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The Refoulement Principle and Its Relevance in the International Law System

Sigit Riyanto

The principle of Non-Refoulement is a concept that is very well known in the framework of international protection applicable to refugees and or asylum seekers. Non Refoulement is a concept in which State shall not expel or return ("refouler") a refugee or asylum seeker 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. The principle of Non Refoulement is generally relevant to the protection of human rights, especially in relation with the freedom of torture or cruel, inhuman or degrading treatment or punishment. In the context of international refugee law, the principle of Non Refoulement is a fundamental concept and considered as the back-bone of the whole frameworks of international protection for refugee and asylum seeker. This article discussed three aspects relevant to the principle of Non Refoulement, namely : the existence of such a principle in the existing international legal system, the character of the principle of Non Refoulement as Jus Cogens, and the condition of which the benefit of such a principle may not be applied . It is obvious that the principle of Non- Refoulement has been accepted by international community as explicitly established in international legal instruments and consistently implemented in the practice of State and the relevant international organisations. Such a principle is accepted by international community and gained ground as Jus Cogens in the international legal system, consequently States individually or collectively shall not derogate in a manner whatsoever, otherwise it is modified by a subsequent norm of general international law having the same character. However, should there are reasonable grounds, the benefit of the present principle may not be granted to a refugee.

Keywords : Non-Refoulement, Refugee, Asylum seeker, Jus Cogens

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I. Introduction

In the context of International Refugee Law, the Principle of Non-Refoulement is one of the fundamental concepts in the international protection system toward the refugees and asylum seekers. The principle is defined as a State is forbidden or prohibited to expel or return ("refouler") a refugee or asylum seeker 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 opinion². The principle is consequently considered as the back-bone of the international protection system toward refugees and asylum seekers and is institutionalized into various national as well as international instruments.

The existence of the principle of Non-Refoulement within the legal framework of refugee and asylum seeker protection is very much relevant to the wider context of human rights protection. The principle is primarily related to the principle of human rights protection, notably in relation to the individual protection against acts of torture or cruel, inhuman or degrading treatment or punishment³. This fundamental principle within the whole international refugee law system has been institutionalized into Article 33 of the Geneva Convention relating to the Status of Refugees of 1951 ("Geneva Convention")⁴. This paper would accordingly discuss three main issues in relation to: the existence of the principle of Non-Refoulement and its development, the role of the principle of Non-Refoulement as *Jus Cogens* and the exemption of the application of the principle of Non-Refoulement.

II. The Non-Refoulement Principle and Its Development

The Term of "non-Refoulement" derives from French word "refouler" which is defined as "to drive back"⁵. Within the international refugee law system the existence of the Non-Refoulement principle has been institutionalized into various international legal instruments such as convention and declaration as well as into customary international law. The Non-

² Guy S Goodwin-Gill, 1988, *The Refugee In International Law, Second Edition*, Oxford :Oxford University Press. p 117.

³ Sir Elihu Lauterpacht and Daniel Bethlehem, 2003, "The Scope and Content of the Principle of Non-Refoulement", in Erika Feller, Volker Turk and Frances Nicholson (eds), 2003, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*. Cambridge: Cambridge University Press. p. 87-164.

Refoulement principle is primarily defined as a prohibition for a state to expel or return a refugee and/or asylum seeker to a territory in which his life and safety would be threatened; unless the existence of such refugee or asylum seeker causes disturbance to the national safety and public order in the concerned country. Non-Refoulement must be distinguished from expulsion or deportation or forced removal. Expulsion or deportation is imposed when a foreign resident is alleged with acts against the host country's interests, or he is the offender of criminal conducts in one country and escape from criminal justice process. On the other hand, the principle of Non-Refoulement prevails only toward refugees and asylum seekers. In relation to the international protection of refugee, the Non-Refoulement is accounted as the basic principle within the international refugee law system. The international community has institutionalized and affirmed such a principle in the article 33 of the Geneva Convention of 1952⁶. This article is a provision in which a reservation is not possible to be made as it is underlined in the Article 42 of Geneva Convention⁷.

⁴ See e.g.: *Convention relating to the Status of Refugees* (Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950 entry into force 22 April 1954). Article 33 states:

Article 33.

Prohibition of Expulsion or return ("Refoulement")

1. 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.

2. The benefit of the present convention may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitute a danger to the community of that country.

See also e.g. Article 3 The 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

⁵ See Harun Ur Rashid, 2005, "Refugee and the Legal principle of Non-Refoulement (Rejection)", dimuat dalam *Law and Our Rights*, Issue No. 197, July 9, 2005.

