MAASTRICHT UNIVERSITY

European Master's Programme in Human Rights and Democratisation

A.Y. 2024/2025

The Duty Not to Return: Non-Refoulement as a *Jus Cogens* Norm in International Law

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Word Count Declaration: 26,083

Abstract:

This thesis examines to what extent the principle of non-refoulement can be recognised as a *jus cogens* norm under international law. While non-refoulement enjoys broad acceptance, it is frequently circumvented through pushbacks, offshore processing, and extraterritorial controls, raising doubts about its legal force. Moreover, no prior study has systematically applied the International Law Commission's Draft Conclusions on Peremptory Norms to this question, leaving a significant gap in scholarship. Using a doctrinal methodology, it analyses treaties, jurisprudence, the interpretations of human rights bodies, domestic legislation, and scholarly commentary. The study finds that non-refoulement meets the cumulative criteria for *jus cogens* as it has been established as customary law with widespread state practice and *opinio juris*, alongside near-universal recognition of its non-derogable character. Recognising non-refoulement as *jus cogens* has critical implications. The principle functions as a procedural safeguard essential to enforcing the prohibition of torture and other absolute rights, binding all states without exception. Even persistent circumvention efforts affirm the normative authority of non-refoulement due to the implicit acknowledgement and lack of contestation regarding its legally binding character. Finally, framing non-refoulement as performing a surrogate protection function underscores its role as a last-resort guarantee of human dignity when national protection fails, reinforcing its status as an *erga omnes* obligation that transcends state consent.

Acknowledgements:

First, I would like to thank my supervisor, Dr Alexandre Skander Galand, for his invaluable guidance and support throughout the process of writing this thesis. His feedback and thoughtful refinements were instrumental to restructuring and narrowing the scope of this thesis. The development and completion of this work would not have been possible without his help.

Next, I would like to express my deepest gratitude for my beautiful fiancée, Amaya Clark, whose words of encouragement kept me going through moments of doubt and frustration.

I would also like to thank Dr. Andrea Broderick for her guidance during my time at Maastricht University Faculty of Law in the second semester. She made the transition from studying in Italy to the Netherlands as seamless as possible and consistently offered her assistance throughout the thesis drafting process.

I would also like to thank my mom, dad, and brother for always believing in me, especially when my morale was low.

Thank you to my colleagues at the Global Campus of Human Rights and to the dedicated faculty and staff whose efforts made this programme so enriching.

Lastly, I would like to express thanks to the clients whose immigration cases I have had the privilege of working on, particularly those whose life experiences inspired the scope of this thesis.

Table of Abbreviations:

ACHR	American Convention on Human Rights
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HRC	Human Rights Committee (UN)
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
IHRL	International Human Rights Law
ILC	International Law Commission
R2P	Responsibility to Protect
Refugee Convention	Convention Relating to the Status of Refugees, 1951
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
VCLT	Vienna Convention on the Law of Treaties

Table of Contents:

1. Introduction:

The principle of non-refoulement, which prohibits the transfer of individuals to territories where they face a real risk of persecution, torture, arbitrary deprivation of life, or other serious human rights abuses, is a cornerstone of international refugee protection. First codified in Article 33 of the 1951 Refugee Convention, non-refoulement has since evolved through international human rights frameworks and judicial interpretation into a norm of customary international law with significantly broader application.[1] This thesis argues that non-refoulement has evolved into a *jus cogens* norm of international law, enjoying consistent and authoritative interpretation as a norm from which no derogation is permitted across various legal regimes.

1.1 Research Questions:

Despite the deep embedment of non-refoulement in both treaty and customary international law, the principle of non-refoulement continues to face serious challenges in contemporary practice, particularly in the contexts of extraterritorial migration control, maritime interception, and bilateral expulsion arrangements.[2] Such policies are "based on highly formalist and decontextualized reasoning" that directly conflict with the object and purpose of the Refugee Convention and broader human rights law.[3] Indeed, the persistence of these violations does not negate the principle's legal force but rather highlights the extent to which states feel compelled to circumvent, rather than reject, the principle of non-refoulement, thereby reinforcing its binding nature.

This tension between formal commitment and practical evasion underscores the need for a deeper inquiry into the normative force of non-refoulement and the degree to which

[1] UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law* (Legal Note, 2005) 1 https://www.refworld.org/docid/437b6db64.html accessed 12 June 2025 ("It is generally accepted that the principle of non-refoulement has become part of customary international law.").
[2] GS Goodwin-Gill, J McAdam and E Dunlop, 'The Principle of Non-Refoulement—Part 2' in GS Goodwin-Gill and J McAdam (eds), *The Refugee in International Law* (4th edn, Oxford University Press 2021) 312.
[3] Ibid.

international law recognises this principle as a peremptory norm. To structure this inquiry, the thesis is centred around the following research question:

To what extent can non-refoulement be recognised as a *jus cogens* norm under international law?

To answer the primary research question, the following sub-questions will be addressed:

1. What are the defining characteristics of *jus cogens* norms, and how are they established in international law?
2. What is the principle of non-refoulement, and how has it evolved within the framework of international refugee and human rights law?
3. What legal and doctrinal criteria support the recognition of non-refoulement as a *jus cogens* norm?

1.2 Methodology:

The analysis of the central inquiry in this thesis proceeds through a doctrinal legal methodology focused on interpreting and synthesising international legal sources, judicial decisions, treaty provisions, and academic commentary. This approach allows for a systematic evaluation of both the normative development and legal status of non-refoulement within the hierarchy of international law.

A key component of this doctrinal approach involves engagement with the 2019 Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*), adopted by the International Law Commission (ILC), which provide a structured framework for identifying peremptory norms of general international law. Their role is not to serve as an authoritative enumeration of *jus cogens* norms but to provide a structured methodology for evaluating claims to peremptory status, primarily through their emphasis on the definitional and evidentiary thresholds for recognition of a norm as non-derogable by the international community of States as a whole. The ILC Draft Conclusions on both Customary International Law and Peremptory Norms can be interpreted as statements of *lex lata*, reflecting what the Commission describes, in the case of customary law, as “the way in which rules of customary

international law are to be determined,"[4] and, in the case of jus cogens, as setting out the "criteria and legal consequences" of peremptory norms.[5] The Commission notes that the conclusions aim to "describe current practice as accurately as possible" and to provide "practical guidance."[6] While they are not themselves binding sources of law, the Draft Conclusions constitute "subsidiary means for the determination of rules of law" under Article 38(1)(d) of the Statute of the ICJ,[7] and have persuasive value as evidence of existing doctrine and methodology in international law.

The ILC's criteria are complemented by the "Custom Plus" framework proposed by Cathryn Costello and Michelle Foster.[8] This framework builds upon the orthodox methodology for identifying customary international law by requiring not only widespread state practice and *opinio juris*, but also widespread *opinio juris* that the norm in question is non-derogable.[9]

Academic commentary is used throughout to both illuminate the doctrinal contours of peremptory norms and to interrogate their functional significance in contemporary legal regimes. This thesis relies on such commentary not as dispositive evidence of law, but as critical context that aids in assessing and interpreting the law. In line with the caution expressed by the ILC regarding scholarly writings, academic sources are approached discerningly, with attention to whether they reflect current law or propose its development.[10] As Alston and Goodman observe, legal scholars often "do not always distinguish (or distinguish clearly) between the law as it is and the law as they would like it to be."[11]

This thesis applies those overlapping frameworks to assess whether *non-refoulement* meets the core indicators of *jus cogens* status: normative content that safeguards fundamental values; widespread and representative state practice accompanied by *opinio juris*;

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[4] International Law Commission, *Draft Conclusions on Identification of Customary International Law, with Commentaries* (2018) UN Doc A/73/10, Commentary to Draft Conclusion 1, para 1.
[5] International Law Commission, *Draft Conclusions on Peremptory Norms of General International Law (Jus Cogens), with Commentaries* (2019) UN Doc A/74/10, Commentary to Draft Conclusion 1, para 3.
[6] ibid, para 3.
[7] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993, art 38(1)(d).
[8] C Costello and M Foster, 'Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test' (2016) 27 Netherlands Yearbook of International Law 273, 279–80.
[9] Ibid
[10] n 4, Commentary to Conclusion 9, para 11, n 142.
[11] Philip Alston and Ryan Goodman, *International Human Rights: The Successor to International Human Rights in Context* (Oxford University Press 2013) 84.

non-derogability under any circumstances; and recognition as non-derogable by the international community of states as a whole.[12] The analysis draws on a range of sources, including decisions by international and regional courts, interpretative guidance by treaty bodies, UN resolutions, domestic legislation, and scholarly commentary.

1.3 Structure:

This thesis is structured in three substantive chapters following the introduction. Chapter 2 addresses the first sub-question, examining how *jus cogens* norms are defined, identified, and applied within the framework of international law. The discussion begins by situating *jus cogens* within the conceptual architecture of international law, distinguishing between the hierarchy of sources and the hierarchy of norms. The chapter then provides a historical overview of the doctrine's evolution, from its early theoretical foundations and codification in the Vienna Convention on the Law of Treaties (VCLT) to its subsequent development through jurisprudence and scholarly debate. Next, this chapter examines the methods and criteria for identifying peremptory norms, focusing in detail on the ILC's 2019 Draft Conclusions, particularly Conclusions 4, 5, 8, and 9. This analysis includes a critical discussion of the "Custom Plus" approach and the evidentiary thresholds required to establish both customary status and recognition of non-derogability by the international community as a whole. Subsequent sections explore the defining features and legal consequences of jus cogens norms, including their universality, hierarchical supremacy over conflicting rules, non-derogable character, and their capacity to generate *erga omnes* obligations. Finally, the chapter assesses the limitations and procedural barriers to enforcement, such as state immunity. This chapter concludes by considering the contested boundaries of the category, evaluating proposals for the recognition of emerging norms, including non-refoulement, as *jus cogens*.

Chapter 3 responds to the second sub-question by tracing the historical evolution and legal consolidation of the principle of non-refoulement. Beginning with its early humanitarian origins in the interwar refugee protection system, the chapter examines its codification in Article 33 of the 1951 Refugee Convention and the 1967 Protocol. The chapter then analyses

[12] n 5, Conclusions 4–5.

the principle's subsequent expansion across international human rights law, including its incorporation into the CAT, ICCPR, and regional human rights treaties and jurisprudence. Finally, the chapter assesses the evidence for non-refoulement's status as a rule of customary international law, highlighting the convergence of widespread state practice, domestic incorporation, and opinio juris. This analysis provides the foundation for evaluating whether non-refoulement meets the criteria for recognition as a *jus cogens* norm.

Chapter 4 addresses the third sub-question and the central research question by applying the doctrinal framework outlined in Chapter 2 to the evidence and normative developments presented in Chapter 3. This chapter systematically assesses whether non-refoulement meets the criteria for recognition as a peremptory norm under international law, with particular emphasis on its non-derogable character and the universal acceptance of this status. In addition to this doctrinal analysis, the chapter examines the procedural role of non-refoulement as a crucial mechanism for preventing breaches of the jus cogens prohibition on torture and other fundamental human rights norms. Moreover, this chapter examines how contemporary practices of circumvention illustrate both the enduring authority and the enforcement challenges of non-refoulement as a peremptory norm. Finally, the chapter reflects on the normative implications of recognising non-refoulement as a jus cogens norm, including its function as a surrogate form of protection when domestic systems fail. In doing so, this chapter demonstrates that non-refoulement is not only doctrinally consistent with the established criteria for jus cogens but also practically indispensable to the integrity and credibility of the international human rights framework.

The Conclusion synthesises the findings of all four chapters, demonstrating how the doctrinal, historical, and evidentiary analysis supports the recognition of non-refoulement as a peremptory norm of general international law. The Conclusion underscores that while enforcement challenges remain, the cumulative evidence establishes that the recognition of non-refoulement as a jus cogens norm is not merely aspirational but an emerging legal reality grounded in consistent state practice, judicial consensus, and the shared values of the international community.

2. The *Jus Cogens* Debate:

This chapter examines the legal and conceptual framework surrounding *jus cogens* norms, which are rules of international law that hold the highest normative authority. It begins by examining how *jus cogens* norms fit within the broader legal architecture of international law. The chapter then sets out the criteria for identifying *jus cogens* norms, with close attention to the ILC's 2019 Draft Conclusions and the "Custom Plus" approach, which requires the same elements of state practice and *opinio juris* as the identification of customary international law, supplemented by *opinio juris* as to the norm's character as one from which no derogation is permitted. Analysis is provided on how courts and scholars have treated these criteria, with a focus on the role of judicial decisions. A dedicated section considers universality, both as a criterion for recognition and a legal consequence of peremptory status. The chapter then turns to other legal effects of *jus cogens*, including their supremacy over conflicting treaty and customary rules, the limitations they impose on state conduct, and their status as *erga omnes* obligations. This chapter also addresses the tension between substantive supremacy and procedural doctrines, such as state immunity, which often hinder the enforcement of *jus cogens* norms. Finally, the chapter concludes by examining contested boundaries of the category and evaluating the criteria by which new norms, such as the principle of non-refoulement, might qualify for *jus cogen*s status. This final section provides a foundation for the next chapter's analysis of non-refoulement's development in international law.

2.1 Conceptual Foundations in International Law:

In municipal law, there exists a clear hierarchy of legal sources and legal rules produced through such sources in the following order: the Constitution, laws enacted by parliament, and then the by-laws or regulations made by local authorities.[13] In contrast to the formal hierarchy found in municipal legal systems, classic international law lacks a strict hierarchical structure. As Hernández explains, international law is traditionally understood as "a consent-based, horizontal system of rules," which lacks a centralised law-making authority and thus resists the kind of hierarchical ordering typical of domestic systems.[14] This

[13] A Cassese, *International Law* 2nd edn (Oxford University Press 2005) 198.
[14] G Hernández, *International Law* (2nd edn, Oxford University Press 2022) 62.

foundational decentralisation makes questions of hierarchy in international law both more complex and more contested.

From the outset, there are two types of hierarchy often discussed in international law that must be distinguished: the hierarchy of sources and the hierarchy of norms. The hierarchy of sources refers to the relative status or priority among the formal sources of law. The sources of international law can be found in Article 38(1) of the ICJ Statute:

> "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognised by civilised nations;
> d. subject to the provisions of Article 59, 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."[15]

While Article 38(1) does not establish a rigid hierarchy of sources, two elements of hierarchy can be seen. Firstly, the article explicitly states that judicial decisions and scholarly writings are listed as subsidiary means of evidence. Secondly, although not directly stated in Article 38(1), Klabbers puts forth that the general agreement among international lawyers is that general principles have as their primary function filling the gaps when there is no applicable treaty or custom.[16] Nevertheless, the relationship between treaty law and customary international law is more complex, as neither is automatically superior to the other. Generally, the principle of *lex posterior* suggests that the later norm prevails.[17] The principle of *lex specialis*, by contrast, holds that more specific rules take precedence over general ones.[18] Accordingly, treaties and custom are generally regarded as sources of equal authority. In this sense, international law does not have a formal hierarchy of sources.

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[15] n 7, art 38(1).
[16] J Klabbers, *International Law* (4th edn, Cambridge University Press 2023) 26.
[17] MN Shaw, *International Law* (6th edn, Cambridge University Press 2008) 123.
[18] n 13, 63.

The hierarchy of norms, by contrast, refers to the substantive rank of legal rules themselves, regardless of the source from which they arise. This idea implies that while a treaty and a customary rule can be formally equal as sources, the content of a rule may place it higher in the normative order. *Jus cogens* exemplifies this principle, referring to fundamental principles of general international law that hold the highest normative status and cannot be derogated from by treaty or contrary customary rules. Positive international law has long recognised that certain norms prevail over others.[19] The idea of overriding legal obligations predates the formal codification of *jus cogens* and is evident in early instruments such as the Covenant of the League of Nations and the UN Charter.[20] The concept of *jus cogens* thus introduces an explicit hierarchy of norms, ensuring that some obligations are binding on all states without exception and override any inconsistent rule, however created.[21]

The intellectual roots of this concept can be traced back to 1953, when Special Rapporteur of the ILC, Hersch Lauterpacht, proposed that treaties conflicting with overriding principles of international law, what he termed *ordre international public*, could be deemed void, thereby anticipating the modern *jus cogens* framework.[22] The formal elevation of certain fundamental legal norms to *jus cogens* status gained momentum in the late 1960s, primarily driven by the efforts of socialist and developing countries.[23] These states argued that principles such as self-determination, the prohibition of aggression, genocide, slavery, racial discrimination, and apartheid should be elevated beyond ordinary treaty and customary rules to ensure their absolute and universal applicability. The motivations behind this initiative varied: for developing countries, *jus cogens* was a means of resisting colonial oppression, while for socialist states, it provided a legal framework for peaceful coexistence between states with differing social and economic systems.[24] The ILC played a key role in formalising the concept of *jus cogens*, introducing it during the Vienna Conference on the Law of Treaties

[19] Ibid
[20] See UN Charter art 103 (providing that Charter obligations prevail over conflicting treaty obligations); Covenant of the League of Nations art 11 (treating threats to peace as a matter of concern to all Member States).
[21] n 13, 64.
[22] H Lauterpacht, 'Report on the Law of Treaties' UN Doc A/CN.4/63 (1953) 155 quoted in A M Weisburd, 'The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina' (1995) 17 *Michigan Journal of International Law* 1, 12.
[23] n 12, 199.
[24] Ibid.

(1968–1969).[25] Although some Western states initially opposed this shift, fearing a transformation from a consent-based legal order to one driven by fundamental values, most ultimately accepted the initiative, provided that a judicial mechanism be established to determine peremptory norms.[26]

This transition from state-led normative claims to formal codification was solidified in Article 53 of the VCLT, which defined the concept of *jus cogens* and outlined its legal consequences. Article 53 of the VCLT states that:

> "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised 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."[27]

There is no universal agreement as to which rules of international law have attained this exalted status, which is why no examples are given in Article 53 of the VCLT.[28] This omission reflects the ILC's intention, as the drafters of the VCLT, to leave the content of jus cogens norms open to subsequent identification by states and jurists.[29] However, the ILC has since identified examples of *jus cogens* norms, including the prohibition of torture, genocide, and slavery.[30] These examples were not included in the VCLT itself but have emerged in the ILC's later work, notably in the 2019 Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*), where the Commission provided an illustrative, non-exhaustive list of such norms.[31] Additionally, earlier ILC reports, such as the Articles on State Responsibility,[32] explicitly recognised certain peremptory norms which helped develop

[25] n 13, 64.
[26] Ibid; n 12, 200.
[27] Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 53.
[28] M Dixon, *Textbook on International Law* (7th edn, OUP 2013) 42.
[29] Ibid
[30] n 5, Conclusion 23 and Annex.
[31] Ibid,
[32] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (2001) Yearbook of the International Law Commission, vol II, Part Two, 85–86, Commentary to Article 26, para 5.

an understanding of the scope of j*us cogens* over time. Despite the examples provided by the ILC Draft Conclusions on Peremptory Norms, no formal consensus exists on other potential norms, and even the most widely accepted examples remain subject to academic and judicial debate.[33]

2.2 Criteria for Identifying *Jus Cogens* Norms:

2.2.1 ILC Draft Conclusions:

The ILC Draft Conclusions offer both a conceptual framework and a practical method for determining whether a norm of general international law possesses the additional quality of peremptory status.[34] In particular, Conclusions 4 and 5 set out the definitional criteria, while Conclusions 8 and 9 elaborate on the necessary evidentiary threshold. Taken together, these conclusions reflect an effort to codify and clarify the process of identifying peremptory norms, addressing both their legal foundations and the objective verification of their existence. This structured framework helps states, courts, and scholars consistently apply and interpret *jus cogens* norms. There is an emerging trend toward judicial reliance on the ILC Draft Conclusions as interpretive guidance for identifying and applying *jus cogens* norms.[35] Notably, the ILC Draft Conclusions do not carry binding authority and must be understood as reflective rather than determinative of state practice and *opinio juris*.

