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

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TO TRANSFER OR NOT TO TRANSFER: IDENTIFYING AND PROTECTING RELEVANT HUMAN RIGHTS INTERESTS IN NON-REFOULEMENT

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

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

This Article argues that there is a clash of human rights duties that arises in these transfer situations: the State's duty to protect aliens from post-transfer mistreatment conflicts with its duty to protect members of the public from rights violations committed by dangerous private persons within society. Human rights law has in recent years recognized a duty on

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the part of States to take reasonable operational measures to protect the public from private person harms where the State knows or should know of the risk. In the case of dangerous aliens, these operational measures presumably would include expulsion. By depriving the State of the ability to expel dangerous aliens, non-refoulement protection places the human rights of dangerous aliens and the public into direct conflict.

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

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

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INTRODUCTION

In April 2009, British police detained ten Pakistani men who were in the United Kingdom on student visas for alleged involvement in a plot to bomb a British shopping center in a "mass casualty" operation on behalf of al Qaida.[1] British police had the ten men under surveillance based on intercepted e-mails and other intelligence information suggesting an imminent attack on a Manchester mall, but were forced to move to detain the suspects immediately after the details of the plot and the police plans to thwart it were discovered by the press.[2] The resulting premature raids turned up no explosives or bomb-making equipment, leading Her Majesty's Government (HMG) to conclude terrorism charges could not be brought against the suspects.[3]

Instead, HMG moved to deport the men to Pakistan, including Abid Naseer, alleged plot ringleader, whose presence in the United Kingdom was deemed "a threat to national security."[4] Naseer contested the finding that he posed a threat to the national security of the United Kingdom.[5] He also opposed removal on grounds that he faced a real risk of torture or inhuman and degrading treatment in Pakistan.[6] Transfer under such circumstances would violate Article 3 of the European Convention on Human Rights (ECHR).[7] The European Court of Human Rights (ECtHR) has interpreted this provision to include an implicit obligation not to transfer individuals to a State where they face real risk of torture or inhuman and degrading treatment after transfer, which is the principle of non-refoulement.[8]

The Special Immigration Appeals Commission (SIAC) ruled in favor of Naseer.[9] After evaluating intelligence and other closed materials as well as

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1. *See* John F. Burns, *Deportation Case Presents Test of British Government*, N.Y. TIMES, May 19, 2010, at A8.

2. *See id.*

3. *See id.*

4. *See* Immigration Rules, pt. 9, ¶ 322(5) (U.K.), *available at* http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/ (last visited Sept. 21, 2011) (allowing denial of leave to remain in the United Kingdom because of "the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his character, conduct or associations or the fact that he represents a threat to national security"); *see also* Burns, *supra* note 1.

5. *See* Burns, *supra* note 1.

6. *See id.*

7. *See* Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter ECHR] ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").

8. *See infra* notes 71–79 and accompanying text (discussing ECtHR case law). Traditionally, the term "refoulement" refers only to summary refusal to admit an alien who has no lawful right of entry into the State and summary repatriation of an alien found illegally in the territory of the State (reconduction). Refoulement can be contrasted to expulsion or deportation, which requires lawfully-present aliens to be removed after a legal process. GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 201 (3d ed. 2007). For purposes of this Article, non-refoulement refers more broadly to the prohibition of all kinds of transfer based on risk of post-transfer mistreatment.

9. Naseer v. Sec'y of State for the Home Dep't, [May 18, 2010] No. SC77/80/21/82/83/09 (Special Immigration Appeals Comm'n [S.I.A.C.]), slip op. ¶ 37

an extensive e-mail correspondence between Naseer and an al Qaida member in Pakistan, SIAC credited HMG's allegations that Naseer was in the final stages of planning an attack on a shopping mall in northwest England.[10] This led Justice Mitting to conclude that "Naseer was an Al Qaeda operative who posed and still poses a serious threat to the national security of the United Kingdom."[11] Nevertheless, Mitting held that deportation to Pakistan was not permissible, consistent with the principle of non-refoulement.[12] SIAC noted the history of Pakistani intelligence officials mistreating alleged Islamic militants, and refused to accept HMG's argument that the public notoriety of the case would ensure Naseer's safety.[13]

The decision left HMG with few options to mitigate the "serious threat to the national security of the United Kingdom" posed by Naseer.[14] Prosecution in the case was not possible because of the lack of physical evidence linking Naseer to the bomb plot. Preventive detention pending deportation in similar circumstances was found to violate the ECHR by the British Law Lords.[15] And deportation to a country other than Pakistan was virtually impossible because no State would accept a suspected al Qaida terrorist for resettlement. HMG was left imposing control orders, or parole-like restrictions, on Naseer's movement and employment, with the knowledge that similar restrictions have been easily evaded by others in the past.[16]

The *Naseer* case is an example of the serious security consequences that may result from providing non-refoulement protection in a post 9/11 world. The principle of non-refoulement has been justified by human rights bodies and advocates as a part of the *jus cogens* prohibition on torture and cruel, inhuman, or degrading treatment.[17] While these prohibitions are

(U.K.), *available at* http://www.siac.tribunals.gov.uk/Documents/outcomes/1_OpenJudgment.pdf.

10. *See id.* ¶¶ 7–15; *see also* Burns, *supra* note 1.

11. *Naseer*, slip op. ¶ 16.

12. *See id.* ¶¶ 30–39.

13. *See id.* ¶¶ 32–34.

14. *See id.* ¶ 16.

15. *See* A v. Sec'y of State for the Home Dep't, [2004] UKHL 56, [68] (appeal taken from Eng.) (rejecting British law pending indefinite detention of aliens suspected of terrorism pending deportation as a violation of the European Convention).

16. *See* Burns, *supra* note 1; *see also* Colm O'Cinneide, *Strapped to the Mast: The Siren Song of Dreadful Necessity, the United Kingdom, Human Rights Act and Terrorist Threat*, *in* FRESH PERSPECTIVES ON THE 'WAR ON TERROR' 327, 343 (Miriam Gani & Penelope Mathew eds., 2008) (describing failures of the control order system).

17. For shorthand purposes, this Article will refer to the "*jus cogens* torture norm" to encompass both torture and cruel, inhuman, and degrading treatment. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702 cmt. n (1987) (describing as *jus cogens* prohibition on "torture or other cruel, inhuman or degrading treatment or punishment"). As discussed below, the criteria for concluding a norm is *jus cogens* is unclear, *see infra* notes 247–48 and accompanying text, and scholars and courts have contested whether cruel, inhuman, and degrading treatment rises to the level of *jus cogens*, *see* Forti v. Suarez-Mason, 672 F. Supp. 1531, 1543 (N.D. Cal. 1987) (refusing to recognize cruel, inhuman, and degrading treatment as a cognizable violation of the Alien Tort Statute because of the lack of consensus on meaning of the terms); ABA, Report to the House of Delegates (Aug. 9, 2004) *in* THE

traditionally thought to forbid a State from employing torture or cruel, inhuman or degrading treatment, human rights bodies have explained that if a State cannot subject an individual to these forms of mistreatment, neither may they send the individual to a State where that mistreatment may occur.[18] Because there are no exceptions to the torture or cruel, inhuman or degrading treatment prohibitions in human rights law, these bodies have concluded that there are no exceptions to non-refoulement either.[19] In recent years, human rights bodies also have sought to expand the scope of non-refoulement protection to other human rights abuses, seeking to prohibit transfer where there is a real risk to the transferee of enforced disappearance, unfair post-transfer trial, or recruitment as a child soldier.[20]

Ever-expanding non-refoulement duties deprive States of a traditional tool used to protect its population from security threats posed by aliens: expulsion. Unlike nationals of a State, who are legally entitled to be present in the State, aliens are present at the prerogative of the host State. States have traditionally used this plenary authority over the presence of aliens to exclude or expel dangerous aliens.[21] Depriving States of this tool may leave them, as in the *Naseer* case, with no real option to mitigate real threats.[22] This concern, magnified by the threat of terrorism, has led a variety of States to advocate a change in the non-refoulement rule to permit States to consider the security risk the alien poses to the State as a factor in determining whether transfer is possible.[23] Such a change would hark back to the origins of non-refoulement protections, which included security exceptions.[24] The security consequences of accepting non-refoulement duties also have led States to resist expansion of non-refoulement protection to lesser forms of mistreatment as advocated by human rights institutions.[25]

The human rights apparatus has resisted such a change for two reasons. First, it argues that the prohibition on torture and cruel, inhuman, and degrading treatment is absolute, and not subject to exception.[26] Opening

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TORTURE PAPERS: THE ROAD TO ABU GHRAIB 1132, 1146 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) ("While many international agreements expressly prohibit *both* torture and cruel, inhuman and degrading treatment, it remains an open question as to whether *jus cogens* status extends to the prohibition against cruel, inhuman or degrading treatment."); Richard B. Lillich, Remarks to the American Society of International Law (Apr. 26, 1985), *in The Revised Draft Restatement of the Foreign Relations Law of the United States and Customary International Law*, 79 AM. SOC'Y INT'L L. PROC. 73, 86 (1985) (noting that commentators might not consider the norm prohibiting cruel, inhuman, and degrading treatment "customary international law, much less of *jus cogens*").

18. *See infra* notes 70–83 and accompanying text.

19. *See infra* notes 89–92 and accompanying text.

20. *See infra* notes 94–97 and accompanying text.

21. *See infra* notes 42–44 and accompanying text.

22. *See supra* notes 1–16 and accompanying text.

23. Suresh v. Canada (Minister of Citizenship & Immigration), [2002] 1 S.C.R. 3 (Can.); *see also* Observations of the Governments of Lithuania, Portugal, Slovakia and the United Kingdom, Ramzy v. Netherlands, App. No. 25424/04, Eur. Ct. H.R. (2005) [hereinafter Observations], *available at* http://www.redress.org/Government_intervenors_observations_in_Ramzy_case%20_21November.pdf.

24. *See infra* notes 55–58, 63–69 and accompanying text.

25. *See infra* Part I.C.

26. *See infra* notes 71–86, 89–91 and accompanying text.

non-refoulement protection to exceptions, advocates worry, will lead to similar exceptions to the basic prohibition on States torturing or otherwise severely mistreating individuals.[27] The result, the apparatus fears, is policies like enhanced interrogation and rendition used by the Bush Administration to combat terrorism.[28] Second, it contends that even if human rights law wanted to account for the threat posed by the alien to the host State, it could not do so given the incomparable nature of the threat posed by the alien and the threat the alien himself faces. The result would be an apples-to-oranges comparison outside the scope of human rights law.[29]

These arguments fail to account for the human rights costs of the current rule. Allowing dangerous aliens to remain free within society risks their commission of acts that constitute serious violations of human rights. This reality has led States to take measures to mitigate the security consequences of granting non-refoulement protection that have negative second-order human rights effects. States have refused to capture or admit aliens from countries where repatriation will be difficult, harming those aliens or those at threat from their actions in the process.[30] Some States also have misused diplomatic assurances, or promises from the receiving State not to mistreat transferred persons, to feign compliance with existing non-refoulement rules, while in fact subjecting the transferred person to substantial risk of mistreatment, without assessment of whether the threat in question merits such a harsh result.[31] The resulting distortions in the law have led officials of at least one State to consider withdrawing from its non-refoulement obligations entirely.[32] At minimum, it has led to State opposition to further expansion of non-refoulement protections.

The full range of human rights equities at issue in non-refoulement has not been captured because of the failure to identify the relevant State duties and rights at issue in non-refoulement. It has been thirty years since Henry Shue identified three duties that exist with all human rights obligations: the duty to avoid harm, the duty to protect from the harm, and the duty to aid individuals in fulfillment of their right.[33] Properly understood, States

27. *See infra* note 181 and accompanying text.
28. *See infra* note 182 and accompanying text.
29. *See infra* note 267 and accompanying text.
30. *See infra* notes 183–84 and accompanying text.
31. *See infra* note 185 and accompanying text.
32. The Conservative Party's winning manifesto in the 2010 elections called for the repeal of the Human Rights Act, which implements the ECHR into British law, in part because of concerns regarding non-refoulement protection. *See* Andrew Sparrow & Patrick Wintour, *Coalition Reconsidering Tory Plan to Scrap Human Rights Act*, GUARDIAN (May 19, 2010), http://www.guardian.co.uk/politics/2010/may/19/theresa-may-coalition-human-rights-act-scrap (quoting Conservative Party manifesto); *see also* David Stringer, *UK: European Law Hampering Terrorism Fight*, ABC NEWS, Feb. 3, 2011, http://abcnews.go.com/International/wireStory?id=12830352 (describing report by Lord Carlile, House of Lords terrorism monitor, arguing ECHR is turning the U.K. into a refuge for international terrorism). Coalition partners, the Liberal Democrats, forced the Tories to abandon this campaign pledge as part of the coalition agreement.
33. *See* HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 60 (1980). Shue explained the three distinct State duties as follows: (1) the duty to

making transfer determinations with respect to dangerous aliens face a conflict between two competing duties to protect.

One such duty is well developed. States have a duty to protect aliens from the risk of serious human rights abuses perpetrated by another State after transfer. Such a duty has already been recognized with torture and cruel, inhuman, and degrading treatment by most States and human rights actors, and may in the future be accepted for other, less serious human rights violations.[34] Less developed is the growing recognition by human rights bodies that a State has a duty to protect those within its jurisdiction from human rights violations committed by non-State actors, including dangerous aliens present within the State's territory.[35] Such an obligation has been recognized by the ECtHR, the Inter-American Court of Human Rights, the Human Rights Committee (HRC), and various national courts as emanating from the right to life and the right to be free of torture and cruel, inhuman, and degrading treatment.[36] It is these two duties, and the corresponding human rights, that conflict in transfer determinations regarding dangerous aliens.

Recognizing this rights competition is important for three reasons. First, a change in rhetoric has the potential to alter the non-refoulement debate. Human rights bodies and scholars for too long have elided over the security consequences of the current non-refoulement rule because they believed these costs were outside the province of human rights law.[37] In fact, human rights are threatened when dangerous aliens are permitted to remain free to commit rights violations. Determining how the State should mediate between these two conflicting protection duties is very much a task for human rights law.

Second, understanding non-refoulement as a protection duty provides an intellectual architecture to separate it from the *jus cogens* prohibition on committing acts of torture or cruel, inhuman, or degrading treatment. Protection duties in human rights law are traditionally limited by competing resources and conflicting rights, restrictions which are anomalously missing here.[38] Recognizing such constraints on non-refoulement would bring the State's non-refoulement obligation into accord with the duty to protect from torture or cruel, inhuman, or degrading treatment perpetrated by private persons. And it would align the law with the traditional legal view that

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avoid: negative duty not to violate the right in question; (2) the duty to protect: positive duty to prevent third parties from violating the right; and (3) the duty to aid: positive duty to take steps to allow individuals to realize their right. *Id.* at 53.

34. *See infra* notes 70–86, 89–91, 94–97 and accompanying text.

35. The United States has been a conspicuous laggard in accepting these developments. *See infra* notes 209–14 (describing U.S. opposition to most positive human rights).

36. *See infra* notes 219–20, 227–39 and accompanying text.

37. *See* Emanuela-Chiara Gillard, *There's No Place like Home: States' Obligations in Relation to Transfers of Persons*, 90 INT'L REV. RED CROSS 703, 707 (2008) (addressing in a cursory fashion the security consequences created by granting non-refoulement protection).

38. *See infra* notes 242–43 and accompanying text.

greater duties are owed with respect to intentional actions as opposed to unintentional actions taken with disregard of substantial risk of harm.[39]

Third, human rights law uses a balancing approach to mediate between competing rights. Balancing is used in human rights law to weigh such diverse interests as the right to free speech versus freedom of religion; the right to assemble versus the State's interest in protecting public order; and the State's obligation to provide health care versus other competing obligations for State resources.[40] A balancing approach allows States a margin of appreciation to strike a balance between competing rights consistent with national priorities, recognizing differences in how States may value different rights. Human rights monitoring bodies, including national courts, then police this balance, using different tools to pressure States whose balance does not accord with the views of those institutions regarding the importance of both rights.

