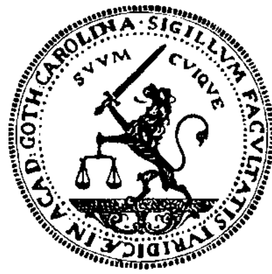

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Summary

Non-refoulement is a fundamental principle of international law, providing an individual the protection from being returned to a place where he or she risks persecution, torture or other ill treatment. The prohibition on refoulement is recognized in refugee law, human rights law and international customary law. Some would argue that the rule has even attained status as a peremptory norm. While there are exceptions to the right to *non-refoulement* in the1951 Refugee Convention, human rights law dictate that *non-refoulement* to face torture or ill treatment is an absolute and non-derogable right. In light of the modern threat of global terrorism, many states are applying a "balancing act" between the interest of the refugee and national security concerns. However, there is no international consensus on the permissibility of a balancing act weighing the interest of the refugee against the security interest of a state. While the UNHCR permits such an approach through the exceptions to *non-refoulement* in Article 33(2), it has been rejected by the HRC, the ECtHR and the ICCPR. There is a problematic collision between legal and political interests, as states keep challenging the absolute nature of *non-refoulement* to face torture or ill treatment in the name of counter-terrorism.

Sammanfattning

Non-refoulement är en grundläggande princip inom internationell flyktingrätt och mänskliga rättigheter. *Non-refoulement* innebär rätten för en individ att inte bli återsänd till en plats där han eller hon riskerar förföljelse, tortyr eller annan omänsklig eller förnedrande behandling. Förbudet mot refoulement är erkänt i flyktingrätt, mänskliga rättigheter och i internationell sedvanerätt. Somliga skulle argumentera att principen dessutom uppnått status som en *jus cogens* regel. 1951 års Flyktingkonvention medger att det finns undantag till principen, men internationella konventioner för mänskliga rättigheter dikterar att principen är absolut och att inga undantag kan göras. I ljuset av dagens globala terrorhot använder flera stater sig av en balansmetod för att väga flyktingens intresse mot statens säkerhetsintresse. Det finns dock ingen internationell konsensus om huruvida en sådan balansmetod är legal. UNHCR föreslår att stater använder sig av en proportionalitetsbedömning när de applicerar undantaget Artikel 33(2) men en såväl HRC, Europadomstolen och ICCPR har konstaterat att en sådan balansmetod bryter mot rättighetens absoluta natur. Stater fortsätter att utmana den absoluta statusen för *non-refoulement* för att bekämpa terrorism vilket skapar därför en problematisk kollision mellan legala och juridiska intressen.

Preface

For the men, women and children fleeing persecution, war and injustice.

Abbreviations

ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and People's Rights
CAT	Convention Against Torture,
ECHR	European Convention of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
HRC	United Nations Human Rights Committee
ICCPR	International Covenant of Civil and Political Rights
ICJ	International Court of Justice
UNHCR	United Nations High Commissioner for Refugees
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Background

"We have reached a moment of truth/…/ World stability is falling apart leaving a wake of displacement on an unprecedented scale. Global powers have become either passive observers or distant players in the conflicts driving so many innocent civilians from their homes/…/Fifteen years into a millennium that many of us hoped would see an end to war, a spreading global violence has come to threaten the very foundations of our international system/…/Borders are closing, pushbacks are increasing, and hostility is rising. Avenues for legitimate escape are fading away/…/Today, some of the wealthiest among us are challenging this ancient principle [the protection of refugees], casting refugees as gate crashers, job seekers or terrorists. This is a dangerous course of action, short-sighted, morally wrong, and – in some cases – in breach of international obligations."[1]

Antonio Guterres, United Nations High Commissioner for Refugees

At time of writing, there are almost 60 million forcibly displaced persons in the world, according to the UNHCR.[2] Nearly 20 million, of which half are children, fulfill the requirements for refugee status. 86 percent of the world's refugees are currently hosted by less wealthy countries.[3] The UNHCR has called it a global crisis and called upon wealthier states to share the burden.

While the number of persons fleeing persecution and war continues to rise, many refugee-receiving states are becoming increasingly concerned with closing their borders. Following the attacks on the World Trade Center and the Pentagon on September 11 2001, and the bombings and attacks on Bali, in Madrid and London 2002, 2004 and 2005, terrorism and external threats to the national security of states has become a significantly increasing concern.[4] Combatting terrorism has been at the top of the international agenda, and multiple United Nations Security Council resolutions have

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[1] http://www.unhcr.org/55842cb46.html last accessed 2015-07-28.
[2] http://www.unhcr.org/55842cb46.html last accessed 2015-06-21.
[3] http://www.unhcr.org/55842cb46.html last accessed 2015-06-21.
[4] Bruin and Wouters, 2003, pp. 5-6; Farmer, 2009, p. 13; Feller, 2006, p. 514.

called upon states to take appropriate measures.[5] Some commentators say that the events of September 11 meant a turning point in international refugee law.[6] Globalization has left states increasingly vulnerable to external threats in the form of terrorism. To keep the threat out many states are adopting more restrictive immigration laws. However, these restrictions may be impeaching the rights of refugees and fundamental human rights.[7] During the World Refugee Day in 2015, the UN High Commissioner for Refugees, Antonio Guterres, declared that international refugee protection is at risk as more wealthy countries are breaching their international obligations.[8]

The principle of *non-refoulement* sets forth an obligation on the international community to guarantee all persons the protection from being returned to a place where they are at risk of persecution or danger.[9] The principle is relevant in several contexts, and besides being a cornerstone of international refugee law,[10] the principle can be found in numerous international and regional human rights treaties. The observance of *non-refoulement* is deeply linked to the determination of refugee status.[11] This means that the procedures for identifying refugee status must ensure a protection against refoulement.[12]

Non-refoulement is most famously expressed in Article 33 of the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention). The first paragraph of the article states that no party to the treaty shall expel or return a refugee to the territory where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. The second paragraph states that the benefits of the first paragraph cannot be claimed by a refugee if there are

[5] See for example UNSCR 1372, UNSCR 1456 and UNSCR 1566.
[6] Bruin and Wouters, 2003, p. 6.
[7] Farmer, 2009, pp.14-15.
[8] http://www.unhcr.org/55842cb46.html last accessed 2015-06-21.
[9] UNHCR Note on the Principle of Non-Refoulement, 1997.
[10] Goodwin-Gill, 1996, p. 137.
[11] UNHCR Note on the Principle of Non-Refoulement, 1997.
[12] Ibid.

reasonable grounds to regard him as a danger to the security of the country in which he is, or if he has been convicted of a particularly serious crime and therefore constitutes a danger to the community of the country he is in. These exceptions, which are outlined in the second paragraph, will be referred to as the national security exception and the public order exception.

At the time of the drafting of the 1951 Refugee Convention, the idea of exceptions to *non-refoulement* was controversial, as the principle was considered so fundamental that no exceptions should be allowed.[13] However, as global security threats have developed to a new level, states seem to be increasingly willing to accept that there may be exceptions to *non-refoulement*. As illustrated in multiple cases of domestic courts, as well as regional and international courts, many states apply a balancing act between the right of the individual and the national security of the state. Whether or not such a balancing act is permissible can have immense repercussions for the future of refugee protection.

