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States' Obligation of Non-refoulement of Refugees under International Law[1]

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المجلة الدولية للفقه والقضاء والتشريع
المجلد ٣ ، العدد ١ ، ٢٠٢٢

إلتزام الدول بعدم رد اللاجئين وفقاً للقانون الدولي

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نسق توثيق المقالة: عمرو عمر الفاروق حسين بدر ، إلتزام الدول بعدم رد اللاجئين وفقاً للقانون الدولي ، المجلة الدولية للفة والقضاء و التشريع ، المجلد ٣ ، العدد ١، ٢٠٢٢ ، صفحات (١٥٣-١٨٢)

Abstract

This article does not aim to provide a full analysis of the obligation of non-refoulement of refugees under international law. Rather, it mainly focuses on the extra-territorial application of the obligation. That is, whether the obligation is only applied to the refugees that have already crossed the State of refuge's borders or it is also applied to those who have left their countries but are still outside the concerned State's borders. It also discusses the feasibility of applying the human rights' principle of effective control to identify the state's responsibility for the refoulement policies that take place beyond the state's borders and when these policies could be attributed to a certain state. The article attempts to answer the question of whether the obligation of non-refoulement, with its extraterritoriality, has acquired the customary international law status or not. It emphasizes the implications of the inconsistent practices of the states with regards to the non-refoulement obligation on the customary international law status of the obligation. To that end, it analyses the USA different Administrations inconsistent practices towards the Haitian refugees' claims. By doing so, the article aims to answer whether these inconsistent practices create varying norms or that they rather establish a certain rule to which any subsequent inconsistent practice should be considered as a violation of the precedent rule not a creation of new one. This article's thesis is that every state in the world shall refrain from returning "refouler" refugees whether or not these refugees have crossed its borders and whether or not this state is party to the Refugee Convention or its 1967 Protocol as the obligation of non-refoulement has crystalized into a customary international law norm.

Keywords: Refugees, Non-refoulement, Obligation, International, Law.

الملخص

إن هذا المقال يرتكز في الأساس على التطبيق عبر الإقليمي للإلتزام الدولي بعدم رد اللاجئين ولا يهدف إلى التحليل الشامل للإلتزام ذاته، ومن ثم فالسؤال الأساسي ههنا هل هذا الالتزام الدولي ينطبق فقط على اللاجئين الذين تمكنوا بالفعل من الوصول إلى حدود دولة اللجوء أم ينطبق أيضاً على من غادر موطنه ولم يصل إلى دولة اللجوء بعد. وكذا يناقش المقال مدى ملائمة تطبيق مبدأ السيطرة الفعلية المستخلص من القانون الدولي لحقوق الإنسان لتحديد مسئولية الدول المستقبلة للاجئين عند إبعادها لهم قبل أن يصلوا لحدودها. كما يسعى أن يجيب على ما إذا كان عدم رد اللاجئين كالتزام عبر إقليمي قد أصبح عرف دولي أم لا، ومن ثم يلقي الضوء على أثر التطبيقات المتناقضة للدول المستقبلة للاجئين على الطبيعة العرفية لهذا الالتزام. ولذلك فإن المقال يعرض للتطبيقات المتناقضة للإدارات المتعاقبة للولايات المتحدة الأمريكية في التعامل مع لاجئي دولة هاييتي. وبهذا فإن المقال يحاول الإجابة على ما إذا كانت التطبيقات المتناقضة تلك تنشيء قواعد عرفية متباينة

أم قاعدة عرفية واحدة ومخالفات تالية لها. إن أطروحة هذا المقال هي أن جميع الدول تلتزم بالإمتناع عن رد اللاجئين سواء عبروا حدودها أم لا يزالوا عالقين خارجها وسواء كانت الدولة المستقبلة لهم موقعة على اتفاقية اللاجئين أو وبروتوكولها أم لا إذ أن هذا الإلتزام قد أصبح عرف دولي.

الكلمات المفتاحية: اللاجئين ، العرف ، الدولي ، عدم رد.

Introduction:

The States' obligation of non-refoulement of refugees finds its roots in Article 33(1) of the Convention Relating to the Status of Refugees 1951 (Refugee Convention/Convention).[1] The obligation has many broad aspects ranging from the conditions that must be met for an individual to be afforded the protections provided by Article 33(1) of the Refugee Convention, to the cases in which the States are obliged not to return refugees to the frontiers of the territories where they have well-founded fears to face persecution.

A comprehensive analysis of the personal and geographical scope of the obligation is beyond the scope of this article. Rather, it focuses on the extraterritorial application of the obligation of non-refoulement. Through highlighting the existing literature, Courts' decisions, international bodies' resolutions and conclusions and State practices this article attempts to answer the following questions: is the State under international law obliged not to return a refugee even though he or she has not yet entered its territory? which States must abide by the rule of non-refoulement? Does the obligation only apply to the States parties to the Refugee Convention? Has the obligation of non-refoulement acquired the Customary International Law (CIL) status? Is this CIL status impacted by inconsistent practices of States?

This article's thesis is that every State under CIL is obliged not to return "refouler" refugees to the frontiers of countries where they would face persecution, even though those refugees have not yet entered its borders. Put simply, this article's thesis is that Article 33(1) of the Refugee Convention applies extraterritorially and has crystalized into a CIL norm.

The article is divided into four sections. Section one examines the scholarly arguments with regards to the interpretation of the principle of non-refoulement in light of Article 33(1) of the Refugee Convention. It focuses particularly on the general rules of interpretation of treaties according to the1969 Vienna Convention on the Law of Treaties (VCLT).[2] Section

[1]The Convention Relating to the Status of Refugees (Refugee Convention), adopted on 28/07/1951, entered into force on 22/04/1954, 189 UNTS 137

[2]Vienna Convention on the Law of Treaties (VCLT), adopted on 23/05/1969, entered into force on 27/01/1980, 1155

Two discusses the attribution of the refoulement policies to the State when they are applied outside its territory. The concept of effective control which was adopted by the Human Rights Committee is highlighted in order to examine its applicability to the principle of non-refoulement.

Section three discusses the conditions under which a treaty-created rule could acquire the CIL status in order to identify whether or not the obligation of non-refoulement has yet gained this status. These conditions are that the rule must be of a fundamentally norm-creating character, there must be widespread and representative participation by the States in the treaties that include this rule and finally, there must be wide State practice accompanied by the belief of the existence of the principle as a rule of law.

Section four examines the implications of the inconsistent practices by the States on the CIL status of the principle of non-refoulement. It raises the question of whether a subsequent practice by a State that is inconsistent with a former practice creates a new rule or should be treated as a breach of the previous one. It highlights the USA subsequent Administrations' different approaches towards the Haitian refugees.

Section One: The Interpretational Controversy with Regards to the Scope of the Obligation of Non-refoulement of Refugees:

In this section, the interpretation of Article 33(1) is examined. To that end, the scholarly opinions regarding the extraterritorial application of Article 33(1) are highlighted in order to build on the methodologies adopted. An analysis of the different terms used in Article 33(1) and the drafters' intentions that could be inferred from such reading are also discussed.

