a duty to protect against violations by non-State actors); NOWAK, supra note 61, at 106 n.12 (asserting right protects against violations committed by non-State actors).
  \item \textsuperscript{152} See NICOLA JAGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY 53 (2003) (citing to Human Rights Committee materials).
  \item \textsuperscript{153} \textit{General Comment No. 20, supra note 47, at ¶ 2.}
  \item \textsuperscript{154} See Edwards & Another v. U.K., [2002] ECHR 46477/99 (Mar. 21, 2002) (holding U.K. failed to take adequate measures to protect life of a prisoner within its custody from threat posed by another prisoner); MOBRAY, supra note 138, at 17-19 (describing two cases in which Turkey failed to take operational measures to protect life where the rights violator colluded in some way with the State). Thus, what is “reasonable” in terms of operational measures where the States has no special relationship with the offenders remains undefined.
\end{itemize}
transfer. This clash of duties is also a clash of rights between the rights of the public to be protected from known threats to their life and the right of the alien to be protected from the risk of post-transfer mistreatment by another State.

Recasting non-refoulement in this manner is rhetorically important. Human rights bodies, advocates and scholars have been sanguine about the risk dangerous aliens may pose to society in significant part because they have failed to identify the human rights costs that result. Recognizing non-refoulement as a competition between human rights, as opposed to a policy problem for States, will encourage human rights actors to wrestle with the difficult problems created when dangerous aliens cannot be expelled. From the perspective of States, frustration with the current rule stems from its failure to acknowledge the importance of the State’s duty to protect the public. By recognizing this duty as a human rights imperative, human rights law better embodies the rights-trade off actually confronted by States.

Beyond rhetoric, recognizing competing human rights in transfer determinations identifies an important shortcoming in existing law: the failure to afford any weight to the rights of the public in the non-refoulement test. Put another way, human rights law has categorically preferred the rights of the alien to the rights of the public without any explanation. To the extent thought has been given to this issue, it is the power of the torture norm that is invoked. The next section will explain why such an explanation is unavailing.

B. Is Torture Different?

The limited justification given for categorically preferring the rights of aliens begins and ends with the *jus cogens* torture norm. The ECtHR in *Saadi* explains that if the right not to be tortured or subjected to cruel and inhuman degrading treatment is absolute, and non-refoulement is a duty emanating from that right, then this duty must also be absolute. But the Court’s simple analysis elides over an important reality: not all duties emanating from these norms are absolute under existing law.

The three relevant State duties at issue here are the duty to avoid committing torture or cruel, inhuman or degrading treatment; the duty to protect from such acts committed by other States; and the duty to protect from such acts committed by non-State actors. Human rights law currently treats the first two of these duties as absolute, while accepting the third is subject to limitation. As discussed above, human rights law does not impose an absolute

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156 Saadi v. Italy, App. No. 37201/06, ¶ 138 (Eur. Ct. H.R. Feb. 28, 2008). Note that human rights bodies have not drawn a distinction between torture and cruel, inhuman and degrading treatment in their non-refoulement analysis, despite the disagreement of at least some scholars that the latter norm constitutes *jus cogens*. *Supra* note 8. If the prohibition on cruel, inhuman or degrading treatment were not *jus cogens*, then the ECtHR’s already weak argument against considering the conduct of the alien in granting non-refoulement protection would be inapplicable to forms of mistreatment that do not rise to the level of torture.
duty on States to protect against torture or cruel, inhuman or degrading treatment committed by non-State actors within the State’s territory, requiring only that they take “reasonable” measures in that situation.157 Thus, the question here is whether the law has properly grouped the duty not to commit torture and non-refoulement together as absolute duties, or whether non-refoulement is more similar to the duty to protect from similar mistreatment committed by private parties, where the law recognizes limitations on the duty.

The different pedigree of the duty to avoid torture and cruel, inhuman and degrading treatment compared to non-refoulement draws into question the current legal scheme. The duty to avoid committing torture or cruel, inhuman or degrading treatment is jus cogens, meaning there is near universal acceptance within the international community that it is not subject to exception or limitation.158 While there is a vast literature on the difficulty in developing criteria for jus cogens norms, a central feature of such duties is a general recognition that the norm protects against conduct “so morally deplorable as to be considered absolutely unacceptable by the international community as a whole.”159 To that end, it is striking that even notorious torturers condemn the practice and deny engaging in the misconduct.160

The Bush Administration’s comments on torture in the conflict with al Qaida provide powerful evidence for this point. Even as the Administration subjected detainees to water boarding, long-recognized as an act of torture, President Bush repeatedly denied that the United States tortured.161 Memos by the Department of Justice Office of Legal Counsel curiously refused to characterize water boarding as torture,162 despite taking the position that the


158 Modern human rights scholars often label as custom norms that do not reflect uniform or extensive state practice, but which are widely acclaimed as legally obligatory. See John O. McGinnis & Ilya Somin, Should International Law be Part of Our Law, 59 STAN. L. REV. 1175, 1200-01 (2007) (describing move to describe norms as custom based on opinio juris alone). Given the widespread prevalence of torture worldwide, this is one example of that practice.