1.2 Purpose and research question

The purpose of this thesis is to analyze the current status of the principle of *non-refoulement* within the context of counter-terrorism. More specific, does international law allow for the application of a so-called balancing act under the national security exception to *non-refoulement*?

In order to answer this question we must first examine the status of *non-refoulement* in international refugee law and human rights law. Thus, is *non-refoulement* an absolute right? It is also relevant to address the status of *non-refoulement* as a rule of international customary law and as a peremptory norm.

[13] Farmer, 2009, p. 10.

1.3 Delimitation

Non-refoulement, in its standing as one of the most fundamental principles of international law, is a wide topic. This thesis will only aim to answer a narrow question with regard to the application of the principle – specifically the application of the national security exception in the name of counter-terrorism.

The research question implies an analysis of counter-terrorism measures and how these implicate refugee protection. This is slightly misleading and requires clarification in two matters. Firstly, as the focus of the thesis is the legal question of *if* and *how* the interest of the state to combat terrorism can be balanced with the rights of individuals seeking international protection, specific national or international counter-terrorism measures or legislation will not be discussed in any detail. Secondly, the research question does not only cover the right to *non-refoulement* for those recognized as refugees by domestic or international law, but for all individuals seeking international protection.

Lastly, the author would like to address the geographical focus of the thesis. There is no doubt that a Eurocentric approach to the research question is highly problematic. It would be both misleading and ignorant to cast the research question as a problem mainly faced by the "Western world" considering that Asian, Middle Eastern and African countries host the vast majority of displaced persons in the world. However, while these countries deal with mostly uncontrolled and unorganized mass influxes of people where the majority of refugees are illegal and unregistered, most Western countries have established systems for controlled immigration. Furthermore, although fundamentally opposed reiterating the notion that the development of international law should simply follow the conduct of the United States and the European Union, the author recognizes that the dynamics of world politics cannot be ignored when establishing the international *lex lata*.

1.4 Methodology and outline

The research question seeks to establish *lex lata*, the current law. In order to do so, relevant international instruments and jurisprudence will be analyzed. Case law, from international and regional courts as well as national courts, will also provide a source of information. Further information will be derived from the preparatory work to the 1951 Refugee Convention, the *travaux préparatoires*, as well as doctrine. Soft law in the form of guidelines, recommendations and comments by different UN human rights bodies also provide valuable information. The research question will be approached using a mainly inter-legal critical perspective.

The purpose of the thesis is to establish whether or not international law allows for the application of a so-called balancing act in cases where the individual faces refoulement, but said individual is also posing a threat to the security of the nation he or she is in. Firstly, the scope and nature of the principle of *non-refoulement* must be established within its different contexts – refugee law, human rights law and customary law. Secondly, the national security exception will be examined. Furthermore, counter-terrorism measures of relevance will be briefly discussed to create a background to the analysis. The application of the national security exception in various national courts will be examined. Lastly, this thesis will conclude with an establishment of *lex lata* and a discussion on the application of a balancing act between *non-refoulement* and national security.

2 The principle of *non-refoulement*

2.1 *Non-refoulement* in the 1951 Refugee Convention

The principle of *non-refoulement* prohibits states from returning a refugee or asylum seeker to a territory where his or her life or freedom would be threatened.[14] The principle is expressed in Article 33 of the 1951 Refugee Convention, which states that:

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

The first paragraph of the article sets out the prohibition on refoulement, while the second paragraph lists the exceptions to the principle. In the context of the 1951 Refugee Convention Article 1F is also relevant when addressing the exceptions to *non-refoulement*. Article 1F of the 1951 Refugee Convention states that:

> The provisions of this 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;

[14] Lauterpacht and Bethlehem, 2003, p. 89.

> (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.

As seen by the wording of the article, it excludes the individual from the Convention. As a result, Article 33 will not be applicable, nor will any other articles of the Convention. For a distinction between Article 33(2) and Article 1F see section 3.2.

Article 33(1) sets out the prohibition of refoulement. The wording of the provision should be interpreted within the context of the treaty as a whole.[15] The object and purpose of the 1951 Refugee Convention is also relevant for the interpretation of the provision.[16] The wording ”in any manner whatsoever” means that the prohibition must be interpreted expansively.[17] The choice of words suggests that all types of removal of a person is included, without regard to the formal description (deportation, expulsion, return, rejection etc.).[18] Furthermore, there is no indication that the prohibition does not include extradition.[19]

There is no general right to asylum in international law. However, this does not mean that states can reject asylum seekers who have a well-founded fear of persecution at the frontier. States may in these cases remove the asylum seeker to a safe third country or adopt another solution that does not amount to refoulement.[20]

The protection of Article 33(1) is afforded the refugee. Pursuant to Article 1A(2) of the 1951 Refugee Convention, and amended by Article I(2) of the 1967 Protocol, a refugee is a person who:

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[15] Lauterpacht and Bethlehem, 2003, p.108.
[16] Ibid.
[17] Lauterpacht and Bethlehem, 2003, p.112.
[18] Ibid.
[19] The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis, 1990, pp. 341-342.
[20] Lauterpacht and Bethlehem, 2003, p.113.

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

However, the prohibition on refoulement does not only apply to those who have been formally recognized as refugees, as this recognition is usually a result of domestic law.[21] The wording of Article 1A(2) tells us that the Convention applies to any person ”owing to a well-founded fear of being persecuted…”. This means that any person who has satisfied the conditions of Article 1A(2) is a refugee under the Convention, whether or not the person has been recognized as such by domestic law.[22] Subsequently, refugees who are illegally residing in the country of refuge will also be included. For this reason, the term ’refugee’ will from now on be used in this thesis with regard to persons who satisfy the conditions of Article 1A(2), regardless of any domestic recognition.

Refoulement is prohibited to the ”frontiers of territories where his life or freedom would be threatened…”. This does not only include the refugee’s country of origin. The reference is made to the plural – “territories”. This means refoulement is prohibited to any territory in which the person will risk his or her life or freedom.[23] The word “territories” is used instead of “countries” or “states”, implicating that the legal status of the territory is irrelevant.[24] The prohibition also includes removals to a third state if there is a risk of the

[21] Lauterpacht and Bethlehem, 2003, p.116.
[22] See Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, 2011, para. 28.
[23] Lauterpacht and Bethlehem, 2003, pp. 121-122.
[24] Ibid.

individual being removed from there to a territory where he or she would be at risk – so-called *chain-refoulement*.[25]

”Where his life or freedom would be threatened” is directly related to the definition of a refugee in Article 1A(2) – ”well-founded fear of persecution”.[26] Consequently, ”where his life or freedom would be threatened” should be read to include the territories in which the person has a ”well-founded fear of persecution”. Similarly, the nature of the threat – “on account of his race, religion, nationality, membership of a particular social group or political opinion” – imports the wording of the definition in Article 1A(2).