1. The Obligation of Non-refoulement Applies Extraterritorially According to the General Rules of Interpretation:

The scope of the obligation of non-refoulement of refugees has been a debatable topic. This is because Article 33(1) of the Refugee Convention did not provide for a geographical or territorial limitation within which States must be obliged by the non-refoulement principle.[(3)] According to Article 33(1), States shall not expel or return 'refouler' refugees "in any manner

UNTS 331

[(3)]Cornelis Wolfram Wouters, International Legal Standards for the Protection from Refoulement: A Legal Analysis of the Prohibitions on Refoulement Contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture." Intersentia, 2009, 50; Also Seunghwan Kim, INTERNATIONAL LAW AND PRACTICE – Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context, Leiden Journal of International Law (2017), pp. 49, 60-61

whatsoever" to the frontiers of the country where their lives or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.[4]

The language used by Article 33(1) "in any manner whatsoever" indicates that States shall refrain from any conduct that results in the return of the refugee to the country that he or she fled based on the abovementioned fears.[5] However, this understanding has not been unchallengeable.

Due to the lack of any territorial limitation 'ratione loci', the debate about the scope of the obligation of non-refoulement has centered, on the one hand, on the different meanings of the different terms used in Article 33(1) and, on the other hand, on the phrase "in any manner whatsoever" provided for in the same Article.

According to the VCLT's interpretation rules, using different terms should be referring to different rules if the parties to the Refugee Convention so intended.[6] In Article 33(1), while the term "expel" means that the refugee must be present within the territory of the State of refuge so that he or she can be driven or forced out of it, the term return or "refouler" does not necessarily require that. The matter has been open for discussion and the international law scholars have had varying views in this respect.[7] This being so, it is significant to highlight this discussion in order to discern its elements and build on the writers' different lines of arguments.

Some scholars have argued that Article 33(1) of the Refugee Convention applies only to those who are present within the territory of the State of refuge.[8] This view has little acceptance today.

Lauterpacht and Bethlehem argue that States under CIL are obliged to refrain from the refoulement of refugees even from points beyond their borders. According to them, wherever a State has effective control over a specific zone – it is obliged not to return refugees to a country where their lives or freedom would be threatened. They add that a State is obliged by the non-refoulement principle wherever its officials are acting on their official capacity or on behalf of this State.[9]

Mungianu builds on Lauterpacht and Bethlehem's view that the human rights'

[6]VCLT (n 3) Article 31, 32

[9]Elihu Lauterpacht and Daniel Bethlehem, "The scope and content of the principle of non-refoulement" in Erika Feller, Volker Türk and Frances Nicholson (eds.), Refugee Protection in International Law: UNHCR's Global Consultations on International Protection, Cambridge University Press 2003,110-111 & 149

effective control principle applies to Article 33(1). She develops the literature's usage of different methodologies ranging from the human rights' effective control to the VCLT's interpretation rules to come up with a conclusion that the principle of non-refoulement applies extraterritorially.[10]

Wouters is of the view that the wording of Article 33(1) – not to expel or return "refouler" a refugee in any manner whatsoever – implies that the non-refoulement obligation applies regardless of how or where the State does that. Wouters supported his opinion by explaining the different meanings of the different terms – expel, return or refouler – used in Article 33(1) of the Refugee Convention.[11]

Goodwin-Gill and McAdam point out that a State must not expel or return "refouler" a refugee to the frontiers of a country where he or she may face persecution wherever this might take place "whether internally, at the border or through its agents outside territorial jurisdiction."[12] They argue that this understanding is confirmed by the relevant subsequent instruments to the Refugee Convention, State practice, the successive resolutions of the UN General Assembly and the conclusions of the executive committee of the United Nations High Commissioner for Refugees (UNHCR).[13]

Hathaway sees no difference from the international law's perspective between a refugee who is present within the State of refuge's territory and a refugee who is present in an international zone. Refusing the refugee claim, for either of them, that results in the refoulement to a country where they would face the risk of persecution violates Article 33(1) of the Refugee Convention.[14]

Giuffre argues that despite the Refugee Convention is silent regarding its extraterritorial application, commentators agree that the prima facie meaning of refouler is to send or push back. Sending back does not necessarily pre-suppose the presence in the country of refuge. He adds, therefore, this supports the opinion that article 33(1) would include either rejection at the border, or in transit zones, or on high seas.[15]

The present writer agrees that the prima facie interpretation of Article 33(1) points to the

[10]Roberta Mungianu, Frontex and Non-Refoulement: The International Responsibility of the EU (Cambridge Studies in European Law and Policy) Cambridge: Cambridge University Press 2016, 140-148 and 180-183.

[11]Wouters (n 4) 50

[12]Guy S Goodwin-Gilland Jane McAdam, The Refugee in International Law, Oxford University Press, 2007,248

[13]Ibid

[14]James C Hathaway, The Rights of Refugees under International Law (Cambridge University Press, 2005) 322

[15]MariagiuliaGiuffré., State Responsibility Beyond Borders, What legal basis for Italy's push-backs to Libya? International Journal of Refugee Law, (2012) 24(4), pp. 692, 718

extraterritorial application. Therefore, the present article builds on the last group of writers' opinions and methodologies.

According to Article 31(1) of the VCLT, a treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In fact, it could be inferred from reading the preamble of the 1951 Refugee Convention that its object and purpose are balancing between the Refugees' right of non-refoulement and the States' interests in not being susceptible to "unduly heavy burdens" by receiving massive numbers of refugees.[16]

Therefore, reading Article 31 paragraph 1 in conjunction with paragraph 4 of the same Article will be more useful at the present case. Article 31(4) provides that a special meaning shall be given to a term if the parties so intended. The intention of the parties to the Convention may be inferred from the wording of Article 33(1) of the Refugee Convention. This intention may be clarified by looking at the drafters' insertion of the French word "refouler" within the English wording of Article 33(1).[17]

The question here is why would the drafters insert a French term alongside the English term "return" in an English-drafted treaty? In fact, the term return might be not clear enough to indicate the drafters' intention of delegalizing an additional form of rejection of refugees. Conversely, the French legal term "refouler" is clearly understood as a summary removal or refusal of entry by the police "without judicial authorization" – a process which is distinct from judicial expulsion.[18] This understanding although supported by most of the scholars today, it still needs a more clear-cut evidence of the intention of the drafters about this meaning.

According to Article 32 of the VCLT, supplementary means of interpretation should be employed whether to confirm the interpretation resulting from the application of Article 31 or if the application of Article 31 left the meaning ambiguous or obscure. In the travaux preparatoires of the Refugee convention, the comments of the ad hoc committee that drafted Article 33 of the Refugee Convention make clear that all what concerned them was the non-return of the refugees to the territories where they might be persecuted. They were of the view that the refugees' rights under this Article should not be impaired.[19]

[16]Refugee Convention (n 2) The Preamble

[17]Stephen H Legomsky, The USA and the Caribbean interdiction program. International Journal of Refugee Law 18(3 and 4), (2006) pp. 677, 689

[18]See the meaning of the term "refouler" in Wouters (n 4) 50-51; Hathaway (n15) 315

[19]Paul Weis, The Refugee Convention 1951: the Travaux Preparatoires Analysed with a Commentary, Grotius Publications 1995, 235

However, the Swiss representative at the Conference of Plenipotentiaries objected to the usage of the different terms "expel, return, refouler" as they might be subjected to different interpretations that might lead to the unconditional acceptance of mass influxes of refugees by the refugees' receiving States. The Swiss representative's view was backed by a few other States' representatives.[20]

Nevertheless, there is no evidence that the Swiss representative's observations were shared by all the present States at the Conference of Plenipotentiaries, nor is there any evidence that the States parties to the Refugee Convention held the Swiss view when they signed the treaty.[21] On the contrary, the subsequent instruments to the Refugee Convention, State practice and the UN General Assembly's resolutions uphold the extraterritorial application of the principle of non-refoulement as noted in Section Three which discusses the customary status of the obligation.[22]

Additionally, the interpretation of a specific rule that was established several decades ago cannot be the same nowadays as it was at the time of its creation. The Refugee Convention was concluded in 1951. It cannot be said that we live today in the same world as it was in 1951. The kinds of challenges and developments that are present today are quite different from the challenges that existed at that time. These challenges and developments should be taken into account when interpreting the non-refoulement principle today.[23]

In this vein, the International Court of Justice (ICJ) in its Advisory Opinion in Namibia Case decided that although it is necessary to interpret a legal rule according to the parties' intentions at the time of its creation – the Court is, also, bound to take into consideration that the concepts established at this time were not static, but were rather evolutionary. The Court went on adding that many changes have occurred during the fifty years since the concerned rule's creation. Hence, its interpretation cannot remain unaffected by the following developments of the law. Rather, international instruments must be interpreted & applied within the framework of the prevailing legal system at the time of their interpretation.[24] There is no doubt that the international refugee law field has developed dramatically. Therefore, the concept of non-refoulement must be interpreted considering this development.

