A Return to the Principle of *Non-Refoulement*: Re-Examining and Reconciling the Principle and its Exceptions

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I. INTRODUCTION

The primary aim of this work is to determine whether the principle of *non-refoulement* and the exceptions to the principle, expressed in article 33 of the 1951 Convention relating to the Status of Refugees,[1] have attained the status of customary international law.

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1. Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention]. Article 33 on the prohibition of expulsion or return (*"refoulement"*) of the 1951 Convention provides:

> No Contracting State shall expel or return (*"refouler"*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Since the 50th anniversary of the 1951 Convention, numerous debates concerning the content and relevance of the Convention have emerged.[2] The pervasive existence of refugee movement and the inherent tension between human rights protection, on the one hand, and State sovereignty and control over State borders, on the other, have shown that discussions concerning the 1951 Convention are as relevant today as they have been 50 years ago.[3] This is most apparent in third world countries, because refugees are usually found in the poorest parts of the world and move from one third world country to another.[4]

The question of finding a middle ground satisfying to States that provide asylum to refugees and a remedy that takes into consideration the plight of one seeking refuge is brought to the fore by the principle of *non-refoulement*. Described briefly, "[t]he principle of *non-refoulement* prescribes ... that no refugee should be returned to any country where he or she is likely to face persecution or torture."[5] This principle is considered the cornerstone of refugee protection and the heart of international refugee law.[6]

2. *See*, LIZ CURRAN & SUSAN KNEEBONE, *Overview to* THE REFUGEES CONVENTION 50 YEARS ON: GLOBALISATION AND INTERNATIONAL LAW 3 (Susan Kneebone ed. 2003).

3. *Id.* at 3, 9.

4. *See*, GIL LOESCHER, BEYOND CHARITY: INTERNATIONAL COOPERATION AND THE GLOBAL REFUGEE CRISIS 8 (1993). *See also*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES [UNHCR], 2005 Global Refugee Trends, *available at* http://www.unhcr.org/cgi-bin/texis/vtx/statistics/opendoc.pdf?tbl=STATISTICS&id=4486ceb12 (last accessed Feb. 11, 2007) (the vast majority of refugees assisted by the UNHCR are located in developing countries, i.e., countries covered by the UNHCR Bureau for Central Asia, South-West Asia, North Africa, and Middle East (47%) and for Africa (41%).).

5. GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 117 (1996).

6. *See*, GUNNEL STENBERG, NON-EXPULSION AND *NON-REFOULEMENT*: THE PROHIBITION AGAINST REMOVAL OF REFUGEES WITH SPECIAL REFERENCE TO ARTICLES 32 AND 33 OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES 171 (1989). *See also*, Reinhard Marx, *Non-Refoulement, Access to Procedures, and Responsibility for Determining Refugee Claims*, 7 INT'L J. REFUGEE L. 383, 383-406 (1995) ("[*Non-refoulement*] is the cornerstone of the regime of international protection of refugees.").

In spite of its importance within the framework of refugee protection, the principle has been criticized as eroding state sovereignty, because some governments believe that upholding the principle results in abdicating their migration control responsibilities.[7] Attention is drawn to the problems encountered by States in relation to the implementation of the *non-refoulement* principle, as it:

> arbitrarily assigns full legal responsibility for protection to whatever state asylum-seekers are able to reach ... . Apart from the right to exclude serious criminals and persons who pose a security risk, the duty to avoid the return of any and all refugees who arrive at a state's frontier takes no account of the potential refugee flows on the receiving state. This apparent disregard for their interests has provided states with a pretext to avoid international legal obligations altogether.[8]

The present system of refugee protection is also described as "unfair, inadequate, and ultimately unsustainable" because obligations imposed upon States are unilateral and undifferentiated.[9]

In analyzing whether the principle of *non-refoulement* and its exceptions have attained the status of customary international law, this study attempts to balance State interests with humanitarian considerations; it proposes an understanding of Refugee Law that takes into perspective the interests of States, without disregarding the rights of refugees, and vice versa.

7. *See,* JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 999 (2005). *See also,* VIGDIS VEVSTAD, REFUGEE PROTECTION: A EUROPEAN CHALLENGE 13 (1998) [hereinafter HATHAWAY, RIGHTS OF REFUGEES] ("States, although recognizing that refugee matters are international in character, do not easily accept legal harmonization because it implies relinquishment of sovereignty in an area in which complete control tends to overshadow all other considerations.").

8. JAMES C. HATHAWAY, *Preface to* RECONCEIVING INTERNATIONAL REFUGEE LAW xvii-xviii (James C. Hathaway ed., 1997) [hereinafter HATHAWAY, INTERNATIONAL REFUGEE LAW].

9. *See, id.* at xxviii. *See also,* HATHAWAY, RIGHTS OF REFUGEES, *supra* note 7 at 1000 ("[N]either the actual duty to admit refugees nor the real costs associated with their arrival are fairly apportioned among states ... . [T]he legal duty to protect refugees is understood to be neither in the national interest of most states, nor a fairly apportioned collective responsibility. It is therefore resisted."). *See, e.g.,* LOESCHER, *supra* note 4, at 8:

> Even a modest influx places a severe strain on a poor host country's social services and physical infrastructure and may radically distort local economic conditions. In Malawi, for example, where the GNP per capita is only $170, one in every ten persons is a refugee from Mozambique. This is the equivalent of the United States, a far richer country, suddenly admitting over 25 million Central Americans — the entire population of that region.

While it is indubitable that States-parties to the 1951 Convention — by virtue of their being parties to the Convention — are obliged to observe the principle of *non-refoulement* expressed in article 33,[10] legal scholars have discussed the possibility of its attaining customary status, and in some instances, whether the principle has become *jus cogens.*[11] Both statuses imply that the principle of *non-refoulement* is binding even on States that are not parties to the 1951 Convention or related instruments that contain the prohibition against *refoulement.* The application of the customary principle of *non-refoulement* vis-à-vis the treaty-based exceptions may raise some questions: if, for instance, States-parties to the 1951 Convention *refoule* a refugee based on the ground that the refugee is a risk to national security or a danger to the receiving community, is the State in violation of its customary duty to prohibit against *refoulement*? If, however, States not parties to the 1951 Refugee Convention *refoule* a refugee based on the exceptions, does this situation differ from acts of *refoulement* by States-parties based on the exceptions?

The study embodies and further strengthens the concern for refugees manifested in the Preamble[12] of the 1951 Convention by proposing that, while the principle of *non-refoulement* is part of customary international law, the exceptions to the principle have not attained the status of customary international law. Due to the customary nature of the principle, non-parties to the 1951 Convention are bound absolutely by *non-refoulement* and may not

10. *See, Sir Elihu Lauterpacht, International Law: Collected Papers, in* INTERNATIONAL LAW: CASES AND MATERIALS 94 (Louis Henkin et al. eds., 3d ed. 1993) ("The rights and duties of States are determined in the first instance, by their agreement as expressed in treaties — just as in the case of individuals their rights are specifically determined by any contract which is binding upon them."); JOAQUIN G. BERNAS, AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 15 (2002) ("Treaties determine the rights and duties of states just as individual rights are determined by contracts. Their binding force comes from the voluntary decision of sovereign states to obligate themselves to a mode of behavior.").

11. *See, e.g.,* Jean Allain, *Insisting on the Jus Cogens Nature of Non-Refoulement, in* THE REFUGEE CONVENTION AT FIFTY: A VIEW FROM FORCED MIGRATION STUDIES (Joanne Van Selm et al. eds., 2003) (insisting that *non-refoulement* is *jus cogens.*).

12. "[T]he United Nations has, on various occasions, manifested its profound concern for refugees and endeavored to assure refugees the widest possible exercise of these fundamental rights and freedoms." *See also,* UNHCR, Note on the International Protection of Refugees, *Interpreting article 1 of the 1951 Convention relating to the Status of Refugees* 1 (Apr. 2001) ("A close reading of the preamble leads to the conclusion that the object and purpose of the instrument is to ensure the protection of the specific rights of refugees ....") [hereinafter UNHCR Note *Interpreting Article 1*].

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12. "[T]he United Nations has, on various occasions, manifested its profound concern for refugees and endeavored to assure refugees the widest possible exercise of these fundamental rights and freedoms." *See also,* UNHCR, Note on the International Protection of Refugees, *Interpreting article 1 of the 1951 Convention relating to the Status of Refugees* 1 (Apr. 2001) ("A close reading of the preamble leads to the conclusion that the object and purpose of the instrument is to ensure the protection of the specific rights of refugees ....") [hereinafter UNHCR Note *Interpreting Article 1*].

claim that the refugee is a national security risk or a danger to the community as justification for non-compliance. As such, "a state cannot take any measure that would violate its duty not to refoule under customary international law."[13] By arguing against the customary nature of the exceptions to the principle, the study enhances the protection given to the unprotected, which is a cornerstone principle of Refugee Law.[14] Consequently, in certain situations, States not parties to the 1951 Convention are prohibited from *refoulement*, a duty imposed under customary international law.

The significance of the principle has often been reiterated by international bodies and experts in the field of international refugee law.[15] For instance, as early as 1977, the United Nations High Commissioner for Refugees [hereinafter UNHCR] Executive Committee emphasized the fundamental importance of the principle in the realm of refugee protection.[16] In 2001, the United Nations General Assembly issued a resolution underlining the importance of the principle of *non-refoulement*.[17]

Furthermore, the emphasis on the study of article 33 of the 1951 Convention with respect to the principle of *non-refoulement* is important, since it is submitted that article 33 has "played a principal part in the development of the principle ... and that, as such, it constitutes the most important part of international refugee law."[18] The article is the embodiment of the principle of *non-refoulement* in treaty law, "demonstrated not only by

13. Alison Stuart, *The Inter-American System of Human Rights and Refugee Protection: Post 11 September 2001*, 24 REFUGEE SURV. Q. 75, 67-82 (2005).

14. *See*, UNHCR Note *Interpreting Article 1*, *supra* note 12, at 2 ("Refugees are owed international protection precisely because their human rights are under threat.").

15. *See*, Thematic Compilation of General Assembly & Economic and Social Council Resolutions - Non-Refoulement, *available at* http://www.unhcr.org/publ/PUBL/3e96a11fc.pdf (last accessed Feb. 11, 2007) (containing a summary of the resolutions concerning the principle of *non-refoulement*.).

16. UNHCR, Executive Committee Conclusion No. 6 (XXIII) (1977).

17. G.A. Res. 56/137, ¶ 3, U.N. Doc. A/RES/56/137 (Dec. 19, 2001):

> The United Nations "*[r]eaffirms* that the 1951 Convention and the 1967 Protocol remain the foundation of the international refugee regime and recognizes the importance of their full application by States parties, notes with satisfaction that 141 States are now parties to one or both instruments, encourages the Office of the United Nations High Commissioner for Refugees and States to strengthen their efforts to promote broader accession to those instruments and their full implementation, and *underlines in particular the importance of full respect for the principle of non-refoulement*" (emphasis supplied).