The provision binds the Contracting States, which refers to all the states party to the Convention. Pursuant to Article I(1) of the 1967 Protocol, it also refers to all states party to the Protocol whether or not they are party to the Convention. In line with general principles of state responsibility, the provision applies to all organs of the Contracting State or other persons or bodies exercising governmental authority.[27] It also includes organs of other states, private undertakings, or other persons acting on behalf of a Contracting State or in exercise of the governmental activity of that state.[28] The application is not constricted to the conducts occurring within the territory of the Contracting State. In general, states are responsible for conducts in relation to persons who are subject to their jurisdiction. [29] Both the Human Rights Committee and the European Court of Human Rights have addressed the more precise meaning of this phrase.[30]

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[25] Lauterpacht and Bethlehem, 2003, pp. 121-122.
[26] Lauterpacht and Bethlehem, 2003, p. 123.
[27] Lauterpacht and Bethlehem, 2003, p. 108.
[28] Lauterpacht and Bethlehem, 2003, p. 109.
[29] Lauterpacht and Bethlehem, 2003, p. 110.
[30] See for example *Loizidou v. Turkey* and *Lopez Burgos v. Uruguay*.

2.2 *Non-refoulement* in human rights law

2.2.1 The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) prohibits torture, cruel, inhuman or degrading treatment. The ICCPR does this in the form of a right, but this right creates a positive obligation on member states to safeguard the individual from such ill treatment through legislation and other necessary measures.[31]Article 7 of the ICCPR states that:

> 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.

The right is absolute and no exceptions are allowed, pursuant to Article 4.2 of the Covenant. Under no circumstances may a violation of the article be excused.[32] Although the article does not include a reference to *non-refoulement*, such a right is implied according to the Human Rights Committee's (HRC) General Comment No. 20.[33] The HRC clarified the *non-refoulement* obligation in General Comment No. 31 by stating that also its Article 2, requiring all State Parties to respect and ensure the Covenant rights for all persons in their territory and under their control, entails a *non-refoulement* obligation.[34] State Parties may not remove a person to a territory where there are substantial grounds for believing there is a real risk of irreparable harm. This obligation also includes *chain-refoulement*.[35]

The *non-refoulement* obligations under the ICCPR are subject to no exceptions, and national security considerations cannot excuse a violation of Article 7.[36] In a number of observations of country reports, the HRC has established that counter-terrorism measures taken by states in connection to

[31] See CCPR General Comment No. 20, para. 2.
[32] See CCPR General Comment No. 20, para. 3.
[33] See CCPR General Comment No. 20, para. 9.
[34] See CCPR General Comment No. 20, para 12.
[35] Persaud, 2006, p. 7.
[36] Persaud, 2006, p.8-9.

UNSCR 1373 do not absolve states from their obligations under the ICCPR.[37]

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

Article 3.1 of the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) contains an absolute prohibition on refoulement. The paragraph states that:

> 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.

This provision is an enforcement of the underlying peremptory[38] norm, the prohibition on torture.[39] The prohibition only includes torture, not 'inhuman' or 'degrading' treatment, and is thus less wide than the provision in the ICCPR. However, like in the ICCPR, the prohibition on refoulement under the CAT is absolute, also in the context of national security concerns, as established in the case *Agiza v Sweden*.[40] The Committee Against Torture has also established that the prohibition on refoulement to face torture under the CAT extends to *chain-refoulement*.[41]

Read together with Article 16.2, and subsequently the exceptions allowed for in Article 33(2) of the 1951 Refugee Convention, it is possible to argue that the CAT leaves an opening for derogation from Article 3. Article 16.2 states that:

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[37] See *Human Rights Committee: Concluding observations: Lithuania, 2004, para. 7; UN Human Rights Committee: Concluding Observations: Yemen* 2005, para. 13; *UN Human Rights Committee: Concluding Observations: Morocco*, 2004, para. 13.

[38] The peremptory status of the prohibition on torture is widely accepted. See for example *Prosecutor v. Anto Furundzia,* ICTY, 1998, para. 153. For further explanation on peremptory norms of international law, see section 2.4.

[39] Farmer, 2009, p. 19.

[40] *Agiza v Sweden,* para. 13.8.

[41] Duffy, 2008, p. 380.

> The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

In light of the exceptions to *non-refoulement* in the 1951 Refugee Convention, the absolute and non-derogable prohibition on torture in the CAT may seem like a contradiction. However, according to the *travaux préparatoires* of the CAT, Article 16 was intended to leave the door open for other legal instruments providing greater protection against torture.[42] This statement will seriously undermine any attempt of using Article 16.2 to narrow the protection against torture.

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

Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) establishes that:

> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 3 protects one of the most fundamental values of democratic society. Through jurisprudence, it has been established that the article also encompasses a prohibition on refoulement.[43] Unlike the protection against refoulement in the 1951 Refugee Convention, Article 3 of the ECHR protects not only those who are refugees under the Convention – everyone has the right to not be sent to a territory where they would face a real risk of torture, inhuman or degrading treatment.[44]

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[42] See Duffy, 2008, p. 380.
[43] See *Soering v United Kingdom*; *Vilvarajah and Others v United Kingdom*, para. 103.
[44] Duffy, 2008, p. 378.

The rights afforded by Article 3 are absolute and no exceptions or derogations can be made, not even in cases of public emergency threatening the life of the nation.[45] This was upheld in the landmark case *Soering v the United Kingdom* where the extradition of a German national from the United Kingdom to the United States was found to violate Article 3.[46]

Subsequently, in the case *Chahal v the United Kingdom*, the European Court of Human Rights (ECtHR) established that the absolute nature of Article 3 also covers its application in expulsion cases. Chahal was a Sikh and an Indian national seeking asylum in the United Kingdom. He was subsequently denied protection and detained awaiting deportation. The British authorities argued that he could not enjoy the rights under Article 33(1) of the 1951 Refugee Convention, since he was considered a threat to the security of the nation.[47] An applicant's risk of persecution upon return to his country of origin had to be weighed against the interest of the nation.[48] In its ruling, the ECtHR firstly held that the expulsion of an alien may activate the prohibition on torture or cruel and inhuman treatment and punishment in Article 3 of the Convention.[49] In cases where there are substantial grounds for believing that the alien upon return would face torture or inhuman or degrading treatment or punishment, Article 3 implies an obligation not to expel that person to that country.[50] The activities of this person is irrelevant, however dangerous or undesirable.[51] Consequently, the ECtHR concluded that the protection afforded by Article 3 of the ECHR is wider than the protection under Article 33 of the 1951 Refugee Convention.[52]

In the case *Ahmad v the United Kingdom*, the United Kingdom wanted to extradite suspected terrorists to face trial and probable "super maximum-

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[45] See *Ireland v United Kingdom,* para. 65; *Vilvarajah and Others v United Kingdom,* para, 108; *Soering v United Kingdom,* para. 88.
[46] *Soering v United Kingdom,* para. 88.
[47] *Chahal v United Kingdom,* para. 41.
[48] Ibid.
[49] *Chahal v United Kingdom,* para. 74.
[50] Ibid; see also *Soering v United Kingdom,* paras. 90-91
[51] *Chahal v United Kingdom,* para. 80.
[52] *Chahal v United Kingdom,* para. 80.

security imprisonment" in the United States. The ECtHR found no breach of Article 3 in the case, not because the applicants were alleged terrorists but because the ECtHR did not find that the conditions of the detention facilities in the United States or the prospect of life imprisonment *per se* were in breach of Article 3.[53] Even if the Court rejected a relativist approach to Article 3, the Court held that what constitutes ill treatment under Article 3 is context-specific.[54]

In *Saadi v Italy in 2009*, the United Kingdom argued again, as an intervening party, that in cases of suspected terrorists the interest of the individual to not face ill treatment must be weighed against the security interest of the state.[55] As in the *Chahal*-case, the ECtHR rejected the United Kingdom's argument, stating that the rights under Article 3 are absolute and no derogation from the rule can be made.