While the ILC Draft Conclusions have been commended as a framework for identifying peremptory norms, their conceptual foundations have not gone unchallenged in academic discourse. Some scholars have expressed scepticism regarding the clarity and doctrinal coherence of the criteria surrounding the jus cogens category. Ulf Linderfalk argues that the VCLT's definition lacks inherent identifying criteria, leading to inconsistencies in how jus cogens norms are characterised. He observes that "lawyers' descriptions of the legal consequences of *jus cogens* range from the most narrow of interpretations of Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties, to suggestions imposing upon

[33] n 16, 125.
[34] n 5, Commentary to Draft Conclusion 1, paras 2 - 4.
[35] Ibid, Conclusions 4 and 7; see also Advisory Opinion OC-26/20 (IACtHR, 9 November 2020) [53]–[55] (relying explicitly on ILC Draft Conclusions regarding jus cogens norms); Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Judgment) [2012] ICJ Rep 422 [99] (considering peremptory norms in line with ILC practice).

states and international organizations some very far-reaching positive obligations concerned with the enforcement of jus cogens norms."[36] As Jean d'Aspremont puts it, "If we search the international law literature for information on the possible normative content and effects of *jus cogens* norms, it will provide but a very diffused picture."[37] Linderfalk further warns that such conceptual ambiguity risks undermining legal certainty, as it could call into question the validity of existing treaties and customary norms.[38] Despite these theoretical objections, the ILC's structured methodology, grounded in state practice, *opinio juris*, and non-derogability, offers a principled and transparent approach to identifying peremptory norms.

Conclusion 4 of the ILC Draft Conclusions outlines the specific criteria that must be met for such a norm to be recognised:

> "To identify a peremptory norm of general international law (*jus cogens*), it is necessary to establish that the norm in question meets the following criteria:
>
> (a) it is a norm of general international law; and
>
> (b) it is accepted and recognised 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."[39]

These provisions underscore that for a norm to attain *jus cogens* status, it must not only be part of general international law but also be accepted and recognised by a broad portion of the international community as fundamentally non-derogable. Importantly, the standard does not require unanimous agreement but rather widespread and representative endorsement by states. This interpretation is rooted in Article 53 of the VCLT, which refers to norms "accepted and recognised by the international community of States as a whole." As clarified by the ILC, this phrase signifies extensive recognition, not literal unanimity.[40]

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[36] U Linderfalk, 'The Legal Consequences of Jus Cogens and the Individuation of Norms' (2020) 33 Leiden J Intl L 894.
[37] J d'Aspremont, *International Law as a Belief System* (CUP 2018) 193.
[38] U Linderfalk, 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' (2007) 18 EJIL 853–857.
[39] n 5, Draft Conclusion 4.
[40] n 26, Art. 53; see also Ibid, Draft Conclusion 4 and Commentary to Draft Conclusion 4, para 9.

To assess whether this level of acceptance has been met, Conclusions 8 and 9 provide a two-tier evidentiary approach: primary and subsidiary means. Draft Conclusion 8 establishes that primary evidence of acceptance and recognition by the international community of States as a whole as non-derogable must be demonstrated and may take a wide range of forms. These include public statements made on behalf of States, government legal opinions, constitutional provisions, legislation, judicial decisions, treaty provisions, and resolutions adopted by international organisations or at intergovernmental conferences, among other forms of State conduct.[41] The ILC emphasises that no single item is determinative; instead, the cumulative weight of the evidence must demonstrate that the norm is regarded as non-derogable by the international community of states as a whole.[42]

Conclusion 9 addresses subsidiary means of determination, which include decisions of international courts and tribunals, especially the International Court of Justice, as well as the works of expert bodies and highly qualified publicists.[43] For example, in *Prosecutor v. Furundžija*, the International Criminal Tribunal for the Former Yugoslavia (ICTY) affirmed the *jus cogens* status of the prohibition of torture, relying on extensive references to state practice, international instruments, and scholarly consensus.[44] This judgment demonstrates how international courts may synthesise primary evidence of *opinio juris* and state practice and, in doing so, function as subsidiary means that help to confirm a norm's peremptory character. Similarly, in *RM v Attorney-General*, the High Court of Kenya relied on General Comment No. 18 of the UN Human Rights Committee, an interpretative output of a treaty body widely regarded as an expert authority under international law, to support its conclusion that non-discrimination constitutes a peremptory norm.[45] While general comments are not binding, they fall within the category of subsidiary means under Conclusion 9 when relied on by national or international courts to endorse the recognition and acceptance of a *jus cogens*

[41] n 5, Draft Conclusion 8 and Commentary to Draft Conclusion 8, paras 1–2.; Obligation to Prosecute or Extradite (n 34) [99] (confirming that legislative and judicial acts may constitute state practice relevant to the identification of norms of general international law).
[42] n 5, Conclusion 8, paras 2–3.
[43] Ibid, Conclusion 9 and Commentary para 1 (fn 123); Official Records of the General Assembly, Seventy-third Session, Supplement No 10 (A/73/10) 149.
[44] Prosecutor v Furundžija (Judgment) ICTY, 10 December 1998, paras 144–153 (fns 125–126, 138).
[45] RM v Attorney-General (High Court of Kenya, 1 December 2006) [2006] eKLR, relying on Human Rights Committee, 'General Comment No 18: Non-discrimination' (10 November 1989) para 1 (considering non-discrimination a peremptory norm of general international law).

norm. Such subsidiary sources do not independently establish *jus cogens* status, yet they serve a corroborative role.[46]

Conclusion 5 addresses the legal sources from which *jus cogens* norms may derive. It provides that:

> "(1) Customary international law is the most common basis for peremptory norms of general international law (*jus cogens*); and
>
> (2) Treaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*)."[47]

This formulation confirms that customary international law remains the primary basis for jus cogens, owing to its generality and universal application. The ILC explains that custom is the "most obvious manifestation of general international law," and its broad applicability renders it particularly well-suited for non-derogable norms.[48] Indeed, various international courts, including the ICJ and the ICTY, have repeatedly recognised the customary basis of peremptory norms such as the prohibitions on torture and genocide.[49]

Nevertheless, Conclusion 5 does not exclude treaty provisions and general principles of law as a potential basis for *jus cogens* norms, provided they meet the stringent criteria outlined in Conclusion 4. For instance, treaty norms may attain *jus cogens* status when they reflect or crystallise existing custom, such as the prohibition of genocide in the Genocide Convention.[50] Widely ratified treaties such as the Geneva Conventions and the Convention on the Rights of the Child have at times been invoked in support of peremptory norms, particularly when aligned with parallel customary law and universal values.[51] That said, while treaty provisions

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[46] n 5, Conclusion 9 and Commentary paras 1, 7 and 9 (fn 135).
[47] n 5, Draft Conclusion 5.
[48] Ibid, Commentary to Draft Conclusion 5, para 4.
[49] n 43, para 153; Prosecutor v Delalić (Trial Chamber Judgment) ICTY IT-96-21-T (16 November 1998) para 733.
[50] n 5, Commentary to Draft Conclusion 5, para 7; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) [1951] ICJ Rep 15, 23.
[51] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3; Geneva Conventions of 12 August 1949, 75 UNTS 31, 85, 135 and 287; see n 5, Commentary to Draft Conclusion 5, para 7 (noting that treaty provisions may reflect or crystallise existing customary international law, thereby supporting the identification of peremptory norms); P Webb, 'Human Rights and the Immunities of State Officials' in E de Wet and J Vidmar (eds), *Hierarchy in International Law: The Place of*

and general principles of law are not excluded as potential bases for peremptory norms, they are rarely sufficient on their own.[52] Because treaties generally bind only the parties to them, they lack the universal scope necessary for peremptory status unless they reflect or crystallise existing customary norms.[53] Similarly, while general principles of law may be elevated to the status of *jus cogens* where there is broad recognition of their fundamental nature, the ILC notes that there is little practice to support such recognition.[54] Thus, although Conclusion 5 of the ILC Draft Conclusions acknowledges multiple potential legal bases, it affirms that customary international law serves as the most reliable and commonly accepted foundation for identifying *jus cogens* norms.

Customary international law remains the most common basis for identifying *jus cogens* norms due to its generality, consistency, and the fact that it arises from widespread state practice accepted as law (*opinio juris*). Because of this, the identification of customary norms becomes a necessary, though not sufficient, condition for the recognition of most *jus cogens* norms. To qualify as a peremptory norm, a rule of customary international law must exhibit not only widespread practice and *opinio juris* but also near-universal recognition of its non-derogable character.[55]

2.2.2 Custom Plus Approach to *Jus Cogens*:

The "Custom Plus" approach to identifying *jus cogens* norms, as articulated by Costello and Foster in their 2016 article, builds upon the orthodox methodology used to identify customary international law, while introducing an additional requirement: *opinio juris* as to the peremptory character of the norm.[56] This method accepts that *jus cogens* norms may be inferred from the same evidentiary base that supports a finding of customary international

Human Rights (OUP 2012) 129–131 (suggesting that widely ratified human rights treaties, especially those reflecting core international values, may contribute to the identification or affirmation of jus cogens norms).

[52] n 5, Draft Conclusion 5(2) and Commentary to Draft Conclusion 5, para 7.

[53] See n 5, Commentary to Draft Conclusion 5, para 7; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (n 49) 23; North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) [1969] ICJ Rep 3, [38–63]; P Webb (n 50) 129–30.

[54] n 5, Commentary to Draft Conclusion 5, para 9; see also GJ Tunkin, 'Is General International Law Customary Law Only?' (1993) 4 European Journal of International Law 534–541 (discussing more broadly the role of general principles in international law).

[55] n 5, Draft Conclusion 3 and Commentary paras 3–6; Dire Tladi, *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputes* (Brill 2021) 74–76.

[56] n 8, 279–80.

law, namely, widespread and representative state practice and *opinio juris*, but adds that such norms must also be regarded as norms from which no derogation is permitted reflecting conclusion 4(b) of the ILC Draft Conclusions.[57]

Costello and Foster's article predates the adoption of the ILC's 2019 Draft Conclusions. While the ILC does not formally adopt the "Custom Plus" approach, its formulation in Conclusion 4(b) is broadly consistent with their model. The Commentary to Conclusion 6 confirms this connection by citing Costello and Foster's article alongside other scholarly and judicial sources in support of the proposition that, beyond widespread state practice and *opinio juris*, peremptory norms must also be recognised as non-derogable by the international community as a whole. In particular, the ILC explains that this requirement reflects the prevailing interpretation of Article 53 of the VCLT as affirmed in regional jurisprudence and academic commentary, including the view that *jus cogens* status entails an "additional widespread endorsement as to [a norm's] non-derogability."[58] Although the ILC's language is more cautious, its engagement with the evidentiary logic advanced by Costello and Foster lends credibility to the "Custom Plus" framework and suggests doctrinal alignment, at least in substance.

Costello and Foster ground their approach in the jurisprudence of the ICJ, which has described certain *jus cogens* norms as "intransgressible principles of international customary law."[59] A prominent example is the ICJ's affirmation of the prohibition of torture as a *jus cogens* norm in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*. There, the Court explicitly relied on the customary status of the prohibition, stating that the ban on torture has become "part of customary international law" and is "a peremptory norm (*jus cogens*)."[60] The Court grounded this conclusion in a cumulative body of evidence, including codification in international instruments, widespread domestic implementation, and consistent denunciation of torture in national and international fora, thus illustrating how *jus cogens* status may emerge through the same evidentiary methods used to establish custom when accompanied by non-derogability and universal acceptance.

[57] n 5, Draft Conclusion 4(b).
[58] Ibid, Draft Conclusion 6 and Commentary to Draft Conclusion 6, para 4; see also n 102; n 8, 281.
[59] Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, para 79.
[60] International Court of Justice, Obligation to Prosecute or Extradite (n 34), [99]; see also nn. 29–32.

Another leading example from international criminal jurisprudence comes from *Prosecutor v. Furundžija*, where the Tribunal explicitly affirmed the prohibition of torture as a norm of *jus cogens*.[61] Notably, the ICTY provided a detailed rationale grounded in methodology that mirrors the "Custom Plus" approach employed in this thesis. The Tribunal pointed to widespread and representative state practice, strong and repeated condemnations by states in international fora, and the incorporation of the prohibition into multiple international instruments without derogation clauses.[62] This evidentiary base satisfies the two classic elements of custom: state practice and *opinio juris*. However, the ICTY went further by emphasising that states not only considered the prohibition of torture legally binding but also universally non-derogable. This reflects the "plus" element in the "Custom Plus" model: the added requirement that the majority of states legally recognise the norm's peremptory character, not merely its customary status.[63] The ICTY thus implicitly applied a two-part test, customary status and universal acceptance of non-derogability, which exemplifies the criteria later codified in the ILC Draft Conclusions.[64] Since this two-part test closely parallels the cumulative criteria later codified in the ILC Draft Conclusions, it suggests convergence between judicial reasoning and the ILC's structured approach.

Importantly, the "Custom Plus" framework does not suggest that only customary norms can become *jus cogens*. Instead, it clarifies that when a norm derives from custom, its elevation to *jus cogens* requires clear evidence that the majority of states regard that norm not only as binding but also as non-derogable under any circumstances.[65] The remainder of this section will examine how the "Custom Plus" model can be applied in practice by assessing specific criteria such as state practice, *opinio juris*, and the recognition of non-derogability by the international community as a whole.

2.2.3 The Role of *Opinio Juris* and State Practice

Opinio juris and state practice are essential criteria for the recognition of *jus cogens* norms that arise from customary international law. *Opinio juris*, or the belief that a rule is legally

[61] n 43, paras. 144–153.
[62] Ibid.
[63] n 8, 279–281.
[64] n 5, Conclusion 4 and commentary.
[65] n 8, 279–281.

obligatory, ensures that peremptory norms are accepted as binding by the international community rather than followed merely out of political expediency or convenience.[66] In the *North Sea Continental Shelf* Cases, the ICJ affirmed that a rule of customary international law requires both "extensive and virtually uniform" state practice and evidence that such practice is "carried out in such a way as to be evidence of a belief that this is rendered obligatory by the existence of a rule of law", that is, *opinio juris*.[67] However, *jus cogens* norms are distinct in that strong *opinio juris* can override inconsistent state practice from a minority of states, ensuring that violations do not undermine the norm's legal status.[68]

This principle finds a parallel in the broader development of customary international law, where inconsistency in state practice does not necessarily negate the formation of a norm. In *Military and Paramilitary Activities in and against Nicaragua,* the ICJ affirmed that even where state practice is inconsistent, a customary norm may still be established if "the instances of State conduct inconsistent with a given rule are generally treated as breaches of that rule" rather than evidence of a new one.[69] This approach marked a significant methodological shift in the identification of customary international law, particularly relevant for *jus cogens,* by allowing for the recognition of norms where consistent *opinio juris* accompanies divergent practice, so long as the latter reflects non-compliance rather than the emergence of a new custom.[70] This reasoning was crucial in bringing the prohibition of the aggressive use of force, rooted in Article 2(4) of the UN Charter, before the Court as the first peremptory norm to be considered during the merits phase of a judgment by the ICJ.[71] While the Court did not explicitly declare the prohibition of the aggressive use of force a *jus cogens* norm, it acknowledged that "there is no doubt that the prohibition of the use of force... has the character of a rule of customary international law."[72] As Hernández explains, however, "even though the Court refrained from pronouncing definitively on the norm's peremptory

[66] n 13, 77.
[67] North Sea Continental Shelf Cases (n 52) [74–77].
[68] n 13, 77.
[69] UN Charter (n 19) art 2(4); Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14 paras 188–190.
[70] n 15, 34.
[71] Nicaragua (n 68) para 190; n 5, Conclusion 23, Commentary para 7.
[72] Ibid (n 68) para 190.

character, its reasoning and the general acceptance of the prohibition have been taken by many commentators as recognition of its status as a norm of *jus cogens*."[73]

This analysis underscores the role of doctrinal methods in identifying customary international law, as they inform the approach to identifying *jus cogens* norms. Under the aforementioned "Custom Plus" method, the same evidentiary elements of state practice and *opinio juris* are required to establish a peremptory norm, with the additional requirement that *opinio juris* must also encompass recognition of the norm's non-derogable, hierarchically superior status. For example, in *Prosecutor v. Furundžija*, the ICTY affirmed that "because of the importance of the values it protects, this principle [of torture] has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules."[74] The Tribunal further held that "the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community."[75] This classification supports the doctrinal hierarchy later codified in the ILC's Draft Conclusions, which distinguish jus cogens norms from ordinary customary norms of international law based on their overriding authority and foundational legal status within the international system.[76] This notion of universal importance leads directly to the next defining feature of *jus cogens* norms: their universal applicability.

2.2.4 Universality:

Universal applicability is both a defining criterion and a legal consequence of *jus cogens* norms. As a criterion, it is reflected in the requirement that such norms be "accepted and recognised by the international community of States as a whole…" as articulated in Article 53 of the VCLT.[77] As stated previously, this phrase has been interpreted, particularly by the ILC and international jurisprudence, to mean broad and representative acceptance, not literal unanimity. This principle was reinforced in the Vienna Conference discussions on Article 53 of the VCLT. Ambassador Yasseen emphasised that a rule's peremptory status does not

[73] n 13, 77.
[74] n 43, para 154.
[75] Ibid
[76] n 5, Draft Conclusion 3 and Commentary to Draft Conclusion 3, para 1.
[77] n 26, art 53.

require unanimous recognition but rather a large majority of states.[78] This ensures that a few dissenting states cannot prevent a norm from attaining *jus cogens* status, reinforcing that universal acceptance means broad, not absolute, consensus. As a consequence, *jus cogens* norms bind all states irrespective of consent and override conflicting treaty or customary obligations.

This idea distinguishes *jus cogens* from other sources of international law. For example, treaty obligations bind only the states parties to a treaty, and even customary international law may not bind states that have persistently objected.[79] In contrast, a norm that qualifies as *jus cogens* applies to all states without exception; no state can opt-out. For example, as Henkin notes, South Africa's rejection of the classification of apartheid as a *jus cogens* violation was widely disregarded, illustrating the unique authority of peremptory norms under international law.[80] Moreover, in *Nicaragua v. United States*, the ICJ emphasised the universal applicability of fundamental humanitarian principles, stating that "the rules of humanitarian law applicable in armed conflict are fundamental to the respect of human persons and must be observed by all States."[81] As stated previously, while the Court did not explicitly designate the prohibition as *jus cogens* norms, its affirmation of their universal character has been interpreted by scholars as indicative of their peremptory status.[82] The non-derogable character of jus cogens norms necessarily entails their universality, as it would be conceptually incoherent for a peremptory rule to prohibit derogation yet allow some states to remain unaffected by its obligations.[83] In this sense, the universality of application operates both as a criterion for recognising a norm as *jus cogens* and as a legal consequence of such recognition since peremptory norms must be accepted by the international community as a whole and bind all states without exception.

However, scholars have challenged the idea that *jus cogens* norms are truly grounded in universal legal consensus. As Krasner observes, "institutions, conceived of as a set of rules and norms often embodied in formal organisations, reflect the policies of powerful states."[84]

[78] n 12, 201.
[79] n 13, 72.
[80] L Henkin, *International Law: Politics and Values* (Martinus Nijhoff 1995) 62.
[81] Nicaragua (n 68) para 218.
[82] n 13, 72.
[83] Ibid.
[84] SD Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999) 59.

Similarly, Koremenos, Lipson and Snidal note that "states spend significant amounts of time and effort constructing institutions precisely because they can advance or impede state goals in the international economy, the environment, and national security."[85] These perspectives emphasise how international norms can emerge not solely from shared values but from processes of political contestation, strategic calculation and bargaining among states seeking to promote their own interests.