159 ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 50 (2006).


162 See Memorandum from Jay Bybee, Assistant Attorney General, to John Rizzo, Acting General Counsel Central Intelligence Agency 16 (Aug. 1, 2002) (available at
President had legal authority to torture in certain circumstances. The twisted and faulty logic used to define torture narrowly reflects the sacrosanct nature of the duty to avoid committing acts of torture. A duty of such a rich pedigree has a strong claim to subordinate all competing duties.

There is far less acceptance among States of the duty to protect against torture committed by other States. This Article has already discussed several instances where States have claimed the right to transfer individuals to another State despite the risk they will be subjected to torture or cruel, inhuman or degrading treatment. The United States denies that it has any international legal obligation restricting transfer of detainees originating outside the United States to other States, even where there is a substantial risk of torture. The Canadian Supreme Court has expressly recognized that the Canadian Charter permits the State to repatriate an alien despite the risk of post-transfer torture in exceptional circumstances. The United Kingdom led several European States in challenging the interpretation of the ECtHR finding within the ECHR an absolute non-refoulement duty.

The willingness of important States like the United States, Canada and the United Kingdom to challenge the legal basis for non-refoulement duties is evidence that States see the duty to protect against torture committed by other States as less important than the duty to avoid committing torture. In this way non-refoulement is closer to the duty to protect against this same misconduct committed by private persons, which is recognized as a limited duty. And given this State reluctance, it is certainly more perilous to claim this duty trumps all conflicting obligations.

This descriptive difference in the way States value these duties is normatively justified by the difference in culpability the law assigns to intentional versus unintentional acts. An intentional act occurs when the actor desires a wrongful consequence, or acts with substantial certainty of that consequence. All other acts are unintentional, even when the actor does not wish the harm in question, but acts despite great risk harm will occur as a consequence of his action. Many bodies of law recognize greater culpability for intentional acts compared to unintentional acts. Criminal law generally draws a distinction between crimes committed purposely (with a conscious desire to achieve the objective) or knowingly (with practical certainty of the consequences of the act), and acts committed with reckless disregard of

http://www.fas.org/irp/agency/doj/olc/zubaydah.pdf (arguing water boarding does not constitute torture because the suffering induced is insufficiently prolonged).

163 See Memorandum from Jay Bybee, Assistant Attorney General, to Alberto Gonzales, Counsel to the President (Aug. 1, 2002) (concluding President was not bound by Congressional legislation banning the use of torture).

164 Supra note 97 & accompanying text.

165 Supra notes 105-108 & accompanying text.

166 Supra note 98 & accompanying text.
wrongful consequences.\textsuperscript{167} Similarly, in tort law intentional torts result in a higher level of culpability than acts undertaken with mere reckless intent.\textsuperscript{168}

When a State commits an act of torture, or contracts with another State to torture on its behalf, it acts intentionally and therefore with the highest level of culpability. It therefore makes sense for the law to impose the most onerous duties on a State to not engage in this conduct because it is the most wrongful. By contrast, in both non-refoulement and protection from private person torture or cruel, inhuman or degrading treatment, the State does not intend the harm in question, and in fact may take active steps to prevent the harm. This identical intent suggests that the duty on States should be the same with respect to protection from any unintentional 3rd party serious mistreatment.\textsuperscript{169} And because the culpability for unintentional acts is less than for intentional acts, this duty should be less onerous that the duty to avoid committing these acts.

Even though State intent in 3rd party protection contexts may be the same, there are some relevant differences between non-refoulement and protection from private person harms. One important difference is control: States have greater control over the actions of private persons within their territory than over the actions of other States. Ironically, control may be a good reason to recast non-refoulement as a less onerous duty than protection from mistreatment committed by private persons within the State. Professor Hakimi posits that a State’s duty to protect is directly correlated to the degree of control it exercises over the rights violator.\textsuperscript{170} Thus, she explains, protection duties are at their zenith with agents or delegates of the State, over whom it exercises plenary control; are somewhat reduced with respect to territorial subjects over whom the State has control, but whose rights restrict protection obligations; and are at their lowest point with respect to external actors, over whom the State has the least control. Hence, in direct contrast to the current non-refoulement rule, a “control” test suggests States should actually incur fewer protection duties with respect to non-refoulement, than with other 3rd party actors.\textsuperscript{171}

\textsuperscript{167} See Model Penal Code §2.02, cmt. 3 (describing the reduced culpability for crimes which are committed recklessly, as opposed to those committed purposely or knowingly). In some instances, such as treason, criminal law requires a specific intent for liability, meaning actual purpose is required before criminal liability is incurred. Id. cmt. 2.

\textsuperscript{168} See Restatement (Second) of Torts § 500 cmt. f (1965) (distinguishing between intentional acts and reckless acts).