⁶ Ibid. See article 33 of the 1951 Geneva Convention.

⁷ Article 42 of the 1951 Geneva Convention states:

Reservations

1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to Articles 1, 3, 4, 16 (1), 33, 36-46 inclusive

See also, Atle Grahl Madsen, 1997, *Commentary on The Refugee Convention 1951*, Published by the *Division of International Protection of the United Nations High Commissioner for Refugees*, UNHCR: Geneva. p. 227

The principle of Non-Refoulement is a concept in which a state is banned or prohibited to expel or return a refugee or asylum seeker to a territory where he would encounter persecution or torture which endangers his life on account of his race, religion, nationality, membership of a particular social group or political opinion⁸. In the contemporary international refugee law context, as it is discussed in a paper written by Sir Eliahu Lauterpacht and Daniel Bethlehem (2003), the principle of Non-Refoulement is frequently considered as the back-bone of international protection system towards refugee. This principle has been ascertained in the Convention relating to the International Status of Refugees of 1933 so long before the Geneva Convention of 1951 was accepted by the international society⁹. The non-Refoulement principle is primarily related to the principle of human rights protection, particularly in relation to the prohibition of torture and/or cruel, inhuman and degrading treatment or punishment.¹⁰

The application of the principle of Non-Refoulement in practice is also extended to asylum seekers. The support and adderance of the principle of Non-Refoulement by the states and relevant international organizations has ascertained the important role of such principle within the international law system generally. Moreover, the basic notion of such principle has also been confirmed by The United Nations General Assembly in the 1967 Declaration on Territorial Asylum which has been adopted unanimously¹¹. Article 3 of the 1967 Declaration on Territorial Asylum affirms that everyone entitled to seek for asylum is prohibited to be expatriated or rejected by a state where he is applying for aylum request. This asylum seeker must not be returned to a any state where he encounters risk of persecution¹².

⁸ Sir Elihu Lauterpacht and Daniel Bethlehem, 2003, *The Scope and Content of the Principle of Non-Refoulement*, in Erika Feller, Volker Turk and Frances Nicholson (eds), 2003, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*. Cambridge: Cambridge University Press. p. 89. See also e.g.: Guy S Goodwin-Gill, 1988, *op. Cit.* p. 117.

⁹ See Convention relating to the International Status of Refugees of 1933. See also, Ate Grahl Madsen, 1997, *Commentary on The Refugee Convention 1951*, Published by the Division of International Protection of the United Nations High Commissioner for Refugees, UNHCR: Geneva. p. 226.

¹⁰ Sir Elihu Lauterpacht and Daniel Bethlehem, 2003, *op. cit.* p. 87-164.

¹¹ See: UNGA Res. 2312 (XXII), 14 December 1967.

¹² See Article 3(1) UNGA Res. 2312 (XXII), 14 December 1967.

In the Expert Roundtable Meeting¹³ held by UNCHR in collaboration with the Lauterpacht Research Centre for International Law, University of Cambridge, UK on 9-10 July 2001, several conclusions relevant to the principle of Non-Refoulement have been agreed. Conclusions resulted from such forum as following:

- a. The principle of Non-Refoulement is acknowledged as the customary international law;
- b. The international refugee law is a dynamic law instrument which is supported by the Geneva Convention of 1951 and The 1967 New York Protocol as well as in the development of other relevant areas of international law such as international human rights and humanitarian law;
- c. Article 33 of the Geneva Convention 1951 is applied to refugee and asylum seeker regardless their formal recognition. In terms of asylum seeker, the principle of Non-Refoulement provision is applied so long as their status is determined based on fair procedure;
- d. The principle of Non-Refoulement institutionalized in Article 33 of the Geneva Convention 1951 encompass every single conduct of a state which may have consequences of returning the asylum seeker or refugee to the state borders where his life and freedom would be threatened, or in the territory where he would encounter risk of torture, including interception, rejection on the border or indirect Refoulement;
- e. Such principle is applied to any situation where there is a mass influx. Particular issues generated during the mass influx need to be handled through creative measures;
- f. The right of a State to take measures directed to the Refoulement is determined according to the international legal principle in relation with