The absolute and categorical approach to Article 3 by the ECtHR was further established in the 2011 case of *Gäfgen v Germany*, where the court held that "even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned. The nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of art.3."[56]

The Court, therefore, leaves no room for balancing the rights under Article 3 with other interests such as the state's interest in combatting terrorism.[57]

[53] *Ahmad v United Kingdom,* paras. 218-224.
[54] *Ahmad v United Kingdom,* para. 242.
[55] *Saadi v Italy,* para. 138.
[56] *Gäfgen v Germany,* para. 87.
[57] Mavronicola and Messineo, 2013, p. 593.

2.3 Other regional treaties

Article 5 of the African Charter on Human and People's Rights (ACHPR) prohibits exploitation or degradation of a man, in particular slavery, slave trade, torture or cruel, inhuman or degrading treatment. This provision is absolute and contains an implied prohibition of refoulement.[58] Similarly, the American Convention on Human Rights (ACHR) contains a prohibition on torture or cruel, inhuman or degrading treatment or punishment. The ACHR also explicitly prohibits refoulement in Article 22(8). However, the prohibition on refoulement is not absolute, pursuant to Article 27 of the ACHR it may be derogated from in times of public emergency. The Charter of Fundamental Rights of the European Union also explicitly prohibits refoulement in absolute terms in article 19(2). The Organization of African Unity's 1969 Convention on the Specific Aspects of Refugee Problems in Africa (OAU Convention) Article II(3) prohibits refoulement and permits no exceptions. Art 27(1) of the Convention states that national security concerns cannot excuse a violation of asylum responsibilities.

2.4 *Non-refoulement* in international customary law

International customary law is created if two components are combined – consistent state practice and *opinio juris*.[59] This essentially means that customary law reflects a broad international consensus.[60] There is no question that the prohibition on torture constitutes a rule of international custamary law.[61] It could be argued that *non-refoulement* is a fundamental component of the customary rule of the prohibition on torture.[62] It could also be argued that the principle of *non-refoulement* on its own has become a rule of international customary law. Let us focus on the latter issue.

[58] Bruin and Wouters, 2003, p. 23.
[59] Duffy, 2008, p. 384.
[60] Lauterpacht and Bethlehem, 2003, p. 151.
[61] Duffy, 2008, p. 384.
[62] Ibid.

The 1951 Refugee Convention, the ICCPR and the CAT all recognize *non-refoulement* as a fundamental right. The treaties have 145, 168 and 158 state parties respectively out of the 193 states in the world recognized by the UN.[63] The ECHR, with probably the most developed protection against refoulement, binds almost all European states.[64] The principle of *non-refoulement* is also recognized in various other human rights treaties, UNHCR conclusions, UN General Assembly Resolutions and regional treaties and declarations.[65] The status of *non-refoulement* as a rule of international customary law has been debated for decades. Continued negative state practice constitute valid reasons for questioning the existing of the customary rule.[66] Yet, according to multiple commentators, there is no doubt that *non-refoulement* is a rule of international customary law.[67] It is, however, not clear what the scope of the rule is. It is hard to determine what version has acquired the status of a rule of international customary law, considering the differences between the scope of the principle in the different international legal instruments. According to Lauterpacht and Bethlehem one must distinguish between the customary principle that has developed in refugee law and the one that has developed in human rights law.[68] The customary rule that has developed in international refugee law permits exceptions to *non-refoulement* for national security och public safety reasons.[69] However, exceptions to the rule cannot be made within the scope of the prohibiton on torture or cruel, inhuman or degrading treatment or punishment, or other non-derogable customary principles of human rights.[70] The customary rule in human rights law, on the other hand,

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[63] See the United Nations Treaty Collection website and the United Nations website for an updated number of state parties. There is no consensus on the number of states in the world, but most would agree there are somewhere between 190 and 200 states.
[64] See the Council of Europe website.
[65] See Duffy, 2008, pp. 383-389.
[66] Coleman, 2003, p. 23.
[67] See for example Duffy, 2008, p. 389; Lauterpacht and Bethlehem, 2003, p. 155; Allain, 2001, p. 538; Goodwin-Gill, 1996.
[68] Lauterpacht and Bethlehem, 2003, p. 149.
[69] Lauterpacht and Bethlehem, 2003, pp. 149-150.
[70] Lauterpacht and Bethlehem, 2003, p. 150.

categorically rejects of the recognition of exceptions to *non-refoulement*.[71] This has been established by the expression of the principle in human rights treaties as well as affirmation of the principles absolute nature by both the HRC and the ECtHR.[72]

2.5 *Non-refoulement* as a peremptory norm

A peremptory norm, or a *jus cogens* norm, is a principle of international customary law that is absolute and non-derogable. Under no circumstances can an exception to a peremptory norm be considered.[73] The Vienna Convention on the Law of Treaties (VCLT) defines peremptory norms as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by subsequent norm of general international law having the same character". Thereby, a peremptory norm is an absolute norm that is binding upon the entire international community, superseding state consent. However, there is little consensus on which norms of international law constitute peremptory norms. The prohibition on torture, however, is commonly used as a rather uncontroversial example.[74]

Non-refoulement is, as previously stated, one of the fundamental principles of international refugee law. It is also, as stated above, widely considered a part of international customary law. There are therefore reasons for contemplating whether or not *non-refoulement* could have gained the status of a peremptory norm.

According to Allain, *non-refoulement* is emerging as a peremptory norm.[75] The two aspects of what constitutes a peremptory norm are satisfied in the

[71] Lauterpacht and Bethlehem, 2003, p. 162.
[72] Ibid.
[73] Duffy, 2008, p. 389.
[74] See Lauterpacht and Bethlehem, 2003, p. 152; CCPR General Comment No. 24.
[75] Farmer, 2009, p. 22.

case of non-refoulement – that it is accepted by the international community as a whole, and that it is a norm that is non-derogable.[76]

Some argue that state practice does not fully support the acceptance of *non-refoulement* as a peremptory norm, considering multiple states continuously violate the principle.[77] However, the International Court of Justice (ICJ) has stated in *Nicaragua v the United States*, that violations of a norm are not necessarily relevant to its status as a *jus cogens* norm.[78] On the contrary, the ICJ states that if states act in a way which is *prima facie* incompatible with a rule, but then defends its actions by referring to exceptions within the rule, such conduct confirms rather than weakens the rule.[79]

Whether or not *non-refoulement* has gained peremptory status is highly relevant for the continued discussion on the exceptions to *non-refoulement*. The result of considering *non-refoulement* as a peremptory norm would be that any type of legislation permitting refoulement would be inacceptable, thus hindering states from impeaching on the rights of the refugee.[80] It could even be considered that an elevation of the principle of *non-refoulement* to peremptory status could nullify the provision of the 1951 Refugee Convention, pursuant to Article 53 of the VCLT.[81]

[76] Allain, 2001, pp. 538-539.
[77] Farmer, 2009, p. 27; Allain, 2001, p. 539.
[78] *Military and Paramilitary Activities in and Against Nicaragua,* para. 98.
[79] Ibid.
[80] Farmer, 2009, p. 26.
[81] Duffy, 2008, pp. 389-390; Article 53 of the VCLT states that a treaty is void if it conflicts with a peremptory norm of general international law.