\textsuperscript{169} States transferring an individual to another State despite the risk of post-transfer mistreatment will be a reckless rather than knowing act because a State is unlikely to have certainty about post-transfer treatment by another sovereign, except where the State solicits such misconduct, as in rendition. See supra note 142 (distinguishing rendition from most transfers where non-refoulement protection is incurred).

\textsuperscript{170} See Hakimi, supra note 141, at 355 (arguing that State relationship with abuser, rather than with victim is the touchstone for the scope of protection duties).

\textsuperscript{171} Professor Hakimi suggests in passing that the “sui generis” duties imposed by non-refoulement are due to a unique relationship with the victim, perhaps created by the custodial
Another difference may be the length of the chain of causation from State action to harm. In the non-refoulement context the chain is short: one State transfers to another State, which then inflicts the relevant harm. By contrast, the State’s role in failing to protect the public from a dangerous alien may be more attenuated. But this does not always hold true. In the Naseer case, for example, the chain appears equally short: State action, whether it be Naseer’s transfer to Pakistan or release into the United Kingdom, leads to the feared harm, with just one proximate intervening actor (either Pakistan or Naseer),

Moreover, there is good reason to believe chain of causation should not be determinative of State legal obligations. Cass Sunstein and Adrian Vermeule challenge the idea that the length of the causal chain in government action, or whether the relevant State action is an action or inaction, has any moral significance.\(^{172}\) They explain that governments are confronted with policy options, and are responsible for the consequences of those options regardless of the length of the chain of causation. Consider the facts of the Naseer case. There HMG has the choice to either release Naseer within the United Kingdom or transfer him to Pakistan. To the extent HMG is culpable for subsequent rights violations, it is based on the consequences of its policy decision. Why those consequences should be evaluated differently based on the length of the chain of causation is unclear.

Instead, this article posits there is no normative justification for imposing upon States an absolute non-refoulement obligation. Non-refoulement has a significantly less impressive pedigree than the duty to avoid committing torture and CIDT. And this difference is understood as a function of the reduced culpability associated with unintentional acts. Without the high level of culpability created by intentional wrongdoing, the argument to subordinate all conflicting duties is weakened. Instead, non-refoulement is similar to protection from serious mistreatment perpetrated by other third parties, where international law recognizes that other considerations, such as resources and conflicting rights and duties, may limit the protection provided.

Existing law perhaps is explained by the greater salience of one set of rights at issue in transfer determinations. In the Naseer case, his right not to be

mistreated by Pakistan is salient in a transfer determination because he is the subject of the transfer inquiry. By contrast, the rights of the public are more obscure: it is harder to identify whose rights are violated when Naseer is released into the United Kingdom, especially where his exact victims cannot be identified in advance. Nevertheless, as has been demonstrated this conflict is real, suggesting non-refoulement like other duties to protect should recognize limitations imposed by conflicting rights.

IV. MEDIATING BETWEEN COMPETING RIGHTS: BALANCING

A. Features of Human Rights Law Balancing Tests

If there is no a priori reason to prioritize the rights of the alien, the question becomes how human rights should accommodate the conflicting rights at issue in non-refoulement. Human rights actors and scholars regularly oppose any change to the absolute non-refoulement rule because of concerns that accounting for the threat posed by the transferee will result in comparing apples to oranges.

As a general matter, human rights law prescribes balancing to mediate between competing rights claims. Provisions mandating balancing between competing interests are expressly included in multilateral human rights instruments, such as the ECHR, the ICCPR, and the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as newer rights provisions in national constitutions, such as South Africa and India. Even in the United States, where rights provisions do not include any express

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173 See id. at 741 (applying these heuristics to explain the failure to support capital punishment if it results in reduced homicides).

174 See Saadi v. Italy, App. No. 37201/06, ¶ 139 (Eur. Ct. H.R. Feb. 28, 2008) (“The concepts of ‘risk’ and ‘dangerousness’ in this context do not lend themselves to balancing because they are notions that can only be assessed independently of one another.”)

175 See, e.g., ECHR, supra note 3, art. 9 (balancing freedom of thought, conscience and religion against the needs of a democratic society to protect “public safety,” “public order, health or morals,” and “the rights and freedoms of others”).

176 See, e.g., ICCPR, supra note 62, art. 18 (allowing State restriction of freedom of thought, conscience and religion where prescribed by law and “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”)

177 See International Covenant on Economic, Social and Cultural Rights art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3 (“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”)

178 See S. Afr. Const. 1996, § 27 (requiring States to take measures to provide health care services, food, water and social security “within its available resources”).