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

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

Part III explains that human rights law generally uses balancing to mediate between conflicting rights. Human rights law balancing gives States discretion to strike a balance between competing duties consistent with cultural values and national priorities, thereby giving States some flexibility to remain within a human rights law framework while protecting its population. But this discretion is not unbridled, as human rights

39. *See infra* notes 257–58 and accompanying text.
40. *See infra* notes 268–73 and accompanying text.

institutions, including national courts, monitor States to push them to strike balances that are consistent with the values underlying human rights law. The effectiveness of this monitoring is improved when human rights groups can engage with the rights trade-off driving State action, not permissible under the current rule. This part concludes by considering the problems of bias and uncertainty created by the use of a balancing approach.

Ultimately, international law, as a system largely dependent upon voluntary State compliance, functions best where the law captures the interests of States. Rules which produce outcomes recognized by States as "incoherent, unfair, or absurd" are unlikely to pull States toward voluntary compliance.[41] By moving to a new non-refoulement rule that recognizes the duty of the State to protect its own people, enhanced rights protection and more stable rule compliance are likely outcomes.

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

A. Development of the Modern Non-Refoulement Rule

International law recognizes the absolute sovereignty of a State over its territory, which includes the right to decide whether to admit or expel aliens, except where otherwise restricted by treaty commitments or customary international law.[42] This authority gives States the ability to use admission and expulsion to combat threats to national security posed by dangerous aliens. Through World War II, concerns about the risk of post-transfer mistreatment generally did not restrict State discretion with respect to aliens.[43] Prior to the war, a small number of European States did enter into agreements restricting expulsion of Russian or German refugees who faced risk of mistreatment upon repatriation, if they had been granted the right to reside in a contracting State. But these treaties had few adherents, and allowed States to remove refugees where required by national security or public order.[44] As a result, States that fought World War II retained plenary control over admission and deportation of aliens.

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41. THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 84 (1990). Using Franck's terminology, the current non-refoulement rule may be thought of as an "idiot rule," meaning a simple rule that creates unreasonable and illegitimate demands at the margins. *Id.* at 77. Franck explains that such results tend to undermine the rule's overall legitimacy, a phenomenon that this Article supports. *See id.* (describing effects of "idiot rules").

42. 1 OPPENHEIM'S INTERNATIONAL LAW 940 (Robert Jennings & Arthur Watts eds., 9th ed. 1996); *see also* U.N. Human Rights Comm., CCPR General Comment 15: The Position of Aliens Under the Covenant, ¶ 5, U.N. Doc. No. A/41/40 (Apr. 11, 1986) ("The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory.").

43. *See* GOODWIN-GILL & MCADAM, *supra* note 8, at 201–03 (summarizing developments in international law before and during World War II).

44. *See* Convention Relating to the International Status of Refugees art. 3, Oct. 28, 1933, 159 L.N.T.S. 199 ("Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*), refugees who have been authorized to reside there regularly, unless the said measures are dictated by reasons of national security or public order."); *see also* Convention Concerning the Status of Refugees Coming from Germany art. 5, Feb. 10, 1938,

States used this authority during and after the War in a manner that resulted in many innocent deaths. In some instances States refused admission to individuals fleeing severe mistreatment at home, forcing them to return to their home countries and near-certain death. Switzerland, for example, refused entry to nearly 20,000 French Jews who sought asylum there after the Nazi takeover of France.[45] The Swiss argued the "boat is full" with respect to refugees during the War, and they were not obligated under existing law to accept French Jews for resettlement.[46] As a result the Jews were forced to return to France, where most were killed.[47] In 1939, a ship with hundreds of Germans seeking refuge was turned away summarily by the United States because of a policy not to admit anyone into the country that lacked a valid visa for admission.[48] The ship returned to Europe, and predictably many of the passengers ended up dead.[49]

In other instances, States transferred aliens who were already present within their territory to their home government, again resulting in severe mistreatment or death. Wartime and post-war transfers to the Soviet Union resulted in the death or severe mistreatment of over two million people.[50] The United States and the United Kingdom committed to repatriating all Soviet prisoners after the war, with no provision made for prisoners who expressed fears of mistreatment after transfer.[51] True to the agreement, the Western Allies transferred to the Soviets prisoners who expressed fears of mistreatment.[52] Tragically, these fears of mistreatment came true, with Stalin subjecting many repatriated prisoners to Siberian labor camps, or even execution.[53] The British also made forcible returns to the Soviets of civilians who fell outside the Yalta agreement, including women and children.[54]

These wartime practices highlighted the need for treaty-based regimes restricting the transfer of persons who face the risk of post-transfer

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192 L.N.T.S. 59 (same for German refugees); Provisional Arrangement Concerning the Status of Refugees Coming from Germany, art. 4, July 4, 1936, 171 L.N.T.S. 75 (same).

45. *See* Detlev F. Vagts, *Switzerland, International Law and World War II*, 91 AM. J. INT'L L. 466, 472 (1997) (describing lawful Swiss refugee practice that resulted in deaths of 20,000 French Jews).

46. *Id.*

47. *See id.*

48. *See* BARBARA MCDONALD STEWART, UNITED STATES GOVERNMENT POLICY ON REFUGEES FROM NAZISM: 1933–1940, at 440–43 (1982) (detailing incident involving the *S.S. St. Louis*).

49. *See id.*

50. NIKOLAI TOLSTOY, VICTIMS OF YALTA 19 (1977).

51. *See, e.g.*, Agreement Relating to Prisoners of War and Civilians Liberated by Forces Operating Under Soviet Command and Forces Operating Under United States of America Command, U.S.-U.S.S.R., art. 1, Feb. 11, 1945, 59 Stat. 1874 ("All Soviet citizens liberated by the forces operating under United States command . . . will, without delay after their liberation, be separated from enemy prisoners of war and will be maintained separately from them in camps or points of concentration until they have been handed over to the Soviet . . . authorities . . . .").

52. *See* CHRISTIANE SHIELDS DELESSERT, RELEASE AND REPATRIATION OF PRISONERS OF WAR AT THE END OF ACTIVE HOSTILITIES 151 (1977).

53. *See id.* at 151–56 (describing Soviet atrocities).

54. *See* TOLSTOY, *supra* note 50, at 20–21 (detailing British post-war practice).

mistreatment. This need was augmented by the large number of displaced and stateless people in Europe after the War. But States resisted recognition of an absolute duty to grant safe haven to threatened aliens. States wished to retain the right to use admission and expulsion of aliens for a range of policy purposes, including protecting the population from the threat posed by dangerous aliens, and would not agree to non-refoulement protection that did not prioritize their security concerns.[55] Thus, treaties negotiated in the immediate aftermath of World War II limited State obligations to retain aliens to situations where the alien did not pose a risk to security.

States negotiating the Third Geneva Convention (3rd GC), regulating treatment of prisoners of war (POW), or captured combatants in international armed conflict, rejected formal restrictions on transfer based on fears of mistreatment.[56] A proposal to allow POW "to apply for their transfer to any other country which is ready to accept them," was rejected by States in large part out of concern about the imposition of a duty to accept POW who feared repatriation.[57] Instead, the 3rd GC includes an absolute obligation to release and repatriate POWs at the end of hostilities.[58]

Nevertheless, State practice since 1949 reflects a general unwillingness, at least in the West, to return prisoners to face mistreatment. After the Korean War, U.N. forces, led by the United States, resisted Soviet, Chinese, and North Korean demands that prisoners who feared post-transfer treatment be forcibly repatriated to the North, resettling some prisoners in South Korea and the United States instead.[59] Similar practices followed the Iran-Iraq War, the First Gulf War, and the wars in the former Yugoslavia.[60] This practice has led Theodor Meron to argue prisoners now have the "right of free choice" with respect to post-conflict repatriation, albeit one conditioned on the consent of States to accept POWs for resettlement.[61]

The Fourth Geneva Convention (4th GC) leans farther forward, restricting States from transferring protected persons, who are civilians in occupied territory or in the territory of a Party to an armed conflict, to face persecution. Article 45 of the 4th GC prohibits the transfer of protected

55. *See* Kathleen M. Keller, Note, *A Comparative and International Law Perspective on the United States (Non) Compliance with its Duty of Non-Refoulement*, 2 YALE H.R. & DEV. L.J. 183, 186 (1999) (contending purpose of exceptions was to strengthen norm of non-refoulement by making compliance more "realistic").

56. *See* INT'L COMM. RED CROSS, COMMENTARY III: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 542 (Jean S. Pictet ed., A.P. de Heney trans., 1960).

57. *Id.*

58. *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 75 U.N.T.S. 135 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.").

59. *See* Jan P. Charmatz & Harold M. Wit, *Repatriation of Prisoners of War and the 1949 Geneva Convention*, 62 YALE L.J. 391, 391–94 (1953) (describing the struggle between the United States and Soviet Union over this issue).

60. *See* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 256 (2000) (summarizing practice).

61. *Id.*

persons in the territory of a Party to the conflict "to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs."[62] But Article 45 allows transfer of "aliens in individual cases when State security demands such action."[63] The 4th GC also expressly refuses to allow fears of persecution to restrict extraditions for ordinary crimes conducted pursuant to treaties in place prior to the conflict.[64]

The 1950 Convention Related to the Status of Refugees (Refugee Convention) provides still more extensive non-refoulement protection for refugees, or non-nationals fleeing persecution in their home States. Article 33(1) prohibits States from expelling or returning a refugee "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[65] The initial draft of the Convention included no restrictions on this obligation.[66] The British objected to the lack of a security exception in the draft provision, and together with the French proposed language retaining for the State the right to use admission and expulsion to protect security interests.[67] Article 33(2) denies non-refoulement protections to refugees if there are reasonable grounds for regarding the detainee 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."[68] Like the other post-War non-refoulement provisions, this one is generally interpreted as granting States an absolute right to expel refugees who fall within Article 33(2).[69]

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62. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 45, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter 4th GC].

63. INT'L COMM. RED CROSS, COMMENTARY IV: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 266 (Jean S. Pictet ed., Ronad Griffin & C.W. Dumbleton trans., 1958) (explaining that Article 45 does not restrict expulsions of "undesirable foreigner[s]" from State territory).

64. 4th GC, *supra* note 62, art. 45 ("The provisions of this Article do not constitute an obstacle to the extradition, in pursuance of extradition treaties concluded before the outbreak of hostilities, of protected persons accused of offences against ordinary criminal law.").

65. Convention Relating to the Status of Refugees art. 33(1), July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

66. PAUL WEIS, THE REFUGEE CONVENTION, 1951: THE TRAVAUX PRÉPARATOIRES ANALYSED, WITH A COMMENTARY 325 (Julian Weis ed., 1995).

67. *Id.* at 328.

68. Refugee Convention, *supra* note 65, art. 33(2). Article 1(F) of the Refugee Convention exempts from refugee protection individuals who have committed war crimes, crimes against the peace, serious non-political crimes, or acts contrary to the purposes and principles of the United Nations outside the country of refuge. *Id.* art. 1(F). The purpose of this provision was to ensure that individuals who do not deserve protection based on their past conduct do not abuse the refugee system. *See* WEIS, *supra* note 66, at xiii. Individuals falling into these categories may additionally pose a threat to the security of the State where they are present, making security a secondary benefit of these restrictions.

69. *See* INS v. Aguirre-Aguirre, 526 U.S. 415, 425–28 (1999) (explicitly rejecting balancing test proposed by UNHCR); *Dhayakpa v Minister for Immigration & Ethnic Affairs* (1995) 62 FCR 556, 563 (Austl.) ("There is no obligation under the Convention . . . to weigh up the degree of seriousness of a serious crime against the possible harm to the applicant . . . ."); Malouf v. Canada, [1995] 190 N.R. 230, 230 (Can. F.C.A.) (holding Article 1(F) does not require balancing "the seriousness of the Applicant's conduct against

While these post-war instruments viewed non-refoulement protection as a stand-alone right limited by security considerations, the European Commission on Human Rights (Commission), a human rights expert body with responsibility for determining which cases would be heard by the ECtHR, concluded in the 1960s that this protection was a manifestation of the broader prohibition on torture and inhuman and degrading treatment found in Article 3 of the European Convention on Human Rights.[70] The Commission provided little justification for its interpretation of the ECHR. But this shift in conception was important because the prohibition on torture and inhuman and degrading treatment is absolute under human rights law. By categorizing non-refoulement as a manifestation of these absolute rights, the legal status of the security exceptions to this duty was drawn into question.

The ECtHR formally adopted the Commission's interpretation of ECHR Article 3 in its decisions in *Soering v. United Kingdom*[71] and *Chahal v. United Kingdom*.[72] Article 3 prohibits State Parties from engaging in torture or inhuman or degrading treatment under any circumstances, but contains no express restrictions on transfer.[73] In *Soering* the court held that Article 3 includes an implied obligation for State Parties not to extradite an individual to a State where there are substantial grounds for believing the person will be subjected to torture or inhuman or degrading treatment after transfer.[74] While the court acknowledged that there was no such express requirement in the treaty, it noted that the object and purpose of the treaty is to protect human rights and to "promote the ideals and values of a democratic society."[75] The court asserted without reasoning that it would be incompatible with these purposes to allow extradition where the

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the alleged fear of persecution"); *S. v Refugee Status Appeals Authority* [1998] 2 NZLR 301 (HC) 314–19 (agreeing with *Malouf*), *aff'd*, [1998] 2 NZLR 291 (CA); T v. Sec'y of State for the Home Dep't, [1996] A.C. 742 (H.L.) 769 (appeal taken from Eng.) (Mustill, L.J.) (holding application of Article 1(F) "cannot depend on the consequences which the offender may afterwards suffer if he is returned"). *But see* U.N. High Comm'r for Refugees (HCR), Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees, ¶ 24, U.N. Doc. HCR/GIP/03/05 (Sept. 4, 2003) (arguing that gravity of the "non-political crime" that merits exclusion must be weighed against the "consequences of the exclusion"); Letter from Thomas Albrecht, Deputy Regional Representative, U.N. High Comm'r for Refugees, to Paul Engelmayer, WilmerHale (Jan. 6, 2006), *available at* http://www.unhcr.org/refworld/pdfid/43de2da94.pdf (explaining that Article 33(2) allows refoulement only where the gravity of danger posed by the individual outweighs the degree of persecution feared after return).

70. *See* X v. Fed. Republic of Ger., App. No. 1802/62, 1963 Y.B. Eur. Conv. on H.R. 462, 478, 480 (Eur. Comm'n on H.R.) (holding that extradition can amount to conduct that violates Article 3 where person is subject to post-transfer torture or other treatment contrary to Article 3); *see also* Kirkwood v. United Kingdom, App. No. 10479/83, 37 Eur. Comm'n H.R. Dec. & Rep. 158, 171–75 (1984) (same); Altun v. Fed. Republic of Ger., App. No. 10308/83, 36 Eur. Comm'n H.R. Dec. & Rep. 209, 231–34 (1983) (same).

71. 161 Eur. Ct. H.R. (ser. A) at 32–36 (1989).

72. 1996-V Eur. Ct. H.R. 1831, 1853.

73. ECHR, *supra* note 7, art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").

74. *Soering*, 161 Eur. Ct. H.R. (ser. A) at 35–36.

