

# The Authority of International Refugee Law

*Evan J. Criddle\* & Evan Fox-Decent\*\**

## INTRODUCTION

As COVID-19 has spread like wildfire around the world, many states have wavered in their commitment to respect a core requirement of international refugee law (IRL): the duty of *non-refoulement*. The duty's classic formulation appears in the 1951 Convention Relating to the Status of Refugees (Refugee Convention), which provides that a state may not “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.”<sup>1</sup> Even before the pandemic arrived in early 2020, mass migrations from Central America, Myanmar, Northern Africa, and Syria were already testing states' political will to abide by the duty of *non-refoulement*. Fears of COVID-19 have prompted nearly all countries to restrict international transit, drawing refugee migration to a near-dead halt worldwide.<sup>2</sup> As states have closed their borders, refugees have lost access to protection guaranteed under international law. These developments have exposed the fragility of international refugee law<sup>3</sup> and have prompted some observers to question whether *non-refoulement* will survive the pandemic as a non-derogable legal duty.<sup>4</sup>

In this Article, we push back against these trends by explaining why the international community should embrace the duty of *non-refoulement* as a peremptory norm of general international law (*jus cogens*) that applies even during public emergencies, such as the coronavirus

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\* Ernest W. Goodrich Professor of Law, William & Mary Law School.

\*\* Professor of Law and Canada Research Chair in Cosmopolitan Law and Justice, McGill University Faculty of Law. The authors wish to express appreciation to Steven Haig, Elena Pruett-Fiederlein, Sun Shen, and Alexandra Smith for exceptional research assistance. We owe a similar debt to François Crepeau, Colin Grey, and Amy Sepinwall for insightful comments and suggestions. Special thanks are due, as well, to the editorial staff of the *William & Mary Law Review*, including Helen Brewer, Michaeli Hennessy, Hillary Kody, and Megan McCarthy, for sponsoring the symposium that inspired this article.

<sup>1</sup> Convention Relating to the Status of Refugees art. 33(1), July 28, 1951, 19 U.S.T. 6259, 6261, 189 U.N.T.S. 150, 152 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention].

<sup>2</sup> See Nasar Meer and Leslie Villegas, *The Impact of COVID-19 on Global Migration*, Working Paper Series: Governance of the Local Integration of Migrants and Europe's Refugees 4 (May 27, 2020), <http://www.glimer.eu/wp-content/uploads/2020/06/Global-Migration-Policies-and-COVID-19.pdf> (finding that by April 2020, states had introduced “roughly 46,000 mobility restrictions,” resulting in the closure of most international borders for most non-essential travel).

<sup>3</sup> See Alex Alenikoff, *The Fragility of the Global Mobility Regime*, ZOLBERG INSTITUTE ON MIGRATION AND MOBILITY, May 19, 2020, <https://publicseminar.org/2020/05/the-fragility-of-the-global-mobility-regime/> (“There is only one thing we can say for sure now: We have learned just how fragile the global mobility regime is.”).

<sup>4</sup> See Lama Mourad & Stephanie Schwartz, *Could COVID-19 Upend International Asylum Norms?*, LAWFARE, Apr. 9, 2020, <https://www.lawfareblog.com/could-covid-19-upend-international-asylum-norms> (lamenting the “ominous threat ... that states and international organizations will allow COVID-19-inspired emergency policies to endure post-crisis”).

pandemic.<sup>5</sup> When viewed from a global justice perspective, the authority that international law entrusts to states—including the sovereign power to regulate migration across their borders—can be understood as legitimate only if states refrain from *refoulement*. This has only become more evident as states have erected new barriers to refugee migration in response to COVID-19. Far from demonstrating the need for IRL to give states greater flexibility in responding to refugee migration, we argue that the COVID-19 crisis illustrates why the legitimacy of the international legal system as a whole depends on refugees enjoying uninterrupted access to protection from persecution. In a just international legal order, the international community would embrace the duty of *non-refoulement* as *jus cogens*. Indeed, we go a step further and make a conceptual claim about the legal character of the international legal system. For the international legal order of multiple territorial states to be a legal order at all for exiled outsiders, it must treat the duty of non-refoulement as a peremptory norm. A failure to do so would render the international legal system incapable of claiming to possess legitimate authority vis-à-vis asylum seekers, supplanting the rule of international law in this context with an extra-legal use of mere coercive force. The COVID-19 crisis has thus exposed the fragility of the international legal order’s claim to legality and normative legitimacy vis-à-vis refugees.

Legal scholars have debated whether international law already characterizes the duty of *non-refoulement* as a peremptory norm of general international law. The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Torture Convention) prohibits states from returning people to territories where they would face a substantial risk of torture.<sup>6</sup> When a refugee does not face torture, however, the prevailing view is that states may sometimes withhold protection. For example although the Refugee Convention does not allow states to make blanket derogations from the prohibition of *refoulement* during emergencies, it does permit states to deny protection on a case-by-case basis when “there are reasonable grounds for regarding [a particular refugee] as a danger to the security of the country.”<sup>7</sup> Some regional treaties and declarations from Africa, Latin America, and the Caribbean take a different approach, proclaiming that the duty of *non-refoulement* is not subject to derogation or limitation under any circumstances.<sup>8</sup> In effect, these regional instruments endorse the duty of *non-refoulement* as a

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<sup>5</sup> See Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT] (defining a “peremptory norm of general international law” as one “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”).

<sup>6</sup> Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention]. See *infra* Part I.B.

<sup>7</sup> Refugee Convention, *supra* note 1, arts. 1(F), 33(2).

<sup>8</sup> See American Convention on Human Rights art. 22(8), OAS Treaty Ser. No. 35, 9 I.L.M. 673 (1969), <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm> [hereinafter American Convention] (“In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.”); Convention Governing Specific Aspects of Refugee Problems in Africa art. I(4)-(5), Sept. 10, 1969, 1001 U.N.T.S. 45, <https://www.unhcr.org/en-us/about-us/background/45dc1a682/oa-convention-governing-specific-aspects-refugee-problems-africa-adopted.html> [hereinafter African Refugee Convention]; Cartagena Declaration on Refugees, embodying the Conclusions of the Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama held in Cartagena, Nov. 19-22, 1984, § III, ¶ 5

peremptory norm. Yet, given that states outside these regions continue to rely on the Refugee Convention's limitation clauses, it is debatable whether this characterization of the duty as a peremptory norm is now part of general customary international law.<sup>9</sup>

By accepting the possibility that national security and other important state interests might justify *refoulement*, the Refugee Convention endorses a distinctive account of the state's role in international legal order. According to this account, states owe a special loyalty to their own people. When granting protection to a particular refugee could undermine national security, the state's responsibility to its people dictates that it may privilege domestic security interests over a refugee's interest in freedom from persecution. Although the Refugee Convention does not contain a general derogation clause, it is not hard to see how the Convention's implicit framing of a state's duty to its people could be extended to justify broader derogations from the duty of *non-refoulement*. If a state may legitimately favor the interests of its own people over those of "alien" refugees, this opens the door to the possibility that some general derogations, such as border closures during a deadly pandemic, might also represent legitimate expressions of the state's special loyalty to its people.<sup>10</sup>

We argue that this account of the state's role is misguided, and that a proper apprehension of the state's role within international legal order supports accepting the duty of *non-refoulement* as a peremptory norm. To arrive at this conclusion, we develop a fiduciary and dual commissions theory of IRL. Under this theory, international law entrusts states with local fiduciary powers to govern and represent their people, and with supranational fiduciary powers to act on behalf of humanity, usually jointly with other states, and sometimes globally. Fiduciary states thus have local and transnational or global commissions. Their global commission includes a duty to enact multilaterally a system of surrogate protection for asylum seekers, a cornerstone of which is the duty of *non-refoulement*. This duty is immanent to and partially constitutive of international legal order vis-à-vis refugees. As we shall see, but for this duty, asylum seekers would suffer incurable domination when confronting receiving states, with the looming possibility that their mere physical presence anywhere in the world might be treated as a trespass. They would do wrong just by existing. In our view, no legal system can treat a subject's mere existence as a wrong and claim to possess legitimate authority over them.

In Part I we take stock of international law's present understanding of *non-refoulement*. We suggest that evidence of its peremptory status is mixed, but that there are some encouraging grounds for thinking that *non-refoulement* is emerging as a norm of *jus cogens*. In Part II we consider a series of objections to the idea of *non-refoulement* as a peremptory norm. These include

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[hereinafter Cartagena Declaration]; Brazil Declaration and Plan of Action, Dec. 3, 2014, <https://www.refworld.org/docid/5487065b4.html> [hereinafter Brazil Declaration].

<sup>9</sup> See *infra* Part I.C.

<sup>10</sup> Indeed, for years after the Refugee Convention entered force, the international community toyed with the idea that states might legitimately derogate from the duty of *non-refoulement* during a mass influx. See U.N. General Assembly, Declaration on Territorial Asylum art. 3(2), Dec. 14, 1967, A/RES/2312(XXII), <https://www.refworld.org/docid/3b00f05a2c.html> [hereinafter Declaration on Territorial Asylum] (asserting that states might make "[e]xception" to the duty of *non-refoulement* "only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons").

objections based on the special loyalty states owe their people; the right to exclude said to follow from a political community's freedom of association and right to self-determination; doctrine from international law that accords robust autonomy to states; and Carl Schmitt's theory of sovereignty in which the executive enjoys legally unlimited discretionary power. We then develop the dual commissions theory and answer the objections, explaining why the case for a peremptory duty of *non-refoulement* remains persuasive. In Part III we look at closed-border policies that have arisen in response to the COVID-19 pandemic and use these as a test case for our theory. We conclude that pandemic-induced restrictions on *non-refoulement* are unjustifiable. Receiving states cannot return refugees to persecution without subverting their own legal authority.

## I. DOES INTERNATIONAL LAW RECOGNIZE *NON-REFOULEMENT* AS A PEREMPTORY NORM?

If the prohibition of *refoulement* is indeed a peremptory norm of general international law (*jus cogens*), this would have significant consequences for how states may lawfully respond to perceived national security and other threats, such as the COVID-19 pandemic. *Jus cogens* norms occupy a distinctive position within international legal order because they are mandatory, universal, do not admit limitation or derogation, and can be modified or abridged only by international norms of equivalent authority.<sup>11</sup> Treaties that are inconsistent with peremptory norms are void, and national laws and practices that violate peremptory norms are invalid under international law. Recognizing the *non-refoulement* principle as a peremptory norm would therefore preclude states from returning refugees to persecution under any circumstances, including in response to extradition requests, mass influxes of migrants, or possible health threats associated with a global pandemic.

In this Part, we review international law and scholarship to assess whether the *non-refoulement* principle has achieved global recognition as *jus cogens*. Our conclusions are mixed. International law clearly prohibits states from returning a person to a territory where she would be threatened with torture. This prohibition finds expression in multilateral treaties, is enshrined in customary international law, and enjoys widespread acceptance as a peremptory norm. When torture is not a real risk, however, it is less certain whether general international law absolutely prohibits states from returning refugees to persecution. Some regional treaties and soft law instruments characterize this broader prohibition of *refoulement* as a peremptory norm, but others allow states to return refugees to persecution in order to safeguard their own national security or satisfy their obligations under extradition treaties. Consequently, legal scholars have struggled to reach consensus about whether *non-refoulement* qualifies as *jus cogens* under general international law.

### A. *The Refugee Convention and Refugee Protocol*

Those who doubt that the *non-refoulement* principle qualifies as a peremptory norm tend to emphasize the text of the 1951 Convention Related to the Status of Refugees (Refugee Convention).<sup>12</sup> The canonical formulation of the *non-refoulement* principle appears in Article 33(1): “No Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever

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<sup>11</sup> See VCLT, *supra* note 5, art. 53 (identifying these characteristics of *jus cogens* norms).

<sup>12</sup> Refugee Convention, *supra* note 1.

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.”<sup>13</sup> Considered in isolation, and bearing in mind that Article 33 is not subject to reservation, this uncompromising language might appear to articulate an absolute prohibition against states-parties returning refugees to persecution. Continuing on, however, Article 33(2) limits the scope of this protection with the following caveat:

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.<sup>14</sup>

With similar effect, Article 1(F) excludes forced migrants from counting as refugees under the Convention if “there are serious reasons for considering that . . . he has committed a crime against peace, a war crime,” “a crime against humanity,” “a serious non-political crime outside the country of refugee,” or “acts contrary to the purposes and principles of the United Nations.”<sup>15</sup> Although the 1967 U.N. Protocol Relating to the Status of Refugees (Refugee Protocol) eliminated certain temporal and geographic limitations on the Refugee Convention’s “refugee” definition, it did not abolish the exceptions in Article 1(F) or the limitations in Article 33(2).<sup>16</sup> Thus, although the Refugee Convention and Refugee Protocol do not approve of derogation from the *non-refoulement* principle during public emergencies,<sup>17</sup> they do envision some circumstances in which states-parties

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<sup>13</sup> *Id.* art. 33(1).

<sup>14</sup> *Id.* art. 33(2). Significantly, Article 33(2) does not necessarily relieve states of their *non-refoulement* obligation unless third-states would be unwilling to receive them. *See, e.g.*, UNHCR Executive Committee, Conclusion on Expulsion No. 7 (XXVIII) ¶ (c) (recommending that “expulsion measures against a refugee should only be taken in very exceptional cases and after due consideration of all the circumstances, including the possibility for the refugee to be admitted to a country other than his country of origin”); Declaration on Territorial Asylum, *supra* note 10, art. 3(3) (emphasizing that states must “consider the possibility of granting [refugee excluded from protection] . . . an opportunity . . . of going to another State”).

<sup>15</sup> *See* Refugee Convention, *supra* note 1, art. 1(F).

<sup>16</sup> United Nations Protocol Relating to the Status of Refugees art. I, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 (1968) [hereinafter Refugee Protocol] (eliminating the Refugee Convention’s geographic and temporal restrictions).

<sup>17</sup> The Convention’s drafters rejected an early proposal from the United Kingdom to include a general derogation clause. *See* U.N. HIGH COMMISSIONER FOR REFUGEES, THE REFUGEE CONVENTION, 1951: THE TRAVAUX PRÉPARATOIRES ANALYSED WITH A COMMENTARY BY DR. PAUL WEIS 52-59 (1990) [hereinafter TRAVAUX PRÉPARATOIRES]. Instead, they approved derogation only for “provisional measures” (chiefly, detention), pending the completion of refugee status determinations. *Id.* art. 9; *see generally* U.N. High Commissioner for Refugees (UNHCR), *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, Jan. 26, 2007, <https://www.refworld.org/docid/45f17a1a4.html> (emphasizing “the fundamental and nonderogable character of the principle of *nonrefoulement*”).

The Convention’s *travaux préparatoires* contain some indications that the drafters did not anticipate *nonrefoulement* applying to mass migrations. *See* TRAVAUX PRÉPARATOIRES, *supra* note 16, at 245 (“It was ruled by the President of the Conference that the Article does not apply to mass migrations.”). No such exception appears in the Convention’s text, and the international community has rejected this reading of the Convention for decades. *See, e.g.*, UNHCR Executive Committee, General Conclusion on International Protection No. 79 (XLVII) ¶ (i) (1996) (“recall[ing] that the principle of non-refoulement is not subject to derogation”); UNHCR Executive Committee, Conclusion on the Protection of Asylum-Seekers in Situations of Large-Scale Influx No. 22 (XXXII) § IIA, ¶ 2 (1981) [hereinafter ExCom Conclusion No. 22] (stressing that in “all cases of large-scale influx the principle of *non-refoulement*—including non-rejection at the frontier—must be scrupulously observed.”).

are not obligated to apply *non-refoulement* to forced migrants who would otherwise qualify for relief as bona fide refugees.

These features of the Refugee Convention are incompatible with the idea that Article 33(1) endorses the prohibition of *refoulement* as a peremptory norm.<sup>18</sup> To qualify as *jus cogens*, international norms may not be subject to any exceptions or limitations. Yet, there is no escaping the fact that Articles 1(F) and 33(2) allow states to return at least some forced migrants to face persecution. For example, when a state-party has reasonable cause to believe that an asylum-seeker might commit acts of terrorism, it is not obligated to refrain from *refoulement*. Similarly, if a refugee is discovered to have committed serious non-political crimes abroad, the Refugee Convention does not forbid extraditing her to a territory where she could face persecution.<sup>19</sup> Even if these exceptions to the *non-refoulement* principle are to be construed narrowly<sup>20</sup>—as emphasized in the Refugee Convention’s drafting history<sup>21</sup> and in guidance from the Office of the U.N. High Commissioner for Refugees (UNHCR)<sup>22</sup>—the fact that such exceptions appear at all calls into question whether Article 33(1) can be characterized as codifying *non-refoulement* as a peremptory norm.<sup>23</sup>

## B. Human Rights Treaties

Whether *non-refoulement* is a peremptory norm does not depend solely on the Refugee Convention, however, because the Refugee Convention is not the only international agreement that proscribes returning refugees to persecution. Human rights treaties also prohibit expelling or returning individuals to either torture or cruel, inhuman or degrading treatment (CIDT). Unlike the Refugee Convention, international human rights law (IHRL) defines *non-refoulement* in a manner that does not allow for any exceptions, limitations, or derogations.

Among international human rights treaties, the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Torture Convention)<sup>24</sup> has proven to be particularly important as a safeguard against *refoulement*. The Torture Convention states that states-parties may not “expel, return (‘refouler’) or extradite a person to another State where there

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<sup>18</sup> Some might argue that the Refugee Convention’s exceptions do not compromise the peremptory character of the principle of *non-refoulement*; rather, they merely narrow the scope of the norm’s peremptory aspect. This definitional sleight-of-hand, however, would sidestep the question with which we are primarily concerned in this Article: whether international law ever permits states to return bona fide refugees to territories where they would face a substantial risk of persecution.

<sup>19</sup> See Refugee Convention, *supra* note 1, art. 1(F)(b); James C. Hathaway & Colin Harvey, *Framing Refugee Protection in the New World Disorder*, 34 CORNELL INT’L L.J. 257, 263-64 & n.19 (2001) (arguing that the primary purpose of Article 1(F) is to reduce conflicts between the Refugee Convention and extradition treaties).