179 See India Const. art. 41 (limiting right to work, education and public assistance to India’s “economic capacity and development”).
balancing requirements, balancing tests have been employed in Fourth Amendment\textsuperscript{180} and Due Process analysis,\textsuperscript{181} and balancing considerations enter other parts of constitutional law.\textsuperscript{182}

These balancing tests regularly require comparison of unlike interests. For example, in assessing whether a State law prohibiting Holocaust denial violates the right to free speech, human rights law balances individual freedom of expression with the State’s need to protect its population from harmful speech. Balancing is also needed to mediate between conflicting individual rights. Should the State recognize a practicing Muslim woman’s religious right to wear the burqa or niqab, if doing so threatens the equally protected right to be free of gender-based discrimination? Thus, contrary to the assertions of supporters of the current non-refoulement rule, human rights law is very familiar with using balancing tests to weigh seemingly incommensurate interests.

An important feature of human rights balancing tests is they provide States a margin of appreciation to determine in the first instance how to choose between conflicting rights. This margin recognizes cultural differences may play an appropriate role in balancing. But this discretion is not unbridled. Instead, the human rights apparatus, meaning courts, international bodies, and non-governmental organizations (NGOs) monitor State action and use the tools available to each respective actor to push States where it believes the State has under-protected a relevant right.

The ECHR is instructive in this regard.\textsuperscript{183} Article 8 guarantees the right to respect for one’s private life. But that article also allows States to restrict privacy rights where “prescribed by law and… necessary in a democratic society” for one of a list of permissible reasons for restricting this right.\textsuperscript{184} States are granted a margin of appreciation to decide whether a particular

\textsuperscript{180} See Stone v. Powell, 428 U.S. 465, 490-91 (1976) (limiting application of the Exclusionary Rule to 4\textsuperscript{th} Amendment violations where the costs of application were disproportionate to the benefit).


\textsuperscript{182} For example, the levels of scrutiny employed to determine whether government legislation restricting fundamental rights meets constitutional muster has an implicit proportionality component.

\textsuperscript{183} The Human Rights Committee has adopted a very similar approach to analyzing whether State restrictions on rights, such as freedom of expression, were in fact proportionate to the rights protected. See U.N. Comm. on Human Rights (CCPR), Faurisson v. France, U.N. Doc. No. A/52/40 (1999) (concluding France acted proportionately in criminalizing Holocaust denial). While laws banning Holocaust denial have been deemed consistent with the ICCPR, they are not mandated by the treaty, and fall within the margin of appreciation afforded States.

\textsuperscript{184} See ECHR, supra note 3, art. 8(2) (“There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”)
restriction on privacy is necessary for society, provided that restriction is
prescribed by law and designed to advance a permissible purpose under Article
8. For example, this margin has allowed Poland and Ireland to maintain more
restrictive abortion laws, while other parties like the United Kingdom provide
women much freer access to terminate unwanted pregnancies. Thus, States can
strike the balance between the rights and restrictions differently, and still act in
accordance with the ECHR.

Nevertheless, the margin of appreciation is not limitless. The ECtHR
will set aside restrictions where they are not proportionate to the aim proffered.
For example, in Lustig-Prean & Beckett v. United Kingdom,185 the United
Kingdom defended its practice of excluding gays from the military under
ECHR article 8 on grounds that the policy was necessary to ensure the
operational effectiveness of the armed forces, and therefore was in the interests
of national security, a permissible ground for infringing privacy rights. While
the Court recognized the United Kingdom’s margin of appreciation to
determine which restrictions were necessary to maintain an effective military, it
emphasized the need for those restrictions must be proportionate to the aim
served. The Court then evaluated for itself the evidence regarding the impact
on military effectiveness of allowing gays to serve openly, concluding that
these concerns were insufficient to support a ban on gays in the military.186

National court balancing tests have proceeded in a similar manner. The
South African Constitution includes numerous economic and social rights
modeled on the ICESCR that include balancing components. For example,
section 27 guarantees everyone the right to health care services, but limits the
government’s duty to “reasonable legislative and other measures, within its
available resources, to achieve the progressive realization of each of these
rights.”187 The South African Constitutional Court has explained that it will
deer to “rational decisions taken in good faith by the political organs and
medical authorities” regarding what level of services may be provided given
available resources.188 Thus, the Court upheld a policy providing kidney
dialysis only to patients who may be cured, and not to those in need of repeat
dialysis, as a rational allocation of resources within the government’s
discretion.189 But it rejected as outside permissible bounds a government policy
denying nevirapine to pregnant mothers to prevent transmission to children of
HIV to a child, concluding such a decision was irrational given the benefits of

186 The ECtHR, like some national courts, is empowered to set aside State action where it
conflicts with the ECHR. Other parts of the human rights apparatus, such as the HRC or NGOs, rely
on moral suasion to push States to alter decisions that under-protect a relevant right.
187 S. AFR. CONST. 1996 § 27.
188 Soobramoney v. Minister of Health (KwaZulu-Natal) 1997 __ SA __ at ¶ 29 (S. Afr.).
189 Id.
the drug, and its availability at zero cost.\textsuperscript{190}

These examples suggest adopting a balancing approach in the non-refoulement context would be less difficult than suggested by human rights critics. It would allow States discretion in the first instance to determine how to trade off the duty to protect the public from dangerous aliens, with the duty to protect the alien from post-transfer mistreatment. And these decisions are subject to comment or even legal review by human rights bodies, which then push States to make decisions that fall within bounds acceptable to human rights law.