3 *Non-refoulement* and national security

3.1 Article 33(2) of the 1951 Refugee Convention

Article 33(2) of the 1951 Refugee Convention states that the right to *non-refoulement* cannot 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".

Lauterpacht and Bethlehem have commented on the interpretation and application of the national security exception in Article 33(2). Firstly, they state that the nature of the exception is clearly prospective – future danger is what is material, as opposed to the individual's past conduct.[82] Yet, while assessing the prospective danger past conduct may be relevant. Furthermore, the danger in question must be directed at the security of the country of refuge. The exception does not deal with the prospect of danger to the security of other countries or the international community as a whole.[83] Such an interpretation would, according to Lauterpacht and Bethlehem, be inconsistent with the humanitarian and fundamental nature of the prohibition against refoulement. This interpretation is supported by developments on the application of *non-refoulement* as an absolute right in human rights law, regardless of the conduct of the individual.[84] However, in the famous *Suresh*-case[85], the Canadian Supreme Court rejects this approach, stating that the national security of one state is dependent on the security of other states.[86] Referring to the events of September 11 2001, the Canadian Supreme Court state that the notion that terrorism in one country

[82] Lauterpacht and Bethlehem, 2003, p. 135.
[83] Ibid.
[84] Ibid.
[85] The case is addressed in section 3.4.1.
[86] *Suresh v Canada,* para. 87.

does not implicate other countries is no longer valid. Although, according to the wording of the exception in Article 33(2) there needs to be a danger to the country of refuge. Despite the changing nature of national security threats post 9/11, the mere possibility of adverse repercussion seems insufficient for applying the national security exception.[87]

Article 33(2) does not specify what kind of acts that would fall into the scope of the national security exception or what standard of proof is sufficient.[88] The only limit to the scope of the provision in the text of the Convention is that there must be 'reasonable grounds'. According to Farmer, this opens for a broad application of the exception.[89] However, Lauterpacht and Bethlehem mean that states can exercise only a limited margin of appreciation in these cases. States cannot act arbitrarily or capriciously, as there must be reasonable grounds for regarding the refugee as a danger to the security of the country of refuge.[90] Relevant authorities must assess the prospective danger and they must support their conclusion with evidence.[91] In general, there must be a high threshold for the application of the exception in Article 33(2), due to the fundamental character of *non-refoulement* as well as the humanitarian character of the 1951 Refugee Convention.[92] However, Lauterpacht and Bethlehem do not specify the level of danger to the security of the country further than stating that it must be very serious. They do state that the threshold of danger in Article 33(2) is higher than that of Article 1F, which deals with crimes of particularly grave nature.[93] Consequently, it would be inconsistent with the Convention to interpret the word 'danger' in Article 33(2) as anything less than very serious danger.

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[87] Bruin and Wouters, 2003, p.18.
[88] Lauterpacht and Bethlehem, 2003, p. 135.
[89] Farmer, 2009, pp. 9-10.
[90] Lauterpacht and Bethlehem, 2003, p. 135.
[91] Ibid.
[92] Lauterpacht and Bethlehem, 2003, p. 136.
[93] Ibid.

The UNHCR has commented that, considering the serious consequences of returning a refugee to a country where he is in danger of persecution, the exception in Article 33(2) must be applied with great caution. It is also necessary to consider all the circumstances of the case.[94]

A restrictive interpretation of the word 'danger' in the exceptions to *non-refoulement* can also be supported by the fact that a number of states where reluctant to the inclusion of any exceptions of *non-refoulement* in the Convention.[95] During the preparatory work to the 1951 Refugee Convention, the *traveaux préparatoires*, the introduction of exceptions to the prohibition on refoulement was controversial.[96] While countries such as the United Kingdom, Israel and Switzerland expressed the wish to rightfully expel an undesirable alien in exceptional cases, the United States' representative considered it highly undesirable to in any way impair the prohibition on refoulement to a territory where a man was at risk of death or persecution, even in very exceptional cases.[97] Similarly, the French representative considered such impairment inhuman and contrary to the purpose of the Convention. Conversely, while *non-refoulement* was considered so fundamental that it should allow for no exceptions, there was an evident reluctance to recognize an international right to asylum.[98] An individual's right to asylum was excluded in both the 1948 Universal Decleration on Human Rights (UDHR) and the 1951 Refugee Convention.[99]

The modern day discourse on the exceptions to *non-refoulement* paints a different picture. The United Kingdom remains insistent on their right to expel a refugee who is posing a danger to their national security, albeit within the boundaries set by the ECtHR.[100] The United States, on the other

[94] UNHCR Note on the Principle of Non-Refoulement, 1997.
[95] *Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37)*, 1997, p. 139.
[96] The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis, 1990, pp. 233-235.
[97] The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis, 1990, pp. 234-235.
[98] Farmer, 2009, p. 10.
[99] Ibid.
[100] See sections 2.2.4 and 3.4.2.

hand, seems to have shifted their stance on exceptions to *non-refoulement*.[101] This shift is can probably be explained by the advent of a global and constant threat of terrorism, or at least the perception of such a threat.

Pursuant to Article 31.1 of the VCLT, treaties shall be interpreted in light of their object and purpose, a so-called *teleological* interpretation. However, the political climate 60 years after the conclusion of the 1951 Refugee Convention is adversely different and there are undeniable reasons today to believe that many states do not share the same view on the exceptions to *non-refoulement*. Therefore, a more dynamic interpretation of the provision could lead to a different conclusion on the scope of the exceptions in Article 33(2).

The exceptions in Article 33(2) essentially amount to a compromise between the danger to a refugee from refoulement and the danger to the security of his or her country of refuge from their conduct.[102] Therefore, the principle of proportionality must be considered, allowing states to weigh the danger faced by the refugee by return with the danger the refugee is posing to the security of the country of refuge.[103] This conclusion is remarkable as it essentially authorizes states to apply a balancing act in cases where a refugee is considered a threat to national security. However, according to Lauterpacht and Bethlehem, states must comply strictly with the prohibition on refoulement in cases where the refugee is risking exposure to torture or cruel, inhuman or degrading treatment or any risk within the scope of any other non-derogable human right.[104]

[101] See Farmer, 2009, p. 97.
[102] Lauterpacht and Bethlehem, 2003, p. 135.
[103] The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis, 1990, p. 342.
[104] Lauterpacht and Bethlehem, 2003, p. 138.