¹³See *Summary Conclusions : the principle of Non Refoulement (Expert Roundtable organized by the United Nations High Commissioner for Refugees and the Lauterpacht Research Centre for International Law, University of Cambridge, UK; 9-10 Juli 2001)* as published in Erika Feller, Volker Turk and Frances Nicholson (eds), 2003, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*. Cambridge: Cambridge University Press. hlm., *op. cit.* p. 178-179. This *Expert Roundtable* was attended by thirty five experts coming from fifteen countries; they include government officials, non-governmental organization, academics and legal professionals. The discussion was chaired by Sir Elihu Lauterpacht, the director of *Lauterpacht Research Centre for International Law* and Rosalyn Higgins, a judge in the *International Court of Justice*.

the principle of State Responsibility. The international responsibility to take measure based on the international obligation should be primarily considered;

- g. The principle of human rights protection may be set aside taking into consideration the public interest and national security of the State concerned as stipulated in Article 33 (2) of the Geneva Convention of 1951. However, such measures must be strictly interpreted and implemented only as the last resort, and where such measures are taken with appropriate considerations of rescuing the affected parties. In terms of cases related to torture, Refoulement action must not be applied without any exception.

During its development, the principle of Non-Refoulement has also been reflected into States practices within the framework of modern international relations¹⁴. Experts' opinions which formulated in conclusions of the Expert Roundtable meeting held by UNHCR in collaboration with the Lauterpacht Research Centre for International Law, University of Cambridge, UK, 9-10 July 2001 and in a declaration resulted from the Ministerial Meeting of States Parties, Geneva, Switzerland, 12-13 December 2001 served as a strong evidence that the principle of Non-Refoulement was supported by legal opinion (*Opinio Juris*) and reflected in States practices within the modern international relations. By support of legal opinion (*Opinio Juris*) and States practices concerning the acceptance of the principle of

¹⁴ The Declaration of States Parties to the 1951 Convention and /or its 1967 Protocol Relating to the Status of Refugees as adopted by the Ministerial Meeting of States Parties, Geneva, Switzerland 12-13 December 2001, stipulates, *inter alia* :

...

3. Recognizing the importance of other human rights and regional refugee protection instruments, including the 1969 Organization of African Unity (OAU) Convention governing the Specific Aspects of the Refugee Problem in Africa and the 1984 Cartagena Declaration, and recognizing also the importance of the common European asylum developed since the 1999 Tampere European Council Conclusions, as well as the Programme of Action of the 1996 Regional Conference to Address the Problem of Refugees, Displaced Persons, other forms of Involuntary Displacement and Returnees in the Countries of the Commonwealth of Independent States and Relevant Neighbouring States.

4. Acknowledging the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of Non-Refoulement, whose applicability is embedded in customary international Law.

...

Non-Refoulement have affirmed that the principle of Non-Refoulement has been recognized as customary international law.

The principle of Non-Refoulement has indeed emerged and has been applied by countries since World War I (1914-1918)¹⁵. Such principle has also been recognized by international instruments such as in the :The 1933 Convention Relating to the International Status of Refugees as well as in the 1949 Geneva Convention on the Protection of Civilian Persons¹⁶, the Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment 1984¹⁷, UN General Assembly resolution - The 1967 Declaration on Territorial Asylum¹⁸. This principle was in fact formulated in declarations and resolutions adopted by international organizations as follows.

A. 1969 Organisation of African Unity (OAU) Convention

Article II of the 1969 OAU Convention governing the Specific Aspects of Refugees stipulates that:

"No person shall be subjected ...to measures such as rejection at the

¹⁵ See e.g.: Harun Ur Rashid, 2005, "Refugee and the Legal principle of Non-Refoulement (Rejection) ", dimuat dalam *Law and Our Rights*, Issue No. 197, July 9, 2005.

¹⁶ The 1949 Geneva Convention on the Protection of Civilian Persons , in article 45 stipulates inter alia:

*" Protected Persons shall not be transferred to a Power which is not a party to the Convention.....
In no circumstances shall a protected person be transferred to a country
where he or she may have reason to fear persecution for his or her
political opinions or religious beliefs."*

¹⁷ The Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment 1984 (The 1984 Convention against Torture), in article 3 mentioned :

" No State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

¹⁸ In 1967, the General Assembly of United Nations adopted a resolution which accepted an international instrument called *The 1967 Declaration on Territorial Asylum* which directed towards the member of states. Such declaration reaffirmed the statement that asylum granting is a conduct of peace and humanity which may not be regarded as an unfriendly conduct by another country. The declaration asserted also that a state is responsible in assessing one's claim of asylum. The 1967 UN Declaration on Territorial Asylum recommends member of states to give respects no one entitled to seek asylum shall be subjected to "measures, such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any state where he may be subjected to persecution.

frontier, return or expulsion, which would compel him to return or remain in a territory where his life, physical integrity or liberty would be threatened."