75. *Id.* at 34.

individual faced the real risk of post-transfer torture or inhuman or degrading treatment.[76]

In *Chahal* the court extended *Soering* by holding that the threat posed by the alien to the State where he is located is irrelevant to non-refoulement analysis.[77] In rejecting a request by the British for recognition of a national security exception to non-refoulement, the ECtHR relied on the fact that Article 3 included no national security exception.[78] If Article 3 did not permit a State Party to torture for national security reasons, neither, the court reasoned, could non-refoulement be subject to security considerations.[79] The court did not discuss whether identical interests were protected by the duties to avoid torturing and to protect from acts of torture committed by others.[80] And no discussion was had of the risks to the human rights of the British people if Chahal were released within the United Kingdom.[81]

The HRC has used similar reasoning to conclude that Article 7 of the International Covenant on Civil and Political Rights (ICCPR) provides an absolute protection against transfer to face torture or cruel, inhuman, or degrading treatment.[82] In General Comment 31, the Committee went further and implied from ICCPR Article 2 a broader obligation not to transfer a person "where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant," without further defining the potential range of post-transfer risk that could limit transfer.[83] The HRC, like the ECtHR, paid no attention to potential differences between negative and positive State duties. The HRC also did not address the impact of the rule on the State's security interests.

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76. *See id.* at 34–35 ("Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article . . . .").

77. *See Chahal*, 1996-V Eur. Ct. H.R. at 1855–56.

78. *Id.* at 1855.

79. *See id.* ("The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases.").

80. *See id.* at 1853–56.

81. *See id.*

82. *See* U.N. Human Rights Comm., General Comment No. 20: Article 7 (Prohibition of Torture, or other Cruel, Inhuman or Degrading Treatment or Punishment), ¶ 9, U.N. Doc. CCPR/C/21 (Oct. 3, 1992) [hereinafter General Comment No. 20] ("States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.").

83. U.N. Human Rights Comm., General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 12, U.N. Doc CCPR/C/21/Rev.1/Add. 13 (May 26, 2004) [hereinafter General Comment No. 31]. Article 6 of the ICCPR guarantees the right to life and includes restrictions on the death penalty. *See* International Covenant on Civil and Political Rights art. 6, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. Article 7 prohibits torture or cruel, inhuman or degrading treatment or punishment. *Id.* art. 7.

Unlike the ECHR and the ICCPR, the Convention Against Torture (CAT) includes an express non-refoulement provision.[84] Sweden included what is now Article 3 in its initial draft of the treaty based on the 1960s and 70s jurisprudence of the European Commission on Human Rights discussed above.[85] This provision prohibits transfer of a person to another State "where there are substantial grounds for believing that he would be in danger of being subjected to torture," and includes no express exceptions for state security concerns.[86] Textually it is not certain that Article 3 allows for no security exceptions. Article 2, which contains the negative duty not to torture, includes an express prohibition on justifications for torture, a prohibition not replicated in Article 3.[87] This absence led the United Kingdom and Portugal, among other States, to argue that "it [was] by no means clear" that Article 3 was intended to be absolute.[88]

Nevertheless, the Committee Against Torture and other human rights actors interpret Article 3 as an absolute manifestation of the right to be free from torture based on the provision's historical link to the ECHR. The Committee Against Torture has repeatedly stated its view that Article 3 does not allow for any exceptions.[89] Similarly, the U.N. Special Rapporteur on the Question of Torture has characterized Article 3 as absolute,[90] viewing the absence of permissible exceptions as derivative of the absolute nature of the negative duty not to torture.[91] None of these opinions addressed the feasibility of such an interpretation of the rule, nor its impact on State security.[92]

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84. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3(1), Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

85. MANFRED NOWAK, UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY 199–200 (2008).

86. CAT, supra note 84, art. 3(1).

87. *Id.* art. 2(2) ("No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.").

88. *See* Observations, *supra* note 23, ¶ 26.5.

89. *See, e.g.*, U.N. Comm. Against Torture, Conclusions and Recommendations of the Committee Against Torture: Canada, ¶ 4(a), U.N. Doc. CAT/C/CR/34/CAN (July 7, 2005) (describing non-refoulement protection of Article 3 as "absolute" and "not subject to any exception whatsoever"); *see also* NOWAK, *supra* note 85, at 147–48 (summarizing Committee Against Torture practice on this question).

90. *See* Special Rapporteur on the Question of Torture, *Report of the Special Rapporteur on the Question of Torture Submitted in Accordance with Comm'n Resolution 2002/38, Comm'n on Human Rights*, ¶ 26(o), U.N. Doc. No. E/CN.4/2003/68 (Dec. 17, 2002) (by Theo van Boven) ("The principle of non-refoulement must be upheld in all circumstances irrespective of whether the individual concerned has committed crimes and the seriousness and nature of those crimes.").

91. Special Rapporteur of the Comm'n on Human Rights, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Transmitted by Note of the Secretary-General*, ¶ 28, U.N. Doc. A/59/234 (Sept. 1, 2004) ("The principle of non-refoulement is an inherent part of the overall absolute and imperative nature of the prohibition of torture and other forms of ill-treatment.").

92. CAT non-refoulement protection, unlike the implied obligations in the ICCPR and ECHR, is limited to torture. The Committee Against Torture has recognized that Article 3 was specifically drafted not to extend non-refoulement protections to cruel, inhuman or

With these developments in human rights law, the law lurched from categorically preferring State security interests to a similar preference for the rights of the transferee. Many scholars have argued that that these developments in human rights law have rendered the security exception in the Refugee Convention "superfluous."[93] In the process, States have lost the ability to use admission and expulsion to protect the public from the threats posed by dangerous aliens who come from States with poor human rights records.

Human rights advocates and some States next appear determined to expand the categories of post-transfer mistreatment subject to non-refoulement protection. The International Convention for the Protection of all Persons from Enforced Disappearance includes an obligation not to transfer someone to a State where there are substantial grounds for believing he will be subjected to enforced disappearance.[94] The Committee on the Rights of the Child has interpreted the Convention on the Rights of the Child to include an open-ended obligation not to transfer children "where there are substantial grounds for believing that there is a real risk of irreparable harm to the child."[95] The Committee suggested that a wide-range of potential post-transfer problems should preclude transfer, including inadequate access to food or health care services and real risk of underage recruitment for sexual abuse or military service.[96] Other human rights bodies have suggested non-refoulement protection should accompany risk of unfair trial.[97] In all of these instances, it appears these new protections would not include exceptions for security considerations, thereby further restricting the right of the State to determine whether dangerous aliens may be admitted to or expelled from its territory.

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degrading treatment. *See* NOWAK, *supra* note 85, at 200 (summarizing Committee Against Torture views to this end).

93. *See* William A. Schabas, *Non-Refoulement*, *in* Expert Workshop on Human Rights and International Co-operation in Counter-terrorism, Triesenberg, Liechtenstein, Nov. 15–17, 2006, *Final Report*, ¶¶ 20, 23, U.N. Doc. ODIHR.GAL/14/07 (Feb. 21, 2007) (summarizing support for this position). *But see* James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in the New World Disorder*, 34 CORNELL INT'L L.J. 257, 316–18 (2001) (arguing that refugee status has important benefits not provided by non-refoulement protection in human rights law).

94. *See* International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, art. 16(1), U.N. Doc. A/RES/61/177 (Jan. 12, 2007) ("No State Party shall expel, return ('refouler'), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.").

95. U.N. Comm. on the Rights of the Child (CRC), General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, ¶ 27, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005).

96. *Id.* ¶¶ 27–28.

97. *See* INT'L COMM'N OF JURISTS, SUBMISSION ON THE 3RD PERIODIC REPORT OF SWITZERLAND TO THE HUMAN RIGHTS COMM. 3 & n.7 (2009), http://www2.ohchr.org/english/bodies/hrc/docs/ngos/ICJ_Switzerland97.pdf (summarizing international organization support for this view).

B. Terrorism Raises the Stakes

Throughout this evolution toward greater State non-refoulement duties, States have raised security considerations as an argument against further expansion. In treaty negotiations dating back to the Refugee Convention, States have argued that security concerns were a legitimate excuse to non-refoulement protection.[98] In the drafting of the ICCPR, States rejected a proposal limiting expulsion of aliens to situations where the alien had been convicted of one of a list of criminal offenses.[99] The reason was the desire of States to maintain their plenary control over admission of aliens into their territory.[100] Similar rationale led the United States to argue against including non-refoulement protection from cruel, inhuman, and degrading treatment in the CAT.[101] And in *Soering* and *Chahal*, the United Kingdom vigorously opposed reading ECHR Article 3 to include absolute non-refoulement protection.[102]

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

States value repatriation of aliens as a security tool because of the general ease with which repatriation may be achieved. Substantively, human rights law only requires that the expulsion decision not be arbitrary, meaning that the decision is based on the law.[103] The ICCPR also requires expulsion to be undertaken consistent with other provisions of the Covenant.[104] Procedurally, human rights law only requires that the alien be allowed to submit the reasons against expulsion to a competent authority that need not be a court;[105] to appeal to a higher authority that need not be a court;[106] and to be represented during expulsion proceedings.[107]

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98. *See supra* notes 55–59 and accompanying text.

99. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 291 & n.5 (2d rev. ed. 2005).

100. *See id.*

101. *See* NOWAK, *supra* note 85, at 200.

102. *See supra* notes 71–81 and accompanying text.

103. Customary international law requires that States have some justification for expulsion. 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 42, at 944. Major human rights treaties all include the requirement that aliens be expelled only in accordance with law. *See* ICCPR, *supra* note 83, art. 13 (permitting expulsion "only in pursuance of a decision reached in accordance with the law"); Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocol No. 11, art. 1, Nov. 1, 1998, E.T.S. No. 117 [hereinafter ECHR Protocol 7] (same); American Convention on Human Rights art. 22(6), Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter American Convention] (same); African Charter on Human and Peoples' Rights, art. 12(4), June 27, 1981), 21 I.L.M. 58 [hereinafter African Charter] (same).

104. NOWAK, *supra* note 99, at 295. This means, for example, that the statute cannot discriminate impermissibly, such as by targeting a particular ethnic group, and cannot call for collective expulsions.

105. ICCPR, *supra* note 83, art. 13; ECHR Protocol 7, *supra* note 103, art. 1(a).

These procedural requirements are subject to waiver in compelling cases of national security.[108] In its communication regarding the case of *Karker v. France*, the HRC upheld the decision of France to forego providing Karker with process prior to expulsion in a case where the French government sought expulsion because it feared he was involved with an Islamic extremist organization.[109]

Expulsion is important because States often are left without any viable alternative to mitigate the threat when it is not available. Contrary to the suggestions of many writers,[110] prosecution is frequently unavailable because of significant substantive and procedural hurdles.[111]

Evidentiary problems are part of the reason why. State evidence in terrorism cases often consists of intelligence information.[112] To be admitted in criminal trials, this intelligence information must be admissible under local evidentiary rules, which is sometimes entirely impossible.[113] The United Kingdom, for example, will not accept electronic intercepts as evidence in a criminal trial, meaning strong evidence as to the intent and plans of the defendant will not go in front of the fact-finder.[114] Even where evidence is admissible, States may have real difficulty exposing that evidence to the requirement of confrontation without revealing the sources and methods used to collect the evidence.[115] In the United States, where

106. ICCPR, *supra* note 83, art. 13; ECHR Protocol 7, *supra* note 103, art. 1(b)–(c).

107. ICCPR, *supra* note 83, art. 13.

108. *Id.*; ECHR Protocol 7, *supra* note 103, art. 1 ("An alien may be expelled before [procedural rights are provided] when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.").

109. *See* Karker v. France, U.N. Human Rights Comm. (CCPR), No. 833/1998, Conclusions Under the Optional Protocol to the International Covenant on Civil and Political Rights, ¶ 9.3, U.N. Doc. No. CCPR/C/70/D/833/1998 (2000) (finding no violation of Article 13).

110. *See, e.g.*, Rene Bruin & Kees Wouters, *Terrorism and the Non-Derogability of Non-Refoulement*, 15 INT'L J. REFUGEE L. 5, 28 (2003) (arguing prosecutions of terror suspects alleviate need for refoulement for security reasons); *cf.* RICHARD B. ZABEL & JAMES J. BENJAMIN JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS (2008) (arguing that federal courts can meet most, if not all, of the detention needs of the United States in the conflict with al Qaida).

111. *See infra* notes 112–23 and accompanying text.

112. *See* Jack Goldsmith, *Long Term Terrorist Detention and Our National Security Court* 4 (Brookings Inst., Working Paper of the Series on Counterterrorism and American Statutory Law, 2009), http://www.brookings.edu/~/media/Files/rc/papers/2009/0209_detention_goldsmith/0209_detention_goldsmith.pdf.

113. *See id.*

114. *See* Regulation of Investigatory Powers Act, 2000, c. 23, § 17 (U.K.) (prohibiting any evidence in a criminal proceeding that discloses information from electronic intercepts). Efforts to revise the intercept ban in a way that both protects national security and the right to a fair trial have failed to date. *See* LORD CARLILE OF BERRIEW, FIFTH REPORT OF THE INDEPENDENT REVIEWER PURSUANT TO SECTION 14(3) OF THE PREVENTION OF TERRORISM ACT 2005 21–24 (Feb. 1, 2010) (quoting testimony from Secretary of State for the Home Department Alan Johnson on the failure of efforts to revise evidentiary rules to allow for admission of evidence based on intercepts).

115. *See* ICCPR, *supra* note 83, art. 14(3)(e) (granting all criminal suspects the right "[t]o examine, or have examined, the witnesses against him"); ECHR, *supra* note 7, art. 6(3)(d) (same); *see also* American Convention, *supra* note 103, art. 8(2)(f) (granting all criminal suspects the right "to examine witnesses present in the court").

criminal defendants have a constitutional confrontation right, the need to subject all evidence to confrontation has derailed prosecutions out of fear of compromising intelligence sources.[116]

There must also be a sufficient quantum of evidence to meet the high burden of proof that exists in criminal trials. Terrorism investigations often require action before the plot is completed in order to avoid risks to innocent lives. But the imperative for action can conflict with the need to collect evidence to meet the burden of proof. In the *Naseer* case, the threat that the media would reveal the existence of an investigation compelled the police to act before the plan to blow up a shopping mall had progressed to a stage where the police could collect enough evidence to prove a crime had been committed under British law.[117] The need for early action also means that detention may occur before the defendant is deemed to have committed a criminal offense already in the laws of the State at the time the illegal conduct occurred.[118] This requirement can impede prosecution of terror suspects.

Non-evidentiary problems exist as well. Criminal offenses sometimes fail to capture the conduct that is worrisome to the State. In *Saadi v. Italy*,[119] the Italian government had admissible evidence that the defendant was in communication with Islamic extremists about plans to attack unspecified targets in Europe.[120] While the government charged Saadi with conspiracy to commit terrorism, the court reduced the charge because under Italian law, terrorism requires proof that the target of the attack is not a participant in an armed conflict.[121] The Italians lacked specific enough evidence of the planned targets for the attack to make a terrorism case.[122]

Prosecution is also less likely to mitigate permanently the threat the alien poses to the host State. The issue of incapacitation arises again at the completion of the sentence, except where a life sentence or death is imposed. Italian courts convicted Saadi of forgery, and he served a four and a half year sentence, but Italy was again confronted with how to

116. *See* Robert M. Chesney, *Terrorism, Criminal Prosecution and the Preventive Detention Debate*, 50 S. TEX. L. REV. 669, 708 (2009) (discussing confrontation clause problems that may arise in terrorism prosecutions). *But see* United States v. Moussaoui, 382 F.3d 453, 476 (4th Cir. 2004) (allowing the government wide latitude to substitute unclassified material for requested witness testimony the court believed was material to defendant's case).

117. *See* Burns, *supra* note 1 (explaining that accelerated schedule for raids resulted in prosecution problems).

118. ICCPR, *supra* note 83, art. 15 (1); ECHR, *supra* note 7, art. 7(1); *see also* American Convention, *supra* note 103, art. 9.

119. App. No. 37201/06, 49 Eur. H.R. Rep. 730 (2008).

120. *See id.* at 736.

121. *See id.* at 734–35.

