

## ESCAPING THE PRINCIPLE OF NON- REFOULEMENT

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### ABSTRACT

Customary international law as a source of law remains debatable in many aspects. Its formation and the binding effect continue to attract various arguments. Due to its automatic operation, an exception is provided for states defence, the persistent objector rule. At first glance this may seem absurd as states are initially forced to accept the rule yet is given a voucher to redeem its independence from it. The abundance of state practice required to prove the existence of custom and to establish objection add to the complexity of international law. This article seeks to analyse the formation of the principle of non- refoulement, a pertinent rule in refugee protection. It will first describe and analyse whether there is a strong support from scholars towards the creation of the rule. Then it will explain the scope and content of the principle and duties of states arising out of the principle. Next, it will look at how states can exempt itself from the operation of the principle by persistently objecting to the rule. The study will review the position of non- state party to the 1951 Convention Relating to the Status of Refugee but continue to act as a host state providing temporary refuge to thousands of refugees and asylum seekers. Discussion in this article will show that not only many states find the principle as Eurocentric but also often define breach of the rule as an objection to the customary rule.

### INTRODUCTION

The protection against *refoulement* or return is the cornerstone of refugee protection. It is also a well established norm in the protection of human rights. State practices in accepting refugees and protecting them and not returning them to a territory where their life and freedom can be in danger is believed to have become a customary law when the two elements of customary legal rules are evidently fulfilled. Though the right to asylum is not easily recognised by states, many states admit the duty not to return a forced migrant under the principle of *non- refoulement* (Chimni, 2000). Under the rule, States are bound to allow refugees to remain in their territories and are prohibited from rejecting, returning or removing refugees and asylum seekers from their jurisdiction so long as this would expose them to a threat of persecution, or a real risk of torture, cruel, inhuman or degrading treatment and punishment; or to a threat to life, physical integrity and freedom (Goodwin-Gill, 1986; Lauterpacht and Bethlehem, 2000; Coleman, 2003). It is argued that the rule has become a principle of customary international law, in which the uniform and general practice; and *opinio juris* clearly support its creation. Nevertheless, the escape route from the binding effect of the principle of *non- refoulement* is available via persistent objection (Charney, 1985; Lau, 2005), though this is still similarly debatable as the formation of the rule itself. The objective of this paper is to discuss the formation of the principle of *non- refoulement* as a customary rule, its content, duties of state under the rule and the operation of the principle of persistent objector for states to evade the binding effect of a customary rule by looking at Malaysia's position.

### THE FORMATION OF THE PRINCIPLE

As explained earlier, the rule of *non- refoulement* has been applied and followed by states even before the adoption of the 1951 Convention Relating to the Status of Refugee (CRSR). The principle of *non- refoulement* contained in Article 33 of the Refugee Convention is one of the codified provision of *non- refoulement* and also considered as the best form of expression apart from provisions of other human treaties with similar effect.<sup>1</sup> This principle is expressed in various ways and derived from different provisions, Lauterpacht and Bethlehem extract the principal essence of the rule to outline the core content of the protection under customary international law (Lauterpacht and Bethlehem, 2000). It is an established principle that similar rule can exist in the form of customary law and treaty law simultaneously.<sup>2</sup> There is also judicial support to the notion that customary rule can crystallised out of a provision of a treaty, if it satisfies the three conditions: i) fundamentally norm creating character; ii) widespread and representative state support including affected states; and iii) consistent state practice and general acceptance and recognition of the rule,<sup>3</sup> and it is argued that Article 33 of the CRSR satisfies all the prerequisites (Lauterpacht and Bethlehem, 2000).

The principle of *non- refoulement* as widely practised around the world is said to have developed into a rule of customary international law and is thus binding upon all states.<sup>4</sup> A number of state expressions and statement acknowledging the obligatory nature of the rule or *opinio juris*, are listed below:

<sup>1</sup> The same rule of non return is also provided under Article 3 of the 1967 Declaration on Territorial Asylum; Article II (3) of the OAU Refugee Convention; Article 22 (8) of the 1969 American Convention on Human Rights; Section III Paragraph 5 of the 1984 Cartagena Declaration; Article 3 of CAT; Article 7 of the ICCPR; and Article 3 of the 1950 European Convention on Human Rights.

<sup>2</sup> North Sea Continental Shelf, Judgement, ICJ Reports 1969, 3 at para 64, 70-4; Nicaragua v United States of America, Judgement, ICJ Reports 1984, 392 at para 73.

<sup>3</sup> North Sea Continental Shelf, Judgement, ICJ Reports 1969, 3, at para 72-4.

<sup>4</sup> The International Institute of Humanitarian Law has also declared the customary status of the *non- refoulement* principle (IIHL, 2001).

- a. the unanimous view conveyed by state representatives during the UN Conference on the Status of Stateless Persons, which stated that the provision of *non-refoulement* in the Convention was taken as a demonstration and representation of a generally accepted principle of non- return (UNHCR 1954).
- b. Provision of non-return is embodied in various international treaties apart from the CRSR.<sup>5</sup>
- c. The UNHCR and states around the world continue to protest and object to any breach of the *non-refoulement* principle or any conduct that amount to *non-refoulement* (Gluck, 1993; Coleman, 2003; Duffy, 2008; Bettis, 2011);
- d. Article 33 of the refugee Convention is considered to have a norm- creating character, which also form the foundation of a customary law (Chowdhury, 1995; Lauterpacht and Bethlehem, 2000; D'Angelo, 2009).