The 1969 OAU Convention regulates issues of refugees particularly in Africa region. Conflicts which indicated the end of colonialism era in Africa has resulted in a profoundly series of displacement in that region. The exclusion of peoples in Africa has encouraged the formulation and acceptance of the 1967 New York Protocol and also the 1969 OAU Convention which regulates issues concening the existence of refugees in Africa in the year 1969. Underlining that the 1951 Geneva Convention was the basic and universal instrument in relation with status of refugee, the 1969 OAU Convention was the only regional international conventions legally binding.

It is noted that one of most important parts from the 1969 OAU Convention is the definition of refugee. This convention followed the definition of refugee stated in the Geneva Convention and also included the more objective consideration i.e. everyone forcedly leave his country because of "external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality."

It means that everyone who escapes from his country's territory as a result of civil chaos, widely-spread violence and war, is entitled to claim a status of refugee within the territory of countries which are Parties of the 1969 OAU Convention, regardless of consideration of whether he has fear toward the underlying oppression or persecution. In addition to the extended definition of refugee, the 1969 OAU Convention has also encouraged the OAU convention parties to provide asylum, emphasizes the Non-Refoulement principle as well as institutionalizes a voluntary repatriation for refugees¹⁹.

B. The 1969 American Convention on Human Rights

Article 22 of the 1969 American Convention on Human Rights stipulates that:

¹⁹ Rachel Murray, 2005, "Refugees and Internally Displaced Persons and Human Rights: The African System", as published in *Refugee Survey Quarterly Vol. 24, Issue No 2*, Geneva: UNHCR. p 57.

"In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions".

C. The 1966 Asian-African Legal Consultative Committee

The 1966 Asian-African Legal Consultative Committee has adopted a declaration known as the Bangkok Principles. The declaration recognized the concept of Non-Refoulement to provide international protection towards asylum-seeking individuals.

D. The 1984 Cartagena Declaration

In 1984, a colloquium of Latin American government representatives and legal experts held in Cartagena, Colombia discussing the international protection towards refugees within that region. The meeting adopted an instrument subsequently known as the 1984 Cartagena Declaration.

The declaration recommended that the definition of a refugee as stipulated in the Geneva Convention is to be extended so as to cover also everyone who has escaped from his country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights and or other circumstances which have seriously disturbed public order.

Latin American countries are not legally bound by the Cartagena Declaration of 1984; nevertheless most of them implement such definition for the sake of practical consideration; several countries in fact have incorporated such definition into their national regulations. The declaration has also been supported by the Organization of American States (OAS), United Nations General Assembly, and the Executive Committee advisors of UNHCR²⁰. The declaration has not only accepted and recognized the Non-Refoulement principle as a foundation of international protection towards refugees; it has also recognized that

²⁰ See e.g. Kate Jastram & Marilyn Achiron, 2001, *Refugee Protection: A guide to International Refugee Law, Handbook for Parliamentarians No. 2 – 2001*: Office of the United Nations High Commissioner for Refugees and Inter-Parliamentary Union. Geneva, 2001.

the Non-Refoulement principle is categorized as "jus cogens" within international law system²¹.

III. The Principle of Non-Refoulement as Jus Cogens

Within the international law system, the concept of Jus Cogens known as the peremptory norm of international law is defined as a legal provision which is accepted and recognized by the international community and such legal provision may not be derogated or defeated by another legal provision. It should be noted that in the context of classic international law, the concept of Jus Cogens has been introduced by several prominent international legal experts such as Netherlands distinguished lawyer, Hugo Grotius (1583-1645) and also de Vattel in the XVI AD. In 1953, Hersch Lauterpacht, in his capacity as the Special Rapporteur of the International Law Commission has also included the concept of Jus Cogens into the draft of convention concerning the law of treaty as a principle within the *ordre international public*²². The concept of Jus Cogens ultimately was accepted by the international community and was institutionalized in The Vienna Convention to the Law of Treaty of 1969²³.

²¹ In the colloquium held in Cartagena, Colombia 9-12 November 1984, one of the conclusions stated:

.... UNHCR

5. To reiterate the importance and meaning of the principle of non-Refoulement (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be recognized and observed as a rule of jus cogens.

See also e.g.: Harun Ur Rashid, 2005, *Refugee and the Legal principle of Non-Refoulement*, *op. cit.*

²² Jean Allain, 2001, "The Jus Cogens Nature of Non-Refoulement", dalam *International Journal of Refugee Law*, Volume 13 No. 4, 2001. Oxford : Oxford University Press. p. 1 534-538.