122. *See id.* (describing judgment of Assize Court dismissing terrorism charges because "it was not known whether the violent acts which the applicant and his accomplices were preparing to commit . . . were to be part of an armed conflict or not").

mitigate his threat at the end of the sentence.[123] By contrast, once repatriated an alien may be restricted from further access to the State.[124]

These difficulties with criminal prosecution have led many scholars,[125] and some States,[126] to suggest that administrative detention, or detention based on the future dangerousness of a terrorist suspect, be made available. But States may find administrative detention an unappealing alternative to repatriation of aliens for at least three reasons.

First, administrative detention is not permitted under some human rights instruments, except in exceptional circumstances. The ECHR has been interpreted to prohibit administrative detention for security purposes,[127] except where the requirements for derogation are met.[128]

Second, while expulsion is by definition limited to aliens, it is difficult to similarly cabin administrative detention to a particular population or type of conduct. In *A v. Secretary of State for the Home Department*,[129] the British House of Lords struck down an immigration law permitting indefinite detention pending deportation where the Secretary of State certifies that the alien is a suspected terrorist, and that his presence threatens the national security of the United Kingdom.[130] Because the ECHR does not permit indefinite administrative detention pending deportation,[131] the British

123. *See id.* at 734.

124. *See, e.g.*, Joel Brinkley, *From Afghanistan to Saudi Arabia, via Guantánamo*, N.Y. TIMES, Oct. 16, 2004, at A4 (noting that Yaser E. Hamdi was required to "renounce his American citizenship" as a condition of his repatriation to Saudi Arabia after the U.S. Supreme Court granted him the right to challenge his detention in court).

125. *See* Goldsmith, *supra* note 112, at 4–5 (arguing in favor of administrative detention where criminal prosecution is not possible). *See generally* Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict Criminal Divide*, 33 YALE J. INT'L L. 369 (2008) (arguing that administrative detention is a tool for combating terrorism consistent with human rights law).

126. In his speech at the National Archives in May 2009, President Obama argued that the United States needed to consider new detention authority to prevent the "release [of] individuals who endanger the American people." President Barack Obama, Remarks by the President on National Security (May 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ (last visited Sept. 21, 2011). To that end Obama proposed that Congress authorize a legal regime that would allow for detention without criminal charge, but with legal process including periodic review. *Id.* To date nothing has come of the Obama proposal.

127. *See* Hakimi, *supra* note 125, at 392 (summarizing ECtHR jurisprudence interpreting Article 5 of the European Convention on Human Rights).

128. *See* Lawless v. Ireland (No. 3), 3 Eur. Ct. H.R. (ser. A) ¶ 48 (1961) (upholding Irish law allowing for security detention without trial based on proper invocation of Article 15 derogation from Article 5 of the European Convention on Human Rights). Article 15 allows for derogation "[i]n time of war or other public emergency [that] threaten[s] the life of the nation." ECHR, *supra* note 7, art. 15. It is doubtful that all conflicts with non-State actors that are the subject of this Article would meet this standard.

129. [2004] UKHL 56 (appeal taken from Eng.).

130. *See id.* at [73]; *see also* Anti-terrorism, Crime and Security Act, 2001, c. 24, § 23 (U.K.) (granting government the power to detain "suspected international terrorist[s]" indefinitely pending deportation where non-refoulement prevents actual expulsion).

131. *See* ECHR, *supra* note 7, art. 5(1)(f) ("No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: the lawful arrest or detention of a person . . . against whom action is being taken with a view to deportation or

attempted to derogate from Article 5.[132] The Law Lords rejected the derogation because they did not believe the immigration provision was strictly required by the exigencies of the situation.[133] The Lords refused to accept indefinite detention pending deportation because British nationals suspected of terrorism were subjected to less restrictive means, such as monitoring and restrictions on movement, to manage their threat.[134] The difficulty in cabining administrative detention has led many human rights advocates to oppose the scheme on grounds it will displace criminal prosecution over time.[135]

Third, even the more lenient procedural requirements for administrative detention may be too onerous to meet. For example, unlike expulsion, the procedural requirements for administrative detention are not subject to security waiver, unless the conditions for derogation from human rights obligations exist.[136]

Thus, without repatriation States may be left with no way to physically counteract the threat posed by a dangerous alien. Human rights groups and scholars have suggested third country resettlement as the solution to the problems created by non-refoulement protection.[137] However, recent attempts to repatriate detainees from Guantanamo Bay demonstrate the futility of depending upon States to accept non-nationals for resettlement, especially where the detainee is believed to be dangerous.[138] It is difficult to conceive of the incentives for a State to accept potentially dangerous aliens for resettlement. States motivated to accept such aliens on humanitarian grounds may be dissuaded by diplomatic pressure from the

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extradition."); *see also* R v. Governor of Durham Prison (*Ex parte* Hardial Singh), (1984) 1 W.L.R. 704 (Q.B.) at 706 (Eng.) (interpreting Article 5 as permitting detention only for so long as "reasonably necessary" to effect deportation).

132. *See A*, [2004] UKHL at [11] (describing derogation order).

133. *Id.* at [44].

134. *Id.* at [35], [44], [155].

135. *See generally* Gabor Rona, *Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools*, 5 CHI. J. INT'L L. 499 (2005).

136. *See, e.g.*, ICCPR, *supra* note 83, art. 9.

137. *See, e.g.*, Gillard, *supra* note 37, at 738 (arguing third country resettlement is solution to security problems created by non-refoulement); HUMAN RIGHTS WATCH, ILL-FATED HOMECOMINGS: A TUNISIAN CASE STUDY OF GUANTANAMO REPATRIATIONS 27 (2007) (calling on Bush Administration to close Guantanamo detention facility through third country resettlement).

138. *See* Dan Ephron, *Life After Gitmo*, NEWSWEEK (Nov. 25, 2008, 7:00 PM) http://www.thedailybeast.com/newsweek/2008/11/25/life-after-gitmo.html (interviewing author on difficulties of third country resettlement from Guantanamo). The Obama Administration has resettled more detainees in third countries, but has not found homes for all of the detainees who cannot be repatriated to their home countries. *See* Peter Finn, *Wolf Criticizes Counterterrorism Nominee over Detainee-Resettlement Plans*, WASH. POST., July 15, 2011, at A7 (noting that "[t]he Obama Administration has repatriated or resettled in third countries 67 detainees"); *The Guantánamo Docket*, N.Y. TIMES, http://projects.nytimes.com/guantanamo/detainees (last visited Sept. 21, 2011) (reporting 171 detainees remain at Guantanamo Bay).

State of nationality of the alien.[139] States already reluctant to take such a step do not need much diplomatic arm-twisting to decline to do so.

Thus, removing repatriation from the table often leaves States resorting to measures like control orders to mitigate the risk posed by dangerous aliens. Control orders are parole-like restrictions imposed on a terrorism suspect in order to protect the public from the suspect. The United Kingdom authorized a system of control orders in the Prevention of Terrorism Act of 2005,[140] and they have been used by other States as well.[141] Restrictions imposed include curfews, restrictions on communication and travel, and the right of the police to search the suspect's premises on demand.[142]

Despite the potential of control orders, they have proven ineffective, at least in the United Kingdom. HMG has found it difficult to design lawful control orders because of the numerous restrictions imposed by the ECHR. Control orders must not be so onerous as to amount to a deprivation of liberty without derogation from the ECHR.[143] And they may only be imposed if the terrorism suspect is provided "knowledge of the essence of the case against him,"[144] requiring the State to rely on information it can share with the suspect. These restrictions have led HMG to question whether control orders provide any practical advantages to national security.[145] Forty-five individuals since 2005 have been subjected to control orders, with seven individuals having absconded, and six more having their control orders quashed by the courts.[146] Former Home Office Secretary Tony McNulty acknowledged the limited efficacy of control orders, calling them "a second best option" to protect the public.[147]

Thus, the threat of terrorist acts perpetrated by aliens increases the security consequences of granting non-refoulement protection. When aliens may not be repatriated, detention, whether criminal, pursuant to ongoing

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139. *See, e.g.*, Julian E. Barnes, *Palau Deal May Not End Uighur Issue*, L.A. TIMES, June 11, 2009, at A16 (reporting that China had "pressured other countries not to take the Uighurs").

140. *See* Prevention of Terrorism Act, 2005, c. 2, § 1(1) (U.K.) ("'[C]ontrol order' means an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism.").

141. *See* COLUMBIA LAW SCH. HUMAN RIGHTS INST., PROMISES TO KEEP: DIPLOMATIC ASSURANCES AGAINST TORTURE IN U.S. TERRORISM TRANSFERS 91 (2010) (detailing Canada's use of similar measures).

142. *See* Prevention of Terrorism Act § 1(4) (listing potential restrictions imposed by control orders).

143. For example, HMG may impose a curfew of up to sixteen hours per day, but no longer. *See* Sec'y of State for the Home Dep't. v. JJ, [2007] UKHL 45, [105] (appeal taken from Eng.) (describing it as "clear" that curfews up to 16 hours are compatible with Article 5, while those longer than 16 hours are not).

144. *See* Sec'y of State for the Home Dep't. v. AF, [2009] UKHL 28, [65] (appeal taken from Eng.) (interpreting ECtHR decision in *A v. United Kingdom*).

145. CARLILE, *supra* note 114, at 63–64 (reprinting letter from Home Secretary to Lord Carlile requesting consideration of whether control orders had use after *AF*).

146. *Id.* at 6–8.

147. *PM Hits Back over Terror Suspect Escapes*, POLITICS.CO.UK (Oct. 17, 2006, 12:00 AM), http://www.politics.co.uk/News/domestic-policy/crime/terrorism/control-orders-reviewed-after-terror-suspects-escape-$454849.htm.

immigration proceedings, or preventive, may not be available.[148] Third country resettlement and release with conditions may also be unachievable or ineffective alternatives.[149]

Of course, this result merely places aliens in the same situation as citizen terrorist suspects. As discussed above, the Law Lords in *A* saw no legitimate reason for treating aliens differently from citizens in this regard.[150] What the Law Lords overlook, however, is that aliens, unlike citizens, have no legal right to remain within the State. While States grudgingly accept the threat posed by nationals as a price for maintaining cherished civil liberties, such a price is far steeper where the individual in question has traditionally been removable from the State. Indeed, the magnitude of the threat involved with acts of terrorism makes it difficult for States to bear additional risk to protect dangerous aliens. Because international law largely depends upon voluntary compliance, States have many options to evade disfavored rules, as will be described in the next section.

C. States Push Back

Given the security problems created through enforcement of the non-refoulement rule, it is not surprising that States have sought to mitigate the resulting security consequences. They have done so in part by pushing human rights bodies to accept the right of States to expel aliens despite the threat of post-transfer mistreatment where the alien threatens State security.[151] These efforts have been unsuccessful. Human rights institutions view non-refoulement as a bulwark against erosion of the *jus cogens* torture norm and are skeptical of the ability of human rights law to account for State security interests.[152] With the current rule entrenched, some States have taken steps to protect their security interests that are inconsistent with the spirit or even letter of human rights law, moves which are ultimately harmful to human rights.[153]

States long have resisted embracing the full import of non-refoulement protections where difficult security consequences result. For example, the United States takes the position that only express treaty obligations can confer non-refoulement rights, rejecting the implication of such duties from more general treaty provisions. This position means the United States does not recognize a non-refoulement obligation with respect to transfers to cruel, inhuman, or degrading treatment or other lesser forms of mistreatment.[154] The United States also rejects the Committee Against

148. *See supra* notes 110–34 and accompanying text.

149. *See supra* notes 137–38 and accompanying text.

150. *See* A v. Sec'y of State for the Home Dep't, [2004] UKHL 56, [44] (appeal taken from Eng.) (striking down British preventive detention law targeting alien terrorist suspects on grounds that it was unreasonable to treat alien and citizen terrorist suspects differently).

151. *See infra* notes 154–71 and accompanying text.

152. *See infra* notes 179–82 and accompanying text.

153. *See infra* notes 183–203 and accompanying text.

154. The United States rejected the HRC's interpretation of ICCPR Article 7. In support of its view it explained that the vigorous debate over the later-in-time, narrower non-

Torture's view that CAT Article 3 applies to transfers not originating in the United States.[155] The U.S. positions on these issues are offered as technical disagreements with the human rights community about negotiating history and methods of interpretation of treaty provisions, consistent with the positivist approach to international law employed by the United States. But the security considerations of accepting broader non-refoulement obligations are a prime policy motivation for the U.S. position.

The aftermath of the 9/11 terrorist attacks has intensified efforts by other States to seek modifications to the non-refoulement rule. These efforts have generally been rebuffed by the human rights apparatus. Several European States, including the United Kingdom and Portugal, sought reconsideration of the ECtHR ruling in *Chahal* that there were no security exceptions to the non-refoulement rule in *Saadi*.[156] Italy had evidence that Saadi was connected with Islamic terrorists, and sought to deport him home to Tunisia after he completed his criminal sentence in Italy.[157] Saadi argued that his deportation to Tunisia would violate Article 3 of the ECHR because of the real risk he would be tortured after his return.[158] The United Kingdom intervened, arguing that *Chahal* wrongly ignored the obligation of States to protect their population from the threat posed by terrorists.[159] Instead, HMG submitted that the court permit States to weigh the threat posed by the person being transferred in its non-refoulement assessment, perhaps by raising the threshold of evidence of mistreatment that must be demonstrated in cases where the individual poses a real threat to the State where he is located.[160]

The ECtHR in *Saadi* fully affirmed its decision in *Chahal*. After noting the real threat terrorism posed to state security, the court repeated the simple premise that underlies *Chahal*: since ECHR Article 3 provides an

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refoulement obligation in the CAT demonstrated that the ICCPR did not already include a broad obligation in the area. *See* U.S. Dep't of State, *List of Issues to Be Taken Up in Connection with the Consideration of the Second and Third Periodic Reports of the United States of America* 17–19, http://www2.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/USA-writtenreplies.pdf.

155. The United States argues the CAT Article 3 lacks the clear indicia of extraterritorial application included in other provisions of the treaty. *See* U.S. Dep't of State, *List of Issues to Be Considered During the Examination of the Second Periodic Report of the United States of America: Response of the United States of America* 34, http://www.state.gov/documents/organization/124126.pdf. The U.S. Supreme Court has adopted this for an identical term in the Refugee Convention. *See* Sale v. Haitian Ctrs. Council, 509 U.S. 155, 179 (1993) (holding that the "text and negotiating history of Article 33 [of the Refugee Convention] affirmatively indicate that it was not intended to have extraterritorial effect").

156. 49 Eur. H.R. Rep. 730 (2009). The brief calling for overruling *Chahal* was initially filed in *Ramzy v. Netherlands*, but the arguments were later made in *Saadi* because that case came in front of the ECtHR first. *See generally* Observations, *supra* note 23.

157. *See Saadi*, 49 Eur. H.R. Rep. at 734–37. Italy had charged Saadi with conspiracy to commit acts of terrorism, but the trial court rejected that charge. *See id.* at 734. Under Italian law terrorism requires proof that the target of the planned violence is not a participant in an armed conflict, and the government introduced insufficient evidence regarding the target of the plan to prove this point. *See id.* at 734–35.

158. *See id.* at 752–53.

159. *See id.* at 756–57.

