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Does Jus Conges Matter? Revisiting The Failure of International Law On Non-Refoulement

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Abstract

The hallmark of refugee law is the principle of non-refoulement which simply means refugees should not be returned or expelled to their prosecution state. Conventions, cases and theses have affirmed this right to be of a non-derogable nature, meaning that it is a jus cogens norm. Critics have dismissed jus conges as having no fundamental content and merely an impracticable impression of a norm lacking flesh and blood. Thus, any principle, like non-refoulement, promoted as a jus cogens norm is doubtful because jus cogens is merely a supernorm in the figment of the imagination of its supporters.

Since adherence to the principle of non-refoulement rests on it being a jus conges norm, this study evaluates the concept of jus conges against the backdrop of critics who opine that it does not exist. It seeks to ascertain the importance of jus conges and its violation by States contrary to the provisions of legal instruments which have upheld some principles to the realm of jus conge norms. Finally, this study submits that connoting a principle as jus conges would not prevent its violation and therefore the principle of non-refoulement may be jettisoned at will after all.

Keywords

International Law, Refugee, Norm, State, Convention, Asylum

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Introduction

Since time immemorial, torture, inhuman and degrading treatment, religious and political persecution and other violations of human rights have forced people to flee their homes and become sojourners in countries that are not theirs. Economic and environmental upheavals during the 20th century and at the beginning of the new millennium, and especially, the recent Syrian crisis, have highlighted the importance of the refugee law.[2] Restrictions and limitations are placed by many States to discourage movement and travel to their territorial jurisdictions through such strategies as strict visa control and carrier sanctions. The concept of *non-refoulement* proscribes harm or human rights violation of those who have fled their homes and it has been incorporated in a number of international legal instruments such as the 1951 Convention Relating to the Status of Refugees, United Nations Convention against Torture and other Cruel, Inhumane, Degrading Treatment and Punishment, International Covenant on Civil and Political Rights, European Convention on the Protection of Human Rights and Fundamental Freedoms, and the OAU/AU Convention Governing the Specific Aspects of Refugee Problems in Africa.

In theory, the principle of *non-refoulement* is of a sacrosanct nature. The principal treaty on this principal - the 1951 Convention Relating to the Status of Refugees – specifically provides that it is non-derogable. Also, it is widely stated that it is a compelling, fundamental and overriding principle of international law from which no derogation is ever permitted.[3] The realm that this principle has been raised to is that of a *jus cogens*norm. However in practice, some countries treat refugees seeking asylum in manners that amount to refouling (expelling or returning). This is done with impunity with no form of sanction whatsoever. For instance, in 1991, in the context of the potential exodus of Iraqi Kurds to Turkey, Turkey indicated that it would close its border, in effect, preventing refugees from accessing Turkey.[4]In 2015, over 2,500 Nigerians from Bama and Gamboru Ngala in Bornu State seeking refuge in The Republic of Cameroon from Boko Haram attacks were unceremoniously repatriated to areas of hostilities in Sahuda village in Mubi South local government area where their lives could be threatened in the most humiliating manner.[5]Recently, the Philippines government forced back one Dina Ali Lasloom to Saudi Arabia where she had escaped to escape Saudi's guardianship laws.[6]Walls are being built, borders are being closed and countries are sealing themselves off from their neighbours.Why do States derogate from a principle that has been agreed upon as

[2]Jarvaid, R.,*International Human Rights Law,* 2nd ed. Essex, Pearson Education Ltd, 2010, p. 641.

[3]Imam, S.D.,"Escaping the Principle of Non-refoulement",*International Journal of Business, Economics andLaw* (2013) 2, p. 86. Farmer, A.,"Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures That Threaten Refugee Protection", *Georgetown Immigration Law Journal* (2008), p. 23.

[4]See Proceedings of a Seminar Held Jointly by the Redress Trust and the Immigration Law Practitioners Association. Non-RefoulementUnder Threat(2006), p. 6.

[5] Bar, A.,"The 1951 Refugee Convention & Cameroon's Violation of the Principle of Non-refoulement". *Legal Articles (*2015), *available at* http//:www.baralpha.com (last visited June 19, 2019).

[6]BBC Trending, available at http://www.bbc.com/news/blogs-trending-40105983 (last visited June 22, 2019).