18. STENBERG, *supra* note 6, at 268.

the fact that to date more than one hundred States have acceded to the 1951 Convention and the 1967 Protocol, but also by the prominence given to the provision in the Convention itself."[19]

The 1951 Convention and 1967 Protocol are central to the international refugee protection regime and "provide the legal framework for any meaningful discussion of States' obligations to respect and to ensure respect for the fundamental rights of refugees."[20] Authors Weissbrodt and Hortreiter observe that article 33 of the Refugee Convention "has served both as a model and textual basis for many subsequent human rights treaties that have incorporated the principle of *non-refoulement*."[21]

The principle protects asylum seekers who have not yet been formally recognized as refugees, since according to the UNHCR:

> A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.[22]

19. *See*, *Id.* at 173. *See also*, G.A. Res. 56/137, *supra* note 17 ("[T]he 1951 Convention and the 1967 Protocol remain the foundation of the international refugee regime ...").

20. Jean-Francois Durieux & Jane McAdam, *Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies*, 16 INT'L J. REFUGEE L. 5, 4-23 (2004).

21. David Weissbrodt & Isabel Hortreiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 2, 1-73 (1999).

22. *See*, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1992), at 9 [hereinafter *UNHCR Handbook*]; *See also*, Marx, *supra* note 6, at 383 ("[T]his principle applies independently of any formal determination of refugee status by a State."); *Governing Rule 14: Rule of Non-Refoulement*, 23 STUD. TRANSNAT'L LEGAL POL'Y 125, 123-29 (1992) ("[T]he principle of non-refoulement applies not only to a person who has already been recognized as a refugee, but also to any person applying for refugee status pending determination of that status."); HATHAWAY, RIGHTS OF REFUGEES, *supra* note 7, at 303-04:

> [I]t is one's de facto circumstances, not the official validation of those circumstances, that give rise to Convention Refugee status ... . They [refugees] are rights-holders under international law, but could be precluded from exercising their legal rights during the often protracted

Delays in the implementation of refugee recognition procedures in asylum countries may result in the *refoulement* of refugees if the application of the principle is dependent upon recognition. As such, the duty of *non-refoulement* is not dependent upon the formal adjudication of status.[23]

In this study, the term *refugee* primarily refers to the conventional definition found in the 1951 Convention and 1967 Protocol. Refugee definitions vary per region, and the extended mandate of the UNHCR further expands the meaning of *refugee* beyond international or regional agreements; varying definitions may result in confusion when identifying the beneficiaries upon whom the customary nature of the principle of *non-refoulement* grants its protection. A delimitation of the term *refugee* is thus significant in order to determine the proper objects of the protection granted by the customary nature of the principle of *non-refoulement*.

II. RE-EXAMINING THE PRINCIPLE OF *NON-REFOULEMENT*

It is essential to discuss the elements of customary international law and analyze whether these elements are present with respect to the principle. On the outset, it must be noted that a substantial number of authors are in accord with the view that *non-refoulement* has attained the status of customary international law.[24] It must also be noted that a discussion of the legal nature of *non-refoulement* lays the foundation for a subsequent analysis of the customary nature of the exceptions to the principle.

A. Fundamentally Norm-Creating Character

A conventional rule may become binding on States irrespective of their consent, in line with article 38 of the Vienna Convention on the Law of Treaties.[25] Thus, a rule of customary international law can generate from a

domestic processes by which their entitlement to protection is verified by officials.

23. *Id.*

24. *See, e.g.*, STENBERG, *supra* note 6, at 279 ("It may be stated that there is ample evidence for the contention that the principle of *non-refoulement* has become a general rule of customary international law."); GOODWIN-GILL, *supra* note 5, at 167 ("There is substantial, if not conclusive, authority that the principle [of *non-refoulement*] is binding on all States, independently of specific assent."); Nils Coleman, *Non-Refoulement Revised: Renewed Review of the Status of Non-Refoulement as Customary International Law*, 5 EUR. J. MIGRATION AND L. 23 (2003) ("The majority doctrinary opinion is that the principle has over time acquired the status of customary international law.").

25. *See,* Vienna Convention on the Law of Treaties, May 23, 1969, art. 38, 1155 U.N.T.S. 331 ("Nothing in Articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of

treaty provision.[26] This occurs when one of the following conditions exist: (1) when the treaty rule declares a pre-existing custom; (2) when the treaty rule crystallizes customary law in the process of formation; or (3) when the treaty rule generates new customary law subsequent to its adoption.[27]

The International Court of Justice treated this matter in detail in the *North Sea Continental Shelf Cases*,[28] where the Court held:

> In so far as [the contention that the equidistance principle enunciated in Article 6 (2) of the 1958 Convention on the Continental Shelf has formed part of customary international law,] this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed ....

Moreover, according to the decision, the provision in question should potentially be "of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law."[29] The decision did not require "the passage of any considerable period of time" and noted that "a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected."[30] Thus, it must be determined whether article 33 of the 1951 Refugee Convention possesses a *fundamentally norm-creating character* as discussed in the decision.

It is submitted that article 33 is of a fundamentally norm-creating character based on the number of States who have ratified the Convention

international law, recognized as such."). *See also,* STENBERG, *supra* note 6, at 268.

26. *See, e.g.*, STENBERG, *supra* note 6, at 269.

27. INTERNATIONAL LAW: CASES AND MATERIALS 101 (Louis Henkin et al. eds., 3d ed. 1993) [hereinafter INTERNATIONAL LAW: CASES AND MATERIALS].

28. North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20, 1969).

29. *Id.* at 43. *See also,* STENBERG, *supra* note 6, at 270.

30. *North Sea Continental Shelf,* 1969 I.C.J. at 43.

and 1967 Protocol.[31] Goodwin-Gill supports this view as follows: "Article 33 of the 1951 Convention is of a 'fundamentally norm-creating character' in the sense in which that phrase was used by the International Court of Justice in the *North Sea Continental Shelf Cases*."[32] Moreover, article 33 is not subject to reservation or derogation.[33]

The existence of the exceptions in article 33 (2) does not deprive the article of its norm-creating character, because the freedom of contracting States to qualify its obligation of *non-refoulement* under the second paragraph is not unlimited.[34] Stated succinctly, the existence of exceptions to a rule does not prevent such rule from attaining customary status.[35]

In analyzing the legal nature of the principle of *non-refoulement*, it is insufficient to end with a discussion that such principle is of a "fundamentally norm-creating character."[36] Rather, the "process of generation simply means that the treaty provision has a stimulating function. In order to be considered a rule of customary international law the provision also has to satisfy the normal conditions for the creation of rules of customary international law ... ."[37] As such, a concise analysis of the customary character of the principle requires a discussion of the basic elements for the creation of rules of customary international law, as enumerated in the previous section.

B. State Practice

31. *See,* STENBERG, *supra* note 6, at 270 (noting that "to date more than one hundred States have adhered to the Convention and/or to the 1967 Protocol Relating to the Status of Refugees.").

32. GOODWIN-GILL, *supra* note 5, at 168.

33. *See,* Refugee Convention, *supra* note 1, at art. 42 ¶ 1 (prohibiting States from making reservations to article 33.). *See also,* Stuart, *supra* note 13, at 75 (discussing the non-derogability of article 33 of the 1951 Convention.).

34. STENBERG, *supra* note 6, at 271. *Accord* GOODWIN-GILL, *supra* note 5, at 168 ("That *refoulement* may be permitted in exceptional circumstances does not deny ... [the] premise [that the principle is of a fundamentally norm-creating character.] but rather indicates the boundaries of [State] discretion."); Coleman, *supra* note 24, at 54 ("That a treaty provision allows for exceptions — as is the case with the principle of *non-refoulement* — does not of itself deprive the provision of its potentially norm creating character."); Sir Elihu Lauterpacht & Daniel Bethlehem, The Scope and Content of the Principle of *Non-refoulement*: Opinion, http://www.unhcr.org/protect/PROTECTION/3b33574d1.pdf (last accessed Feb. 11, 2007) (enumerating the elements of the exceptions to the principle under article 33 ¶ 2.).

35. Coleman, *supra* note 24, at 57.

36. *Id.*

37. STENBERG, *supra* note 6, at 272.

1. Uniformity and Consistency

In the *North Sea Continental Shelf Cases*, the Court held, "State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked."[38] While complete uniformity is not required, substantial uniformity is an essential requisite for the formulation of custom.[39] The concepts of "extensive" and "virtually uniform" State practice are eludicated further in the *Asylum Case*,[40] where the Court held:

> The party which relies on a custom ... must prove that this custom is established in such a manner that it has become binding on the other party ... that the rule invoked ... is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom as 'evidence of a general practice accepted as law.'

Authors asserting the customary nature of *non-refoulement* emphasize the resolutions and conclusions that originate from the United Nations to support the proposition that *non-refoulement* had attained widespread acceptance and support. For instance, Stenberg notes that proving uniformity and consistency of State practice with respect to the principle of *non-refoulement* is difficult if one focuses on the domestic side, implying that a comprehensive survey of State practice with respect to the principle is not feasible due to its breadth.[41] As such, Stenberg proposes analyzing "the process within international organizations, especially the United Nations General Assembly and the work of UNHCR."[42]

Goodwin-Gill proposes the same methodology in order to prove uniform and consistent State practice: "special regard should ... be paid to the practice of international organizations, such as the United Nations General Assembly and the United Nations High Commissioner for Refugees."[43] He further asserts that General Assembly resolutions concerning the report of the UNHCR endorsing the principle of *non-*

38. North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20, 1969).

39. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 5 (1990).

40. Colombia v. Peru, 1950 I.C.J. 266 (June 13, 1951).

41. STENBERG, *supra* note 6, at 276-77.

42. *Id.* at 277.

43. GOODWIN-GILL, *supra* note 5, at 167.

refoulement has been adopted by consensus.[44] These General Assembly resolutions "call upon States to abide by the principle of *non-refoulement* or reaffirm the need for States to co-operate with UNHCR in international protection, *inter alia*, by scrupulously observing the principle of *non-refoulement*. Other provisions call upon States to refrain from the return of refugees contrary to international standards."[45]

Uniformity and consistency of State practice have been supported by the lack of formal or informal opposition to the principle of *non-refoulement*, and where there has been objection, its basis was questioning the status of the refugees involved.[46] Also worthy of note is the observation that despite the ambivalence of some States in their treatment of refugees, "no State today claims any general right to return refugees or bona fide asylum seekers to a territory in which they may face persecution or danger to life or limb. Where States do claim not to be bound by any obligation, their arguments

44. *See, Id. See also,* Thematic Compilation of General Assembly & Economic and Social Council Resolutions - Non-Refoulement, *supra* note 15 (containing a summary of the resolutions concerning the principle of *non-refoulement*.).