Meanwhile, the following practices are presumed to have met the requirements of generality and uniformity of state practices of non- refoulement:

- a. States' ratification and accession to one or more international or regional instrument that embody the rule of *non-refoulement* (Lauterpacht and Bethlehem, 2000) including the CRSR, ICCPR, CAT, ICESCR, European Convention of Human Rights (ECHR), OAU Refugee Convention, and the American Convention of Human Rights 1969 (ACHR). This is not applicable to Malaysia as it is not a state party to any of the instrument but it was already a member of the UN when the Declaration of the Territorial Asylum was adopted by the General Assembly unanimously in 1967.
- b. States' membership in international and regional organisations that adopt non- legal document containing provisions of non- refoulement effect (Lauterpacht and Bethlehem 2000). This shows that member states are aware of the rule and support its customary status. Malaysia is a member state to the AALCO which adopted the Bangkok Principles, a non- binding document concerning refugees.<sup>6</sup>
- c. State incorporation of the said treaties above into municipal laws either by adopting the whole treaties; or legislating the rule into constitutions; or enacting legislations which incorporate provisions of the treaties especially the principle of *non-refoulement*. More than 120 states have incorporated the *non-refoulement* provisions in their municipal law. Malaysia is one of the very few states which has not made the rule part of its domestic law.
- d. State actual practices of not rejecting, removing and returning refugees within their territory to a frontier where the refugees will be persecuted or their life and liberty are at risk of persecution, torture or any inhumane and degrading treatment. This includes their practice in relation to extradition. This part of the argument is perhaps the most controversial because despite their compliance to the rule of non- refoulement, at the same time, many states do act against the principle and justify the breach and violation by citing security, socio and economic reasons. States for instance, adopt a restrictive legal measures which indirectly preventing persons in need of international protection from entering a safe territory to enable them to apply for asylum. In mass influx situations, states deliberately closed their borders to asylum seekers. Security and economic shortages are two most widespread explanations for their negative action. Nevertheless, none of this state have cited non- obligation or denied their responsibility under the rule of non- refoulement. The various form of violation however, will not trounce the consistency and uniformity of *non-refoulement* practice.

The assertion that the duty of *non-refoulement* has become a customary rule is accepted by many writers (Goodwin-Gill and McAdam, 2007; Allain, 2001; Chowdhury, 1995). Lauterpacht and Bethlehem for instance, made an extensive discussion of the customary status of the rule. They apply the three elements required in the crystallisation of a customary rule from a treaty provision<sup>7</sup> to the *non-refoulement* principle, drawing attention to, first, the expression of the principle as a norm- creating character in several international instruments<sup>8</sup> and a number of Conclusions of the UNHCR Executive Committee (UNHCR, 1977; UNHCR, 2003). Second, they assert that there is evidence showing that the principle is already widespread and representative (Goodwin-Gill and McAdam, 2007; Allain, 2001; Lauterpacht and Bethlehem, 2000; Chowdhury, 1995). This is derived from the fact that the principle is contained in many binding instruments and that when these are combined; about 90% of all UN members are parties to one or more of these conventions and treaties. Furthermore, there was no evidence of opposition from states who are not party to any of the legal and non-legal instruments (Lauterpacht and Bethlehem, 2000).

The third element, consistent practice and general recognition of the rule, are shown in the participation of states in binding and non-binding instruments as discussed earlier in the second element. Furthermore, about 80 states have incorporated the principle in their national legislation, and membership of the UNHCR's ExCom is taken as sufficiently representative of states as to constitute generality.<sup>9</sup> However, states' support for the principle is not sufficiently and consistently reflected in their actual

<sup>5</sup> For example Article III (3) of the Bangkok Principles; Article 3 of the 1967 Declaration on Territorial Asylum adopted by UNGA; Article II (3) of the OAU Refugee Convention; Article 22 (8) of the 1969 American Convention on Human Rights; Section III Paragraph 5 of the 1984 Cartagena Declaration; Article 3 of CAT; Article 7 of the ICCPR; and Article 3 of the 1950 European Convention on Human Rights

<sup>6</sup> Article III of the Bangkok Principles provides as follows:

*1. No one seeking asylum in accordance with these Principles shall be subjected to measures such as rejection at the frontier, return or expulsion which would result in his life or freedom being threatened on account of his race, religion, nationality, ethnic origin, membership of a particular social group or political opinion.*

<sup>7</sup> As identified and applied by the ICJ in the *North Sea Continental Shelf Case*.

<sup>8</sup> In CAT, ICCPR, ECHR, ACHR, OAU and Banjul Charter.

<sup>9</sup> The membership of the ExCom is currently composed of 78 members, a gradual expansion from initial 25 members in 1958 when it was founded. The elected representative of states are from Algeria, Argentina, Australia, Austria, Bangladesh, Belgium, Benin, Brazil, Canada, Chile, China, Colombia, Costa Rica, Côte d'Ivoire, Cyprus, Democratic Republic of the Congo, Denmark, Djibouti, Ecuador, Egypt, Estonia, Ethiopia,

practice, especially in situations of mass influx. Violations of the principle through deportation, rejection at frontiers and restrictive application of the law have been reported in many occasions (USCRI, 2007; USCRI, 2008; Kelley, 2007; Durieux and McAdam, 2004; Coleman, 2003). Nevertheless, domestic courts have interpreted provisions relating to the *non-refoulement* principle and recognised such prohibition while rejecting any exceptions and derogation.<sup>10</sup> A declaration by a court that there is a possibility that in future, deportation to face torture may be justified has been heavily criticised.<sup>11</sup>