Several benefits from adopting a balancing approach emerge. First, a balancing approach allows the law to account for all relevant rights at issue in transfer determinations. Absent a reason for categorically preferring a set of rights, this approach best maximizes rights fulfillment. Here, it is important to remember that security concerns are already affecting State action. Competing rights claims do not disappear because human rights law believes they should. States have continued to address security concerns created by the current rule, just in a surreptitious manner.\textsuperscript{191} Enshrining within the law the very trade-off in which States engage encourages States to make openly the rights trade-off they now make surreptitiously, creating transparency within the strictures of the law.

Second, greater State transparency and a legal rule which reflects the trade-offs States are actually making improves the ability of human rights institutions to monitor these decisions, to the benefit of human rights. Under existing law human rights bodies make recommendations accounting for current law that fail to engage with the rights competition actually facing States, leading to States ignoring those recommendations. For example, Human Rights Watch (HRW) has issued reports calling for the closure of the U.S. detention facility at Guantanamo Bay, while at the same time calling for an end to the use of diplomatic assurances. When faced with the reality that such a position would preclude repatriation of many prisoners, the group suggests resettlement in the United States or Europe without assessment of the security risks in such a course of action.\textsuperscript{192} By moving to a balancing approach that recognizes within the law the obligation to protect the public in transfer determinations, human rights bodies will be encouraged to wrestle with the full-range of rights costs associated with different options. HRW’s suggestions would have been more meaningful to U.S. policymakers if they recognized that release of prisoners into the United States or Europe itself has human rights costs.

\textsuperscript{190} \textit{Treatment Action Campaign v. Minister of Health} 2002 __ SA __ at ¶ 135 (S. Afr.)

\textsuperscript{191} \textit{Supra} Part II C.

\textsuperscript{192} See \textsc{Hum. RTS. Watch, Ill-Fated Homecomings}, \textit{supra} note 85, at 3, 27-28. (arguing resettlement conundrum is “an uphill struggle no doubt, but not an impossible one”).

- 43 -
One consequence of a balancing approach may be an incentive for human rights institutions to improve monitoring of diplomatic assurances. Human rights bodies have felt comfortable in a purity of position against assurances because of the comfort that the legal consequence of not accepting assurances was withholding of expulsion. Under a balancing approach, where transfer may occur even where there is risk of post-transfer mistreatment, the benefits of an absolute position against assurances will evaporate, and human rights apparatus instead will have a powerful incentive to push both the sending and receiving State to follow their assurances.

Third, a balancing approach to non-refoulement protection will remove a powerful obstacle to State agreement to additional non-refoulement obligations. As discussed earlier, once non-refoulement protection is understood as a manifestation of the duty to protect, its expansion to other forms of post-transfer misconduct is inevitable. Full effectuation of human rights requires protection from rights violations committed by others, including other States. Such thinking is already occurring, with new human rights treaties including non-refoulement protection, and human rights bodies interpreting older treaties to include such duties. But States like Canada, the United Kingdom, and the United States, for whom existing non-refoulement obligations have proven difficult to follow given security considerations, are rejecting additional obligations of this sort because the protection duty is viewed as too onerous.

A balancing approach provides an avenue to address these concerns. The scale of prohibited post-transfer mistreatment ranges on a sliding scale from the most intense (extrajudicial killing, torture), to the somewhat less intense (cruel, inhuman or degrading treatment), to the still less intense (denial of fair trial, forced conscription of children). Similarly, the risks an alien may pose to the State where he is located varies from very significant (mass casualty terror operation), to somewhat significant (kidnapping or hijacking) to still less significant (financial and other material support to terrorist organizations). By moving to a balancing approach to non-refoulement, States could modulate the protection provided based on consideration of both the kind of post-transfer mistreatment and kind of risk to society anticipated. Thus, while the risk an alien may commit financial crimes may not warrant transfer to torture, it may permit transfers where voting rights may be deprived. Such an approach would encourage States to accept new non-refoulement duties.

193 Supra notes 57-60 & accompanying text.
194 None of these States signed the Enforced Disappearances Convention. The United States has been clear that concern about the non-refoulement provision is a major reason for its failure to sign the treaty. See U.S. Statement Concerning Draft International Convention for the Protection of All Persons from Enforced Disappearance (2005) (available at: http://www.state.gov/s/l/2005/87209.htm) (“We have clearly stated for the record our continuing reservation to the absence of language in Article 16 explicitly conforming this text to the principle of non-refoulement articulated in the 1951 Refugee Convention.”)
without fearing the security consequences of such a move.