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non-derogable.[7] One of the reasons advanced is premised on the non-derogable nature of the principle as a *jus cogens* norm. It has been contended that *jus cogens* is not real[8], hence, the principle of non-refoulement cannot be described as a non-derogable norm and therefore, countries can refoul refugees seeking protection from them.

The implication of the above points to the bane of international law as being a system of unenforceable promises and ideas. The 1951 Refugee Convention can be seen as the 'Bible of States' on how to treat refugees and it is expected that its wordings should be held and proclaimed to the letters. It is contended that the phrase "in any manner whatsoever" means no exception should be allowed yet instances abound of States' violations of the principle that has been upheld as a peremptory norm. This paper makes a critical analysis of the concept of *jus cogens*, its place in international law and its essence on the principle of *non-refoulement*. It pontificates that though jus cogens should continue to be upheld, its grip on the *non-refoulement* is slacking.

The Meaning and History of Jus Cogens

'Jus' and 'cogens' are Latin words meaning compelling law. *Jus cogens* is a mandatory or compelling norm of a general International Law accepted and recognized by the international community as a norm from which no derogation is permitted.[9]The notion of jus cogens is expressed in International Law through Articles 59 and 64 of the 1969 Vienna Convention on the Law of Treaties.[10]These provisions state that treaties may be invalidated upon their ratification or may later be terminated if their content conflicts with a peremptory norm of general International Law , which is accepted and recognized by the international community as a whole as a norm from which no derogation is permitted.

The concept of *jus conges* as finally codified by the Vienna Convention is not recent. The notion was first developed by the so-called 'stoics'.[11]In the 4th AD, they developed the theory that law should be applied on an international scale, by virtue of a so-called 'universal reasoning' which is not based on individual nationalities or race but is rather common to all. In doing

[7] 145 States are signatories to the 1951 Refugee Convention (Bar, A., The 1951 Refugee Convention & Cameroon's Violation of the Principle of Non-refoulement. *Legal Articles (*2015), *available at* http//:www.baralpha.com (last visited 19 June 2019)

[8]D'Amato, A.," It's a bird, it's a plane, it's jus cogens*!" Connecticut Journal of International Law* (1990), pp. 1-6.

[9]Black's Law Dictionary. Garner. B. (ed). 9thEdn.Thomson Reuters Business.2009, p. 937.

[10]See Art. 53 (Treaties conflicting with a peremptory norm of general international law (jus cogens)) of the Vienna Convention on the Law of Treaties: 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole from which no derogation is permitted and which can be modified by a subsequent norm of general international law having the same character.'
See also Art. 64 (Emergence of a new peremptory norm of general international law (jus cogens)): 'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminated.

[11]Nieto-Navia, R.," International Peremptory Norms (Jus Cogens) AndInternational Humanitarian Law", *Writing Colombia Eng (*2001), p. 3.

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so, they arrived at an idea of a 'universal State' in which all men should be equal.[12]

It was also mentioned by the 16th era's scholars who are regarded as the fathers of modern international law.[13] For Grotius and for other classical writers, there existed certain 'principles' which amounted to a *jus naturalenecessarium* (necessary natural law).[14] Grotius stated that principles of natural law were so immutable that not even God could change them.[15] In recognizing the existence of natural law principles, most philosophers were also in general agreement that there existed an international community to which all sovereignties should submit in the interests of what could be described as the common good of humanity.[16]

It was after the Second World War that the concept of jus cogens gained a foothold internationally. In 1953, HerschLauterpacht, in his role as Special Rapporteur of the International Law Commission, prepared a draft Convention of the Law of Treaties which included a provision whereby a treaty could be void if it was inconsistent with 'such overriding principles of international law which may be regarded as constituting principles on international public policy.'[17]

Jus cogens, was, thus, incorporated into the Vienna Convention and this can be regarded as an acknowledgment of the fact that there are principles which States cannot legislate away or agree amongst themselves to abrogate.

