Chapter 10
Non-refoulement as Custom and *Jus Cogens*? Putting the Prohibition to the Test

Cathryn Costello and Michelle Foster

Abstract The norm of *non-refoulement* is at the heart of the international protection of refugees yet there remains a lack of consensus as to its status. In this contribution, we examine the question whether it has attained the status of a *jus cogens* norm. Adopting the methodology of 'custom plus' we first examine whether *non-refoulement* has attained the status of custom, concluding that widespread state practice and *opinio juris* underpin the view that it is clearly a norm of customary international law. Moreover, much of this evidence also leads to the conclusion that it is ripe for recognition as a norm of *jus cogens*, due to its universal, non-derogatory character. In other words, it is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted. The chapter then examines the consequences for its

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recognition as *jus cogens*, exploring some of the many ways in which *jus cogens* status may have meaningful implications for the norm of *non-refoulement*.

Keywords *Jus cogens* · International refugee law · *Non-refoulement* · Torture · Customary international law · Implications of *jus cogens*

Contents

10.1 Introduction 274
10.2 Understanding and Identifying *Jus Cogens* 276
10.2.1 'Custom Plus' 279
10.2.2 Understanding Non-derogability 280
10.3 *Non-refoulement* as Customary International Law 282
10.3.1 Non-refoulement in Contemporary Treaty Law 283
10.3.2 *Opinio Juris* 286
10.3.3 State Practice 297
10.3.4 Subsidiary Means for the Determination of Customary International Law 303
10.3.5 The Scope of the Customary International Law Norm of Non-refoulement 305
10.4 The Customary Norm of *Non-refoulement* as *Jus Cogens* 306
10.5 What Difference Does *Jus Cogens* Character Make? 310
10.5.1 Non-derogability 310
10.5.2 *Jus Cogens* and the Law of Treaties 312
10.5.3 State Responsibility 315
10.5.4 Constraining the UN Security Council 317
10.6 Does a Risk of a *Jus Cogens* Violation Create an Obligation of Non-refoulement? 319
10.6.1 *Jus Cogens* and Positive Duties—Hierarchy Without Consequences 320
10.6.2 *Jus Cogens* Prohibitions and the Duty of Non-refoulement—A Brief Investigation 321
10.7 Conclusions 323
References 324

10.1 Introduction

When refugees flee, their immediate need is protection from being returned. *Non-refoulement* is the central norm of the refugee regime—without it, other protections are meaningless. As Jean-Francois Durieux has written, 'the principle of *non-refoulement* is not the foundation of the [Refugee] Convention, but its cornerstone: the protection Convention (and other) refugees are owed would be illusory if it did not include protection against forcible return.'[1] *Non-refoulement* (in its focal sense) is rooted in a negative duty not to return, while duties to refugees also include a range of positive duties of assistance. Notably too, the refugee regime also envisages international responsibility sharing,[2] but those obligations are owned by the international community generally, and often difficult to allocate and enforce.

[1] Durieux 2013, at 167.

[2] Preamble of the 1951 Convention Relating to the Status of Refugees, 189 UNTS 137 (Refugee Convention).

UNHCR has stated repeatedly that the numbers of displaced people are at the highest level since the end of the Second World War. Notably that figure comprises around 40 million internally displaced persons, and 20 million refugees, of whom around 4 million are displaced from Syria. The vast majority of those Syrian refugees are in four countries: Lebanon, Turkey, Jordan and Iraq.[3] That refugees tend to cluster in the neighbouring countries is not unusual. This tends to place great responsibility for refugee protection on states in the immediate vicinity of persecution and conflict. This is particularly the case when other potential countries of asylum, particularly the rich ones, have developed a range of policies and practices to prevent asylum-seekers and refugees from reaching their territory.[4] Countries facing a mass influx may wish to close borders, while those further away may employ practices to prevent people fleeing further on. The norm of *non-refoulement* is pertinent in both contexts.

Evidently, legal protections for refugees are elusive in many contexts. In the absence of legal routes to seek protection, over 1 million people crossed the Mediterranean Sea irregularly in 2015, and over 3700 died or went missing in the attempt.[5] As people seeking refuge move onwards across Europe, several states have closed borders and made transit difficult. Once again, 'safe zones' inside refugee-producing countries are under discussion.[6] Other states engage in non-arrival practices of dubious legality. Australia's maritime push-backs are notorious,[7] but the border practices of other states also imperil refugee protection. In 2015, a sharp increase in the number of stateless Rohingya, Bangladeshis and other asylum-seekers travelling by boat across the Indian Ocean in search of protection led to Indonesia, Malaysia and Thailand 'pushing back' boats with the consequence that thousands were left stranded at sea.[8]

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[3] UNHCR, Syria regional refugee response, 2015. http://data.unhcr.org/syrianrefugees/regional.php. Accessed 20 September 2015.

[4] Gammeltoft-Hansen 2013, at 15; and Gammeltoft-Hansen and Hathaway 2015, at 236–237.

[5] UNHCR, Refugees/Migrants emergency response—Mediterranean, 2015. http://data.unhcr.org/mediterranean/regional.php. Accessed 30 December 2015.

[6] For a discussion of the practice of 'safe-zones', see Long 2012; and Orchard 2014.

[7] 'Operation Sovereign Borders' has been the most visible manifestation of the push back policy, and this was further supported in 2014 by the passage of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014.

[8] See Joint Statement by UNHCR, OHCHR, IOM and SRSG for Migration and Development: Search and rescue at sea, disembarkation, and protection of the human rights of refugees and migrants now imperative to save lives in the Bay of Bengal and Andaman Sea, 19 May 2015. http://www.unhcr.org/555aee739.html. Accessed 17 December 2015.

Given its limited but crucial function, it is therefore timely to consider the legal status of *non-refoulement*. This chapter addresses the key question as to whether the norm of *non-refoulement* has attained the status of a *jus cogens* norm and if so what that would mean in practice for the protection of refugees.[9]

In Sect. 10.2, we sketch our approach to the contested question of how to understand the concept of *jus cogens*, and how to identify it. We endorse the 'custom plus' approach, a demanding approach to the identification of *jus cogens*, in part as we wish to put *non-refoulement* to the test. By 'custom plus' we mean a method for identifying *jus cogens* that draws on the standard methods of identifying norms of customary international law, with the additional requirement of adequate *opinio juris* as to the *jus cogens* status of the norm in question. Our use of this method does not rule out other routes to *jus cogens*, but we use it as it is both orthodox and stringent.

Section 10.3 then addresses the question whether *non-refoulement* has attained the status of a norm of customary international law. In Sect. 10.4, we turn to the question whether the customary norm of *non-refoulement* has attained the status of a *jus cogens* norm. In Sect. 10.5, we consider the consequences of a finding that *non-refoulement* has attained the status of a *jus cogens* norm. While some scholars have questioned whether it makes much difference to refugee protection, in fact the consequences may be significant. For instance, a treaty or treaty provision is void if it conflicts with a peremptory norm (as set out in Article 53 of the Vienna Convention on the Law of Treaties). We consider the implications of this rule given that Article 33(2) of the 1951 Convention relating to the Status of Refugees[10] (Refugee Convention) sets out an exception to *non-refoulement*. Section 10.6 briefly considers whether the *jus cogens* status of certain prohibitions (apartheid, torture for instance) necessitates particular *non-refoulement* obligations.

10.2 Understanding and Identifying *Jus Cogens*

According to the Vienna Convention on the law of Treaties (VCLT), a peremptory norm of general international law is 'a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[11]

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[9] We observe that the concept of *jus cogens* may be relevant to other aspects of refugee status. For example, in determining which violations of human rights are sufficiently serious to constitute persecution, it has sometimes been suggested that if this is understood as involving a hierarchical analysis, then the *jus cogens* nature of certain violations may be relevant. However, as explained by Foster, reliance on *jus cogens* in this context has limited pertinence given the narrow range of violations widely accepted to have attained the status of a *jus cogens* norm. Foster 2007b. By contrast, a wide range of potential human rights violations are understood to be encompassed within the meaning of persecution. See Hathaway and Foster 2014, at 208–287.

[10] Article 33(2) Refugee Convention.

[11] Article 53 of the 1969 Vienna Convention on the law of Treaties, 1155 UNTS 331 (VCLT).

Reflecting the innovative character of the introduction of the notion into the law of treaties, the drafters assumed that over time, the content would develop. However, the settled content of *jus cogens* has emerged via stipulation, with the methodology remaining obscure. The ILC states that 'those peremptory norms that are clearly accepted and recognised include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.'[12] Stipulation by definition provides no explanation, and the precise method for identifying *jus cogens* remains elusive. As Koskenniemi has deftly characterised, the text of Article 53 VCLT reflects a compromise between the consensualist view that norms of *jus cogens* arise out of agreement, and the descending or non-consensualist view, whereby they emerge out of some superior normative commitments.[13]

The consensualist view, based on the notions of *acceptance* and *recognition*, suggests that the Vienna Convention 'conceptualises *jus cogens* as a norm of positive law, founded on consent'.[14] Yet, the genealogy of the VCLT provision is generally traced back to the natural law thinking of Verdross.[15] Since then, different schools of thought on *jus cogens* have developed. Indeed, debates about *jus cogens* are rooted in different conceptions of international law, indeed, as Linderfalk has suggested, of law itself.[16] Positivist conceptions of international law tend to support a view of *jus cogens* as a species of custom, whereas more expansive notions are often rooted in broader conceptions of legality, or even natural law. Saul has identified three competing approaches in the literature: natural law, public order and customary international law.[17]

Some conceptions of *jus cogens* have a genealogy in natural law thinking, and evoke the fundamental values of the international community as the source of *jus cogens*. For example, amongst the conceptions that are redolent of natural law is that of the Inter-American Court of Human Rights, which describes *jus cogens* as deriving 'directly from the oneness of the human family'[18] heavily influenced by Judge Antônio Augusto Cançado Trindade.[19] The Inter-American Commission in

[12] UNGA, Report of the International Law Commission, 53rd session of the ILC, UN Doc. A/56/10, 2001, at 208.

[13] Koskenniemi 1989.

[14] UNGA, Report of the International Law Commission, 66th session of the ILC, UN Doc. A/69/10, 2014, at 280.

[15] Verdross 1937, 1966.

[16] Linderfalk 2015, at 3. '[M]any assumptions that discussants bring to bear on their contributions to the *jus cogens* debate eventually turn on their definition of law.'

[17] Saul 2014, at 2.

[18] *Juridical Condition and Rights of Undocumented Migrants*, IACtHR, Advisory Opinion, No. OC-18/03, 17 September 2003, paras 99–100.

[19] Cançado Trindade 2005, 2008, 2013.

contrast tends to adopt a customary law approach in many cases.[20] Cassesse refers to the notion that '[t]he fundamental values of the world society are those enshrined in that core of rules that constitute the international *jus cogens,* a set of peremptory norms that may not be derogated from.'[21] This move then raises a methodological problem as to who is to identify *jus cogens* and by what means in the context of the decentralised global legal order. Tomuschat suggests that 'generally, rules of *jus cogens* will evolve from the common value fund cherished by all nations. To establish them is therefore less a constitutive than a declaratory process.'[22] Nonetheless, he suggests that as well as the deductions 'from the constitutional foundations of the international community', the 'regular criteria of customary law keep an important evidentiary function. The deductive method can never be used to oppose and disregard the actual will of the international community.'[23]

A further expansive conception invokes the notion of 'public order of the international community,' and is usually traced back to Moser's General Course at the Hague Academy in 1974.[24] Moser defined the international *ordre public* as the principles and rules of 'such vital importance to the international community as a whole that any unilateral action or any agreement which contravenes these principles can have no legal force'. For Zemanek, the move from natural law to *ordre public* is a 'paradigmatic change,'[25] in that while natural law connotes immutable values, public order invites a shifting body of values.[26]

In our view, the additional *opinio juris* required to confer *jus cogens* status on a norm will generally be related to the importance of the norm, reflected in the notion that it embodies a 'fundamental value'. That fundamentality is reflected in its non-derogability, so there is no need to reach for theories of universal morality. Our approach, focusing on custom, does not exclude other routes to *jus cogens*. For instance, if a Treaty was universally ratified endorsing the view that a particular provision was non-derogable, that too could be taken as an indication of *jus cogens* character.

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[20] *Michael Domingues v United States*, IACsionHR, Case No. 12.285, Report No. 62/02, 22 October 2002, para 50. The Commission (citing scholarly work) explained that: 'while based on the same evidentiary sources as a norm of customary international law, the standard for determining a principle of *jus cogens* is more rigorous, requiring evidence of recognition of the indelibility of the norm by the international community as a whole. This can occur where there is acceptance and recognition by a large majority of states, even if over dissent by a small number of states.'

[21] Cassese 2012, at 139.

[22] Tomuschat 1993, at 386.

[23] Ibid.

[24] Ibid.

[25] Zemanek 2001, at 383.

[26] Ibid., at 384. 'Instead of reflecting the firm, for some immutable, commands of natural law, *jus cogens* became the expression of fundamental values shared by the international community of states at a certain time and it is, therefore, not absolutely free of contradictions.'

10.2.1 'Custom Plus'

The expansive views of *jus cogens* pose normative and methodological problems, so in this contribution we take the view that *jus cogens* status may be inferred from the same evidence that supports a finding that a norm is one of customary international law, with an added requirement of *opinio juris* as to the character of the norm. This view is orthodox. It is supported by the International Court of Justice, (ICJ) which refers to some *jus cogens* norms as 'intransgressible principles of international customary law.'[27] Thus, at least some *jus cogens* norms are particularly compelling norms of customary international law.

Under this approach, *jus cogens* is identified via similar methodology to customary international law, although this should not be mistaken for conflation of the two sorts of norms. For example, in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, the ICJ found that, 'the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)'.[28] In explaining this conclusion, the Court observed that the 'prohibition is grounded in a widespread international practice and on the *opinio juris* of States', citing numerous international instruments 'of universal application,'[29] including the Universal Declaration of Human Rights, the 1949 Geneva Conventions for the protection of war victims, the ICCPR, and General Assembly resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading treatment.[30] In addition the Court relied on the fact that the prohibition has 'been introduced into the domestic law of almost all States',[31] and that 'acts of torture are regularly denounced within national and international fora'.[32]

The two key elements mentioned by the ICJ in this case in connection with establishing *jus cogens*, namely, practice and *opinio juris*, are also the fundamental tenets of a claim of customary international law. Again, this does not mean that only custom may become *jus cogens*, but rather that the evidence that supports

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[27] *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion, 8 July 1996, para 79. See also the dissent of Judge Weeramantry, who was clearer on this point. 'The rules of the humanitarian law of war have clearly acquired the status of *jus cogens*, for they are fundamental rules of a humanitarian character, from which no derogation is possible without negating the basic considerations of humanity which they are intended to protect.' Ibid., Dissenting Opinion of Judge Weeramantry, at 496. See also ibid., Declaration of President Bedjaoui. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion, 9 July 2004, para 157.

[28] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, ICJ, Judgment, 20 July 2012, para 99.

[29] Ibid.

[30] Ibid.

[31] Ibid.

[32] Ibid. Importantly there is no evidence cited by the ICJ in relation either to domestic implementation of the norm or the point about regular denunciation.

identification of custom may also support a conclusion of a norm's *jus cogens* character.

Some commentators accept that *jus cogens* is a form of customary international law, but insist that its identification requires adaptation of the methodology used to identify customary international law.[33] This 'custom minus' view finds some support in the 1986 *Nicaragua* judgment of the ICJ.[34] This reflects the fact that by definition, *jus cogens* is not subject to persistent objection, so the state practice required to support it does not need the degree of consistency as that of general custom. For instance, South Africa's objection to the prohibition of apartheid was no impediment to that prohibition's *jus cogens* character. In this way, some norms become *jus cogens* even when that objection would hinder their recognition as custom. Our view does not rule out these scenarios, but simply notes that there is a context-dependent assessment as to whether a particular norm is recognised as having the requisite degree of universality and non-derogability in order to be *jus cogens*.