On the other hand, some commentators dispute that *non-refoulement* has reached customary status. Holders of these opposing views, have insisted that despite decades of refugee problems and acknowledgement of their rights under the 1951 Convention, no custom has ever been established due to first, lack of consistent and uniform practice among contracting states (Hathaway, 2005). In this regards, several instances can be referred to in establishing the negative practice of states which is contrary to the prerequisite of uniform and consistent practice. It is argued that actual state practice as seen from the asylum laws and actions of Western Europe, the USA and Canada demonstrated contradictory evidence against customary status (Gluck, 1993; Coleman, 2003; Duffy, 2008; Bettis, 2011). Secondly, it is claimed that the principle will not easily reach customary status because the rule is against states' desire to maintain control over their own borders (Hailbronner, 1986) or in other words, contrary to states idea of sovereignty (Farmer, 2008). The rule will impose on states an obligation to accept aliens into their territories or removing states power while states insist that they should have the prerogative to allow or disallow entry (Hailbronner, 1986).

The next counter argument contests the sufficiency of clear proof. The attainment of customary status is not convincing enough as there is inadequate evidence to support the proposal. This argument takes into consideration all the inconsistent practice that is taking place for decades until today. The idea of the customary status of the *non-refoulement* principle and its recognition is regarded as a wishful legal thinking rather than a careful factual and legal analysis (Hailbronner, 1986). However, there are apparent difficulties in the argument of these opposing views. The proposition of customary status counted the adoption and incorporation of the principle in domestic legislation as 'state practice'. Conflicting practice by states is perceived as violation and breach of the principle rather than 'inconsistent' state practice that would undermine the element of customary international law.

#### Negative and Inconsistent State Practice As Violation Rather Than Denial of Obligation Under the *Non-refoulement* Rule

A few example of state practice that violate the principle can be looked at to show that many states simply break the rule despite realising their obligation in international law. We shall take a number of regional cases as samples. In Asia, a classic example of *refoulement* occurred during the Indochina crisis when Thailand, Malaysia, Indonesia, Singapore and Australia were all criticised for refusing refugees to land and disembark on their shore despite appeals and apparent poor condition of the refugees and their boat/ vessel (Wain, 1977; Sutter, 1990).

The *Tampa* incident in Australia is one of the leading incidents of *refoulement* (Wilheim, 2003). The Norwegian freighter carrying Afghanistan refugees whom they saved at high seas was not allowed to disembark despite concern over the welfare and health of the refugees as well as the crew. The incident attracted responses from international community and has led to the introduction and enactment of a series of new laws by the Australian House of Representative to validate Australian act. Responding to the attitude of the Australian government, the Prime Minister of Norway was reported as saying that, 'Australia's attitude to the refugee incident is unacceptable and inhuman and contravenes international law' (Wilheim, 2003, p.160). This was then replied by the Prime Minister who said that, 'Norwegian Government had no responsibility in the matter, despite the fact that it is a Norwegian flagged vessel, it is a Norwegian captain and it is a Norwegian company' (Wilheim, 2003, p.160). During the course of the incident, Australia never denies its responsibility not to *refoules* the refugees despite continuously asserting that the refugees should not be allowed to apply for political refugee status and should not enter Australia illegally.

In South Asia, refugees from Kashmir (Robinson, 2012), the Biharis (Sen, 1999; Sen, 2000) and refugees from Afghanistan were repeatedly *refouled* by the host states including India and Pakistan Reasons cited by authorities are national security and limited resources, apart from oppositions and resentment of the local people.

A few examples of breach of the *non-refoulement* principle can be identified in the African countries too (Gordenker, 1983; Murray 1986; Abi-Saab, 2001; Ramcharan, 2001). In 1996, two ships carrying Liberian refugees attempted to disembark at a few ports in West Africa. Fleeing the civil war, the refugees are among 700,000 people escaping violence. The ships were not allowed to remain at various docks but at some points were permitted to get urgent supplies. One of the ships, *Bulk Challenge*, was later allowed to disembark in Ghana after intensified international pressure. The other ship, the *Zolotitsa*, was forced to return to Liberia after no state volunteer to take in the refugees (Kuruk, 1999, p. 313; O'Neill, 2000). In this occasion, state justified its violation with suspicion of armed militias that could pose a threat to national security; and the claim of the Liberians as bona fide refugees.

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Finland, France, Germany, Ghana, Greece, Guinea, Holy See, Hungary, India, Iran (Islamic Republic of), Ireland, Israel, Italy, Japan, Jordan, Kenya, Lebanon, Lesotho, Luxembourg, Madagascar, Mexico, Montenegro, Morocco, Mozambique, Namibia, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Pakistan, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Serbia, Somalia, South Africa, Spain, Sudan, Sweden, Switzerland, Thailand, The former Yugoslav Republic of Macedonia, Tunisia, Turkey, Uganda, United Kingdom, United Republic of Tanzania, United States of America, Venezuela (Bolivarian Republic of), Yemen and Zambia.