[20]Ibid 236-237

[21]See generally Weis (n 20)

[22]See Section Three

[23]International Court of Justice (ICJ), Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) ICJ Rep 1971, para 53

[24]Ibid

Furthermore, Article 33(1) contains no territorial limitation "ratione loci" contrary to other provisions in the convention which have geographical limitations. This means that the drafters' committee intended the non-refoulement obligation to be applied extraterritorially.[25] The present writer's opinion is that this cannot be refuted by the fact that the swiss representative objected to the extraterritorial application and that his view was supported by other states' representatives, as mentioned above. This is because these objections have not influenced the last draft of Article 33(1) which was finalized in the Convention with no territorial limitation. If their objection was supported by the majority of the present States at the Conference of Plenipotentiaries, this should have been culminated in a territorial limitation in Article 33(1), or at least this widespread support should have been clearly expressed in the trauvauxpreparatoire – which is not the case as discussed above.

One of the arguments against the extraterritorial application of Article 33(1) of the Refugee Convention was made by the USA Supreme Court. The Supreme Court decided that the extraterritorial application of Article 33(1) would lead to an anomaly. The Court demonstrated that according to the literal interpretation of Article 33(2) people who are dangerous to the country's national security should be repatriated from the country where they are already present. An extraterritorial application would compel the State of refuge to accept dangerous refugees who are still outside its borders, while equally dangerous refugees who are within its territory would not enjoy the same protection.[26]

The Supreme Court's argument can be refuted by the fact that the host country can allow the refugees to enter its territory where their refugee claims can be examined scrupulously. In case these examinations found that they were dangerous to the national security of the host country, they could be repatriated. By doing so, the host country would be acting in accordance with the extraterritorial application of the obligation of non-refoulement – meanwhile, it would be keeping its right to repatriate refugees who are dangerous to its national security.[27]

2. Non-refoulement is an Obligation of Result Not Conduct:

It can be perceived from the reading of Article 33(1) that the drafters were concerned about the result, not the conduct. They used different expressions – namely expel, return or

[25]James Mansfield, Extraterritorial application and customary norm assessment of non-refoulement: the legality of Australia's 'Turn-back' policy. University of Notre Dame Australia law review, 17(17), pp.18, 25-26 and 33

[26]Sale, Acting Commissioner, Immigration and Naturalisation Service, et al., Petitioners v Haitian Centers Council, Inc., et al, 509 US 155, US Supreme Court, 21 June 1993 in Wouters (n 4) 55

[27]Wouters (n 4) 55

refouler to emphasize the prohibition of sending the refugees back "in any matter whatsoever" to the frontiers of the territories where they might face persecution.[28] The language used by the drafters – in any manner whatsoever – shows how determined they were about the result rather than the conduct as such. If the drafters had been concerned about prohibiting a specific single form of conduct, the Article would have been more clear-cut in prohibiting this conduct rather than using different terms that cover different kinds of conducts.

Although States are not obliged to accept asylum requests under international law, they are still compelled not to send refugees back to the territories where there are well-founded fears that they would face persecution.[29] Hence, the obligation is not to be misunderstood as it is an obligation to accept refugees. Rather, the obligation is simply not to force them back during their way of seeking refuge. This means that the obligation of non-refoulement can be perceived as an obligation of not stopping refugees during their journey towards their destined country of refuge. Put simply, there is no obligation under contemporary international law on any country to accept refugees according to specific procedures. Meanwhile, States are obliged not to interrupt their journey by any means.

As States are not obliged to accept asylum requests, it could be argued that a State can redirect refugees on the high seas to move to a port in another State or even to push them away from its shores – and that in this case this would not be considered an act of refoulement.[30]

The present writer disagrees with this claim as such a conduct would be contradictory with the object and purpose of the Refugee Convention whose aim is to protect refugees from being sent back in any manner whatsoever to the frontiers of the territories where they would face fears of persecution. Such an act of redirection risks the destiny of those refugees who might be left no choice but to return to their country of origin where they would face persecution.[31]

However, the present writer suggests that a specific State "State (A)" can only redirect the refugees on the high seas to seek asylum in another State "State (B)" if State (A) can prove at the time of redirection to State (B) any of the following scenarios: 1) that State (A) cannot receive those refugees for reasons beyond its control and that it would suffer unduly heavy burden if it received them;[32] 2) that those refugees would not face persecution in State (B), and that State (B) would not return those refugees to their country of origin where they

[28]Goodwin-Gill, McAdam (n 13) 206-208

[29]Hathaway (n 15) 300-301

[30]Ibid

[31]Goodwin-Gill, McAdam (n 13) 277; Hathaway (n 15) 300-301

[32]Refugee Convention (n 2), The Preamble "Unduly heavy burdens."

would face persecution.[33]

Based on the foregoing, the obligation of non-refoulement is not to be only applied to cases of rejection within the territories of the State or at its borders. In line with the intentions of the drafters to preclude the return of the refugees to the frontiers of territories where they would face persecution, the principle of non-refoulement should be understood as extraterritorially applicable.

Crucially, the extraterritorial application of the obligation of non-refoulement must not be arbitrary. Conversely, it must be grounded on discernable standards that all States already know in advance for purposes of legal certainty and foreseeability. In this connection, it has been suggested[34] that the State must be obliged by the principle of non-refoulement wherever it has effective control over zones that are not part of its territory but within which it has actual authority. In the next Section, the attribution of the refoulement policies to the State and the concept of effective control are examined.

Section Two: The Attribution Test and the Human Rights' Effective Control Concept:

In this Section, the attribution of the refoulement policies to the State is examined. That is, in which cases could the State be considered responsible for the refoulement policies that take place outside its territory? What are the Standards that should be followed in order to determine this responsibility?

1. States' Organs' Actions that Take Place outside Its Territory are Actions of the State Itself:

Refugees might be intercepted by the State's authorities outside its territory "extraterritorial refoulement." In this case, the State might claim that it did not breach its international obligation of non-refoulement as the refugees have not yet crossed its borders. This can take place whether in another state's territory where the State of refuge has effective control or on the high seas.

