

Articles

Expulsion to Face Torture? *Non-refoulement* in International Law

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Abstract

Non-refoulement is a principle of international law that precludes states from returning a person to a place where he or she might be tortured or face persecution. The principle, codified in Article 33 of the 1951 Refugee Convention, is subject to a number of exceptions. This article examines the status of *non-refoulement* in international law in respect to three key areas: refugee law, human rights law and international customary law. The findings suggest that while a prohibition on *refoulement* is part of international human rights law and international customary law, the evidence that *non-refoulement* has acquired the status of a *jus cogens* norm is less than convincing.

1. Introduction

The 1951 Convention Relating to the Status of Refugees states:

No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion¹

Non-refoulement has been a guiding principle of refugee law since its appearance in the 1933 Convention relating to the International Status of Refugees.² *Non-refoulement* has also emerged in complementary areas of international law, in human rights treaties and in international customary law. In essence, *non-refoulement* provides that a government should not eject a refugee from its state-territory or borders and '*refouler*' that person to a place (country of origin or otherwise) where he or she might be exposed to torture or experience persecution.³ The prohibition on *refoulement*

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¹ Convention Relating to the Status of Refugees, (1954) 189 UNTS 137, Article 33(1).

² (1935) 159 LNTS 3663, Article 3.

³ For further information on issues relating to the definition of 'persecution' in international law, see, J. Pirjola, 'Shadows in Paradise – Exploring *Non-refoulement* as an Open Concept' 19 *IJRL* 639-60 (2007).

is related to the absolute prohibition on torture,⁴ however, where the anticipated mistreatment falls short of particularly egregious acts of torture, debate reigns as to the degree of protection offered by various human rights instruments. Several commentators attest the *jus cogens* status of *non-refoulement* as a corollary of the peremptory status that the prohibition on torture has acquired.⁵ The principle of *jus cogens* was codified in Article 53 of the Vienna Convention on the Law of Treaties (1969), which states, 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'.⁶ Christos Rozakis's definition of *jus cogens* will underpin the conceptual framework of this essay, 'There are general rules of law which exclude the conclusion of particular contractual arrangements conflicting with them by actually prohibiting derogation from their content and by threatening with invalidity any attempt of violation of that prohibition. These rules are usually called *jus cogens*'.⁷

In order to investigate the status of *non-refoulement*, this article will examine *non-refoulement* in three key areas: firstly, under international refugee law; an analysis of its positioning in international human rights law will follow; and the final section of this paper will look at *non-refoulement* in international customary law.

2. *Non-refoulement* in refugee law

The Convention Relating to the Status of Refugees has been ratified by almost 150 states and remains one of the most widely accepted treaties in refugee law.⁸ Article 42(1) of the Refugee Convention confirms that the provision relating to *non-refoulement*, contained in Article 33, is non-derogable. Although this would seem to advance an argument that supports the *jus cogens* status of *non-refoulement*, there is a criminality exception evident in Article 33(2):

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.⁹

⁴ 'The idea that people must not be deported or extradited to countries in which they face a serious risk of torture has been seen as implicit in the prohibition of torture', S. Marks and A. Clapham, *International Human Rights Lexicon* (Oxford; New York 2005), 373.

⁵ J. Allain, 'The *Jus Cogens* Nature of *Non-refoulement*' 13 *IJRL* 533-58 (2001).

⁶ Vienna Convention on the Law of Treaties, 23 May 1969, entered into force on 27 Jan. 1980, UN Treaty Series, vol. 1155, 331.

⁷ C. L. Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (Amsterdam [etc.]; Oxford 1976), 2.

⁸ <<http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>>, last accessed 29 Apr. 2008.

⁹ Convention Relating to the Status of Refugees, (1954) 189 UNTS 137, Article 33(2), hereinafter referred to as the Refugee Convention.

James Hathaway and Colin Harvey identify two main tests that are applicable in assessing whether the asylum seeker or refugee is a danger to the national security of the asylum state.¹⁰ The first test requires a high level of proof for the determination that the person is a danger to the security of the asylum state, in that there must be 'reasonable grounds' for this conclusion. The asylum state must demonstrate that the refugee's continued presence in the state constitutes a threat to the security of the state. Secondly, the refugee may be excluded if, 'having been convicted by a final judgment of a particularly serious crime', he or she constitutes a danger to the community in the asylum-state. In the *travaux préparatoires* of the Refugee Convention, the drafters stressed that only serious crimes, 'for example, rape, homicide, armed robbery, and arson', are considered as leading to exemptions in *non-refoulement* protection.¹¹ Additionally, the criminality clause can only be utilised where the refugee has been 'convicted by the final judgment', that is, where all other legal remedies have been exhausted. Furthermore, Hathaway and Harvey note that in the 33(1) exception a connection must be made between the nature of the conviction and the real risk posed by the person's presence in the state, otherwise the exception cannot come into effect. This is not the only exception to the *non-refoulement* principle that can be found in the Refugee Convention. Article 1(F) allows for preadmission exclusions in certain circumstances. Whereas 33(2) considers the risk of the continued presence of the refugee to the host state, in drafting 1(F), the convention writers were primarily concerned with excluding those deemed 'unworthy' of benefiting from Convention refugee status.