45. *See, e.g.,* G.A. Res. 32/67 ¶ 5(c), U.N. Doc. A/RES/32/67 (Dec. 8, 1977), G.A. Res. 33/26 ¶ 6, U.N. Doc. A/RES 33/26 (Nov. 29, 1978), G.A. Res. 34/60, ¶ 3(a), U.N. Doc. A/RES 34/60 (Nov. 29, 1979), G.A. Res. 35/41 ¶ 5(a) U.N. Doc. A/RES 35/41, (Nov. 25, 1980), G.A. Res. 36/125 ¶ 5(a), U.N. Doc. A/RES/36/125 (Dec. 14, 1981), G.A. Res. 37/195 ¶ 2, U.N. Doc. A/RES/37/195 (Dec. 18, 1982), G.A. Res. 38/121 ¶ 2, U.N. Doc. A/RES/38/121 (Dec. 16, 1983), G.A. Res. 39/140 ¶ 2, U.N. Doc. A/RES/39/140 (Dec. 14, 1984), G.A. Res. 40/118 ¶ 2, U.N. Doc. A/RES/40/118 (Dec. 4, 1986), G.A. Res. 42/109 ¶ 1, U.N. Doc. A/RES/42/109 (Dec. 7, 1987), G.A. Res. 43/117 ¶ 3, U.N. Doc. A/RES/43/117 (Dec. 8, 1988), G.A. Res. 44/137 ¶ 3, U.N. Doc. A/RES/44/137 (Dec. 15, 1989), G.A. Res. 46/106 ¶ 4, U.N. Doc. A/RES/46/106 (Dec. 16, 1991), G.A. Res. 47/105 ¶ 4, U.N. Doc. A/RES/47/105 (Dec. 16, 1992), G.A. Res. 48/116 ¶ 3, U.N. Doc. A/RES/48/116 (Dec. 20, 1993), G.A. Res. 49/169 ¶ 4, U.N. Doc. A/RES/49/169 (Dec. 23, 1994), G.A. Res. 50/152 ¶ 3, U.N. Doc. A/RES/50/152 (Dec. 21, 1995), G.A. Res. 51/75 ¶ 3, U.N. Doc. A/RES/51/75 (Dec. 12, 1996), G.A. Res. 52/103 ¶ 5, U.N. Doc. A/RES/52/103 (Dec. 12, 1997), G.A. Res. 52/132 ¶ 16, U.N. Doc. A/RES/52/132 (Dec. 12, 1999), G.A. Res. 53/125 ¶ 5, U.N. Doc. A/RES/53/125 (Dec. 9, 1998), G.A. Res. 54/146 ¶ 6, U.N. Doc. A/RES/54/146 (Dec. 17, 1999), G.A. Res. 55/74 ¶ 6, U.N. Doc. A/RES/55/74 (Dec. 4, 2000), G.A. Res. 56/137, *supra* note 17, at ¶ 3; G.A. Res. 57/187 ¶ 4, U.N. Doc. A/RES/57/187 (Dec. 18, 2002) *in* Thematic Compilation of General Assembly & Economic and Social Council Resolutions - Non-Refoulement, *supra* note 15.

46. GOODWIN-GILL, *supra* note 5, at 167.

either dispute the status of the individuals in question, or invoke exceptions to the principle of *non-refoulement* ... ."[47]

Two international conferences in which representatives from around the world participated support the customary nature of the principle. The *San Remo Declaration on the Principle of Non-Refoulement of Refugees* acknowledges that the principle is "an integral part of customary international law" based on "the general practice of States supported by a strong *opinio juris*,"[48] while the *Summary Conclusion on the Principle of Non-Refoulement* organized by the UNHCR in 2001, affirms the customary status of the principle.[49] In addition, the UNHCR High Commissioner observed that the principle has attained universal recognition among States and that the principle is "[t]he most essential component of refugee status."[50]

State practice with respect to the principle of *non-refoulement* is sufficiently uniform, despite occasional acts of *refoulement* by States.[51] There is a tendency among authors to view irregular practice of a customary rule as breaches of the current rule which *confirm* the existence of the rule, rather than indicate its ending or evolution into a new rule.[52] According to Coleman, "the decisive factor for the interpretation of a violation as a permissible breach is whether the violating State forwards an exception as justifying its (irregular) behavior."[53] Thus, rather than disavowing the existence of the duty of *non-refoulement*, uniformity of State practice is further strengthened when States claim as justification for *refoulement* the asylum seeker's non-compliance with the criteria for refugee status or the application of the exceptions expressed in article 33 (2).[54] Stenberg cites the case of Kenya, which returned refugees from Uganda in the mid-1970's on the basis of a mutual security agreement; when the UNHCR protested, claiming

47. *Id.* at 169.

48. International Institute of Humanitarian Law, *San Remo Declaration on the Principle of Non-Refoulement, "Refugees: a Continuing Challenge"* (Sep. 2001) (contribution of the International Institute of Humanitarian Law through the UNHCR's Global Consultations on International Protection of Refugees) [hereinafter *San Remo Declaration*].

49. Summary Conclusion on the Principle of *Non-Refoulment, available at* http://www.unhcr.org/protect/PROTECTION/3baf3117f.pdf (last accessed Feb. 11, 2007) ("*Non-refoulement* is a principle of customary international law.").

50. *See,* Note on *Non-Refoulement* (Submitted by the High Commissioner), *available at* http://www.unhcr.org/excom/EXCOM/3ae68ccd10.html (last accessed Feb. 11, 2007).

51. *See,* STENBERG, *supra* note 6, at 278.

52. Coleman, *supra* note 24, at 56.

53. *Id.* (citing case of Kenya).

54. *See,* STENBERG, *supra* note 6, at 278.

violation of the principle of *non-refoulement*, the Kenyan government apologized for its violation.[55]

Although it is admittedly difficult to provide a comprehensive survey of the practice of *all* States, the remaining portion of this section discusses the evolution of the *non-refoulement* principle *outside treaty law* within the Council of Europe, the regions of Africa, Latin America, and Asia.

Within the Council of Europe, "the question of granting asylum and refugee status, and problems relating to these issues, has been on the agenda of the various Council of Europe organs for many years."[56] Moreover, the various Council of Europe organs have issued several recommendations, resolutions, and declarations concerning asylum and the principle of *non-refoulement*.[57]

Within Africa, of considerable importance is the Arusha Conference of 1979,[58] where government delegations of the participating States adopted a recommendation concerning asylum in Africa, stressing the importance of the observance of the principle of *non-refoulement*.[59]

Within Latin America, two colloquia are worthy of note: the 1981 Contadora Act for Peace and Cooperation in Central America, where "the members undertook to ensure that any repatriation of a refugee would be entirely voluntary, declared to be so on an individual basis, and carried out only in co-operation with UNHCR,"[60] and 1984 colloquium organized in Cartagena, Colombia, resulting in the Cartagena Declaration on Refugees where the principle of *non-refoulement* was declared to be "a corner-stone of the international protection of refugees ... and ... should be acknowledged

55. *Id.*

56. *Id.* at 256.

57. *See,* Committee of Ministers Res. 14 (1967) (on Asylum to Persons in Danger of Persecution exhorting member States to, in a liberal and humanitarian spirit, "ensure that no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure" which would compel him to return to, or remain in, a country where he risks persecution because of his race, religion, nationality, membership of a particular social group or political opinion). *See also,* Rec. 769 (1975), 773 (1976) and 817 (1977) by the Parliamentary Assembly (concerning the development of a regional treaty and the inclusion of de facto refugees ... within the scope of *non-refoulement*.); Recommendation No. R(81) 16 (adopted by the Committee of Ministers of the Council of Europe on Nov. 5, 1981.).

58. Conference on the Situation of Refugees in Africa, Arusha, United Republic of Tanzania, May 7-17, 1979.

59. *Id.*

60. STENBERG, *supra* note 6, at 260.

and observed as a rule of *jus cogens*."[61] Ten Latin American States attended this colloquium, namely, Belize, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, and Venezuela.[62]

Within Asia, despite the limited accession of the various States to the 1951 Convention and 1967 Protocol, there appears a growing concern for the plight of refugees. In the Arab region, for instance, the Union of Arab Lawyers in 1988 presented a draft Arab Refugee Convention to the Council of Ministers of Foreign Affairs of the League of Arab States.[63] In 1988, Pakistan harbored over 3 million Afghan refugees, and within the same year, Iran harbored approximately 2,400,000 Afghan refugees.[64] Both Pakistan and Iran have refrained from large-scale forcible return of refugees.[65] In addition, the Philippines has acceded to the 1951 Convention and 1969 Protocol.[66]

2. Generality

In his commentary on generality as an element of customary international law, Brownlie remarks, "[c]ertainly universality is not required, but the real problem is to determine the value of abstention from protest by a substantial number of States in face of a practice followed by some others."[67] Stenberg supports this statement, asserting: "[I]t must ... be maintained that State practice is not a matter of counting heads. The common opinion ... is that State practice need not be universal, but it must be substantial. Thus, it may be maintained that the great majority of 'specially affected' States do apply the principle of *non-refoulement*."[68] Goodwin-Gill does not end the proposition there, and asserts that General Assembly resolutions concerning the report of the UNHCR endorsing the principle of *non-refoulement* has been adopted by consensus.[69]

As discussed under State Views and State Practice in this study, the regions of Western Europe, Africa, and America have witnessed considerable

61. 1984 Cartagena Declaration on Refugees, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev.1, at 190-93 (1984-85), at § 3 ¶ 5 [hereinafter Cartagena Declaration].

62. STENBERG, *supra* note 6, at 261.

63. *Id.* at 264.

64. *Id.* (citing UNHCR World Map 1988, in Refugees, Special Issue 23-24 (1998)).

65. *Id.*

66. *UNHCR Handbook, supra* note 22, at Annex IV.

67. BROWNLIE, *supra* note 39, at 6.

68. STENBERG, *supra* note 6, at 274.

69. GOODWIN-GILL, *supra* note 5, at 167.

progress in terms of protection of refugees and the development of the *non-refoulement* principle *within the realm of treaty law.*[70]

In addition, the *non-refoulement* principle has evolved *beyond the confines of treaty law.* This is evident in the developments within the Council of Europe, Africa, Latin America, and Asia, discussed in Uniformity and Consistency of Practice found above.

