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The Peremptory Nature of Non-Refoulement Obligation: Juridico-Ethical Argument for Humanity

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To my Grandmother for her unconditional love, support and sacrifice

ეძღვნება ბებოს, მისი უპირობო სიყვარულისთვის, მხარდაჭერისა და თავგანწირვისთვის

Contents

"But if we believe in human rights at all— or in any other rights, for that matter— we must take a stand on the true basis of such rights. My understanding of human dignity might be defective. You must judge for yourself and, if necessary, correct my account. But unless you are tempted by a global skepticism about human and political rights, you must find a basis for such rights in some formulation of that kind, and you must embrace that formulation not because you find it embedded in some culture or shared by all or most nations but because you believe it to be true. You must make applications of your basic premise sensitive to a variety of circumstance that vary across regions and nations. But your judgments must be grounded finally in something that is not relative: your judgment about the conditions of human dignity and the threats that coercive power offers to that dignity."

Ronald Dworkin, *Justice for Hedgehogs* (HUP 2011) 338

Summary

This thesis argues that non-refoulement obligation has entered the domain of *jus cogens* norms. Its legal effects have considerable implications upon the *de jure* rightlessness and extraterritorial deterrence measures eliding jurisdictional link between the State and the individual. Apart from stipulating the normative and legal argument in support of this position, the various objections to the effect of denying the *jus cogens* status of non-refoulement obligation is addressed. An assertion about the given legal norm's peremptoriness means that it is non-derogable, universally applicable, hierarchically superior, and effective. Such characterization stems from the legal account of the concept of *jus cogens* norms proposed in the inquiry dealing with the systematic appraisal of nature e.i., the essential properties of *jus cogens* norms.

The *jus cogens* nature of the non-refoulement obligation, complemented with various conceptual and normative objections about the adequacy and intelligibility of the phenomena of *de jure* rightlessness, argues that it is best to conceive the relationship between the State jurisdiction, legal human rights, and legal human rights obligations not as uttering that it is the jurisdiction that confers the human rights upon the individual. Instead, the jurisdiction relates to the rights protection and not the rights existence or the conferment. This is argued mainly through the cumulative argument consisting of numerous conceptual and normative objections against *de jure* rightlessness, and it is engaging the genuine normative conflict and, therefore, derogating from the *jus cogens* non-refoulement obligation either in the limb of human rights existence or in the limb of human rights protection.

The various assertions about the maritime legal blackholes referring to the structural limitations of human rights law and, consequently, to the *de jure* rightless individuals concerning the non-refoulement obligation rest on the conceptual, normative, and legal misapprehension. As this inquiry argues, it is not the case that individuals are rendered *de jure* rightless in these states of affair. On the contrary, individuals have *the de jure* right to non-refoulement obligation, but this right is not protected in the extraterritorial deterrence context due to the alleged absence of the jurisdiction.

Therefore, in the extraterritorial deterrence context, individuals have *the de jure, but in the alleged absence of the jurisdiction, an unprotected* right to non-refoulement obligation. It is one thing to say that individuals do not have legal human rights; it is altogether another thing to say that individuals have legal human rights which are not protected. On the account proposed and argued, unprotected legal human rights are also human rights in the focal sense of the word. Therefore, whether or not the jurisdiction exists must relate to human rights protection and not to the question of human rights existence or conferment.

However, all human rights and especially those having the *jus cogens* legal status, as is the case in the context of non-refoulement obligation, *ought to be* protected. While the existence of *jus cogens* non-refoulement obligation as the legal human right is unconditional, the beneficiaries of and through the given legal norm have the normative and legal claim that jurisdiction is established to accord the human right the protection that is peremptorily due to it. *jus cogens* norms are public order norms and their non-derogable and universal operation must be unfractured. The property of effectiveness inherent in *jus cogens* non-refoulement obligation brings *sui generis* interpretive legal consequences to ensure their non-derogable and universal operation. Therefore, it follows that – in the extraterritorial context – *jus cogens* non-refoulement obligation through its legally inseparable properties such as *erga omnes* duties makes the normative and legal claim to the effect of establishing the exercising of the extraterritorial jurisdiction by the State.

Thus, the thesis argues for the intelligibility of *sui generis* interpretive legal consequences instead of other kinds of legal consequences – inferential from *jus cogens* non-refoulement obligation. The author argues that interpretive *sui generis* legal consequences amount to the legal framework of our normative thought that insists on rethinking the legal relationship between the State jurisdiction and the existence of human rights. In the domain of *jus cogens*, the interpretive legal consequence is a normative dependency between the truth conditions of the concept of State jurisdiction and satisfaction of the grounds of law of *jus cogens* non-refoulement obligation in terms of ensuring its non-fragmentable and non-derogable legal applicability.

Acknowledgment

This master thesis finds its inspiration in one of the first lectures on migration law, where Professor Eleni Karageorgiou assigned us to read the wonderful article on *de jure* rightlessness and consequent maritime legal black holes. This launched the moment where I started to reflect upon the grand scheme of the relationship between the State jurisdiction, non-refoulement obligation, and the State duties in general. I wish to genuinely thank her for providing the food for theoretical thought and the whole-hearted and deeply attentive engagement with every lecture.

It is with great gratitude that I acknowledge the academic support of my supervisor, Professor Valentin Jeutner. I could not have wished for a better supervisor! First, and foremost, he was highly tolerant and imperturbable to the obstinate pupil desiring to go above and beyond. I thank Valentin for providing me with the kind of freedom to engage in the kind of academic craftsmanship to develop the kind of scholarly vision on *jus cogens* non-refoulement obligation. His comments and critical remarks made the manuscript improved. Not only that but I thank him for his kindness and openness allowing me to approach him for advice and the suggestion. Indeed, his kind emphasis on me to keep things right to the point ensured that the thesis did not go at an extreme length. His future supervisees are in good hands!

I am particularly grateful to *all* teachers at Lund, whose passionate attitude, intellectual and analytic rigor and humanitarian mindset profoundly influenced how I reflected upon things when writing a thesis. The special mention warrants the elective subject 'Human Rights, Values and Legal Trends: The Role of Ethics' authored by Professor Anja Matwijkiw. I genuinely thank her, for the course greatly influenced my theoretical vision on human rights theory, and its insight is implicit in the thesis.

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Abbreviations

ACHR	American Convention on Human Rights
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CFREU	Charter of Fundamental Rights of the European Union
COE	Council of Europe
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EUBAM	EU Border Assistance Mission in Libya
EUTF	EU Emergency Trust Fund for Africa
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide
HRC	Human Rights Committee
IACPPT	Inter-American Convention to Prevent and Punish Torture
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPED	International Convention for the Protection of All Persons from Enforced Disappearance
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
OAS	Organization of American States
OAU Convention	Convention Governing the Specific Aspects of Refugee Problems in Africa
OAU	Organization of African Unity
PCIJ	Permanent Court of International Justice
Refugee Convention	Convention Relating to the Status of Refugees
Rome Statute	Rome Statute of the International Criminal Court
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCAT	UN Committee Against Torture
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
VCLT	Vienna Convention on the Law of Treaties

I. Sketching out the Deterrence paradigm

It is well-known that since the mid-1980s, European states lifted the profitable and beneficial schemes providing for the labor immigration opportunities. At the same time, however, the overall process of globalization made the ever-growing network of the various types of transportation connecting the world more accessible and available for the broader section of the world's population. Consequently, the migration market was dominated by human smugglers offering the people – not limited to the traditional asylum-seekers – sophisticated techniques of avoiding ordinary border controls and therefore "rather than conforming to the traditional image of the singular *bona fide* asylum-seeker, refugees were increasingly caught up in mixed flows of irregular migrants."[1]

The response from the states was mainstream and consisted of gradually strengthening the modes of border controls in various ways resulting in deterring migrants from reaching the borders in the first place. Thus, it can be said without hesitation that the "efforts by States to prevent migrants and refugees from reaching their territory has been a defining feature of the developed world's migration policies."[2] The efforts undertaken by the states are of multifaceted and multidimensional nature consisting of various pillars ranging from less to more sophisticated and advanced techniques of preventing migrants from reaching the physical or the juridical borders of the states. These measures evolve gradually over time. Scholars often refer to these sorts of strategies, techniques, and undertakings as *non-entrée policies*.[3] The latter can be employed as an umbrella term to catch the broad ranges of measures cultivated by the states for advancing the key purposes associated with the migration control agenda. For example, the notions of externalization,[4] remote border controls,[5] securitization,[6] proliferation,[7] denationalization,[8] containment,[9] 'humanitarian crisis'[10] or 'fortress Europe'[11] are derivations of a broader political conception of the deterrence paradigm which through the various integrated, interwoven and interconnected measures aim at preventing prospective asylum seekers from exercising what follows from their legal claim-right of the non-refoulement principle.

Undoubtedly, the global migration infrastructure concerning the asylum seekers is premised upon the "denial of access to the global mobility infrastructure."[12] The implementation of such denials consists of enforcing the conjoined legal and policy measures directed against the attempts of refugees to step inside the jurisdictional dominion of the political and legal entity. Simple externalization measures range from visa requirements and carrier sanctions to high seas interdictions and establishing international zones.[13] By introducing external borders, physical borders are redirected elsewhere, thus having the intended consequence where the migrant – without even reaching the physical borders – is denied access to the state jurisdiction to avail herself the non-refoulement claim. Indeed, visa requirements are stringent and are not usually granted for asylum-seeking purposes. While by enacting carrier sanctions, transportation companies are now being hugely fined for boarding persons without checking the relevant

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[1] Thomas Gammeltoft-Hansen and Nikolas F. Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy' [2017] JMHS 5, 30, 51.
[2] Annick Pijnenburg, Thomas Gammeltoft-Hansen & Conny Rijken, 'Controlling Migration through International Cooperation' [2018] *European Journal of Law and Migration* 20, 365, 365.
[3] J. Hathaway, 'The Emerging Politics of Non-Entrée' [1992] *Refugees* 91 40-41. Prof. Hathaway was first who coined the term non-entrée.
[4] David Scott FitzGerald, 'Remote control of migration: Theorizing territoriality, shared coercion, and deterrence' [2020] *Journal of Ethnic and Migration Studies* 46, 1, 4-22.
[5] Aristide R. Zolberg, 'Matters of State: Theorizing Immigration Policy' in Philip Kasinitz Charles Hirschman and Josh DeWind (eds) *The Handbook of International Migration: The American Experience* (New York: Russell Sage) 71–93.
[6] Gemma Pinyol-Jiménez, 'The Migration-Security Nexus in Short: Instruments and Actions in the European Union' [2012] *Amsterdam Law Forum* 4,1, 36-57.
[7] Thomas Spijkerboer, 'Bifurcation of people, Bifurcation of law: Externalization of Migration Policy Before the EU Court of Justice' [2017] *Journal of Refugee Studies,* 31, 2, 217-239.
[8] Anna Ligouri, *Migration Law and the Externalization of Border Controls: European State Responsibility* (Routledge 2019)
[9] Violeta Moreno-Lax & Mariagiulia Giuffré, 'The Rise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows' in Juss (Ed) *Research Handbook on International Refugee Law* (Edward Elgar 2019)
[10] Jaya Ramji-Nogales, 'Migration Emergencies' [2017] 68 Hastings LJ 609 627
[11] Ashley Binetti Armstrong, 'You Shall Not Pass! How the Dublin System Fueled Fortress Europe' [2020] *Chicago Journal of International Law*, 20, 2, 332-383
[12] Thomas Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' [2018] European Journal of Migration and Law 452 457
[13] James C. Hathaway & Thomas Gammeltoft-Hansen, 'Non-Refoulement in a World of Cooperative Deterrence' [2015] Transnat'l L. 53, 2, 235-284.

migratory documentation.[14] Scholars argued that legislatively imposed penalties upon the transportation companies violate the non-punishment provision as affirmed in the Refugee Convention.[15] From an ethical viewpoint, it was also contended that it would not be immoral for transportation companies to break the law to provide refugees an opportunity to claim protection.[16] When it comes to international zones, the states, by modifying the legal status as a transit zone, intend to misapply some of their international legal obligations. However, this mode of evading the jurisdiction and thus international legal responsibility has been successfully challenged before the European Court of Human Rights.[17] Concerning high sea interdictions, the most egregious example is the U.S. interdiction of more than 35 000 Haitian refugees, resulting in Haitian refugees being returned without assessing their claim to international legal protection.[18] Regrettably, while in *Sale,* U.S. Supreme Court affirmed the validity of interdiction and therefore found no violation of the Refugee Convention,[19] Inter-American Commission on Human Rights turned this judgment upside down, thus choosing to go in the opposite direction.[20] Notably, The English Court of Appeal in the *Prague Airport Case* declared *Sale* case to be wrongly decided and lamented that it "certainly offends one's sense of fairness."[21] Though the traditional externalization measures were successfully challenged either legally or by having the recourse to the networks of smugglers instead of relying on the mainstream visa or carrier facilities, it largely contributed to aggravated and yet more sophisticated policymaking in the migration framework. As scholars explain, "by changes in migratory patterns and technologies" and by the legal developments that have taken place on the level of international human rights and migration law,[22] the states tend to demonstrate fascinating creative legal and policy thinking abilities in expanding deterrence policies and in exploring and inventing new diverse ways of eliding international legal responsibility.

The denial of access to the international legal infrastructure was buttressed by the causal chain of numerous additional policy and legal responses aimed at deactivating non-refoulement obligation. The creativeness of their common thought to rephrase Rawls was to undertake the project, the rationale of which lay in having a cooperative venture ensured for the mutual advantage.[23] The cooperativeness of the joint venture includes the implementation of policy and legal action in tandem with the states of origin or that of transit. The outcome that can be dubbed as the mutual advantage of both deterring community and the states of origin or transit is that from the one hand, refugees are deterred from reaching the jurisdictional settings of the deterring community, and from the other hand, the states that contribute to making the project "legally risk free"[24] (for instance) get the development aid in response for the loyalty expressed. Ironically, as Rawls observed "the idea of *reciprocity* lies between the idea of impartiality, which is altruistic (being moved by the *general good*) and the idea of mutual advantage understood as everyone's being advantaged with respect to each person's present or expected future situation as things are."[25] Indeed, the cooperation-based deterrence paradigm takes many forms and variations. Providing their overarching descriptive account by reference to the relevant legal and policy examples taken from the various legal and policy practices of the deterring states goes beyond the confines of the present inquiry. However, still much can be said about their deteriorating effect on non-refoulement obligations. The most classic examples include various sorts of policy manipulations concerning the development aids, visa facilitation, or labor immigration quotas.[26] Other measures are closely associated with the provision of financial resources *per se*, be it in the form of direct funding or indirect financial resources, ensuring

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[14] For a recent statistic over the implementation of carrier sanctions see interesting analysis of Theodore Baird, 'Carrier Sanctions in Europe: A Comparison of Trends in 10 Countries' [2017] *European Journal of Migration and Law* 19, 307–334.
[15] E. Feller, 'Carrier Sanctions and International Law' [1989] *International Journal of Refugee Law* 1, 48-66; R.I.R. Abeyratne, 'Air Carrier Liability and State Responsibility for the Carriage of Inadmissible Persons and Refugees' [1998] *International Journal of Refugee Law* 10, 4, 675–687.
[16] Theodore Baird & Thomas Spijkerboer, 'Carrier Sanctions and the Conflicting Legal Obligations of Carriers: Addressing Human Rights Leakage' [2019] *Amsterdam Law Forum,* 11, 1, 1-16.
[17] *Amuur v. France*, ECtHR, 25 June 1996.
[18] See the facts briefly stated in Christopher M. Owens, 'Examining the Intersection of Refugee Policies and Contemporary Protracted Displacement' [2017] *International Development, Community and Environment (IDCE)* 24.
[19] *Sale v. Haitian Centers Council,* 509 U.S. 155 (1993).
[20] *Haitian Centre For Human Rights and Others v United States of America Report* No 51/96 (1997).
[21] *European Roma Rights Centre and Others v. the Immigration Officer at Prague Airport and the Secretary of State for the Home Department,* [2003] EWCA Civ 666, United Kingdom: Court of Appeal (England and Wales), 20 May 2003, para.34.
[22] Thomas Gammeltoft-Hansen and Nikolas F. Tan (n 1) 33.
[23] John Rawls, *Theory of Justice* (Rev edn, Harvard University Press Cambridge 1971) 4.
[24] Thomas Spijkerboer (n 7) 248.
[25] John Rawls, *Political Liberalism* (Expanded Ed, Columbia University Press 2005) 16-17. Italics is mine.
[26] James C. Hathaway & Thomas Gammeltoft-Hansen, 'Non-Refoulement in a World of Cooperative Deterrence' [2015] Transnat'l L. 53, 2, 251.

the provision of various facilities such as equipment and training for efficient "refugee catching" operations. [27] In some other variations, the migration officials of the destination countries work closely with the authorities of the transit or the state of origin, giving general or precise guidance as to how the operations should be conducted.[28] In contrast, the destination states retain continuous and incessant control over the activities of the partner states. In order to make the containment effective, the policy measures also include setting up asylum application processing facilities in third states thus providing them with necessary infrastructural, medical or other life sustaining facilities.[29] Further, the phenomena of refugee deterring paradigm are exacerbated by abolishing public and private distinction in effect creating the legal landscape where for example, private companies are also involved in enforcing the various migration policies.[30] As observed, "private actors process visa applications, enforce visa requirements as "carriers," and more."[31]

We face an overarching and orchestrated process of outsourcing essential migration enforcement functions to make refugee deterring communities legally untouchable from the perspective of international law. These measures are supported, and their efficacy is indeed buttressed by introducing various legislative enactments such as criminal sanctions on so-called false marriages or the obligation on the part of various financial or administrative stakeholders to check whether the residence permit of the present migrants is clandestine and so forth.[32] Indeed, suppose the asylum seekers happen to be lucky enough to reach the jurisdiction of the refugee deterring community anyhow. In that case, the measures aiming at preventing their non-arrival by introducing the so-called 'safe-third country' notion[33] will direct these people elsewhere with the hope whereby the guarantees of allegedly 'somewhat equivalent'[34] or 'close to equivalent' degree of protection is ensured.[35] As a result, the migrants have naturally directed to the dangerous routes the plight of their shocking the 'conscience of mankind.'[36]

Yet more sophisticated measures rely on so-called contactless control premised upon the controlling the subject of enforcement with zero or close to zero physical control exerted on the intermediary stakeholder aiming at eliding "any jurisdictional link" as a matter of international human rights law.[37] The theory and the practice of 'jurisdictional deterrence paradigms' is the focus of the present inquiry.

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[27] See for example U.S. Department of State, Merida Initiative (https://2009-2017.state.gov/j/inl/merida//index.htm) Last visited 02.06.2021. See Also, Australian Government: Department of foreign Affairs and Trade, 'The Bali Porcess' (https://www.dfat.gov.au/international-relations/themes/people-smuggling-trafficking/Pages/the-bali-process) Last visited 02.06.2021. In European context see most recent undertaking, Academic Network for Legal Studies on Immigration and Asylum in Europe, '*Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic'* 2 Feb 2017.

[28] James C. Hathaway & Thomas Gammeltoft-Hansen (n 26) 251. They refer to "Airline Liason Officers (ALOs) in Bangkok in 1990, and by 2013 had an ALO network of fifteen offices" while "In 2004, the European Union established a network of immigration officers drawn from member states to be posted at airports and border crossing points in key states of origin and transit."

[29] Susan Kneebone, 'Australia as a Powerbroker on Refugee Protection in Southeast Asia: The Relationship with Indonesia' [2017] *Refuge* 33, 1, 29-41. See Also, Amy Nethery & Carly Gordyn, 'Australia–Indonesia cooperation on asylum-seekers: a case of 'incentivised policy transfer' [2014] *Australian Journal of International Affairs,* 68, 2, 177-193. As the authors observe, "in the case study of Australia and Indonesia, the authors argue that the cooperation is best understood as a form of 'incentivised policy transfer', whereby Australia has provided substantial financial and diplomatic incentives to Indonesia to adopt policies consistent with Australia's own."

[30] Cathryn Costello and Itamar Mann (n 28) 316.

[31] Violeta Moreno-Lax, 'Life After Lisbon: EU Asylum Policy as a Factor of Migration Control' in D. Acosta Arcarazo and C. Murphy (eds.), *EU Security and Justice Law After Lisbon and Stockholm* (Hart Publishing, 2014), 146-167

[32] Thomas Spijkerboer (n 7) 218-219.

[33] See article 38 in Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 *On Common Procedures for Granting and Withdrawing International Protection (recast).*

[34] *Ibid.,*

[35] Eleni Karageorgiou Luisa Feline, Freier De Ferrari & Kate Ogg, 'The Evolution of Safe Third Country Law and Practice' [2021] *The Oxford Handbook of International Refugee Law* (Accepted in Press)

[36] incent Chetail 'The Common European Asylum System: Bric-à-brac or System?' in V. Chetail, P. De Bruycker & F. Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Leiden: Brill/Nijhoff, 2016), 3-38

[37] Thomas Gammeltoft-Hansen, 'International Cooperation on Migration Control: Towards a Research Agenda for Refugee Law' [2018] European Journal of Migration and Law 20, 373, 380.

II. Aim and Research Questions

The following inquiry aims to question the normative and legal intelligibility of *any* deterrence measure striving to eclipse the jurisdictional relationship within the individual and the Refugee Deterrent Community. This is realized first and foremost by questioning the theoretical underpinning known as *de jure* rightlessness in international law, whereby through the distribution and the relationship between rights, jurisdiction, and State obligations, the migrants are rendered rightless. Therefore, this inquiry is the theoretical, normative, and legal critique of the phenomenon of rightlessness in its application and figuring in the normative thinking about how migrants are allegedly rightless when trapped in the maritime legal blackholes. Thus, this author takes these two issues as theoretically and normatively interdependent. The inquiry takes the following research questions to approach the issue as demonstrating the falseness of the phenomena of rightlessness and calls for reconceptualizing the normative thinking about deterrence measures attempting to avoid the jurisdictional connection.

1. Is non-refoulement obligation "accepted and recognized" as a peremptory norm of general international law (*jus cogens*), as one from which no derogation is permitted?
2. If yes, What *sui generis* (unique) legal consequences stem from such an acceptance and recognition?

The due account should also be given to the matter that to make the theoretical aims of the inquiry successful, this author provides the legal account of the concept of *jus cogens* norms against the backdrop of which these two research questions shall then be unfolded. Therefore, this account can itself be dubbed as the normatively necessary and constituent framework necessarily attached to the normative and theoretical intelligibility of the research questions provided above.

III. Method and Material

This inquiry is solely based on the doctrinal research method as a systematic and comprehensive means of conducting fruitful legal reasoning. Particularly, through knowledge-constructing sub-method, this inquiry – as part of making its theoretical point – seeks to expose itself not only as of the legal research 'within the law,' but also as the jurisprudential inquiry 'about the law.' This dual approach is justified by referring to vastly theoretical argument of the inquiry.

The relevant materials indispensable for accomplishing the objectives mentioned above include both primary and secondary sources of determining the rules of international law. As usual when utilizing doctrinal research method, within international law, relevant international legal materials, such as the Treaty-Law, Case-law of the various international and regional tribunals – such as ICJ, ECtHR, IACtHR, ICTY, ICTR – analytically and normatively connected to the matter of *jus cogens*, the State jurisdiction, and non-refoulement obligation are employed. References to the practice of various UN Treaty Bodies (HRC, UCNAT, *et al.*) in the form of case law and general comments are invoked where necessary. Furthermore, the work of ILC should be particularly highlighted. The main building block of the present inquiry is the legal doctrine having the utmost paramountcy in providing for the legal account of the concept of *jus cogens* and constructing the legal argument for *sui generis* legal consequences arising from *jus cogens* non-refoulement obligation. The legal doctrine consists of various textbooks and legal articles regarding the matter. Some of the main works utilized throughout the inquiry include Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2008); Robert Kolb, *Peremptory International Law – jus cogens: A General Inventory* (Oxford: Hart Publishing 2015); Thomas Weatherall, *jus cogens: International Law and Social Contract* (CUP 2015); Ulf Linderfalk, *Understanding jus cogens in International Law and International Legal Discourse* (Edward Elgar 2020); Marko Milanovic, *Extraterritorial Application of Human Rights Treaties Law, Principles, and Policy* (OUP 2011); M. Gibney and S. Skogly, *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press, 2010).

IV. Theory

This inquiry provides for the legal account of the concept of *jus cogens* against the backdrop of which the peremptoriness of non-refoulement obligation and the specific interpretive legal consequences arising from it is argued to constitute the immanent legal reality. Throughout the inquiry, it is made abundantly clear that the author doubts the soundness of *pure* consensual and voluntarist accounts of international law in general and particularly opts towards proposing a non-positivist and non-consensual theory of *jus cogens*. As a matter of general jurisprudence and legal theory, the author subscribes to the non-positivist view of the law – the view holding that to identify what makes the propositions of law true or the grounds of law for that matter satisfied, the recourse must be made not only to the social facts and rule-books, but also the morally evaluative facts of the general political morality. This author is influenced by the legal philosophy of Ronald Dworkin, whose works are relied upon in the various parts of the inquiry, especially in the last part of constructing the *sui generis* legal consequences arising from the relevant *jus cogens* norm.

As a matter of moral theory, the author subscribes to the universalist and idealist vision of the moral order and various theories of moral objectivism. This exposition is not unimportant because the author visions the international legal order as the legal system having its unique systematic framework of significant moral thought and is committed to upholding the universal values such as *jus cogens* norms are. To make the value-laden account of the *jus cogens* norms legally intelligible, the author brings the insights from the various legal materials of various International Tribunals and intends to use the latter as comprehensively as to demonstrate the theoretical point the author has in mind. To this effect, the argument for unique legal consequences arising from the relevant *jus cogens* norms is made more powerful and normatively robust by referring to the various writings in the moral, political and legal theory of Immanuel Kant. The author is not unaware of the so-called realist vision of international relations and *realpolitik* considerations of it. The author believes that there is always a political choice to make between competing theoretical paradigms, and this choice is duly made in the Thesis. The author's reliance on these theoretical worldviews is implicit in the inquiry.

V. Central Argument of the Thesis

The central argument of the thesis is twofold. First, the thesis establishes that non-refoulement obligation is *jus cogens* norms. Before establishing the peremptoriness of the given legal norm, the account of the concept of *jus cogens* is proposed within which such elevation occurs. The argument suggests that *jus cogens* non-refoulement obligation complemented with the various conceptual and normative objections undermine the conceptual viability of the phenomena of rightlessness in international law, particularly concerning *jus cogens* non-refoulement obligation. Second, it argues for and proposes *sui generis* interpretive legal consequences – as opposed to another kind of legal consequences – arising from the peremptoriness of non-refoulement obligation. The first and second arguments propose the explication of how the legal relationship between non-refoulement obligation, State jurisdiction, and human rights obligations *is* best construed and as an application of the proposed framework briefly considers *SS et al. v. Italy* pending before the ECtHR.

VI. Contribution to Existing Scholarship

Recent academic articles treat the relationship between State jurisdiction and legal human rights as constitutive of the rightlessness in international law. If there is no State jurisdiction, then there is no human right within the given legal system (ECHR, for example). Consequently, the individual is rendered *de jure* rightless. In the context of extraterritorial deterrence scenarios, by eclipsing the jurisdictional link between the State jurisdiction and the individual the condition of *de jure* rightlessness is reproduced. The fully-fledged argument advanced in this inquiry suggests that at least concerning the non-refoulement obligation, the phenomena of rightlessness as a conceptualization of our normative thinking about how the jurisdiction clauses function and how its relationship with non-refoulement obligation is construed should be abandoned. Instead, it ought to be substituted by the *sui generis* interpretive legal framework as a kind of legal consequences inferential from *jus cogens* non-refoulement obligation proposed in the inquiry.

VII. Terminology

This inquiry uses the term "refugee deterrent community" to denote the totality of the states and the practices involved in undertaking various deterrence measures striving to elide the jurisdictional connection. The terms migrants, asylum-seekers, and the kinds are usually used interchangeably because the purpose of the present inquiry is not to delve into the semantics of the terms. Further, the terms right, human rights, political rights, or legal human claim rights are used interchangeably concerning the specific context. The notion of 'peremptoriness' denotes the *jus cogens* status of the norm unless otherwise can be inferred from the context. Finally, *sui generis* consequences relate to the specific consequences following from the *jus cogens* non-refoulement obligation.

VIII. Delimitations

The thesis does not inquire what the non-refoulement obligation is. It means that inquiry leaves the substantive legal content and the material substance undiscussed. This decision is motivated at least by four reasons. First, the present inquiry is itself the comprehensive exposition of general legal account of *jus cogens* norms, the peremptoriness of non-refoulement obligation and *sui generis* legal consequences that follow from its peremptoriness. Due to the space constraints, examining the actual substance of the given legal norm is omitted. Second, the author assumes that even though precise contours and precise legal boundaries of non-refoulement obligation are exposed to persistent legal disagreement, some core of the notion can on reflection be seen to be shared by the relevant stakeholders. Third, the discussion of the material substance of non-refoulement obligation would merely distract from the crucial point of the thesis – whether the non-refoulement obligation is *jus cogens* norm. As the author argues in Chapter 3, the interpretive divergence on the scope of the given legal norm has no material bearing whether the norm can be qualified as one of *the jus cogens.* This is not to assert that there is no connection whatsoever between the substance of the non-refoulement obligation and its consequent elevation as *jus cogens* norm; instead, there is no conceptually and normatively necessary connection between what the precise and universally accepted understanding of what non-refoulement obligation is and whether the norm in question qualifies as one of the *jus cogens*. Fourth, the thesis is concerned with the deterrence measures and their theoretical underpinnings, which prevent materializing the substance of the given legal norm, whatever its substance is. Therefore, the focus of the thesis is to construe the legal relationship between the State jurisdiction and legal human rights to enable the substance of non-refoulement obligation to flourish regardless of what such legal flourishing entails.

The thesis does not also deal with the political desirability of this author's legal vision. Partly because, as a matter of *policy* considerations, this approach is undesirable. However, the author is guided by the belief that the undesirability of the thing cannot establish its normative unsuitability. To engage in the *policy* discussion, elementary speaking, one would need to provide some reasonable exposition of the relevant cost-benefit analysis of accepting and rejecting the approach thereto developed, something falling beyond the confines of the present inquiry. In any case, the author firmly believes that rights *trump* desirable policy goals in a sense Ronald Dworkin argued long ago. Indeed, human rights are part of what justice requires; "A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust."[1]

On the other hand, it may seem that present inquiry goes beyond its reasonable bounds in discussing and setting the general legal account of the concept of *jus cogens* norms. However, the author believes that he is justified in treating the topic in greater length because the comprehensibility of the central legal argument(s) of the inquiry necessarily depends on the general legal account of the theory of *jus cogens.* This is motivated by many interconnected reasons. First, while international lawyers generally recognize the existence of the *jus cogens* norms, they persistently disagree on what kind of norms they are, how to identify them, and what kind of legal consequences are attached to them. It means that an agreement on the concept is followed by the disagreement about its essential properties – on what makes the theory of *jus cogens* norms the right kind of theory. Therefore, the central argument of the thesis – not

[1] John Rawls, *Theory of Justice* (HUP Revn ed., 1971) 3

backed with the theory of what *jus cogens* norms are – fails and does not make sense. Admittedly, the normativity of the central argument is intelligible if the reader finds my understanding of the concept of *jus cogens* intelligible. Building the central argument without the theory is similar to building the house on the sand near the beach where tsunamis are not infrequent. Thus, while the exposition of theory does not make tsunamis disappear, it makes the house stay on solid grounds. That being said, essential links to why the theory is necessary will be provided where necessary.

IX. Outline

Chapter 1 provides a brief overview of the deterrence measures, emphasizing the one aiming to elide the jurisdictional connection between the State and the individual by concentrating on the post-*Hirsi* developments. Following this exposition, the connection with the phenomena of *de jure* rightlessness is made, and the normative trajectory of how the thesis proceeds are set.

Chapter 2 provides the general legal account of the concept of *jus cogens* norms against the backdrop of which the peremptoriness of non-refoulement obligation and *sui generis* interpretive legal consequences inferential from it is argued. In other words, chapter 2 serves as the legal and normative groundwork, and chapter 3 and chapter 4 must be read in light of the conception of *jus cogens* proposed as expressing what *jus cogens* norms are. The general rationale established in chapter 2 is quintessential for the normative intelligibility of other chapters.

In Chapter 3, it is argued that non-refoulement obligation has entered the domain of *jus cogens*. As the identification method, the chapter follows the method identified in the second chapter as pertinent for identifying the peremptoriness of the given legal norm. To substantiate the claim on the *jus cogens* nature of non-refoulement obligation, the author invokes various normative and legal arguments following the pertinent scheme of identifying *jus cogens* norms. Furthermore, the judicial pronouncements and the scholarly consensus make a case for peremptoriness of non-refoulement obligation even more compelling. However, the scholarly minority can be seen to doubt the peremptoriness of non-refoulement obligation. This inquiry attempts to address the objection bearing in mind the confines of the present thesis.

Chapter 4 is the legal and normative application of the general legal account of the concept of *jus cogens* argued in Chapter 2. It questions the theoretical adequacy of all deterrence measures striving to elide the jurisdictional connection and its normative underpinning of *de jure* rightlessness that explain how the relationship between human rights and the State jurisdiction ought to be conceived. By providing the number of the conceptual and normative objections, the *jus cogens* nature of non-refoulement obligation culminates in undermining the case of *de jure* rightlessness. It is explicated that by consequence, the existence of human rights is the lexically, conceptually, the normatively and legally prior question to whether the individual falls within the State jurisdiction and thus, becomes the first order legal question figuring as the first *sui generis* legal consequence of *jus cogens* nature of the norm. In the meantime, the thesis defends the intelligibility and suitability of *sui generis* interpretive legal consequences instead of other kinds of legal consequences – inferential from *jus cogens* non-refoulement obligation.

Finally, the author argues that interpretive *sui generis* legal consequences amount to the legal framework of our normative thought that reconceptualizes the legal relationship between the State jurisdiction and the existence of human rights. It further insists that in peremptory law of non-refoulement, the truth conditions of the concept of State jurisdiction essentially depend on what makes the grounds of law of *jus cogens* non-refoulement obligation satisfied. That is, no materialized claim to jurisdiction amounts to the derogation from *jus cogens* non-refoulement obligation.

1. Post-*Hirsi* Developments

1.1. Introduction

Numerous scholars made a compelling case that most deterrence measures are undertaken simultaneously in tandem with each other.[1] One particular example worth being inquired about refers to "a Treaty on Friendship, Partnership and Cooperation"[2] signed between Italy and Libya to prevent refugees from Libya to Italy.

According to the agreement, Italy carried out several search and rescue operations and then, upon finding was rescuing these migrants by returning them to Libya. Italy was also responsible for providing funding, equipment, and other material support and training to Libya. This agreement has led to the famous *Hirsi Jama Case.*[3] The case concerned 11 Somali and 13 Eritrean nationals intercepted by the Italian Revenue Police and Coastguard on the high seas. Upon intercepting, they were returning these migrants to Libya. In the famous ruling, the ECtHR affirmed *the Al-Skeini* principle[4] and reasoned that the intercepted migrants were "under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities."[5] It meant that jurisdiction for art.1 ECHR was found to be established. Another important remarque from the ECtHR was to rule that "Italy cannot circumvent its "jurisdiction" under the Convention by describing the events in issue as rescue operations on the high seas."[6] Italy's argument was to argue that the transfer of refugees occurred under the umbrella of the agreement signed with Libya, which the ECtHR dismissed in the following manner: "Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya."[7]

However, the much-celebrated *Hirsi* ruling does not at all answer many essential questions. As observed by Pijnenburg "although the judgment clarifies that the transfer of irregular migrants onto military ships on the high seas triggers Italy's jurisdiction, it does not say whether this is also the case with other forms of interception: what if the Italian vessels had forced the migrant boats to return to Tripoli without transferring the migrants to their own vessels?"[8] Indeed, these are the right questions.

True, the judgment of the ECtHR in *Hirsi* is a step forward. However, is that so? Perhaps, the skeptic might rightly counterargue that *Hirsi's* judgment made Italy and other states from the refugee deterring community comprehend the legal lesson learned. Furthermore, perhaps the political implication resulting from *Hirsi* – if measured in policy terms – is that now the States absorbed *Hirsi Jama's* mistakes from a legal perspective. Consequently, they were encouraged to introduce yet more advanced measures eliding the jurisdictional hurdle altogether in some way or the other. As Mann rightly noted, "precisely when they try the hardest to protect rights beyond territorial borders, courts acquire the most significant role in providing the conditions for the rights' further violation"[9] and that [Hirsi] "contributed to understandings of how to evade judicial review in future cases. By saying that a state must not turn back asylum seekers with boats under their *de jure* or de facto control a court is also inviting such policies, as long as they can be conducted with no such control."[10] The counterargument from the skeptic does not seem to be meritless. Indeed, the Memorandum of Understanding on Cooperation on Development, Combatting Illegal Immigration, Human Trafficking, and Smuggling, and Strengthening Border Security agreed upon between Italy and Libya[11] constituted new form of the contactless control. It reaffirmed the

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[1] James C. Hathaway & Thomas Gammeltoft-Hansen, 'Non-Refoulement in a World of Cooperative Deterrence' [2015] Transnat'l L. 53, 2, 250.

[2] For the overview of the content see, Natalino Ronzitti, 'The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?' [2009] *Bulletin of Italian Politics,* 1, 1, 125-133

[3] *Hirsi Jamaa and Others v. Italy,* ECtHR (GC), Application no. 27765/09, 23 February 2012.

[4] Marko Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' [2012] *The European Journal of International Law,* 12, 1, 122-139. Al-skeini principle refers to the personal notion of the extraterritorial jurisdiction exercised outside the state territory.

[5] *Hirsi Jamaa and Others v. Italy,* ECtHR [GC], Application no. 27765/09, 23 February 2012.

[6] *Hirsi* (n 5) para.79.

[7] *Hirsi* (n 5) para.129.

[8] Annick Pijnenburg, 'From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?' [2018] *European Journal of Migration and Law* 20, 396, 402.

[9] Itamar Mann, 'Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993–2013' [2013] 54, 2, 316 369

[10] Mann (n 9) 369.

[11] See., Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic. (https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf) Accessed 9 Fabruary 2021.

commitments of the previous agreement – particularly article 19 thereof – setting the obligation of preventing illegal migration flows.[12] The content of the treaty was seemingly usual. On the one hand, Italy provides the material support for development programs coupled with the technological and technical support necessary for Libyan authorities for successfully conducting search and rescue operations. In contrast, on the other hand, Libya is obliged to undertake search and rescue operations to ensure 'the physical integrity of the migrants.[13] The involvement on the part of the EU in the process of implementing these initiatives takes place through the backdoor of the EU Border Assistance Mission to Libya (EUBAM).[14]

In order to see how the legal lessons learned from the *Hirsi* ruling were absorbed, consider a very important remarque from Pijnenburg.: "In summer 2018, Libya declared its SAR zone and Italy handed over SAR responsibility to Libya; Italy and Libya reactivated the 2008 Friendship Treaty; and Italy provided the LCG with more vessels and other equipment. Italy also closed its ports to rescued migrants in June 2018 and allegedly pressured Panama into deflagging the last NGO vessel still active in the Central Mediterranean in September 2018."[15] The doubt is that Italy is trying to prevent the migrants from reaching the international water altogether and seeks to prevent the rescue "by European vessels, which disembark rescued migrants in Europe rather than Libya."[16] Indeed, these policies and, in particular, Italy-Libya MoU are further endorsed within the Malta Declaration signed on 3 February 2017 through which the EU and its member states undertake to provide the financial resources, training, and equipment to Libyan Coastguard.[17] The strengthening of the Libyan Coastguard is also supported through the EUNAVFOR MED[18] and EU emergency trust fund for Africa,[19] providing the Libyan authorities with the equipment and other related resources.[20] The joint venture did not survive unchallenged. First and foremost, UN Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, Nils Melzer[21] submitted the report before the CAT concerning Italy's responsibility for the torture, inhuman, and other degrading treatments of migrants returned to Libya, arguing that such practices stand in contravention with and are in the breach of international human rights law.[22] Further, this submission constituted the document forming the basis for the communication to the Office of the Prosecutor of the International Criminal Court in conformity with Article 15 of the Rome Statute[23] to launch proceedings against the relevant EU perpetrators alleging the commission of the crime against humanity – in contravention with the principles of moral decency and universal humanity – against the migrants.

[12] Natalino Ronzitti (n 2)
[13] Anja Palm, 'The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe?' [2017] published in *EUMigrationLawBlog* (https://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/) Accessed 9 February 2021
[14] EU Border Assistance Mission in Libya (EUBAM) (https://eeas.europa.eu/csdp-missions-operations/eubam-libya_en)
[15] Pijnenburg (n 8) 404
[16] Pijnenburg (n 8) 311
[17] European Union: Council of the European Union, *Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route,* 3 February 2017.
[18] EUNAVFOR MED OPERATION SOPHIA (https://www.operationsophia.eu/) Accessed 9 February 2021
[19] International Trade Center, The EU Emergency Trust Fund for Africa accessible at (https://www.intracen.org/yep/about-trust-fund/) Accessed 9 February 2021
[20] IOM UN Migration, European Commission Factsheet on the EU Emergency Trust Fund for Africa (EUTF) accessible at (https://www.iom.int/iscm/european-commission-factsheet-eu-emergency-trust-fund-africa-eutf) Accessed 9 February 2021
[21] In the following blogs the authors square the findings of Nils Melzer with the prospects of investigating the crime against humanity committed against migrants in Libya. Itamar Mann, Violeta Moreno-Lax & Omer Shatz, 'Time to Investigate European Agents for Crimes against Migrants in Libya' [2018] *EJIL:Talk Blog of The European Journal of International Law* accessible at (https://www.ejiltalk.org/time-to-investigate-european-agents-for-crimes-against-migrants-in-libya/) Accessed 9 February 2021
[22] Nils Melzer, Information Submitted under Article 20 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concerning Italy's responsibility for the torture of migrants pulled back to Libya. Accessible at (https://centre-csdm.org/wp-content/uploads/2020/07/CAT-Art.-20-Inquiry-CSDM-01.07.2020.pdf) Accessed 9 February 2021.
[23] Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to the Article 15 of the Rome Statute: EU Migration Policies in the Central Mediterranean and Libya (2014-2019), Accessible at (https://www.statewatch.org/media/documents/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf) Accessed 9 February 2021

Agnes Callamard, the UN Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions – in her 2017 report[24] also criticized Italy-Libya migratory practices.[25] Back in 2011, the ICC Office of the Prosecutor of the International Criminal Court, through the referral of the U.N. Security Council[26] launched its investigation with respect to the situation prevailing in Libya.[27] The investigations are still ongoing.[28] Further, the case of *SS et al. v Italy*[29] is pending before the ECtHR.

The case before the ECtHR is submitted in May 2018 by the Global Legal Action Network (GLAN) and the Association for Juridical Studies on Immigration (ASGI), with support provided from the Italian non-profit ARCI and Yale Law School's Lowenstein International Human Rights Clinic.[30] In May 2019, Italy was notified that the case is pending, and eight interventions inter allia by the Commissioner for Human Rights of the Council of Europe argued in support of the case. It is argued that:

> "The application is based on an incident in which the Italian Navy maintained command and control throughout an incident at sea in which the Libyan Coast Guard on board the Ras Jadir (a patrol vessel donated by Italy under the terms of the MoU) interfered with the efforts of a humanitarian SAR ship, Sea-Watch 3, to rescue 130 migrants from a sinking dinghy, an action that resulted in the death of at least 20 of them. The interference by the Libyan vessel was partly coordinated from Rome by the Maritime Rescue and Coordination Centre (MRCC) which is managed by the Italian Coat Guard, and by an Italian navy ship, part of the Mare Sicuro operation which has operated in Libyan territorial waters facilitating interceptions. After the Libyan Coast Guard 'pulled back' the survivors to Libya, they endured detention in inhumane conditions, beatings, extortion, starvation, and rape. Two of the survivors were subsequently 'sold' and tortured with electrocution."[31]

It is evident is that these reconfigured deterrence measures, in any of their plausible manifestations, touches upon the very heart of what is perceived to be the flagrant structural vulnerability of international human rights law taken as a whole in its general totality. In essence, the structural arrangement of the functioning vehicle embedded in the international human rights law's quintessence makes the strings of things operate in the way it does. The emergence of structural incompleteness results from an incoherence of the (meta)structural underpinnings ensuring the system's operability. These (meta)structural underpinnings perfectly intersect with the metaphysical relation between the law dominantly conceptualized as the social construction[32] and the 'social cosmos,'[33] which we call the complex natural arrangement of life as things usually stand. Therefore, the legal 'matrix'[34] at which point the very framework responsible for the conceptual consistency in the operation of international human rights law, is grounded, in the final analysis, finds its roots in the comprehending of the complete incongruence between the perfect order of life the trajectory of which is never fully comprehensible and on the contrary

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[24] Report of the Special Rapporteur (Agness Callamard) of the Human Rights Council on extrajudicial, summary or arbitrary executions, *Unlawful death of refugees and migrants*, 15 August 2017. Accessible at (https://www.statewatch.org/media/documents/news/2017/sep/un-report-unlawful-refugees-and-migrants.pdf)

[25] Itamar Mann, Violeta Moreno-Lax & Omer Shatz, 'Time to Investigate European Agents for Crimes against Migrants in Libya' [2018] *EJIL:Talk Blog of The European Journal of International Law* accessible at (https://www.ejiltalk.org/time-to-investigate-european-agents-for-crimes-against-migrants-in-libya/) Accessed 9 February 2021

[26] *Ibid.,*

[27] Situation referred to the ICC by the United Nations Security Council: February 2011, https://www.icc-cpi.int/libya

[28] Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011) https://www.icc-cpi.int/Pages/item.aspx?name=otp_lib_unsc

[29] ECtHR, Factsheet on Collective expulsions of aliens, *S.S. and Others v. Italy (no. 21660/18) Application communicated to the Italian Government on 26 June 2019,* July 2020. Accessible at (https://www.echr.coe.int/Documents/FS_Collective_expulsions_ENG.pdf) Accessed 9 February 2021

[30] Global Legal Action Network, Italy's Coordination of Libyan Coast Guard, https://www.glanlaw.org/ss-case

[31] Global Legal Action Network (GLAN), *Association for Juridical Studies on Immigration (ASGI) and Italian Recreational and Cultural Association (ARCI) Complaint to the European Court of Auditors Concerning the Mismanagement of EU Funds by the EU Trust Fund for Africa's 'Support to Integrated Border and Migration Management in Libya' Programme,* 32. Accessible at (https://oi-files-d8-prod.s3.eu-west-2.amazonaws.com/s3fs-public/2020-04/GLAN%20ASGI%20ARCI%20ECA%20Libya%20complaint%20%26%20expert%20opinion%20EMBARGOED.pdf) Accessed 9 February 2021. See Also, ECRE, *Case against Italy before the European Court of Human Rights will raise issue of cooperation with Libyan Coast Guard* [2018] Accessed at (https://www.ecre.org/case-against-italy-before-the-european-court-of-human-rights-will-raise-issue-of-cooperation-with-libyan-coast-guard/) Accessed 9 February 2021.

[32] H.L.A. Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994)

[33] Valentin Jeutner, 'Legal Dilemma' in Jean d'Aspremont & Sahib Singh (eds), *Fundamental Concepts for International Law: The Construction of a Discipline* (Edward Elgar 2018) 607, 623.

[34] *Ibid.,*

is incompletely appraised by the imperfect modalities of the law.[35] Therefore, an equilibrium between them is not attainable; an imperfect is always in the pursuance of the perfect. Thus, rationalizing these stipulations in conjunction with the structural apparatus of international human rights law clarifies why the current system is what it is. Indeed, these deterrence measures undertaken by the global world in pursuance of the migratory policies, all things considered, would in effect appear as mere childish whim if the structural vehicle international human rights law embodies has not allowed it. In other words, any attempt would be of mere futility if and only if the international human rights law did not conceptualize its order of things in a way it does. The rationale of Arendt's claim – of the rights to have the rights to be a member of the political community – plagues the international legal order dealing with human rights.[36]

Interaction of international legal modalities distribute the rights and duties in a way as to leave the social cosmos and the moral space projected therein wholly untouchable from the legal realm. These deficiencies exist on the (meta)structural level and create an inherent vulnerability resulting from which the whole system suffers to respond to the pressing issues of the social reality. Shortly, no deterrence paradigm could ever manage to survive legally untouched if it were not part and parcel of the even larger paradigm of the rightlessness the current structure of international legal order generates. Taken the matter at the highest level of abstraction, the phenomena of rightlessness make the deterrence paradigm and its various reflections legally possible. That is, the source wherefrom deterrence policy exerts its unjust political authority, and consequent legal coercion over the plight of the refugees stems from the realm of deficiencies characterizing and permeating the whole of the international legal order of human rights. Deterrence paradigms conceived of in this manner are nothing but the creative byproducts of a more general template of the rightlessness. They exploit international human rights order on every conceivable level of philosophical analysis. On the legal level *strictu sensu*, the relationship between the rights, obligations, and jurisdiction is abused. On the moral and legal level, the source of the human rights – the question of where they are coming from – is consequently erroneously conceptualized. On the metaphysical level, a perfect inability of the law to follow the perfect constellation of things in life is misused in a crudely utilitarian manner. Therefore, through the simultaneous exploitation of universal human rights on legal, moral, and metaphysical levels by the deterrence paradigms, the phenomena of rightlessness emerge.

Indeed, it would be a futile attempt from us to fight the symptoms – deterrence paradigms – without necessarily challenging, contesting, and debunking its constitutive illness – the more general realm of rightlessness.[37] The entire legal landscape of the current migratory practices cannot be coherently conceived without first conceptualizing and understanding the rightlessness. However, a fully-fledged legal critique of the deterrence paradigm will suffer from intellectual inadequacies if the phenomena of rightlessness will not be taken very seriously or sufficiently appreciated otherwise. Therefore, it is the phenomena of the rightlessness to which now I turn.

1.2. The Phenomena of Rightlessness

Within the confines of international human rights law, to conceive of the phenomena of rightlessness, one needs to stick with the strictly legal sphere,[38] though one might be skeptical about what 'strictly legal' means.[39] Indeed, as a matter of ordinary moral reasoning[40] and subject to the laws of humanity,[41] individual human beings always have moral human rights because they belong to the dominion of common

[35] The point noted by Bassiouni relates to my point: "Positivists espouse the view that no gaps or ambiguities exist in international customs and conventions because the only international law that exists is that which has been stated in positive terms. That which has not been established in positive terms is outside the scope of the law." However, for the sake of justice it needs to be mentioned that as matter of legal philosophy positivists don't usually think that gaps in law don't exist. M. Cherif Bassiouni, 'A Functional Approach to "General Principles of International Law' [1990] 11 Mich. J. Int'l L. 768 792.

[36] See Chapter 9 in Hannah Arendt, The Origins of Totalitarianism (New York: Harcourt Brace Jovanovich 1973)

[37] Kennedy insists that the human rights system when dealing with the problem cures the symptoms, not the illness. David Kennedy, 'International Human Rights Movement: Part of the Problem?' [2002] 15 Harv Hum Rts J 101. David Kennedy, 'The International Human Rights Regime: Still Part of the Problem?' In Rob Dickinson, Elena Katselli, Colin Murray, Ole W. Pedersen (eds), *Examining Critical Perspective on Human Rights* (Cambridge University Press 2012) 19-34.

[38] Marmor, Andrei, "The Pure Theory of Law", *The Stanford Encyclopedia of Philosophy* (Spring 2016 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/spr2016/entries/lawphil-theory/>.

[39] See parts I, II, V in Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1995)

[40] John Tasioulas, 'The Moral Reality of Human Rights' in Thomas Pogge (ed.), *Freedom from Poverty as a Human Right* (Oxford University Press 2007) 75–102; John Tasioulas, 'On the Nature of Human Rights', in Gerhard Ernst and Jan-Christoph Heilinger (eds.), *The Philosophy of Human Rights* (Berlin: de Gruyter, 2012), 17–60.

[41] Julius Ebbinghaus, 'The Law of Humanity and the Limits of State Power' [1950] *The Philosophical Quarterly* 3, 10, 14-22.

human family.[42] However, the phenomena of rightlessness relate to legal human rights as a matter of pure *lex lata*. More precisely, the matter of one's having legal human rights should be understood as the matter of one's having legal human claim rights.[43] On the mainstream account, To have the legal rights granted within the ambit of international human rights law means to have the ability to claim that these rights thus granted ought to be enforced either through the claim that the states who are duty-bound should give the flesh to the right or through the court of law which has the final say over the matter whether the state which was duty-bound to enforce the right did enforce the right. Enforceability of human rights should be understood in a broad sense by referring to the classical typology of human rights obligations requiring from the subject of law to respect, protect and fulfill human rights.[44] Therefore, legal human rights articulated as the legal human claim rights refer to the enforceability of human rights, making the obligation to respect, protect and fulfill the human rights claimable in the focal sense of international human rights law. The analysis so far suggests that if legal human rights are claimable – that is, the tripartite classification of the obligations are assigned to the duty bearer – then the legal human claim rights are attached to the right holder individual. The crucial question that remains to be answered is what the legal properties of the structure of international legal human rights argument that makes the right claimable are? It is the most straightforward question that anyone who has glanced through the cursory reading in the mainstream textbook of international human rights law can answer. The classical logic of international human rights law, its architectural framework perceived in its totality, is that the subjects of law, that is, the states, are assigned the duty if and only if they exercise the jurisdiction within the meaning of the particular human rights treaties. The legal human rights articulated as legal human claim rights become claimable upon the state's exercise of the jurisdiction. Under the article 1 ECHR, the obligation to respect human rights arises whence "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."[45] According to article 2 ICCPR, "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."[46] Within the ACHR an article 1 prescribes the obligation to respect the rights in the following manner: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms."[47]

Put it now upside down. Suppose the states of the affair are arranged in a way whereby the state does not exercise the jurisdiction. In that case, the state cannot reasonably be expected to be assigned any particular conceptual configuration of the duty – be it the obligation to respect, protect or fulfill – and if the later type of the duty cannot be imposed upon the state, ipso *factum* no legal claim human rights can be attached to the individual human being. In this way, the person is rendered merely rightless. Smantha Besson aptly put: "Without jurisdiction, there are no human rights applicable and hence no duties, and there can be no acts or omissions that would violate those duties that can be attributed to a state and a fortiori no potential responsibility of the state for violating those duties later on."[48] The paradigm of rightlessness is explained as the product of the (meta)structural underpinnings engrained in the functioning modicum of international human rights law. It is the status quo.

[42] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: https://www.refworld.org/docid/3ae6b3712c.html [accessed 10 February 2021]
[43] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' [1913] *Yale Law Journal* 16, 30.
[44] UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: https://www.refworld.org/docid/478b26ae2.html [accessed 10 February 2021]
[45] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: https://www.refworld.org/docid/3ae6b3b04.html [accessed 10 February 2021]
[46] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: https://www.refworld.org/docid/3ae6b3aa0.html [accessed 10 February 2021]
[47] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969, available at: https://www.refworld.org/docid/3ae6b36510.html [accessed 10 February 2021]
[48] Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' [2012] *Leiden Journal of International Law* 25, 857, 868.

1.3. Migration Legal Black Holes *qua* Rightlessness

Against this background, it is easy to capture how the migrants are rendered rightless as a result of their falling within the confines of what is dubbed as the maritime legal black hole.[49] Maritime legal blackholes are a physical emanation of the rightlessness reflecting the structural deficiency of the apparatus responsible for the functioning international human rights law at its very core. Itamar Mann coins the discipline of the legal blackholes contextualized within the ambit of the migrant's affair trapped in the maritime distress. The example particularly interesting for our purposes he used to shed light on the migration legal blackholes concerns above mentioned ECtHR *Hirsi* ruling.[50] In that case, the ECtHR found the jurisdiction exercised by the Italian agents because the migrant boat came under the control of Italian authorities within some plausibly articulated conception of jurisdiction. As the ECtHR ruled, the intercepted migrants were "under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities."[51] Had the jurisdiction not been triggered, the migrants trapped in the black hole would be rendered merely rightless *per Hirsi*. However, as has been noted, the deterrence policies "all exploit areas where the applicability or division of legal norms is contested or institutional invisibility or distancing hamper the legal process… it could be seen as a reaction to the impositions and advances made by international human rights law and institutions in the first place."[52] Therefore, the "violence beyond the jurisdiction of any authority is what a maritime legal black hole is about."[53] This is not to suggest that the maritime legal blackholes are unfortunate byproducts of the isolated acts or omissions of the institutions; instead, the phenomena of the rightlessness of which maritime legal black hole is nothing but just one vivid manifestation is the deliberate and an inescapable consequence of the cooperative relationship between the states of things as a matter of international human rights law.[54] Mann suggests that the gap is "deep and structural."[55]

It is suggested that the migrants losing their lives do not – as the order of things stands – have enforceable legal human claim rights that make their moral interest *de jure* claimable. The conceptual vehicle ensuring the coordination of and the points of intersection between rights and obligations in human rights law makes them *de jure* rightless. Indeed, their deathbed at the bottom of the nowhere "are consequences of an international legal architecture founded upon sovereignty and human rights. They stem from the way sovereignty and human rights mutually construct jurisdiction, posit jurisdictional limitations and delineate areas where no such jurisdiction exists."[56] They are qualitatively different in their design and "are unique in that they do not result from violations of international law but, rather, generate deaths that stem from the structure of international law."[57] Again, "because of the law's allocation of duties according to jurisdictional limitations, the problem of mass drowning in the Mediterranean presents itself as such a problem of *de jure* rightlessness."[58] The deterrence paradigm prevalent in the refugee context is a straightforward emanation, and practical continuation of the far more general problem of the current rightlessness system of legal order embodies. Therefore, if one wishes to deal with the horrendous migration deterrence practice aiming at eclipsing any jurisdictional link whatsoever, if consistently pursued, one has to mount the attack against its very foundations. It is the foundations of the concept that makes the conclusion of the conception legally possible—this author attempts in the present inquiry to demonstrate such a venture.[59]

[49] Itamar Mann, 'Maritime Legal Black Holes: Migration and Rightlessness in International Law' [2018] *The European Journal of International Law* 29, 2, 347–372.
[50] *Hirsi* (n 49)
[51] *Hirsi* (n 49)
[52] Thomas Gammeltoft-Hansen & Jens Vedsted-Hansen, 'Introduction: Human Rights in an Age of International Cooperation' in Gammeltoft-Hansen and Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Routledge 2017) 6.
[53] Itamar Mann (n 49) 357
[54] Thomas Gammeltoft-Hansen & Jens Vedsted-Hansen (n 52) 1
[55] Itamar Mann (n 49) 357
[56] Itamar Mann (n 49) 365
[57] Itamar Mann (n 49) 365
[58] Itamar Mann, 'The Right to Perform Rescue at Sea: Jurisprudence and Drowning' [2020] *German Law Journal* 21, 598, 602
[59] See the Last Chapter

1.4. How to Proceed

Needless to say, that the current state of affairs about the migration deterrence paradigm is both legally complex and intellectually nuanced. How to account for the solution capable of dealing with all plots and twists of these states of things does not seem clear. Shortly, this author is unaware of whether there is something like the magical legal sword in the current international legal arsenal to cut the Gordian Knot altogether. Nor this author naively believes that without having a sophisticated political will as a matter of more general theory about how to conceive of an equilibrium between the conflicting rationales underpinning the global migration infrastructure, any type of distanced and far-reaching legal articulation as to how to destroy the Fortress will be of any more use, than just doing the master thesis.