<sup>20</sup> See, e.g., *Pushpanathan v. Canada*, [1998] 1 S.C.R. 982 (construing Article 1(F)(c) to authorize denials of protection to those who have engaged in persecution of others but not drug trafficking per se).

<sup>21</sup> See TRAVAUX PRÉPARATOIRES, *supra* note 16, at 245 (“As to paragraph 2 it constitutes an exception to the general principle embodied in paragraph 1 and has, like all exceptions, to be interpreted restrictively. Not every reason of national security may be invoked, the refugee must constitute a danger to the national security of the country.”).

<sup>22</sup> See U.N. High Commissioner for Refugees (UNHCR), UNHCR Note on the Principle of Non-Refoulement, Nov. 1997, <https://www.refworld.org/docid/438c6d972.html> (emphasizing that Article 33(2) “is to be interpreted and implemented in a restrictive manner”).

<sup>23</sup> See LAURI HANNKAINEN, PREEMPTORY, NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS 262 (1988) (“If on the ground of their own security States are not prohibited [under the Refugee Convention] from expelling or returning a refugee, what is left of the peremptory obligation?”).

<sup>24</sup> Torture Convention, *supra* note 5.

are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>25</sup> This prohibition of *refoulement* is less protective than the Refugee Convention in some respects, because the harm an individual faces upon return must rise to the level of torture—a “severe” form of “pain or suffering”—in order to qualify for relief under the Torture Convention,<sup>26</sup> whereas the Refugee Convention extends *non-refoulement* to less intense forms of mistreatment.<sup>27</sup> But the Torture Convention is significantly more protective than the Refugee Convention in other important respects. In particular, *non-refoulement* applies under the Torture Convention even if a person would not qualify as a “refugee” under the Refugee Convention<sup>28</sup> and Refugee Protocol.<sup>29</sup> Moreover, the Torture Convention does not permit any exceptions to its prohibition of *refoulement*; a person can qualify for refuge under the Torture Convention even if she has committed war crimes in the past or aspires to commit terrorism in the future.<sup>30</sup> Thus, unlike the Refugee Convention and Protocol, the Torture Convention accepts *non-refoulement* as a mandatory, non-derogable, and illimitable obligation that applies at all times and in all contexts.<sup>31</sup>

Other human rights treaties expand the scope of protection available under IHRL. Some explicitly prohibit *refoulement*, including the American Convention on Human Rights,<sup>32</sup> the Charter of Fundamental Rights of the European Union (EU Charter of Fundamental Rights),<sup>33</sup> the Inter-American Convention to Prevent and Punish Torture,<sup>34</sup> and the International Convention for the Protection of all Persons Against Enforced Disappearance.<sup>35</sup> Others do not ban *refoulement*

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<sup>25</sup> *Id.* art. 3(1).

<sup>26</sup> *Id.* art. 1. The Torture Convention does not indicate whether the principle of *non-refoulement* applies to CIDT.

<sup>27</sup> *See, e.g.*, *Koval v. Gonzales*, 418 F.3d 798, 805-06 (7th Cir. 2005) (explaining that economic deprivations may constitute “persecution” without threatening a person’s life or freedom).

<sup>28</sup> *See* Refugee Convention, *supra* note 1, art. 1(A) (defining “refugee”).

<sup>29</sup> *See* Refugee Protocol, *supra* note 15, art. I (eliminating the Refugee Convention’s geographic and temporal restrictions).

<sup>30</sup> *See* Decision of the Committee Against Torture, *Nasirov v. Kazakhstan*, CAT/C/52/D/475/2011, ¶ 11.6 (2014) (stating “that the non-refoulement principle in article 3 of the [Torture] Convention is absolute and the fight against terrorism does not absolve the State party from honouring its obligation to refrain from expelling or returning (“refouler”) an individual to another State, where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.”); Decision of the Committee Against Torture, *Singh Sogi v. Canada* (CAT/C/39/D/297/2006), ¶ 10.2 (2007) (“The Committee recalls that article 3 affords absolute protection to anyone in the territory of a State party, regardless of the person’s character or the danger the person may pose to society.”).

<sup>31</sup> *See, e.g.*, Committee Against Torture, General Comment No. 4 on the Implementation of Article 3 of the Convention in the Context of Article 22, ¶¶ 8, 9 (2017) (affirming that “no exceptional circumstances whatsoever, whether a state of war or . . . any public emergency, may be invoked as a justification of torture,” and explaining that “[t]he principle of ‘non-refoulement’ . . . is . . . absolute”).

<sup>32</sup> *See* American Convention, *supra* note 7, art. 22(8) (“In no case may an alien be deported or returned to a country . . . if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.”).

<sup>33</sup> *See* Charter of Fundamental Freedoms of the European Union art. 19(2), 2012 O.J. C 326/391 (“No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”).

<sup>34</sup> *See* Inter-American Convention to Prevent and Punish Torture art. 13(4), opened for signature Dec. 9, 1985, O.A.S.T.S. No. 67 (“Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.”).

<sup>35</sup> *See* International Convention for the Protection of all Persons against Enforced Disappearance art. 16, 2715 U.N.T.S. 3, Dec. 20, 2006 (“No State Party shall expel, return (‘refouler’), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.”).

expressly, but international courts and tribunals have understood *non-refoulement* obligations to be implicit in states' obligations to respect and protect particular human rights. For example, the U.N. Human Rights Committee has concluded that *refoulement* violates the International Covenant on Civil and Political Rights (ICCPR) when it "expose[s] individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return."<sup>36</sup> Likewise, the European Court of Human Rights has held that *refoulement* is inconsistent with the right to life and the prohibitions against torture and CIDT as codified in the European Convention on Human Rights and Fundamental Freedoms (ECHR).<sup>37</sup> Under these treaties, *non-refoulement* is a mandatory, non-derogable, and illimitable obligation that is not subject to modification except by international norms of equivalent authority. Indeed, the only missing ingredient for these prohibitions to qualify as *jus cogens* is universality, because the relevant treaties have not been adopted by all states<sup>38</sup> and are not binding of their own force on non-parties.<sup>39</sup>

### C. Customary International Law

Conventional wisdom holds that customary international law also regulates when states may return refugees to territories where they could encounter persecution.<sup>40</sup> To discern the content

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<sup>36</sup> U.N. Human Rights Committee, General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), Mar. 10, 1992, U.N. Doc. HRI/ GEN/1/Rev.7, ¶ 9; *see also* U.N. Human Rights Committee, General Comment No. 31 on the Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, ¶ 12 (concluding that the ICCPR "entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm").

<sup>37</sup> *See, e.g.*, Chahal v. United Kingdom, Application No. 22414/93, Nov. 15, 1996, ¶¶ 75-82 (holding that the ECHR's prohibition against returning a person to a territory where they face a real risk of torture or CIDT admits no exceptions or derogations and applies even when the person poses a threat to national security); Soering v. United Kingdom, Application No. 14038/88, July 7, 1989, ¶ 88 (concluding that extradition violates the ECHR when it subjects a person to "a real risk of exposure to inhuman or degrading treatment or punishment" in the receiving state).

<sup>38</sup> For example, the Refugee Convention has 146 states-parties, and the Refugee Protocol has 147 states-parties. *See* U.N. Treaty Collection, Refugees and Stateless Persons, Convention Relating to the Status of Refugees, [https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg\\_no=V-2&chapter=5&Temp=mtdsg2&clang=\\_en](https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en) (last visited Sept. 22, 2020); U.N. Treaty Collection, Refugees and Stateless Persons, Protocol Relating to the Status of Refugees, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=V-5&chapter=5](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5) (last visited Sept. 22, 2020). Although the Torture Convention comes closer to universal membership, it also falls short with 171 states-parties. *See* U.N. Treaty Collection, Human Rights, Convention Against Torture and Other Cruel, Unusual and Degrading Treatment, [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-9&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en) (last visited Sept. 22, 2020).

<sup>39</sup> *See* VCLT, *supra* note 10, art. 34 ("A treaty does not create either obligations or rights for a third State without its consent."). International humanitarian law also prohibits sending refugees to jurisdictions where they could suffer serious harm. *See, e.g.*, Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, Aug. 12, 1949, arts. 3, 45, 147, 6 U.S.T. 3516, 75 U.N.T.S. 287, <http://www.icrc.org/ihl.nsf/0/6756482d86146898c125641e004aa3c5?OpenDocument> (authorizing states-parties to transfer civilians only to states that are parties to the Geneva Conventions and are willing and able to protect civilians from torture, CIDT, and other "outrages upon personal dignity"). In particular, the Fourth Geneva Convention provides that "[i]n no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs." *Id.* art. 45. Like the Refugee Convention, however, the Fourth Convention does not define *non-refoulement* as a fully peremptory norm. *See id.* (exempting states from this obligation when necessary to satisfy extradition requests).

<sup>40</sup> *See* U.N. General Assembly, New York Declaration for Refugees and Migrants, Sept. 19, 2016, A/RES/71/1, ¶ 24 (recognizing "that, in line with the principle of *non-refoulement*, individuals must not be returned at borders"). Legal

of customary international law, international lawyers traditionally have looked for two elements: (1) general state practice in conformity with or affirming a norm, and (2) general international acceptance of the norm's legal character (*opinio juris*).<sup>41</sup> Applying these criteria, most legal scholars have concluded that customary international law prohibits *refoulement* for any persons who would qualify for protection under the Refugee Convention, the Refugee Protocol, and the Torture Convention. But the scope of the customary *non-refoulement* principle may sweep even more broadly. Over the past four decades, human rights discourse has exerted a powerful gravitational pull on the customary norms of international refugee law. As a result, the idea that states may lawfully return refugees to persecution based on extradition requests or national security concerns no longer commands universal acceptance among states today.

This shift in customary international law has emerged gradually over time. For at least a decade and a half after the Refugee Convention entered force, states embraced the Convention's guidance that domestic national security and transnational law enforcement were legitimate legal justifications for *refoulement*. In the 1966 Bangkok Declaration on the Status and Treatment of Refugees, states from Africa and Asia confirmed that the prohibition of *refoulement* did not apply "when there are reasonable grounds to believe the person's presence is a danger to the national security or public order of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."<sup>42</sup> The following year, the U.N. General Assembly's Declaration on Territorial Asylum asserted that states could withhold *non-refoulement* "for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons."<sup>43</sup> Both declarations expressed states' understanding that international law did not forbid *refoulement* when this step was necessary to safeguard certain important national interests.

This global consensus against treating *non-refoulement* as a peremptory norm eventually began to show cracks, starting in Latin America. In 1969, states in the Western Hemisphere declined to recognize any exceptions, limitations, or grounds for derogation from the *non-refoulement* principle enshrined in the American Convention on Human Rights.<sup>44</sup> Ten Latin

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scholars have endorsed the customary status of the principle of *non-refoulement* in the San Remo Declaration on the Principle of Non-Refoulement 2, Sept. 2001, <http://iihl.org/wp-content/uploads/2019/05/Sanremo-Declaration-on-the-Principle-of-Non-Refoulement.pdf> [hereinafter San Remo Declaration]; GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 345-54 (2007); Philip C.W. Chan, *The Protection of Refugees and Internally Placed Persons: Non Refoulement under Customary International Law?*, 10 INT'L J. HUM. RTS. 231 (2006); Cathryn Costello & Michelle Foster, *Non-Refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test*, 46 NETH. Y.B. INT'L L. 273 (2015); Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 149 (Erika Fuller, Volker Türk & Frances Nicholson eds., 2003). *But see* James C. Hathaway, *Leveraging Asylum*, 45 TEXAS INT'L L.J. 503, 506 (2010) (arguing that "there is no duty of non-refoulement that binds all states as a matter of customary international law").

<sup>41</sup> Statute of the Permanent Court of International Justice art. 38, Dec. 13, 1920, 6 L.N.T.S. 390.

<sup>42</sup> Asian-African Legal Consultative Organization, Bangkok Principles on the Status and Treatment of Refugees art. III(1), Dec. 31, 1966, <https://www.refworld.org/docid/3de5f2d5.html>.

<sup>43</sup> Declaration on Territorial Asylum, *supra* note 9, art. 3(2).

<sup>44</sup> *See* American Convention, *supra* note 7, art. 22(8) ("In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions."). The same year, the Organization for African Unity did not include an equivalent of the Refugee Convention's Article 33(2) in its Convention Governing Specific Aspects of Refugee Problems in Africa, but it did adopt the equivalent of Article 1(F). *See* African Refugee Convention, *surpa* note 7, art. I(4)-(5).

American states later reaffirmed this principle in the 1984 Cartagena Declaration on Refugees.<sup>45</sup> In the 2014 Brazil Declaration and Plan of Action, states from Latin America and the Caribbean asserted with exceptional clarity “the *jus cogens* character of the principle of *non-refoulement*.”<sup>46</sup> At least among Latin American states, therefore, *opinio juris* supports the peremptory character of the principle of *non-refoulement*.

These developments have not escaped the attention of the broader international community. In 1982, the Executive Committee of the High Commissioner’s Programme (Executive Committee), an international deliberative body composed of state representatives, observed that “the principle of *non-refoulement* . . . was progressively acquiring the character of a peremptory norm of international law.”<sup>47</sup> Because Executive Committee conclusions “reflect the consensus of States, acting in an advisory capacity where issues of protection and *non-refoulement* are addressed internationally,” they “carry a disproportionate weight in the formation of [international] custom” on refugee protection.<sup>48</sup> The fact that the Executive Committee characterized *non-refoulement* as a norm “progressively acquiring” peremptory status suggests that the international community as a whole was open to embracing this result at the time. Yet, a dose of caution is also in order: although *non-refoulement* may have been “progressively acquiring the character of a peremptory norm of international law,” the fact remains that the Executive Committee apparently concluded that this transformation was not yet complete.

Fast forward to the present, and legal scholars continue to debate whether, or to what extent, customary international law recognizes *non-refoulement* as a peremptory norm. Conventional wisdom holds that the prohibition against *refoulement* to torture qualifies as a customary norm of *jus cogens*, such that it applies even to states that are not parties to the Torture Convention.<sup>49</sup> Beyond that relatively uncontroversial principle, however, scholarly consensus has proven to be elusive. Some publicists have argued that the prohibition against *refoulement* to CIDT also qualifies as *jus cogens* under customary international law,<sup>50</sup> but that proposition does not enjoy universal acceptance.<sup>51</sup> Whether less grave forms of persecution, such as discrimination in public

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<sup>45</sup> See Cartagena Declaration, *supra* note 7, § III, ¶ 5.

<sup>46</sup> Brazil Declaration, *supra* note 7.

<sup>47</sup> Executive Committee of the High Commissioner’s Programme, General Conclusion on International Protection No. 25 (XXXIII), 1982 Executive Committee 33rd session. G.A. Doc. No. 12A (A/37/12/Add.1) (Oct. 20, 1982), <https://www.unhcr.org/en-us/excom/exconc/3ae68c434c/general-conclusion-international-protection.html>; see also U.N. High Commissioner for Refugees, Note on International Protection. Thirty-fifth Session of the Executive Committee of the High Commissioner's Programme ¶ 15, U.N. Doc. A/AC.96/643 (1984) (asserting that *nonrefoulement* “is progressively acquiring the character of a peremptory norm of international law”).

<sup>48</sup> Jean Allain, *The Jus Cogens Nature of Non-refoulement*, 13 INT’L J. REFUGEE L. 533, 539 (2002); see also Lauterpacht & Bethlehem, *supra* note 38, ¶ 214 (“Conclusions of the Executive Committee can, in our view, be taken as expressions of opinion which are broadly representative of the views of the international community.”). Only forty states participated in the Executive Committee deliberations that produced Conclusion 25, but this group included a relatively diverse cross-section of the international community. See Executive Committee’s Membership by Year of Admission of Members, <https://www.unhcr.org/en-us/excom/announce/40112e984/excom-membership-date-admission-members.html>.

<sup>49</sup> See Lauterpacht & Bethlehem, *supra* note 38, ¶ 222 (“There is consensus that the prohibition of torture constitutes a rule of customary international law.”).

<sup>50</sup> See, e.g., *id.* ¶¶ 219, 253.

<sup>51</sup> See GOODWIN-GILL & MCADAM, *supra* note 38, at 348-51.

entitlements or employment, trigger peremptory *non-refoulement* obligations is more controversial still.<sup>52</sup>

This diversity of viewpoints is perhaps to be expected, considering the challenging empirical questions that arise whenever international lawyers seek to identify the state practice and *opinio juris* of refugee protection. Does a substantial super-majority of specially affected states actually accept the idea that *refoulement* to persecution is never permissible under customary international law? Or do most states outside of Latin America and the Caribbean continue to accept the Refugee Convention's exceptions and limitations as *lex specialis*? Does general state practice actually support the proposition that states may not withhold protection from persecution under any circumstances? Or do states persist in returning refugees to territories where they have well-founded fears of persecution, while publicly defending such measures as legally permissible based on national security threats, refugees' prior criminal acts, or the administrative and financial burdens associated with mass influxes? Assembling the evidence and formulating an interpretive framework adequate to provide credible answers to these questions is no mean feat.

Among scholars who have taken up this challenge, Cathryn Costello and Michelle Foster have made the most powerful case in favor of an expansive conception of *non-refoulement* as a peremptory norm of customary international law.<sup>53</sup> To determine whether *non-refoulement* is a peremptory norm, they apply a "customary international law plus" theory, according to which customary norms qualify as *jus cogens* if states have manifest widespread support for the norm having this distinctive status.<sup>54</sup> Surveying multilateral treaties, U.N. General Assembly resolutions, Executive Committee conclusions, and other evidence of state practice and *opinio juris*, Costello and Foster make a compelling case that the principle of *non-refoulement* has become firmly embedded in customary international law.<sup>55</sup> Costello and Foster then lean heavily on General Assembly resolutions and Executive Committee conclusions to establish that states now accept *non-refoulement* as a peremptory norm.<sup>56</sup> Although Costello and Foster acknowledge that the General Assembly and the Executive Committee do not regularly use the words "peremptory" or "*jus cogens*" to describe *non-refoulement*,<sup>57</sup> they deem it "highly pertinent" that states consistently refer to *non-refoulement* as having a "fundamental character" or as a "cardinal" or "fundamental principle."<sup>58</sup> Reasoning that these expressions reflect *jus cogens*, Costello and

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<sup>52</sup> Compare U.N. High Commissioner for Refugees, Note on International Protection ¶ 17, July 23, 1985, A/AC.96/660) ("The fundamental principle of *non-refoulement* . . . has come to be characterized as a peremptory norm of international law."), with Lauterpacht & Bethelheim, *supra* note 38, ¶ 253 ("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 or . . . other non-derogable customary principles of human rights.").