The 1969 Vienna Convention has been ratified by 114 States as of April, 2014.[18] This means that 14 States have agreed that indeed, there are peremptory norms which cannot be derogated from. With this, one cannot but question the reason of those who still doubt the existence of *jus cogens* when over 100 States in the world, through ratification of the Vienna Convention which provides for *jus cogens*, that there really are norms that are peremptory. A lot of philosophical polemics have arisen on the discourse of *jus cogens*; the major of which is that any writer could just christen an ordinary norm of his or her choice as a new jus cogens norm, thereby in one stroke investing it with magical power. But, it seems these opponents of jus cogens have not examined in depth the provision of Article 53 of the Vienna Convention which provides for the criteria a norm must have before it can be regarded as jus cogens. This provision put paid to any innuendo that any writer could just name any norm of his or her choice as jus cogens. Article 53 provides that:

> "*Jus cogens are norms of general international law accepted and recognized by the international community of States as a whole and from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.*"

THE EFFECTS OF ARTICLE 53

[12] *Supra.*
[13] Allain, J.,"The Jus Cogens Nature of Non-Refoulement", *International Journal of Refugee Law*, (2001), p. 535.
[14] Nieto-Navia, R.,*op.cit.*, p. 3
[15] Grotius, H. 1625. De Jure Belli Ac PacisLibriTres.1 ch. 1, X 5.Cited by Rafael Nieto-Navia, op.cit. 3.
[16] *Ibid.* p. 31
[17] Mark, W.A. "The Emptiness of the Concept of Jus Cogens as Illustrated by the War in Bosnia Herzergovina."*Michigan Journal of International Law* (1995), p.13.
[18] Vienna Convention on the Law of Treaties, United Nations Treaty Series *available at*www.refworld.org/docid/3ae6b3a10.html (last visited June 29, 2019).

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Article 53 of the Vienna Convention on the Law of Treatiesfirst focuses on the generality of the norms. Only "general international law" may qualify as *jus cogens*. Norms of general international law are those of general applicability, creating rights and obligations for at least a great majority of States. In this context, general appears to mean 'all' or 'nearly all' the members of the international community. Thus, jus cogens must have a universal scope of application.

Secondly, *jus cogens* norms have been conceived as an expression of the general will of the international community. It is quite clear that it relates to widespread recognition. This is further supported by the fact that, the diction of the relevant article "a norm accepted and recognized by the international community of States as a whole" is followed by "as a norm from which no derogation is permitted," and as such makes it clear that the recognition of the international community is a necessary and in fact a key element in a norm being elevated to the status of *jus cogens*. The notion of international community of States as a whole highlights the fact that such a community is composed of States. In this regard, Article 53 of the Vienna Convention establishes that one of the constituent elements of a *jus cogens* or peremptory norms is that it must be "accepted and recognized by the international community of States as a whole." This formulation has been adopted verbatim in several subsequent international law instruments, such as the Vienna Convention on Treaties between States and International Organizations and the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts.[19]

It must be noted that Article 53 mentions "International Community of States." On this basis, it means there is no room for entities except States to participate in the acceptance and recognition of *jus cogens* norms. It has been said that the *travauxpréparatoires*[20] of the Vienna Convention on the Law of Treaties indicate that the drafters did not consider the possibility of non-state actors playing a role in the determination of *jus cogens*.

However, this conclusion was severely tested by the application of the rules establishing *jus cogens* to treaties between States and international organizations in the Vienna Convention on the Law of Treaties between States and International Organizations.[21]The *travauxpréparatoires* of that treaty, and particularly the records of the codification conferences leading up to it, show that the drafters considered whether the phrase "international community of States and international organizations",oralternatively "international community as a whole." These suggestions were ultimately rejected on the grounds that: (a) it was advisable to adopt a textual construction that places international organizations on the same footing as States and (b) international organizations are composed of States and any relevant international organization practice was essentially state practice.[22]

The International Law Commission, which was responsible for drafting the Vienna Convention, has explained that the words "as a whole", does not necessarily mean acceptance of all existing States. According to the Chairman of the Draft

[19]International Law Commission's Yearbook. 2001, Vol II, Part Two).

[20]Travauxpreparatoires means materials used in preparing the ultimate form of an international treaty. Black's Law Dictionary Op.cit., p. 1638.

[21]Working Group No. 1 Final Report. 2015. Criteria for identifying jus cogens norms in public international law, International Law Seminar. 7

[22]*Ibid*, p.

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Committee of the Vienna Convention, it is sufficient to have the acceptance of a great majority of States.[23] The Chairman stated further that if one State in isolation refused to accept the peremptory character of a rule, or if that State was supported by a very small number of States, the acceptance and recognition of the peremptory character of the rule by the international community would not be affected. According to an author, the binding effect of peremptory norms extends even to those States that from the very beginning have objected to such a norm.