Refugees must not be intercepted by the receiving State's authorities wherever this might take place under international law. If the refoulement policies took place outside the receiving State's territory but through this State's agents – acting on their official capacity – this State would be violating its international obligation of non-refoulement.[35]

(33)Hathaway (n 15) 301

[34]Lauterpacht and Bethlehem (n 10) 110-111 & 149-150

[35]Martina Federica Manfredi, "NON-REFOULEMENT, INTERCEPTION AND PUSH-BACK POLICIES." Cogito -

In this context, the International Law Commission (ILC) – in Articles 4 and 5 of its Draft Articles on the Responsibility of States for Internationally Wrongful Acts – stated that the conducts of the organs of the state or its entities that have elements of governmental authority shall be considered as acts of that state itself under international law.[36] The ILC comment on this article was that the attribution of the conducts of the agents or organs of the State has long been recognized in international judicial decisions.[37] Therefore, wherever a specific State's officials send the refugees back to territories where they would face persecution this conduct must be considered as an act of refoulement that should be attributed to the State on behalf of which those officials act.[38]

Additionally, the human rights' concept of effective control of the State over a certain territory in another State or an international zone applies also to the refugees' cases. This notion means that the State must comply with its international obligations extraterritorially wherever it has effective control over a specific zone. According to the UNHCR's Advisory Opinion, the "[i]nternational refugee law and international human rights law are complementary and mutually reinforcing regimes."[39] Hence, the notion of effective control should be applied when it comes to the obligation of non-refoulement considering the object and humanitarian character of the Refugee Convention.

2. The Concept of Effective Control:

The notion of effective control was adopted by the Human Rights Committee (HRC) in its General Comment no. 31. According to the HRC, States must respect the rights of the persons within their territories and those who are subject to their jurisdictions. This means that the State should be obliged by the International Covenant of Civil and Political Rights' (ICCPR)[40] rules towards any person within its power or under its effective control even though he or she is not present within its territory.[41]

Multidisciplinary Research Journal, no. 1, 2014, pp. 44, 45

[36]International Law Commission (ILC), Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, UN DOC A/56/49(Vol. I)/Corr.4 Articles 4 & 5

[37]Ibid pp. 40

[38]Lauterpacht and Bethlehem (n 10) 111

[39]UNHCR (Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol) (2007) 16,available at: https://www.unhcr.org/4d9486929.pdf

(40) International Covenant on Civil and Political Rights (ICCPR), adopted on 16/12/1966, entered into force on 23/3/1976, 999 UNTS 171

(41) General Comment No 31, Human Rights Committee: The Nature of the General Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) para 10

The Committee went on adding that it makes no difference where the act of violating the individual's rights took place as long as it was committed by the states' agents acting on its behalf whether within the territory, in a foreign country or in an international zone.(42) This approach was adopted by the HRC in more than one case.(43) The ICJ, also, supported this view in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.(44) The European Court of Human Rights (ECtHR) upheld this notion as well.(45)

In fact, what the HRC has established with regards to the rights included in the ICCPR can be applied to the obligation of non-refoulement. This is because, as noted above, both the international refugee law and the international human rights law are complementary. Therefore, the general principles that apply to one of them also apply to the other. In the case of the obligation of non-refoulement, as noted above, article 33(1) of the Refugee Convention did not provide for a territorial limitation "ratione loci" contrary to the rights included in the ICCPR which provided for geographical limitation.

The present writer's view is that the applicability of the effective control concept is even more feasible in the case of non-refoulement than it is in the human rights sphere. In other words, it makes more sense from the legal point of view that the obligation of non-refoulement would be applied extraterritorially, in the absence of any territorial or jurisdictional limitation in Article 33(1), contrary to the ICCPR where there is at least a jurisdictional frame. Thus, a State should refrain from pushing refugees back even before they have crossed its borders.

States might apply refoulement policies either in other States where they have de facto control or in the international zones such as the high seas. As noted above, if a State has effective control over any region outside its territory through its organs or agents acting on its behalf – this state must still abide by the obligation of non-refoulement.

This being so, if there is a person who fled his or her country of origin or habitual residence where he or she had faced persecution to another State, he or she cannot be pushed

(42) Ibid

(43) Delia Saldias de Lopez v Uruguay, Human Rights Committee, UN Doc CCPR/C/13/D/52/1979 (29 July 1981) para 12.3; Lilian Celiberti de Casariego v Uruguay, Human Rights Committee, UN Doc CCPR/C/13/D/56/1979 (29 July 1981) para. 10.3

(44) ICJ, Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, 180

(45) European Court of Human Rights (ECtHR), Loizidou (1995) 20 EHRR 99, para 62; ECtHR, Issa v Turkey (2005) 41 EHRR 27, para 68

back by either this State or by any other State having effective control over it. In this context, the HRC held that it would be unconscionable to interpret the rules of the ICCPR in a way that permits a State to commit violations outside its territory which it cannot commit within its territory.[46] In Delia Saldias de Lopez v. Uruguay, the HRC decided that although Lopez Burgos was living in Argentina when he had been arrested by the Uruguayan authorities, this did not exempt Uruguay from its responsibility for breaching the ICCPR's rules.[47]

Based on the foregoing, a State, its organs, or agents acting on its behalf are obliged not to return refugees who are present within this State's borders, in another State or in international zones where it has effective control. This is affirmed by the HRC's jurisprudence, the ICJ and the ECtHR's decisions, as mentioned above. But which States are obliged not to do so? Are they the States parties to the Refugee Convention and its 1967 Protocol? Or should all the world States abide by the non-refoulement obligation since the rule has crystalized into CIL? In the next section, these questions are examined.

Section Three: The Obligation of Non-refoulement as a Customary International Law (CIL) Norm:

In this Section, the question of whether the conventional obligation of non-refoulement has become a CIL norm or not is examined. In order to answer this question, the scholarly opinions – international and domestic courts' decisions and the statements and declarations of the States and international bodies are underscored. It is important to highlight this customary character and the scope of the obligation of non-refoulement as a CIL norm. This would determine whether all world States – regardless of their inclusionin the Refugee Conventionor its 1967 Protocol – are obliged by the extraterritorial application of the principle or not.

1. The General Acceptance of the Non-refoulement's CIL Status:

Hathaway's view, as a prominent scholar in the field of international refugee law, is that the non-refoulement obligation has not yet acquired the CIL character. He argues that mere declarations by States are not ample evidence that non-refoulement has acquired such status. According to him, the CIL status is attained by the interstate practice of the rule not merely words of their officials. He claims, this condition is not yet met for non-refoulement to be deemed a CIL norm. He adds that even the condition of opinio juris has not achieved a near-

[46]Delia Saldias de Lopez v. Uruguay (n 44) paras 12.2, 12.3; Lilian Celiberti de Casariego v. Uruguay (n 44) para 10.3
[47]Delia Saldias de Lopez v. Uruguay (n 44) para 10.2

universal observation of the non-refoulement principle.[48]

However, the majority of scholars today agree that the obligation of non-refoulement has become a customary international law norm. Goodwin-Gill and McAdam suggest that the fact that the obligation of non-refoulement has become part of CIL is supported by the relevant subsequent instruments to the Refugee Convention, State practice, the successive resolutions of the UN General Assembly and the conclusions of the executive committee of the UNHCR.[49]Perluss and Hartman support Goodwin-Gill and McAdam's view.[50]

Chetail argues that despite the difficulty of determining whether the obligation of non-refoulement has become CIL as it is an obligation of abstention rather than a one of conduct, it is evident that it has acquired this status due to the widespread and representative participation of States in the instruments that include the principle. It is also evident by the fact that States never tend to return refugees by claiming that they have the right to do so. Rather, they justify their push-back policies by claiming that the individuals they return are not refugees. He adds that the CIL status of the obligation is affirmed by its incorporation in domestic laws in addition to the support of this CIL status in several resolutions of the international & regional organizations.[51]

Duffy's view is that the widespread participation in the treaties that include the obligation of non-refoulement indicates that it has acquired the CIL status. He adds that this is supported by the conclusions and decisions of international bodies and the incorporation of the rule in binding and non-binding instruments.[52] Gilbert contends that the customary character of the obligation of non-refoulement is inferred from the 1984 Convention Against Torture (CAT)[53] and the European Convention[54] for the Protection of Human Rights and

[48]Hathaway (n 15) 363-367

[49]Goodwin-Gill and McAdam (n 13) 248

[50]Deborah Perluss and Joan F Hartman,Temporary refuge: Emergence of customary norm. Virginia Journal of International Law (1986), 26(3), pp. 551, 624

[51]Vincent Chetail, Sources of International Migration Law in BrianOpeskin, RichardPerruchoud, and Jillyanne Redpath-Cross (Eds.), Foundations of International Migration Law (pp. 56-92). Cambridge: Cambridge University Press (2012) 76-77

[52]AoifeDuffy, Expulsion to Face Torture - Non-Refoulement in International Law, International Journal of Refugee Law 20, no. 3 (2008): pp. 373, 383-390

[53]Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), adopted on 10/12/1984, entered into force on 26/6/1987, 1456 UNTS 85.