These critiques, while important, do not undermine the legal status or function of *jus cogens* norms.[86] The fact that certain states may derive strategic benefits from international legal structures does not negate the normative force of widely accepted prohibitions such as those on torture, genocide, or slavery.[87] Indeed, the very survival and operationalisation of these norms across treaties, national constitutions, judicial decisions, and customary practice demonstrate that they have transcended political contingency.[88] The ILC does not prescribe any assessment of the motives behind states' acceptance and recognition of a norm as jus cogens beyond the requirement that such acceptance be accompanied by *opinio juris* regarding its binding and non-derogable character. Functional universality, in this respect, may coexist with imperfect origins so long as the legal community continues to treat the norm as one from which no derogation is permitted.[89]

The self-perpetuating nature of *jus cogens* norms further underscores their universality. As Dixon notes, " because these rules are fundamental, any conduct contrary to the rule of *jus cogens* will usually be regarded as 'illegal' no matter how often it is repeated."[90] In this sense, *jus cogens* norms override conflicting state practice, and the standard for replacing them would require overwhelming evidence of *opinio juris*, demonstrating a universal shift in legal belief and practice.[91] The threshold for replacing or modifying a *jus cogens* norm requires the emergence of a new norm of equal authority, also accepted by the international

[85] B Koremenos, C Lipson and D Snidal, 'The Rational Design of International Institutions' (2001) 55 *International Organization* 761, 762.
[86] A Orakhelashvili, *Peremptory Norms in International Law* (2nd edn, OUP 2021) 47–48.
[87] A Bianchi, 'Human Rights and the Magic of *Jus Cogens*' (2008) 19 *EJIL* 495–497.
[88] A D'Amato, 'It's a Bird, It's a Plane, It's Jus Cogens!' (1990) 6 *Connecticut Journal of International Law* 1, 1–6.
[89] n 85, 46 - 49.
[90] n 27, 42.
[91] Ibid

community of states as a whole.[92] This principle is reflected in Article 53 of the VCLT, which deliberately refrains from listing specific *jus cogens* norms, reflecting the evolving nature of these rules and the lack of universal agreement on the full scope of their application.[93]

Thus, universality serves as both a threshold requirement and a defining feature of *jus cogens* norms. This dual nature ensures that these norms have a binding force on all states, regardless of their consent, reservations, or objections. Other important legal consequences of *jus cogens* norms, including non-derogability, treaty invalidation, and *erga omnes* obligations, will be discussed in the following section.

2.3 Legal Consequences of *Jus Cogens* Norms:

2.3.1 Hierarchical Supremacy and Non-Derogability:

Jus cogens norms occupy a unique and hierarchically superior position within the substantive framework of international law. While, as established, international law generally lacks a central law-making authority and a formal hierarchy of sources, the category of jus cogens is indicative of a hierarchy of norms whose content overrides other rules, regardless of their source. This limited hierarchy of norms is codified in Articles 53 and 64 of the VCLT. Article 53 establishes that a treaty is void if it conflicts with a peremptory norm at the time of its conclusion, while Article 64 provides that any treaty in conflict with a newly emerged *jus cogens* norm becomes void and terminates.[94] In this way, *jus cogens* norms depart from the mostly horizontal structure of international law, creating a higher tier of obligations that are binding on all states and from which no derogation is permitted.

The defining feature of *jus cogens* is non-derogability: no treaty, agreement, or domestic law can validly contradict such a norm.[95] This reflects their character as universally binding and immutable, absent the emergence of a subsequent norm of equal authority.[96] *Jus cogens* rules are self-perpetuating; violations do not weaken them but instead are regarded as illegal acts.[97]

[92] n 26, art 53; n 5, Conclusion 10.
[93] n 13, 72.
[94] n 26, arts 53 and 64.
[95] n 5, Conclusion 3.
[96] Ibid., Conclusion 4(b).
[97] n 27, 41–42.

Even widespread violations do not alter or diminish the legal weight of a *jus cogens* norm, because such conduct is treated as unlawful rather than as evidence of a change in legal consensus.

The hierarchical supremacy of *jus cogens* norms implies that they override not only treaties but also rules of customary international law and general principles.[98] This hierarchical superiority endows *jus cogens with* its foundational legal effect, acting as both a constraint on all other sources of law and a reference point for determining the legality of these sources. Consequently, in any conflict of norms, a *jus cogens* norm prevails. This concept has been reaffirmed by international tribunals, such as in *Prosecutor v. Furundžija*, where the ICTY affirmed that the prohibition of torture "has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules."[99] The Tribunal emphasised that such norms "cannot be derogated from by States through international treaties or customary rules" and that their jus cogens status reflects their binding nature on all states, regardless of treaty ratification or national legislation[100] This legal character distinguishes *jus cogens* from both ordinary treaty law and customary law, underscoring its normative supremacy within the international legal order.

This legal effect of *jus cogens* norms raises broader questions about the coherence of the international legal order within the realm of human rights law. The modern-day international human rights framework is centred around the idea that rights are universal, indivisible, and interdependent.[101] However, the elevation of certain norms, such as the prohibitions on torture, slavery, and genocide, to the status of *jus cogens* creates a de facto hierarchy of rights. This stratification, though justified by the foundational and non-negotiable character of such norms, risks marginalising rights that do not share peremptory status, such as socio-economic or cultural rights.

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[98] n 13, 66.
[99] n 43, para 153.
[100] Ibid.
[101] Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights (25 June 1993) UN Doc A/CONF.157/23, para 5.

Scholars such as Alston, Goodman, and Donnelly have warned that such prioritisation may detract from efforts to enforce the full spectrum of human rights protections.[102] On the other hand, the legal elevation of certain norms to *jus cogens* status can be strategically valuable. Such a hierarchy provides a clear standard for enforcement, facilitates the operation of universal jurisdiction, and reinforces both legal and moral consensus on fundamental values. The prohibition on torture, for instance, has enabled courts to deny immunity in otherwise protected cases and to pursue accountability even in the absence of direct state interest.[103] Ultimately, the challenge lies in maintaining a balance, recognising the absolute, non-derogable character of jus cogens norms while preserving the holistic and indivisible nature of human rights law on which the integrity of the international legal order depends.

2.3.2 Limitations on State Conduct:

Jus cogens norms significantly constrain state conduct, particularly in areas such as treaty reservations, recognition of statehood, and the legal permissibility of extradition and immunity claims. In *North Sea Continental Shelf*, separate opinions by Judges Padilla Nervo, Tanaka, and Sørensen asserted that reservations conflicting with peremptory norms are inadmissible, reinforcing the idea that *jus cogens* imposes substantive limits on states' treaty-making autonomy.[104] This principle was later endorsed by the UN Human Rights Committee in General Comment No. 24, which held that "reservations contrary to peremptory norms are incompatible with the object and purpose of human rights treaties."[105] These positions challenge traditional conceptions of state sovereignty by limiting states' discretion to selectively comply with multilateral obligations.

Scholars have also highlighted the normative implications of these limitations. Antonio Cassese, for example, emphasises the evolving and systemic nature of *jus cogens*, particularly in its application to contemporary human rights challenges. He observes that *jus cogens* norms possess a unique "deterrent function," signalling to states that violations will

[102] J Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press 2013) 119; n 10, 278–279.
[103] n 43, para 155; *A v Secretary of State for the Home Department* [2005] UKHL 71, [2006] 2 AC 221 [34]–[35] (Lord Bingham); *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147, 198–199 (Lord Millett).
[104] North Sea Continental Shelf Cases (n 52) Separate Opinions of Judges Tanaka, Padilla Nervo, and Sørensen.
[105] UN Human Rights Committee, 'General Comment No 24' UN Doc CCPR/C/21/Rev.1/Add.6 (1994) para 8.

not be tolerated regardless of the legal technicalities involved.[106] This deterrent function was also underscored by the ICTY in *Prosecutor v. Furundžija*, which held that "the jus cogens nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community."[107] The Tribunal further explained that this status "signal[s] to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate." In this way, the ICTY confirmed that the prohibition binds all states, regardless of their consent, and that no derogation is permitted under any circumstances, thereby reinforcing the deterrent function of *jus cogens* norms by making clear that such violations will be universally condemned and never justified.

Furthermore, Cassese underscores the systemic impact of *jus cogens*, particularly in limiting the recognition of statehood when based on unlawful conduct such as aggression or systemic racial discrimination.[108] Thus, *jus cogens* norms impact the legality of recognising certain entities or regimes whose creation involves violations of fundamental norms. When an entity emerges through aggression or systematic violations of fundamental rights, states are legally bound to withhold recognition.[109] For example, the international community's refusal to recognise South Africa's administration of Namibia or Iraq's annexation of Kuwait reflected the application of peremptory norms, particularly those prohibiting racial discrimination and aggression.[110]

Beyond questions of recognition, the constraints imposed by jus cogens norms also extend into the realm of extradition and jurisdiction. In *Bufano*, a Swiss court refused extradition on the grounds that it would violate the *jus cogens* prohibition against torture.[111] Similar logic has been used to argue against granting sovereign immunity in civil suits involving violations of *jus cogens*, especially in cases involving torture, genocide, or other crimes against

[106] n 12, 207.
[107] n 43, para 154.
[108] Ibid 215–216.
[109] n 31, art 41.
[110] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16 [122]; UN Security Council Resolution 662 (9 August 1990) UN Doc S/RES/662 (1990)
[111] *Bufano et al.* (Swiss Federal Supreme Court, 1982).

humanity.[112] The consistent pattern across jurisdictions is that where a *jus cogens* norm is at stake, traditional doctrines such as comity, non-intervention, and immunity are reevaluated in light of higher-order legal obligations.[113]

2.3.3 *Erga Omnes* Obligations:

Closely related to *jus cogens* is the concept of *erga omnes* obligations, which the ICJ first recognised in *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*.[114] In that case, the Court affirmed that "in view of the importance of the rights involved, all States can be held to have a legal interest in their protection," thereby distinguishing obligations owed to the international community as a whole from those owed to specific states.[115] These *erga omnes* obligations include, among others, the prohibitions on unlawful use of force, genocide, and slavery.[116] While *jus cogens* norms inherently give rise to *erga omnes* obligations, the reverse is not necessarily true. Some *erga omnes* obligations arise from treaties or customary law but do not hold peremptory status.[117] This distinction underscores that *jus cogens* norms invalidate any conflicting treaties or customary rules by virtue of their superior normative status. By contrast, *erga omnes* obligations define the collective legal interest of all states in their enforcement, primarily influencing *locus standi* rather than the substantive hierarchy of norms.[118]

The ICJ's jurisprudence illustrates the overlap between these two concepts, particularly regarding genocide and torture, which have been recognised as both *jus cogens* norms and *erga omnes* obligations.[119] However, as mentioned previously, not all *erga omnes* obligations qualify as *jus cogens* norms. For instance, obligations concerning common heritage regimes, environmental protection, or whaling regulations apply universally but lack the peremptory status that would render them non-derogable.[120] This distinction is crucial because *jus cogens*

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[112] *Princz v Federal Republic of Germany* (DC Cir 1994) 26 F.3d 1166 (Wald J concurring).
[113] n 43, paras 153 – 157; *A v Secretary of State for the Home Department* [2005] UKHL 71, [2006] 2 AC 221 [34]–[38] (Lord Bingham).
[114] *Barcelona Traction, Light and Power Company, Limited* (Belgium v Spain) [1970] ICJ Rep 3.
[115] Ibid [33].
[116] ibid [34].
[117] n 13, 70.
[118] *Barcelona Traction* (n 113) [33]–[36]; n 16 125.
[119] n 13, 70 - 71.
[120] Ibid 71.

norms are absolute, whereas *erga omnes* obligations may still be subject to limitations or procedural enforcement mechanisms.

2.3.4 Procedural Barriers and the Enforcement of *Jus Cogens*:

Despite the substantive supremacy of *jus cogens* norms, courts have consistently struggled to reconcile these norms with procedural doctrines such as state immunity. This tension is perhaps most visible in *Al-Adsani v United Kingdom* (2001), where the European Court of Human Rights (ECtHR) accepted the *jus cogens* status of the prohibition of torture but upheld Kuwait's immunity in a civil suit. The majority held that immunity, although procedural, remained valid even where the underlying conduct violated a peremptory norm, illustrating a structural limitation in enforcement.[121]

Dissenting opinions in *Al-Adsani*, particularly from Judges Rozakis and Caflisch, argued that shielding perpetrators through procedural bars effectively neutralises the legal consequences of *jus cogens*, especially the principle of accountability without exception.[122] This unresolved dilemma has persisted in other jurisdictions as well. Similar to *Al-Adsani*, in *Jones v Ministry of Interior of the Kingdom of Saudi Arabia* (UKHL, 2006), the House of Lords reaffirmed immunity in a civil suit involving torture claims, even while recognising the *jus cogens* nature of the prohibition.[123]

The issue further resurfaced in *Jurisdictional Immunities of the State (Germany v Italy)*, where the ICJ reaffirmed immunity for Germany in the context of civil claims related to Nazi-era atrocities.[124] While acknowledging the gravity of the underlying violations, the Court concluded that "the rules of State immunity are procedural in character and… do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful."[125] Like *Al-Adsani* and *Jones*, this decision reflects the ongoing judicial challenge in striking a balance between normative supremacy and jurisdictional coherence.

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[121] *Al-Adsani v United Kingdom* (2001) 34 EHRR 273, paras 60–61.
[122] Ibid, Joint Dissenting Opinion of Judges Rozakis and Caflisch.
[123] *Jones v Ministry of Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270.
[124] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening) (Judgment)* [2012] ICJ Rep [99].
[125] ibid [92].

More broadly, courts have often maintained that procedural doctrines, such as sovereign immunity, do not automatically yield to peremptory norms, even when the norm in question is absolute and universally binding.[126] Legal scholars remain divided on this issue, with some arguing that adherence to procedural integrity ensures consistency within international law, while others view procedural immunity as undermining the accountability mechanisms needed to enforce *jus cogens*.[127]

The ILC has acknowledged this tension in its 2019 Draft Conclusions on Peremptory Norms but hasn't offered a definitive resolution.[128] The challenge remains: how to enforce norms that are, by definition, immune to derogation when legal structures continue to permit procedural exceptions that shield violators from responsibility.

Despite these enforcement difficulties, the concept of *jus cogens* continues to evolve.[129] Recent scholarly and institutional debates have increasingly turned toward the question of whether the category of peremptory norms should expand beyond its traditional core.[130] While enforcement remains uneven, particularly in the face of procedural doctrines like state immunity, the discourse surrounding *jus cogens* reflects a broader tension between legal rigidity and normative aspiration.[131] In this space, between fixed legal categories and the moral demands of the international community, proposals to recognise new *jus cogens* norms have gained traction.[132]

2.4 Contested Boundaries and Emerging Norms:

Within the literature, a particularly contentious issue is whether additional norms should be recognised as *jus cogens*. While the core prohibitions, such as genocide, torture, slavery, and aggression, are widely accepted, some scholars argue for the inclusion of other norms reflecting the evolving consensus of the international community. Proposals have included the prohibition of enforced disappearances, the right to life, and the principle of

[126] n 13, 77–78.
[127] P Webb (n 50) 132–137.
[128] n 5, Commentary to Conclusion 17, para 3.
[129] Ibid, Commentary to Conclusion 23, para 4.
[130] n 13, 82–83.
[131] See n 86, 495–496 (criticising the conceptual elasticity of jus cogens and its rhetorical deployment in legal argument); n 37, 853–857 (warning that overextending the doctrine risks destabilising international legal order).
[132] n 5, Commentary to Conclusion 23, para 4 and annex.

non-refoulement.[133] Advocates for expansion argue that international law must reflect humanity's moral progress and that *jus cogens* norms serve as a vehicle for enshrining shared ethical commitments. However, critics caution that expanding the category risks diluting its legal force and turning a once-clear hierarchy of norms into a contested field of political preference.[134] For example, Bassiouni acknowledges the risk of overreach, noting that without clear and consistent criteria, the category of *jus cogens* could be expanded in ways that call into question its credibility and utility.[135] The ILC has attempted to strike a balance by emphasising that recognition must be based on widespread and representative state practice combined with *opinio juris* as to a norm's non-derogable character, thereby resisting both over-inclusiveness and rigidity.[136]

In conclusion, the legal doctrine of *jus cogens* has matured significantly since its formal codification in the VCLT. While theoretical uncertainties and procedural challenges remain, international jurisprudence and scholarly debate continue to refine these nuances. The scholarly discourse surrounding *jus cogens* reveals a complex interplay between legal theory, institutional practice, and normative aspiration. Whether viewed as a manifestation of shared moral values, a codification of consistent state practice, or a construct shaped by geopolitical forces, *jus cogens* remains one of the most conceptually rich and contested features of international law. The debate over whether to expand the category of peremptory norms reflects a deeper tension between the need for legal certainty and the moral imperative to address emerging global concerns. As the boundaries of *jus cogens* continue to evolve, so too does the conversation around which protections merit inclusion in this elite category.

One of the most prominent examples of these contenders for *jus cogens* status is the principle of non-refoulement, a cornerstone of refugee protection that has increasingly been invoked in the language of *jus cogens*. The next chapter explores this norm, tracing its historical development and legal consolidation from its early roots to its codification and subsequent expansion in modern international law. This exploration lays the groundwork for the central

[133] D Tladi, 'Fourth Report on Peremptory Norms of General International Law (Jus Cogens)' (30 January 2019) UN Doc A/CN.4/727, paras 125–133.
[134] n 37, 853–857.
[135] M Cherif Bassiouni, 'International Crimes: Jus Cogens and Obligatio Erga Omnes' (1996) 59 Law & Contemp Probs 68–70.
[136] n 5, Conclusion 3.

inquiry of this thesis, critically examining whether non-refoulement meets the threshold for recognition as a peremptory norm under international law.

3. The Evolution of Non-Refoulement:

Non-refoulement occupies a central place in contemporary international law, safeguarding individuals from being returned to territories where they face serious threats to their life or freedom. Originating as a humanitarian response to mass displacement during the early twentieth century, non-refoulement has undergone a remarkable transformation: from a pragmatic protection mechanism in refugee law to a cross-cutting guarantee within international human rights frameworks. Non-refoulement now applies in contexts involving torture, inhuman or degrading treatment,[137] the death penalty,[138] arbitrary detention,[139] and grave threats to life or dignity.[140] Jurisprudence has extended the principle to cover extraterritorial enforcement, including maritime interceptions,[141] offshore processing,[142] and chain refoulement,[143] as well as post-conviction deportations[144] and summary border pushbacks.[145]

This chapter traces the evolution of non-refoulement, beginning with its early manifestations in the interwar refugee protection system and culminating in its codification in the 1951 Refugee Convention and the 1967 Protocol. Next, the principle's subsequent expansion into international human rights law is examined through key instruments such as the Convention

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[137] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 3;
Committee Against Torture, *General Comment No 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22* (4 September 2018) UN Doc CAT/C/GC/4, paras 9–13.
[138] Soering v United Kingdom (1989) 11 EHRR 439 (extradition to face the death penalty in Virginia found to violate Article 3 ECHR).
[139] Human Rights Committee, *Teitiota v New Zealand* (7 January 2020) UN Doc CCPR/C/127/D/2728/2016 (on risks to life and arbitrary detention from climate-induced displacement).
[140] *Chahal v United Kingdom* (1996) 23 EHRR 413 (deportation of a suspected terrorist prohibited due to risk of ill-treatment in India, despite national security concerns).
[141] *Hirsi Jamaa and Others v Italy* (2012) 55 EHRR 21 (interception and return of migrants on the high seas to Libya violated Article 3 ECHR).
[142] UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention' (26 January 2007) paras 7–9.
[143] n 2 (discussing responsibility for chain refoulement in maritime contexts).
[144] *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 (deportation of a non-citizen convicted of terrorism found impermissible due to torture risk).
[145] Council of Europe, 'Report of the Commissioner for Human Rights on Pushbacks and Rights Violations at EU Borders' (19 April 2021)

Against Torture (CAT), the International Covenant on Civil and Political Rights (ICCPR), and regional human rights treaties. Particular attention is paid to the status of non-refoulement as a principle of customary international law. Through this analysis, the chapter lays the necessary foundation for the subsequent inquiry into whether the principle now qualifies as a peremptory norm under international law.

3.1 Historical Development in Refugee Protection:

Refugee law is not simply a system designed to enable persons to escape the risk of serious harm, but instead serves a more fundamental purpose, which is to serve as a back-up to the protection one expects from the State of which an individual is a national.[146] In the past century, refugee law has evolved at the intersection of international and municipal legal systems.[147] The upheaval caused by World War I, the Russian Revolution, and the dissolution of multi-ethnic empires, such as the Austro-Hungarian and Ottoman empires, generated large-scale population displacement.[148] These events prompted the international community to address the issue of refugees through multilateral institutional mechanisms.