<sup>53</sup> See Costello & Foster, *supra* note 38. Other endorsements of an expansive peremptory principle of *non-refoulement* include ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 56 (2006); and Allain, *supra* note 46.

<sup>54</sup> See *id.* at 306-07 (citing John Tasioulas, *Custom, Jus Cogens, and Human Rights, in CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD* (Curtis A. Bradley ed., 2016)).

<sup>55</sup> See Costello & Foster, *supra* note 38, at 282-306.

<sup>56</sup> *Id.* at 309.

<sup>57</sup> With the exception, of course, of Executive Committee Conclusion 25, which uses this language only tentatively to describe *lex ferenda* that might mature eventually into *lex lata*. See *supra* text accompanying notes 45-50.

<sup>58</sup> Costello & Foster, *supra* note 38, at 309 n.227 (citing UNHCR Executive Committee, Conclusion No. 99 (LV), Oct. 8, 2004, ¶ (1)); UNHCR, Executive Committee Conclusion No. 94 (LIII), Oct. 8, 2002, ¶ (c)(i) [hereinafter ExCom Conclusion No. 94]; UNHCR, Executive Committee Conclusion No. 16 (XXXI), Oct. 9, 1998, ¶ (e) [hereinafter ExCom Conclusion No. 16]; UNHCR, Executive Committee Conclusion No. 74 (XLV), Oct. 7, 1994, ¶ (g); ExCom

Foster conclude that *non-refoulement* has ripened into a peremptory norm under general international law.<sup>59</sup>

This argument, while attractive, has notable weaknesses. The fact that states have accepted *non-refoulement* as a fundamental feature of international legal order does not necessarily mean that the norm has a peremptory and nonderogable character. By way of comparison, few would dispute the General Assembly’s description of freedom of expression, peaceful assembly, and association as “fundamental” to international public order,<sup>60</sup> but all of these norms are subject to limitation and derogation under IHRL.<sup>61</sup> Perhaps more important, for every multilateral statement affirming the fundamental character of the *non-refoulement* principle, skeptics could point to another that casts doubt on whether *non-refoulement* to persecution is a peremptory norm. For example, although the Executive Committee has asserted at times that the *non-refoulement* principle has an “absolute character”<sup>62</sup> and applies “[i]n all contexts,”<sup>63</sup> it has also encouraged states to “apply scrupulously the exclusion clauses stipulated in Article 1F” in order to facilitate international law enforcement.<sup>64</sup> When states worried after 9/11 that armed insurgents or terrorists might infiltrate refugee camps, the Executive Committee cautioned that “during the refugee status determination process, utmost attention should be paid to article 1F of the 1951 Convention, in order to avoid abuse of the asylum system by those who do not deserve international protection.”<sup>65</sup> A plausible interpretation of this guidance is that refugees excluded from protection under Article 1(F) could be returned to their states of origin without regard to the *non-refoulement* principle.<sup>66</sup> Moreover, to the extent that the international community has formulated the *non-refoulement* principle differently on different occasions, one might reasonably question, with James Hathaway, whether there is a coherent norm around which *opinio juris* might catalyze into *jus cogens* (other than, perhaps, the prohibition of return to torture).<sup>67</sup> These considerations cast doubt on whether international *opinio juris* accepts *non-refoulement* as a peremptory and nonderogable norm.

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Conclusion No. 22, *supra* note 16, ¶ (2); UNHCR, Executive Committee Conclusion No. 33 (XXXV), Oct. 8, 1984, ¶ (c); UNHCR, Executive Committee Conclusion No. 21 (XXXII), Oct. 21, 1981, ¶ (f). Costello and Foster also note in passing that a few domestic and regional courts have characterized *non-refoulement* as a peremptory norm. See Costello & Foster, *supra* note 38, at 308.

<sup>59</sup> See Costello & Foster, *supra* note 38, at 309 (“it appears that *non-refoulement* is ripe for recognition as *jus cogens*”); see also James C. Simeon, *What Is the Future of Non-refoulement in International Refugee Law?*, RESEARCH HANDBOOK ON INTERNATIONAL REFUGEE LAW 183, 192 (Salvinder Singh Juss ed., 2019) (offering a similar argument).

<sup>60</sup> U.N. General Assembly, Promotion and Protection of Human Rights and Fundamental Freedoms, Including the Rights to Peaceful Assembly and Freedom of Association, Jan. 8, 2019, A/RES/73/173, at 3, ¶ 2.

<sup>61</sup> See International Covenant on Civil and Political Rights art. 4(1), Dec. 16 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (permitting derogation from certain Convention rights, including freedom of expression, peaceful assembly, and association); *id.* art. 19(3) (providing that freedom of expression may be limited in the interest of “respect[ing] the rights or reputations of others” and “[f]or the protection of national security or of public order (ordre public), or of public health or morals”); *id.* art. 21 (same for peaceful assembly); *id.* art. 22(2) (same for association). To be sure, each of these norms might have a non-derogable core, see Tasioulas, *supra* note 52, at 115, but this does not mean the larger derogable aspects of these norms are not fundamental to international legal order.

<sup>62</sup> ExCom Conclusion No. 16, *supra* note 56, ¶ (d).

<sup>63</sup> ExCom Conclusion No. 22, *supra* note 16, ¶ II.A.2.

<sup>64</sup> UNHCR, Executive Committee Conclusion No. 103 (LVI) ¶ (g) (2005).

<sup>65</sup> ExCom Conclusion No. 94, *supra* note 56, ¶ (c)(vii).

<sup>66</sup> See *id.*; see also UNHCR, Executive Committee Conclusion No. 17 (XXXI) ¶ (g) (1980) (observing that protection in regard to extradition” does not apply to those “excluded from refugee status by virtue of Article 1(F)(b)”).

<sup>67</sup> See Hathaway, *supra* note 38, at 510 (“There is, in short, no common acceptance of the duty of *non-refoulement* related to any particular class of persons or type of risk, much less to their combined beneficiary class.”).

Skeptics have argued further that state practice does not support the idea that customary international law enshrines an expansive peremptory principle of *non-refoulement*. National courts sometimes impose parsimonious interpretations on Convention and Protocol protections, limiting the scope of the *non-refoulement* principle in a manner that puts in question its status as a peremptory and nonderogable norm.<sup>68</sup> Aoife Duffy contends that the prevalence of “‘terrorist’ exceptions to the prohibition on *refoulement*” in national laws and policies “indicates that the goal of acquiring peremptory status for the principle of *non-refoulement* in [customary] international law has yet to be reached.”<sup>69</sup> Rene Bruin and Kees Wouters, Hathaway, and William Schabas offer similar assessments.<sup>70</sup> The influential 2001 *San Remo Declaration on the Principle of Non-Refoulement*, a document crafted by a panel of experts in cooperation with UNHCR, likewise characterizes the principle of *non-refoulement* as being subject to “legitimate exception[s]”—presumably, those set forth in Articles 1(F) and 33(2) of the Refugee Convention.<sup>71</sup> In short, despite the fact that some regional treaty regimes and declarations endorse *non-refoulement* as a peremptory norm, legal experts have yet to reach consensus about whether *non-refoulement* has attained this status under a “customary international law plus” theory of *jus cogens*.<sup>72</sup>

To be sure, none of these grounds for hesitation conclusively disproves that *non-refoulement* is a peremptory norm. They do suggest, however, that other arguments and approaches may play a productive role in selecting and assessing the evidence of state practice and *opinio juris* relevant to customary international law’s recognition of IRL’s *non-refoulement* principle as a peremptory norm.

#### D. Synthesis

In sum, the legal landscape of international refugee protection is highly complex and fractured. Applying conventional criteria, there are limits to what scholars can assert with confidence about the status of *non-refoulement* as a peremptory norm under treaties and customary international law. In at least some respects, the principle of *non-refoulement* indisputably qualifies

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<sup>68</sup> See, e.g., *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993) (concluding that the Protocol’s prohibition of *refoulement* does not apply to maritime interdiction on the high seas).

<sup>69</sup> See, e.g., Aoife Duffy, *Expulsion to Face Torture? Non-refoulement in International Law*, 20 INT’L J. REFUGEE L. 373, 389 (2008) (concluding that “arguments put forth by the authors of the Sanremo Declaration and the UNHCR Executive Committee, that non-refoulement has acquired *jus cogens* status, are less than convincing,” given the exclusion clauses of Article 1(F)).

<sup>70</sup> See WILLIAM A. SCHABAS, BACKGROUND PAPER FOR THE TECHNICAL WORKSHOP ON NON-REFOULEMENT, HUMAN RIGHTS AND INTERNATIONAL COOPERATION IN COUNTER-TERRORISM 27 n.22 (2006) (“The arguments that *non-refoulement* is a *jus cogens* norm are not particularly convincing.”); Rene Bruin & Kees Wouters, *Terrorism and the Non-derogability of Non-refoulement*, 15 INT’L J. REFUGEE L. 5, 26 (2003) (“The major practical problem remains the burden of proof to be able to actually characterize the obligation of non-refoulement as a peremptory norm of general international law . . . .”); Hathaway, *supra* note 38, at 516 (arguing that “there is a pervasive—perhaps even dominant—state practice that denies in one way or another the right to be protected against *refoulement*”).

<sup>71</sup> See San Remo Declaration, *supra* note 38, at 2 (characterizing *non-refoulement* as subject to “legitimate exception[s]”). In some cases, states have invoked national security and have characterized the risk of harm narrowly to justify returning forced migrants to territories where they would face a serious risk of torture. See, e.g., *Dadar Deported to Iran Despite Fears of Torture*, CBC NEWS, Mar. 27, 2006, <https://www.cbc.ca/news/canada/new-brunswick/dadar-deported-to-iran-despite-fears-of-torture-1.604648> (reporting the deportation of an Iranian national who, according to the U.N. Committee Against Torture, “may risk being subjected to torture if returned to Iran”).

<sup>72</sup> Even some scholars who endorse a customary aspect to the principle of *non-refoulement* have concluded that the norm is not peremptory. See, e.g., Lauterpacht & Bethlehem, *supra* note 38, ¶ 158.

as *jus cogens*. The prohibition against exposing a person to torture is indisputably a peremptory norm that applies to all states in all contexts. However, it is less clear whether *non-refoulement* to persecution also qualifies as a peremptory norm. Some regional treaties endorse this principle as *jus cogens*, but the Refugee Convention does not go so far, and legal academics have divided over whether *non-refoulement* to persecution has become a peremptory norm under customary international law. This may be due, at least in part, to the fact that state practice and *opinio juris* on this question are amenable to different interpretations. For international lawyers who espouse a “custom international law plus” theory of *jus cogens*, it might be tempting to conclude that the *non-refoulement* principle remains in a Sisyphean purgatory, forever “progressively acquiring” the character of *jus cogens* (*lex ferenda*) without ever quite attaining enough state practice and *opinio juris* to put the matter to rest (*lex lata*).

Our goal in this Article is three-fold. First, we aim to develop a fiduciary and dual commissions theory of IRL that ultimately may serve as an interpretive prism congenial to the selection and qualification of state practice and *opinio juris* supportive of recognizing *non-refoulement* as a customary norm. Second, we deploy this theory to explain why the very legality of the international legal order depends on its recognition of *non-refoulement* as a peremptory norm. And third, we present as we develop this theory a normative case in favor of the international community recognizing that the duty of *non-refoulement* has a *jus cogens* character.

## II. THE CASE FOR RECOGNIZING *NON-REFOULEMENT* AS A PEREMPTORY NORM

In this Part, we first consider a number of arguments that oppose the peremptory status of the duty of *non-refoulement*. We then elaborate our dual commissions theory of international refugee law, explaining how the dual commissions theory is able to meet the skeptics’ arguments while providing a positive account of the peremptory character of *non-refoulement*.

### A. *Skepticism*

Scholars who resist characterizing *nonrefoulement* as a customary and peremptory norm fall into two camps. Some accept that customary international law enshrines a general principle of *nonrefoulement*, but they question whether states have a moral or legal duty to observe this principle when vital sovereign interests, such as national security or public health, are imperiled.<sup>73</sup> Others argue that there are no rational grounds to suppose that states have a moral duty of *non-refoulement* at all, and therefore that there is no good reason to attribute to state actors a motive to act in accordance with such a duty.<sup>74</sup>

Prominent arguments against a customary and peremptory duty of *non-refoulement* raise four concerns: the special loyalty states owe their citizens; the value of local self-determination and freedom of association; the presumption against limitations on sovereign discretion found in international legal sources such as *The S.S. Lotus*;<sup>75</sup> and Schmittian conceptions of sovereignty under which the sovereign is understood as an “uncommanded commander”<sup>76</sup> with unfettered

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<sup>73</sup> E.g., Bruin & Wouters, *supra* note 68, at 26; Duffy, *supra* note 69, at 389.

<sup>74</sup> E.g., David Miller, *Immigration: The Case for Limits*, in CONTEMPORARY DEBATES IN APPLIED ETHICS 363, 368-72 (Andrew I. Cohen & Christopher H. Wellman eds., 2013); Christopher H. Wellman, *Immigration and Freedom of Association*, 119 ETHICS 109, 109 (2008); cf. Hathaway, *supra* note 38, at 506 (concluding that there is no customary duty of *non-refoulement*).

<sup>75</sup> The Case of the S.S. Lotus (Turk. v. Fr.), 1927 P.C.I.J. (Ser. A) No. 10 (Sept. 7).

<sup>76</sup> See discussion of Austin in Ronald Dworkin, *A New Philosophy for International Law*, 41 PHIL. & PUB. AFFAIRS 2, 3 (2013).

discretion, particularly in times of crisis.<sup>77</sup> In this Section, we sketch various arguments that call on these considerations. Some of these arguments are from political theory and philosophy. They are nonetheless germane to conventional legal inquiry into customary and peremptory norms, such as Costello and Foster's "custom plus" theory,<sup>78</sup> because this is *inter alia* an interpretive inquiry into whether certain acts of states that conform to aspiring customary and peremptory norms do so because state actors believe themselves to be under a legal obligation to comply with them (customary norms) or to comply with them without the possibility of limitation or derogation (peremptory norms).<sup>79</sup>

### 1. *Special Loyalty*

Some scholars argue that states owe their citizens a special form of loyalty that invariably stands in tension with a peremptory norm of *non-refoulement*. We are not referring to realists of international relations such as Hans Morgenthau who claim that the state's exclusive concern is the well-being of its own people, and for whom the very idea of a customary international legal obligation is suspect.<sup>80</sup> Rather, we are referring to more moderate thinkers who recognize that states owe some duties to outsiders, but who think that the state's primary and most important obligations are to its citizens. Thus, in the event of conflict, the state's duties to its citizens generally prevail, and therefore the idea that *non-refoulement* is a peremptory duty faces an uphill climb. David Miller's views are characteristic of this more moderate nationalism.

Miller argues that states may justifiably limit immigration based on their members' interest in maintaining and controlling their public culture, as well as their interest in population control.<sup>81</sup> He compares the outsider's interest in permanent migration to another state to his possible interest in acquiring an Aston Martin.<sup>82</sup> He is, however, prepared to make a qualified exception for refugees, on the grounds that individuals whose "basic rights" (human rights) are threatened or violated are entitled to move to somewhere that offers them better security.<sup>83</sup> It follows, Miller says, that states have a "prima facie" obligation to admit refugees, a class he specifies more broadly than the Refugee Convention to include persons "deprived of rights to subsistence, basic healthcare, and so on."<sup>84</sup> But the prima facie obligation to take in refugees comes with three important qualifications.

First, the obligation, as Miller understands it, is to provide refuge only for so long as the threat to human rights persists. Following James Hathaway and Alexander Neve, Miller asserts that refugees may be "asked to return to their original country of citizenship when the threat has passed."<sup>85</sup> Second, states need not take in refugees themselves if asylum-seekers can be sent to a

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<sup>77</sup> CARL SCHMITT, *POLITICAL THEOLOGY* 5-15 (George Schwab trans. 2005) (1934).

<sup>78</sup> See Costello & Foster, *supra* note 38.

<sup>79</sup> We recognize, of course, that states act for self-interested reasons as well as (sometimes) from a sense of duty.

<sup>80</sup> See, e.g., HANS J. MORGENTHAU, *SCIENTIFIC MAN VS. POWER POLITICS* (1947); John R. Bolton, *Is There Really "Law" in International Affairs?*, 10 *TRANSNAT'L L. & CONTEMP. PROBS.* 1, 4-7 (2000) (disputing the existence of international legal obligations on nationalist grounds); see also ALLAN BUCHANAN, *JUSTICE, LEGITIMACY AND SELF-DETERMINATION* 35-37 (2004) (dubbing Morgenthau a "fiduciary realist" and critiquing this form of realism for disregarding basic moral obligations that bind a person whether she acts for herself or another).

<sup>81</sup> Miller, *supra* note 74, at 368-72.

<sup>82</sup> *Id.* at 364, 366.

<sup>83</sup> *Id.* at 372.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* (citing James Hathaway & Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal of Collectivized and Solution-oriented Protection*, 10 *HARV. HUM. RTS. J.* 115 (1997)). The sense in which refugees are

place where their “basic rights” are not threatened; *e.g.*, refugee camps in the South, or as Miller characterizes them, “safety zones for refugees close to their homes.”<sup>86</sup> Third, and perhaps most importantly from the point of view of an inquiry into *non-refoulement*, Miller insists that all states are entitled to decide for themselves how to respond to individual requests for asylum. Each state, Miller says, “is at some point entitled to say that it has done enough to cope with the refugee crisis.”<sup>87</sup> An implication of every state having this prerogative, Miller concedes, is that “there can be no guarantee that every bona fide refugee will find a state willing to take him or her in.”<sup>88</sup>

The prerogative over bona fide refugee admissions that Miller supports is inconsistent with a peremptory duty of *non-refoulement*, since the very existence of such a duty entails the denial of such a prerogative. Miller would therefore resist ascribing to states a peremptory legal duty of *non-refoulement*.