However, this author does take the words of Philip Allott extremely seriously that "the highest professional duty now rests on international lawyers to exert eternal vigilance on behalf of the people, because lawyers have power over the law, the only thing which can have power over the government."[60] This author deems that there is something more to non-refoulement obligation than is currently appreciated. It does not lie directly on the surface to notice with the naked eye, but nor reaching the Archimedean point is necessarily required. This author believes that projecting the matters through the lenses of human rights, universal humanism, and moral and political idealism shall be more than sufficient. If the system of international human rights law morally claims itself to be the legal system at all,[61] the moral energy of non-refoulement obligation, it follows, is embedded in the deeper layers of that legal system. The only thing left for now is to see that layer. However, it is easier said than done. This means that the moral principle that underpins non-refoulement obligation does not disappear in the void when confronted with what is known as the phenomena of rightlessness. The states deliberately exploit the latter to pursue their Faustian deterrence measures[62] when attempting to elide any jurisdictional link between the political entity and the migrant's non-refoulement legal human claim right.

The skeptic might say that the attempt is futile from the outset since, in the previous discussions, it was admitted that the phenomena of rightlessness naturally follows from the (meta)structure of international human rights law having the natural consequence emanation of which constitute deterrence measures described so far. Anything I will be saying to mount the existing order is just the quibble about what it ought to be and not what it is. This objection is logical but too quick to be plausible. For there are many different legal pictures of what is and what I offer, I hasten to add is the best legal account of what is.

This author offers the account through the moral lenses of which the phenomena of rightlessness turn out to be wrong, implausible, and conceptually incoherent. Any consequent attempt of any deterrence measure to eclipse the jurisdictional connection between the universal subject of law and the political entity is just futile. The states posit rules, but states do not have the moral competence of setting the rules about how to play well. This is so since human rights set the latter category over the configuration of which states have no moral dominion whatsoever. True, if one does not admire the states of things, then one must demonstrate what his or her model of better states of things is. Therefore, this author proposes the present thesis to go along the lines of these two following research questions:

1. Is non-refoulement obligation "accepted and recognized" as a peremptory norm of general international law (*jus cogens*), as one from which no derogation is permitted?
2. If yes, What *sui generis* (unique) legal consequences stem from such an acceptance and recognition?

The due account should also be given to the matter that to make the theoretical aims of the inquiry successful, this author provides the legal account of the concept of *jus cogens* norms against the backdrop of which these two research questions shall then be unfolded. Therefore, this account can itself be dubbed as the normatively necessary and constituent framework necessarily attached to the normative and theoretical intelligibility of the research questions provided above.

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[60] Philip Allott, 'State Responsibility and the Unmaking of International Law' (1988) 29 Harv Int'l L J 1 25
[61] H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press 1961) 213-232; Lon L. Fuller, *The Morality of Law* (Yale University Press 1964)
[62] Allott (n 60) 25

2. Legal Account of the Concept of *jus cogens*

2.1. Introduction

This inquiry attempts to provide an overarching legal argument of ethico-juridical nature that intends to conceptually and normatively challenge the phenomenon of rightlessness and any consequent deterrence measure purposefully striving to elide any jurisdictional link between the deterring state(s) and the migrant's alleged legal-claim right(s) arising from the principle of non-refoulement. One does not need to hesitate to freely acknowledge that legal states of affair the phenomena of rightlessness is all about naturally follows from the current normative operability of the human rights system. It is argued that the phenomenon of *de jure* rightlessness is what follows from the operation of the jurisdiction clauses in human rights law. In other words, *de jure* rightlessness adequately captures legal consequences derived from the way the jurisdiction clauses function. However, it would be entirely parochial to contend that the latter constitutes the appropriate legal appraisal of how the jurisdiction clauses function because competing normative and legal arguments might provide a better case of what it is and, therefore, undermine the conceptual coherence of the dominant approach endorsed so far. Therefore, it is more than necessary to subject the phenomena of rightlessness to the scrutiny to demonstrate where it errs and examine closely whether other arguments provide the competing legal account this study intends to establish as a matter of law.

Before turning to the discussion, two rather superficial objections need to be addressed. The skeptic might ponder what the reason the author resorted to the *jus cogens* argumentative process is? In other words, the question seeks to inquire whether the invocation of *jus cogens* is overzealous?[1] Professor Christian Tomuschat put it: "*Jus cogens* should be reserved as an instrument to address borderline situations where law and morals join to repulse attacks against the foundational bases of the international legal order as the fundamental legal device designed to ensure a dignified life for all human beings."[2] That laws and morals are conjoined, if they ever were conceptually separate, in condemning the deteriorating substratum of non-refoulement obligation and in affirming that such practices "shock the conscience of humanity"[3] is beyond any meaningful dispute. The skeptic might next ponder whether the invocation of *jus cogens* merely seeks to exploit and corrupt the law in terms of employing *jus cogens* simply as a "magic"[4] club to sweep away everything on its way? Or as Ulf Linderfalk would put it "utterers resort to *jus cogens* because it potentially causes addressees to misunderstand the true nature of any utterer's argument"?[5] True, this author makes an idealistic and utopist case for non-refoulement obligation, but this argument's nature is still legal. Conceding that while "I belong to that group of 'victims' of the charming power …. of *jus cogens*,"[6] "I am not an unreflecting victim."[7] The threshold set for measuring the argumentative rigor of the legal claims set the strict boundaries for the present author and serve as the gentle reminder that irrespective of the potentially unlimited power of *jus cogens*, it is of paramount importance not to move beyond the juristic logic relative to what one's juristic logic may imply.

This study demonstrates that the phenomenon of rightlessness as it figures in current deterrence measures in the context of the non-refoulement principle are committed to and rest on the normative and conceptual fallacy. It misconceives the normative properties of human rights in general and the relationship between human rights, duties, and jurisdiction in particular. This misconception stems from the inadequate appreciation of the current state of international law relative to non-refoulement obligation. The reason behind the existence of the phenomena of rightlessness and the maritime legal blackholes derived by implication is because non-refoulement obligation is not accorded its due legal status and

[1]Indeed, the argument of *jus cogens* is not yet invoked, but the invocation must be understood as inquiring what the reason the author decided to base his case on non-refoulement obligation on *jus cogens* considerations is.
[2] *Christian Tomuschat, 'The Security Council and jus cogens' in Enzo Cannizzaro (eds.). The Present and Future of jus cogens (Rome: Sapienza Università Editrice 2015) 33*
[3] M. Cherif Bassiouni, 'International Crimes: "*jus cogens*" and "Obligatio Erga Omnes"' [1996] *Law and Contemporary Problems* 59, 4, 69
[4] Andrea Bianchi, 'Human Rights and the Magic of *jus cogens*' [2008] *EJIL* 19, 3, 491-508
[5] Ulf Linderfalk, 'All the things that you can do with *jus cogens*. A pragmatic Approach to Legal Language' [2013] *German Yearbook of International Law* 56, 368
[6] Hélène Ruiz Fabri, 'Enhancing the Rhetoric of *jus cogens*' [2012] *EJIL* 23, 4, 1050
[7] *Ibid.,*

effective legal consequences as should emanate from such accordance. These misconceptions, this author humbly submits, if not disappear altogether, are refuted when the non-refoulement obligation is comprehended from the normative standpoint that international legal order currently reflects as a matter of *lex lata.*

The first objective of the present inquiry is to examine the current legal status of the non-refoulement obligation relative to the current stage of development of international law. It argues that non-refoulement obligation is the norm of general international law, "which is accepted and recognized by the international community as a whole as the one from which no derogation is permitted."[8] In other words, the non-refoulement obligation is the conspicuous example of the norm of *jus cogens* enjoying the highest axiomatic standing among other norms of international law. The second objective of the present inquiry is to argue for the specific legal consequence(s) *sui generis* for *jus cogens* non-refoulement obligation. In the second part of the argument, the author shall provide an account of the legal consequences stemming from the normative status of *jus cogens* non-refoulement obligation. By arguing for and establishing the specific legal consequences mentioned above and exposing the phenomena of rightlessness and jurisdiction-eclipsing policies at the jurisprudential apex of the international legal and philosophical thought, the final chains of arguments will bring to attention the following issues. What kind of normative and conceptual fallacies the phenomena of rightlessness engage? To what extent does an ordinary sequential string between human rights, obligations, and jurisdiction be altered? To what extent the specific consequences emanating from the *jus cogens* non-refoulement obligation structurally impact the current conception of jurisdiction as it figures in the current human rights framework? These questions require longer theoretical treatment and will not be pursued here.

2.2. A Framework of the Inquiry

What will be pursued here, however, is the first research question establishing the *jus cogens* status for non-refoulement obligation. Indeed, it is senseless to argue for the specific legal consequences following from the *jus cogens* non-refoulement obligation, if such legal status itself, will not be convincingly demonstrated to exist. Therefore, at face-value successful establishment of the *jus cogens* status for non-refoulement obligation is the first normative underpinning and therefore, the first building block informing the sophisticated normative argument for *sui generis* legal consequences briefly mentioned above. However, mere inquiry into whether the truth conditions for the norm's inclusion into the realm of the *jus cogens* norms has been obtained, does not provide the adequate normative underpinning to grasp the very quintessence of the specific legal consequences following from such inclusion. Neither every conception of the concept of *jus cogens* is capable of serving as the proper basis for establishing *sui generis* legal consequences, nor every manifestation of *jus cogens* are theoretically appealing. Shortly, what *jus cogens* norms really are and what legal consequences follow from them constitute one of the controversial matters of the international legal thought.[9]

Therefore, to provide an appropriate substance for the norm being elevated to the status of *jus cogens*, this author will attempt to provide a controversial, but an overarching legal account of the conception of *jus cogens* itself. The legal account of the conception of *jus cogens* and conceptually connected questions about its constitutive foundations, normative features, and legal peculiarities inform and substantiate the final argumentative claims concerning the specific legal consequences following from *jus cogens* non-refoulement obligation. It means that they have necessary conceptual connection and normative interconnectedness. In effect, without venturing into the inquiry noted above, the normative intelligibility of the *sui generis* legal consequences this author argues to follow from *jus cogens* non-refoulement obligation as a matter of international law does not make sense or at worse seem nonsensical. This author

[8] See., Art. 53 in United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331

[9] See among others, Christos L. Rozakis, *The Concept of jus cogens in the Law of Treaties* (North-Holland Pub. Co. 1976); Lauri Antero Hannikainen, *Peremptory Norm (jus cogens) in International Law - Historical Development, Criteria, Present Status* (Finnish Lawyers' Publishing Company 1988); Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2008); Robert Kolb, *Peremptory International Law – jus cogens: A General Inventory* (Oxford: Hart Publishing 2015); Thomas Weatherall, *jus cogens: International Law and Social Contract* (CUP 2015); Daniel Costelloe, *Legal Consequences of Peremptory Norms in International Law* (CUP 2017); Ulf Linderfalk, *Understanding jus cogens in International Law and International Legal Discourse* (Edward Elgar 2020)

believes that the account provided below serves as the proper basis for accounting for the final interpretive claim in terms of specific legal consequences and reveals a more general crux of *jus cogens* themselves as these norms tend to shape, configure, impact or influence international legal order. That being uttered, in this chapter, first, the legal account of *jus cogens* will be provided; then, the case for non-refoulement obligation's being the *jus cogens* norm will be established. The final chapter will be argued based on and be grounded in the argumentative claims made in this chapter.[10] In this chapter, to enable the reader to understand the reasons for providing for the general legal account of the concept of *jus cogens*, the connection between the latter and the legal arguments this author provides will be outlined.

In the conceptual universe of *jus cogens* non-refoulement obligation, the general legal account of the concept of *jus cogens* helps grasp the intelligibility of kind of sets of legal propositions together, making up the whole legal argument.

The legal account of *jus cogens* consists of providing its normative grounds and theoretical underpinnings, essential properties inherent in *jus cogens*, and the methods of their identification. Construing each of these aspects in the way this author intends has a conceptual and normative argumentative connection with the general doctrine of *jus cogens* non-refoulement obligation.

Positing the method of identification *jus cogens* norms is central to the first research question inquiring whether the non-refoulement obligation entered the realm of *jus cogens.* There is a multiplicity of doctrinal conceptualizations how the norm is vested with the *jus cogens* status, such as the method grounded in the customary law analysis, narrow method of custom-generation, independent source of *jus cogens,* and some also argue that treaty creating processes are adequate for generating *jus cogens* norms. Without positing the identifying criteria, the reader would have a hard time second-guessing which methodological avenue the author resorted to arguing that non-refoulement obligation is *jus cogens.* This is exacerbated by the fact that some methodological avenues are unsound and do not conform to the underlying nature of *jus cogens* norms. The author's choice is not neutral and opts for cumulative existence of the normative-legal argument inquiring the theoretical underpinnings of the given legal norm and the legalistic argument inquiring whether the peremptory norm of *jus cogens* is so accepted and recognized by the international community of the states as a whole. The identification method is also connected to why the proposed legal account of *jus cogens* articulates normative grounds of *jus cogens* norms.

According to the identification method proposed, the first criteria consists of positing the normative grounds inquiring on what normative grounds the non-refoulement obligation is vested peremptoriness. Therefore, construing international public order norms as normative underpinnings of *jus cogens* norms also explains in detail what makes the non-refoulement obligation peremptorily included in the class of the norms of public order. Thus, the argument for the normative underpinning of *jus cogens* non-refoulement obligation should be read, analyzed, and reflected within the general framework of public order norms posited as the ground of *jus cogens* norms in general. Reading the former in conjunction with the latter is a central and overarching explication of the given legal norm's peremptory and public order nature. Therefore, conceptualizing the public order norms as inherent in the legal account *of jus cogens* through the humanitarian conception of international law provided in the chapter is itself the explication of how the non-refoulement obligation and its *jus cogens* nature figures in our normative understanding of the international legal order making its legal inclusion within the realm of *jus cogens* even more eligible.

The explication of its normative grounds is also essential for the second research question inquiring the *sui generis* interpretive legal consequences and will be briefly analyzed in conjunction with positing essential properties of *jus cogens* norms. Indeed, *jus cogens* are the positive law of international order, and its existence is beyond any question; however, what this existence implies is the subject of profound theoretical controversy. Indeed, without positing the essential properties of *jus cogens* and understanding of these properties would make responding to the second research question essentially meaningless because it would not be otherwise clear against which background rationale of *jus cogens* norms the various interpretive consequences are inferred or otherwise derived. For example, without construing the kind of conception of 'non-derogation,' it would be relatively obscure how the operation of the jurisdiction provisions derogate non-refoulement obligation. This is especially so because some deny the scope of

[10] Here I adopt Jeremy Waldron's methodology, who, in making the core case against the judicial review, made certain core assumptions as informing and supporting the conceptual viability of his critique. See., Jeremy Waldron, 'The Core of the Case Against Judicial Review' [2006] *The Yale Law Journal* 115, 1348-1406.

non-derogability criteria and, therefore, *jus cogens* status to the conduct prohibiting norms and not the enforcements norms. Indeed, some also artificially deny the conflict between the substantive and procedural norms altogether. The property of effectiveness introduced as the constituent of *jus cogens* norms mitigates this nonchalant distinction and informs various interpretive legal consequences argued in the last chapter.

Moreover, without positing the essential properties (non-derogability, universal applicability, hierarchical superiority, and effectivity) of *jus cogens* norms and construing their meanings, and positing the theoretical, normative underpinning of *jus cogens* grounded in the public order conceptualization, it would be altogether complicated to argue why the phenomenon of *de jure* rightlessness fails concerning *jus cogens* non-refoulement obligation. The cumulative effect of these properties and public order conceptualization of the *jus cogens* norms that inform the final chapter on genuine normative conflict should be construed as background normative rationale for understanding the chapter. Furthermore, the property of effectiveness juxtaposed with *erga omnes* duties makes the *sui generis* interpretive legal consequences reflective of the more general legal account of *jus cogens* provided here. Without opting for these specific properties, the final legal argument of interpretive nature would fail because it would not be clear why these legal consequences, let alone *sui generis* type, should follow from the *jus cogens* norms. Again, the intelligibility of the final chapter is necessarily and conceptually dependent on the understanding of *jus cogens* provided in this chapter.

Finally, the reader inquiring present chapter and then the first research and the second research question – this author hopes – that will have kind of impression as if the responses to the first and the second research questions were the concrete juridical application of the general legal account of *jus cogens* provided here. Therefore, to provide the separate normative universe of *jus cogens* non-refoulement obligation, it is quintessential to start with the abstract theory of *jus cogens* norms as the groundwork foundation of the concrete and particular legal claims.

2.3. Legal Account of *jus cogens*: Preliminary Reflections

The legal and normative reflection on the concept of *jus cogens* proceeds from its definition provided for in art.53 VCLT stating that it is the kind of legal norm from which no derogation is permitted. Apart from the formal legal endorsement of the concept, the doctrinal uncertainties emerge regarding its every conceptual and normative property. This is the reason why in the conceptual universe of international law, the concept of *jus cogens* occupies a distinctively unique position and can be meaningfully dubbed as the "sovereign virtue"[11] of the international legal order. It occupies a truly distinguished place because not many concepts have generated that much scholarly debate in the international legal discourse. And it can be fairly labeled as the sovereign virtue of international law because of the concept's evident faculty of invoking the most profound matters of international political morality alleged to constitute the common good for the whole international community.[12] These two rather superficial points mentioned above help explain what makes almost everything about *jus cogens* norms so profoundly controversial. That the concept of *jus cogens* is and continues to be the subject of fierce scholarly disagreement does not necessarily make the concept itself redundant. On the contrary, the debate about what *jus cogens* norms are and whether they exist as a separate category of international law[13] enhances and strengthens their normative credibility and conceptual appeal in the international legal discourse. In addition to the point mentioned, the concept of *jus cogens* is revealing in one important philosophical sense. The questions related to its normative underpinnings, properties making up the *jus cogens* norms or what makes normative propositions about them true and when the legal grounds for the norm's endorsement as peremptory obtain falls to one's conceptualization and understanding of international law.[14] The latter inevitably engages the profound questions of the widest jurisprudential range as to what is the correct

[11] H.L.A. Hart, 'Positivism and the Separation of Law and Morals' [1958] *Harvard Law Review* 71,4, 593
[12] Dan Dubois, 'The Authority of Peremptory Norms in International Law: State Consent or Natural Law?' [2009] *Nordic Journal of International Law* 78, 133–175
[13] For an early critical overview of *jus cogens* see., Georg Schwarzenberger, 'The Problem of International Public Policy' [1965] *Current Legal Problems* 18, 1, 191–214; For the most influential account see, Prosper Weill, 'Towards Relative Normativity in International Law?' [1983] *AJIL* 77, 3, 413-442
[14] Ulf Linderfalk, 'The Legal Consequences of *jus cogens* and the Individuation of Norms' [2020] *Leiden Journal of International Law* 33, 894

account of the concept of law.[15] Therefore, any normatively intelligible understanding of the concept of *jus cogens* does not merely provide an account of the 'pure theory' of *jus cogens*, but is necessarily committed to the entire specter of philosophical thought "concerning the course of the world materializing within and among the international legal order"[16] and necessarily moves beyond the *jus cogens* norms itself. Metaphorically, any concept of *jus cogens* can be construed as the normative vessel wherein the matters of general jurisprudence, political morality, and international legal thought are at their quintessence. To use the terminology of Professor Ulf Linderfalk, no account of the concept of *jus cogens* is 'theory-neutral.'[17] Present author suspects that with respect to the fierce theoretical disagreement as to which conception of the concept of *jus cogens* establishes the truth of the matter, the result is all the same as with jurisprudential debate among positivists and non-positivist as to what makes propositions of law true. Liam Murphy amply noticed: "I am skeptical about the availability of substantive argument that might have the power to move either side closer to the other. All the arguments … inevitably include some premise or methodological commitment that … seem less compelling to one of the sides than their initial fundamental convictions about the kind of things law is."[18] This conclusion arguably applies to the debate about striving to determine what the correct concept of *jus cogens* is.[19] Therefore, far from pretending to adopt an alleged value-neutral approach, this author is inclined to propose a non-positivist and non-consensual[20] legal account of the concept of *jus cogens*.[21] Emphasizing the non-positivist dimension of the legal account of the concept of law signifies involving the determinants from the political morality into the equation of establishing what the content of law requires. However, for the purposes of conceptual clarity, it should be noted that no serious account of non-positivism neglects the importance of ordinary social facts.[22] What distinguishes positivism from non-positivism is their contradictory commitments to the significance of the 'value facts' in establishing the truth conditions of the legal propositions.[23] In the context of the legal account of the concept of *jus cogens* norms, non-positivism purports to accentuate that full-blooded peremptoriness of *jus cogens* norms cannot be sufficiently explained only by resorting to the ordinary social facts codified in international law. In addition to the former determinants (social facts),[24] considerations of political morality also play a role in elucidating what a fully-fledged account of peremptoriness signifies.[25] Focusing on the non-consensual nature of the legal account of the concept of *jus cogens* emphasizes that peremptory processes intrinsic in the *jus cogens* norms cannot necessarily be adequately conceptualized through the prism of classical consent-based international law.[26] It implies a clear division between the norms of ordinary international law (*jus dispositivium*) emanating from the sovereign will of the individual states and peremptory international law (*jus cogens norms)* following

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[15] Ulf Linderfalk, 'Understanding the *jus cogens* Debate: The Pervasive Influence of Legal Positivism and Legal Idealism' in Maarten den Heijer & Harmen van der Wilt (eds.) *jus cogens: Quo Vadis?* (Netherlands Yearbook of International Law 2015) 51-85, See also, Linderfalk (n 7) 41-62

[16] Valentin Jeutner, *Irresolvable Norm Conflicts in International Law: The Concept of a Legal Dilemma* (OUP 2017) 53

[17] Linderfalk (n 11) 908

[18] Liam Murphy, *What Makes Law: An Introduction to the Philosophy of Law* (CUP 2014) 88 See also, Ulf Linderfalk 'The Emperor's New Clothes – What If No *jus cogens* Claim Can Be Justified?' [2020] *International Community Law Review* 139-162

[19] Linderfalk (n 11) 908. As Professor Linderfalk notes "The two modes of understanding *jus cogens* issues will both be right, in the particular universe of thought that they assume." He then continues: "What will remain of the adversarial debate is just the question of whether, in their respective universe of thought, lawyers are consistent or not." Taking this reasoning for granted, it remains an interesting matter whether the two different conceptions of the concept of *jus cogens* can genuinely conflict in the absence of some common understanding about what the normative universe is. Or will it be the case that discussants will talk past each other? See., Ronald Dworkin, *Law's Empire* (HUP 1986) 44

[20] Liam Murphy, 'Law Beyond the State: Some Philosophical Questions' [2017] *EJIL* 28, 1, 205. It is important to note that non-positivism and voluntarism should not be confused. Non-positivism is the view stating that moral considerations have meaningful bearing in establishing the content of law; while voluntarism in international law emphasizes that the source of the obligation in the international law is the state consent. As Liam Murphy explains: "It is true that no state
is bound to a treaty without its consent. But that it is a rule of law that states perform their treaty obligations is not itself a matter of states' wills. No state consents to pacta sunt servanda as a legal principle."

[21] Linderfalk (n 12) 51-85. Under the characterization elaborated by Professor Linderfalk, an account of *jus cogens* I provide would arguably fall under the conceptual department of legal idealist's thought.

[22] Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism* in Bonnie Litschewski Paulson & Stanley L. Paulson (trs,) (OUP 2002) 8-10

[23] Mark Greenberg, 'How Facts Make Law' [2004] *Legal Theory* 10, 157–198

[24] Ulf Linderfalk, 'The Source of *jus cogens* Obligations - How Legal Positivism Copes with Peremptory International Law' [2013] *Nordic Journal of International Law* 82, 369-389

[25] Mary Ellen O'Connell, *jus cogens*: International Law's Higher Ethical Norms, in Donald E. Childress III (eds.) *The Role of Ethics in International Law* (CUP 2012) 78-101

[26] *S.S. Lotus (Fr. v. Turk.),* 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7)

from the argument of political morality about the norm's having the peremptory nature and its acceptance and recognition by the international community as a whole. To give an example of what this categorization implies consider the following normative statement and the proposition denoted by it: "peremptory norms prevail not because the States involved have so decided but because they are intrinsically superior and cannot be dispensed with through standard inter-State transactions."[27] This proposition makes evident that various normative processes associated with the peremptoriness of *jus cogens* norms are not necessarily susceptible to be reduced to the ordinary and traditional international law creating processes. That being said, non-positivism and non-consensualism should be understood as general theoretical propositions grounding and informing normative conception of peremptoriness embodied in the legal account of the *jus cogens* norms. It means that considerations arising from these theoretical paradigms penetrate and shape the whole discourse of the legal account of the concept of *jus cogens* norms. This author is perfectly aware of different jurisprudential conceptualizations of the legal accounts of *jus cogens* norms. True, many accurate and adequate legal exposition of the legal account of the concept of *jus cogens* may exist. Each of them may provide very good reasons to believe that it is what the crux of *jus cogens* is. Therefore, while humbly submitting that the operability of the account provided here should not be construed to the exclusion of other multiplicities of viable conceptualizations of the legal accounts of *jus cogens*, the present discussion does not aim to enter into the jurisprudential debates about various legal peculiarities on the gist of what makes *jus cogens* norms true. The understanding of the legal account of the concept of *jus cogens* proposed here might be mistakenly conflated with some metaphysical version of godly natural law and be labeled so;[28] but the formulation of the various things should be embraced not because they appear in the intellectual apex of the academic thought, but simply because one honestly believes it to be true.[29] Indeed, the complete and overarching account of *jus cogens* norms theorizing each constitutive legal determinant embedded within peremptory norms, such as its nature,[30] grounds,[31] scope,[32] normative features,[33] identification and sources,[34] delimitation,[35] and legal consequences,[36] requires book-length treatment, something that can hardly be undertaken here. Instead, this inquiry provides the legal account of the concept of *jus cogens* most narrowly tailored to the purposes of establishing *sui generis* legal consequences for *jus cogens* non-refoulement obligation.[37] This author shall leave the general legal consequences following from the peremptory norms undiscussed. The account of the special legal consequences will be explained, and step by step justified in the final chapter. However, *jus cogens* non-refoulement obligation needs to ultimately have the robust theoretical basis because it is precisely the adequate exposition of the theoretical foundations – within the confines of this inquiry – that provides the conceptual possibility to make the final interpretive argument granting due place and establishing efficient legal consequences for the peremptory norm of non-refoulement obligation. Having outlined the general landscape, it is to the legal account of the concept of *jus cogens* this author resorts to.

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[27] Orakhelashvili (n 7) 8

[28] Ronald Dworkin, 'Natural Law Revisited' [1982] *U Fla L Rev* 34, 165. Ronald Dworkin put it aptly: "If some theory of law is shown to be a natural law theory, therefore, people can be excused if they do not attend to it much further."

[29] Ronald Dworkin, *Justice for Hedgehogs* (HUP 2011) 338

[30] Antônio Augusto Cançado Trindade, *International Law for Humankind Towards a New Jus Gentium* (Martinus Nijhoff vol 6) 289-327

[31] M. Cherif Bassiouni, 'A Functional Approach to "General Principles of International Law' [1990] *Mich. J. Int'l L* 11, 3, 801-818

[32] Alexander Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions' [2005] *EJIL* 16, 1, 59–88. See also, Elizabeth Santalla Vargas, 'In Quest of the Practical Value of *jus cogens* Norms' in Maarten den Heijer & Harmen van der Wilt (eds.) *jus cogens: Quo Vadis?* (Netherlands Yearbook of International Law 2015) 223-236

[33] Thomas Kleinlein, '*jus cogens* as the 'Highest Law'? Peremptory Norms and Legal Hierarchies' in Maarten den Heijer & Harmen van der Wilt (eds.) *jus cogens: Quo Vadis?* (Netherlands Yearbook of International Law 2015) 173-2011; See also, Orakhelashvili (n 7) 67-82

[34] Ulf Linderfalk, 'The Creation of *jus cogens* – Making Sense of Article 53 of the Vienna Convention' [2011] *ZaöRV* 71, 359-378

[35] Linderfalk (n 7) 134-153

[36] Enzo Cannizzaro, 'On the Special Consequences of a Serious Breach of Obligations Arising out of Peremptory Rules of International Law' *in Enzo Cannizzaro (eds.). The Present and Future of jus cogens (Rome: Sapienza Università Editrice 2015) 133-145.*

[37] See the subsequent section

2.4. Humanized International Law and *jus cogens* Norms

Whether the *jus cogens* norms are mostly the product of scholarly and academic craftsmanship[38] or just the delusion of the international legal order's pretension to establish itself as the constitutional system of law,[39] in the current stage of the development of international law it is almost uncontroversial that certain legal norms wield higher status and are attributed the quality of peremptoriness.[40] Peremptory international law is based on the idea of the values of universal political morality taking precedence over bilateralism and reciprocity.[41] Universal political morality is the umbrella term embracing core values associated with elementary considerations of humanity[42] – as *jus necessarium* – making up minimum ethical content inevitable for the existence of the international community as a whole.[43] In other words, peremptory norms ensure the essential guarantees for establishing "an eternal and cohesive moral order"[44] founded upon minimum common agreement on what direction the political trajectory of the international system must take. Any meaningful appreciation of the legal concept of *jus cogens* norms must be cognizant of the political reality ensuring the normative possibility of the concept to flourish its legal potency in the concrete legal scenarios. While the quality of peremptoriness embedded in the concept of *jus cogens* norms itself is truly universal in the most intelligible sense of the word, its express legal manifestation and the normative claim towards effective implementation is owed to the ontological realm wherein the *jus cogens* norms received due recognition.[45] It is suggested that "the *jus cogens* debate cannot be isolated from the broader paradigm shift in international law from state-centrism to the so-called humanization of international law."[46] Conceptualized in these terms, humanization of international law or the humanistic philosophy proper constitutes soil where *jus cogens* norms are embraced because the values these norms endorse reflect and are in ideal consonance with the broader understanding of the international legal order's turn towards humanization. Insistence on international law's humanized nature constitutes a political assertion claiming an occurrence of a paradigm shift. This assertion shouldn't be understood as conveying that even alleged 'humanized regime' is regarded as satisfactory.[47] On the contrary, it is far from being even close to it,[48] and the normative case made for *jus cogens* non-refoulement obligation bears witness to it. However, the normative pull, the political trajectory, and the general juridical-social direction of international law can be taken to be characterized by the humanitarian turn. What the humanization signifies is that juridical, political, and moral properties making the structure of international law essentially dominated by what is usually dubbed as 'state-centrism' or 'voluntarism' no more constitutes an adequate appreciation of the state of things current picture of international law demonstrates.[49] However, a skeptic might ponder how exactly the concept of humanized international law should be captured. This question can be framed as the one attempting to determine what the humanized conception of international law really is and how one can be sure about the conclusiveness of the proposed argument. The natural and non-circular answer would be that if juridical, political, and moral entities that

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[38] Dinah Shelton, 'Sherlock Holmes and the Mystery of *jus cogens*' in Maarten den Heijer & Harmen van der Wilt (eds.) *jus cogens: Quo Vadis?* (Netherlands Yearbook of International Law 2015) 23; See also, Matthew Saul, 'Identifying *jus cogens* Norms: The Interaction of Scholars and International Judges' [2015] *Asian JIL* 5, 26

[39] Gordon A. Christenson, '*jus cogens*: Guarding Interests Fundamental to International Society' [1987] *Faculty Articles and Other Publications.* Paper 159. 589; See also, Anne Peters, 'Are we Moving towards Constitutionalization of the World Community?' in A. Cassese (eds.), *Realizing Utopia: The Future of International Law* (OUP 2012) 118-136

[40] Antonio Cassese, 'For an Enhanced Role of *jus cogens*' in A. Cassese (eds.), *Realizing Utopia: The Future of International Law* (OUP 2012) 158

[41] Andreas Paulus, 'Whether Universal Values can Prevail over Bilateralism and Reciprocity' in A. Cassese (eds.), *Realizing Utopia: The Future of International Law* (OUP 2012) 89-90

[42] *Corfu Channel Case (United Kingdom v. Albania);* Merits, International Court of Justice (ICJ), 9 April 1949, p.22. See Matthew Zagor, 'Elementary considerations of humanity' in Karine Bannelier, Theodore Christakis & Sarah Heathcote (eds.) *The ICJ and the Evolution of International Law The enduring impact of the Corfu Channel case* (Routledge 2021) 264-293

[43] Alfred von Verdross, 'Forbidden Treaties in International Law: Comments on Professor Garner's Report on "The Law of Treaties' [1937] *AJIL* 31, 4, 574

[44] Maarten den Heijer and Harmen van der Wilt, '*jus cogens* and the Humanization and Fragmentation of International Law' in in Maarten den Heijer & Harmen van der Wilt (eds.) *jus cogens: Quo Vadis?* (Netherlands Yearbook of International Law 2015) 4

[45] For a very good overview of the conceptual development of *jus cogens* norms see., Cezary Mik, '*jus cogens* in Contemporary International Law' [2013] *Polish Yearbook of International Law* 27-95

[46] Maarten den Heijer and Harmen van der Wilt (n 41) 5

[47] For the contours of the concept of international law see., Philip Allott, 'The Concept of International Law' [1999] 10 *EJIL* 31-50; See also,

[48] Indeed, the theme of current inquiry concerning the rightlessness in international law and the occurrence of successful deterrence measures demonstrate that it is still a long way to go until we can dub the regime as truly satisfactory.

[49] Full case can be viewed in C. Wilfred Jenks, *The Common Law of Mankind* (New York: Frederick A. Praeger, 1958)

together make the very structure of international law into what it is are imbued with the humanitarian considerations of various kind associated with the supposed supremacy of the individual and group like collectivities of the natural human kind, then we have very good reason for making the convincing case substantiating an international law's humanized nature.

This is to say that these considerations together help us to imagine the rule of recognition implicit in the theoretical and practical argumentative structure of international legal propositions pointing towards the increasing ideational convergence on international law's being humanized legal and socio-political order. Indeed, even in such a constellation the state is an archetypical subject of international law.[50] However, an individual's emergence and establishment as a major legal stakeholder of international law is uncontroversial.[51] The proliferation of access to the international judicial institutions of the individuals, and their expanding involvement in the international fora, substantiates this contention.[52]

The realist vision of international law characterized by the constant reign of the states' individual goods[53] no longer constitutes the dominant paradigm, though its vestiges are usually reminiscent.[54] This is not to deny the states' paramount role in shaping, developing, and modifying international law; This is to attest that in the current state of international law, the will of the states counts neither for nothing nor for everything.[55] Indeed, the obligation can be imposed upon the states against their individual sovereign will.[56] The conception of sovereignty is itself reconceptualized.[57] If an earlier understanding of sovereignty conceived through the prism of international law signified unabashed and unfettered freedom of states having the supreme and ultimate political dominion over the international arena, the novel conception of sovereignty is characterized by the humanitarian considerations conceived in terms of the constraints imposed by the human rights upon the scale, degree and the magnitude of the state freedom.[58] At the highest level of abstraction, universal values (*jus cogens norms* for example) constitute global limits on state sovereignty. Some scholars make even radical case and insist that humanity is *Grundnorm* wherefrom the sovereignty derives its normative force.[59] Whether the claim is exaggerated or not, it is beyond any reasonable doubt that nowadays, protection of human rights is itself the common denominator and the benchmark of the states' internal and external legitimacy.[60]

The humanization of international law, whatever its full articulation may look like, presupposes a certain understanding of an international community. An international community is a normative concept that derives its substratum from an international political morality that is juridically embedded in the deepest layers of international legal order. Legal order formed around the common interest of an international community as a whole transcends an understanding of an international community as a mere aggregate of the individual states.[61] Indeed, it would be strikingly idiosyncratic to suppose that the legal

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[50] Emer de Vattel (J. Chitty, Ed.)., *The Law of Nations: Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (Cambridge Library Collection 2011)

[51] See chapters 28, 39, 30 James Crawford, Brownlie's Principles of Public International Law (OUP 9th edn, 2019); Malcolm Shaw, International Law (CUP 8th edn) 204-209; Jan Klabbers, International Law (CUP 2nd edn, 2017) Robert McCorquodale, "The Individual and the International Legal System" in Malcolm D Evans (ed), *International Law* (OUP 4th ed, 2014) 280-305.

[52] For a full overview of the history, evolution, and development of the law of access to international tribunals see Antônio Augusto Cançado Trindade, *The Access of Individuals to International Justice* (OUP 2011)

[53] Bruno Simma and Andreas L. Paulus, 'The 'International Community: Facing the Challenge of Globalization' [1998] *EJIL* 9 266, 270.

[54] One may also rightly say that the consensual account of international law never constituted the dominant paradigm. For our purposes, it suffices to say that consent-based account of international law still constitutes the building block of the legal order.

[55] *S.S. 'Lotus', France v Turkey*, Judgment, Judgment No 9, PCIJ Series A No 10, ICGJ 248 (PCIJ 1927), (1935) 2 Hudson, World Ct Rep 20, 7th September 1927, League of Nations (historical) [LoN]; Permanent Court of International Justice (historical) [PCIJ]. However, see Christian Tomuschat, *Obligations Arising for the States without or against their Will* (Brill Vol 241) 210. Prof. Tomuschat ponders: "Nonetheless, the question must be answered whether the consent model really reflects the present-day specificities of the international legal order. One should bear in mind that answers, even if correctly provided on a given problem at some point in time, do not necessarily remain valid forever."

[56] International customary law can bind the state without the latter's consent, provided that the rule of persistent objector is not utilized. See., Michael Akehurst, 'Custom as a Source of International Law' [1975] *British Yearbook of International Law* 47, 1-53.

[57] There is an abundant literature on the matter. See the numerous authorities cited in Patrick Macklem, *The Sovereignty of Human Rights* (OUP 2015)

[58] Antônio Augusto Cançado Trindade, *International Law for Humankind Towards a New Jus Gentium* (Martinus Nijhoff vol 6) 16-20, 47-50.

[59] Anne Peters, 'Humanity as the A and Ω of Sovereignty' [2009] *EJIL* 20, 3, 513-544.

[60] See the political conception of human rights in John Rawls, *The Law of Peoples* (HUP 1993)

[61] Tomuschat (n 39) 267

obligation not to commit genocide stems from the state's formal commitment to the treaty based on the idea of mutual reciprocity.[62] Understood in this way, international law's humanization is simultaneously an end-goal and the process towards which leads the common and the value-dependent path of the international community as the common entity beyond and above individual states.[63] Indeed, the proliferation of the *jus cogens norms*[64] and *erga omnes obligation*[65] common to the international community as a whole makes the concept of an international community normatively intelligible. Thus, the claim pertaining to international law's humanization is not a mere scholarly fantasy of rudimentary kind[66] but is a robust normative assertion evident in the international law itself.

Conclusively, an ontological realm of *jus cogens* norms finds its manifestation in the humanized conception of the international legal order. True, *jus cogens* norms being necessary constituents of such normative vision protect the values embraced within the humanity-oriented international law. It has been demonstrated that humanized understanding of international law cherishes elementary considerations of humanity manifesting itself in the ultimate respect of the dignity of the individual human being in furtherance of the certain conceptualization(s) of international community as a whole. That being said, if the *jus cogens* norms constitute the embodiment of the humanized international legal order itself and the latter accords the normative primacy to the values mentioned above, then the normative underpinnings of any sensible legal account of *jus cogens* norms must itself be grounded in such normative considerations.

2.5. *jus cogens* Norms as International Public Order

The legal account of the concept of *jus cogens* norms is normatively and conceptually adequate if it provides for a meaningful exposition of its grounds.[67] The question of grounds seeks to discern the normative underpinnings of *jus cogens* norms wherefrom an appropriate conclusion can be drawn about the theoretical foundations of such norms explaining their whereabouts and more generally elucidating the matter of their sources and origins. In the doctrine and the practice of States, it is commonly asserted that the point of departure expounding the essence of *jus cogens* norms are to be found in the art.53(VCLT).[68] Indeed, the definition contained therein does not *per se* explain the theoretical foundations of *jus cogens* norms.[69] However, it can be argued that an acceptance and recognition of the norm as embodying peremptory character by the international community as a whole constitutes an implicit indication that *jus cogens* norms are grounded in the superior interests of the international community.[70] It is illogical on the part of the international community as a whole to accept and recognize– whatever the acceptance and recognition may be taken to signify – legal norm as one from which no derogation is permitted if the subject-matter of what is so accepted and recognized does not concern the fundamental values of universal political morality for the whole community.[71] Considering that the conception of international public order manifest themselves as global restrictions imposed upon the contractual and bilateral capacities of the States to arrange their states of affairs as would emanate from the consensual nature of international law, then by definition, such conception must itself necessarily

[62] Martti Koskenniemi, 'The Pull of the Mainstream' [1990] *Survey of Books Relating to the Law* 88, 6, 1946. See also, Bosnia and Herzegovina v Serbia and Montenegro

[63] Philip Allott, 'State Responsibility and the Unmaking of International Law' [1988] 29 *Harvard International Law Journal*, 25-26.

[64] Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2008)

[65] Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005)

[66] Philip Allott, *Eunomia: New Order for a New World* (OUP 2012); Philip Allott, 'Reconstituting Humanity — New International Law' [1992] *EJIL* 3, 219-252. Giuliana Ziccardi Capaldo, *The Pillars of the Global Law* (Ashgate Publishing Ltd, 2008).

[67] The answer exposing the grounds of *jus cogens* norms is essential for several reasons. One may mention that derived legal consequences from *jus cogens* norms account for their authority in being the kind of norms and being grounded in and having the kind of underpinnings they have. Without exposing the grounds of *jus cogens*, it is unclear why *jus cogens* norms are considered belonging to the peremptory and objective law instead of the subjective and the consequent reciprocal law in dealing with the ordinary norms of international law.

[68] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331

[69] Dinah Shelton (n 35) 33

[70] Weatherall (n 7) 23

[71] *jus cogens* norms have the binding power against the consent of the individual state and do not admit of persistent objector option. Therefore, the object of *jus cogens* must be some non-factual and moral entity that is not disposable by the State consent; otherwise, it does not make sense to insist on their objective character and blurs the distinction between objective non-reciprocal and subjective and reciprocal norms of international law.

reflect the moral character.[72] Therefore, on the non-positivist conception of *jus cogens* norms by linking the moral determinants arising from the normative considerations of the international public order to the social facts codified in the art.53(VCLT), the concept of *jus cogens* – without the distortion of the treaty language – can be interpreted in a way as to retain its inherent ethical character. However, the reflective equilibrium struck between the moral determinants derived from the values of international public order and the social facts enshrined in the art.53(VCLT) can provide a sound theoretical basis for the legal account of the concept of *jus cogens* if only the moral considerations invoked for interpretive purposes is itself sensibly granted sufficiently accurate normative expression.

According to the public order conception of *jus cogens,* all peremptory norms are accorded the function of ensuring cohesive coexistence of the States as the international community or realizing common goals uphold as normatively integral by the latter.[73] In the words of Alfred Verdross, "a truly realistic analysis of the law shows us that every positive juridical order has its roots in the ethics of a certain community, that it cannot be understood apart from its moral basis."[74] According to the Special Rapporteur Fitzmaurice, the common feature of *all jus cogens* norms is that "they involve not only legal rules but also considerations of morals and international good order."[75] In the view of the Special Rapporteur Lauterpacht, the norms belonging to the international public order are "expressive of rules of international morality so cogent"[76] that an international tribunal would undoubtedly be justified in resorting to it. However, for the Special Rapporteur Lauterpacht immorality must attain a certain threshold as to be such "as to render its enforcement contrary to public policy and to socially imperative dictates of justice."[77] According to Judge Schücking in *Oscar Chinn* the Court of Law should never "apply a convention the terms of which were contrary to public morality."[78] In his separate opinion annexed by Judge Dugard to *Armed Activities on The Territory of Congo* (2006) pondered that the norms *jus cogens* "give legal form to the most fundamental policies or goals of the international community."[79] Scholar Dinah Shelton pondered that "the existence of an international legal system means that public policy requires states to conform to those principles whose non-observance would render illusory the very concept of an international society of states or the concept of international law itself."[80] In McNair's *magnum opus* on Law of Treaties the author couldn't reasonably conceive of any society setting no limit whatsoever on the freedom of contract and regarded the norms of *jus cogens* as expressive of international public morality.[81] Professor Jean d'Aspremont links the norms of *jus cogens* to "a more systemic and morally cohesive international legal order."[82] An Oxford Scholar Alexander Orakhelashvili considers that "when a right of a particular actor or entity is very important in terms of morality, it can be assumed to embody the community interest and hence limit the will and discretion of individual States."[83] Professor Christian Tomuschat adduced that public order norms serve and protect the essential interests of the whole international community.[84] Judge Antônio Augusto Cançado Trindade emphasized the primacy of the considerations of international *ordre public* over the inter-state transactions in his jurisprudence *constante* numerous times.[85]

Thus, from the recapitulations of the views mentioned above, one can infer that the peremptoriness of *jus cogens* norms is grounded in the normative considerations associated with the conception of international public order; It promotes minimum level of agreement for ensuring the very existence of the

[72] *Ibid.*, 21; See Supra note 71 and 67
[73] Evan J. Criddlet & Evan Fox-Decenttt, 'A Fiduciary Theory of *jus cogens*' [2009] *The Yale Journal of International Law* 34, 344
[74] Verdross (n 40) 576
[75] Gerald Fitzmaurice, Third Report on the Law of Treaties, [1958] II *Yearbook International Law Commission* 40–1, para.76.
[76] Hersch Lauterpacht, First Report on the Law of Treaties, [1953] II *Yearbook International Law Commission* 154–6, para.4.
[77] *Ibid.*,
[78] Separate opinion of Judge Schücking Oscar Chinn, United Kingdom v Belgium, Judgment, PCIJ Series A/B No 63, ICGJ 313 (PCIJ 1932), 12th December 1934.
[79] Separate opinion of Judge Dugard in *Armed Activities on the Territory of the Congo,* Congo, the Democratic Republic of the v Rwanda, Judgment, Jurisdiction and Admissibility, [2006] ICJ p.89
[80] Dinah Shelton (n 35) 29
[81] Lord McNair, *The Law of Treaties* (OUP 1961) 213
[82] Jean d'Aspremont, '*jus cogens* as a Social Construct Without Pedigree' in Maarten den Heijer & Harmen van der Wilt (eds.) *jus cogens: Quo Vadis?* (Netherlands Yearbook of International Law 2015) 91
[83] Orakhelashvili (n 7) 47
[84] Trindade (n 27) 289ff
[85] Tomuschat (n 39) 237

international community and protects the 'basic' moral values so cogent that every member of the international community can be reasonably expected to have the legal interest in their protection.

However, it is contended that public order conception of *jus cogens* norms neither clarifies what it takes for a normative basis of a norm to be deemed peremptory nor illuminates which particular norms are so qualified.[86] It is further contended that it is unclear why the international community should have a specific legal interest in observing of the most fundamental rights "than either its constituent member states or the people who reside within them."[87] These considerations pose substantial difficulties to the public order conceptualization of the legal account of the *jus cogens* norms and will be briefly addressed below.

The objections leveled against the public order conceptualization of *jus cogens* norms are based on the misunderstanding of the concept of international public order itself and, therefore, are normatively unsustainable. An idea of international public order connotes the total sum of normative propositions accounting for the institutional normativity[88] of the international community of states as a whole.[89] In this constellation of things, "*the international community* may be seen to represent shared interests and values that arise from mankind, the unit of which is the individual human being… *Of States* can be seen to focus the interests of an international community of human-oriented States on those particular such interests implicated by the relations of States as interacting and interdependent units within that community… *As a whole* can be considered in this sense as a qualifier that substantively distinguishes interests and values articulated through the international community from those incidentally common to States."[90] Note that conceptualized in this way, the notion of international public order constitutes an emanation of the international community of states as a whole centered around the values of common political morality, an ultimate *telos* and beneficiaries of which constitutes an individual human being.[91] Within the conceptual structure mentioned, the States being themselves the institutional constructions committed to the service of their ultimate beneficiaries, are constituent entities of the international community as a whole.[92] Then, the question of why the international community should be having a more particularized legal interest in the observance of the values embedded within the norms of international public order[93] becomes *eo ipso* conceptually redundant, if not normatively unintelligible at all. If only for a reason, that it is impossible to will – even in strictly consequential terms – the universalization of those actions and omissions alleged to be prohibited by the public order norms.[94] Therefore, the States being one of the major stakeholders of the international community are bound by the principles of fidelity[95] towards the international community of the States as a whole and *ipso factum* to the ultimate values embraced through these states of affairs. Indeed, the principles of sincerity[96] in the performance of the obligations derived from the international public order process *via* the peremptoriness of the norm accord the normative

[86] Evan J. Criddlet & Evan Fox-Decenttt (n 67) 345
[87] *Ibid.,*
[88] Compare to Neil MacCormick, *Institutions of Law* (OUP 2007)
[89] International Law Commission (ILC), Chapter V Peremptory norms of general international law *(jus cogens),* 7 Aug 2019, A/74/10. The Conclusion 3 on the "General nature of peremptory norms of general international law *(jus cogens)*" states that "peremptory norms of general international law *(jus cogens)* reflect and protect fundamental values of the international community." It then ventured to explain that "The Commission chose the words "reflect and protect" to underline the dual function that fundamental values play in relation to peremptory norms of general international law. The word "reflect" is meant to indicate that the fundamental value(s) in question provide, in part, a rationale for the peremptory status of the norm of general international law at issue. Further, the word "reflect" seeks to establish the idea that the norm in question gives effect to particular values. The word "protect" is meant to convey the effect of the peremptory norm on the value – that a specific peremptory norm serves to protect the value(s) in question. In some ways these are mutually reinforcing concepts. A value reflected by a peremptory norm of general international law (*jus cogens*) will be protected by compliance with that norm."
[90] For a fuller discussion see Weatherall (n 7) 24-29
[91] William J. Wagner, 'Universal Human Rights, The United Nations, And the Telos of Human Dignity' [2005] *Ave Maria L. Rev* 3, 197, 197-203
[92] Bruno Simma and Andreas L. Paulus (n 50) 270
[93] *Case Concerning Barcelona Traction, Light, and Power Co., Ltd (Belgium v. Spain),* February 5, 1970, [1970] ICJ, paras.33-34
[94] John Rawls, *Lectures on the History of Moral Philosophy* (HUP Barbara Herman(eds.) 2000) 162-181
[95] Lon L. Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' [1958] *Harvard Law Review* 71, 4, 630-672; See also, *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* International Court of Justice (ICJ), 9 July 2004, para.159.
[96] Paul Ricoeur, *The Just* (The University of Chicago Press David Pellauer (trs.) 2000) 6; See also, International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001,* Supplement No. 10 (A/56/10), chp.IV.E.1, art.41.

comprehension of what it takes to express such fidelity.[97] The question inquiring how specifically international public order processes account for the norm's theoretical basis to constitute *jus cogens* might be driven by the global moral skepticism about the normative possibility of the existence of value and human rights[98] or gravely misses the point of reference wherefrom international public order norms derive their ultimate authority. Normative discourse concerning international public order cannot be isolated from its constitutive ontological background. Indeed, the idea of an international public order derives its ultimate authority from its being part and parcel of yet greater and deeper normative picture of the humanized ontology of international law.[99] Thus, denying the international public order's institutional ability to constitute eligible theoretical candidate for being a sound basis for *jus cogens* norms, in the final analysis, is implicitly tantamount to denying the existence of humanized international law and constitutive values it embraces. The latter move constitutes a denial of reality and in this stage of the development of international law is an impossible burden to think of any rebuttal. Humanized international law is the ontological realm wherefrom international public order by virtue of its being its constituent part derives its legitimate authority. International Public order is but one big layer of the humanized international law. Furthermore, humanized state of things does not emanate from the State's pure will but is the simultaneous product of the interinstitutional coordination of the normative nature between various stakeholders. At the very minimum, the humanized constitutional architecture of international law is not necessarily reducible to consent. Therefore, in accounting international public order as the possible candidate for the legal account of *jus cogens* norms the following chains of authorities substantiate the contention. Here is a brief legal account of how these chains of authorities inform the normative legitimacy of each other. Firstly, the conception of international public order derives its authority from the concept of international community of the states as a whole. Secondly, the international community of the states as a whole being what it is derive its authority from its being constituent entity of the broader ontological picture of humanized international law. Thirdly, humanized international law derives its authority from and is the product of the complex sum of interinstitutional coordinated arrangements evident in the international law itself. In passing, it should be mentioned that the resulting outcome of the humanized international law is an appreciation of decent values of political morality inferential from the complex argumentative and institutional processes of international law that takes the pristine legal expression in the form of denoting the respect to the dignity of the individual human being in the multiplicity of distinct but normatively interrelated legal fields.[100] Therefore and fourthly, the values humanized international law embodies derive their authority from the critical morality of some sort[101] – indeed, the reason for their being considered as authoritative is because of embracing the values so dear[102] that they manage to survive any comprehensible test of reason of justificatory kind.[103] Those [humanitarian] values passing the test of the reason of some kind constitute the subject of "overlapping political consensus"[104] having the evident

[97] *Questions relating to the Obligation to Prosecute or Extradite*, Belgium v Senegal, Judgment, ICJ GL No 144, ICGJ 437 (ICJ 2012), 20th July 2012, Separate Opinion of Judge Cançado Trindade, paras 44–51. See also, Enzo Cannizzaro (n 33); See also, Stefan Kadelbach, '*jus cogens*, Obligations Erga Omnes and other Rules – The Identification of Fundamental Norms' in Christian Tomuschat and Jean-Marc Thouvenin (eds.) *The Fundamental Rules of International Legal Order: jus cogens and Obligations Erga Omnes* (Martinus Nijhoff 2006) 21-41.

[98] Dworkin (n 26) 338

[99] Antônio Augusto Cançado Trindade (n 27) chapters: 1-15

[100] There is some support for the idea that the quintessence of the theoretical underpinnings of the international criminal, humanitarian, and human rights triad is based on human dignity. M Cherif Bassiouni 'Perspectives on International Criminal Justice' [2010] *Virginia Journal of International Law* 50, 2, 270-322. See Also, M. Cherif Bassiouni, 'Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights' in M. Cherif Bassiouni (ed.) *Post-Conflict Justice* (Transnational Publishers 2002) 383-442

[101] H. L. A. Hart, *The Concept of Law* (OUP 1961) 56; as Hart noted: "What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of "ought," "must," "should," "right," and "wrong." See also, Harold Hongju Koh, 'Why Do Nations Obey International Law?' [1997] Faculty Scholarship Series. 2101 2628-2629

[102] *Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, International Court of Justice (ICJ), 28 May 1951, p.12; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v Serbia and Montenegro*, Judgment, Merits, ICJ GL No 91, ICGJ 70 (ICJ 2007), 26th February 2007, pp.43, 110-111.

[103] H.L.A. Hart (n 94) 56

[104] John Rawls, 'The Domain of the Political and Overlapping Consensus' [1989] 64, 2, *NYU L Rev* 233-255.

manifestation on the international legal level.[105] As Professor MacCkormick noted: "They [community] also evince a supposition that what they do will in some way enhance the common good of the community, either in a way that squares with or indeed in a way that actively procures some needed element of justice in the community."[106] This complex normative relationship elucidates the legal essence behind the State's duties of sincere performance of their obligation in their normative expression of fidelity towards such norms. The duty of fidelity to act in compliance with these norms is legitimately required because such requirement derives its authority from the complex processes explained above and provides the States with the exclusionary[107] 'independent' and morally correct reasons[108] for the action. Therefore, the ethical dimension of the peremptoriness of the legal norm is grounded in this complex and multi-faceted chain of the normative 'authorities' deriving their normative strength from one another's structural support. That being said, in the final analysis, the peremptoriness of the norm – expressed in the sufficiently clear legal form[109] – has the normative claim to the moral correctness, thereby providing for the exclusionary moral reasons for expressing the duties of fidelity through the normative sincerity in the performance of the obligations derived therefrom. On non-positivist and legal idealist grounds, therefore, the kingdom of justice, as "the first virtue of social institutions" is sought.[110] Against this background, it is not necessary to state exhaustively the concrete instances of *jus cogens* norms. However, Indeed, this process requires individuated and context sensitive treatment.[111] What is important is that public order theory provides for the sound substantive and methodological starting point in terms of their accounting as the proper theoretical basis for *jus cogens* norms. Conclusively, this is how the general non-positivist thought bears on the normative intelligibility of the legal account of the concept of *jus cogens.* The moral determinants help elucidate the social facts, thereby preserving the ethical unity of *jus cogens* norms. That morality has something to bear on *jus cogens* norms is relatively uncontroversial and has already been convincingly established.[112] The crucial question remains to be answered is "what effect moral considerations have upon their expression in legal form as *jus cogens*…therefore… what effect this moral foundation has as a matter of international law."[113] Therefore, it is the distinctive constitutive legal features of the *jus cogens* norms that any adequate legal account of the concept of *jus cogens* norms should expound.

2.6. Constitutive Legal Features of *jus cogens* Norms

The section above attempted to establish that an appropriate normative basis through which the peremptoriness of the legal norm can be intelligibly argued must be sought in the normative processes associated with the international public order considerations. The underlying rationale behind this assertion is to affirm the legal and conceptual primacy of the interests of the international community over the bilateral or multilateral interests of the individual States.[114] In the international legal ambit, *jus cogens* norms are ascribed the point of materializing the public interest in the furtherance of what is owed to their

[105] On the overlapping agreement on the legal level see Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornel University Press 3edn, 2013) 57-60, 96-99; Christian Tomuschat, *Human Rights: Between Idealism and Realism* (OUP 2nd 2008) 69-97

[106] Neil MacCormick, Why Law Makes No Claims in George Pavlakos (eds.) *Law, Rights and Discourse The Legal Philosophy of Robert Alexy* (2007) 66; However, no institutional relationship needs to be assumed between the public order norm's inclusion into the realm of *jus cogens* and any comprehensive ideal, but such institutional relationship should be convincingly demonstrated to exist. It can be employed either the top-down *(why the ideal of international peace and security requires the prohibition of genocide)* or bottom-up approach (*why the prohibition of genocide is required to further the ideal of international peace and security).* It can even be argued whether the prohibition of genocide has the instrumental value at all to figure as a normative property in such an instrumental relationship.

[107] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP 1979); See also, Joseph Raz, *Between Authority and Interpretation: on the Theory of Law and Practical Reason* (OUP 2009) 126-166

[108] Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism* in Bonnie Litschewski Paulson & Stanley L. Paulson (trs,) (OUP 2002) 35-40

[109] *South-West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa);* Second Phase, International Court of Justice (ICJ), 18 July 1966, para.49.

[110] John Rawls, *Theory of Justice* (HUP Revn ed., 1971) 3

[111] Identifying the norm as the one having the *jus cogens* nature and identifying the exhaustive catalog of *jus cogens* norms are logically independent of each other. It means that the failure to do the latter cannot undermine the theoretical case for the former.