In 1921, the League of Nations appointed Fridtjof Nansen as the first High Commissioner for Refugees.[149] Hathaway identifies this period as marking the beginning of the "juridical" phase of refugee protection, in which individuals were primarily defined by their lack of adequate national protection rather than by persecution per se.[150] The juridical phase was marked by an attempt to regularise the status of stateless persons through legal documents, not by substantive protection guarantees.[151] Nansen was charged with coordinating international responses to stateless persons, particularly Russian and Armenian refugees, populations that were among the first to receive formal international attention.[152] This led to

[146] J C Hathaway, *The Law of Refugee Status* (2nd edn, CUP 2014) ch 4, 288.
[147]GS Goodwin-Gill, 'Customary International Law and International Refugee Law' in C Costello, M Foster and J McAdam (eds), *The Oxford Handbook of International Refugee Law* (OUP 2021) 25.
[148] Ibid.
[149] Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford University Press 2001) 31–33.
[150] JC Hathaway, 'The Evolution of Refugee Status in International Law: 1920–1950' (1984) 33(2) *International and Comparative Law Quarterly* 367.
[151] Ibid 349–355.
[152] Ibid 152–154.

the development of identity certificates, known as Nansen Passports, which facilitated cross-border movement for stateless individuals.[153]

The same year, the Geneva Conference of Enquiry, convened under the League's auspices, examined the plight of Russian refugees and articulated one of the earliest international affirmations of what would later crystallise into the principle of non-refoulement.[154] The Conference emphasised that no refugee should be returned to a territory where their life or freedom would be threatened, thus laying the normative foundation for a principle that would become central to post-war refugee law.[155] This response to mass displacement caused by the collapse of empires, particularly the aftermath of the Russian Revolution of 1917, signalled an emergent international consensus that some forms of protection should be non-negotiable.

The early international refugee regime began to take shape with the 1928 Arrangement on the Legal Status of Russian and Armenian Refugees[156] and was further developed through the 1933 Convention Relating to the International Status of Refugees, which was the first international treaty to impose legal obligations on states to protect refugees.[157] Notably, Article 3 of the 1933 Convention included a precursor to the formal codification of non-refoulement, obliging states "not to remove or keep from its territory by application of police measures...refugees who have been authorised to reside there regularly, unless the said measures are dictated by reasons of national security or public order."[158] However, a limited number of states ratified the treaty, and its implementation remained weak.[159] Moreover, these instruments were limited in their geographical and temporal scope, and their reservations regimes allowed considerable circumvention of obligations.[160] While only a small number of states ratified the 1933 Convention, "the period was also remarkable for the

[153] UNHCR, 'A Century of Mobility: A Glimpse into the History of Refugee Travel Documents' (2022) https://www.unhcr.org/blogs/a-century-of-mobility-a-glimpse-into-the-history-of-refugee-travel-documents/ accessed 9 July 2025.
[154] n 146, 28-29.
[155] n 2, 30.
[156] Arrangement relating to the Legal Status of Russian and Armenian Refugees (adopted 30 June 1928, entered into force 30 June 1928) 89 LNTS 53
[157] Convention relating to the International Status of Refugees (adopted 28 October 1933, entered into force 13 June 1935) 159 LNTS 199.
[158] Ibid, art 3.
[159] G S Goodwin-Gill, J McAdam and E Dunlop, 'The Principle of Non-Refoulement—Part 1' in G S Goodwin-Gill and J McAdam (eds), *The Refugee in International Law* (4th edn, Oxford University Press 2021) 242
[160] Ibid.

very large numbers of refugees not in fact sent back to their countries of origin."[161] This practice helped to crystallise the emerging humanitarian norm against forced return.

Other international agreements were added to the growing refugee law framework, expanding protections beyond travel, covering refugees' rights to work, education, relief, and legal status.[162] However, these instruments were limited in scope, applying only to certain refugee groups, and suffered from low levels of ratification and inconsistent application.[163] These agreements remained fragmented, geographically and temporally limited, and were often subject to extensive reservations, further weakening their efficacy.[164] Following earlier efforts like the Nansen Passport, the 1946 London Agreement introduced a more formal refugee travel document, resembling a passport and permitting re-entry into the issuing country.[165]

However, the limitations of the interwar and immediate postwar refugee framework became tragically evident during the Holocaust when many states refused entry to Jewish refugees fleeing Nazi persecution. A defining symbol of this collective failure was the voyage of the MS *St. Louis* in 1939, where multiple states turned away hundreds of Jewish refugees and ultimately returned them to Europe.[166] The 1951 Convention Relating to the Status of Refugees (hereinafter referred to as the Refugee Convention) emerged in response to this failure, seeking to establish uniform criteria for refugee status and to codify core protections.

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[161] n 158, 243.
[162] Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees (adopted 5 July 1926, entered into force 5 July 1926) 89 LNTS 47; Convention relating to the International Status of Refugees (adopted 28 October 1933, entered into force 13 June 1935) 159 LNTS 199; Provisional Arrangement concerning the Status of Refugees coming from Germany (adopted 4 July 1936, entered into force 4 July 1936) 171 LNTS 75; Convention concerning the Status of Refugees coming from Germany (adopted 10 February 1938, entered into force 10 February 1938) 192 LNTS 59; Additional Protocol concerning the Status of Refugees coming from Germany (adopted 14 September 1939, entered into force 14 September 1939) 198 LNTS 141.
[163] Paul Weis, The Development of Refugee Law, 28
[164] n 146, 36.
[165] Agreement relating to the Issue of Travel Documents to Refugees who are the Concern of the Intergovernmental Committee on Refugees (adopted 15 October 1946, entered into force 15 October 1946) 11 UNTS 73
[166] US Department of State, 'Remarks at the US Holocaust Memorial Museum's National Tribute Dinner' (19 March 2012) https://2009-2017.state.gov/s/d/former/burns/remarks/2012/198190.htm accessed 16 April 2025.

3.2 Codification in the 1951 Refugee Convention and the 1967 Protocol:

The Refugee Convention represented the culmination of evolving humanitarian commitments and interwar legal experimentation. Among its most significant contributions was the formal articulation of the principle of non-refoulement, widely regarded as the cornerstone of international refugee protection and a foundational rule in international human rights law. Non-refoulement did not gain formal expression in international law until the adoption of the Refugee Convention, where Article 33(1) provides:

> "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[167]

The travaux préparatoires confirm that "the principle of nonrefoulement was considered so vital that no exceptions were initially envisaged."[168] However, Article 33(2) introduces an exception, providing that the benefit of non-refoulement may not be claimed by a refugee "for whom there are reasonable grounds for regarding as a danger to the security of the country…or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community."[169] While this language might suggest flexibility, state practice and UNHCR guidance affirm that these exceptions must be interpreted narrowly. UNHCR clarifies that a particularly serious crime should generally be a capital or violent offence and that the standard of proof must be high.[170] While Article 33(2) permits limited exceptions to protection under certain conditions, Article 1(F) goes further by excluding individuals entirely from refugee status where there are "serious reasons for considering" that they have committed war crimes, serious non-political crimes outside the country of refuge, or acts contrary to the purposes and principles of the United Nations.[171] These exclusion

[167] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 33(1).
[168] V G Yatani, M Safrin and D Wagian, 'Exclusion of the Principle of Non-Refoulement in Article 33 Paragraph 2 of the 1951 Refugee Convention' (2021) 13(2) JILS 60.
[169] n 165, art 33(2).
[170] UNHCR, *Guidelines on International Protection No 5: Application of the Exclusion Clauses* (2003) paras 17–20.
[171] n 165, art 1(F).

clauses operate alongside Article 33(2) and reflect a carefully calibrated balance between the humanitarian aims of the Convention and the need to protect host societies from genuine threats.[172] Nevertheless, courts have held that even when the Article 33(2) exception applies, states remain bound by non-refoulement obligations under international human rights law, particularly the CAT and the ICCPR.[173] These overlapping protections, explored in greater detail in the following section, underscore the limits of the Refugee Convention's exceptions and highlight the broader legal framework in which non-refoulement operates. Although Article 33(2) was introduced after the initial draft, it has consistently been understood as a narrowly construed safeguard clause, not a license for broader derogation from the fundamental principle of protection.[174]

Notably,

While the 1951 Convention was a landmark step in refugee protection, its scope was initially limited to persons displaced "as a result of events occurring before 1 January 1951" and permitted states to confine its application to events occurring in Europe.[175] These constraints rendered the Convention insufficient to address subsequent waves of displacement resulting from decolonisation, civil wars, and regional conflicts in Africa, Asia, and the Americas. To address these limitations, the international community adopted the 1967 Protocol Relating to the Status of Refugees, which removed both the temporal and geographical restrictions of the 1951 Convention.[176] This ensured that the Convention's protections, including the principle of non-refoulement, would apply to refugees worldwide, irrespective of when or where their displacement occurred. The Protocol, which incorporates the substantive provisions of the 1951 Convention by reference, marked a critical step toward universalising refugee protection under international law.[177]

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[172] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* (Geneva, 2023) paras 147–149, 154–156, 162–163.
[173] UNHCR, 'Note on Non-Refoulement (Submitted by the High Commissioner)' (1997) EC/SCP/2 para 11; Human Rights Committee, 'General Comment No 20' (1992) UN Doc HRI/GEN/1/Rev.9 (Vol I) para 9; Convention Against Torture (n 136) art 3.
[174] n 143; Human Rights Committee (n 171) para 9.
[175] n 165, art 1(B)(1).
[176] Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.
[177] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 23–24

Today, the 1967 Protocol has nearly as many States Parties as the Convention itself, 147 to the Convention and 146 to the Protocol, with 142 States Parties to both, so that 149 UN Member States are party to one or both, reflecting the Convention's global reach and near-universal recognition.[178] However, despite this near universality, gaps remain in implementation as states continue to reinterpret or limit their obligations through domestic law, administrative practices, or bilateral agreements.[179] States continue to impose immigration controls, visa regimes, and procedural barriers that indirectly restrict access to protection. Notably, Article 33(1) prohibits return only to the territory where danger exists, not to any third country. This has led to controversial practices such as the "first country of arrival" rule and the "safe third country" rule, resulting in chains of deportation whereby refugees are bounced from one country to another until they are returned to the very country from which they fled.[180] These evolving practices reveal the limits of the Convention framework alone, underscoring the importance of understanding non-refoulement as a broader human rights obligation.

While the 1951 Refugee Convention and its 1967 Protocol provide the treaty-based foundation for the principle of non-refoulement, their significance has since expanded beyond the boundaries of refugee law. The principle has gained considerable traction across other branches of international law, particularly international human rights law (IHRL).[181] Non-refoulement has been embedded in core human rights instruments such as the CAT, the ICCPR, and regional systems, including the European Convention on Human Rights (ECHR).[182] These parallel developments have deepened the legal entrenchment of non-refoulement beyond its treaty-specific origins and have broadened the scope of its

[178] United Nations Treaty Collection, *Convention relating to the Status of Refugees* (adopted 28 July 1951, entered into force 22 April 1954) UNTS vol 189, p 137 https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&clang=_en and *Protocol relating to the Status of Refugees* (adopted 31 January 1967, entered into force 4 October 1967) UNTS vol 606, p 267 https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&Temp=mtdsg2 accessed 26 June 2025.
[179] n 8, 282–283.
[180] n 13, 465.
[181] H Lambert, 'Customary International Refugee Law' in C Costello, M Foster and J McAdam (eds), *The Oxford Handbook of International Refugee Law* (OUP 2021) 242–247.
[182]Convention Against Torture (n 136), art 3; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 7;
European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, art 3.

protection.[183] The following section examines this evolution, focusing on how the principle of non-refoulement has been interpreted and applied across various human rights regimes.

3.3 Expansion Beyond Refugee Law:

3.3.1 International Human Rights Treaties:

One of the clearest expressions of non-refoulement in IHRL is found in Article 3 of the CAT, which prohibits a State from expelling, returning ("refouler"), or extraditing any individual to another State "where there are substantial grounds for believing that he would be in danger of being subjected to torture."[184] The provision has been interpreted broadly to apply in all return scenarios, regardless of the individual's legal status.[185]

The normative force of Article 3 is closely tied to the status of torture as a peremptory norm of general international law (*jus cogens*). The ILC, in its 2019 Draft Conclusions on Peremptory Norms, explicitly listed the prohibition of torture among the illustrative norms that are explicitly recognised as having peremptory status.[186] This is further echoed in CAT Article 2(2), which states, "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[187] Importantly, Lauterpacht and Bethlehem argue that non-refoulement is a fundamental "component of the customary prohibition of torture and cruel, inhuman or degrading treatment or punishment."[188] As such, the duty of non-refoulement operates as an essential corollary to the peremptory prohibition of torture.

The ICCPR has been interpreted as encompassing non-refoulement through Article 6, which states that "no one shall be arbitrarily deprived of his life," and Article 7, which states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or

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[183] n 180, 241–256.
[184]Convention Against Torture (n 136), art 3.
[185] Committee Against Torture, 'General Comment No. 4 on the Implementation of Article 3 in the Context of Article 22' (9 February 2018) UN Doc CAT/C/GC/4, paras 9–10.
[186] n 5, Annex.
[187] D Tladi, 'Fifth Report on Peremptory Norms of General International Law (Jus Cogens)' (30 January 2020) UN Doc A/CN.4/738, para 108.
[188] E Lauterpacht and D Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' (UNHCR, 2003) 6.

punishment."[189] While neither article explicitly mentions non-refoulement, the Human Rights Committee (HRC) has interpreted it, consistent with the approach under CAT, to prohibit returning individuals to countries where they face a real risk of torture or other ill-treatment. In General Comment No. 20, the Committee confirmed that states must not expose individuals to torture "by way of their extradition, expulsion or refoulement."[190] The Committee further clarified in General Comment No. 31 that this obligation extends to any removal, whether by extradition, expulsion, or deportation, whenever there are substantial grounds for believing that a person faces a real risk of irreparable harm under Articles 6 or 7, including the risk of death or torture in any country to which the individual might be sent.[191]

The link between non-refoulement and the risk of serious human rights violations, such as torture, enforced disappearance, or inhuman treatment, has also influenced the jurisprudence and general comments of other human rights instruments. For example, the Convention on the Rights of the Child (CRC),[192] where the principle has been applied in the context of child return procedures, and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), which expressly prohibits returning individuals to a State where there are substantial grounds to believe they would be subjected to enforced disappearance.[193] While the principle of non-refoulement has been incorporated across many human rights treaties, the threshold for protection varies between instruments, with CAT requiring "substantial grounds"[194] of risk of torture and the Refugee Convention applying a "life or freedom" standard.[195] Nevertheless, in each of these contexts, non-refoulement functions as an essential mechanism for upholding core rights.

[189] ICCPR (n 181), arts 6–7.
[190] Human Rights Committee, General Comment No 20 (n 172) , para 9.
[191] Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 12.
[192] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, arts 6 and 37; Committee on the Rights of the Child, *General Comment No 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin* (2005) UN Doc CRC/GC/2005/6.
[193] International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3, art 16.
[194] Convention Against Torture (n 136), art 3.
[195] n 165, art 33(1).

3.3.2 Regional Human Rights Systems:

At the regional level, human rights courts have significantly broadened the application of non-refoulement, especially where the risk of torture or inhuman treatment is present. In the European system, Article 3 of the ECHR mirrors ICCPR Article 7, prohibiting torture, inhuman or degrading treatment, and punishment.[196] The ECtHR has interpreted this article to prohibit the removal of persons to states where they face a real risk of such treatment.[197] The ECtHR's interpretation of Article 3 encompasses indirect return, including rejection at borders, reinforcing the view that states cannot escape responsibility by outsourcing risk.[198]

The Inter-American Court of Human Rights (IACtHR) has similarly strengthened the reach of non-refoulement in its jurisprudence. In Advisory Opinions 21/14 and 25/18, the Court held that Article 22(8) of the American Convention on Human Rights (ACHR) prohibits the return of any person, regardless of legal status, when their life or freedom would be at risk due to factors such as race, nationality, or political opinion.[199] The Court emphasised that this protection extends beyond refugee law and encompasses all individuals facing the risk of torture or other irreparable harm.[200]

The African regional system, as outlined in the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, also enshrines the principle of non-refoulement. Article III(3) prohibits rejection at the frontier or return to a country where life, liberty, or physical integrity would be threatened.[201] Importantly, this protection applies even to those outside the formal refugee definition, thus broadening the scope of the principle within regional asylum systems.[202]

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[196] ECHR (n 181) art 3.
[197] n 137; n 139.
[198] n 140, paras 114–115, 121–123; *M.S.S. v Belgium and Greece* App no 30696/09 (GC, 21 January 2011) paras 286–322.
[199] Inter-American Court of Human Rights, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* (Advisory Opinion OC-21/14, 19 August 2014) Series A No 21; *The Institution of Asylum, and its Recognition as a Human Right under the Inter-American System of Protection* (Advisory Opinion OC-25/18, 30 May 2018) Series A No 25.
[200] Ibid.
[201] Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45, art III(3).
[202] Ibid.

The principle of non-refoulement has undergone a remarkable evolution since its early articulation in the interwar refugee protection frameworks. Originating as a humanitarian norm aimed at protecting stateless persons, it was formally codified in the 1951 Refugee Convention and subsequently expanded and reinforced through the 1967 Protocol. From its foundation in refugee law, non-refoulement has become deeply embedded within broader international human rights law, including the CAT, the ICCPR, CRC, ICPPED and regional systems such as the European, Inter-American, and African human rights frameworks.

These developments collectively underscore the universal applicability and fundamental role of non-refoulement within the international legal order. The principle has evolved from a treaty-based safeguard in refugee law into a broadly recognised human rights obligation, embedded across multiple legal regimes. As non-refoulement has been increasingly affirmed not only in treaty law but also through jurisprudence, soft law instruments, and consistent claims by international bodies, its character as a rule of customary international law demands closer examination. The following section evaluates this development by analysing the evidence of consistent state practice and opinio juris.

3.4 Non-Refoulement as Customary International Law:

While treaty law provides the initial legal basis, the repeated affirmation of non-refoulement beyond treaty instruments suggests that it has evolved into a rule of customary international law. This transformation is supported by consistent state practice, an extensive body of General Assembly resolutions, and authoritative statements from international bodies such as the UNHCR. Conclusion 2 of the ILC Draft Conclusions on Customary International Law affirms that the existence of a rule of customary international law requires both a general practice and its acceptance as law (*opinio juris*).[203] The dual criterion is echoed in the jurisprudence of the ICJ, which in the *North Sea Continental Shelf Cases* emphasised the need for both “widespread and representative” state conduct and a belief in the practice's legal obligation.[204]

[203] n 5, Draft Conclusion 2 and Commentary to Draft Conclusion 2, para 1.
[204] *North Sea Continental Shelf* (n 52) [77].

According to Lauterpacht and Bethlehem: "By reference to the 1951 Convention, the Torture Convention and the ICCPR, 169 States, representing the overwhelming majority of the international community, are bound by some or other treaty commitment prohibiting refoulement."[205] Since the author's article was published in 2003, the number of states bound by treaty commitments has continued to grow. The principle of non-refoulement enjoys broad formal recognition at both the domestic and international levels, as well as the convergence of state practice and legal conviction, which are required to establish a customary norm under international law. The analysis below highlights the extent of domestic implementation and patterns of legislative and judicial affirmation as indicators of both widespread practice and opinio juris. Taken together, these elements demonstrate that non-refoulement is not merely affirmed in the abstract but has been operationalised and internalised by states as a binding legal obligation of foundational importance within the international legal order.