## 2. *Self-determination*

Arguments similar to these are sometimes said to follow from a state’s freedom of association and related right to self-determination.

Among the boldest claim in the literature on migration is Christopher Wellman’s “stark conclusion” that “every legitimate state has the right to close its doors to all potential immigrants, even refugees desperately seeking asylum from incompetent or corrupt political regimes that are either unable or unwilling to protect their citizens’ basic moral rights.”<sup>89</sup> Wellman argues that states, like individuals and groups generally, enjoy freedom of association. For individuals, Wellman’s favored case of freedom of association is matrimony: individuals are free to choose whom they marry, but to enjoy freedom of association fully in this context “one must also have the discretion to reject the proposal of any given suitor and even to remain single indefinitely if one chooses.”<sup>90</sup> For groups, freedom of association includes the right to exclude so as to control the group’s membership, which in the case of legitimate states implies an entitlement “to exclude all foreigners from its political community.”<sup>91</sup> For Wellman, freedom of association is “a central component of the more general right of self-determination,” so that “a state cannot fully enjoy the right to political self-determination unless its rights to freedom of association are respected.”<sup>92</sup>

Wellman argues that a state’s right to exclude applies “even in the case of asylum seekers in desperate need of a political safe haven.”<sup>93</sup> His proposal for responding to refugee crises is humanitarian intervention: “one cannot ship justice in a box, but one can intervene, militarily if necessary, in an unjust political environment to ensure that those currently vulnerable to the state

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to be “asked” is euphemistic. As with Hathaway and Neve’s proposal, Miller’s view is that states are entitled to deport forcibly asylum-seekers if the threat to their human rights in their country of origin recedes within a lesser period of time than it is reasonable to keep them without permanent status and in limbo. In previous work, we have argued in favor of a durable right to asylum. See EVAN J. CRIDDLE & EVAN FOX-DECENT, *FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY* 276-81 (2016).

<sup>86</sup> Miller, *supra* note 77, at 372.

<sup>87</sup> *Id.* at 373. In later work, Miller subscribes to the principle of *non-refoulement*, though with at least the first two qualifications firmly in place. See DAVID MILLER, *STRANGERS IN OUR MIDST: THE POLITICAL PHILOSOPHY OF IMMIGRATION* ch. 5 (2016).

<sup>88</sup> Miller, *supra* note 77, at 373.

<sup>89</sup> Wellman, *supra* note 74, at 109.

<sup>90</sup> *Id.* at 110.

<sup>91</sup> *Id.* at 111.

<sup>92</sup> *Id.* at 115 n.5.

<sup>93</sup> *Id.* at 128.

are made safe in their homelands.”<sup>94</sup> He uses the Kurds in northern Iraq as an example of how this might work in practice. One way to alleviate the Kurds’ suffering, he says, would be through their resettlement elsewhere, but another would be to create a safe haven and no-fly zone.<sup>95</sup> Receiving states owe the Kurds and others similarly situated a duty to help, but it is a “disjunctive duty” they can fulfil either by granting asylum to those in desperate need or through humanitarian intervention.<sup>96</sup> Wellman qualifies in a footnote that because interventions typically take time, receiving states “should not return the refugees to their home state (at least without protecting them) until the intervention is successfully completed.”<sup>97</sup> Admittedly, this qualification may bring Wellman’s proposal within a narrow interpretation of the duty of *non-refoulement*, although it is consistent with receiving states deporting refugees to internment camps while the intervention unfolds.

### 3. *The Lotus Doctrine*

The wide discretion Wellman attributes to states is reflected in well-known doctrine from international law. In the famous *Case of The S.S. Lotus*,<sup>98</sup> a majority of the Permanent Court of International Justice (PCIJ) held that “[t]he rules of law binding upon States . . . emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law . . . . Restrictions upon the independence of States cannot therefore be presumed.”<sup>99</sup> The Court declared that states enjoy “a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.”<sup>100</sup> Thus, Prosper Weil notes laconically, the *Lotus* doctrine is simply that “whatever is not explicitly prohibited by international law is permitted.”<sup>101</sup>

The International Court of Justice (ICJ) has reiterated the permissive *Lotus* doctrine in subsequent cases. For example, in the *Haya de la Torre* case, Colombia petitioned the ICJ for direction regarding whether it was legally bound to surrender a Peruvian, Haya de la Torre, who

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<sup>94</sup> *Id.* at 129.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* Wellman does not venture a guess at the proportion of refugee cases that resemble the Kurds, nor how intervention might work when the refugee-producing state is not easily dominated by Western powers (*e.g.*, China, Iran), nor how intervention is to occur when the persecution is of a kind that plainly does not warrant military intervention (*e.g.*, periodic and mild stifling of political opinion). He cites with approval a passage from Miller that presents an additional option for when humanitarian intervention is impractical: receiving states “must help [refugees] move to other communities where their lives will go better.” Miller, *supra* note 77, at 368. For Miller, and presumably for Wellman, “other communities” include refugee camps or “safety zones for refugees close to their homes.” When Wellman presents his closed border view most directly, it is without qualification. *See supra* text accompanying notes 85-89.

<sup>97</sup> *Id.* at 129 n.26. This qualification is arguably inconsistent with Wellman’s brasher claim that states can close their doors to “refugees desperately seeking asylum,” since in these cases, presumably, successful intervention has not yet occurred. *Id.* at 109.

<sup>98</sup> *The Case of the S.S. Lotus (Turk. v. Fr.)*, 1927 P.C.I.J. (Ser. A) No. 10 (Sept. 7).

<sup>99</sup> *Id.* at 18.

<sup>100</sup> *Id.* at 19.

<sup>101</sup> Prosper Weil, “*The Court Cannot Conclude Definitively*” . . . *Non Liqueur Revisited*, 36 COLUM. J. TRANSNAT’L L. 109, 112 (1998). *But see* An Hertogen, *Letting Lotus Bloom*, 26 EUR. J. INT’L L. 901, 904 (2016) (arguing that *Lotus* has been misinterpreted and that the key to understanding the case lies in the Court’s commitment to the “co-existence of independent communities”).

was seeking exile within Colombia's embassy in Peru.<sup>102</sup> Peru sought to take him into custody for prosecution of alleged criminal offences. The Court found that the governing Convention on Asylum (Havana 1928) "does not give a complete answer on the manner in which an asylum shall be terminated."<sup>103</sup> The Court then concluded that "[t]he silence of the Convention implies that it was intended to leave the adjustment of the consequences of this situation to decisions inspired by considerations of convenience or of simple political expediency."<sup>104</sup> In the instant case, this meant that "extra-legal factors" and "the spirit of the Havana Convention" weighed decisively in favor of Colombia's refusal to deliver Haya de la Torre to Peru. The absence of an express prohibition or prescription meant that Colombia, according to the ICJ, had the prerogative to deny Peru's request.

A lesson that skeptics of a preemptory duty of *non-refoulement* might draw is that in the absence of an express legal norm establishing the preemptory status of the duty, states remain free to derogate from it. For scholars who doubt the preemptory status of the duty of *non-refoulement*, such as Duffy,<sup>105</sup> Hathaway,<sup>106</sup> Bruin and Wouters,<sup>107</sup> and Schabas,<sup>108</sup> cases such as *Lotus* and *Haya de la Torre* disclose a view of sovereignty that denotes a default principle of robust state autonomy. On this understanding of sovereignty, proponents of a preemptory duty of *non-refoulement* face a heavy burden to show that state practice and *opinio juris* displace the default principle of state autonomy in a way that reveals the duty of *non-refoulement's* preemptory status.

#### 4. Schmittian Sovereignty

In the decades prior to *Lotus* and *Haya de la Torre*, Carl Schmitt developed a conception of sovereignty that gave the sovereign a qualitatively wider discretion still, a conception of sovereignty that would return to prominence in the years following 9/11.<sup>109</sup> Schmitt begins *Political Theology* with the declaration that "[s]overeign is he who decides on the exception."<sup>110</sup> By this Schmitt means that the sovereign is the person politically capable of making and enforcing a decision about whether there is an emergency, as well as the person entitled to determine what must be done to address it. Because "the precise details of an emergency cannot be anticipated, nor can one spell out . . . how it is to be eliminated," the power to decide on the exception "must necessarily be unlimited."<sup>111</sup> Schmitt premised this claim on the idea that legality consists in exclusively two elements: general norms and particular decisions.<sup>112</sup> Legal norms, however, cannot exhaustively anticipate the shape an emergency will take nor what must be done to eliminate it.<sup>113</sup> And because, for Schmitt, only decisions on the exception are capable of safeguarding the "normal" legal order, he could conclude that "[l]ike every other order, legal order

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<sup>102</sup> *Haya de la Torre (Colum. v. Peru)*, 1951 I.C.J. 71, 73 (June 13).

<sup>103</sup> *Id.* at 80.

<sup>104</sup> *Id.* at 81.

<sup>105</sup> Duffy, *supra* note 66.

<sup>106</sup> Hathaway, *supra* note 38.

<sup>107</sup> Bruin & Wouters, *supra* note 68.

<sup>108</sup> SCHABAS, *supra* note 69.

<sup>109</sup> Our discussion of Schmitt draws on our discussion of his theory of sovereignty in Evan J. Criddle & Evan Fox-Decent, *Human Rights, Emergencies, and the Rule of Law*, 34 HUM. RTS. Q. 39 (2012).

<sup>110</sup> SCHMITT, *supra* note 74, at 5.

<sup>111</sup> *Id.* at 6-7.

<sup>112</sup> *Id.* at 10.

<sup>113</sup> *Id.* at 7.

rests on a decision and not a norm.”<sup>114</sup> That is, even during normal times the sovereign retains an unlimited power to declare and deal with emergencies. By virtue of this power, the sovereign “stands outside the normally valid legal system,” but also “belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety.”<sup>115</sup>

Schmitt has had enormous influence on scholarship and policy related to emergency powers since 9/11.<sup>116</sup> Giorgio Agamben’s *State of Exception*, for example, applies Schmitt’s ideas to war-on-terror measures adopted by the Bush Administration, and maintains that the state of exception “tends increasingly to appear as the dominant paradigm of government in contemporary politics.”<sup>117</sup> Agamben points to the “military order” issued by President George W. Bush on November 13, 2001, authorizing *inter alia* “indefinite detention” of noncitizens suspected of terrorism and trial by military commissions.<sup>118</sup> He observes that President Bush’s order “radically erases any legal status of the individual. . . . Neither prisoners nor persons accused, but simply ‘detainees,’ they are the object of a pure de facto rule, of a detention that is indefinite not only in the temporal sense but in its very nature as well, since it is entirely removed from the law and judicial oversight.”<sup>119</sup> The Schmittian implication is that the U.S. president, like Schmitt’s sovereign, has absolute and unfettered power to identify and confront perceived threats to national security. For governments declaring emergencies based on the COVID-19 pandemic, the Schmittian framework provides a tested resource to deny that the duty of *non-refoulement* has any applicability other than at the sufferance of the sovereign, much less preemptory status.

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In the next section we develop a dual commissions theory of IRL that aims to meet the skeptical challenges posed by Schmitt, moderate nationalism (Miller), the alleged implications of freedom of association and self-determination (Wellman), and the purportedly wide discretionary authority international law confers on states (*Lotus*).

## B. *The Dual Commissions Theory of IRL*

Under the dual commissions theory, states are understood to occupy two juridically salient fiduciary positions, and thereby to have two juridically salient commissions.<sup>120</sup> One of these

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<sup>114</sup> *Id.* at 10.

<sup>115</sup> *Id.* at 7.

<sup>116</sup> See, e.g., GIORGIO AGAMBEN, *THE STATE OF EXCEPTION* (2005); OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* (2006) (drawing on Schmitt’s work to develop a theory of sovereign prerogative to take extra-legal action during emergencies); ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 38-39 (2007) (identifying Schmitt as the “philosopher-jurist most often invoked in discussions of emergencies” and deploying Schmittian arguments to defend security-based restrictions on civil liberties); Austin Sarat, *Introduction: Toward New Conceptions of the Relationship of Law and Sovereignty Under Conditions of Emergency*, in *SOVEREIGNTY, EMERGENCY, LEGALITY* 1, 2 (Austin Sarat, ed. 2010).

<sup>117</sup> AGAMBEN, *supra* note 112, at 9.

<sup>118</sup> *Id.* at 3 (discussing Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001)).

<sup>119</sup> *Id.* at 3-4.

<sup>120</sup> Elements of this discussion draw on prior work. See CRIDDLE & FOX-DECENT, *supra* note 85, ch. 7; Evan J. Criddle & Evan Fox-Decent, *Guardians of Legal Order: The Dual Commissions of Public Fiduciaries*, in *FIDUCIARY GOVERNMENT* 67-95 (Evan J. Criddle et. al. eds, 2018) [hereinafter *Guardians*].

commissions is local, whereas the other is global. Locally, the state is entrusted by international law to govern its people domestically, as well as to represent them and advocate for their interests internationally. Under this theory, the “people” includes all citizens and non-citizens within the state’s territory and otherwise amenable to the state’s jurisdiction. In the domestic sphere, the special loyalty states owe their people is reflected in the comprehensive international human rights obligations that flow from treaty-based and customary international human rights law.<sup>121</sup> States owe their people, but not others, particularized human rights obligations related to, for example, freedom of expression, freedom of association, and freedom of religion,<sup>122</sup> as well as socioeconomic human rights related to goods such as housing, education, and healthcare.<sup>123</sup> In the international domain, international law entrusts states with a commission to make decisions about war and peace on behalf of their people, and likewise to negotiate hard for their people in negotiations over trade and commerce.<sup>124</sup>

The state’s global commission is categorically distinct, notwithstanding that it operates at a supranational level. The global commission is a joint mandate shared with all other states to act with due regard for the common interests and patrimony of humanity, such as the earth’s surface and climate. This commission arises from the state’s position—a position common to all states—as a fiduciary of humanity with respect to humanity’s common interests and patrimony. Eyal Benvenisti characterizes the state in this position as “a trustee of humanity.”<sup>125</sup> George Scelle likewise emphasized national authorities’ “dual function” (*dédoublement fonctionnel*) as agents of both the national and international legal orders.<sup>126</sup> On our view, when international law allocates to states collective responsibility and joint authority to regulate certain transnational or global public goods on behalf of humanity (*e.g.*, the deep ocean floor, international peace and security), states as fiduciaries of humanity occupy positions of joint stewardship with other states.<sup>127</sup> In this role, the transnational or global commission of states is to regulate those goods multilaterally rather than unilaterally.<sup>128</sup>

The argument for joint stewardship proceeds from the consequences of possible spillover effects that can arise from international law’s distribution of sovereign power to multiple states. States have legal authority to govern within the limits of their territory, but in some cases the results of their policy choices may spill over their territorial limits, such as policies related to carbon emissions or the development of a dangerous nuclear facility near the border of a neighboring state.<sup>129</sup> The major normative premise of the argument for joint stewardship is that states are not

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<sup>121</sup> For discussion, see CRIDDLE & FOX-DECENT, *supra* note 85, at 77-122.

<sup>122</sup> See *id.* at 107 (outlining formal criteria which explain why a particular human right is owed by a given state to those under its authority).

<sup>123</sup> See *id.* at 113-15 (explaining why the fiduciary theory also imposes positive obligations to protect socioeconomic human rights such as education and healthcare).

<sup>124</sup> See *Guardians*, *supra* note 116, at 26 (“states bear a first-order responsibility under international law to advocate for the rights and interests of their particular beneficiaries”).

<sup>125</sup> Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT’L L. 295 (2013). In the case of outsiders seeking to enter a receiving state, Benvenisti claims that the receiving state is under an “obligation not to deny entry to migrants and refugees without taking into account the asylum seekers’ individual concerns and without at least providing justification for their exclusion.” *Id.* at 311.

<sup>126</sup> See Georges Scelle, *Le phénomène juridique du dédoublement fonctionnel*, in RECHTFRAGEN DER INTERNATIONALEN ORGANISATION 324 (1956).

<sup>127</sup> Evan J. Criddle & Evan Fox-Decent, *Mandatory Multilateralism*, 113 AM. J. INT’L L. 272, 298-300 (2019).

<sup>128</sup> *Id.*

<sup>129</sup> See Matthias Kumm, *Constitutionalism and the Cosmopolitan State* 18 (NYU Public Law and Legal Theory Working Paper No. 423, 2013) [hereinafter *Constitutionalism and the Cosmopolitan State*]; Matthias Kumm, *The*

entitled to set policies unilaterally that have wrongful spillover effects, *i.e.*, harms prejudicial to the rights or justice claims of foreign nationals. As Matthias Kumm puts it, international law must settle these matters because “any claim by one state to be able to resolve these issues authoritatively and unilaterally amounts to a form of domination.”<sup>130</sup> In cases that affect humanity generally, such as the regulation of carbon emissions, the “people” subject to the local state’s sovereign power is humanity at large. Therefore, the class of beneficiaries in this iteration of the state-subject fiduciary relationship is not limited to the state’s national legal subjects, but is humanity itself.