160. *See id.* at 757–58.

absolute prohibition on torture and inhuman and degrading treatment by State Parties, non-refoulement protection must also be absolute.[161] No consideration may be made of any factors not related to threat of post-transfer mistreatment. Because the threat the detainee poses to the State that seeks expulsion does not affect the risk of mistreatment after transfer, the ECtHR held that this factor may not be considered.[162]

Canada, by contrast, has gained some traction with the Canadian Supreme Court with the argument that its security interests are relevant to the determination of whether to provide non-refoulement protection. Canadian immigration law permits deportation "to a country where a person's life or freedom would be threatened" based on a determination that a person "constitutes a danger to the security of Canada."[163] In *Suresh v. Canada (Minister of Citizenship & Immigration)*,[164] Canada sought to deport Suresh to his native Sri Lanka because his involvement in the Liberation Tigers of Tamil Eelam (LTTE), a terrorist group seeking an independent Tamil homeland in Sri Lanka, threatened the security of Canada.[165] Suresh sought to block his deportation on grounds that he faced torture if returned to Sri Lanka because of his affiliation with the LTTE.[166] Suresh argued that deportation where substantial risk of torture exists violates the right to life protected in the Canadian Charter of Rights and Freedoms.[167]

The Canadian Supreme Court held that the Canadian Charter permitted balancing the State's interest in combating terrorism against Suresh's constitutional right not be transferred to face torture.[168] While the court recognized that "barring extraordinary circumstances, deportation to torture" was impermissible, it refused to exclude the possibility that such

161. *See id.* at 761 ("Since protection against the treatment prohibited by art. 3 is absolute, that provision imposes a[] [non-refoulement] obligation . . . [for] any person who, in the receiving country, would run the real risk of being subjected to such treatment.").

162. *See id.* ("The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment . . . .").

163. Immigration Act, R.S.C. 1985, c. I-2, § 53 (Can.) ("[No person] . . . shall be removed from Canada to a country where the [person's] life or freedom is threatened . . . unless . . . the person is [reasonably believed to be engaged in terrorism or part of an organization engaged in terrorism] and the Minister is of the opinion that the person constitutes a danger to the security of Canada."), *repealed and replaced by* Immigration and Refugee Protection Act, S.C. 2001, c. 27 (effective June 28, 2002). A person whose removal on June 28, 2002 was allowed by section 53(1)(a) to (d) of the former Immigration Act is a person referred to in section 115(2) of the new Immigration and Refugee Protection Act. *See* Immigration and Refugee Protection Regulations, SOR/2002-227, § 326(3) (Can.).

164. [2002] 1 S.C.R. 3 (Can.).

165. *See id.* para. 1.

166. *See id.* paras. 15, 42.

167. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, pt. 1, § 7 (U.K.) ("Everyone has the right to life, liberty and the security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.").

168. *See Suresh*, 1 S.C.R., para. 58 (explaining that Canadian law balances the state's interest in combating terrorism against its "constitutional commitment to liberty and fair process").

circumstances existed.[169] "The ambit of an exceptional discretion to deport to torture, if any," the court explained, "must await future cases."[170] The court acknowledged that this decision was contrary to international law.[171]

Nevertheless, lower Canadian courts have yet to find "exceptional circumstances" where transfers are permitted despite the substantial risk of torture. Courts have avoided reaching the balancing analysis in most cases, instead reversing the factual determinations underlying the government's removal decision.[172]

In the one case where the lower court has directly engaged in *Suresh* balancing, it refused to authorize deportation. The lower court upheld the finding of the Canadian government that Mahmoud Es Sayyid Jaballah facilitated communications that assisted in the 1998 U.S. Embassy bombings in Tanzania and Kenya, trained in al Qaida camps, and was in active contact with senior al Qaida leaders in Canada, the United Kingdom, and Yemen.[173] But the Court refused to authorize his deportation to Egypt where there was a substantial risk of torture because his case did not rise to the level of "exceptional circumstances" mandated by *Suresh*.[174] The Court believed such circumstances did not exist because Jaballah did not himself commit acts of violence.[175]

Despite the unwillingness of the lower Canadian courts to authorize deportation using the *Suresh* rule, the reaction of the human rights treaty bodies to the *Suresh* decision has been overwhelmingly negative. In 2005, the HRC criticized the decision as a violation of Article 7 of the ICCPR.[176] In its concluding observations to Canada, the HRC wrote,

> [n]o person, without any exception, even those suspected of presenting a danger to national security or the safety of any person, and even during a state of emergency, may be deported to a country where he/she runs the risk of being subjected to torture or cruel, inhuman or degrading treatment.[177]

That same year the Committee Against Torture specifically criticized *Suresh*, writing, "The Committee expresses its concern at: [t]he failure of the Supreme Court of Canada, in [*Suresh*] . . . to recognize . . . the absolute

169. *Id.* para. 76.
170. *Id.* para. 78.
171. *See id.* para. 75 ("We conclude that . . . international law rejects deportation to torture, even where national security interests are at stake.").
172. *See, e.g.*, Mahjoub v. Canada (Minister of Citizenship & Immigration), [2005] 3 F.C.R. 334, para. 54 (Can.) (refusing to accept Immigration Ministry's finding that Mahjoub posed a threat to Canada without evidence that the Minister had independently reviewed intelligence information, including source material).
173. *See In re* Jaballah, [2006] F.C. 1230, paras. 39–55 (Can.).
174. *See id.* paras. 81–84.
175. *Id.* paras. 81–82.
176. *See* U.N. Human Rights Comm. (CCPR), *Report of the Human Rights Committee*, para. 15, U.N. Doc. A/61/40 (2006).
177. *Id.*

nature of the protection of article 3 of the Convention, which is not subject to any exception whatsoever."[178]

Similarly, the limited scholarship examining *Suresh* has criticized the decision for refusing to categorically exclude the possibility of transfer where the risk of torture exists.[179] This scholarship conflates non-refoulement with the *jus cogens* duty not to torture, and therefore fears that *Suresh* undermines the anti-torture norm.[180] Scholars have also been skeptical of the ability of the Canadian government to balance the relevant equities fairly, fearing that the government will prefer security interests to the human rights of the transferee, thereby expanding the exception.[181] This skepticism is fueled by the specter of extraordinary rendition, defined in this context as transfer for the purpose of interrogation using torture.[182]

Given the unwillingness of the human rights community and some States to reconsider the scope of non-refoulement protection, States have resorted to behavioral adaptations that have negative second-order human rights effects to avoid the security consequences of non-refoulement. In some instances States have been unwilling to capture dangerous aliens out of fear that they could not be repatriated after capture. European navies have released suspected pirates captured off the coast of Somalia back onto their ships or onto Somali beaches out of concern that they would be unable to repatriate them if taken prisoner because of torture concerns.[183] The British have gone further still and instructed their ships not to capture pirates at all, out of fear that they could claim the right to remain in the United Kingdom if brought onboard the ship or to British soil for trial.[184] While these

178. U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture: Canada*, ¶ 4(a), U.N. Doc. CAT/C/CR/34/CAN (July 7, 2005).

179. *See* Kent Roach, *Constitutional, Remedial and International Dialogues About Rights: The Canadian Experience*, 40 TEX. INT'L L.J. 537, 572 (2005) (arguing that it would have been preferable for the Canadian Supreme Court to follow established international law).

180. *See* Robert J. Currie, Charter *Without Borders? The Supreme Court of Canada, Transnational Crime and Constitutional Rights and Freedoms*, 27 DALHOUSIE L.J. 235, 259 (2004) (arguing against distinction between negative obligation not to torture and non-refoulement protection); David Jenkins, *Rethinking* Suresh*: Refoulement to Torture Under Canada's Charter of Rights and Freedoms*, 47 ALTA. L. REV. 125, 127 (2009) (criticizing *Suresh* for undermining "international peremptory norm against torture and the concomitant protective principle of non-refoulement").

181. Currie, *supra* note 180, at 260 (criticizing balancing test for giving too much weight to security concerns); Jenkins, *supra* note 180, at 132–33 (raising concerns about willingness of Canadian government to expand *Suresh* to dangerous aliens not involved in terrorism).

182. Jenkins, *supra* note 180, at 151 ("[R]endition shows that the principle of non-refoulement must be absolutely respected as an outgrowth of *jus cogens*, so that countries cannot unscrupulously avoid their obligation not to inflict torture directly by 'shopping out' or 'out-sourcing' the dirty work to other willing countries.").

183. *See* Tullio Treves, *Human Rights and the Law of the Sea*, 28 BERKELEY J. INT'L L. 1, 13 (2010) (describing release of pirates by a Danish naval vessel due to non-refoulement concerns).

184. *See* Marie Woolf, *Pirates Can Claim UK Asylum*, SUNDAY TIMES (London), Apr. 13, 2008, at 1 (explaining Foreign Office instruction to the Royal Navy). Julian Brazier, Conservative MP, criticized the British policy to not capture pirates in Somalia, saying,

policies protect the European public from the risk that captured pirates are freed in Europe, the significant costs of this decision are borne by merchants and ship crews plying the Red Sea, and Somalis terrorized by the released pirates back on shore.

More perniciously, States have puffed the effectiveness of diplomatic assurances to argue that they may repatriate individuals consistent with their non-refoulement duties.[185] Diplomatic assurances are promises obtained from the receiving State that they will not torture or otherwise mistreat detainees.[186] Assurances are designed to reduce the risk of mistreatment such that transfer is still permissible under international law.[187] Major European States, including the United Kingdom, Italy and Spain, as well as Canada and the United States, employ diplomatic assurances regularly.[188]

Generally these assurances are obtained from States with poor human rights records, which have a history of mistreating transferees.[189] Human rights groups are critical of diplomatic assurances because the States asked to give assurances have already violated international commitments not to mistreat their people.[190] These groups ask why these bilateral promises are any more likely to be followed. Advocates of assurances respond that promises from high-ranking foreign ministry or interior ministry officials to their U.S., Canadian, or European counterparts may influence the State's behavior more than multilateral treaty commitments.[191] In the past I have written that assurances can reduce the risk of post-transfer mistreatment where they are standardized, evaluated by appropriate country experts within a State's foreign ministry, actively monitored, and accompanied by a political commitment to ensure that they are followed.[192]

"These people commit horrendous offences. The solution is to turn them over to the local authorities. It's a pathetic indictment of our legal system." *Id.* at 1.

185. The United Kingdom has actively promoted diplomatic assurances as an effective "way forward" to comply with non-refoulement while protecting its public. *See* JULIA HALL, HUMAN RIGHTS WATCH, NOT THE WAY FORWARD: THE UK'S DANGEROUS RELIANCE ON DIPLOMATIC ASSURANCES 25–27 (Joanne Mariner et al. eds., 2008) (describing efforts by the British to convince other European states to embrace deportation with assurances).

186. *See id.* at 1.

187. The CAT, for example, permits transfers so long as there are not "substantial grounds" to believe the individual will be tortured. CAT, *supra* note 84, art. 3. Assurances may allow the State to assess that there are no longer "substantial grounds" to believe the transferee will be tortured, even if the risk is greater than zero. *See id.*

188. JULIA HALL, HUMAN RIGHTS WATCH, STILL AT RISK: DIPLOMATIC ASSURANCES NO SAFEGUARD AGAINST TORTURE 3–4 (Rachel Denber et al. eds., 2005).

189. *Id.* at 18–19.

190. *See generally* HUMAN RIGHTS WATCH, THE STAMP OF GUANTANAMO: THE STORY OF SEVEN MEN BETRAYED BY RUSSIA'S DIPLOMATIC ASSURANCES TO THE UNITED STATES (2007) (arguing that mistreatment of detainees after their transfer from Guantanamo Bay demonstrates ineffectiveness of diplomatic assurances).

191. John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT'L L. 201, 239 (2011).

192. *See id.* at 239–40. For a comprehensive understanding of the difficult issues surrounding diplomatic assurances, see generally ASHLEY S. DEEKS, COUNCIL ON FOREIGN RELATIONS, AVOIDING TRANSFERS TO TORTURE (2008).

But the risks associated with providing non-refoulement protection motivate States to rely upon assurances they know are faulty. A Columbia Law School Human Rights Institute report concluded that the United States is more likely to use assurances where it has no tenable alternatives to mitigate the threat posed by dangerous aliens.[193] Take the case of Maher Arar, a Canadian-Syrian dual national, whom the United States suspected of involvement with al Qaida when it detained him at Kennedy Airport in 2002.[194] U.S. officials were reluctant to release Arar to Canada, his country of residence, because Canadian officials indicated they had no legal authority to detain him if he returned. U.S. officials feared Arar would use the porous U.S.-Canadian border to re-enter the country to commit terrorist attacks.[195] Rather than bear this risk, the United States decided to remove Arar to Syria, pursuant to an immigration law permitting fast-track removal of dangerous aliens.[196] While that law prohibited transfer where it violated U.S. non-refoulement duties under the CAT, the United States claimed the transfer to Syria complied with this requirement, citing assurances received from the Syrian government.[197] The United States credited these assurances despite Syria's notorious history of torturing suspected Islamic radicals, and the poor state of U.S.-Syrian relations that made enforcing assurances difficult.[198] Tragically, Arar was tortured by Syrian officials, and Canada subsequently cleared him of any involvement with radical Islamic groups.[199]

The Arar case is not unique. In 2002, the United States deported suspected Islamic radical Nabil Soliman to Egypt.[200] His removal had been deferred for many years due to fears of post-transfer mistreatment, but in the aftermath of the 9/11 attacks that deferral was lifted on the basis of assurances from Egypt.[201] Soliman was held incommunicado in Egypt for seven weeks after his return, and the U.S. Embassy in Cairo could not confirm that he had not been tortured.[202] Similarly, the United Kingdom persisted with deporting terrorist suspects to Algeria pursuant to diplomatic assurances despite reports from detainees who had been repatriated previously that they had been tortured, dismissing those complaints as less reliable than promises from the Algerian government.[203]

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193. COLUMBIA LAW SCH. HUMAN RIGHTS INST., *supra* note 141, at 31.

194. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-08-18, THE REMOVAL OF A CANADIAN CITIZEN TO SYRIA 6 (2008).

195. *See id.* at 12, 21; *see also* Scott Shane, *The Costs of Outsourcing Interrogation: A Canadian Muslim's Long Ordeal in Syria*, N.Y. TIMES, May 29, 2005, at 10 (quoting U.S. officials explaining they could not risk Arar's release in Canada after the 9/11 attacks).

196. *See* Immigration and Naturalization Act, 8 U.S.C. § 1225(c)(2) (2006) (permitting Attorney General to designate aliens for removal without proceedings in front of an immigration judge).

197. *See* Shane, *supra* note 195, at 10 (quoting testimony by former Attorney General John Ashcroft).

198. *See id.*

199. *See id.*

200. *See* Soliman v. United States, 296 F.3d 1237, 1239–40 (11th Cir. 2002).

201. *See id.* at 1241–42 (summarizing facts in case).

202. COLUMBIA LAW SCH. HUMAN RIGHTS INST., *supra* note 141, at 49.

203. *See id.* at 82–83 (detailing actions by HMG and SIAC in the case).

These cases reveal an important reality regarding non-refoulement protection. Even as human rights bodies have held the line against any exceptions to the non-refoulement duty, States concerned about the security consequences of the rule found alternative methods to protect their population. This result is not surprising; as Thomas Franck has explained, rules that produce outcomes at the margins that are viewed as unjust lose some of the legitimacy required to entice voluntary compliance.[204] But these State workarounds have important second-order negative repercussions for human rights, which raises questions about the desirability and viability of the current rule.

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

A. Understanding the Protection Competition

The non-refoulement debate has reached an impasse. From the perspective of human rights bodies, like the ECtHR in *Saadi*, non-refoulement is inseparable from the right to be free from torture or cruel, inhuman, and degrading treatment, which is absolute.[205] Even if human rights law wanted to account for security interests, these are viewed as outside the ambit of human rights law.[206] This leads to the accusation that seeking to balance individual rights with security interests in transfer assessments compares apples to oranges.[207] From the perspective of States, a human rights framework that fails to account for the fundamental obligation of States to secure the safety of their people is untenable, not the least because of political pressures to do so. Because international law for the most part depends upon voluntary state enforcement, an untenable rule results in State evasion.