3. Opinio Juris

Opinio juris was introduced as a legal formula in an attempt to distinguish legal rules from mere social usage.[71] The term "refers to the subjective belief maintained by states that a particular practice is legally required of them."[72] Stenberg, when discussing whether States comply with the *non-refoulement* principle in the belief that they are legally bound to do so, notes the following: first, non-party States to the 1951 Convention to a large extent do not consider that they have a general right to effect *refoulement.*[73] Second, "the virtually uniform abstention from formal opposition to General Assembly resolutions [regarding the principle of *non-refoulement*] may also be considered to constitute persuasive evidence of a *communis opinio iuris* as well as of individual *opinio iuris* of States."[74] Third, States do not claim that they have a right to return refugees to a country of persecution when their attention is called by the UNHCR; rather, States attempt to justify their actions by stating that the person does not fall under the Convention definition or that the circumstances fall under one of the exceptions under article 33(2).[75] Finally, State opinions enunciated by their representatives during international conferences also indicate the existence of *opinio juris.*[76]

C. Contrary Views: Non-Refoulement as Customary Law is "Wishful Legal Thinking"[77]

A handful of authors assert that the principle of *non-refoulement* does not form part of customary international law.[78] Hailbronner rejects the proposition

70. STENBERG, *supra* note 6, at 245.

71. REBECCA M.M. WALLACE, INTERNATIONAL LAW: A STUDENT INTRODUCTION 15-16 (1992).

72. *Id.*

73. STENBERG, *supra* note 6, at 279.

74. *Id.*

75. *Id.*

76. *Id.*

77. *See,* Kay Hailbronner, *Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?* 26 VA. J. INT'L L. 857-96 (1985-86).

that *non-refoulement* has attained the status of customary international law due to lack of State practice, characterizing the proposition as "wishful legal thinking."[79] According to Hailbronner, "[n]either the UNHCR's extended mandate nor its repeated recommendations that *de facto* refugees should at least be protected against *refoulement* and be permitted to remain in the territory of refuge until an appropriate solution is found for them provides sufficient evidence of the emergence of a customary international law .... The activities of the UNHCR ... must not be confused with state practice."[80] The basic assertion in Hailbronner's work is that the argument in favor of the customary character of *non-refoulement* must fail due to lack of State practice and significant *opinio juris.*

Hathaway echoes Hailbronner's views, emphasizing that "a large and representative part of the community of states must concretize its commitment ... [to *non-refoulement*] through its actions,"[81] observing that "reference to the institutional positions and practices of UNHCR mistakenly assumes that the work of international agencies can *per se* give rise to international law binding on states."[82] Hathaway also notes that "*refoulement* still remains part of the reality for significant numbers of refugees, in most parts of the world."[83]

Both Hailbronner and Hathaway, however, fail to consider that recommendations of international bodies provide persuasive evidence for determining whether a principle has been generally accepted by the community of States.[84] UNHCR Executive Committee Conclusions, for instance, may contribute to the formulation of *opinio juris* which provide States with a sense of legal obligation toward their treatment of refugees.[85]

78. *See, e.g., id.*; HATHAWAY, RIGHTS OF REFUGEES, *supra* note 7, at 363 ("There is insufficient evidence to justify the claim that the duty to avoid the refoulement of refugees has evolved at the universal level beyond the scope of Art. 33 of the Refugee Convention.").

79. *See,* Hailbronner, *supra* note 77, at 857-58.

80. *Id.* at 868-69.

81. HATHAWAY, RIGHTS OF REFUGEES, *supra* note 7, at 363.

82. *Id.* at 365.

83. *Id.* at 364.

84. *See,* BROWNLIE, *supra* note 39, at 5 (identifying the practice of international organs and resolutions relating to legal questions in the United Nations General Assembly as material sources of custom), 675 (identifying recommendations of international bodies as supplementary means of determining whether a rule has become customary.).

85. GOODWIN-GILL, *supra* note 5, at 128.

Concurrently, General Assembly resolutions may be considered as evidence of international custom.[86]

Hailbronner and Hathaway likewise fail to consider that State actions amounting to *refoulement* are considered violations of the customary rule, rather than indicators of inconsistent State practice. Stenberg observes that State practice as regards the principle of *non-refoulement* is sufficiently uniform, despite occasional acts of *refoulement* by States.[87] Emphasis must also be placed on the growing tendency among authors to view irregular practice of a customary rule as breaches of the current rule which *confirm* the existence of the rule, rather than indicate its ending or evolution into a new rule.[88] Although breaches of the principle of *non-refoulement* have occurred, none have been sufficient to question the customary nature of the principle.[89] Moreover, in situations where States have violated the principle, they attempt to justify their actions, thus implying their recognition of an existing rule of law.[90]

The *San Remo Declaration* affirms the customary nature of *non-refoulement* despite the existence of contrary State practice in this manner:

> *[I]f a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, this confirms rather than weakens the rule as customary international law.*[91]

As shown above, the contrary views of Hailbronner and Hathaway are unavailing in light of the evident customary nature of *non-refoulement*. They fail to consider that recommendations of international bodies provide persuasive evidence for determining whether a principle has been generally accepted by the community of States.[92] They likewise fail to consider that State actions amounting to *refoulement* are considered violations of the customary rule, rather than indicators of inconsistent State practice. It is thus submitted that the principle of *non-refoulement* expressed in article 33 of the 1951 Convention, which is of a fundamentally norm creating character, has

86. *See,* The Legal Effect of General Assembly Resolutions and Decisions *in* INTERNATIONAL LAW: CASES AND MATERIALS, *supra* note 27, at 129 ("These [General Assembly] resolutions, declarations, or decisions may be considered by governments and by courts or arbitral tribunals as evidence of international custom ... .").

87. *See,* STENBERG, *supra* note 6, at 278.

88. Coleman, *supra* note 24, at 56.

89. *Id.* at 47.

90. *See,* GOODWIN-GILL, *supra* note 5, at 168-69; STENBERG, *supra* note 6, at 279.

91. *San Remo Declaration, supra* note 48 (emphasis supplied).

92. *See,* BROWNLIE, *supra* note 39.

crystallized into a customary norm satisfying the requirements of consistent, uniform, and general State practice, supported by strong *opinio juris*. Having established the customary character of the general principle, the section discusses the exceptions to the principle of *non-refoulement*.

III. RE-EXAMINING THE EXCEPTIONS TO THE PRINCIPLE OF *NON-REFOULEMENT*

Article 33(2) of the 1951 Refugee Convention provides:

> The benefit of the present provision [on the prohibition against *refoulement*] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.[93]

The exceptions may be classified into two categories: the national security exception ("danger to the security of the country in which he is") and the danger to the community exception ("having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country").

A. Writings of Qualified Publicists

The writings of qualified publicists provide enlightening, albeit conflicting, views on the scope and content of the exceptions to *non-refoulement*. The negotiating history of article 33 reveals that the *Ad Hoc* Committee on Refugees and Stateless Persons tasked with drafting a refugee convention did not include any exception into its draft article 28, believing that the principle of *non-refoulement* was fundamental and should not be impaired.[94] Despite this observation, the exceptions were included in a British, French, and Swedish amendment to draft article 28, reasoning that the right of asylum rested on moral and humanitarian grounds, but which nonetheless contain certain limitations.[95]

In analyzing the content of article 33(2), Weis notes that, like all exceptions, the provisions of the second paragraph must be interpreted

93. Refugee Convention, *supra* note 1, at art. 33 ¶ 2.

94. Report of the *Ad Hoc* Committee on Refugees and Stateless Persons, Second Session, Geneva, Aug. 14-25, 1950, E/AC.32/8;E/1850, *available at* http://www.unhcr.org/protect/PROTECTION/3ae68c248.html (last accessed Feb. 11, 2007) [hereinafter Report of the *Ad Hoc* Committee on Refugees and Stateless Persons]; *See also,* DR. PAUL WEIS, THE REFUGEE CONVENTION, 1951: THE *TRAVAUX PREPARATOIRES* ANALYSED WITH A COMMENTARY 327 (1995); STENBERG, *supra* note 6, at 219.

95. *See, id.*

restrictively.[96] Concerning the first exception, "[n]ot every reason of national security may be invoked[:] the refugee must constitute a danger to the national security of the country."[97] In construing the national security exception, only refugees who "seriously threaten the foundations of the State or even its existence can be forcibly returned to a country of persecution."[98] Goodwin-Gill observes that whether a refugee constitutes a security risk appears to be left to the judgment of State authorities.[99] State discretion is not unlimited, however, as the nature of the risk must pose a threat of substantial harm to the receiving State's most basic interests, such as a risk of armed attack on a State's territory or citizens, or the destruction of democratic institutions.[100]

Discretion of State authorities is nevertheless restricted, as with regard to the danger to the community exception, three criteria must be satisfied:

1. There has to be a final judgment;
2. The offence in question must constitute a *particularly serious crime*; and
3. It must be established that the refugee constitutes a danger to the community of the State.[101]

Concerning the first criteria requiring a final judgment, it must be clarified that "final conviction ... mean[s] ... after any appeal had been heard or after the term of appeal had expired."[102] The exception cannot be relied upon on the basis of mere suspicion.[103] Stenberg further explains the significance of the first criteria:

> Article 33(2) requires the authorities of the State of refuge to wait with the execution of an order of return until all ordinary means of review or appeal have been exhausted or until the normal statutory period for filing applications for review or appeal has been exhausted. This means that the mere fact that there exists a possibility for a case to be re-opened when new circumstances emerge is not sufficient for regarding a judgment as not being final. Nor does the fact that there may be a chance of applying extraordinary means of procedure alter the fact that a final judgment has been made in the case. If review or appeal in such circumstances has actually been granted, the former judgment can, however, hardly be considered to be final any longer. In such a case execution of an order of return may be considered to violate Article 33(2) of the Convention.[104]

96. WEIS, *supra* note 94, at 342.
97. *Id.*
98. STENBERG, *supra* note 6, at 220.
99. GOODWIN-GILL, *supra* note 5, at 139.
100. *See,* HATHAWAY, RIGHTS OF REFUGEES, *supra* note 7, at 336, 347.
101. *Id.* at 221.
102. UN Doc. A/CONF.2/SR. 16, 12.
103. Lauterpacht & Bethlehem, *supra* note 34.