10.2.2 Understanding Non-derogability

While non-derogability is a defining feature of *jus cogens*, it is a necessary but insufficient one. In *Jurisdictional Immunities of the State* (*Germany v Italy*), the ICJ confirmed the basic idea that '[a] *jus cogens* rule is one from which no derogation is permitted.'[35] However, not all non-derogable norms of customary international law may be assumed to be *jus cogens*. Accordingly, we agree with de Wet, that 'non-derogability is a factor to be taken into account, but is not in itself decisive.' This is in keeping with the idea behind the ILC Commentary to Draft Article 50 of the Draft Articles on the Law of Treaties.[36] In particular for human rights norms, the Inter-American Commission on Human Rights suggests non-derogability is a 'starting point' for the identification of *jus cogens*.[37]

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[33] We note also that some scholars, notably Cassese, challenges the view that *jus cogens* are a sub-set of customary norms. Cassese 2012. For a persuasive critique, see Tasioulas 2016, at 13–14.

[34] *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, ICJ, Merits, Judgment of 27 June 1986. See further Orakhelashvili 2006, at 119.

[35] *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, ICJ, Judgment, 3 February 2012, para 95.

[36] The ILC states that it would be incorrect 'to say that a provision in a treaty possesses the character of *jus cogens* merely because the parties have stipulated that no derogation from that provision is to be permitted, so that another treaty which conflicted with it would be void.' International Law Commission, Draft Articles on the Law of Treaties with commentaries, 18th session, UN Doc. A/6309/Rev.l, 1966, Article 50, para 2.

[37] *Victims of Tugboat '13 de Marzo' v Cuba,* IACHR, Report No.47/96, Case 11.436, 16 October 1996, para 79 (cited in de Wet 2015, at 544).

The prohibitions on torture and slavery, for instance, are evidently non-derogable, and treated as such under the International Covenant on Civil and Political Rights (ICCPR), European Convention on Human Rights (ECHR) and American Convention on Human Rights (ACHR).[38] However, the list of non-derogable rights varies across human rights treaties, although they have in common the stipulation that the following rights are non-derogable: the right to life, the prohibition of slavery, prohibition of torture or cruel, inhuman or degrading treatment or punishment and prohibition of retroactive penal measures.

The Human Rights Committee (HRC) in General Comment 29 has drawn on 'other obligations in international law' to expand the scope of non-derogability.[39] It adds genocide and crimes against humanity as defined by the Rome Statute of the International Criminal Court. Notably also, the HRC expands non-derogability to certain procedural obligations, including the right to an effective remedy, on the basis that it is 'inherent in the Covenant as a whole'.

In this contribution, we are keen to put *non-refoulement* as a candidate for *jus cogens* status to the most suitable test for *jus cogens* in this context, so we adopt the method of 'customary international law plus', namely that to be *jus cogens*, a norm must meet the normal requirements of customary international law (with the exception that the get-out for persistent objectors is no longer relevant), and furthermore have that additional widespread endorsement as to its non-derogability and peremptory character.

In adopting this approach, importantly, we do not rule out the possibility that there are other routes to *jus cogens* status, in particular for human rights norms. We note attempts to ground human rights' *jus cogens* status in general principles of law, for instance.[40] The Opinion of the Inter-American Court of Human Rights on the *Juridical Conditions and the Rights of Undocumented Migrants* is a striking example of a human rights court taking a broad view of *jus cogens*, to lead to a legally innovative conclusion. To support its view that the principle of non-discrimination was customary international law (in contrast to specific prohibitions of discrimination on say, grounds of race) it cited several treaties and declarations.[41] However, in making the claim that this general norm of non-discrimination was

[38] Article 4 of the 1966 International Covenant on Civil and Political Rights, 999 UNTS 171 (ICCPR); Article 15 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms European Convention on Human Rights, 213 UNTS 222 (ECHR); Article 27 of the 1969 American Convention of Human Rights, 1144 UNTS 123 (ACHR). Note, there is no derogation clause in the 1981 African Charter of Human and Peoples' Rights, 1520 UNTS 217.

[39] UN Human Rights Committee, General Comment No. 29: Derogations during a state of emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para 9. For a discussion, see Joseph 2002, at 91.

[40] Simma and Alston 1988–1989.

[41] *Juridical Condition and Rights of the Undocumented Migrants*, para 86.

also *jus cogens*, its reasoning was somewhat opaque.[42] As Chetail notes, 'while the fundamental principle of non-discrimination is not contested as such, its implications for non-nationals are still difficult to grasp with certainty.'[43] Shelton suggests that the issue of *jus cogens* was raised in order to anticipate possible US objections that it was not bound by the relevant international norms.[44] While the content of the Opinion is hard to square with orthodox legal principles, it is part of a project to develop human rights protections that protect the *human*, rather than permit restrictions on the migrant.[45] Of course, the IACtHR can develop this approach by interpreting the Inter-American Convention, but its reliance on *jus cogens* gave an added normative dimension to the decision.

10.3 *Non-refoulement* as Customary International Law

The overwhelming majority of scholarly opinion favours the view that *non-refoulement* constitutes a customary norm,[46] although there continues to be some debate on this question.[47] In particular protagonists argue about the application of the two crucial elements, and especially the significance of state practice in contravention of the customary norm.

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[42] See ibid., para 100. 'The principle of equality before the law and non-discrimination permeates every act of the powers of the State, in all their manifestations, related to respecting and ensuring human rights. Indeed, this principle may be considered peremptory under general international law, inasmuch as it applies to all States, whether or not they are party to a specific international treaty, and gives rise to effects with regard to third parties, including individuals.'

[43] Chetail 2012, at 81.

[44] Shelton 2006, at 309.

[45] See generally Dembour 2015.

[46] See Goodwin-Gill and McAdam 2007, at 354. Goodwin-Gill has recently gone further to argue that the customary international law norm is one of temporary refuge/protection. 'Temporary refuge, nonetheless, is a matter of obligation'. Goodwin-Gill 2014, at 441. For further support, see Kälin et al. 2001, at 1342–1346; Chetail 2012, at 76; and Wallace 2014, at 435. Wallace indicates that 'there would appear to be general consensus that the principle of *non-refoulement* as expressed in Article 33(1) is a principle of customary international law'. See also Messineo 2013, at 142. He argues that '[t]here is near universal acceptance of the legal binding nature of *non-refoulement*, or *opinio juris* … most commentators and- more decisively- states agree on the customary nature of *non-refoulement*'. See also Gilbert 2004, at 966; Duffy 2008, at 383 and 389; Trevisanut 2009; Giuffre 2013, at 718; Perluss and Hartman 1985–1986; Chan 2006, at 232–235; and Vang 2014, at 371.

[47] Unquestionably, the most prominent scholar who argues against *non-refoulement* as custom is Hathaway although Hailbronner has historically been a prominent protagonist as well. Hathaway 2010; Hailbronner 1986. Messineo recently concluded that 'history seems to have proved the wishful thinker right,' and that arguments 'against the customary international law nature of *non-refoulement* of refugees seems slightly anachronistic'. Messineo 2013, at 142.

10.3.1 Non-refoulement in Contemporary Treaty Law

It is well accepted that a treaty-based norm can generate a customary rule of international law,[48] however it is first necessary that such a treaty rule or provision 'be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law'.[49] There is no question that such requirement is satisfied in the case of *non-refoulement*.[50]

The principle of *non-refoulement* is set out explicitly in many treaties, most notably the 1951 Refugee Convention, but also the Convention Against Torture[51] and the International Convention for the Protection of all Persons against Enforced Disappearance.[52] In addition, human rights treaties are generally interpreted as prohibiting *refoulement*. This holds under, for example, the ICCPR, and regional human rights treaties. In other words, as part of the positive obligations inherent in the obligation to protect against human rights violations, states are obliged to conduct a risk assessment and not to return people where they would face serious human rights violations on return. In addition, it has been persuasively argued that international humanitarian law also contains such an obligation, based on the duty in Common Article 1 of the Geneva Conventions.[53] Finally, as Lauterpacht and Bethlehem observe, *non-refoulement* is also explicitly protected in standard-setting conventions concerned with extradition.[54]

Turning to the process as to how a conventional rule passes 'into the general corpus of international law,'[55] Lauterpacht and Bethlehem undertook a comprehensive analysis of state ratification of relevant treaties in 2003 in order to assess whether there is 'widespread and representative participation in the conventions said to embody the putative customary rule'.[56] In terms of ratification Lauterpacht and Bethlehem found that when all relevant instruments were considered, 170 of the 189 members of the United Nations, or around 90 % of the membership, are party to one or more conventions which include *non-refoulement* as an essential

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[48] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, ICJ, Judgment of 20 February 1969, paras 70–71.

[49] Ibid., para 43.

[50] Lauterpacht and Bethlehem 2003, 143–146; and Messineo 2013, at 142. See also *C and others v. Director of Immigration and another*, Hong Kong Court of Appeal, Civil Appeals, No. 132–137 of 2008, 21 July 2011, para 47. 'In the present case, there is no dispute over the first element [the concept must be of such a character and its formulation of sufficient precision as to be capable of creating a general rule'].

[51] 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (Convention against Torture).

[52] Article 16 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, 2715 UNTS 3 (Convention against Enforced Disappearance).

[53] Ziegler 2014.

[54] Lauterpacht and Bethlehem 2003, at 93.

[55] *North Sea Continental Shelf Cases*, para 71.

[56] Lauterpacht and Bethlehem 2003, at 146.

component.[57] This figure has increased since that time.[58] They therefore concluded that participation in 'some or other conventional arrangement embodying *non-refoulement* is more than simply 'widespread and representative'. It 'is near universal'.[59]

While this analysis has subsequently been cited extensively with approval, it has been called into question by one prominent scholar on the basis that the various treaties cited are not identical.[60] However, it is not necessary that such provisions be identical; the International Law Commission suggests that 'the repetition *of similar* or identical provisions in a large number of bilateral treaties may give rise to a rule of customary international law or attest to its existence.'[61]

The principle of *non-refoulement* embodied in a wide range of treaties has the same fundamental core, albeit expressed in slightly different terms across different instruments. The Refugee Convention prohibits *refoulement* where a refugee's 'life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion,' with regional instruments containing similar prohibitions.[62] The CAT prohibits *refoulement* 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' and the Convention on Enforced Disappearances prohibits *refoulement* 'where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance'.[63] The ICCPR is interpreted as prohibiting return where there 'are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 [right to life]

[57] Ibid., at 147. In 2015, there were only 13 UN member states that have not signed any of the Refugee Convention or Protocol, the ICCPR or the Convention against Torture. They are as follows: Bhutan, Brunei Darussalam, Cook Islands, Kiribati, Malaysia, Marshall Islands, Micronesia (Federated States of), Myanmar, Niue, Oman, Singapore, Solomon Islands, and Tonga.

[58] For example, there have been two new states party to the Refugee Convention since then.

[59] Lauterpacht and Bethlehem 2003, at 147.

[60] Hathaway 2010, at 509.

[61] M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, at 29, para 42.

[62] Article II(3) of the 1969 Organisation of African Unity, Convention Governing Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45(OAU Convention). 'No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paras 1 and 2 [concerning persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion or who is compelled to leave his country of origin or place of habitual residence in order to seek refuge from external aggression, occupation, foreign domination or events seriously disturbing public order].' Article 22(8) ACHR reads: '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.'.

[63] Article 16(1) Convention against Torture.

and 7 [right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment]'.[64] Under the ECHR, while in the main *non-refoulement* concerns return to face real risks of treatment contrary to Article 3 ECHR (torture, inhuman and degrading treatment), flagrant denials or breaches of other rights may also trigger *non-refoulement*.[65] The ECtHR has explicitly recognised this possibility as regards Articles 4,[66] 5,[67] 6,[68] 7,[69] 8,[70] and 9.[71]

Although the texts differ in terms of the focal harms, the duty of *non-refoulement* is similar in all cases. It prohibits return to serious human rights violations, unless the risk in question is not sufficiently 'real'.

In any event, a treaty text 'cannot serve as conclusive evidence of the existence or content of the rules of customary international law'[72]; rather the argument that a rule set forth in a treaty has codified, led to the crystallisation of, or generated a new rule of customary international law, must be substantiated by evidence of both *opinio juris* and state practice in support of the rule.[73]

Hence, since widespread ratification of a norm 'may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law',[74] the twin elements of state practice and *opinio juris* remain ultimately determinative. In an oft-repeated passage, the ICJ explained in the context of custom that 'not only

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[64] UN Human Rights Committee, General Comment 31, Nature of the general legal obligation on states parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 29 March 2004, para 12.

[65] See McAdam 2007, at 136–172.

[66] *Ould Barar v Sweden,* ECtHR, No. 42367/98, 19 January 1999. The case illustrates that the ECtHR is open to claims under Article 4 ECHR, but found no risk of treatment contrary to Article 4 ECHR on return in the particular case.

[67] *Tomic v. UK,* ECtHR, No. 17387/03, 14 October 2003.

[68] *Soering v. United Kingdom*, ECtHR, No. 14038/88, 7 July 1989; *Drozd and Janousek v. France and Spain* and, ECtHR, No. 12747/87, 26 June 1992; *Mamatkulov Askarov v. Turkey*, ECtHR, No. 46827/99 and 46951/99, 4 February 2005; *Einhorn v. France*, ECtHR, No. 71555/01, 16 October 2001; *Al-Moayad v. Germany*, ECtHR, No. 35865/03, 30 February 2007; *Stapleton v. Ireland*, ECtHR, No. 56588/07, 4 May 2010; *Othman (Abu Qatada) v. United Kingdom,* ECtHR, No. 8139/09, 17 January 2012.

[69] *Gabarri Moreno v. Spain,* ECtHR, No. 68066/01, 22 July 2003.

[70] *F v. UK*, ECtHR, No. 17341/03, 22 June 2004.

[71] *Z and T v. UK*, ECtHR, No. 27034/05, 28 February 2006.

[72] M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, at 18, para 34.

[73] This appears to explain a key source of the disagreement between Hathaway and Lauterpacht and Bethlehem. Hathaway summarises the 'essence of the … claim' as follows: 'because an express or implied duty of *non-refoulement* is recognized in the various treaties…it is now the case that all states—whether bound by a relevant treaty or not- are legally obligated to honour the duty of *non-refoulement*.' Hathaway 2010, at 507. Yet Lauterpacht and Bethlehem consider other evidence of practice as well as *opinio juris*. Lauterpacht and Bethlehem 2003, at 146–149.

[74] International Law Commission, Identification of customary international law. Text of the draft conclusions provisionally adopted by the Drafting Committee, 67th session of the ILC, UN Doc. A/CN.4/L.869, 14 July 2015, at 3.

must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it'.[75] The 'two-element' approach is widely supported and well-entrenched.[76] However, while the existence of the two requisite elements is uncontroversial,[77] their precise meaning and application, particularly in the context of human rights treaties, can nonetheless be controversial.

In our view, the evidence points overwhelmingly to the establishment of *non-refoulement* as a norm of customary international law.

10.3.2 Opinio Juris

It is well accepted that evidence of *opinio juris* may take a wide range of forms including, according to the ILC,

> Public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organisation or at an intergovernmental conference.[78]

While there is insistence that the two elements are distinct and that they need to be substantiated separately, there is of course overlap in the types of evidence that may be relevant to establishing each element, particularly as the ILC concedes that practice may be constituted by both physical *and* verbal conduct.[79] The ILC Special Rapporteur on identification of customary international law has observed

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[75] *North Sea Continental Shelf Cases*, para 77.

[76] M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, para 17.

[77] In *R v Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others* Lord Bingham commented that: 'the conditions to be satisfied before a rule may properly be recognised as one of customary international law have been somewhat differently expressed by different authorities, but are not in themselves problematical.' *R v Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others* [2004] UKHL 55, Lord Bingham, para 23.

[78] International Law Commission, Identification of customary international law. Text of the draft conclusions provisionally adopted by the Drafting Committee, 67th Session of the ILC, UN Doc. A/CN.4/L.869, 14 July 2015, at 3.