This Article contends that this stand-off is due in significant part to a failure to appreciate the human rights competition at issue in transfer determinations regarding dangerous aliens. The traditional conception of human rights is that they entail negative duties: the State shall avoid actions that constitute a deprivation of the right.[208] U.S. domestic and international legal interpretation has generally viewed human rights in this way.[209] In *DeShaney v. Winnebago County Department of Social Services*,[210] the U.S. Supreme Court rejected a claim that the State had a constitutional duty to protect a boy from abuse by his father when it knew

204. *See* FRANCK, *supra* note 41, at 84 (discussing compliance problems for "idiot rules").
205. *See supra* notes 161–62 and accompanying text.
206. *See supra* ntoes 176–78 and accompanying text.
207. *See infra* note 267 and accompanying text.
208. *See* SHUE, *supra* note 33, at 35–36, 52–53.
209. Criminal law is a major exception, as U.S. law recognizes affirmative governmental duties to effectuate the right to a fair trial, such as government provision of counsel to the indigent. *See* Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938) (holding that the Sixth Amendment includes a government duty to provide counsel to the indigent for criminal trial).
210. 489 U.S. 189 (1989).

or should have known of the danger.[211] The Court held that all due process requires is that the State not deprive an individual of a protected interest, not that it take any affirmative steps to prevent private deprivations of rights.[212] This limited conception of rights is reflected in U.S. tort law by the public duty doctrine, which limits government liability for failure to protect to situations where the State itself created the danger at issue.[213] And it is espoused regularly by the United States in rejecting human rights that require the State to take positive fulfillment measures, such as most economic, social and cultural rights.[214]

Henry Shue's important book *Basic Rights*,[215] however, rejects this limited American conception of rights. He instead argues that fulfillment of basic rights requires positive action from States, including the duty to protect those within their jurisdictions from violations committed by others.[216] Shue explains that it would make little sense to speak of a right to physical security, for example, if the State allowed others free reign to violate that security.[217] Such a duty is in accordance with the understanding that a primary purpose of the State is to create the structures required to prevent one member of society or institution from harming another.[218] Human rights bodies,[219] treaties,[220] and most human rights

211. *See id.* at 191.

212. *Id.* at 195–96.

213. *See* Helen Gugel, *Remaking the Mold: Pursuing Failure to Protect Claims Under State Constitutions via Analogous* Bivens *Actions*, 110 COLUM. L. REV. 1294, 1312–13 (2010) (describing impediment to right to protect claims under U.S. state tort law).

214. *See, e.g.*, Tony P. Hall, U.S. Ambassador to the U.N. Agencies for Food and Agriculture, U.S. Opening Statement at the Food and Agriculture Organization Right to Food Forum (Oct. 1–3, 2008), http://www.fao.org/righttofood/rtf_forum/files/Right%20to%20food%20statement.pdf (describing right to food as a "goal or aspiration" not giving rise to "any international obligation or domestic legal entitlement").

215. *See* SHUE, *supra* note 33, at 52.

216. *See id.* at 37–40.

217. *See id.*

218. *Id.* at 56. For a good primer on political theory supporting the view that protection of citizens is a primary purpose of the State, see generally Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991).

219. *See* Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988) (holding that Article 1(1) of the American Convention includes a positive obligation "to prevent, investigate and punish" human rights violations committed by private actors); General Comment No. 31, *supra* note 83, ¶ 8 (expressing view that Article 2(1) of the ICCPR includes obligation "to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress" violations of the Covenant); A.R. MOWBRAY, THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS 6 (2004) (explaining that ECtHR has recognized State "duties to protect persons from the violation of their Convention rights from both other private individuals and public officials").

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

scholars[221] accept that satisfying human rights obligations mandates protection against violations committed by actors other than the State.

The duty to protect provides the intellectual architecture for non-refoulement protection.[222] As discussed in the previous part, a major development in human rights law of the last thirty years has been recognition of an obligation not to transfer someone where there is a substantial risk of being subjected to torture or cruel, inhuman, or degrading treatment.[223] While human rights bodies such as ECtHR and the HRC have failed to provide much in the way of meaningful analysis to justify implication of such a duty, especially in the face of evidence such protection was not contemplated during drafting, understanding non-refoulement as a duty to protect provides the normative foundation for their interpretation. The obligation not to torture or seriously mistreat imposes upon States a negative duty to avoid torturing or mistreating anyone. But fully effectuating the right also requires protecting the individual from the torture or mistreatment by others. Non-refoulement is State protection from torture or mistreatment perpetrated by the receiving State.[224]

Shue's analysis of duties also explains the pressure to expand the categories of post-transfer mistreatment that merit non-refoulement protection. Because fulfilling human rights mandates State protection against the violation of those rights by others, expansion of non-refoulement duties is inevitable as the law seeks to deepen rights fulfillment. This development is already occurring. As noted above, the Enforced Disappearances Convention includes a non-refoulement

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221. *See* Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, *in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 72, 77–78 (Louis Henkin ed., 1981) (arguing that Article 2(1) of the ICCPR requires States to protect against rights violations committed by non-State actors); SARAH JOSEPH ET AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 24 (2000) (same).

222. *See* Monica Hakimi, *State Bystander Responsibility*, 21 EUR. J. INT'L L. 341, 366 (2010) (discussing the characteristics of non-refoulement as a manifestation of the duty to protect).

223. *See supra* notes 70–97 and accompanying text.

224. Not all instances where non-refoulement protection is implicated fall within the duty to protect. During the Bush Administration, the United States engaged in a practice of extraordinary rendition, in which aliens were transferred from one State to another for the purpose of interrogation using torture. *See* Charlie Savage, *Obama's War on Terror May Resemble Bush's in Some Areas*, N.Y. TIMES, Feb. 18, 2009, at A20. Rendition involves intent on the part of the transferring State that the receiving State mistreats the individual, usually to obtain information. Such intent means the transferring State incurs responsibility under international law for its complicity in the wrongful act of the receiving State under the principle that a State may not do through another that which it could not do itself. *See* Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 16 *in* Rep. of the Int'l Law Comm'n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, at 43, 47, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001) (placing responsibility on State for assistance with the wrongful acts of another State where that assistance is provided with "a view to facilitating the commission of [the] act"); *id.* art. 17 (imposing State responsibility for wrongful acts of other States where State directed and controlled wrongful act). In those instances, the transferring State is implicated in the commission of torture or other serious forms of mistreatment, thereby violating its absolute duty to avoid committing such acts, as opposed to its duty to protect from those acts committed by others. *See id.* art 16.

obligation,[225] and other human rights bodies are locating non-refoulement duties in ostensibly negative treatment prohibitions.[226]

While this protection duty is well-established in the law, less acknowledged is the competing protection duty at issue in transfer of dangerous aliens. Human rights law has in recent years recognized that the State has a duty to protect the public not only from rights violations committed by other States, but also from rights violations committed by private persons within society which it knows or should know are likely to occur. The ECtHR first recognized this duty in its landmark decision in *Osman v. United Kingdom*.[227] In that case plaintiffs argued that the British police violated the right to life of a family member when it failed to take adequate preventive measures to stop a deranged man from killing the family member despite clear warnings regarding the threat.[228] The United Kingdom denied it owed such a broad duty to protect against actions committed by members of society, arguing instead it could only be held liable where the police "assumed responsibility" for the safety of the individual.[229] The Court rejected the British position, holding the right to life includes positive State duties to safeguard the lives of those within its jurisdiction. The Court explained that the State has a duty to take "preventive operational measures" to combat threats where "the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party."[230] The Court remarked that the operational measures required went beyond merely creating a criminal justice apparatus to deal with threats, instead sometimes requiring action to mitigate the threat.[231]

While *Osman* involved a threat to an identified individual, the ECtHR has held this duty extends to society at large. In *Mastromatteo v. Italy*,[232] the petitioner claimed that Italy violated his son's right to life when it released habitual offenders from prison before the termination of their sentence, and they in turn killed his son.[233] The Court noted that this claim was different from *Osman* in that the police were not alleged to know that Mastromatteo himself was in danger, but rather should have known the released prisoners posed a danger to society in general.[234] The Court extended *Osman* and held that the State has a duty to do "all that could be

225. *See supra* note 94 and accompanying text.
226. *See supra* notes 95–100 and accompanying text.
227. 1998-VIII Eur. Ct. H.R. 3124.
228. *See id.* at 3155–56.
229. *Id.* at 3156–57. This is the rule adopted by the U.S. Supreme Court in *DeShaney*. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989).
230. *Osman*, 1998-VIII Eur. Ct. H.R. at 3159–60. The Court found that the right had not been violated because the petitioners failed to demonstrate that the police knew or should have known of the threat the killer posed to the family. *Id.* at 3162.
231. *See id.* at 3159–60.
232. 2002-VIII Eur. Ct. H.R. 151.
233. *See id.* at 163.
234. *See id.* at 166.

reasonably expected of them to avoid a real and immediate risk to life" of the "public at large," where they know or should know of the threat.[235]

The ECtHR is not alone in construing the right to life as including a duty to protect the public from the threat posed by non-State actors. While Article 6 of the ICCPR appears on its face to protect only against government interference with the right to life,[236] scholars evaluating the treaty's negotiating history argue the drafters intended to include a duty to protect against violations committed by non-State actors.[237] The HRC has accepted this duty in its evaluation of State practice under the treaty, as it refers to State efforts to protect against the threats posed by non-State actors.[238] The HRC has also recognized a similar duty to protect against torture and cruel, inhuman, and degrading treatment committed "by people acting . . . outside their official capacity or in a private capacity."[239]

Given that the law is still developing in this area, human rights bodies have yet to define precisely which operational acts the public may reasonably expect the State to undertake to protect public rights. In neither *Osman* nor *Mastromatteo* was the Court called upon to determine which operational actions were required because in neither did the Court find that the State knew or should have known of the risk in question. In three cases where the Court did find that the State did not take adequate operational measures to protect life, the burden of reasonable action for the State was heightened by its relationship with the killers.[240] Thus, what is "reasonable" in terms of operational measures where the States have no special relationship with the offenders remains undefined.

Nevertheless, it is fair to assume that expulsion would be a reasonable operational measure with respect to dangerous aliens, at least in the ordinary course of events. Expulsion is the traditional tool used by States to mitigate threats posed by aliens. And its importance is heightened where there is an absence of alternative tools to protect the public, which as explained in the previous part often occurs in terrorism cases.[241] But

235. *Id.* at 167 (citing *Osman*, 1998-VIII Eur. Ct. H.R. at 3159–60). The Court held that Italy did not violate the ECHR because petitioner failed to demonstrate that Italy's prisoner release scheme systematically failed to protect the public right to life, nor that it knew or should have known of the threat posed by these prisoners prior to release. *See id.* at 166–67.

236. ICCPR, *supra* note 83, art. 6 ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.").

237. *See* MARC J. BOSSUYT, GUIDE TO THE "TRAVEAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL & POLITICAL RIGHTS 120 (1987) (explaining that the majority of delegates spoke in favor of the right to life including a duty to protect against violations by non-State actors); NOWAK, *supra* note 99, at 123 n.12 (asserting that the right protects against violations committed by non-State actors).

238. *See* NICOLA JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY 53 (2002) (citing to Human Rights Committee materials).

239. General Comment No. 20, *supra* note 82, para. 2.

240. *See* Edwards v. United Kingdom, 2002-II Eur. Ct. H.R. 137 (holding U.K. failed to take adequate measures to protect the life of a prisoner within its custody from threat posed by another prisoner); MOWBRAY, *supra* note 219, at 17–19 (describing two cases in which Turkey failed to take operational measures to protect life where the rights violator colluded in some way with the State).

241. *See supra* Part II.B.

human rights bodies have recognized that the duty to protect from private actor harm is constrained by two considerations. First, any operational burden is limited by resources, as any burden must not be "disproportionate" to the risk.[242] Second and more important here, the operational burden is limited by conflicting rights.[243] Thus, the rights of the alien are a relevant limitation on any "duty to expel."

This analysis recasts the issue facing States in transfer determinations involving dangerous aliens as a competition between conflicting State duties. The State's duty to protect its public from threats to life, torture, and cruel, inhuman, and degrading treatment conflicts with the duty to protect the alien from substantial risk of death, torture, or cruel, inhuman, or degrading treatment after transfer. This clash of duties is also a clash of rights between the right of the public to be protected from known threats to their life and the right of the alien to be protected from the risk of post-transfer mistreatment by another State.

Recasting non-refoulement in this manner is rhetorically important. Human rights bodies, advocates, and scholars have been sanguine about the risk dangerous aliens may pose to society in significant part because they have failed to identify the human rights costs that result. Recognizing the security consequences of non-refoulement as a competition between human rights, as opposed to a policy problem for States, will encourage human rights actors to wrestle with the difficult problems created when dangerous aliens cannot be expelled. From the perspective of States, frustration with the current rule stems from its failure to acknowledge the importance of the State's duty to protect the public.[244] By recognizing this duty as a human rights imperative, human rights law better embodies the rights trade-off actually confronted by States.

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

B. Is Torture Different?

The limited justification given for categorically preferring the rights of aliens begins and ends with the *jus cogens* torture norm. The ECtHR in *Saadi* explains that if the right not to be tortured or subjected to cruel and inhuman degrading treatment is absolute, and non-refoulement is a duty

242. Osman v. United Kingdom, 1998-VIII Eur. Ct. H.R. 3124, 3159–60.
243. *Id.*
244. *See supra* notes 154–60 and accompanying text.

emanating from that right, then this duty must also be absolute.[245] But the Court's simple analysis elides over an important reality: not all duties emanating from these norms are absolute under existing law.

The three relevant State duties at issue here are the duty to avoid committing torture or cruel, inhuman, or degrading treatment; the duty to protect from such acts committed by other States; and the duty to protect from such acts committed by non-State actors. Human rights law currently treats the first two of these duties as absolute, while accepting the third is subject to limitation. As discussed above, human rights law does not impose an absolute duty on States to protect against torture or cruel, inhuman, or degrading treatment committed by non-State actors within the State's territory, requiring only that they take "reasonable" measures in that situation.[246] Thus, the question here is whether the law has properly grouped the duty not to commit torture and non-refoulement together as absolute duties, or whether non-refoulement is more akin to the duty to protect from similar mistreatment committed by private parties, where the law recognizes limitations on the duty.

The different pedigree of the duty to avoid torture and cruel, inhuman, and degrading treatment compared to non-refoulement draws into question the current legal scheme. The duty to avoid committing torture or cruel, inhuman, or degrading treatment is *jus cogens*, meaning there is near universal acceptance within the international community that it is not subject to exception or limitation.[247] While there is a vast literature on the difficulty in developing criteria for *jus cogens* norms, a central feature of such duties is a general recognition that the norm protects against conduct "so morally deplorable as to be considered absolutely unacceptable by the

245. Saadi v. Italy, App. No. 37201/06, 49 Eur. H.R. Rep. 730, 761 (2008). Note that human rights bodies have not drawn a distinction between torture and cruel, inhuman, and degrading treatment in their non-refoulement analysis, despite the disagreement of at least some scholars that the latter norm constitutes *jus cogens*. *See supra* note 17. If the prohibition on cruel, inhuman, or degrading treatment were not *jus cogens*, then the ECtHR's already weak argument against considering the conduct of the alien in granting non-refoulement protection would be inapplicable to forms of mistreatment that do not rise to the level of torture.

246. *See* General Comment No. 31, *supra* note 83, ¶ 8 (concluding that the ICCPR requires States take "due diligence to prevent . . . the harm caused by such acts by private persons or entities"); *Osman*, 1998-VIII Eur. Ct. H.R. at 3159–60 (explaining that ECHR limits protection obligations to what is "reasonable" because of resource constraints and conflicting rights); Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 174 (July 29, 1988) (interpreting the American Convention as requiring States take "reasonable steps to prevent human rights violations"); *see also* John H. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT'L L. 1, 23–24 (2008) (arguing that international law acts purposefully in granting States discretion to determine what protective actions are reasonably consistent with national laws and priorities).