<sup>10</sup> See for instance *Soering v United Kingdom* (1989) 11 EHRR 439 ; *Cruz Varaz v Sweden* (1992) 14 EHRR 1, *Chahal v. United Kingdom* (1997), 108 ILR 385, *Ahmed v. Austria* (1997), 24 EHRR 278, *McKinnon v Government of the United States of America* (2008) 4 AER 1012; *Puzan v Ukraine* (2010) ECHR 51243/ 08, *HLR v France* (1997) 26 EHRR 29; *Jabari v Turkey* (2000) BHRC 1; and *Bensaid v UK* (2001) 33 EHRR 10

<sup>11</sup> The Canadian Supreme Court in *Suresh v Canada* (2002) SCC 1

The West is no exception. They refouled the Haitian (Goodwin- Gill, 1994), Cuban (Kerwin, 2005) and Mexican refugees accusing them as economic migrants (Yundt, 1988). One significant example from the Europe was the border closure by the Macedonia government who rejected refugees from Kosovo during the crisis in Yugoslavia. Here, the Macedonian authority justified their action with problems of resources and unstable ethnic balance (Barutciski & Suhrke, 2001; Coleman, 2003). It appears that none of these states denies their obligation under the principle of *non-refoulement*. In such cases, we should treat the breach as violation of rule rather than as expression that the rule is rejected by states.

### **Incorporation of Non- Refoulement Provision in Domestic Law as State Practice**

The next argument to rebut claim by the opposition is that they have failed to consider the practice of incorporating the principle into domestic legislation as part of general practice. Proposer of non- refoulement argued that the incorporation of the principle into municipal laws is also the *opinio juris* of the state that the principle of *non-refoulement* is in fact an obligation under the law. However this argument was not considered by opposing commentators. Instead, these commentators take into account only actual state practice in dealing with refugees, such as the conflicting practice in the areas of return, border closure, rejection and deportation by many countries which are faced with a situation of mass influx but fail to take other obvious practice into account.

From the above argument, by comparison, there are two significant, consistent state practices: first, becoming members of instruments that contain protection against return; and second, the incorporation of the principle of *non-refoulement* into national laws as opposed to resorting to the intermittent application of forced return. The number of states that consistently practise the rule is greater than the number of states that carry out practices which are in breach of the principle. These incompatible practices are inadequate to dismiss the consistency and generality of the *non-refoulement* principle; instead, these contradictions shall be construed as deliberate infringement of the rule for unlawful reasons, even where states do view the principle as legally obligatory. Hence, this study is taking the view that the customary law of non- refoulement do exist in the form or content as set out by Lauterpacht and Bethlehem. The consequence of being recognised as customary international law will allow the principle of *non-refoulement* to be applicable to everyone whose return to a territory would risk their persecution, torture, cruel, inhuman and degrading treatment or punishment, and pose a threat to their life and liberty regardless of their refugee status or the state's status in treaty ratification. Thus, a person who has failed to claim refugee status under the Convention or has no treaty to turn to is still entitled to protection against *refoulement* under customary international law.

### **Non- Derogability Of The Non- Refoulement Principle Or The Jus Cogens Nature**

Apart from being customary, a number of commentators are also of the view that the principle of *non-refoulement* cannot be set aside or ignored by states in any way as it has become a rule of *jus cogens* (Farmer 2008; Allain 2001). The repercussion of being a *jus cogens* rule is that the rule cannot be breached or violated for any reason; and any kind of derogation from the rule is prohibited. This discussion on non- refoulement principle as peremptory norm is relevant in a situation where the persistent objector rule is to be invoked. Many states that provide temporary refuge hold the stand that they have limited resources and there unable to support refugees security issues pertaining to refugees. It is very likely that states such as Malaysia will claim exemption from the *non-refoulement* principle using the persistent objector rule if an application is made in Malaysian courts to compel Malaysia to fulfil its obligation towards refugees under the rule. States can only rely on the success of the persistent objector claim to evade the binding force of any customary rules. However, a counter measure is invented to overcome the dodging of international responsibilities by states. In principle, nothing escapes the customary rules with *jus cogens* status. No state can validly claim the persistent objector rule against a peremptory norm in international law. As a result, if the *non-refoulement* principle is found to have gained the *jus cogens* status, no state will be able to benefit from the persistent objector rule. By virtue of Article 53 of the Vienna Convention on the Law of the Treaties (VLT),<sup>12</sup> the principle of *non-refoulement* can be categorised as *jus cogens* if the rule is accepted and recognised by all states as a norm which does not permit any derogation. *Jus cogens* rule can be altered only by a subsequent norm having the same character. Article 53 has plainly designate that clear and strong corroboration is needed to prove that there is a real acceptance and recognition by a large majority of states that the *non-refoulement* principle is indeed a *jus cogens* rule.

As deciphered from the provision, the standard of prove for *jus cogens* can be distinguished from the customary law because it needs state to accept and recognise that a particular international rule should be adhered to without any derogation. The term 'states as a whole' could mean all states without exception. Oxford Dictionary defines the word 'whole' as full, complete, as one thing or piece and not separate parts.<sup>13</sup> Thus, the acceptance and recognition of each and every state counts in the determination of *jus cogens*. As a result, even a single state rejection of the notion could vanquish the *jus cogens* status. Such strict requisite is understandable, reasonable and coherent as *jus cogens* rule will put an unavoidable and continuing obligation on states without the possibility for withdrawal, making reservation or claiming exemption (Criddle, E. J., & Fox-Decent 2009). Nevertheless, putting an overly strict requirement as illustrated above will make Article 53 worthless due to its impossible mission because under this interpretation, a single state will have a powerful vote to veto and to reject a rule that has been accepted by even the large majority of states.