[79] While the ILC maintains that 'each element is to be separately ascertained' it adds that 'This generally requires an assessment of specific evidence for each element.' M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, The report suggests amendment to Draft Conclusion 3[4]. International Law Commission, Identification of customary international law. Text of the draft conclusions provisionally adopted by the Drafting Committee, 67th Session of the ILC, UN Doc. A/CN.4/L.869, 14 July 2015, at 1. The word 'generally' was inserted following discussion of the flexibility needed depending on the area of law.

that resolutions adopted by states within international organisations and at international conferences 'are accorded considerable importance'.[80]

10.3.2.1 General Assembly Resolutions and the Recognition of Non-refoulement

The ICJ has long recognised that General Assembly resolutions, although not technically binding, may have 'normative value'[81] and can 'provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris.*'[82] The Court has indicated that it is necessary to consider, in relation to a General Assembly Resolution, both the content and conditions of the adoption, and to 'see whether an *opinio juris* exists as to its normative character'.[83] The Court further explained that a series of resolutions 'may show the gradual evolution of the *opinio juris* required for the establishment of the rule'.[84]

In the context of the use of nuclear weapons, the ICJ found that the language used in the relevant General Assembly resolutions referred to their use as being 'a direct violation of the Charter of the United Nations' and also that such use 'should be prohibited'.[85] It regarded such language as insufficiently indicative of *opinio juris*, presumably because the principle was not expressed as having been established independent of the Charter. In addition, several of the resolutions had been adopted with 'substantial numbers of negative votes and abstentions'[86]; hence, while the Court accepted that there was 'nascent *opinio juris*',[87] it fell short of 'establishing the existence of an *opinio juris* on the illegality of the use of such weapons'.[88]

By contrast in *Nicaragua*, the Court relied on several General Assembly resolutions and declarations that embodied the principle of non-intervention and concluded that such resolutions indicated sufficient *opinio juris*. It is worth noting that in none of the cited resolutions was the relevant principle explicitly described as customary international law; rather the language of 'principles' and 'basic principles' was used.[89]

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[80] Wood M, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, at 31, para 45.

[81] *Legality of the Threat or Use of Nuclear Weapons*, para 70.

[82] Ibid.

[83] Ibid. See also UNGA, Report of the International Law Commission, 67th session of the ILC, UN Doc. A/70/10, 24 August 2015, para 69. '[T]he particular wording used in a given resolution was of critical importance, as were the circumstances surrounding the adoption of the resolution in question.'

[84] *Legality of the Threat or Use of Nuclear Weapons*, para 70.

[85] Ibid., para 71.

[86] Ibid.

[87] Ibid., para 73.

[88] Ibid.

[89] See declarations referred to in *Case concerning Military and Paramilitary Activities in and against Nicaragua*, paras 203–204.

Turning to the principle of *non-refoulement*, the General Assembly has passed forty resolutions since 1977 to the present-day in which it has consistently recognised and affirmed the principle of *non-refoulement.*[90] Importantly such recognition has *not* been tied solely to relevant treaties but has been expressed as a more general stand-alone principle. In these resolutions, reference is typically made to the importance of increasing accessions to, and effective implementation of, the 1951 Convention and Protocol, before a distinct and further call is made for states to 'scrupulously observ[e] the principle of *non-refoulement*.'[91] In 1989 the General Assembly strengthened the language by invoking the phrase 'fundamental prohibitions' against 'the return or expulsion of refugees and asylum-seekers'[92] a form of words repeated in subsequent resolutions that have called on states 'to respect scrupulously the fundamental principle of *non-refoulement'*.[93]

The consistency of this affirmation and the clarity and lack of ambiguity with which it has been expressed provide very compelling evidence of *opinio juris* as to the customary nature of the principle of *non-refoulement*.[94] Such indications were further strengthened by the passage of *Resolution 57/187 (2001)* in which the General Assembly welcomed the Declaration adopted at the Ministerial Meeting of States Parties to the Convention and/or its Protocol.[95] This Declaration includes the following statement,

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[90] UNGA Res. 57/187, 18 December 2002; UNGA Res. 32/67, 8 December 1977; UNGA Res. 33/26, 29 November 1978; UNGA Res. 34/60, 29 November 1979; UNGA Res. 35/41, 25 November 1980; UNGA Res. 36/125, 14 December 1981; UNGA Res. 37/195, 18 December 1982; UNGA Res. 38/121, 16 December 1983; UNGA Res. 39/140, 14 December 1984; UNGA Res. 40/118, 13 December 1985; UNGA Res. 41/124, 4 December 1986; UNGA Res. 42/109, 7 December 1985; UNGA Res. 43/117, 8 December 1988; UNGA Res. 44/137, 15 December 1989; UNGA Res. 46/106, 16 December 1991; UNGA Res. 47/105, 16 December 1992; UNGA Res. 48/116, 20 December 1993; UNGA Res. 49/169, 23 December 1994; UNGA Res. 50/152, 21 December 1995; UNGA Res. 51/75, 12 December 1996; UNGA Res. 52/103, 9 February 1998; UNGA Res. 53/125, 12 February 1999; UNGA Res. 54/146, 22 February 2000; UNGA Res. 55/74, 12 February 2001; UNGA Res. 56/137, 19 December 2001; UNGA Res. 57/187, 18 December 2002; UNGA Res. 58/151, 22 December 2003; UNGA Res. 59/170, 20 December 2004; UNGA Res. 60/129, 20 January 2006; UNGA Res. 61/137, 25 January 2007; UNGA Res. 62/124, 24 January 2008; UNGA Res. 63/148, 18 December 2008; UNGA Res. 63/127, 15 January 2009; UNGA Res. 65/194, 28 February 2011; UNGA Res. 64/127, 15 January 2010; UNGA Res. 66/133, 19 March 2012; UNGA Res. 67/149, 6 March 2013; UNGA Res. 68/141, 28 January 2014; UNGA Res. 69/152, 17 February 2015.

[91] UNGA Res. 34/60, 29 November 1979.

[92] UNGA Res. 44/137, 15 December 1989.

[93] UNGA Res. 49/169, 23 December 1994; UNGA Res. 44/137, 15 December 1989; Resolution 46/106, 16 December 1991; Resolution 47/105, 16 December 1992; Resolution 48/116, 20 December 1993; Resolution 49/169, 23 December 1994; Resolution 51/75, 12 December 1996.

[94] For arguments in support of this point, see Goodwin-Gill 2014, Kälin et al. 2011, at 1344–1345.

[95] Kälin et al. 2011, at 1344.

> 4. Acknowledging the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of non-refoulement, *whose applicability is embedded in customary international law* …[96]

Although the Declaration was made only by states party to the 1951 Convention and/or 1967 Protocol, its endorsement by the General Assembly ensures that it has the approval and agreement of all members of the United Nations.[97] In our view this provides further compelling evidence that there is *opinio juris* sufficient to solidify *non-refoulement* as a norm of customary international law.

Of course, these developments would be far less significant had there been a pattern of dissent or abstention in relation to the adoption of the relevant resolutions.[98] As Michael Wood, the ILC Special Rapporteur on customary international law has explained, one must consider 'the method employed for adopting the resolution; the voting figures (where applicable); and the reasons provided by States for their position'.[99] A resolution adopted by consensus or by unanimous vote 'will necessarily carry more weight than one supported only by a two-thirds majority of States'.[100] In this regard, it is highly significant that the 40 resolutions that have recognised the principle of *non-refoulement,* including the endorsement of the Declaration that states that *non-refoulement* is 'embedded in customary international law,' have been widely accepted and subject neither to negative votes nor abstentions.[101]

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[96] Emphasis added. We acknowledge that the phrase 'embedded in' is rather curious language from the perspective of international law, because a norm either is or is not a customary norm. However given that 'embedded' is not a term of art nor does it have any specific meaning, the most logical conclusion is that the Declaration provides further compelling evidence of the international community's acceptance of *non-refoulement* as a customary norm.

[97] Kälin et al. 2011, at 1344.

[98] We note that in the past the US government has disputed that *non-refoulement* is a norm of customary international law, yet does not appear to have distanced itself in any way from these GA resolutions. In *Case concerning Military and Paramilitary Activities in and against Nicaragua* the ICJ took into account that the US had not issued statements qualifying its agreement or acceptance of similar resolutions and declarations. *Case concerning Military and Paramilitary Activities in and against Nicaragua*, at 107 [203]-[204].

[99] M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, para 49.

[100] Boyle and Chinkin 2007, at 226.

[101] See Article 18 of the 1945 Charter of the United Nations, 1 UNTS XVI (UN Charter); and Rules 82–95 of United Nations, Rules of procedure of the General Assembly, UN Doc. A/520/Rev.17, 2008. These concern voting in the General Assembly. For further discussion of consensus voting in this context, see Goodwin-Gill and McAdam 2007, at 346–347. Importantly Hathaway concedes that these resolutions go 'some distance in support of the claim that there is *opinio juris* for a duty of *non-refoulement* owed to more than just Convention refugees.' Hathaway 2010, at 512.

10.3.2.2 Executive Committee of the UNHCR

While the resolutions passed by the General Assembly are particularly significant given that it is a forum with near universal participation, it is recognised that 'other meetings and conferences of States may be important' in forming and identifying customary international law, including the work of 'organs of international organizations and international conferences with more limited membership'.[102]

In the context of *non-refoulement*, it is instructive to consider the work of the UNHCR Executive Committee which currently consists of 98 members, including a number of states that have ratified neither the 1951 Convention nor 1967 Protocol and yet host very large numbers of refugee populations.[103] The consensus reached by the Executive Committee in the course of its discussions is expressed in the form of Conclusions on International Protection (ExCom Conclusions). These conclusions are adopted by consensus, hence constituting particularly authoritative statements by a large group of states focused on issues of international protection.

It is significant that since 1975 the Executive Committee has repeatedly called for both states and non-states party to the relevant treaties 'scrupulously to observe the principle whereby no refugee should be forcibly returned to a country where he fears persecution'.[104] *Non-refoulement* is variously described as a 'fundamental principle,'[105] a 'fundamental prohibition',[106] a 'cardinal principle',[107] a 'humanitarian legal principle',[108] a 'recognized principle',[109] a principle of 'fundamental

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[102] M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, para 46. Here we focus on ExCom, however we note that Goodwin-Gill and McAdam provide examples of other methods by which the United Nations has recognised the importance of the principle of *non-refoulement*. Goodwin-Gill and McAdam 2007, at 213–215.

[103] See below.

[104] UNHCR, Executive Committee Conclusion No 1 (XXVI), 15 October 1975, para (b); UNHCR, Executive Committee Conclusion No 19 (XXXI), 16 October 1980, para (a); UNHCR, Executive Committee Conclusion No 71 (XLIV), 8 October 1993, para (g); UNHCR, Executive Committee Conclusion No 108 (LIZ), 10 October 2008, para (a).

[105] UNHCR, Executive Committee Conclusion No. 16 (XXXI), 9 October 1998, para (e); UNHCR, Executive Committee Conclusion No. 21 (XXXII), 21 October 1981, para (f); UNHCR, Executive Committee Conclusion No. 22 (XXXII), 21 October 1981, para (2); UNHCR, Executive Committee Conclusion No. 33 (XXXV), 18 October 1984, para (c); UNHCR, Executive Committee Conclusion No. 74 (XLV), 7 October 1994, para (g); UNHCR, Executive Committee Conclusion No. 94 (LIII), 8 October 2002, para (c)(i); UNHCR, Executive Committee Conclusion No. 99 (LV), 8 October 2004, para (l); UNHCR, Executive Committee Conclusion No. 80 (XLVII), 11 October 1996, para (e)(iii); UNHCR, Executive Committee Conclusion No. 100 (LV), 8 October 2004, para (i).

[106] UNHCR, Executive Committee Conclusion No. 50 (XXXIX), 10 October 1988, para (g); UNHCR, Executive Committee Conclusion No. 55 (XL), 13 October 1989 para (d).

[107] UNHCR, Executive Committee Conclusion No. 65 (XLII), 11 October 1991, para (c).

[108] UNHCR, Executive Committee Conclusion No. 19 (XXXI), 16 October 1980, para (a).

[109] UNHCR, Executive Committee Conclusion No. 15 (XXX), 16 October 1979, para (b).

importance',[110] with recognition of 'the fundamental character of the generally recognized principle'.[111] As in the case of General Assembly resolutions, the principle of *non-refoulement* is described as distinct and independent of treaty obligations;[112] hence there is no suggestion in any of these resolutions that its application is confined to states party to the 1951 Convention and/or Protocol.[113] Rather, the Executive Committee often calls on '*all States* to abide by their international obligations in this regard'.[114]

10.3.2.3 Contrary Indications?

Despite acknowledging the significance that is appropriately to be placed on the above indicators, particularly relevant General Assembly resolutions,[115] Hathaway argues that these must be weighed against contrary indications, 'in particular those emanating from states not already bound by a treaty-based duty of *non-refoulement*'.[116] In his view, 'the major contraindication is the persistent refusal of most states of Asia and the Middle East to be formally bound by the asserted comprehensive duty of *non-refoulement'*.[117] He argues that the 'persistent reluctance of the majority of states in Asia and the Middle East to embrace a comprehensive legal duty to protect refugees and other against *refoulement'* is especially problematic because particular attention should be given to the views of states 'specially affected' by the phenomenon sought to be regulated.[118] Since most refugees are

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[110] UNHCR, Executive Committee Conclusion No. 79 (XLVII), 11 October 1996, para (j). UNHCR, Executive Committee Conclusion No. 81 (XLVIII), 17 October 1997, para (i).

[111] UNHCR, Executive Committee Conclusion No. 17 (XXXI), 16 October 1980, para (b).

[112] See for example UNHCR, Executive Committee Conclusion No. 103 (LVI), 7 October 2005, para (m). '*Affirms* that relevant international treaty obligations, where applicable, prohibiting *refoulement* represent important protection tools to address the protection needs of persons who are outside their country of origin and who may be of concern to UNHCR but who may not fulfil the refugee definition under the 1951 Convention and/or its 1967 Protocol; and *calls upon* States to respect the fundamental principle of *non-refoulement*.'.

[113] See, for example, UNHCR, Executive Committee Conclusion No. 102 (LVI), 7 October 2005, para (j). '*Recalls* its Conclusions No 6 (XXVII) and 7 (XXVIII), as well as numerous subsequent references made in its other Conclusions to the principle of *non-refoulement*; *expresses* deep concern that refugee protection is seriously jeopardised by expulsion of refugees leading to refoulement; and *calls on* States to refrain from taking such measures and in particular from returning or expelling refugees contrary to the principle of *non-refoulement*.'.

[114] UNHCR, Executive Committee Conclusion No. 50 (XXXIX), 10 October 1988, para (g) (emphasis added).

[115] Hathaway 2010, at 512. He acknowledges that GA resolutions are 'noteworthy and goes some distance in support of the claim that there is *opinio juris* for a duty of *non-refoulement* owed to more than just Convention refugees.'.

[116] Ibid., at 512–513.

[117] Ibid., at 513.

[118] Ibid., at 514.

hosted in these regions,[119] he concludes that the assertion of universal *opinio juris* 'based on General Assembly resolutions is especially fragile.'[120]

In the *North Sea Continental Shelf Case*, the ICJ explained that due regard should be given to the *practice* (not *opinio juris*) of 'States whose interests [are] specially affected.'[121] However, there is some debate surrounding how to measure this criterion, and indeed it has been observed that 'not all areas … allow a clear identification of 'specially affected' states.'[122] Hathaway assumes that identification of such states turns on which countries host the highest numbers of refugees,[123] although it is not clear whether this is to be measured in gross terms, per capita or relative to GDP. More fundamentally it is not clear that the concept of 'specially affected' states turns on such a quantitative assessment, especially given the potential fluidity of this notion in the context of a normative human rights principle.[124]

The notion of 'specially affected states' makes sense in relation to a norm that has particular relevance to some states due to its material or tangible pertinence, for example, the question whether the equidistance principle is the appropriate method for delimiting the continental shelf as between neighbouring countries has limited if any relevance to a land-locked state; hence the notion of states 'specially affected' has some logic in that context.[125] However, as Chetail sensibly points out, the notion of 'specially affected states' is of limited value in 'matters of common interest, such as human rights or international migration'.[126] As he observes, in the context of immigration, every State is affected by the movement of persons, 'whether as a country of emigration, transit or immigration'.[127] In this regard it is notable that the concept was *not* relied upon by the ICJ in either its *Nuclear Weapons Opinion* or *Nicaragua*, cases whose subject matter much more closely aligns with the concept of *non-refoulement* than the question of a delimitation of

[119] Ibid.