A particularly salient measure of this operationalisation is the extent to which non-refoulement has been embedded in national legislation and constitutional frameworks. According to the UNHCR-led study published in *Refugee Protection in International Law* (2003), 125 states had already incorporated the principle of non-refoulement into their national legislation or constitutional frameworks, either directly or by way of applying one or more treaties to which they were party.[206] This figure included Yugoslavia, which no longer exists as a UN Member State. Excluding Yugoslavia, the total number of states stood at 124. Since the publication of that study, eleven additional states have incorporated non-refoulement into domestic law, raising the total to 135.[207] Moreover, with the admission of five new Member States to the UN since the time of the UNCHCR study, this brings the current total to 140 out of 193 UN Member States, or approximately 72.5%, that now embed

[205] n 187, 93.
[206] Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) annex 2.2.
[207] See: Chad, Asylum Law (2020) art 36 (verifiable via UNHCR reports); The Gambia, Refugee Act (2008) s 29 (prohibiting removal to states where life or freedom would be threatened); Iceland, Act No 80/2016 on Foreign Nationals (entered into force 1 January 2017); Kenya, Refugees Act 2021 s 29; South Korea, Refugee Act 2012 art 3; Luxembourg, Loi du 5 mai 2006 relative à l'asile art 5; Malta, International Protection Act (Cap 420) arts 3, 8(1)(g), 23 and 24(1)(c); Nauru, Refugee Convention Act 2012 s 4; Philippines, Department of Justice, Guidelines on RSD (2012) (some procedural focus); Philippines, Department of Justice, Circular No 94 (2000) (some procedural focus); Thailand, Prevention and Suppression of Torture and Enforced Disappearance Act B.E. 2565 (2022) s 13 (prohibiting return to risk of torture); Vanuatu, Immigration Act 2010 s 73(1).

the principle in their domestic legal system.[208] When comparing this degree of domestic implementation to the prohibition of genocide, a well-established *jus cogens* norm, an identical level of internalisation is observed. According to a 2020 study reviewing the domestic criminal legislation of 196 jurisdictions, 41 states incorporated the international definition of genocide verbatim, while another 101 states implemented modified versions.[209] This brings the total number of states with domestic genocide legislation to 142, approximately 73.6% of UN Member States, closely matching the number of states that have embedded the non-refoulement principle in their national law.[210]

Even among the 51 states that do not yet have formal constitutional or legislative provisions on non-refoulement, 48 are parties to at least one of the three core treaties that contain binding non-refoulement obligations: the Refugee Convention, ICCPR, and CAT.[211] These treaty commitments provide compelling evidence of *opinio juris*, particularly when legislative or judicial affirmations of legal obligation accompany their implementation.

Moreover, several states without explicit non-refoulement provisions in their national legislation nonetheless demonstrate adherence to the principle through judicial interpretation, executive practice, or subsidiary legal mechanisms. For instance, Bangladesh, though lacking a domestic statute, has seen its Supreme Court affirm non-refoulement as part of customary international law in decisions involving Rohingya refugees, explicitly referencing CAT obligations.[212] Similarly, India's courts have interpreted Article 21 of the Constitution (Right to Life and Personal Liberty) to encompass non-refoulement, notably in *Ktaer Abbas Habib*

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[208] See: Serbia, Constitution (2006) art 39(3); Serbia, Law on Asylum and Temporary Protection (2007, as amended) art 6; Montenegro, Constitution art 82(1)(2); Montenegro, Law on International and Temporary Protection of Foreigners (2016) art 3; Switzerland, Asylum Act (AsylA) of 26 June 1998 (SR 142.31) art 5(1)–(2); Switzerland, Federal Constitution, art 25; Timor-Leste, Law No 11/2017 on Migration and Asylum art 24 and accompanying legislative analysis; South Sudan, Refugees Act 2012 s 10(1)(a–c), read in conjunction with international obligations under the 1951 Refugee Convention and its 1967 Protocol.
[209] Tamás Hoffmann, 'The Domestic Definitions of the Crime of Genocide: A Dizzying Diversity' (Opinio Juris, 17 June 2020) http://opiniojuris.org/2020/06/17/the-domestic-definitions-of-the-crime-of-genocide-a-dizzying-diversity/ accessed 10 July 2025.
[210] Ibid.
[211] United Nations Treaty Collection, 'Status of Treaties' https://treaties.un.org/Pages/Overview.aspx?path=overview/status/page1_en.xml accessed 10 July 2025.
[212] Refugee and Migratory Movements Research Unit (RMMRU) v Government of Bangladesh, Writ Petition No 10504 of 2016 (Supreme Court of Bangladesh, 31 May 2017)

Al Qutaifi v Union of India and *Dongh Lian Kham v Union of India*.[213] While lacking dedicated asylum legislation, Israel has recognized non-refoulement obligations primarily under international treaties, which have been reinforced by constitutional protections of dignity and liberty under the Basic Law: Human Dignity and Liberty (1992).[214] Mauritius, while also lacking an explicit non-refoulement law, prohibits extradition where there is a risk of ill-treatment via Section 8 of its 2017 Extradition Act, thereby reflecting core non-refoulement protections.[215] Jordan, though not a Refugee Convention party, has implemented the norm through successive Memoranda of Understanding (MOUs) with UNHCR, explicitly committing to non-refoulement in refugee processing.[216] Barbados, though lacking formal legislation, affirmed in its 2018 Universal Periodic Review that it "respects the principle of non-refoulement in the treatment of persons claiming persecution".[217] These examples illustrate how state practice and *opinio juris* may be discerned not only through direct legislation but also through judicial pronouncements, constitutional interpretation, extradition safeguards, and international commitments, all of which reinforce the customary character of the norm.[218]

By contrast, only three UN Member States, Micronesia, Myanmar, and Tonga, have neither ratified any of the three principal treaties containing non-refoulement obligations (the 1951 Refugee Convention and 1967 Protocol, the ICCPR, and CAT) nor enacted any constitutional or legislative provisions incorporating the principle domestically.[219] This small minority further emphasises the near-universal acceptance of non-refoulement, and their omission serves to highlight the exceptional nature of such non-recognition. Moreover, these three states have never expressly or consistently objected to the principle of non-refoulement as a binding legal obligation, whether in their practice or in international fora. Their silence, coupled with the lack of any formal repudiation by other states, supports the conclusion that

[213] *Ktaer Abbas Habib Al Qutaifi v Union of India* 1999 Cri LJ 919 (Gujarat HC); *Dongh Lian Kham v Union of India* 2016 SCC OnLine Del 5007 (Delhi HC).
[214] *Basic Law: Human Dignity and Liberty*, 1992 (Israel).
[215] Extradition Act 2017 (Mauritius) s 8.
[216] UNHCR and Government of Jordan, *Memorandum of Understanding Relating to the Protection of Refugees* (1998, revised 2003 and 2014).
[217] Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Barbados' (19 December 2018) UN Doc A/HRC/40/6, para 73.
[218] n 4, Draft Conclusion 10 and Commentary to Draft Conclusion 10, para 2.
[219] n 210.

non-refoulement is accepted and recognised by the international community as a whole as a norm from which no derrogation is permitted. Taken together, this pattern of widespread incorporation and the rarity of any express rejection strongly supports the view that non-refoulement enjoys near-universal recognition as a binding norm.

At the same time, it is necessary to consider how states have responded to allegations of non-compliance. The tendency to avoid open repudiation of the principle further reinforces its normative force. Rather than denying the existence of a non-refoulement obligation, states seek to narrow its application or justify non-compliance through exceptional legal reasoning. For example, the United States has explicitly rejected the extraterritorial application of non-refoulement under the Refugee Convention and its Protocol, not by repudiating the obligation itself but by contesting its scope.[220] Similarly, many European states have been implicated in land and sea pushback operations, actions widely documented as summary returns of migrants and asylum-seekers without access to individual asylum assessment, yet such states seldom justify these measures under international law.[221] Instead, they typically dispute the factual allegations or rely on national security concerns or claims that individuals have not formally entered their territory.[222] This pattern of condemnation and circumvention, in which states avoid directly challenging the norm while others denounce its breach, aligns the notion that practice accompanied by expressions of legal obligation, even if inconsistent, is evidence of *opinio juris*.[223]

Equally compelling evidence of *opinio juris* is the fact that UNHCR has repeatedly affirmed that non-refoulement constitutes a binding obligation under customary international law.[224] The Executive Committee of the UNHCR (ExCom) has reinforced this stance, stating in Conclusion No. 25 that the principle is "fundamental to the international protection of refugees."[225] Moreover, the United Nations General Assembly (UNGA) has also consistently

[220] United States Department of State, *Letter to the Office of the United Nations High Commissioner for Refugees* (15 January 2007) https://2001-2009.state.gov/s/l/2007/112631.htm accessed 9 July 2025.
[221] n 2, 349.
[222] Council of Europe, *Report to the Greek Government on the visit to Greece carried out by the CPT from 13 to 17 March 2020* CPT/Inf(2020)35, paras 9–11; European Parliament, *Pushbacks at the EU external borders* (2022).
[223] Nicaragua (n 68) para 186.
[224] n 141, para 15
[225] UNHCR Executive Committee, *Conclusion No 25 (XXXIII) on General* (1982) para (b).

reaffirmed the principle of non-refoulement. Since 1977, it has adopted at least fifty resolutions that explicitly reaffirm the fundamental importance of the non-refoulement obligation, urging states to respect and uphold it in both law and practice and highlight its centrality to international refugee protection and human rights law.[226] These resolutions, often adopted by consensus, signal the enduring commitment of states to uphold the principle of non-refoulement beyond treaty obligations. According to the ILC, resolutions are not in themselves evidence of state practice or *opinio juris,* but they may reflect or contribute to either, depending on their content and the degree of acceptance by states.[227]

Further evidence of *opinio juris* is found in the way states frequently reference non-refoulement in their diplomatic statements, pleadings before international courts, and legal instruments not limited to refugee law, including the CAT, ICCPR, CRC, and ICRMW, many of which reflect an understanding that the obligation is binding.[228] For instance, states such as Sweden, Canada, and Germany have explicitly affirmed their non-refoulement obligations in UN General Assembly debates and before international courts, often framing them as binding obligations under international law.[229] The ILC recognises such public

[226] 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 1987); 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 64/127 (15 January 2010); UNGA Res 65/194 (28 February 2011); 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); UNGA Res 71/172 (19 December 2016); UNGA Res 72/150 (19 December 2017); UNGA Res 73/151 (17 December 2018); UNGA Res 74/130 (18 December 2019); UNGA Res 75/163 (16 December 2020); UNGA Res 76/143 (16 December 2021); UNGA Res 77/198 (15 December 2022); UNGA Res 78/184 (19 December 2023); UNGA Res 79/156 (17 December 2024).

[227] n 4, Draft Conclusion 12 and Commentary to Draft Conclusion 12, para 2.

[228] UNHCR, *Note on the Principle of Non-Refoulement* (1997) paras 14–18; n 141, paras 15–22; n 5, Conclusion 17; para 9; Committee Against Torture, *General Comment No 4* (n 136) paras 9–12; Committee on the Rights of the Child, *General Comment No 6* (n 191) paras 27–29; International Court of Justice, *Obligation to Prosecute or Extradite* (n 34) [128].

[229] See, eg; UNHCR, Note on the Principle of Non-Refoulement (n 227) paras 14–18; UN General Assembly, *Summary Record of the 58th Meeting*, UNGA Third Committee, 53rd Session (13 November 1998) UN Doc A/C.3/53/SR.58 (statements by Sweden, Canada, and Germany affirming the binding character of non-refoulement obligations); n 190, para 12.

statements, pleadings, and other official acts as relevant evidence of either state practice or *opinio juris*, provided they indicate a belief in legal obligation.[230]

The object and purpose of non-refoulement further strengthens its normative coherence and interpretative weight under international law. While these interpretative principles formally apply to treaties, they also help illuminate how treaty provisions may reflect and reinforce customary international law. For instance, Article 31(1) of the VCLT, which requires that treaties be interpreted in light of their object and purpose, and Article 31(3)(c) mandates reference to "any relevant rules of international law applicable in the relations between the parties."[231] These principles thus support a holistic reading of treaty provisions that engage with the broader customary foundation of non-refoulement. This understanding situates non-refoulement as a principle that transcends the boundaries of specific treaty regimes, reinforcing its role as a foundational norm within international law.

Moreover, as discussed in Chapter 2, inconsistent state practice does not necessarily preclude the identification of customary norm if such practice is "condemned or acknowledged as unlawful by other States."[232] Accordingly, the tendency of states to justify breaches of the non-refoulement obligation through alternative legal arguments, rather than by denying the obligation itself, supports the inference that the norm is accepted as legally binding. This pattern of behaviour aligns with the evidentiary approach adopted by the ICJ in *Nicaragua v United States*, where the Court concluded that a rule of customary international law could be established despite violations, so long as those violations were accompanied by affirmations of the rule's legal validity.[233]

Moreover, McAdams provide robust support for the customary status of non-refoulement, noting that: "In the past two decades, no State in the [UNHCR] Executive Committee has sought to justify refoulement, and States have repeatedly reiterated their commitment to and respect for the principle."[234] Even in cases of apparent breach, "states go to great lengths to recharacterise returns as standard immigration control or exclusion measures, rather than

[230] n 4, Draft Conclusion 10 and Commentary to Draft Conclusion 10, paras 3–5.
[231] n 26, art 31(1) and (3).
[232] n 5, Commentary to Conclusion 9, para 6.
[233] Nicaragua (n 68) para 186.
[234] n 158, 262.

challenging the principle itself."[235] This behaviour evidences a shared belief in the norm's legally binding nature, bolstering the case for *opinio juris*. As the ILC notes, the assessment of evidence must consider the overall context, including consistency of practice and expressed legal conviction.[236]

There is no doubt that the principle of non-refoulement has evolved far beyond its initial codification in the 1951 Refugee Convention and its 1967 Protocol. Now widely recognised as a rule of customary international law, non-refoulement is grounded in consistent state practice and reinforced by substantial evidence of *opinio juris*. Today, non-refoulement is reflected in and interpreted through multiple core international treaties with near-universal ratification, including the ICCPR and CAT, as well as in the legal instruments of all major regional human rights systems. While the evidence surveyed here establishes the widespread acceptance and binding nature of non-refoulement as a customary norm, determining its peremptory character requires additional criteria, particularly its recognition as a norm from which no derogation is permitted. This idea leads to the central inquiry of this thesis, which is explored in the following chapter. Having traced its development, the analysis now turns to whether non-refoulement satisfies the criteria necessary for recognition as a *jus cogens* norm. In this respect, the ILC's Draft Conclusions, outlined in Chapter 2, provide the most comprehensive methodology to evaluate the norm's status and determine whether non-refoulement meets the evidentiary threshold required for such recognition.

4. Establishing Non-Refoulement as a *Jus Cogens* Norm

The ILC added *jus cogens* to its programme of work in 2015, appointing Dire Tladi as Special Rapporteur to guide its codification and progressive development on the subject.[237] Between 2016 and 2019, the ILC examined the identification and legal consequences of peremptory norms, ultimately adopting the Draft Conclusions on Peremptory Norms of General International Law in 2019.[238] As stated in Chapter 2, these conclusions are not intended to define specific *jus cogens* norms but rather to establish a structured methodology

[235] Ibid 264.
[236] n 4, Draft Conclusion 3 and Commentary to Draft Conclusion 3, paras 1–3.
[237] UN General Assembly, *Report of the International Law Commission on the Work of Its Sixty-Seventh Session* (4 May–5 June and 6 July–7 August 2015) UN Doc A/70/10, paras 21 and 286.
[238] UN General Assembly, *Report of the International Law Commission on the Work of Its Seventy-First Session* (29 April–7 June and 8 July–9 August 2019) UN Doc A/74/10, ch V.

for identifying them and clarifying their legal consequences.[239] According to the ILC, this methodology is grounded in existing state practice, judicial decisions, and doctrinal consensus.[240]

This chapter additionally adopts the "Custom Plus" framework developed by Cathryn Costello and Michelle Foster. This approach builds upon the orthodox method of identifying customary international law, requiring widespread and representative state practice coupled with *opinio juris*, but adds a further requirement of *opinio juris* as to the norm's non-derogability.[241] In other words, the international community must treat the norm not only as legally binding but as non-dergoable. The authors argue that this heightened form of *opinio juris*, one that recognises the absolute and overriding nature of the norm, is what distinguishes *jus cogens* norms from ordinary customary rules. Their framework is grounded in the jurisprudence of courts such as the ICJ and the ICTY, which have recognised the prohibition of torture as a jus cogens norm using a cumulative evidentiary methodology.[242]

With the criteria for identifying *jus cogens* norms reclarified, this thesis now turns to its central inquiry. The previous chapters have addressed the necessary conceptual groundwork by examining two foundational questions: first, what are the criteria for recognition of *jus cogens* norms under international and what are their defining features; and second, how has the principle of non-refoulement evolved from its initial codification in the Refugee Convetion to its status as a norm of customary international law. With these elements established, the present chapter turns to the question of whether the principle of non-refoulement satisfies the legal and evidentiary criteria for recognition as a peremptory norm of general international law. Accordingly, this chapter argues that the principle of non-refoulement has evolved such that it has become a *jus cogens* norm of international law, as demonstrated by its widespread and consistent recognition as a legally binding, non-derogable, and hierarchically superior principle, as well as by its foundational role in

[239] n 5, Draft Conclusion 1 and Commentary to Draft Conclusion 1, para 4.
[240] Ibid, Draft Conclusion 1 and Commentary to Draft Conclusion 1, para 3; Draft Conclusion 4 and Commentary to Draft Conclusion 4, paras 1–6.
[241] n 8, 279.
[242] n 58, para 79; ibid Dissenting Opinion of Judge Weeramantry 496; ibid Declaration of President Bedjaoui; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 157; n 43, paras 144–153.

safeguarding core human rights and maintaining the integrity of the international human rights law framework.

4.1 Application of ILC Criteria to Non-Refoulement

4.1.1 *Opinio Juris* and State Practice of Non-Derogability

Ample evidence confirms that the principle of non-refoulement has attained an absolute character under IHRL. This section applies the evidentiary and definitional criteria of the ILC's 2019 Draft Conclusions on Peremptory Norms, which state that a *jus cogens* norm must be of such a character that "no derogation is permitted."[243] The ILC underscores that recognition of this non-derogable character must be evidenced through a broad range of materials, including treaties, jurisprudence, statements by states, and resolutions adopted within international organisations.[244] The jurisprudence of international and regional bodies confirms that non-refoulement meets this threshold.

While Article 33(2) of the 1951 Refugee Convention provides an exception clause, allowing states to remove individuals deemed a danger to national security or convicted of a particularly serious crime, this exception has been significantly curtailed by developments in IHRL.[245] Courts and treaty bodies have consistently held that where return would expose an individual to torture, inhuman or degrading treatment, or other irreparable harm, such removal is prohibited regardless of the individual's conduct or status.[246] As a result, the absolute nature of non-refoulement under instruments such as the CAT and the ICCPR has come to override the exception clause in Article 33(2), affirming that protection from return is non-derogable even in situations of emergency or national security concern.[247]

The ICCPR's right to life in Article 6 and the prohibition of torture and ill-treatment in Article 7 are interpreted in conjunction with Article 4(2), which provides that no derogation from these provisions (among others) may be made, even in times of public emergency.[248]

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[243] n 5, Conclusion 4(b).
[244] Ibid Conclusion 4 and Commentary para 6.
[245] UNHCR, Note on the Principle of Non-Refoulement (n 227), paras 9–11; Human Rights Committee, General Comment No 20 (n 172), para 9; n 190, paras 12–13.
[246] n 139; n 137; Human Rights Committee, General Comment No 20 (n 172)
[247] ICCPR (n 181), arts 6–7 and art 4(2); Committee Against Torture, General Comment No 4 (n 136), para 11.
[248] ICCPR (n 181), arts 4(2), 6 and 7.