3.2 Article 1F of the 1951 Refugee Convention

Article 1F of the 1951 Refugee Convention establishes a mechanism for exclusion from refugee status. Under Article 1F, the individual is not considered a refugee at all. Whereas under Article 33(2), the individual is considered a refugee, but withheld the right to *non-refoulement*.[105] The relationship between the two articles is complex and there is an evident overlap between the provisions.[106] The purpose of Article 1F is to define who can and who cannot claim the rights of the Convention. Article 33(2) on the other hand serves to protect the country of refuge.[107]

While Article 33(2) is silent as to when and where crimes should be committed, Article 1F refers to crimes committed outside the country of refuge prior to admission, at least according to some commentators.[108] However, crimes committed outside the country of refuge are not necessarily excluded from Article 33(2), if the refugee is considered a danger to the security of the country he or she is in.[109]

Article 1F is more restrictive in its wording than Article 33(2). According to Article 1F there must be "serious reasons to consider" compared to the "reasonable grounds" of Article 33(2).[110] On the other hand, Article 33(2) indicates a higher threshold as it must be established that there is a future threat to the country of refuge instead of the past conduct of a person relevant for the application of Article 1F.[111] As a result, it is unlikely that a person who is not excluded under Article 1F will satisfy the higher threshold of Article 33(2).[112]

[105] Bruin and Wouters, 2003, p. 16.
[106] Lauterpacht and Betlehem, 2003, p. 129.
[107] Bruin and Wouters, 2003, p. 16.
[108] See Bruin and Wouters, 2003, p. 16; Lauterpacht and Betlehem, 2003, p. 129.
[109] Bruin and Wouters, 2003, p. 16.
[110] Farmer, 2009, p. 11.
[111] Lauterpacht and Betlehem, 2003, p. 129.
[112] Ibid.

According to Farmer, relying on Article 33(2) to provide national security is unnecessary as Article 1F already fills this need, providing opportunity to exclude those from refugee status who have committed terrorist acts.[113] Relying on Article 33(2) in cases of security concerns will therefore undermine refugee protection.[114]

3.3 *Non-refoulement* and counter-terrorism

There is no international consensus on the definition of terrorism.[115] There is also no uniform international list of terrorist organizations.[116] The classification of an organization as a terrorist organization is highly politically motivated, which subsequently renders the definition of terrorism highly political. Therefore, this thesis deals with terrorism as a non-legal term.

Shortly after the attacks on the World Trade Center and the Pentagon on 11 September 2001, the UNSC issued resolution 1373, calling upon states to combat terrorism. The resolution called upon states to exclude from refugee status, pursuant to Article 1F of the 1951 Refugee Convention, those who have planned, facilitated or participated in terrorist crimes.[117] The resolution did not include a definition on terrorism; subsequently such a definition was left to the discretion of states.[118] In 2003, UNSC resolution 1456, also dealing with counter-terrorism, made a reference to human rights considerations when combatting terrorism and resolution 1566 subsequently spelled out a contextual definition on terrorism.

According to Bruin and Wouters, the mere membership of a terrorist organization cannot be considered a terrorist act. However, there is a danger

[113] Farmer, 2009, p. 18.
[114] Farmer, 2009, p. 37.
[115] Bruin and Wouters, 2003, p. 5.
[116] Bruin and Wouters, 2003, p. 8.
[117] UNSCR 1373, para.3(g).
[118] Bruin and Wouters, 2003, pp. 7-8.

that the fact that an individual is a member of a particular terrorist organization will suffice to, in practice, exclude the individual from refugee status or the protection against refoulement.[119] The United States currently rely heavily on the language of the national security exception in Article 33(2) to exclude the right to *non-refoulement* with regard to refugees who are suspected to have links to terrorism.[120]

Since the events of September 11 2001, many states have imposed stricter counter-terror measures.[121] There is a great potential for national security concerns to be prioritized over refugee protection, given current concerns of global terrorism.[122] According to Bruin and Wouters, states are responsible not only to protect individuals in need of protection, but also to hold individuals criminally accountable for their acts. The current practice of exclusion and expulsion neglects both these responsibilities.[123] The objective of asylum law is to protect the individual from violations of fundamental human rights. This objective has, post 9/11 and the advent of global terrorism, become subject for discussion.[124] This is further evidence of the politicization of asylum law and how the current approach to the "war on terrorism" is harmful to human rights.[125]

3.4 A balancing act?

3.4.1 Suresh v Canada (MCI)

In the leading decision of *Suresh v Canada (MCI)* of 2002, the Canadian Supreme Court held that in exceptional cases, deportation to face torture could be justified. The findings of the case have been subject to criticism, but as the Canadian Supreme Court applies a 'balancing act' it is highly interesting from the point of view of this thesis.

[119] Bruin and Wouters, 2003, p. 5.
[120] Farmer, 2009, p. 37.
[121] Ibid.
[122] Ibid.
[123] Bruin and Wouters, 2003, pp. 25, 29.
[124] Bruin and Wouters, 2003, p. 25.
[125] Bruin and Wouters, 2003, p. 29.

Suresh, a Sri Lankan national, was recognized as a refugee by the Canadian IRB in 1991.[126] Suresh was subsequently found inadmissible as an immigrant on security grounds and detained awaiting deportation in 1995.[127] The decision was based on the opinion of the Canadian Security Intelligence Service who suspected Suresh of being a member and a fundraiser for the Sri Lankan terrorist organization The Liberation Tigers of Tamil Eelem, an organization also active in Canada.

The Canadian Supreme Court found that torture was fundamentally unjust under Canadian law, and that it is also rejected in international law regardless of security concerns.[128] However, they rejected the idea that Canadian authorities may never deport a person to face such treatment elsewhere.[129] In these cases, there must be a balancing between the considerations of the individual seeking protection, and the security concerns of Canada.[130] The interest of the state to combat terrorism and protecting the public should be balanced against the particular circumstances of the person whom the government seeks to expel.[131] It is essentially a question of proportionality – is the proposed response reasonable in relation to the posed threat?[132] Consequently, the Court found that deportation to face torture could be justified in exceptional cases as a consequence of this balancing process.[133] However, even if balance rarely will be struck in favor of expulsion in cases where there is a serious risk of torture, it must be determined by discretion on a case-to-case basis.[134]

The Committee Against Torture criticized this, so-called 'Suresh-exception'. They expressed concerns about the Canadian failure to

[126] *Suresh v Canada*, para. 7.
[127] *Suresh v Canada*, para. 8-9.
[128] *Suresh v Canada*, para. 51, 75.
[129] *Suresh v Canada*, para. 58.
[130] Ibid.
[131] Ibid.
[132] *Suresh v Canada*, para. 47.
[133] *Suresh v Canada*, para. 78.
[134] Ibid.

recognize the absolute and non-derogable nature of Article 3 of the CAT.[135] Similarly, the HRC found that the type of balancing act adopted by the Canadian Court in no way could justify deportation to face torture or cruel, inhuman or degrading treatment.[136] The HRC rejected the idea that any person, whatever danger he or she might pose to the security of a state and regardless of any state of emergency, may be deported to face a risk of such ill treatment.

3.4.2 Cases before the European Court of Human Rights

As seen under section 2.2.3, the ECtHR has established the absolute nature of the prohibition on refoulement to face torture, inhuman or degrading treatment in numerous cases. The ECtHR has also addressed the notion of "a balancing act" in a number of cases.