[54]Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4/11/1950, entered into force on 3/9/1953, 213 UNTS 221

Fundamental Freedoms.[55]Giuffre supports Gilbert view.[56]

Chan contends that there is a general consensus regarding the significance of the non-refoulement principle at both universal & regional levels. The massive number of declarations and resolutions support that non-refoulement has acquired a CIL status.[57]Vang suggests that the non-refoulement obligation has become part of CIL. This means that it applies to all States even though they are not parties to either the Refugee Convention or its 1967 Protocol.[58]

The fact that the non-refoulement obligation has acquired the CIL status is also expressed by international bodies. In this respect, the International Criminal Court decided that: The obligation of non-refoulement is deemed to be a rule of CIL and forms one of the cornerstones of the protection of international human rights. Hence, everyone has the right to enjoy its application.[59]

Also, the UNHCR has stated for years that the non–refoulement principle has acquired the CIL status.[60] It based this conclusion on the fact that States have always justified their push-back policies by claiming that the individuals they return are not refugees. This affirms their acceptance of the principle.[61] In one of its conclusions, the UNHCR Executive Committee has even gone farer by observing that the non-refoulement principle was "progressively acquiring the character of a peremptory rule of international law."[62]

2. The Conditions of the Establishment of a CIL norm:

To examine whether a rule has become a CIL norm or not, the conditions that must be

[55]Geoff Gilbert, Is Europe Living Up to Its Obligations to Refugees? European journal of international law, 15(5), 2004, pp.963, 966

[56]Giuffre (n16) 718

[57]Phil CW Chan, The protection of refugees and internally displaced persons: Non-Refoulement under customary international law? The International Journal of Human Rights (2006), (10:3) pp. 231, 234

[58]Jerry Vang, Limitations of the customary international principle of non-refoulement on non-party states: Thailand repatriates the remaining hmong-lao regardless of international norms. Wisconsin International Law Journal (2014), 32(2), pp. 355, 371-372

[59]Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, International Criminal Court, Judgment according to Article 74 of the Statute, No. ICC-01/04-02/12, (18 December 2012) 203

[60] UNHCR, The Principle of Non-Refoulement as a Norm of Customary International Law: Response to the Questions Posed to UNHCR by Germany, 31 January 1994 para 5,available at: https://www.unhcr.org/search?page=search&query=UNHCR%2C+The+Principle+of+Non-Refoulement+as+a+Norm+of+Customary+International+31+January+1994.&skip=0&querysi=UNHCR%2C+The+Principle+of+Non-Refoulement+&searchin=fulltext&sort=relevance

[61]Ibid

[62]UNHCR Executive Committee, General Conclusion on International Protection, Conclusion 25 (XXXIII) (20 October 1982). UN Doc No. 12A (A/37/12/Add.1) para (b)

met for this rule to be considered CIL should be highlighted. According to the ICJ,[63] three conditions must be met for a treaty-created provision to be crystalized into a CIL rule. First, the rule must be of a fundamentally norm-creating character. Second, widespread participation by States might be solely an ample indication of the CIL character of the rule. Third, the extensive, uniform State practice of the rule should be associated with the belief that it is part of law "opinio juris."[64] This article examines CIL status of the non-refoulement obligation under this ICJ's methodology.

A) The Rule Must Be of a Fundamentally Norm-creating Character:

As noted above, the first condition for a provision to be considered a CIL rule is that it must be of a fundamentally norm-creating character. This means that it should be regarded as a general rule of law rather than being a rule of little recognition.

In addition to the Refugee Convention, the non-refoulement obligation is found in many international instruments. The obligation is included in some binding instruments as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment(CAT),[65] The 1966 International Covenant on Civil and Political Rights (ICCPR),[66]the American Convention on Human Rights 1969,[67]the Organisation of African Unity(OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa 1969.[68] It is also found in non-binding instruments including the Declaration on Territorial Asylum 1967,[69] the Bangkok Principles on Status and Treatment of Refugees 2001.[70] This inclusion of the obligation of non-refoulement in the abovementioned instruments whether those binding or non-binding ones indicates that it is an obligation of a norm-creating character.

Although all the above-mentioned instruments include the non-refoulement obligation,

[63]ICJ, North Sea Continental Shelf (Germany v Denmark) (Judgment) (1969) ICJ Rep 3, 41-43

[64]Stephen Hall, Principles of International Law, LexisNexis Butterworths, 4th Edition, (2014) 46; Roozbeh (Rudy) B Baker, Customary International Law in the 21st Century: Old Challenges and New Debates, (2010) 21 The European Journal of International Law pp.173, 177; Also see generally Anthony D'Amato, 'The Concept of Human Rights in International Law' (1982) 82 Columbia Law Review pp. 1110-1127

[65]CAT (n 54) Article 3(1)

[66]ICCPR (n41) Articles 6 & 7

[67]American Convention on Human Rights, adopted on 22/11/1969, entered into force on 18/07/1978, 1144 UNTS 123, Article 22(8)

[68]The Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted on 10/9/1969, entered into force on 20/06/1974, 1001 UNTS 45, Article 11(3)

[69]Declaration on Territorial Asylum, adopted on14/12/1967, UN Doc A/RES/2312, Article 3

[70]Asian-African Legal Consultative Organization – Revised Text of the Bangkok Principles on Status and Treatment of Refugees, adopted on 24/06/2001, Res 40/3, Article 111(1)

they do not have the same meaning of non-refoulement as in the Refugee Convention. This does not impact the significance of such inclusion in developing a CIL norm. The ILC suggested that the inclusion of identical or similar provisions in many treaties can give rise to a CIL rule.[71] This view is also supported by some scholars.[72] Therefore, the rule does not need to be identical in each instrument in order to acquire the CIL status. Rather, it is sufficient that this rule is similar to the main principle.

B) Widespread and Representative Participation in the Treaties:

The widespread and representative participation by the world States – particularly by those whose interests are especially affected – in a treaty or number of treaties that include a specific rule may suffice of itself to reflect the CIL character of this rule.[73]Lauterpacht and Bethlehem have done a comprehensive examination of the magnitude of States' participation in the treaties that include the non-refoulement obligation.

According to their analysis, about 90 percent of the member States of the United Nations are parties to one of the instruments that include non-refoulement as a fundamental rule. The other countries that are not parties to one of these agreements either supported the principle of non-refoulement on one occasion or have not shown any objection to the principle. The two authors concluded from this analysis that the participation in agreements or instruments that include the obligation of non-refoulement particularly by those States whose interests are especially affected is without a question widespread and representative.[74] The present writer agrees with this view and concludes that this widespread and representative participation suffices of itself for the obligation of non-refoulement to be crystallized into a CIL norm.