[120] Ibid.

[121] *North Sea Continental Shelf Cases*, para 74.

[122] M. Wood, Special Rapporteur, Second report on identification of customary international law, UN Doc. A/CN.4/672, 22 May 2014, para 37 (citing Danilenko 1993, at 95).

[123] Hathaway 2010, at 514. Although note that he is discussing this element in the context of *opinio juris* not practice.

[124] For a very different approach to the idea of specially affected states, see M. Wood, Special Rapporteur, Second report on identification of customary international law, UN Doc. A/CN.4/672, 22 May 2014, n. 167.

[125] *North Sea Continental Shelf Cases.*

[126] Chetail 2012, at 75. See also views of ICJ in *Legality of the Threat or Use of Nuclear Weapons* cited in M. Wood, Special Rapporteur, Second report on identification of customary international law, UN Doc. A/CN.4/672, 22 May 2014, n. 165.

[127] Chetail 2012, at 75.

the continental shelf as between states.[128] Hence as a jurisprudential matter it is simply not clear that it has ever been intended to apply to this normative human rights-based context.

In any event, even if it were an appropriate indicator in the *non-refoulement* context, it is not at all clear that the argument invoking 'specially affected' states detracts from the overwhelming evidence of *opinio juris* outlined above.

First, the core of the argument relies on the supposition that inaction in the form of failure to ratify the Refugee Convention can be taken as a rejection of *opinio juris* in relation to the customary principle of *non-refoulement*.[129] While in some circumstances inaction may be relevant to ascertaining custom, for example, where it may 'serve as evidence of acceptance as law',[130] there is scant judicial authority to support reliance on non-ratification of a treaty in this context[131]; rather this analysis distorts the usual context in which inaction is relevant to establishing custom.[132]

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[128] Indeed, in *Legality of the Threat or Use of Nuclear Weapons*, Judge Weeramantry rejected the argument in relation to 'specially affected states on the basis that 'Every nation in the world is specially affected by nuclear weapons, for when matters of survival are involved, this is a matter of universal concern'. Ibid., Dissenting Opinion of Judge Weeramantry, at 536.

[129] As noted above, Hathaway 2010, at 512–513 relies on the lack of ratification of the Refugee Convention among most states in Asia and the Middle East as 'the major contraindication' to a finding of *opinio juris* based on General Assembly Resolutions.

[130] International Law Commission, Identification of customary international law, Text of the draft conclusions provisionally adopted by the Drafting Committee, 67th Session of the ILC, UN Doc. A/CN.4/L.869, 14 July 2015, para 3. Also see M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, at 14, para 26.

[131] In the ICJ's judgment in the *Asylum Case*, the Court held that even if Columbia had been able to assert a customary rule as between certain Latin American states, it could not be invoked against Peru because Peru had repudiated the customary rule 'by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a [relevant] rule'. *Asylum Case* (*Columbia v Peru*), ICJ, Judgment, 20 November 1950, para 278. However that decision is now 65 years old and the more recent cases on custom have not invoked this reasoning. On the contrary, in *C and others v Director of Immigration and another* the Director had relied on the fact that Hong Kong, like most jurisdictions in Asia, 'has never recognized any form of legal obligation to adhere to a norm of international custom concerning the refoulement of refugees.' *C and others v Director of Immigration and another*, para 71. Hartmann J regarded this as 'not decisive' because 'a rule of customary international law maintains its independent existence even though the rule has partially or even exactly been codified in a treaty.' *C and others v Director of Immigration and another*, para 72.

[132] See ILC discussion in M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, at 9–14. Interestingly in *C and others v Director of Immigration and another*, the Hong Kong Court of Appeal questioned the decision of the judge below who had found that the norm of *non-refoulement* equated to CIL but Hong Kong was a persistent objector. In declining to agree with the view on appeal, the Court found that although the Hong Kong government had stated many times that it could remove refugees (similar to some of the evidence relied on by Hathaway 2010), these actions could have been relevant to the 'non-applicability of the RC to Hong Kong'; indeed the Court noted that it had not been referred 'to any clear statements where there has been a disassociation from the process of the development of the concept of *non-refoulement* of refugees into a CIL.' *C and others v Director of Immigration and another*, para 72.

Indeed, there is ample evidence to rebut the assumption that failure to ratify one particular convention embodying *non-refoulement* equates to a rejection of the norm of *non-refoulement*. Most states in Asia and the Middle East *have* assumed formal obligations in relation to *non-refoulement* in the form of ratification of express *non-refoulement* obligations in the *Convention Against Torture* or the International Convention for the Protection of all persons from Enforced Disappearance,[133] or implied *non-refoulement* obligations embodied in the *International Covenant on Civil and Political Rights.*[134] Hence, it is highly questionable whether one can assume that these states categorically reject *non-refoulement* as a legal concept simply because they have not ratified the Refugee Convention and Protocol. Considering that the Refugee Convention embodies a far wider range of obligations than the principle of *non-refoulement* alone, there may be many complex reasons why some states have declined to ratify. It is impossible to assume that a single factor explains the decision not to ratify in every case.

In addition, there are region-specific initiatives that although non-binding, are consistent with, not in contradiction to, the recognition of the fundamental principle of *non-refoulement* in the more populous fora such as the General Assembly. As is the case in other regions including Latin America[135] and Africa,[136] in Asia the principle of *non-refoulement* is recognised in the region-specific *Bangkok Principles on the Status and Treatment of Refugees*, which were developed by the Asian-African Legal Consultative Committee in 1966 and revised in 2001.[137] More recently, member States of the Association of Southeast Asian Nations

[133] Only six states in these regions have thus far ratified this Convention, but some have signed and not yet ratified, and it must be recognized that this treaty only came into force in 2010 and has only 51 parties to date (as at 24 November 2015).

[134] Hathaway acknowledges this. Hathaway 2010, n. 67. While designations 'Asia' and 'Middle East' do not have a precise meaning, our analysis suggests that approximately 41 states who arguably fall within this description have ratified the CAT, 30 have ratified the ICCPR, and 4 have ratified the Convention against Enforced Disappearance.

[135] Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984 (Cartagena Declaration); and more recent Brasilia Declaration on the Protection of Refugees and Stateless Persons in Americas, 11 November 2010 (Brasilia Declaration).

[136] African Union, The Kampala Declaration on Refugees, Returnees and Internally Displaced Persons in Africa, 23 October 2009 (Kampala Declaration), para 6. 'We undertake to deploy all necessary measures to ensure full respect for the fundamental principle of *non-refoulement* as recognised in International Customary Law.'.

[137] Article III(1) of the Bangkok Principles on the Status and Treatment of Refugees (Bangkok Principles) provides that: 'No one seeking asylum in accordance with these Principles shall be subjected to measures such as rejection at the frontier, return or expulsion which would result in his life or freedom being threatened on account of his race, religion, nationality, ethnic origin, membership of a particular social group or political opinion. The provision as outlined above may not however be claimed by a person 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.' Asian-African Legal Consultative Organization (AALCO), Bangkok principles on the status and treatment of refugees, 31 December 1966.

(ASEAN),[138] in late 2012 took a vital step towards establishing a 'framework for human rights cooperation in the region' by adopting the ASEAN Human Rights Declaration which provides that '[e]very person has the right to seek and receive asylum in another State in accordance with the laws of such State and applicable international agreements.'[139] In the Middle East, Article 2 of the 1992 Declaration on the Protection of Refugees and Displaced Persons in the Arab World reaffirms 'the importance of the principle prohibiting the return or the expulsion of a refugee to a country where his life or freedom will be in danger and considers this principle as an imperative rule of the international public law',[140] while Article 23 of the 1994 Arab Charter on Human Rights recognises the right to political asylum, stating '[p]olitical refugees shall not be extradited'.[141] Further even states in these regions that are not bound by explicit *non-refoulement* obligations have made commitments to 'respect the principle of *non-refoulement'* in bilateral arrangements,[142] including in Memoranda of Understanding with the UNHCR.[143]

Even more compelling is the fact that non-ratification of the Refugee Convention has not prevented many states, most notably in recent times in the Middle East, from admitting (and not *refouling*) millions of refugees. As explained above, it is Syria's neighbours—Turkey, Lebanon and Jordan—that are currently protecting the overwhelming majority of the 4 million Syrian refugees. And indeed some of these

[138] Namely Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Republic of the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam.

[139] Association of Southeast Asian Nations (ASEAN), ASEAN human rights declaration, 18 November 2012, Article 16.

[140] Arabic-Islamic States, Declaration on the protection of refugees and displaced persons in the Arab world, 19 November 1992.

[141] League of Arab States, Arab Charter on Human Rights, 15 September 1994.

[142] For example, in the Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement, 25 July 2011, *non-refoulement* was the only explicit obligation outlined, otherwise reference was made only to the far more vague 'dignity and respect and in accordance with human rights standards'. See *Plaintiff M70/2011 v Minister for Immigration and Citizenship* ('*M70*') [2011] HCA 32, para 22.

[143] The UNHCR explains that the principle of *non-refoulement* is recognised in its Memorandum of Understanding with Jordan, even though Jordan is not a party to the Refugee Convention. See UNHCR, Global Appeal 2012–2013, Jordan, http://www.unhcr.org/4ec231020.pdf. Accessed 20 September 2015.

states have underpinned this protective stance with legislative support, as in the case of Turkey's 2014 *Law on Foreigners and International Protection* which provides within Sect. 2 entitled '*Non-refoulement'* the following core provision:

> 4 (1) No one within the scope of this Law shall be returned to a place where he or she may be subjected to torture, inhuman or degrading punishment or treatment or, where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion.[144]

This domestic implementation in legally binding form of the principle of *non-refoulement* is powerful evidence that a State regards the principle as one with legal not merely moral implications.

A second reason for rejecting the argument that non-ratification of the Refugee Convention by 'specially affected states' undermines the cogency of the otherwise compelling evidence of *opinio juris* is that none of these so-called 'specially affected' states have dissented or abstained, or indeed subsequently sought to detract or renege on their participation in numerous General Assembly resolutions that have persistently and clearly affirmed the fundamental nature of the duty of *non-refoulement* as a stand-alone norm independent of treaty obligations.

Third, the non-ratification argument ignores the role that states from these regions play as members of the UNHCR Executive Committee, membership being open to non-states party.[145] As explained above, the Executive Committee has consistently emphasised the fundamental nature of the principle of *non-refoulement*, and these conclusions have been passed by consensus with the participation of countries from Asia and the Middle East which host very significant refugee populations notwithstanding a lack of ratification of the 1951 Refugee Convention and/or Protocol.

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[144] See Republic of Turkey, Ministry of Interior, Directorate General of Migration Management, Law on Foreigners and International Protection, 2014 (unofficial translation). http://www.goc.gov.tr/files/files/eng_minikanun_5_son.pdf. Accessed 20 September 2015. The UNHCR notes that since the new Law on Foreigners and International Protection came into force in April 2014, the Directorate General of Migration Management has become the sole institution responsible for asylum matters. While Turkey still maintains the geographical limitation to the 1951 Convention, the law provides protection and assistance for asylum-seekers and refugees, regardless of their country of origin. See UNHCR, Country operations profile: Turkey, 2015, http://www.unhcr.org/pages/49e48e0fa7f.html. Accessed 20 September 2015.

[145] Indeed Lauterpacht and Bethlehem argue that members of the Executive Committee are 'specially affected states'. Lauterpacht and Bethlehem 2003, at 148. As does Kälin et al. after citing Excom conclusions; they state: 'the prohibition of refoulement can therefore be considered to be universally accepted as a legal obligation by States whose interests are especially affected.' Kälin et al. 2011, at 1344. See also UNHCR, The principle of non-refoulement as a norm of customary international law: response to the questions posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1953/93, 2 BvR 1954/93, 31 January 1994, at 41.

These include Bangladesh,[146] India,[147] Jordan,[148] Lebanon,[149] Pakistan,[150] Thailand,[151] and Turkey.[152] Indeed, the fact that these states continue to host very large numbers of refugees despite not having ratified the 1951 Convention or Protocol, and at the same time to participate on the Executive Committee of the UNHCR, which consistently affirms the independent status of the norm of *non-refoulement,* is powerful evidence in support of a customary norm.[153]

In short there is no plausible argument to diminish the very powerful *opinio juris* expressed in General Assembly resolutions and the work of the UNHCR Executive Committee.[154]

10.3.3 State Practice

It is well recognised that state practice may take a variety of forms, and includes both physical and verbal acts.[155] As neatly summarised by the ILC,

> Forms of state practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organisation or

[146] As at December 2014, Bangladesh hosted 232.485 refugees and asylum-seekers according to UNHCR. See UNHCR, Sub-regions operations profile, South East Asia: Bangladesh, 2015, http://www.unhcr.org/pages/49e487546.html. Accessed 25 November 2015.

[147] As at December 2014, there were 205.012 refugees and asylum-seekers residing in India according to UNHCR. See UNHCR, Sub-regions operations profile, South Asia: India, 2015, http://www.unhcr.org/pages/49e4876d6.html. Accessed 25 November 2015.

[148] There are currently 633.664 'persons of concern' (refugees and asylum seekers) in Jordan. See UNHCR, Syrian refugee response: Jordan, 2015, http://data.unhcr.org/syrianrefugees/country.php?id=107. Accessed 20 September 2015.

[149] As at 31 October 2015, there are 1.075.637 Syrian refugees in Lebanon. See UNHCR, Syria regional refugee response: Lebanon, 2015, http://data.unhcr.org/syrianrefugees/country.php?id=122. Accessed 25 November 2015.

[150] As at December 2014, 1.5 m refugees and asylum-seekers reside in Pakistan. See UNHCR, Country operations profile: Pakistan, 2015, http://www.unhcr.org/pages/49e487016.html. Accessed 25 November 2015.

[151] As of December 2014 there are 138.169 refugees and asylum-seekers residing in Thailand. See UNHCR, Country operations profile: Thailand, 2015, http://www.unhcr.org/pages/49e489646.html. Accessed 25 November 2015.

[152] This is relevant because of Turkey's geographical reservation. As at 3 November 2015, Turkey hosts 2.181.293 Syrian refugees, see UNHCR, Syria regional refugee response: Turkey, 2015, http://data.unhcr.org/syrianrefugees/country.php?id=224. Accessed 25 November 2015.

[153] See also Mesinneo 2013, at 144.

[154] We agree that when *opinio juris* is so overpowering, it may support the notion that state practice is less important, see, for example, Kirgis 1987 (cited by Messineo 2013, at 143; and Goodwin-Gill 2014, at 444).

[155] International Law Commission, Identification of customary international law, Text of the draft conclusions provisionally adopted by the Drafting Committee, 67th session of the ILC, UN Doc. A/CN.4/L.869, 14 July 2015, para 1. This is particularly important because of Hathaway's very lengthy argument against words as practice.

> at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct 'on the ground'; legislative and administrative acts; and decisions of national courts.[156]

As is evident from this list, some factors are considered relevant *both* to establishing *opinio juris* and state practice, most importantly in this context, 'conduct in connection with resolutions adopted by an international organisation or at an international conference,'[157] a factor analysed in depth above. Since there 'is no predetermined hierarchy among the various forms of practice',[158] there is no legitimate basis on which to minimise the significance of verbal acts over physical acts in assessing state practice.

The key issue in the context of *non-refoulement* has focused on the degree of consistency required, at least in the context of physical conduct. It is clear that state practice must be sufficiently widespread so as to meet the definition of 'general practice' as provided in the ICJ Statute, yet it is well established that the practice need not be universal. In the *Asylum Case* in 1950, the ICJ referred to 'constant and uniform usage' as the relevant test.[159] Yet, as Wood notes, the 'exact number of States required for the "kind of 'head count' analysis of State practice" leading to the recognition of a practice as 'general' cannot be identified in the abstract'.[160]

The ICJ later clarified that while the relevant practice should be consistent, uniformity of practice is not required.[161] As the ICJ stated in *Nicaragua*,

> It is not to be expected that in the practice of States the application of the rules in question should have been perfect … In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.[162]

The Court further explained that,

> [i]f a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.[163]

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156 Ibid., para 2.