<sup>12</sup> Vienna Law of Treaties, Article 53:

'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

<sup>13</sup> Oxford Advanced Learners Dictionary ( 7<sup>th</sup> Ed, Oxford University Press, Oxford 2005) 1680

It is generally accepted that 'states as a whole' only means large majority of states or most states (Criddle, E. J., & Fox-Decent 2009, p. 341). Again, states acceptance and recognition needs to be derived from their practice and clear expression of intent to transform a rule to become *jus cogens* (Criddle, E. J., & Fox-Decent 2009, p. 341). The real challenge in proving state acceptance and recognition lies with collecting every states expression that accept and recognise that the rule of non- refoulement is indeed a *jus cogens* rule in definite forms. For the expression of states to be valid and acceptable, it must be unambiguous and unqualified.

Three theories of *jus cogens* have developed though not completely, from the positivists; the naturalist; and the public order. However, all of them are unable to provide answers to two crucial problems: firstly, the normative basis of peremptory norms in international law; and secondly, the relationship between states sovereignty and peremptory norms (Criddle, E. J., & Fox-Decent 2009, p. 346). Currently, a new theory of *jus cogens* is developing where it attempts to explain the peremptory status and relationship of state sovereignty (Criddle, E. J., & Fox-Decent 2009, p. 347). Proposers of the 'fiduciary' theory argue that '... *jus cogens* norms are constitutive of a state's authority to exercise sovereign powers domestically and to claim sovereign status as an international legal actor (Criddle, E. J., & Fox-Decent 2009, p. 347).

They further deliberated that:

*'...the state and its institutions are fiduciaries of the people subject to state power, and therefore a state's claim to sovereignty, properly understood, relies on its fulfilment of a multifaceted and overarching fiduciary obligation to respect the agency and dignity of the people subject to state power. One of the requirements of this obligation—perhaps the main requirement—is compliance with jus cogens. Put another way, a fiduciary principle governs the relationship between the state and its people, and this principle requires the state to comply with peremptory norms.'* (Criddle, E. J., & Fox-Decent 2009, p. 347).

This theory is saying that '...peremptory norms arise from a state- subject fiduciary relationship rather than from state consent.' However, the state- subject fiduciary relationship is unable to reconcile this presumption of relationship to the fact that an alien or immigrant is not a subject to the state that he or she is trying to seek asylum from.

Based on above specification, this study will now examine if the *jus cogens* status of the *non- refoulement* principle can be firmly established and safely concluded as binding on states without any derogation permitted. In recent years, the non- derogability of the *non- refoulement* principle has been asserted by various parties and states in many occasions. Visible support for the *jus- cogens* nature of the principle can be found in a number of recent works which indicate that a number of reasons put forth to defeat the customary status and *jus cogens* nature of the non- refoulement principle cannot stand.

Firstly, according to Allain (2001), the principle of *non- refoulement* is a norm that cannot be overridden and it can be characterised as *jus cogens* because of the numerous Conclusions concerning the non- derogability of the principle made by the UNHCR ExCom and state practice that materialised as a result of the 1984 Cartagena Declaration and this is also supported by Fitzpatrick (2000) and Koh (1994). The Conclusions of the ExCom are perceived as states acceptance because they come from representative of states who are given the mandate to govern and oversee the UNHCR. The composition of the UNHCR ExCom which includes representatives of UN member states is being taken as sufficient measures to satisfy the acceptance and recognition of states as a whole.

However, it must be noted that this view only takes into account the expressions from a small number of states not the supermajority. The current number of ExCom representatives is 79, which is the result of a gradual increase from only 25 members in 1958. There are 191 recognised states in the world including two non- members of the United Nations. This number is nowhere near the requirement of Article 53 of the VLT, it is not even half. Furthermore, it cannot be ascertained whether the state representation of the world's regions is fair enough. Even if it is considered fair, 79 will not be equal to 'states as a whole'. Since there is no limit on the year that the Conclusions are taken into account, the number of states participating in the making of the Conclusions will be less because members of the ExCom only reach 79 in 2010. In the year 2000, there were only 56 members.

Secondly, it is argued that inconsistent state practice is irrelevant so long as states and international bodies insist on the non- derogable nature of the principle (Allain 2001, p. 544) This argument is agreeable. Any breach or violation of the *non refoulement* rule should be treated as states failure to respect a rule not as objection or rejection of norms. Meanwhile, Bruin and Wouters (2003) are of the view that the war against terrorism should not be accepted as an excuse to undermine the non- derogability of the *non- refoulement* principle.

Thirdly, a number of case laws have been held in support of the non- derogability of the *non- refoulement* principle. In *Soering v United Kingdom* (1989) 11 EHRR 439, the court concluded that Article 3 of the European Convention on Human Rights (ECHR) which prohibits extradition, expulsion and deportation of individuals does not permit any exception. In *Chahal v United Kingdom* (1996) 23 EHRR 413 and *D v United Kingdom* (1997) 24 EHRR 423 derogation even where there is a public emergency and protection under the principle of *non- refoulement* is considered absolute and unqualified. In a situation where an alien can be excluded from the Convention under Article 1F,<sup>14</sup> he is entitled to protection against refoulement under Article 3 of

<sup>14</sup> 1951 Convention, Article 1F:

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

CAT as decided in *Paez v Sweden* (28 April 1997) *Committee Against Torture*, No. 39/ 1996 or the customary international law. Nevertheless it is also important to refer the ICJ decision in recent case of *Armed Activities on the Territory of the Congo (Congo v Rwanda)* that endorsed the existence of the concept of *jus cogens*. However, the judgement does not guide us to the legal status of peremptory norms in international law and the characteristics of peremptory norms or how to identify it out of other norms.