Weis notes that *crimes* should not be understood in the technical sense of any criminal code, but simply means a serious criminal offense.[105] There have been varying judicial pronouncements on what constitutes a particularly serious crime. Suffice to say that:

> capital crimes such as murder, rape, armed robbery and arson are included. However, even a particularly serious crime, if committed in a moment of passion, may not necessarily constitute the refugee as a danger to the community. On the other hand, a refugee who has committed a particularly serious crime and many minor offences may well, as a habitual criminal, constitute a danger to the community.[106]

Such habitual criminality must indicate a "basically criminal, incorrigible nature of the person" in order to justify *refoulement.*[107]

Lauterpacht and Bethlehem provide an even more restrictive enumeration of the elements for the exceptions.[108] As regards the *national security exception,* they note: first, the nature of the danger to the country of refuge must be prospective; second, the danger must be to the country of refuge; third, the State's margin of appreciation and seriousness of risk must comprehend a very serious danger; fourth, State assessment of the risk must be based on individual determination; and finally, a proportionality test is required, which considers whether the danger to the refugee outweighs the menace to public security.[109]

As regards the *danger to the community exception,* Lauterpacht and Bethlehem provide the following criteria: first, the nature of the danger to the country of refuge must be prospective; second, the danger must be to the country of refuge; third, the State's margin of appreciation and seriousness of risk must comprehend a very serious danger; fourth, the refugee must be convicted by final judgment; fifth, the conviction must be for a particularly

104. STENBERG, *supra* note 6, at 222. *See also,* Lauterpacht & Bethlehem, *supra* note 34 ("'Final judgment' must mean a judgment from which there remains no possibility of appeal.").
105. WEIS, *supra* note 94, at 342; STENBERG, *supra* note 6, at 224 ("[S]tress should not be put on the terminology used to denominated the offence against the State. Stress should instead be put on the words 'particularly serious/*particulierement grave.*").
106. *Id. Accord* Lauterpacht & Bethlehem, *supra* note 34; STENBERG, *supra* note 6, at 227.
107. STENBERG, *supra* note 6, at 227.
108. *See,* Lauterpacht & Bethlehem, *supra* note 34.
109. *Id.*

serious crime; sixth, State assessment of the risk must be based on individual determination; and finally, a proportionality test is required, which considers whether the danger to the refugee outweighs the danger to the community.[110]

Hathaway, on the other hand, disagrees with the inclusion of a proportionality test among the elements of the exceptions, reasoning that "no purely individuated risk of persecution can offset a real threat to such critical security interests of a receiving state." Because the objective of article 33(2) is protection of the most fundamental interests of the host state and its community, a clear risk to such collective interests defeats the refugee's right to invoke the duty of *non-refoulement*.[111]

In arguing against the inclusion of a proportionality test, Hathaway remarks:

> [m]ost writers have taken a contrary position [in favor of a proportionality test], relying largely on a single comment of the British co-sponsor of the particularized *refoulement* provision. Yet the British reference to the importance of letting states weigh relative risks was actually an answer to a proposal to restrict States' margin of appreciation, not an argument for a super-added proportionality test.[112]

Hathaway ends his assertions stating that a proportionality test works against the interests of refugees, because the receiving government can construe relatively minor concerns as matters of national security or communal danger: trivializing the significance of the exceptions and justifying an unacceptably broad reading of the scope of article 33 (2).[113]

As indicated above, it is understood that both the exceptions require a restrictive construction, and if limited to only clear and extreme cases,[114] a refugee who poses a risk to the national security or a danger to the community can, as a consequence, be *refouled* under article 33 (2). In the words of Hathaway, "if ... national security and danger to the community are more carefully constrained... it is readily apparent that they would always trump purely individuated risks, in consequence of which no super-added balancing test is required or appropriate."[115] Thus, this study does not consider the additional element of proportionality in delineating the scope of the exceptions to *non-refoulement*.

110. *Id.*

111. HATHAWAY, RIGHTS OF REFUGEES, *supra* note 7, at 353.

112. *Id.*

113. *Id.* at 354.

114. *See,* HATHAWAY, RIGHTS OF REFUGEES, *supra* note 7, at 353.

115. *Id.* at 355.

IV. ARE THE EXCEPTIONS TO THE PRINCIPLE OF *NON-REFOULEMENT* CUSTOMARY INTERNATIONAL LAW?

This section discusses whether the exceptions to the principle of *non-refoulement* have formed part of customary international law. It analyzes the elements of customary international law (namely, uniformity, consistency, generality, and existence of *opinio juris*) vis-à-vis the exceptions to the principle of *non-refoulement*.

A. Uniformity and Consistency of State Practice

According to the *San Remo Declaration*, "[i]n the last half-century, no State has expelled or returned a refugee to the frontiers of a country where his life or freedom would be in danger."[116] While it is impossible to provide a completely accurate survey of all State practices with respect to the application of the exceptions to the principle, a survey of State practice within Europe and North America, touching upon the countries of Denmark, Finland, Sweden, the Federal Republic of Germany, Switzerland, the United States of America, and Canada are discussed below.[117]

Stenberg's observation concerning the importance of analyzing the processes within the UNHCR must also be borne in mind, because proving uniformity and consistency of State practice is difficult if one focuses purely on the domestic aspect.[118] Thus, aside from providing a survey of State practice through municipal legislation and jurisprudence, this study also analyzes textual formulations of the exceptions found in international and regional agreements as well as various UN and UNHCR issuances.

1. Europe

In Denmark, section 31(1) of the Aliens Act of 1983 does not contain any exception to the prohibition against forcible return; neither is there any exception to the prohibition of extraditing an alien who risks persecution.[119] Legislation in Finland also does not contain any exception to the prohibition against forcible return.[120] In Sweden, section 77 of the Aliens Act of 1980 provides that no alien may be sent to a country of persecution; this is qualified by section 78(1) of the Act, which provides that an alien may be sent to a country of persecution if he has committed a particularly serious

116. *San Remo Declaration*, *supra* note 48.

117. The selection is based primarily on the availability of resources on the subject matter.

118. STENBERG, *supra* note 6, at 276-77.

119. *Id.* at 229. *See,* § 6 of the Danish Extradition Act of 1967.

120. STENBERG, *supra* note 6, at 229. *See, Lag om utlamning for brott,* July 7, 1970 (FFS 1970/456).

crime and that his continued presence in Sweden would constitute a serious danger to public order and security.[121] Germany, like Sweden, employs a restrictive practice of *refouling* refugees in danger of persecution;[122] the mere fact that a refugee has been convicted of a particularly serious crime is not sufficient for ordering his or her *refoulement*.[123] Stenberg derives two conclusions from German practice:

> Firstly, the fact that the refugee has been convicted of a particularly serious crime is not sufficient for regarding him as a danger to the community; secondly, in order to be considered as a (serious) danger to the community, it must be established that the refugee might commit a particularly serious crime again.[124]

In general, European legislation among the States discussed above do not contain any exceptions to the principle of *non-refoulement*, and among those States whose legislation contain exceptions, such exceptions are construed restrictively and in favor of the refugee, as in countries such as Sweden and Germany.

2. North America

a. National Security Exception

As previously indicated, invocation of the national security exception is justified only in cases where the refugee poses an objectively reasonable, substantial threat to a State's most basic interests.[125] In *Suresh v. M.C.I.* it was held that:

> A person constitutes a 'danger to the security of Canada' if he or she poses a serious threat to the security of Canada, whether direct or indirect, bearing in mind the fact that the security of one country is often dependent on the security of other nations ... . The definition of the term 'terrorism' is sufficiently settled to permit legal adjudication in the expulsion context.[126]

In *Linnas v. I.N.S.*, a chief of a Nazi concentration camp was ordered deported being a danger to the national security, since "[i]t is certainly

121. STENBERG, *supra* note 6, at 231.

122. *Id.* at 240.

123. *Id.*

124. *Id.*

125. HATHAWAY, RIGHTS OF REFUGEES, *supra* note 7, at 346; *Accord* WEIS, *supra* note 94, at 342; STENBERG, *supra* note 6, at 220.

126. Suresh v. M.C.I., 1 S.C.R. 3 (2002), *cited in* ANNOTATED REFUGEE CONVENTION: FIFTY YEARS OF NORTH AMERICAN JURISPRUDENCE 749-50 (Pia Zambelli ed., 2004) [hereinafter ANNOTATED REFUGEE CONVENTION].

reasonable for the citizens of the United States, through their elected representatives, to conclude that they do not wish to share their communities with persons who ordered the wholesale extermination of men, women, and children."[127]

In *Mortagy v. Ashcroft*, it was found that Mortagy was "ineligible for withholding deportation" because of his association with the Popular Front for the Liberation of Palestine, classified by the State Department as a Designated Foreign Terrorist Organization.[128] Moreover, he underwent military and weapons training provided by the Palestinian Liberation Organization and gathered intelligence of Syrian and Turkish officials.[129] This led the court to conclude that Mortagy was a threat to the security of the United States.[130]

Based on the cases mentioned above, examples of threats to national security in Canada and the United States have often been attributed to terrorist activities.

b. Danger to the Community Exception

There is a wide array of North American jurisprudence relating to the danger to the community exception expressed in article 33(2) of the Refugee Convention. The focus of this section attempts to delineate what constitutes a danger to the community, such that *refoulement* is justified under the circumstances.

In *Williams v. M.C.I.*, the notion *danger to the public* was held to "refer to the possibility that a person who has committed a serious crime in the past may seriously be thought to be a potential re-offender."[131] This ruling finds support in *Chedid v. M.C.I.*, where it was held that an individual convicted for trafficking narcotics cannot be *refouled* based on such conviction, absent a "likelihood to commit further criminal offences, [or] ... an established pattern of violent or criminal behaviour, lifestyle or values."[132]

Thus, the following crimes were considered not particularly serious due to the improbability of a repeat offense: one sexual assault on a 13 year-old,

127. Linnas v. I.N.S., 790 F. 2d 1024 (1986), *cited in* ANNOTATED REFUGEE CONVENTION, *id.* at 751.

128. Mortagy v. Ashcroft, (5th Cir. 02-60544, Aug. 15, 2003), *cited in* ANNOTATED REFUGEE CONVENTION, *id.* at 752.

129. *Id.*

130. *Id.*

131. Williams v. M.C.I., 2 F.C. 646 (1997), *cited in* ANNOTATED REFUGEE CONVENTION, *id.* at 755.

132. *Id.*

light sentence, no propensity for pedophilia;[133] three narcotics trafficking convictions but low risk of recidivism;[134] one conviction on coerced guilty plea for Triad membership in Hong Kong, but no evidence of actual Triad membership or activity in Canada;[135] conviction on one count of conspiracy to traffic in cocaine and one count of trafficking in other narcotics, 54-month sentence, non-violent, low risk of re-offending;[136] and a single conviction for trafficking cocaine.[137]

As for what is considered *particularly serious*, the cases discussed below are instructive; in *Saleh v. I.N.S.*,[138] murder was classified as a particularly serious crime, and in *Ahmetovic v. I.N.S.*,[139] first degree manslaughter was also considered particularly serious. Moreover, considered *particularly serious* are: breaking and entering with intent while carrying a concealed handgun;[140] possessing with intent to distribute heroin and aiding and abetting the distribution of heroin;[141] second degree murder with a 20 year prison sentence;[142] robbery with a weapon resulting in the imposition of a 10 to 20 year jail sentence;[143] willful cruelty towards a child and assault with a deadly weapon that attracted a four year sentence;[144] statutory rape with a 10 year prison sentence;[145] sexual relations with a minor over a four-month