General Comment No. 31 further confirms this interpretation and extends it to non-refoulement, stating that "The article 2, paragraph 1, obligations… entail an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed."[249] These provisions confirm that non-refoulement, insofar as it protects against torture, cruel, inhuman or degrading treatment, or arbitrary deprivation of life, is absolute and non-derogable under the ICCPR.[250] The Human Rights Committee, in its General Comment No. 20, further emphasises that States Parties must not expose individuals to the danger of torture through refoulement, noting that such obligations fall within the scope of Article 7 ICCPR, which is non-derogable under Article 4(2).[251] This understanding is explicitly reaffirmed in the CAT's General Comment No. 4, which provides that "the principle of non-refoulement in Article 3 is absolute and non-derogable."[252] Article 3 prohibits the expulsion, return ("refoulement") or extradition of any person to another State where there are substantial grounds for believing they would be in danger of being subjected to torture.[253] Moreover, the UNHCR has affirmed that the principle of non-refoulement under Article 33(1) of the Refugee Convention "constitutes an essential and non-derogable component of international refugee protection"[254] and applies in all circumstances, including "in the context of measures to combat terrorism and during times of armed conflict."[255]

This view of non-refoulement as a non-derogable obligation is not only reflected in treaty interpretation and soft law but has also been repeatedly affirmed in judicial decisions across diverse legal systems. In *Soering v United Kingdom*, the ECtHR held that extraditing an individual to a state where they face a real risk of treatment contrary to Article 3 of the ECHR, prohibiting torture and inhuman or degrading treatment, would itself engage the

[249] n 190, para 12.
[250] Human Rights Committee, *General Comment No 36: Article 6: Right to Life* (30 October 2018) UN Doc CCPR/C/GC/36, paras 30–31.
[251] Human Rights Committee, General Comment No 20 (n 172), para 9.
[252] Committee Against Torture, General Comment No 4 (n 136), para 11.
[253] Convention Against Torture (n 136), art 3.
[254] n 141, para 12.
[255] Ibid, para 20.

responsibility of the sending state.[256] The Court affirmed that the prohibition under Article 3 is absolute in terms of the Convention irrespective of the victim's conduct, encompassing criminality or threats to national security.[257] The Court emphasised that "no exception or derogation is permissible" to the principle of non-refoulement.[258] This reasoning was reinforced in *Chahal v United Kingdom*, when the ECtHR stated that "the prohibition provided by Article 3 against ill-treatment is absolute, and it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion."[259] The Court reiterated that "Article 3 enshrines one of the fundamental values of democratic societies… even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment."[260] These judgments establish that the principle of non-refoulement under Article 3 of the ECHR applies irrespective of a person's legal status or the severity of the threat they may pose.

Similarly, in the case of *Agiza v Sweden*, the Committee Against Torture found Sweden in breach of Article 3 of the CAT by deporting an Egyptian national despite credible allegations of torture risks. The deportation was executed on national security grounds, as Agiza was suspected of involvement in terrorism-related activities. However, the Committee stated that, "the nature of the obligation in article 3 is absolute. That is, it is not subject to any exception whatsoever."[261] Notably, the Committee also concluded that "the procurement of diplomatic assurances… did not suffice to protect against the manifest risk of torture."[262] Additionally, in *Pacheco Tineo Family v Bolivia*, the IACtHR held that "even in exceptional circumstances, such as national security, the State must respect the principle of non-refoulement."[263] These statements confirm that neither national security considerations nor diplomatic assurances can override the obligation to prevent return where a real risk of torture exists, reaffirming the non-derogable nature of the non-refoulement principle under international law. These

[256] n 137.
[257] Ibid, para 88.
[258] Ibid.
[259] n 139, para 81.
[260] Ibid, para 79.
[261] Agiza v Sweden, Communication No 233/2003, UN Doc CAT/C/34/D/233/2003 (2005) para 13.6.
[262] Ibid, para 13.4.
[263] *Pacheco Tineo Family v Bolivia* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 272 (2013) paras 131–132.

interpretations underscore that, where a real risk of torture or other irreparable harm is established, the safeguards under international human rights law take precedence, rendering the exception clause in Article 33(2) of the Refugee Convention inapplicable in such cases.

UN special procedures have echoed this position. In his 2005 report to the UN General Assembly, the Special Rapporteur on Torture, Manfred Nowak, underscored that the "principle of non-refoulement… has not been respected" in several cases involving transfers to countries where individuals risk torture, and described the obligation as "absolute."[264] He reinforced that the prohibition of torture is "non-negotiable" and "cannot be justified by any circumstances whatsoever,"[265] stating that this prohibition includes "an absolute ban, in accordance with article 3 of the Convention, on transferring any person to another jurisdiction where there are reasonable grounds to believe that the person is at risk of torture."[266] He also referenced the ECtHR's decision in *Soering*, affirming that non-refoulement falls within the "general and absolute prohibition against torture" in Article 3 of the ECHR.[267] This interpretation of non-refoulement as non-derogable is further reinforced by the UNGA, which has consistently recognised the absolute nature of non-refoulement in its resolutions. For example, Resolution 52/132 states that "the principle of non-refoulement is not subject to derogation."[268]

Moreover, the UNHCR, in its 2007 Advisory Opinion, states that non-refoulement is "a fundamental and inherent component" of the *jus cogens* prohibition of torture. As such, it imposes "an absolute ban on any form of forcible return to a danger of torture" that is binding on all states, including those not party to the relevant treaties.[269] This position is reinforced by the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v Furundžija*, which explicitly connected the jus cogens status of the prohibition of torture to the obligation of non-refoulement. The Tribunal affirmed that "[t]he prohibition on torture laid down in human rights treaties enshrines an absolute right, which can never be

[264] UN General Assembly, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak' (30 August 2005) UN Doc A/60/316, para 29.
[265] ibid para 37.
[266] ibid.
[267] ibid para 38.
[268] UNGA Res 52/132 (12 December 1997) UN Doc A/RES/52/132.
[269] n 141, para 21.

derogated from, not even in time of emergency."[270] Crucially, it added that "this prohibition is so extensive that States are even barred by international law from expelling, returning or extraditing a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture."[271] This analysis demonstrates non-refoulement's non-derogable character when connected to the peremptory prohibition of torture.

Taken together, this evidence demonstrates that the principle of non-refoulement is consistently treated as absolute and not subject to derogation. Having established its non-derogable character, it is now necessary to examine whether this character is accepted and recognised by the international community of States as a whole, a further requirement under the ILC framework for the identification of peremptory norms.[272] While non-derogability is an essential attribute of *jus cogens* norms, it must be coupled with clear evidence of widespread recognition of said non-derogability. The following section therefore assesses the extent to which states and other authoritative bodies have expressly affirmed the non-derogable character of non-refoulement.

4.1.2 *Opinio Juris* and State Practice of Universal Recognition of Non-Derogability:

As discussed in Chapter 2, a defining feature of jus cogens norms is the requirement that they be "recognized by the international community of States as a whole as a norm from which no derogation is permitted."[273] This section applies that criterion to the principle of non-refoulement. Non-refoulement has been embedded across both international and regional human rights systems as a norm from which no derogation is permitted, thereby reinforcing this essential criteria. This subsection does not merely reiterate the non-refoulement principle's non-derogable character. Rather, it highlights specific evidence demonstrating that this status has been acknowledged by the international community as a whole, thereby satisfying the definitional criteria set out in Article 53 of the VCLT and Draft Conclusion 4(b) of the ILC's Draft Conclusions on Peremptory Norms.[274]

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[270] n 43, para 144.
[271] Ibid.
[272] n 25, art 53; n 5, Conclusion 4(a)–(b).
[273] n 25, art 53
[274] Ibid, art 53; n 5, Conclusion 4(b).

Under ILC Conclusion 4 and its commentary, "A norm of general international law is one which is of general application and not limited in its scope to a particular region or group of States."[275] Per the ILC Draft Conclusions on Peremptory Norms, *jus cogens* norms typically derive from customary international law.[276] As previously established, in the case of non-refoulement, this customary foundation is reinforced by its near-universal implementation in domestic practice, widespread codification in binding human rights treaties and consistent interpretation by international courts and monitoring bodies. These authorities consistently affirm that the obligation is absolute and does not permit derogation, including in circumstances of national security. The absence of derogation clauses in the relevant human rights treaties and persistent reaffirmation of the obligation by international courts and bodies further supports its status as a non-derogable norm of general application binding on all states.[277]

As established in the preceding section, Article 3 of CAT sets out a clear and binding obligation of non-refoulement. Through the convention's interpretation in General Comment 4, the principle under this article is absolute and non-derogable. As of June 2025, CAT has 174 States Parties, representing 90.1% of the UN's 193 member states.[278] Similarly, the ICCPR's right to life in Article 6 and prohibition of torture and ill-treatment in Article 7 are interpreted in conjunction with Article 4(2), which provides that no derogation from Articles 6 and 7 (among others) may be made.[279] General Comments 20 and 31 of the HRC interpret these articles as extending to non-refoulement, thereby confirming its non-derogable status.[280] The ICCPR likewise has 174 States Parties as of June 2025, representing 90.1% of the UN's 193 member states.[281] Importantly, 190 states are party to either CAT, the ICCPR, or both,

[275] n 5, Draft Conclusion 4 and Commentary to Draft Conclusion 4, para 9.
[276] Ibid, Commentary to Draft Conclusion 5, para 4.
[277] ICCPR (n 181) arts 4(2), 6 and 7; CAT (n 136) art 3; ECHR (n 181) art 3; Human Rights Committee, General Comment No 20 (n 172) para 9; Committee Against Torture, General Comment No 4 (n 136) para 11.
[278] United Nations Treaty Collection, 'Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Status as at June 2025' https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4 accessed 6 June 2025.
[279] ICCPR (n 181), arts 4(2), 6, and 7.
[280] Human Rights Committee, General Comment No 20 (n 172), para 9; n 190, para 12.
[281] United Nations Treaty Collection, 'International Covenant on Civil and Political Rights: Status as at June 2025' https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4 accessed 6 June 2025.

constituting 98.4% of the UN's 193 member states.[282] This broad ratification near-universal recognition of non-refoulement's non-derogable character and is further strengthened by the absence of reservations to the provisions that affirm non-refoulement's non-derogable character, underscoring the consensus among States regarding its absolute nature. The prohibition of genocide is a well-established *jus cogens* norm, which the International Law Commission explicitly lists in the annex to its 2019 Draft Conclusions as a peremptory norm of general international law.[283] For comparison, 174 states are party to either the Genocide Convention or the Rome Statute of the International Criminal Court as of June 2025, representing 90.1% of the UN's 193 member states, reflecting a similar level of near-universal treaty endorsement for the prohibition of genocide.[284]

Notably, there are no reservations to Article 4(2) of the ICCPR, which enumerates the rights from which no derogation is permitted, except for a single declaration by Trinidad and Tobago reserving the right not to apply the provision in full.[285] Likewise, the non-refoulement obligation under Article 3 of the CAT has been accepted without reservation by nearly all States Parties, with the sole exception of Saudi Arabia.[286] Nevertheless, this reservation arguably contravenes Article 19(c) of the VCLT, which prohibits reservations incompatible with the object and purpose of a treaty.[287] Given that Article 3 operationalises the Convention's central aim, preventing torture by prohibiting transfers to states where torture is likely, any reservation that seeks to limit or nullify this obligation is incompatible with that

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[282] Author's calculation based on publicly available UN Treaty data. Combined number of States Parties to CAT and/or ICCPR as of June 2025.
[283] n 5, annex.
[284] *Convention on the Prevention and Punishment of the Crime of Genocide* (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277; *Rome Statute of the International Criminal Court* (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3; ICC, 'States Parties to the Rome Statute' https://asp.icc-cpi.int/states-parties accessed 12 June 2025; United Nations Treaty Collection, 'Convention on the Prevention and Punishment of the Crime of Genocide: Status as at June 2025' https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4 accessed 10 July 2025.
[285] United Nations Treaty Collection, *International Covenant on Civil and Political Rights: Declarations and Reservations* UNTS vol 999 (adopted 16 December 1966, entered into force 23 March 1976) https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4 accessed 6 June 2025.
[286] United Nations Treaty Collection, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Declarations and Reservations* UNTS vol 1465 (adopted 10 December 1984, entered into force 26 June 1987) https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4 accessed 6 June 2025.
[287] n 26, art 19(c).

purpose. Moreover, these outliers do not undermine the broader trend of widespread acceptance. As discussed in Chapter 2, the persistent objector doctrine does not apply to peremptory norms, which are binding on all states regardless of consent. Article 53 of the VCLT and the ILC Draft Conclusions both affirm that *jus cogens* norms must be accepted and recognised by the international community of States as a whole, not unanimously, but in a broadly representative manner.[288] In this context, the existence of a few outliers does not negate the norm's non-derogable status, nor does it prevent its elevation to the status of jus cogens. The near-universal endorsement of non-refoulement is further reflected in its consistent regional incorporation and enforcement.

From Europe to the Americas, Africa, and the Asia-Pacific region, the principle has been consistently recognised, either explicitly in treaty texts or through authoritative interpretation by regional courts and commissions as a norm from which no derogation is permitted. In Europe, the prohibition of refoulement has been firmly embedded through the jurisprudence of the ECtHR, particularly under Article 3 of the ECHR, which prohibits torture and inhuman or degrading treatment or punishment.[289] This prohibition has been extended to non-refoulement and has been interpreted as absolute and non-derogable. In *Soering v United Kingdom*, the ECtHR held that extradition to face a real risk of inhuman treatment would violate Article 3, stressing that "Article 3 enshrines one of the fundamental values of the democratic societies" and "prohibits in absolute terms" such treatment regardless of the victim's conduct.[290] Similarly, in *Chahal v United Kingdom*, the Court reaffirmed that the Article 3 obligation prevails over national security concerns.[291] With 46 States Parties to the ECHR, the Court's expansive interpretation of non-refoulement reflects the norm's entrenchment across nearly the entire European continent.[292] This interpretation is reinforced by the fact that no reservations have been entered in regard to Article 3 of the ECHR,

[288] Ibid, art 53; n 5, Draft Conclusion 4 and Commentary to Draft Conclusion 4, para 9.
[289] ECHR (n 181) art 3.
[290] n 137.
[291] n 139, para 79.
[292] Council of Europe, 'Chart of signatures and ratifications of Treaty 005' (Status as of 6 June 2025) https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=005 accessed 6 June 2025.

underscoring its absolute nature and confirming its universal applicability across all States Parties to the Convention.[293]

As for the Americas, Article 22(8) of the ACHR explicitly codifies the principle of non-refoulement, stating that "in no case may an alien be deported or returned to a country... where his right to life or personal freedom is at risk."[294] The IACtHR has interpreted this provision broadly and in line with the absolute prohibition of torture under Article 5 ACHR. In *Pacheco Tineo Family v Bolivia*, the Court held that the principle of non-refoulement applies even in cases involving irregular entry or national security concerns and emphasised that "this protection is absolute and non-derogable, even in circumstances such as a state of emergency or situations of internal disturbance or armed conflict."[295] As of June 2025, the ACHR has 24 States Parties, primarily in Latin America and the Caribbean.[296] While narrower in geographic scope than the ECHR, the ACHR's explicit and non-derogable treatment of non-refoulement offers robust regional evidence of its peremptory nature.

Although the African Charter on Human and Peoples' Rights does not explicitly codify non-refoulement, the African Commission on Human and Peoples' Rights has interpreted this obligation as implicit in its provision on the prohibition of torture (Article 5).[297] The Commission has clarified that States must not expose individuals to the danger of torture or ill-treatment "by way of expulsion, refoulement or extradition."[298] The African Commission on Human and Peoples' Rights has affirmed that the prohibition of torture is absolute and non-derogable, irrespective of circumstances or the victim's status.[299] This interpretation supports the view that where non-refoulement obligations arise to prevent torture, they share

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[293] Council of Europe, 'Reservations and Declarations for Treaty No.005 – Convention for the Protection of Human Rights and Fundamental Freedoms' https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=005 accessed 6 June 2025.
[294] Organization of American States, American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, art 22(8).
[295] n 262, para 134.
[296] OAS, 'Signatories and Ratifications of the American Convention on Human Rights' https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm accessed 6 June 2025.
[297] African Commission on Human and Peoples' Rights, *General Comment No 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)* (2017).
[298] Ibid, para 27.
[299] *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR) para 180.

the non-derogable character of the underlying substantive right. The 1981 African Charter has 54 States Parties, covering nearly the entire African continent.[300] Moreover, no reservations have been made to Article 5 of the African Charter, further underscoring the absolute character of this obligation.[301] These interpretive developments demonstrate that non-refoulement has become embedded within African human rights jurisprudence, aligning the region with other systems in treating non-refoulement as an essential safeguard flowing from the absolute prohibition of torture.

This consistent regional judicial recognition further supports the conclusion that the international community recognizes non-refoulement as a norm from which no derogation is permitted, reaffirmed through state practice, international monitoring bodies, and multilateral judicial decisions. The combined regional and international entrenchment of the principle of non-refoulement, through binding obligations, judicial interpretation, and reaffirmation in soft law, confirms its universal recognition as a non-derogable principle.

Jus cogens norms are identified not only through universal recognition of non-derogability but also through explicit permeptory status attribution by relevant actors. The peremptory character of non-refoulement has been supported in the scholarly literature for over two decades. In 2001, Jean Allain argued that non-refoulement had already attained jus cogens status, pointing to its codification across multiple treaties, its centrality to the prohibition of torture, and the lack of permitted exceptions under international human rights law.[302] However, as Lambert puts it, "in their article, Costello and Foster explain that '[w]hile non-derogability is a defining feature of jus cogens, it is a necessary but insufficient one.'"[303] Contrary to Allain, they argue that non-derogability and jus cogens are not "functional equivalents"[304] and insist, as does this author, that widespread opinio juris as to the non-derogable character of the norm is what endows these norms with their peremptory

[300] African Union, 'List of countries which have signed, ratified/acceded to the African Charter' https://au.int/en/treaties/african-charter-human-and-peoples-rights accessed 6 June 2025.
[301] African Commission on Human and Peoples' Rights, 'Reservations and Declarations to the African Charter on Human and Peoples' Rights' https://achpr.au.int/en/node/649 accessed 8 July 2025.
[302] Jean Allain, 'The Jus Cogens Nature of Non-Refoulement' (2001) 13(4) International Journal of Refugee Law 533.
[303] n 180, 248 (citing C Costello and M Foster, 'Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test' (2016) 27 Netherlands YB Intl L 273).
[304] n 8, 307.

status.[305] Although Allain's analysis predated the evidentiary structure later formalised by the ILC and lacked the granularity of more recent contributions, such as the article by Costello and Foster,[306] his work remains a necessary precursor. This article reflects an early and sustained academic view that non-refoulement meets the substantive criteria required for peremptory status.

Moreover, soft-law instruments have also explicitly recognised the peremptory status of non-refoulement. For example, the Cartagena Declaration on Refugees explicitly called for recognition of non-refoulement as a *jus cogens* norm, stating: "This principle [of non-refoulement] is imperative regarding refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*."[307] While the Declaration is a non-binding instrument, it was adopted by representatives of 10 Latin American states at an intergovernmental conference and has since informed domestic laws and policies across the region. As such, it constitutes primary evidence of opinio juris under Draft Conclusion 8 of the ILC framework, which recognises that resolutions adopted at intergovernmental conferences may reflect acceptance and recognition of a peremptory norm.[308] Taken together, these cumulative sources demonstrate a clear and growing consensus in support of recognising non-refoulement as a norm of *jus cogens* under international law.

4.2 Normative Scope and Implications of Recognising Non-Refoulement as *Jus Cogens*:

Having established that non-refoulement enjoys widespread recognition as an absolute, non-derogable norm, and that there is growing support for its characterisation as *jus cogens*, this thesis considers the practical significance of this elevation. The *jus cogens* designation entails important normative consequences for states and the international community. The following section examines these implications that surround the peremptory status of non-refoulement.

[305] Ibid, 279–80.
[306] n 8, 282–283.
[307] Cartagena Declaration on Refugees (22 November 1984) OAS/Ser.L/V/II.66, doc 10, rev 1, p 190, para III(5).
[308] Ibid; n 5, Conclusion 8.

4.2.1 Non-Refoulement as a Procedural Obligation

Critics such as Anthony D'Amato have questioned the conceptual coherence and practical utility of *jus cogens*, arguing that it functions more as a rhetorical "supernorm" than a doctrine with defined legal contours.[309] He challenges the field to explain what purpose *jus cogens* norms serve beyond moral symbolism.[310] This question provides a valuable framework for assessing the utility of non-refoulement as a *jus cogens* norm.