157 Ibid., at 3.

158 Ibid.

159 *Asylum Case*, at 277.

160 M. Wood, Special Rapporteur, Second report on identification of customary international law, UN Doc. A/CN.4/672, 22 May 2014, para 53.

161 It is worth recalling that the rule at issue in the *Asylum Case* was, in the words of the ICJ, 'of an exceptional character' as it 'involves a derogation from the equal rights of qualification which, in the absence of any contrary rule, must be attributed to each of the States concerned'. *Asylum Case*, at 275. It is little wonder then that the Court applied a high standard of proof, which was later softened in subsequent decisions.

162 *Case relating to Military and Paramilitary Activities in and against Nicaragua*, at 14.

163 Ibid.

In these passages, the Court appears to be distinguishing between the reactions of other states ('generally have been treated as breaches of that rule') and the reaction of the perpetrator state (a State …) to a relevant breach of a rule of custom.

In terms of domestic implementation of the norm of *non-refoulement*, it is significant that at least 125 states have incorporated the principle of *non-refoulement* in some form into their domestic law.[164] And indeed since the empirical assessment that produced this figure was undertaken, further examples can be cited, including in states that do not have universal *non-refoulement* obligations under the Refugee Convention.[165] Yet, some scholars have attached great weight to the fact that in practice the norm of *non-refoulement* is not always respected in contemporary international relations.[166] Like other human rights-based customary norms, such as torture, practice is not perfectly aligned with the norm. If such compliance were required, however, it would be impossible ever to identify a human rights-based customary norm given that we live in an imperfect world.[167] And yet, it is well recognised that most norms that have attained the status of customary international law and even *jus cogens* are human rights norms.[168] It is to this

[164] Lauterpacht and Bethlehem 2003, at 87; Kälin et al. 2011, at 1344.

[165] See, for example, Turkey, discussed above, which maintains a geographical exception and yet whose domestic law extends to refugees from any region. In addition, as a State Party to the ECHR, it is subject to human rights-based *non-refoulement*.

[166] Hathaway 2010. It should be acknowledged that Hathaway takes a very conservative approach to the identification of customary international law in general, accepting only the prohibition on racial discrimination to be established. Goodwin-Gill is critical of Hathaway's examples of non-compliance with non-*refoulement*, arguing that 'many of his examples involve general interference with the movements of people, rather than the actual return of those in need of protection to situations of persecution or conflict.' Goodwin-Gill 2014, at 451.

[167] Messineo argues that the 'question of state practice is precisely the one over which Hathaway construes an impossibly high threshold'. Messineo 2013, at 143. See also Henckaerts and Doswald-Beck citing *Nicaragua v United States of America* and noting that the ICJ's approach to contrary practice 'is particularly relevant for a number of rules of international humanitarian law where there is overwhelming evidence of verbal State practice supporting a certain rule found alongside repeated violations of that rule.' Henckaerts and Doswald-Beck 2009, at 44. See also Goodwin-Gill 2014, at 453. We note that the ILC has recognised that 'in some cases, a particular form (or particular instances) of practice, or particular evidence of acceptance as law, may be more relevant than in others; in addition, the assessment of the constituent elements needs to take account of the context in which the alleged rule has arisen and is to operate.' M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, at 7–8. In this context, the work of Thirlway is cited, who argues that the element of practice in the special domain of human rights law 'may be of a different character from that generally required to establish custom.' See M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, note 32.

[168] We note that in the context of state practice as relevant to the interpretation of the Refugee Convention (pursuant to Article 31(3)(b) of the Vienna Convention on the Law of Treaties), Hathaway argues that 'while state practice is often of clear value in the interpretation of bilateral treaties involving purely interstate interests, there are good reasons to read this provision narrowly as a guide to the construction of multilateral treaties in general, and of multilateral human rights in particular'. Hathaway 2005, at 68. While articulated in relation to treaty interpretation rather than the formation of customary international law, it embodies the modern approach to the formation of custom which has been described as a deductive process 'that begins with statements of rules, rather than particular instances of practice.' See Goodwin-Gill 2014, at 446 (citing Roberts 2001).

apparent paradox that the ICJ speaks in *Nicaragua*. As the ICJ's jurisprudence indicates, what is significant in this context is not whether there is state practice that is inconsistent with the putative norm, but rather the reaction of both the international community and the offending state in question to such action.

Significant in this regard is that where the UNHCR has reported instances of *refoulement* to the General Assembly, the General Assembly has repeatedly responded by 'deplor[ing] the *refoulement* and unlawful expulsion of refugees and asylum-seekers.'[169] The UNHCR Executive Committee has reacted in a similar manner. For example, as early as 1979 the Executive Committee recognised that returning refugees to persecution 'constitutes a grave violation of the recognized principle of *non-refoulement'*.[170] In 1988 it 'expressed deep concern that the fundamental prohibitions against expulsion and *refoulement* are often violated by a number of States and appealed to all States to abide by their international obligations in this regard and to cease such practices immediately'.[171] A year later it expressed its 'deep concern' that some states had engaged in *refoulement*, and called on all states to refrain from 'returning or expelling refugees *contrary to fundamental prohibitions against these practices*',[172] and has continued since to 'deplore' violations of the principle.[173] Such statements, which have been repeated in numerous Executive Committee Conclusions, are unambiguous in indicating that *refoulement* is unlawful as a matter of international law.[174]

Turning to the reaction of the 'perpetrator' states, in *Nicaragua*, the Court assessed whether instances of foreign intervention were 'illustrative of belief in a kind of general right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State'.[175] Although the Court acknowledged the existence of State conduct 'prima facie inconsistent with the principle of non-intervention',[176] the Court found that such interventions were either justified by the relevant State 'solely by reference to the "classic" rules involved, namely, collective self-defence against an armed attack',[177] or justified on a political rather than legal level.[178]

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169 UNGA Res. 64/127, 27 January 2010. See also UNGA Res. 33/26, 29 November 1978.

170 UNHCR, Executive Committee Conclusion No 15 (XXX), 16 October 1979, para (b).

171 UNHCR, Executive Committee Conclusion No 50 (XXXIX), 10 October 1988, para (g).

172 UNHCR, Executive Committee Conclusion No 55 (XL) 13 October 1989, para (d), emphasis added. See also UNHCR, Executive Committee Conclusion No 15 (XXX), 16 October 1979.

173 UNHCR, Executive Committee Conclusion No 85 (XLIX), 9 October 1998, para (q). See also UNHCR, Executive Committee Conclusion No 79 (XLVII), 11 October 1996, para (i).

174 See, for example, as early as 1977 a UNHCR conclusion, where it noted that refugees had been subjected to rights abuses such as physical violence, but in describing non-refoulement used distinctive language, viz, 'measures of forcible return in disregard of the principle of *non-refoulement*'. UNHCR, Executive Committee Conclusion No 3 (XXVIII), 12 October 1977, para (a).

175 *Case relating to Military and Paramilitary Activities in and against Nicaragua,* para 206.

176 Ibid., para 207.

177 Ibid., para 208.

178 Ibid., paras 207–208.

Similarly, it is noteworthy that individual states that engage in *refoulement* in practice tend to justify such action but not on the grounds that the State is entitled as a matter of international law freely to return a refugee to persecution.[179] As explained by Justice Yuen of the Hong Kong Court of Appeal (with whom Cheung CJHC and Lam J agreed),

> [i]n my view what is important is that since the [Refugee Convention] (which is now in its 50th year), no State has explicitly asserted that it is entitled, *solely as a matter of legal right in public international law,* to return genuine refugees to face a well-founded fear of persecution, and has openly done so. Clearly the [Refuge Convention] has had an impact, even on non-signatory States, and has helped to create a CIL of *non-refoulement* of refugees. In conclusion on this issue, I would agree with the learned judge that on balance, the Appellants are correct in asserting that the concept of *non-refoulement* of refugees has developed into a CIL.[180]

States rather tend to explain their action by reference to an exception or justification that supports rather than undermines the customary norm.[181]

One of the factors that has been overlooked in much of the debate surrounding the customary status of *non-refoulement* is the role of the United Nations High Commissioner for Refugees in its capacity as an international organisation independent of the work of its members states. As the ILC has highlighted, while conduct by such non-State actors does not constitute practice for customary international law purposes,[182] in certain cases it 'contributes to the formation, or

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[179] As Chetail explains, no State 'claims to possess an unconditional right to return a refugee to a country of persecution.' Instead, 'they attempt to justify such conduct by invoking exceptions or by alleging that returnees are not refugees.' Chetail 2012, at 76–77.

[180] *C and others v Director of Immigration and another*, at paras 66–67 (emphasis in original).

[181] The UNHCR notes that cases in which a government has stated to UNHCR that it does not recognise any obligations to act in accordance with the principle of *non-refoulement* 'have been extremely rare.' UNHCR, The principle of non-refoulement as a norm of customary international law: response to the questions posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in cases 2 BvR 1953/93, 2 BvR 1954/93, 31 January 1994, at 6. In the San Remo declaration on the principle of non-refoulement, San Remo, Italy, September 2001 it is observed: 'The telling point is that, in the last half-century, no State has expelled or returned a refugee to the frontiers of a country where his life or freedom would be in danger—on account of his race, religion, nationality, membership of a particular social group or political opinion—using the argument that refoulement is permissible under contemporary international law. Whenever refoulement occurred, it did so on the grounds that the person concerned was not a refugee (as the term is properly defined) or that a legitimate exception applied.' Indeed, Hathaway acknowledges that 'where an effort to justify refoulement is made, states tend to offer only blunt and unsubstantiated assertion that those seeking protection are not refugees, or that the political cost of protection is too high.' Hathaway 2010, at 518. However, this appears to support the notion that the norm is binding on those states, not the opposite. See also Goodwin-Gill and McAdam 2007 at 353.

[182] See M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, at 54, para 79.

expression, of rules of customary international law.'[183] For example, the conduct of international organisations 'may serve to catalyse State practice'.[184]

In this regard it is important to note that the UNHCR has consistently argued for decades that the principle of *non–refoulement* has attained the status of customary international law,[185] and this expression of principle has elicited relevant responses from states. As the UNHCR observes, there have been numerous cases in which the High Commissioner has been required to make representations to non-party states, and 'it is here that the Office has necessarily had to rely on the principle of *non-refoulement* irrespective of any treaty obligation'.[186] As the UNHCR explains:

> the Governments approached have almost invariably reacted in a manner indicating that they accept the principle of *non-refoulement* as a guide for their action. They indeed have in numerous instances sought to explain a case of actual or intended refoulement by providing additional clarifications and/or claiming that the person in question was not to be considered a refugee. The fact that States have found it necessary to provide such explanations or justifications can reasonably be regarded as an implicit confirmation of their acceptance of the principle.[187]

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[183] International Law Commission, Identification of customary international law, Text of the draft conclusions provisionally adopted by the Drafting Committee, 67th session of the ILC, UN Doc. A/CN.4/L.869, 14 July 2015, at 2. Draft conclusion 4(5), adopted in 2014, no change proposed in 2015. See M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, at 54, para 79.

[184] M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, at 51, para 75.

[185] One of its earliest pronouncements was in the UNHCR's Principle of non-refoulement as a norm of customary law. UNHCR, The principle of non-refoulement as a norm of customary international law: response to the questions posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1953/93, 2 BvR 1954/93, 31 January 1994. See also UNHCR, Statement on the right to asylum, UNHCR's supervisory responsibility and the duty of States to cooperate with UNHCR in the exercise of its supervisory responsibility, 2012, para 2.1.2; 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, 2007, paras 14–16. See also numerous interventions as *amicus* in domestic jurisdictions; for example, *McNary, Commissioner, INS v Haitian Centers Council,* Supreme Court of the United States, October 1992, No. 92-344, Brief *Amicus Curiae* of the Office of the United Nations High Commissioner for Refugees, at 16–21, http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3f336bbc4. Accessed 17 December 2015; *CPCF v Minister for Immigration* [2015] HCA 1, High Court of Australia, Submissions of the Office of the UNHCR, submissions dated 16 September 2014, paras 34–39.

[186] UNHCR, The Principle of Non-Refoulement as a Norm of Customary International Law: Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal republic of Germany in Cases 2 BvR 1953/93, 2 BvR 1954/93, 31 January 1994, para 5.

[187] Ibid. See also Goodwin-Gill and McAdam 2007, at 351–352.

10.3.4 Subsidiary Means for the Determination of Customary International Law

Article 38 of the ICJ Statute refers to 'judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'. It is significant that where domestic courts have been required to examine the issue in depth, they have drawn the conclusion that '[t]he prohibition on *refoulement*, contained in Article 33.1 of the Refugee Convention, is generally thought to be part of customary international law'.[188] In Hong Kong, where the courts have been required to grapple most directly and hence in most depth with the question,[189] Justice Hartmann of the Hong Kong High Court concluded:

> I have taken note of the dissenting voices. I have reminded myself of the dangers of legal wishful thinking: considering it right that it should be so and therefore making it so. On balance, however, it seems to me that today it must be recognised that the principle of *non-refoulement* as it applies to refugees has grown beyond the confines of the Refugee Convention and has matured into a universal norm of customary international law.[190]

On appeal, following further comprehensive analysis, the Court affirmed that 'the appellants are correct in asserting that the concept of *non-refoulement* of refugees has developed into a CIL'.[191]

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[188] See, for example, *Zaoui v. Attorney-General (no 2)* [2005] 1 NZLR 690, Glazebrook J, para 34. 'The prohibition on refoulement, contained in Article 33.1 of the Refugee Convention, is generally thought to be part of customary international law, the (unwritten) rules of international law binding on all States, which arise when States follow certain practices generally and consistently out of a sense of legal obligation.' We note that in the Supreme Court the issue was not necessary to resolve, although the Court appears to assume that this is correct by noting that because New Zealand is a party to the Convention 'the customary rule cannot add anything by way of interpretation to the essentially identical treaty provision.' *Attorney-General v. Zaoui* (2006) 1 NZLR 289, para 35. The Israeli Supreme Court sitting as a High Court of Justice has held, referring to Article 33 of the Refugee Convention, '[t]his is a principle of international customary law that is also manifested in domestic Israeli law, according to which the State of Israel does not remove a person to a place where he faces danger to his life or liberty (see *Al-Tai v. Minister of Interior*, *Pisk ei Din* 49(3) 843 (1995)).' HCJ 7146/12, MAA 1192/13, AAP 1247/13 (2013), para 8, unofficial translation, http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5277555e4. Accessed 20 September 2015. See also Ziegler 2015. We are grateful to Ruvi Ziegler for alerting us to this decision. In *R v Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others* it was unnecessary for the Court to decide this question; hence Lord Bingham referred to 'that principle, even if one of CIL', not assisting the applicants in that case. See *R v Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others*, Lord Bingham, para 26. However, his Lordship did refer to the notion that there was 'general acceptance of the principle' of *non-refoulement*. Ibid.

[189] *C and others v Director of Immigration and another*. This litigation is significant as it represents the first clear exposition, at least at common law, of the customary status of *non-refoulement*. See Jones 2009, at 450.

[190] *C and others v Director of Immigration and another*, para 113.

[191] Ibid., para 67. We note that on appeal to the Final Court of Appeal the issue was not raised. *Final Appeal Nos 18, 19 & 20 of 2011 (Civil) between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents) and United Nations High Commissioner for Refugees (Intervener)*, Hong Kong Court of Final Appeal, 25 March 2013.