In *Chahal v the United Kingdom*, the United Kingdom argued that the protection under Article 3 was not absolute in expulsion cases. In these cases, an alien posing a real threat to the national security of the state could be expelled even if there existed a real risk of ill treatment. The United Kingdom referred, in support of this argument, *inter alia* to the limitations in Article 33(2) of the 1951 Refugee Convention.[137] As an alternative to this argument, the United Kingdom argued that the risk for the individual must be balanced with the threat posed to the State by the individual, in cases where issues under Article 3 are considered. The greater the risk of ill treatment, the less weight should be accorded to the threat to national security.[138] The Court held that, even though aware of the difficulties faced by states to protect their communities from terrorist violence, the prohibition on torture, inhuman and degrading treatment is absolute and irrespective of

[135] UN Committee Against Torture: Conclusions and Recommendations, Canada, 2005, para. 4(a).
[136] UN Human Rights Committee: Concluding Observations, Canada, 2006, para. 15.
[137] *Chahal v United Kingdom*, para. 76.
[138] Ibid.

the individuals own behavior.[139] Article 3 is equally absolute in cases of expulsion – subsequently a Contracting State is obligated to safeguard an individual from the threat of such ill treatment. The activities of this person is irrelevant, however dangerous or undesirable.[140]

Thus, the rights under Article 3 are absolute, and not relative. However, the assessment of what constitutes "torture", "inhuman" and "degrading" treatment might be relative as it depends on the circumstances of the case. As the ECtHR noted in *Ahmad v the United Kingdom*, life imprisonment could potentially breach Article 3, but only if it is grossly disproportionate to the crime committed.[141] This approach has led some commentators to interpret the rights under Article 3 as relative.[142] Mavronicola and Messineo state that at least in practice, the assessment of the Court will be context-specific and in that way, relative.[143] However, this "relativism" in the application and assessment of the terms of Article 3 does not undermine its absolute nature.[144]

In *Ramzy v Netherlands* an individual faced expulsion but claimed he was in danger of ill treatment violating Article 3 upon return to Algeria. The Netherlands judged that his involvement in terrorist activities rendered him a threat to national security. The governments of Lithuania, Portugal, Slovakia and the United Kingdom jointly intervened. The governments' stated that in cases of removal to face ill treatment prohibited by Article 3, national security considerations could not be dismissed as irrelevant. The rights of the citizens of Contracting States who are threatened by terrorism must be afforded weight.[145] The Court never addressed the issue, as the case was struck out of the list.[146]

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[139] *Chahal v United Kingdom*, para. 79.
[140] *Chahal v United Kingdom*, para. 80.
[141] *Ahmad v United Kingdom,* para. 242.
[142] Mavronicola and Messineo, 2013, p. 593.
[143] Ibid.
[144] Mavronicola and Messineo, 2013, p. 594.
[145] Observations of the governments of Lithuania, Portugal, Slovakia and the Unted Kingdom intervening in *Ramzy v Netherlands*, para. 3.
[146] *Ramzy v Nethertlands,* para. 66. The applicant defected.

3.4.3 House of Lords – R (On the application of Wellington)

In 2008, the authorities of the United Kingdom persisted in its relativist approach to Article 3 of the ECHR in the *Wellington*-case, despite the ECtHR decision to reject the United Kingdom's stance on refoulement in cases involving suspected terrorists in the *Chahal*-case.

In *Wellington*, the majority argued that while there was an absolute prohibition on refoulement to face torture, cases involving inhuman or degrading treatment must be considered within the context of each case.[147] Therefore, there must be a distinction made between ill treatment breaching Article 3 in a domestic context and in an extradition context. Ambiguities in the *Soering*-case formed a base for the argument of the House of Lords.[148] Lord Scott and Lord Brown disagreed with the majority, stating that such reasoning generated a relativist approach to the rights under Article 3, which would be incompatible with the absolute nature of the article.[149]

As seen above, the ECtHR disagreed and rejected the relativist approach of the House of Lords in *Wellington*, in *Ahmad v the United Kingdom*. However, while firmly reiterating the stance on the absolute nature of the rights under Article 3 in *Chahal* and *Saadi*, the ECtHR stated that they agreed with the minority in *Wellington* that not all forms of ill treatment will automatically bar removal to another state.[150] The Court explained that what would be a violation of Article 3 in a domestic context can, on occasion, not suffice to find a violation of the article in an extra-territorial context. As an example the Court stated that a Contracting State's negligence in providing appropriate medical care could violate Article 3, while it would possibly not attain the minimum level of severity for a violation of the article in the

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[147] *Wellington*, para. 24.
[148] *Wellington*, para. 22.
[149] *Wellington*, para. 40-41.
[150] *Ahmad v United Kingdom,* para. 177.

extra-territorial context.[151] According to Mavronicola and Messineo, the Court is essentially applying cultural relativism, saying that what would constitute ill treatment under Article 3 in ECHR states might not amount to a violation of Article 3 in for example the United States.[152] In the Court's own words "save for cases involving the death penalty, it has even more rarely found that there would be a violation of Article 3 if an applicant were to be removed to a State which had a long history of respect of democracy, human rights and the rule of law".[153]

3.4.4 UNHCR

The idea of a balancing act is not unique to national courts. Such an approach also seems to be accepted by the UNCHR. According to the *travaux préparatoires* of the 1951 Refugee Convention, the principle of proportionality must be observed when applying Article 33(2).[154] This means that the danger entailed to the refugee by removal must be balanced with the menace the refugee would pose to public security.[155]

[151] *Ahmad v United Kingdom,* para. 177.
[152] Mavronicola and Messineo, 2013, p. 601.
[153] *Ahmad v United Kingdom,* para. 179.
[154] The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis, 1990, p. 246.
[155] Ibid.

4 Conclusion

Non-refoulement is a vital part of refugee protection and protection of human rights. The principle is a part of international customary law, and by some considered an emerging peremptory norm. It is famously expressed in Article 33 of the 1951 Refugee Convention as well as various human rights treaties. The status of the principle cannot be generally defined in international law. The same can be said about the scope of the principle, which depends on the legal context in which it is applied.

It can be concluded, from the above, that *non-refoulement* in the 1951 Refugee Convention is a fundamental right. However, it is not an absolute right. Firstly, one must be considered a refugee under the Convention to enjoy the right to *non-refoulement*. This means, not only must an individual satisfy the terms of Article 1A(2) defining who is a refugee, the individual must also avoid exclusion under Article 1F. Furthermore, the second paragraph of Article 33 permits exceptions to the principle in cases of public order and national security. Therefore, in order to enjoy the right to *non-refoulement* under the 1951 Refugee Convention, an individual must satisfy the terms of refugee status under the Convention, he or she cannot have committed crimes of such nature that he or she could be excluded from refugee status, and the country of refuge cannot have reasons to believe he or she poses a threat to public order or national security. In cases where the refugee has committed terrorist acts, it is firstly the exclusion clause in Article 1F that is relevant. However, the threshold for the exclusion clause is very high, and simply being a suspected terrorist, or a member of a terrorist organization may not suffice to satisfy the terms of the article. In these cases, Article 33(2) becomes highly relevant. Although some commentators find the national security exception in Article 33(2) superfluous, as terrorist crimes are already covered by the exclusion clause, the paragraph is frequently used by states to deny refugees the right to *non-refoulement*.

Unlike in international refugee law, *non-refoulement* in international human rights law is generally considered an absolute, non-derogable right. Unlike the prohibition on refoulement in refugee law, which applies only to refugees, the prohibition in human rights law applies to all individuals. However, as international refugee law prohibits refoulement to a "territory where the persons life or freedom would be threatened", human rights treaties prohibit refoulement to face torture or other ill treatment. These are the underlying rights being protected by *non-refoulement*.

Multiple countries have objected to the categorical approach that especially the ECtHR has taken to the prohibition on refoulement. The United Kingdom has been a persistent objector to the ECtHR take on *non-refoulement*. Furthermore, the cases of *Suresh* and *Wellington* are two examples of countries applying a relative approach to the application of *non-refoulement* in situations where there are national security concerns.