The fourth argument insists that exceptions to the non- refoulement provision such as those in Article 33 of the Refugee Convention do not form a basis on which to rule out the non- derogable nature of the principle. It is important that derogation should be distinguished from exceptions and limitation under which a rule or norm operates. It is under this notion that an exception in the prohibition of the use of force as in the Charter of the United Nation shall not be treated as derogation (Orakhelashvili 2006). Under similar circumstances, the exceptions provided in the treaty provisions of *non- refoulement* principle such as the CRSR should not be treated as derogation and shall be construed as not more than mere exceptions.

'Exception' alone cannot easily defeat *jus cogens*, since there are certain constraints and restrictions imposed on the exceptions. Furthermore, not all instruments provide for exceptions. The OAU Refugee Convention, the ACHR and the Cartagena Declaration do not allow any exception to *non- refoulement*. If *refoulement* is justified, states are required to give the person an opportunity to go to another state, which is safe rather than to a state where there is a risk of persecution and torture.<sup>15</sup> The exception does not apply in a situation where the threat constitutes torture, or cruel, inhuman and degrading treatment and punishment. The interpretation of the exception must be made in a restrictive manner; and applied with caution; and with due process of law (Lauterpacht and Bethlehem 2000). In addition, IHRL does not permit *refoulement* in any circumstances and this should be used to guide the application of Article 33 (Lauterpacht and Bethlehem 2000).<sup>16</sup>

From a different perspective, where mass influx of refugees is involved, it is argued that the non- derogability of the *non- refoulement* rule during large scale refugee situation is neither sustainable nor practical (Durieux and McAdam 2004). Is it then possible to propose that different rules should apply to mass influx of refugees? The CRSR was introduced in 1951 to deal with the mass influx of refugees in the Europe post World War II, thus it should have intended that the whole exodus of refugees should not be rejected or returned and the same rule or principle should apply today. Furthermore, the importance of observing the rule of *non- refoulement* at all times is also clearly articulated by the UNHCR ExCom in a number of its Conclusions.

On the contrary however, it must be born in mind that the CRSR was also initially introduced as a temporary tool to manage and solve the problem of mass influx and therefore, there is a possibility that the suitability of retaining the protection under Article 33 has been overlooked when the temporal limit of the CRSR is removed through the 1969 Protocol. Since mass influx of refugees has become more common; the movement are induced by different reasons than previously known; and the nature of refugee flow have changed, thus, it is then justified to reconsider the status of the principle *non- refoulement* in time of very large refugee movement (Durieux and McAdam 2004) and the challenges that those influx could pose to states security and interests of the nation in general.

### Conclusion in Respect of the Jus Cogens Status of Non- Refoulement

Is it then possible to conclude that there is enough evidence to evince that the rule of *non- refoulement* has attained the required support to become a *jus cogens* rule? This study inclines to answer in the negative. It is definitely unsafe to wrap up the evidence available by stating that the *non- refoulement* rule is indeed a *jus cogens*. The reason for the stance is based on the following grounds:

- a. The question of state sovereignty in relation to *jus cogens* norms is still unanswered despite the attempt by the new fiduciary theory.
- b. There is insufficient evidence to prove that states as a whole have accepted and recognise the status. It is highly doubtful that the rule has garnered enough support from states to become a *jus cogens* norm.

However, it is interesting to note that being a peremptory norm only makes a rule non- derogable and completely binding but the effect of its breach by a state is in fact non distinguishable from the breach of any standard international norm. In *Al- Adsani v The United Kingdom* (Application No 35763/97, Council of Europe: European Court of Human Right) the courts refused to accept the argument that a state sovereignty will be deprived as a result of its violation of a *jus cogens* rule. Nevertheless, the sanctions of international law are not the only thing that matters. We understand that the sanctions for the breach are limited but

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(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

<sup>15</sup> Declaration on Territorial Asylum, Article 3 (3)

<sup>16</sup> Lauterpacht and Bethlehem restated the content of the *non- refoulement* principle in refugee context in the following terms-

"1. No person seeking asylum may be rejected, returned or expelled in any manner whatever where this would compel him or her to remain in or return to a territory where he or she may face a threat of persecution or to life, physical integrity, or liberty. Save as provided in paragraph 2, this principle allows of no limitation or exception.

2. Overriding reasons of national security or public safety will permit a state to derogate from the principle expressed in paragraph 1 in circumstances in which the threat does not equate to and would not be regarded as being on a par with a danger of torture or cruel, inhuman or degrading treatment or punishment and would not come within the scope of other non- derogable customary principles of human rights. The application of these exceptions is conditional on strict compliance with due process of law and the requirement that all reasonable steps must first be taken to secure the admission of the individual concerned to a safe third country."

that should not stop us from collecting evidence of state support and real expression of acceptance and recognition of the non-refoulement principle as *jus cogens* in the future. It must be promoted that the impact of being a *jus cogens* rule entails a far reaching effect in terms of state practice and the implementation of the rule in domestic laws and governance.

### THE PERSISTENT OBJECTOR RULE

As *non-refoulement* is not a peremptory norm, thus derogation is allowed depending on the circumstances that justify it. Besides derogation which is exercisable in strictest condition, states are also left with another option, to claim the persistent objector rule. By showing that a state has been persistently objecting to the rule during its formation and after the completion of its creation, it may be able to escape the legal effect of *non-refoulement*. For the purpose of this study, we will look at whether Malaysia is at a position to benefit from the rule. Malaysia is chosen as the sample since it is not a contracting state to the CRSR and has not ratified any other international instrument that contain the provision of *non-refoulement*.