2.1 Article 1(F) exclusions

The provisions of the 1951 Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.¹²

Hathaway and Harvey consider that 'this clause requires governments to deny refugee status to any person reasonably regarded as either an

¹⁰ J. C. Hathaway and C. J. Harvey, 'Framing Refugee Protection in the New World Disorder' (2001) 34 *Cornell Journal of International Law* 290.

¹¹ *Ibid.*, 292.

¹² Convention Relating to the Status of Refugees, 189 UNTS 137, Article 1(F).

international criminal or a fugitive from domestic criminal justice, the person's fear of persecution notwithstanding'.¹³ Drafters of the Refugee Convention were concerned that criminals or fugitives from justice might abuse the Convention. The exclusions of Article 1(F) were also in line with Article 14(2) of the Universal Declaration of Human Rights, which affirmed that the right to asylum 'may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations'.¹⁴ And while exclusion on a low evidentiary threshold may seem harsh, the stipulated exclusions are extremely limited and were meant to target only those who had committed an 'indisputably wrong act', extraditable criminals, or in 1(F)(a) those who are believed to have committed, 'a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes'.¹⁵ Although the definition of crimes against humanity has changed in recent years, to include murder, rape, torture and other degrading acts, this exception will affect a relatively small subset of asylum seekers because for a crime to be considered a 'crime against humanity' it would have to be 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of attack'.¹⁶ Most asylum seekers, even if they have engaged in violence prior to seeking asylum in another state, will not meet the high threshold the definition of 'crimes against humanity' requires for this exclusion to apply. However, it might be that the asylum seeker, who meets the asylum state's definition of an extraditable criminal, is excluded under the common-law criminality clause of 1(F)(b). This preadmission exemption considers crimes committed prior to the asylum seeker's arrival at the asylum state (either in the country of origin or in a transit state), and according to the double criminality clause of extradition law, dictates that the offence must also be a crime in the asylum state. Moreover, the crime must be prosecutable without committing double-jeopardy; if the asylum seeker has already undergone the due process of law, and has, for example, served a prison sentence for a particular crime, Convention protections cannot be withheld under 1(F)(b). Obviously crimes would have to reach a standard of gravity that corresponds with standards of extradition law. The final exclusion is in 1(F)(c): 'Acts that are Contrary to the Principles and Purposes of the United Nations'.¹⁷ The traditional view held that this exclusion pertained to persons in

¹³ Hathaway and Harvey, above n. 10, 259.

¹⁴ G.A. Res. 217A, art. 14(2), UN doc. A/810, at 74 (1948).

¹⁵ Hathaway and Harvey, above n. 10, 263.

¹⁶ Rome Statute of the International Criminal Court, UN GAOR, 53rd Sess., art 7.1, UN doc. A/CONF. 183/9, at 6-9 (1998).

¹⁷ Convention Relating to the Status of Refugees, above n. 12, Article 1(F)(c).

positions of power who were entrusted with implementing UN principles and standards. Nevertheless, a shift has occurred with the advent of modern terrorism, which Hathaway and Harvey regard as repugnant to the original conception of this provision. Section 4 below, 'Terrorism & *Non-refoulement*', will consider how Article 1(F)(c) has been reframed in light of the 1997 UN General Assembly Resolution on Measures to Eliminate International Terrorism.

The Refugee Convention exclusions discussed above suggest that *non-refoulement* has not acquired peremptory status in refugee law.¹⁸ 'The Refugee Convention is a supple instrument, capable of meeting the challenges of the new world disorder',¹⁹ yet it is clearly at odds with developments within the area of refugee protection, such as the 1984 Cartagena Declaration which attests the *jus cogens* nature of *non-refoulement*. William Schabas argues that 'the human rights regime governing *non-refoulement* has largely taken over that of the Refugee Convention, which is gradually becoming virtually superfluous'.²⁰ Whatever the relevance of the 1951 Refugee Convention in international law today, discriminating against persons on the basis of past conduct and denying such persons protection from ill-treatment is clearly abhorrent to organisations entrusted with a human rights mandate. The UNHCR Executive Committee, in its conclusion on international protection, supported the case for the universal application of *non-refoulement*, not only for successful asylum seekers.²¹ To get a better understanding of *non-refoulement* it is necessary to examine how the principle of *non-refoulement* is incorporated into international human rights instruments and mechanisms.

3. International human rights law

Unlike the *non-refoulement* protections of Article 33 of the Refugee Convention, Article 3 of the European Convention on Human Rights, Article 3 of the Convention Against Torture and Article 7 of the International Covenant on Civil and Political Rights, are not subject to exception. This section will assess *non-refoulement* provisions safeguarded in these instruments and, where relevant, will compare these provisions with corresponding elements of the Refugee Convention.²²

¹⁸ Although the 1984 Cartagena Declaration states: 'To reiterate the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*'.

¹⁹ Hathaway and Harvey, above n. 10, 262.