²³ Article 53 of the Vienna Convention to the law of Treaties of 1969 stipulates:

...

For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole 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.

Meanwhile, article 64 states:

Emergence of a new peremptory norm of general international law ("jus cogens")

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

A general acceptance of the concept of Jus Cogens in the modern international law regulation as reflected in the The 1969 Vienna Convention on the Law of Treaty, shows that within the international law system, the international community acknowledges two kinds of nature of the legal norms applied, i.e. Jus Dispositivum and Jus Cogens.²⁴ Jus Dispositivum is an international legal norm, in which a State as a member of the international community (according to certain situation and requirements) is possible to set aside or make modifications of those legal provisions.

Conversely, Jus Cogens or a peremptory norm of international law is an international legal norm which has been recognized and accepted by the international community; therefore it may not be set aside, modified and/or overruled by another legal provisions. Jus Cogens is categorized as a legal norm which stands higher than the norm of Jus Dispositivum. A State as a member of the international community with no reasons may not set aside the international legal norm which categorized as Jus Cogens. Jus Cogens is regarded as a norm which is essential to the international law system, consequently any contravention against such essential norm may threaten the continuity of international law system prevailing in the international community.

The institutionalization of a peremptory norm of international law into the 1969 Vienna Convention on the Law of Treaty is a recognition and affirmation expressed by the international community particularly states in response to the fact that within the international law system, a state may not create a regulation contravening the Jus Cogens in its relation with another state as well as in the national law framework of each state. Nevertheless, it is necessary to suggest that the application of Jus Cogens is not to be limited to the Vienna Convention of 1969 yet applies to the whole international law system generally. The peremptory and non-derogative natures of Jus Cogens is the principle applied towards any state's conduct as a member of the international community within the international law framework. Accordingly, Jus Cogens limits the conduct and interaction of a State within the international system framework.

With regard to this writing, a context to be suggested is how to identify and evaluate that the principle of Non-Refoulement is a norm of Jus Cogens

²⁴ Jean Allain, 2001, *op. cit.* p. 534 -535.

within the international law. Consequently, a reference to Article 53 of the 1969 Vienna Convention on the Law of Treaty must be exercised in evaluating that the principle of Non-Refoulement should be categorised as Jus Cogens. According to Article 53 of the 1969 Vienna Convention on the Law of Treaty, certain requirements of Jus Cogens to be satisfied i.e. firstly, that the Non-Refoulement principle is accepted and recognized by the international community of States as a whole); secondly, as a norm from which no derogation is permitted.

The qualification of the Non-Refoulement principle as a norm of Jus Cogens in the international law may be evaluated based on consideration of facts as follow. First, the principle of Non-Refoulement is recently a norm of international law which is institutionalized in the multilateral international convention i.e. in Article 33 of the Geneva Convention of 1951.

Second, the principle of Non-Refoulement has also become the international customary law which put into practice by States so long before such a principle was drafted in the international instrument²⁵. States applying the principle of Non-Refoulement are not only limited to State parties of the Geneva Convention of 1951 as well as the New York Protocol of 1967. Other States which are not State parties of the Geneva Convention in fact respect and implement to the principle Non-Refoulement accordingly.

Third, in the subsequent development, particularly in the international legal instruments adopted by the international community in respect of the refugee protection issues, the principle of Non-Refoulement has also been reaffirmed and in fact recognized explicitly as Jus Cogens. The reaffirmation of such a principle in the international legal instruments adopted by the international community may be found in: The 1969 OAU (Organisation of African Unity) Convention Governing the Specific Aspects of Refugees, the 1984 Cartagena Declaration on Refugees, The Inter-American Commission on Human Rights and also The 1967 Declaration on Territorial Asylum²⁶.

²⁵ Jean Allain, *ibid.* p. 338; See also Guy S Goodwin-Gill . *op. cit.* p. 166-167;

²⁶ See also e.g.: REDRESS&ILPA, 2006, *Non Refoulement Under Threat* ; (*Proceedings*) Seminar jointly held by The Redress Trust (REDRESS) and 'The Immigration law Practitioners' Association (ILPA) 16 May 2006 Matrix Chamber, London, Published in November 2006, London : Matrix Chamber.