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

international community as a whole."[248] To that end, it is striking that even notorious torturers condemn the practice and deny engaging in the misconduct.[249]

The Bush Administration's comments on torture in the conflict with al Qaida provide powerful evidence for this point. Even as the Administration subjected detainees to waterboarding, long-recognized as an act of torture, President Bush repeatedly denied that the United States tortured.[250] Memos by the Department of Justice Office of Legal Counsel curiously refused to characterize waterboarding as torture,[251] despite taking the position that the President had legal authority to torture in certain circumstances.[252] The twisted and faulty logic used to define torture narrowly reflects the sacrosanct nature of the duty to avoid committing acts of torture. A duty of such a rich pedigree has a strong claim to subordinate all competing duties.

There is far less acceptance among States of the duty to protect against torture committed by other States. This Article has already discussed several instances where States have claimed the right to transfer individuals to another State despite the risk they will be subjected to torture or cruel, inhuman, or degrading treatment.[253] The United States denies that it has any international legal obligation restricting transfer of detainees originating outside the United States to other States, even where there is a substantial risk of torture.[254] The Canadian Supreme Court has expressly recognized that the Canadian Charter permits the State to repatriate an alien despite the risk of post-transfer torture in exceptional circumstances.[255] The United Kingdom led several European States in challenging the interpretation of the EctHR that found an absolute non-refoulement duty within the ECHR.[256]

The willingness of important States like the United States, Canada, and the United Kingdom to challenge the legal basis for non-refoulement duties is evidence that States see the duty to protect against torture committed by

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

249. *See, e.g.*, U.N. Comm. Against Torture, *Syrian Arab Republic*, U.N. Doc. CAT/C/SYR/1 (July 20, 2009) (noting condemnation by government of Syria of torture and denial of using the practice).

250. *See* Press Release, White House Office of the Press Sec'y, President's Statement on the U.N. International Day in Support of Victims of Torture (June 26, 2004), http://georgewbush-whitehouse.archives.gov/news/releases/2004/06/20040626-19.html ("America stands against and will not tolerate torture.").

251. *See* Memorandum from Jay S. Bybee, Assistant Attorney Gen., to John Rizzo, Acting Gen. Counsel of the CIA 16 (Aug. 1, 2002), *available at* http://www.fas.org/irp/agency/doj/olc/zubaydah.pdf (arguing that waterboarding does not constitute torture because the suffering induced is insufficiently prolonged).

252. *See* Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President 46 (Aug. 1, 2002) http://www.npr.org/documents/2005/nov/torture/torturebybee.pdf (concluding that the President was not bound by congressional legislation banning the use of torture).

253. *See supra* notes 77–81, 156–60, 164–71 and accompanying text.

254. *See supra* note 155 and accompanying text.

255. *See supra* notes 168–71 and accompanying text.

256. *See supra* note 156 and accompanying text.

other States as less important than the duty to avoid committing torture. In this way non-refoulement is closer to the duty to protect against the same misconduct committed by private persons, which is recognized as a limited duty. And given the less impressive pedigree of this norm, it is certainly more perilous to claim it trumps all conflicting obligations.

This descriptive difference in the way States value these duties is normatively justified by the difference in culpability the law assigns to intentional versus unintentional acts. An intentional act occurs when the actor desires a wrongful consequence, or acts with substantial certainty of that consequence. All other acts are unintentional, even when the actor does not wish the harm in question, but acts despite great risk harm will occur as a consequence of his action. Many bodies of law recognize greater culpability for intentional acts compared to unintentional acts. Criminal law generally draws a distinction between crimes committed purposely (with a conscious desire to achieve the objective) or knowingly (with practical certainty of the consequences of the act), and acts committed with reckless disregard of wrongful consequences.[257] Similarly, in tort law, intentional torts result in a higher level of culpability than acts undertaken with mere reckless intent.[258]

When a State commits an act of torture, or contracts with another State to torture on its behalf, it acts intentionally and therefore with the highest level of culpability. It therefore makes sense for the law to impose the most onerous duties on a State to not engage in this conduct because it is the most wrongful. By contrast, in both non-refoulement and protection from private person torture or cruel, inhuman, or degrading treatment, the State does not intend the harm in question, and in fact may take active steps to prevent the harm. This identical intent suggests that the duty on States should be the same with respect to protection from any unintentional third party serious mistreatment.[259] And because the culpability for unintentional acts is less than for intentional acts, this duty should be less onerous than the duty to avoid committing these acts.

Still there are some relevant differences between non-refoulement and protection from private person harms. One important difference is control: States have greater control over the actions of private persons within their territory than over the actions of other States. Ironically, control may be a good reason to conclude that States have a less onerous duty to prevent

257. *See, e.g.*, MODEL PENAL CODE § 2.02 cmt. 3 (Official Draft and Revised Comments 1985) (describing the reduced culpability for crimes which are committed recklessly, as opposed to those committed purposely or knowingly). In some instances, such as treason, criminal law requires a specific intent for liability, meaning that actual purpose is required before criminal liability is incurred. *Id.* at cmt. 2.

258. *See* RESTATEMENT (SECOND) OF TORTS § 500 cmt. f (1965) (distinguishing between intentional acts and reckless acts).

259. States transferring an individual to another State despite the risk of post-transfer mistreatment will be committing a reckless rather than knowing act because a State is unlikely to have certainty about post-transfer treatment by another sovereign, except where the State solicits such misconduct, as in rendition. *See supra* note 224 (distinguishing rendition from most transfers where non-refoulement protection is incurred).

mistreatment by other States than mistreatment by private persons within their own State. Monica Hakimi posits that a State's duty to protect is directly correlated to the degree of control it exercises over the rights violator.[260] Thus, she explains, protection duties are at their zenith with agents or delegates of the State, over whom it exercises plenary control. They are somewhat reduced with respect to territorial subjects over whom the State has control, but whose rights restrict protection obligations. Such duties are at their lowest point with respect to external actors, over whom the State has the least control.[261] Application of this "control" test argues that States should actually incur fewer protection duties with respect to non-refoulement than with other third party actors.[262]

Another difference may be the length of the chain of causation from State action to harm. In the non-refoulement context the chain is short: one State transfers to another State, which then inflicts the relevant harm. By contrast, the State's role in failing to protect the public from a dangerous alien may be more attenuated. But this does not always hold true. In the *Naseer* case, for example, the chain appears equally short: State action, whether it be Naseer's transfer to Pakistan or release into the United Kingdom, leads to the feared harm, with just one proximate intervening actor (either Pakistan or Naseer).

Moreover, there is good reason to believe chain of causation should not be determinative of State legal obligations. Cass Sunstein and Adrian Vermeule challenge the idea that the length of the causal chain in government action, or whether the relevant State action is an action or inaction, has any moral significance.[263] They explain that governments are confronted with policy options, and are responsible for the consequences of those options regardless of the length of the chain of causation.[264] Consider the facts of the *Naseer* case.[265] There HMG had the choice to either release Naseer within the United Kingdom or transfer him to Pakistan. To the extent HMG is culpable for subsequent rights violations, it is based on the

260. *See* Hakimi, *supra* note 222, at 355–56 (arguing that State relationship with the abuser, rather than with the victim, is the touchstone for the scope of protection duties).

261. *See id.* at 357–67.

262. Professor Hakimi suggests in passing that the "sui generis" duties imposed by non-refoulement are due to a unique relationship with the victim, perhaps created by the custodial relationship. *See id.* at 366 & n.158 (arguing that the relationship with victim may explain *sui generis* scope of non-refoulement duty). But absolute non-refoulement protection is not tethered to all custodial situations. Consider the situation where Mexico is holding a Pakistani national suspected of involvement in a drug gang, whom it wishes to release from prison. Under current law, if the alien provides evidence that he is at substantial risk of torture by Pakistan after repatriation, Mexico has an absolute obligation to protect him from that mistreatment. If, by contrast, the alien has the same evidence that he will be tortured by a Mexican drug gang after release within Mexico, Mexico's obligation is limited to taking reasonable steps to prevent that mistreatment. The duties are different despite the custodial relationship being the same.

263. *See* Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 721 (2005) (dismissing significance of omission/commission distinction with respect to government action).

264. *See id.* at 720–24.

265. *See supra* notes 1–16 and accompanying text.

consequences of its policy decision. Why those consequences should be evaluated differently based on the length of the chain of causation is unclear.

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

Existing law perhaps is explained by the greater salience of one set of rights at issue in transfer determinations. In the *Naseer* case, his right not to be mistreated by Pakistan was salient in a transfer determination because he was the subject of the transfer inquiry. By contrast, the rights of the public are more obscure: it is harder to identify whose rights are violated when Naseer is released into the United Kingdom, especially where his exact victims cannot be identified in advance.[266] Nevertheless, as has been demonstrated, this conflict is real, suggesting non-refoulement, like other duties to protect, should recognize limitations imposed by conflicting rights.

III. MEDIATING BETWEEN COMPETING RIGHTS: BALANCING

A. Features of Human Rights Law Balancing Tests

If there is no a priori reason to prioritize the rights of the alien, the question becomes how human rights should accommodate the conflicting rights at issue in non-refoulement. Human rights actors and scholars regularly oppose any change to the absolute non-refoulement rule because of concerns that accounting for the threat posed by the transferee will result in comparing apples to oranges.[267]

As a general matter, human rights law prescribes balancing to mediate between competing rights claims. Provisions mandating balancing between competing interests are expressly included in multilateral human rights instruments, such as the ECHR,[268] the ICCPR,[269] and the International

266. *See* Sunstein & Vermeule, *supra* note 263, at 741 (applying these heuristics to explain the failure to support capital punishment if it results in reduced homicides).

267. *See* Saadi v. Italy, App. No. 37201/06, 49 Eur. H.R. Rep. 730, 761 (2008) ("The concepts of 'risk' and 'dangerousness' in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other.").

268. *See, e.g.*, ECHR, *supra* note 7, art. 9 (balancing freedom of thought, conscience and religion against the needs of a democratic society to protect "public safety," "public order, health or morals," and "the rights and freedoms of others").

269. *See, e.g.*, ICCPR, *supra* note 83, art. 18 (allowing State restriction of freedom of thought, conscience and religion where prescribed by law and "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others").

Covenant on Economic, Social and Cultural Rights (ICESCR),[270] as well as newer rights provisions in national constitutions, such as in South Africa[271] and India.[272] Even in the United States, where rights provisions do not include any express balancing requirements, balancing tests have been employed in Fourth Amendment[273] and Due Process analysis,[274] and balancing considerations enter other parts of constitutional law.[275]

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

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

The ECHR is instructive in this regard.[276] Article 8 guarantees the right to respect for one's private life.[277] But that article also allows States to

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

271. *See* S. AFR. CONST., 1996 § 27 (requiring a State to take measures to provide health care services, food, water and social security "within its available resources").

272. *See* INDIA CONST. art. 41 (limiting right to work, education and public assistance to India's "economic capacity and development").

273. *See* Stone v. Powell, 428 U.S. 465, 490–91 (1976) (limiting application of the Exclusionary Rule to Fourth Amendment violations where the costs of application were disproportionate to the benefit).

274. *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (holding that determining what procedural due process requires in a particular situation involves balancing competing considerations).

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

276. The Human Rights Committee has adopted a very similar approach to analyzing whether State restrictions on rights, such as freedom of expression, were in fact proportionate to the rights protected. *See* Rep. of Human Rights Comm., 60th sess., July 14–Aug. 1, 1997, ¶ 514, U.N. Doc. A/52/40; GAOR, 52nd Sess., Supp. No. 40 (Vol I), Annex VI (1997) (concluding that in the case of *Faurisson v. France*, France acted proportionately

restrict privacy rights where prescribed by law and "necessary in a democratic society" for one of a list of permissible reasons for restricting rights.[278] States are granted a margin of appreciation to decide whether a particular restriction on privacy is necessary for society, provided that restriction is prescribed by law and designed to advance a permissible purpose under Article 8.[279] For example, this margin has allowed Poland and Ireland to maintain more restrictive abortion laws, while other parties like the United Kingdom provide women much freer access to terminate unwanted pregnancies.[280] Thus, States can strike the balance between the rights and restrictions differently, and still act in accordance with the ECHR.

Nevertheless, the margin of appreciation is not limitless. The ECtHR will set aside restrictions where they are not proportionate to the aim proffered. For example, in *Lustig-Prean v. United Kingdom*,[281] the United Kingdom defended its practice of excluding gays from the military under ECHR Article 8 on grounds that the policy was necessary to ensure the operational effectiveness of the armed forces, and therefore was in the interests of national security, a permissible ground for infringing privacy rights.[282] While the Court recognized the United Kingdom's margin of appreciation to determine which restrictions were necessary to maintain an effective military, it emphasized the need for those restrictions must be proportionate to the aim served.[283] The Court then evaluated for itself the evidence regarding the impact on military effectiveness of allowing gays to serve openly, concluding that these concerns were insufficient to support a ban on gays in the military.[284]

National court balancing tests have proceeded in a similar manner. The South African Constitution includes numerous economic and social rights modeled on the ICESCR that include balancing components. For example, section 27 guarantees everyone the right to health care services, but limits the government's duty to "reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of

in criminalizing Holocaust denial). While laws banning Holocaust denial have been deemed consistent with the ICCPR, they are not mandated by the treaty, and fall within the margin of appreciation afforded States.

277. *See* ECHR, *supra* note 7, art. 8(1).

278. *See id.* art. 8(2) ("There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.").

279. *See id.*

280. *See* CTR. FOR REPROD. RIGHTS, THE WORLD'S ABORTION LAWS 2 (2008), http://reproductiverights.org/sites/crr.civicactions.net/files/pub_fac_abortionlaws2008.pdf.

281. App. Nos. 31417/96 & 32377/96, 29 Eur. H.R. Rep. 548 (1999).

282. *See id.* at 574–77.

283. *See id.* at 580–81.

284. *See id.* at 581–86. The ECtHR, like some national courts, is empowered to set aside State action where it conflicts with the ECHR. Other parts of the human rights apparatus, such as the HRC or NGOs, rely on moral persuasion to push States to alter decisions that under-protect a relevant right.

these rights."[285] The South African Constitutional Court has explained that it will defer to "rational decisions taken in good faith by the political organs and medical authorities" regarding what level of services may be provided given available resources.[286] Thus, the Court upheld a policy providing kidney dialysis only to patients who may be cured, and not to those in need of repeat dialysis, as a rational allocation of resources within the government's discretion.[287] But it rejected as outside permissible bounds a government policy denying nevirapine to pregnant mothers to prevent transmission to children of HIV to a child, concluding such a decision was irrational given the benefits of the drug, and its availability at zero cost.[288]

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

Several benefits from adopting a balancing approach emerge. First, a balancing approach allows the law to account for all relevant rights at issue in transfer determinations. Absent a reason for categorically preferring a set of rights, this approach best maximizes rights fulfillment. Here, it is important to remember that security concerns are already affecting State action. Competing rights claims do not disappear because human rights law believes they should. States have continued to address security concerns created by the current rule, just in a surreptitious manner.[289] Enshrining within the law the very trade-off in which States engage encourages States to make openly the rights trade-off they now make surreptitiously, creating transparency within the strictures of the law.

Second, greater State transparency and a legal rule which reflects all relevant interests improves the ability of human rights institutions to monitor transfer decisions, to the benefit of human rights. Currently the human rights apparatus makes recommendations consistent with existing law that fails to engage with the rights competition actually facing States, reducing the value of these recommendations. For example, Human Rights Watch (HRW) has issued reports calling for the closure of the U.S. detention facility at Guantanamo Bay, while at the same time calling for an end to the use of diplomatic assurances.[290] When faced with the reality that such a position would preclude repatriation of many prisoners, the group suggested resettlement in the United States or Europe without assessment of

285. S. AFR. CONST., 1996 § 27.

286. *Soobramoney v. Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at 776 para. 29 (S. Afr.).

287. *Id.* at 774–78 paras. 24–36.

288. *See Minister of Health v. Treatment Action Campaign (No. 2)* 2002 (5) SA 721 (CC) at 764–65 para. 135 (S. Afr.).

289. *See supra* Part I.C.