[112] Weatherall (n 7) 67-95

[113] Weatherall (n 7) 85-86

[114] Weatherall (n 7) 20-40

peremptoriness itself.[115] The explication of what it means for a legal norm to be located within the department of peremptory law lies in elucidating what normative features or characteristics are integral to the *jus cogens* norms. These features are constitutive of and conclusory to the norm's ascribing the *jus cogens* status. The legal norm's peremptoriness can itself be viewed as a complex compound of normative statements denoted by the set of individual propositions accounting for the constitutive legal features of *jus cogens* norms. These features ensure the normative operability of the *jus cogens* norms and make the peremptoriness of the legal norm actualize the possible legal potentialities in a way as is due to it. Importantly, these features operate not only as an embodiment of the legal norm's having some concrete characteristics logically following from its nature and purposes but also as the legal consequences and effects logically deriving from the normative configuration of these features.[116] Therefore, these characteristics or features – taken separately or in their entirety – making up the peremptoriness of a given legal norm are not exterior or otherwise external to the peremptoriness itself. Instead, they are inherent or otherwise intrinsic to the legal norms having the *jus cogens* status. In other words, these features are themselves the normative constituents of the legal norms' peremptoriness. It is mentioned that, "any concern on the sources and genesis of *jus cogens* cannot be detached from its content and functions."[117] Conceptualized in this way, it is arguable that the peremptory law's applicability extends to both the commission of actual conduct prohibited by *jus cogens* norms and the legal features of these *jus cogens norms*, ensuring its normative operability with the view of enhancing actual enforcement of the given legal norm.[118] This means that any enforcement measure deriving from *jus cogens*' legal characteristics are peremptory constituting *jus cogens* themselves.[119] The reason is that first legal norms are there to be enforced,[120] and second these enforcement measures derive from the inherent legal characteristics of *jus cogens* norms, thereby constituting interior features of the norm's peremptoriness itself.[121] "The peremptory character of a norm means that its operation as a legal norm, including its capability to produce the effects of a legal norm, is peremptory in itself."[122] That being posited, it by no means comes as surprising that any adequate legal account of the concept of *jus cogens* must stipulate specific inherent characteristics actualizing normative efficiency of the given legal norm's peremptoriness. Without further ado, *the legal norms falling within the confines of the international peremptory law are 'non-derogable,' 'universally applicable,' 'hierarchically superior' and 'effective.'* It is to be explicated what is meant by each thereby providing the basis for the ultimate chains of legal argument provided for in the final chapter. On this view, it is not necessary to state internal hierarchies between the constituent features themselves. While the feature of non-derogability can be viewed both as a meta-normative characteristic and the most important legal effect of *jus cogens* norms, all features referred to above are mutually supporting and reinforcing. Each of them serves to inform and act as a building block, ensuring each other's normative efficacy.

2.6.1. On non-derogability

According to art.53 VCLT, Peremptory norms constitute non-derogable in this sense because their operation is an integral normative process and cannot be fragmented, partitioned, segmented, dispersed, fractured, dismembered, or disintegrated in any conceivable legal manner.[123] Semantically, a derogability

[115] *Case of Goiburú et al. v. Paraguay,* Serie C No. 153, 22th September 2006, [IACtHR] para.128
[116] Trindade (n 27) 307
[117] Maarten den Heijer and Harmen van der Wilt (n 41) 4
[118] Orakhelashvili (n 7) 80; As Orakhelashvili points out that "It would be pointless if a norm was endowed with peremptory status, but its effects and legal consequences were governed by the criteria of ordinary rules."
[119] Alexander Orakhelashvili, 'Audience and Authority—The Merit of the Doctrine of *jus cogens*' in Maarten den Heijer & Harmen van der Wilt (eds.) *jus cogens: Quo Vadis?* (Netherlands Yearbook of International Law 2015) 122; Orakhelashvili notes that "If the attribute of non-derogability from a particular *jus cogens* rule had followed from the consent of those very states whom that rule has to prevent from entering into a derogatory deal, then the entire concept of non-derogability under the general doctrine of *jus cogens* would be inoperative."
[120] Alexander Orakhelashvili, 'The Classification of International Legal Rules: A Reply to Stefan Talmon' [2013] *Leiden Journal of International Law* 26, 89-103
[121] Orakhelashvili (114) 122
[122] Orakhelashvili (n 7) 78
[123] Orakhelashvili (n 7) 70

is a homonym and has various legal meanings in the context of international law.[124] For the purposes of this subsection, non-derogability should only be understood within the meaning of *jus cogens norms*. Indeed, the notion of non-derogability marks the normative distinction between *jus dispositivium and jus strictum.* It means that the former is derogable on any conceivable level of treaty law operation, be it in the form of "substance, invocation, remedies, or validation of a breach."[125] The latter, however, cannot be subjected to the same processes without necessarily distorting the normative unity of peremptory norms themselves. It is impermissible to derogate from the *jus cogens* norms in any manner because the legal essence for outlawing derogation is concerned with the particular normative function of *jus cogens* norms not to admit any derogation and not with the form of derogation *per se*.[126] It is meticulously explained that "to derogate means to repeal or abrogate in part, to destroy and impair the force and effect of, to lessen the extent of authority of, take away or detract from, deteriorate, diminish, depreciate; it also means to curtail or deprive a person of any part of his rights."[127] Derogation is successful if the integral juridical regime concerned with the uniform operation of the peremptory norms is partitioned into separate juridical relations in the complete abstraction of the *jus cogens* norms. That is, "it is an attempt to legitimize acts contrary to *jus cogens* on an inter se basis and thus to hinder the integral and non-fragmentable operation of a given peremptory norm, to aim at a result outlawed by that norm, to allow States to do what peremptory norms prohibit or abstain from what peremptory norms require."[128] Obviously, it is inherent in the nature of derogation to constitute the violation of *jus cogens* norms.[129] The notion of derogation is pertinent and applicable to each aspect of the legal norm's internal structure either "through denial of the existence or applicability of a norm to a given situation on an inter se basis."[130] Derogation is the normative category of substance and not the form. The derogation may not occur through the formal arrangement of the legal states of affair but can also take place informally.[131] For example, "it can occur where a norm is formally maintained 'alive', but it is stipulated that it does not apply or its consequences shall not be enforced with regard to a given situation."[132] Ultimately, the hinderance of the realization of the *telos* of *jus cogens* norms itself constitutes the derogation from a given legal norm.[133] It means that an alleged genuine normative conflict would also exist and result in derogation where "the treaty or treaty provision contributes to a state of affairs, which, in combination with other factors, prevents the realization of the telos of a … *jus cogens*."[134] The notion of derogation must be construed widely because the actions or omissions prohibited by the relevant *jus cogens* norms are objectively illegal.[135] That being said, this description suffices for the purposes of demonstrating what is believed to be the legal representation of the adequate notion of the derogation. Any further consideration on derogation which, will be mentioned in the subsequent chapter is the emanation of and derives from the general rationale of the derogation set out in this subsection.

2.6.2. On Universal Applicability

One can ponder that peremptory norm's property on its universal applicability is just another concrete instantiation of the meta-normative feature of non-derogability. Indeed, "the universality of *jus*

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[124] It simply means that derogation has at least two legal meanings making them normatively distinct concepts. This point will be crucial in the argument whether the non-refoulement obligation has acquired the *jus cogens* status. See., Kleinlein (n 30) 189-191; The HRC affirms that "The enumeration of non-derogable provisions in article 4 is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law… Furthermore, the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2." See., UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11. para.11.

[125] Orakhelashvili (n 7) 71

[126] Orakhelashvili (n 7) 74

[127] Orakhelashvili (n 7) 73

[128] Orakhelashvili (n 7) 73

[129] Orakhelashvili (n 7) 73

[130] Orakhelashvili (n 7) 75

[131] Orakhelashvili (n 7) 74

[132] Orakhelashvili (n 7) 76

[133] Ulf Linderfalk, "Normative Conflict and the Fuzziness of the International ius cogens Regime" [2009] *ZaöRV* 69 972

[134] Linderfalk (n 126) 972 footnote 42. Professor Linderfalk, in proving his case about conceptual intelligibility of the conflict concerning *jus cogens* norms, mentions the following proposition: "If it can be shown that a treaty provision is in conflict with a first order rule of ius cogens relative to some specific case or state of affairs, then the ius cogens rule shall prevail." 962

[135] Orakhelashvili (n 7) 71

cogens is implicit in non-derogability, and both effects are viewed to arise from the subject matter of *jus cogens*."[136] For a *jus cogens* norms to be universally applicable, its range of normative application must not be hindered or otherwise prevented in terms of the subjects and the objects of international law. The legal effects of the universal applicability of a given *jus cogens* norms are that it applies to every State,[137] prevents the rule of persistent objector from materializing,[138] and can legally impact the normative operation of any given international treaty, agreement, or any other rule of international law.[139] It marks the distinction between the peremptory international and consent based law.[140] Understood in this way, the universality of *jus cogens* norms refers to the categorical and absolute nature of their application.[141] Universal applicability of *jus cogens* norms are particularly important in the context of human rights law. Since the most category of *jus cogens* norms are human rights legal norms and the latter is universal by its intrinsic nature, when the particular human rights norm is the vested the *jus cogens* status, it acquires a double layer of universality. In this way, it "possess the capacity to survive multiple levels of illegality and have a multiple consequential effect."[142] Therefore, universal applicability of the *jus cogens* norms is an inseparable feature of the norm's peremptory nature. Its scope of applicability can be understood not only in terms of subjects and the objects of international law but also in terms of the applicability to the multiplicity of the subject matter[143] starting from the law of treaties[144] to that of state responsibility[145] and even to the resolutions of the Security Council.[146]

2.6.3. On Hierarchical Superiority

Hierarchical superiority constitutes primacy of the peremptory law over the other norms of international law.[147] Similar to the feature of universal applicability, hierarchical superiority is both the feature and the consequence of the peremptory norms. "It is a consequence in that the identification of a norm as a peremptory norm of general international law (*jus cogens*) has the effect that it will be superior to other norms. It is, however, also a characteristic since hierarchical superiority describes the nature of the peremptory norms of general international law (*jus cogens*)."[148] Its normative affirmation is present not only in art.53(VCLT) but also in the art.64(VCLT).[149] It must be noted that hierarchy of the *jus cogens*

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[136] Weatherall (n 7) 87

[137] *Prosecutor v. Goran Jelisic* (Trial Judgement), IT-95-10-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 14 December 1999, para.60; *Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants,* OC-18/03, Inter-American Court of Human Rights (IACrtHR), 17 September 2003, p.113, para.5.

[138] Erika de Wet, '*jus cogens* and Obligations Erga Omnes' in Dinah Shelton (eds.), *Oxford Handbook on Human Rights* (OUP 2013) 2

[139] Kyoji Kawasaki, "A Brief Note on the Legal Effects of *jus cogens* in International Law" [2006] *Hitotsubashi Journal of Law and Politics* 34, 27-43; see also Jean d'Aspremont (n 76) 93-96; See also, Antonio Cassese (n 37) 161-162.

[140] Alfred Verdross, 'Jus Dispositivum and *jus cogens* in International Law' *AJIL* 60, 1, 55-63

[141] For example, the ICJ refused to judge using force as legal, even to rescue hostages. *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran);* Order, 12 V 81, International Court of Justice (ICJ), 12 May 1981; The ICJ also refused to fragment the legal order with respect to the rules governing the use of force in *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America*, International Court of Justice (ICJ), 6 November 2003; ILC does not accept any justification (be it necessity, duress, countermeasures, etc.) with respect to offending *jus cogens* norms, see., ILC (n 90) p.85 commentary on 26(4); The ECtHR completely denies any argument concerning the act of balancing between the rights arising from art.3(ECHR) and even the State security. See., *Saadi v. Italy*, ECtHR [GC], App. No. 37201/06, 28 February 2008, paras.140; *Chahal v. The United Kingdom*, ECtHR, App. No. 70/1995/576/662, 11 November 1996; para.149; The IACtHR rejects that non-compliance with the prohibition of torture can be justified by invoking any competing considerations (war, the threat of war, fight against terrorism, state of emergency) in *Case of the Gómez-Paquiyauri Brothers v. Peru*, (Merits, Reparations and Costs), Judgment of July 8, 2004, IACtHR, para.111. These lines of legal materials show how the norms of *jus cogens* operate in the absolute fashion.

[142] Orakhelashvili (n 7) 81

[143] On the creative pull of *jus cogens* norms as to the applicability of the different subject matters and different planes in international law see Jean d'Aspremont (n 76) 93-96; See also, Antonio Cassese (n 37) 161-162. See also, UN Human Rights Committee (HRC*), CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant,* 4 November 1994, CCPR/C/21/Rev.1/Add.6.

[144] Trindade (n 27) 304ff

[145] International Law Commission (n 90);

[146] Kamrul Hossain, The Concept of *jus cogens* and the Obligation Under the U.N. Charter, [2005] *Santa Clara J. Int'l L*. 72, 3, 72-98;

[147] International Law Commission (ILC), Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682 (13 April 2006) paras.361-379

[148] International Law Commission (ILC), Chapter V Peremptory norms of general international law *(jus cogens),* A/74/10 (7 Aug 2019) p.153

[149] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331

norms must be understood in their structural, substantial, logical and axiological sense.[150] Hierarchical nature of *jus cogens* norms can be ascribed to their moral paramountcy in international law.[151] On the non-positivist conception of *jus cogens* norms, the hierarchical superiority is but the emanation of the said moral primacy. In international law, to say that the norm enjoys higher hierarchical standing is to argue for the higher hierarchical rank of that norm in the context of *lex superiori* considerations.[152] Further, the norms of "*jus cogens* not only postulates the hierarchy between conflicting interests, but provides, by its very essence, the legal tool of ensuring the maintenance and continuous operability of this hierarchy, depriving conflicting acts and transactions of States of their legal significance."[153] The hierarchical superiority with the universal applicability of the given legal norm ensures that the non-derogability of *jus cogens* norms is not deprived of the meaningful effect that is due to them.[154] Though the actual legal practice of the legal effects associated with the hierarchical paramountcy of *jus cogens* norms is abundantly scarce,[155] there is a general agreement in the scholarly writings[156] and the practice of international tribunals[157] on this feature of *jus cogens* norms. For the present purposes, it suffices to conclude that hierarchical superiority is the necessary constitutive ingredient of the institutional normativity of *jus cogens* norms, making the peremptoriness of these norms into what they are. Since the hierarchical superiority, universal applicability aims to secure non-derogability of the norm, and the latter serves as the gatekeeper of the normative unity of *jus cogens* norms, then these norms must by definition be of effective legal nature.

2.6.4. On Effectiveness

Within the legal dimension of non-positivist understanding of the concept of *jus cogens*, the considerations of effectiveness occupy a distinctively unique part. To ensure non-derogability through the legal features of universal applicability and hierarchical superiority, the considerations of effectiveness should play the role of normative intermediary by linking these features with each other. The effectiveness, thus, lies at the heart of realizing the *telos*[158] or *raison d'etre*[159] of *jus cogens* norms. That effectiveness is ascribed the role of that paramountcy is constituted by the normative identity of *jus cogens* norms themselves. Most *jus cogens* norms – if not all of them – are concerned with human rights or considerations having the profoundly humanitarian dimension.[160] When engaging with the various legal scenarios concerning the applicability of these normative variables mentioned above, legal reasoning must be guided and informed by the interpretive principles of effectiveness[161] to realize the normative desiderata of *jus cogens* norms. Since the principle of effectiveness – usually framed as *effet utile*[162] – is a part and

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[150] Kleinlein (n 30) 174-178
[151] *Ibid.,* p.197-202
[152] Elizabeth Santalla Vargas (n 29) 230-232
[153] Orakhelashvili (n 7) 68
[154] Orakhelashvili (n 7) 75
[155] Perhaps the only exception is *Case of Aloeboetoe et al v Suriname, Aloeboetoe and ors v Suriname,* Reparations and costs, IACHR Series C no 15, [1993] IACHR 2, IHRL 1396 (IACHR 1993), 10th September 1993, [IACtHR]
[156] Gennady M Danilenko, 'International *jus cogens*: Issues of Law-Making' [1991] *EJIL* 2, 1, 42-65; M.M. Whiteman, "*jus cogens* in International Law, with a projected list' [1997] *Georgia Journal of International and Comparative Law* 7, 2, 609-626; Christian Tomuschat, "Reconceptualizing the debate on *jus cogens* and obligations erga omnes: concluding observations" in Christian Tomuschat and Jean-Marc Thouvenin (eds.) *The Fundamental Rules of International Legal Order: jus cogens and Obligations Erga Omnes* (Martinus Nijhoff 2006) 420-425. Orakhelashvili (n 7); Weatherall (n 7) 80-90; Andreas L. Paulus, '*jus cogens* in a Time of Hegemony and Fragmentation an Attempt at a Re-appraisal' [2005] *Nordic Journal of International Law* 74, 297–334; Dinah Shelton, 'Normative Hierarchy in International Law' [2006] *AJIL* 100, 291-324.
[157] *Al-Adsani v. The United Kingdom,* ECtHR [GC], App. No. 35763/97, 21 November 2001, para.60; *Prosecutor v. Anto Furundzija* (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, para.153; *Case of García Lucero et al v. Chile,* Preliminary objection, merits and reparations, 28th August 2013, [IACtHR] para.123; See also, *case of Michael Domingues v. United States,* Case 12.285, Report No. 62/02, [IACtHR] para.49; See also, *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities,* Case T-315/01, 21 September 2005, para.226.
[158] William J. Wagner (n 85)
[159] *Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,* International Court of Justice (ICJ), 28 May 1951, p.12;
[160] Trindade (n 27) 289ff; Maarten den Heijer and Harmen van der Wilt (n 41) 4-9
[161] Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 9-70
[162] Frédéric Mégret, 'Nature of Obligations' in Daniel Mockeli, in Sangeeta Shah & Sandesh Sivakumaran (eds.,) *International Human Rights Law* (OUP 3rd 2018) 86-110; Matthew Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law' [2000] *EJIL* 11, 3, 497-499; See also, *UN Human Rights Committee (HRC), General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant,* 26 May 2004, CCPR/C/21/Rev.1/Add.13; *Wemhoff v. Germany,* App. No. 2122/64, ECtHR, 25 April 1968, para.8.; *Case Concerning Military*

parcel of human rights legal reasoning and *jus cogens* norms themselves are primarily human rights norms, this interpretive approach must itself figure as a constituent entity of the norm's peremptoriness. Conceptualized in this manner, the effectiveness should be understood as a peremptory itself, however, only relative to the concrete instances of *jus cogens* norms and not separately or otherwise independently on its own. Since the principle of effectiveness and the interpretive considerations[163] thereof are widely accepted in the human rights doctrine[164] and the case-law of the international tribunals[165] as well, no independent legal account of the principle of effectiveness will be provided. It is only to be mentioned that the very core of the principle of effectiveness figuring in the human rights and *jus cogens* reasoning is to provide the most victim oriented interpretation.[166] Therefore, each familiar interpretive technique[167]employed in the final analysis enhances the effectiveness of *jus cogens* norms by providing victim-centered interpretation of any given legal states of affair.

In this sub-section, however, one familiar objection leveled against the material expansion of *jus cogens'* applicability, which can also be levelled against the inclusion of considerations of effectiveness into the realm of legal norms' peremptoriness should be addressed. This charge points towards the imperialistic and utopian dimension of *jus cogens* norms, alleging that its material scope is somehow expanding to the extent of accommodating and sweeping away everything on its way.[168] Therefore, the considerations of effectiveness which by their very nature are the complex normative compound of different interpretive propositions, under the exegesis of human rights driven *jus cogens* norms will attempt to modify the material content of *jus cogens* in an all-encompassing manner. This objection is valid in one sense and invalid in another. However, this objection is only valid in the trivial and very

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and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (n 58) para.267. The ICJ recognized that "where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves."

[163] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007) 72-79, See also George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' [2010] *EJIL* 21, 3, 538-541; Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' [2009] 42 Vanderbilt Journal of Transnational Law 905–947; Başak Çali 'Specialized Rules of Treaty Interpretation: Human Rights' in Duncan B. Hollis (eds.) *The Oxford Guide to Treaties* (OUP 2012) 525-545.

[164] Giuseppe Martinico, 'Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts' [2012] *EJIL* 23, 2, 401-424; Robert Kolb, 'Is there a subject-matter ontology in interpretation of international legal norms?' in Mads Andeas & Eirik Bjorge (eds.) *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (CUP 2015) 478; Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention' [2005] *ICLQ* 54, 2, 279-319. Ulf Linderfalk, 'Who are 'The Parties'? Article 31, Paragraph 3(C) of the 1969 Vienna Convention and the 'Principle of Systemic Integration' Revisited' [2008] *Netherlands International Law Review*, 55, 343–364; Adamantia Rachovitsa, 'The principle of Systemic Integration in Human Rights Law' [2017] *ICLQ* 66, 557–588.

[165] *Cyprus v. Turkey*, App. No. 25781/94, ECtHR, 10 May 2001, para.78; *Engel and ors v Netherlands,* ECtHR, App. No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, 8 June 1976, para.81; *Matthews v. The United Kingdom,* ECtHR, App. No. 24833/94, 18 February 1999, para.39; Separate opinion of Judge A. A. Cançado Trindade in *Blake v. Guatemala,* Inter-American Court of Human Rights (IACrtHR), 24 January 1998, paras.26-32; *Prosecutor v. Anto Furundzija* (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, para.96; On hermeneutic of human rights treaties see, Separate opinion of Judge Antônio Augusto Cançado Trindade in *Ahmadou Sadio Diallo, Guinea v Democratic Republic of the Congo,* Judgment, Preliminary Objections, ICJ GL No 103, ICGJ 52 (ICJ 201), 30 November 2010, United Nations [UN]; International Court of Justice [ICJ]

[166] *Wemhoff v. Germany,* App. No. 2122/64, ECtHR, 25 April 1968, para.8. The ECtHR noted that "it is also necessary to seek the interpretation that is most appropriate in order to realize the aim and achieve the object of the treaty." It then, continued "not that which would restrict to the greatest possible degree the obligations undertaken by the Parties." Indeed, the normative proposition that human rights treaty should be interpreted with the view of having the particular emphasis on the victims of the violation shouldn't be conflated with interpreting the treaty in a way to impose upon the state the obligation of a disproportionate degree. However, it is to be acknowledged that it is impossible to draw the blanket line between the former and the latter. Such an inquiry should be undertaken on a case-by-case basis. See. *Osman v. the United Kingdom,* App. No. 87/1997/871/1083, ECtHR, 28 October 1998, para.116.

[167] *Tyrer v. The United Kingdom,* App. No. 5856/72, ECtHR, 15 March 1978, para.31*; Dudgeon v. United Kingdom*, App. No. 7525/76, ECtHR, 22 October 1981. See also *Gordon C. Van Duzen v. Canada,* CCPR/C/15/D/50/1979, UN Human Rights Committee (HRC), 7 April 1982, para.10.2. See numerous authorities cited in George Letsas 'The ECHR as a living instrument: Its meaning and legitimacy' in A. Føllesdal, B. Peters, & G. Ulfstein (Eds.) Constituting Europe: The European Court of Human Rights in a National, European and Global Context (CUP: Studies on Human Rights Conventions) 106-141; *Case of the "Street Children" (Villagran-Morales et al.) v. Guatemala,* Inter-American Court of Human Rights (IACrtHR), 19 November 1999, paras.192-194. See also, Alastair Mowbray, 'The Creativity of the European Court of Human Rights' [2005] *Human Rights Law Review* 5, 1, 57-79. See also, *Prosecutor v. Dusko Tadic aka "Dule"* (Opinion and Judgment), IT-94-1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 7 May 1997. The ICTY put it meticulously "This body of law is not grounded on formalistic postulates...Rather, it is a realistic body of law, grounded on the notion of effectiveness and inspired by the aim of deterring deviation from its standards to the maximum extent possible."

[168] For a very interesting defense see., Ulf Linderfalk, 'The Effect of *jus cogens* Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' [2007] *EJIL* 18, 5, 853−871

obvious sense of the word. Crucially, conferring a *jus cogens* status on the norm only signifies accepting and recognizing the highest normative status of the norm and has nothing to do with the scope of the norm itself.[169] If one takes the scope of the norm to denote the applicability of *ratione personae*, thereby preserving the constituent features of non-derogability, hierarchical superiority, and universal applicability, then the objection leveled against the material expansion of the scope of *jus cogens* norms is valid. Indeed, it is in the self-preserving faculty of *jus cogens* norms to protect themselves against any conceivable attempt of formally or informally reducing its constituent normative features to the dead-letter. Therefore, the considerations of effectiveness here play the reflexive part of ensuring that this will not take place. This normative reflexivity ensures the capacity of *jus cogens* norms to preserve themselves. Contrary stance would render *jus cogens* norms theoretical, illusory and entirely inoperable.[170] However, even the objection is valid, it is superficial and unsound and adds nothing to the discussion other than recapitulating triviality. What is more, the fact that something is undesirable or brings about the normative changes cannot by itself be used as an argument against the normative characteristics and ensuing consequences of *jus cogens* norms. In a second sense, if one under the scope of *jus cogens* norms means the *ratione materiae* or the legal content of the actual norm, then the contention needs to be questioned.[171] The norms of *jus cogens* are the norm with the highest normative quality and do not affect the given norm's material content. For example, whether the material content of the prohibition of torture embraces the rights or the duties of *x, y, z* or the rights or the duties of *a, b, c* is not something that *jus cogens* norms *qua jus cogens* regulate. Whether the material prohibition of torture protects the former or the latter triad of the rights and duties is regulated by the interpretive considerations of human rights norms. Whatever set of norms are then embraced becomes the subject of *jus cogens* norms in a sense as to preserve the non-derogability of the chosen scheme of rights and duties. When the grounds of law on the prohibition of the use of force (art.4(2)) obtains[172] is subject to the honest interpretive exercise and not the modalities of *jus cogens* norms. Whenever their grounds of law are obtained, *jus cogens* norm come into action. Thus, the existence of the interpretive difficulties associated with discerning the content or threshold of the norm is not the argument against *jus cogens.* This is not to say that interpretive considerations are entirely independent of *jus cogens* norms. Indeed, dishonestly downplaying the definition of the given norm may result in the derogation of the core of the norm, which is something that *jus cogens* norms cannot tolerate.[173] Though these considerations will often operate hand by hand in practice, their internal normative structure is still logically independent from each other. Therefore, an important distinction must be made between the considerations of effectiveness employed in ascertaining what the given legal norm requires – irrespective of its actual normative status – in terms of its material content and those considerations of effectiveness that help *jus cogens* norms – irrespective of what the honest interpretation in the former stage will require – to preserve their normative operability. In this subsection, the considerations of effectiveness are used in the second sense of the word. It ensures that *jus cogens* norms preserve their normative features and ensuing legal consequences.

This section demonstrated what non-positivist legal account of the concept of *jus cogens* has to offer in terms of its constitutive normative features. Indeed, "the 'peremptory' legal effects of *jus cogens* … may be understood with reference to the morality underlying the doctrine of *jus cogens*."[174] It was submitted that the norms of *jus cogens* are non-derogable, universally applicable, hierarchically superior and effective in a sense described above. True, "the peremptory character of *jus cogens* follows logically from the operative conceptualization of morality oriented in human dignity, which holds that fundamental rights can be realized only through duties of universal application."[175] Now, the final aspect left to be

[169] Orakhelashvili (n 7) 68
[170] *Airey v. Ireland,* App. No. 6289/73, ECtHR, 9 October 1979, para.26.
[171] Stefan Kadelbach, Genesis, Function and Identification of *jus cogens* Norms in in Maarten den Heijer & Harmen van der Wilt (eds.) *jus cogens: Quo Vadis?* (Netherlands Yearbook of International Law 2015) 169
[172] See the first and fourth chapters in Christine Gray, *International Law and the Use of Force* (OUP 4edn,2018)
[173] Concurring opinion of Judge Pinto de Albuquerque in *Hirsi Jamaa and Others v. Italy,* ECtHR [GC], Application no. 27765/09, 23 February 2012, p.64. "Consequently, neither the absence of an explicit request for asylum nor the lack of substantiation of the asylum application with sufficient evidence may absolve the State concerned of the non-refoulement obligation in regard to any alien in need of international protection."
[174] Weatherall (n 7) 92
[175] *Ibid.,*

outlined concerns the international legal processes through which the norm is endowed the *jus cogens* status.

2.7. Identification of *jus cogens* Norms

The question of what makes the legal norm's claim to peremptoriness and therefore to the inclusion within the realm of *jus cogens* true is a matter of profound jurisprudential importance in international law. The importance of the matter stems not only from the theoretical pertinence of the issue but also from the practical implications of the question. One cannot argue for the general or specific legal consequences of some sort deriving from the concrete instance of *jus cogens* norm unless one has convincingly established the case for the norms' constituting the instance of *jus cogens* true. Therefore, the successful international legal argument hinges on the accurate legal method employed for identifying which particular legal norm is vested the status of *jus cogens.* Notably, the question of legal method shouldn't be construed as having mere mechanical or formalistic nature. Instead, it is the substantive question of international law having the material importance. The account of identification proposed here can be treated only as introductory, for it does not cover all the details relevant for an overarching legal account for identifying *jus cogens* norms.

Within the non-positivistic conceptualization of *jus cogens* norms, the grounds of law responsible for identifying which legal norm is qualified as peremptory constitutionalizes two-tier normative system for identification. The first step inquires the fundamental nature of the norm. The second step concerns the acceptance and recognition by the international community of the states as a whole of the norm's peremptory status. Both criteria are cumulative and need to be demonstrated to exist simultaneously.

The point of departure wherefrom the line of inquiry takes off is art.53(VCLT). It is submitted that under art.53, the ground of law for forming the norms of *jus cogens* is the criterion of non-derogability that does not constitute its cause but merely its consequence; Therefore, it defines *jus cogens* norms by appealing to its consequential effects.[176] However, it counterargued that formal criterion of non-derogability become normatively comprehensible only by appealing the material element of the norm, "for there must be a clear reason why that norm is non-derogable."[177] Thus, according to the non-positivistic understanding of *jus cogens* norms, the material element of *jus cogens* norms constitutes the normative argument of political morality, forming the first ground of law inquiring whether the legal norm has the *jus cogens* status. This argument seeks to expound what are the reasons making the subject matter of the legal norm non-derogable.[178] "The very idea of non-derogability of peremptory norms implies a superior limit of permissibility of the exercise of State will in disposing the interests protected by peremptory norms."[179] The argument of political morality does not in itself explain why the given legal norm should be qualified as peremptory. It plays the role of normative intermediary elucidating what makes the claim of a particular legal norm to non-derogability indefeasible in the normative sense. However, the criteria of non-derogability is not an end in itself. The legal norm in question must protect the fundamental value of international concern. Only after the question of value the norm protects is settled makes it sense to ask whether the given norm is non-derogable.[180] The criteria of derogability should be understood only within the context of art.53(VCLT) and should not be construed as the concept of derogability employed in the human rights treaties.[181] The theoretical underpinnings making the legal norm the part of peremptory international law is based on the specific understanding of international public

[176] G. Abi-Saab, 'The Concept of *jus cogens* in International Law' [1967] *Lagonissi Conference on International Law* 15
[177] Orakhelashvili (n 7) 44
[178] Orakhelashvili (n 7) 46; He noted that "Identification of the content of international public order as embodied in peremptory norms is only possible through identifying the substantive values and principles which are as fundamentally important to the international community."
[179] Orakhelashvili (n 7) 44
[180] Orakhelashvili (n 7) 59 noting that "Therefore, categorization of rights into derogable and non-derogable is not the same as dividing human rights norms into *jus cogens* and *jus dispositivum*."
[181] UN Human Rights Committee (HRC) (n 117) para.11.

order[182] grounded in the conception of the international community of the states as a whole.[183] Therefore, only the considerations of political morality conceptually connected to the public order norms can meaningfully "determine which factor causes a legal interest to become the community concern and be protected by a peremptory norm."[184] The normative connection of the individual norm to the community interest ascertains the norm's peremptory character – it must be inquired whether the legal norm can be meaningfully partitioned into bilateral legal transactions without distorting the normative unity of the given norm.[185] The guidance should be sought "from the value system as it is reflected in the rules and principles of today's international legal order."[186] Therefore, in line with the opinions of ILC in both counts in drafting the Law of Treaties[187] and in preparing the draft for the Law of peremptory norms,[188] it is evident that it is the subject matter and the material content of the norm that is important in deciding whether the legal norm protects the interest 'so cogent'[189] as to become the concern of the international community.[190] The most common candidates are the norms of general international law. That being said, the normative argument of political morality constitutes the first truth condition of the legal ground making the legal norm's claim of qualifying as peremptory true.

The second truth condition granting an authoritative legal expression to the norm already wielding the quality is the requirement of acceptance and recognition by the international community of the states as a whole, of peremptoriness of that very norm. The notion of acceptance and recognition should be understood on non-consensual grounds explicating that *jus cogens* norms are not bilateral.[191] The non-consensual dimension of the legal account of the concept of *jus cogens* precisely steps to the fullest in this context. It demonstrates that construing the terms the acceptance and recognition as implying the consent-based approach to the formation of *jus cogens* norms wouldn't only deteriorate the normative unity of *jus cogens* norms but would also empty the idea of the consent itself.[192] Therefore, acceptance and recognition should be construed as treating or corroborating the normative belief about the norm's having the peremptory nature to be the case. The question might arise whether the second truth condition satisfying the ground of conferring the norm the *jus cogens* quality is conceptually redundant. This is natural because the normative argument of political morality is sufficient to establish the norm's peremptoriness. However, the second criterion is equally important as the first. Irrespective of the moralized conceptualization of the *jus cogens* norms, the States are significant stakeholders of international law. It means that before applying the legal potentialities of the peremptoriness in practical legal scenarios, the international community of the states as a whole must express their collective will in considering the argument of political morality conferring the *jus cogens* status to the norm as authoritatively expressed. It is demonstrative of the fact that "*jus cogens* is the end result of a common effort of humankind which is conscious of its own

[182] Markus Petsche, '*jus cogens* as a Vision of the International Legal Order' [2010] *Penn State International Law Review* 29, 2, 2, 258-264; See also, Alexander Orakhelashvili, 'Peremptory Norms of the International Community: A Reply to William E. Conklin' [2012] *EJIL* 23, 3, 863-868; William E. Conklin, 'The Peremptory Norms of the International Community: A Rejoinder to Alexander Orakhelashvili' [2012] *EJIL* 23, 3, 869-872

[183] See subchapter 4 '*jus cogens* Norms as International Public Order'

[184] Orakhelashvili (n 7) 48

[185] Orakhelashvili (n 7) 45; This view should not be conflated with the view that regards non-derogability as the only criterion. Instead, the norm is non-derogable because of the fundamental values it seeks to protect. Further, it is in line with the work of ILC stating that "Nor would it be correct to say that a provision in a treaty possesses the character of *jus cogens* merely because the parties have stipulated that no derogation from that provision is to be permitted, so that another treaty which conflicted with that provision would be void. Such a stipulation may be inserted in any treaty with respect to any subject-matter for any reasons which may seem good to the parties." See., International Law Commission (ILC), Draft Articles on the Law of Treaties with Commentaries, *Yearbook of the International Law Commission*, 1966, vol. II. Art.50(2), 248. Indeed, the treaty as a method of *jus cogens* generation is obviously incompatible with the nature of *jus cogens.* See also, Orakhelashvili (n 7) 112

[186] *Tomuschat (n 1) 30*

[187] ILC (n 175) 248

[188]While the ILC noted that values protected by the *jus cogens* don't themselves figure among the criteria for identifying the norms of *jus cogens*, these value can still "provide an indication of the peremptory status of a particular norm of general international law. In other words, evidence that a norm reflects and protects fundamental values of the international community of States as a whole… may serve to support or confirm the peremptory status of a norm." ILC (n 83) 157

[189] Hersch Lauterpacht (n 70) para.4

[190] Monika Hakimi, 'Constructing an International Community' [2017] *AJIL* 111 317

[191] Karen Parker, '*jus cogens*: Compelling the Law of Human Rights' [1989] *Hastings Int'l & Comp. L. Rev* 12, 411-420.

[192] Dubois (n 9) 146: "if the authority of a norm relies on consent being given, and that consent is withheld, yet nevertheless the norm is still held to be binding, it can be understood that the authority of the norm never really relied on the States' consent in the first place." See also, Shelton (n 35) 34: "The positivist concept of peremptory norms thus reaches a conundrum in having a consensual process with a non-consensual result—the imposition of rules adopted by a large majority on dissenting states. Even if states consented to a consensus-based source of international lawmaking, this would not preclude them from withdrawing their consent at will."

responsibility. It knows that it cannot leave its fate to any mysterious transcendental authorities but must take its destiny into its own hands."[193] Moreover, the second criterion is essential not only for the reason stated above but also for other moral reasons. Under the non-positivistic conception of *jus cogens* norms, not only the moral account of the peremptoriness is preferred, but also such account itself derives its authority from the common moral trust of the international community of the States.[194] Considering the far-reaching legal effects deriving from *jus cogens* norms, the reliance on the second criterion makes it clear that it cherishes the values of predictability, certainty, and stability. For that reason, the States must be aware of how to regulate their conduct accordingly[195] as not to violate the dictates of peremptory norms. There is an equilibrium between the first and second criterion for if the first truth condition makes the intelligible moral case for establishing the norm's peremptoriness true, then there is no reason why the international community of the States should not accept and recognize it to be the case considering the conceptualization of the international community advanced in the sections above. Therefore, acceptance and recognition are "based on a belief of the international community that the interest protected by that norm is so essential that the norm binds States even if they have not consented to it."[196] Concerning the *jus cogens* generating processes, since the account proposed is non-consensual, it opts for the independent source of law grounded in the considerations of art.53.[197] However, the apparent doctrinal support exists for the traditional source-based criteria, such as conferring *jus cogens* status through custom generating processes[198] and general principles of law[199] as codified in the art.38(1)(ICJ Statute). Under the proposed account, the impermissibility of the persistent objector is duly affirmed.[200] Though the autonomous source of peremptory norms does not make the State practice a decisve element for their identification, the same approach must be applied to the *jus cogens* generating process through customary processes.[201] Indeed, the sources of international law such as custom[202] and treaty provisions[203] can perform the function of the normative vessel containing the various possible candidates of peremptory norms. It is clear that international community of the States as a whole are the constituencies manifesting their acceptance and

[193] Tomuschat (n 1) 32

[194] Compare to *South-West Africa Cases; Advisory Opinion Concerning the International Status*, International Court of Justice (ICJ), 11 July 1950, 12.

[195] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007) 57

[196] Orakhelashvili (n 7) 107

[197] ILC (n 83) 164:The ILC In its draft articles on peremptory norms of general international law, seems to support the autonomous source for identification *jus cogens* norms. It provides for the following indication: "the "acceptance and recognition" addressed in draft conclusion 6 is not the same as, for example, acceptance as law *(opinio juris)*, which is an element for the identification of customary international law. The acceptance and recognition referred to in draft conclusion 6 is qualitatively different. Acceptance as law (opinio juris) addresses the question whether States accept a practice as a rule of law and is a constitutive element of customary international law…. Acceptance and recognition, as a criterion of peremptory norms of general international law (*jus cogens*), concerns the question whether the international community of States as a whole recognizes a rule of international law as having peremptory character."

[198] Orakhelashvili (n 7) 113-127; Linderfalk (n 31) 359-378. Orakhelashvili (105) further notes that "the question to which sources peremptory norms belong is not crucial from conceptual and practical perspectives as the peremptory character of a norm can be proved without proving the specific source." However, Linderfalk finds this extremely hard to accept from the perspective of legal positivism. See, Linderfalk (n 12) 60 footnote 58

[199] See in general Trindade (n 27) 300ff

[200] Howver, in the context of positivist understanding of *jus cogens* linderfalk (n 12) 63 makes the case that "If all states have agreed (in one form or another) that the creation of an obligation does not necessarily always require the consent or acquiescence of all those to which it applies, if the obligation happens to be non-derogable, then legal positivists can still argue that ultimately the basis of the obligation is consent." The account of consent cannot be established by appealing to consent, but only by invoking some further normative considerations. This account begs further questions. See., Dworkin (n 26) 387 noting that "we cannot sensibly treat numbers as decisive over the question whether numbers should be decisive." Letsas (n 185) noting that "it would be wholly circular to argue that state consent is the ultimate foundation of international law because states consent that it is." Dubois (n 9) 146 noting that "A norm which establishes that consent is what is required to establish binding law cannot itself be founded upon consent because this would require a further rule establishing the validity of that consent, and on and on ad infinitum." In general see., Stephen Hall, 'The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism' [2001] *EJIL* 269-307

[201] Orakhelashvili (n 7) 113; See also Tomuschat (n 1) 28 noting that "*jus cogens* may be associated with a top-down approach where basic values of the international community are the building blocks which need not be buttressed by daily practice but will of cause be confirmed by congruent practice"

[202] *Questions relating to the Obligation to Prosecute or Extradite*, Belgium v Senegal, Judgment, International Court of Justice [ICJ 2012] para.99; *Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic* (Trial Judgement), IT-96-21-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 16 November 1998, para.454; *Prosecutor v. Goran Jelisic* (Trial Judgement), IT-95-10-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 14 December 1999, para.60.

[203] Orakhelashvili (n 7) 113 noting that "Therefore, even if a multilateral humanitarian treaty embodies *jus cogens*, it cannot be a direct source of *jus cogens*, but merely its reaffirmation and codification."

recognition of the norm having the peremptory nature.[204] Such acceptance and recognition don't require unanimity but a very large majority of the States – that is, an international community of the State as a whole suffices.[205] The empirical evidence for demonstrating such an acceptance and recognition can be demonstrated by appealing but are not limited "to public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; legislative and administrative acts; decisions of national courts; treaty provisions; and resolutions adopted by an international organization or at an intergovernmental conference."[206] The resolutions are the most vivid reflection of acceptance and recognition.[207] The evidence in question must sufficiently demonstrate that the norm in question is accepted and recognized as non-derogable and reflects the values of paramount moral significance for the international community. The evidence must demonstrate the normative essence that lies behind non-derogability and the fundamental normative importance of the norm. While these are the primary pieces of evidence, the subsidiary evidence also plays a limited role. The subsidiary evidence may include the pronouncements of international tribunals and "the works of expert bodies established by States or international organizations and the teachings of the most highly qualified publicists of the various nations."[208] The subsidiary nature means that they are not in themselves sufficient to establish a given norm's peremptoriness; instead, they corroborate with a sufficiently high level of credibility the primary shreds of evidence. The weight that needs to be attached to the particular piece of evidence in the specters of primary and secondary evidence is relatively equal. In case of the slight inconsistency between the primary sources of evidence concerning the endowment of the peremptory status to the legal norm, the benefit of the doubt should be given to the norm's peremptoriness.

[204] Linderfalk (n 7) 112; See also, *Case of Othman (Abu Qatada) v. The United Kingdom*, ECtHR, App. No.8139/09, 17 January 2012, para.266.
[205] Gennady M Danilenko (n 149) 50
[206] ILC (n 83) 168
[207] Orakhelashvili (n 172) 865 noting that "What we need to search for is the ways in which the international community as a whole speaks. This leads to the evidentiary relevance of multilateral treaties and UN General Assembly resolutions. Although none of these can independently generate – as opposed to reflecting – a peremptory norm, they serve as evidence of the community attitude to the relevant norm's content and status."
[208] ILC (n 83) 170

3. *jus cogens* Non-Refoulement Obligation

3.1. Introduction

This chapter is the juridical concretization of the general rationale set out in the previous one. Upon providing for the legal account of the concept of *jus cogens* norms, this chapter argues that non-refoulement obligation constitutes the example of the legal norm having such nature. This assertion signifies that non-refoulement obligation manifestly satisfies both truth conditions for considering the legal norm's normative status as *jus cogens.* The appropriate method of identifying *jus cogens* norms has been set out in the previous chapter, and this chapter rigorously follows it.

First, this chapter will establish that normative argument of political morality renders the legal claim of non-refoulement obligation to represent the concern of international community and therefore to the inclusion within the dominion of peremptory norms true. The moral and humanitarian considerations extant with respect to non-refoulement obligation is uncontroversial. The normative argument will categorically reaffirm the intrinsic connection between the international public order and the non-refoulement obligation. By demonstrating the non-derogable ambit precisely through the universal values the non-refoulement obligation protects, its peremptory status will be revealed. Subsequently, this chapter will establish that the international community of the States as a whole accepts and recognizes the peremptory status of non-refoulement obligation. This means that international community through the means of acceptance and recognition corroborate, manifest and affirm the belief of the peremptoriness of the non-refoulement obligation to constitute the immutable legal reality. To demonstrate this, a thorough treatment of the primary and subsidiary sources of law will be required. The primary sources of law are sufficient to substantiate the contention stated above. The secondary sources of law having the subsidiary nature will be shown to support those having the primary nature. Among others, the decisions and opinions of international tribunals will be invoked. While most scholars working in the subject support the *jus cogens* status of non-refoulement obligation, some doubt such affirmation. The view of the scholars expressing these doubts will be questioned. Conclusively, this chapter proves that both truth conditions grounding legal properties for claiming the non-refoulement obligation as a legal norm of *jus cogens* exist.

3.2. Normative Argument

The normative argument is the non-positivistic legal argument deriving its ultimate authority from the totality of values derived from the humanitarian conceptualization of international law set out in the previous chapter. The latter constitutes the normative sum of international legal materials produced by the international legal practices of diversity of different stakeholder constituencies and of "the most attractive moral principles that are immanent in those materials."[1] International human rights law demonstrating what it means to be the significant catalysator of producing humanistic international legal affair is premised on "the oneness of the human family and is linked to the essential dignity of the individual."[2] Indeed, "there is undoubtedly something inherently constitutional in the very nature and subject-matter of international human rights law."[3] The requirement of respect for and safeguarding the human dignity of the individual human being is part and parcel of international law[4] and is established to constitute the

[1] Matthew H Kramer, 'When Is There Not One Right Answer?' [2008] AJIL 49

[2] Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants, OC-18/03, Inter-American Court of Human Rights (IACrtHR), 17 September 2003, paras.90-91; See also, Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' [2008] EJIL 19, 4, 655-724; Paolo G. Garozza, 'The Universal Common Good and the Authority of International Law' [2006] Notre Dame Law School Legal Studies Research Paper No. 07-36, 32-33.

[3] Stephen Gardbaum, 'Human Rights as International Constitutional Rights' [2008] EJIL 19, 4, 752.

[4] Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic (Trial Judgement), IT-96-21-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 16 November 1998. Prosecutor v. Dusko Tadic aka "Dule" (Opinion and Judgment), IT-94-1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 7 May 1997. Prosecutor v. Drazen Erdemovic (Appeal Judgment), IT-96-22-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 7 October 1997. Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic (n 65) Prosecutor v. Tihomir Blaskic (Trial Judgement), IT-95-14-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 3 March 2000.

common concern of international community.[5] This is the reason why almost all candidates of the *jus cogens* are norms of human rights.[6] But what precisely makes the non-refoulement obligation *jus cogens* norm? As it is famously argued, "If we can introduce in the international field a category of law, namely *jus cogens* … a kind of imperative law which constitutes the contrast to the *jus dispositivum*, capable of being changed by way of agreement between States, surely the law concerning the protection of human rights may be considered to belong to the *jus cogens.*"[7] Apart from this plausible argument,[8] there is something to non-refoulement obligation making its claim to constitute the concern for the international community and, therefore, to embody the quality of *jus cogens* genuinely indefeasible. Non-refoulement obligation is the fundamental universal moral[9] and legal right[10] because it protects a) "fundamental and general human interests"[11] and b) constitutes "the basic need right."[12] The fundamental and general human interests are the kind of interests providing for the genuine and basic reasons for uttering that all people are universally owed these interests not to be breached and incur them simply in virtue of their humanity.[13] Non-refoulement obligation constitutes the normative constellation of the most basic human interests. Not to subject to torture, inhuman and degrading treatment and punishment,[14] to be treated with equal concern and respect,[15] and not to have the one's life deprived or worsened for the sole reason of who the individual is,[16] undoubtedly figure among such interests. The interests protected by the non-refoulement obligation are the paradigmatic instances of the basic need rights because "If X is a basic need, then X is something which the need-holder, Y, cannot be or do without, without at the same time, suffering serious harm.

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[5] See the considerations in The Prosecutor v. Jean-Paul Akayesu (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998. The Prosecutor v. Jean Kambanda (Judgement and Sentence), ICTR 97-23-S, International Criminal Tribunal for Rwanda (ICTR), 4 September 1998. Omar Serushago v. The Prosecutor (Appeal Judgement), ICTR-98-39-A, International Criminal Tribunal for Rwanda (ICTR), 6 April 2000.

[6] Andrea Bianchi, 'Human Rights and the Magic of *jus cogens*' [2008] EJIL 19, 3, 491; Maarten den Heijer and Harmen van der Wilt, '*jus cogens* and the Humanization and Fragmentation of International Law' in in Maarten den Heijer & Harmen van der Wilt (eds.) *jus cogens*: Quo Vadis? (Netherlands Yearbook of International Law 2015) 4

[7] Dissenting opinion of Judge Tanaka in South-West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa); Second Phase, International Court of Justice (ICJ), 18 July 1966, p.297.

[8] Alexander Orakhelashvili, Peremptory Norms in International Law (OUP 2008) 59

[9] With respect to universal moral rights see., John Tasioulas, 'On the nature of human rights' in Gerhard Ernst & Jan-Christoph Heilinger (eds.) The Philosophy of Human Rights Contemporary Controversies (Hubert & Co. GmbH & Co. KG 2012) 17-61; John Tasioulas, 'Human Rights, Legitimacy, and International Law' [2013] The American Journal of Jurisprudence 58, 1, 1-25; John Tasioulas, 'The Moral Reality of Human Rights' in Thomas Pogge (eds.) Freedom from Poverty as a Human Right: Who Owes What to the Very Poor? (OUP 2007) 75–102; John Tasioulas, 'Towards a Philosophy of Human Rights' [2012] Current Legal Problems 65, 1-30; See an excellent overview about what the philosophy of human rights, as a distinct field of inquiry, studies in Rowan Cruft, S. Matthew Liao, and Massimo Renzo, 'The Philosophical Foundations of Human Rights: An Overview' in Rowan Cruft, Matthew Liao & Massimo Renzo (eds.) Philosophical Foundations of Human Rights (OUP 2015) 1-45; See also, Marie-Bénédicte Dembour, 'What Are Human Rights? Four Schools of Thought' [2010] Human Rights Quarterly 32, 1, 1-20;

[10] Samantha Besson, 'Human Rights: Ethical, Political . . . or Legal? First Steps in a Legal Theory of Human Rights' in Donald Earl Childress III (eds.) The Role of Ethics in International Law (CUP 2012) 211-246; See also, Allen Buchanan, Why International Legal Human Rights? in Rowan Cruft, Matthew Liao & Massimo Renzo (eds.) Philosophical Foundations of Human Rights (OUP 2015) 244-263; Erasmus Mayr, 'The political and moral conceptions of human rights – a mixed account' in Gerhard Ernst & Jan-Christoph Heilinger (eds.) The Philosophy of Human Rights Contemporary Controversies (Hubert & Co. GmbH & Co. KG 2012) 73-107;

[11] Samantha Besson, 'Human Rights and Constitutional Law: Patterns of Mutual Validation and Legitimation' in Rowan Cruft, Matthew Liao & Massimo Renzo (eds.) Philosophical Foundations of Human Rights (OUP 2015) 282

[12] Anja Matwijkiw, 'Human Needs and the Justice: The Case against Realism' [2011] NORDISK TIDSSKRIFT FOR MENNESKERETTIGHETER 26, 4, 280

[13] John Skorupski, 'Human Rights' in Samantha Besson and John Tasioulas (eds.) The Philosophy of International Law (OUP 2010) 357-377; James Griffin, 'Human Rights and the Autonomy of International Law' in Samantha Besson and John Tasioulas (eds.) The Philosophy of International Law (OUP 2010) 339-357; James Griffin, 'The Presidential Address: Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights' [2001] OUP: Proceedings of the Aristotelian Society, 101,1, 1-28; Simon Hope, 'Common humanity as a justification for human rights claims' in Gerhard Ernst & Jan-Christoph Heilinger (eds.) The Philosophy of Human Rights Contemporary Controversies (Hubert & Co. GmbH & Co. KG 2012) 211; Gerhard Ernst, 'Universal human rights and moral diversity' in Gerhard Ernst & Jan-Christoph Heilinger (eds.) The Philosophy of Human Rights Contemporary Controversies (Hubert & Co. GmbH & Co. KG 2012) 233; James Griffin, 'Human rights: questions of aim and approach' in Gerhard Ernst & Jan-Christoph Heilinger (eds.) The Philosophy of Human Rights Contemporary Controversies (Hubert & Co. GmbH & Co. KG 2012) 6

[14] Soering v. The United Kingdom, ECtHR, 7 July 1989; M.N. and Others against Belgium, ECtHR [GC], Application. No. 3599/18, 5 May 2020; Hirsi Jamaa and Others v. Italy, ECtHR (GC), Application no. 27765/09, 23 February 2012.

[15] David Weissbrodt and Stephen Meili, 'Human Rights and Protection of Non-Citizens: Whither Universality and Indivisibility of Rights?' [2010] Refugee Survey Quarterly, 28, 4, 34–58.

[16] Vladislava Stoyanova, 'The Right to Life Under the EU Charter and Cooperation with Third States to Combat Human Smuggling' [2020] German Law Journal, 21, 436–458; Alan Desmond, 'The Private Life of Family Matters: Curtailing Human Rights Protection for Migrants under Article 8 of the ECHR?' [2018] European Journal of International Law, 29,1, 261-279; Alison Kesby, The Right to Have Rights Citizenship, Humanity, and International Law (Oxford University Press 2012) 14-38.

Furthermore, it holds that (if X is a basic need, then) X is something which Y, or anybody else for that matter, is unable to change by changing the way he thinks or feels about X. It is not possible to un-need X just through choosing to believe that, e.g., "X is a myth.""[17]

The categorical nature of the non-refoulement obligation as a human right is uncontroversial.[18] The kind of interest the non-refoulement obligation protects is impossible to leave at the disposition of the bilateral interstate transaction or to "speak of individual advantages or disadvantages to States."[19] This means that individual or the group of the States are not allowed to partition the subject matter of the very core of non-refoulement obligation into the series of bilateral obligations. The subject matter of the non-refoulement obligation and the values this subject matter endorse are for these reasons non-derogable. The humanitarian political trajectory of international law means that human rights in general and some human rights, in particular, are so basic and so fundamental that they fall within the realm of community concern.[20] The impact of fundamental human rights on the international community of the States as a whole is materialized through the "recognition of individual rights as fundamental values of the international legal order."[21] Non-refoulement obligation precisely because of its subject matter and the general fundamental characteristics it involves wields the quality of peremptoriness and should be so affirmed. Conceptualized through the lenses of humanitarian construction of international law, the international community of the States is the sum of the States themselves committed to the protection of human rights conceiving of the fundamental and basic norms of human rights as the global limitation upon their sovereign contractual capacity. Therefore, since the non-refoulement obligation has that fundamental nature, it *eo ipso* embodies the normative capacity to establish itself as the norm of international public order and acquire peremptoriness. That being said, the normative argument of political morality establishing the first truth condition for the claim of non-refoulement obligation about its *jus cogens* nature is present.

3.3. Primary and Secondary Sources of Law

3.3.1. Treaty Provisions

The treaty provisions constitute the most prominent legal materials[22] capable of identifying and reflecting the States' views in determining whether they accept and recognize the non-refoulement obligation as the norm of *jus cogens*. The principle of non-refoulement – though expressed in somewhat different terms – contains the same irreducible core.[23] International human rights legal framework affirms non-refoulement obligation to be absolute. The ICCPR enshrines an obligation incumbent upon State parties "not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm."[24] The CAT in its article 3 affirms that "No State Party shall expel, return ("refouler") or extradite a person to another State where

[17] Matwijkiw (n 10) 281

[18] Cathryn Costello, The Human Rights of Migrants and Refugees in European Law (Oxford University Press 2015); Eman Hamdan, The Principle of Non-Refoulement under the ECHR and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Brill Nijhoff 2016); Violeta Moreno-Lax, Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law (Oxford University Press 2017); Samantha Velluti, Reforming the Common European Asylum System - Legislative Developments and Judicial Activism of the European Courts (Springer 2014) 77-105.

[19] Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, International Court of Justice (ICJ), 28 May 1951, p.12.

[20] Andreas Paulus, 'Whether Universal Values can Prevail over Bilateralism and Reciprocity' in A. Cassese (eds.), Realizing Utopia: The Future of International Law (OUP 2012) 89-90; Anne Peters, 'Humanity as the A and Ω of Sovereignty' [2009] *EJIL* 20, 3, 513-544; Anne Peters, 'Are we Moving towards Constitutionalization of the World Community?' in A. Cassese (eds.), Realizing Utopia: The Future of International Law (OUP 2012) 118-136

[21] Markus Petsche, '*jus cogens* as a Vision of the International Legal Order' [2010] Penn State International Law Review 29, 2, 2, 258-264

[22] See Questions relating to the Obligation to Prosecute or Extradite, Belgium v Senegal, Judgment, ICJ GL No 144, ICGJ 437 (ICJ 2012), 20th July 2012, para.99

[23] Cathryn Costello and Michelle Foster, 'Non-refoulement as Custom and *jus cogens*? Putting the Prohibition to the Test' in Maarten den Heijer & Harmen van der Wilt (eds.) *jus cogens*: Quo Vadis? (Netherlands Yearbook of International Law 2015) 284

[24] UN Human Rights Committee (HRC), General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13; Wemhoff v. Germany, App. No. 2122/64, ECtHR, 25 April 1968, para.12.; UN Human Rights Committee (HRC), CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, para.6; UN Human Rights Committee (HRC), CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986, para.5.

there are substantial grounds for believing that he would be in danger of being subjected to torture."[25] The prohibition of refoulement is also categorical under the ECHR,[26] extending the protection not only under the art.3[27] but also under the art.5,[28] 6,[29] 8.[30] The same can be said with respect to the CRC[31] and the CEDAW.[32] According to the article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance, "No State Party shall expel, return ("refouler"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance."[33] The ACHR is categorical in pondering in its art.22(8) that "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."[34] Moreover, the Intern-American Convention to Prevent and Punish Torture expounds in its 13(4) that the "extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State."[35] Further, according to the art.19(2) of the Charter of Fundamental Freedoms of the European Union "no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."[36] The non-refoulement obligation is also duly affirmed in the OAU Convention Governing Specific Aspects of Refugee Problems in Africa which states that "No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened."[37] The Article 23 of the Arab Charter on Human Rights stipulates that "Every citizen has the right to seek political asylum in other countries, fleeing persecution."[38]

These treaty provisions don't themselves codify *jus cogens* but only embody it. The emphasis is drawn not on the semantic structure and the textual string of the sentences, but on the fundamental values of political morality immanent in these terms. They contain veritable and trustworthy empirical materials for inferring the views and the positions of the States in accepting and recognizing non-refoulement obligation as a non-derogable value[39] of fundamental jurisprudential importance. The sum of treaty provisions amply demonstrates that the principle of non-refoulement constitutes non-derogable and unlimited legal obligation. The very fact that these treaties don't themselves constitute universal in their

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[25] UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85,

[26] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5; Soering v. The United Kingdom, ECtHR, 7 July 1989.