Fourth, an adoption and affirmation of the Non-Refoulement principle in the system of international protection towards refugees and asylum seekers; may be found in practices carried out by relevant international organizations such as the UNHCR. It may be traced in the decisions issued by the Executive Committee of the Programme of the United Nations High Commissioner for Refugees (UNHCR). Those decisions reflect the consensus made by States in their capacity to provide opinions and advices concerning the aspects of international protection towards refugees and asylum seekers all over the world. The decisions of the Executive Committee UNHCR containing the affirmation of the Non-Refoulement principle may be found in: Conclusion No. 25 of 1982²⁷, Conclusion No. 55 of 1989²⁸ and Conclusion No. 79 of 1996²⁹.

Moreover, it must be noted that the existence of the Non-Refoulement principle and its qualification as Jus Cogens are supported by the opinions of international law experts. Those opinions concerning the existence of the principle of Non-Refoulement are strong and factual arguments that such a principle as one of the international law sources which categorized as Jus Cogens is recognized and supported by the opinions of international law experts³⁰. Those opinions prove the existence of the principle of Non-Refoulement as one of international law sources in accordance with the

²⁷Executive Committee Conclusion No. 25, "General Conclusion on International Protection", 1982, states:

"...

(b) Reaffirmed the importance of the basic principles of international protection and in particular the principle of non Refoulement which has progressively acquiring the character of a peremptory rule of international law."

²⁸Executive Committee Conclusion No. 55, "General Conclusion on International Protection", 1989, states :

"(d) Expressed deep concern that refugee protection is seriously jeopardized in some States by expulsion and Refoulement of refugees or by measures which do not recognize the special situation of refugees and called on all States to refrain from taking such measures and in particular from returning or expelling refugees contrary to fundamental prohibition against these practices"

²⁹Executive Committee Conclusion No. 79, "General Conclusion on International Protection", 1996, states :

(i)Distressed at the widespread violations of the principle of non Refoulement and of the rights of refugees, in some cases resulting in loss of refugee lives, and seriously disturbed at report indicating that large numbers of refugees and asylum seekers have been refouled and expelled in highly dangerous situations: recalls the principle of non Refoulement is not subject to derogation."

definition of the sources of international law set forth in the Statute of the International Court of Justice³¹.

With regard to practices on the management of refugees and asylum seekers issues by States, it is acknowledged that there are contraventions against the principle of Non-Refoulement. In this context, it has to be noted that it has been also suggested by UNHCR that violations against the rights of refugee recognized by the international community, including violations against the principle of Non-Refoulement, is a very disturbing practice which may indeed damage the international protection system towards refugees and asylum seekers³². However, it must also be emphasized that the violations against the principle of Non-Refoulement is not relevant and may not be put forward as an argument to negate its status as *Jus Cogens* in the international law system³³. In other words, the nature of the Non-Refoulement principle as a peremptory norm of international law may not be disqualified or cancelled by the fact of the violations against it. The nature of the principle of Non-Refoulement as *Jus Cogens* may only be disqualified or replaced if the community has accepted and recognized the new existence of

³⁰ See e.g., Harold Hongju Koh, *The Haitian Centers Council Case: Reflection on Refoulement and Haitian Center Council*, in 35 *Harvard International Law Journal*, 30 (1994) as quoted by Jean Allain. *Op. cit.*; Compare to Harun Ur Rashid, 2005, *Refugee and the Legal principle of Non-Refoulement*, *op. cit.*; See also e.g. The conclusions from the Expert Roundtable jointly held by UNHCR and the Lauterpacht Research Centre for International Law, University of Cambridge, UK; 9-10 Juli 2001.

³¹ In this regard, article 38 the Statute of the International Court of Justice also affirmed that the opinions of international law experts is one of the subsidiary means of the international law. Article 38 stipulates that

1. 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 recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized 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.

³² See also the statements made by UNHCR in the *Executive Committee Conclusion No. 89*, "General Conclusion on International Protection", 2000.

³³ See e.g. the provision in article 53 of the 1969 Vienna Convention that the pre-emptive norm of international law or *Jus Cogens* may only be replaced or modified by the new existing *Jus Cogens* yang baru. (... a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character).

Jus Cogens replacing such principle in the international law system. It is also in line with the arguments put forward by the International Court of Justice according to decisions adopted in the Nicaragua Case in 1986, which stipulated that violations conducted by a state against an international legal provision may not always be interpreted as weakening the relevant legal provision as norms of international law adopted and applied by international community as a whole³⁴. According to such decision of the International Court of Justice, violations against an international legal provision in fact may confirm or strengthen more the standing of such international legal provision than weaken it³⁵.