C) State Practice and opinio juris:

As noted above, the present writer's view is that the widespread and representative participation in the conventions that include non-refoulement component suffice of itself to establish the customary status of the obligation. However, the question that remains unanswered: which of the different interpretations of the obligation of non-refoulement should be applied to it as a CIL norm? That is, should the extraterritorial application of

[71]Special Rapporteur M. Wood, Third Report on Identification of Customary International Law, on 27 March 2015, UN Doc. A/CN.4/682, at 29; See also Van der Wilt, Harmen &Heijer, Maarten den, 2016. Netherlands Yearbook of International Law 2015, The Hague: T.M.C. Asser Press, 284

[72]Lauterpacht and Bethlehem (n10) 143; Goodwin-Gill G. S., The Refugee in International Law (2 n' ed, Oxford University Press, 1996) 134-137

[73]ICJ, North Sea Continental Shelf (n64) 42

[74]Lauterpacht and Bethlehem (n10) 147

non-refoulement be applied when it is a CIL norm or rather it is just the obligation with its common, narrowest understanding in all the instruments that should be applied?

In order to answer this question, it is important to shed some light on the traditional way of developing a CIL rule so as to identify the scope of the obligation of non-refoulement as a CIL norm. The traditional way for developing any CIL norm is that there must be uniform, wide State practice accompanied by the belief that this practice is obligatory as a rule of law "opinio juris."

In this regard, it is important to look at the different kinds of conducts that might indicate state practice and opinio juris:

I) State Inaction:

When the State encounters refugees it might either push them back or it might choose not to interrupt their journey by any sort of intervention. Such State inaction might be evidence of State practice in case of prohibitory rules.[75]Non-refoulement without a question involves prohibition. Nevertheless, inaction does not indicate necessarily that there is opinio juris.[76] Although State practice that supports non-refoulement might be inferred from the state inaction in not returning (refouling) refugees, it is not easy to prove that this inaction comes down to its belief in the existence of the rule.[77] Therefore, this inaction should be supported by other evidence that indicates the State's belief in the obligatoriness of such inaction.

II) Positive Conduct from the States:

Positive conducts that can be evidence of State practice &opinio juris comprise many kinds of States' conducts. According to the ILC, this includes but not limited to the correspondence and diplomatic acts; conducts connected to the resolutions adopted by intergovernmental conferences or international organizations; conducts connected to treaties; executive conducts; administrative and legislative acts; national courts' decisions.[78] This Heading highlights some of these conducts:

1- The Inclusion of the Non-refoulement Rule in Domestic Legislations:

Enacting a legislation that obliges the State not to refouler refugees is evidence of opinio juris especially if this State is not party to any treaty that includes the non-refoulement

[75]Hall (n 65) 35; Jordan J Paust, Customary International Law: Its Nature, Sources and Status as Law of the United States, 12 Michigan Journal of International Law (1991), 76-77

[76]ICJ, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (1996) ICJ Rep 226, 253-254.

[77]Mansfield (n26) 42-43

[78]ILC, Identification of Customary International Law, UN Doc. A/CN.4/L.869, 14 July 2015, para 1

obligation.[79] Many States have passed laws comprising the non-refoulement obligation and some others have incorporated the treaties that include the obligation in their domestic laws.[80] Such conducts from different States prove the CIL status of the obligation since they show the commitment of these States to the principle.

2- Statements and Declarations that Uphold the Obligation of Non-refoulement:

Statements and declarations by different States can be evidence of their position towards the obligation of non-refoulement. They issue these declarations and statements to officially express whether they are obliged not torefouler refugees or not.

However, Statements and declarations solely cannot be evidence of the State's belief in the existence of the rule of law opinio juris. In this vein, the ICJ, in Nicaragua, held that mere statements and declarations by the State of the existence of a certain rule are not sufficient for this rule to become customary international law.[81] This view was supported by Hathaway.[82]

But the importance of such statements and declarations cannot be ignored. The ICJ, in Nuclear Tests, decided that unilateral declarations made by States can establish legal obligations whenever the State intends to be bound by these declarations.[83]Therefore, these declarations should be evidence of State practice and opinio juris given their binding character.

This is particularly so in the case of rules of prohibition such as the non-refoulement obligation where it is difficult to prove the belief of the State towards its inaction.[84] The present writer's view is that State inaction can be an indication of this State's commitment to the rule only when this is accompanied by the binding declaration or statement that this State issued.[85] For instance, when a certain State refrain from taking any sort of action towards the refugees that are moving towards its borders and had issued a declaration committing itself by the obligation of non-refoulement – this inaction by the State clearly supports its belief in the rule as a law and, therefore, contribute to the development of this rule to become a CIL norm.

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[79]Brian D Lepard, Customary International Law: A New Theory with Practical Applications (Cambridge University Press, 2010) 172; Lauterpacht and Bethlehem (n10) 148

[80]Lauterpacht and Bethlehem (n 10) annex 2.2.

[81]ICJ, Nicaragua Merits (1986) ICJ Rep 14, 97

[82]Hathaway (n 15) 363

[83]ICJ, Judgment on the Nuclear Tests (Australia v France) (1974) ICJ Rep 253, 267

[84]Mansfield (n 26) 44

[85]Ibid 43, 50

The magnitude of the statements and declarations that support the crystallization of the non-refoulement obligation into CIL is too immense to be addressed in this article. Therefore this article relies on the work of Goodwin-Gill and McAdam[86] and Lauterpacht& Bethlehem[87] to conclude that these declarations and statements by the States form ample evidence that the obligation of non-refoulement has become part of CIL. It is noteworthy, though, that States' commitment to the principle of non-refoulement was expressed through the UN general assembly's resolutions.[88] In this vein, the ICJ recognised – in Nuclear Weapons Case – that the resolutions of the General Assembly, although not binding, may indicate evidence for a rule or the existence of opinio juris.[89]

3- National Courts' Decisions:

Domestic Courts' decisions can be evidence of the beliefs of a State towards a specific rule. Justice Yuen of the Hong Kong Court of Appeal – supported by other judges – explained in his dissenting opinion that in his view what was important was that no State has ever claimed it had the right to return genuine refugees to the countries where they would face persecution or did so openly. In his view, the Refugee Convention has had impact on all the world States whether they were parties or not to the Convention. He then concluded that the Appellants were correct in affirming the development of the non-refoulement principle into CIL.[90]

Based on the foregoing, the obligation of non-refoulement has crystallized as part of CIL. This is affirmed by the fact that the obligation is of a norm-creating character. Also, there is widespread participation in the treaties that include the principle. Moreover, State practice and opinio juris in their varying forms indicate the establishment of the CIL status of the obligation.

Furthermore, the obligation of non-refoulement as a CIL rule applies extraterritorially.[91] The present writer's view is that the norm-creating character of the non-refoulement obligation is inferred from the earliest instrument that included the obligation, that is, the Refugee Convention which was concluded in 1951. In addition, the widespread and representative participation is mainly found in the Refugee Convention and its protocol–

[86]Goodwin-Gill and McAdam (n 13) 218-32, 248-50, 345-54

[87]Lauterpacht and Bethlehem (n 10) 147-150

[88]Goodwin-Gill and McAdam (n 13) 248

[89]ICJ, Legality of the Threat or Use of Nuclear Weapons (n 77) para 70

[90]Netherlands Yearbook (n 72) 301

[91]Lauterpacht and Bethlehem (n 10) 149-150

bothhavemost of the world states as parties to at least one of them.[92] Accordingly, the scope of the obligation should be interpreted in light of Article 33(1) of the Refugee Convention which – as concluded in Section One – applies extraterritorially.