[27] *Soering v. The UK*, ECtHR Judgment 7 July 1989; *Chahal v. The United Kingdom*, App. No. 70/1995/576/662, 15 November 1996; *Saadi v. Italy*, App. No. 37201/06, 28 February 2008; *Harkins and Edwards v. United Kingdom*, App. No. 9146/07 and 32650/07, 17 January 2012, *Al-Saadoon and Mufdhi v. United Kingdom*, Application no. 61498/08, 2 March 2010, *Kafkaris v. Cyprus*, Application no. 9644/09, 21 June 2011

[28] *Case of El-Masri v. The Former Yugoslav Republic of Macedonia*, ECtHR [GC], App. No. 39630/09, 13 December 2012

[29] *Tomic v. The United Kingdom*, App. No. 17837/03, 14 October 2003

[30] *Moustaquim v. Belgium*, App. No. 12313/86, 18 February 1991

[31] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3. See Also, Committee on the Rights of the Child, I.A.M. v. Denmark, U.N. Doc. CRC/C/77/D/3/2016 (Jan. 25, 2018).

[32] UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13. See Also, Committee on the Elimination of Discrimination Against Women, N.S.F. v. U.K., U.N. Doc. CEDAW/C/38/D/10/2005 (June 12, 2007).

[33] UN General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, 3 August 2017, A/72/280.

[34] Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969; However, The ACHR permits the derogation from the given norm.

[35] Organization of American States (OAS), Inter-American Convention to Prevent and Punish Torture, 9 December 1985, OAS Treaty Series, No. 67,

[36] European Union: Council of the European Union, Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, C 303/1,

[37] Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention"), 10 September 1969, 1001 U.N.T.S. 45; However, it permits the States to invoke derogatory considerations if the case for the national emergency arises.

[38] League of Arab States, *Arab Charter on Human Rights*, 15 September 1994. Article 23 is qualified: "A person who was pursued for a common crime does not benefit from this right."

[39] On the distinction between different concepts of derogability see., Orakhelashvili (n 7) 58-60 and UN Human Rights Committee (HRC), CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para.12.

(extra)territorial application because of the reason that either they have not been consented by all States and cannot bind the States that are not a party to them[40] cannot be argued to constitute "the only missing ingredient for these prohibitions to qualify as *jus cogens*."[41] While the property of universality is a constitutive feature of *jus cogens* norms, they are universal because of the kind of values they guard. Construing universality as the criterion of territorial applicability in terms of the absence of the expressed consent by the States to the concrete instances of the treaties is implicitly tantamount to arguing that it is the consent-based properties of the treaty itself that confers the *jus cogens* status upon the legal norm. Exclusively concentrating on the territorial reach of the concrete treaty and inferring the absence of the universality criterion by appealing to the absence of the universal adherence to the concrete treaty means to imply that it is the State consent, "the text of a treaty, and the intention of the parties, which makes a rule peremptory."[42] For example, the ICJ invoked various international instruments of "universal application"[43] in identifying the *jus cogens* nature of the prohibition of torture. The universal applicability of these instruments is not exhausted by the universal adherence to these instruments. Holding so would subordinate any instance of the *jus cogens* to the State will.[44] This would misconstrue the identity of *jus cogens* norms and misconceive the kind of universality criterion that is due to *jus cogens* norms. The norms become *jus cogens* not because they are territorially universal, but they are *so universal* because they are *jus cogens.* However, as with the norms of customary international law,[45] the treaty provisions are insufficient to constitute exclusive empirical material to attest the acceptance and recognition on the part of an international community of the States as a whole of the crystallization of the norm of *jus cogens* ultimately.

3.3.2. The conclusions of the Executive Committee of the UNHCR

The empirical materials produced through the work of the executive committee of the UNHCR (The EC) in the form of its conclusions provide for the material expression of the State's view on the fundamental importance of the non-refoulement obligation. The pertinent conclusions don't create binding legal obligations but are essential in discerning and formatting the normative viewpoint whether the non-refoulement principle wields the peremptory nature.[46] As Lauterpacht and Bethlehem observe in their study "Adopting the language of the ICJ in its *North Sea Continental Shelf* judgment, the Executive Committee is thus composed of representatives of States 'whose interests are specially affected' by issues concerning refugees. With a membership of fifty-seven States having a declared interest in the area, Conclusions of the Executive Committee can, in our view, be taken as expressions of opinion which are broadly representative of the views of the international community."[47] The peremptory nature of the non-refoulement obligation is expressed variously through the multiplicity of semantic constructions. Starting from 1975, the State and non-state parties are asked to observe scrupulously "the principle whereby no refugee should be forcibly returned to a country where he fears persecution."[48] As early as in the 1977 the EC recalled that "the fundamental humanitarian principle of non-refoulement has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States."[49] In 1982 it reaffirmed "the importance of the basic principles of international protection and in particular the principle of non-refoulement which was progressively acquiring the character of a

[40] See art. 34 in United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331,
[41] Evan J. Criddle and Evan Fox-Decent, 'The Authority of International Refugee Law' [2021 forthcoming] Wm. & Mary L. Rev. p.8. The article can be accessed at "https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733019"
[42] Orakhelashvili (n 8) 58
[43] See Questions relating to the Obligation to Prosecute or Extradite, Belgium v Senegal, Judgment, ICJ GL No 144, ICGJ 437 (ICJ 2012), 20th July 2012, para.99.
[44] Twenty-One Detained Persons v Germany, ECOMHR, Collection 27, 97-116, para.4.
[45] International Law Commission (ILC), "Draft conclusions on identification of customary international law, with commentaries," Yearbook of the International Law Commission, 2018, vol. II, Part Two., p.143; The ILC noted that "treaties cannot create a rule of customary international law or conclusively attest to its existence or content."
[46] I greatly benefited from the scholarly research undertaken by Cathryn Costello and Michelle Foster (n 23) 290-291
[47] Sir Elihu Lauterpacht and Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion* (CUP 2003) para.214.
[48] United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.1 (XXVI), 1975, para (b)
[49] United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.21 (XXXII), 1981, para (f)

peremptory rule of international law."[50] Almost decade later, it "called on all States to refrain from taking such measures and in particular from returning or expelling refugees contrary to fundamental prohibitions against these practices."[51] In 1996 the EC stressed that "the principle of non-refoulement is not subject to derogation."[52] Throughout its working mandate, the EC has been consistent in affirming the fundamental nature of non-refoulement obligation.[53] In its various conclusions such as the conclusions No. 16, 21, 22, 33, 74, 80, 94, 99 and 100 the non-refoulement obligation was featured as the principle of "fundamental importance".[54] In the same way, conclusion No.65 describes non-refoulement obligation as the "cardinal principle."[55] The non-refoulement obligation wields "the fundamental character of the generally recognized principle."[56] Further, the non-refoulement obligation is also depicted as the "humanitarian legal principle"[57] and the "recognized principle"[58] constituting the "fundamental prohibition."[59] As Professors C. Costello and M. Foster note "the principle of non-refoulement is described as distinct and independent of treaty obligations; hence there is no suggestion in any of these resolutions that its application is confined to states party to the 1951 Convention and/or Protocol."[60]

3.3.3. Cartagena Declaration and Subsequent Developments

It is equally important to observe that the non-refoulement principle is affirmed in the Cartagena declaration adopted by the Latin American States in furtherance of its absolute status. The Colloquium on the International Protection of Refugees adopted the conclusion to this effect "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…[and affirmed that] this principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of ***jus cogens***."[61] This was reaffirmed on 16 November 2004 by adopting "Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America."[62] It recognized "the ***jus cogens*** nature of the principle of non-refoulement, including non-rejection at the border, the cornerstone of international refugee law."[63] Recently, on the 3 December 2014, "A Framework

[50] United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.25 (XXXIII), 1982, para (b);
[51] United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.55 (XXVIII), 1989, para (d); United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.100 (LV), 2004, para (i);
[52] United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.79 (XLVII), 1996, para (i)
[53] United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.17 (XXXI), 1980, para (b)
[54] United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.16 (XXXI), 1998, para (e); United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.79 (XXXII), 1981, para (f); United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.22 (XXXII), 1981, para (2); United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.33 (XXXV), 1984, para (C); United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.74 (XLV), 1994, para (g); United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.80 (XLVII), 1996, para (e); United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.94 (LIII), 2002, para (c-i); United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.100 (LV), 2004, para (i); United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.103 (LVI), 2005, para (g);
[55] United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.65 (XLII), 1991, para (c)
[56] United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.17 (XXXI), 1980, para (b)
[57] United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.19 (XXXI), 1980, para (a)
[58] United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.15 (XXX), 1979, para (b)
[59] United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.50 (XXXIX), 1988, para (g)
[60] Cathryn Costello and Michelle Foster (n 23) 291 and subsequent citations of UNHCR conclusions offering far more detailed guidance to this matter.
[61] Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19 - 22 November 1984, p.3. (*Emphasis is Mine*)
[62] Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America Mexico City, 16 November 2004. (*Emphasis is Mine*)
[63] Ibid., p.1. (*Emphasis is Mine*)

for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean" was adopted. The so-called BRAZIL DECLARATION recognized the "developments in the jurisprudence and doctrine of the Inter-American Court of Human Rights …. the ***jus cogens*** character of the principle of non-refoulement, including non-rejection at borders and indirect refoulement, and the integration of due process guarantees in refugee status determination procedures, so that they are fair and efficient."[64]

3.3.4. General Assembly Resolutions

It is a commonplace in the international legal realm to conceive the General Assembly Resolutions as possessing the 'normative value' of an evidentiary kind.[65] Irrespective of the fact that these legal materials are not legally binding, they can still serve the vital role in discerning the normative viewpoint of the States whether the peremptory nature of non-refoulement obligation is so accepted and recognized.[66] The analysis of the resolutions in the context of *jus cogens* status of the non-refoulement principle was undertaken in the study of C. Costello and M. Foster.[67] The authors observe that "the General Assembly has passed forty resolutions since 1977…in which it has consistently recognized and affirmed the principle of non-refoulement."[68] Notably, the affirmation of the principle of non-refoulement took place in the abstraction of the treaty provisions framing it as the standalone principle of international law.[69] The States are asked to "scrupulously observe the principle of non-refoulement."[70] The return or the expulsions of the refugees or the asylum-seekers are deemed as the "fundamental prohibitions."[71] The authors further observe that these resolutions are expressed with the "clarity and lack of ambiguity."[72] Crucially, the authors cite the resolution 57/187 (2001)[73] account for the welcoming notes of the General Assembly to the declaration adopted at the Ministerial Meeting of States Parties to the Refugee Convention and/or its Protocol.[74] In the mentioned declaration, "the continuing relevance and resilience of this [Refugee] international regime of rights and principles, including at its core the principle of non-refoulement" is duly acknowledged.[75] That General Assembly endorsed the resolution is the sign, as authors notice, of "the approval and agreement of all members of the United Nations."[76] Finally, the authors conclude that "it is highly significant that the 40 resolutions that have recognized the principle of non-refoulement, have been widely accepted and subject neither to negative votes nor abstentions."[77]

3.3.5. Judicial Pronouncements

The pronouncements of the judicial nature are the category included in the subsidiary shreds of evidence and consists of both the actual judgments and the advisory opinion. Importantly, international human rights argumentative practice is replete with the judicial pronouncements emphasizing the fundamental and genuinely categorical nature of the non-refoulement obligation through employing various semantic constructions and have probative value in their own light.[78] Thus, the references will

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[64] BRAZIL DECLARATION "A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean" Brasilia, 3 December 2014, p.2 (*Emphasis is Mine*)
[65] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996, para.70.
[66] Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America); Merits, International Court of Justice (ICJ), 27 June 1986, para.100-101,203-204.
[67] Cathryn Costello and Michelle Foster (n 23) 287-289
[68] *Ibid.*, p.287
[69] *Ibid.*, p.287
[70] UNGA Res. 44/137, 15 December 1989. Cited in Cathryn Costello and Michelle Foster (n 23) 288
[71] UNGA Res. 44/137, 15 December 1989. Cited in Cathryn Costello and Michelle Foster (n 23) 288
[72] Cathryn Costello and Michelle Foster (n 23) 288
[73] Cathryn Costello and Michelle Foster (n 23) 288
[74] Cathryn Costello and Michelle Foster (n 23) 288
[75] Cathryn Costello and Michelle Foster (n 23) 289
[76] Cathryn Costello and Michelle Foster (n 23) 289
[77] Cathryn Costello and Michelle Foster (n 23) 289
[78] Başak Çalı, Cathryn Costello and Stewart Cunningham, 'Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies' [2020] German Law Review 21, 355-384; Committee Against Torture, Mutombo v. Switzerland, U.N. Doc. CAT/C/12/D/013/1993 (Apr. 27, 1994). Committee Against Torture, J.H.A. v. Spain (Marine I), U.N. Doc. CAT/C/41/D/323/2007, (Nov. 21, 2008).

only be made to those judicial opinions which explicitly endorsed the *jus cogens* nature of non-refoulement obligation. Notably, the ICJ hasn't yet taken the stance on the question. The same applies to the ECtHR except for separate opinion annexed to *Hirsi* Judgment by Judge Pinto de Albuquerque. He noted that non-refoulement obligation is "a rule of *jus cogens*, on account of the fact that no derogation is permitted and of its peremptory nature, since no reservations to it are admitted."[79] In the concurring opinion annexed by Judge Antônio Augusto Cançado Trindade to the case of *Haitians and Dominicans of Haitian Origin in the Dominican Republic*, he pondered the non-refoulement obligation to enter in the domain of *jus cogens norms*.[80] Later, in the advisory opinion rendered by the IACtHR in the *Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection* the Court affirmed the *jus cogens* status of non-refoulement obligation. [81] Further, in the case of *The Prosecutor v. German Katanga*, the ICC observed that the non-refoulement obligation "finds increasing recognition among States … from which no derogation is permitted (*jus cogens*) … [explicitly mentioning] the peremptory norm of non-refoulement."[82] Lastly, in the case of *Prosecutor v. Furundžija* the ICTY implicitly endorsed the *jus cogens* nature of non-refoulement principle by pondering that "that the prohibition on torture is a peremptory norm or *jus cogens*… [and] is so extensive that States are even barred by international law from expelling, returning or extraditing a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture."[83]

3.3.6. Scholarly Consensus

The peremptory nature of non-refoulement obligation finds increasing recognition and support among the scholars of international law. While it is true that these scholars employ different methodological avenues for substantiating their contentions, the overall theoretical conclusion concerning the peremptoriness of the non-refoulement obligation is affirmative. Importantly, in 2002 ***Jean Allen*** argued that non-refoulement obligation constituted the norm of *jus cogens.*[84] He departed from the assumption that non-refoulement obligation was already crystallized into the customary international law. In his view, the identification of the non-refoulement obligation as one having the *jus cogens* quality required considering it in light of the double *opinio juris.*[85] He observed that, "the practice of States in not forcibly repatriating refugees must thus be shown to be based on the belief (*opinio juris*) that they themselves are bound by a legal obligation not to do so, and that such an obligation is binding on them as a matter of *jus cogens*."[86] To substantiate his contention, he referred to the various conclusions of the UNHCR and Cartagena Declaration accompanied by its various developments described above.[87] Lastly, he insisted on the desirability of recognizing the non-refoulement obligation as the norm of *jus cogens* by emphasizing the legal consequences deriving from such recognition in terms of constraining the activity of the Security Council and the European Union in their dealing with the refugees and asylum seekers.[88] Another scholar ***Alexander Orakhelashvili*** argued the non-refoulement obligation to constitute the norm of *jus cogens.*[89] He insists that the norm of *jus cogens* are consent independent and constitute public order norms. However, concerning the legal sources of its identification, he considers that no material

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[79] Separate opinion of Judge Pinto de Albuquerque in Hirsi Jamaa and Others v. Italy, ECtHR (GC), Application no. 27765/09, 23 February 2012, p.65. It should be noted that Judge Pinto de Albuquerque notes that "This is now the prevailing position in international refugee law as well" and cites numerous materials to support the contention in footnote 18.

[80] Concurring opinion of Judge Antônio Augusto Cançado Trindade in Case of the Haitians and Dominicans of Haitan Origin in the Dominican Republic v. Dominican Republic, Inter-American Court of Human Rights (IACrtHR), 26 May 2001. Cited in Antônio Augusto Cançado Trindade, International Law for Humankind Towards a New Jus Gentium (Martinus Nijhoff vol 6) 521

[81] Advisory Opinion OC-21/14, "*Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection"*, OC-21/14, Inter-American Court of Human Rights (IACrtHR), 19 August 2014, paras.225-227; see footnotes 449-450 for the materials relied.

[82] Prosecutor v. German Katanga (Trial Chamber II), ICC-01/04-01/07, International Criminal Court (ICC), Decision on the application for the interim release of detained Witnesses, 1 October 2013, para.30. See footnote 57 for the materials cited to support the contention.

[83] *Prosecutor v. Anto Furundzija* (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, para.144 and 153. See footnote 165 for the materials cited to support the contention.

[84] Jean Allain, 'The *jus cogens* Nature of Non-Refoulement' [2001] *International Journal of Refugee Law* 533-558

[85] Allain (n 78) 538

[86] *Ibid.*,

[87] *Ibid.*, 538-541

[88] *Ibid.*, 541ff

[89] Orakhelashvili (n 8)55

significance can be derived from it because *jus cogens* can be traced through the independent sources of law, custom-based approach conceptualized within the *Nicaragua* Case,[90] and through the general principles of law.[91] He, too, like Jean Allen, appeals to the conclusions of the UNHRC Executive Committee and the Cartagena Declaration to support the normative expression of the non-refoulement obligation as the norm of *jus cogens.*[92] Importantly, ***Antônio Augusto Cançado Trindade***, both in his capacity as a judge[93] and scholar, pondered the non-refoulement obligation to enter into the domain of *jus cogens*.[94] He argued that cross fertilization among the regimes of international legal protection made the conclusion about the categorical nature of the non-refoulement obligation particularly pertinent.[95] His views about the *jus cogens* nature of the non-refoulement principle could also be generated by his more profound philosophical worldview about the humanized international law and be rooted in the (*jus*)naturalist thinking as emanating from the only material source of law – what he calls the *recta ratio.*[96] In support of his conclusion, he also referred to the Cartagena Declaration and the opinions of the IACtHR mentioned above. ***Alice Farmer*** is also among the scholars considering the non-refoulement obligation to embody *jus cogens* norm.[97] She posits that the non-refoulement obligation has fundamentally "norm-creating character such that it can be used to form the basis of general rules of law."[98] The conclusion that the non-refoulement obligation is the instance of *jus cogens* norm is drawn by referring to the research undertaken by Orakhelashvili, Allain and the conclusions of the Executive Committee of UNHC.[99] She argues that article 33(2) of the Refugee Convention must be read in light of the newly emerged *jus cogens* non-refoulement obligation.[100] It follows that exceptions to the non-refoulement obligation codified in the 1951 Convention must be read very narrowly.[101] Her analysis is significant because of the view that "the prohibition on refoulement in the torture context derives from the prohibition on torture itself: essentially, non-refoulement functions to ensure full adherence to the prohibition on torture."[102] She not only considers the non-refoulement obligation to represent the sovereign *jus cogens* norm but also thinks that in the context of torture, the non-refoulement should be deemed *jus cogens* because the prohibition of the torture is itself *jus cogens*.[103] This view is in line with the ICTY *Prosecutor v. Furundžija*.[104] This is also shared by ***Karel Wouters***, though the author did not necessarily endorse the *jus cogens* character of the non-refoulement itself but inferred it from the prohibition itself.[105] Surely, ***Antonio Cassese*** the author of *Furundžija* is of the same view.[106] As ***John Dugard and Christine Van den Wyngaer*** observe "If any human rights norm enjoys the status of*jus cogens*, it is the prohibition on torture. Consequently, no requested state should have difficulty injustifying a refusal to extradite a person to a state in which he is

[90] *Ibid.*, 117-121. Orakhelashvili noted that "The Court found a further confirmation of the validity of the rules relating to the non-use of force as customary law in the fact that they are part of *jus cogens*… Arguably, a norm recognized and accepted by the international community of States as a norm from which no derogation is permitted would pass the test of custom, but then the Court in fact treated the norm's peremptory character as an alternative to traditional custom-generation criteria." at 117-118.
[91] *Ibid.*, 125-126
[92] *Ibid.*, 55
[93] Concurring opinion of Judge Antônio Augusto Cançado Trindade (n 74)
[94] Antônio Augusto Cançado Trindade, *International Law for Humankind Towards a New Jus Gentium* (Martinus Nijhoff vol 6) 520-525
[95] Antônio Augusto Cançado Trindade (n 74) 520-522
[96] For a detailed picture see., Judge Antônio A. Cançado Trindade, *The Construction of a Humanized International Law A Collection of Individual Opinions (1991–2013)*, Preface by Dean Spielmann General Introduction by Andrew Drzemczewski (Brill Nijhoff Vol 6, Book 1); See also, *Judge Antônio A. Cançado Trindade The Construction of a Humanized International Law A Collection of Individual Opinions (2013–2016)*, Preface by Dean Spielmann General Introduction by Andrew Drzemczewski, (Brill Nijhoff Vol 7, Book 3).
[97] Alice Farmer, 'Non-Refoulment and *jus cogens*: Limiting Anti-Terror Measures that Threaten Refugee Protection' [2008] *Georgetown Immigration Law Journal*, 23, 1, 1-38.
[98] *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), I.C.J. Reports 1969, p.3, International Court of Justice (ICJ), 20 February 1969, paras.70-71
[99] Farmer (n 93) 23-28
[100] Farmer (n 93) 28
[101] Farmer (n 93) 34
[102] Farmer (n 93) 35
[103] See also Erika de Wet, 'The Prohibition of Torture as an International Norm of *jus cogens* and its Implications for National and Customary Law' [2004] *EJIL* 15, 97-121
[104] *Prosecutor v. Anto Furundzija* (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, para.144 and 153
[105] Karel Wouters, *International Legal Standards from the Protection From Refoulement* (Intersentia 2009) 30
[106] Antonio Cassese, 'For an Enhanced Role of *jus cogens*' in A. Cassese (eds.), *Realizing Utopia: The Future of International Law* (OUP 2012) 167

likely to be subjected to torture."[107] ***James C. Simeon*** is categorical in affirming that the non-refoulement obligation wields the peremptory nature and constitutes an established instance of *jus cogens* norms.[108] He closely follows Guy S. Goodwin-Gill and ponders "What Guy S. Goodwin-Gill describes as the fundamental rules of the international refugee implies that the principle of non-refoulement is *jus cogens* and a peremptory norm of international law."[109] He then analyses the work of Allen, Costello, and Foster and finds them compelling.[110] He amply concludes that "The 1951 Convention does not deny the competence of each state to decide who should be admitted to its borders. However, it prohibits the return of someone to any state where there are reasonable grounds to suspect that the person will face persecution."[111] The authors ***Cathryn Costello and Michelle Foster*** deserve particular credit for making the comprehensive and detailed legal argument in their substantiation that the non-refoulement obligation is *jus cogens* norm.[112] Their methodology had particular legal accuracy and stringency. They adopted what they called the custom plus approach. First, they argued that the extant state practice and *opinio juris* was sufficient to make the crystallization of the non-refoulement obligation into the customary international law normatively comprehensible. Second, to qualify the non-refoulement obligation as the norm of *jus cogens*, an additional requirement of *opinios juris cognetis* needed to be fulfilled. They made it clear that their choice of methodology was only strategic and one of stringency. As they mentioned "this does not mean that only custom may become *jus cogens*, but rather that the evidence that supports identification of custom may also support a conclusion of a norm's *jus cogens* character."[113] Their analysis was extensive in many respects. Upon providing the treaty law analysis, they ventured to provide the detailed analysis of the UNHCR Executive Committee Conclusions, the State Practice and the General Assembly resolutions.[114] They concluded that non-refoulement obligation embodies all the necessary characteristics emphasized by the ICJ in the *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, qualifying the prohibition of torture as the norm of *jus cogens*.[115] Lastly, while ***Evan J. Criddle and Evan Fox-Decent***[116] found the analysis of Costello and Foster to suffer from considerable weaknesses,[117] they still believed that the non-refoulement obligation was the norm of *jus cogens.* However, they chose a different methodological path to follow. First, they ventured to refute what they considered to stand in the way of the peremptory character of the non-refoulement obligation. "These include objections based on the special loyalty states owe their people; the right to exclude said to follow from a political community's freedom of association and right to self-determination; doctrine from international law that accords robust autonomy to states; and Carl Schmitt's theory of sovereignty in which the executive enjoys legally unlimited discretionary power."[118] By developing the fiduciary and dual commissions theory of international law, they made the case that non-refoulement obligation constitutes *jus cogens* norm. This theory constitutes the conceptual claim about the normative nature of international law. They argue: "Under this theory, international law entrusts states with local fiduciary powers to govern and represent their people, and with supranational fiduciary powers to act on behalf of humanity, usually jointly with other states, and sometimes globally. Fiduciary states thus have local and transnational or global commissions. Their global commission includes a duty to enact multilaterally a system of surrogate protection for asylum seekers, a cornerstone of which is the duty of non-refoulement."[119] Ultimately, they employ the COVID-19 pandemic as the test for their case to demonstrate *the jus cogens* nature of the non-

[107] John Dugard and Christine van den Wyngaert, 'Reconciling Extradition with Human Rights' (1998) 92 *AJIL* 187 198
[108] James C. Simeon, 'What is the future of non-refoulement in international refugee law?' in Salvinder Singh Juss (ed.) *Research Handbook of International Refugee Law* (Edward Elgar 2019) 189-193
[109] *Ibid.,* 191
[110] *Ibid.,* 190-191
[111] *Ibid.,* 192
[112] Cathryn Costello and Michelle Foster (n 23) 274-323
[113] Cathryn Costello and Michelle Foster (n 23) 278-280
[114] Cathryn Costello and Michelle Foster (n 23) 283-309
[115] They note that "the ICJ…interwove the factors that grounded its customary and *jus cogens* status, noting three features of the norm—its acceptance in 'widespread international practice and in the opinio juris of States', its appearance in 'numerous international instruments of universal application', and that it had been 'introduced into the domestic law of almost all States' and that 'acts of torture are regularly denounced within national and international fora.'" Cathryn Costello and Michelle Foster (n 23) 309
[116] Evan J. Criddle and Evan Fox-Decent (n 8) 1-40
[117] *Ibid.,* 11
[118] *Ibid.,* 3
[119] *Ibid.,* 3

refoulement obligation.[120] Lastly, the ILC in its fourth report on peremptory norms of general international law (*jus cogens*) observes that "the principle of non-refoulement is another principle of international law whose candidacy for peremptory status has ample support."[121] Finally, As ***Harold Hongju Koh*** observes "[n]umerous international publicists now conclude that the principle of non-refoulement has achieved the status of *jus cogens*."[122]

The views of the scholars referred to above base their analysis in the different methodological avenues, but arrive at the same conclusion. The non-refoulement obligation is the instance of *jus cogens* norms. "Dignity is indivisible."[123] While the considerable scholarly consensus is evident, it does not mean that such consensus is universal. There are some scholars who disagree with that conclusion for the some or the other reason. The last section attempts to deal with these objections juxtaposed with the Art.33of the Refugee Convention.

3.4. Objections

The broad endorsement of the *jus cogens* status of the non-refoulement obligation notwithstanding, some scholars doubt this conclusion. This skepticism stems from the nest of the non-refoulement obligation itself, from the 1951 Refugee Convention. Briefly, article 33(1) codifies the principle of non-refoulement, article 33(2) constitutes an exception to the prohibition, while article 1(F) is the exclusion clause.[124] That any exception should be construed narrowly is confirmed and widely shared.[125] Article 33(2) and Article 1(F) are supplemented by the 1966 Bangkok Declaration,[126] the U.N. General Assembly's Declaration on Territorial Asylum,[127] and the San Remo Declaration on the Principle of Non-Refoulement,[128] recapitulating the exception or the exclusion clauses one way or the other. Instead of treating these legal materials as paradigmatic embodiments of the values immanent in the non-refoulement obligation, providing ample support for the given legal norm's peremptoriness, precisely the opposite is maintained. Aoife Duffy argues that "notwithstanding the clear prohibition on refoulement that exists within human rights instruments, the existence of ' terrorist' exceptions to the prohibition on refoulement, either through the use of a balancing test in some jurisdictions or the current practice of ' rendition ' , alongside Refugee Convention exceptions, indicates that the goal of acquiring peremptory status for the principle of non-refoulement in international law has yet to be reached."[129] William Schabas observes that "the arguments that non-refoulement is *a jus cogens* norm are not particularly convincing."[130] Rene Bruin and Kees Wouters claim that "the major practical problem remains the burden of proof to be able to actually characterize the obligation of non-refoulement as a peremptory norm of general international law and to claim this in a court of law."[131] The point that James C. Hathaway mentioned in the context of the customary international status of the non-refoulement obligation equally applies to the *jus cogens* status of the non-refoulement obligation. "There is a pervasive-perhaps even dominant-state practice that denies in one way or another the right to be protected against refoulement…. There is, in short, no common

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[120] *Ibid.,* 3
[121] International Law Commission (ILC), Fourth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, 31 January 2019, para.130.
[122] Harold Hongju Koh, 'Reflections on refoulement and the Haitian Centres Council' [1994] *Harvard International Law Journal*, 35, 30.
[123] Ronald Dworkin, *Justice for Hedgehogs* (HUP 2011) 422
[124] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137
[125] UN High Commissioner for Refugees (UNHCR), *UNHCR Note on the Principle of Non-Refoulement*, November 1997
[126] Asian-African Legal Consultative Organization (AALCO), *Bangkok Principles on the Status and Treatment of Refugees* ("Bangkok Principles"), 31 December 1966, article V.
[127] UN General Assembly, *Declaration on Territorial Asylum,* 14 December 1967, A/RES/2312(XXII), article 3
[128] *Sanremo Declaration on the Principle of Non-Refoulement,* Sanremo, Italy September 2001, 2.
[129] Aoife Duffy, 'Expulsion to Face Torture? *Non-refoulement* in International Law' [2008] *International Journal of Refugee Law* 20, 3, 390
[130] William A. Schabas, 'Non-Refoulement' as *Background Paper for the technical workshop on Human Rights and International Cooperation in Counter Terrorism,* Liechtenstein, 15-17 November 2006 OSCE Office for Democratic Institutions and Human Rights and UN Office of the High Commissioner for Human Rights, footnote 22. Accessible at: https://www.osce.org/files/f/documents/1/3/24170.pdf. Professor Schabas does not state his reasons, but instead refers to the article below.
[131] Rene Bruin and Kees Wouters, 'Terrorism and the Non-derogability of Non-Refoulement' [2003] *International Jounrla of Refugee Law* 15, 23

acceptance of the duty of non-refoulement related to any particular class of persons or type of risk, much less to their combined beneficiary class."[132]

These criticisms seem less than convincing. It is not clear why the exception or the exclusion clauses embedded in the 1951 Convention should be construed to the exclusion of the *jus cogens* status of the non-refoulement obligation. What is the reason – as Goodwin-Gill suggests– these clauses shouldn't be construed as the limits of the discretionary power of the States rather than any immanent objections to the principle itself?[133] Is not the assertion about the exception or the exclusion clauses to undermine the case of the peremptoriness to the non-refoulement obligation an implicit presupposition that the source of the *jus cogens* norms is to be founded in the treaties as opposed to being their mere embodiments? If that is so, then such assertion must venture the hard time to ground *jus cogens* norms in the consent through the treaty-law making processes. Even in this case, what is the reason, then why the exception and exclusion clauses should have any importance? Don't these clauses disappear when considered within the meaning art.31(3)(c), taking into account the common normative environment which arguably includes the whole *corpus juris* of international human rights law?[134] More robust protective legal norms of the human rights treaties will, then, carry greater normative weight in determining *jus cogens* status of the given norm either because non-refoulement obligation under human rights law is absolute or because a more victim-oriented approach should be preferred. If they do not disappear at all, why then – following Sir Lauterpacht and Bethlehem – should they not be read in the utmost restrictive light?[135] However, treaties neither create the norms of *jus cogens* neither the 1951 Convention can be in itself conclusive in this respect since though the major treaty in the area of refugee protection, from the standpoint of acceptance and recognition of the non-refoulement obligation as the norm of *jus cogens* it is just but a mere embodiment of the normative value protected by the non-refoulement obligation. Even if the normative conceptualization of the non-refoulement obligation as codified in the 1951 Convention is the only available theoretical construction in the total abstraction of other more robust constructions of the non-refoulement obligation codified elsewhere, the exception and the exclusion clauses do not make any sense. It only demonstrates how in the debates of the *jus cogens*, the availability of the highest normative quality of the norm is obscured by reference to the interpretive and thus, the material scope of the norm. The non-absolute nature of the norm only signifies that its non-reducible core can be the candidate of the *jus cogens* norm. The question then becomes whether this non-reducible core represents the normative value of international concern and is non-derogable in the sense of not being bilateralisable or partitionable in the series of inter-state transactions. The prohibition on the use of force has its exceptions but is most commonly asserted to be the conspicuous example of the *jus cogens.*[136] For instance, in *Slivenko* case, the ECtHR considered whether the Treaty on the Withdrawal of Russian Troops from Latvia was compatible with the margin of appreciation accorded to the States under article 8 of the ECHR.[137] This can be interpreted as implying that while the States can limit the ECHR's rights through the bilateral treaty, there is some common core or bottom line of the right below which no justification can be accepted. Therefore, the normative properties of the given human right – whether it is absolute, qualified, allows exceptions or, the exclusions – cannot have any bearing upon its capacity to constitute an instance of *jus cogens.* This is so because *jus cogens* norms *qua jus cogens* norms don't regulate the material scope of the human right, but it falls to the interpretive particularities of the given human right. Therefore, such conflation constitutes the category error. *Jus cogens* norms step in not to allow derogation from some selected interpretive conceptualization of the human right norm. Therefore, the discussion in the academic literature whether the art.33(2) and art.1(f) of the 1951 Convention should be subjected to the effects of either art.53 or art.64 VCLT[138] should be understood as implying that better interpretive options of the non-refoulement obligation are available as a matter of human rights law. These interpretive options need to be protected by the *jus cogens* and are not the product of the *jus cogens* of and in itself.

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[132] James C. Hathaway, 'Leveraging Asylum' [2010] *Int'l L. J.* 45, 3, 516, 518

[133] Guy S. Goodwin-Gill, Jane McAdam, *The Refugee in International Law* (OUP 1996) 168

[134] Antônio Augusto Cançado Trindade (n 74) 520-525 on the cross-fertilization and the convergence between the different regimes of the protection.

[135] Sir Elihu Lauterpacht and Daniel Bethlehem (n 43) p.133, para.159.

[136] International Law Commission (ILC), the commentary of the Commission of its draft Articles on the Law of Treaties, *International Law Commission Yearbook,* 1966-11, art.50(1), p.247

[137] *Slivenko v. Latvia*, ECtHR, App. No.48321/99, 9 October 2003. This case is invoked by Orakhelashvili (n 8) 60

[138] Farmer (n 93) 30-34

The exclusion and the exception clauses are analytically connected to the State practice. This seems to assume that the State practice is a necessary ingredient in qualifying the norm as *jus cogens* and most certainly relies on the *jus cogens* generating process based on the customary law. The customary law processes in generating *jus cogens* norms have their drawbacks, and the ILC itself seems to be more favorable to the independent source of the *jus cogens* norms.[139] However, this needs to be assessed on its own terms. How the state practice to apply the exception of the exclusion clause to the non-refoulement principle codified in the 1951 Convention can account for the *opinio juris* of any State when such a state practice is itself barred by the other more robust conceptualization of the human rights norms making the scope of the non-refoulement obligation absolute? As Orakhelashvili noted "the relevance of State practice cannot, of course, be excluded but it cannot be a factor excluding the relevance of other factors including the relevance of a norm's peremptory character and the community interest it embodies."[140] The non-refoulement obligation embodies the community interest simply in virtue of its being the human rights norm. It is rather opaque whether through the application of the custom generation criteria based on the *Asylum Case*[141] or the *North Sea*[142] "the Court would … find that the rules governing the use of force were customary. Perhaps the nature of rules involved was relevant for the Court in choosing different methods of custom identification."[143] As the UNHCR explained, "the Governments approached have almost invariably reacted in a manner indicating that they accept the principle of non-refoulement as a guide for their action. They indeed have in numerous instances sought to explain a case of actual or intended refoulement by providing additional clarifications and/or claiming that the person in question was not to be considered a refugee. The fact that States have found it necessary to provide such explanations or justifications can reasonably be regarded as an implicit confirmation of their acceptance of the principle."[144] With respect to the reaction expressed by the wrongdoer states, the ICJ in *Nicaragua* observed that the State practices depicting the violation of the principle of non-intervention weren't conducive for the opinion juris and could not be argued to be justifiable juridically.[145] In *Reservations* in deducing the categorical nature of the Genocide Convention, the ICJ drew not on the State practice but the moral law within the prohibition of the Genocide itself.[146] If appraised from the different conceptualization of the *jus cogens* generating processes, the sole emphasis on the State practice will turn out futile. The reason is simple. It is not that the State practice, in the final analysis, decides which norms are peremptory and which are not, but the peremptoriness of the norm itself dictates the State practice to conform with it. However, even appraised through the lenses of the State practice in light of whether the significantly affected States [in terms of migration flow] consider the non-refoulement obligation to be impermissible under customary international law,[147] the analysis of Costello and Foster makes the perfect case for the *jus cogens* status of the non-refoulement obligation.

Lastly, the question that "in short, no common acceptance of the duty of non-refoulement related to any particular class of persons or type of risk, much less to their combined beneficiary class"[148] can be clearly answered to similarly suffer from the confusion between the interpretive and the *jus cogens* considerations in a sense referred to above. The last point makes it particularly clear. Virtually no

[139] International Law Commission (ILC), Chapter V Peremptory norms of general international law *(jus cogens),* A/74/10 (7 Aug 2019) p.166
[140] Orakhelashvili (n 8) 117
[141] *Asylum Case (Colombia v. Peru),* International Court of Justice (ICJ), 20 November 1950, 15
[142] *North Sea Continental Shelf Cases* (n 94) paras.70-71
[143] Orakhelashvili (n 8) 119
[144] UN High Commissioner for Refugees (UNHCR), The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, 31 January 1994. Cited in Cathryn Costello and Michelle Foster (n 23) 302
[145] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (n 62) 206-208
[146] Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (n 19) 12. Though, the ICJ did not directly mention the term *jus cogens*. This interpretation is taken from Orakhelashvili (n 8) 121
[147] Cathryn Costello and Michelle Foster (n 23) 292. This deserves the citation in full: "However, as Chetail sensibly points out, the notion of 'specially affected states' is of limited value in 'matters of common interest, such as human rights or international migration'. As he observes, in the context of immigration, every State is affected by the movement of persons, 'whether as a country of emigration, transit or immigration'." At 292
[148] James C. Hathaway (n 128) 518

international lawyer denies that the prohibition of Genocide is the *jus cogens.*[149] There seems to be an ideational normative convergence on this point.[150] According to the art.6 of the Rome Statute "… "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[151] According to Article II of the Genocide Convention, "genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[152] There is a pervasive disagreement in international criminal law literature and the case-law on what the requirement *in part* means.[153] What precisely a '*destruction in part*' means? In the 2007 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* the ICJ observed that 'in part requirement' necessitated quantitative and substantiality criteria.[154] However, in *Prosecutor v. Krstić*, the ICTY opted out for the qualitative criteria,[155] which is diametrically different from the ICJ's approach. The determination of what 'in part' requirement signifies is also contentious in now pending *case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar).*[156] Both the ICJ and the ICTY diverge on which grounds the propositions of law are rendered true. They diverge in their interpretive approaches, of which grounds of law make the general character of the crime of Genocide into what it ought to be. Neither tribunal, however, debates the character of the prohibition itself. The prohibition of Genocide is the norm of *jus cogens* irrespective of the interpretive divergencies between the tribunals. The parties in *The Gambia v. Myanmar* argue when the '*in part*' requirement obtains.[157] They do not seem to argue over the normative quality of the prohibition itself. The disagreement over the question of which interpretive dialectics make the character of the prohibition of the Genocide normatively comprehensible is not held to the exclusion of the normative character of the prohibition itself. The question of interpretation and normative quality of *jus cogens* is kept logically independent, having the internal connection notwithstanding. It would be good to glance at the argument denying the prohibition of the Genocide *jus cogens* character because what 'in part' requirement means is not converged upon. Indeed, the argument attempting to deny the status of *jus cogens* to the non-refoulement obligation based on the interpretive uncertainties is unsound because its normative premises are false and is *non sequitur* because even if the premises were true, the desired conclusion still wouldn't follow. Any attempt to appeal to the distinction between these two prohibitions will consciously or subconsciously appeal to moral determinants but would not manage to change the crux of the principle that interpretive divergence has no bearing upon the character of the norm.

Conclusively, while the answers provided for the objection may not argue for the position advocated – if only for the reason that these objections require a way longer treatment than can be managed within the confines of this inquiry – it is still to be believed that the position advocated is not without normative and conceptual merit. This and not the refutation of these scholars' views was the objective.

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[149] Jan Wouters and Sten Verhoeven, 'The Prohibition of Genocide as a Norm of *Ius* Cogens and Its Implications for the Enforcement of the Law of Genocide' [2005] *International Criminal Law Review* 5 401-416

[150] Carlone Fournet, 'The Universality of the Prohibition of the Crime of Genocide, 1948-2008' [2009] *International Criminal Justice Review* 19, 2, 132-149

[151] UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998

[152] UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide,* 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277,

[153] K. Ambos, Genocide, in 'Treatise on International Criminal Law: Volume II: The Crimes and Sentencing,' Oxford Scholarly Authorities on International Law, (2014), pp.41-44; C. Kreß, 'The Crime of Genocide under International Law' [2006] *International Criminal Law Review* 6 489-492; Gerhard Werle and Florian Jeßberger, F.: *Principles of International Criminal Law* (OUP 2014) 288-326; C. Kreß, 'The International Court of Justice and the Elements of the Crime of Genocide,' [2005] *EJIL*, 18, 4, 627.

[154] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* International Court of Justice (ICJ), ICJ Rep. 2007, 43, paras.198-201.

[155] *Prosecutor v. Radislav Krstic* (Appeal Judgement), IT-98-33-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 19 April 2004, paras.6-12; Compare to *Prosecutor v. Milomir Stakic* (Trial Judgement), IT-97-24-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 31 July 2003, para.523.

[156] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar),* International Court of Justice (ICJ), 11 November 2019 (Application instituting proceedings and Request for the indication of provisional measures)

[157] Take a look at Prof. William a Schabas comment during the Public sitting held on Thursday 12 December 2019 12 December 2019, at 10 a.m., at the Peace Palace, President Yusuf presiding, in the *case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* p.36. para.17.

3.5. Conclusion

The non-refoulement obligation has the character of *jus cogens.* While the argument propounded in this inquiry was based on the non-positivistic and non-consensual understanding of the legal account of the concept of *jus cogens,* the methodological and philosophical discrepancies of the worldviews shouldn't detract from the obvious fact. The non-refoulement obligation is the norm of *jus cogens.* "Dignity is indivisible."[158] It enjoys acceptance and recognition from the international community of the States as a whole. The primary and subsidiary evidence is proof of this. The normative quality of the non-refoulement obligation as a *jus cogens* is demonstrable through different methodological avenues of various kinds. Different tribunals directly mention its *jus cogens* character in one way or the other. It enjoys near-universal scholarly support, and the argument of the minority is far from being conclusive. The final chapter is the interpretive turn of *jus cogens* non-refoulement obligation dealing with the *suis generis* legal consequences.

[158] Dworkin (n 119) 422

4. Humanistic Plea against *de jure* Rightlessness: Peremptory turn of *jus cogens* Non-Refoulement Obligation

4.1. Introduction

In the preceding chapters, the legal account of the concept of *jus cogens* was proposed to delineate the boundaries of normative thinking within which the non-refoulement obligation was argued to constitute the instance of such a norm.[1] This normative utterance signifies an assertion to the extent of claiming the belief about the peremptoriness of the non-refoulement obligation to express the legal reality. This chapter – by extracting the set of *sui generis* legal consequences from the *jus cogens* non-refoulement obligation – calls into question the ongoing normative viability of *all* deterrence measures aiming at eliding the 'jurisdictional' link between the Sponsoring State and the Migrant's legal claim right to non-refoulement obligation[2] and its intellectual foundation dubbed as the phenomena of rightlessness in international law.[3] These legal consequences unique in their nature are derived or otherwise inferred against the backdrop of the general legal account of the concept of *jus cogens* established in the previous chapter. This means that legal states of affairs this author proposes to constitute the account of *what is* as opposed to what it *ought to be*,[4] derives its normative comprehensibility from the kind of theory of *jus cogens* norms this author deems to reflect best what the norms of *jus cogens* in general are, and *jus cogens* non-refoulement obligation in particular, is. This observation is essential for the following reason. Those disagreeing with the legal conclusions proposed in the chapter can best be seen to have the divergence on the more

[1] See the Second and the Third Chapters.

[2] James Hathaway, 'The Emerging Politics of Non-Entrée' [1992] *Refugees* 91 40-41. Prof. Hathaway was the first who coined the term non-entrée; Thomas Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' [2018] European Journal of Migration and Law 452 453-461; Thomas Gammeltoft-Hansen and Nikolas F. Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy' [2017] *JMHS* 5, 29, 30; Cathryn Costello and Itamar Mann, 'Border Justice: Migration and Accountability for Human Rights Violations' [2020] *German Law Journal* 21, 311, 316; Annick Pijnenburg, Thomas Gammeltoft-Hansen & Conny Rijken, 'Controlling Migration through International Cooperation' [2018] *European Journal of Law and Migration* 20, 365, 365; David Scott FitzGerald, 'Remote control of migration: Theorizing territoriality, shared coercion, and deterrence' [2020] *Journal of Ethnic and Migration Studies* 46, 1, 4-22; Aristide R. Zolberg, 'Matters of State: Theorizing Immigration Policy' in Philip Kasinitz Charles Hirschman and Josh DeWind (eds) *The Handbook of International Migration: The American Experience* (New York: Russell Sage) 71–93; Gemma Pinyol-Jiménez, 'The Migration-Security Nexus in Short: Instruments and Actions in the European Union' [2012] *Amsterdam Law Forum* 4,1, 36-57; Thomas Spijkerboer, 'Bifurcation of people, Bifurcation of law: Externalization of Migration Policy Before the EU Court of Justice' [2017] *Journal of Refugee Studies*, 31, 2, 217-239; Anna Ligouri, *Migration Law and the Externalization of Border Controls: European State Responsibility* (Routledge 2019); Ashley Binetti Armstrong, 'You Shall Not Pass! How the Dublin System Fueled Fortress Europe' [2020] *Chicago Journal of International Law*, 20, 2, 332-383; Daria Davitti, 'Biopolitical Borders and the State of Exception in the European Migration 'Crisis'' [2018] *EJIL* 29,4, 1173–1196; James C. Hathaway & Thomas Gammeltoft-Hansen, 'Non-Refoulement in a World of Cooperative Deterrence' [2015] Transnat'l L. 53, 2, 235-284; Theodore Baird, 'Carrier Sanctions in Europe: A Comparison of Trends in 10 Countries' [2017] *European Journal of Migration and Law* 19, 307–334; E. Feller, 'Carrier Sanctions and International Law' [1989] *International Journal of Refugee Law* 1, 48-66; R.I.R. Abeyratne, 'Air Carrier Liability and State Responsibility for the Carriage of Inadmissible Persons and Refugees' [1998] *International Journal of Refugee Law* 10, 4, 675–687; Theodore Baird & Thomas Spijkerboer, 'Carrier Sanctions and the Conflicting Legal Obligations of Carriers: Addressing Human Rights Leakage' [2019] *Amsterdam Law Forum*, 11, 1, 1-16; Christopher M. Owens, 'Examining the Intersection of Refugee Policies and Contemporary Protracted Displacement' [2017] *International Development, Community and Environment (IDCE)* 24; Andrew Shacknove, 'From Asylum to Containment' [1993] *International Journal of Refugee Law* 516-533; Susan Kneebone, 'Australia as a Powerbroker on Refugee Protection in Southeast Asia: The Relationship with Indonesia' [2017] *Refuge* 33, 1, 29-41. See Also, Amy Nethery & Carly Gordyn, 'Australia–Indonesia cooperation on asylum-seekers: a case of 'incentivised policy transfer' [2014] *Australian Journal of International Affairs*, 68, 2, 177-193; Gregor Noll, *Negotiating Asylum. The EU acquis, Extraterritorial Protection and the Common Market of Deflection* (Kluwer 2000); Vincent Chetail 'The Common European Asylum System: Bric-à-brac or System?' in V. Chetail, P. De Bruycker & F. Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Leiden: Brill/Nijhoff, 2016), 3-38; Samantha Velluti, *Reforming the Common European Asylum System - Legislative Developments and Judicial Activism of the European Courts* (Springer 2014) 77-105; Cathryn Costello, 'Immigration Detention: The Grounds Beneath Our Feet' [2015] *Current Legal Problems* 68, 1, 143 –177; Violeta Moreno-Lax & Mariagiulia Giuffré, 'The Rise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows' in Juss (Ed) *Research Handbook on International Refugee Law* (Edward Elgar 2019); Eleni Karageorgiou, 'Human rights and a-legality: destitution of persons seeking asylum in the EU' in Martha F. Davis, Morten Kjaerum & Amanda Lyons (Eds.) *Research Handbook on Human Rights and Poverty* (Edward Elgar 2021)

[3] Itamar Mann, 'Maritime Legal Black Holes: Migration and Rightlessness in International Law' [2018] *The European Journal of International Law* 29, 2, 347–372; Itamar Mann, 'The Right to Perform Rescue at Sea: Jurisprudence and Drowning' [2020] *German Law Journal* 21, 598, 602.

[4] Jeremy Waldron, *Law and Disagreement* (OUP 1999) 6; Professor Waldron put it in the following way: "One could, in a spirit of crusading zeal, simply ignore all this, brushing aside any decision or legal authority that didn't comport with one's own heartfelt convictions about justice. But it is not clear that one would be engaging then in *legal* analysis; as opposed to simply announcing what, in one's own view, the law on the matter ideally ought to be."

foundational level at the metaphysics of *jus cogens* norms and the conceptualization of international legal order thereafter.[5] Granted the validity of the foundational premises, this author fails to comprehend how one can disagree with the soundness of the very crux of the legal conclusions proposed. Indeed, it is easier said than accomplished. This ambitious utterance needs normative substantiation. The latter requires many legal and technical steps, thus rendering it impossible to explicate all these intermediary and in-between steps in the introduction. However, throughout the inquiry, sufficient light shall be accorded to them. As for now, the general normative template guiding the course of our inquiry suffices.

To begin, the author conceives the migration deterrence measures as the symptoms of the far more general illness[6] – or the framework of rightlessness described by the international lawyers. It would be entirely parochial to propose some single-headed and factually oriented legal case directed against the one variation of the deterrence measure without first subjecting its intellectual master phenomena – the rightlessness – to the rigorous scrutiny.

This chapter argues that rightlessness, as conceptualized in international law, is unimaginative, rests on and entails the false normative premises, commits and directs our normative thinking towards the fallacious ways of thoughts being blatantly unsound as a consequence.[7] It distorts the normative relationship between the 'legal human rights,' 'legal human rights obligation' and the 'legal human rights jurisdiction.' The first legal consequence lies in correcting this normative relation and culminates in conceptualizing the human rights matter as the *first-order legal question*. This entails that conclusion drawn from the human rights question – what legal human rights people have – being the first *sui generis* legal consequence inferential from *jus cogens* non-refoulement obligation becomes the first-order legal question worth reflecting upon. Consequently, the phenomena of rightlessness vanish from our normative realm of international legal thought. The phenomena of rightlessness constitute an intellectual bedrock wherefrom the considerations of the 'legal black holes'[8] and how we think about the deterrence measures affecting the legal human claim-rights of the migrants derive its normative energy and intellectual support.[9] Once its comprehensibility is called into question, and the belief about the unjustifiable nature of the rightlessness is rendered true, it is theoretically justified to divert our attention towards a more interesting issue of how the *jus cogens* non-refoulement obligation whose *legal* existence is beyond any meaningful question, should be protected.

To utter that the individual has the legal human claim-right to *jus cogens* non-refoulement obligation means to assert that it *ought to be* protected unless absolutely prevented or faced with an insurmountable obstacle. However, it is noteworthy that existing deterrence measures constitute the complex bundle of the extraterritorial measures and therefore operate in the extraterritorial context. Thus, within the current parameters of international law, there can be no *a priori* inference from what legal human claim-rights people have (*viz*., *is*) to whether this fact alone is constitutive of and foundational to whether it ought to (*viz., ought)* fall within the jurisdiction of deterring States.[10] Insistence on the highest normative quality – on the peremptoriness – of the *jus cogens* non-refoulement obligation cannot *eo ipso* establish the jurisdiction within the meaning of the human rights treaties where none can reasonably be demonstrated

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[5] Ulf Linderfalk, 'The Legal Consequences of *jus cogens* and the Individuation of Norms' [2020] *Leiden Journal of International Law* 33, 894; Ulf Linderfalk, 'Understanding the *jus cogens* Debate: The Pervasive Influence of Legal Positivism and Legal Idealism' in Maarten den Heijer & Harmen van der Wilt (eds.) *jus cogens: Quo Vadis?* (Netherlands Yearbook of International Law 2015) 51-85; Ulf Linderfalk, *Understanding jus cogens in International Law and International Legal Discourse* (Edward Elgar 2020) 41-62; Ulf Linderfalk 'The Emperor's New Clothes – What If No *jus cogens* Claim Can Be Justified?' [2020] *International Community Law Review* 139-162; Liam Murphy, *What Makes Law: An Introduction to the Philosophy of Law* (CUP 2014) 88.

[6] David Kennedy, 'International Human Rights Movement: Part of the Problem?' [2002] 15 *Harv Hum Rts* J 101. David Kennedy, 'The International Human Rights Regime: Still Part of the Problem?' In Rob Dickinson, Elena Katselli, Colin Murray, Ole W. Pedersen (eds), *Examining Critical Perspective on Human Rights* (Cambridge University Press 2012) 19-34.

[7] For the distinction between the basic concepts such as the 'validity' and 'soundness' see., Michael Huemer, *Knowledge, Reality, and Value: A Mostly Common Sense Guide to Philosophy* (Self-Published 2021) 36

[8] Tom De Boer, 'Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection' [2014] *Journal of Refugee Studies* 28, 1, 119-134; Ralph Wilde, 'Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights' [2005] *MICH. J. INT'L L.* 26, 772-780; Silvia Borelli, 'Casting light on the legal black hole: International law and detentions abroad in the "war on terror"' [2005] *International Review of Red Cross* 87, 857, 39-68

[9] Thomas Gammeltoft-Hansen, *Access to Asylum International Refugee Law and the Globalization of Migration Control* (CUP 2011) 24 noting that "On the one hand human rights are declared to be universal; on the other hand human rights are part and parcel of the larger framework of international law and as such must pay homage to its underlying principles in order to remain law."

[10] Compare to *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Rwanda), International Court of Justice (ICJ), 3 February 2006, p.27;

to exist.[11] However, it is an entirely different matter to inquire what interpretive considerations could *jus cogens* non-refoulement obligation bring to the table and how it could bear, impact or otherwise influence the multiplicity of conceptualizations of the jurisdiction within human rights law.[12] That being asserted, the second *sui generis* legal consequence inferential from the *jus cogens* non-refoulement obligation is interpretive consequences exercised on the juridical level. Admittedly, *jus cogens* non-refoulement obligation cannot in itself be constitutive of the jurisdiction. However, it has the incredible legal potency to influence the interpretive contours of the jurisdiction to enable the latter to accommodate the peremptoriness of the given legal norm.[13]

Therefore, this chapter proposes the legal 'framework' of our normative theoretical and practical thought, enabling us to reflect upon the relationship between the jurisdiction, *jus cogens* non-refoulement obligation, and human rights obligations possibly attached to it. The interpretive nature of such a framework is materialized in that it places the interpretive principles in the abstract reflective mode,[14] putting the sole emphasis on explicating the normative relation between these legal variables in its best legal light.[15] The framework sets no "*a priori* limit to the justificatory ascent which a problem will draw"[16] the interpreters. Thus, the second *sui generis* legal consequence is itself the interpretive 'system' of legal thought, which directs the normative focus from the highest (*meta*)theoretical level and culminates in the concrete juridical scenarios. According to the system thereto proposed, the jurisdiction can be spelled out to exist without risking the various conception of the concept of jurisdiction becoming normatively redundant and without any legal threshold being thereby abandoned.[17] This ['interpretive'] solution is preferred because the deterrence measures are arranged in a complex and multi-faceted manner.[18] Attempting to address them in 'all or nothing,'[19] therefore, in a rule-based fashion risks becoming meaningless since changing the one legal or the factual variable in the structure of deterrence measures renders the solution almost inoperative.[20] Therefore, the abstract normative considerations of the highest level of generality about the *jus cogens* non-refoulement obligation should be relativized relative to the concrete and individual instances of the factual scenarios to legally concretize and tailor the abstract principle to conform to the factual entities of the world. This approach is flexible and, for its highly abstract nature, cannot risk becoming inoperative. To demonstrate how this approach functions in the individual cases, the final move will propose the legal solution for the *SS et al. v Italy* now pending before the ECtHR.[21]

Conclusively, apart from the obvious fact that the present argument constitutes the legal critique mounted against the State-centric account of international law, it is inherently political in that it is an

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[11] Compare to *Case Concerning East Timor (Portugal v. Australia),* International Court of Justice (ICJ), 30 June 1995, p.102, para.29. Notably, the jurisdiction within the human rights treaties relates to the jurisdiction of the State; the pronouncements of the ICJ in *DRC v. Rwanda* and *East Timor Case* relate to the jurisdiction of the Court. These two conceptions of the concept of jurisdiction should not be confused. In the context of the ECHR Human Rights Protection System – even to join the Council of Europe – a State must bind itself by the compulsory jurisdiction, as opposed to the modalities of the ICJ statute 36(5,6). For a detailed analysis see., Marko Milanovic, *Extraterritorial Application of Human Rights Treaties Law, Principles, and Policy* (OUP 2011) 19-25.

[12] Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2008) 508

[13] Orakhelashvili (n 12) 490

[14] Ronald Dworkin, *Justice in Robes* (HUP 2006) 69

[15] Ronald Dworkin, *Law's Empire* (HUP 1986) 52

[16] Dworkin (n 14) 68

[17] The crucial problem when reflecting upon and trying to conceptualize a specific legal account of the concept of the jurisdiction within the meaning of the human rights law is to find an equilibrium between protecting human rights from the one hand and not distorting the idea of the jurisdiction as the threshold criterion as not to make such threshold normatively redundant from the other hand. See the comment of Marko Milanovic on the review of his book (Milanovic n 9) made by Yuval Shany in Marko Milanovic, 'Reply to Shany, Lowe and Papanicolopulu' [2011] *EJIL Blog* https://www.ejiltalk.org/reply-to-shany-lowe-and-papanicolopulu/

[18] Thomas Gammeltoft-Hansen & Jens Vedsted-Hansen, 'Introduction: Human Rights in an Age of International Cooperation' in Gammeltoft-Hansen and Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Routledge 2017) 6

[19] Ronald Dworkin, *Taking Rights Seriously* (HUP 1978) 24; Robert Alexy, 'On the Structure of Legal Principles' (2000) 13 *Ratio Juris* 294, 295

[20] Itamar Mann, 'Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993–2013' [2013] 54, 2, 316 369; Annick Pijnenburg, 'From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?' [2018] *European Journal of Migration and Law* 20, 396, 402; Annick Pijnenburg, 'Containment Instead of Refoulement: Shifting State Responsibility in the Age of Cooperative Migration Control?' [2020] *Human Rights Law Review,* 20, 306, 312. The authors note that the deterring States have become aware of how to avoid the *Hirsi* constraints. See *Hirsi Jamaa and Others v. Italy,* ECtHR [GC], Application no. 27765/09, 23 February 2012.