As discussed earlier, objection and protest towards customary international law can be effective if they are made at the formation stage when the rule is not yet created. A state which dissents to a particular rule, must clearly display its disagreement (Charney 1985; Colson 1986; Lau 2005). If the opposite practices are carried out after the formation and for specific reasons, it may not terminate the customary rules because states may take opposite action that violates the customary rules while still believing that they are bound to abide by the law. The non-compliance is then simply due to economic reasons or to some other inability.

Since the *non-refoulement* principle give rise to various obligation and have certain implication on states, it is believed that Malaysia could attempt to elude the binding effect of the customary rule by employing the persistent objector rule (POR) (Guzman 2005; Charney 1986). Under the POR principle, a state which does not expressly object to a rule is considered to have acquiesced unless it explicitly raises objections against a particular rule (Charney 1985, p. 2). This is because the rule works on the basis that no rule of international law can be binding on state without its consent. The majority of international law writers supported the rule but their assertions were not sufficiently corroborated by state practice and judicial decision. Diverse acceptance of the rule is centrally linked to the argument that the rule was not confirmed by state practice (Danilenko 1988; Charney 1986; Stein 1985; Weil 1983). Charney (1993) argued that states should never be allowed to dissent or be exempted from a universal rule if such exemption will allow 'rider' and lead to grave consequences such as the exemption in environmental law which control dangerous emission to atmosphere and thus has long term direct effect to human kind due to its grave consequences to ozone layer.

The principle of persistent objector, a typical inclusion in the discussion of the formation of customary international law, permits a state to opt out of new rules of international law. However, in practice, the International Court of Justice (ICJ) is extremely reluctant to accept a state's objection; and states in general do not acknowledge or recognise other states' objection. Though this is not straightforward, by proving that it has indeed persistently objected to the customary status of the principle of *non-refoulement* during its emergence and subsequently after it became customary, Malaysia may be able to discharge itself from the rule. The principle of persistent objector has been claimed in many cases but were not successful owing to lack of state practice to support the objection (Stein 1985). In assessing Malaysia's objection to the customary status of the principle of *non-refoulement* two elements must be satisfied: first, that the objection has been made persistently over time, before and after the rule's emergence; and secondly, the objection is made known to other states (Stein 1985). The ICJ's refusal to accept the objection in a number of cases has prompted Stein to claim that it is easier to find cases where states have claimed the 'persistent objector rule' but failed than to find the real application of the rule by the courts (p. 457, 459, 460). Stein also criticise the parties in *Fisheries* case who, despite acknowledging and concurring the existence of the principle and claim making such objection, failed to provide any instances of practice of the principle. The principle of non-refoulement as discussed earlier, received majority support from states, and therefore a state that wants to object '...needs to be especially vigilant in protecting its legal position' (Colson 1986, p. 967).

We will now examine Malaysia's actions and statements to see if they are in support of the principle or otherwise fit the conditions of objections under the POR.

### Arrangement with UNHCR regarding the Indochinese refugees

Some of the early suggestions that the rule has become customary international law emerged in the late 1980s (Goodwin- Gill 1986; Hailbronner 1986; and Stenberg 1989) during which period Malaysia was struggling to cope with the mass influx of Indochinese refugees and the assertion has been consistently maintained until today. From the beginning of 1975 when Vietnamese refugees first set foot on Malaysian shores until the 1980s, Malaysia's response was a mixture of compliance, *non-refoulement* that include stow aways and redirections. The boats were stowed from the shore and forced to leave or extra supplies were given and the refugees were asked to continue their journey to other countries ( Helton 1992; Ismail 1993, p. 1; Sappani 1989, p. 2; Dorall 1988; Muntarhorn 1992, p. 113- 120; Rachagan 1987, p. 257).

During this period, Malaysia never made any claim that it does not owe any responsibility towards refugees. What it did claim was that the country is unable to accept the burden of hosting a mass influx of refugees due to security reasons and shortage of resources. It does not reject any obligation towards refugees. In its response to the UN Secretary General's telegram regarding the rejection of the boat people, the then Prime Minister while asserting Malaysia's status as a sovereign state, made no indication as to deny Malaysia's obligation to accept refugees and repeatedly maintained that the country does not have enough resources to absorb the burden. The Prime Minister demanded that western states should do more to resolve the conflict in Malaysian territory.

Malaysia's response to Vietnamese refugees is the most published and documented as compared to its reaction to Filipino refugees and the Cambodians who were granted temporary refuge. From 1983, refugees from Burma (or currently Myanmar) and Indonesia were continuously arriving in Malaysia seeking protection. Malaysia's positive practice or action in support of the *non-refoulement* principle, include, but not limited to, the admission of refugees, providing temporary refuge and maintaining refugee camps, accepting refugees to settle permanently in the country, providing specific sites for the accommodation of Filipino refugees

### **The AALCO Membership**

Secondly, at the same time since 1970, Malaysia is also a member of AALCO which adopted the Bangkok Principles. Though this is only soft law, it is still a recognition that states owes a duty to protect refugees against forced return. Furthermore, Malaysia maintain its membership of AALCO which adopted AALCO's 1966 Bangkok Principles on Status and Treatment of Refugees in 2001.

Malaysia's actions which could be counted as objections against the rule of *non-refoulement*, can be in a variety of forms and may include actual practice, diplomatic correspondence and diplomatic statements by state officials. However, as Stein (1985) and Colson (1986) show in their analysis, it is impossible to gather all evidence of state objections because there may be too many or they may be beyond reach; for instance communications between states, which may be confidential. In any event, the fact that a state recorded more acts or objections than another state may not be enough to establish a legal relationship between the rule and the objections. In the case of the delimitation of the *Marine Boundary in the Gulf Maine Area (Canada v US), 1984 I.C.J. 246* the court was presented with lengthy list of action by both parties.