290. *See* HUMAN RIGHTS WATCH, *supra* note 137, at 2.

the security risks in such a course of action.[291] If by contrast the law recognized the obligation to protect the public as part of transfer determinations, the human rights apparatus would be forced to address the rights of the public in its recommendations. HRW's suggestions would have been more meaningful to U.S. policymakers if they addressed the human rights costs of releasing prisoners into the United States or Europe.

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

Third, a balancing approach to non-refoulement protection will remove a powerful obstacle to State agreement to additional non-refoulement obligations. As discussed earlier, once non-refoulement protection is understood as a manifestation of the duty to protect, its expansion to other forms of post-transfer misconduct is inevitable. Full effectuation of human rights requires protection from rights violations committed by others, including other States. Such thinking is already occurring, with new human rights treaties including non-refoulement protection and human rights bodies interpreting older treaties to include such duties.[292] But States like Canada, the United Kingdom, and the United States, for whom existing non-refoulement obligations have proven difficult to follow given security considerations, are rejecting additional obligations of this sort because the protection duty is viewed as too onerous.[293]

A balancing approach provides an avenue to address these concerns. The scale of prohibited post-transfer mistreatment ranges from the most intense (extrajudicial killing, torture), to the somewhat less intense (cruel, inhuman, or degrading treatment), to the still less intense (denial of fair trial, forced conscription of children). Similarly, the risks an alien may pose to the State where he is located varies from very significant (mass casualty terror operation), to somewhat significant (kidnapping or hijacking) to still less significant (financial and other material support to terrorist organizations).

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291. *See id.* at 27–28 (arguing resettlement conundrum is "an uphill struggle no doubt, but not an impossible one").

292. *See supra* notes 94–97 and accompanying text.

293. None of these States signed the Enforced Disappearances Convention. The United States has been clear that concern about the non-refoulement provision is a major reason for its failure to sign the treaty. *See U.S. Statement Concerning Draft International Convention for the Protection of All Persons from Enforced Disappearances*, U.S. DEP'T OF STATE (2005), http://www.state.gov/s/l/2005/87209.htm ("We have clearly stated for the record our continuing reservation to the absence of language in Article 16 explicitly conforming this text to the principle of NON-REFOULEMENT articulated in the 1951 Refugee Convention.").

By moving to a balancing approach to non-refoulement, States could modulate the protection provided based on consideration of both the kind of post-transfer mistreatment and kind of risk to society anticipated. Thus, while the risk an alien may commit financial crimes may not warrant transfer to torture, it may permit transfers where voting rights may be deprived. Such an approach would encourage States to accept new non-refoulement duties, with reduced concerns regarding the security consequences of such a move.

B. Concerns About Balancing: Bias and Uncertainty

Despite the status of balancing as the traditional method for mediating between competing rights claims, and the benefits suggested in the previous section, the problems of bias and uncertainty may cause critics to nevertheless argue that balancing is unlikely to produce a rights-optimal outcome in transfer decisions. States are notoriously biased against the interests of aliens, especially those perceived as dangerous.[294] This bias is enhanced by real political pressures States may face to favor the rights of its public over those of aliens present within the society.[295] A legitimate fear is that bias may lead to overvaluing the rights of the public and undervaluing the rights of the transferee. This bias may be given easy effect in non-refoulement because of the difficulty in assessing factors relevant to a balancing determination. Under a balancing approach States should consider factors such as: the risk the alien will be mistreated after transfer; the intensity of mistreatment; the risk the alien poses to the State where he is located; the nature of that risk; and the likelihood that risk will be averted through refoulement or its alternatives. Given epistemic uncertainty regarding these factors, there is an opening for bias to color State assessment.

It is worth noting at the outset that bias and uncertainty concerns are not unique to a balancing approach. Under the current rule there is epistemic bias with respect to assessment of the risk of post-transfer mistreatment.[296] While States will possess human rights reporting regarding the general conditions in a receiving State, often that reporting will reveal little about whether a particular alien is in danger of mistreatment. Diplomatic assurances are designed to reduce the risk of mistreatment, but evaluating the sufficiency of assurances may be more art than science. Does a

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294. *See* Christiane Wilke & Paula Willis, *The Exploitation of Vulnerability: Dimensions of Citizenship and Rightlessness in Canada's Security Certificate Legislation*, 26 WINDSOR Y.B. ACCESS JUST. 25, 37 (2008) (discussing phenomenon of "rightlessness" among non-Canadian citizens present in Canada).

295. *See supra* note 181 (noting criticism of *Suresh* on grounds that it would open the door to bias against aliens).

296. The risk of post-transfer mistreatment of the transferee includes two components: the intensity of mistreatment anticipated and the likelihood of its occurrence. In general terms, these two elements reflect the importance that human rights law places on the deprivation in question, and the probability that deprivation will occur. *See* Aharon Barak, *Proportionality and Principled Balancing*, 4 LAW & ETHICS HUM. RTS. 1, 11 (2010) (providing elements of balancing test).

particular official have the credibility to make assurances? Is the relationship between States of sufficient importance that following through on bilateral promises is important? Uncertainty allows State bias to color evaluation of the sufficiency of the threat of mistreatment and the sufficiency of assurances.

A balancing model would create additional opportunities for bias to infect evaluation of uncertain factors. Determining whether an alien poses a risk to the State where he is located will often require assessment of intelligence information.[297] Even the best intelligence information cannot predict with certainty what an individual plans to do. The United States and numerous European States have hyped arrests of terrorism suspects as important captures, only to later discover the individual had minimal connection to terrorist activity.[298] There is also uncertainty about the extent to which the receiving State actually will take steps to mitigate the threat posed after transfer. For example, the United States credited assurances from Kuwait that two Guantanamo detainees would be monitored and prevented from returning to terrorist activity after repatriation. The detainees evaded Kuwaiti security after transfer, and ended up as suicide bombers in Iraq.[299]

Thus, the risk of bias coloring assessments of factors relevant to balancing is real. Given these concerns, a rule utilitarian may argue that the law must as a prophylactic measure prioritize the rights of the alien. While it may be that in individual situations the result is a sub-optimal maximization of rights, such an outcome may be justified because of the inability of the State to be trusted to make a rights maximizing determination.[300]

As has already been discussed, lax enforcement in international law weakens this argument. If the law ignores State interests in protecting its population as a prophylactic measure, States will then act outside the law to protect their interests. Moreover, there are tools available to human rights law to minimize the impact of anti-alien bias in transfer determinations, as

297. The risk averted through refoulement should consider at least three factors: the intensity of the threat anticipated, its likelihood of occurrence, and the likelihood the threat will be averted through transfer.

298. The case of the Liberty City Seven is instructive in this regard. Upon arrest of seven suspects in Miami, the Bush Administration announced it had thwarted a plot to destroy the Sears Tower. *See* Damien Cave & Carmen Gentile, *Five Convicted in Plot to Blow Up Sears Tower as Part of Islamic Jihad*, N.Y. TIMES, May 13, 2009, at A19. But evidence at trial did not match this grandiose pronouncement, resulting in two mistrials. *See id.* Ultimately, a jury did convict many of the defendants of at least some counts. *See id.*

299. Alissa J. Rubin, *Former Guantánamo Detainee Tied to Mosul Suicide Attack*, N.Y. TIMES, May 8, 2008, at A8.

300. *See* Mattias Kumm, *Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement*, *in* LAW, RIGHTS AND DISCOURSE: THE LEGAL PHILOSOPHY OF ROBERT ALEXY 131, 151–52 (George Pavlakos ed., 2007) (explaining that institutional biases may require designing rights in a manner that over and under enforce rights).

has been seen in Canada, the only State to date to have adopted a balancing approach to non-refoulement decisions.[301]

The non-refoulement balancing test itself may be modified to mitigate bias concerns by placing a proverbial thumb on the scale in favor of the rights of the alien. For example, a State's authority to transfer may be limited to situations where the risk averted through refoulement "clearly exceeds" or is of "significantly greater importance" than the risk of mistreatment.[302] The Canadian Supreme Court in *Suresh* may have intended exactly this result when it wrote that transfers to torture would be permissible only in "exceptional" circumstances.[303] This approach has led the Canadian courts to reject several attempts by the government to repatriate aliens in spite of the risk of serious mistreatment or torture.[304]

Placing a thumb on the scale in favor of the rights of aliens is a compromise between the current rule and a pure proportionality test: limited over-enforcement of the rights of the alien is permissible to address the risk of bias, without completely crowding out consideration of the rights of the public. The degree of over-enforcement could be increased or decreased depending upon the level of concern about bias.

The more attention the balancing test pays to bias, however, the closer it moves toward the current rule and the fewer the benefits of a balancing approach. As under-enforcement of the obligation to protect the public increases, States will have ever greater incentive to return to self-help options to avoid the security consequences of the rule. This outcome is not surprising; the tighter the law seeks to cabin State discretion, the greater the incentive for States to resort to mechanisms outside the non-refoulement rule to address the need to protect the public. Thus, altering the proportionality rule alleviates bias concerns at the expense of the benefits of balancing described earlier.

Human rights law may also mandate a more robust process attendant to transfer determinations. As discussed in Part II, human rights law currently requires only that the alien be allowed to submit the reasons against expulsion to a competent authority that need not be a court; to appeal to a higher authority that need not be a court; and to be represented during expulsion proceedings, with all requirements subject to waiver in compelling cases of national security.[305] Greater process associated with expulsions could address the bias and uncertainty concerns in two ways. First, greater process increases the chances that incorrect government assessments of risk may be caught and remedied. Second, a neutral (or more neutral) arbiter may be less likely to allow bias to color assessment of

301. *See supra* notes 164–75 and accompanying text.

302. *See* Kumm, *supra* note 300, at 151 (explaining proportionality inquiries can bear the weight of institutional biases through altering the formulation of the test).

303. *See* Suresh v. Canada (Minister of Citizenship & Immigration), [2002] 1 S.C.R. 3 para. 78 (Can.) (describing discretion to deport to face torture as "exceptional").

304. *See supra* notes 172–75 and accompanying text (describing post-*Suresh* jurisprudence).

305. *See supra* notes 103, 105–09 and accompanying text.

factors determining whether non-refoulement protection must be granted. The extensive procedures provided aliens prior to expulsion in Canada appear to have achieved these aims. The Canadian courts have regularly rejected the factual predicates offered by the government to support expulsion despite the risk of post-transfer mistreatment.[306] Even where the courts have upheld the government's fact finding, they have refused to allow transfer on the grounds that the case was not "exceptional."[307]

Nevertheless, there are difficult questions that human rights law would need to answer before prescribing additional process in expulsion hearings. First, are courts well suited to address the factual predicates underlying the balancing determination? Non-refoulement determinations often will involve assessment of intelligence information and foreign government communications. The United States has aggressively pursued the position that only the Executive has the capacity to make these sorts of determinations, and it is inappropriate for courts to interfere.[308] The experience of other States, however, suggests this concern is overstated. Judges in Canada and in Europe have reviewed intelligence information to ascertain threat levels and risk of post-transfer mistreatment, including review of assurances to determine whether those assurances are sufficient to support transfer.[309]

Still, to be meaningful, court reviews would need to look behind the intelligence information proffered by the government. U.S. and Canadian courts have questioned procedures in which the court is asked to evaluate claims based on intelligence reports without being able to assess the reliability of the sources that are the basis of the reports.[310] States may be unable or unwilling to subject intelligence sources to even ex parte, in camera examination by the courts given the risk of compromising those sources. They may be more willing to allow access to intelligence sources in an administrative hearing within the Executive Branch. But questions would exist as to whether an Executive Branch official would qualify as a neutral decision maker, capable of setting aside bias.[311]

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306. *See supra* note 172.

307. *In re* Jaballah, [2006] F.C. 1230, paras. 81–82 (Can.).

308. *See* Declaration of Clint Williamson, U.S. Ambassador at Large for War Crimes Issues, para. 10 (June 8, 2007), *available at* http://www.state.gov/documents/organization/116359.pdf (arguing that sharing with the court materials used to make assessments about risk of post-transfer mistreatment would compromise U.S. foreign policy).

309. *See* DEEKS, *supra* note 192, at 18–19.

310. *See* Parhat v. Gates, 532 F.3d 834, 846–47 (D.C. Cir. 2008) (holding that government evidence could not be assessed without consideration of the reliability of the sources that are the basis for that evidence); Mahjoub v. Canada, [2005] 3 F.C.R. 334, para. 54 (Can.) (refusing to accept the Immigration Ministry's finding that Mahjoub posed a threat to Canada without evidence that the Minister had independently reviewed intelligence information, including source material).

311. *See* Declaration of Stephen Abraham, Lieutenant Colonel, U.S. Army Reserve, Reply to Opposition to Petition for Rehearing, at app. i–v, Al Odah v. United States, 551 U.S. 1161 (2007) (mem.) (No. 06-1196) (describing bias in favor of decisions to detain in U.S. military Combatant Status Review Tribunals), *available at* www.scotusblog.com/archives/Al%20Odah%20reply%206-22-07.pdf.

Second, should the transferee play a substantial role in the review process? The Committee Against Torture has been critical of the United States for not allowing alien terrorism suspects to play a greater role in the determination of whether or not there is a substantial risk of mistreatment after transfer.[312] It may be still more difficult to assess threat information without giving an alien the opportunity to respond to that information. But how robust should such procedures be? The closer the procedures required in the expulsion process approximate criminal procedural rights, the less useful expulsion will be as a tool to protect the public. Ex parte, in camera hearings, or allowing cleared counsel for the alien to review classified information, may be a useful middle ground approach to reduce uncertainty and bias in transfer determinations, while preserving secrecy of classified information.

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

The experience of the Canadian courts after *Suresh* suggests that courts may struggle in making what is essentially a policy determination about how to weigh competing rights without guidance from the political branches. In *Jaballah* the lower court held that an individual who had not committed actual violence could not be deported to face mistreatment.[313] But the court created this standard itself, in the absence of guidance from the elected branches, or the Canadian Supreme Court, on which exceptional circumstances would justify such transfers. If courts are expected to review balancing determinations, they will need better guidance from State political branches and/or international human rights law on the bounds within which discretion is cabined.

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

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312. *See* U.N. Comm. Against Torture, *Conclusions and Recommendations of the Committee Against Torture*, ¶ 20, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006) (criticizing lack of involvement of those rendered in determination of whether they were at a substantial risk of being mistreated).

313. *In re* Jaballah, [2006] F.C. 1230, paras. 81–82 (Can.).

CONCLUSION

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

Second, the act of identifying the separate State duties necessary for fulfillment of a human right can lead to better enforcement of that right. One of the most important insights of Shue's duty typology is that it is almost never preferable to have protection duties do all the work because doing so almost certainly results in rights violations.[314] But this is exactly what is happening with the torture norm, as the onus for torture prevention is placed on the sending State as opposed to the receiving State. It is telling that the largest number of communications heard by the Committee Against Torture are against Sweden, a State with no history of torture, alleging violations of non-refoulement obligations.[315]

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

Third, human rights law works best when the law recognizes State interests and then seeks to cabin those interests within reasonable bounds. Human rights law is filled with balancing tests precisely for this reason. The concept of margin of appreciation allows States to decide how to trade off rights in the first instance. Human rights bodies and groups play a valuable role in pressuring States to keep their balance within reasonable bounds. Applying this model to non-refoulement increases the likelihood

314. *See* SHUE, *supra* note 33, at 61 (explaining that complete reliance on either avoidance or protection duties is unrealistic, and "almost certainly not desirable").

315. NOWAK, *supra* note 85, at 160–61.

of State adherence to human rights, and improves the quality of monitoring activities of human rights groups. But granting States greater legal discretion on transfer decisions must come with realistic steps to correct for the threat of bias against aliens. Human rights law can consider placing a thumb on the scale in favor of the rights of aliens, as well as increasing the procedural requirements associated with expulsion, while being mindful that requiring too many procedures risks once again pushing States outside the human rights framework to address security concerns.