Borders present a structural spillover effect, one that results from international law’s organization of the world into multiple territorially sovereign states.<sup>131</sup> At the limit, in a case where a refugee was forcibly removed or driven from his or her home state and denied a right of asylum by all others, the territorial jurisdiction over the earth’s surface enjoyed by states would convert his or her very physical existence into an illegality. The refugee’s body occupies space and must exist somewhere, but (on the present assumption) the exiled outsider has no right to be anywhere. The asylum seeker’s unavoidable presence anywhere would constitute a permanent trespass.<sup>132</sup> Benvenisti compellingly argues that “the dramatic consequences of states universally acting to exclude entry” must be addressed “with certain limitations on the sovereign’s right to exclude.”<sup>133</sup>

The “dramatic consequences” to which Benvenisti refers are structural spillover effects arising from international law’s distribution of territorial sovereignty to states. Under the dual commissions model, that distribution can be legitimate only if international law’s authorization of territorial sovereignty can be understood to be made on behalf of every person subject to it, which is to say, on behalf of humanity. For this to be possible, international law must legally guarantee that every individual, come what may, has a fair opportunity to pursue a decent life *somewhere*; *i.e.*, a life free from human rights abuse. Ordinarily, this opportunity is provided through the state’s grant of citizenship to individuals either born within its territory (*jus soli*) or born to citizens of the state (*jus sanguinis*). But if an individual is forced to flee or is stripped of citizenship and deported from her home state, international law must step in to provide the refugee somewhere she can live a decent life. Without the availability of surrogate protection, international law could not be said to guarantee to every individual a fair opportunity to live a decent life somewhere. International law would lose its claim to legitimate authority with respect to territory because it could not be said to authorize territorial sovereignty on behalf of every person subject to it. Refugees and the stateless would be excluded.

It is important to appreciate from the outset that the possible exclusion of refugees and the stateless from international law’s protection points to a conceptual claim going to the very legality of international legal order, considered as a legal system, as well as to a normative claim about the wickedness of such a regime. We have argued elsewhere that a fiduciary model of international law makes available a representational fiduciary criterion that can serve as a standard of adequacy for assessing the legitimacy of a state’s action. This criterion stipulates that for a state’s action to

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*Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and Beyond the State, in RULING THE WORLD? INTERNATIONAL LAW, GLOBAL GOVERNANCE, CONSTITUTIONALISM* 258 (J.L. Dunoff & J.P. Trachtman eds., 2009); Matthias Kumm, *The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law*, 20 *IND. J. GLOBAL LEGAL STUDS.* 605 (2013).

<sup>130</sup> *Constitutionalism and the Cosmopolitan State*, *supra* note 125, at 9.

<sup>131</sup> *Id.* at 15–17.

<sup>132</sup> See ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY* 279–80 (2009) (arguing that if all land were privately held and the landless were denied permission to be anywhere, “they would do wrong simply by being wherever they happened to be”).

<sup>133</sup> Benvenisti, *supra* note 121, at 311.

be legitimate with respect to a given individual, it must be intelligible as action made on behalf of or in the name of the individual subject to it, even if the state's action sets back the individual's interests.<sup>134</sup> We refer to this norm as the “fiduciary criterion of legitimacy,” or simply the “fiduciary criterion.”

The fiduciary criterion is both normative and conceptual, and helps explain and justify the claim that, according to Joseph Raz, all legal systems necessarily make; *i.e.*, the claim to possess legitimate authority.<sup>135</sup> On Raz's view, it is an existence condition of a legal system that it claims to possess legitimate authority. A further corollary of his conceptual claim, Raz says, is that law “must be capable of possessing authority.”<sup>136</sup> It follows that legal systems either have (and claim) legitimate authority or they possess merely *de facto* authority while claiming but not having legitimate authority. We shall see that these insights about the relationship between law and authority have important implications for the dual commission theory's explanation of both the customary nature of the duty of *non-refoulement* and its preemptory status.

Under this theory, states at the global level are conceptualized as joint fiduciaries or stewards of humanity, and international law entrusts them as such to govern collectively the earth's territory on behalf of humanity. A power-conferring fiduciary principle authorizes joint stewardship of the earth's surface, but requires as a condition of its authorization that states participate in a collective and multilateral regime of surrogate protection in the service of exiled outsiders. Significantly, IRL conceives of itself as a regime of surrogate protection,<sup>137</sup> and so the dual commissions theory supplies an account of refugee law's self-understanding. International law provides the legal framework for a regime of surrogate protection by carving out an exception to territorial sovereignty in favor of refugees. The dual commissions model explains the refugee's standing to make a claim on this exception by positing states as joint fiduciaries of the earth's surface on behalf of humanity, and in particular on behalf of asylum seekers entitled to resort to surrogate protection. In other words, the dual commissions model conceptualizes sovereignty in a manner that makes its territorial dimension consistent with the entitlement of every member of humanity to have his or her bare physical existence somewhere not treated as a wrong. The duty of *non-refoulement* can thus be understood and explained as a consequence of international law's claim to legitimate authority. Without this duty in place, international law would treat the bare physical existence of exiled outsiders as a wrong, and so could not possibly claim to authorize territorial sovereignty in their names or on their behalf. That is, international law, in this respect, could not possibly claim to possess legitimate authority with respect to refugees. International law would thereby fail to meet the demands of the fiduciary criterion of legitimacy, and so would fail to be authoritative with respect to exiled outsiders. To the extent that all legal systems must claim

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<sup>134</sup> CRIDDLE & FOX-DECENT, *supra* note 85, at 3, 99–100, 131, 217, 240, 268, 288.

<sup>135</sup> Joseph Raz, *Authority, Law, and Morality*, in ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 210, 215 (1994) (arguing that “every legal system claims that it possesses legitimate authority”). Raz uses phrases such as “the law claims” or “legal systems claim” to indicate that legal officials or institutions implicitly or explicitly make certain claims *qua* legal authorities. One of us argues elsewhere that for Raz's conceptual claim to be able to explain law's authority, as Raz intends, then it must be understood as a standard of adequacy of legality, and not merely as something the law simply wishes or asserts to be true. See Evan Fox-Decent, *Jurisprudential Reflections on Cosmopolitan Law*, in THE DOUBLE-FACING CONSTITUTION 121 (Jacco Bomhoff, David Dyzenhaus & Tomas Poole eds., 2020) [hereinafter *Jurisprudential Reflections*].

<sup>136</sup> *Id.* Following Raz, we use “legitimate authority” and “authority” interchangeably, and distinguish both from non-legitimate authority with “merely *de facto* authority”.

<sup>137</sup> See, e.g., Canada (Att'y Gen.) v. Ward [1993] 2 S.C.R. 689, at 709 (referring to the international refugee regime as one of “surrogate or substitute protection”) (citing JAMES HATHAWAY, THE LAW OF REFUGEE STATUS 135 (1991)).

to possess authority over their subjects *to be legal systems*, the very legality of international law vis-à-vis refugees would be in doubt.

Notice some of the implications of this reasoning. If states must claim to possess legitimate authority over the individuals amenable to their jurisdiction in order to govern them through law, then it follows that the myriad national and international policies, laws, and treaty provisions that embody or support a duty of *non-refoulement* must be deemed to be actions undertaken, at least in part, because they are necessary to the states' claim to authority and the rule of law. This implication of the fiduciary criterion strengthens the view that *non-refoulement* is a customary norm of international law, because rule-of-law-championing states can have attributed to them a legal motivation for actions that abide by or commend a duty of *non-refoulement*. It also follows from the argument above that actions that breach the duty of *non-refoulement* are not relevant to inquiry into whether state practice reflects a customary norm of *non-refoulement*, for only valid state action can count as state practice in this context. Invalid or ultra vires actions are attributable to states for purposes of determining liability, but they are ordinarily irrelevant to the issue of international customary law-making, because such actions have no legal effects of themselves other than the possible generation of liability.<sup>138</sup>

The fiduciary criterion also supports viewing the duty of *non-refoulement* as a peremptory norm. We have argued elsewhere that the fiduciary criterion can help inform inquiry into whether an international norm is peremptory.<sup>139</sup> International norms such as the prohibitions against slavery, genocide, and torture, for example, may be understood to be *jus cogens* because it could never be the case that they could be intelligible as norms enacted in the name of or on behalf of the individuals victimized by them. Such actions constitute irredeemable abuse or domination, and so neither limitation nor derogation from them is permitted as a matter of international law. The same may be said of *refoulement* to face persecution. It could never be the case that a policy of subjecting an individual to a deliberate and avoidable risk of persecution could be made in the name of or on behalf of that individual. Such a policy bears indelible stains of needless abuse and domination. And, as we will discuss in Part III when we turn to the closed-border policies states have adopted to arrest the spread of COVID-19, the case for peremptory *non-refoulement* is especially powerful given the many alternative means available to achieve the desired outcome. We set out first, however, a further argument in favor of viewing IRL from the perspective of the dual commission framework.

We have argued elsewhere that public fiduciaries generally have dual first-order and second-order commissions, which typically are to their immediate beneficiaries (first-order) and to the wider legal regime within which they hold and exercise fiduciary power (second-order).<sup>140</sup> For example, lawyers owe first-order duties of zealous advocacy to their clients, and second-order duties of candor and good faith—as “guardians of the law”<sup>141</sup> or “officers of the court”<sup>142</sup>—to the legal system. The second-order duties aim at a wider public benefit. In the event of an irreconcilable conflict between first-order and second-order duties, the second-order norms

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<sup>138</sup> See *Nicaragua v. United States*, Judgment, 1986 I.C.J. Rep. 14, 108-09, ¶¶ 206-08 (explaining that state acts in violation of customary rules do not undermine the rules when the states concerned do not contest the validity of the rules themselves).

<sup>139</sup> CRIDDLE & FOX-DECENT, *supra* note 85, at 77-122; Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens* 34 YALE J. INT'L L. 331; Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights* 15 LEGAL THEORY 301.

<sup>140</sup> *Guardians*, *supra* note 116.

<sup>141</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY pmbl. (1981).

<sup>142</sup> See, e.g., Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 43 n.20 (1989).

prevail. We argue that the reason for the priority of second-order norms is that they provide the framework that make first-order norms justifiable.<sup>143</sup> As Robert Gordon puts it, second-order principles applicable to lawyers must prevail in the event of conflict with first-order duties because a “system of adversary representation can only work, can only be justified, if it’s carried on within a framework of law and regulation that assures approximately just outcomes, at least in the aggregate.”<sup>144</sup>

The same logic applies to states’ local commission to govern and represent their people vis-à-vis their global commission to provide a system of surrogate protection for refugees. States’ local commission presupposes that the citizens of a state are entitled to enter and remain within its borders. Were states entitled to banish or forcibly exile citizens, then their rule over them would constitute a severe form of domination and put their claim to legitimate authority (and thus to legality) in doubt. Moreover, as a matter of international law, states’ local commission includes a general right to exclude outsiders, and determine the criteria for citizenship. But as Benvenisti and others have noted, the possibility that states could close their borders universally means that they could, in principle, deny exiled outsiders the possibility of existing lawfully anywhere.

Refugees without a preemptory right to *non-refoulement* would, in effect, be stripped of their legal personality and treated as non-persons with no access to lawful safe harbor, much less citizenship. Their status would approximate “enemy combatants” detained in the war on terror and denied prisoner-of-war status so as to deny them the benefit of legal protection and the rule of law. Exiled outsiders would find themselves in a state of nature with no exit, for there would be nowhere they could go to live lawfully with others. Under the dual commissions theory, states have a global commission to act multilaterally to establish a universal system of surrogate protection that enjoys priority over states’ local commission to exclude outsiders. A cornerstone of this system is the duty of *non-refoulement*, which guarantees legally that refugees have the right to exist somewhere lawfully. As a second-order commission, IRL’s system of surrogate protection avoids entrapping exiles in a state of nature, while at the same time making states’ first-order and limited right to exclude justifiable.<sup>145</sup>

A possible objection to our theory might suggest that legal norms protective of national security and public health, such as those that fall within the meaning of Article 33(2) of the Refugee Convention, are also second-order norms.<sup>146</sup> If states were forced to admit severe national security and health threats, one might think that the rationale for having states with a first-order commission—collective and secure self-determination of a political community—would disintegrate. As we will see in Part III, however, the objection rests on a false dichotomy, since in practice receiving states can attend to their security and health concerns while declining to return asylum-seekers to persecution.

We consider now how understanding the duty of *non-refoulement* in light of the dual commissions theory provides resources to respond to the skeptical concerns considered above.

### C. *The Skeptics Reconsidered*

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<sup>143</sup> *Guardians*, *supra* note 116, at 72-76.

<sup>144</sup> Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 17 (1988).

<sup>145</sup> We leave to another day the scope of the limited right to exclude, but for argument that on a dual commission and fiduciary view it is far narrower than international law presently allows, see *Jurisprudential Reflections*, *supra* note 131, at 24-26.

<sup>146</sup> We thank Colin Grey for raising this objection.

Recall David Miller's claims that states are entitled to determine for themselves when they have taken in enough refugees so as to help cope with the refugee crisis, and this means facing up to the possibility that some bona fide refugees may find themselves with nowhere they can lawfully go.<sup>147</sup> Miller is clearly uncomfortable with this prospect, but believes it is unavoidable given the significance of states maintaining control over their public culture and size of population.<sup>148</sup> On the dual commissions view, Miller has dramatically underestimated the legal and normative cost of sending individuals back to face a serious risk of persecution. As a joint steward of the earth's habitable territory, under our theory the receiving state has an ineliminable duty of *non-refoulement*. The asylum-seeker must have somewhere she can exist lawfully and free from persecution for states of our multi-state world order to be able to claim to possess legitimate authority—and therefore to govern through legality—vis-à-vis asylum seekers generally. For a state to adopt Miller's policy and return refugees to danger would imply that the state is renouncing its claim to govern through the rule of law, since the state would deport such individuals through the use of force alone, in defiance of the duty it owes to asylum seekers as a territorially vested joint steward of humanity.

Recall that Wellman thinks a position much like Miller's is defensible on grounds of freedom of association and self-determination. His brasher formulations, as noted, affirm without qualification that receiving states are entitled to turn away bona fide refugees,<sup>149</sup> on the grounds that states' freedom of association is a vitally important interest, and because humanitarian duties to refugees may be satisfied by intervention in the affairs of the sending state. Ultimately, however, he concedes in a footnote that receiving states are not entitled to deport refugees until such time as the danger in the home state has passed.<sup>150</sup> His position is consistent with "warehousing" refugees in camps near their home state, so long as the camps themselves are not sites of danger. The dual commissions theory, by contrast, affirms that states as joint stewards of humanity are duty-bound to provide exiles safe and lawful harbor, and thus explains the legal duty of *non-refoulement* within this framework. The dual commissions theory also explains the common practice among Northern receiving states to provide asylum-seekers a fair opportunity at a decent life. As noted above, without providing this opportunity to exiles, the legal systems of the world's states could not claim to possess legitimate authority vis-à-vis refugees, because refugees could be excluded from lawful residency and possible membership in all of them. It is important to emphasize that the mere possibility of universal exclusion is enough to put in doubt the legal authority of the world's states vis-à-vis asylum-seekers, since the possibility alone, independently of whether it is realized, constitutes a severe threat of arbitrary treatment and thus a form of domination.

Wellman and Miller might reply that although warehousing is regrettable, asylum seekers sent to camps are at least physically safe and not stripped of their legal personality. Warehousing, on this view, is consistent with the duty of *non-refoulement* because that duty requires merely that refugees not be returned to a place of danger. Yet warehousing of any kind involves indeterminate and forcible confinement to a camp, and usually the suffering of deplorable conditions.<sup>151</sup> In our

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<sup>147</sup> See *supra* notes 83-84.

<sup>148</sup> Miller, *supra* note 77, at 373.

<sup>149</sup> See *supra* note 89 and accompanying text.

<sup>150</sup> See *supra* note 88 and accompanying text.

<sup>151</sup> Studies documenting the inhumane conditions in refugee camps include MEDICINES SANS FRONTIERES, DADAAB REFUGEES: AN UNCERTAIN TOMORROW (2014), <https://reliefweb.int/sites/reliefweb.int/files/resources/bp-dadaab-march-2014-low.pdf>; ALISON LEDWITH, ZAATARI: THE INSTANT CITY 10-12 (2014), <http://sigus.scripts.mit.edu/x/files/Zaatari/AHIPublication.pdf>; Human Rights Watch, *Greece: Nearly 2,000 New Arrivals Detained in Overcrowded, Mainland Camps* (Mar 30, 2020), [25](https://www.hrw.org/news/2020/03/31/greece-</a></p></div><div data-bbox=)

view, subjection to indeterminate forcible confinement is an infringement of a person's human rights to liberty, freedom of association, and freedom of movement. Warehousing typically imperils numerous socioeconomic and cultural human rights, including labor rights, rights to an adequate standard of living, rights to health, and rights to education. From the perspective of IRL, whether or not these rights violations amount to physical danger *per se* is irrelevant, because the prohibition of *refoulement* is a prohibition on returning someone to a place where they would face persecution which, understood most narrowly, is a threat to life *or* freedom.<sup>152</sup> Under the Refugee Convention, persecution includes state or third-party action that infringes human rights that protect individuals from harms linked to race, nationality, religion and political opinion. These harms need not involve physical danger; for example, they could be fines or incarceration based on one's religion or political opinions.<sup>153</sup> A compromise of freedom on Convention grounds is enough.

We do not discuss further the problematic policy of warehousing, since our principal practical target is policies states have adopted to turn away asylum seekers during the time of COVID-19, as discussed *infra* in Part III. Typically, these policies are implemented without consideration of warehousing, and often with the result that the refugee is deported to a place where they have a well-founded fear of persecution. There is a good sense in which these policies presuppose the kind of default rule of state autonomy that *Lotus* is usually taken to represent.

*Lotus* and its progeny could be understood to supply two arguments from international law against a peremptory norm of *non-refoulement*. We will call them the *minimalist* and *voluntarist* arguments. The minimalist argument is the idea that states have only those obligations that are clearly expressed in either treaty or customary law. We have argued that a customary and peremptory norm of *non-refoulement* is immanent to, and thus partially constitutive of, the legitimate authority that a multi-state and territorially exhaustive international legal order can claim vis-à-vis exiled outsiders. In *Lotus*, Judge Weiss held that “the rule sanctioning the [equal] sovereignty of States” is one “which does not even require to be embodied in a treaty” because without this rule “no international law would be possible, since the purpose of [international] law precisely is to harmonize and reconcile the different sovereignties over which it exercises sway.”<sup>154</sup> *Mutatis mutandis*, the same may be said of the peremptory principle of *non-refoulement*, which follows as a direct consequence of (i) the division of the earth's surface into territorially exhaustive and sovereign states, and (ii) the idea that dual-commission states exist to serve their people and humanity at large, such that every individual is entitled to exist somewhere on the earth without his or her mere existence being a trespass. The duty to refrain from *refoulement* is part of what it means for states to be fiduciaries of humanity. Thus, the principle of *non-refoulement*, like the principle of sovereign equality, is integral to the constitution of international legal order.