²⁰ W. A. Schabas, *Non-refoulement, Human Rights and International Cooperation in Counter-terrorism* (Liechtenstein 2006), 4.

²¹ EXCOM General Conclusion on International Protection, No. 81 (XLVIII) 1997.

²² Other instruments, which also have *non-refoulement* provisions, include, the American Convention on Human Rights, (1979) 1144 UNTS 123, OASTS 36, Article 22.8 and the International Convention for the Protection of All Persons from Enforced Disappearance, UN doc. A/HRC/RES/2006/1, Article 17.

3.1 The European Convention for the Protection of Human Rights and Fundamental Freedoms

The European Convention for the Protection of Human Rights and Fundamental Freedoms, drafted by the Council of Europe Member States, came into force in 1950.²³ The European Convention has been ratified by forty-seven states.²⁴ The European Court of Human Rights, the judicial mechanism of the Convention, is monitored by the Committee of Ministers. Although the Court only presides over the limited regional spread represented by the Council of Europe states, its judgments can influence other jurisdictions. European Court judgments are examined critically in the next section, particularly where reference is made to the normative quality of the principle of *non-refoulement*.

There is growing consensus in the area of human rights that Article 3 of the European Convention offers individuals more protection from *refoulement* than Article 33 of the Refugee Convention.²⁵ Article 3 states, 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.²⁶ Not only does the absence of exceptions in this Article contrast with Article 33 of the Refugee Convention, the protections inherent in Article 3 apply to everyone, not simply to those who meet the Refugee Convention definition of a 'refugee'. Although the standard of proof required by the European Court for a *non-refoulement* claim to be admissible is relatively high, the applicant does not have to demonstrate a nexus between the risk of torture and one of the five grounds for refugee protection of the Refugee Convention. In 1965, the Parliamentary Assembly of the Council of Europe affirmed that Article 3, 'by prohibiting inhuman treatment, binds contracting parties not to return refugees to a country where their life or freedom would be threatened'.²⁷ The first inter-state complaint to come before the European Court in 1978 (*Ireland v. the United Kingdom*) emphasised the unconditional character of Article 3 when the Court stated, 'the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct'.²⁸ The Court elaborated, 'Article 3 makes no provision for exception ... there can be no derogation

²³ European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the European Convention), Rome, 4 Nov. 1950.

²⁴ See the Council of Europe website: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=10&DF=4/29/2008&CL=ENG>, last accessed on 29 Apr. 2008.

²⁵ H. Lambert, 'Protection Against *Refoulement* from Europe: Human Rights Law Comes to the Rescue' (1999) 48 *ICLQ* 515-44.

²⁶ The European Convention, above n. 23, Art. 3.

²⁷ Recommendation 434 'Concerning the granting of the right of asylum to European refugees' *Assembly Debate* on 1st Oct. 1965 (15th Sitting) (see Doc. 1986, report of the Committee on Population and Refugees).

²⁸ *Ireland v. United Kingdom* (1978) ECHR, Series A, No. 25.

therefrom even in the event of a public emergency threatening the life of the nation'.²⁹

A subsequent case, which involved the extradition of a German national (*Soering v. the United Kingdom*) to Virginia in the United States, a state that retains the death penalty for the punishment of capital offences, reiterated the peremptory nature of Article 3. The European Court of Human Rights held that transferring Soering to a territory where he risked experiencing cruel and inhuman treatment clearly in violation of Article 3 would be 'contrary to the spirit and intention' of that Article.³⁰ In the 1996 *Chahal* judgment, the European Court ruled that the non-derogability of Article 3 was absolute, even in times of national emergency.³¹ In that case, the European Court concluded that Article 3 of the Convention has a wider scope than Article 33 of the Refugee Convention. It could be said that although not universally applicable, the European Convention offers more protections from *refoulement* than the Convention Against Torture, as it also regards *refoulement* to face cruel, inhuman or degrading treatment in violation of Article 3.

3.2 The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The *jus cogens* status of the prohibition on torture is widely accepted; it is inconceivable that a state would openly sanction or draft laws that allowed for individuals to be tortured by state actors or its officials.³² The peremptory status of the prohibition on torture is best demonstrated in the 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment,³³ which entered into force in 1987 and has 145 state parties.³⁴ Similar to the European Convention, the

²⁹ *Ibid.*, para. 65.

³⁰ *Soering v. United Kingdom*, 7 July 1989, Series A, No. 161, 11 EHRR 439, para. 88.

³¹ *Chahal v. United Kingdom*, 15 Nov. 1996, Reports 1996-V, para. 80; see also, *Saadi v. Italy*, 37201/06, S. Ct. H.R. (Grand Chamber), 28 Feb. 2008.

³² Cases that have attested the *jus cogens* nature of the prohibition on torture: *Prosecutor v. Anto Furundžija*, IT-95-17/1-T, Judgment of the International Criminal Tribunal for the former Yugoslavia, 10 Dec. 1998, para. 153 and Judgment (1999) - *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*; *Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* (On Appeal from a Divisional Court of the Queen's Bench Division). Although it should be noted that in *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia* [2004] EWCA Civ 1394, [2005] 2 WLR 808, the House of Lords granted sovereign immunity to Saudi Arabia, rather than find that the Torture Convention granted universal jurisdiction, on the grounds that there was no evidence that states had agreed to pursue violations of peremptory norms.