Thirdly, Article 53 also defines *jus cogens* norms as those norms being non-derogable and which can only be modified by a subsequent norm of general international law having the same character. This characteristic is both a prerequisite and a consequence of a peremptory norm. Rafael Nieto Naval opined that it could be stated that this is in fact the main identifying feature and essence of a norm of *jus cogens*.[24]

For clarity sake, it is pertinent to draw a preliminary classification of norms that do not permit derogation by inter-parties treaties or otherwise:

a. Norms which have a fundamental bearing on the behavior of the international community of States as a whole and from which no derogation is permitted at all. The existence of a fundamental interest of the international community can be ascertained by looking to whether the violation of a rule: (i) shocks the conscience of the international community as a whole, or (ii) threatens the survival of States. One example is the principle of good faith.[25]

b. Norms which are necessary for the stability of the international juridical order, for example *pactasuntservanda* and general principles of law from which derogation is logically impossible, *res inter aliosacta*.[26]

c. Norms referred to as having humanitarian objects and purposes including certain principles of human rights and international humanitarian law.[27] In general terms, one can say that *under jus cogens*, States are obliged to respect human rights. Specific human rights which can be considered as part of *jus cogens* are for example, the goals and aspirations set out in the preamble to the Charter of the United Nations:

> *"WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war, which twice in our lifetime has brought, untold sorrow to*

[23]Hannikainen, L. *Peremptory Norms (Jus Cogens) In International Law*. Finland: Helsinki Press,1985, p. 210; Corten, O. and Klein, P. Eds. *Les Conventions de Vienne sur le Droit de Traités*. Bruylant: Brussels, 2006, pp. 1910-1911

[24]Nieto-Navia, R.*op.cit*.,p. 12.

[25]*Ibid*, p. 12.

[26]This rule forbids the introduction of collateral facts which by their nature are incapable of affording any reasonable presumption or inference as to the principal matter in dispute, and thus evidence as to acts, transactions or occurrences to which accused is not a party or is not connected is inadmissible. Black's Law Dictionary (9th Edition, 2009), p. 1420.

[27]Verdross, A.,"Jus Dispositivum and Jus Cogens in International Law."*AJIL, (*1966*)*, pp. 59 – 60.

mankind, and to regain faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom."

The Purposes and Principles of the United Nations, as set out in, inter alia, Articles 1(2) and 2(1)-2(4) respectively of the Charter are also great examples of *jus cogens* norms. These include: respect for equal rights and self determination of peoples, sovereign equality of States, fulfilment in good faith of international obligations, settlement of international disputes by peaceful means, prohibition of the threat of use of force against other States in any manner inconsistent with the purposes of the UN.

d. Norms which are binding on all new States even without their consent as being established rules of the international community. Examples are the principles of the freedom of the high seas or the common heritage of mankind, the protection of the environment and respect for the independence of States.[28]

A number of international and regional human rights treaties mention the non-derogation principle attached to their *jus cogens* provisions, for instance, 1951 Refugee Convention,[29] the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984,[30] the European Convention for the Protection of Human Rights and Fundamental Freedoms,[31] and American Convention on Human rights.[32]

Several international courts and tribunals have directly recognized the attribute of non-derogation. For instance, the International Court of Justice in its advisory opinion concerning the legality of the threat or use of nuclear weapons concluded that some rules of international humanitarian law embodied in the Geneva Conventions constituted "intrangressible principles of international customary law"[33]. Also, the International Criminal Tribunal for the Former Yugoslavia, when assessing the legal nature of the prohibition of torture in **Prosecutor v. AntoFurundzija**,[34] noted "the prohibition of torture laid down in human rights treaties can be never be derogated from." Moreover, in the arbitration between Guinea-Bissau and Senegal concerning the maritime delimitation, the arbitral tribunal found that "for the purposes of the law of Treaties, *jus cogens*is simply the characteristic inherent in certain legal

[28]Ago, R.,"Droit des Traités à la Lumière de la Convention de Vienne: Introduction*". Recueil des Cours*, (1971), p. 324.

[29]Articles 33 and 42(1) of the 1951 Refugee Convention

[30]SeeWorking Group No. 1 Final Report. Criteria for identifying jus cogens norms in public international law,International Law Seminar. 2015, pp. 9-10.

[31]Articles 3 and 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

[32]See articles 5 and 27 of the American Convention on Human Rights.

[33]Legality of the Threat or Use of Nuclear Weapons, I.C.J., Reports 1996, p. 226.