133. Thompson v. M.C.I., 37 Imm. L.R. (2d) 9 (1996), *cited in* ANNOTATED REFUGEE CONVENTION, *id.* at 755-56.

134. Fairhurst v. M.C.I., 37 Imm. L.R. (2d) 122 (1996), *cited in* ANNOTATED REFUGEE CONVENTION, *id.* at 756.

135. Lam v. M.C.I., 45 Imm. L.R. (2d) 179 (1998, *cited in* ANNOTATED REFUGEE CONVENTION, *id.*

136. Do v. M.C.I., 24 Imm. L.R. (3d) 301 (2002), *cited in* ANNOTATED REFUGEE CONVENTION, *id.*

137. Pearce v. M.C.I., 26 Imm. L.R. (3d) 131, *cited in* ANNOTATED REFUGEE CONVENTION, *id.*

138. Saleh v. I.N.S., 962 F.2d 234, 241 (2nd Cir. 1992).

139. Ahmetovic v. I.N.S., 62 F.3d 48, 53 (2d Cir. 1995).

140. Matty v. I.N.S., 21 F.3d 428 (6th Cir., 1994), *cited in* ANNOTATED REFUGEE CONVENTION, *id.* at 762.

141. Mahini v. I.N.S., F.2d 1419 (9th Cir. 1986), *cited in* ANNOTATED REFUGEE CONVENTION, *id.* at 763.

142. Abate v. I.N.S., 972 F.2d 1336 (9th Cir. 1992), *cited in* ANNOTATED REFUGEE CONVENTION, *id.* at 764.

143. Tran v. I.N.S., (9th Cir. 92-70399, Oct. 20, 1993), *cited in* ANNOTATED REFUGEE CONVENTION, *id.* at 756.

144. Mustafa v. I.N.S., 19 F.3d 1440 (9th Cir., 1994), *cited in* ANNOTATED REFUGEE CONVENTION, *id.* at 764.

145. Goh v. I.N.S., 61 F.3d 910 (9th Cir., 1995), *cited in* ANNOTATED REFUGEE CONVENTION, *id.* at 765.

period;[146] conspiracy to invade a home at night and commit armed robbery while masked;[147] forcing a woman into a telephone booth in order to perform oral sex;[148] shooting a police officer and receiving a sentence of 23 years imprisonment;[149] and possession of 4,000 pounds of marijuana.[150]

Finally, in *Yousefi v. I.N.S.*, the Court noted that the Board of Immigration Appeals had previously established criteria for determining whether a given crime amounts to a *particularly serious* one.[151] It further observed that "[w]hen the crime is against a person, the likelihood that the offense will be classified as a 'particularly serious crime' is increased."[152]

Based on the survey of North American jurisprudence presented above, there appears some difficulty in determining whether uniform and consistent State practice in this region has arisen with respect to the application of the exceptions. This is apparent especially as regards the danger to the community exception. Numerous offenses have been enumerated, ranging from sexual offenses to drug trafficking offenses. Although it may appear that the United States and Canada have uniformly and consistently applied the exceptions to the principle as they deem fit, the substantive content of these exceptions, especially the danger to the community exception, has not been applied uniformly and consistently in North American case law.

In other words, refugees are *refouled* in the United States and Canada based on a variety of different reasons, particularly as regards the danger to the community exception. The inconsistent reasons for *refoulement* may already militate against the uniformity and consistency of State practice within North America as regards the application of the exceptions.

146. Gatalski v. I.N.S., 72 F.3d 135 (9th Cir., 1995), *cited in* ANNOTATED REFUGEE CONVENTION, *id.*

147. Luan v. I.N.S., (9th Cir. 96-70323, Sept. 23, 1997), *cited in* ANNOTATED REFUGEE CONVENTION, *id.*

148. Ahmed v. I.N.S., (10th Cir. 95-9546, Aug. 8, 1996), *cited in* ANNOTATED REFUGEE CONVENTION, *id.* at 766.

149. Nguyen v. I.N.S., 991 F.2d 621 (10th Cir., 1993), *cited in* ANNOTATED REFUGEE CONVENTION, *id.*

150. Arauz v. Rivkind, 845 F.2d 271, 275 (11th Cir., 1988), *cited in* ANNOTATED REFUGEE CONVENTION, *id.*

151. Yousefi v. I.N.S., 260 F.3d 318 (4th Cir., 2001), *cited in* ANNOTATED REFUGEE CONVENTION, *id.* at 761.

> The factors to be considered in judging the seriousness of a crime are: (1) the nature of the conviction, (2) the circumstances and underlying facts of the conviction, (3) the type of sentence imposed, and (4), most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community.

152. *Id.*

Nevertheless, assuming *arguendo* that the application of the exceptions within North America is substantially uniform, this fact does not contribute to the customary nature of the exceptions, as State practice in other regions do not meet the elements of consistency and uniformity.

Generally, there are three reasons why it is untenable to assert the customary character of the exceptions to the principle based on current State practice. First, there is a lack of State consensus affirming the customary nature of the exceptions, exemplified in the current trend found in textual formulations and State practice against such exceptions. For instance, municipal legislation in some European States do not contain any exceptions to the principle of *non-refoulement*; in cases where municipal legislation contain exceptions to the principle, European States apply the exceptions restrictively. Thus, in some instances where the exceptions apply, States must consider the possibility of sending the refugee to a safe third country. Second, in some instruments, the principle is not subject to exceptions: *non-refoulement* is thus absolute. Third, the UN and UNHCR have issued several conclusions and guidelines with respect to the absolute nature of the principle of *non-refoulement*, which may be viewed as the embodiment of State consensus with respect to the legal nature of *non-refoulement*.

B. Generality of State Practice

With respect to generality of practice, Brownlie remarks, "[t]his is an aspect which complements that of consistency. Certainly universality is not required, but the real problem is to determine the value of abstention from protest by a substantial number of states in face of a practice followed by some others. Silence may denote either tacit agreement or a simple lack of interest in the issue."[153] There has been no formal opposition among States regarding the existence of the exceptions to the principle of *non-refoulement*; in fact, the provision on exceptions to the principle was placed there precisely to protect the national security of parties to the 1951 Convention.[154] In certain circumstances, it has even been categorically stated that the principle of *non-refoulement* is not absolute.[155]

Nonetheless, it must be noted that the initial draft adopted by the *Ad Hoc* Committee at its first session contained the following article 28, which would later form the basis of the first paragraph of article 33 of the 1951 Convention: "No Contracting State shall expel or return, in any manner whatsoever, a refugee to the frontiers of territories where his life or freedom

153. BROWNLIE, *supra* note 39, at 6.

154. *See,* WEIS, *supra* note 94, at 325, 327-28.

155. *See, Governing Rule 15, Exceptions to the Rule of Non-Refoulement*, 23 STUD. TRANSNAT'L LEGAL POL'Y 131 (1992); GOODWIN-GILL, *supra* note 5, at 139 ("[*N*]*on-refoulement* is not an absolute principle.").

would be threatened on account of his race, religion, nationality, or political opinion."[156] Moreover, the Committee made the following comment: "While some question was raised as to the possibility of exceptions to article 28, the Committee felt strongly that the principle here expressed was fundamental and it should not be impaired."[157] Despite this observation by the Committee, the exceptions to the principle were later added, which exceptions form part of article 33 as acceded to by parties to the 1951 Convention.

Lauterpacht and Bethlehem argue against the customary nature of the exceptions, and conclude that an analysis of municipal legislation applying such exceptions cannot be viewed as conclusive evidence of the customary nature of the latter[158] based on the following reasons:

> First, much of this legislation is dated. Secondly, to the extent that municipal measures depart from the terms of applicable international instruments or other principles of international law they suggest that the State concerned is in breach of its international obligations. Thirdly, municipal measures in this field exhibit little uniformity in approach. It is virtually impossible, therefore, to draw any coherent guidance threads from such practice for purposes of customary international law. For example, while some States have enacted exceptions to *non-refoulement*, very many others which have expressly incorporated the principle have not done so. Others preclude expulsion to States where there would be a threat of persecution. Fourthly, to the extent that there may be a difference between State practice in the municipal sphere and State practice in international fora involving, for example, the adoption and interpretation of international instruments, we have preferred the latter practice on the ground that this better reflects *opinio juris*.

In light of Lauterpacht and Bethlehem's last statement quoted above regarding the adoption of international instruments by States as a better reflection of *opinio juris*, the next section discusses whether the application of the exceptions to the principle of *non-refoulement* is supported by a strong *opinio juris*, thus resulting in the inclusion of the exceptions within the sphere of customary international law.

156. Report of the *Ad Hoc* Committee on Refugees and Stateless Persons, First Session, E/1618.

157. Report of the *Ad Hoc* Committee on Refugees and Stateless Persons, E/1850, at 13.

158. *See,* Lauterpacht & Bethlehem, *supra* note 34 ("While such [municipal] measures support the view that some exceptions to non-refoulement subsist as a matter of custom, we have been hesitant for a number of reasons to rely on this practice as evidence of the current state of customary international law more generally.") (emphasis supplied).

C. Existence of Opinio Juris

In order to establish the existence of *opinio juris*, there must be a showing that States engage in a certain practice because they believe themselves bound to do so.[159] There are three reasons why it is untenable to assert the customary character of the exceptions to the principle based on current State practice. First, there is a lack of State consensus affirming the customary nature of the exceptions, exemplified in the current trend found in textual formulations and State practice against such exceptions. Where the exceptions apply, States must consider the possibility of sending the refugee to a safe third country. Second, in some instruments, the principle is not subject to exceptions. Third, the UN and UNHCR have issued several conclusions and guidelines with respect to the absolute nature of the principle of *non-refoulement*, which may be viewed as the embodiment of State consensus with respect to the legal nature of *non-refoulement*.

First, as regards the current trend against the exceptions, Lauterpacht and Bethlehem note that State practice and the textual content of instruments subsequent to the 1951 Convention militate against the application of the exceptions to the prohibition of *refoulement*.[160] They cite the Asian African Refugee Principles[161] and the Declaration on Territorial Asylum[162] as providing exceptions to the principle, while concurrently noting that the Declaration on Territorial Asylum requires the *refouling* State, in cases where the exceptions apply, to "consider the possibility of granting the person concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State."[163]

159. *See,* WALLACE, *supra* note 71, at 15-16.

> States in their relations with each other engage in behavior other than that which is required of them legally. If certain rules are to evolve into law, it is necessary to distinguish rules which are regarded as legally obligatory from those which are not ... . *Opinio juris* was introduced as a legal formula in an attempt to distinguish legal rules from mere social usage.

160. Lauterpacht & Bethlehem, *supra* note 34.

161. *See,* Asian African Legal Consultative Organization [AALCO], Final Text of the AALCO's 1966 Bangkok Principles on Status and Treatment of Refugees, 40th Session, New Delhi (June 24, 2001).

162. *See,* United Nations Declaration on Territorial Asylum, G.A. Res. 2132 (XXII), U.N. Doc. A/2132 (XXII) (Dec. 14, 1967).

163. Lauterpacht & Bethlehem, *supra* note 34 (citing United Nations Declaration on Territorial Asylum, *id.* at art. 3, ¶ 3).