³³ <<http://www2.ohchr.org/english/bodies/ratification/9.htm>>, last accessed 29 Apr. 2008, (hereinafter referred to as the Convention Against Torture).

³⁴ See also, the UNGA Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by consensus by the UNGA in 1975, which states that 'torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment' and declares that such acts are 'a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights' United Nations, *General Assembly Resolution* No. 3452, 30 UN GAOR Supp. (No. 34) at 91, UN doc. A/10034 (1975).

Convention Against Torture's *non-refoulement* protections can be applied to anyone, regardless of his or her past activities. The Convention Against Torture is sometimes criticized for failing to include the risk of cruel, inhuman or degrading treatment as prohibiting *refoulement*, and only makes reference to the instance of torture, thus falling short of European Convention protections:

No State Party shall expel, return (*'refouler'*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.³⁵

In General Comment 2 issued by the Committee Against Torture in November 2007, the Committee stressed that because it can be extremely difficult to identify the threshold between ill-treatment and torture, it considers 'the prohibition of ill-treatment to be likewise non-derogable under the Convention and its prevention to be an effective and non-derogable measure'.³⁶ However, in this General Comment the Committee fails to expand the non-derogability conception of ill-treatment by linking it to the principle of *non-refoulement*, as the General Comment refers to territories within the *de jure* or *de facto* control of the State.

The Committee Against Torture, which can examine individual claims, extends protections to prohibit the expulsion of a person to any state from which he or she may subsequently be expelled to a third state where he or she may face torture.³⁷ The burden of proof on the applicant is less than under the European Convention or the International Convention on Civil and Political Rights; the applicant must show that the risk goes 'beyond mere theory or suspicion', yet does not have to 'meet the test of being highly probable'.³⁸ Article 3(2) also assists the person being threatened with expulsion, insofar as it places an onus on the State to investigate the human rights situation in the offending State:

For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.³⁹

³⁵ Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, 189 UNTS 150, Art. 3.

³⁶ General Comment 2, CAT/C/GC/2/CRP.1/Rev.4, 23 Nov. 2007, para. 3.

³⁷ Marks and Clapham, above n. 4.

³⁸ Committee Against Torture, General Comment I (Implementation to art. 3 of the Convention in the context of art. 22: art. 3), 21 Nov. 1997, para. 2. See also, The Committee Against Torture's Conclusion in the *Mutombo* case: 'in the present circumstances, his return to Zaire would have the foreseeable and necessary consequence of exposing him to a real risk of being detained and tortured' 'The danger of torture involves the foreseeable and necessary consequence that a real risk will occur that the person in question will be subjected to torture as a risk of deportation'. *Mutombo v. Switzerland*, Communication No. 13/1993, 27 Apr. 1994.

³⁹ Convention Against Torture, above n. 35, Art 3.2.

The high evidentiary burden placed on asylum-seekers under the Refugee Convention process is clearly at odds with the rationale espoused by the Committee Against Torture, which has made statements to the effect that inconsistencies in the accounts of victims of torture are to be expected and that this should not undermine the overall veracity of their claim.⁴⁰

While the Convention Against Torture offers those who are at risk of experiencing torture upon *refoulement* another avenue or opportunity to avail of treaty protections, it is limited, as the potential danger must emanate from state actors.⁴¹ Article 16 refers to a prohibition on cruel, inhuman and degrading treatment, in the context of *non-refoulement*, yet Article 3 only offers assistance to individuals who are at risk of particularly egregious acts of torture. In light of General Comment 2 mentioned above, there may be a possibility that the Committee Against Torture will deal with complaints from persons at risk 'of being subjected to cruel, inhuman or degrading treatment or punishment in the event of *refoulement*'.⁴² However, at present, 'If there is a danger of a breach of rights other than torture, or if the danger of torture originates from a body other than the State, an individual could be better off applying to the Human Rights Committee'.⁴³

3.3 The International Covenant on Civil and Political Rights

Article 7 of the International Covenant on Civil and Political Rights reads:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.⁴⁴

The scope of Article 7 is wider than that of Article 3 of the Convention Against Torture, as Article 7 specifically incorporates cruel, inhuman and degrading treatment into its non-derogable provisions. Although the standard of proof expected by the Human Rights Committee is particularly high, there are benefits from making an application to the Human Rights Committee, which can consider additional rights that the Committee Against Torture cannot, such as the right to family life, the right to freedom of movement and the right to an effective legal remedy. In cases where the person involved is being removed to face the death

⁴⁰ B. Gorlick, 'The Convention and the Committee Against Torture: A Complementary Protection Regime for Refugees', 11 *IJRL* 484 (1999).