The voluntarist argument against a peremptory duty of non-refoulement is that states are bound by only the obligations they voluntarily accept, and that exceptions to *non-refoulement* within the positive law (e.g., Articles 1(F) and 33(2) of the Refugee Convention) suggest that states have never agreed to be bound by a general and peremptory duty of *non-refoulement*. On this view, customary law is to be construed narrowly with the result that states have a duty of *non-refoulement* no wider than treaties such as the Refugee Convention and Torture Convention expressly allow.

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nearly-2000-new-arrivals-detained-overcrowded-mainland-camps; and Human Rights Watch *Thailand: Refugee Policies Ad Hoc and Inadequate* (Sept. 13, 2012), <https://www.hrw.org/news/2012/09/13/thailand-refugee-policies-ad-hoc-and-inadequate>.

<sup>152</sup> Refugee Convention, *supra* note 1, art. 33(1).

<sup>153</sup> See, e.g., *Canada (Att'y Gen.) v. Ward* [1993] 2 S.C.R. 689.

<sup>154</sup> *The Case of the S.S. Lotus* (Turk. v. Fr.), 1927 P.C.I.J. (Ser. A) No. 10 (Sept. 7), ¶ 43 (dissenting, but not on this point).

We have argued elsewhere that foundational principles of sovereign equality and joint stewardship are baked into the mold of international legal order, and that these principles are particularly visible across a wide range of contexts in which international law requires states to engage in multilateral policy formation and decision-making.<sup>155</sup> Voluntarism is hard-pressed to explain international law's contemporary practice of mandatory multilateralism. At base, it is a positivist theory that reached its zenith in the 19<sup>th</sup> century, and that is at odds with *jus cogens* norms generally, since these bind independently of state consent and over state objections.<sup>156</sup> Schmitt's theory of executive supremacy, however, goes well beyond voluntarism in its skepticism of customary law.

Recall that under Schmitt's theory the sovereign has legally unlimited authority to suspend public law.<sup>157</sup> Accordingly, the Schmittian sovereign has authority to suspend the operation of public international law whenever he or she deems it necessary or prudent to do so, including the duty of *non-refoulement*. Contemporary advocates of a Schmittian conception of sovereignty might take encouragement from the individualized decision-making power international law vests in the sovereign to avoid the duty of *non-refoulement*, such as the authority to interpret and apply Articles 1(F) and 33(2) of the Refugee Convention related to war crimes or serious criminality (1F) or a "danger to the security of the [host] country" (33(2)).<sup>158</sup> On a Schmittian construal, the executive's legally unlimited discretion could take one of two general forms. On the first, the sovereign acts facially within the given parameters of the IRL exceptions to *non-refoulement*, but in substance declares without individual assessment that all members of a certain group are a danger, and then refuses some or all of them entry *en masse*. The second form is the declaration of an emergency and subsequent suspension of IRL and other areas of national and international public law, leaving the executive with legally unlimited extra-legal powers until such time as the sovereign decides to reinstitute public law.<sup>159</sup>

Both the facially intra-legal and explicitly extra-legal forms of Schmittian executive power are far outside various requirements of IRL and its ordinary practice. As noted in Part I, although Articles 1(F) and 33(2) provide some apparent scope within the Refugee Convention to limit application of the *non-refoulement* principle, that scope is cabined by the Torture Convention, which provides that individuals are not to be returned to a place where they face a serious risk of torture.<sup>160</sup> Moreover, various international courts have held that IHRL prohibits returning individuals to face torture or CIDT, suggesting that the prohibition is of a *jus cogens* character.<sup>161</sup> Additionally, to the extent that the duty of *non-refoulement* is a customary obligation, the conventional exceptions found in the Refugee Convention arguably do not apply.

In practice, receiving countries in the global North ordinarily use individualized risk assessment and status determination, as prescribed by the Refugee Convention and Protocol. Fair individual determinations allow receiving states to ensure that individuals who claim they face a

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<sup>155</sup> Criddle & Fox-Decent, *supra* note 123.

<sup>156</sup> See ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 114 (2006) (disputing the consent-driven custom theory and concluding that "calling peremptory norms customary distorts the concept beyond recognition")

<sup>157</sup> See *supra* notes 74, 105-07 and accompanying text.

<sup>158</sup> Refugee Convention, *supra* note 1, arts. 1(F) and 33(2).

<sup>159</sup> For defense of an "Extra-Legal Measures model" of emergency powers, see Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1023 (2003). For a persuasive reply, see DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY, IN THE CONSTITUTION OF LAW 51-52 (2006).

<sup>160</sup> Torture Convention, *supra* note 5, art. 3.

<sup>161</sup> See, e.g., *Chahal v. United Kingdom*, Application No. 22414/93, Nov. 15, 1996.

serious risk of persecution actually do face a serious risk, while giving claimants the opportunity to enter and remain in a foreign state lawfully while avoiding persecution in their home state. Furthermore, initial determinations in receiving countries are typically subject to independent judicial review, which further entrenches and underscores the legal nature of refugee status determination. In short, individualized determinations in the shadow of judicial review are consistent with states' joint stewardship of the earth's territory and a refugee regime of surrogate protection. Blanket bans on groups alleged to pose a danger, on the other hand, are radically inconsistent with IRL's means and goals. Border closings to whole classes of asylum seekers reveal starkly that Schmittian assertions of executive power in this context have as their aim the rejection of IRL rather than its interpretation.

Having said this, we need to concede that, as a matter of orthodox interpretation, the prohibition on *refoulement* is arguably emerging as a peremptory norm, but plainly its status as *jus cogens* is not as entrenched as, for example, the prohibitions on genocide, slavery, torture, racial discrimination, and military aggression. Whereas the Refugee Convention contemplates exceptions, the positive law on the preceding list of peremptory norms emphatically denies their susceptibility to limitation or derogation.<sup>162</sup> In our view, an advantage of the dual commissions theory is that it provides a cogent argument for recognizing the peremptory status of the duty of *non-refoulement*, while ultimately mooring that argument in the same representational fiduciary criterion available to assess the *jus cogens* character of other norms; *i.e.*, the criterion that inquires whether a limitation of or derogation from a candidate peremptory norm could ever be intelligible as a limitation or derogation made in the name of or on behalf of the people subject to it.

We turn now to test this theory of the peremptory status of non-refoulement through a critical appraisal of numerous states' refusal to accept asylum seekers on the grounds that COVID-19 presents unmitigable danger.

### III. LESSONS FOR THE COVID-19 PANDEMIC

With twenty-six million refugees currently living in forced exile outside their countries of origin, the global refugee crisis has reached staggering proportions.<sup>163</sup> Since COVID-19 exploded on the international scene in early 2020,<sup>164</sup> the plight of refugees around the world has become

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<sup>162</sup> See, e.g., Torture Convention, *supra* note 5, art 2(2) (“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”); Reservations to the Convention on Genocide, Advisory Opinion, 1951 I.C.J. Rep. 15, 23-24 (May 28) (arguing that reservations to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide would be contrary to its “special characteristics”); ICCPR, *supra* note 59, arts. 4(2), 8(1) (asserting the prohibition against slavery and that no derogation from such prohibition may be permitted).

<sup>163</sup> See U.N. High Commissioner for Refugees, *Figures at a Glance*, <https://www.unhcr.org/en-us/figures-at-a-glance.html> (last visited June 29, 2020). Another 45.7 million people are internally displaced within the borders of their own country. *Id.*

<sup>164</sup> See UNHCR Projected Global Resettlement Needs 2020, July 1-2, 2019, <https://www.unhcr.org/en-us/protection/resettlement/5d1384047/projected-global-resettlement-needs-2020.html> (discussing expanding needs for refugee protection in many regions of the world). See also, Press Release, Court of Justice of the European Union, “Advocate General’s Opinion in Case C-808/18 Commission v. Hungary,” 25 June 2020, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-06/cp200079en.pdf> (concluding that Hungary’s policy of limiting immigration to certain “transit zones” violates E.U. law); U.S. Department of Homeland Security, Migrant Protection Protocols, <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> (explaining how the United States has compelled asylum-seekers to wait outside the United States while their applications are pending); International Refugee Committee, The State of Refugee Resettlement in 2020, Jan. 21, 2020, <https://www.rescue.org/announcement/state-refugee-resettlement-2020> (explaining that the United States 18,000 cap

increasingly dire—not only because many face greater vulnerability to the disease, but also because the pathways to international protection have narrowed considerably. In March 2020, UNHCR and IOM announced a temporary suspension of the international refugee resettlement program.<sup>165</sup> Many states have also closed their borders to asylum-seekers.<sup>166</sup> Greece has used lethal force to drive back asylum-seekers at its borders.<sup>167</sup> The United States has even expelled asylum-seekers who were already inside its borders when COVID-19 arrived.<sup>168</sup> As a consequence of these and other developments, the *non-refoulement* principle now faces its greatest test since the Refugee Convention entered force seventy years ago.

To be sure, not all measures adopted in response to COVID-19 violate international law. The *non-refoulement* principle does not obligate states to grant visas or authorize international air travel in order to facilitate refugee mobility.<sup>169</sup> At a minimum, however, the *non-refoulement* principle does prohibit states from turning back refugees who reach their territory to places where they would face a well-founded fear of persecution on account of a protected ground.<sup>170</sup> This includes a prohibition on “indirect” or “chain” *refoulement*—forced transfer to a third-country where a refugee would face a serious risk of *refoulement*.<sup>171</sup> Considerable authority also supports the view that states may not prevent refugees from accessing their shores by intercepting and repatriating foreign vessels at sea.<sup>172</sup> To the extent that emergency measures violate these well-established norms of international law, they pose a threat to the rule of international law.

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for refugee resettlement marked a “drastic reduction” from previous years, which had averaged over 95,000 since 1980).

<sup>165</sup> U.N. High Commissioner for Refugees, *IOM, UNHCR Announce Temporary Suspension of Resettlement Travel for Refugees*, Mar. 17, 2020, <https://www.unhcr.org/en-us/news/press/2020/3/5e71103034/iom-unhcr-announce-temporary-suspension-resettlement-travel-refugees.html>.

<sup>166</sup> See Andrea Salcedo, Sanam Yar & Gina Chereus, *Coronavirus Travel Restrictions, Across the Globe*, N.Y. TIMES, May 8, 2020, <https://www.nytimes.com/article/coronavirus-travel-restrictions.html> (describing border closures by country).

<sup>167</sup> See Amnesty International, *Greece/Turkey: Asylum-Seekers and Migrants Killed and Abused at Borders* (Apr. 3, 2020), <https://www.amnesty.org/en/latest/news/2020/04/greece-turkey-asylum-seekers-and-migrants-killed-and-abused-at-borders/>.

<sup>168</sup> See Yael Schacher & Chris Beyrer, *Expelling Asylum-Seekers Is Not the Answer: U.S. Border Policy in the Time of COVID-19, Refugees International*, Apr. 27, 2020, <https://www.refugeesinternational.org/reports/2020/4/26/expelling-asylum-seekers-is-not-the-answer-us-border-policy-in-the-time-of-covid-19> (discussing U.S. expulsions).

<sup>169</sup> Many states have suspended international flights or restricted visas in response to COVID-19. See Salcedo, Yar & Chereus, *supra* note 160.

<sup>170</sup> See UNHCR Executive Committee, Conclusion No. 85 (XLIX), International Protection, para. (q) (1998) (affirming the principle of “no rejection at frontiers without access to fair and effective procedures for determining [refugee] status and protection needs”).

<sup>171</sup> See Refugee Convention, *supra* note 1, art. 33(1) (prohibiting *refoulement* “in any manner whatsoever”); *Ilias and Ahmed v. Hungary*, App. No. 47287/15, ¶ 133, Eur. Ct. H.R. (Nov. 21, 2019) (explaining that states have a duty under the ECHR to make sure that the intermediary country’s asylum procedure affords sufficient guarantees to avoid an asylum-seeker being removed, directly or indirectly, to his country of origin without a proper evaluation of the risks he faces”); James Crawford & Patricia Hyndman, *Three Heresies in the Application of the Refugee Convention*, 1 INT’L J. REFUGEE L. 155, 171 (1989) (observing that Refugee Convention art. 33(1) “prohibits indirect as well as direct measures of return, otherwise the words ‘in any manner whatsoever’ would be unnecessary”).

<sup>172</sup> See *Hirsi Jamaa v. Italy*, App. No. 27765/09, ¶¶ 180, 186 (Eur. Ct. H.R. Feb. 23, 2012) (holding that naval operations to push back migrants on the Mediterranean violate the prohibition against collective expulsions in Article 4 of ECHR Protocol 4); U.N. High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 12, ¶ 24 Jan. 26, 2007, <https://www.refworld.org/docid/45f17a1a4.html> (“[T]he purpose, intent and meaning of Article 33(1) of the 1951 Convention are unambiguous and establish an obligation not to return a refugee or asylum-

Guided by these considerations, this Part reviews and critiques border-control measures adopted respectively by the United States, Canada, Cyprus, Italy, Malta, and Malaysia in response to COVID-19. We explain briefly why international organizations and human rights monitors have condemned these measures as violating international law. Remarkably, the states concerned have not made serious efforts to defend their suspension of refugee protections under international law. In effect, they have all but conceded that the measures violate their commitments under applicable treaties and customary international law. Instead, they have defended their actions based on arguments about compelling state necessity (*raison d'état*): the need to protect their people from deadly viral infection. Accordingly, these emergency measures may best be understood not merely as discrete acts of non-compliance with international law, but also as a more fundamental challenge to the peremptory character of the *non-refoulement* principle itself. Drawing on the arguments developed in Part II, we explain why the international community should vigorously resist these challenges, reaffirming the peremptory character of the *non-refoulement* norm and the importance of the international legal order's claim to legitimate authority.

#### A. Land Border Exclusions and Expulsions: The United States

As COVID-19 spread across the globe in February and March 2020, U.S. President Donald Trump issued a series of proclamations suspending entry of certain foreign nationals who had recently visited Brazil,<sup>173</sup> China,<sup>174</sup> Iran,<sup>175</sup> Ireland and the United Kingdom,<sup>176</sup> and the Schengen Area in Europe.<sup>177</sup> The White House also announced that the United States, in coordination with UNHCR and the International Organization for Migration, would suspend refugee resettlement program for the duration of the pandemic.<sup>178</sup> Meanwhile, the U.S. Department of Homeland

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seeker to a country where he or she would be risk of persecution or other serious harm, which applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State.”).

<sup>173</sup> See President Donald J. Trump, Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Novel Coronavirus, May 24, 2020, <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-novel-coronavirus/> [hereinafter Brazil Proclamation].

<sup>174</sup> See Donald J. Trump, Proclamation 9992, Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus and Other Appropriate Measures to Address This Risk, 85 Fed. Reg. 6709, Mar. 4, 2020.

<sup>175</sup> See President Donald J. Trump, Proclamation 9992, Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus, 85 Fed. Reg. 12855, Mar. 4, 2020.

<sup>176</sup> See President Donald J. Trump, Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus, Mar. 14, 2020, <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-coronavirus-2/>.

<sup>177</sup> See President Donald J. Trump, Proclamation 9993, Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus, 85 Fed. Reg. 15045, Mar. 11, 2020 (“For purposes of this proclamation, the Schengen Area comprises 26 European states . . .”). President Trump later expanded upon these orders by suspending entry to certain immigrants for the purpose of promoting employment among resident citizens. See President Donald J. Trump, Proclamation Suspending Entry of Immigrants Who Present Risk to the U.S. Labor Market During the Economic Recovery Following the COVID-19 Outbreak, Apr. 22, 2020, <https://www.whitehouse.gov/presidential-actions/proclamation-suspending-entry-immigrants-present-risk-u-s-labor-market-economic-recovery-following-covid-19-outbreak/>.

<sup>178</sup> Priscilla Alvarez, *Refugee Admissions to the US Temporarily Suspended*, CNN.com, Mar. 18, 2020, <https://www.cnn.com/2020/03/18/politics/us-refugee-admissions-coronavirus/index.html>.

Security (DHS) closed all land ports of entry to undocumented migrants.<sup>179</sup> Acting Secretary of Homeland Security Chad Wolf explained that the United States’ land borders would remain open for commercial traffic and medical tourism, but asylum-seekers arriving from Canada and Mexico would be turned back without the opportunity to apply for relief under the Refugee Convention and Torture Convention.<sup>180</sup> DHS later instructed Border Patrol agents to return any foreign migrants apprehended along the U.S.-Mexico border back as quickly as possible, irrespective of whether they claimed to be refugees, unless there were exigent circumstances or migrants offered “an affirmative, spontaneous and reasonably believable claim that they fear being tortured in the country they are being sent back to.”<sup>181</sup> Concurrently with these measures, DHS announced that it would summarily expel migrants held in immigration detention facilities to their country of last transit or their country of origin.<sup>182</sup> Between March and May 2020, DHS excluded over 188,000 migrants and expelled over 41,000 detained migrants from the United States pursuant to these policies—all without conducting hearings to determine whether asylum-seekers within this group were entitled to *non-refoulement*.<sup>183</sup> Collectively, these measures brought to an abrupt halt the United States’ decades-long commitment to protect refugees from persecution.

The U.S. government defended these actions by invoking several domestic statutes that authorize temporary emergency measures in response to public health crises. First, President Trump cited section 212(f) of the Immigration and Nationality Act (INA), which authorized him to suspend entry into the United States whenever he determines “that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States.”<sup>184</sup> According to President Trump, limiting entry from Brazil, China, Iran, and other countries with acute COVID-19 outbreaks was necessary to prevent “undetected transmission of the virus by infected individuals seeking to enter the United States.”<sup>185</sup> This, in turn, would counter a serious threat to “the security of [the U.S.] transportation system and infrastructure and the national security.”<sup>186</sup>

Second, DHS invoked legislation enacted in the wake of 9/11 that authorized its Commissioner of Customs “to close temporarily any . . . port of entry or take any other lesser action that may be necessary to respond to” “a specific threat to human life or national interests.”<sup>187</sup> DHS claimed that “the risk of continued transmission and spread of COVID-19 between the United States and” its closest neighbors, Canada and Mexico, in particular, “pose[d] a ‘specific threat to

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<sup>179</sup> Zolan Kanno-Youngs & Kirk Semple, *Trump Cites Coronavirus as He Announces a Border Crackdown*, N.Y. TIMES, Mar. 20, 2020, <https://www.nytimes.com/2020/03/20/us/politics/trump-border-coronavirus.html>.