[21] ECtHR, Factsheet on Collective expulsions of aliens, *S.S. and Others v. Italy* (no. 21660/18) Application communicated to the Italian Government on 26 June 2019, July 2020. See also, Global Legal Action Network, Italy's Coordination of Libyan Coast Guard, https://www.glanlaw.org/ss-case

embodiment of the argument of the political morality all the way down.[22] Therefore, it contributes to the international legal scholarship atomized and pulled in the contradictory normative directions of vehemently oscillating between the realist and state-centric and idealist and universalist templates of the international legal order.[23] If the moral and political– and therefore the *legal* choice – is between the "apology and utopia,"[24] it seems meaningless not to choose utopia. For It seems to the present author that an apology is to accept the *status quo* and, therefore, legitimize the ongoing states of things, while the utopia is to deinstitutionalize the existing political and legal order to (*re*)institutionalize it in the *realistically* best manner possible.[25]

4.2. The Rightlessness Unveiled

The rightlessness in international law constitutes a complex, challenging, profound, legally nuanced, yet very simplistic normative claim declaring how the legal state of affairs is.[26] In its shortest form it can be explicated through the following maxim: *If[f] no jurisdiction…then no [legal] human rights.*[27] The rightlessness is the normative conclusion or what follows from this maxim. For the sake of simplicity, let us dub it the jurisdiction thesis. Notably, there is no material legal basis whatsoever affirming the jurisdictional thesis as the law. Rather, it is the interpretation of, inference or derivation from the law. It is the conclusion inferred from the normative observation – about how jurisdictional clauses function – on what the law is. In the extraterritorial context,[28] the jurisdictional thesis is constitutive of the belief that the migrants are rendered *de jure* rightless. While the jurisdictional thesis is but the mere interpretative conclusion drawn from the law, it is treated as if it itself were the law. However, neither this reading constitutes the sole interpretive option nor is the most imaginative. It appears that the jurisdiction thesis accounts for the normative comprehensibility of the rightlessness. Therefore, if the jurisdiction thesis upon further inspection turns out to rest on conceptually and normatively fallacious premises, there is left no reasonable ground on which the rightlessness could be argued to exist. It is possible to conduct a closer examination of this phenomenon through the normative lenses of any classic human rights treaty, be it the CAT,[29] ACHR,[30] or ICCPR.[31] However, placing the ECHR as the reference model for the present analysis is justified, if only because the ECtHR is the forum that produced the most extensive jurisprudence on the law of extraterritorial application of the ECHR.[32] The abstract normative rationale inferred from the analysis can, by extension, analogously be applied to other human rights treaties. It should be borne in mind that the current focus is only on the non-refoulement obligation.

The jurisdiction thesis – being the normative essence of what the rightlessness is the conclusion of or what it amounts to – has two theoretically distinct, but consequentially similar conceptualizations. According to its first variation, "the extraterritoriality, or extraterritorial application, of the ECHR refers to the recognition …. of ECHR rights by states parties and the identification of the corresponding duties

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[22] Ronald Dworkin, *A matter of Principle* (HUP 1985) 36

[23] Sam Muller & Marcel Bruss, 'The Decade of International Law: Idealist Dream of Realist Perspective' [1990] *Leiden Journal of International Law* 3, 3, 1-14

[24] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2006)

[25] Paul Ricoeur, *Lectures on Ideology and Utopia* (George H. Taylor (ed.), Columbia University Press 1986) 269-314. This author uses the word realistic to convey the meaning of Utopia that Paul Ricoeur has developed – the utopia, the meaning of which lies in realistically reinstitutionalizing existing political and legal order.

[26] The present analysis concerns and is limited only to the legal-claim right to the *jus cogens* non-refoulement. The sole theoretical focus on the non-refoulement obligation can be explained by referring to the constant abuse by the Refugee Deterring Community of the law of a jurisdiction to deconstruct the operability of the jurisdiction clauses. The abstract rationale implicit in the analysis can be applied to the most (moral) and legal human right found in the existing catalogue of international human rights law.

[27] The lack of rights is limited to that system which lack jurisdiction.

[28] Hugh King, 'The Extraterritorial Human Rights Obligations of States' [2009] *Human Rights Law Review* 9, 4, 521-556

[29] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85. According to the art.2(1) "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

[30] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose",* Costa Rica, 22 November 1969; According to the art.1(1) "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction…."

[31] UN General Assembly, *International Covenant on Civil and Political Rights,* 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171; According to the art.2(1) "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant…"

[32] For a very good overview see Michal Gondek, 'Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization' [2005] *NILR* 349-387

on their part to individuals or groups of individuals situated outside their territory."[33] The second variation closely follows Hohfeldian conceptualization of the legal claim-rights and other-directed correlative duties[34] and is framed in the following manner: "For a human rights violation to occur, however, one must be able to clearly identify a state that has carried out a violation. Put differently, person a's right must be coupled with authority x's duty."[35] Thus, on the second variation, the existence of the legal human rights necessarily depends on the other-directed correlative duties on the part of the State, which again necessarily depends on the exercise of the jurisdiction by that State. Both variations share and are committed to the jurisdiction thesis. However, the route towards reaching the *same* conclusion is different in its theoretical trajectory. According to the first variation, the jurisdiction is the normative trigger for legal human rights after recognizing which duties are *eo ipso* allocated to the State. While according to the second alternative, legal human rights are grounded in the jurisdiction but through the intermediary of allocated legal duties. Thus, legal human rights are the normative conclusion of the legal duties grounded in the exercise of jurisdiction. In the context of the ECtHR jurisprudence, these theoretical constructions would operate in the following manner. If under the ECtHR case-law, individual does not fall within particular conceptualization or theoretical construction of the concept of the jurisdiction, be it through the personal,[36] spatial,[37] extraterritorial effects[38] or the decisive influence theories,[39] the individual has no legal human right as a matter of having the legal human right. Therefore, "In circumstances where it is… impossible to assign other-regarding duties (to Y), that particular individual, X, remains *rightless* in the strict sense."[40] The criticism provided below mostly suits both theoretical variations of the jurisdiction thesis; however, some might be more pertinent to each than the other. Before moving towards the more substantive objections, some conceptual and semantic considerations are in order.

4.2.1. The Conceptual Objections

The logical flaw of the jurisdiction thesis is that it renders the substantive provision governing the extraterritorial application of the ECHR hopelessly circular.[41] According to the art.1 ECHR "The High

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[33] Samantha Besson, "The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to" [2012] *Leiden Journal of International Law* 25, 862

[34] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' [1913] 23 *Yale Law Journal* 23, 16, 711-770

[35] Mann (n 3) 603

[36] *Al-Skeini and Others v. United Kingdom*, ECtHR [GC], App. No. 55721/07, 7 July 2011, paras.136-137; *Ocalan v. Turkey*, ECtHR, App. No. 46221/99, 12 March 2003, para.91; *Issa and Others v Turkey*, ECtHR, App. No. 31826/96, 16 November 2004, paras.74-75; *Al-Saadoon and Mufdhi v. United Kingdom*, ECtHR, App. No. 61498/08, 2 March 2010, para.140; *Medvedyev and Others v. France*, ECtHR [GC], App. No. 3394/03, 29 March 2010, paras.66-67; *Pad and others v. Turkey*, ECtHR, App. No. 60167/00, 28 June 2007, paras 53–54; *Isaak and Others v. Turkey*, ECtHR, App. No. 44587/9828 September 28 2006, para.103-106; *Solomou and Others v. Turkey*, App. No. 36832/97, 24 June 2008; *Jaloud v. Netherlands*, ECtHR [GC], App. No. 47708/08, 20 November 2014, para.152.

[37] *Loizidou v. Turkey*, ECtHR (preliminary objections), App. No. 15318/8923, 23 February 1995; *Loizidou v. Turkey*, ECtHR (merits), App. No. 15318/89, 28 November 1996; *Cyprus v. Turkey* (dec.), European Commission of Human Rights, App. Nos 6780/74 and 6950/75, 26 May 1975; *Chiragov and Others v. Armenia*, ECtHR [GC], App. No. 13216/05, 16 June 2015, para.172-187.

[38] *Andreou v. Turkey*, ECtHR (admissibility), App. No. 45653/99, 3 June 2008, p.11; *Nada v Switzerland*, ECtHR [GC], App. No. 10593/08, 12 September 2012, paras.122-123.

[39] *Ilascu and others v. Moldova and Russia*, ECtHR [GC], App. No. 48787/99, 8 July 2004, para.192.

[40] Anja Matwijkiw, 'The Dangers of the Obvious but Often Disregarded Details in the International Criminal Law Demarcation Debate: Norm-Integration and the Triple-Thesis 'Argument'' [2019] *International Criminal Law Review* 14 (Emphasis is mine)

[41] In the French version of the ECHR, however, the text of the ECHR is not – on the jurisdiction thesis – circular. "Les Hautes Parties contractantes *reconnaissent* à toute personne relevant de leur juridiction les droits et libertés définis au titre I de la présente Convention." (Emphasis is mine). However, if the word "reconnaissent" should be understood as the recognition and not as the securement, it faces another problem of requiring theoretical justification whether the recognition of human rights necessarily entails protecting human rights. Thus, then, it becomes an interesting question why the drafters have omitted the word protection. The obvious objection would suggest that if the drafters wished to include the word 'protection' in the convention, they would have done so (*Bankovic* n 59, para.75). However, it is evident that drafters most probably implied the duty of protection under the French counterpart. Nevertheless, an appeal to the counterfactual questions inquiring what the drafters would have done had they faced this question when drafting the Convention would face the task of distinguishing between the abstract and the concrete intentions. It is quite possible that drafters of the treaties had both intentions: "they had a concrete idea of what human rights there are but it was their more abstract belief in the moral objectivity and universality of these rights … [which] denotes certain kind mind-independence (Letsas n 41, 70)." There is no reason, one could sustain, why we should suppose any of the intentions propounded here as overriding the other. This suggestion seems true because preferring one kind of intention over the other commits us to circular reasoning since determining which of the suggested intention actually obtains falls to some notion of the intention itself (Letsas n 41, 70-72). The reasoning reaches the point of circularity because one cannot assume the premise one needs to prove. Therefore, it becomes reasonable to conclude that "the ground for choosing between any of these different types of intentions cannot have anything to do with intentions" (Letsas n 42, *EJIL* 538) because the question is not "whether the intentions of the drafters are relevant but which of their intentions are relevant in interpretation." (Letsas n 41, 71) The legal philosophy of Ronald Dworkin provides for two very important points in this respect: First, that "some part of any constitutional theory must be independent of the intentions or beliefs or indeed acts of the people the theory

Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."[42] Under the jurisdiction thesis, which ties the existence or recognition of the legal human right to the jurisdiction in some way or the other, the art.1 is rendered circular because it would need to assume or otherwise presuppose the existence and recognition of those legal human rights, the existence, and recognition of which should, following the jurisdiction thesis, be demonstrated after the jurisdiction of the State is itself established. The conclusion – that of recognition and the existence of the legal human rights after the jurisdiction is established – already figures in the premises of the art.1, making the structure of provision conceptually fallacious. It is worth wondering what the High Contracting Parties *shall secure* if that what they *must secure* is not yet recognized or its existence is not yet brought to the sufficient light? Thus, if the jurisdiction thesis is the sound interpretation of the art.1, then there is nothing the States should secure in the first place. However, it is better to ponder not of art.1 as circular and, therefore, fallacious but of the jurisdiction thesis itself. Art. 1 makes it plain that it is not the existence or recognition of the legal human rights that jurisdiction brings to the table, but the falling within the jurisdiction of the individual is essential because the States then become duty-bound to secure the rights that people already have. Indeed, "the question of which rights…the Convention creates is independent of"[43] whether the States exercise the jurisdiction or not upon the individual.[44] No amount of metaphorizing that international law is yet truly *inter-nation*(*al*) and that the rights are mostly tied to the territories can change that. An interpretive reading sketched above – that makes the better sense of what art.1 is about – instead of the fallacious jurisdiction thesis appeals to the morality of universalism immanent in the current human rights enterprise.[45] It does neither matter whether the theoretical justification[46] of the universalism

designates as Framers. Some part must stand on its own in political or moral theory; otherwise the theory would be wholly circular" (Dworkin n 22, 54) and second, that it is reasonable to think that drafters "made the constitution out of abstract moral principles not coded references to their own opinions… about the best way to apply those principles (Dworkin n 14, 121)." Indeed, considering the object and the purpose of the human rights treaties it is natural to suppose that "states which set up international mechanisms for the protection of human rights intended to give effect to the more abstract moral truths rather than to their own imperfect understanding of what these moral truths are (Letsas n 42, *EJIL* 540)." The reason, therefore, making the abstract intentions of the drafters morally relevant is normative consideration presupposing that "complying with the obligations human rights impose on states is an end in itself (Letsas n 42, *EJIL* 540)." Considering this analysis, according to the abstract intentions of the authors, the word "secure" should be given priority over "*reconnaissent*" because the latter is obviously more universalism-oriented and recognizes the existence of human rights without any jurisdictional requirement. However, for another view see., Michael S. Moore, 'Justifying the Natural Law Theory of Constitutional Interpretation' [2001] *Fordham L. Rev.* 69 2098 noting that "Yet as mentioned earlier, those good reasons showing the text to be authoritative will not lie in the authority of those who drafted that text. The constitutional text does not possess authority because those who wrote it had authority, and in this, constitutional texts differ from wills, spousal directions, popular initiatives, and statutes." On this view, the authority of the ECHR does not depend on the authority of those who drafted it. Thus, the question of what ECHR requires and says should be approached by employing the best moral reading of the text itself. According to such reading, again, the word "secure" should be given priority over "reconnaissent" because the latter is more universalism-oriented and recognizes the existence of human rights without any jurisdictional requirement.

[42] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5,

[43] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007) 32

[44] George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' [2010] *EJIL* 21, 3, 540

[45] William J. Wagner, 'Universal Human Rights, The United Nations, And the Telos of Human Dignity' [2005] *Ave Maria L. Rev* 3, 197, 197-203; Pablo Gilabert, 'Human Rights, Human Dignity, and Power' in Rowan Cruft, Matthew Liao & Massimo Renzo (eds.) Philosophical Foundations of Human Rights (OUP 2015) 196-200; Jack Donnelly, Universal Human Rights in Theory and Practice (Cornel University Press 3edn, 2013) 57-60, 96-99;

[46] It does not mean that such justification of universalism has not been offered; what matters is that it does not matter at all whether the concept of universalism is theoretically justified. For the justification of the universalism and orthodox theories of human rights see., James Griffin, *On Human Rights* (OUP 2008), James Griffin, 'Human rights: questions of aim and approach' in Gerhard Ernst & Jan-Christoph Heilinger (eds.) The *Philosophy of Human Rights Contemporary Controversies* (Hubert & Co. GmbH & Co. KG 2012); James Griffin, 'Human Rights and the Autonomy of International Law' in Samantha Besson and John Tasioulas (eds.) *The Philosophy of International Law* (OUP 2010) 339-357; James Griffin, 'The Presidential Address: Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights' [2001] *OUP: Proceedings of the Aristotelian Society*, 101,1, 1-28; John Tasioulas, 'On the nature of human rights' in Gerhard Ernst & Jan-Christoph Heilinger (eds.) The Philosophy of Human Rights Contemporary Controversies (Hubert & Co. GmbH & Co. KG 2012) 17-61; John Tasioulas, 'Human Rights, Legitimacy, and International Law' [2013] The American Journal of Jurisprudence 58, 1, 1-25; John Tasioulas, 'The Moral Reality of Human Rights' in Thomas Pogge (eds.) Freedom from Poverty as a Human Right: Who Owes What to the Very Poor? (OUP 2007) 75–102; John Tasioulas, 'Towards a Philosophy of Human Rights' [2012] Current Legal Problems 65, 1-30; See an excellent overview about what the philosophy of human rights, as a distinct field of inquiry, studies in Rowan Cruft, S. Matthew Liao, and Massimo Renzo, 'The Philosophical Foundations of Human Rights: An Overview' in Rowan Cruft, Matthew Liao & Massimo Renzo (eds.) Philosophical Foundations of Human Rights (OUP 2015) 1-45; Note that Besson is also a proponent of Interest-theory of human rights. See., Samantha Besson, 'Human Rights: Ethical, Political . . . or Legal? First Steps in a Legal Theory of Human Rights' in Donald Earl Childress III (eds.) The Role of Ethics in International Law (CUP 2012) 211-246; Samantha Besson, 'Human Rights and Constitutional Law: Patterns of Mutual Validation and Legitimation' in Rowan Cruft, Matthew Liao & Massimo Renzo (eds.) Philosophical Foundations of Human Rights (OUP 2015)

is satisfactory[47] nor does it matter whether or not it can be explicated to the satisfaction of everyone else;[48] what matters is that even theoretically unjustified universalism is the *law proper*.[49] It is the law that individuals have human rights as a matter of law simply in virtue of being human. International human rights treaties did not enact 'manifesto rights,'[50] and their magically turning into its legal counterparts were not – as a normatively necessary condition – linked with their falling within the control and authority of the State. Instead, these documents enacted universal moral and legal rights and tied their enactment to the indivisibility of human dignity.[51] These treaties are not about citizens' or residents' legal rights. However, the jurisdiction thesis directs us towards thinking that these international treaties recognized some illusory human rights and only promised to make them legal when confronted with the jurisdictional dominion of the State, thus obliterating any appeal of the normativity of the universalism. On the contrary, what the clauses of the jurisdiction – be it within the meaning of PIL[52] or IHRL[53] – delineated was the distribution of the duties according to the various theories of control, functionalities, competencies, influences, effects, and authorities[54] to ensure the human rights protection for the legal human rights that already exist and are recognized. These clauses of jurisdiction constitute the particular emphasis on the territorial nature of international law where the States cannot reasonably be expected to secure human rights all over the world, making the universality of human rights and non-universality of the duty bearers normatively compatible.[55] Therefore, there is a distinction between what legal human rights people have, on the one hand, and what duties can be attached to the States to protect these rights from the other. It might be tempting to treat the latter as the constitutive of the former and assert that if there is no jurisdiction, and thus, no human rights duties which can account for the human rights protection, then, as a matter of legal existence, there is no legal human rights in the first place. However, this would confuse both the former and the latter and arbitrarily merge independent sets of questions that figure in our normative reflection about human rights in general: what are the legal human rights that people have, and what duties, if any, should be ascribed to the possible duty bearers. At least, according to the non-circular reading, it would be intelligible to separate and treat them as independent sets of normative questions. There might be the objection to this circularity argument, that there is a distinction between the enactment and declaring the legal human rights as universal and due to the territorial nature of international law between recognizing the specific human right as being legal in each instance where the existence of the jurisdiction will be demonstrated to be unproblematic. This objection is easily set aside because there is a hardly divisive theoretical line between the entities of the enactment and the entities of the recognition in the human rights argument. Rather, the enactment of human right as legal rights is coextensive with its recognition as legal right. The right is enacted as a legal human right because it is so recognized. Thus, positing another requirement of recognition – in terms of tying it with the existence of the jurisdiction – that peoples do not have legal human rights as a matter of law without falling within the jurisdiction is redundant because there is no non-arbitrary reason why the independent requirement of the recognition should figure as the double constraint on individual's having the legal right. However, these conceptual objections hardly count as decisive. Thus, the normative objections make the case even more robust.

[47] Besson (n 32) 859 noting that "However, except for vague and often misleading gestures to the universality of human rights, which allegedly requires their extraterritorial application…"

[48] Compare to Dworkin (n 15) ix

[49] Milanovic (n 11) 80; In his magnum opus, Professor Milanovic proceeds and bases his argument on the assumption that human rights are universal and that dignity matters. He put it meticulously: "From the standpoint of the international legal system, universality is no longer just one of many competing ideological viewpoints—universality is the law."

[50] Joel Feinberg, *Social Philosophy* (New Jersey: Prentice-Hall, 1st edn., Inc 1973) 68-75, 84-88.

[51] Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' [2008] *EJIL* 19, 4, 655-724; Jeremy Waldron, 'Is Dignity the Foundation of Human Rights?' in Rowan Cruft, Matthew Liao & Massimo Renzo (eds.) *Philosophical Foundations of Human Rights* (OUP 2015) 127. Prof. Waldron – who criticized the concept of dignity as applauded in the human rights enterprise – agreed that: "More affirmatively, the invocation of dignity may suggest that there is a suprapositive explanation for our according the importance to human rights that we do, for our insistence on their universality, inalienability, and non-forfeitability. It is not simply a matter of our having decided to create positive law in this form; our creation of laws with these features presents itself as an affirmative response to facts about human specialness that we recognize in our ethical talk of human dignity. I think this is about as far as I can take this version of the foundational claim."

[52] Cedric Ryngaret, *Jurisdiction in International Law* (OUP 2nd., 2015)

[53] Marko Milanović, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' [2008] *Human Rights Law Review*, 8, 3, 411–448

[54] Ryngaret (n 50); See also, Michael Akehurst, 'Jurisdiction in International Law' [1972-1973] 46 *Brit Y B Int'l* L 145-257; Sarah Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' [2010] *EJIL* 20, 4, 1223–1246

[55] Besson n (32) 859 noting that "This is surprising as it is unclear why the universality of human rights (and human rights-holders) ought to imply the universality of human rights duty-bearers vis-a-vis any right-holder without reference to their political and legal relationship."

4.2.2. Substantive Objections

The conceptual unintelligibility of the argument cannot – in principle – in itself account for its normative unintelligibility. It can ideally be possible that the jurisdiction thesis is the correct normative proposition making the best sense of how the normative political morality[56] inherent in the law of jurisdiction should be understood to construe the proper normative conceptualization of art.1. It means that even if the jurisdiction thesis makes the text of art.1. circular, it can still be normatively defensible. However, it is submitted that other interpretive reading can make better sense of how the relationship between human rights, human rights obligations, and human rights jurisdiction should be conceived of and can accord it better normative defense than the current variations of jurisdiction thesis do.

The normative argument claiming the primacy over the jurisdiction thesis is necessarily influenced by the considerations of the political morality associated with universalism.[57] Its defensive baseline can be construed in the following manner: *under no concrete conception of the general and abstract concept of jurisdiction can it be reasonably and non-arbitrarily claimed that the recognition and the existence of legal human rights, as opposed to its legal protection, depends on the State exercising the jurisdiction within some particular conceptualization of the notion of the jurisdiction over the individual.* The obvious objection to this argument would refer to the meaningful legal disagreement[58] among the Scholars[59] and within the ECtHR[60] over the adequate and satisfactory understanding of the jurisdiction. It is a commonplace within the international human rights law to dub the extraterritorial application of the ECHR as being manifestly exceptional,[61] requiring particular justification.[62] It seems wrong to overgeneralize the normative conclusion about the normative unintelligibility of the jurisdiction thesis when no commonly agreed understanding of the extraterritorial jurisdiction exists. This objection needs to be taken seriously, but its explanatory power should not be overstated. It is not necessary to have fathomed some abstract truth condition that makes our general understanding of what human rights jurisdiction is normatively comprehensible. Precisely, in order to argue for the normative incomprehensibility of the jurisdiction thesis, it is not in and of itself necessary for everyone to exercise the consensus over the adequate theory of the extraterritorial jurisdiction.[63] That is, one can expose the internal implausibility of the jurisdiction thesis to sufficient light even if one reasonably disagrees over the adequate conception of human rights jurisdiction as it figures in our abstract thinking about what extraterritorial human rights jurisdiction really means.[64] Indeed, we share some familiar normative entities about the extraterritorial jurisdiction inferential from our shared human rights argumentative practice. First and foremost, there is a common

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[56] See the chapter "Policy behind the rule" in Milanovic (n 11) 54-117

[57] Christian Tomuschat, *Human Rights: Between Idealism and Realism* (OUP 2nd 2008) 69-97

[58] Samantha Besson, *The Morality of Conflict Reasonable Disagreement and the Law* (Hart Publishing 2005) 375-419

[59] Milanovic (n 11); M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, 2009); M. Gibney and S. Skogly, *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press, 2010); K. da Costa, The Extraterritorial Application of Selected Human Rights Treaties (Nijhoff, 2012); F. Coomans and M. Kamminga, (eds), Extraterritorial Application of Human Rights Treaties (Intersentia, 2004); R. Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties' [2007] 40 *Israel Law Review* 503; Theodor Meron, 'Extraterritoriality of Human Rights Treaties' [1995] *The American Journal of International Law* 89, 1, pp. 78-82; Alexander Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of European Court of Human Rights' [2003] *EJIL* 14, 3, 529-568; Joseph Sinchak, 'The Extraterritorial Application of Human Rights Treaties: Al-Skeini et al. v. United Kingdom' [2013] *Pace Int'l L. Rev.* 416-445; Antoine Buyse, 'A Legal Minefield - The Territorial Scope of the European Convention' [2008] 1 *Inter-Am & Eur Hum Rts J* 269-296; Yuval Shany, "Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law" [2013] *L & Ethics Hum Rts* 7, 47-71; Olivier De Schutter, 'Globalization and Jurisdiction : Lessons from the European Convention on Human Rights' [2005] *CRIDHO Working Paper 2005/04*, 1-36

[60] Concurring opinion of Judge Bonello in *Al Skeini* (n 35) para.8. The Judge Bonello noted: "My guileless plea is to return to the drawing board. To stop fashioning doctrines which somehow seem to accommodate the facts, but rather, to appraise the facts against the immutable principles which underlie the fundamental functions of the Convention." See also, Marko Milanovic, 'Extraterritoriality and human rights: prospects and challenges' in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds.,) *Human Rights and The Dark Side of Globalization: Transnational law enforcement and migration control* (Routledge 2017) 54 noting that "existing case law suffers from numerous gaps and inconsistencies with regard to questions of both state jurisdiction and state responsibility. In respect of the former, it is difficult to predict with confidence how the European Court in particular will address some of the most complex challenges before it."

[61] *Bankovic and Others v. Belgium and Others,* ECtHR [GC] (dec.), App. No. 52207/99,12 Dec. 2001, para.61; Assanidze v. Georgia, ECtHR [GC], App. No. 71503/01, 8 April 2004, para.131.

[62] *Bankovic* (n 59) para.61.

[63] Compare to Dworkin (n 14) 10-12

[64] On the various types of the concepts of jurisdiction see., Den Heijer, M., & Lawson, R, 'Extraterritorial Human Rights and the Concept of 'Jurisdiction'' In M. Langford, W. Vandenhole, M. Scheinin, & W. Van Genugten (eds.,), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (CUP 2012) 153-191

belief that human rights treaties are extraterritorially applicable.[65] Further, the spatial conception of jurisdiction conceived of as effective overall control – whether lawful or unlawful – over the areas seems commonsensical.[66] The personal conception of jurisdiction construed as the authority and the control over the individual,[67] perhaps coupled with some conception of "public powers normally to be exercised,"[68] is also commonly relied upon. Nevertheless, it seems that there is a disagreement over whether the adequate theory of jurisdiction should be purely factual,[69] functional,[70] functionally normative,[71] or whether the State exercising the extraterritorial jurisdiction should be capable of claiming the legitimate authority over the individual it exercises its power and such authority.[72] The same applies to the cause-and-effect notion of the jurisdiction over whom the respective tribunals of ECtHR and IACtHR diverge.[73] Whether any control, that is, any exercise of the power entails the responsibility in terms of establishing the jurisdiction, is controversial.[74] Irrespective of the fierce normative disagreement among the reasonable individuals, there is something – some commonly shared or relied property – inherent in our very understanding of the jurisdiction. This, in the view of the present author, is the traditional understanding of *ought implies can* maxim.[75] It can, on abstraction, be seen to be shared among the various conceptualizations of the general concept of the jurisdiction and which forms our common normative starting point in reflecting upon whether some conception or understanding of the jurisdiction should count as an eligible candidate for the adequate and normatively intelligible conception of the jurisdiction.[76]

Conventionally, this maxim means that to say that an agent ought to act, the agent must be capable of acting. On this view, "the 'ought implies can' maxim is conventionally interpreted to mean that the existence of an 'ought' presupposes the existence of a 'can'. This means that a moral actor's ability (the 'can') determines the range of possible obligations (the 'ought')."[77] At least, Professor Samantha Besson – who can be deemed as the proponent of the jurisdiction thesis[78] – holds that "Article 1 ECHR…provides the conditions for the corresponding duties to be feasible (jurisdiction as practical condition of human

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[65] *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004, para.111; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996, para.25; *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)*, International Court of Justice (ICJ), 1 April 2011.

[66] Michael Duttwiller, 'Authority, Control and Jurisdiction in the Extraterritorial Application of European Convention on Human Rights' [2012] *Netherlands Quarterly of Human Rights* 32, 2, 149-151

[67] Sarah H. Cleveland, 'Embedded International Law and the Constitution Abroad' [2010] *Colum. L. Rev* 110, 260-267; Marko Milanovic, 'Trends in the Jurisprudence of the Strasbourg Court' in Anne van Aaken and Iulia Motoc (eds.,) *The European Convention on Human Rights and General International Law* (OUP 2018) 98-111; Işıl Karakaş Hasan Bakırcı, 'Extraterritorial Application of the European Convention on Human Rights' in Anne van Aaken and Iulia Motoc (eds.,) *The European Convention on Human Rights and General International Law* (OUP 2018) 130-131.

[68] *Bankovic* (n 59) para.71,73; *Al-Skeini* (n 35) para.135.

[69] Milanovic (n 11) 30

[70] Yuval Shany (n 59) 71

[71] Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model"' [2020] *German Law Journal* 21, 414

[72] Besson (n 32) 864-866

[73] *Bankovic* (n 59) para.75; *Alejandre et al. v. Cuba*, Inter-American Court of Human Rights, Case 11.589, Report No. 86/99, September 29, 1999. See also, Erik Roxstrom, Mark Gibney and Terje Einarsen, 'The Nato Bombing Case (*Bankovic et Al v. Belgium et al)* and The Limits of Western Human Rights Protection' [2005] *Boston University International Law Journal* 23, 55, 89-91;

[74] Rick Lawson, 'Life After Banković: On the Extraterritorial Application of the European Convention on Human Rights,' in F. Coomans and M.T. Kamminga (eds.,), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 84-86. In the view of Lawson "the extent to which Contracting parties must secure the rights and freedoms of individuals outside their borders is commensurate with their ability to do so – that is: the scope of their obligations depend [sic] on the degree of control and authority that they exercise." See also, Wilde (n 8) 770-772, 793-797; Tarik Abdel-Monem, 'How Far do the Lawless Area of Europe Extend? Extraterritorial Application of European Convention on Human Rights' [2005] *Publications of the University of Nebraska Public Policy Center*. 46, 159-162, 196-197.

[75] Valentin Jeutner, *Irresolvable Norm Conflicts in International Law: The Concept of a Legal Dilemma* (OUP 2017) 125-133

[76] The assertion that 'ought implies can' maxim is a necessary ingredient of any intelligible understanding of the jurisdiction merely denotes that no concept of jurisdiction will be theoretically or practically appealing if it asks the impossible. This is why, intuitively and on reflection, it can be deemed a necessary constituent of each theory of jurisdiction. Note that this assertion does not necessarily mean that international law necessarily reproduces the requirement of *ought implies can.* On the contrary, international law does not necessarily reproduce what is required by '*ought implies can'* maxim. See., Jeutner (n 75) 129-133. In the similar vein, there are instances in the international human rights law where the requirement of '*ought implies can'* maxim is neglected. See., *Ilascu* (n 38) where The ECtHR found that Moldova also had jurisdiction over the disputed territory even though it lacked effective control. However, the judgment was criticized for violating precisely this maxim and was alleged to be the mere policy decision, aiming to secure the conformity with the flawed understanding of the jurisdiction in ECtHR case law. See., Erik Roxstrom, Mark Gibney and Terje Einarsen (n 73) 127.

[77] Jeutner (n 75) 126

[78] Besson (n 32) 862 noting that "Without state jurisdiction over certain people, those people do not have human rights against that state and that state has no human rights duties towards those people."

rights). Jurisdiction amounts, therefore, at once to a normative threshold and a practical condition for human rights."[79] She also adds that "the correlation between human rights and duties implies that the application of human rights not only is required in certain circumstances that need to be identified, but that it also has to be possible before it can be required (by reference to the 'ought implies can' principle)."[80]

The introduction of 'ought implies can maxim' within the conception of the extraterritorial jurisdiction makes sense. On the highest level of abstraction, the jurisdiction can be construed as referring to the normative conclusion inferential from the empirical observation of what kind of relational correspondence between the various stakeholders in the course of the world is. The jurisdiction should not be equated with the various forms of control and authority; instead, the jurisdiction is what follows from such control or authority.[81] On this view, the State exercising the control – through some conception of the jurisdiction or the other – over the particular area of the territory or the individual is said to be capable or have the facultative capability and capacity to exercise such control.[82] The capacity or the faculty to exercise such control is essential because the act of control which necessarily presupposes the capacity to control constitutes the practical condition present in the course of the world where the States can reasonably be expected to shoulder the duties presupposed to be imposed by the act of such control. If it is practically impossible to exercise the control and, therefore, the State has no capacity of exercising control, and thus, the State is not practically capable of protecting human rights, it would be onerous to impose such burden upon the State in question. It is where the 'ought implies can' maxim steps in. According to this chain of thought provided, the control relates to the practical possibility of the State to have the capacity to fulfill the human rights obligation, if and only if the jurisdiction will be reflected to be established. We arrived at the breaking point. In the extraterritorial context, if and only if the State *already* controls some portion of the world, the capacity to control – from the perspective of the extraterritorially acting State – means to wield the faculty and the capacity of fulfilling the obligation. Having these considerations in mind, the jurisdiction thesis expresses its true and unveiled posture in the following way:

On this view, the existence of legal human claim-rights is conditional on the existence of the control or the authority in question exercised by the State over the individual or the area in question (1), which are for their existence, again conditional on the practical possibility of having the faculty or the capacity to exercise such control or authority (2), meaning that such practical possibility accounts for the intelligibility of conferring the other-directed correlative duties on the part of the State (3), which is again conditional on the presence of the Circumstances C and Times (T) where the State will by chance happen to exercise such control or authority (4). Therefore, only if the Circumstances *C* and Times *T* (4) will make the chain of causation from 3 to 1 practically possible (*Cf. Ought implies can)*, only then and consequently, the legal human claim-rights under the law can be recognized.

This is the fundamental posture of the jurisdiction thesis. In order to recognize that individual has legal human rights, it is so patently implausible to argue that the State should be in the position of (1)-(4).[83] It does not matter whether the State is able to control the individual or the area in question or consequently is able to fulfill the duties by performing the action or the omission towards that particular individual[84] to say that the individual has the legal human claim-rights. The normative foundation of this theory is arbitrary and does not have a consistent response to the question of how individuals have legal rights as a matter of international human rights law. Note that the proposition (1) and (2) do not have the binary relationship. Proposition (1) can give rise to proposition (2) but not the other way around.[85] It is unreasonable to utter that the State controls the *x* when it has the capacity to do so, but the State has the capacity to control *x* when it, in fact, controls *x*.[86] Therefore, what is constitutive of proposition (1) is an

[79] Besson (n 32) 863
[80] Besson (n 32) 862
[81] *Al Skeini* (n 35) para.137; It posited: "It is clear that, whenever the State, through its agents, *exercises control and authority over an individual, and thus jurisdiction,* the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual." (Emphasis is mine). See also, *Jaloud* (n 35) para.154.
[82] Milanovic (n 11) 106, 107, 109, 170
[83] The numbers and letters are necessary because they convey the propositions in an easily accessible manner in that the reader can go above and see which proposition is at play.
[84] Compare to Anja Matwijkiw, 'Human Needs and Justice: The Case Against Realism' [2008] *Nordisk Tidsskrift For Menneskerettigheter* 26, 4, 296
[85] *Loizidou* (n 36) para.62. "The Obligation to secure…derives from the fact of such control."
[86] Note that under the proposed scheme, the jurisdiction is not equated with the feasibilities of the duties. See., Besson (n 32) 868. Rather, talking about the feasibility of duties under the current parameters of international human rights law is intelligible

only proposition (4). Since the proposition (4) – Circumstances *C* and Times *T* – "here and now may change… in tomorrow's world,"[87] the propositions (1)(2)(3) cannot be fulfilled, and the individual is rendered rightless. The change of the Circumstances *C* and Times *T* is an arbitrary and cannot be captured by the rational chains of thoughts. It means that it is impossible to rationalize and measure it using some non-arbitrary criteria to secure at least an elementary degree of legal certainty. The jurisdiction thesis – conceptualized as the explication of how the jurisdiction clauses function in human rights law – should be rejected as arbitrary because its normative foundation of what gives rise to the control and authority, and thus, to legal human rights, are contingent facts of the world incapable of being captured within non-arbitrary criteria. No theory is adequate if the primary vehicle of its normative operability is based on arbitrary factors. The problem of this thesis is that, in the inquiry of whether the jurisdiction can be sought to be established, it already halfway assumes the possibility of recognizing the legal human rights but then refuses to recognize them because of other contingent and arbitrary factors. It is halfway there, and in this halfway route, assumes that due to mere contingency, the individual can or cannot by the mere chance have legal rights and betrays even its arbitrary principle of allocating and recognizing legal human rights. The jurisdiction thesis explicitly reproduces what the whole project of the universality of having human rights condemns. This will be evident if we compare the (*intra*)territorial and (*extra*)territorial applicability of the jurisdiction. (*Intra*)Territorially the existence of the jurisdiction "is presumed over people situated on the official territory of the state party."[88] In (*Extra*)territorial settings, on the contrary, the jurisdiction must be convincingly demonstrated to exist. Now, if one asks the abstract question "when, if ever, the individuals have human rights," the jurisdiction thesis cannot respond to this question without referring to some non-arbitrary criteria such as the place of the birth.[89] Therefore it reproduces the unequal distribution of legal human rights based on unaccounted and arbitrary conditions. For *A* shall be presumed as the beneficiary of the legal human rights (*intra*)territorially. In contrast, *B* – who did not happen to be lucky enough to share the roof with *A* (*intra*)territorially – must demonstrate that she too, in virtue of contingent fact and merely by chance, happen to fall within the control, and thus, the jurisdiction of the State to have the legal human rights. Therefore, the individual is rendered rightless due to the arbitrary and contingent factors of the world over which she never exercised any reasonable control. A theory whose normative foundation and, thus, normativity is based on luck is no theory at all. It does not matter whether the adequate conception of jurisdiction is factual, some public powers conceptualization, or has something to do with the functional attributes associated with sovereignty; in the extraterritorial context, they are still contingent. The jurisdiction thesis can be a sound theory on its terms. However, it is normatively fallacious and entirely arbitrary as an explication of how the functioning and operation of the jurisdictional clauses of human rights treaties should be read and interpreted in international human rights law. It is simply at odds with universality.[90] "The protective canvas of human rights jurisprudence and implementing mechanisms recognizes the natural and social bonds of human destiny everywhere, that is, our kinship in rights."[91] The moral claim behind that sort of kindship – in moral and legal human rights – presupposes for us all[92] "to claim our entitlement to a life of dignity, our right to count or be counted irrespective of

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only after the proposition (4) will take place. However, I agree with Besson (n 32) 868 that the feasibility of the duty is part of the concrete requirement of jurisdiction. However, I am afraid I have to disagree with her that jurisdiction is the condition for recognizing human rights.

[87] Anja Matwijkiw and Bronik Matwijkiw, 'Stakeholder Theory and Justice Issues: The Leap from Business Management to Contemporary International Law' [2010] *International Criminal Law Review* 10 160

[88] Besson (n 32) 876

[89] John Rawls, *Theory of Justice* (Rev edn, Harvard University Press Cambridge 1971) 12, 82, 86, 141, 443.

[90] Besson (n 32) 864 noting that "What is universal about international and European human rights indeed is their guaranteeing the right to political membership in any given political community that exercises jurisdiction over the right-holders." Conditioning even the abstract right to the political membership to the jurisdiction makes the language of universality redundant. If the universality of human rights relates to some urgent moral interests that need to be protected by law but not itself the legal protection, then the whole theoretical and foundational appeal of universality is a delusion. Nevertheless, universality is the law. Some theories of human rights might better explain the very concept of human rights than the language of universalism does, but universalism wields the explanatory power of our shared human rights practices. The language and the theory of universalism constitute the foundation and explanation of the current human rights practice.

[91] Navanethem Pillay, Kenneth Roth and Hina Jilani 'What are Human Rights for? Three Personal Reflections' in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, Oxford University Press 2018) 3, 4.

[92] From the point of view of the individuals before the ECtHR – even when the existence of the jurisdiction is not established and therefore, the case is dismissed as inadmissible – the view that they just for that fact do not have human rights sounds incomprehensible. Imagine saying that the people who died in the *Bankovic* (n 59) did not have human rights against the

our ancestry, gender, color, status, and creed."[93] This criticism applies to the enforceability and claimability objections set out below.

Moreover, the jurisdiction thesis on its face amounts to erecting "the Brocard *ubi remedium ibi jus* into an analytic truth."[94] It simply reproduces the 'no-remedy no-rights' thesis. Note that propositions (4), (1) and (2) are necessary in order to reproduce the minimum requirements of *ought implies can* maxim – to impose the duty on the Controlling State based on the practical possibility of fulfilling the other-directed correlative duties. Therefore, recognizing legal human rights is tied to the possibility of *enforcing* others' directed correlative duties. Thus, if no enforcement…then no remedy…if no remedy…then no legal human rights. According to the jurisdiction thesis, then, the possibility of enforcing others' directed duties and thus, having the potential to access legal remedy gives rise to *real* legal human rights. But it is irrelevant to the truth of whether individuals have legal rights, which only says that people have legal rights in virtue of their being human, and not that "they are rights endowed with some extra property that might be obscurely designated by the word "really."[95] The problem of the jurisdiction thesis is that it blatantly conflates the truth condition of human rights with the separate question of conditions inquiring when the legal human rights that people already have can be protected in the extraterritorial context. It understands the legal human rights "in an unduly superficial way, as essentially embodying some prescription for legal enactment or remedial measures… Rather than being, as they should be, potential objects of an assessment that is sensitive to the demands of human rights, these institutions and policies [associated with the provision of remedies] are imported into the very meaning of such rights."[96] The fatal normative flaw of the jurisdiction thesis is that it conflates the existence and enforcement conditions of legal human rights and, by arbitrarily merging these separate sets of the question, is trapped in the chain of arbitrary and unaccounted reasoning.

In the spirit of the jurisdiction thesis, it is also argued that: "With no jurisdiction, there would of course be no finding of a violation of the right to life."[97] On this view, the existence of legal human rights is essentially tied with the claimability of these rights.[98] In the ECHR context, while the extraterritorial jurisdiction refers to the State's and not the Court's jurisdiction it is still evident that "if a particular human rights treaty does not apply in the absence of a state's jurisdiction, this would automatically lead to the treaty body in question lacking jurisdiction *ratione materiae*."[99] Thus, "a right only exists if the duties associated with it are claimable."[100] Therefore, this objection reproduces the jurisdiction thesis in a different way but with the same conclusion. However, it is flawed in a similar fashion. It obscures the existence criteria for legal human rights and meshes the criteria of the claimability necessary to argue whether the duties on the part of the States were complied with by that State in question. The claimability is a "precondition for speaking in a meaningful way of *violations* of duties entailed by human rights and, in turn, of addressing questions about the blameworthiness and punishment of this category of wrongdoers."[101] It is indeed unclear "why should the conditions for determinate assessments of human rights *violations* be criteria for the seemingly prior and independent question of whether a human right *exists* or, for that matter, goes *unfulfilled*?"[102] In *Al-Skeini,* ECtHR posited that "The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set

Bombing airplane. This sounds strange. For the similar strange implication of the jurisdiction thesis see., *Behrami v. France* and Saramati v. France, Germany and Norway, ECtHR [GC], App. No. 71412/01 and App. No. 78166/01, 15 November 2006.

[93] Navanethem Pillay, Kenneth Roth and Hina Jilani (n 89) 3,4.

[94] Neil MacCormick, Children's Rights: A Test Case for Theories of Rights, in Neil MacCormick (eds.,) *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (OUP 1984) 157

[95] John Gardner, 'Simply in Virtue of Being Human: The Whos and Whys of Human Rights' [2008] *Journal of Ethics & Social Philosophy* 2, 2. Gardner posited: "A trivial truth, one might think. And yet I have heard people try to cast doubt on it. How? They say that human rights are not really rights because it is not the case that wherever people have human rights they can obtain a remedy for their violation. I find it hard to repeat this objection with a straight face."

[96] Tasioulas (n 46) 88

[97] Mann (n 3) 605

[98] Milanovic (n 11) 20; This is not to say that the requirement of State jurisdiction is a mere technical requirement. Instead, ECHR's substantive question has the decisive influence on whether the case will proceed on merits.

[99] Milanovic (n 11) 20

[100] Tasioulas (n 46) 89

[101] *Ibid.,* 91

[102] *Ibid.,* 91

forth in the Convention."[103] Notice that if the claimability criteria were true, then *Al-Skeini* dictum would not make sense because, on the claimability objection, there would be nothing for which the States could be held accountable. Notably, the ECtHR connects the concept of responsibility[104] with the actions or omissions imputable to the State which "gives rise the to an allegation of the *infringement of rights and freedoms set forth in the Convention."*[105] The existence of the legal human right – set forth in the Convention – is treated as a different from the compatibility of the action and omission imputable to it with the State duties and the violability of these rights. Moreover, it is simply an unclear normative proposition to claim the impossibility of establishing human rights violations without finding the jurisdiction. In *Al-Sekini* dictum cited, the ECtHR posited of the exercise of jurisdiction to be the necessary condition for *finding* the violation; Nevertheless, this is not the same as holding that there is no violation unless jurisdiction is exercised. For when the Court lacks jurisdiction on the given legal issue, be it the State's or consequently the Court's jurisdiction, it simply declares the case inadmissible. Therefore, it is simply unknown whether the Court would have *found* the violation of the Convention had the jurisdiction been exercised. This view, therefore, leaves the one logical step empty and jumps from non-establishing the jurisdiction to non-finding the violation. In this way, it also conflates the compatibility of the State action or omission with the ECHR obligations from the separate question of whether the jurisdiction was found to be established.[106] Therefore, this view fails even on its terms. At best, the jurisdiction thesis is so implausible, flawed, and is not in conformity with the underlying ideals of human rights that it should be abandoned. However, the metaphysical mistake of the jurisdiction thesis lies in its wrong emphasis.

To say that "jurisdiction both requires the recognition of human rights normatively (jurisdiction as normative trigger of human rights) and provides the conditions for the corresponding duties to be feasible (jurisdiction as practical condition of human rights)"[107] means to provide the same normative foundation for the truth conditions of recognizing legal human rights and the truth conditions for allocating corresponding duties. This is arbitrary for the reasons explained above. Instead, the emphasis should be abandoned from the human rights existence and should be accentuated only on the human rights protection duties.[108] This is to say that "rights are prior to the duties they ground."[109] Indeed, "human rights preexist logically to the specification of their corresponding duties in given circumstances."[110] The jurisdiction, therefore, must be related to not the truth conditions of conferring the legal rights upon the individuals, but to the truth conditions of conferring the duty on the part of the State which then should secure the legal rights conferred in virtue of humanity.[111] On this view, the moral logic of universalism and the impossibility of securing all human rights worldwide is brought to equilibrium. It only takes to abandon the view that unprotected human rights can be no human right at all. "The foundational assumption is that rights do not depend on the…. [propositions (1)(2)(3)(4)], and while performance of legally binding duties do, these are still credentials-checked by the ultimate source, namely rights as normatively-causal reasons for their consequential existence."[112] This constellation of things makes it evident why it is inappropriate to ground the current system of human rights in the Hohfeldian system of legal claim-rights.[113] That logical

[103] *Al Skeini* (n 35) para.130
[104] While the concept of State responsibility entails both the matter of attributability and the jurisdiction, the former and the latter are not the same legal notions. See., Milanovic (n 11) 41-45
[105] *Ilascu* (n 38) para.311.
[106] Milanovic (n 11) 7. Indeed, "the interpretation of the jurisdiction clauses is conceptually distinct from the substantive application of a treaty to a specific issue." (at 7)
[107] Besson (n 32) 863
[108] Tasioulas (n 46) 89. This seems to me pertinent: "But who should best be assigned those duties will be a separate question requiring further deliberation. In that process of deliberation, we have to draw on considerations that bear on the allocation and specification of duties arising from the right."
[109] *Ibid.*, 99
[110] Besson (n 46) 225. Professor Besson is herself the proponent of the interest-based theory of Human Rights, which I sympathize with. However, I find it unclear how she commits herself to the jurisdiction thesis from her theory of human rights. It may be the case that her thesis commits us to the view I defend here and that her far more general view of what human rights are and the jurisdiction thesis are not consistent with each other. However, this issue is beyond the present inquiry.
[111] Another intuitive problem of the jurisdiction thesis, which is very striking, is that it creates the impression that people have human rights because they have some proximate connection with the State and not that the human rights are held simply in virtue of humanity. It creates an implicit assumption as if the State grants human rights. However, human rights are preconventional and preinstitutional. See., Marie-Bénédicte Dembour, 'What Are Human Rights? Four Schools of Thought' [2010] *Human Rights Quarterly* 32, 1, 1-20.
[112] Matwijkiw (n 39) 21
[113] Mann (n 3) 601-604

correlativity thesis (if duties…then human rights) constitutes an inappropriate explication of how the human rights talk is conducted is even conceded by its ardent defender H.L.A. Hart.[114] Moreover, Neil MacCormick refuted this thesis.[115] Instead, the current human rights talk is characterized by the two terms-relations between the person and the subject-matter.[116] John Finnis noted that "the modern vocabulary and grammar of rights is a many-faceted instrument for reporting and asserting the requirements or other implications of a relationship of justice from the point of view of the person(s) who benefit(s) from that relationship."[117] He added that "the common good is precisely the good of the individuals whose *benefit*, from fulfilment of duty by others, is their *right* because *required in justice* of those others."[118] True, "a right exists if an individual's interest, taken by itself, has the requisite kind of importance to justify the imposition of duties on others variously to respect, protect, and promote that interest."[119] On this view, thus, "they are rights grounded in universal interests significant enough to generate duties on the part of others."[120] But there is an obvious requirement according to the universalist vision of human rights law: "rights cannot simply be defined in terms of benefits which advance the important interests in freedom and/or well-being, but instead the establishment of rights is conditional on it being the case that the intended beneficiary is treated as an end."[121] Therefore, the existence of legal human rights justifies the imposition of others' directed correlative duties and not vice versa. "The existence of the correlative duty, as derived from the right, is to ensure that [Individual] is given his due. The duty is a means for rights-protection and, therefore, it should be imposed as a categorical imperative whenever possible."[122] However, in the extraterritorial context, one must not require more than is practically feasible. Thus, human "rights together with the circumstances determine which duties there are or ought to be."[123] The preliminary formula is the following: If Rights…Then Possible Duties.[124] To have a legal human right means to have a specific claim-right. "A claim-right is always either, positively, a right to be given something (or assisted in a certain way) by someone else, or, negatively, a right not to be interfered with or dealt with or treated in a certain way, by someone else."[125] In the extraterritorial scenario, the duties of respecting, securing, protecting, and ensuring human rights cannot be presumed.[126] However, the human rights holder has the claim-right against the State to argue the existence of the jurisdictional relationship, which then, if established, activates these duties. This requires shifting in our normative thinking and reflecting another model – and not the fallacious jurisdiction thesis – as explicating how the functional relation between legal human rights, legal human rights duties, and legal human rights jurisdiction should be construed. It requires us to abandon the view that the jurisdiction gives rise to the legal human right and instead concentrate on the relationship between the jurisdiction and human rights protection obligations, which should secure the human rights individuals have simply in virtue of being human. Therefore, the human rights jurisdiction relates to protection of human rights, not to the human right's recognition or conferment. From the *ubi remedium ibi jus* the normative thought should be directed towards thinking *ibi jus ubi remedium.*[127]

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[114] H.L.A. Hart, 'Bentham on Legal Rights' in A.W.B. Simpson (ed.,) *Oxford Essays in Jurisprudence*, (Clarendon Press 1973) 200-201; See also, H.L.A. Hart, 'Definition and Theory in Jurisprudence*'* in H.L.A. Hart *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983) 36; See also, John Finnis, *Natural Law & Natural Rights* (OUP 2nd 2011) 205

[115] Neil MacCormick, 'Rights in Legislation' in P.M.S. Hacker & J. Raz (eds.,) Law, Morality and Society: Essays in Honor of H.L.A. Hart (Clarendon Press 1977) 189-209; See also, MacCormick (n 96)

[116] Finnis (109) 201

[117] *Ibid.,* 205

[118] *Ibid.,* 210

[119] Tasioulas (n 46) 77;

[120] *Ibid.,* 77; He also notes that "Although it would be pleasingly symmetrical, there is no implication that the duties must also be universal."

[121] Anja Matwijkiw and Bronik Matwijkiw (n 85) 161

[122] Matwijkiw (n 83) 296

[123] Matwijkiw (n 83) 298 Another interesting view on the matter, denying that interests can in themselves be of the requisite weight to justify the imposition of others directed correlative duties see., Lea Raible, *Human Rights Unbound: A Theory of Extraterritoriality* (OUP 2020) 41-73

[124] *Ibid.,* 298

[125] Finnis (n 109) 200

[126] I find the concept of jurisdiction developed by Milanovic on lifting the threshold of jurisdiction on negative obligations intelligible; Milanovic (n 11; 209-22). However, under the current international human rights law parameters, he says that it is not how the courts are dealing with the cases (Milanovic n 60; 59).

[127] MacCormick (n 96) 158

4.3. *jus cogens* Non-Refoulement Obligation as the First-order Question

Arguably, even if the jurisdiction thesis constitutes – as the present author claims – normatively implausible, fallacious and arbitrary, this still does not in itself undermine the viability of this position as a legal. The jurisdiction thesis can perfectly be legal. However, at least concerning *jus cogens* non-refoulement obligation, the jurisdiction thesis is neither legal *status quo* nor can it account for an interpretation of how the legal operation of the jurisdiction clauses needs to be perceived. The strategy is simple and straightforward. I test the legality of the jurisdiction thesis against the backdrop of *jus cogens* non-refoulement obligation. The predicate of *jus cogens* attached to the object of non-refoulement obligation should be understood as presupposing the legal account of the concept of *jus cogens* which was argued in the previous chapters, to constitute its adequate exposition. The norms of *jus cogens,* and *ceteris paribus*, non-refoulement obligation are the legal norms of international political morality constituting the class and kind of norms designated as the norm of international public order (*ordre public)* and, for that matter, have the quality of peremptoriness. The *jus cogens* status understood as peremptoriness of the given legal norm entails that these norms are non-derogable, universally applicable, hierarchically superior, and effective. If the jurisdiction thesis is true – as its proponents argue it to be – then there is a genuine normative conflict between the operation of jurisdiction clauses in human rights treaties (ECHR in the example) and *jus cogens* non-refoulement obligation. Consequently, this normative conflict between the former and the latter results in the derogation of the latter – the outcome categorically prohibited by the *jus cogens* norms. By spelling out this argument, thus, the chapter will establish the first legal consequence, paving the way towards the second and more systemic interpretive claim emanating from the *jus cogens* non-refoulement obligation. In the meantime, the present argument will also demonstrate why the interpretive consequences are the kind of *suis generis* consequences – as opposed to other mainstream legal consequences – most suitable to the nature of *jus cogens* non-refoulement obligation juxtaposed with the international human rights regime.

4.3.1. Genuine Normative Conflict

The legal argument on the *jus cogens* non-refoulement obligation calls into question and conclusively undermines any legal plausibility of the jurisdiction thesis. Even if the jurisdiction thesis is the legally correct appraisal of how the jurisdiction clauses operate and function, it still does not survive scrutiny in examining it within the ambit of *jus cogens* non-refoulement obligation. The jurisdiction thesis conceptualized in a way as to subject the conferment of legal human rights to the exercise of jurisdiction entails genuine normative conflict with *jus cogens* non-refoulement obligation, and in virtue of such conflict, derogates from it. The properties of *jus cogens* norms described earlier informs this chapter.

It is a commonplace that the normative conflict between two sets of norms entails the operation of two different norms.[128] Intuitively, *jus cogens* non-refoulement obligation would at least require that formal recognition or the conferment to the individual of the legal human right against refoulement. On the opposite, the jurisdiction thesis while agrees with this proposition categorically adds that this legal right does not exist as such and shall only be obtained, that is, an individual's legal human right to non-refoulement shall be recognized and conferred if and only if that individual finds herself within some conceptualization of control or authority and, thus, the jurisdiction of that State. These two legal propositions demonstrated how the functioning vehicle of these two legal propositions are arranged and not that they are necessarily in conflict. The existence of the latter falls to the conceptualizing an adequate definition of the genuine normative conflict itself. There are many such definitions some of which are satisfactory and some of which are not.[129] Instead of venturing into these debates, the following account of the genuine normative conflict is assumed as satisfactory. "If someone argues that two rules (R1 and R2) are in conflict, this is tantamount to saying that, according to R1, some certain legal relationship (SS) shall be organized in such a way that φ, whereas according to R2, that same legal relationship SS shall be organized in such a way that –φ."[130] The conflict as understood within the meaning of art.53(VCLT)

[128] Wilfred Jenks, 'The Conflict of Law-Making Treaties' [1953] *British Yearbook of International Law* 30, 401, 426; E. Vranes, 'The Definition of "Norm Conflict" in International Law and Legal Theory' [2006] *European Journal of International Law* 17, 395

[129] Vranes (n 125) 403-405

[130] Ulf Linderfalk, "Normative Conflict and the Fuzziness of the International ius cogens Regime" [2009] *ZaöRV* 69 969

"refers to what is prohibited by a peremptory norm, what is contrary to it, aiming at a result outlawed under a peremptory norm."[131] The normative conflict may occur not only when the subject matter of the legal norms (peremptory/ordinary) are mutually exclusive,[132] but also in terms of their practical and operative aspects in preventing to produce the effects these norms have and the result necessarily required by them.[133] "This requires an objective examination of how an actual treaty provision and a given peremptory norm interact with each other, ie of the reality and not only the form."[134] In the language of ILC, the genuine normative conflict exists when following the interpretation of the given legal norms the relevant norms point to different directions in their respective applicatory ranges.[135] Pointing towards the different direction should not be construed as the mere logical incompatibility of complying with the different sets of the rules in question. Indeed, "focusing on a mere logical incompatibility mischaracterizes legal reasoning as logical subsumption."[136] Therefore, from the strict logical incompatibility, the conception of genuine normative conflict should be redirected to the objective-oriented approach, comparing the normative compatibility of the respective legal norm's objectives and functioning mechanisms.[137] The nature of *jus cogens* norms also warrants this approach. To determine the nature of the thing, one must refer to the necessary properties of that thing. In the context of non-refoulement obligation, *jus cogens* status entails the property of non-derogability. The general background rationale of non-derogability and other features was already conceptualized within the more extensive account of the concept of *jus cogens*, and here it suffices to say that "derogation could take place through denial of the existence or applicability of a norm to a given situation."[138] Thus, arguing for the existence of genuine normative conflict between the peremptory norm and the ordinary norm is tantamount to arguing that the ordinary norm derogates from the peremptory one.[139] Moreover, the property of effectiveness inherent in understanding *jus cogens* norms makes the property of non-derogability "an adequate to the object of"[140] *jus cogens* non-refoulement obligation. Therefore, the property of effectiveness constitutes an adequacy simpliciter,[141] the intermediary notion connecting the reflective adequacy of non-derogability as property of *jus cogens* norms and the non-refoulement obligation as the object of *jus cogens* norms. Thus, the property of effectiveness "strives to grasp the nature of the things to which they refer as perfectly, as correctly, as possible."[142] Since the interpretive considerations of effectiveness (1) necessarily influence the normative comprehensibility of non-derogability (2) and the latter is intrinsically connected to the conception of genuine normative conflict (3), then *these* No.1 through *these* No.2 is connected to *these* No.3. Therefore, since the norms of *jus cogens* are at stake, our understanding of the normative conflict warrants the adoption of the notion proposed above.