The significant feature to be suggested within the context of the nature of Non-Refoulement as a peremptory norm in the international law that such principle is essential within the international protection system towards refugees and asylum seekers and it may not be set aside by countries in terms of international relations. By considering that the principle of Non-Refoulement has a nature of Jus Cogens provide consequences that States both individually and collectively must not contravene such principle since the Non-Refoulement principle is an international legal provision adopted and recognized by the international community.

IV. The Exclusion of the application of the Principle of Non-Refoulement

The definition of refugee and international protection institutionalized by international law is not an absolute guarantee of protection towards a refugee or asylum seeker. The law of refugee system made possible the existence of an act of exclusion in which refugees and asylum seekers do not have international protection due to certain reasons. The exclusion clause in refugee law is a legal provision cancelling the provision of international

³⁴ See *Case concerning Military and Para Military Activities in and Against Nicaragua*, (ICJ Reports, 1986, 98).

³⁵ *Ibid.* In *Case concerning Military and Para Military Activities in and Against Nicaragua*, The International Court of Justice stated inter alia :

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

protection towards people who may in fact satisfy the criteria of refugee status, yet they have certain qualifications which make them do not deserve the international protection. The exclusion clause was formulated in the Geneva Convention in Article 1D, 1E and 1F. Under the provisions outlined in Article 1D, 1E and 1F of the Geneva Convention of 1951, these exclusion clauses apply to the following groups of people, i.e.:

- a. People who receive protection or assistance from UN agencies other than UNHCR;
- b. People who have the same rights and obligations in comparison to citizens of countries in which they reside; and
- c. And those people who by special considerations have been regarded as violated the peace, war crimes, crimes against humanity, serious non-political crimes or acts contrary to the purposes and principles of the UN³⁶.

Likewise is the application of the principle of Non Refoulement. When examined, the formulation of the Non-Refoulement principle in Article 33 Paragraph (1) of the Geneva Conventions of 1951, there is a possibility in which a State based on legitimated specific reasons and legal procedures which may be accounted perform conducts which are different to the necessity of applying the Non-Refoulement principle³⁷. In this case, what may

³⁶ Article 1 of the Geneva Convention stipulates as following:

....

D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that.

- (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

³⁷ Guy S Goodwin-Gill, 1998, *op.cit.* p. 139-140. See also Stephane Jaquemmet, *op.cit.*

be done by a State towards refugees and asylum seekers are expulsion from the territory of that state. According to Article 33 Paragraph (2) of the Geneva Convention, there were two reasons that can be used as a foundation by a State to take action which may be considered negating the necessity to implement the principle of Non-Refoulement defined in Article 33 paragraph (1)³⁸.

First, the presence of refugees or asylum seekers within a state may become a threat to national security of that state (... reasonable grounds for regarding as a danger to the security of the country ...). In this regard, it should be noted that the formulation of a threat to national security is a formulation which has a very broad and relative meaning. Basically the interpretation of threats to national security is determined by the authority of the host State as the holder of sovereignty. However, the assessment of the existence of a threat to national security by States because of the presence of refugees, which was conducted on a case by case basis, must be based on good faith³⁹.

Second, a refugee or asylum seeker has engaged in a serious crime so that the presence of him/her in a State have caused a nuisance to public order (public order) in the State (... having been convinced by a final judgement of a particularly serious crime, constitute a danger to the community of that country)⁴⁰. In line with the provision in Article 33 Paragraph (2) of the Geneva Convention of 1951, an international instrument adopted by the UN General Assembly i.e. the 1967 UN Declaration on Territorial Asylum has also provided emphasizes to the implementation of the principle of Non Refoulement by State parties⁴¹.

In the case of expulsion of refugees and asylum seekers within its territory, a State should consider several limitations as follow. Firstly, a decision

³⁸ Article 33 Paragraph (2) the 1951 Geneva Convention states as follows:

...

2. The benefit of the present convention may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convinced by a final judgement of a particularly serious crime, constitute a danger to the community of that country.

³⁹ Atle Grahl Madsen, 1997, *Commentary on The Refugee Convention 1951*, Published by the Division of International Protection of the United Nations High Commissioner for Refugees, UNHCR: Geneva. p 233.

⁴⁰ Atle Grahl Madsen, *ibid.* p. 233.

made by a State to conduct expulsion against a refugee and asylum seeker from its territory is case by case and based on considerations and strict legal procedure and may be accounted for. The strict legal procedure and may be implemented for to the end of making decisions of expulsion has also to be accompanied with respect towards the general principles of human rights⁴². Secondly, in taking action of expulsion, a State has to make an effort in which refugees and asylum seekers who are obliged to deportation may be accepted in a third country⁴³.