Nevertheless, the refoulement policies that take place after the establishment of the CIL status of the non-refoulement obligation raises the question of whether this is to be considered as a new practice by the States or a violation of the established CIL rule of non-refoulement. In the next Section this question is examined.

Section Four: The Implications of the State's Refoulement Policies on the Customary Status of the Obligation of Non-refoulement:

In this Section, the effects of the States' refoulement policies that take place on the high seas on the customary character of the non-refoulement obligation are examined. That is, whether the refoulement policies of a State impact the crystallization of the rule – with its extraterritorial application interpretation – into CIL? for instance, when a number of States return refugees from the high seas to the frontiers of territories where they would face persecution, would this be a counter State practice that negates the CIL status of the non-refoulement obligation?

1. Inconsistent States Practices Do Not Create Multiple Rules:

As noted above, there must be State practice accompanied by the belief in the obligatoriness of this practice in order for a rule to be considered CIL. However, if the States act inconsistently towards a certain rule of law that has not yet acquired the CIL status – this would lead to legal uncertainty. To avoid this uncertainty, there should be guidelines to regulate such inconsistent conducts of States.

In the case of the obligation of non-refoulement, if a State in a number of instances refrain from returning refugees – then in another later incident it pushes them back, this later conduct must be considered a violation of the established precedent rule rather than a practice that creates a new rule. In this regard, the ICJ in Nicaragua held that it is not necessary for the rule to gain the CIL status that the State practice towards this rule's application must have been perfect. The court went on adding that it is sufficient that the conducts of States should be generally consistent with the rule. If there are later inconsistent practices, this should be

[92]See the List of State parties to the Refugee Convention, United Nations,available at: https://treaties.un.org/Pages/showDetails.aspx?objid=080000028003002e&clang=_en; Also see the List at: https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf

treated as breaches of this rule, not an indication of the establishment of a new rule.[93]

It is worth noting that States when encountering refugees' influxes, they never tend to claim they have the right to return refugees. In this vein, the UNHCR has stated that the governments have in frequent instances of refoulement justified their intended or actual refoulement policies by claiming or clarifying that the individuals in question are not refugees rather than defending their right to refouler refugees. These justifications from the States indicate their acceptance of the rule.[94] Much along the same lines, the ICJ decided that if a State acts in an incompatible manner with an established rule but defends this behavior by this rule's justifications and exceptions – whether this behavior is actually justified or not under this rule – "the significance of that attitude is to confirm rather than to weaken the rule."[95]

2. The USA Administrations' Inconsistent Approaches towards the Haitian Refugees and Their Implications on the CIL Status of the Non-refoulement Obligation:

The USA governments' approaches towards the Haitian refugees represent a precise example of how inconsistent practices by a State should not impact the CIL status of the non-refoulement obligation and its extraterritoriality according to Article 33(1). In this case, the USA different administrations acted inconsistently and had varying approaches in dealing with the Haitian refugees moving towards the USA territory. It is noted that the USA is obliged by the Refugee Convention as it has ratified its 1967 Protocol and, therefore, is obliged by the extraterritorial application of non-refoulement according to the interpretation of Article 33(1). However, this Heading addresses the impact of the USA inconsistent practices on the CIL status of the obligation of non-refoulement.

The United States president Reagan issued, in 1981, an Executive Order to interdict and refouler individuals fleeing Haiti on the high seas. However, this order included an exception for refugees who have legitimate fears of being persecuted in respect for the USA obligations under international law.[96] The importance of such an order is that it shows that the USA

[93]ICJ, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment (1984) I.C.J. Rep 392, 14

[94]UNHCR, The Principle of Non-Refoulement as a Norm of Customary International Law: Response to the Questions Posed to UNHCR by Germany, 31 January 1994, para 5,available at: https://www.unhcr.org/search?page=search&query=UNHCR%2C+The+Principle+of+Non-Refoulement+as+a+Norm+of+Customary+International+31+January+1994.&skip=0&querysi=UNHCR%2C+The+Principle+of+Non-Refoulement+&searchin=fulltext&sort=relevance

[95]ICJ, Military and Paramilitary Activities in and against Nicaragua (n 94) 14

[96]See United States President Ronald Reagan, Executive Order 12324, Interdiction of Illegal Aliens, 29 September 1981:

Administration at that time believed it was obliged not to intercept or return refugees on the high seas. This approach continued for several years by the USA.[97] However, the USA has taken later a varying approach which was inconsistent with this one.

After the coup that took place in 1991 against the elected president in Haiti, the number of individuals fleeing Haiti to the USA increased.[98] Consequently, the USA president Bush, in 1992, issued another Executive Order to intercept and return all the Haitians on the high seas who were attempting to reach the USA without providing for the possibility of examining the refugee status of any of them.[99] The United States justified this order by claiming that the obligation of non-refoulement was not to be applied extraterritorially.[100] This approach adopted by the Bush Administration contradicts with the Reagan Administration's approach.

It is noteworthy that the CIL status of the obligation of non-refoulement has existed before the issuance of the 1992 Executive Order.[101] This development is confirmed in the instruments following the 1951 Convention, comprising declarations in varying fora and conventions as the CAT, the UN General Assembly successive resolutions expressing the will of the world States, the domestic laws and States' practice and particularly the declarations issued by the USA Administrations.[102]

The USA officials, throughout the first decade of the programme of Haitian interdiction, have frequently affirmed their commitment to the principle of non-refoulement. The Executive Order issued by the Reagan Administration, mentioned above, stated clearly that the Attorney General shall take the necessary steps to ensure the observance of the USA's international obligations towards the genuine refugees.[103] This confirmation of the commitment to the non-refoulement principle during an entire decade cannot be simply abolished by a subsequent contradictory practice represented in Bush's Executive Order. The latter must be considered a breach of the rule not a creation of a new one.

As noted above, declarations and statements cannot solely indicate the CIL status of a rule. These declarations should be accompanied by another supporting evidence of the

Available at: https://www.presidency.ucsb.edu/documents/executive-order-12324-interdiction-illegal-aliens

(97) Mansfield (n26) 50

[98]Goodwin-Gill and McAdam (n13) 247

[99]See United States President George Bush, Executive Order 12807, Interdiction of Illegal Aliens, 24 May 1992. Availabe at: https://www.presidency.ucsb.edu/documents/executive-order-12807-interdiction-illegal-aliens

[100]Legomsky (n18) 680

[101]Mansfield (n26) 50

[102]Goodwin-Gill and McAdam (n13) 248

[103]Ibid

State's belief in the existence of the principle as a rule of a law. In fact, the undertakings made by the officials of the USA government towards refugees were applied practically for the first decade of the Haitian interdiction programme.[104] The USA Administration has adopted this approach even when it was aware that the influxes included economic migrants. However, it made sure to take all steps to afford the appropriate protection for the genuine refugees among them.[105]

This practical application was only halted after the USA Administration later decided to send back even Haitians who might be genuine refugees. Therefore, the practical instances of examining the refugees' statuses that lasted for 10 years accompanied by the issuance of declarations that were in line with these instances cannot be said to be abolished by the later practice.[106]

The present writer's view is that the USA Administration's approach of looking into the massive influxes of Haitians – even when it was aware of the existence of economic migrants among them – to protect the genuine refugees among them should be applauded. This practice by the USA represents a good example of applying the international obligations in good faith[107] and according to due process of law.[108] In other instances, States just claim that the influxes seeking asylum consist of just illegal or economic migrants without examining their refugee claims.[109] Such conducts should be considered as violations of the principle of non-refoulement. In fact, the USA Administration's approach of looking into the genuine refugee claims on the high seas[110] contributes to the solidification of the extraterritoriality of the non-refoulement as a CIL norm that is applied in good faith and according to due process of law.