<sup>180</sup> *Id.*

<sup>181</sup> U.S. Customs and Border Patrol, Memorandum, *COVID-19 CAPIO*, at 4, <https://www.documentcloud.org/documents/6824221-COVID-19-CAPIO.html>.

<sup>182</sup> U.S. Customs and Border Protection, *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions*, <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics>.

<sup>183</sup> *Id.*

<sup>184</sup> 8 U.S.C. § 1182(f).

<sup>185</sup> Brazil Proclamation, *supra* note 166.

<sup>186</sup> *Id.*

<sup>187</sup> U.S. Customs & Border Protection, Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico, 85 Fed. Reg. 16547, 16547, Mar. 24, 2020 (citing 19 U.S.C. § 1318(b)(1)(c) & (b)(2) (as amended by the Trade Act of 2002, § 342, P.L. 107-210, Aug. 6, 2002, 116 Stat. 933 (included under “Chapter 4—Anti-Terrorism Provisions”)); U.S. Customs & Border Protection, Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Canada, 85 Fed. Reg. 16548, 16548, Mar. 24, 2020 (same).

human life or national interests.”<sup>188</sup> According to the agency, “maintaining the current level of travel between the two nations” would put “the personnel staffing land ports of entry between the United States and Mexico, as well as the individuals traveling through these ports of entry, at increased risk of exposure to COVID-19.”<sup>189</sup>

Third, U.S. Secretary of Health and Human Services Alex M. Azar II asserted that the Public Health Service Act (PHSA) empowered him to authorize the expulsion of asylum-seekers and other migrants who were already present within the United States. Under section 362 of the PHSA, if the Secretary determines that a “communicable disease in a foreign country” poses a “serious danger” to public health in the United States, he may “prohibit, in whole or in part, the introduction of persons” from that country “for such period of time as he may deem necessary for such purpose.”<sup>190</sup> To bolster the case for expelling migrants from the United States, HHS promulgated an interim-final rule defining “the introduction of persons” under section 362 to “encompass those who have physically crossed a border of the United States.”<sup>191</sup> Secretary Azar defended this move in a press conference by asserting that detained migrants “were spreading the virus to other migrants, to C.B.P. agents and border health care workers and even the United States population as a whole.”<sup>192</sup> When pressed for details about Secretary Azar’s assertions, however, an HHS spokesperson later conceded that the agency had yet to identify any cases of coronavirus among detained migrants; rather, the agency was taking preemptive steps to prevent a possible outbreak.<sup>193</sup>

The United States’ emergency measures have provoked vigorous legal challenges. The American Civil Liberties Union (ACLU) has led the way, filing multiple lawsuits against Secretary Wolf to challenge DHS’s exclusion of child asylum-seekers at the United States’ borders with Canada and Mexico.<sup>194</sup> In these cases, the ACLU has argued that statutes authorizing emergency measures do not supersede the INA’s subsequently enacted and unequivocal prohibitions of *refoulement*.<sup>195</sup>

Amidst this litigation in domestic courts, the United States has not made a meaningful effort to justify its border closures and expulsions under international law. The closest it has come to publicly defending its emergency measures from the perspective of international law is a single paragraph in an email from the U.S. State Department prepared in response to an inquiry from congressional leaders.<sup>196</sup> The paragraph reads as follows:

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> Public Health Service Act § 362, 42 U.S.C. § 265.

<sup>191</sup> Centers for Disease Control and Prevention, Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16559, 16563 (Mar. 24, 2020).

<sup>192</sup> Kanno-Yongs & Semple, *supra* note 172.

<sup>193</sup> *Id.* At the time Secretary Azar announced this move, the United States had 17,000 confirmed COVID-19 cases, while Mexico had 164 confirmed cases of the coronavirus, and the Northern Triangle countries of Guatemala, El Salvador and Honduras, which produce many asylum-seekers, had 37 collectively. *Id.*

<sup>194</sup> See, e.g., J.B.B.C. v. Wolf, Complaint (June 9, 2020), <https://www.aclu.org/legal-document/jbbc-v-wolf-complaint> [hereinafter J.B.B.C. Complaint]; G.Y.J.P. v. Wolf, Complaint, 1:20-CV-01511 (D.C.D.C. June 8, 2020), <https://www.aclu.org/legal-document/gypj-v-wolf-complaint> [hereinafter G.Y.J.P. Complaint].

<sup>195</sup> See G.Y.J.P. Complaint, *supra* note 187, at 25; J.B.B.C. Complaint, *supra* note 187, at 24. At the time of this writing, a U.S. district court has issued a temporary restraining order to protect the named plaintiffs in these cases from expulsion, and the court awaits the government’s responsive pleading. [Note: To be updated as briefing continues through the summer.]

<sup>196</sup> See Email, *Statement re Asylum Laws and Policy*, Apr. 24, 2020, [https://foreignaffairs.house.gov/\\_cache/files/1/5/15b9fb59-24f7-44e1-a8dd-](https://foreignaffairs.house.gov/_cache/files/1/5/15b9fb59-24f7-44e1-a8dd-)

Stopping the introduction of people and articles from COVID-19-risky locations is indispensable to protecting our public health and the national security of the United States. The Administration’s policy comports with our domestic law obligations concerning asylum seekers. As for our international obligations, the Supreme Court has noted that neither the United States nor any State or municipality has any legal obligation to conform its conduct to international treaties that are not self-executing or otherwise implemented into domestic law by an Act of Congress.<sup>197</sup>

This statement is riddled with legal errors and *non sequiturs*. Contrary to the State Department’s suggestion, non-self-executing treaties do bind the United States under international law, regardless of whether the United States has incorporated them into domestic legislation.<sup>198</sup> Customary norms also bind the United States under international law without any requirement for further domestic implementation.<sup>199</sup> Furthermore, even assuming *arguendo* that the United States would not incur international obligations without domestic legislative implementation, this response would offer no cover for the administration’s actions, because Congress has codified the relevant *non-refoulement* obligations in the INA and associated regulations.<sup>200</sup> Accordingly, none of the legal arguments advanced in the State Department email are responsive to the charge that the United States has violated its obligations under the Refugee Protocol, the Torture Convention, and customary international law.

Nor could the United States offer a more plausible legal justification for its suspension of refugee protection. Although international law does not obligate states to grant visas to refugees seeking protection from abroad, it does forbid states from repulsing refugees at their borders<sup>201</sup> and expelling refugees within their borders—including those awaiting status determinations.<sup>202</sup> Moreover, the Refugee Convention’s exception and limitation clauses require an individualized assessment of dangerousness<sup>203</sup>; as Oona Hathaway has explained, these clauses “cannot be applied on a blanket basis to everyone seeking asylum regardless of whether they actually pose a threat”—particularly given the availability of “lesser alternatives—like quarantine—that could address the risk.”<sup>204</sup> Even if the United States excluded or expelled only migrants who tested

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b438072a8cc7/40C6CAE6BA2441181901371E291682E4.april-24-opinion.pdf; Oona Hathaway, *The Trump Administration’s Indefensible Legal Defense of Its Asylum Ban: Taking a Wrecking Ball to International Law*, JUST SECURITY, May 15, 2020, <https://www.justsecurity.org/70192/the-trump-administrations-indefensible-legal-defense-of-its-asylum-ban/> (discussing this interchange between the State Department and congressional leaders).

<sup>197</sup> *Id.* (citing *Medellín v. Texas*, 552 U.S. 491, 504-06 (2008), and *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)).

<sup>198</sup> See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 310(1) (AM. L. INST. 2018) (“Whether a treaty provision is self-executing concerns how the provision is implemented domestically and does not affect the obligation of the United States to comply with it under international law. Even when a treaty provision is not self-executing, compliance with the provision may be achieved through . . . executive, administrative, or other action outside the courts.”).

<sup>199</sup> *The Paquete Habana*, 175 U.S. 677, 700 (1900).

<sup>200</sup> See 8 U.S.C. § 1231(b)(3)(A) (implementing Article 33(1) of the Refugee Convention); 8 C.F.R. §§ 208.16(c)(4), 208.17(a).

<sup>201</sup> See Refugee Protocol, *supra* note 15, art. I (incorporating the *non-refoulement* principle in Article 33 of the Refugee Convention).

<sup>202</sup> See *id.* (incorporating the prohibitions of expulsion and *refoulement* from Articles 32 and 33 of the Refugee Convention).

<sup>203</sup> Refugee Convention, *supra* note 1, arts. 32, 33.

<sup>204</sup> Hathaway, *supra* note 189 (analyzing the text of art. 33(2)); see also UNHCR, *Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response*, ¶ 5. Mar. 16, 2020, <https://www.refworld.org/docid/5e7132834.html> (arguing that health risk can be addressed on an individual or group basis through “testing and/or quarantine, which would enable authorities to manage the arrival of asylum-seekers in a safe manner,” whereas “[d]enial of access to territory without safeguards to protect against refoulement cannot be justified on the grounds of any health risk”). Critics have argued that the blanket nature of the United States’

positive for COVID-19, such measures could still violate the Torture Convention and ICCPR, which do not permit states to send individuals to torture or CIDT under any circumstances.<sup>205</sup> For a host of reasons, therefore, public health concerns associated with the COVID-19 pandemic do not legally justify the United States' failure to comply with the *non-refoulement* principle.

### B. *Indirect Refoulement: Canada*

As the United States was closing its borders and summarily expelling asylum-seekers, Canada and the United States entered into a purportedly temporary agreement under which Canada will return immediately asylum-seekers to the United States who enter Canada via irregular U.S.-Canada border crossings or via air or sea.<sup>206</sup> Since 2004, Canada has turned asylum-seekers crossing at regular points of entry back to the United States pursuant to a preexisting "safe-third country agreement" between the two states.<sup>207</sup> Under the agreement, the United States committed to accept certain asylum-seekers who had passed through its borders on route to Canada.<sup>208</sup> To ensure compliance with the duty of *non-refoulement*, asylum-seekers delivered to the United States in this manner were to receive "access to a refugee status determination" in U.S. immigration court before any decision was made to "return or remove" them to their country of origin.<sup>209</sup> During the COVID-19 pandemic, however, the United States has refused to abide by its obligation to conduct refugee status determinations, declaring that "[i]n the event an alien cannot be returned to Mexico or Canada," for the duration of the pandemic it would "secure return to the alien's country of origin" as expeditiously as possible without a hearing to determine refugee status.<sup>210</sup> As a result, asylum-seekers returned to the United States under either the safe third-country agreement or as a result of Canada's closed-border COVID-19 policy faced a serious risk of chain *refoulement* in violation of international law.

Despite these concerns, Prime Minister Justin Trudeau announced in March 2020 that most asylum-seekers attempting to cross the U.S.-Canadian border at irregular crossings would be

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response smacks of bad faith. *See, e.g.,* León Castellanos-Jankiewicz, *U.S. Border Closure Breaches International Refugee Law*, OPINIO JURIS, Apr. 3, 2020, <http://opiniojuris.org/2020/04/03/covid-19-symposium-us-border-closure-breaches-international-refugee-law/> (contending that "discriminatory action against migrants is being cloaked as a public health emergency response"); Lucas Guttentag, *Coronavirus Border Expulsions: CDC's Assault on Asylum Seekers and Unaccompanied Minors*, JUST SECURITY, Apr. 13, 2020, <https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/> (characterizing the United States' emergency measures as "an act of medical gerrymandering" that "tries to justify an end-run around congressionally mandated procedural rights and protections essential for refugees and unaccompanied minors" in order "to achieve an impermissible goal").

<sup>205</sup> *See id.*

<sup>206</sup> Government of Canada, *Coronavirus Disease (COVID-19): Refugees, Asylum Claimants, Sponsors and PRRA Applicants*, June 26, 2020, <https://www.canada.ca/en/immigration-refugees-citizenship/services/coronavirus-covid19/refugees.html#claimants>.

<sup>207</sup> *See* Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, U.S.-Can., Dec. 5, 2002, 2002 U.S.T. Lexis 125.

<sup>208</sup> *Id.* art. 5. Canada likewise committed to accept asylum-seekers who passed through its borders on route to the United States.

<sup>209</sup> *See id.* art. 3(1).

<sup>210</sup> *Asylum-Seekers Turned Back by Canada at its Border Will Be Shipped Home, U.S. Says*, REUTERS, Mar. 27, 2020, <https://nationalpost.com/news/canada/u-s-to-return-canada-bound-asylum-seekers-stopped-at-border-to-home-nations> (quoting U.S. Customs and Border Protection spokesperson Michael Niezgod).

summarily turned back to the United States.<sup>211</sup> Critics lambasted this decision, arguing that Canada's policy would lead inevitably to indirect *refoulement* in violation of Canada's obligations under international law.<sup>212</sup> Canadian diplomats reportedly sought assurances that the United States would conduct refugee status determinations for asylum-seekers returned from the United States, but there is no evidence that these discussions have borne fruit.<sup>213</sup> Rather than address the legal objections against its border restrictions head on, the Canadian government emphasized instead that the country faces "extraordinary circumstances"<sup>214</sup> and advised that its exclusion of asylum-seekers under the recent COVID-19 closed-border policy is "exceptional"<sup>215</sup> and "temporary."<sup>216</sup> More generally, Canada has prohibited all non-essential travel to Canada, and it has made no exception for asylum-seekers.<sup>217</sup>

### C. Maritime Interdiction: Cyprus, Italy, Malta, and Malaysia

As Canada and the United States were jettisoning refugee protections at their land borders in response to COVID-19, other states were suspending *non-refoulement* at sea. Cyprus was a trendsetter in this regard. Before COVID-19, Cyprus had the highest number of Syrian asylum-seekers per capita in Europe, and the continued flow of migrants was straining the country's resources and political commitment to refugee protection.<sup>218</sup> In March 2020, Cyprus announced that based on the global pandemic it would begin intercepting foreign vessels that were attempting to reach its shores.<sup>219</sup> Although Cyprus offered fuel, clothing, food, and water to asylum-seekers adrift at sea, it would no longer allow them to pursue safe haven within its territory.<sup>220</sup>

Italy took similar action in April 2020, announcing that due to its own skyrocketing COVID-19 infection rate, it did not qualify as a "place of safety" under international maritime

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<sup>211</sup> See Kathleen Harris, *Canada to Turn Back Asylum Seekers, Close Border at Midnight To Stop Spread of COVID-19*, CBC News, Mar. 20, 2020, <https://www.cbc.ca/news/politics/trudeau-covid19-coronavirus-medical-equipment-1.5504149>. Subsequently, Canada has made exceptions for asylum-seekers who are U.S. nationals, unaccompanied minors, or stateless persons habitually resident in the United States. See Government of Canada, *Coronavirus Disease (COVID-19): Refugees, Asylum Claimants, Sponsors and PRRA Applicants*, June 26, 2020, <https://www.canada.ca/en/immigration-refugees-citizenship/services/coronavirus-covid19/refugees.html#claimants>.

<sup>212</sup> See *Asylum-Seekers Turned Back by Canada at its Border Will Be Shipped Home, U.S. Says*, REUTERS, Mar. 27, 2020, <https://nationalpost.com/news/canada/u-s-to-return-canada-bound-asylum-seekers-stopped-at-border-to-home-nations> [hereinafter *Shipped Home*] (citing concerns raised by Amnesty International); Tessa Wright, *Canada Could Face Legal Trouble Over Refugee Deportations: Advocates*, CTV NEWS, Mar. 28, 2020, <https://www.ctvnews.ca/health/coronavirus/canada-could-face-legal-trouble-over-refugee-deportations-advocates-1.4872726> (citing concerns raised by multiple NGOs).

<sup>213</sup> Catharine Tunney, *Canada 'Urgently' Discussing Asylum Seeker Deportation Issue with U.S.*, CBC NEWS, Mar. 27, 2020, <https://www.cbc.ca/news/politics/troops-trump-border-coronavirus-1.5512261>.

<sup>214</sup> Harris, *supra* note 204 (quoting Public Safety Minister Bill Blair).

<sup>215</sup> *Id.* (quoting Prime Minister Trudeau).

<sup>216</sup> *Shipped Home, supra* note 205 (quoting Public Safety spokesperson Mary-Liz Power).

<sup>217</sup> Oliver O'Connell, *Coronavirus: Canada Extends Travel Restrictions*, INDEPENDENT, June 30, 2020, <https://www.independent.co.uk/news/world/americas/canada-coronavirus-travel-restrictions-extended-july-august-a9594676.html>.