However, the genuine normative conflict between the *jus cogens* non-refoulement obligation and the jurisdiction thesis can occur not on the abstract but '*in concreto*' level.[143] Thus, the norms in question must be reduced "to their most concrete state."[144] The non-refoulement obligation and the conception of jurisdiction both are complex bundles of rules and principles. Arguing for the genuine normative conflict between the principles making up the jurisdiction and the principles making up the non-refoulement

[131] Orakhelashvili (n 12) 73
[132] Linderfalk (n 127) 966
[133] Orakhelashvili (n 12) 137
[134] *Ibid.,* 137
[135] ILC, Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,* UN Doc A/CN.4/L.682 (13 April 2006) para.24.
[136] *Ibid.,* para.25.
[137] *Ibid.,* para.25.
[138] Orakhelashvili (n 12) 75
[139] *Ibid.,*
[140] Robert Alexy, 'On the Concept and the Nature of Law' [2008] *Ratio Juris* 21, 3, 291
[141] Again, an important distinction must be made between the considerations of effectiveness employed in ascertaining what the given legal norm requires – irrespective of its actual normative status – in terms of its material content and those considerations of effectiveness that help *jus cogens* norms – irrespective of what the honest interpretation in the former stage will require – to preserve their normative operability. Indeed, it is in the self-preserving faculty of *jus cogens* norms to protect themselves against any conceivable attempt of formally or informally reducing its constituent normative features to the dead-letter. Therefore, the considerations of effectiveness here play the reflexive part of ensuring that this will not take place.
[142] *Ibid.,* 291
[143] Valentin Jeutner, 'Rebutting Four Arguments in Favour of Resolving ius cogens Norm Conflicts by Means of Proportionality Tests' [2020] *Nordic Journal of International Law* 89, 453, 459
[144] Valentin Jeutner, 'Legal Dilemma' in Jean d'Aspremont & Sahib Singh (eds), *Fundamental Concepts for International Law: The Construction of a Discipline* (Edward Elgar 2018) 609

obligation would be vague. It could not capture the main gist of how precisely *jus cogens* non-refoulement obligation and the jurisdiction thesis are in genuine normative conflict. Further, their resolution would involve balancing or proportionality weighting, thereby obscuring the theoretical unity of *jus cogens* norms and their inherent normative properties.[145] Therefore, to envisage the normative conflict, the positioning of the rules, as opposed to principles, on the spectrum of conflict should be reasonable. It is in the inherent nature of the rules that they apply in 'all or nothing' fashion.[146] If one set of rules emanating from *jus cogens* non-refoulement obligation and another set of rules emanating from the law of jurisdiction can be demonstrated to be in the genuine normative conflict, it can be a non-arbitrarily assumed that any set of rules of former, and any set of rules of latter could genuinely conflict. This is precisely the case because while testing the concrete conflict between some proposed sets of rules, the true conflict occurs on the abstract level between the master concepts to which non-refoulement obligation and the jurisdiction are the normative auxiliaries, the concrete conflict between the rules being just the concrete instantiation of this abstract conflict between the master concepts. On the highest level of theoretical abstraction, the conflict occurs between the operation of *jus cogens* norms and the impossibility of its subjecting to *the treaty to which the jurisdiction is an intrinsic part*. On the contrary, the latter should be subjected to the former.

It is not unfamiliar to deduce the concrete rule from the more general scheme of the law of a jurisdiction to provide for the eligible candidate for the genuine normative conflict.[147] According to the jurisdiction thesis, the rule under the test shall be the following. The conferring of the legal human rights (*HR*) depends on the State (*S*) exercising the authority and Control (*A&C*) over the individual (*M)* at times (*T*) and circumstances (*C*). Concerning the *jus cogens* non-refoulement obligation, the case is a bit harder. Non-refoulement obligation is itself the complex set of legal rights coupled with many positive and negative obligations.[148] The non-refoulement obligation contains, to use the terminology of Robert Alexy, many "ideal-oughts." They are the principles constituting the commands to be optimized. The optimization "depends not only on actual facts but also on legal possibilities. The field of legal possibilities is determined by countervailing principles and rules."[149] An "ideal ought" (*principles*) should be optimized and transformed into a "real ought" (*rules).* The "real ought," thus, is the command to optimize. The "real ought" being the object of the optimization is always placed on the object level, while an "ideal ought" is located on the meta-level, dictating what is to be done on the object level. "There is a necessary connection between the ideal "ought," that is, the principle as such, and the optimization command as a rule. The ideal "ought" implies the optimization command and vice-versa."[150] An "ideal ought" of the non-refoulement obligation is qualified by its normative predicate *jus cogens* relating to the object to which *jus cogens* refers to, that is, to non-refoulement obligation. Therefore, from the ideal dimension of non-refoulement obligation, designated as the meta-level of principle, the emphasis should be drawn on the object level of *jus cogens* where the "real ought" must be derived from an "ideal ought" in the form of "definitive obligations"[151] which should "only either be fulfilled or not fulfilled, and its complete fulfilment is always obligatory."[152] The 'real ought' derived from the non-refoulement obligation through

[145] Jeutner (n 140) 458-460
[146] Dworkin (n 19) 24; Alexy (n 19) 295
[147] Lea Raible, 'Title to Territory and Jurisdiction in International Human Rights Law: Three Models for a Fraught Relationship' [2018] *Leiden Journal of International Law* 31, 314-334; Smadar Ben-Natan, 'Constitutional Mindset: The Interrelations between Constitutional Law and International Law in the Extraterritorial Application of Human Rights' [2017] *Israel Law Review* 50, 2, 139–176; Maarten den Heijer and Rick Lawson, 'Extraterritorial Human Rights and the Concept of 'Jurisdiction'' in M. Langford, W. Vandenhole, M. Scheinin, & W. Van Genugten (eds.,), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (CUP 2012) 153-191
[148] *Saadi v. Italy*, ECtHR [GC], App. No. 37201/06, Judgment of 28 February 2008; *N. v. The United Kingdom*, ECtHR, App. No. 26565/05, Judgment of 27 May 200; *Sufi and Elmi v. The United Kingdom*, ECtHR, App. No. 8319/07 and 11449/07, Judgment of 28 June 2011; *Paposhvili v. Belgium*, ECtHR [GC], App. No. 41738/10, Judgment of 13 December 2016; *Soering v. The United Kingdom*, ECtHR, App. No. 1/1989/161/217, 7 July 1989; Chahal v. The United Kingdom, ECtHR, App. No. 70/1995/576/662, 15 November 1996; *D. v. United Kingdom*, ECtHR, App. No. 146/1996/767/964, 2 May 1997; *M.S.S. v. Belgium and Greece*, ECtHR, App. No. 30696/09, ECtHR, January 2011; *Al-Saadoon and Mufdhi v. United Kingdom*, ECtHR, App. No. 61498/08, 2 March 2010;
[149] Alexy (n 19) 295
[150] *Ibid.*, 302
[151] Jeutner (n 140) 459
[152] *Ibid.*, 300

its being located on the object level of *jus cogens* norms is the following: 'An Individual Shall Have a *jus cogens* human right not to be refouled.'

It is easy to see how both deduced rule – one of the *jus cogens* and other treaty provision (art.1 ECHR) – can conflict "relative to some specific case or state of affairs."[153] While the former commands the application of non-refoulement obligation categorically in virtue of its being *jus cogens,* the latter does not even recognize its existence and subjects it to the specific case or state of affairs related to the State control. The jurisdiction thesis deprives the non-refoulement obligation of the dimension of rightness conferred upon by the *jus cogens* status. While the jurisdictional provisions definitively constitute the procedural instruments, it is nonetheless inaccurate to utter that operation of these procedural instruments does not in and of itself form the substantive law[154] and does not have a juridical impact on what makes the substance in the given legal norm legally possible. Holding so would deprive the normative sense to the legal norms and make it appear to belong not to an integral legal system of interconnected rules making up the coherent international legal order but as a randomly, chaotically, and arbitrarily arranged states of affair.[155] Indeed, "what matters is not whether a rule is inherently procedural or not, but how states have designed it, what framework it forms part of, what particular function it performs as part of the international legal system, and how it relates to other rules."[156] The concrete operation of the jurisdiction thesis is arbitrary, and its procedural operation deprives the substance of non-refoulement obligation, which it is the human right and the substance to. While the rules on jurisdiction are normatively distinguishable from the substantive obligations, they still constitute "an accessory to the substantive provisions of the treaty,"[157] making an inherent link between the jurisdiction clauses and substantive treaty provisions. True, the jurisdiction clauses themselves do not determine the substance of *jus cogens* non-refoulement obligation, but they determine whether their substance will be determined. Therefore, it is the procedural question of law having the substantive dimension enabling the substance of the primary norm to be given what is due to it. The jurisdiction thesis does not enable to happen what is required by the *jus cogens* nature of non-refoulement obligation. Instead of enforcing the peremptoriness of the given legal norm, it obstructs it not even by not enforcing it but by denying its existence and applicability altogether.[158] The *jus cogens* non-refoulement obligation requires that the relationship between the jurisdiction and human rights must be organized so that φ, whereas according to the jurisdiction thesis, the same legal relationship must be organized in such a way that –φ. This is not only the incompatibility between the logical subsumptions but constitutes the divergence between substantive and underlying rationales, which point in completely contradictory directions. By uttering that individual does not have a legal right to non-refoulement obligation without herself falling within the jurisdiction, the jurisdiction thesis legitimizes something already outlawed by the *jus cogens* non-refoulement obligation. In this way, there is a genuine normative conflict between the jurisdiction thesis and the *jus cogens* non-refoulement obligation in the following way. On the one hand, the former makes the conferring of the legal human right conditional on exercising the jurisdiction where the legal human right to non-refoulement obligation is already conferred by its being the *jus cogens*. On the other hand, again, the former conditions conferring the *jus cogens* non-refoulement obligation on exercising jurisdiction, thereby exceeding the normative parameters of what is categorically required by the latter. This way, the jurisdiction thesis commits itself to the performative contradiction. It is the legal contradiction to hold that the legal right to *jus cogens* non-refoulement obligation depends on the jurisdiction. While the norms of *jus cogens* may appear in the treaty it does not mean that the treaties codify *jus cogens*; they only embody it. The norms of *jus cogens* are the norms of international public order meaning that they transcend the human rights treaties. Therefore, the operation of the norms of international public order cannot depend on their operation. That jurisdiction thesis can account for the operability of international public order norms is a straightforward category error. The execution of the jurisdiction provisions in a given human rights treaty cannot simply determine whether their beneficiaries should enjoy the norms of international public order entailing the *jus cogens* non-refoulement obligation. The norms of *jus cogens* exist to constrain the treaty-making activities of the

[153] Linderfalk (n 127) 965
[154] Orakhelashvili (n 12) 491
[155] ILC (n 132) para.33.
[156] Alexander Orakhelashvili, 'The Classification of International Legal Rules: A Reply to Stefan Talmon' [2013] *Leiden Journal of International Law* 26, 89, 90
[157] Orakhelashvili (n 12) 496
[158] Orakhelashvili (n 12) 508

States and outweigh the application of any treaty, which in its application produces the result threatening the integral normative applicability of *jus cogens* norms. The fact that human rights treaties have the object and the purpose of protecting *jus cogens* norms, if only for the reason that most human rights are susceptible of representing the category of *jus cogens*,[159] cannot prevent "the actual conflict between a specific treaty provision and *jus cogens*."[160] From the perspective of art.53(VCLT), the importance is attached to the conflict between the provision *of jus cogens* norms and the provision of the treaty or the treaty itself and not to the object, purpose, and the designation of the treaty with which *jus cogens* norm happen to conflict. Therefore, the jurisdiction thesis – in its application – produces the contingent normative conflict with the *jus cogens* non-refoulement obligation. How the jurisdiction thesis can account for *jus cogens* non-refoulement obligation? It is simply unclear because the *jus cogens* non-refoulement obligation is itself universal in a twofold manner. First, the non-refoulement obligation is universal because it is the human rights norm; Second, even if the jurisdiction thesis swallows the universality claim, it cannot account for another property of universality as the universality of the applicability of *jus cogens* norms.[161] The jurisdiction thesis needs to provide the other normative consideration to account for another layer of universality inherent in *jus cogens* non-refoulement obligation. It is in the inherent nature of *jus cogens* non-refoulement obligation to be universally applicable; therefore, what is *universally* applicable – that individual has the legal human right not to be refouled – cannot be dependent on what is only contingently attainable. Moreover, the *jus cogens* non-refoulement obligation have a hierarchically superior standing against the jurisdiction provisions. The norms of lower rank cannot subject the operation of those enjoying the hierarchically superior position. The performative contradiction of the jurisdiction thesis is that it desires to subject the operability of the legal norm of non-refoulement obligation whose *jus cogens* character is embedded in the inherent normative and legal impossibility of its being susceptible to be reduced to the human rights treaty-law application.

It is by now clear that the jurisdiction thesis normatively conflicts with the *jus cogens* non-refoulement obligation and consequently derogates from it.[162] The considerations of effectiveness inherent

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[159] Dissenting opinion of Judge Tanaka in *South-West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa); Second Phase, International Court of Justice (ICJ), 18 July 1966, p.295-296

[160] Orakhelashvili (n 12) 138

[161] Thomas Weatherall, *jus cogens: International Law and Social Contract* (CUP 2015); Daniel Costelloe, *Legal Consequences of Peremptory Norms in International Law* (CUP 2017) 82

[162] One may say that there is no genuine normative conflict between the jurisdiction thesis and non-refoulement obligation. Indeed, the jurisdiction thesis limits recognizing the legal human rights to the system lacking the jurisdiction. The proposed account of *jus cogens* non-refoulement obligation asserts that human rights treaties embody *jus cogens* norms and not codify them. Then, it is theoretically possible that there is *jus cogens* non-refoulement obligation which exists legally and independent of the State jurisdiction, and there is a treaty right to non-refoulement obligation dependent on the exercise of the State jurisdiction. Therefore, they exist in parallel: the jurisdiction thesis being a legally correct appraisal of how the jurisdiction clauses function and legally existent *jus cogens* non-refoulement obligation. However, this view, though the sound on its terms, is implausible. It artificially quantifies the non-refoulement obligation into the separate treaty legal human right and *jus cogens* legal human right. There is one legal human right to non-refoulement obligation with different interpretive conceptualizations relative to the concrete HR treaty. Otherwise, the idea of more robust human rights protection and cross-fertilization in terms of posting the relevant human right in its broader normative environment would not make sense. The *jus cogens* status is the normative predicate attached to the requisite treaty right granting it the inclusion in the legal domain of peremptory law and by virtue of the fact the legal human right concerned transcends the relevant treaty, and it is precisely the reason why the treaty embodies this right and not codifies it. However, the embodiment of *jus cogens'* non-refoulement obligation by the relevant human rights treaty does not constitute the conceptual and the normative assertion to the effect of excluding any normative connection between the treaty concerned and *jus cogens* non-refoulement obligation. The treaty embodying *jus cogens* non-refoulement obligation *protects its* non-fragmentable and non-derogable operation – being the normative and legal framework through which the peremptoriness of the given legal norm is actualized. There is nothing incompatible in holding that *jus cogens* norm is independent of the treaty in the sense of its codification and dependent on the treaty in the sense of its protection, enforcement or actualization. Indeed, the treaties are there to enforce and protect *jus cogens* norms. Therefore, *jus cogens* norms – while external to the relevant human rights treaties they embody – are internal to these treaties in the sense of their protection and enforcement. Thus, if this objection is sound at all, then by recognizing the possibility of the parallel existence of *jus cogens* non-refoulement obligation, it already deviates from the core principle of the jurisdiction thesis, that the existence of legal human rights depends on the existence of the State jurisdiction. If the jurisdiction thesis does not deviate from its master view, then it is engaged in the genuine normative conflict with the *jus cogens* non-refoulement obligation. For the protection or the existence of non-refoulement obligation, the State jurisdiction must be exercised upon which the protection of the *jus cogens* non-refoulement obligation is dependent in a sense explained above. No matter what kind of theoretical distinction or articulation shall be employed in support of the jurisdiction thesis, from the perspective of the genuine normative conflict and, therefore, derogability, the jurisdiction thesis affirms that for *some* states of affair, there should be *x*. In contrast, the *jus cogens* non-refoulement obligation affirms that for *some* states of affairs, there should be *y*. The jurisdiction thesis requires the legal existence, conferment of the protection of something be dependent on the State jurisdiction of which the jus cogens non-refoulement obligation requires non-derogable and universally applicable, unfractured legal operation. Therefore, the conflict is engaged in one variation or the other.

in the *jus cogens* non-refoulement obligation warranted the adoption of the broad view of the concept of normative conflict to strengthen the property of non-derogability and not to upset and obstruct the *telos* of *jus cogens* non-refoulement obligation. The interesting now is to find out what kind of consequences does this normative conflict brings? Does this author argue that jurisdiction clauses in human rights treaties and these treaties themselves, including the CAT, ECHR, ACHR, CAT, ICCPR, for their being in the conflict with *jus cogens* are *void?* The answer is negative. The first *suis generis* legal consequence is recognizing the question of legal human rights – that of non-refoulement obligation – as being the conceptually, lexically, and legally prior to whether the jurisdiction exists. The jurisdiction must relate to the legal human rights protection and not the legal human rights recognition, existence, or conferment. Before arguing for the compatibility of the *suis generis* interpretive legal consequences – as opposed to any other legal consequences – few considerations need to be outlined in response to the possible objections.

The first objection would run as follows: *Even if the jus cogens non-refoulement obligation becomes the first-order legal question and can be deemed to exist prior to inquiring whether the jurisdiction is exercised, is this view tantamount to claiming that whenever an individual asserts to be the beneficiary to jus cogens non-refoulement obligation, it should be so assumed?* The answer is negative. The proposed reasoning does not purport to change the way external legal states of the affair – at least with the current parameters of international law – are conducted in arranging the preliminary and merits phase of the proceedings in one way or the other. However, the proposed argument purports to change the internal theoretical and normative thinking about the relation between the jurisdiction and legal human rights. The practical consequences of this theoretical construction are the subject of following chapter inquiring *sui generis* legal consequences. However, the one possible interpretation of this objection is that it assumes that individuals are not the beneficiaries of non-refoulement obligation unless the relevant judicial determination ascribes them such status. There is a huge portion of truth to this view, if only for the reason that judicial determination must always present the law as it is. Nevertheless, this view is trivial. For it matters how judges decide cases.[163] On further inspection, it is noticeable that this question is not that obvious. Is it the case that the Judges believe that some external moral properties of non-refoulement obligation are just the part of 'the furniture of the universe'[164] and the text of the relevant treaties and the intentions of the drafters does not and merely reproduce constrain them[165] and what they must do is to find the *real* nature of these external properties[166] ascribed to the legal right to non-refoulement obligation? Or, perhaps the latter view is wrong and what matters falls to the best interpretation of the existing legal materials,[167] and those moral values wherein the moral value of non-refoulement obligation manifests itself? Or, perhaps, both views are false and what matters in deciding the case is what kind of breakfast the judges had before deciding the cases?[168] The interpretation of the law and what it amounts to is a profound question of legal philosophy.[169] The idea is that unless we have some definitive agreement on how judges decide cases, the fact that it is the relevant judicial determination that ascribes the beneficiaries the right to non-refoulement obligation is trivial. However, at least in the human rights and refugee law context, two considerations may support the theoretical argument I propose. First, according to the UNHCR guidelines, the determination of refugee status does not depend on its being legally recognized, but it is legally recognized because the person concerned already fulfills the criteria set out for the recognition.[170] It follows that the recognition is merely formal and declaratory but not of

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[163] Dworkin (n 15) 3
[164] Dworkin (n 22) 168
[165] *Matthews v. The United Kingdom*, ECtHR, App. No. 24833/94, 18 February 1999, para.39; See also, Letsas (n 41) 58-79
[166] Michael S. Moore, 'Justifying the Natural Law Theory of Constitutional Interpretation' [2001] *Fordham L. Rev.* 69 2087-2117; Michael S Moore, 'A Natural Law Theory of Interpretation' [1985] *S Cal L Rev* 58 277-397; Michael S. Moore, 'The Interpretive Turn in Modern Theory: A Turn for the Worse?' [1989] *Stanford Law Review* 41, 4, 871-957; Michael S Moore, 'The Semantics of Judging' [1981] *S Cal L Rev* 54, 151-294
[167] See chapter 7 in Dworkin (n 15)
[168] This metaphor is often associated with the school of legal realism. For one of the most elaborate articulation see., Oliver Wendell Holmes Jr., 'The Path of the Law' [1897] *Harvard Law Review* 10, 8, 457-478
[169] Philip Allott, 'Interpretation—An Exact Art' in Andrea Bianchi, Daniel Peat, Matthew Windsor (eds.) *Interpretation in International Law* (OUP 2015) 373ff
[170] *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, January 1992, para.28-88 focusing on the determination of refugee status within the meaning of Refugee Convention.

determinative nature.[171] Based on the maxim of principled generality,[172] it is not inconceivable that non-refoulement obligation is of a similar kind. The second consideration relates to the burden of proof.[173] While the initial burden of proof of demonstrating the threat inherent in the risk of refoulement lies within the applicant[174] this standard is of one "arguability" or a *prima facie*, meaning that the applicant must be capable of proving and not definitively establishing her case.[175] The ECtHR notes the difficulty the applicant faces in discharging the burden of proof and states that "the lack of direct documentary evidence thus cannot be decisive *per se*."[176] The principle of *affirmanti incumbit probation* is not meticulously relied upon,[177] and thus, when assessing the credibility of the applicant's statements, the benefit of the doubt is accorded to them.[178] Having these considerations in mind, it is not unthinkable to treat the human rights question as the first-order legal question based on these legal standards primarily arranged in a way as to enable the individual to prove his or her case to non-refoulement obligation.

The second objection would run as follows: "*The ICJ is constantly denying the conflict between the procedural norms and the substantive norms, such as jus cogens.*" This is valid. However, the ICJ is also constantly criticized for doing so.[179] The ICJ, this author believes, is perfectly aware of the fragility and artificiality between the designation and labeling the norms as 'substantive,' 'procedural,' 'first-order' and the 'second-order.'[180] Irrespective of these norms' secondary nature, they bear on substantive and procedural considerations, and no amount of the judicial pronouncements to the contrary can change that.[181] Indeed, the *Pulp Mills Case*[182] and *Barcelona Traction Case*[183] bear witness to this. The definition of the genuine normative conflict espoused is perfectly compatible with the ILC view on the normative conflict.[184] However, the ICJ's dictums do not *formally* apply to the kind of genuine normative conflict that is at stake here. *Technically* speaking, The *DRC Case* and *East Timor* case dictums are inapplicable to this normative conflict because the matter does not concern the jurisdiction of the Court but the jurisdiction of the State.[185] In the ICJ context, the jurisdiction of the Court falls to the State's consent,[186] while in the human rights context, the jurisdiction relates to the jurisdiction of the State – to the issue of whether the latter exercises the requisite degree of control or the authority. Since the nature of the genuine normative conflict and the requisite legal variables under the conflict are different, then the ICJ considerations – inclined to adopt the technical and fuzzy distinctions – cannot reasonably apply in the present context. Also, *technically* speaking, the dictum of *Jurisdictional Immunities Case* is inapplicable[187] to the normative conflict at stake here. It is related to the State's immunity as such and not to the jurisdiction of the State *per se* within the meaning of human rights law. While "writers and courts upholding immunities for violations of *jus cogens* emphatically declare that immunities do not derogate

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[171] *Ibid.,*
[172] Moore (n 40) 2110; See also, Concurring opinion of Pinto de Albuquerque in *Hirsi* (n 20) 64
[173] Başak Çalı, Cathryn Costello and Stewart Cunningham, 'Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies' [2020] *German Law Review* 21, 374-376
[174] See the following ECtHR cases: *Saadi v. Italy*, [GC], App. no. 37201/06, para. 129, 2008; *N. v. Finland*, no. 38885/02, para. 167, 26 July 2005; *NA. v. the United Kingdom*, no. 25904/07, para.111, 17 July 2008; *A.A. v. France*, no. 18039/11, para.53, 15 January 2015; *R.K. v.* France, no. 61264/11, para.59, 9 July 2015; *R.C. v. Sweden*, no. 41827/07, para.50; *Salah Sheekh v. the Netherlands*, no. 1948/04, para.136, 11 January 2007; *Garabayev v. Russia*, no. 38411/02, para.74, 7 June 2007
[175] *Nasimi v. Sweden* (dec.), no. 38865/02, 16 March 2004
[176] *Bahaddar v. the Netherlands*, judgment of 19 February 1998, Reports of Judgments and Decisions 1998-I, p. 263; *Said v. the Netherlands*, no. 2345/02, para.49, ECHR 2005-VI
[177] *Mawajedi Shikpohkt v. Netherlands* (dec.), no. 39349/03, 27 January 2005
[178] *M.A. v. Switzerland*, no. 52589/13, para.69, 18 November 2014; *Collins and Akasiebie v. Sweden*, dec. No. 23944/05, 8 March 2007
[179] Andrea Bianchi, 'Gazing at the Crystal Ball (again): State Immunity and *jus cogens* beyond Germany v Italy' [2013] *Journal of International Dispute Settlement* 4, 3, 457, 472-475; J. Vidmar, 'Rethinking *jus cogens* After Germany v. Italy: Back to Article 53?' [2013] *Netherlands International Law Review* 60, 10ff; Orakhelashvili (n 154) 89ff; For an analysis of background case see., Pasquale De Sena and Francesca De Vittor, 'State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case' [2005] *EJIL* 16, 1, 90-114
[180] Dissenting Opinion of Judge Cançado Trindade in *Jurisdictional Immunities of the State, Germany v Italy, Judgment*, ICGJ 434 (ICJ 2012), 3rd February 2012, United Nations [UN]; International Court of Justice [ICJ] para.294.
[181] *Jurisdictional Immunities of the State* (n 175)
[182] *Case Concerning Pulp Mills on the River Uruguay, Argentina v Uruguay*, Judgment on the merits, ICGJ 425 (ICJ 2010), 20th April 2010, United Nations [UN]; International Court of Justice [ICJ] 49, para.77.
[183] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain);* Second Phase, International Court of Justice (ICJ), 5 February 1970, 33
[184] ILC Report on Fragmentation (n 132) para.24-25
[185] See, Supra Note 10 and Supra Note 11
[186] See the chapter 19 Malcolm Evans, *International Law* (OUP 5th eds., 2018)
[187] *Jurisdictional Immunities of the State* (n 175)

from the underlying rules of *jus cogens*, but merely divert the solution of the underlying matters to other fora"[188] in the present case, the normative conflict "goes right to the normative essence of the substantive *jus cogens* rule whose adjudication it prevents, because through this allegedly procedural impact….[the jurisdiction] emasculates the substantive normativity of that substantive rule and leaves the beneficiaries of that rule without anywhere to assert their rights under that substantive rule."[189] Therefore, there is a distinction between the rules of immunity and the related concept of jurisdiction and between the rules of jurisdiction understood in human rights law. Indeed, the distinctions provided are artificial and technical, but they are allegedly *legalistic.* These distinctions enable to make present normative conflict invulnerable to the objection of procedural/substantive dichotomies made by the ICJ. It is simply unknown what the ICJ would have adjudged had it been faced with the opportunity of dealing with establishing current normative conflict. One may indeed speculate on it but should also take into account these technical distinctions. Indeed, these distinctions are implausible in the way the ICJ distinctions are. However, the one desiring to justify the implausibility of these distinctions should also provide for some adequate account of the concept of the legal system where the legal rules standstill and hardly have any connection with each other.

4.4. *Sui Generis* Legal Consequences

Arguing for the genuine normative conflict between the *jus cogens* non-refoulement obligation and the jurisdiction clauses (Art.1(ECHR)), and declaring that the latter derogates from the former comes for a considerable normative price. At face value, it seems that there are only two legal avenues to pursue. First, according to the art.64(VCLT) 'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.'[190] This is the apparent situation of nullity *ab initio.* On this view, the operation of jurisdiction clauses derogating from the *jus cogens* non-refoulement obligation would make the whole treaty void. Precisely, this entails that most human rights treaties are void. Second, if the treaty provisions derogating from *jus cogens* non-refoulement obligation can be separable from the remainder of the treaty, derogating provisions become void, and the remainder survives unscratched. The justification is the principle of stability,[191] and there is ample evidence from the ILC drafting history that "neither the text of the Vienna Convention nor its preparatory materials exclude the possibility of using severability to remedy the conflict with the international public order."[192] Thus, if the jurisdiction provisions can be regarded as separable from the respective human rights treaties, these treaties will remain as they are, but the jurisdiction clauses shall be considered void.[193] There is academic support for this option,[194] and the ILC too, in its draft articles on *jus cogens* norms, envisages this possibility.[195] However, both of these avenues provided are unsatisfactory and lead to absurd results. According to art.32(b)(VCLT), the drafter's intentions can be invoked when the interpretation leads to a manifestly absurd or unreasonable result. These results are both manifestly unreasonable and absurd. According to any conceptualization of the intentions (*cf. abstract, concrete*), it is inconceivable – that drafters could have intended the nullity of the human rights treaties in the face of normative conflict. It could be the case that drafters did not envisage any such derogation, and this question is counterfactual. True, while drafting the most human rights treaties, the concept of *jus cogens* was not codified within the VCLT. Thus, the latter type of question should be resolved by referring to the underlying values and principles the drafters would have relied upon had they faced the question.[196] Under no conception of counterfactual intentions can the nullity of human rights treaties be the case. If

[188] Alexander Orakhelashvili, 'Audience and Authority—The Merit of the Doctrine of *jus cogens*' in Maarten den Heijer & Harmen van der Wilt (eds.) *jus cogens: Quo Vadis?* (Netherlands Yearbook of International Law 2015) 140
[189] Orakhelashvili (n 154) 98
[190] See Art.64 in United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331
[191] Elizabeth Santalla Vargas, 'In Quest of the Practical Value of *jus cogens* Norms' in Maarten den Heijer & Harmen van der Wilt (eds.) *jus cogens: Quo Vadis?* (Netherlands Yearbook of International Law 2015) 234
[192] Orakhelashvili (n 12) 153
[193] Compare to Alice Farmer, 'Non-Refoulment and *jus cogens*: Limiting Anti-Terror Measures that Threaten Refugee Protection' [2008] *Georgetown Immigration Law Journal*, 23, 1, 34-36.
[194] Erika de Wet, 'The Prohibition of Torture as an International Norm of *jus cogens* and its Implications for National and Customary Law' [2004] *Eua. J. INT'L L.* 15 97, 98
[195] International Law Commission (ILC), Chapter V Peremptory norms of general international law *(jus cogens),* 7 Aug 2019, A/74/10; 177-178
[196] Dworkin (n 22) 23

only for the reason that human rights treaties are themselves cognate to *jus cogens* norms.[197] Moreover, human rights treaties themselves embody other norms of *jus cogens* other than *jus cogens* non-refoulement obligation, and it would be absurd to hold that *jus cogens* norms invalidate the treaty embodying other *jus cogens* norms. The present genuine normative conflict is only contingent, not something thought through or conceptual. The same analysis applies to the legal avenue of severability. The jurisdiction clauses ensure the legal operation of human rights treaties and severing them from the human rights treaties means to leave these treaties without the functioning bedrock, which is unreasonable and manifestly absurd. Furthermore, the instance of derogation from *jus cogens* non-refoulement obligation – apart from the conceptual and normative considerations – by the jurisdiction thesis applies only to the *jus cogens* non-refoulement obligation. If severability is preferred, other human rights norms are left without a functioning vehicle. Therefore, both avenues must be rejected as unsatisfactory, and something else should be preferred. For human rights treaties, by their very nature, constitute innocent treaties. Their very aim is not to derogate but to uphold *jus cogens* norms.

Nevertheless, the undesirability of the thing cannot account for its normative incomprehensibility. On a closer inspection, it becomes evident that the nullity and severability are not even engaged. The definition of the normative conflict adopted and the consequent derogation therefrom was conditioned on the specific states of affair relative to the execution, application of the respective human rights treaties. The view of the ILC was that invalidity as a requisite legal consequence should have followed only to the incompatibility of the substance with *jus cogens* norms and not its actual execution.[198] The jurisdiction clauses derogate not through the legal norm's substance but the executive application of their jurisdictional properties. Therefore, no issue arises under the invalidity clauses of art.53 and 64 (VCLT) *per se.* Indeed, "States may offend against *jus cogens* not only by inserting explicit clauses in treaties, but also—and predominantly—by the manner in which they attempt to exercise rights and prerogatives under a treaty which does not itself explicitly conflict with *jus cogens* but can prejudice it in the course of its application."[199] Whether the treaty's execution (*cf. jurisdictional clauses*) is compatible with the *jus cogens* non-refoulement obligation cannot be raised *a priori* but should be determined in each specific case.[200] From the point of view of *jus cogens* non-refoulement obligation, the concern is not the inherent validity of any human rights treaty – the latter, on the contrary, embraces it – but the application of itself perfectly valid human rights treaty.[201] These legal states of affairs should instead be approached with the method of treaty interpretation to apply otherwise derogating human rights treaties (*cf. jurisdiction clauses*) in a compatible manner with the *jus cogens* non-refoulement obligation.[202] In *Namibia*[203] and *Oil Platforms Case*,[204] the ICJ can be reasonably interpreted to come very close to this interpretive view. Indeed, "A treaty leading to something unlawful involves its conflict with non-derogable peremptory norms."[205] Therefore, the suitable legal consequences – instead of opting for unreasonable, irrelevant, and manifestly absurd-leading rules of nullity – are themselves the interpretive consequences. Apart from the academic support of this view,[206] it also enjoys support from ILC. According to the Conclusion 20: "Where it appears that there may be a conflict between a peremptory norm of general international law (*jus cogens*) and another rule of international law, the latter is, as far as possible, to be interpreted and applied so as to

[197] Orakhelashvili (n 154) 83-103; See also, Frédéric Mégret, 'Nature of Obligations' in Daniel Mockeli, in Sangeeta Shah & Sandesh Sivakumaran (eds.,) *International Human Rights Law* (OUP 3rd 2018) 86-110; Matthew Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law' [2000] *EJIL* 11, 3, 497-499; Separate opinion of Judge Antônio Augusto Cançado Trindade in *Ahmadou Sadio Diallo, Guinea v Democratic Republic of the Congo,* Judgment, Preliminary Objections, ICJ GL No 103, ICGJ 52 (ICJ 201), 30 November 2010, United Nations [UN]; International Court of Justice [ICJ]

[198] Orakhelashvili (n 12) 166

[199] *Ibid.,* 167

[200] *Ibid.,* 167

[201] *Ibid.,* 167

[202] *Ibid.,* 168

[203] The ICJ interpreted the mandate as incorporating the principle of self-determination in *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia,* International Court of Justice (ICJ), 21 June 1971

[204] The ICJ refused to fragment the legal order with respect to the rules governing the use of force in *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America,* International Court of Justice (ICJ), 6 November 2003

[205] Orakhelashvili (n 12) 168

[206] C. Wilfred Jenks, *The prospects of International Adjudication* (Oceana Publications 1964) 458; Antonio Cassese, *International Law* (OUP 2nd., 205) 206

be consistent with the former."[207] The ILC notes that "the interpreter is directed to interpret the rule of international law that is not of a peremptory character in such a way that it is consistent with the peremptory norm of general international law (*jus cogens*)."[208] Proper, if the rule at face value is consistent with *jus cogens* norm, but its concrete application brings the result contrary to it, the interpretive techniques must be employed to achieve the harmonization.[209] The interpretive legal consequences are the most suitable to the nature of non-refoulement obligation conceived of as a part of the broader scheme of international human rights legal order. As John Rawls put it, "the correct regulative principle for anything…depends on the nature of that thing."[210] The property of effectiveness inherent in the legal account of the concept of *jus cogens* plays an enormous role in this context, not by affecting the substance of non-refoulement obligation but by affecting the relevant rules of jurisdiction to make the substance of non-refoulement obligation itself substantively feasible. Since the interpretive consequence is not the legal consequence of ordinary kind, it is *sui generis*. The *sui generis* legal consequences have the ample support from the ILC which in its Conclusion 22 proceeds as follows: "The present draft conclusions are without prejudice to consequences that specific peremptory norms of general international law (*jus cogens*) may otherwise entail under international law."[211] The ILC is well-aware of the specific nature of some peremptory norms and leaves the possibility as an open category: "The contents of individual peremptory norms of general international law (*jus cogens*) may themselves have legal consequences that are distinct from the general legal consequences."[212] Thus, the author is justified in preferring interpretive legal consequences *sui generis* by their nature. The reason has to do something with a specific border-oriented nature of non-refoulement obligation requiring different conceptual, legal, and normative treatment.[213] For *jus cogens* non-refoulement obligation, *sui generis* interpretive legal consequences are appropriate not only because they capture the particular jurisdiction related peculiarities of non-refoulement obligation but also because such approach also conforms to the parameters of existing international human rights law. Thus, our argument for treating *jus cogens* non-refoulement obligation as the first order legal question and construing the emanating legal consequences as interpretive in its *sui generis* dimension is justified, and our attention should be diverted towards providing the systematic interpretive framework of *jus cogens* non-refoulement obligation. Metaphorically, it is the process whereby the human rights law "must work itself pure"[214] and regain its lost constitutional soul[215] blatantly vacated and emptied by the implausible jurisdiction thesis. *Jus cogens* non-refoulement obligation has the ambition for itself; the ultimate purpose towards which the law of jurisdiction should grow. This process is interpretive all the way down. The turn is interpretive.

4.4.1. *jus cogens* Non-Refoulement Obligation : Interpretive Turn

The reader would have already noticed that the argument for the genuine normative conflict and, therefore, the derogation from *jus cogens* non-refoulement obligation related to treating the legal existence of the latter as the first-order legal question independent of the jurisdictional considerations. On the other hand, as the author argues, the jurisdictional considerations relate to the protection of already existent *jus cogens* non-refoulement obligation. The problem quickly arises. It does not have any substantive importance how one differentiates, fragments, or partitions the structure of human rights norms in the separate normative entities of 'existence' and 'protection.' Upon accepting the argument of *jus cogens* non-refoulement entailing the genuine normative conflict and agreeing that its existence cannot be dependent on the jurisdictional matters, precisely the same argument can be made where the *protection* of

[207] ILC on Peremptory Norms of General International Law (n 190) 198-199
[208] *Ibid.,* 199
[209] *Ibid.,* 199
[210] Rawls (n 87) 29
[211] ILC on Peremptory Norms of General International Law (n 190) 203
[212] *Ibid.,* 203
[213] Richard Perruchoud, State sovereignty and freedom of movement in B. Opeskin, R. Perruchoud, & J. Redpath-Cross (eds), Foundations of International Migration Law (Cambridge University Press 2012) 123 124-125.Alison Kesby, *The Right to Have Rights Citizenship, Humanity, and International Law* (Oxford University Press 2012) 14-38. David Weissbrodt and Stephen Meili, 'Human Rights and Protection of Non-Citizens: Whither Universality and Indivisibility of Rights?' [2010] *Refugee Survey Quarterly,* 28, 4, 34–58; Bridget Anderson, Matthew J. Gibney & Emanuela Paoletti, 'Citizenship, deportation and the boundaries of belonging' [2011] Citizenship Studies, 15:5, 547-563
[214] Ronald Dworkin, 'Law's Ambitions for Itself' [1985] *Virginia Law Review* 71, 2, 173-187
[215] Rebecca L. Brown, 'How Constitutional Theory Found its Soul: The Contributions of Ronald Dworkin' in Scott Hershovitz (eds.,) *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (OUP 2009) 41-67

already *existent jus cogens* non-refoulement obligation is derogated through the operation of the jurisdictional provisions. Once the one entered the domain of *jus cogens* norms, there is no way of reasonably denying it. This argument, if pursued consistently, leads to the disappearance of the jurisdictional threshold concerning *jus cogens* non-refoulement obligation. However, under the current parameters of international law, there is no *a priori* way to infer from the *jus cogens* status of the norm the abolition of the jurisdictional threshold altogether. This goes beyond the legal "is" of *jus cogens* norms and enters the domain of legal "ought" of *jus cogens* norms. As critics rightly contend, the *jus cogens* norms constitute neither the magical club[216] nor the holy grail[217] to make the miracles happen.[218] Nevertheless, it is unclear why *jus cogens* norms cannot have an interpretive impact on existing jurisdictional provisions and why they cannot require "to adopt methods of interpretation and application of a jurisdictional instrument which support such enforcement rather than obstructing it."[219] Within our conceptualization of the legal account of the concept of *jus cogens*, the considerations of effectiveness ensure the normative intelligibility of the substance of *jus cogens* non-refoulement obligation by influencing the interpretive considerations as to prevent any rule of international law from derogating from the given peremptory norm. The property of effectiveness inherent in the norms of *jus cogens* does not themselves determine what the substance of non-refoulement obligation requires, but they are lexically prior legal properties, ensuring that what is substantive in the non-refoulement obligation is heard. Therefore, the first *sui generis* legal consequence arising from *jus cogens* non-refoulement obligation is to consider it as the first order legal question (*cf. human rights preexist the jurisdiction and thus, duties*). The second *sui generis* legal consequences are interpretive that influence the interpretation of the jurisdictional instrument and enable the protection of *jus cogens* non-refoulement obligation by the State through establishing the jurisdiction (*cf. legal human rights as the causal-normative reason for the jurisdiction and thus, duties*).

This chapter provides for the preliminary exposition of the interpretive system that can be considered to follow from the legal considerations of *jus cogens* non-refoulement obligation. Since our normative focus is the phenomena of rightlessness and consequent deterrence measures striving to elide the jurisdictional link between the migrants' legal right to non-refoulement obligation and the jurisdiction of the State, this chapter– based on *jus cogens* non-refoulement obligation as its legal foundation – will provide the novel interpretive system of the normative thinking about the relationship between *jus cogens* non-refoulement obligation and the jurisdiction. This chapter will only *briefly* argue for this system bearing in mind the confines of the present inquiry. However, the general rationale provided will enable the readers to reflect on the interpretive system proposed and further develop themselves. While the project primarily relates to the *jus cogens* non-refoulement obligation, it can be applied to any legal human right by extension. Therefore, the legal relation between *jus cogens* non-refoulement obligation and the States Jurisdiction can be conceptualized in the following way provided the legal foundation of *jus cogens* non-refoulement obligation enables such legal theorization.

1) ***If A*** *jus cogens Non-Refoulement Obligation…****Then B*** *Possible Duties ;*
2) ***If B*** *Possible Duties…****Then C*** *Claim to Jurisdiction;*

If A **=>** ***C*** *jus cogens Non-Refoulement Obligation … Then Claim to Jurisdiction;*

3) If **C1** the materialized {Claim} to Jurisdiction …**Then B1** {Materialized} Duties;

If ***A*** *then* ***B1*** *jus cogens Non-Refoulement Obligation… Then Duties ;*

4) *If -C1 then* **-*B1*** *No* materialized {Claim} to *Jurisdiction … Then No Duties;*

If -B1 then **-A** *No Duties … Then Unprotected jus cogens Non-Refoulement Obligation;*

5) *If* **-A** then **D** *Unprotected jus cogens Non-Refoulement Obligation … Then Derogated jus cogens Non-Refoulement Obligation ;*

If **-C1** then **D** *No* materialized {Claim} to *Jurisdiction … Then Derogated jus cogens Non-Refoulement Obligation.*

[216] Andrea Bianchi, 'Human Rights and the Magic of *jus cogens*' [2008] *EJIL* 19, 3, 491-508
[217] Ulf Linderfalk, 'The Effect of *jus cogens* Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' [2007] *EJIL* 18, 5, 853−871
[218] Jean d'Aspremont, '*jus cogens* as a Social Construct Without Pedigree' in Maarten den Heijer & Harmen van der Wilt (eds.) *jus cogens: Quo Vadis?* (Netherlands Yearbook of International Law 2015) 93-96
[219] Orakhelashvili (n 12) 508

Based on the rationale elaborated throughout this inquiry – including the objections based on the critique involving the normative, conceptual, and *jus cogens* non-refoulement obligation dimensions – this scheme expounds and explicates itself independently. In the context of the deterrence measures, striving to elide the jurisdictional link between the migrant and the State, precisely this normative scheme of thinking should be substituted for morally, legally, conceptually, and normatively impoverished jurisdiction thesis. Thus, the interpreter must immerse herself in the *jus cogens* domain and, following the steps outlined above, must employ his or her best judgment to make the best legal case for *jus cogens* non-refoulement obligation. The scheme employs highly abstract moral language[220] and presents itself as the flexible fit to the most important human rights treaties (ICCPR, ACHR, CAT, CRC, CEDAW, ECHR *et al.*). However, the present scheme is not itself the interpretive system; it is rather what is reflexive of the system provided below. This means that scheme for the normative thinking above is what follows – or can be seen as a matter of abstract reflection – from the interpretive framework proposed. Bearing in mind that second *sui generis* legal consequences are interpretive, the author is mindful that others may diverge on what the proper interpretation requires. Therefore, this framework constitutes just one eligible candidate for being qualified as interpretive consequences inferential from *jus cogens* non-refoulement obligation. Others may believe that the other interpretive framework better suits those relevant interpretive legal consequences. The only formal requirement for *any* interpretive system is to reproduce the rigorous compliance with the normative scheme (1-5) drawn above. From the purely consequential perspective, it is altogether immaterial what kind of interpretive belief will best protect the scheme provided that the migrant's *jus cogens* non-refoulement obligation is secured. The present interpretive framework is the normative system of thought refined to the international legal ambit. It does not dictate the interpreter the concrete *legal* outcome but guides it towards taking the best legal judgment on the case. What the best legal judgment means falls to the underlying metaphysical convictions of each interpreter. The best legal judgment – interpretive in nature – will be the right answer to the case,[221] provided that such rightness cannot be demonstrated to the satisfaction of everyone else.[222] In the final move, the interpreter may arrive at proposition 3 or 4 from the above scheme. Whatever legal point the interpreter may arrive at, he or she must be fully aware of the consequences of their judgment following from their interpretive beliefs. The choice is inevitable.

The framework constituting the normative sample – this author provides for – is an example of an eligible candidate for the second *sui generis* legal consequence of *jus cogens* non-refoulement obligation. The first level of inquiry is *meta-theoretical*, and while not being itself the constituent of *jus cogens* non-refoulement obligation, it relates to its non-positivist dimension demonstrating how the 'ought' influences 'is.' This is the level of metaphysical assumptions that bear in the interpretive scheme of *jus cogens* non-refoulement obligation. The second level is the *juridical* explicating the legal interpretive considerations brought by the interaction of *jus cogens* non-refoulement obligation and its consequent *erga omnes* duties on the law of jurisdiction. This is the level where *jus cogens* non-refoulement obligation figures as the *ratio decidendi* for deciding the case. The legal considerations of *jus cogens* non-refoulement obligation are given the flesh within interpreting the law of a jurisdiction to make the best case possible relative to one's understanding of what the best case is. Precisely on this level, the interpreter decides what sort of propositions from the scheme above he or she considers the best. This normative sample system forms the normative whole since the first level influences the second. The outcome of the interpretive process in the proposed normative framework is not immediately apparent and depends on taking the legally best stance on a given issue. If it were apparent, then it would not be the interpretation but the law *strictu sensu*. After each level is explicated, the final move will consider the possible application of these interpretive considerations to the *SS et al. v. Italy* case pending before the ECtHR. Without further ado, the normative triad making up the present system of thought is the following.

1. The Jurisdiction must be sought in furtherance of the requirements of the concept of the Duty of the Right (*cf. meta-theoretical level).*
2. The Jurisdiction must be sought in furtherance of the requirements of *erga omnes* Duty of *jus cogens* non-refoulement Right (*cf. juridical level).*

[220] Ronald Dworkin, *Freedom's Law: The Moral Reading of The American Constitution* (Oxford University Press 1996)2
[221] Dworkin (n 22) 119-146
[222] Dworkin (n 15) ix

4.4.2. The Concept of the Duty of the Right

The metaphysical considerations on how international legal order *ought to be* bear on our interpretive judgments about how the legal norms constitutive of the international legal order *are.* This assertion arguably constitutes one of the competing normative explications of what Ronald Dworkin meant when he 'paradigmatically' asserted that "lawyers and judges are working political philosophers of a democratic state."[223] Far from being untrue or implausible, the same normative considerations apply to the international legal order being the same realm of contradictory legal, political, and moral thoughts. The underlying theoretical properties of the system are simultaneously committed to the contradictory conceptualization of moral theory that is underpinned by the divergence of political philosophies "concerning the course of the world materializing within and among the international legal order"[224] and culminates in preferring one mode of legal reasoning over the other accordingly. One set of norms designated as 'legal' is drawn to moral subjectivism whereby how 'what legal means' will be construed is necessarily dependent on the participants' attitudes and their internal point of views; these norms are called the ordinary legal norms of international law.[225] Another set of norms designated as 'legal' is drawn to moral objectivism where how 'what legal means' will be construed is necessarily independent of the participants' attitudes and internal points of view; these norms are called the peremptory norms of international law.[226] The normative identity of an international legal actor is dichotomized through its commitment to the contradictory and in itself the radically diverged theoretical specter of moral thought. This is not the problem by itself. The problem arises when what is *morally objective* is treated *as if it were morally subjective*. In deterrence scenarios, *jus cogens* non-refoulement obligation is derogated and fractured *as if it were upon the participants to decide the fate of what is manifestly morally objective.* When *The Concept of the Duty of the Right* is at stake, international legal actors *ought to behave* – to introduce the philosophical thought of Immanuel Kant – as if they were *Moral Politicians*, as opposed to *political moralists.*[227] Therefore, the juridical properties of *jus cogens* non-refoulement obligation *ought to be treated* through construing the normative identity of the given legal actor as one of *moral politician*. The concept of a *moral politician* is a metaphysical concept, and its theoretical construction constitutes an '*ideal ought*' influencing our interpretive legal judgments[228] about what the law of the jurisdiction in the given extraterritorial scenario really *is*. Therefore, it is necessary to briefly see what the international legal actor being the *moral politician* amounts to.

The normative identity of the *Moral Politician* amounts to claiming the following unconditional duty upon which any maxim of the future external relations shall be based: the political maxims must "be based on the pure concept of the duty of right (on what one *ought* to pursue, the principle of which is given *a priori* by pure reason), whatever the physical consequences may be."[229] The physical consequences relate to the end – to the object of choice – that needs to be attained by the legal actor concerned. This is the material principle of the given external conduct, but for the *Moral Politician*, the given end is constrained by the formal principle of the laws of freedom making up the maxims governing external relations, which stems from the recognition of *The Concept of the Duty of the Right* and designating such an obligation as an essentially moral task.[230] On this formulation, *The Concept of the Duty of the Right* constitutes an '*ideal ought*' fulfilling of which the normatively comprehensible theory of jurisdiction must seek. The maxim is "the subjective principle of the volition."[231] For the maxim of an action to become the

[223] Ronald Dworkin, *Justice for Hedgehogs* (HUP 2011) 414
[224] Jeutner (n 75) 53
[225] Orakhelashvili (n 12) 70-71
[226] Orakhelashvili (n 12) 71-72
[227] Immanuel Kant, Toward Perpetual Peace: A Philosophical Sketch in Pauline Kleingeld (eds.,) and David L. Colclasure (Trs.,) *Toward Perpetual Peace and Other Writings on Politics, Peace, and History* (Yale University Press 2006) at 96 8:372. Kant notes "I can imagine a moral politician, that is, one who interprets the principles of political prudence in such a way that they can coexist with morality, but not a political moralist, who fashions himself a morality in such a way that it works to the benefit of the statesman."
[228] Compare to Dworkin (n 14) 145
[229] Immanuel Kant (223) at 102 8:379
[230] *Ibid.*, 101 at 8:377
[231] Immanuel Kant, Groundwork for the Metaphysics of Morals in Allen Wood (eds., trs.,) *Rethinking the Western Tradition* (Yale University Press 2002) at 16 4:401

objective principle, it must be tested in light of what *The Concept of the Duty of the Right* requires. A "Duty is the necessity of an action from respect for the law."[232] *The Concept of the Right* entails the moral faculty to obligate others.[233] *The Concept of the Duty of the Right* constitutes the simultaneous normative equation whereby the latter (*Right)* creates the normative conditions through which the former (*duty*) presents itself as the normatively necessary "designation of any Action to which any one is bound by an obligation."[234] This normative connection is made possible by the property of *the Concept of Right* as the relational concept coordinating the duties where the external and practical relationship is concerned.[235] The *Moral Politician* needs to immerse itself in the mode of abstract normative and reflective thinking to make the conditions of the *Concept of the Duty* possible; the latter requires reflecting what makes the *Concept of the Right* normatively intelligible. This enables him or her to make the comprehensible connection between how the jurisdiction must be sought in accordance with the categorical imperative (*cf. that "which commands this conduct immediately"*[236]) of the *Concept of the Duty of the Right.*

For the *Moral Politician,* at the heart of the *Concept of Right* lies the characterization of external freedom as "independence from someone else's necessitating choice."[237] "To say I have a right to be free from someone's necessitating choice means I have a claim against all others that they refrain from using either irresistible or resistible force against me to necessitate me to move my body in any way, or to act in the broad sense of "acting."[238] *The Concept of Right* takes the following principle as explicating what *ought to be* considered 'right' under the law: "Every act is right if it or its maxim is compatible with everyone else's freedom of choice under a universal law."[239] From this formulation, *The Concept of Right* takes the form of 'universal principle of right'[240] in the following manner: "Act externally so that the free use of your choice can coexist with everyone's freedom according to a universal law."[241] The *jus cogens* non-refoulement obligation consistently follows from the conception of external freedom and the 'universal principle of right.' While the former ensures that individuals have the right to *jus cogens* non-refoulement obligation, the latter imposes the duty not to violate the right.[242] However, in the extraterritorial context, the duty to protect is conditional upon the exercising of the jurisdiction; therefore, 'universal principle of right' must have the normative implications for the juridical protection of *jus cogens* non-refoulement obligation. When in *any* extraterritorial deterrence context, the State or the group of States hinder the realization of *jus cogens* non-refoulement obligation and thus, derogate from 'the universal principle of right,' *The Concept of Right* hinders that hindrance of freedom and therefore, claims to exercise the *coercion* over that States freedom by establishing the jurisdictional connection between the individual and that State. In this manner, whenever fundamental freedom is infringed, the *Moral Politician* construes *The Concept of Right* as entailing – at least – the claim to authorization to use the *coercion*.[243] The latter is the normative corollary of what follows from *The Concept of Right.* When in *any* extraterritorial deterrence context, the State or the group of States coerce the external juridical freedom of the autonomous subject of *jus cogens* non-refoulement obligation, these subjects are denied *equal* and *reciprocal* capacity to hinder their hindrance of freedom in the same way their freedom was hindered.[244] When the subjects are *necessitated* and, therefore, are obliged to perform the actions whereby infringing their external freedom, they are deprived of the *equal* capacity of *reciprocally* imposing same *necessitating* hindrance on the freedom of Deterrent States.[245] For the *Moral Politician,* the claim to authorization to use the *coercion* embedded in *The Concept of Right* by arguing for the existence of the

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[232] *Ibid.,* at 16 4:400
[233] B. Sharon Byrd and Joachim Hruschka, *Kant's Doctrine of Right A Commentary* (CUP 2010) 3; See also, Arthur Ripstein, *Force and Freedom Kant's Legal and Political Philosophy* (HUP 2009) 30-57
[234] Immanuel Kant, The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as The Science of Right in W. Hastie B.D. (trs.,) (Edinburgh 1887) 30
[235] Amanda Perreau-Saussine, 'Immanuel Kant on International Law' in Samantha Besson and John Tasioulas (eds.) *The Philosophy of International Law* (OUP 2010) 51 57; See also, Fernando R. Tesón, 'The Kantian Theory of International Law' [1992] *Columbia Law Review* 92, 1, 53-102
[236] Immanuel Kant (n 227) at 33 4:416
[237] B. Sharon Byrd and Joachim Hruschka (n 229) 78
[238] *Ibid.,* 79
[239] Immanuel Kant, The Metaphysics of Morals in Mary Gregor (trs.,) (CUP 1991) at 56 231
[240] B. Sharon Byrd and Joachim Hruschka (n 229) 79-80
[241] Immanuel Kant (n 235) at 56 231
[242] Compare to B. Sharon Byrd and Joachim Hruschka (n 229) 79
[243] Immanuel Kant (n 235) at 57 231
[244] Compare to Immanuel Kant (n 235) at 57 232
[245] *Ibid.,* at 57 232

jurisdictional connection amounts to restoring the equilibrium between the normative moral powers and the capacities of the Subjects of external freedom, whereby one can and other cannot necessitate the external freedom of other. Therefore, through the claim to authorization to use the *coercion* and, consequently, establishing the jurisdiction, *The Concept of Right* activates its proper faculty of obligating others. Through engaging *The Concept of Duty*, the States then become obligated to respect *jus cogens* non-refoulement obligation. From the point of view of *Moral Politician*, the external freedom of the Refugee-Deterring Community cannot be lawless, for it must always be dependent on the considerations arising from the *Concept of the Duty of the Right* of which *jus cogens* non-refoulement obligation is the normative corollary.