⁴¹ C. Ingelse, *The UN Committee Against Torture: An Assessment* (The Hague/London/Boston 2001), 307.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ International Covenant on Civil and Political Rights, (1976) 999 UNTS 171, Art. 13 (hereinafter referred to as the ICCPR).

penalty, the Human Rights Committee may make reference to the Second Optional Protocol of the ICCPR, which explicitly outlaws the death penalty.⁴⁵ In the case of *Kindler v. Canada*, the Human Rights Committee suggested that 'if a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant'.⁴⁶ The particular stance of the Human Rights Committee, as a mechanism of norm creation in international law will be surveyed in Section 5, which examines *non-refoulement* in international customary law. For the moment, it is sufficient to say that the Human Rights Committee, in its interpretation of Article 7, accepts the principle of *non-refoulement* and rejects the possibility that state parties could '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*'.⁴⁷

4. Terrorism & *Non-refoulement*

The foregoing analysis of human rights instruments that furnish the individual with safeguards from the threat of *refoulement*, observed that specific provisions prohibiting torture and cruel, inhuman and degrading treatment or punishment, are not subject to limitation or reservation. In the European Convention on Human Rights, the Convention Against Torture and the International Covenant on Civil and Political Rights, a balancing act that weighs up the risk of torture against the potential threat to national security is not required; these principles are absolute and apply to everyone without discrimination. The UN Committee Against Torture is of the opinion that the *non-refoulement* principle, in the case of a risk of torture, applies even to those associated with terrorism. However, there is countervailing discourse in the international community, which muddies the waters slightly and makes it difficult to conclude with authority that the principle of *non-refoulement* has acquired peremptory status.

The 1997 UN General Assembly Resolution on Measures to Eliminate International Terrorism states that acts of terrorism are contrary to the principles and standards of the United Nations.⁴⁸ By using the language of the Refugee Convention's Article 1(F)(c) exception, the General Assembly attempted to redefine those deemed unworthy of refugee status. However, several commentators, including Hathaway and Harvey, have criticised

⁴⁵ Ingelse, above n. 41, 310.

⁴⁶ *Kindler v. Canada*, Communication No.470/1991, at para. 13.2.

⁴⁷ General Comment 20, HRI/GEN/1/Rev.1 (1994), 30, s. 9.

⁴⁸ United Nations General Assembly Resolution 52-165, Measures to Eliminate International Terrorism, 15 Dec. 1997.

this approach. The validity of the General Assembly actually changing the parameters of the Refugee Convention in a non-binding declaration has been questioned. Furthermore, in the absence of a clear definition of terrorism that is accepted by the community of states in the UN system, it remains to be seen as to who exactly are these 'terrorists' whose access to UN treaty protections is curtailed by such declarations.

4.1 A test of reasonableness for terrorists?

Although the Committee Against Torture declared that the principle of *non-refoulement* applies equally to 'terrorists', several domestic judgments have opened the door to possible exceptions. In the *Chahal* and *Saadi* cases, the European Court would not even entertain the idea of a balancing act, as the court ruled that Article 3 is absolute and is not subject to this type of approach. Hathaway and Harvey also reject the idea of a balancing approach, but for very different reasons. For them, the threat to national security is fundamentally different to the risk of torture to an individual. For these authors, national security takes precedent, although it seems that they neglect to put a value on the principle of *refoulement*. However, this opinion is supported by case law, specifically the judgment of the Canadian Supreme Court in the *Suresh* case, whereby the Court accepted that *refoulement* could occur in exceptional circumstances if a substantial risk to the national security of the state was proven.⁴⁹ The Court failed to outline exactly what was so exceptional in *Suresh* that deportation to face torture would be considered.⁵⁰ The following discussion of *non-refoulement* in international customary law will examine state practise and declarations that seemingly contradict the absolute nature and quality of the prohibition of *refoulement* in international law crystallised in human rights treaties.

5. International customary law

The principle of *non-refoulement* is also widely considered to be international customary law, which means that all states, whether or not they are a party to the human rights and/or refugee conventions incorporating the prohibition against *refoulement*, are obliged not to return or extradite any person to a country where the life or safety of that person would be seriously endangered.⁵¹

⁴⁹ *Manickavasagam Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1. File No.: 27790.

⁵⁰ Other cases that involve 'terrorists' and *non-refoulement*: *Secretary of State for the Home Department v. Rehman*, [2001] 3 WLR 877, *Ahani v. Minister of Citizenship and Immigration*, [2002] OJ No. 81 (CA); *Chahal v. the United Kingdom*, (15 Nov 1996), European Court of Human Rights, Appl.no. 22414/93. See also, *Ahmed v. Austria*, (17 Dec. 1996), Appl.no. 25964/94.

⁵¹ 'Extraditions, Expulsions, Deportations' in, *Anti-terrorism Measures, Security and Human Rights - Developments in Europe, Central Asia and North America in the Aftermath of September 11* (The International Helsinki Federation, 2003).