When establishing whether or not international law allows for a so-called balancing act when applying the principle of *non-refoulement* in the national security context, one must consider many aspects. The status of non-refoulement is inarguably different depending on the context. While the prohibition of refoulement to face torture has been declared an absolute right by multiple instances, international refugee law recognizes that there may be exceptions to *non-refoulement*. When the principle differs between legal contexts it is relevant to decide the hierarchy between the legal contexts. This issue will not be addressed here. However, the following should be noted.

If a person, not considered a refugee under international law pursuant to Article 1F in the 1951 Refugee Convention, is faced with expulsion or removal to a territory where he or she risks persecution or another threat to his or her life or freedom he or she cannot claim the right of *non-refoulement* under the refugee law regime. However, as the principle of *non-*

refoulement is a rule of international customary law, the obligation of *non-refoulement* will still be relevant in the case. With this in mind, the argument that the exceptions under Article 33(2) are obsolete in cases of national security concerns since Article 1F already fills the need, is not valid. *Non-refoulement* will still be afforded, either pursuant to a state's commitment to human rights treaties or because the state is bound by the rule of international customary law. However, depending on the status of the rule in customary law, the exceptions outlined in Article 33(2) may still be applied. In this situation, the possible peremptory status of *non-refoulement* is highly relevant. If *non-refoulement* is a peremptory norm, no exceptions may be considered pursuant to the VCLT. If *non-refoulement* is not a peremptory norm, exceptions may be considered and the permissibility of a balancing act is highly relevant. It should be noted that even if the principle of *non-refoulement* is not peremptory, the rule has been established as absolute by multiple international and regional human rights treaties. What can be established is that human rights law, and perhaps even refugee law according to some commentators, prohibits refoulement to face torture in absolute terms. This would be in line with the general notion that the prohibition on torture is a peremptory norm. Although this has been contested by states in domestic cases such as *Suresh v Canada* as well as numerous cases subsequently brought before the ECtHR, the human rights regime remains clear on the point – the prohibition on refoulement to face torture is an absolute right subject to no exceptions whatsoever.

Unlike the prohibition on torture, the prohibition on cruel, inhuman or degrading treatment has not gained the same uncontested status as a peremptory norm of international law. Therefore, arguing for an international consensus on the absolute prohibition on refoulement to face cruel, inhuman or degrading treatment is not as straight forward.

The idea of a balancing the interest of the individual to *non-refoulement* and the interest of a state to safeguard itself from the possible threat of said individual is not completely foreign to the 1951 Refugee Convention. Such

a balancing act was proposed in the *travaux préparatoires* when applying Article 33(2). There are, however, considerable concerns that the open and vague wording of the exception in Article 33(2) leave a substantial room for state discretion, and subsequently may open the door for states to act arbitrarily or capriciously. To the backdrop of the current global political climate, it seems reasonable to suspect states may challenge the perimeters of the rule if it seems to be in their best interest.

While the *travaux préparatoires* of the 1951 Refugee Convention seem to permit a balancing act, Lauterpacht and Bethlehem seem adamant no exceptions to *non-refoulement* can be justified where the individual faces torture, cruel, inhuman or degrading treatment. A way to interpret these contradictions is to establish that a balancing act under Article 33(2) is permitted, as long as it is on par with non-derogable rights of human rights law. However, there is no indication in the wording of the article pointing in this direction, and the *travaux préparatoires* only refer to the principle of proportionality.

Another relevant factor when considering the permissibility of a balancing act between counter terrorism and *non-refoulement* is if such a balancing act in itself is proportional. Proportionality is an established principle in international law. Allowing for a balancing act between counter-terrorism and *non-refoulement* applies the principle of proportionality in practice. Yet, this argument raises more questions than it answers. How will there be guarantees that the legal principle of proportionality is safely maintained by political instances weighing the safety of their nation against the interest of an alien? As soon as the principle of proportionality is not correctly maintained, it opens the door for abuse. Such abuse of a balancing act could potentially harm other interests beyond refugee protection – such as non-discrimination. When considering if a balancing act in itself is a proportional means, one must therefore also consider possible harm to other interests. Considering the probability of it impeaching on other human rights, a balancing act might no longer be proportional.

While the ECtHR has rejected the idea that the actions of the individual can justify refoulement to face torture, inhuman or degrading treatment, the actions of the individual cannot categorically be said to be irrelevant to the assessment of what constitutes "torture", "inhuman" or "degrading" treatment. Through the *Ahmad*-case, the ECtHR seems to have opened the door for cultural relativism in the assessment of the terms under Article 3. Firstly, by stating that what constitutes torture, inhuman or degrading treatment in a Contracting State may not constitute torture, inhuman or degrading treatment in an extra-territorial context. Secondly, the Court boldly states that a violation of Article 3 will rarely be found with regard to states with a "long history of respect of democracy, human rights and the rule of law". It seems like the Court is proposing a presumption of non-violation in cases involving removal to a third state which is perceived as a state with similar democratic values as the ECHR. These statements seem contradictable towards each other. The ECtHR is proposing in one sentence, cultural relativism as to what violates Article 3, yet applies a Eurocentric approach to what can be presumed to be a violation of Article 3 or not.

This reasoning is inconsistent and problematic. The Court did not go into detail of what constitutes "respect of democracy, human rights and the rule of law". These are norms that are hard to legally define and in large extent dependent on political considerations, which means ECtHR will apply different standards of proof depending on how states are politically perceived. To the critical commentator, such practice could undermine the rule of law.

Putting aside the ambiguous reasoning of the ECtHR in *Ahmad*, there seems to be consensus on the absolute nature of the right to *non-refoulement* to face torture, cruel, inhuman or degrading treatment in human rights law. Yet, states keep challenging the absolute nature of the rule in the name of counter-terrorism.

The HRC has proclaimed that counter-terrorism measures called upon by the UNSC do not absolve states from their obligations under human rights law. However, it would be incorrect to declare that counter-terrrorism measures in the shape of restrictive immigration is, *per se,* a violation of human rights. The purpose of considering national security is, for the state, to safeguard human rights for the population of the state. One of the reasons that people become refugees is that their states are unable or unwilling to protect them. However, international human rights law, to its very essence, is about protecting the rights of all, without distinction. States remain allowed to differentiate between citizens and non-citizens, to some extent. Still, while the possibility to remove a suspected terrorists may seem reassuring in the eyes of the community, this is obviously only possible with regard to non-citizens. There is no possibility of removing a citizen of a state based on such suspicion. To the backdrop of the argument of global terrorism, the distinction between citizen and non-citizen is most likely irrelevant in the eyes of a community in fear of terrorism.

Ultimately, while international human rights dictate that the right to *non-refoulement* is absolute and non-derogable, the UNHCR and the practice of multiple states seriously undermines an argument that a balancing act between the interest of the refugee and the security concerns of a state is illegal. The fact that the exceptions to non-refoulement must be interpreted restrictively does not, in itself, mean that a balancing act is not permissible. On the contrary, it suggests that the principle of proportionality should be considered. While there at least seems to be consensus between human rights law and refugee law on the absolute prohibition on refoulement to face torture, cases such as *Suresh* indicates unwillingness from states to allow such a categorical prohibition. Consequently, the application of *non-refoulement* in the counter-terrorism context paints a picture of a collision between a legal provision and political interests.

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