The judgment of *Moral Politician* "about a state's being in accordance with law is a judgment about whether the state's institutions accord with what is *right* under law."[246] The judgment of whether the jurisdiction exists must accord to the *Concept of Right*. It is the latter "which itself rules and is tied to no particular"[247] State. *The Concept of Right* requires that "each…be *peremptorily* allotted what is his."[248] *jus cogens* non-refoulement obligation accrues to migrant simply in virtue of being the possessor of "an inner worth, i.e., *dignity*."[249] Accordingly, in the realm of the *Concept of Right*, the person is admitted simply by virtue of his or her humanity[250] and should be treated as an end.[251] "Correspondingly, humanity becomes an "ideal," a "duty" we all have. The name "humanity" thus no longer designates the human being *as he is*, but rather the human being *as he should be*."[252] The jurisdiction *ought to* be established to further the ultimate moral ends of humanity itself,[253] being the moral task of *The Concept of Right*, and, therefore, *Moral Politician*.[254] For the *Moral Politician*, in any extraterritorial deterrence context, to assert that jurisdiction *ought to be* established is tantamount to asserting that the requisite control *can be* exercised. The Concept of Right accords '*ought implies can*' maxim its proper posture: *You Can, because You Ought*.[255] "The "ought" in "'ought' implies 'can'" is not the general "ought" of a rule, but rather a concrete "ought" in the (prospective) application of a rule in a particular situation."[256] It is inconceivable to imagine the extraterritorial context where the State being able to protect the *jus cogens* non-refoulement obligation or violate it and to say that it does not exercise the control over its ability to protect or to violate the *jus cogens* non-refoulement obligation, and therefore, does not exercise the control over the territory or the individual itself. When *the Concept of The Duty of the Right* provides that jurisdiction *ought to be* established, it also provides the reason for normatively thinking that requisite control *can* be exercised.[257] This process is simultaneous, for when *ought* can be established *can* follow as the concrete application of the given *ought*. "It is therefore obviously inconsistent, after having acknowledged the authority of this concept of duty, to want to say that one cannot carry out one's moral duties."[258] If *can* constitutes a necessary condition for *ought*, then the latter constitutes the sufficient condition for the former.[259] "If one can speak of "duty" only when the person obligated can commit the required act, then assuming a duty includes assuming that the person obligated indeed is capable of performing the act. In yet other words: Assuming a duty implies assuming the person who is obligated is free to undertake the act which he is required to perform."[260] Indeed, "What on rational grounds holds for theory also holds for practice…for

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[246] B. Sharon Byrd and Joachim Hruschka (n 229) 90
[247] Immanuel Kant, Metaphysics of Morals, Doctrine of Right 43-62 (eds.,) and David L. Colclasure (Trs.,) *Toward Perpetual Peace and Other Writings on Politics, Peace, and History* (Yale University Press 2006) at 137 341
[248] *Ibid.,* at 137 341
[249] Immanuel Kant (n 227) at 52 4:434
[250] B. Sharon Byrd and Joachim Hruschka (n 229) 287
[251] Immanuel Kant (n 227) at 52 4:434, at 53 4:435. See also, Roger J. Sullivan, *An Introduction to Kant's Ethics* (CUP 1994) 28-46, 65-79, 84-89. Further see., J. B. Schneewind, 'Why Study Kant's Ethics?' In Immanuel Kant, Groundwork for the Metaphysics of Morals in Allen Wood (eds., trs.,) *Rethinking the Western Tradition* (Yale University Press 2002) 83-91
[252] B. Sharon Byrd and Joachim Hruschka (n 229) 286
[253] Immanuel Kant, Critique of Judgment 83-84; in Pauline Kleingeld (eds.,) and David L. Colclasure (Trs.,) *Toward Perpetual Peace and Other Writings on Politics, Peace, and History* (Yale University Press 2006) at 43 5:436; See also, Immanuel Kant, 'An old question raised again: Is the human race constantly progressing?' in Allen W. Wood & George Di Giovanni (trs.,) *Religion and Rational Theology* (Yale University Press 1996) 297-308
[254] Marcia Baron, 'Acting from Duty' In Immanuel Kant, Groundwork for the Metaphysics of Morals in Allen Wood (eds., trs.,) *Rethinking the Western Tradition* (Yale University Press 2002) 92-107
[255] For further references see., Jeutner (n 75) 129-133
[256] B. Sharon Byrd and Joachim Hruschka (n 229) 295
[257] Compare to B. Sharon Byrd and Joachim Hruschka (n 229) 295
[258] Immanuel Kant (n 223) at 94 8:370
[259] B. Sharon Byrd and Joachim Hruschka (n 229) 296
[260] *Ibid.,* 296

it would not be a duty to aim at a certain effect of our will if this effect were not also possible in experience."[261] The theoretical view proceeds from the *Concept of Right* and dictates categorically what kind of relations between the States and the human beings *ought to be*.[262] The ultimate task of *Moral Politician* is the following. It is to construe the *theory or the account of the jurisdiction* – made up of rules "thought as principles having a certain generality," so that abstraction is made from a multitude of conditions that yet have a necessary influence on their application."[263] Then *ought to* apply these rules and principles in *practice* which she *can* apply imagined as "effecting of an end which is thought as the observance of certain principles of procedure represented in their generality."[264] The intermediary concept between theory and practice is the faculty of value-judgment[265] connecting the former and the latter, seeking jurisdiction following what is required by *the Concept of the Duty of the Right*.

The abstract level recapitulated above is the *meta-theoretical* and not the juridical level of thought. An 'ideal ought' explicated bears on how we interpret real 'is.' True, concerning *jus cogens* non-refoulement obligation, States must behave as if they were *Moral Politicians*, but they seldom do. The role of *Moral Politician*, therefore, falls to the Court of *law*.[266]

4.4.3. Duties *Erga Omnes* of *jus cogens* Non-Refoulement Obligation

The juridical level of the proposed framework is where *jus cogens* non-refoulement obligation is treated first and foremost as *ratio decidendi* of the given legal matter.[267] The various assertions about the maritime legal blackholes referring to the structural limitations of human rights law and, consequently, to the *de jure* rightless individuals concerning the non-refoulement obligation rest on the conceptual, normative, and legal misapprehension. As this inquiry argues, it is not the case that individuals are rendered *de jure* rightless in these states of affair. On the contrary, individuals have *the de jure* right to non-refoulement obligation, but this right is not protected in the extraterritorial deterrence context due to the alleged absence of the jurisdiction. Therefore, in the extraterritorial deterrence context, individuals have *the de jure*, but in the alleged absence of the jurisdiction, an unprotected right to non-refoulement obligation. It is one thing to say that individuals do not have legal human rights; it is altogether another thing to say that individuals have legal human rights which are not protected. On the account proposed and argued, unprotected legal human rights are also human rights in the focal sense of the word. Therefore, whether or not the jurisdiction exists must relate to human rights protection and not to the question of human rights existence or conferment.[268] However, all human rights and especially those having the *jus cogens* legal status, as is the case in the context of non-refoulement obligation, *ought to be* protected. While the existence of *jus cogens* non-refoulement obligation as the legal human rights is unconditional, the beneficiaries of and through the given legal norm have the *normative and legal claim* that jurisdiction is established to accord the human right the protection that is *peremptorily* due to it. *jus cogens* norms are public order norms and their non-derogable and universal operation must be unfractured. The property of effectiveness inherent in *jus cogens* non-refoulement obligation brings interpretive considerations to ensure their non-derogable and universal operation. Therefore, it follows that – in the extraterritorial context – *jus cogens* non-refoulement obligation through its legally inseparable properties makes the *normative and legal claim* to the effect of establishing the exercising of the extraterritorial jurisdiction by the State to ensure its non-fragmentable legal application. This section briefly demonstrates what these interpretive considerations amount to.

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[261] Immanuel Kant, *On the common saying: That may be correct in theory, but it is of no use in practice* (available at https://hesperusisbosphorus.files.wordpress.com/2015/02/theory-and-practice.pdf) at 279 8:275 and 308 8:313
[262] *Ibid.*, 308 8:313
[263] *Ibid.*, at 279 8:275
[264] *Ibid.*, at 279 8:275
[265] *Ibid.*, at 279 8:275
[266] Dworkin (n 22) 33-75; Philip Allott, 'The International Court and the voice of justice' in V. Lowe & M. Fitzmaurice (Eds.) Fifty Years of the *International Court of Justice: Essays in Honour of Sir Robert Jennings* (CUP 1996) 17
[267] Antonio Cassese, 'For an Enhanced Role of *jus cogens*' in A. Cassese (eds.), *Realizing Utopia: The Future of International Law* (OUP 2012) 159
[268] This assertion is the theoretical claim about the normative thinking on *de jure* human rights and does not imply that the jurisdiction should be necessarily construed as the ability to discharge the obligation or violate given human rights.

From the invocation of *jus cogens* non-refoulement obligation *erga omnes* duties follow necessarily. The legal acceptance and endorsement of the latter norms by international law is unquestioned.[269] The *jus cogens* non-refoulement obligation is "a concept of material law, the obligations *erga omnes* [attached to it] refer to the structure of their performance on the part of all the entities and all the individuals bound by them."[270] In the words of the ILC, "obligations *erga omnes* designate the scope of application of the relevant law, and the procedural consequences that follow from this."[271] These peremptory *erga omnes* obligations traditionally relate to the range of international legal subjects entitled to invoke the responsibility when the alleged breach of the legal norm does not represent their unique and material legal interest.[272] The *erga omnes* duties relate to applying the material law of *jus cogens* non-refoulement obligation and are analytically linked with the Concept of State responsibility.[273] Therefore, it is not inconceivable to construe *jus cogens* non-refoulement obligation and derived *erga omnes* duties as interpretive legal materials informing the normative intelligibility of establishing the State jurisdiction. Admittedly, the latter is itself the constituent of the Concept of State responsibility.[274] It is precisely the cumulative normative effects of the interpretive considerations of the effectiveness coupled with the consequent *erga omnes* duties that materialize the *normative and legal claim* of *jus cogens* non-refoulement obligation to have the State jurisdiction established. Following *Barcelona Traction,* "in view of the importance of the rights involved, al1 States can be held to *have a legal interest* in their protection; they are obligations *erga omnes*."[275] Thus, the *jus cogens* non-refoulement obligation is the 'basic' right of the human person which each State has *a legal interest* to protect. *Prima facie,* when extraterritorially or territorially acting State(s) through its action or the omission impact the individuals outside the national territory, it has the legal interest not to violate that right. This is the normative corollary of the conceptualization of the public order norms (*jus cogens* non-refoulement obligation) towards the protection of which an international community of the States as a whole expresses its normative fidelity.[276] Thus, finding the jurisdiction established is the materialization of the duties of the sincerity and expression of the following normative proposition: The States are sincere and fidelity-oriented in protecting the 'basic norm'[277] that are again the corollary of having *the legal interest* to protect the realization of *jus cogens* non-refoulement obligation. In the domain of *jus cogens*, the addresses of the claim of establishing the jurisdiction are the international community of the States as a whole, meaning that the jurisdiction cannot be solely exclusive.[278] *Jus cogens* non-refoulement obligation binds all States and operates as the public order norm; thus, the robust operation of the jurisdictional provision of the human rights treaties embodying the *jus cogens* norms enforce its realization. These are interpretive considerations and are not in themselves the constitutive of the State jurisdiction. However, when the interpreter takes the plethora of extraterritorial standards such as *Al-Skein, Ocalan, Catan, Issa, Al-Saadoon, Hirsi, Medvedyev, Pad, Isaak, Solomou, Jaloud, Loizidou, Andreou, Nada, Ilascu,* even *Bankovic*[279] or other interpretive standards of various Human Rights Treaty Bodies[280] or the Inter-American Institutions,[281] the due account must be given to the fact that the State has the legal interest not to act in impunity[282] and to protect the *jus cogens*

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[269] Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005)
[270] Antônio Augusto Cançado Trindade, *International Law for Humankind Towards a New Jus Gentium* (Martinus Nijhoff vol 6) 318
[271] ILC (n 134) at 193, para.380
[272] *Barcelona Traction* (n 181) 33; See however, *Questions relating to the Obligation to Prosecute or Extradite, Belgium v Senegal*, Judgment, ICJ, 20th July 2012, para.68 For the criticism see., Orakhelashvili (n 186) 126-131
[273] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, art.48(1)
[274] ILC (n 270) art.2(b); The question of State jurisdiction falls within art.2(b).
[275] *Barcelona Traction* (n 181) 33
[276] Compare to *Namibia* (n 201) at 56, para.121; Compare to *Wall Advisory Opinion* (n 65) at 64, 146
[277] *Barcelona Traction* (n 181) 33
[278] That jurisdiction can also be not exclusive is recognized in *Ilascu* (n 38)
[279] See Supra Notes 35-38
[280] UN Human Rights Committee (HRC), *General comment no. 36, Article 6 (Right to Life),* 3 September 2019, para.63; For the broader discussion see., Başak Çalı, Cathryn Costello and Stewart Cunningham (n 171) footnotes 9-10
[281] Başak Çalı, Cathryn Costello and Stewart Cunningham (n 171) footnote 6
[282] Immanuel Kant's (n 225) Transcendental Concept of Public Right is pertinent here, at 104 8:381. As Kant notes: ''All actions that affect the rights of other human beings, the maxims of which are incompatible with publicity, are unjust.'' Explicating the concept as an essentially juridical concept, (*"Concerning Rights of Humans")* Kant goes on to insist that: "If I may not utter my maxim explicitly without thereby thwarting my own aim, if it must rather be kept secret if it is to succeed, if I cannot admit it publicly without thereby inevitably provoking the resistance of all others to my plan, then the necessary and universal and hence *a priori* understandable opposition to me can be due to nothing other than the injustice with which my

non-refoulement obligation. Therefore, construing the notion of the jurisdiction in such a manner to materialize something which extraterritorially acting States themselves have *the legal interest to protect* lies in their *legal interest* as the necessary normative corollary. Refuse to construe the notion of the jurisdiction under the normative impact of these interpretive considerations amounts to what was long ago acknowledged in *Barcelona Traction*: "a finding by the Court that the Applicant Government has no *jus standi*, would be tantamount to a finding that these rights did not exist, and that the claim was, for that reason, not well-founded in substance….[which is not] simply of the admissibility of the claim, but of the substantive legal rights pertaining to the merits… of what is the juridical situation in respect of shareholding interests, as recognized by international law."[283] A *similar* normative pattern revolves around *jus cogens* non-refoulement obligation – denying construing the jurisdiction in the manner not impacted by the considerations of the effectiveness inherent in *jus cogens* norms and consequent considerations of *erga omnes* duties amounts to denying the *jus cogens* right recognized under international law as one binding on the international community. The jurisdiction – as necessarily procedural norm – must be given the substance as itself the normative intermediary of vesting the substance in *jus cogens* non-refoulement obligation.[284] From the normative scheme drawn above, 'If No materialized {Claim} to Jurisdiction … Then Derogated *jus cogens* Non-Refoulement Obligation.' The argument of *jus cogens* non-refoulement obligation given the legal effect through *erga omnes* duties brings another necessary legal consequence that the States must discharge. The distribution of the burden of proof in determining whether or not extraterritorial jurisdiction was exercised should be unequal and should lie to that State. When the States claims that no extraterritorial jurisdiction was exercised on its part – thus implicitly denying *jus cogens* non-refoulement obligation in the protection of which it *has the interest accrued in the law* – the burden that should be discharged must be reasonably set high. The precise constellation and the level of persuasion inherent in the burden of proof "are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake."[285] The ECHR not only embodies but itself recognizes the existence of *jus cogens* norms.[286] Since *jus cogens* non-refoulement obligation is at stake when the individual makes the reasonable legal argument for extraterritorial jurisdiction, the burden of disapproving it interpretively shifts on the State that must be set high relative to the concrete nature of the given states of affair. Pointing to the undesirability or the normative incomprehensibility of "imposing disproportionate burden" upon the State is justified[287] but is balanced against the consideration of *jus cogens* non-refoulement obligation bringing the *erga omnes* duties.[288] The legal fact of *erga omnes* counterbalances the level of disproportionate burden that it is in the *legal interest of the State to protect* the right. As its normative corollary, *it is in the legal interest of the State* to discharge the high burden wherever the right at stake is one where the State, again, has *the legal interest to protect*. *Jus cogens* non-refoulement obligation becomes the normative-causal reason for state jurisdiction.

4.4.4. On the Best Legal Interpretation

To accept the *sui generis* legal consequences – interpretive in nature – inferential from the legal account of the concept of *jus cogens* non-refoulement obligation implies no *a priori* theory of the jurisdiction that necessarily follows from it. One cannot reasonably infer from the normative quality of the norm one single conception of the concept of State jurisdiction if only because there might be many different conceptions that enable the realization of the *telos* of the given norm. Furthermore, holding so would account for the arbitrary theoretical preference of each author over what are the truth conditions of the best understanding of the theory of the State jurisdiction. It would unjustifiably veil such understanding in the constitutional exegesis of the *jus cogens* norms. And necessarily amount to self-supporting normative assumption where anything can follow from one's generalization of legal, political, and moral beliefs risking the conceptual clarity and analytical rigor. Therefore, it does not normatively and

maxim threatens everyone;" at 105 8:381. It captures the essence of why States do not, in principle, desire to imply that their action is lawless.

[283] *Barcelona Traction* (n 181) 33

[284] Compare to *Pulp Mills* (n 180) para.77

[285] *Isaak* (n 35) para.107

[286] *Al-Adsani v. The United Kingdom*, ECtHR, App. No. 35763/97, 21 November 2001, para.60.

[287] *Osman v. The United Kingdom*, ECtHR, App. No. 87/1997/871/1083, 28 October 1998, para.116

[288] For example, the CAT Committee supported the reversal of the burden of proof and shifted it to the State when the individual cannot obtain the supporting documentation. See., UN Committee Against Torture (CAT), *General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22*, 9 February 2018, para.38.

conceptually follow - with the definitive certainty - from *jus cogens* status of non-refoulement obligation what makes the propositions of the law of jurisdiction true. Thus, it is arbitrary to derive from *jus cogens* non-refoulement obligation either the theory of functional,[289] normative,[290] power,[291] the factual[292] or functional-authority[293] or other conceptualization of the State jurisdiction.

On the other hand, this is an advantage rather than a disadvantage. When applied in the *real* case, any conceptualization of the jurisdiction risks becoming inoperative by changing one factual or legal variable in the given context, therefore generating arbitrary results.[294] However, it is one thing to assert that no specific theory follows from *jus cogens* non-refoulement obligation; it is another thing to insist that realization of the *telos* of *jus cogens* requires the best interpretive legal judgment over the conception of the State jurisdiction. For the State jurisdiction to avoid the risk of becoming inoperative and losing the conceptual clarity in choosing one concrete conception over the other, the following *interpretive* solution should be preferred. According to the *sui generis* interpretive legal consequences, the State jurisdiction exists wherever it follows from the best legal interpretation of existing legal materials immanent in our shared human rights practices inquiring what the best understanding of the concept of State jurisdiction is, even though the participants of the said interpretive practice disagree on what such best conception is and what it thereto entails.[295] Importantly, "Jurisdictional/procedural instruments themselves can create substantive law and are as subject to interpretation as any other instrument."[296] On this view, the considerations of normative property of effectiveness ensure that the law of jurisdiction is interpreted *per* art—31 (1) VCLT. Since the relevant law of jurisdiction must be interpreted and applied in light of the "the framework of the entire legal system prevailing at the time of interpretation,"[297] the realization of the *telos* of *jus cogens* norms becomes constitutive of the object and the purpose of the relevant HR treaty.[298] It derives its normative authority from the conceptualization of the public order norms provided in the general account of the concept of *jus cogens.* These considerations are the ideal legal 'ought(s)' influencing our interpretive judgments. From the kind of international legal order one conceives of may follow what the substance of the given legal norms are. Therefore, the best legal interpretation of the law of jurisdiction inquiring the proper conception of the concept of jurisdiction in light of the given extraterritorial situation is one advancing the object and the purpose of the HR treaty - *jus cogens* non-refoulement obligation. In this view, the legal statements of the law of jurisdiction are the set of abstract legal principles inferential from the jurisprudential practice of human rights tribunals. The human rights legal enterprise can arguably be called the interpretive practice.[299] The interpreter deciding whether it follows from the law of the jurisdiction that the State exercises jurisdiction must impose "purpose on object or practice in order to make of it the best possible example the form or genre to which it is taken to belong."[300] In the relationship between the human right of *jus cogens* non-refoulement, the State jurisdiction, and the Obligation attached to the State after the jurisdiction is established, the eligible value that the practice must cherish is that of respecting *jus cogens* norms.[301] The law of jurisdiction is interpreted best if the interpreter shows such law in the best possible legal light.[302] Due to the inherent link between the State jurisdiction and realization of *jus cogens* non-refoulement obligation, "the jurisdictional clause must simply be considered to cover the entire legal relationship."[303] Indeed, the question of justification of selecting the concrete interpretive considerations over the other means to place the law of the jurisdiction in light of which *jus cogens* non-refoulement obligation will be given its material

[289] Shany (n 59)
[290] Besson (n 32)
[291] Lawson (n 74); Tarik Abdel-Monem (n 74); Lea Raible (n 122)
[292] Milanovic (n 11)
[293] Violeta Moreno-Lax (n 71)
[294] Mann (n 20) 369; Pijnenburg (n 20) 402; Pijnenburg (n 20) 312
[295] Dworkin (n 15) in general. Note that the present reliance on Dworkin's theory intends not to transport his theory in international human rights law but only to use his theory as the conceptual framework to accommodate the relationship between *jus cogens* non-refoulement obligation and the establishing the State jurisdiction.
[296] Orakhelashvili (n 12) 491
[297] *Namibia* (n 201) at 50
[298] Compare to Letsas (n 42) 533
[299] Letsas (n 41)
[300] Dworkin (n 15) 52
[301] Compare to Letsas (n 42) 533
[302] Dworkin (n 212) 176
[303] Orakhelashvili (n 12) 496

legal realization.[304] In the domain of *jus cogens*, the best possible light is one that takes the best legal interpretation as advancing the properties of universal application and non-derogability. Therefore, what falls to the interpreter is to decide which legal principles inferential from the law of jurisdiction enables herself to make the best legal judgment to show *jus cogens* non-refoulement obligation in the best possible light. The international legal materials comprising the law of jurisdiction are mediated by art.31(3)(C), meaning that the interpreter can avail itself from the surrounding 'normative environment'[305] to select the right kind of legal principles. This would enable the interpreter to construe the groundwork interpretive material not as placed in a normative vacuum but embedded in the general legal framework of interpretive thought.[306] Furthermore, the domain of *jus cogens* is general international law and the human rights treaty that embodies it must cross-fertilize their legal materials to hold *jus cogens* non-refoulement obligation genuinely universal.[307] This is the interpretive account of the legal reasoning inferential from the effectiveness considerations of *jus cogens* non-refoulement obligation and makes the satisfaction of the truth conditions of the propositions of law dependent on the satisfaction of the grounds of law of *jus cogens* norms. Extraterritorial deterrence scenarios are very complex in factual and legal terms involving various stakeholders. Therefore, the character of the inquiry shall sometimes be a very complex unfolding of the jurisdictional problems generated by it – and the interpreter must be willing to pursue the character of inquiry in the process of its unfolding.[308] Thus, the abstractness of justificatory bound cannot be *a priori* determined in advance unless the concrete problem makes the interpreter unveil this abstraction and relativize it to the concrete states of affair. The range of normative reflection is made vivid in the course of such normative inquiry, reflecting upon how the truth of the propositions of the law of jurisdiction will make the ground of the law of *jus cogens* genuinely true. The justification may take any principle or concrete theory of jurisdiction, whether it is functional, sovereignty-based, factual, or so on. This also allows the interpreter to construe the kind of understanding of the principles of the law of the jurisdiction that realizes *telos* of *jus cogens* non-refoulement obligation and does not itself make the normative threshold of the jurisdiction disappear altogether.[309] The latter cannot be set in advance but should be reflected upon in each concrete instance, taking into account the complexity of maintaining the bright-line rules of the jurisdiction without risking the arbitrary results.[310] If the interpreter decides that realizing the telos of *jus cogens* unimportant – he must justify why his or her best understanding of the jurisdiction is not consonant to *jus cogens* non-refoulement obligation.[311] Instead of downplaying and pretending non-existence of the genuine normative conflict, the interpreter must be fully aware of the legal consequence of his interpretive choice, which is that the application of the jurisdictional provision denying the realization of *jus cogens* norm derogates from the given legal norm in its attempt to dismantle its normative substance altogether. After the most rigorous and careful interpretive exercise and facing the impossibility of establishing the jurisdiction, the Court, as a measure of the *ultima ratio* would be justified to act *proprio motu* and hear the case.[312] Since the precondition of this choice is the interpretive framework – the only definitive exhaustion of the latter would justify invoking *proprio motu* as a measure of the last resort.[313] The exact conditions and requirements of invocation depend on the precise nature and the situation of the

[304] Compare to *Hirsi* (n 20) para.178; Compare to *Al-Saadoon v. UK*, ECtHR, Appl. 61498/08, 2 March 2010, para. 138.
[305] ILC (n 134) at 208, para.413
[306] Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention' [2005] *ICLQ* 54, 2, 279-319
[307] Trindade (n 268) 146
[308] Dworkin (n 14) 55, 68, 69
[309] This cannot be tested in advance but should be decided in each individual case. Indeed, the notions such as 'direct and immediate relationship,' (*Andreou* n 37 at 11) 'direct and reasonably foreseeable,' (HRC n 278 para.63) 'intensity of power relations or the special relations' (Shany n 59 at 47) or 'sufficiently proximate' (*Al Skeini* n 35 para.133) will be of great interpretive help.
[310] Indeed, one should never forget the advice of Milanovic that such notions are ineffective in limiting the jurisdictional threshold non-arbitrarily. See., Marko Milanovic, 'Drowning Migrants, the Human Rights Committee, and Extraterritorial Human Rights Obligations' *EJIL Blog* (https://www.ejiltalk.org/drowning-migrants-the-human-rights-committee-and-extraterritorial-human-rights-obligations/)
[311] See., Propositions 8 and 9. A) If Unprotected *jus cogens* Non-Refoulement Obligation … Then Derogated *jus cogens* Non-Refoulement Obligation; B) If No materialized {Claim} to Jurisdiction … Then Derogated *jus cogens* Non-Refoulement Obligation.
[312] For a complete exposition and the justification of this measure see., Orakhelashvili (n 12) 496-499
[313] Compare to Jeutner (n 75) 94; Jeutner puts it in the following way: "a dilemmatic declaration may be issued in the course of such proceedings only once a most rigorous and stringent application of contemporary international law's norm conflict resolution and accommodation devices has been unable to decide a given norm conflict."

given case. Its utilization is justified once the most rigorous application of the interpretive framework was not sufficient to uphold *jus cogens* non-refoulement obligation.[314]

Indeed, the account of the interpretive dimension of the consideration of effectiveness as an inherent property of *jus cogens* non-refoulement obligation is underdeveloped; however, its abstractness is itself the normative indicator of how the theoretical route would have been pursued, developed, and unfolded had it been the sole inquiry of what fully-fledged interpretive practice amounts to. The theoretical contours of the given account made it abundantly clear what kind of interpretive legal framework the author has in mind – the framework which can be fully developed in the future.

4.5. *SS et al. v. Italy* – 'Dignity indivisible'

In the extraterritorial context, if State *A* controls the individual(s) *B*(*n+1*) according to some conceptualization of the concept of jurisdiction, and thus exercises the jurisdiction while justifying this judgment with the one kind of the principles of the law of jurisdiction,[315] "it must allow those principles their natural extension."[316] *SS et al. v. Italy* pending before the ECtHR will be briefly argued what sort of natural extension of the principles of the law of jurisdiction it necessarily attaches whereby the *jus cogens* non-refoulement obligation is accorded its universal and genuine primacy. The present argument provided assumes and reiterates that the present case is well-document and empirically sustainable.[317] Thus, instead of juxtaposing with factual circumstances, the only legal argument will be invoked, which the author hopes can be reinforced factually. The present argument is also not concerned with the question of attribution – bearing in mind that according to some conceptualization of the concept of jurisdiction, the jurisdiction establishing and attribution establishing conduct may but not necessarily be the same.[318] The author is also mindful of the academic treatment of the case and various plausible, compelling, persuasive, and more thoroughly inquired legal arguments that the requirement of State jurisdiction is met in the present case.[319] In sharing the general spirit of these authors, this inquiry offers a brief argument aiming to contribute to the present discussion – bearing in mind that such argument could have been exposed in some greater length. Therefore, the present legal argument is only the brief legal application of the central insights of the inquiry.

It is unquestionable that in the present case the migrants have legal human right to *jus cogens* non-refoulement obligation. The normative, moral and legal primacy of the human rights existence over the question of the State jurisdiction in the context of non-refoulement obligation is amply met. The ECHR embodying *jus cogens* non-refoulement obligation is 'practical and effective,'[320] and the considerations of the effectiveness as the legal property of *jus cogens* norms ensure that relevant legal norms be given their material substance. Therefore, the possible duties *ought to be* transformed into real duties through establishing the State jurisdiction. Thus, individuals enjoying *jus cogens* non-refoulement obligation as a matter of its non-derogability and universal applicability in terms of the question of human rights existence have the immanent *legal claim* to argue that State jurisdiction is exercised over them. Alternatively, it engages the genuine normative conflict and derogates from the *jus cogens* non-refoulement obligation in the legal limb of human rights protection. The migrant's legal human claim-rights are that of *jus cogens* nature, meaning that they operate as the norms of international public order disallowing any fragmentable operation. Since the non-refoulement obligation enjoys the peremptoriness, its observance is incumbent upon the international community of the States as a whole which in the present context legally translates as the claim to the State jurisdiction against Italy and Libya as well. Further, both States have the *legal interest* in protecting the given *jus cogens* non-refoulement obligation as a matter of *erga omnes* duties

[314] *Ibid.,*
[315] Supra Note 20
[316] Dworkin (n 212) 185
[317] For a thorough overview of the factual, legal and political situation see., Violeta Moreno-Lax (n 71) 388-396
[318] Milanovic (n 67) 108
[319] Violeta Moreno-Lax (n 71); Violeta Moreno-Lax & Mariagiulia Giuffré (n 2); Thomas Gammeltoft-Hansen, 'International Cooperation on Migration Control: Towards a Research Agenda for Refugee Law' [2018] *European Journal of Migration and law* 373–395; Pijnenburg (n 20); Pijnenburg (n 20); Tilmann Altwicker, 'Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts' [2018] *EJIL* 29 581 591–592; James C. Hathaway & Thomas Gammeltoft-Hansen (n 2); Jackson, 'Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction' [2016] *EJIL 817–830*
[320] *McCann and Others*, ECtHR [GC], App. No. 18984/91, 27 September 1995, para.146

within the meaning of *Barcelona Traction* or *Belgium v. Senegal.*[321] The ideal 'legal ought' dictates that if the jurisdiction *ought to be* exercised, then it indeed *can* be exercised. The State jurisdiction *ought to be* established – because the protection of *jus cogens* non-refoulement obligation is at stake – and therefore, it *can* be demonstrated to be established. The crucial question is how the *ideal* '*ought*' should be translated in the *legal* 'is.' The central question falls to determining whether the requirements of the State jurisdiction can be demonstrated to be met. This author deems that the following abstract principle inferential from the general human rights practice can be deemed as the relevant jurisdictional principle in *SS et al. v. Italy* and can, by extension, be shared to cover many familiar situations involving various stakeholders engaged in the jurisdiction-deterring scenarios. The legal principle (hereinafter the principle) is the following:

> The ECHR *cannot be interpreted* in a way as *to allow* the State, the group of the States or to the State or the group of States under the Umbrella of International Organization(s), *to commit the violations of the human rights of the migrant(s) through* other State, group of States or 'through' the State or the group of States under the Umbrella of International Organization(s), which the ECHR would not allow the State, the group of the States or to the State or the group of States under the Umbrella of International Organization(s), *to commit these violations by themselves.*

Note how this principle engages the questions of complicity or, at the extreme, the individual State responsibility.[322] As noted above, the sole concern of the present inquiry is the question of State jurisdiction. The term 'through' entails all possible legal relationships the State(s) can have with another state(s). It does not exclude the situation wherein the state acts individually provided that the infringement would be qualified as the violation if committed by the state irrespective of whether individually or collectively. This principle is abstract, flexible, adaptative, and can be amended to involve the various situations involving private enterprises engaged in the deterrence measures. This principle can be read in various *jus cogens* non-refoulement obligation embracing ways. Indeed, the due account should be given to the connection between the considerations of *jus cogens* non-refoulement obligation and consequent *erga omnes* duties engaged. The principle holds especially true because the State itself has the *legal interest* to protect the *jus cogens* non-refoulement obligation (*#1*) the legal corollary of which is that it is not willing to violate the right (*#2*) the legal corollary of which is that it does not intend to act in impunity (*#3*) the legal corollary of which is that it can be demonstrated that following these considerations the State exercises the jurisdiction whereby its action or the omission is not lawless (#4). The author employs the interpretive legal judgment to see the relationship between the State jurisdiction and *jus cogens* non-refoulement obligation in the best legal light. The object and the purpose of interpreting the State jurisdiction (art.1 ECHR) lie in protecting the *jus cogens* non-refoulement obligation. To the best of the author's knowledge, this principle has never been relied upon as the basis or the constitutive of the State jurisdiction in the case-law of relevant tribunals. The author believes that the Courts can treat the principle as the standalone basis for establishing the State jurisdiction. However, since under the current parameters of International law, this legal principle has never been relied upon, the author contends that it is not solely the legal principle drawn above that brings the migrants within the State jurisdiction. Instead, what brings the migrants within the State jurisdiction of Italy is the question of whether the legal principle drawn above can be demonstrated to embody, be embedded in, and reflect the relevant case-law of the respective Tribunals *as a whole*.[323] In other words, the central question is whether the provided legal principle *fits* the relevant case-law and *justifies* it in the best possible legal light. The question of justification is clear – the *jus cogens* non-refoulement obligation. Indeed, the requirement of fit cannot be absolute – since the case law on the jurisdiction is so blatantly incoherent[324] that neither legal principle can justify it as a whole. However, the author believes that some degree of fit can be demonstrated. If any part of the legal material fits any part of the legal principle, then State jurisdiction is established. Is it

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[321] Italy is the state party to ECHR. At the same time, Libya is the State party to CAT (https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en). Thus, the reiterated dictum on *erga omnes* of Belgium v. Senegal is applicable too; *Questions relating to the Obligation to Prosecute or Extradite, Belgium v Senegal* (n 269) para.68

[322] On the issue of State responsibility see., Violeta Moreno-Lax & Mariagiulia Giuffré (n 2); Pijnenburg (n 20);

[323] This should not be understood as implying that the proposed principle is exactly stated elsewhere in the case law. The answer is negative. "As a whole" should be understood as implying that different constituent part of the proposed principle is in different parts of the case law and read together can provide the legal foundation of the intelligibility of this principle—Nothing more and Nothing less.

[324] See., *Delia Saldias de Lopez v. Uruguay*, CCPR/C/13/D/52/1979, HRC, 29 July 1981, para. 12.3.

possible to assert that the principle provided above fits the relevant-case law to interpret the law of jurisdiction according to art.31(1) in furtherance of its object and the purpose – that of *jus cogens* non-refoulement obligation?

The legal principle drawn above echoes the following well-known pronouncement: "Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory."[325] This legal principle appeals to the fact that no State can circumvent its international legal obligations arising under human rights law. In *Hirsi*, the ECtHR noted that "Italy cannot circumvent its "jurisdiction" under the Convention by describing the events in issue as rescue operations on the high seas"[326] and that it "cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya."[327] Indeed, human rights responsibility applies "even after their having entered into treaty commitments subsequent to the entry into force of the Convention or its Protocols."[328] Following *Al-Saadoon*, "it is not open to a Contracting State to enter into an agreement with another State which conflicts with its obligations under the Convention."[329] However, even if Italy entered into the agreements to circumvent the ECHR obligations, *per* ICJ "it is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and intended to produce effects in accordance with existing law and not in violation of it."[330] *jus cogens* non-refoulement obligation must be construed in a way that "is necessary in order to avoid depriving the…rights of effectiveness."[331] Note that the legal principle presupposes some relationship between the States, as between Italy and Libya. In *Ilascu*, the ECtHR noted that State could be held responsible for the acts of other stakeholders when that actor is under its 'decisive influence' and survives "by virtue of the military, economic, financial and political support given to it."[332] The ECtHR found it sufficient to establish a "continuous and uninterrupted link of responsibility" of the former State.[333] The sole fact that matters is whether the actor performs the infringement of *jus cogens* non-refoulement obligation, *per Catan*, due to the "military and other support."[334] In *Mozer*, the ECtHR highlighted the immaterial nature of whether the influencing State's role was one of active engagement in the alleged human rights violations.[335] Furthermore, the ECtHR is clear that neither it is of paramountcy "whether the [Italy] exercises detailed control over the policies and actions of the subordinate local administration [Libya].[336] Indeed, the principle presupposing some relationship between the two states also presupposes that some agreement between them makes infringing actions and policies look lawful, such as between Italy and Libya. Thus, *per Castaño*, the existence of the prerogative under the European Arrest Warrant was sufficient to trigger the jurisdictional link.[337] *Per Aliyeva*, the launched criminal investigations within the Minks Convention framework were also deemed sufficient to establish the jurisdictional connection.[338] The principle can also be interpreted as implying that States can violate the *jus cogens* non-refoulement obligation themselves – the central essence of the principle is the argument that some class of actions *Z* would have been the violation if performed by that State. Indeed, *Xhavara* and *Women on Waves* cases demonstrate how the jurisdiction can be engaged even without any physical control by that State.[339] Since the main issue is that of contactless control and the principle undoubtedly covers such cases, it also fits the following ECtHR judgments. In *N.D. and N.T. v Spain*, the ECtHR summarized that "acts of the Contracting States performed, or producing effects, outside

[325] *Hirsi* (n 20) para.79.
[326] *Ibid.*, para.129.
[327] *Ibid.* para.180
[328] *Ibid.*, para.129
[329] *Al-Saadoon and Mufdhi v. United Kingdom*, ECtHR, App. No. 61498/08, 2 March 2010, para.138
[330] *Right of Passage over Indian Territory, Portugal v India*, Merits, Judgment, [1960] ICJ, 12th April 1960] at 142 21
[331] *Sharifi and Others v. Italy and Greece*, ECtHR, App. No. 16643/09, 21 October 2014, para.178
[332] *Ilascu* (n 38) paras.392-394; See also, *Ivanţoc and Others v Moldova and Russia*, ECtHR, App. No. 23687/05, 15 November 2011. *Turturica and Casian v Moldova and Russia*, ECtHR, App. Nos 28648/06&18832/07, 30 Aug 2016
[333] *Ilascu* (n 38) paras.392-394
[334] *Catan and Others v Moldova and Russia*, ECtHR [GC], App. Nos. 43370/04, 8252/05 and 18454/06, 19 October 2012, para.106
[335] Compare to *Mozer v Moldova and Russia*, ECtHR [GC], App. No. 11138/10, 23 February 2016, para.101
[336] *Catan and Others* (n 331) para.106
[337] *Romeo Castaño v. Belgium*, ECtHR, App. No. 8351/17, 9 July 2017, para. 42.
[338] *Aliyeva and Aliyev v. Azerbaijan*, ECtHR, Apo. No. 35587/08, 31 July 2014, paras. 56-57; See also, *Güzelyurtlu and others v. Cyprus and Turkey*, ECtHR [GC] Application No. 36925/07, 29 January 2019, para.186
[339] *Xhavara and Others v Italy and Albania*, ECtHR, App. No. 39473/98, 11 January 2001, 5-6; *Women on Waves v Portugal*, ECtHR, App. No. 31276/05, 3 February 2009.

their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention"[340] provided that "direct and immediate" effects beyond the national territory is felt.[341] The IACtHR also pondered that "a person is under the jurisdiction…if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory."[342] The HRC in *Munaf* adheres to the rationale and holds that "if there is a link in the causal chain that would make possible violations on the territory of another State…[the jurisdiction shall be established]…if "risk of an extraterritorial violation must be a necessary and foreseeable consequence and must be judged on the knowledge the State party had at the time."[343] The policies of Italy can be said to have effects on the rights of intercepted migrants. The principle can also fit the "public powers" model of *Al-Skeini*.[344] What matters is to protect the unfragmented and non-derogable operation of *jus cogens* non-refoulement obligation. Thus, "problems with managing migratory flows cannot justify having recourse to practices which are not compatible with the"[345] it. Therefore, the latter is itself accrued in the law of *jus cogens* and the legal framework "capable of affording them enjoyment of the rights and guarantees protected by…which the States have undertaken to secure to everyone within their jurisdiction" [346] cannot be evaded.

The abstractness of the principle does not discriminate between the various conceptions of the concept of State jurisdiction, and such principle can be proved to be present within the conception of various types of functional, normative, and purely factual notions of State jurisdictions. The real concern of what matters is the *jus cogens* non-refoulement obligation in which the State through the consequent *erga omnes* duties has the legal interest to protect. The effectiveness considerations of *jus cogens* norms conceive the relationship between the *erga omnes* and the State jurisdiction in the best light of furtherance *jus cogens* non-refoulement obligation. The fundamental aim of any legal principle of jurisdiction inferred as a matter of *sui generis* interpretive legal consequences from *jus cogens* non-refoulement obligation is not seeking the general truth of the concept of State Jurisdiction. Instead, it makes the truth of the latter dependent on the truth conditions of *jus cogens* non-refoulement obligation. It makes sense because when one is in the domain of *jus cogens,* what matters is preserving the non-derogable and universally applicable nature of the given legal norm. Therefore, the construal of the legal principle of the law of jurisdiction and, therefore, of the concept of jurisdiction counts as legally and normatively successful when it secures the very aim of this whole interpretive enterprise – that of protecting *jus cogens* non-refoulement obligation. The best legal judgment is necessary not to reveal some abstract wisdom on what counts adequate conception of the State jurisdiction, but to see the relationship of the State jurisdiction in the best light of legal furtherance of *jus cogens* non-refoulement obligation. What matters is that legal right to non-refoulement obligation – which all migrants have – be given the requisite protection *peremptorily* due to it. On the account provided, the question of the State jurisdiction as the procedural norm and the non-refoulement obligation as the substantive norm become normatively interdependent because the latter must give the legal flesh to the former. This also says something general about the legal norms and legal systems as such that every legal norm is closely interdependent, and its artificial separation is too artificial to seem intelligible. In the case of *SS et al. v. Italy,* the basis for establishing the State jurisdiction – apart from grounding in numerous sophisticated arguments provided elsewhere – is existent either based on the principle provided or based on fit of this principle with the case law. Lastly, *jus cogens* non-refoulement applies – in a way as the ICJ pondered long ago – 'to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question."[347]

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[340] *Case of N.D. and N.T. v. Spain*, ECtHR [GC], App. No. 8675/15 and 8697/15, 13 February 2020; *Hirsi* (n 20) para.72; *Bankovic* (n 60) para.67; *Al-Skeini* (n 35) para.131.
[341] *Andreou v. Turkey*, ECtHR, App. No. 45653/99, 3 June 2008.
[342] *Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights*, Inter-American Court of Human Rights (IACrtHR), 15 November 2017, para.74; *Alejandre et al. v. Cuba*, IACtHR (n 72).
[343] *Mohammad Munaf v. Romania*, CCPR/C/96/D/1539/2006, HRC) 21 August 2009, para.4.14.
[344] James C. Hathaway & Thomas Gammeltoft-Hansen (n 2) 267
[345] *Medvedyev and Others v. France*, ECtHR, App. No. 3394/03, 29 March 2010, para.81
[346] *Hirsi* (n 20) para.178
[347] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*, ICJ, 26 February 2007, at 120, para.183.

4.6. Conclusion

This thesis argues that non-refoulement obligation has entered the domain of *jus cogens* norms. Its legal effects have considerable implications upon the *de jure* rightlessness and extraterritorial deterrence measures eliding jurisdictional link between the State and the individual. Apart from stipulating the normative and legal argument in support of this position, the various objections to the effect of denying the *jus cogens* status of non-refoulement obligation is addressed. An assertion about the given legal norm's peremptoriness means that it is non-derogable, universally applicable, hierarchically superior, and effective. Such characterization stems from the legal account of the concept of *jus cogens* norms proposed in the inquiry dealing with the systematic appraisal of nature e.i., the essential properties of *jus cogens* norms.

The *jus cogens* nature of the non-refoulement obligation, complemented with various conceptual and normative objections about the adequacy and intelligibility of the phenomena of *de jure* rightlessness, argues that it is best to conceive the relationship between the State jurisdiction, legal human rights, and legal human rights obligations not as uttering that it is the jurisdiction that confers the human rights upon the individual. Instead, the jurisdiction relates to the rights protection and not the rights existence or the conferment. This is argued mainly through the cumulative argument consisting of numerous conceptual and normative objections against *de jure* rightlessness, and it is engaging the genuine normative conflict and, therefore, derogating from the *jus cogens* non-refoulement obligation either in the limb of human rights existence or in the limb of human rights protection.

The various assertions about the maritime legal blackholes referring to the structural limitations of human rights law and, consequently, to the *de jure* rightless individuals concerning the non-refoulement obligation rest on the conceptual, normative, and legal misapprehension. As this inquiry argues, it is not the case that individuals are rendered *de jure* rightless in these states of affair. On the contrary, individuals have *the de jure* right to non-refoulement obligation, but this right is not protected in the extraterritorial deterrence context due to the alleged absence of the jurisdiction.

Therefore, in the extraterritorial deterrence context, individuals have *the de jure, but in the alleged absence of the jurisdiction, an unprotected* right to non-refoulement obligation. It is one thing to say that individuals do not have legal human rights; it is altogether another thing to say that individuals have legal human rights which are not protected. On the account proposed and argued, unprotected legal human rights are also human rights in the focal sense of the word. Therefore, whether or not the jurisdiction exists must relate to human rights protection and not to the question of human rights existence or conferment.

However, all human rights and especially those having the *jus cogens* legal status, as is the case in the context of non-refoulement obligation, ought to be protected. While the existence of *jus cogens* non-refoulement obligation as the legal human rights is unconditional, the beneficiaries of and through the given legal norm have the normative and legal claim that jurisdiction is established to accord the human right the protection that is peremptorily due to it. *jus cogens* norms are public order norms and their non-derogable and universal operation must be unfractured. The property of effectiveness inherent in *jus cogens* non-refoulement obligation brings *sui generis* interpretive legal consequences to ensure their non-derogable and universal operation. Therefore, it follows that – in the extraterritorial context – *jus cogens* non-refoulement obligation through its legally inseparable properties such as *erga omnes* duties makes the normative and legal claim to the effect of establishing the exercising of the extraterritorial jurisdiction by the State.

Thus, the thesis argues for the intelligibility of *sui generis* interpretive legal consequences instead of other kinds of legal consequences – inferential from *jus cogens* non-refoulement obligation. The author argues that interpretive *sui generis* legal consequences amount to the legal framework of our normative thought that insists on rethinking the legal relationship between the State jurisdiction and the existence of human rights. In the domain of *jus cogens*, the interpretive legal consequence is a normative dependency between the truth conditions of the concept of State jurisdiction and satisfaction of the grounds of law of *jus cogens* non-refoulement obligation in terms of ensuring its non-fragmentable and non-derogable legal applicability.

BIBLIOGRAPHY

Books and book chapter

- Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2008); 14-38.
- Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 9-70
- Alison Kesby, *The Right to Have Rights Citizenship, Humanity, and International Law* (Oxford University Press 2012)
- Anna Ligouri, *Migration Law and the Externalization of Border Controls: European State Responsibility* (Routledge 2019);
- Antônio Augusto Cançado Trindade, *International Law for Humankind Towards a New Jus Gentium* (Martinus Nijhoff vol 6) 16-20, 47-50
- Antônio Augusto Cançado Trindade, *The Access of Individuals to International Justice* (OUP 2011)
- Antonio Cassese, *International Law* (OUP 2nd., 205) 206
- Arthur Ripstein, *Force and Freedom Kant's Legal and Political Philosophy* (HUP 2009) 30-57
- B. Sharon Byrd and Joachim Hruschka, *Kant's Doctrine of Right A Commentary* (CUP 2010) 3;
- C. Wilfred Jenks, *The Common Law of Mankind* (New York: Frederick A. Praeger, 1958)
- C. Wilfred Jenks, *The prospects of International Adjudication* (Oceana Publications 1964) 458;
- Cathryn Costello, The Human Rights of Migrants and Refugees in European Law (Oxford University Press 2015)
- Cedric Ryngaret, *Jurisdiction in International Law* (OUP 2nd., 2015)
- Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005)
- Christian Tomuschat, *Human Rights: Between Idealism and Realism* (OUP 2nd 2008) 69-97
- Christian Tomuschat, *Obligations Arising for the States without or against their Will* (Brill Vol 241) 210
- Christine Gray, *International Law and the Use of Force* (OUP 4edn,2018)
- Christos L. Rozakis, *The Concept of jus cogens in the Law of Treaties* (North-Holland Pub. Co. 1976);
- Daniel Costelloe, *Legal Consequences of Peremptory Norms in International Law* (CUP 2017);
- Eman Hamdan, The Principle of Non-Refoulement under the ECHR and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Brill Nijhoff 2016);
- Emer de Vattel (J. Chitty, Ed.)., *The Law of Nations: Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (Cambridge Library Collection 2011)
- George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007) 72-79,
- Gerhard Werle and Florian Jeßberger, F.: *Principles of International Criminal Law* (OUP 2014) 288-326;
- Giuliana Ziccardi Capaldo, *The Pillars of the Global Law* (Ashgate Publishing Ltd, 2008).
- Guy S. Goodwin-Gill, Jane McAdam, *The Refugee in International Law* (OUP 1996) 168
- H. L. A. Hart, *The Concept of Law* (OUP 1961) 56
- Hannah Arendt, The Origins of Totalitarianism (New York: Harcourt Brace Jovanovich 1973)
- Immanuel Kant, 'An old question raised again: Is the human race constantly progressing?' in Allen W. Wood & George Di Giovanni (trs.,) *Religion and Rational Theology* (Yale University Press 1996) 297-308
- Immanuel Kant, Critique of Judgment 83-84; in Pauline Kleingeld (eds.,) and David L. Colclasure (Trs.,) *Toward Perpetual Peace and Other Writings on Politics, Peace, and History* (Yale University Press 2006) at 43 5:436;
- Immanuel Kant, Groundwork for the Metaphysics of Morals in Allen Wood (eds., trs.,) *Rethinking the Western Tradition* (Yale University Press 2002) at 16 4:401
- Immanuel Kant, Metaphysics of Morals, Doctrine of Right 43-62 (eds.,) and David L. Colclasure (Trs.,) *Toward Perpetual Peace and Other Writings on Politics, Peace, and History* (Yale University Press 2006) at 137 341
- Immanuel Kant, *On the common saying: That may be correct in theory, but it is of no use in practice* (available at https://hesperusisbosphorus.files.wordpress.com/2015/02/theory-and-practice.pdf) at 279 8:275 and 308 8:313
- Immanuel Kant, The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as The Science of Right in W. Hastie B.D. (trs.,) (Edinburgh 1887) 30
- Immanuel Kant, Toward Perpetual Peace: A Philosophical Sketch in Pauline Kleingeld (eds.,) and David L. Colclasure (Trs.,) *Toward Perpetual Peace and Other Writings on Politics, Peace, and History* (Yale University Press 2006) at 96 8:372.

- Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornel University Press 3edn, 2013) 57-60, 96-99;
- James Crawford, Brownlie's Principles of Public International Law (OUP 9th edn, 2019);
- James Griffin, *On Human Rights* (OUP 2008),
- Jan Klabbers, International Law (CUP 2nd edn, 2017)
- Jeremy Waldron, *Law and Disagreement* (OUP 1999) 6;
- Joel Feinberg, *Social Philosophy* (New Jersey: Prentice-Hall, 1st edn., Inc 1973) 68-75, 84-88.
- John Finnis, *Natural Law & Natural Rights* (OUP 2nd 2011) 205
- John Rawls, *Lectures on the History of Moral Philosophy* (HUP Barbara Herman(eds.) 2000) 162-181
- John Rawls, *Political Liberalism* (Expanded Ed, Columbia University Press 2005) 16-17
- John Rawls, *The Law of Peoples* (HUP 1993)
- John Rawls, *Theory of Justice* (HUP Revn ed., 1971) 3
- Joseph Raz, *Between Authority and Interpretation: on the Theory of Law and Practical Reason* (OUP 2009) 126-166
- Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP 1979);
- *Judge Antônio A. Cançado Trindade The Construction of a Humanized International Law A Collection of Individual Opinions (2013–2016),* Preface by Dean Spielmann General Introduction by Andrew Drzemczewski, (Brill Nijhoff Vol 7, Book 3).
- Judge Antônio A. Cançado Trindade, *The Construction of a Humanized International Law A Collection of Individual Opinions (1991–2013),* Preface by Dean Spielmann General Introduction by Andrew Drzemczewski (Brill Nijhoff Vol 6, Book 1);
- K. Ambos, Genocide, in 'Treatise on International Criminal Law: Volume II: The Crimes and Sentencing,' Oxford Scholarly Authorities on International Law, (2014), pp.41-44;
- K. da Costa, The Extraterritorial Application of Selected Human Rights Treaties (Nijhoff, 2012); F. Coomans and M. Kamminga, (eds), Extraterritorial Application of Human Rights Treaties (Intersentia, 2004);
- Karel Wouters, *International Legal Standards from the Protection from Refoulement* (Intersentia 2009) 30
- Lauri Antero Hannikainen, *Peremptory Norm (jus cogens) in International Law - Historical Development, Criteria, Present Status* (Finnish Lawyers' Publishing Company 1988);
- Lea Raible, *Human Rights Unbound: A Theory of Extraterritoriality* (OUP 2020) 41-73
- Liam Murphy, *What Makes Law: An Introduction to the Philosophy of Law* (CUP 2014) 88
- Lord McNair, *The Law of Treaties* (OUP 1961) 213
- M. Gibney and S. Skogly, *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press, 2010);
- M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, 2009);
- Malcolm Shaw, International Law (CUP 8th edn) 204-209;
- Marko Milanovic, *Extraterritorial Application of Human Rights Treaties Law, Principles, and Policy* (OUP 2011) 19-25.
- Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2006)
- Michael Huemer, *Knowledge, Reality, and Value: A Mostly Common Sense Guide to Philosophy* (Self-Published 2021) 36
- Neil MacCormick, *Institutions of Law* (OUP 2007)
- Patrick Macklem, *The Sovereignty of Human Rights* (OUP 2015)
- Paul Ricoeur, *Lectures on Ideology and Utopia* (George H. Taylor (ed.), Columbia University Press 1986) 269-314
- Paul Ricoeur, *The Just* (The University of Chicago Press David Pellauer (trs.) 2000) 6;
- Philip Allott, *Eunomia: New Order for a New World* (OUP 2012);
- Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism* in Bonnie Litschewski Paulson & Stanley L. Paulson (trs,) (OUP 2002) 8-10
- Robert Kolb, *Peremptory International Law – jus cogens: A General Inventory* (Oxford: Hart Publishing 2015);
- Roger J. Sullivan, *An Introduction to Kant's Ethics* (CUP 1994) 28-46, 65-79, 84-89.
- Ronald Dworkin, *A matter of Principle* (HUP 1985) 36
- Ronald Dworkin, *Freedom's Law: The Moral Reading of The American Constitution* (Oxford University Press 1996)2
- Ronald Dworkin, *Justice for Hedgehogs* (HUP 2011) 338
- Ronald Dworkin, *Justice in Robes* (HUP 2006) 69

- Ronald Dworkin, *Law's Empire* (HUP 1986) 44
- Ronald Dworkin, *Taking Rights Seriously* (HUP 1978) 24;
- Samantha Besson, *The Morality of Conflict Reasonable Disagreement and the Law* (Hart Publishing 2005) 375-419
- Samantha Velluti, Reforming the Common European Asylum System - Legislative Developments and Judicial Activism of the European Courts (Springer 2014) 77-105.
- Thomas Gammeltoft-Hansen, *Access to Asylum International Refugee Law and the Globalization of Migration Control* (CUP 2011) 24
- Thomas Weatherall, *jus cogens: International Law and Social Contract* (CUP 2015);
- Ulf Linderfalk, *Understanding jus cogens in International Law and International Legal Discourse* (Edward Elgar 2020)
- Valentin Jeutner, *Irresolvable Norm Conflicts in International Law: The Concept of a Legal Dilemma* (OUP 2017) 53
- Violeta Moreno-Lax, Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law (Oxford University Press 2017);

Scholarly Articles

- Adamantia Rachovitsa, 'The principle of Systemic Integration in Human Rights Law' [2017] *ICLQ* 66, 557–588.
- Alan Desmond, 'The Private Life of Family Matters: Curtailing Human Rights Protection for Migrants under Article 8 of the ECHR?' [2018] European Journal of International Law, 29,1, 261-279;
- Alastair Mowbray, 'The Creativity of the European Court of Human Rights' [2005] *Human Rights Law Review* 5, 1, 57-79.
- Alexander Orakhelashvili, 'Audience and Authority—The Merit of the Doctrine of *jus cogens*' in Maarten den Heijer & Harmen van der Wilt (eds.) *jus cogens: Quo Vadis?* (Netherlands Yearbook of International Law 2015)
- Alexander Orakhelashvili, 'Peremptory Norms of the International Community: A Reply to William E. Conklin' [2012] *EJIL* 23, 3, 863-868;
- Alexander Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of European Court of Human Rights' [2003] *EJIL* 14, 3, 529-568;
- Alexander Orakhelashvili, 'The Classification of International Legal Rules: A Reply to Stefan Talmon' [2013] *Leiden Journal of International Law* 26, 89-103
- Alexander Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions' [2005] *EJIL* 16, 1, 59–88.
- Alfred Verdross, 'Jus Dispositivum and *jus cogens* in International Law' *AJIL* 60, 1, 55-63
- Alfred von Verdross, 'Forbidden Treaties in International Law: Comments on Professor Garner's Report on "The Law of Treaties' [1937] *AJIL* 31, 4, 574
- Alice Farmer, 'Non-Refoulment and *jus cogens*: Limiting Anti-Terror Measures that Threaten Refugee Protection' [2008] *Georgetown Immigration Law Journal*, 23, 1, 34-36.
- Alison Kesby, The Right to Have Rights Citizenship, Humanity, and International Law (Oxford University Press 2012) 14-38.
- Allen Buchanan, Why International Legal Human Rights? in Rowan Cruft, Matthew Liao & Massimo Renzo (eds.) Philosophical Foundations of Human Rights (OUP 2015) 244-263;
- Amanda Perreau-Saussine, 'Immanuel Kant on International Law' in Samantha Besson and John Tasioulas (eds.) *The Philosophy of International Law* (OUP 2010) 51 57;
- Amy Nethery & Carly Gordyn, 'Australia–Indonesia cooperation on asylum-seekers: a case of 'incentivised policy transfer' [2014] *Australian Journal of International Affairs*, 68, 2, 177-193;
- Andrea Bianchi, 'Gazing at the Crystal Ball (again): State Immunity and *jus cogens* beyond Germany v Italy' [2013] *Journal of International Dispute Settlement* 4, 3, 457, 472-475;
- Andrea Bianchi, 'Human Rights and the Magic of *jus cogens*' [2008] *EJIL* 19, 3, 491-508
- Andreas L. Paulus, '*jus cogens* in a Time of Hegemony and Fragmentation an Attempt at a Re-appraisal' [2005] *Nordic Journal of International Law* 74, 297–334;
- Andreas Paulus, 'Whether Universal Values can Prevail over Bilateralism and Reciprocity' in A. Cassese (eds.), *Realizing Utopia: The Future of International Law* (OUP 2012) 89-90
- Andrew Shacknove, 'From Asylum to Containment' [1993] *International Journal of Refugee Law* 516-533;
- Anja Matwijkiw and Bronik Matwijkiw, 'Stakeholder Theory and Justice Issues: The Leap from Business Management to Contemporary International Law' [2010] *International Criminal Law Review* 10 160