In 1982, prior to the adoption of the Convention Against Torture, the international community of states reached consensus that the prohibition on torture constituted a rule of customary international law.⁵² It could be argued that *non-refoulement* is a fundamental component of the customary prohibition on torture and cruel, inhuman and degrading treatment or punishment. With 90 per cent of the world's sovereign states party to a treaty which prohibits *refoulement* in some shape or form, does this sufficiently establish the normative status of *non-refoulement* in international law? The incorporation of this principle into key international instruments is also testament to consistent practice and a strong *opinio juris* which contributes to the creation of a customary norm. The following discussion will attempt to assess the customary normative status that the principle of *non-refoulement* has acquired, by looking beyond European and UN based human rights treaties, and examining non-binding soft instruments and declarations issued by authoritative bodies who interpret evolving international customary law.

5.1 The Human Rights Committee

One of the key functions of the Human Rights Committee is to transmit 'such general comments as it may consider appropriate' to state parties signed up to the International Covenant on Civil and Political Rights (ICCPR).⁵³ In General Comment 20, the Human Rights Committee noted that extradition cases, where the extraditee risks facing the death penalty in the requesting state in circumstances that might involve torture or ill-treatment, come under the purview of Article 7 of the ICCPR.⁵⁴ The Human Rights Committee stated that 'the aim of the provisions in Article 7 of the ICCPR is to protect the dignity and the physical and mental integrity of the individual'.⁵⁵ The Human Rights Committee was particularly concerned with the effects of extradition or expulsion, if transferring a person to another territory would expose him or her to torture or other forms of cruel, inhuman or degrading treatment or punishment. The interpretation of the ICCPR in General Comment 20 is a

⁵² The customary status of the prohibition of cruel, inhuman or degrading treatment or punishment is apparent in the UN General Assembly's Res 39/118 14 Dec 1984, which refers to the 'existing prohibition under international law of every form of cruel, inhuman or degrading treatment or punishment'. Lauterpacht and Bethlehem, below n. 70, suggest that this statement indicates that the prohibition on cruel, inhuman and degrading treatment was part of the existing 'corpus of customary international law'.

⁵³ H. Steiner and P. Alston, *International Human Rights in Context* (Oxford/New York, 2nd edn., 2000), 731.

⁵⁴ *Ng v. Canada* (No. 469/1991), UN doc. CCPR/C/49/D/469/1991, UN doc. A/49/40, Vol. II, *Cox v. Canada*, Communication No.539/1993; *G.T. v. Australia* (No. 706/1996), CCPR/C/61/D/706/1996.

⁵⁵ Human Rights Committee, General Comment No. 20 (1992), HRI/HEN/1/Rev.1, 28 July 1994, at para. 2.

clear signal to states who attempt to ‘*refoule*’ persons that they must abide by the provisions, both explicit and inferred, of the ICCPR, and protect detained individuals and those subject to extradition from torture, and cruel, inhuman or degrading treatment or punishment. In 1994, the Human Rights Committee issued General Comment 24, which underlined the customary status of the prohibition on torture and cruel, inhuman or degrading treatment or punishment, in the context of the ICCPR. The Human Rights Committee stated that certain provisions of the ICCPR ‘that represent customary international law may not be the subject of reservations’.⁵⁶ Additionally, the Human Rights Committee stated that ‘accordingly, a State may not reserve the right to engage in slavery, to torture, or to subject persons to cruel, inhuman or degrading treatment or punishment’.⁵⁷ Of course, that both components of the prohibition (torture and cruel, inhuman or degrading treatment or punishment) are included in this comment is significant, and while, in the *Ireland v. the United Kingdom* case, the European Court of Human Rights determined that the ill-treatment could be classified as cruel, inhuman and degrading treatment or punishment, as opposed to torture on the other end of the spectrum of mistreatment, there is no doubt as to the equal legal standing of torture and cruel, inhuman or degrading treatment or punishment.

5.2 UN General Assembly Resolutions/International Declarations

UN General Assembly resolutions have consistently defended the principle of *non-refoulement*. The acceptance of the principle by the General Assembly, alongside the Human Rights Committee, as well as in various UNHCR Executive Committee Conclusions, supports its essential normative quality. Article 3 of the 1967 United Nations Declaration on Territorial Asylum significantly prohibits *refoulement* (although with exceptions).⁵⁸ In General Assembly Resolution 37/95, issued on 18 December 1982:

The Assembly reaffirmed the fundamental nature of the High Commissioner’s function to provide international protection and the need for Governments to

⁵⁶ Human Rights Committee, General Comment No. 24 (52) (1994), CCPR/C/21/Rev.1/Add.6, 2 Nov. 1994, at para. 8.