Among other critical purposes, the principle of non-refoulement serves as a procedural guarantee against human rights violations that are explicitly prohibited under international law, including cruel, inhuman or degrading treatment or punishment, and arbitrary deprivation of life.[311] In particular, non-refoulement is functionally indispensable to the enforcement of the absolute prohibition of torture. Torture has been recognised as a peremptory norm in the ICTY's *Furundžija* judgement[312], the UN HRC in *Georgopoulos v Greece*[313], the IACtHR in *Espinoza González v Peru*[314], by the ACnHPR in *Saleh al-Asad v Djibouti*[315], and the ECtHR in the *Al-Adasani* decision.[316] The *Obligation to Prosecute or Extradite* judgment declared that, "the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)".[317] This recognition not only affirms the substantive gravity of the norm but also underlines the necessity of procedural mechanisms for its enforcement.

Just as the *jus cogens* prohibition of torture gives rise to the procedural duty to prosecute or extradite alleged perpetrators under Article 7 CAT, a duty affirmed by the ICJ in *Belgium v Senegal*, so too does it necessitate the preventive safeguard of non-refoulement under Article 3 CAT. Notably, international and regional courts have consistently affirmed that this

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[309] Anthony D'Amato, 'It's a Bird, It's a Plane, It's Jus Cogens!' (1990) 6 Conn J Intl L 1–5.
[310] Ibid.
[311] Human Rights Committee, General Comment No 20 (n 172), para 9; n 190, paras 9–11.
[312] n 43, paras 257–258, 260–262.
[313] *Georgopoulos v Greece*, Human Rights Committee Communication No 1799/2008, UN Doc CCPR/C/99/D/1799/2008 (14 September 2010) para 5.
[314] Espinoza Gonzáles v Peru, Judgment (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No 289 (20 November 2014), para 141.
[315] Mohammed Abdullah Saleh al-Asad v Djibouti, African Commission on Human and Peoples' Rights Communication 383/10 (April–May 2014) para 179.
[316] n 120, para 179
[317] Obligation to Prosecute or Extradite (n 34), [99].

safeguard is not limited to torture narrowly defined but extends to all treatment contrary to Article 7 of the ICCPR and Article 3 of the ECHR, which prohibit both torture and cruel, inhuman or degrading treatment or punishment in absolute terms.[318] While the former ensures accountability, the latter ensures prevention, together illustrating that the enforcement of peremptory norms may require both *ex post* and *ex ante* procedural guarantees. These procedural obligations are essential to ensuring that peremptory norms are not merely aspirational but are implemented in practice, demonstrating that *jus cogens* entails both substantive prohibitions and enforceable procedural obligations. Moreover, non-refoulement is primarily a negative obligation, requiring states simply to abstain from certain conduct, namely, returning individuals to a risk of serious harm, making the demands on states minimal in comparison to positive obligations such as prosecution or extradition. This distinction is significant because it highlights that many of the critiques of *jus cogens* norms, which focus on the difficulties of enforcing affirmative duties, are less applicable to non-refoulement's primarily negative character.

The procedural obligation of non-refoulement functions as a preemptive barrier, preventing states from contributing to a foreseeable breach of peremptory norms. Whereas non-refoulement operates as a preventive safeguard to protect potential victims from future harm, the principle of *aut dedere aut judicare* reflects a repressive obligation aimed at ensuring accountability for perpetrators after the fact. In this respect, non-refoulement serves as the essential first line of defence against the full spectrum of absolute prohibitions, torture, cruel or inhuman treatment, and arbitrary deprivation of life, ensuring that states cannot escape their most fundamental obligations by transferring risk beyond their borders.

4.2.2 Circumvention of Non-Refoulement

While the principle of non-refoulement enjoys near-universal endorsement as a norm from which no derogation is permitted, its practical implementation is often undermined by strategies of circumvention. This paradox, whereby states profess adherence while devising methods to avoid responsibility, illustrates both the enduring normative force of the obligation and the challenges of enforcing peremptory norms in practice.

[318] n 137, paras 88–91; n 139, paras 79–80; Human Rights Committee, General Comment No 20 (n 172), para 9; Committee Against Torture, General Comment No 4 (n 136), paras 9–11.

In *Hirsi Jamaa and Others v Italy,* the ECtHR found that Italy violated the prohibition of refoulement by intercepting migrants on the high seas and returning them to Libya without individual assessments.[319] The Court reaffirmed that non-refoulement obligations apply extraterritorially whenever a state exercises effective control over individuals and that collective expulsions without guarantees against risk of harm are unlawful under international law.[320] This idea has been affirmed by Lauterpacht and Bethlehem, for example, who affirm that non-refoulement applies extraterritorially wherever a person is under the effective control of a State or is affected by those acting on behalf of the State.[321] In *Hirsi Jamaa*, the Court's recognition that extraterritorial removals by sea violated Article 3 ECHR underscores the scope of non-refoulement obligations, even beyond a state's territory.[322] The judgment affirms that procedural or geographic nuances cannot be invoked to circumvent the absolute duty not to expose individuals to inhuman treatment.

Nevertheless, the practical implementation of non-refoulement remains inconsistent, with significant legal grey zones. As Hernández explains, while treaty obligations bind states, "they remain entitled to introduce systems of immigration control and visa requirements" that, in effect, curtail access to asylum and protection.[323] Notably, Article 33(1) prohibits return to the frontiers of the state of feared persecution but does not explicitly forbid transfer to a third country, a loophole that states have exploited through mechanisms such as the "first country of arrival rule" and the "safe third country rule", often resulting in "chains of deportation" that ultimately return refugees to danger without adequate assessment of protection needs.[324]

Certain Western states continue to intercept refugees on the high seas and prevent them from reaching territorial waters to avoid triggering non-refoulement obligations.[325] Australia has institutionalised this through offshore processing policies in Nauru and Papua New Guinea's Manus Island. Even where refugee status is granted, those affected are not permitted to settle in Australia. These offshore centres, run in part by private contractors with no appeals

[319] n 140, paras 122–125, 185–186.
[320] Ibid, paras 133-158.
[321] n 187, 63.
[322] n 140, paras 66–74.
[323] n 13, 463.
[324] Ibid 464.
[325] Ibid.

process, have faced allegations of indefinite detention, degrading conditions, and abuse, with Papua's Supreme Court declaring the Manus Island centre unconstitutional in 2016.[326] Despite these shortcomings, Australia's model has inspired others: Denmark has passed parallel legislation, the UK's Nationality and Borders Act introduces offshore processing frameworks, and the EU has considered similar arrangements in Morocco, Mali, Niger, and Chad.[327] Greece's Aegean islands now function as de facto offshore processing centres, where asylum seekers are confined for months or even years without freedom of movement.[328] The 2016 EU–Turkey Statement, under which certain asylum seekers are returned to Turkey from Greece before their claims are processed, has drawn criticism for undermining non-refoulement safeguards.[329] For every return, one Syrian refugee is resettled from Turkey to the EU, alongside substantial aid payments.[330]

These developments highlight that modern state practice often seeks to circumvent rather than explicitly derogate from or dispute the legality of principle of non-refoulement. States increasingly rely on legal and territorial fictions, such as offshore processing, extraterritorial interceptions, and third-country agreements, to avoid engaging their protection obligations, while continuing to profess adherence to international law.[331] This pattern reveals a paradox: non-refoulement is not openly contested but deliberately avoided, suggesting its underlying authority remains intact. As the International Court of Justice (ICJ) affirmed in the *Nicaragua* judgment, the existence of violations does not negate the customary status of a norm; rather, persistent breaches may reinforce its binding nature, particularly where states attempt to justify or obscure their conduct instead of repudiating the rule itself.[332] In this sense, circumvention may reflect not the erosion of legal obligation but the recognition that the principle of non-refoulement continues to constrain state conduct at a foundational level. This doctrinal insight challenges the assumption that inconsistent state behaviour weakens

[326] Ibid 465.
[327] Ibid.
[328] Ibid.
[329] K de Vries, 'The EU–Turkey Statement: A Design for Human Rights Violations' (2018) 20(4) *European Journal of Migration and Law* 465, 471–475; H Kaya, *The EU–Turkey Statement on Refugees: Assessing Its Impact on Fundamental Rights* (Edward Elgar Publishing 2020).
[330] European Council, 'EU–Turkey Statement, 18 March 2016' (Press Release No 144/16, 18 March 2016) para 2.
[331] n 2, 307 - 349.
[332] Nicaragua (n 68) para 186.

the normative status of non-refoulement and instead suggests that such behaviour may bolster the case for its peremptory status.

On the issue of maritime interception, "a State that intercepts a boat carrying refugees on the high seas and returns them directly to their country of origin violates the principle [of non-refoulement] … [and] becomes party to that act" when it knowingly facilitates return to persecution or serious harm.[333] This notion reinforces the principle of international law regarding joint and several responsibility.[334] Even passive facilitation, such as failing to prevent onward transfer to a state likely to engage in torture, may engage a state's legal liability.[335] In this regard, "States must refrain from any act or omission that could foreseeably expose an asylum seeker to serious harm, whether through return to the country of origin, a transit country, or any country that might itself remove an asylum seeker in violation of the principle of non-refoulement."[336]

As Goodwin-Gill and McAdam explain, "there is virtual unanimity among States, UNHCR, and academics that responsibility for respecting the principle of non-refoulement is engaged wherever States assert jurisdiction, whether on their own territory or extraterritorially, for example on the high seas."[337] This understanding applies "not only to those formally recognised as refugees or beneficiaries of complementary protection, but also to asylum seekers who have not yet been through a formal status determination process."[338] Most significantly, "the place from which the person is returned is immaterial; what matters is that the state does not engage in conduct that puts a person at risk of being returned to a place of danger."[339] This functional interpretation of jurisdiction aligns non-refoulement with the broader protective aims of international human rights law.

Conduct like chain-refoulement or offshore processing is typically framed as legally compliant, operationally necessary, or justified by extraneous considerations, including

[333] n 2, 317.
[334] n 31, arts 47–48.
[335] Ibid, Commentary to Article 2, para 10.
[336] n 2, 316.
[337] Ibid 308.
[338] Ibid.
[339] Ibid 311.

third-country agreements or externalised border control frameworks.[340] However, jurisprudence and scholarly analysis have affirmed that such practices fall within the scope of non-refoulement and, when they expose individuals to risk, constitute violations of the obligation under international law.[341] While states may invoke legal or operational justifications, the continued invocation of the principle in legal discourse, along with the absence of open repudiation, suggests a tacit acknowledgement of its normative authority. Although the ILC's Draft Conclusions do not address this precise issue, their methodology for the recognition of peremptory norms helps to contextualise this pattern of state conduct.

4.2.3 Non-Refoulement as a Surrogate Sovereign:

As demonstrated through the discussion of procedural obligations, recognising non-refoulement as a *jus cogens* norm entails significant normative implications. As a peremptory norm, it binds all states irrespective of treaty ratification, precludes reservations or derogations, and invalidates any agreement in conflict with its obligations.[342] Furthermore, such norms give rise to *erga omnes* obligations, entitling all states to invoke responsibility and take measures to ensure compliance with these norms.[343] These consequences reflect the norm's elevated status within the hierarchy of international law. Yet, the elevation of non-refoulement to *jus cogens* status raises a broader question: what are the implications for the international community in upholding such a norm without exception? To address this, this thesis draws on social contract theory, which provides a robust framework for understanding the protective function of non-refoulement when domestic systems fail to uphold their end of the contract. The core principle of social contract theory, whether conceptualised by Hobbes, Locke, or Rousseau, is that individuals give up certain liberties in exchange for the state's protection. Rousseau writes, "Each of us puts his person and all his power in common under the supreme direction of the general will" in return for civil peace

[340] See eg n 326; Department of Home Affairs (Australia), 'Australia's Offshore Processing Regime' (updated 2021) https://www.homeaffairs.gov.au/about-us/our-portfolios/border-protection/offshore-processing; Home Office (UK), 'Migration and Economic Development Partnership with Rwanda' (updated 2022) https://www.gov.uk/government/publications/migration-and-economic-development-partnership-with-rwanda all accessed 6 June 2025.
[341] See n 140, paras 113–122; n 262, paras 128–132; n 2, 308 - 319.
[342] n 26, art 53.
[343] n 13, 70.

and protection.[344] But when a state itself becomes the agent of persecution, torture, or arbitrary violence, it fundamentally violates this bargain. In such cases, the individual is left without protection or a state capable or willing to enforce their rights.

In the absence of state protection, non-refoulement operates as a secondary or "back-up" social contract. Where the domestic sovereign has defaulted, the international legal order must intervene to prevent the individual's return to persecution, loss of life, bodily harm, torture, etc. This logic directly echoes the historical function of refugee law outlined in Chapter 3, where the earliest international efforts were designed to provide minimum legal recognition and mobility to individuals who had lost effective national protection.[345] Refugee law has never merely been a system to enable escape from harm; it has always served as a back-up to the protection one expects from the State of which an individual is a national.[346] Thus, non-refoulement as a peremptory norm of international law reflects not only a procedural guarantee but also a commitment by the global community to intervene when the protective obligations of statehood have failed. This logic mirrors the foundations of the Responsibility to Protect (R2P) doctrine, which holds that sovereignty is not a shield but a responsibility.[347] Both treat sovereignty as conditional. When a state fails to protect, other states assume limited obligations toward the individual based on a legal and moral duty. Through non-refoulement as a *jus cogens* norm, the international legal order ensures that when the social contract is breached in an individual's country of origin, it is not doubly breached by returning the individual to where their rights are fundamentally violated. The second state is not at liberty to disregard the rights of a person simply because they are a foreigner; non-refoulement imposes an obligation not to perpetuate the injustice.

In functioning as a surrogate sovereign, the international legal order assumes a limited but vital function: to uphold the bare minimum protections owed to human beings when their own state refuses or fails to do so. In this sense, non-refoulement operates as an *erga omnes* safeguard, which *jus cogens* norms inherently give rise to, regardless of nationality, legal

[344] Jean-Jacques Rousseau, *The Social Contract* (Penguin Classics 1968).
[345] n 145, 289.
[346] Ibid.
[347] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (ICISS 2001) ch 2.

status, or origin. Non-refoulement's *jus cogens* status reflects the idea that no state may lawfully outsource persecution by shifting the burden to another jurisdiction. *Jus cogens* norms, such as non-refoulement, stand as a testament to the belief that some wrongs are so grave that they offend not only the victim but also the conscience of all humanity. These norms reflect a collective moral agreement that human dignity cannot be bartered for national interest, procedural convenience, or political expediency. As displacement crises intensify worldwide, the need to uphold this norm will only become more pressing.

5. Conclusion

Let us now return to the central inquiry of this thesis: To what extent does international law support the recognition of non-refoulement as a *jus cogens* norm? This thesis argues that non-refoulement does not merely constitute a widely recognised treaty obligation or a customary norm but has evolved into a peremptory norm of general international law. Through doctrinal analysis, historical evidence, and jurisprudential study, this thesis demonstrates that non-refoulement meets the criteria established under international law for recognition as a jus cogens norm.

First, in addressing Sub-Research Question 1: What are the defining features of jus cogens norms, and how are they recognised under international law?—this thesis has shown that three defining characteristics distinguish jus cogens norms: their basis in general international law, their acceptance and recognition by the international community of States as norms from which no derogation is permitted, and their universal and overriding applicability irrespective of consent. Chapter 2 examined these features comprehensively by analysing the ILC's 2019 Draft Conclusions on Peremptory Norms, which provide both the criteria and the evidentiary standards for identifying such norms. The "Custom Plus" approach proposed by Costello and Foster was also outlined as a methodology with the dual requirements of the elements required for establishing a norms of customary international law and a widespread *opinio juris* as to the non-derogability of the norm. The chapter also engaged with the jurisprudence of the ICJ and the ICTY, illustrating how courts have applied these criteria to norms such as the prohibition of torture. Finally, the analysis demonstrated that *jus cogens* norms possess unique legal consequences, including their hierarchical

supremacy over conflicting treaty and customary rules, their capacity to generate *erga omnes* obligations, and the systemic limitations they impose on state conduct, even when procedural doctrines like state immunity constrain enforcement in practice. By establishing this detailed conceptual and doctrinal framework, the thesis established clear benchmarks for evaluating whether the principle of non-refoulement meets the stringent requirements for recognition as a jus cogens norm.

Second, in response to Sub-Research Question 2: How has the principle of non-refoulement evolved into a rule of customary international law?—Chapter 3 traced the historical development of non-refoulement from its humanitarian origins in the interwar period, including the early work of the League of Nations, to its codification in Article 33 of the 1951 Refugee Convention and the global extension of its protections through the 1967 Protocol. The chapter further demonstrated how non-refoulement has been progressively incorporated into IHRL, notably through Article 3 of the CAT and the interpretative practice of the Human Rights Committee under Articles 6 and 7 of the ICCPR. This expansion has been reinforced by consistent jurisprudence across regional systems, including the European, Inter-American, and African human rights courts, as well as widespread domestic legislation and constitutional provisions that embed the principle in national legal frameworks, thus establishing near-universal state practice. Additionally, Chapter 3 analysed the convergence of near-universal treaty ratification and repeated affirmation by the UN General Assembly, the UNHCR, and other authoritative bodies as compelling evidence of *opinio juris*. Collectively, these elements demonstrated that non-refoulement has crystallised into a general norm of customary international law, which allowed this thesis to progress to its analysis of the principle's status as a *jus cogens* norm.

Third, to answer Sub-Research Question 3: What evidence demonstrates that non-refoulement meets the criteria for jus cogens status?—Chapter 4 systematically applied the ILC's Draft Conclusions on Peremptory Norms and the "Custom Plus" framework to assess the principle's legal character. This analysis demonstrated that non-refoulement possesses the defining attributes of jus cogens norms: it is absolute, non-derogable, and universally applicable. International and regional courts and human rights systems have consistently affirmed non-refoulement's non-derogable character. The near-universal

ratification of the CAT and ICCPR, both of which contain provisions which are interpreted to prohibit any derogations from non-refoulement obligations, further underscores the consensus that this obligation is not subject to derogation.

Finally, in addressing the central research question, this thesis has demonstrated that a compelling body of legal authority and consistent state practice supports the recognition of non-refoulement as a *jus cogens* norm. The analysis reveals that non-refoulement is firmly established in international and regional human rights law as an absolute obligation, reinforced by near-universal treaty ratification, the absence of reservations to core provisions, and sustained judicial affirmation of its non-derogable character. The principle's indispensable function as a procedural safeguard against torture, enforced disappearance, arbitrary deprivation of life, and other fundamental human rights underscores its essential role in upholding the integrity of the international legal order. Moreover, the principle's evolution into a form of surrogate sovereign protection, ensuring minimum guarantees where domestic systems fail, reflects its foundational significance and universal applicability. While enforcement challenges remain, particularly the tension between non-refoulement and procedural doctrines such as state immunity and extraterritorial border control, these obstacles do not diminish the overwhelming evidence that non-refoulement has crystallised into a peremptory norm. The thesis concludes that the elevation of non-refoulement to *jus cogens* status is not merely a statement of *lex ferenda* but rather an emerging reality grounded in consistent state practice, *opinio juris* as to its non-derogability, judicial recognition, and the shared values of the international community.

As discussed in Chapter 2, the absence of a supranational enforcement authority means that compliance ultimately rests on the political will and legal systems of individual states. The global community's failure to prevent or respond to egregious violations of other *jus cogens* norms, such as the ongoing genocide in Gaza as of 2025, demonstrates that normative supremacy alone does not guarantee protection. The legal recognition of non-refoulement as a peremptory norm must, therefore, be accompanied by sustained advocacy, institutional accountability, and political resolve. While the elevation of non-refoulement to jus cogens status is not without consequence, the question of enforcement falls outside the scope of this thesis and merits a separate, in-depth study. Nevertheless, this recognition of

non-refoulement's *jus cogens* status signals a heightened obligation, narrowing the space for evasion or exception, and reflects a fundamental legal and moral truth: that no human being should be returned to the hands of their persecutor, and no state should be complicit in such a return.