- Anja Matwijkiw, 'Human Needs and Justice: The Case Against Realism' [2008] *Nordisk Tidsskrift For Menneskerettigheter* 26, 4, 296
- Anja Matwijkiw, 'The Dangers of the Obvious but Often Disregarded Details in the International Criminal Law Demarcation Debate: Norm-Integration and the Triple-Thesis 'Argument'' [2019] *International Criminal Law Review* 14
- Anne Peters, 'Are we Moving towards Constitutionalization of the World Community?' in A. Cassese (eds.), *Realizing Utopia: The Future of International Law* (OUP 2012) 118-136
- Anne Peters, 'Humanity as the A and Ω of Sovereignty' [2009] *EJIL* 20, 3, 513-544.
- Annick Pijnenburg, 'Containment Instead of Refoulement: Shifting State Responsibility in the Age of Cooperative Migration Control?' [2020] *Human Rights Law Review*, 20, 306, 312.
- Annick Pijnenburg, 'From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?' [2018] *European Journal of Migration and Law* 20, 396, 402;
- Annick Pijnenburg, Thomas Gammeltoft-Hansen & Conny Rijken, 'Controlling Migration through International Cooperation' [2018] *European Journal of Law and Migration* 20, 365, 365;
- Antoine Buyse, 'A Legal Minefield - The Territorial Scope of the European Convention' [2008] 1 *Inter-Am & Eur Hum Rts J* 269-296;
- Antonio Cassese, 'For an Enhanced Role of *jus cogens*' in A. Cassese (eds.), *Realizing Utopia: The Future of International Law* (OUP 2012) 158
- Aoife Duffy, 'Expulsion to Face Torture? *Non-refoulement* in International Law' [2008] *International Journal of Refugee Law* 20, 3, 390
- Aristide R. Zolberg, 'Matters of State: Theorizing Immigration Policy' in Philip Kasinitz Charles Hirschman and Josh DeWind (eds) *The Handbook of International Migration: The American Experience* (New York: Russell Sage) 71–93;
- Ashley Binetti Armstrong, 'You Shall Not Pass! How the Dublin System Fueled Fortress Europe' [2020] *Chicago Journal of International Law*, 20, 2, 332-383;
- Başak Çali 'Specialized Rules of Treaty Interpretation: Human Rights' in Duncan B. Hollis (eds.) *The Oxford Guide to Treaties* (OUP 2012) 525-545.
- Başak Çalı, Cathryn Costello and Stewart Cunningham, 'Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies' [2020] *German Law Review* 21, 374-376
- Bridget Anderson, Matthew J. Gibney & Emanuela Paoletti, 'Citizenship, deportation and the boundaries of belonging' [2011] Citizenship Studies, 15:5, 547-563
- Bruno Simma and Andreas L. Paulus, 'The 'International Community: Facing the Challenge of Globalization' [1998] *EJIL* 9 266, 270.
- C. Kreß, 'The Crime of Genocide under International Law' [2006] *International Criminal Law Review* 6 489-492;
- C. Kreß, 'The International Court of Justice and the Elements of the Crime of Genocide,' [2005] *EJIL*, 18, 4, 627.
- Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention' [2005] *ICLQ* 54, 2, 279-319.
- Carlone Fournet, 'The Universality of the Prohibition of the Crime of Genocide, 1948-2008' [2009] *International Criminal Justice Review* 19, 2, 132-149
- Cathryn Costello and Itamar Mann, 'Border Justice: Migration and Accountability for Human Rights Violations' [2020] *German Law Journal* 21, 311, 316;
- Cathryn Costello and Michelle Foster, 'Non-refoulement as Custom and *jus cogens*? Putting the Prohibition to the Test' in Maarten den Heijer & Harmen van der Wilt (eds.) *jus cogens*: Quo Vadis? (Netherlands Yearbook of International Law 2015) 284
- Cathryn Costello, 'Immigration Detention: The Grounds Beneath Our Feet' [2015] *Current Legal Problems* 68, 1, 143 –177;
- Cezary Mik, '*jus cogens* in Contemporary International Law' [2013] *Polish Yearbook of International Law* 27-95
- Christian Tomuschat, 'The Security Council and *jus cogens*' in Enzo Cannizzaro (eds.). *The Present and Future of jus cogens* (Rome: Sapienza Università Editrice 2015)
- Christian Tomuschat, "Reconceptualizing the debate on *jus cogens* and obligations erga omnes: concluding observations" in Christian Tomuschat and Jean-Marc Thouvenin (eds.) *The Fundamental Rules of International Legal Order: jus cogens and Obligations Erga Omnes* (Martinus Nijhoff 2006) 420-425.
- Christopher M. Owens, 'Examining the Intersection of Refugee Policies and Contemporary Protracted Displacement' [2017] *International Development, Community and Environment (IDCE)* 24;
- Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' [2008] *EJIL* 19, 4, 655-724;

- Dan Dubois, ‘The Authority of Peremptory Norms in International Law: State Consent or Natural Law?’ [2009] *Nordic Journal of International Law* 78, 133–175
- Daria Davitti, ‘Biopolitical Borders and the State of Exception in the European Migration ‘Crisis’’ [2018] *EJIL* 29,4, 1173–1196;
- David Kennedy, ‘The International Human Rights Regime: Still Part of the Problem?’ In Rob Dickinson, Elena Katselli, Colin Murray, Ole W. Pedersen (eds), *Examining Critical Perspective on Human Rights* (Cambridge University Press 2012) 19-34.
- David Kennedy, 'International Human Rights Movement: Part of the Problem?' [2002] 15 *Harv Hum Rts* J 101.
- David Scott FitzGerald, ‘Remote control of migration: Theorizing territoriality, shared coercion, and deterrence’ [2020] *Journal of Ethnic and Migration Studies* 46, 1, 4-22;
- David Weissbrodt and Stephen Meili, ‘Human Rights and Protection of Non-Citizens: Whither Universality and Indivisibility of Rights?’ [2010] *Refugee Survey Quarterly*, 28, 4, 34–58;
- Den Heijer, M., & Lawson, R, ‘Extraterritorial Human Rights and the Concept of ‘Jurisdiction’’ In M. Langford, W. Vandenhole, M. Scheinin, & W. Van Genugten (eds.,), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (CUP 2012) 153-191
- Dinah Shelton, ‘Normative Hierarchy in International Law’ [2006] *AJIL* 100, 291-324.
- Dinah Shelton, ‘Sherlock Holmes and the Mystery of *jus cogens*’ in Maarten den Heijer & Harmen van der Wilt (eds.) *jus cogens: Quo Vadis?* (Netherlands Yearbook of International Law 2015) 23;
- E. Feller, ‘Carrier Sanctions and International Law’ [1989] *International Journal of Refugee Law* 1, 48-66;
- Eleni Karageorgiou, ‘Human rights and a-legality: destitution of persons seeking asylum in the EU’ in Martha F. Davis, Morten Kjaerum & Amanda Lyons (Eds.) *Research Handbook on Human Rights and Poverty* (Edward Elgar 2021)
- Elihu Lauterpacht and Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion* (CUP 2003) para.214.
- Elizabeth Santalla Vargas, ‘In Quest of the Practical Value of *jus cogens* Norms’ in Maarten den Heijer & Harmen van der Wilt (eds.) *jus cogens: Quo Vadis?* (Netherlands Yearbook of International Law 2015) 223-236
- Enzo Cannizzaro, ‘On the Special Consequences of a Serious Breach of Obligations Arising out of Peremptory Rules of International Law’ in Enzo Cannizzaro (eds.). *The Present and Future of jus cogens* (Rome: Sapienza Università Editrice 2015) 133-145.
- Erasmus Mayr, ‘The political and moral conceptions of human rights – a mixed account’ in Gerhard Ernst & Jan-Christoph Heilinger (eds.) The Philosophy of Human Rights Contemporary Controversies (Hubert & Co. GmbH & Co. KG 2012) 73-107;
- Erik Roxstrom, Mark Gibney and Terje Einarsen, ‘The Nato Bombing Case (*Bankovic et Al v. Belgium et al)* and The Limits of Western Human Rights Protection’ [2005] *Boston University International Law Journal* 23, 55, 89-91;
- Erika de Wet, ‘*jus cogens* and Obligations Erga Omnes’ in Dinah Shelton (eds.), *Oxford Handbook on Human Rights* (OUP 2013) 2
- Erika de Wet, ‘The Prohibition of Torture as an International Norm of *jus cogens* and its Implications for National and Customary Law’ [2004] *Eua. J. INT'L L.* 15 97, 98
- Evan J. Criddle and Evan Fox-Decent, ‘The Authority of International Refugee Law’ [2021 forthcoming] Wm. & Mary L. Rev. p.8. The article can be accessed at “https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733019”
- Evan J. Criddlet & Evan Fox-Decenttt, ‘A Fiduciary Theory of *jus cogens*’ [2009] *The Yale Journal of International Law* 34, 344
- Fernando R. Tesón, ‘The Kantian Theory of International Law’ [1992] *Columbia Law Review* 92, 1, 53-102
- Frédéric Mégret, ‘Nature of Obligations’ in Daniel Mockeli, in Sangeeta Shah & Sandesh Sivakumaran (eds.,) *International Human Rights Law* (OUP 3rd 2018) 86-110;
- G. Abi-Saab, ‘The Concept of *jus cogens* in International Law’ [1967] *Lagonissi Conference on International Law* 15
- Gemma Pinyol-Jiménez, ‘The Migration-Security Nexus in Short: Instruments and Actions in the European Union’ [2012] *Amsterdam Law Forum* 4,1, 36-57;
- Gennady M Danilenko, ‘International *jus cogens*: Issues of Law-Making’ [1991] *EJIL* 2, 1, 42-65;
- Georg Schwarzenberger, ‘The Problem of International Public Policy’ [1965] *Current Legal Problems* 18, 1, 191–214;

- George Letsas ‘The ECHR as a living instrument: Its meaning and legitimacy’ in A. Føllesdal, B. Peters, & G. Ulfstein (Eds.) Constituting Europe: The European Court of Human Rights in a National, European and Global Context (CUP: Studies on Human Rights Conventions) 106-141;
- George Letsas, ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer’ [2010] *EJIL* 21, 3, 538-541;
- Gerhard Ernst, ‘Universal human rights and moral diversity’ in Gerhard Ernst & Jan-Christoph Heilinger (eds.) The Philosophy of Human Rights Contemporary Controversies (Hubert & Co. GmbH & Co. KG 2012) 233;
- Giuseppe Martinico, ‘Is the European Convention Going to Be ‘Supreme’? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts’ [2012] *EJIL* 23, 2, 401-424;
- Gordon A. Christenson, ‘*jus cogens*: Guarding Interests Fundamental to International Society’ [1987] *Faculty Articles and Other Publications.* Paper 159. 589;
- H.L.A. Hart, ‘Bentham on Legal Rights’ in A.W.B. Simpson (ed.,) *Oxford Essays in Jurisprudence,* (Clarendon Press 1973) 200-201;
- H.L.A. Hart, ‘Definition and Theory in Jurisprudence*’* in H.L.A. Hart *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983) 36;
- H.L.A. Hart, ‘Positivism and the Separation of Law and Morals’ [1958] *Harvard Law Review* 71,4, 593
- Harold Hongju Koh, ‘Reflections on refoulement and the Haitian Centres Council’ [1994] *Harvard International Law Journal*, 35, 30.
- Harold Hongju Koh, ‘Why Do Nations Obey International Law?’ [1997] Faculty Scholarship Series. 2101 2628-2629
- Hélène Ruiz Fabri, ‘Enhancing the Rhetoric of *jus cogens*’ [2012] *EJIL* 23, 4, 1050
- Hugh King, ‘The Extraterritorial Human Rights Obligations of States’ [2009] *Human Rights Law Review* 9, 4, 521-556
- Işıl Karakaş Hasan Bakırcı, ‘Extraterritorial Application of the European Convention on Human Rights’ in Anne van Aaken and Iulia Motoc (eds.,) *The European Convention on Human Rights and General International Law* (OUP 2018) 130-131.
- Itamar Mann, ‘Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993–2013’ [2013] 54, 2, 316 369;
- Itamar Mann, ‘Maritime Legal Black Holes: Migration and Rightlessness in International Law’ [2018] *The European Journal of International Law* 29, 2, 347–372;
- Itamar Mann, ‘The Right to Perform Rescue at Sea: Jurisprudence and Drowning’ [2020] *German Law Journal* 21, 598, 602.
- J. B. Schneewind, ‘Why Study Kant’s Ethics?’ In Immanuel Kant, Groundwork for the Metaphysics of Morals in Allen Wood (eds., trs.,) *Rethinking the Western Tradition* (Yale University Press 2002) 83-91
- J. Vidmar, ‘Rethinking *jus cogens* After Germany v. Italy: Back to Article 53?’ [2013] *Netherlands International Law Review* 60, 10ff;
- Jackson, ‘Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction’ [2016] *EJIL 817–830*
- James C. Hathaway & Thomas Gammeltoft-Hansen, ‘Non-Refoulement in a World of Cooperative Deterrence’ [2015] Transnat'l L. 53, 2, 235-284; Theodore Baird, ‘Carrier Sanctions in Europe: A Comparison of Trends in 10 Countries’ [2017] *European Journal of Migration and Law* 19, 307–334;
- James C. Hathaway, ‘Leveraging Asylum’ [2010] *Int'l L. J.* 45, 3, 516, 518
- James C. Simeon, ‘What is the future of non-refoulement in international refugee law?’ in Salvinder Singh Juss (ed.) *Research Handbook of International Refugee Law* (Edward Elgar 2019) 189-193
- James Griffin, ‘Human Rights and the Autonomy of International Law’ in Samantha Besson and John Tasioulas (eds.) *The Philosophy of International Law* (OUP 2010) 339-357;
- James Griffin, ‘Human rights: questions of aim and approach’ in Gerhard Ernst & Jan-Christoph Heilinger (eds.) The Philosophy of Human Rights Contemporary Controversies (Hubert & Co. GmbH & Co. KG 2012) 6
- James Griffin, ‘The Presidential Address: Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights’ [2001] *OUP: Proceedings of the Aristotelian Society,* 101,1, 1-28;
- James Hathaway, ‘The Emerging Politics of Non-Entrée’ [1992] *Refugees* 91 40-41.
- Jan Wouters and Sten Verhoeven, ‘The Prohibition of Genocide as a Norm of *Ius* Cogens and Its Implications for the Enforcement of the Law of Genocide’ [2005] *International Criminal Law Review* 5 401-416
- Jaya Ramji-Nogales, 'Migration Emergencies' [2017] 68 *Hastings LJ* 609 627
- Jean Allain, ‘The *jus cogens* Nature of Non-Refoulement’ [2001] *International Journal of Refugee Law* 533-558

- Jean d'Aspremont, '*jus cogens* as a Social Construct Without Pedigree' in Maarten den Heijer & Harmen van der Wilt (eds.) *jus cogens: Quo Vadis?* (Netherlands Yearbook of International Law 2015) 91
- Jeremy Waldron, 'Is Dignity the Foundation of Human Rights?' in Rowan Cruft, Matthew Liao & Massimo Renzo (eds.) *Philosophical Foundations of Human Rights* (OUP 2015) 127.
- Jeremy Waldron, 'The Core of the Case Against Judicial Review' [2006] *The Yale Law Journal* 115, 1348-1406.
- John Dugard and Christine van den Wyngaert, 'Reconciling Extradition with Human Rights' (1998) 92 *AJIL* 187 198
- John Gardner, 'Simply in Virtue of Being Human: The Whos and Whys of Human Rights' [2008] *Journal of Ethics & Social Philosophy* 2, 2.
- John Rawls, 'The Domain of the Political and Overlapping Consensus' [1989] 64, 2, *NYU L Rev* 233-255.
- John Skorupski, 'Human Rights' in Samantha Besson and John Tasioulas (eds.) The Philosophy of International Law (OUP 2010) 357-377;
- John Tasioulas, 'Human Rights, Legitimacy, and International Law' [2013] The American Journal of Jurisprudence 58, 1, 1-25;
- John Tasioulas, 'The Moral Reality of Human Rights' in Thomas Pogge (eds.) Freedom from Poverty as a Human Right: Who Owes What to the Very Poor? (OUP 2007) 75–102;
- John Tasioulas, 'On the nature of human rights' in Gerhard Ernst & Jan-Christoph Heilinger (eds.) The Philosophy of Human Rights Contemporary Controversies (Hubert & Co. GmbH & Co. KG 2012) 17-61;
- John Tasioulas, 'Towards a Philosophy of Human Rights' [2012] Current Legal Problems 65, 1-30;
- Joseph Sinchak, 'The Extraterritorial Application of Human Rights Treaties: Al-Skeini et al. v. United Kingdom' [2013] *Pace Int'l L. Rev.* 416-445;
- Julius Ebbinghaus, 'The Law of Humanity and the Limits of State Power' [1950] *The Philosophical Quarterly* 3, 10, 14-22.
- Kamrul Hossain, The Concept of *jus cogens* and the Obligation Under the U.N. Charter, [2005] *Santa Clara J. Int'l L*. 72, 3, 72-98;
- Karen Parker, '*jus cogens*: Compelling the Law of Human Rights' [1989] *Hastings Int'l & Comp. L. Rev* 12, 411-420.
- Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' [2009] 42 Vanderbilt Journal of Transnational Law 905–947;
- Kyoji Kawasaki, "A Brief Note on the Legal Effects of *jus cogens* in International Law" [2006] *Hitotsubashi Journal of Law and Politics* 34, 27-43;
- Lea Raible, 'Title to Territory and Jurisdiction in International Human Rights Law: Three Models for a Fraught Relationship' [2018] *Leiden Journal of International Law* 31, 314-334;
- Liam Murphy, 'Law Beyond the State: Some Philosophical Questions' [2017] *EJIL* 28, 1, 205.
- Lon L. Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' [1958] *Harvard Law Review* 71, 4, 630-672;
- M Cherif Bassiouni 'Perspectives on International Criminal Justice' [2010] *Virginia Journal of International Law* 50,
- M. Cherif Bassiouni, 'A Functional Approach to "General Principles of International Law' [1990] *Mich. J. Int'l L* 11, 3, 801-818
- M. Cherif Bassiouni, 'Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights' in M. Cherif Bassiouni (ed.) *Post-Conflict Justice* (Transnational Publishers 2002) 383-442
- M. Cherif Bassiouni, 'International Crimes: "*jus cogens*" and "Obligatio Erga Omnes"' [1996] *Law and Contemporary Problems* 59, 4, 69
- M.M. Whiteman, "*jus cogens* in International Law, with a projected list' [1997] *Georgia Journal of International and Comparative Law* 7, 2, 609-626;
- Maarten den Heijer and Harmen van der Wilt, '*jus cogens* and the Humanization and Fragmentation of International Law' in in Maarten den Heijer & Harmen van der Wilt (eds.) *jus cogens: Quo Vadis?* (Netherlands Yearbook of International Law 2015) 4
- Maarten den Heijer and Rick Lawson, 'Extraterritorial Human Rights and the Concept of 'Jurisdiction'' in M. Langford, W. Vandenhole, M. Scheinin, & W. Van Genugten (eds.,), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (CUP 2012) 153-191
- Marcia Baron, 'Acting from Duty' In Immanuel Kant, Groundwork for the Metaphysics of Morals in Allen Wood (eds., trs.,) *Rethinking the Western Tradition* (Yale University Press 2002) 92-107
- Marie-Bénédicte Dembour, 'What Are Human Rights? Four Schools of Thought' [2010] *Human Rights Quarterly* 32, 1, 1-20.
- Mark Greenberg, 'How Facts Make Law' [2004] *Legal Theory* 10, 157–198
- Marko Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' [2012] *EJIL*, 12, 1, 122-139.

- Marko Milanovic, ‘Extraterritoriality and human rights: prospects and challenges’ in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds.,) *Human Rights and The Dark Side of Globalization: Transnational law enforcement and migration control* (Routledge 2017) 54
- Marko Milanović, ‘From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties’ [2008] *Human Rights Law Review*, 8, 3, 411–448
- Marko Milanovic, ‘Trends in the Jurisprudence of the Strasbourg Court’ in Anne van Aaken and Iulia Motoc (eds.,) *The European Convention on Human Rights and General International Law* (OUP 2018) 98-111;
- Markus Petsche, ‘*jus cogens* as a Vision of the International Legal Order’ [2010] *Penn State International Law Review* 29, 2, 2, 258-264;
- Martti Koskenniemi, ‘The Pull of the Mainstream’ [1990] *Survey of Books Relating to the Law* 88, 6, 1946.
- Mary Ellen O’Connell, *jus cogens*: International Law’s Higher Ethical Norms, in Donald E. Childress III (eds.) *The Role of Ethics in International Law* (CUP 2012) 78-101
- Matthew Craven, ‘Legal Differentiation and the Concept of the Human Rights Treaty in International Law’ [2000] *EJIL* 11, 3, 497-499;
- Matthew H Kramer, ‘When Is There Not One Right Answer?’ [2008] AJIL 49
- Matthew Saul, ‘Identifying *jus cogens* Norms: The Interaction of Scholars and International Judges’ [2015] *Asian JIL* 5, 26
- Matthew Zagor, ‘Elementary considerations of humanity’ in Karine Bannelier, Theodore Christakis & Sarah Heathcote (eds.) *The ICJ and the Evolution of International Law The enduring impact of the Corfu Channel case* (Routledge 2021) 264-293
- Michael Akehurst, ‘Custom as a Source of International Law’ [1975] *British Yearbook of International Law* 47, 1-53.
- Michael Akehurst, 'Jurisdiction in International Law' [1972-1973] 46 *Brit Y B Int'l* L 145-257;
- Michael Duttwiller, ‘Authority, Control and Jurisdiction in the Extraterritorial Application of European Convention on Human Rights’ [2012] *Netherlands Quarterly of Human Rights* 32, 2, 149-151
- Michael S Moore, ‘A Natural Law Theory of Interpretation’ [1985] *S Cal L Rev* 58 277-397; Michael S. Moore, ‘The Interpretive Turn in Modern Theory: A Turn for the Worse?’ [1989] *Stanford Law Review* 41, 4, 871-957;
- Michael S Moore, ‘The Semantics of Judging’ [1981] *S Cal L Rev* 54, 151-294
- Michael S. Moore, ‘Justifying the Natural Law Theory of Constitutional Interpretation’ [2001] *Fordham L. Rev.* 69 2087-2117;
- Michal Gondek, ‘Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization’ [2005] *NILR* 349-387
- Monika Hakimi, ‘Constructing an International Community’ [2017] *AJIL* 111 317
- Natalino Ronzitti, ‘The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?’ [2009] *Bulletin of Italian Politics*, 1, 1, 125-133
- Navanethem Pillay, Kenneth Roth and Hina Jilani ‘What are Human Rights for? Three Personal Reflections’ in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, Oxford University Press 2018) 3, 4.
- Neil MacCormick, Children’s Rights: A Test Case for Theories of Rights, in Neil MacCormick (eds.,) *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (OUP 1984) 157
- Neil MacCormick, 'Rights in Legislation' in P.M.S. Hacker & J. Raz (eds.,) Law, Morality and Society: Essays in Honor of H.L.A. Hart (Clarendon Press 1977) 189-209
- Neil MacCormick, Why Law Makes No Claims in George Pavlakos (eds.) *Law, Rights and Discourse The Legal Philosophy of Robert Alexy* (2007) 66;
- Oliver Wendell Holmes Jr., ‘The Path of the Law’ [1897] *Harvard Law Review* 10, 8, 457-478
- Olivier De Schutter, ‘Globalization and Jurisdiction : Lessons from the European Convention on Human Rights’ [2005] *CRIDHO Working Paper 2005/04*, 1-36
- Pablo Gilabert, ‘Human Rights, Human Dignity, and Power’ in Rowan Cruft, Matthew Liao & Massimo Renzo (eds.) Philosophical Foundations of Human Rights (OUP 2015) 196-200;
- Paolo G. Garozza, ‘The Universal Common Good and the Authority of International Law’ [2006] Notre Dame Law School Legal Studies Research Paper No. 07-36, 32-33.
- Pasquale De Sena and Francesca De Vittor, ‘State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case’ [2005] *EJIL* 16, 1, 90-114
- Philip Allott, ‘Interpretation—An Exact Art’ in Andrea Bianchi, Daniel Peat, Matthew Windsor (eds.) *Interpretation in International Law* (OUP 2015) 373ff
- Philip Allott, ‘Reconstituting Humanity — New International Law’ [1992] *EJIL* 3, 219-252
- Philip Allott, ‘State Responsibility and the Unmaking of International Law’ [1988] 29 *Harvard International Law Journal*, 25-26.

- Philip Allott, 'The Concept of International Law' [1999] 10 *EJIL* 31-50;
- Philip Allott, 'The International Court and the voice of justice' in V. Lowe & M. Fitzmaurice (Eds.) Fifty Years of the *International Court of Justice: Essays in Honour of Sir Robert Jennings* (CUP 1996) 17
- Prosper Weill, 'Towards Relative Normativity in International Law?' [1983] *AJIL* 77, 3, 413-442
- R. Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties' [2007] 40 *Israel Law Review* 503;
- R.I.R. Abeyratne, 'Air Carrier Liability and State Responsibility for the Carriage of Inadmissible Persons and Refugees' [1998] *International Journal of Refugee Law* 10, 4, 675–687;
- Ralph Wilde, 'Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights' [2005] *MICH. J. INT'L L.* 26, 772-780
- Rebecca L. Brown, 'How Constitutional Theory Found its Soul: The Contributions of Ronald Dworkin' in Scott Hershovitz (eds.,) *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (OUP 2009) 41-67
- Rene Bruin and Kees Wouters, 'Terrorism and the Non-derogability of Non-Refoulement' [2003] *International Jounrla of Refugee Law* 15, 23
- Richard Perruchoud, State sovereignty and freedom of movement in B. Opeskin, R. Perruchoud, & J. Redpath-Cross (eds), Foundations of International Migration Law (Cambridge University Press 2012) 123 124-125.
- Rick Lawson, 'Life After Banković: On the Extraterritorial Application of the European Convention on Human Rights,' in F. Coomans and M.T. Kamminga (eds.,), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 84-86.
- Robert Alexy, 'On the Concept and the Nature of Law' [2008] *Ratio Juris* 21, 3, 291
- Robert Alexy, 'On the Structure of Legal Principles' (2000) 13 *Ratio Juris* 294, 295
- Robert Kolb, 'Is there a subject-matter ontology in interpretation of international legal norms?' in Mads Andeas & Eirik Bjorge (eds.) *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (CUP 2015) 478;
- Robert McCorquodale, "The Individual and the International Legal System" in Malcolm D Evans (ed), *International Law* (OUP 4th ed, 2014) 280-305
- Ronald Dworkin, 'Law's Ambitions for Itself' [1985] *Virginia Law Review* 71, 2, 173-187
- Ronald Dworkin, 'Natural Law Revisited' [1982] *U Fla L Rev* 34, 165.
- Rowan Cruft, S. Matthew Liao, and Massimo Renzo, 'The Philosophical Foundations of Human Rights: An Overview' in Rowan Cruft, Matthew Liao & Massimo Renzo (eds.) Philosophical Foundations of Human Rights (OUP 2015) 1-45;
- Sam Muller & Marcel Bruss, 'The Decade of International Law: Idealist Dream of Realist Perspective' [1990] *Leiden Journal of International Law* 3, 3, 1-14
- Samantha Besson, 'Human Rights and Constitutional Law: Patterns of Mutual Validation and Legitimation' in Rowan Cruft, Matthew Liao & Massimo Renzo (eds.) Philosophical Foundations of Human Rights (OUP 2015)
- Samantha Besson, 'Human Rights: Ethical, Political . . . or Legal? First Steps in a Legal Theory of Human Rights' in Donald Earl Childress III (eds.) The Role of Ethics in International Law (CUP 2012) 211-246;
- Samantha Besson, "The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to" [2012] *Leiden Journal of International Law* 25, 862
- Samantha Velluti, *Reforming the Common European Asylum System - Legislative Developments and Judicial Activism of the European Courts* (Springer 2014) 77-105;
- Sarah H. Cleveland, 'Embedded International Law and the Constitution Abroad' [2010] *Colum. L. Rev* 110, 260-267;
- Sarah Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' [2010] *EJIL* 20, 4, 1223–1246
- Silvia Borelli, 'Casting light on the legal black hole: International law and detentions abroad in the "war on terror"' [2005] *International Review of Red Cross* 87, 857, 39-68
- Simon Hope, 'Common humanity as a justification for human rights claims' in Gerhard Ernst & Jan-Christoph Heilinger (eds.) The Philosophy of Human Rights Contemporary Controversies (Hubert & Co. GmbH & Co. KG 2012) 211;
- Smadar Ben-Natan, 'Constitutional Mindset: The Interrelations between Constitutional Law and International Law in the Extraterritorial Application of Human Rights' [2017] *Israel Law Review* 50, 2, 139–176;
- Stefan Kadelbach, '*jus cogens*, Obligations Erga Omnes and other Rules – The Identification of Fundamental Norms' in Christian Tomuschat and Jean-Marc Thouvenin (eds.) *The Fundamental Rules of International Legal Order: jus cogens and Obligations Erga Omnes* (Martinus Nijhoff 2006) 21-41.

- Stefan Kadelbach, Genesis, Function and Identification of *jus cogens* Norms in in Maarten den Heijer & Harmen van der Wilt (eds.) *jus cogens: Quo Vadis?* (Netherlands Yearbook of International Law 2015) 169
- Stephen Gardbaum, 'Human Rights as International Constitutional Rights' [2008] EJIL 19, 4, 752.
- Stephen Hall, 'The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism' [2001] *EJIL* 269-307
- Susan Kneebone, 'Australia as a Powerbroker on Refugee Protection in Southeast Asia: The Relationship with Indonesia' [2017] *Refuge* 33, 1, 29-41
- Tarik Abdel-Monem, 'How Far do the Lawless Area of Europe Extend? Extraterritorial Application of European Convention on Human Rights' [2005] *Publications of the University of Nebraska Public Policy Center*. 46, 159-162, 196-197.
- Theodor Meron, 'Extraterritoriality of Human Rights Treaties' [1995] *The American Journal of International Law* 89, 1, pp. 78-82;
- Theodore Baird & Thomas Spijkerboer, 'Carrier Sanctions and the Conflicting Legal Obligations of Carriers: Addressing Human Rights Leakage' [2019] *Amsterdam Law Forum,* 11, 1, 1-16;
- Thomas Gammeltoft-Hansen & Jens Vedsted-Hansen, 'Introduction: Human Rights in an Age of International Cooperation' in Gammeltoft-Hansen and Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Routledge 2017) 6
- Thomas Gammeltoft-Hansen and Nikolas F. Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy' [2017] *JMHS* 5, 29, 30;
- Thomas Gammeltoft-Hansen, 'International Cooperation on Migration Control: Towards a Research Agenda for Refugee Law' [2018] *European Journal of Migration and law* 373–395;
- Thomas Kleinlein, '*jus cogens* as the 'Highest Law'? Peremptory Norms and Legal Hierarchies' in Maarten den Heijer & Harmen van der Wilt (eds.) *jus cogens: Quo Vadis?* (Netherlands Yearbook of International Law 2015) 173-2011;
- Thomas Spijkerboer, 'Bifurcation of people, Bifurcation of law: Externalization of Migration Policy Before the EU Court of Justice' [2017] *Journal of Refugee Studies,* 31, 2, 217-239;
- Thomas Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' [2018] European Journal of Migration and Law 452 453-461;
- Tilmann Altwicker, 'Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts' [2018] *EJIL* 29 581 591–592;
- Tom De Boer, 'Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection' [2014] *Journal of Refugee Studies* 28, 1, 119-134;
- Ulf Linderfalk 'The Emperor's New Clothes – What If No *jus cogens* Claim Can Be Justified?' [2020] *International Community Law Review* 139-162
- Ulf Linderfalk, 'All the things that you can do with *jus cogens*. A pragmatic Approach to Legal Language' [2013] *German Yearbook of International Law* 56, 368
- Ulf Linderfalk, 'The Creation of *jus cogens* – Making Sense of Article 53 of the Vienna Convention' [2011] *ZaöRV* 71, 359-378
- Ulf Linderfalk, 'The Effect of *jus cogens* Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' [2007] *EJIL* 18, 5, 853−871
- Ulf Linderfalk, 'The Legal Consequences of *jus cogens* and the Individuation of Norms' [2020] *Leiden Journal of International Law* 33, 894
- Ulf Linderfalk, 'The Source of *jus cogens* Obligations - How Legal Positivism Copes with Peremptory International Law' [2013] *Nordic Journal of International Law* 82, 369-389
- Ulf Linderfalk, 'Understanding the *jus cogens* Debate: The Pervasive Influence of Legal Positivism and Legal Idealism' in Maarten den Heijer & Harmen van der Wilt (eds.) *jus cogens: Quo Vadis?* (Netherlands Yearbook of International Law 2015) 51-85,
- Ulf Linderfalk, 'Who are 'The Parties'? Article 31, Paragraph 3(C) of the 1969 Vienna Convention and the 'Principle of Systemic Integration' Revisited' [2008] *Netherlands International Law Review,* 55, 343–364;
- Ulf Linderfalk, "Normative Conflict and the Fuzziness of the International ius cogens Regime" [2009] *ZaöRV* 69 972
- Valentin Jeutner, 'Legal Dilemma' in Jean d'Aspremont & Sahib Singh (eds), *Fundamental Concepts for International Law: The Construction of a Discipline* (Edward Elgar 2018) 609
- Valentin Jeutner, 'Rebutting Four Arguments in Favour of Resolving ius cogens Norm Conflicts by Means of Proportionality Tests' [2020] *Nordic Journal of International Law* 89, 453, 459
- Vincent Chetail 'The Common European Asylum System: Bric-à-brac or System?' in V. Chetail, P. De Bruycker & F. Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Leiden: Brill/Nijhoff, 2016), 3-38;

- Violeta Moreno-Lax & Mariagiulia Giuffré, 'The Rise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows' in Juss (Ed) *Research Handbook on International Refugee Law* (Edward Elgar 2019);
- Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model"' [2020] *German Law Journal* 21, 414
- Vladislava Stoyanova, 'The Right to Life Under the EU Charter and Cooperation with Third States to Combat Human Smuggling' [2020] German Law Journal, 21, 436–458;
- Vranes, 'The Definition of "Norm Conflict" in International Law and Legal Theory' [2006] *European Journal of International Law* 17, 395
- Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' [1913] 23 *Yale Law Journal* 23, 16, 711-770
- Wilfred Jenks, 'The Conflict of Law-Making Treaties' [1953] *British Yearbook of International Law* 30, 401, 426;
- William A. Schabas, 'Non-Refoulement' as *Background Paper for the technical workshop on Human Rights and International Cooperation in Counter Terrorism,* Liechtenstein, 15-17 November 2006 OSCE Office for Democratic Institutions and Human Rights and UN Office of the High Commissioner for Human Rights, footnote 22. Accessible at: https://www.osce.org/files/f/documents/1/3/24170.pdf.
- William E. Conklin, 'The Peremptory Norms of the International Community: A Rejoinder to Alexander Orakhelashvili' [2012] *EJIL* 23, 3, 869-872
- William J. Wagner, 'Universal Human Rights, The United Nations, And the Telos of Human Dignity' [2005] *Ave Maria L. Rev* 3, 197, 197-203
- Yuval Shany, "Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law" [2013] *L & Ethics Hum Rts* 7, 47-71;

Treaties

- UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.
- UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.
- UN General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance*, 3 August 2017, A/72/280.
- Organization of American States (OAS), *American Convention on Human Rights*, "Pact of San Jose", Costa Rica, 22 November 1969;
- Organization of American States (OAS), *Inter-American Convention to Prevent and Punish Torture*, 9 December 1985, OAS Treaty Series, No. 67,
- European Union: Council of the European Union, *Charter of Fundamental Rights of the European Union* (2007/C 303/01), 14 December 2007, C 303/1,
- Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa* ("OAU Convention"), 10 September 1969, 1001 U.N.T.S. 45;
- League of Arab States, *Arab Charter on Human Rights,* 15 September 1994.

- United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331,

- Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969;
- UN General Assembly, *Convention Relating to the Status of Refugees,* 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137
- UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.
- UN General Assembly, *International Covenant on Civil and Political Rights,* 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171;
- Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5,
- UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998
- UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide,* 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277,

UN Human Rights Treaty Body Materials (Decisions, Reports)

- Committee Against Torture, Mutombo v. Switzerland, U.N. Doc. CAT/C/12/D/013/1993 (Apr. 27, 1994). Committee Against Torture, J.H.A. v. Spain (Marine I), U.N. Doc. CAT/C/41/D/323/2007, (Nov. 21, 2008).
- *Delia Saldias de Lopez v. Uruguay*, CCPR/C/13/D/52/1979, HRC, 29 July 1981, para. 12.3.
- *Gordon C. Van Duzen v. Canada*, CCPR/C/15/D/50/1979, UN Human Rights Committee (HRC), 7 April 1982, para.10.2.
- *Mohammad Munaf v. Romania*, CCPR/C/96/D/1539/2006, HRC) 21 August 2009, para.4.14.
- Nils Melzer, Information Submitted under Article 20 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concerning Italy's responsibility for the torture of migrants pulled back to Libya. Accessible at (https://centre-csdm.org/wp-content/uploads/2020/07/CAT-Art.-20-Inquiry-CSDM-01.07.2020.pdf) Accessed 9 February 2021.
- Report of the Special Rapporteur (Agness Callamard) of the Human Rights Council on extrajudicial, summary or arbitrary executions, *Unlawful death of refugees and migrants*, 15 August 2017. Accessible at (https://www.statewatch.org/media/documents/news/2017/sep/un-report-unlawful-refugees-and-migrants.pdf)

UN Treaty Body General Comments

- UN Committee Against Torture (CAT), *General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22*, 9 February 2018, para.38.
- UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, para.6; UN Human Rights Committee (HRC), CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986, para.5.
- UN Human Rights Committee (HRC*), CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, 4 November 1994, CCPR/C/21/Rev.1/Add.6.
- UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para.12.
- UN Human Rights Committee (HRC), General comment no. 31 [80], *The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13;
- UN Human Rights Committee (HRC), *General comment no. 36, Article 6 (Right to Life)*, 3 September 2019, para.63;

International Law Commission (ILC)

- Gerald Fitzmaurice, Third Report on the Law of Treaties, [1958] II *Yearbook International Law Commission* 40–1, para.76.
- Hersch Lauterpacht, First Report on the Law of Treaties, [1953] II *Yearbook International Law Commission* 154–6, para.4.
- International Law Commission (ILC), Chapter V Peremptory norms of general international law *(jus cogens),* 7 Aug 2019, A/74/10. The Conclusion 3 on the "General nature of peremptory norms of general international law *(jus cogens).*"
- International Law Commission (ILC), Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,* UN Doc A/CN.4/L.682 (13 April 2006) paras.361-379.
- International Law Commission (ILC), "*Draft conclusions on identification of customary international law, with commentaries*," Yearbook of the International Law Commission, 2018, vol. II, Part Two., p.143;
- International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001,* Supplement No. 10 (A/56/10), chp.IV.E.1, art.41.
- See., International Law Commission (ILC), Draft Articles on the Law of Treaties with Commentaries, *Yearbook of the International Law Commission*, 1966, vol. II. Art.50(2), 248.
- International Law Commission (ILC), the commentary of the Commission of its draft Articles on the Law of Treaties, *International Law Commission Yearbook,* 1966-11, art.50(1), p.247

United Nations High Commissioner for Refugees (UNHRC)

- *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, January 1992, para.28-88
- UN High Commissioner for Refugees (UNHCR), *UNHCR Note on the Principle of Non-Refoulement*, November 1997
- United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.1 (XXVI), 1975, para (b)
- United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.21 (XXXII), 1981, para (f)
- United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.25 (XXXIII), 1982, para (b);
- United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.55 (XXVIII), 1989, para (d); United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.100 (LV), 2004, para (i);
- United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.79 (XLVII), 1996, para (i)
- United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.17 (XXXI), 1980, para (b)
- United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.16 (XXXI), 1998, para (e);
- United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.79 (XXXII), 1981, para (f);
- United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.22 (XXXII), 1981, para (2);
- United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.33 (XXXV), 1984, para (C);
- United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.74 (XLV), 1994, para (g);
- United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.80 (XLVII), 1996, para (e);
- United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.94 (LIII), 2002, para (c-i);
- United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.100 (LV), 2004, para (i);
- United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.103 (LVI), 2005, para (g);
- United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.65 (XLII), 1991, para (c)
- United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.17 (XXXI), 1980, para (b)
- United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.19 (XXXI), 1980, para (a)
- United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.15 (XXX), 1979, para (b)
- United Nations High Commissioner for Refugees (UNHCR), Executive Committee Conclusion No.50 (XXXIX), 1988, para (g)

Other Soft Law Instruments

- Cartagena Declaration on Refugees, *Colloquium on the International Protection of Refugees in Central America, Mexico and Panama Adopted by the Colloquium on the International Protection of Refugees in Central America*, Mexico and Panama, held at Cartagena, Colombia from 19 - 22 November 1984, p.3.
- *Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America Mexico City*, 16 November 2004.
- BRAZIL DECLARATION "*A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean"* Brasilia, 3 December 2014, p.2 (*Emphasis is Mine*)
- Asian-African Legal Consultative Organization (AALCO), *Bangkok Principles on the Status and Treatment of Refugees* ("Bangkok Principles"), 31 December 1966, article V.

- UN General Assembly, *Declaration on Territorial Asylum*, 14 December 1967, A/RES/2312(XXII), article 3
- *Sanremo Declaration on the Principle of Non-Refoulement*, Sanremo, Italy September 2001, 2.

Web Materials

- (https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf) Accessed 9 Fabruary 2021.
- Anja Palm, 'The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe?' [2017] published in *EUMigrationLawBlog* (https://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/) Accessed 9 February 2021
- ECtHR, Factsheet on Collective expulsions of aliens, *S.S. and Others v. Italy (no. 21660/18) Application communicated to the Italian Government on 26 June 2019,* July 2020. Accessible at (https://www.echr.coe.int/Documents/FS_Collective_expulsions_ENG.pdf) Accessed 9 February 2021
- EU Border Assistance Mission in Libya (EUBAM) (https://eeas.europa.eu/csdp-missions-operations/eubam-libya_en)
- EUNAVFOR MED OPERATION SOPHIA (https://www.operationsophia.eu/) Accessed 9 February 2021
- European Union: Council of the European Union, *Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route,* 3 February 2017.
- Global Legal Action Network (GLAN), *Association for Juridical Studies on Immigration (ASGI) and Italian Recreational and Cultural Association (ARCI) Complaint to the European Court of Auditors Concerning the Mismanagement of EU Funds by the EU Trust Fund for Africa's 'Support to Integrated Border and Migration Management in Libya' Programme,* 32. Accessible at (https://oi-files-d8-prod.s3.eu-west-2.amazonaws.com/s3fs-public/2020-04/GLAN%20ASGI%20ARCI%20ECA%20Libya%20complaint%20%26%20expert%20opinion%20EMBARGOED.pdf) Accessed 9 February 2021. See Also, ECRE, *Case against Italy before the European Court of Human Rights will raise issue of cooperation with Libyan Coast Guard* [2018] Accessed at (https://www.ecre.org/case-against-italy-before-the-european-court-of-human-rights-will-raise-issue-of-cooperation-with-libyan-coast-guard/) Accessed 9 February 2021.
- Global Legal Action Network, Italy's Coordination of Libyan Coast Guard, https://www.glanlaw.org/ss-case
- International Trade Center, The EU Emergency Trust Fund for Africa accessible at (https://www.intracen.org/yep/about-trust-fund/) Accessed 9 February 2021
- IOM UN Migration, European Commission Factsheet on the EU Emergency Trust Fund for Africa (EUTF) accessible at (https://www.iom.int/iscm/european-commission-factsheet-eu-emergency-trust-fund-africa-eutf) Accessed 9 February 2021
- Itamar Mann, Violeta Moreno-Lax & Omer Shatz, 'Time to Investigate European Agents for Crimes against Migrants in Libya' [2018] *EJIL:Talk Blog of The European Journal of International Law* accessible at (https://www.ejiltalk.org/time-to-investigate-european-agents-for-crimes-against-migrants-in-libya/) Accessed 9 February 2021
- Yuval Shany in Marko Milanovic, 'Reply to Shany, Lowe and Papanicolopulu' [2011] *EJIL Blog https://www.ejiltalk.org/reply-to-shany-lowe-and-papanicolopulu/*

TABLE OF CASES

International Court of Justice (ICJ) / Permanent Court of International Justice (PCIJ)

- *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004, para.159.
- *Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, International Court of Justice (ICJ), 28 May 1951, p.12;
- *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, International Court of Justice (ICJ), 21 June 1971
- *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v Serbia and Montenegro*, Judgment, Merits, (ICJ 2007), 26th February 2007, pp.43, 110-111.
- *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar),* International Court of Justice (ICJ), 11 November 2019 (Application instituting proceedings and Request for the indication of provisional measures)
- *Asylum Case (Colombia v. Peru),* International Court of Justice (ICJ), 20 November 1950, 15
- *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain);* Second Phase, International Court of Justice (ICJ), 5 February 1970, 33
- *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia),* International Court of Justice (ICJ), 1 April 2011.
- *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Rwanda), International Court of Justice (ICJ), 3 February 2006, p.27;
- *Case Concerning East Timor (Portugal v. Australia),* International Court of Justice (ICJ), 30 June 1995, p.102, para.29.
- Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America); Merits, International Court of Justice (ICJ), 27 June 1986, para.100-101,203-204.
- *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America*, International Court of Justice (ICJ), 6 November 2003
- *Case Concerning Pulp Mills on the River Uruguay, Argentina v Uruguay*, Judgment on the merits, International Court of Justice (ICJ) 20th April 2010 49, para.77.
- *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran);* Order, 12 V 81, International Court of Justice (ICJ), 12 May 1981;
- *Corfu Channel Case (United Kingdom v. Albania);* Merits, International Court of Justice (ICJ), 9 April 1949, p.22.
- Dissenting Opinion of Judge Cançado Trindade in *Jurisdictional Immunities of the State, Germany v Italy, Judgment*, International Court of Justice (ICJ) 3rd February 2012 para.294.
- Dissenting opinion of Judge Tanaka in *South-West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa); Second Phase, International Court of Justice (ICJ), 18 July 1966, p.295-296
- Judge Dugard in *Armed Activities on the Territory of the Congo*, Congo, the Democratic Republic of the v Rwanda, Judgment, Jurisdiction and Admissibility, International Court of Justice (ICJ), [2006] p.89
- *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, International Court of Justice (ICJ), 8 July 1996, para.25;
- *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), International Court of Justice (ICJ), 20 February 1969, paras.70-71
- Prof. William a Schabas comment during the Public sitting held on Thursday 12 December 2019 12 December 2019, at 10 a.m., at the Peace Palace, President Yusuf presiding, in the *case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* p.36. para.17.
- *Questions relating to the Obligation to Prosecute or Extradite,* Belgium v Senegal, Judgment, International Court of Justice (ICJ) 2012 para.99;
- *Right of Passage over Indian Territory, Portugal v India*, Merits, Judgment, International Court of Justice (ICJ), 12th April 1960, at 142 21
- *S.S. Lotus (Fr. v. Turk.),* 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7)
- Separate opinion of Judge Antônio Augusto Cançado Trindade in *Ahmadou Sadio Diallo, Guinea v Democratic Republic of the Congo,* Judgment, Preliminary Objections, International Court of Justice (ICJ), 30 November 2010
- Separate opinion of Judge Schücking Oscar Chinn, United Kingdom v Belgium, Judgment, PCIJ Series A/B No 63, ICGJ 313 (PCIJ 1932), 12th December 1934.

- *South-West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa);* Second Phase, International Court of Justice (ICJ), 18 July 1966, para.49.
- *South-West Africa Cases; Advisory Opinion Concerning the International Status,* International Court of Justice (ICJ), 11 July 1950, 12.

European Court of Human Rights (ECtHR)

- *A.A. v. France*, ECtHR, App. No. 18039/1115, January 2015; para.53,
- *Airey v. Ireland*, ECtHR, App. No. 6289/73, 9 October 1979, para.26.
- *Al-Adsani v. The United Kingdom*, ECtHR [GC], App. No. 35763/97, 21 November 2001, para.60;
- *Aliyeva and Aliyev v. Azerbaijan*, ECtHR, Apo. No. 35587/08, 31 July 2014, paras. 56-57;
- *Al-Saadoon and Mufdhi v. United Kingdom*, ECtHR, App. No. 61498/08, 2 March 2010, para.140;
- *Al-Skeini and Others v. United Kingdom*, ECtHR [GC], App. No. 55721/07, 7 July 2011, paras.136-137;
- *Andreou v. Turkey*, ECtHR (admissibility), App. No. 45653/99, 3 June 2008, p.11;
- *Assanidze v. Georgia*, ECtHR [GC], App. No. 71503/01, 8 April 2004, para.131.
- *Bahaddar v. the Netherlands*, judgment of 19 February 1998, Reports of Judgments and Decisions 1998-I, p. 263;
- *Bankovic and Others v. Belgium and Others*, ECtHR [GC] (dec.), App. No. 52207/99,12 Dec. 2001,
- *Behrami v. France* and Saramati v. France, Germany and Norway, ECtHR [GC], App. No. 71412/01 and App. No. 78166/01, 15 November 2006.
- *Case of El-Masri v. The Former Yugoslav Republic of Macedonia*, ECtHR [GC], App. No. 39630/09, 13 December 2012
- *Case of N.D. and N.T. v. Spain*, ECtHR [GC], App. No. 8675/15 and 8697/15, 13 February 2020;
- *Case of Othman (Abu Qatada) v. The United Kingdom*, ECtHR, App. No.8139/09, 17 January 2012, para.266
- *Catan and Others v Moldova and Russia*, ECtHR [GC], App. Nos. 43370/04, 8252/05 and 18454/06, 19 October 2012, para.106
- *Chahal v. The United Kingdom*, ECtHR, App. No. 70/1995/576/662, 11 November 1996; para.149;
- *Chiragov and Others v. Armenia*, ECtHR [GC], App. No. 13216/05, 16 June 2015, para.172-187.
- *Collins and Akasiebie v. Sweden*, dec. ECtHR, App. No. 23944/05, 8 March 2007
- Concurring opinion of Judge Bonello in *Al Skeini*
- Concurring opinion of Judge Pinto de Albuquerque in *Hirsi Jamaa and Others v. Italy*, ECtHR [GC], Application no. 27765/09, 23 February 2012, p.64.
- *Cyprus v. Turkey* (dec.), European Commission of Human Rights, App. Nos 6780/74 and 6950/75, 26 May 1975;
- *Cyprus v. Turkey*, ECtHR, App. No. 25781/94, ECtHR, 10 May 2001, para.78;
- *D. v. United Kingdom*, ECtHR, App. No. 146/1996/767/964, 2 May 1997;
- *Dudgeon v. United Kingdom*, ECtHR, App. No. 7525/76, 22 October 1981.
- *Engel and ors v Netherlands*, ECtHR, App. No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, 8 June 1976, para.81;
- *Garabayev v. Russia*, ECtHR, App. No. 38411/02, para.74, 7 June 2007
- *Güzelyurtlu and others v. Cyprus and Turkey*, ECtHR [GC] App. No. 36925/07, 29 January 2019, para.186
- *Harkins and Edwards v. United Kingdom*, ECtHR, App. No. 9146/07 and 32650/07, 17 January 2012,
- *Hirsi Jamaa and Others v. Italy*, ECtHR [GC], App. No. 27765/09, 23 February 2012.
- *Ilascu and others v. Moldova and Russia*, ECtHR [GC], App. No. 48787/99, 8 July 2004, para.192.
- *Isaak and Others v. Turkey*, ECtHR, App. No. 44587/9828 September 28 2006, para.103-106;
- *Issa and Others v Turkey*, ECtHR, App. No. 31826/96, 16 November 2004, paras.74-75;
- *Ivanţoc and Others v Moldova and Russia*, ECtHR, App. No. 23687/05, 15 November 2011.
- *Jaloud v. Netherlands*, ECtHR [GC], App. No. 47708/08, 20 November 2014, para.152.
- *Kafkaris v. Cyprus*, ECtHR, Application no. 9644/09, 21 June 2011
- *Loizidou v. Turkey*, ECtHR (merits), App. No. 15318/89, 28 November 1996;
- *Loizidou v. Turkey*, ECtHR (preliminary objections), App. No. 15318/8923, 23 February 1995;
- *M.A. v. Switzerland*, ECtHR, App. No. 52589/13, 18 November 2014, para.69;
- *M.N. and Others against Belgium*, ECtHR [GC], Application. No. 3599/18, 5 May 2020;
- *M.S.S. v. Belgium and Greece*, ECtHR, App. No. 30696/09, ECtHR, January 2011;
- *Matthews v. The United Kingdom*, ECtHR, App. No. 24833/94, 18 February 1999, para.39;
- *Mawajedi Shikpohkt v. Netherlands* (dec.), ECtHR, App. No. 39349/03, 27 January 2005

- *McCann and Others*, ECtHR [GC], App. No. 18984/91, 27 September 1995, para.146
- *Medvedyev and Others v. France*, ECtHR, App. No. 3394/03, 29 March 2010, para.81
- *Moustaquim v. Belgium*, App. No. 12313/86, 18 February 1991
- *Mozer v Moldova and Russia*, ECtHR [GC], App. No. 11138/10, 23 February 2016, para.101
- *N. v. Finland*, ECtHR, App. No. 38885/02, 26 July 2005, para. 167;
- *N. v. The United Kingdom*, ECtHR, App. No. 26565/05, Judgment of 27 May 200;
- *NA. v. the United Kingdom*, ECtHR, App. No. 25904/07, 17 July 2008, para.111;
- *Nada v Switzerland*, ECtHR [GC], App. No. 10593/08, 12 September 2012, paras.122-123.
- *Nasimi v. Sweden* (dec.), ECtHR, App. No. 38865/02, 16 March 2004
- *Ocalan v. Turkey*, ECtHR, App. No. 46221/99, 12 March 2003, para.91;
- *Osman v. The United Kingdom*, ECtHR, App. No. 87/1997/871/1083, 28 October 1998, para.116
- *Pad and others v. Turkey*, ECtHR, App. No. 60167/00, 28 June 2007, paras 53–54;
- *Paposhvili v. Belgium*, ECtHR [GC], App. No. 41738/10, Judgment of 13 December 2016;
- para.61;
- *R.K. v. France*, ECtHR, App. No. 61264/11,,9 July 2015, para.59;
- *Romeo Castaño v. Belgium*, ECtHR, App. No. 8351/17, 9 July 2017, para. 42.
- *Saadi v. Italy*, ECtHR [GC], App. No. 37201/06, 28 February 2008, paras.140;
- *Said v. the Netherlands*, ECtHR, App. No. 2345/02, 2005-VI, para.49;
- *Salah Sheekh v. the Netherlands*, ECtHR, App. No. 1948/04, 11 January 2007, para.136;
- *Sharifi and Others v. Italy and Greece*, ECtHR, App. No. 16643/09, 21 October 2014, para.178
- *Slivenko v. Latvia*, ECtHR, App. No.48321/99, 9 October 2003.
- *Soering v. The United Kingdom*, ECtHR, App. No. 1/1989/161/217, 7 July 1989;
- *Solomou and Others v. Turkey*, ECtHR, App. No. 36832/97, 24 June 2008;
- *Sufi and Elmi v. The United Kingdom*, ECtHR, App. No. 8319/07 and 11449/07, Judgment of 28 June 2011;
- *Tomic v. The United Kingdom*, ECtHR, App. No. 17837/03, 14 October 2003
- *Turturica and Casian v Moldova and Russia*, ECtHR, App. Nos 28648/06&18832/07, 30 Aug 2016
- *Twenty-One Detained Persons v Germany*, ECOMHR, Collection 27, 97-116, para.4.
- *Tyrer v. The United Kingdom*, ECtHR, App. No. 5856/72, 15 March 1978, para.31*;*
- *Wemhoff v. Germany*, ECtHR, App. No. 2122/64, ECtHR, 25 April 1968, para.8.
- *Women on Waves v Portugal*, ECtHR, App. No. 31276/05, 3 February 2009.
- *Xhavara and Others v Italy and Albania*, ECtHR, App. No. 39473/98, 11 January 2001, 5-6;

Inter-American Court of Human Rights (IACtHR)

- Advisory Opinion OC-21/14, "Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection", OC-21/14, Inter-American Court of Human Rights (IACrtHR), 19 August 2014;
- Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights, Inter-American Court of Human Rights (IACrtHR), 15 November 2017, para.74;
- Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants, OC-18/03, Inter-American Court of Human Rights (IACrtHR), 17 September 2003, paras.90-91;
- *Case of Aloeboetoe et al v Suriname, Aloeboetoe and ors v Suriname,* Reparations and costs, Inter-American Court of Human Rights (IACrtHR), 10th September 1993, (IACtHR)
- *Case of García Lucero et al v. Chile*, Preliminary objection, merits and reparations, Inter-American Court of Human Rights (IACrtHR), 28th August 2013, para.123;
- *Case of Goiburú et al. v. Paraguay,* Serie C No. 153, 22th Inter-American Court of Human Rights (IACrtHR) September 2006, para.128
- *Case of Michael Domingues v. United States*, Case 12.285, Report No. 62/02, Inter-American Court of Human Rights (IACrtHR), October 22, 2002, para.49;
- *Case of the "Street Children" (Villagran-Morales et al.) v. Guatemala,* C No 63, Inter-American Court of Human Rights (IACrtHR), 19 November 1999, paras.192-194.
- *Case of the Gómez-Paquiyauri Brothers v. Peru*, (Merits, Reparations and Costs), Inter-American Court of Human Rights (IACrtHR), C No 110, July 8, 2004, IACtHR, para.111.
- Concurring opinion of Judge Antônio Augusto Cançado Trindade in Case of the Haitians and Dominicans of Haitan Origin in the Dominican Republic v. Dominican Republic, Inter-American Court of Human Rights (IACrtHR), 26 May 2001. Cited in Antônio Augusto Cançado Trindade, International Law for Humankind Towards a New Jus Gentium (Martinus Nijhoff vol 6) 521

- Separate opinion of Judge A. A. Cançado Trindade in *Blake v. Guatemala*, Inter-American Court of Human Rights (IACrtHR), C No. 27, 24 January 1998, paras.26-32;

International Criminal Court

- *Prosecutor v. German Katanga* (Trial Chamber II), ICC-01/04-01/07, International Criminal Court (ICC), Decision on the application for the interim release of detained Witnesses, 1 October 2013, para.30.
- Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to the Article 15 of the Rome Statute: EU Migration Policies in the Central Mediterranean and Libya (2014-2019), Accessible at (https://www.statewatch.org/media/documents/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf) Accessed 9 February 2021

International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda (ICTY/ICTR)

- *Omar Serushago v. The Prosecutor* (Appeal Judgement), ICTR-98-39-A, International Criminal Tribunal for Rwanda (ICTR), 6 April 2000.
- *Prosecutor v. Drazen Erdemovic* (Appeal Judgment), IT-96-22-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 7 October 1997.
- *Prosecutor v. Dusko Tadic aka "Dule*" (Opinion and Judgment), IT-94-1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 7 May 1997.
- *Prosecutor v. Milomir Stakic* (Trial Judgement), IT-97-24-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 31 July 2003, para.523.
- *Prosecutor v. Radislav Krstic* (Appeal Judgement), IT-98-33-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 19 April 2004, paras.6-12;
- *Prosecutor v. Tihomir Blaskic* (Trial Judgement), IT-95-14-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 3 March 2000.
- *Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic* (Trial Judgement), IT-96-21-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 16 November 1998, para.454;
- *The Prosecutor v. Jean Kambanda* (Judgement and Sentence), ICTR 97-23-S, International Criminal Tribunal for Rwanda (ICTR), 4 September 1998.
- *Prosecutor v. Goran Jelisic* (Trial Judgement), IT-95-10-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 14 December 1999, para.60;
- *Prosecutor v. Goran Jelisic* (Trial Judgement), IT-95-10-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 14 December 1999, para.60.
- *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998.
- *Prosecutor v. Anto Furundzija* (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, para.153;