Moreover, the *travaux preparatoires* of the 1951 Convention support the concept of a safe third country.[164] In his commentary on the *travaux preparatories*, Weis concludes that "[t]he provisions of Article 31 paragraph 2 and Article 32 paragraph 3 apply also to Article 33 paragraph 2, that is, the refugee should be allowed a reasonable period within which to seek admission in another country than a country of persecution and the necessary facilities to obtain such admission."[165] Despite the applicability of the exceptions to the circumstances, and in the face of a threat to national security or a danger to the community, receiving States are still required to exert all reasonable efforts to facilitate the refugee's admission into a third country; *refoulement* to the country of persecution is thus seen as a last resort.[166] Lauterpacht and Bethlehem support this view in the following manner: "[i]n any case in which a State seeks to apply the exceptions to the principle of *non-refoulement*, the State should first take all reasonable steps to secure the admission of the individual concerned to a safe third country."[167]

Second, as regards the absence of any exceptions to the principle in some instruments, Lauterpacht and Bethlehem cite the OAU Convention, American Convention on Human Rights, and Cartagena Declaration as examples.[168] As mentioned previously, "the African Convention effectively bars all forcible return to a country of persecution even in cases where the security of the country of refuge may be at stake, if the persecution would endanger the 'life, physical integrity or liberty' of the alien in question."[169] In the same manner, the 1969 American Convention on Human Rights prohibits the *refoulement* of an alien to any country if his or her right to life or freedom is in danger because of race, nationality, religion, social status, or political opinion.[170] Finally, the Cartagena Declaration highlights the

164. *See,* WEIS, *supra* note 94, at 343.

165. *Id.*; *Accord* NEHEMIAH ROBINSON, CONVENTION RELATING TO THE STATUS OF REFUGEES, ITS HISTORY, CONTENTS AND INTERPRETATION: A COMMENTARY 140 (1997).

166. ROBINSON, *supra* note 165.

> [R]eturn under paragraph two [is] conditioned upon the obligation of the state to grant the refugee a reasonable period of time and all necessary facilities to obtain admission into another country. Only if the refugee fails to gain admission into another country, may ... return to the country of peril take place.

167. Lauterpacht & Bethlehem, *supra* note 34.

168. *Id.*

169. STENBERG, *supra* note 6, at 249; *See,* Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, Sep. 10, 1969, 1001 U.N.T.S. 45 [hereinafter OAU Convention].

170. American Convention of Human Rights, OEA/Ser.L.V/II.82 doc.6 rev.1 at art. 22 ¶ 8 (1992).

significance of the principle of *non-refoulement* and asserts that it has attained the status of *jus cogens*.[171]

As Lautherpacht and Bethlehem note, the UN Human Rights Committee has also issued a General Comment with respect to the prohibition of *refoulement* in cases where the individual faces torture.[172]

As regards individuals facing torture, another issue is brought to the fore: while the 1951 Refugee Convention provides exceptions to the principle of *non-refoulement*, the UN Convention Against Torture[173] does not provide any exceptions. Thus, in situations where a refugee also faces the threat of torture in the country of persecution, may a State, party to both Conventions, *refoule* the refugee if the latter poses a national security risk or is a danger to the community?

The essential nature of *non-refoulement* within the prohibition against torture is explained by Lauterpacht and Bethlehem, as follows: "As regards parties to the Torture Convention, Article 3 of that Convention prohibits *refoulement* where there are substantial grounds for believing that a person would be in danger of being subjected to torture .... The express stipulation of this obligation [against *refoulement*] attests to its central importance within the scheme of the prohibition of torture."[174]

Paragraph 1 of article 3 of the Torture Convention provides: "No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[175] Thus, when a refugee falling under the provisions of article 33(2) faces a threat to life or freedom, as well as a threat of torture, which provisions concerning *refoulement* should apply? Is the State in breach of its obligation against *refoulement* if it properly applies the

171. Cartagena Declaration, *supra* note 61, at § 3, ¶ 5. The assertion that *non-refoulement* is now *jus cogens*, is, of course, debatable. The proponent merely asserts that the principle has attained the status of customary international law. The proposition that *non-refoulement* is now *jus cogens* nevertheless affirms the arguments in favor of the customary nature of the principle. *See,* Jean Allain, *supra* note 11, at 84 ("At present, it is clear that the norm prohibition of *refoulement* is part of customary international law, thus binding on all states whether or not they are party to the 1951 convention.").

172. Lauterpacht & Bethlehem, *supra* note 34 (citing General Comment No. 21 (1992) of the Human Rights Committee.).

173. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, art. 3, G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984) [hereinafter Convention Against Torture].

174. Lauterpacht & Bethlehem, *supra* note 34.

175. Convention Against Torture, *supra* note 173, art. 3.

exceptions to the principle and subsequently *refoules* a refugee, claiming that article 33(2) applies, and not the Convention Against Torture?

Authors Weissbrodt and Hotreiter claim:

> In cases where one State is party to several treaties, the question may arise as to which *non-refoulement* provisions should be applied. There are many similarities between the various *non-refoulement* provisions and relevant interpretations. Hence, a similar result may be achieved under several of the treaties ... . In cases where a different result is mandated, States should implement the treaty which gives the greatest human rights protection to the individual from *refoulement*.[176]

This statement may be employed to reconcile the apparent contradiction between the exceptions found in article 33(2) of the Refugee Convention and the absolute prohibition against *refoulement* in the Convention Against Torture. As such, if a refugee poses a threat to national security or constitutes a danger to the community of the receiving State, yet is in danger of being subjected to torture upon his *refoulement* to the country of persecution, article 3(1) of the Convention Against Torture must apply, as this conclusion coincides with the ratio of giving the greatest human rights protection from *refoulement* to the individual.

Lauterpacht and Bethlehem agree with this proposition, stating that in cases where the threat of persecution does not amount to torture, the asylum-seeker may be *refouled* to the country of origin.[177] A prerequisite to *refoulement*, however, is compliance with the requirements of due process of law and exertion of reasonable efforts to secure the admission of the individual to a safe third country. They assert their conclusions in the following manner:

> Overriding reasons of national security or public safety will permit a State to derogate from the principle [of *non-refoulement*] ... in circumstances in which the threat of persecution does not equate to and would not be regarded as being on a par with a danger of torture ... and would not come within the scope of other non-derogable customary principles of human rights. The application of these exceptions is conditional on the strict compliance with principles of due process of law and the requirement that all reasonable steps must first be taken to secure the admission of the individual concerned to a safe third country.[178]

Two conclusions may be drawn from the discussion above. First, it a refugee poses a threat to national security or constitutes a danger to the community of the receiving State and is in danger of being subjected to

176. Weissbrodt & Hortreiter, *supra* note 21, at 63.

177. Lauterpacht & Bethlehem, *supra* note 34.

178. *Id.*

torture upon his *refoulement* to the country of persecution, article 3(1) of the Convention Against Torture must apply,[179] as this conclusion coincides with the ratio of giving the greatest human rights protection to the individual from *refoulement*. Second, if a refugee poses a threat to national security or constitutes a danger to the community of the receiving State, but is not in danger of being subjected to torture upon his *refoulement*, the asylum-seeker may be *refouled* to the country of origin.[180] A prerequisite to *refoulement*, however, is compliance with the requirements of due process of law and exertion of reasonable effort to secure the admission of the individual to a safe third country.

The third indication of a lack of state consensus to the customary character of exceptions to the principle is found in the various issuances of the UN and UNHCR, which may be viewed as the embodiment of State consensus with respect to the legal nature of *non-refoulement*. Author Jean Allain claims "Executive Committee conclusions are the consensus of states, acting in their advisory capacity, where issues of protection and hence *non-refoulement* are given voice internationally. Their pronouncements carry a disproportionate weight in the formation of custom, as they are the states most specifically affected by issues related to *non-refoulement*."[181] Thus, Allain observes that "[b]y the late 1980's EXCOM concluded that 'all states' were bound to refrain from *refoulement* on the basis that such acts were 'contrary to fundamental prohibitions against these practices.'"[182]

Finally, Lauterpacht and Bethlehem cite UNHCR's 1980 Guidelines for National Refugee Legislation, which provide:

> No person shall be rejected at the frontier, returned or expelled, or subjected to any other measures that would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons mentioned ... [reflecting the definitions of 'refugee' in both the 1951 Convention and the OAU Refugee Convention].[183]

The authors also note that "[i]n so far as these Guidelines may be regarded as an authoritative interpretation of the commitments of States under both the 1951 Convention and the OAU Refugee Convention, they suggest that the trend against exceptions since 1951 reflects an evolution in the development of the law concerning *non-refoulement* more generally which

179. *See*, Lauterpacht & Bethlehem, *supra* note 34.

180. *Id.*

181. *See*, Allain, *supra* note 11, at 85.

182. *Id.*

183. Lauterpacht & Bethlehem, *supra* note 34 (citing UNHCR, Guidelines for National Refugee Legislation, Dec. 9, 1980, at § 6, ¶ 2).

would exclude any exceptions to *non-refoulement*."[184] Despite this statement, however, the authors "are not ultimately persuaded that there is a sufficiently clear consensus opposed to exceptions to *non-refoulement* to warrant reading the 1951 Convention without them."[185] According to Lauterpacht and Bethlehem, "there remains an evident appreciation among States, within UNHCR, and amongst commentators that there may be some circumstances of overriding importance that would, within the framework of that Convention, legitimately allow the removal or rejection of individual refugees or asylum seekers."[186] The authors thus conclude that the application of the exceptions to the principle must be restrictive, and compliance with due process of law requirements must be ensured, as well as reasonable efforts by the receiving State of *refouling* the refugee to a safe third country prior to *refoulement* to the country of persecution.[187]

While the elimination of the exceptions to the principle is not advocated by Lauterpacht and Bethlehem, the purpose of the inclusion of the exceptions within the 1951 Refugee Convention militates against its customary character, because it indicates a lack of *opinio juris*. Rather than attesting to the customary nature of the exceptions to the principle, the *travaux preparatoires* of the 1951 Refugee Convention show that the inclusion of the exceptions was not based on an acknowledged duty by States to comply with these exceptions: rather, such exceptions were included in order to safeguard individual State interests.[188] Thus, the essential

184. *Id.*

185. *Id.*

186. *Id.*

187. *See also*, ROBINSON, *supra* note 165, at 140.

> It should be added that Article 33, paragraph 2 must be read in connection with Articles 31 and 32. In other words, ... return under par. 2 [is] conditioned upon the obligation of the state to grant the refugee a reasonable period of time and all necessary facilities to obtain admission into another country. Only if the refugee fails to gain admission into another country, may ... return to the country of peril take place.

188. *See*, WEIS, *supra* note 94, at 325, 330.

> The UK commented. 'Article 28. His Majesty's Government will continue to act, as they have done in the past, in the spirit of this Article. They have in mind, however, certain exceptional cases, including those in which an alien, despite warning, persists in conduct prejudicial to good order and government and the ordinary sanctions of the law have failed to stop such conduct; or those in which an alien, although technically a refugee within the meaning of Article 1 of the Convention is known to be a criminal. In such and similar exceptional cases His Majesty's Government must reserve the right to deport or

requirement of *opinio juris* is not complied with, because States *refoule* refugees on the ground that they are a national security risk or a danger to the community, and not because States believe themselves bound to do so under international law. The compelling force does not emanate from a belief in an international obligation, but in the desire to protect national interests.