B. Concerns about Balancing: Bias and Uncertainty

Despite the provenance of balancing as the traditional method for mediating between competing rights claims, and the benefits suggested in the previous section, the problems of bias and uncertainty may cause critics to nevertheless argue balancing is unlikely to produce a rights-optimal outcome in transfer decisions. States are notoriously biased against the interests of aliens, especially those perceived as dangerous.195 This bias is enhanced by real political pressures States may face to favor the rights of its public over those of aliens present within the society.196 A legitimate fear is that bias may lead to overvaluing of the rights of the public and undervaluing of the rights of the transferees. This bias may be given easy effect in non-refoulement because of the difficulty in assessing factors relevant to a balancing determination. Under a balancing approach States are required to consider factors such as: the risk the alien will be mistreated after transfer; the intensity of mistreatment; the risk the alien poses to the State where he is located; the nature of that risk; and the likelihood that risk will be averted through refoulement or its alternatives. Given epistemic uncertainty regarding these factors, there is an opening for bias to color State assessment.

It is worth noting at the outset that bias and uncertainty concerns are not unique to a balancing approach. Under the current rule there is epistemic bias with respect to assessment of the risk of post-transfer mistreatment.197 While States will possess human rights reporting regarding the general conditions in a receiving State, often that reporting will reveal little about whether a particular alien is in danger of mistreatment. Diplomatic assurances are designed to reduce the risk of mistreatment, but evaluating the sufficiency of assurances may be more art than science. Does a particular official have the credibility to make assurances? Is the relationship between States of sufficient importance that following through on bilateral promises is important? Uncertainty allows State bias to color evaluation of the sufficiency of the threat of mistreatment and the sufficiency of assurances.

A balancing model would create additional opportunities for bias to


196 See supra note 115 (noting criticism of Suresh on grounds it would open the door to bias against aliens).

197 The risk of post-transfer mistreatment of the transferee includes two components: the intensity of mistreatment anticipated and the likelihood of its occurrence. In general terms, these two elements reflect the importance human rights law places on the deprivation in question, and probability that deprivation will occur. See Aharon Barak, Proportionality and Principled Balancing, 4 LAW & ETHICS OF HUM. RTS. 1, 11 (2010) (providing elements of balancing test).
infect evaluation of uncertain factors. Determining whether an alien poses a risk to the State where he is located will often require assessment of intelligence information.\textsuperscript{198} Even the best intelligence information cannot predict with certainty what an individual plans to do. The United States and numerous European States have hyped arrests of terrorism suspects as important captures, only to later discover the individual had minimal connection to terrorist activity.\textsuperscript{199} There is also uncertainty about the extent to which the receiving State actually will take steps to mitigate the threat posed after transfer. The United States credited assurances from Kuwait that two Guantanamo detainees would be monitored and prevented from returning to terrorist activity after repatriation. The detainees evaded Kuwaiti security after transfer, and ended up as suicide bombers in Iraq.\textsuperscript{200}

Thus, the risk of bias coloring assessments of factors relevant to balancing is real. Given these concerns, a rule utilitarian will argue that the law must as a prophylactic measure prioritize the rights of the alien. While it may be that in individual situations the result is a sub-optimal maximization of rights, such an outcome may be justified because of the inability of the State to be trusted to make a rights maximizing determination.\textsuperscript{201} As has already been discussed, weak enforcement in international law weakens this argument. If the law ignores State interests in protecting its population as a prophylactic measure, States will then act outside the law to protect their interests. Moreover, there are tools available to human rights law to minimize the impact of anti-alien bias in transfer determinations, as has been seen in Canada, the only State to date to have adopted a balancing approach to non-refoulement decisions.

The non-refoulement balancing test itself may be modified to mitigate bias concerns by placing a proverbial thumb on the scale in favor of the rights of the alien. For example, a State’s authority to transfer may be limited to situations where the risk averted through refoulement “clearly exceeds” or is of

\textsuperscript{198} The risk averted through refoulement would consider at least three factors: the intensity of the threat anticipated, its likelihood of occurrence, and the likelihood the threat will be averted through transfer.

\textsuperscript{199} The case of the Liberty City Seven may be instructive in this regard. Upon arrest of seven suspects in Miami, the Bush Administration announced it had thwarted a plot to destroy the Sears Tower. But evidence at trial did not match this grandiose pronouncement, resulting in two mistrials. Ultimately, a jury did convict many of the defendants of at least some counts. \textit{See} Damien Cave & Carmen Gentile, \textit{Five Convicted in Plot to Blow Up Sears Tower}, N.Y. TIMES, May 12, 2009, at A19 (reporting on events in the case).


\textsuperscript{201} \textit{See} Mattias Kumm, \textit{Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement}, in \textit{LAW RIGHTS AND DISCOURSE} 131, 152 (George Pavlakos, ed., 2007) (explaining that institutional biases may require designing rights in a manner that over and under enforce rights).
“significantly greater importance” than the risk of mistreatment. The Canadian Supreme Court in Suresh may have intended exactly this result when it wrote that transfers to torture would be permissible only in “exceptional” circumstances. This approach has led the Canadian courts to reject several attempts by the government to repatriate aliens in spite of the risk of serious mistreatment, or even torture.