In terms of international courts, we note that the International Criminal Court has observed:

> The 'non-refoulement' principle is considered to be a norm of customary international law and is an integral part of international human rights protection. All individuals are entitled to enjoy its application by a State.[192]

Article 38 of the ICJ Statute also identifies 'the teachings of the most highly qualified publicists of the various nations' as 'subsidiary means for the determination of rules of law'.[193] As recognised by the ILC, the teachings of publicists is 'potentially relevant in respect of all the formal sources of international law, and this is especially so for customary international law'.[194] The ILC emphasises that in this regard special importance may be attributed to collective works including texts and commentaries emerging from private bodies such as the Institute of International Law, and the International Law Association.[195]

In the context of refugee law, not only is the weight of scholarly opinion overwhelmingly in favour of the recognition of *non-refoulement* as customary international law, but there is strong support from the collective work of experts. For example, in 2001 on the occasion of the 50th anniversary of the Refugee Convention, the International Institute of Humanitarian Law in cooperation with the United Nations High Commissioner for Refugees convened an expert roundtable which ultimately adopted the *San Remo Declaration on the Principle of Non-refoulement* as follows:

> The Principle of *Non-refoulement* of Refugees incorporated in Article 33 of the Convention relating to the Status of Refugees of 28 July 1951 is an integral part of customary international law.[196]

In its accompanying note the Institute explained that this conclusion was reached 'on the basis of the general practice of States supported by a strong *opinio*

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[192] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC, Judgment pursuant to Article 74 of the Statute, No. ICC-01/04-02/12, 18 December 2012; and *Hirsi Jamaa and Ors v. Italy*, ECtHR, No. 27765/09, 23 February 2012, Separate Concurring Opinion of Judge Pinto de Albuquerque, para 68.

[193] Article 38(1)d) of the 1945 Statute of the International Court of Justice, 33 UNTS 993.

[194] M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, at 41, para 55.

[195] Ibid., at 45, para 65.

[196] Council of the International Institute of Humanitarian Law, San Remo Declaration on the principle of non-refoulement, September 2001. The declaration was adopted 'bearing in mind the Institute's long-term interest in and association with the development and codification of international law pertaining to the status of refugees'. See also the Summary Conclusions adopted by an Expert roundtable organised by the UNHCR and the Lauterpacht Research Centre for International Law, University of Cambridge, 9–19 July 2001 in which they concluded that, '*[n]on-refoulement* is a principle of customary international law.' Summary conclusions: the principle of *non-refoulement,* in Feller et al. 2003, at 178–179.

juris.'[197] There is hence no question that the Institute's Declaration reflects its view as to the existing law (*lex lata)* rather than positing the progressive development of the law (*lex ferenda)*.[198]

10.3.5 The Scope of the Customary International Law Norm of Non-refoulement

Having established that there is overwhelming evidence in support of the conclusion that *non-refoulement* has attained the status of a customary international norm, the final issue to clarify is its scope.[199] The key challenge is that there is often no definition of the beneficiary class in the numerous General Assembly resolutions or Executive Committee Conclusions on this point, and many of the sources relied upon above are similarly imprecise. However, this difficulty is more apparent than real, as there is clear consensus on at least a minimum core of the principle. Hence although as in *Nicaragua*, there is a question as to the 'exact content of the principle',[200] this does not detract from the cogency of the claim that at least a minimally defined concept has achieved the status of custom.[201]

In relevant ExCom conclusions the 'principle of *non-refoulement'* has been described as one:

> which prohibits expulsion and return of refugees in any manner whatsoever to the frontiers of territories where their lives or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion … or of persons in respect of whom there are substantial grounds for believing that they would be in danger of being subjected to torture …[202]

This in effect encapsulates the beneficiary class defined in the Refugee Convention, which at a minimum, reflects the customary norm given that when states, judges, international organisations and scholars refer to *non-refoulement* of

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[197] Council of the International Institute of Humanitarian Law, San Remo Declaration on the principle of non-refoulement, Explanatory Note, September 2001.

[198] M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, at 45, para 65.

[199] We note that there is an additional question of scope involving whether the principle applies to both territorial and extraterritorial state action. While beyond the scope of this article to explore in detail, we observe that there is considerable consensus that the principle applies to any conduct attributed to a State, regardless of territorial connection: see Lauterpacht and Bethlehem 2003, at 149–150; see also 'Summary Conclusions: the principle of *non-refoulement*' in Feller et al. 2003, at 178–179.

[200] *Case relating to Military and Paramilitary Activities in and against Nicaragua*, para 205.

[201] Ibid. '[T]hose aspects of the principle which appear to be relevant to the resolution of the dispute.'

[202] UNHCR, Executive Committee Conclusion No 82 (XLVIII), 17 October 1997, para (d)(i). See also UNHCR, Executive Committee Conclusion No 79 (XLVII), 11 October 1996, para (j).

refugees, they typically explicitly,[203] or at least implicitly, refer to the term of art at international law. The addition of torture—independent of the refugee definition—is also well justified given the uncontroversial nature of both the customary and *jus cogens* nature of the prohibition of torture. As noted by the International Criminal Court:

> the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 sets forth a similar rule to that contained in the Geneva Convention of 1951 and, although narrower in scope, has acquired customary status. It prohibits a State from expelling or extraditing a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.[204]

The fact that there remains some debate about whether the customary norm extends also to cruel, inhuman or degrading treatment or punishment[205] does not detract from the core of the normative claim.

10.4 The Customary Norm of *Non-refoulement* as *Jus Cogens*

Having examined in depth the customary basis of the norm of *non-refoulement* we now turn to the question whether this customary norm is recognised as *jus cogens* and what the implications for refugee protection would be should it be recognised as such. As demonstrated above, there is now ample evidence to support the claim that *non-refoulement* is customary international law. Our approach is to work from that premise to see additionally whether it has *jus cogens* status. Our method is 'customary international law plus', looking for the sources of additional authority to support that contention, above and beyond that which supports its customary international law status.

Two questions arise about this body of evidence: Would it be enough if the international community asserted that a customary international law norm was

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[203] See, for example, International Law Association, Resolution 6/2002, Refugee procedures: declaration on international minimum standards for refugee procedures, para 1. 'BEARING IN MIND the fundamental obligation of States not to return (*refouler*) a refugee in any manner whatsoever to a country in which his or her life or freedom may be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion, or in which he or she may be at risk of torture.' See also Council of the International Institute of Humanitarian Law, San Remo Declaration on the Principle of Non-Refoulement, September 2001, Explanatory Note, in noting that no state has expelled or returned a refugee using the argument that refoulement is permissible refers to returning a refugee 'to the frontiers of a country where his life or freedom would be in danger- on account to his race, religion, nationality, membership of a particular social group or political opinion.'.

[204] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui.*

[205] See Goodwin-Gill and McAdam 2007, at 337–339 and 351; Lauterpacht and Bethlehem 2003, at 1346.

jus cogens, or would there also have to be additional state practice as regards its non-derogable and peremptory character? We contend that under the 'customary international law plus' approach the practice and *opinio juris* that evidences customary international law need only be supplemented by sufficiently widespread *opinio* in order to support the claim that a norm is *jus cogens*.[206]

Secondly, in terms of the *opinio juris*, the question arises whether international statements need to invoke the magic words '*jus cogens*' or 'peremptory norm', or whether other terms will do. Here, we take the view that the nature of the endorsement must indicate that the norm be viewed as (a) universal (b) peremptory and (c) non-derogable. These formal characteristics of the norm can be conveyed in different language. In particular, we note the range of evidence cited by the ICJ in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, discussed above.

Several scholars have argued that *non-refoulement* is indeed *jus cogens*, notably Jean Allain, writing in 2002.[207] Like us, he assumes that *jus cogens* is identifiable if there is sufficient state practice, and if the *opinio juris* recognises the rule not only as one of custom, but of *jus cogens*.[208] Allain assumes that *non-refoulement* has attained the status of customary international law,[209] and examines whether it has been elevated to *jus cogens*. In support of his conclusion that it has indeed reached this status, he cites principally Executive Committee Conclusions, in particular Conclusion No 25 of 1982 which observed that *non-refoulement* was 'progressively acquiring the character of a peremptory rule of international law.'[210] Two later conclusions are also invoked which described *refoulement* respectively as 'contrary to fundamental prohibitions',[211] and 'not subject to derogation'.[212] Allain treats the statement that *non-refoulement* is not open to derogation as embodying a statement that the principle was *jus cogens*. His article both tacitly, and later explicitly,[213] treats non-derogability and *jus cogens* as functional equivalents.[214] This is simply incorrect as a matter of law. As discussed above, while non-derogability is one of the three formal indicia of a *jus cogens* norm (along with universality and peremptory character) that in itself is not sufficient. A statement to the effect that *non-refoulement* is non-derogable is a part of an account of

[206] Agreeing with Tasioulas 2016.

[207] Allain 2002, at 533.

[208] Ibid.

[209] Ibid., at 539, note 19.

[210] Ibid., at 539.

[211] UNHCR, Executive Committee Conclusion No 82 (XL), 13 October 1989 (cited by Allain 2002, at 539, note 22).

[212] UNHCR, Executive Committee Conclusion No 79 (XLVII), 11 October 1996 (cited by Allain 2002, at 539, note 23).

[213] Allain 2002, at 540–541. He states: '[a]s long as there is an insistence on the non-derogable nature of *non-refoulement*, its status is secure.'

[214] Ibid., at 540.

its acknowledgement as *jus cogens*, but not sufficient in itself to confer that character on a norm.

Orakhelashvili too treats *non-refoulement* as *jus cogens*. He states that *non-refoulement* 'which is enshrined both in Article 33 of the 1951 Geneva Convention on the Status of Refugees, as well as in customary law' is a 'firmly established peremptory norm related to the rights of an individual.'[215] His assertion is supported by the principle's 'inseparable link with the observance of basic human rights such as the right to life, freedom from torture and non-discrimination.' He contends that EXCOM Conclusion No. 25 confirms that the principle of *non-refoulement* amounts to a norm of *jus cogens*.[216] However, as we identify above, it did not state that *non-refoulement* was *jus cogens*, but that it was 'progressively acquiring' that character.

Some regional and domestic orders treat *non-refoulement* as *jus cogens*. Both Allain and Orakhelashvili cite the Cartagena Declaration on Refugees which affirms that this principle 'is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*'.[217] More recently Latin American and Caribbean governments have affirmed, in the Brazil Declaration of December 2014, that they 'recognize developments in the jurisprudence and doctrine of the Inter-American Court of Human Rights, regarding … the *jus cogens* character of the principle of *non-refoulement'*.[218]

There are a handful of examples of domestic or regional courts accepting the *jus cogens* status of *non-refoulement*. De Wet cites the example of the domestic declaration of a popular initiative in Switzerland invalid where it potentially violated *non-refoulement* as *jus cogens*.[219] In addition, we can point to the concurring opinion of Judge Pinto de Albuquerque in *Hirsi v Italy,* in which he stated that 'the prohibition of *refoulement* is a principle of customary international law, binding on all States, even those not parties to the UN Refugee Convention or any other treaty for the protection of refugees. In addition, it is a rule of *jus cogens*, on account of the fact that no derogation is permitted and of its peremptory nature, since no reservations to it are admitted.'[220]

In contrast, other scholars have doubted that conclusion, albeit without subjecting the matter to particularly deep examination. Duffy regards *non-refoulement* as custom, but regards evidence of its *jus cogens* status as 'less than convincing'.[221] Bruin and Wouters examine whether *non-refoulement* may be *jus cogens*, and aside from citing Allain and other works discussed here, do not draw a strong

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215 Orakhelashvili 2006, at 56.

216 Ibid.

217 Ibid.

218 Brazil Declaration and plan of action, 3 December 2014.

219 de Wet 2004, at 101.

220 *Hirsi Jamaa and Ors v. Italy*, at 67 (citing Article 53 of the Vienna Convention on the Law of Treaties and Article 42 § 1 of the Refugee Convention and Article VII § 1 of the 1967 Protocol).

221 Duffy 2008, at 389–390.

conclusion.[222] In his treatise on *non-refoulement*, Wouters does not take a view on whether *non-refoulement* in general is *jus cogens*, but he endorses the view that *non-refoulement* to face torture would have such character.[223] In support, he cites Dugard and van de Wyngaert's claim that due to the *jus cogens* character of the prohibition on torture, 'no requested state should have difficulty in justifying a refusal to extradite a person to a state in which he is likely to be subjected to torture—a course approved by the 1984 Convention against Torture and the UN Model Treaty on Extradition'.[224]

On the basis of the statements reviewed in section 10.3 above, it appears that *non-refoulement* is ripe for recognition as *jus cogens*. The practice and *opinio* demonstrate its virtually universal scope. Non-derogability is also evident in the language, including in relevant General Assembly resolutions.[225] What is perhaps lacking is acknowledgement of its peremptory character *per se*, but here we have to pause and consider the feasibility of demanding specific statements as to a norm's peremptory character. If, as is often asserted, *jus cogens* norms represent 'fundamental values of the international community',[226] it is highly pertinent that the consistent description by the international community (in the form of the General Assembly resolutions and the UNHCR Executive Committee Conclusions) of *non-refoulement* refers to its 'fundamental character,' and its status as a 'cardinal' or 'fundamental principle.'[227] Further, we note that the ICJ in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* interwove the factors that grounded its customary and *jus cogens* status, noting three features of the norm—its acceptance in 'widespread international practice and in the *opinio juris* of States', its appearance in 'numerous international instruments of universal application', and that it had been 'introduced into the domestic law of almost all States' and that 'acts of torture are regularly denounced within national and international fora.' As demonstrated above, these features are shared with *non-refoulement*.

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222 Bruin and Wouters 2003, at 7.

223 Wouters 2009, at 30.

224 Dugard and van den Wyngaert 1998, at 198.

225 UNGA Res. 51/75, 12 February 1997.

226 Chinkin 2010, at 113. 0.

227 UNHCR, Executive Committee Conclusion No 16 (XXXI), 9 October 1998, para (e); UNHCR, Executive Committee Conclusion No 21 (XXXII), 21 October 1981, para (f); UNHCR, Executive Committee Conclusion No 22 (XXXII), 21 October 1981, para (2); UNHCR, Executive Committee Conclusion No 33 (XXXV), 18 October 1984, para (c); UNHCR, Executive Committee Conclusion No 74 (XLV), 7 October 1994, para (g); UNHCR, Executive Committee Conclusion No 94 (LIII), 8 October 2002, para (c)(i); UNHCR, Executive Committee Conclusion No 99 (LV), 8 October 2004, para (l); UNHCR, Executive Committee Conclusion No 80 (XLVII), 11 October 1996, para (e)(iii); UNHCR, Executive Committee Conclusion No 100 (LV), 8 October 2004, para (i); UNHCR, Executive Committee Conclusion No 65 (XLII), 11 October 1991, para (c).

10.5 What Difference Does *Jus Cogens* Character Make?

The absence of settled method to discern the existence of *jus cogens*, or explain its legal character has not, however, thwarted its development. As Zemanek notes, from its roots in the VCLT, the notion of *jus cogens* has evolved, at its most extravagant, to an overarching normatively superior set of rules and principles for the international community.[228] To give an example of the breadth of the consequences attributed to *jus cogens*, consider this statement from the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Furundžija*:

> At the inter-state level, [the *jus cogens* concept] serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State say, taking national measures authorising or condoning torture.[229]

In contrast, Goodwin-Gill and McAdam observe that 'little is likely to be achieved' by regarding the principle of *non-refoulement* as peremptory.[230] It may be that in the context of *non-refoulement*, the practical impact of a recognised *jus cogens* status would be muted by the fact that the scope of treaty-based *non-refoulement* is wide, as most states have ratified the ICCPR, CAT and/or the Refugee Convention.[231] Moreover, as we have demonstrated, the customary law prohibition is well established. The question then arises as to what the precise added value is of *jus cogens* status for *non-refoulement*. In this section, we canvass *some* of the many putative consequences that are attributed to *jus cogens* norms.

10.5.1 Non-derogability

An inherent feature of *jus cogens* norms is that they are non-derogable. Non-derogability means that there is no provision to set aside the rule in cases of emergency or where adherence to the rule would be particularly burdensome.[232]

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[228] Zemanek 2001, at 381.

[229] *Prosecutor v. Anto Furundzija*, Trial Chamber, Judgment, Case No. IT-95-17/1-T, 10 December 1998, para 155.

[230] Goodwin-Gill and McAdam 2007, at 346, note 421.

[231] Lauterpacht and Bethlehem 2003, at 147. In 2015, there are only 13 UN member states that have not signed any of the Refugee Convention or Protocol, the ICCPR or the Convention against Torture. They are as follows: Bhutan, Brunei Darussalam, Cook Islands, Kiribati, Malaysia, Marshall Islands, Micronesia (Federated States of), Myanmar, Niue, Oman, Singapore, Solomon Islands, and Tonga.