V. RECONCILING THE PRINCIPLE OF *NON-REFOULEMENT* AND ITS EXCEPTIONS: PROPOSING A PRAGMATIC REFUGEE PROTECTION PARADIGM

Synthesizing the study involves discussing whether the customary norm of *non-refoulement* admits of any exceptions. By doing so, the customary norm of the principle may be reconciled with the exceptions found in article 33 of the 1951 Refugee Convention.[189] According to one author:

> Where custom develops after a treaty, the rule is not clear. The logical rule perhaps should be that the later custom, being the expression of a later will, should prevail. But such an approach would militate against the certainty of treaties. In practice, however, an attempt is made to keep the treaty alive by efforts at reconciling a treaty with the developing custom.[190]

As earlier discussed, the principle of *non-refoulement* has attained the status of customary international law. Its customary character crystallized from treaty law expressed in article 33 of the 1951 Convention. Goodwin-Gill clearly states, "Article 33 of the 1951 Convention is of a 'fundamentally norm-creating character' in the sense in which that phrase was used by the International Court of Justice in the *North Sea Continental Shelf Cases*."[191] State practice with regard to the application of the principle has been uniform, consistent, general, and supported by strong *opinio juris*. Uniform, consistent, and general State practice is illustrated by the ratification of a

> return the alien to whatever country is prepared to receive him, even though this involved his return to his own country ...
>
> The second paragraph of the Swedish amendment was intended to meet the case of refugees engaged in subversive activities threatening the security of their country of asylum, refugees who, after having been accepted as residents, were found to have been fugitives from justice in their own country, and refugees who failed to comply with the conditions of residence.'
>
> *See also,* HATHAWAY, RIGHTS OF REFUGEES, *supra* note 7, at 353.

189. *See,* Coleman, *supra* note 24, at 57 (acknowledging the difficulty in determining the customary nature of a rule subject to exceptions, nonetheless admitting that a rule subject to exceptions may still become customary law.).

190. BERNAS, *supra* note 10, at 17.

191. GOODWIN-GILL, *supra* note 5, at 168.

considerable number of States to instruments containing the duty of *non-refoulement*, as well as evidence of widespread acceptance and support within the municipal sphere.

The same treaty provision from which the customary law originates, however, contains exceptions. A general overview of State practice shows inconsistent application of the exceptions: several States have entered into regional conventions or declarations expressing the *non-refoulement* principle without any exceptions.[192] Examples of municipal legislation in some European States do not contain any exceptions to the principle of *non-refoulement*; in cases where municipal legislation contains exceptions to the principle, European States apply the exceptions restrictively.

The survey of American and Canadian jurisprudence, however, shows consistent application of the exceptions to the principle, although the consistent and uniform application refers to the *refoulement* of refugees, and not the *reasons* for their *refoulement*. It must be noted that the substantive content of these exceptions, especially the danger to the community exception, has not been applied uniformly and consistently in North American case law. Numerous offenses have been enumerated, ranging from sexual offenses to drug trafficking offenses. Thus, while the United States and Canada have applied the national security and danger to the community exceptions uniformly and consistently to cases they deem appropriate, there is no such corresponding uniformity and consistency in what constitutes cases falling under national security, and more especially, cases under the danger to the community exception.

In other words, refugees are *refouled* in the United States and Canada based on a variety of different reasons, particularly as regards the danger to the community exception. The inconsistent reasons for *refoulement* may already militate against the uniformity and consistency of State practice with regard to the application of the exceptions. Nevertheless, assuming that the application of the exceptions is substantially uniform, this fact does not contribute to the customary nature of the exceptions as State practice in other regions do not meet the elements of consistency and uniformity.

It is likewise submitted that the exceptions are not customary, because the element of *opinio juris* is lacking: States *refoule* refugees on the ground that they are a national security risk or a danger to the community, and not because States believe themselves bound to do so under international law. The compelling force does not emanate from a belief in an international obligation, but in the desire to protect national interests. Rather than attesting to the customary nature of the exceptions to the principle, the

192. *See, e.g.,* OAU Convention, *supra* note 169, art. II, ¶ 3; Cartagena Declaration, *supra* note 61, § 3 ¶ 5; American Convention of Human Rights, *supra* note 168, art. 22 ¶ 8.

travaux preparatoires of the 1951 Refugee Convention show that the inclusion of the exceptions was not based on an acknowledged duty by States to comply with these exceptions, but rather, such exceptions were included in order to safeguard individual State interests.[193] For instance, in the *travaux preparatoires*, the U.K. representative observed that with regard to the absolute prohibition against *refoulement* contained in the draft provision:

> in ... certain exceptional cases, including those in which an alien ... persists in conduct prejudicial to good order and government and the ordinary sanctions of the law have failed to stop such conduct; or those in which an alien, although technically a refugee ... is known to be a criminal .... His Majesty's Government must reserve the right to deport or return the alien to whatever country is prepared to receive him, even though this involved his return to his own country ... .[194]

In sum, it is untenable to assert the customary nature of the exceptions to the principle of *non-refoulement* based on the following grounds: first, there is a lack of State consensus affirming the customary nature of the exceptions, exemplified in the current trend found in textual formulations and State practice against such exceptions. Where the exceptions apply, States must

193. *See,* WEIS, *supra* note 94, at 325; *See also,* HATHAWAY, RIGHTS OF REFUGEES, *supra* note 7, at 353.

194. *Id. See also,* HATHAWAY, RIGHTS OF REFUGEES, *supra* note 7 at 554:

> [t]he British representative associated himself with his French co-sponsor's explanation of the rationale for the particularized *refoulement* clause: 'The French and United Kingdom delegations had submitted their amendment in order to make it possible to punish activities ... directed against national security or constituting a danger to the community ... The right of asylum rested on moral and humanitarian considerations which were freely recognized by receiving countries, but it had certain essential limitations. *A country could not contract an unconditional obligation towards persons over whom it was difficult to exercise any control, and into the ranks of whom undesirable elements might well infiltrate.* The problem was a moral and psychological one, and in order to solve it, it would be necessary to take into account the possible reactions of public opinion.' (emphasis supplied).

But cf., ROBINSON, *supra* note 165, at 136:

> The drafts of the *Ad Hoc* Committee contained the first paragraph [of Article 33] only. In the second session of the Committee some question was raised as to the possibility of exceptions to the article (as now contained in par. 2), but the Committee felt strongly that the principle expressed was fundamental and that it should not be impaired. The Conference disagreed with the Committee mainly on the ground that the international situation had changed since the *Ad Hoc* Committee had met and that it was therefore necessary to include exceptions to the rule of Art. 33.

consider the possibility of sending the refugee to a safe third country. Second, in some instruments, the principle is not subject to exceptions: *non-refoulement* is thus absolute. Third, the UN and UNHCR have issued several conclusions and guidelines with respect to the absolute nature of the principle of *non-refoulement*, which may be viewed as the embodiment of State consensus with respect to the legal nature of *non-refoulement*. Fourth and finally, there is lack of *opinio juris* since States *refoule* refugees based on the exceptions due to a desire to protect State interests, and not because States believe themselves bound to do so under international law.

The reconciliation of the exceptions to the principle of *non-refoulement* and the customary nature of the general principle does not erode the protection afforded refugees. Rather, re-examination and reconciliation of the two concepts further strengthen refugee protection. As Hathaway succinctly observes, "[i]f the international protection of refugees is to be meaningfully regulated, then we must temper the demands of moral criticality to meet the constraints of practical feasibility. International law is, after all, a consensual system of authority among states. If states are not convinced that their interests are taken into account by international refugee law, then in practice — despite whatever formal standards are proclaimed — international law will not govern the way refugees are treated."[195]

Current State practice reveals that a growing number of governments around the world are violating their obligations towards refugees: although States ostensibly proclaim a willingness to grant refugee protection, many governments are nonetheless employing various defensive strategies in order to avoid international legal responsibilities altogether.[196] There is, in Hathaway's view, a "perverse logic to the option of simply closing borders and preemptively avoiding any responsibility for providing protection"[197] because States are unable to rely on their neighbors or the international community for support.[198] In order to meet this problem, a refugee protection paradigm that States consider as reconcilable to their own interests should be implemented: "the goal of refugee law, like that of public international law in general, is not to deprive states of either authority or operational flexibility."[199]

195. HATHAWAY, INTERNATIONAL REFUGEE LAW, *supra* note 8, at xxiv.

196. HATHAWAY, RIGHTS OF REFUGEES, *supra* note 7, at 998.

197. HATHAWAY, INTERNATIONAL REFUGEE LAW, *supra* note 8, at xxviii.

198. *Id.*

199. HATHAWAY, RIGHTS OF REFUGEES, *supra* note 7, at 999.

The introduction to this study describes the present system of refugee protection as "unfair, inadequate, and ultimately unsustainable"[200] because obligations imposed upon states are unilateral and undifferentiated.[201] In order to address this challenge, the study thus proposes a pragmatic understanding of Refugee Law that takes into perspective the interests of States, without disregarding the rights of refugees, and vice versa.

In determining refugee protection responsibilities among States, the principles of international solidarity and burden sharing must be considered within the framework of common but differentiated responsibilities among States.[202] This system of differentiated responsibility must take into consideration the resources of each State, ensuring that their contributions to refugee protection are commensurable to their capacities and strengths. While taking into consideration the interests of governments, the central focus of the refugee protection paradigm — the refugee — must always be borne in mind, because "obligations which arise in relation to ... refugees are not merely legal but are moral in nature and derive from our common humanity. They relate ... to the sort of world we want to create, forge, and be a part of."[203]

According to Hathaway, "[i]f the net result of ... [Refugee Law] reforms is only to lighten the load of governments, or to signal the renewed relevance of international agencies to meeting the priorities of states, then an extraordinary opportunity to advance the human dignity of refugees themselves will have been lost."[204]

200. *See,* HATHAWAY, INTERNATIONAL REFUGEE LAW, *supra* note 8, at xxviii; *See also,* HATHAWAY, RIGHTS OF REFUGEES, *supra* note 7, at 1000 ("[N]either the actual duty to admit refugees nor the real costs associated with their arrival are fairly apportioned among states .... [T]he legal duty to protect refugees is understood to be neither in the national interest of most states, nor a fairly apportioned collective responsibility. It is therefore resisted."). *See, e.g.,* LOESCHER, *supra* note 4, at 8:

> Even a modest influx places a severe strain on a poor host country's social services and physical infrastructure and may radically distort local economic conditions. In Malawi, for example, where the GNP per capita is only $170, one in every ten persons is a refugee from Mozambique. This is the equivalent of the United States, a far richer country, suddenly admitting over 25 million Central Americans—the entire population of that region.

201. HATHAWAY, INTERNATIONAL REFUGEE LAW, *supra* note 8, at xxviii.

202. *See,* HATHAWAY, RIGHTS OF REFUGEES, *supra* note 7, at 1000.

203. Curran & Kneebone, *supra* note 2, at 16.

204. HATHAWAY, RIGHTS OF REFUGEES, *supra* note 7, at 999.

In ensuring the rights of refugees through a guarantee of the customary nature of the *non-refoulement* principle and the non-customary nature of the exceptions, the rights of receiving States are safeguarded. By ensuring the rights of the Protector through common but differentiated State responsibilities, the rights of the Protected are also ensured.