Placing a thumb on the scale in favor of the rights of aliens is a compromise between the current rule and a pure proportionality test: limited over-enforcement of the rights of the alien is permissible to address the risk of bias, without completely crowding out consideration of the rights of the public. The degree of over-enforcement could be increased or decreased depending upon the level of concern about bias. The more attention the balancing test pays to bias, however, the closer it moves toward the current rule and the fewer the benefits of a balancing approach. As under-enforcement of the obligation to protect the public increases, States will have ever greater incentive to return to self-help options to avoid the security consequences of the rule. This outcome is not surprising; the tighter the law seeks to cabin State discretion, the greater the incentive for States to resort to mechanisms outside the non-refoulment rule to address the need to protect the public. Thus, altering the proportionality rule alleviates bias concerns at the expense of the benefits of balancing described earlier.

Human rights law may also mandate a more robust process attendant transfer determinations. As discussed in Part II, human rights law currently requires only that the alien be allowed to submit the reasons against expulsion to a competent authority that need not be a court; to appeal to a higher authority that need not be a court; and to be represented during expulsion proceedings, with all requirements subject to waiver in compelling cases of national security. Greater process associated with expulsions could address the bias and uncertainty concerns in two ways. First, greater process increases the chances that incorrect government assessments of risk may be caught and remedied. Second, a neutral (or more neutral) arbiter may be less likely to allow bias to color assessment of factors determining whether non-refoulment protection must be granted. The extensive procedures provided aliens prior to expulsion in Canada appear to have achieved these aims. The Canadian courts have regularly rejected the factual predicates offered by the government to support expulsion despite the risk of post-transfer mistreatment. Even where

202 See id. at 152 (explaining proportionality inquiries can bear the weight of institutional biases through altering the formulation of the test).
203 See Suresh v. Canada (Minister of Citizenship and Immigration), ¶ 78, [2002] 1 S.C.R. 3 (Can.) (describing discretion to deport to face torture as “exceptional”).
204 Supra notes 109-110 & accompanying text (describing post-Suresh jurisprudence).
205 Supra notes 64-68 & accompanying text.
206 Supra note 109 & accompanying text.
the courts have upheld the government’s fact finding, they have refused to allow transfer on the grounds that the case failed to reach the “exceptional” status mandated in Suresh.\footnote{In re Jaballah, [2006] F.C. 1230 (Can.) ¶ 81-82.}

Nevertheless, there are difficult questions that human rights law would need to answer before prescribing additional process in expulsion hearings. First, are courts well suited to making the determination on which balancing is based? Non-refoulement determinations often will involve assessment of intelligence information and foreign government communications. The United States has aggressively pursued the position that only the executive has the capacity to make these sorts of determinations, and it is inappropriate for courts to interfere.\footnote{See Declaration of Clint Williamson, U.S. Ambassador for War Crimes Issues ¶ 10 (available at http://www.state.gov/documents/organization/116359.pdf) (arguing sharing with the court materials used to make assessments about risk of post-transfer mistreatment would compromise U.S. foreign policy).} The experience of other States, suggests this concern is overstated. Judges in Canada and in Europe have reviewed intelligence information to ascertain threat levels and risk of post-transfer mistreatment, including review of assurances to determine whether those assurances are sufficient to support transfer.

Still, to be meaningful, court reviews would need to look behind the intelligence information proffered by the government. U.S. and Canadian courts have questioned procedures in which the court is asked to evaluate claims based on intelligence reports without being able to assess the reliability of the sources that are the basis of the reports.\footnote{See Mahjoub v. Canada ¶ 54, [2005] F.C. 156 (Can.) (refusing to accept Immigration Ministry finding that Mahjoub posed a threat to Canada without evidence Minister had independently reviewed intelligence information, including source material); Parhat v. Gates, 532 U.S. 834, 846-47 (D.C. Cir. 2008) (holding government evidence could not be assessed without consideration of the reliability of the sources that are the basis for that evidence).} States may be unable or unwilling to subject intelligence sources to even \textit{ex parte, in camera} examination by the courts given the risk of compromising those sources. They may be more willing to allow access to intelligence sources in an administrative hearing within the Executive Branch. But questions would exist as to whether an executive branch official would qualify as a neutral decision maker, capable of setting aside bias.\footnote{See Declaration of Stephen Abraham, Lt. Col. U.S. Army Reserve, in Al-Odah v. United States, No. 06-1196 (D.C. Cir. 2007) (describing bias in favor of decisions to detain in U.S. military Combatant Status Review Tribunals).}

Second, should the transferee play a substantial role in the review process? The Committee Against Torture have been critical of the United States for not allowing alien terrorism suspects to play a greater role in the determination of whether or not there is a substantial risk of mistreatment after transfer.\footnote{See U.N. Comm. Against Torture, \textit{Conclusions and Recommendations of the Committee}} It may be still more difficult to assess threat information without...
giving an alien the opportunity to respond to that information. The difficulty lies in sharing classified information with an alien who may pose a security threat to the State. An important advantage for States in pursuing expulsion over criminal trial to deal with dangerous aliens is the absence of confrontation rights in expulsion proceedings. The closer the procedures required in the expulsion process approximate criminal procedural rights, the less likely expulsion will be protect a State’s population from dangerous aliens. Ex parte, in camera hearings, or allowing cleared counsel for the alien to review classified information, may be a useful middle ground approach to reduce uncertainty and bias in transfer determinations, while preserving secrecy of classified information.