[232] We note, however, that Tasioulas takes a narrower view of non-derogability, which would not exclude the possibility of treating a norm as non-derogable even if it could be departed from in times of emergency. Tasioulas 2016, at 17.

It differs from the idea of absolute prohibition, which means that a prohibition has no exceptions to it in individual cases. Some *jus cogens* norms may also have that character (like the prohibition on torture), but derogability and exceptions are conceptually distinct. To illustrate, while the prohibition on aggression is *jus cogens*, there are exceptions that define the scope of the prohibition.

The practice and *opinio* outlined above in section 10.3 tend to regard *non-refoulement* as non-derogable. On the other hand, the 1967 Declaration on Territorial Asylum provides that 'exception may be made to the foregoing principle [*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.' While the former limitation on national security concerns is aligned with Article 33(2) of the Refugee Convention, the broader notion of 'mass influx' effectively operates as a derogability clause in that it would permit the blanket suspension of the norm during an emergency-like situation. Accordingly, we conclude that this Declaration is no longer indicative of the general state of international law, if it ever was.

The recognition of the norm of *non-refoulement* as *jus cogens* would solidify this non-derogable status which would mean that even in cases of mass influx, states are required not to *refoule*. Unlike most human rights treaties, the Refugee Convention does not have a clause permitting derogation in times of emergency.[233] Moreover, even when scholars cautiously examine where some derogation from the substantive rights in the Convention should be permitted, as Durieux and McAdam did some time ago, they invariably acknowledge that no derogation from *non-refoulement* could be countenanced.[234] Rather, they envisaged that countries of first asylum would be required to offer temporary protection, and that other states would offer the full protections the Refuge Convention envisaged over time. In large measure, their project was to induce greater responsibility sharing in the refuge regime, by allowing states under particular strain to invoke a state of emergency-type derogation mechanism. Our conclusion shares their overall aim, in that we argue that insisting on the *jus cogens* character of *non-refoulement* can also form the basis for cooperative duties under the law of state responsibility, as discussed below.

[233] We note that Article 9 of the Refugee Convention contemplates provisional measures 'in time of war or other grave and exceptional circumstances' but note that this is not a general derogation clause. As Hathaway notes, the drafters 'considered, but rejected, an all-embracing power of derogation in time of national crisis.' Hathaway 2005, at 261.

[234] Durieux and McAdam 2004. See also Summary Conclusions: the principle of *non-refoulement*, in Feller et al. 2003, at 179. 'The principle of *non-refoulement* applies in situations of mass influx.' In contrast, Edwards has argued that such a derogation should be regarded as part of the current law, as an implied derogation allowing for temporary protection or derogation based on subsequent practice. While the practice of temporary protection is widespread, we do not agree that it evidences a 'derogation' from the Convention. Edwards 2012.

10.5.2 Jus Cogens and the Law of Treaties

10.5.2.1 Treaty-Based Exceptions to Non-refoulement—Article 33(2) of the Refugee Convention

An apparently clear consequence of the recognition of a norm as *jus cogens* is that treaties in violation of *jus cogens* are invalid.[235] However, on closer inspection, as d'Aspremont points out, 'even the effects of *jus cogens* that are traditionally recognized within the law of treaties have given rise to disagreement, as is illustrated by the divergence between the Vienna Convention on the Law of Treaties and the International Law Commission Study on the Fragmentation of International Law.'[236] While the VCLT seems to rule out severability of Treaty provisions in breach of *jus cogens*, the ILC in its Fragmentation work countenanced just this possibility. If a treaty required a violation of *jus cogens*, it would seem appropriate that it should be deemed invalid in toto. However, in other contexts, particularly human rights treaties, severance would seem to be the appropriate response.[237]

Concerning *non-refoulement*, there are questions as to how the compatibility of Article 33(2) Refugee Convention with the peremptory norm ought to be assessed.[238]

First of all, if *non-refoulement* is regarded as a *jus cogens* norm, we still have to determine its precise scope. One fairly predictable consequence of deeming a norm to be *jus cogens*, is that states will urge a narrow view of its scope, in order to avoid precisely these norm conflicts. Accordingly, it might leave the *jus cogens non-refoulement* rule much narrower than the one based in human rights treaties, in order to preserve the validity of Article 33(2) Refugee Convention. This approach is evident in the work of Moore, who treats *non-refoulement* as 'a fundamental entitlement of all refugees who do not threaten the national community in which they seek refuge'.[239] The difficulty with this approach is that it does not reflect the absolute character of the prohibition on return to face torture, rather reading the Article 33(2) Refugee Convention exception into the general norm. In our view this is a wrong move. While there may be arguments as to the outer limits of the *jus cogens* norm, at a minimum the scope of the norm mirrors the core content of

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235 Articles 53 and 64 VCLT.

236 d'Aspremont 2016, at 97 n. 85. 'This disagreement pertains to the divisibility of treaties found contrary to *jus cogens*.'

237 See Shelton 2016, at 37.

238 This was raised by the Hong Kong Court of Appeal in *C and others v Director of Immigration and another*, where the Court stated that if 'the prohibition on refoulement of refugees is not derogable, there would be real difficulties. It will call into question the validity of Article 33(2) of the RC itself, which permits refoulement if the refugee poses a danger to he security of a receiving state.' *C and others v Director of Immigration and another*, para 76.

239 Moore 2014, at 416, n. 11.

the customary norm, namely, a prohibition on 'expulsion and return of refugees in any manner whatsoever to the frontiers of territories where their lives or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion … or of persons in respect of whom there are substantial grounds for believing that they would be in danger of being subjected to torture.'[240] Accordingly, Article 33(2) Refugee Convention may not be relied upon to return someone to risks of torture and hence an attempted narrowing of the scope of the *jus cogens* norm does not in itself avoid conflict between Article 33(2) Refugee Convention and the *jus cogens* norm.

A second approach would simply treat the invalidity rule as a last resort, requiring reinterpretation of Treaty rules in the first instance to conform with *jus cogens*, and invalidity only in a last resort if reinterpretation is not possible. Such an approach is entirely consistent with the notion of *jus cogens* norms having a hierarchically superior position, or even some sort of constitutional status. In constitutionalised legal orders (like domestic ones or even the EU), invalidity is often avoided by strenuous duties of reinterpretation in order to ensure that the normatively superior rule prevails.[241] However, this approach seems more fitting in contexts where there is a judicial body with a central interpretative role. Otherwise *jus cogens* could become the basis for divergent Treaty interpretation. Moreover, developing a novel rule of Treaty interpretation out of Article 53 VCLT may be hard to sustain. The route of reinterpreting Article 33(2) Refugee Convention seems to be endorsed by Farmer, who relies on the work of Orakhelashvili,[242] to support her view that *non-refoulement* is attaining *jus cogens* status.[243] However, other than then insisting that Article 33(2) is to be interpreted narrowly (which is already the case under orthodox principles of Treaty interpretation), it is unclear what added value *jus cogens* brings.

The third, and in our view preferable approach, is to investigate more deeply the prior question of norm conflict. As Linderfalk has illustrated, understanding *jus cogens* requires an understanding of the complexities of norm conflict and when it occurs.[244] Even in apparently straightforward cases, we need to give meaning to normative conflict. For instance, if Rule 1 says: State A may do X; while Rule 2 states: State A may not do X; Rule 1 is merely facultative, hence Rule 2 prevails. This might be viewed as avoiding norm conflict. Thus if a Treaty appears to allow *refoulement* under certain

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240 UNHCR, Executive Committee Conclusion No 82 (XLVIII), 17 October 1997, para (d)(i).

241 In EU law, national judges are required to reinterpret national law 'so far as possible' to conform with higher EU norms. This duty originates in Case C–106/89, *Marleasing SA v La Comercial Internacionale de Alimentacion SA* [1990] ECR I–4135.

242 Orakhelashvili 2006.

243 Farmer 2008.

244 Linderfalk 2009.

exceptional circumstances, and the *jus cogens* prohibition of refoulement is more expansive, *jus cogens* prevails and there is no norm conflict.[245]

Practically speaking, this potential clash between Article 33(2) Refugee Convention and *jus cogens* is limited. Under Treaty law, some prohibitions on *refoulement* are already absolute—notably that under CAT concerning return to face torture, and that under the ECHR to face any breach of Article 3 ECHR, which prohibits not only torture, but also inhuman and degrading treatment. Many states already find themselves precluded under these treaties from engaging in conduct that Article 33(2) Refugee Convention might otherwise permit.

10.5.2.2 Other Treaties

The recognition of *non-refoulement* as *jus cogens* could have concrete consequences for the validity or at least valid implementation of a range of treaties, particularly bilateral treaties by which persons are transferred between states. For example, extradition treaties, prisoner transfer agreements or readmission agreements pursuant to which persons could be transferred or return to face torture would be subject to challenge on the basis of their conflict with the *jus cogens* norm.

Another set of practices Allain identifies as needing constraint by the *jus cogens* of *non-refoulement* is the practice of deporting individuals who would otherwise be protected against refoulement to 'safe third countries' (STC). These practices may be unilateral, with sending states simply asserting that they may transfer people in this way, as the original European practices did. However, they may also be embodied in formal STC or Readmission Agreements. These agreements usually purport to be compatible with *non-refoulement* and with the Refugee Convention and other human rights obligations.[246] Indeed, under human rights law, the prohibition on indirect *refoulement* has been clarified, as have the duties on states to examine the safety of the country to which return is contemplated, not only in general, but for the individual in question.[247] These constraints have developed with-

[245] This norm harmonisation approach already occurs in refugee law, for example, where domestic jurisdictions recognise that *non-refoulement* applies to extradition treaties. See Goodwin-Gill and McAdam 2007, at 257–262. Another interesting example is provided in Canadian litigation which involved a potential conflict between Canada's obligations under the Refugee Convention and the Hague Convention on the Civil Aspects of International Child Abduction. The Court of Appeal for Ontario resolved the case on the basis that 'harmonious effect can be given to both.' *Issasi v. Rosenzweig*, 2011 ONCA 302, para 8.

[246] Lambert 2012; Foster 2007a; Hurwitz 2009, at 46–66; Government of Canada, Final text of the safe third country agreement, 2009, http://www.cic.gc.ca/english/department/laws-policy/safe-third.asp. Accessed 20 September 2015.

[247] Under the ECHR, the leading cases on returns to ostensibly 'safe' countries include *Tarakhel v. Switzerland,* ECtHR, No. 29217/12, 4 November 2014; and *Hirsi Jamaa and Others v. Italy*. Under the ICCPR, a similar approach has been taken. See *Jasin* et al. *v. Denmark*, Human Rights Committee, Communication No. 2360/2014, UN Doc. CCPR/C/114/D/2370/2014, 4 September 2015.

out recourse to *jus cogens*, drawing in particular on the positive duties to protect against *refoulement* under human rights treaties. If a state that was not a party to any human rights treaty purported to engage in safe third country practices, it would still be bound by customary international law. But if it bound itself by treaty to treat other states as 'safe', then there could be some added value in *non-refoulement qua jus cogens.*

10.5.3 State Responsibility

Another area where the legal implications of *jus cogens* are fairly settled is in the law of state responsibility. The regime of state responsibility makes it impossible to preclude the wrongfulness of a breach of *jus cogens*. The grounds precluding wrongfulness in the ILC Draft Articles on State Responsibility (ASR) may not be used to justify an act that is in breach of a peremptory norm.[248]

Where there is a serious breach of a *jus cogens* norm, there are additional legal consequences set out in Articles 40 and 41 ASR. According to Article 40 ASR, a serious breach of a peremptory norm incurs state responsibility,[249] while Article 41 ASR deals with the situation after the breach. A breach of a peremptory norm creates an obligation for *all states to cooperate* in order to put to an end an unlawful situation created by a breach of a peremptory norm and not to recognise the situations created by such a breach as lawful.[250] As stated in the Commentary to Article 41 ASR, such an obligation is owed *erga omnes*.

Assuming that *non-refoulement* is *jus cogens*, if a state were grossly or systematically to fail to respect this obligation, Article 40 ASR would apply. In that context, other states have positive duties to cooperate to bring that conduct to an end, and have specific negative duties not to render 'aid or assistance' to the state seriously breaching *jus cogens*.

This insight may represent one of the most important ramifications of recognising *non-refoulement* as having *jus cogens* status. It is widely recognised that the efficacy of the international refugee regime is dependent on concepts of solidarity and responsibility sharing, yet infusing these concepts with legal force has proven

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[248] Article 26 of the Articles on the Responsibility of States for Internationally Wrongful Acts. International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, 53rd session of the ILC, UNGA Res 56/83, 12 December 2001 (ASR).

[249] Article 40 ASR.

[250] 'Article 41. Particular consequences of a serious breach of an obligation under this chapter.
1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation.
3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.'

elusive as it is only in the Preamble to the Refugee Convention—not the Convention itself- that notions of 'international co-operation' are found. Hence, while states currently decry obvious violations of core refugee norms by other states, recognition of the norm of *non refoulement* as *jus cogens* may mean that states are under a legal obligation to work cooperatively to put to an end the violations by others of the cardinal refugee principle of *non-refoulement*. This could in turn be understood to require states to better monitor, observe state practice, and communicate with other states about their compliance with *non-refoulement*. This more solid basis for the norm of cooperation may in turn solidify efforts to develop genuine responsibility sharing arrangements such as are currently being discussed both in regions that already have sophisticated frameworks such as Europe, and those where regional approaches to refugee protection are nascent, such as in the Asia-Pacific region. Even if Article 41 ASR is more 'progressive development of the law' than existing obligation,[251] this points to an area for future development of *jus cogens*, which may have some fruitful and constructive ramifications for international refugee protection.

A related consequence of the above ASR is that if a state violates *non-refoulement* systematically, then other states should not aid or assist in that conduct. This rule against aid and assistance concerns such conduct after the fact. This *general* prohibition on complicity in international law applies equally to *jus cogens* principal violations as it does to ordinary principal violations. For Article 16 ASR, the *jus cogens* nature of the principal wrong does not make a difference.

On the basis of Article 16 and the customary norm it embodies,[252] it has been argued, for instance, that Italy's previous cooperation with Libya in migration control activities meant that Italy was 'aiding and assisting' in Libya's unlawful acts. On this basis too, it could be argued that states that cooperate with Australia's *refoulement* of those seeking protection are also in breach of international law. This claim may be made irrespective of the nature of the *non-refoulement* obligation, and whether it is rooted in custom or treaty.[253] The important legal move is the development of the scope of the notion of 'aid and assistance' to encompass

[251] See discussion of Article 41 ASR in Wyler and Castellanos-Jankiewicz 2014, at 304–305. They note that while the legal status of the duty of cooperation enshrined in Article 41(1) ASR is 'rather indeterminate', there is authority to suggest it is anchored in legal obligation. Wyler and Castellanos-Jankiewicz 2014, at 305. In particular, the ICJ stated in its Advisory Opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, that '[i]t is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.' *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para 159. See also ibid., para 160.

[252] Jackson 2015, at 107–191; Quigley 1986; Nolte and Helmut 2009, at 7–10; and d'Aspremont 2009, at 432. Cf. Other scholars have remained more cautious, see, e.g. Lowe 2002.

[253] Indeed, Gammeltoft-Hansen and Hathaway point out that states which are not party to the Refugee Convention often have 'cognate' *non-refoulement* obligations under other treaties such as the ICCPR and CAT. Unsurprisingly, they do not rely on the customary status of non-refoulement. Gammeltoft-Hansen and Hathaway 2015, at 282.

acts which would not in themselves entail an exercise of jurisdiction under human rights treaties, as Hathaway and Gammeltoft-Hansen have demonstrated.[254]

10.5.4 Constraining the UN Security Council

There is broad agreement that the Security Council is bound by *jus cogens* norms.[255] In practice, the significance in this context depends on whether that institution is likely to endorse *refoulement*. Christian Tomuschat has suggested that violations of *jus cogens* by the Security Council largely 'belong to the imaginary sphere of academic hypothesis rather than political reality.'[256] Nonetheless, as the Security Council has become an active legislator, the impact of its actions on human rights and possibly *jus cogens* norms has become all too real.