The possibility of not applying the principle of Non-Refoulement is basically identical to the provisions contained in Article 2 of the Geneva Convention of 1951. Article 2 of the Geneva Convention of 1951 formulated general obligations which must be obeyed by the refugees in asylum countries. General obligations of refugees as defined in Article 2 of the Geneva Convention of 1951 is essentially in accordance with the applicable provisions of international law in general; in which everyone, including foreigners residing in the territory of a state must comply with laws and regulations in the country concerned. Thus, the provisions contained in Article 2 of the Geneva Convention of 1951 are reaffirmation of the provisions applicable in international law in general⁴⁴.

⁴¹ In this regard, The 1967 UN Declaration on Territorial Asylum (Adopted by the General Assembly of the United Nations on 14 december 1967, Text : *UNGA Resolution 2312 (XXII)*) article 3 stipulates:

...

2. Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.

3. Should a State decide in any case that exception to the principle state in paragraph 1 of this article would be justified, it shall consider the possibility of granting to the person concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State.

⁴² Sir Elihu Lauterpacht and Daniel Bethlehem, 2003, *The Scope and Content of the Principle of Non-Refoulement*, as published in Erika Feller, Volker Turk and Frances Nicholson (eds), 2003, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*. Cambridge: Cambridge University Press. p 89. See also e.g.: Guy S Goodwin-Gill, 1988, *op. cit.* p 134.

⁴³ Article 2 1951 Geneva Convention states the general obligations of the refugees as follows:
General Obligations

Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

See also e.g: *UNHCR, 2007, Text of the 1951 Convention Relating to the Status of Refugees Text of the 1967 Protocol Relating to the Status of Refugees Resolution 2198 (XXI) adopted by the*

Unlike the Geneva Convention of 1951 and the 1967 UN Declaration on Territorial Asylum, which allows deviations of the application of the principle of Non-Refoulement, in the 1969 OAU (Organisation of African Unity) Convention Governing the Specific Aspects of Refugees there is absolutely no exceptions to the application of the principle of Non-Refoulement principle. Under the provisions outlined in the 1969 OAU (Organisation of African Unity) Convention Governing the Specific Aspects of Refugees there is no single reason which can be used for deviating the Non-Refoulement principle. In this case, the 1969 OAU (Organisation of African Unity) Convention Governing the Specific Aspects of Refugees asserts that a threat to national security may not be used for deviating the Non-Refoulement principle, however it may be used as an excuse for doing residential (resettlement) to a region which is considered secure⁴⁵.

V. Conclusion

Within the current system of international law, the existence of the principle of Non-Refoulement is a necessity and has been institutionalized in the various international legal instruments in the form of Conventions, Declarations and Customary International Law. In the context of the legal framework for the protection of refugees and asylum seekers, the principle of non-Refoulement, is a fundamental concept and is considered as the backbone for the whole system of international refugee law.

The nature of the principle of Non-Refoulement as *Jus cogens* in the international law system is based on the consideration that in fact recently such principle is a norm of international law which has been recognized and affirmed by the international community in multilateral international conventions and other relevant international legal instruments. The principle of Non Refoulement is very fundamental in the system of international protection towards refugees and asylum seekers and can not be deviated by coun-

United Nations General Assembly with an Introductory Note by the Office of the United Nations High Commissioner for Refugees Dapat dilihat di : <http://www.unhcr.org/cgi-bin/texis/vtx/protect/openssl.pdf?tbl=PROTECTION&id=3b66c2aa10> (diakses 2 Juni 2008).

⁴⁴ Atle Grahl Madsen. *Op. cit.* p 3.

⁴⁵ See Article II, *The 1969 OAU (Organisation of African Unity) Convention Governing the Specific Aspects of Refugees Problems in Africa*; entry into force : 20 June 1974,(Text : 1000 UNTS 46).

tries in international relations. Relevant international organizations also acknowledge and apply the principle of Non Refoulement consistently. Given the fact that the principle of Non-Refoulement is an international legal provision which has been recognized and accepted by the international community and has a nature as Jus Cogens, as a consequence countries either individually or collectively, must not violate such a principle.

In the context of implementing the principle of Non Refoulement, based on the legitimate reasons and strict and accountable legal procedures; a State may take a different measure with the obligation of applying the principle of Non Refoulement to in a specific case.

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