[34]Case No. IT-95-17/1-T, ICTY, Judgment of 10 December 1998, para. 144

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norms that cannot be derogated from by the treaty."[35]

Thus, non-derogation of *jus cogens* reflects a level of hierarchy of norms in public international law. The International Law Commission in the conclusions of the work of the Study Group on the Fragmentation of International Law noted that a rule of international law may be superior to other rules on account of the importance of its content as well as the universal acceptance of its superiority.[36]

Moreover, Article 53 of the Vienna Convention on the Law of Treaties states that "a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law". This means that an existing *jus cogens* norm has the effect of rendering void an international treaty conflicting with it from the time of the conclusion of the treaty. If the conflicting treaty already existed before the emergence of the *jus cogens*norm, this treaty shall be deemed as void "only from the date when the new rule of *jus cogens* is established." In other words it does not annul the treaty, it forbids its further existence and performance.[37]

From the foregoing, it could be seen that there are actually norms that are *jus cogens* and one can identify a *jus cogens* norm by:

1. Looking at evidence of an almost universal acceptance and recognition among States

2. After ascertaining that such evidence exists, it is necessary to assess State practice as well as the belief of States that the said norm is peremptory in nature. Other sources of international law, such as treaties may be used to assess the existence of universal acceptance and recognition of the said norm.

3. The judgments of international courts and tribunals are a subsidiary means of identifying *jus cogens* norms.

However, it seems the express mention in a treaty of a principle as non-derogatory is the most certain way of removing any doubt whether a certain principle can be derogated from or not. A treaty is an international agreement concluded by States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[38] Since it is trite law that what is expressly mentioned cannot be second guessed, it is only wise to incorporate a non-derogatory principle into treaty as it has been done in various treaties protecting refugees.[39]

EMBRACING AN IDEAL PRINCIPLE

The value attributed to the principle of *non-refoulement* by the international community of states can be seen in the conclusions adopted by the Executive Committee of the United Nations High

[35]Cited by Working Group No. 1 Final Report.Criteria for identifying jus cogens norms in public international law. International Law Seminar, 2015, p. 11.

[36]See Yearbook of the International Law Commission, 2006, vol. II, Part Two, para. 251, pp. 177-178.

[37] Yearbook Working Group No. 1 Final Report. Criteria for identifying jus cogens norms in public international law,International Law Seminar. 2015, 1966, vol. II, p. 261.

[38]Article 2, 1969 Vienna Convention on the Law of Treaties.

[39] Articles 3 and 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Articles 5 and 27 of the American Convention on Human Rights, See Articles 33 and 42(1) of the 1951 Refugee Convention, Articles 4(2) and 7 of the International Covenant on Civil and Political Rights.

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Commissioner for Refugees (UNHCR).[40] The United Nations High Commission for Refugees, set up in 1982 by Resolution 428 of the United Nation's General Assembly, is a programme mandated to protect and support refugees at the request of a government or the UN itself and assists in their voluntary repatriation, local integration or resettlement to a third country.[41] Since this Commission was established by the General Assembly which is made up of all States of the United Nations,[42] conclusions reached by the Executive Committee of the UNHCR reflect the consensus of States. Thus, its conclusion in 1982 reflected the acceptance and recognition of the principle of *non-refoulement*. It was stated that "State members determined that the principle of *non-refoulement* was progressively acquiring the character of peremptory rule of international law."[43]

Significantly, the Refugee Convention that provided for *non-refoulement* as a non-derogatory principle came into force in 1954.[44] The Conclusion of the UNHCR's Executive Committee in 1982 that "non-refoulement was progressively acquiring the character of peremptory rule of international law" shows that States were not aware that *non-refoulement* was already a peremptory rule by virtue of the 1951 Refugee Convention.

They still seemed not to realize their previous omission as they only concluded in 1989 that "all were States were bound to refrain from *refoulement* on the basis that such acts were contrary to fundamental prohibition against these practices.[45]"

It finally dawned on them in 1996 when they stated in yet another conclusion that *non-refoulement* had acquired the level of a norm of jus cogens and it was determined that principle of *non-refoulement* is not subject to derogation.[46] Thus, the members States of the Executive Committee eventually conceded that the principle of *non-refoulement* is a jus cogens norm from which no derogation is permitted.