The UN Security Council has been criticised for facilitating the containment of refugee flows, potentially undermining the right to leave and seek asylum.[257] And, as Long has demonstrated, UNHCR has found itself being requested to provide humanitarian assistance in the context of safe haven practices where the norm of *non-refoulement* is certainly being undermined, if not directly violated. Notwithstanding the practical impact of these practices, it is important to note that Security Council resolutions have never permitted *refoulement*.[258] Admittedly, they may appear to tacitly endorse border closures in situations where potential refugees may have otherwise attempted to leave their home countries. Until those fleeing cross an international frontier, they are not refugees. It may be argued that safe havens prompt neighbouring states to close borders under certain circumstances. And those border closures *may* offend *non-refoulement*[259] depending on the context. However, those closures are difficult to attribute legally to the Security Council.

More recently, the UN Security Council has adopted a Resolution taking a different view of refugee flows, namely focusing on the role of smugglers. In Resolution 2240 (2015), the Security Council calls on member states to assist Libya to 'secure its borders and to prevent, investigate and prosecute acts of smuggling of migrants and human trafficking through its territory and in its territorial

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254 Ibid., at 276.

255 Akande 1997; Krisch 2012; and White 1999.

256 Tomuschat 2007 (cited in Michaelsen 2014, at 37).

257 See, for example, Allain 2002.

258 In legal terms, on their face as Jaquemet has analysed, the criticised UN Security Council resolutions generally endorse the prohibition of *refoulement*. Jaquemet 2014.

259 'Safe haven practices' are forever haunted by Srebrenica. The ECtHR ruling in *Stichting Mothers of Srebrenica and Others v. The Netherlands*, discussed below, is just one of the many attempts of relatives of the victims to find redress. *Stichting Mothers of Srebrenica and Others v. The Netherlands*, ECtHR, No. 65542/12, 11 June 2013. See further Long 2012; and Orchard 2014.

sea.'[260] It authorises exceptional measures for a period of one year including, under certain conditions, the ability of member states to inspect vessels on the high seas,[261] to seize such vessels,[262] and to 'use all measures commensurate to the specific circumstances in confronting migrant smugglers or human traffickers in carrying out' such activities.[263] In practice in Europe, it is unlikely that the Resolution could be interpreted as tacitly or indirectly authorising *refoulement,* in particular in light of the decision of the ECtHR in *Hirsi*.[264] However, while the Resolution demands respect for international refugee law,[265] it also uses typically broad empowering measures, allowing states to take action 'commensurate to the specific circumstances'. Reaffirming the *jus cogens* status of *non-refoulement* is particularly important if the underlying premise in the resolution were to be exported to regional contexts where Treaty-based *non-refoulement* protections have less institutional protection.

Ultimately, a practical difficulty is that no international court is empowered to review the validity of the acts of the Security Council directly. An assessment of the complex concerns surrounding the moves to ensure legal accountability of the Security Council whilst preserving the authority of its actions goes beyond the scope of this contribution.[266] However we note that the institutional gap in legal accountability of the Security Council remains even if *jus cogens* is agreed to constrain the Security Council. Into that institutional gap have come some audacious regional courts.[267] Notably, the Court of First Instance of the EU held in *Kadi* that the whole body of international human rights law had *jus cogens* status, using that reasoning to review indirectly whether UN Security Council resolutions led to breaches of the right to property and fair trial. *Jus cogens* was defined 'as a body of higher rules of public international law binding all subjects of international law, including the bodies of the United Nations [sic], and from which no derogation is possible'.[268] The Court of Justice did not engage with this aspect of the CFI's reasoning, but rather undertook its review on the basis of EU principles alone. It appears that since *Kadi*, litigants have avoided *jus cogens*. For instance, in a recent case where self-determination was at issue, *Frente Polisario*,[269] the applicants framed their arguments in pure EU law terms, rather than invoking *jus cogens*.[270]

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[260] UNSC Res. S/RES/2240, 9 October 2015, at 3, para 2.

[261] Ibid., para 7.

[262] Ibid., para 8.

[263] Ibid., para 10.

[264] *Hirsi Jamaa and Ors v. Italy.*

[265] UNSC Res. S/RES/2240, 9 October 2015, paras 12, 13 and 15.

[266] Tzanakopoulous 2011.

[267] *Juridical Condition and Rights of the Undocumented Migrants*.

[268] Case T-315/01, *Yassin Abdullah Kadi v Council and Commission* [2005] ECR–3649, para 226.

[269] Case T-512/12, *Front Polisario v. Council of the European Union*, General Court of the European Union, 10 December 2015.

[270] Vigigal 2015.

These judicial moves lead to criticism. The Court of First Instance in *Kadi* is after all challenging the authority of international obligations based on its own idiosyncratic conception of *jus cogens*. For instance, de Wet argues that

> [t]he vague natural law arguments of [these] courts, combined with their scant reliance on state practice, arguably pose some of the biggest threats to the credibility of peremptory norms as representing the core values of the international community as a whole.[271]

However, the outcome of the *Kadi* saga, and other challenges to UN Security Council practices of targeted sanctions, led to an improvement of due process within that institution. Without the extravagant judicial invocation of *jus cogens*, the rule of law and protection of human rights would have been weakened. In this respect, we concur with Chinkin that *jus cogens* offers some glimpses of protection for those marginalised by the hegemonic structures of international law. The powerful rely on the importance of coherence to avoid challenge.[272]

In the context of *non-refoulement*, as has been noted, while the UN Security Council has adopted measures that tacitly limit the right to leave and seek asylum, it has not directly violated *non-refoulement*, or permitted its violation by states. Nonetheless, a reminder of the *jus cogens* status of *non-refoulement* does provide a normative, if not an institutional, constraint on the Security Council, at a time when powerful actors contend not only that refugee outflows, but also the crime of human smuggling, are a threat to international peace and security.[273] A reminder that the Security Council may not endorse breaches of *non-refoulement* is important and timely in this context. And the CFI ruling in *Kadi* serves as a reminder that states that act on the basis of Security Council resolutions may not do so in complete comfort that their acts are insulated from legal scrutiny. While that position may seem to some to undermine the authority of international law, on the other hand without that shadow of legal accountability, the Security Council can all too easily become the venue for actions which would otherwise be deemed unlawful as breaching human rights and refugee protection.

10.6 Does a Risk of a *Jus Cogens* Violation Create an Obligation of Non-refoulement?

One of the surprising features about judicial pronouncements and scholarship on *jus cogens* is that while it is clear that *jus cogens* entails prohibitions of certain conduct, its implications beyond those negative duties are less clear. In this section, we review some of the issues surrounding the positive duties, and then consider in particular whether there is a distinctive obligation of *non-refoulement* in cases where there is a risk of violation of *jus cogens.*

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271 de Wet 2015, at 544 (citing Shelton 2006, at 313).

272 Chinkin 2008.

273 Mananashvilli 2015.

10.6.1 Jus Cogens and Positive Duties—Hierarchy Without Consequences

Often *jus cogens* is invoked in order to trump other rules of international law, which are seen to undermine the efficacy of the prohibitions in question. In the main, courts have tended to reject these arguments, limiting the consequences of the normatively superior position of *jus cogens*. For instance, in *Questions Relating to the Obligation to Prosecute or Extradite*, while accepting that the prohibition on torture was *jus cogens*, the ICJ noted that the obligation to prosecute was rooted in the CAT, and so bound states only after they had ratified that convention. Similarly, in other instances while accepting the *jus cogens* nature of particular prohibitions, the ICJ did not view states'[274] reservations against judicial adjudication as in conflict with those prohibitions. In order words, *jus cogens* status was confined to the prohibition, and did not automatically extend to any ancillary norms that would have rendered it more effective.

This position also applies most notably with regard to immunity, where the ICJ[275] (and indeed the ECtHR[276]) have rebuffed the invitation to temper state and UN immunity in order to grant *jus cogens* prohibitions greater effectiveness.[277] In particular, the ICJ in *Jurisdictional Immunities of the State (Germany v Italy)* drew a distinction between substantive and procedural norms. Only rules of substance would cede to *jus cogens* superiority, while those of procedure would not. This issue is hardly settled once and for all, in particular as litigation at the national and regional level continues. The dissenting judgement in *Al-Adsani* is thus worth recalling:

> The acceptance … of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions…Due to the interplay of the *jus cogens* rule on the prohibition of torture and the rules on State immunity, the procedural bar of State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect.[278]

The orthodox position, which rejects this view, is not a rejection of *jus cogens*, but rather a steadfast refusal to expand its scope beyond the prohibitions in question.

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[274] See, for example, *Armed Activities on the Territory of the Congo* (New Application: 2002) (*Dem. Rep. Congo v Rwanda*), ICJ, Jurisdiction and Admissibility, 3 February 2006.

[275] *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*. Note the dissenting opinion of Judge Cancado Trindade, who was the sole dissenting judge on the question of whether *jus cogens* overrode state immunity. Ibid., Dissenting Opinion of Judge Cancado Trindade.

[276] *Al-Adsani v. United Kingdom*, ECtHR, No. 35763/97, 21 November 2001, para 61. Cf. ibid., Joint Dissenting Opinions of Judges Rozakis, Caflisch, Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic.

[277] de Wet 2004.

[278] *Al-Adsani v. United Kingdom*, Joint Dissenting Opinions of Judges Rozakis, Caflisch, Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic, para 3.

To a human rights lawyer, it seems odd that other *jus cogens* norms do not entail, *ipso facto*, such a duty to prevent, or at least some notion of *effet utile*. After all, human rights treaty-based *non-refoulement*, while it entails a clear negative duty not to return an individual to face particular risks, contingent on a positive duty of effort to examine the degree of risk. However, reading in positive duties is not apt for *jus cogens* norms. Notably, not all *jus cogens* norms are human rights norms. Out of the multifaceted character of *jus cogens*, comes an inhibition from reading in capacious positive duties.

10.6.2 Jus Cogens Prohibitions and the Duty of Non-refoulement—A Brief Investigation

The focus of this contribution has been on *non-refoulement per se*. However, in this section we turn to a related but distinct question. Given that there is some settled content to *jus cogens*, does that have any implications for how we understand the scope of *non-refoulement*? In particular, if certain conduct is prohibited as a breach of *jus cogens*, is returning someone to face conduct in breach of *jus cogens* also prohibited *due to* the *jus cogens* nature of the prohibition? In other words, irrespective of whether *non-refoulement* itself has *jus cogens* status or not, does the *jus cogens* character of the prohibition of certain conduct invest those prohibitions with specific *non-refoulement* obligations? And relatedly, is that ancillary *non-refoulement* obligation (if it exists) also of *jus cogens* character?

Of course, there will be situations when returning someone to face a *jus cogens* violation will amount to complicity in that wrong, as discussed above. But complicity presupposes the wrongfulness of the conduct of the receiving state. In this way, complicity grounds a narrower obligation than *non-refoulement*, which is in essence a protective obligation, not to expose someone to a *risk* of ill-treatment. *Non-refoulement*, unlike complicity, does not depend on the materialisation of the wrong in question.[279] Rather, it protects against a risk of harm occurring.

10.6.2.1 Return to Face Torture

Certainly it is the case that as the law stands, returning someone to face torture is prohibited, both under human rights treaties (explicitly under CAT, and by interpretation under global and regional human rights treaties) and customary international law. It is a non-derogable obligation. The question then arises whether the duty of *non-refoulement* is explained by the *jus cogens* status of the prohibition of torture. This view is supported by Menendez, who states that ‘[i]t follows that the principle of *non-refoulement* is also a peremptory norm of international law when

[279] See discussion in Greenman 2015.

compliance with it is necessary to prevent torture or, in my view, a violation of the other already mentioned rights included in the non-derogable minimum standard of international human rights law.'[280] His claim rests on the notion that if there is a *jus cogens* prohibition, then the duty to prevent breaches of that prohibition should also be regarded as *jus cogens*. However, our central argument about the scope of *non-refoulement* does not derive the prohibition from the *jus cogens* character of the prohibition on torture.

10.6.2.2 Return to Face Genocidal Violence

As regards genocide, the prohibition of which is undoubtedly *jus cogens*, the duty to prevent genocide has also been regarded as of *jus cogens* character. The 2013 ECtHR ruling in *Stichting Mothers of Srebrenica and Others v. The Netherlands* concerned not the commission of genocide, but the alleged failure to prevent it. The national courts and the ECtHR held the orthodox position that *jus cogens* does not override state (and UN) immunity, albeit using the language of proportionality.[281] Nonetheless, as Ventura and Akande note,[282] it was simply assumed that as the obligation *not to commit genocide* was a rule of *jus cogens*, the obligation *to prevent* genocide is also a norm of *jus cogens*.[283] While under the Genocide Convention, there is a clear duty to prevent genocide, whether that duty is even one of customary international law or indeed *jus cogens* requires detailed examination. If the duty to prevent genocide is *jus cogens*, then the much less demanding positive obligation not to expose individuals to the risk of genocidal violence would seem to be much easier to ground. Moreover, it may also be the basis for arguing for stronger positive duties in the context of genocide—not only duties of *non-refoulement*, but also to evacuate or intervene. This clearly raises questions well beyond the scope of this contribution.

Accordingly, we conclude that while there is currently no firmly settled view on this question, there is an argument for recognising associated positive duties connected with the recognition of a norm as having *jus cogens* status, in particular if that norm is a human rights one. But perhaps a better view is that the *non-refoulement* obligation arises out of the seriousness of the human rights violation of which there is a risk, rather than the *jus cogens* character of the prohibition itself. This is not to suggest that *jus cogens* norms are confined to pure prohibitions, but simply to note that there is lack of clarity as to the positive duties arising out of *jus cogens*. Given the multifaceted and diverse nature of the norms of

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[280] Menendez 2015.

[281] See *Stichting Mothers of Srebrenica and Others v. The Netherlands*, para 169. '[T]he grant of immunity to the UN served a legitimate purpose and was not disproportionate.'

[282] Ventura and Akande 2013.

[283] See *Stichting Mothers of Srebrenica and Others v. The Netherlands*, para 157. 'The Court has recognised the prohibition of genocide as a rule of *jus cogens*.'

jus cogens, it would be difficult to imagine a uniform set of positive duties, except at an extremely high level of generality.

Nonetheless, concerning those elements of *jus cogens* that are human rights based, it would be ill-fitting not to include some positive obligations to protect the rights in question. Human rights law is now well-settled in regarding all rights as entailing both negative and positive duties. Contemporary understandings of human rights treat them as giving rise to obligations to respect, protect and fulfil. This approach has become a standard feature of the interpretation of human rights treaties, and grounds the general duties of *non-refoulement* we find under them. For instance, the HRC in regard to the right to life, which is not universally perceived to be a norm of a peremptory character, grounds a duty of *non-refoulement* as a matter of human rights protection. In *Judge v Canada*, the HRC stated:

> For countries that *have* abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.[284]

10.7 Conclusions

This chapter has demonstrated that *non-refoulement* is a norm of customary international law. This conclusion is shared by most other refugee law scholars, and so is unsurprising in many ways. However, we are more surprised at the conclusion that on the basis of the evidence reviewed, and applying a rigorous 'customary international law plus' approach to identification of *jus cogens* norms, it is also ripe for recognition as a norm of *jus cogens*. The crucial question however is whether there is any added utility in ascribing a *jus cogens* status to the norm of *non-refoulement*. On one view, there is not. For example, de Wet argues that '[f]ocusing on the customary nature of the rights and obligations in question rather than their *jus cogens* character could therefore be equally if not more effective.'[285] On the other hand, as our analysis in Sect. 10.5 suggests, there is genuine potential for the progressive development of international law concerning *jus cogens* norms to contribute in fruitful ways to refugee protection, particularly in the context of international cooperation and responsibility sharing. These are issues at the heart of the challenge to international protection today.

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[284] *Judge v. Canada*, Human Rights Committee, Communication No. 829/1998, UN. Doc. CCPR/C/78/D/829/1998, 20 October 2003, para 10.4.

[285] de Wet 2004, at 97–121 and 114.

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