Bibliography:

Case Law:

A v Secretary of State for the Home Department [2005] UKHL 71, [2006] 2 AC 221

African Commission on Human and Peoples' Rights, *Mohammed Abdullah Saleh al-Asad v Djibouti*, Communication 383/10 (April–May 2014).

Al-Adsani v United Kingdom (2001) 34 EHRR 273

Alzery v Sweden (Human Rights Committee, 2006)

Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) [1970] ICJ Rep 3

Bufano et al. (Swiss Federal Supreme Court, 1982)

Chahal v United Kingdom (1996) 23 EHRR 413

Delalić (Prosecutor v) (Trial Chamber Judgment) ICTY IT-96-21-T (16 November 1998)

Dongh Lian Kham v Union of India 2016 SCC OnLine Del 5007 (Delhi HC)

Furundžija (Prosecutor v) (Judgment) ICTY, 10 December 1998

Hirsi Jamaa and Others v Italy (2012) 55 EHRR 21

ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136

Inter-American Court of Human Rights, *Pacheco Tineo Family v Bolivia (Preliminary Objections, Merits, Reparations and Costs)* Series C No 272 (2013).

Jones v Ministry of Interior of the Kingdom of Saudi Arabia [2007] 1 AC 270 (HL)

Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening) (Judgment) [2012] ICJ Rep 99

Ktaer Abbas Habib Al Qutaifi v Union of India 1999 Cri LJ 919 (Gujarat HC)

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971] ICJ Rep 16

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14

M.S.S. v Belgium and Greece App no 30696/09 (GC, 21 January 2011)

North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) [1969] ICJ Rep 3

Princz v Federal Republic of Germany (DC Cir 1994) 26 F.3d 1166

Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Judgment) [2012] ICJ Rep 422

R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3) [2000] 1 AC 147

Refugee and Migratory Movements Research Unit (RMMRU) v Government of Bangladesh, Writ Petition No 10504 of 2016 (Supreme Court of Bangladesh, 31 May 2017)

RM v Attorney-General (High Court of Kenya, 1 December 2006) [2006] eKLR

Soering v United Kingdom (1989) 11 EHRR 439

Suresh v Canada (Minister of Citizenship and Immigration) [2002] 1 SCR 3

Zimbabwe Human Rights NGO Forum v Zimbabwe (2006) AHRLR 128 (ACHPR).

Books and Articles:

Allain J, 'The Jus Cogens Nature of Non-Refoulement' (2001) 13(4) International Journal of Refugee Law 533

Alston P and Goodman R, *International Human Rights: The Successor to International Human Rights in Context* (Oxford University Press 2013)

Bassiouni MC, 'International Crimes: Jus Cogens and Obligatio Erga Omnes' (1996) 59 Law and Contemporary Problems 63

Bianchi A, ‘Human Rights and the Magic of Jus Cogens’ (2008) 19 European Journal of International Law 491

Bonavero Institute at Oxford University, ‘Reassessing Non-Refoulement: A Case for Jus Cogens in Refugee Law’ (Bonavero Institute, 2023)

Cassese A, *International Law* (2nd edn, Oxford University Press 2005)

Costello C, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016)

Costello C and Foster M, ‘Non-Refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test’ (2016) 27 Netherlands Yearbook of International Law 273

Criddle EJ and Fox-Decent E, ‘A Fiduciary Theory of Jus Cogens’ (2009) 34(2) Yale Journal of International Law 331

D’Amato A, ‘It’s a Bird, It’s a Plane, It’s Jus Cogens!’ (1990) 6 Connecticut Journal of International Law 1

d’Aspremont J, *International Law as a Belief System* (Cambridge University Press 2018)

de Vries K, ‘The EU–Turkey Statement: A Design for Human Rights Violations’ (2018) 20(4) European Journal of Migration and Law 465

de Wet E and Vidmar J (eds), *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press 2012)

Dixon M, *Textbook on International Law* (7th edn, Oxford University Press 2013)

Donnelly J, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press 2013)

Feller E, Türk V and Nicholson F (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press 2003)

Goodwin-Gill GS and McAdam J, *The Refugee in International Law* (4th edn, Oxford University Press 2021)

Hathaway JC, *The Law of Refugee Status* (2nd edn, Cambridge University Press 2014)

Hathaway JC, ‘The Evolution of Refugee Status in International Law: 1920–1950’ (1984) 33(2) International and Comparative Law Quarterly 348

Harris D, *Cases and Materials on International Law* (7th edn, Sweet & Maxwell 2010)

Henkin L, *International Law: Politics and Values* (Martinus Nijhoff 1995)

Hernández G, *International Law* (2nd edn, Oxford University Press 2022)

Kaya H, *The EU–Turkey Statement on Refugees: Assessing Its Impact on Fundamental Rights* (Edward Elgar Publishing 2020)

Klabbers J, *International Law* (4th edn, Cambridge University Press 2023)

Koremenos B, Lipson C and Snidal D, 'The Rational Design of International Institutions' (2001) 55 International Organization 761

Krasner SD, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999)

Lambert H, 'Customary International Refugee Law' in C Costello, M Foster and J McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021)

Lauterpacht E and Bethlehem D, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in E Feller, V Türk and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003)

Linderfalk U, 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' (2007) 18 European Journal of International Law 853

Linderfalk U, 'The Legal Consequences of Jus Cogens and the Individuation of Norms' (2020) 33 Leiden Journal of International Law 893

Orakhelashvili A, *Peremptory Norms in International Law* (2nd edn, Oxford University Press 2021)

Rousseau J-J, *The Social Contract* (Penguin Classics 1968)

Shaw MN, *International Law* (6th edn, Cambridge University Press 2008)

Shelton D (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013)

Tladi D, *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputes* (Brill 2021)

Tunkin GJ, ‘Is General International Law Customary Law Only?’ (1993) 4 European Journal of International Law 534

Webb P, ‘Human Rights and the Immunities of State Officials’ in E de Wet and J Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press 2012)

Weis P, ‘The Development of Refugee Law’ (1984) 8 Michigan Yearbook of International Legal Studies 1

Weisburd AM, ‘The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina’ (1995) 17 Michigan Journal of International Law 1

Yatani VG, Safrin M and Wagian D, ‘Exclusion of the Principle of Non-Refoulement in Article 33 Paragraph 2 of the 1951 Refugee Convention’ (2021) 13(2) Journal of Indonesian Legal Studies 60

Official Documents:

International Treaties and Statutes:

Additional Protocol concerning the Status of Refugees coming from Germany (adopted 14 September 1939, entered into force 14 September 1939) 198 LNTS 141.

Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees (adopted 5 July 1926, entered into force 5 July 1926) 89 LNTS 47.

Agreement relating to the Issue of Travel Documents to Refugees who are the Concern of the Intergovernmental Committee on Refugees (adopted 15 October 1946, entered into force 15 October 1946) 11 UNTS 73.

Arrangement relating to the Legal Status of Russian and Armenian Refugees (adopted 30 June 1928, entered into force 30 June 1928) 89 LNTS 53.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

Convention concerning the Status of Refugees coming from Germany (adopted 10 February 1938, entered into force 10 February 1938) 192 LNTS 59.

Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277

Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

Convention relating to the International Status of Refugees (adopted 28 October 1933, entered into force 13 June 1935) 159 LNTS 199.

Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

Covenant of the League of Nations (adopted 28 April 1919, entered into force 10 January 1920) 225 CTS 195.

Geneva Conventions of 12 August 1949, 75 UNTS 31, 85, 135 and 287.

International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3.

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

League of Nations, Convention Relating to the International Status of Refugees (adopted 28 October 1933) Treaty Series Vol. CLIX No. 3663.

Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

Provisional Arrangement concerning the Status of Refugees coming from Germany (adopted 4 July 1936, entered into force 4 July 1936) 171 LNTS 75.

Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3

Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993.

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

Regional Treaties:

Agiza v Sweden, Communication No 233/2003, UN Doc CAT/C/34/D/233/2003 (2005).

European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221

Organization of African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45.

Organization of American States, American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

United Nations Documents:

Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

Committee Against Torture, *General Comment No. 4 on the Implementation of Article 3 in the Context of Article 22* (9 February 2018) UN Doc CAT/C/GC/4.

Committee on the Rights of the Child, *General Comment No 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin* (2005) UN Doc CRC/GC/2005/6.

Georgopoulos v Greece, Human Rights Committee Communication No 1799/2008, UN Doc CCPR/C/99/D/1799/2008 (14 September 2010).

International Law Commission, *Draft Conclusions on Identification of Customary International Law, with Commentaries* (2018) UN Doc A/73/10, ch V

International Law Commission, *Draft Conclusions on Peremptory Norms of General International Law (Jus Cogens), with Commentaries* (2019) UN Doc A/74/10, ch V

International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83.

Human Rights Committee, *General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986.

Human Rights Committee, 'General Comment No. 20: Article 7 (Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment)' (1992) UN Doc HRI/GEN/1/Rev.9 (Vol I).

Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13.

Human Rights Committee, *General Comment No 36: Article 6: Right to Life* (30 October 2018) UN Doc CCPR/C/GC/36.

Human Rights Committee, *Teitiota v New Zealand* (7 January 2020) UN Doc CCPR/C/127/D/2728/2016

Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Barbados* (19 December 2018) UN Doc A/HRC/40/6.

Lauterpacht E and Bethlehem D, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' (UNHCR, 2003)

Tladi D, 'Fifth Report on Peremptory Norms of General International Law (Jus Cogens)' (30 January 2020) UN Doc A/CN.4/738

Tladi D, 'Fourth Report on Peremptory Norms of General International Law (Jus Cogens)' (30 January 2019) UN Doc A/CN.4/727

UN General Assembly, *Official Records of the General Assembly, Seventy-third Session, Supplement No 10 (A/73/10)*.

UN General Assembly, *Report of the International Law Commission on the Work of Its Sixty-Seventh Session* UN Doc A/70/10 (2015).

UN General Assembly, *Report of the International Law Commission on the Work of Its Seventy-First Session* UN Doc A/74/10 (2019).

UN General Assembly, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak' (30 August 2005) UN Doc A/60/316.

UN General Assembly Resolution 32/67 (8 December 1977).

UN General Assembly Resolution 33/26 (29 November 1978).

UN General Assembly Resolution 34/60 (29 November 1979).

UN General Assembly Resolution 35/41 (25 November 1980).

UN General Assembly Resolution 36/125 (14 December 1981).

UN General Assembly Resolution 37/195 (18 December 1982).

UN General Assembly Resolution 38/121 (16 December 1983).

UN General Assembly Resolution 39/140 (14 December 1984).

UN General Assembly Resolution 40/118 (13 December 1985).

UN General Assembly Resolution 41/124 (4 December 1986).

UN General Assembly Resolution 42/109 (7 December 1987).

UN General Assembly Resolution 43/117 (8 December 1988).

UN General Assembly Resolution 44/137 (15 December 1989).

UN General Assembly Resolution 46/106 (16 December 1991).

UN General Assembly Resolution 47/105 (16 December 1992).

UN General Assembly Resolution 48/116 (20 December 1993).

UN General Assembly Resolution 49/169 (23 December 1994).

UN General Assembly Resolution 50/152 (21 December 1995).

UN General Assembly Resolution 51/75 (12 December 1996).

UN General Assembly Resolution 52/103 (9 February 1998).

UN General Assembly Resolution 53/125 (12 February 1999).

UN General Assembly Resolution 52/132 (12 December 1997).

UN General Assembly Resolution 54/146 (22 February 2000).

UN General Assembly Resolution 55/74 (12 February 2001).

UN General Assembly Resolution 56/137 (19 December 2001).

UN General Assembly Resolution 57/187 (18 December 2002).

UN General Assembly Resolution 58/151 (22 December 2003).

UN General Assembly Resolution 59/170 (20 December 2004).

UN General Assembly Resolution 60/129 (20 January 2006).

UN General Assembly Resolution 61/137 (25 January 2007).

UN General Assembly Resolution 62/124 (24 January 2008).

UN General Assembly Resolution 63/148 (18 December 2008).

UN General Assembly Resolution 63/127 (15 January 2009).

UN General Assembly Resolution 64/127 (15 January 2010).

UN General Assembly Resolution 65/194 (28 February 2011).

UN General Assembly Resolution 66/133 (19 March 2012).

UN General Assembly Resolution 67/149 (6 March 2013).

UN General Assembly Resolution 68/141 (28 January 2014).

UN General Assembly Resolution 69/152 (17 February 2015).

UN General Assembly Resolution 71/172 (19 December 2016).

UN General Assembly Resolution 72/150 (19 December 2017).

UN General Assembly Resolution 73/151 (17 December 2018).

UN General Assembly Resolution 74/130 (18 December 2019).

UN General Assembly Resolution 75/163 (16 December 2020).

UN General Assembly Resolution 76/143 (16 December 2021).

UN General Assembly Resolution 77/198 (15 December 2022).

UN General Assembly Resolution 78/184 (19 December 2023).

UN General Assembly Resolution 79/156 (17 December 2024).

UN General Assembly, *Summary Record of the 58th Meeting*, UNGA Third Committee, 53rd Session (13 November 1998) UN Doc A/C.3/53/SR.58.

UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention* (26 January 2007).

UNHCR Executive Committee, *Conclusion No 25 (XXXIII) on General* (1982).

UNHCR, *Guidelines on International Protection No 5: Application of the Exclusion Clauses* (2003).

UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* (Geneva, 2023).

UNHCR, *Note on the Principle of Non-Refoulement* (1997)

UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law* (2018)

UNHCR, 'UNHCR Welcomes Close of Australia's Pacific Solution', *UNHCR News*, 8 February 2008.

UN Security Council Resolution 662 (9 August 1990) UN Doc S/RES/662 (1990)

Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights (25 June 1993) UN Doc A/CONF.157/23

Other Official Documents:

Advisory Opinion OC-21/14, 2014, Inter-American Court of Human Rights, reaffirming the non-refoulement obligation under Article 22(8) of the *American Convention on Human Rights*.

Advisory Opinion OC-26/20 (IACtHR, 9 November 2020).

African Commission on Human and Peoples' Rights, *General Comment No 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)* (2017).

Basic Law: Human Dignity and Liberty, 1992 (Israel).

Cartagena Declaration on Refugees (22 November 1984) OAS/Ser.L/V/II.66.

Chad, *Asylum Law* (2020).

Council of Europe, *Report of the Commissioner for Human Rights on Pushbacks and Rights Violations at EU Borders* (19 April 2021)

Council of Europe, *Report to the Greek Government on the visit to Greece carried out by the CPT from 13 to 17 March 2020* CPT/Inf(2020)35.

European Commission, 'The Dublin System', *Migration and Home Affairs*, European Commission.

European Council, 'EU–Turkey Statement, 18 March 2016' (Press Release No 144/16, 18 March 2016)

European Court of Human Rights, 'The Principle of Non-Refoulement under the European Convention on Human Rights', *ECHR*, 2017.

European Parliament, *Pushbacks at the EU external borders* (2022).

Extradition Act 2017 (Mauritius).

Iceland, *Act No 80/2016 on Foreign Nationals* (entered into force 1 January 2017).

Inter-American Court of Human Rights, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* (Advisory Opinion OC-21/14, 19 August 2014) Series A No 21.

Inter-American Court of Human Rights, *The Institution of Asylum, and its Recognition as a Human Right under the Inter-American System of Protection* (Advisory Opinion OC-25/18, 30 May 2018) Series A No 25.

International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (ICISS 2001).

Kenya, *Refugees Act* 2021.

Luxembourg, *Loi du 5 mai 2006 relative à l'asile.*

Malta, *International Protection Act* (Cap 420).

Montenegro, *Constitution* (2007).

Montenegro, *Law on International and Temporary Protection of Foreigners* (2016).

Nauru, *Refugee Convention Act* 2012.

Philippines, *Department of Justice Guidelines on RSD* (2012).

Philippines, *Department of Justice Circular No 94* (2000).

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) [1951] ICJ Rep 15.

Serbia, *Constitution* (2006).

Serbia, *Law on Asylum and Temporary Protection* (2007, as amended).

South Korea, *Refugee Act* 2012.

South Sudan, *Refugees Act* 2012.

Switzerland, *Asylum Act* (AsylA) of 26 June 1998 (SR 142.31)

Switzerland, *Federal Constitution.*

Thailand, *Prevention and Suppression of Torture and Enforced Disappearance Act B.E. 2565* (2022).

The Gambia, *Refugee Act* (2008).

Timor-Leste, *Law No 11/2017 on Migration and Asylum*.

UNHCR and Government of Jordan, *Memorandum of Understanding Relating to the Protection of Refugees* (1998, revised 2003 and 2014).

Vanuatu, *Immigration Act* 2010.

Internet Sources:

African Commission on Human and Peoples' Rights, 'Reservations and Declarations to the African Charter on Human and Peoples' Rights' https://achpr.au.int/en/node/649 accessed 8 July 2025

African Union, 'List of Countries Which Have Signed, Ratified/Acceded to the African Charter' https://au.int/en/treaties/african-charter-human-and-peoples-rights accessed 6 June 2025

Council of Europe, 'Chart of Signatures and Ratifications of Treaty 005' (Status as of 6 June 2025) https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=005 accessed 6 June 2025

Council of Europe, 'Reservations and Declarations for Treaty No.005 – Convention for the Protection of Human Rights and Fundamental Freedoms' https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=005 accessed 6 June 2025

Department of Home Affairs (Australia), 'Australia's Offshore Processing Regime' (updated 2021) https://www.homeaffairs.gov.au/about-us/our-portfolios/border-protection/offshore-processing accessed 6 June 2025

Hoffmann T, 'The Domestic Definitions of the Crime of Genocide: A Dizzying Diversity' (Opinio Juris, 17 June 2020) http://opiniojuris.org/2020/06/17/the-domestic-definitions-of-the-crime-of-genocide-a-dizzying-diversity/ accessed 10 July 2025

Home Office (UK), 'Migration and Economic Development Partnership with Rwanda' (updated 2022) https://www.gov.uk/government/publications/migration-and-economic-development-partnership-with-rwanda accessed 6 June 2025

International Criminal Court, 'States Parties to the Rome Statute' https://asp.icc-cpi.int/states-parties accessed 12 June 2025

Organization of American States, ‘Signatories and Ratifications of the American Convention on Human Rights’ https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm accessed 6 June 2025

UNHCR, ‘A Century of Mobility: A Glimpse into the History of Refugee Travel Documents’ (2022) https://www.unhcr.org/blogs/a-century-of-mobility-a-glimpse-into-the-history-of-refugee-travel-documents/ accessed 9 July 2025

United Nations Treaty Collection, ‘Status of Treaties’ https://treaties.un.org/Pages/Overview.aspx?path=overview/status/page1_en.xml accessed 10 July 2025

United Nations Treaty Collection, ‘Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Status as at June 2025’ https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4 accessed 6 June 2025

United Nations Treaty Collection, ‘Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Declarations and Reservations’ UNTS vol 1465 (adopted 10 December 1984, entered into force 26 June 1987) https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4 accessed 6 June 2025

United Nations Treaty Collection, ‘Convention on the Prevention and Punishment of the Crime of Genocide: Status as at June 2025’ https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4 accessed 10 July 2025

United Nations Treaty Collection, ‘Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954)’ UNTS vol 189, p 137 and ‘Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967)’ UNTS vol 606, p 267 https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&clang=_en and https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&Temp=mtdsg2 accessed 26 June 2025

United Nations Treaty Collection, ‘International Covenant on Civil and Political Rights: Declarations and Reservations’ UNTS vol 999 (adopted 16 December 1966, entered into force 23 March 1976)

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4 accessed 6 June 2025

United Nations Treaty Collection, 'International Covenant on Civil and Political Rights: Status as at June 2025' https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4 accessed 6 June 2025

United States Department of State, 'Letter to the Office of the United Nations High Commissioner for Refugees' (15 January 2007) https://2001-2009.state.gov/s/l/2007/112631.htm accessed 9 July 2025

United States Department of State, 'Remarks at the US Holocaust Memorial Museum's National Tribute Dinner' (19 March 2012) https://2009-2017.state.gov/s/d/former/burns/remarks/2012/198190.htm accessed 16 April 2025