Secondly, further evidence of the *jus cogens* nature of *non-refoulement* can be

[40] Allain, J.,*op.cit.*,p. 539, Farmer, A.,*op.cit.*, p. 7.
[41] The UN Refugee Agency.*About us,available at*https://en.m.wikipedia.org/wiki/United Nations _ High Commissioner _for Refugee 2016 (last visited June 18, 2019)
[42] As of June 2019, the UN has 193 members and 2 observer states, *available at*http://en.m.wikipedia.org/wiki/United Nations_General_Assembly (last visited June 18, 2019).
[43] Executive Committee Conclusion No: 25, "General Conclusion on International Protection," 1982: '(b) Reaffirmed the importance of the basic principles of international protection and in particular the principle of non-refoulement which was progressively acquiring the character of a peremptory rule on international law.' Cited by Allain, J., *op.cit.*, p. 539.
[44] Wouters, C.W. *International Legal Standards for the Protection from Refoulement*. Hart Publishing Ltd, 2001, p. 34.
[45] Executive Committee Conclusion No: 55, "General Conclusion on International Protection," 1989: '(d) Expressed deep concern that refugee protection is seriously jeopardized in some States by expulsion and refoulement of refugees or by measures which do not recognize the special situation of refugees and called in particular from returning or expelling refugees contrary to fundamental prohibitions against these principles.' Cited by Allain, J. op. cit., p. 539.
[46] Executive Committee Conclusion No: 79, "General Conclusion on International Protection," 1996: '(i) Distressed at the widespread violation of the principle of non-refoulement and of the rights of refugees in some cases resulting in loss of refugee lives, and seriously disturbed at reports indicating that large numbers of refugees and asylum seekers have been refouled and expelled in highly dangerous situations, recalls that the principle of non-refoulement is not subject to derogation. ' Cited by Jean Allain, op. cit.

found in the Declaration on Refugees.[47] The Declaration recognizes, amongst others, the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a cornerstone of the international protection of refugees. The principle isimperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of jus cogens.[48]

As a writer has noted,[49] the acceptance by Latin American States of the principle of *non-refoulement* as *jus cogens* has been manifest in intergovernmental bodies like the Inter-American Commission on Human Rights and the Organization of American States (OAS) General Assembly which have acknowledged the conclusions of the Cartagena Colloquium with approval.

Also, scholars have pointed to various elements of State Practice and have determined that, in the words of Harold Koh, numerous international publicists now conclude that the principle of *non-refoulement* has achieved the status of *jus cogens*.[50]

Thirdly, virtually all States have accepted that the principle of *non-refoulement* as articulated in Articles 33 and 42(1) of the 1951 Refugee Convention. As of April, 2015, there are 145 parties to the Convention and 146[51] to its 1967 Protocol.[52]

Moreover, States' incorporation of the treaties which provide for *non-refoulement* into their municipal laws either by adopting the whole treaties or legislating the rule into constitutions or enacting legislations which incorporate provisions of the treaties especially the principle of *non- refoulement*, reflects the international recognition of the principle.More than 120 States have incorporated the *non-refoulement*provisions in their municipal law.[53] Malaysia is one of the very few states which have not made the rule part of its domestic law.[54]

Finally, States actual practices of not rejecting, removing and returning refugees within their territory to a frontier where the refugees will be persecuted or their life and liberty are at risk of persecution, torture or any inhumane and degrading treatment, is another clear-cut example of the acceptance and recognition of the principle of *non-refoulement* by the international community of States as non-derogatory. Instances of State practices can be seen in situations of mass influx which usually arise as a result of war or ethnic cleansing. These crises, more often than not, make front page news and often lead to changes in the social or ethnic demographics of a country or region.

[47]Helton, A. and Jacobs, E. "What is Forced Migration?"*Geographical Immigration Law Journal*. (1999), p. 526.

[48] United Nations High Commissioner for Refugees: "Collection of International Instruments and other Legal Texts Concerning Refugees and Displaced Persons: Regional Instruments," (1995), p. 206.

[49] Fitzpatrick, J., "Temporary Protection of Refugees: Elements of a Formalized Regime", *AJIL,*(2000), *p.* 284.

[50]Koh, H., "The Haitian Centers Council Case: Reflections on Refoulement and Haitian Centers Council",*Harvard International Law Journal*, (1999) p. 30.

[51]UNHCR.State Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, Publication No. 3b73b0d63.pdf.2016,*available at*https://www.unhcr.org.html (last visited April 16, 2009).