⁵⁷ *Ibid.*

⁵⁸ 1967 United Nations Declaration on Territorial Asylum, Article 3:

- 1 No person referred to in Article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.
- 2 Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.
- 3 Should a State decide in any case that exception to the principle stated in paragraph I of this Article would be justified, it shall consider the possibility of granting to the persons concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State.

co-operate fully with him to facilitate the effective exercise of this essential function, in particular by acceding to and fully implementing the relevant international and regional instruments and scrupulously observing the principles of asylum and *non-refoulement*.⁵⁹

Subsequently, in Resolution 48/116, the General Assembly called on 'all States to uphold asylum as an indispensable instrument for the international protection of refugees, and to respect scrupulously the fundamental principle of *non-refoulement*'.⁶⁰

In 2001 The International Institute of Humanitarian Law, along with the United Nations High Commissioner for Refugees, issued the Sanremo Declaration on the Principle of *Non-refoulement* on the occasion of the 50th anniversary of the 1951 Refugee Convention. Due to the *non-refoulement* provision of the Refugee Convention, the authors state that 'the principle of *non-refoulement* of refugees can now be deemed as an integral part of customary international law'.⁶¹ The panel of experts account for exceptions that occur in practise by saying that 'wherever *refoulement* occurred, it did so on the grounds that the person concerned was not a refugee or that a legitimate exception applied'.⁶² The experts refer to the *Nicaragua* case, which found that for a rule to emerge in customary international law, there need not be perfect compliance to that rule from all member states of the international community.⁶³ If, for example, an exception occurs, but is accompanied by a justification or explanation from the rule-breaking country, this is perceived as reinforcing the existence of the rule, rather than the denial of the existence of the rule. The Sanremo Declaration, while taking account of the conflicts and doubts that arise in the application of *non-refoulement* in international law, asserts that the 'essence of the principle', as encapsulated in Article 33(1) of the Refugee Convention, 'can be regarded at present as a reflection of general international law'.⁶⁴ While at first this argumentative strategy seemed counterintuitive, that contrary state practise actually confirms the normative status of a specific rule, upon further examination there appears to be some substance to this argument, 'the fact that States have found it necessary to provide such explanations or justifications can reasonably be regarded as an implicit

⁵⁹ UNGA Res 37/95, 18 Dec. 1982, Similar wording was used in resolutions adopted between the years 1983-1988.

⁶⁰ UNGA Res 48/116, 21 Dec. 1993.

⁶¹ Sanremo Declaration on the Principle of *Non-refoulement* (2001): The International Institute of Humanitarian Law, along with the United Nations High Commissioner for Refugees, issued this statement on the occasion of the 50th anniversary of the 1951 Refugee Convention.

⁶² Ibid.

⁶³ Case Concerning Military and Paramilitary Activities In and Against Nicaragua (*Nicaragua v. United States of America*), Merits, ICJ, Judgment of 27 June 1986, [1986] ICJ Rep 14.

⁶⁴ Ibid.

confirmation of their acceptance of the principle'.⁶⁵ In an UNHCR report, which outlines UNHCR Refugee Policy and Practice, the authors make reference to this statement from the *Nicaragua* case:

In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.⁶⁶

That states have rarely totally disregarded their duty not to 'refoule' individuals to face torture is evidence of the normative practice of *non-refoulement*. Additionally, states not party to the Refugee Convention and the 1967 Protocol have 'confirmed to the UNHCR that they recognise and accept the principle of *non-refoulement*'.⁶⁷ A cynical response to the UNHCR policy document would question UN preoccupation with the principle of *non-refoulement* as defined by the Refugee Convention, which is obviously subject to significant exceptions and discriminations. Perhaps this is why some legal scholars push for its recognition as a principle of *jus cogens* – in order to liberate the principle of *non-refoulement* from its restrictive Refugee Convention definition.

5.3 UNHCR Executive Committee Conclusions

The Office of the United Nations High Commissioner for Refugees asserts that the principle of *non-refoulement* has become a rule in customary international law based on two sources of evidence, firstly, state practise with regard to *non-refoulement* and, secondly, states' *opinio juris* of the principle's character, 'The Office of the United Nations High Commissioner for Refugees is of the opinion that the principle of *non-refoulement* satisfies this requirement [the requirement to apply *inter alia* international custom as evidence of a general practise accepted as law] and constitutes a rule of international customary law'.⁶⁸ While the UNHCR Executive Committee's position on the normative character and the position of *non-refoulement* in international customary law are generally in line with prevailing legal doctrines, the 1982 Excom statement that the principle

⁶⁵ UNHCR Refugee Policy and Practice, 'The Principle of *Non-Refoulement* as a Norm of Customary International Law', document to be found at: <<http://www.unhcr.org/publ/RSDLEGAL/437b6db64.html>>.

⁶⁶ ICJ Reports 1986, 88, para. 186.

⁶⁷ Above n. 65.

⁶⁸ Ibid.

of *non-refoulement* was ‘progressively acquiring the character of a peremptory rule of international law’, is less than compelling. If *non-refoulement* had been progressively acquiring peremptory status in 1982, one would imagine that a quarter of a century later the principle would be preserved in the highest position of the normative hierarchy. However, in 2006, Schabas stated, ‘The arguments that *non-refoulement* is a *jus cogens* norm are not particularly convincing’.⁶⁹

5.4 *Non-refoulement: an opinion*

In a section of Elihu Lauterpacht and Daniel Bethlehem’s insightful article on *non-refoulement*, the authors investigate ‘the content of the principle of *non-refoulement* in customary international law’.⁷⁰ Their key concern was to identify elements that reflected ‘broad consensus across the international community’.⁷¹ For Lauterpacht and Bethlehem, the significance of the principle of *non-refoulement* in international customary law stems directly from *non-refoulement* as a component of the prohibition on torture:

No person shall be rejected, returned or expelled in any manner whatever where this would compel him or her to remain in or return to a territory where substantial grounds can be shown for believing that he or she would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment. This principle allows of no limitation or exception.⁷²

However, when examining *non-refoulement*’s independent status at customary law, Lauterpacht and Bethlehem state:

Overriding reasons of national security or public safety will permit a State to derogate from the principle [*non-refoulement*] expressed in paragraph 2 [*above*] in circumstances in which the threat of persecution does not equate to and would not be regarded as being on a par with a danger of torture or cruel, inhuman or degrading treatment or punishment and would not come within the scope of other non-derogable customary principles of human rights. The application of these exceptions is conditional on the strict compliance with principles of due process of law and the requirement that all reasonable steps must first be taken to secure the admission of the individual concerned to a safe third country.⁷³

Using the reasoning in the *Nicaragua* case, it might be that these exceptions actually demonstrate that the principle of *non-refoulement* is an integral

⁶⁹ Schabas, above n. 20, 7.

⁷⁰ E. Lauterpacht and D. Bethlehem, ‘The Scope and Content of the Principle of *Non-refoulement*: Opinion’ in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law*, (Cambridge 2003), 140.

⁷¹ *Ibid.*, 151.

⁷² For further information on Lauterpacht & Bethlehem’s conclusions with regard to *non-refoulement* as a component of the prohibition on torture and cruel, inhuman, degrading treatment or punishment see, above n. 70, 153–6.

⁷³ Lauterpacht and Bethlehem, above n. 70, 155.

aspect of international custom, particularly when states feel compelled to justify national security measures that might impinge on the prohibition on *refoulement*. Unfortunately Lauterpacht and Bethlehem do not elaborate on exactly what they mean by ‘circumstances in which the threat of persecution does not equate to and would not be regarded as being on a par with a danger of torture or cruel, inhuman or degrading treatment or punishment’ and we are set adrift to reach our own conclusions.

6. Conclusions

An examination of the valued opinions of legal scholars, along with careful consideration of international refugee law, various human rights treaties, UNHCR Conclusions, UN General Assembly Resolutions and other regional declarations, has firmly established the character of the principle of *non-refoulement* as a rule of customary international law. Unfortunately, the arguments put forth by the authors of the Sanremo Declaration and the UNHCR Executive Committee, that *non-refoulement* has acquired a *jus cogens* status, are less than convincing.⁷⁴ That this principle was elevated to a peremptory place would suggest that no exceptions would be considered under any circumstance. This, sadly, is not the case. The Refugee Convention will exclude from its protections persons that are deemed unsuitable or ‘unworthy’ of such refugee status through Article 1(F). There are also exclusions based on matters of national security, which allows states to enact a balancing test, the risk to national security against the risk of persecution upon return. This test of reasonableness hardly denotes an absolute prohibition in all circumstances, but degraded protections for certain persons contingent on their past conduct, which opens up the potential for state abuse and manipulation. Although the exceptions to *non-refoulement* contained in the 1967 UN Declaration on Territorial Asylum are of a different nature, they are nonetheless present. While Article 3 of the Convention Against Torture allows for no exceptions, its scope is limited to torture. The provisions of some other regional instruments, such as the European Convention, are more generous, but they lack universal applicability and can, at best, influence decisions made in other jurisdictions in an *ad hoc* and unpredictable manner.

Within the context of Rozakis’s definition of *jus cogens*, one must ask what would the consequences be if *non-refoulement* became a norm of *jus cogens*? Is a compelling argument that draws on its normative function in international customary law not sufficient? Could it be that its elevation to peremptory status would have the effect of contradicting elements of the

⁷⁴ See also, R. Bruin & K. Wouters, ‘Terrorism and the Non-derogability of *Non-refoulement*’ 15 *IJRL* 5 (2003), 24–6; Allain, above n. 5.

Refugee Convention, thus nullifying the Refugee Convention, as per Article 53 of the Vienna Convention on the Law of Treaties?

An assessment of the status of the principle of *non-refoulement* in international law must take account of how the political landscape has changed since the events of 11 September 2001. Restrictive measures, imposed during high security alerts, rescind individual rights and empower state security agencies. The purpose of the US state practice of 'rendition' or 'extraordinary rendition' is ostensibly to subject 'terrorists' to torture. European governments acquiesce to this practice not only by allowing US military personnel and the CIA to smuggle victims of 'rendition' through their airports and airspace, but also by saying nothing. If the principle of *non-refoulement* was absolute, would states be allowed to transport persons to face indeterminate prison sentences, where they experience ill-treatment and torture without access to due process or effective legal remedy? Notwithstanding the clear prohibition on *refoulement* that exists within human rights instruments, the existence of 'terrorist' exceptions to the prohibition on *refoulement*, either through the use of a balancing test in some jurisdictions or the current practice of 'rendition', alongside Refugee Convention exceptions, indicates that the goal of acquiring peremptory status for the principle of *non-refoulement* in international law has yet to be reached.