<sup>218</sup> Andrew Connelly, *Cyprus Pushes Syrian Refugees Back at Sea Due to Coronavirus*, ALJAZEERA, Mar. 30, 2020, <https://www.aljazeera.com/news/2020/03/cyprus-pushes-syrian-refugees-sea-due-coronavirus-200330091614066.html>. Cyprus made exceptions only for Cypriots, European workers, or people with special two-week entry permits. *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> Some Syrian refugees obtained temporary refuge in the autonomous Turkish Cypriot region of Northern Cyprus, where they faced the prospect of eventual deportation to Turkey or elsewhere. *Id.*

law.<sup>221</sup> Thereafter, Italy would continue to allow Italian vessels to come and go from its ports, but it would drive away ships flying foreign flags, including those operated by nongovernmental humanitarian organizations (NGOs) that were rescuing refugees in distress on the Mediterranean.<sup>222</sup> In the weeks that followed, Italy repeatedly ignored pleas for assistance from overloaded dinghies bearing asylum-seekers from Libya, and it denied disembarkation to vessels that neared its shores.<sup>223</sup> Critics argued that this “automatic and indiscriminate rejection” of non-Italian ships violated the principle of *non-refoulement* as enshrined in the ECHR and the E.U. Charter of Fundamental Rights.<sup>224</sup>

Shortly after Italy issued its declaration, Malta followed suit, closing its own ports to asylum-seekers on the theory that “it is presently not possible to ensure the availability of a safe place on the Maltese territory, without compromising the efficiency/functionality of the national health, logistic and safety structures, which are dedicated to limiting the spread of the contagious disease.”<sup>225</sup> Malta’s Prime Minister, Robert Abela, explained that once the state closed its “ports and airport to cruise passengers and tourists” due to the COVID-19 crisis, it did “not make sense to then let migrants in.”<sup>226</sup> “Hundreds of thousands of people in Libya want to cross the Mediterranean to Italy or Malta,” Abela said. “We will be firm in our commitment not to open our ports.”<sup>227</sup>

Sixteen NGOs responded with a joint-statement castigating Malta for closing its ports to refugees. The joint-statement explained that “under no circumstances is Malta permitted to return persons to a territory where their lives and safety would be at risk. A public health emergency does not . . . exonerate Malta from its responsibility to ensure that rescued persons are not returned to Libya.”<sup>228</sup> The NGOs predicted that Malta’s announcement would “result in either people stranded out at sea for days, possibly weeks, or in their return to Libya, where they will probably face atrocious human rights conditions. It is unacceptable for Malta to exploit the COVID-19 pandemic to shelve its human rights obligations and endanger the lives of men, women, and children.”<sup>229</sup>

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<sup>221</sup> See Andrea Maria Pelliconi, *Covid-19: Italy Is Not a “Place of Safety” Anymore. Is the Decision to Close Italian Ports Compliant with Human Rights Obligations?*, EJILTALK!, Apr. 23, 2020, <https://www.ejiltalk.org/covid-19-italy-is-not-a-place-of-safety-anymore-is-the-decision-to-close-italian-ports-compliant-with-human-rights-obligations/> (providing a translated quotation from Inter-ministerial Decree No. 150, Apr. 7, 2020), [https://www.avvenire.it/c/attualita/Documents/M\\_INFR.GABINETTO.REG\\_DECRETI\(R\).0000150.07-04-2020%20\(3\).pdf?fbclid=IwAR1ND4AFGVqsfN07pzXcldIG2NIPGcPKUgT1Mjjg6lYqsU-3cEsfPu3ovU4](https://www.avvenire.it/c/attualita/Documents/M_INFR.GABINETTO.REG_DECRETI(R).0000150.07-04-2020%20(3).pdf?fbclid=IwAR1ND4AFGVqsfN07pzXcldIG2NIPGcPKUgT1Mjjg6lYqsU-3cEsfPu3ovU4)). Under the 1979 International Convention on Maritime Search and Rescue, states have a duty to rescue persons in peril at sea and deliver them to a “place of safety.” See Int’l Maritime Org., *Guidelines on the Treatment of People Rescued at Sea*, ¶ 6.12, Res. MSC.167(78) (May 20, 2004), [http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MS.C.167\(78\).pdf](http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MS.C.167(78).pdf).

<sup>222</sup> Pelliconi, *supra* note 214.

<sup>223</sup> Mediciens Sans Frontieres, *European Governments Must Stop Using COVID-19 as an Excuse to Block Lifesaving Search and Rescue Operations*, Apr. 17, 2020, <https://www.doctorswithoutborders.org/what-we-do/news-stories/news/european-governments-must-stop-using-covid-19-excuse-block-lifesaving>.

<sup>224</sup> Pelliconi, *supra* note 214.

<sup>225</sup> Salvo Nicolosi, *Non-refoulement During a Health Emergency*, EJILTALK!, May 14, 2020, <https://www.ejiltalk.org/non-refoulement-during-a-health-emergency/> (quoting the Maltese declaration).

<sup>226</sup> *Malta to Keep Migrants at Sea Until EU Acts*, DW, May 1, 2020, <http://www.msn.com/en-xl/europe/top-stories/malta-to-keep-migrants-at-sea-until-eu-acts/ar-BB13viVY?li=BBKxOeh&MSCC=1544122609&ocid=spartanntp> [hereinafter *Migrants at Sea*].

<sup>227</sup> *Id.*

<sup>228</sup> Joint NGO Press Release, *Migrants Should Not Be Sacrificed for the Nation’s Well-being*, Apr. 10, 2020, <https://aditus.org.mt/migrants-should-not-be-sacrificed-for-the-nations-well-being/>.

<sup>229</sup> *Id.*

Sadly, this prediction proved to be accurate. Just four days later, Malta acknowledged that it had intercepted a boat and had returned the asylum-seekers on board to Libya, their point of departure, without undertaking refugee status determinations.<sup>230</sup> An investigation by the International Organization for Migration (IOM) determined that before the Maltese Coast Guard boarded the boat to return it to Libya, the vessel had drifted aimlessly for several days without fuel after being denied access to Italian and Maltese ports.<sup>231</sup> Five bodies were discovered among the 51 survivors.<sup>232</sup> Seven other migrants who embarked on the trip from Libya had gone missing.<sup>233</sup>

Resistance to refugee migration was not limited to states along the Mediterranean. In mid-April, Malaysia turned back several boats containing hundreds of Rohingya asylum-seekers from Myanmar based on fears of possible COVID-19 transmission.<sup>234</sup> Bangladesh eventually rescued hundreds of these asylum-seekers after they had spent months adrift in the Bay of Bengal, but not before dozens of others on board had perished.<sup>235</sup> Between May 1 and June 12, 2020, Malaysia blocked another twenty-two boats carrying asylum-seekers from Myanmar, jeopardizing the lives of those on board.<sup>236</sup> Nonetheless, Malaysia defended its “maritime surveillance” program, explaining that the government “strongly feared that undocumented migrants who try to enter Malaysia either by land or sea will bring (Covid-19) into the country.”<sup>237</sup>

UNHCR, IOM, and the U.N. Office on Drugs and Crime have expressed alarm at Malaysia’s actions.<sup>238</sup> While acknowledging that states may justifiably take a variety of exceptional “border management measures to manage risks to public health,” the international organizations have emphasized that such measures “should not result in the closure of avenues to asylum, or in forcing people to either return to situations of danger or seek to land clandestinely, without health screening or quarantine.”<sup>239</sup> Repulsing asylum-seekers at sea “violates basic human

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<sup>230</sup> *Migrants at Sea*, *supra* note 219.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Malaysia Turns Back Rohingya Boat Over Coronavirus Fears*, THE STRAIT TIMES, Apr. 18, 2020, <https://www.straitstimes.com/asia/se-asia/malaysia-turns-back-rohingya-boat-over-virus-fears-0> [hereinafter *Malaysia Turns Back Rohingya*]; Rebecca Ratcliffe, *Hundreds of Rohingya Refugees Stuck at Sea, Say Rights Groups*, THE GUARDIAN, Apr. 17, 2020, <https://www.theguardian.com/global/2020/apr/17/malaysia-and-thailand-urged-to-help-stranded-rohingya-refugees>.

<sup>235</sup> Ratcliffe, *supra* note 227. Bangladesh later changed course, declaring that “not a single Rohingya will be allowed to enter.” Pierfilippo M. Natta, *COVID–19 Is No Excuse to Abandon Basic Principles Protecting Refugees and Asylum Seekers*, DIPLOMAT, May 4, 2020, <https://thedi diplomat.com/2020/05/covid-19-is-no-excuse-to-abandon-basic-principles-protecting-refugees-and-asylum-seekers/>.

<sup>236</sup> *Malaysia/Thailand: Allow Rohingya Refugees Ashore*, HUMAN RIGHTS WATCH, June 12, 2020, <https://www.hrw.org/news/2020/06/12/malaysia/thailand-allow-rohingya-refugees-ashore#> (citing a figure provided by Malaysian Defense Minister Ismail Sabri Yaakob); *see also* A.S.M. Suza Uddin & Poppy McPherson, *Traffickers Demand Payments for Rohingya Stranded at Sea*, REUTERS, June 15, 2020, [https://www.reuters.com/article/us-myanmar-rohingya/traffickers-demand-payments-for-rohingya-stranded-at-sea-idUSKBN23M2BT#\\_ga=2.220943768.1875369749.1593027822-815747816.1583893753](https://www.reuters.com/article/us-myanmar-rohingya/traffickers-demand-payments-for-rohingya-stranded-at-sea-idUSKBN23M2BT#_ga=2.220943768.1875369749.1593027822-815747816.1583893753) (reporting that in some cases human smugglers, unable to deliver Rohingya refugees to Malaysia, have remained at sea for months while demanding payments from the refugees’ families to secure their release).

<sup>237</sup> *Malaysia Turns Back Rohingya*, *supra* note 227 (quoting a statement from the Malaysian air force).

<sup>238</sup> UNHCR, Joint Statement by UNHCR, IOM, and UNODC on Protection at Sea in the Bay of Bengal and Andaman Sea, May 6, 2020, <https://www.unhcr.org/en-us/news/press/2020/5/5eb15b804/joint-statement-unhcr-iom-unodc-protection-sea-bay-bengal-andaman-sea.html>.

<sup>239</sup> *Id.*

rights, the law of the sea and the principles of customary international law by which all States are equally bound.”<sup>240</sup>

#### D. *Evaluating Emergency Restrictions on Refugee Migration*

While by no means exhaustive, these case studies illustrate how the COVID-19 pandemic has undermined state compliance with the duty of *non-refoulement*. Under the Refugee Convention, states plausibly may exclude asylum-seekers based on national security concerns, such as the public health risks associated with COVID-19,<sup>241</sup> but they must do so on an individualized basis; the Convention does not contemplate blanket border closures. The requirement that states make individual assessments means that governments seeking to use Article 33(2) to close borders in light of COVID-19 would need to offer a legal justification for doing so. More specifically, they would need to show that a given individual actually has COVID-19, and that there is not a less intrusive means than *refoulement* to achieve the goal of public safety.<sup>242</sup> Allowing asylum seekers to self-isolate for fourteen days or detaining them in quarantine for that period of time would be less intrusive, for these purposes. In the case studies, however, the states concerned invoked general public health concerns in support of wholesale border closures, expulsions, and maritime interdictions without undertaking individualized determinations of dangerousness for particular asylum-seekers. Nor did the relevant states contemplate less harmful measures that could achieve their stated public health goals, such as enforced quarantine.<sup>243</sup> Without question, therefore, these measures violate the Refugee Convention.

Even if states in the case studies had tested asylum-seekers for COVID-19 and excluded only those who were capable of transmitting the virus, the emergency measures in question would still be legally suspect. Setting aside whether COVID-19 transmission by refugees qualifies as a “serious danger” triggering exceptions to the Refugee Convention’s duty of *non-refoulement*,<sup>244</sup> asylum-seekers who faced a substantial threat of torture would be entitled to protection under the Torture Convention regardless of their health status. Likewise, refugees on the Mediterranean who were threatened with CIDT in their countries of origin would be entitled to relief from *refoulement* under the European Convention on Human Rights. To the extent that the international community embraces this Article’s argument that the prohibition of *refoulement* qualifies as a peremptory norm, the exceptional border controls adopted by Canada, Cyprus, Italy, Malta, Malaysia, and the United States would also violate international *jus cogens*. All of these legal protections would preclude states from returning asylum-seekers to harm abroad, regardless of asylum-seekers’

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<sup>240</sup> *Id.*; see generally *Hirsi Jamaa v. Italy*, App. No. 27765/09, ¶¶ 180, 186 (Eur. Ct. H.R. Feb. 23, 2012).

<sup>241</sup> *But see* Kate Ogg, *COVID-19 Travel Restrictions: A Violation of Non-refoulement Obligations?*, Australian National University, College of Law, Apr. 24, 2020, <https://law.anu.edu.au/research/essay/covid-19-and-international-law/covid-19-travel-restrictions-violation-non-refoulement-obligations> (arguing that Article 33(2) does not apply to COVID-19, because the pandemic does not imperil “basic interests” of the state).

<sup>242</sup> See U.N. HIGH COMMISSIONER FOR REFUGEES, KEY LEGAL CONSIDERATIONS ON ACCESS TO TERRITORY FOR PERSONS IN NEED OF INTERNATIONAL PROTECTION IN THE CONTEXT OF THE COVID-19 RESPONSE, Mar. 16, 2020, <https://www.refworld.org/docid/5e7132834.html> (arguing that border controls adopted in response to COVID-19 must be “non-discriminatory as well as necessary, proportionate and reasonable to the aim of protecting public health”).

<sup>243</sup> UNHCR, “Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response” (16 March 2020) available at: <https://www.refworld.org/docid/5e7132834.html> [accessed 14 July 2020], at 2.

<sup>244</sup> Refugee Convention, *supra* note 1, art. 33(2).

health status, and regardless of whether customary international law recognizes the duty of *non-refoulement* as *jus cogens*. Thus, irrespective of the level of threat posed by COVID-19, international law prohibits states from closing their borders in a manner that is inconsistent with their peremptory responsibilities to protect refugees from torture, CIDT, or other serious harm. Significantly, in none of the case studies did the states concerned make a serious effort to justify their border restrictions under international law. Instead, they essentially asserted a Schmittian prerogative to decide unilaterally that the pandemic constituted an emergency that necessitated temporary recourse to *refoulement*. Implicit in these measures was the unspoken assumption that states could legitimately allow domestic security concerns to trump the interests of refugees, who were ostensibly “alien” to their self-determining political association. Legal experts have argued that such necessity-based rationales for border closures, expulsions, and maritime interdiction are unconvincing, given the obvious alternative of temporarily quarantining ailing refugees to limit viral transmission.<sup>245</sup> For Schmitt and his defenders, however, objective justifiability and the authority to decide are separate matters. In Schmitt’s memorable words, it is the sovereign who “decides whether there is an extreme emergency as well as what must be done to eliminate it.”<sup>246</sup> By asserting the right to determine unilaterally what measures are necessary to curb the spread of COVID-19—up to and including *refoulement*—Canada, Cyprus, Italy, Malaysia, Malta, and the United States have held themselves out as Schmittian sovereigns whose authority over asylum-seekers does not depend on compliance with international refugee law. Critics have expressed concern, therefore, that states’ emergency measures are undermining the principle of *non-refoulement* and could cause long-lasting damage to international refugee law.<sup>247</sup>

The COVID-19 border closures, expulsions, and maritime interdictions discussed above demonstrate indifference to the possibility that the returned refugee may have no other place where she can lawfully reside free of persecution. As states across the world adopt closed-border policies, the possibility of a refugee’s bare existence constituting a wrong moves closer to realization. That possibility alone, combined with states’ refusal to participate in IRL’s multilateral regime of surrogate protection, is enough to show that the states discussed in this Part have forfeited their claim to legitimate authority vis-à-vis exiled outsiders. Not only have states in this context given up on the rule of international law and human rights, they likewise have given up on the idea that brought western civilization out of feudalism and into modernity: the principle that individuals are to be judged based on their volitional actions rather than on a mere status over which they have no say or recourse.<sup>248</sup> When states prevent refugees from accessing protection within their borders,

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<sup>245</sup> See, e.g., Claire Ellis, *COVID-19: Canada Locks its Gates to Asylum Seekers*, OPEN DEMOCRACY (Apr. 10, 2020), <https://www.opendemocracy.net/en/pandemic-border/covid-19-canada-locks-its-gates-asylum-seekers/> (arguing that excluding refugees and asylum seekers is not necessary for effectively combatting the COVID-19 pandemic). This is not to gainsay the genuine risk that some asylum-seekers present threats of COVID-19 transmission. See Migrant Workers Contract COVID-19 at Thai Detention Center, UCA News, May 5, 2020, <https://www.ucanews.com/news/migrant-workers-contract-covid-19-at-thai-detention-center/87922> (reporting on a COVID-19 outbreak in a Rohingya refugee camp in Thailand); Joe McCarthy, *Rohingya Refugees Brace for Catastrophic COVID-19 Outbreak*, Global Citizen, May 21, 2020, <https://www.globalcitizen.org/en/content/rohingya-refugee-covid-19-pandemic/> (same in Bangladesh).

<sup>246</sup> SCHMITT, *supra* note 74 at 7.

<sup>247</sup> See, e.g., Lama Mourad & Stephanie Schwartz, *Could COVID-19 Upend International Asylum Norms?*, LAWFARE, Apr. 9, 2020, <https://www.lawfareblog.com/could-covid-19-upend-international-asylum-norms> (expressing concern that if emergency measures “persist, these policies could have disastrous consequences and potentially upend the already fragile global refugee and asylum regime”).

<sup>248</sup> For discussion of this principle as applied to the criminal prosecution of refugees, see Evan J. Criddle, *The Case Against Prosecuting Refugees*, 115 NW. U. L. REV. (forthcoming 2020).

they thereby tear asunder the foundations of their own authority to rule over humanity's most vulnerable.

## CONCLUSION

During a public emergency, such as the ongoing COVID-19 pandemic, political pressure to suspend refugee protection can be acute, as domestic stakeholders demand border closures to safeguard public health and national security. But the cost is too high, and the means are disproportionate. As this Article has shown, the duty of *non-refoulement* is an indispensable component of the international rule of law. The authority states claim over their territory vis-à-vis outsiders can be understood as legitimate only if they resist the temptation to return refugees to persecution abroad. This principle is foundational to the authority of international law and applies with undiminished force during national crises. The duty of *non-refoulement* therefore merits international acceptance as *jus cogens*.

We recognize, of course, that it remains uncertain how the COVID-19 pandemic will shape the practical development or erosion of IRL. Emergency measures adopted during the pandemic might become entrenched in national laws and policies, undermining refugee protection for decades to come. However, that bleak future is not inevitable. With concerted effort from UNHCR and refugee advocacy organizations, states might eventually acknowledge the humanitarian costs of their border closures, expulsions, and maritime interdictions, as well as recognize how these policies have undermined the legitimacy of the international order on which their own claims to authority and legality rest. Lessons learned from the current crisis may create opportunities for the international community to strengthen IRL by enshrining the duty of *non-refoulement* as *jus cogens*. The international legal system's claim to be a legal system for all humanity—for exiles as well as resident nationals—hangs in the balance.