[52] A Protocol is a subsequent supplement to a treaty which can be used to amend a treaty.

[53] Imam, S.D., "Escaping the Principle of Non-refoulement",*International Journal of Business, Economics andLaw*(2013) p. 87.

[54]*Ibid*., p. 87.

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During the refugee crisis caused by the civil turmoil in Rwanda, about three million refugees were produced. The conflict began with the massacre of an estimated 500,000 Rwandans in 1993. Most of those killed were Tutsi, which therefore prompted retaliation from the Tutsi community and ultimately an extremely bloody war. The majority of refugees fleeing the country over the ensuing months were Hutu and therefore viewed bymany as the perpetrators of the original massacre. Despite this, countries like Zaire now Democratic Republic of Congo, Burundi and Tanzania were the primary receivers of these refugees.[55]

Also, during the civil war that ravaged Liberia in 1989, the numbers of refugees were estimated at around 700,000, countries like Ghana, Togo and Nigeria sheltered these large numbers, in adhering to the principle of *non-refoulement* contained in the 1969 OAU Convention Relating to Refugees.[56] In fact, Amnesty International[57] has stated that "historically, the response of most African countries and communities towards the displaced has been generous, reflecting African values of hospitality and long-standing ethnic political and cultural links between refugees and host populations."[58]

States practices of *non-refoulement* can also be seen in the behaviour of some States towards extradition.[59] For instance, countries like Bolivia, Ecuador, Iceland, Nicaragua, Switzerland, Venezuela and Zimbabwe do not extradite a person no matter his mission in the host country.[60] The recent wrangling between Ecuador and Julian Assange, however, makes one wonder if Ecuador is changing its gesture towards non-refoulement.

THE VIOLATION OF THE INVIOLABLE

Derogations contemplate not only the rejection of the norm, but also its amendment or partial infraction. Article 33(1) of the United Nations Convention Relating to the Status of Refugees expressly compels contracting State parties not to 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. The non-derogable nature of Article 33 is specifically mentioned by Article 42(1) of the Refugee Convention.[61]

The 2015 Syrian refugee crisis brought home to many the fact that States now seek legal excuses and justifications that enable them to remove persons who enter their territories or prevent their entry without protecting the rights of the removed persons to life, liberty, and protection from torture and cruel, inhuman, or humiliating treatment or punishment. The death of a 3-year old Syrian refugee boy in the Mediterranean Sea because the Canadian government allegedly did not grant his relatives asylum because their application

[55] Rodger, J., Defining the Parameters of the Non-Refoulement Principle. *Thesis*.International Law.Law.Victoria University of Wellington.(2001, p. 14.

[56] Article 2(3) of the OAU Convention Relating to Refugees provides for the principle of non-refoulement.

[57] Amnesty International is an organization responsible for watching human rights record in the world.

[58] Rodger, J. *op.cit.*, p. 15.

[59] Imam, S.D., op. cit., p. 87.

[60] Giambruno, N.The Best Countries for Your Escape Plan.Casey Research International Man. 2016,*availableat http://*www.international.com(last visited June 18, 2019).

[61] Article 42(1) provides that: At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16(1), 33, 36-46 inclusive.

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was not complete[62] shows the rigours and even horrors that those seeking safety in another country face; when there is a principle which guarantees their protection.

The practice of non-entrée by powerful states to prevent refugees from ever reaching their jurisdiction at which point they become entitled to the benefit of the duty of *non-refoulement* and other rights set by the 1951 Refugee Convention.[63] The forms of non-entrée include visa controls, carrier sanctions, and high seas interdiction.