Third, if courts are to be involved in reviewing the factual predicates for balancing, should they be involved in reviewing the balancing determination itself? Uncertainty regarding the factors the State needs to consider in conducting the proportionality review strongly suggests the need for external review procedures. But the actual balance (i.e., whether a particular level of risk averted through refoulement justifies transfer at a given level of risk of mistreatment) might be viewed as a discretionary decision best left in the hands of the executive once the factual predicates for balancing have been verified.

The experience of the Canadian courts after Suresh suggests that courts may struggle in making what is essentially a policy determination about how to weigh competing rights without guidance from the political branches. In Jaballah the lower court held that an individual who had not committed actual violence could not be deported to face mistreatment. But the court created this standard itself, in the absence of guidance from the elected branches, or the Canadian Supreme Court, on which exceptional circumstances would justify such transfers. If courts are expected to review balancing determinations, they will need better guidance from State political branches and/or international human rights law on the bounds within which discretion is cabined.

Ultimately, bias and uncertainty, while subject to mitigation, are a reality in any system which grants States discretion to use expulsion to protect its public, including the balancing approach suggested here. Given that reality, as well as the unwillingness of States to comply fully with a rule that does not protect State security interests, managing bias and uncertainty may be the best the law can do.

V. Conclusion

Against Torture, ¶ 20, U.N. Doc. No. CAT/C/USA/CO/2 (July 25, 2006) (criticizing lack of involvement of those rendered in determination of whether they were at a substantial risk of being mistreated).

212 In re Jaballah, [2006] F.C. at ¶ 81-82.
Identifying the human rights competition at issue in non-refoulement is important for at least three reasons. First, too much of the post 9/11 dialogue among human rights bodies, States, and scholars has lingered in the void of security-rights debates. These debates are ultimately unfulfilling because neither side has anything of value to offer the other. Human rights actors dismiss State security concerns as an impediment to the important task of protecting rights. States view human rights advocates and bodies as naïve, unable to appreciate the imperative of protecting the population. The developing concept of duty to protect recognizes that protecting the public is not just an important security imperative for States, but it also a human rights obligation. This fact has yet to fully permeate the thinking of human rights actors. Once it does so, these institutions may alter their calculus on important security-rights debates, including the debate over preventive detention. At minimum, it will allow human rights bodies and groups to address the actual rights competition driving State action, thereby increasing the impact of monitoring activities.

Second, the act of identifying the separate State duties necessary for fulfillment of a human right can lead to better enforcement of that right. One of the most important insights of Shue’s duty typology is that it is almost never preferable to have protection duties do all the work because doing so almost certainly results in rights violations. But this is exactly what is happening with the torture norm, as the onus for torture prevention is placed on the sending State as opposed to the receiving State. It is telling that the largest number of communications heard by the Committee Against Torture are against Sweden, a State with no history of torture, alleging violations of non-refoulement obligations.

While non-refoulement should play an important role in advancing the prohibition on torture, it should not play the only role. Human rights bodies and groups need to increase efforts to combat torture in States where the practice actually occurs if the right to be free of torture is to be fully effectuated. For example, human rights groups would be well served to work on improving diplomatic assurances practice in order to place an appropriate burden on the receiving State, which as the actual torturer bears the greatest culpability for the wrongdoing.

Third, human rights law works best when the law recognizes State interests and then seeks to cabin those interests within reasonable bounds. Human rights law is filled with balancing tests precisely for this reason. The concept of margin of appreciation allows States to decide how to trade off

213 See Shue, supra note 11, at 61 (explaining that complete reliance on either avoidance or protection duties is unrealistic, and “almost certainly not desirable”).

214 Nowak, supra note 52.
rights in the first instance. Human rights bodies and groups play a valuable role in pressuring States to keep their balance within bounds prescribed by international law. Applying this model to non-refoulement increases the likelihood of State adherence to the human rights rule, and improves the quality of monitoring activities of human rights groups. But granting States greater legal discretion on transfer decisions must come with realistic steps to correct for the threat of bias against aliens. Human rights law can consider placing a thumb on the scale in favor of the rights of aliens, as well as increasing the procedural requirements associated with expulsion, while being mindful that requiring too many procedures risks once again pushing States outside the human rights framework to address security concerns.