It is worth noting that the USA is obliged under international law not to return refugees to the frontiers of the territories where there are well-founded fears that they would face persecution. As noted above, the USA obligation not to return refugees applies extraterritorially according to the interpretation of Article 33(1) of the Refugee Convention which acquired a CIL character. Therefore, the USA cannot claim it has the right to return

[104] Legomsky (n18) 679

[105] Goodwin-Gill and McAdam (n13) 249

[106] Ibid

[107] VCLT (n3) Article 26

[108] See generally, Charles T. Kotuby, Jr., General principles of law, International Due Process, and the Modern Role of Private International Law, Duke Journal of Comparative and International Law, vol. 23 no. 3 (2013) pp. 411- 443

[109] Goodwin-Gill and McAdam (n13) 224-225

[110] Legomsky (n18) 679

refugees based on its domestic law.

In this regard, the USA decision to return Haitians was challenged in the USA Supreme Court in the Sale Case.[111] In this case, the Supreme Court held that the USA had had the right to repatriate the undocumented aliens – including refugees – on the high seas since neither Article 33 of the Refugee Convention nor the USA law had limited the president's power to do so. The Court added that the domestic law had regulated the immigration procedures only for those who had been present within the USA. According to the Court, these procedures had not applied to those on the high seas and had not yet entered the USA, the Haitians in this case. The Inter-American Commission of Human Rights stated that the USA was in violation of Article 33(1) of the Refugee Convention in this case.[112]

It is noteworthy that the Supreme Court argued that the USA was not obliged to apply domestic Acts passed by the USA Congress outside of its borders. This assumption challenges the Refugee Convention's extraterritoriality by invoking the USA domestic law. However, Justice Blackmun in a dissenting opinion argued that this should be considered as an absurd assumption by the Court as the Act it invoked was passed specifically to implement the USA's international obligations under the Refugee Convention.[113]

Based on the foregoing, State practices that contradict a previously established CIL norm, as shown in the Haiti Case, should not be considered as generating a new CIL rule. Rather, these practices should be considered violations of the already existent CIL norm. Arguing otherwise would lead to the creation of contradictory principles and would open the door for uncertainty. In fact, the USA examination of the claims of the Haitian influxes – in the early years of the Haitian interdiction programme on the high seas – to make sure that no refugee would be pushed back constituted a constant practice by the USA. This practice by the State was accompanied, as mentioned, by its belief in respecting its international obligations towards refugees. Accordingly, such a practice affirms the extraterritorial application of non-refoulement as a CIL norm.

Conclusion:

The principle of non-refoulement has proven to be developed into a CIL norm that applies extraterritorially and obliges all States whether they are parties to the Refugee Convention or not. This is supported by the commentators' analyses that have adopted different methodologies in examining the scope of the principle of non-refoulement. These

[111]Sale Case in Goodwin-Gill, McAdam (n 13) 247-248

[112]Ibid

[113]Legomsky (n18) 688

analyses have drawn fundamentally on the general rules of interpretation according to the VCLT, resolutions and conclusions of international bodies, State practices.

As for the obligation's extraterritoriality, using different terms as expel, return, refouler in Article 33(1) of the Refugee Convention indicates that the drafters intended the unexclusiveness of the forms of the prohibited conducts that can lead the refugees to return to the frontiers of territories where they would face persecution. Put simply, the principle of non-refoulement could be considered as an obligation of result rather than one of conduct.

The drafters of the Refugee Convention focused on the result that would face the refugees, that is, returning to the countries where they would face persecution. This emphasis on the result by the drafters is also affirmed by the insertion of the sentence "in any manner whatsoever" in Article 33(1). Such a concern about the result rather than the conduct assures the extraterritoriality of the obligation of non-refoulement.

The extraterritoriality of the obligation of non-refoulement would give rise to uncertainty if there were no discernible standards according to which acts of refoulement could be attributed to the State responsible for these acts. The human rights law concept ofeffective control represents a solution to this issue. That is, a State should be considered responsible for the refoulement policies that take place wherever this State has effective control.

International refugee law and international human rights law are complementary and the concepts that apply to one of them could be applied to the other. This means that a State should be held responsible for acts of refoulement that were undertaken by its organs or agents acting on its behalf. In fact, it is more logical to apply the human rights' effective control concept to the non-refoulement obligation than it is for the ICCPR's rights. This is because Article 33(1) did not include a geographical limitation 'ratione loci' contrary to the ICCPR's rights. It is noteworthy that there is a research gap in this area, as the literature did not discuss this geographical limitation's difference between the obligation of non-refoulement and the ICCPR's rights.

The non-refoulement obligation's CIL status is confirmed by its fundamentally norm-creating character. The obligation is included in many international binding and non-binding instruments. The widespread and representative participation by the States in these different instruments affirms this CIL status. Also, State practice that is expressed through the States' inaction, States' declarations and statements and the incorporation of the rule in the domestic laws assure that there is a wide state practice accompanied by the belief of the obligatoriness of the non-refoulement obligation.

The non-refoulement principle as a CIL norm applies extraterritorially. This is because the interpretation of Article 33(1) of the 1951 Refugee Convention which is the earliest instrument that includes the principle supports this extraterritoriality. Also, the widespread and representative participation is mainly found in the Refugee Convention and its protocol. Accordingly, the non-refoulement obligation as a CIL norm derives its extraterritoriality from the Refugee Convention. There is a research gap in this area as the literature did not pay much attention to the scope of the obligation of non-refoulement as a CIL norm. Although Lauterpacht and Bethlehem have concluded that the obligation applies extraterritorially as a CIL norm, they did not provide their reasoning for such a conclusion.

The CIL status of the obligation of non-refoulement is amply firm that it cannot be impacted by the inconsistent practices of the States. In fact, inconsistent practices by the States towards the obligation of non-refoulement do not create multiple contradictory CIL rules. Rather, the later practice that contradicts with a previous one should be considered a breach of the rule not a creation of a new one.

The Haitian refugees' case is an example of the inconsistent practices by the USA different Administrations. In this case, the refoulement policies undertaken by the USA against Haitians on the high seas without examining their refugee status represented a violation of the obligation of non-refoulement rather than creating a new practice. This is because the USA before adopting such a practice used to examine the Haitians' refugee claims while they were on the high seas for several years.

Although international law does not oblige States to offer refugees the right of asylum, it compels them not to return refugees to the territories where they would face persecution. Therefore, a State cannot redirect the refugees to move towards another country unless it can prove that: it cannot receive them for reasons beyond its control, that is, it would suffer unduly heavy burdens if it accepted them; they would not be persecuted in the other country they are redirected to and that the latter would not return them to their country of origin where they would face persecution. There is a research gap in this area as this assumption is not discussed by the literature.

It is worth noting that it would have been much more useful for the protection of the refugees if there had been an international judicial body that looks at their refugee claims. Such an international judicial body would have protected the refugees from the uncertainty of the governments' decisions. This international judicial body would have also issued decisions that would provide the governments with the necessary guidelines regarding the

application of their international obligation of non-refoulement instead of interpreting the obligation according to each State's policies and interests.