Furthermore, since many countries are bound by extradition treaties, their obligations under those treaties often conflict with their responsibilities under the *non-refoulement* provisions. The case of **Soering v. United Kingdom**[64]particularly highlights the conflict that can arise between an extradition treaty and the principle of non-refoulement. In that case, Jens Soering, 18 years old son of a German diplomat was enrolled at the University of Virginia, when in the night of March 30, 1985 the parents of his fiancée, Elizabeth Haysom, were brutally murdered in their Virginia home. The evidence showed that either Soering or Haysom must have been at the crime scene. When the investigation zeroed in on Soering and Haysom, the couple fled to Europe. Eventually they were arrested in England. In British custody, Soering admitted the crime to save his girlfriend from the death penalty. For himself, he hoped to be extradited to Germany, where he could expect a maximum sentence of ten years. However, Virginia filed for extradition based on a 1972 extradition treaty between the United States and Britain. Soering, however, brought a complaint under the European Convention on Human Rights asserting that he would face inhuman and degrading treatment contrary to Article 3 of the European Convention on Human Rights and Fundamental Freedoms, which indirectly deals with the principle of *non-refoulement*. He also contended that he could be exposed to the death row phenomenon where he would be kept in detention for an unknown period, awaiting execution. The European Commission of Human Rights held that the death row phenomenon did not violate Article 3 of the European Convention, hence, Soering could be extradited to Virginia where he could face this treatment. However, the European Court of Human Rights eventually held that the death row phenomenon actually violated Article 3 of the European Convention. After obtaining diplomatic assurances from the United States that Soering would not face the death penalty, the United Kingdom extradited him to Virginia where he was sentenced to 90 years imprisonment.

Additionally, diplomatic assurances are an increasingly popular way for governments to get around the international ban on torture as they smooth the way for undesirable foreigners to be sent to another country where they will be at risk or torture.[65] Diplomatic assurances are another way that States use to justify extraditions and other transfers of individuals to countries with a known record of torture or ill-treatment, on the

[62]Los Angeles Times.Death of Syrian toddler throws global spotlight onto refugee crisis, *available at* touch.latimes.com/#section-1/article/p2p-84351047 (last visited Juner 3, 2019).
[63] Hathaway, J.C. &Gammeltoft-Hansen, T.,"Non-Refoulement in a World of Cooperative Deterrence" *Law & Economics Working Papers*(2014), p. 11.
[64](1989) 11 EHRR 439.

[65] Human Rights Watch..What are "Diplomatic Assurances" against Torture?*available at* http://www.hrw.org/news/2006/11/10/diplomatic assurances against torture (last visited June 30, 2019).

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basis that the governments of those countries have provided assurances (so-called "diplomatic assurances") that the individuals will be treated humanely.[66]

TOWARD AN IDEAL PRINCIPLE THAS IS REALISTIC

The issue of the non-derogability of *jus cogens*normswill continue to be a problem. In law, there is no absolute. All the evasive practices mentioned above will continue to hold sway as long as States interact with one another. It is not possible for there to be a rule which protects refugees without any exception. Though the principle of *non-refoulement* meets the requirements of a *jus cogens* norm, it is inconceivable to think of a rule without an exception. Already, exceptions of national security, having a conviction status and suspicion of committing a crime are provided in Articles 33(2) and 1F of the Convention. This is a monumental contradiction for a principle that is supposed to be non-derogable.Instead of engaging in its continuing ambiguity, Article 42(1) of the Convention should be amended in such a way that States can make reservations to the provision of Article 33(1). This will bring the Convention in tandem with what is reality where States cannot but resort to *refoulement*. Even, States that are signatories to Conventions providing for the absolute peremptoriness of this principle are the worst offenders. For example, Germany, in 2016, voted in a regional election which was seen as a test of Chancellor Angela Merkel's progressive policy on refugees. Not so long ago, the United Kingdom voted to leave the European in a move seen as a rejection of refugee influx. Moreover, in the face of new wave of terrorism around the world, States are bound to continue to adopt sterner and severe attitudes towards refugees.

However, balance must be laid carefully between the need for States to guard against criminal activity and refouling a refugee to a place where he/she is danger of his/her life. This balancing can be done by weighing the seriousness of the crime of the refugee to the danger of his *refoulement*.

CONCLUSION

What I have attempted to achieve in this studyis to trace the principle of *jus cogens* as an ideal principle to a modern burdensome idea, using the principle of *non-refoulement* as a mirror. The aim of the study has not been to paint *jus cogens* as an irrelevant standard in the modern world. After all, it is a principle that seeks the protection of human dignity and respect for human dignity is evergreen. It is also a principle that, in spite of its defects, is still eminently worthy of preservation. The point has simply been to urge that a more concerted effort be made in realising that States would not always have a peremptory norm at the back of their minds while violating a principle of *jus cogens*. Ascribing a principle as *jus cogens* is simply like using a razor to cut a sequoia.

[66]Amnesty International.Diplomatic assurances' – No Protection against Torture or Ill-Treatment.Publication No – Act/40/021/2005, *available at*https://www.amnesty.org (last visited June. 20, 2019).

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