### **Malaysia's Claim of its Observation of Customary International law**

This claim was expressly made in the report to the Committee on the Rights of a Child. As the report was commissioned by the Ministry responsible to look after children, it is possible to conclude that the authorities do realise their responsibility under the CIL and thus has acted in full awareness and sense of obligation of its duties under the principle of *non-refoulement*.

### **Conclusion in Respect of Malaysia's Position as Persistent Objector**

Study of the literature reveals that during the mass influx of Indochinese refugees, Malaysia not only made a commitment to admit the boat people and give them temporary shelter, but it has also cooperated with the UNHCR and other NGOs (Tran; Helton 1993; Helton 1990). Unfortunately, on numerous occasions it fell short of keeping its promise, justifying this by referring to limited resources, conflicting national interest and national security. However, amidst the occurrence of *non-refoulement* throughout the period, there is no evidence to show that Malaysia has ever objected to the principle or denied the responsibility to protect against forced return, even though Malaysia remains adamant in maintaining that it is not a party to the 1951 Convention, and thus, has no obligation under it. Malaysia admitted that it towed the boat people out of Malaysian waters but claimed that it was the request of the boat people themselves but makes no objection to its responsibility towards the refugees. The boat people were also pushed off because they were believed to be economic migrants, not refugees. It also asserted that the policy of allowing refugees to remain in the country is merely a humanitarian gesture. In recent years, the government continues to contend that Malaysia has no intention to ratify the 1951 Convention, but is silent on its obligation under the *non-refoulement* principle. Furthermore, Malaysia has never been treated with the exception by other states just like the Soviet Union which has failed in its objection against diplomatic immunity as there is no evidence that other state has ever treated Soviet diplomats differently from others (Charme 1991, p. 76). Moreover Malaysia's violation of the principle were widely criticised by the UNHCR, ExCom, USCRI and other states (Helton 1992). In light of the available evidence, it is safe to conclude that Malaysia's claim as a persistent objector cannot be accepted as on no occasion objection can be found on the binding nature of the principle on Malaysia.

In short, the customary status of the principle of *non-refoulement* has earned widespread support from scholars and evidence of Malaysia's persistent objection against the principle of *non-refoulement* is not sufficient to exempt itself from the operation of the rule. Thus the principle of *non-refoulement* binds Malaysia under customary international law and Malaysia is under the obligation not to return refugees and asylum-seekers or any person to a frontier or territory where there is a risk of persecution, torture, cruel, inhuman and degrading treatment or punishment or risk to that person's life and liberty.

### **MALAYSIA'S OBLIGATION AND DUTIES ARISING OUT OF THE PRINCIPLE OF NON- REFOULEMENT**

Lauterpacht and Bethlehem (2000, p. 87) described the primary content of the principle of *non-refoulement* as a customary rule as follows:

- “1. No person shall be rejected, returned or expelled in any manner whatever where this would compel him or her to remain in or return to a territory where substantial grounds can be shown for believing that they would face a real risk of being subjected to torture, cruel, inhuman or degrading treatment or punishment. This principle allows of no limitation or exception.
2. In circumstances that do not come within the scope of paragraph 1, no person seeking asylum shall be rejected, returned or expelled in any manner whatever where this would compel them to remain in or to return to a territory where they may face a threat of persecution or to life, physical integrity or liberty. Save as provided in paragraph 3, this principle allows of no limitation or exception.



3. *Overriding reasons of national security or public safety will permit a state to derogate from the principle expressed in paragraph 1 in circumstances in which the threat does not equate to and would not be regarded as being on a par with a danger of torture or cruel, inhuman or degrading treatment or punishment and would not come within the scope of other non-derogable customary principles of human rights. The application of these exceptions is conditional on strict compliance with due process of law and the requirement that all reasonable steps must first be taken to secure the admission of the individual concerned to a safe third country."*

The above description provides a clear account of protection for anyone including those seeking asylum under the principle of *non-refoulement* against rejection, return and expulsion. The protection however can only be granted if the person who should benefit from it can be identified by the states. Hence it follows naturally that the duties and obligation of states found in the description of content above shall include:

- a. The duty to identify 'persons' entitled to the protection which shall involve specific procedure of screening aliens claiming protection as asylum seekers. This should be carried out by a body/ agency which has the duty and capacity to do so and related matters arising out of the identification.
- b. The duty to provide the proper avenue to deal with the exception in the application of the protection, which must consist of a due process of law such as the court. The avenue should be independent from the body set out for the purpose of identification or screening as explained in para 1 above.

### **Determination of Status by the Authority**

The obligation under the principle of *non-refoulement* will require states to determine that a person is in fact a refugee or someone who cannot be returned to enable them to claim protection under the principle. Only those who are prescribed as refugees or in need of international protection are entitled to the protection against return. The determination of a person's status should be carried out by a specific body carrying specific function similar to refugee status determination (RSD) as practiced by contracting states to the CRSR. To help understand the requirement for a mechanism to determine a person's status, it is useful to look at the operation of the CRSR which does not specify any form of refugee determination status. However, to enable a state to accord protection to the right person or refugee, states commonly set up a body/ agency for that purpose.

An important question arise in relation to state's duty to provide screening mechanism or identification process for asylum seekers and refugees, that is, whether by allowing the UNHCR to process the application without the government having any control or participation and involvement at all level of the process will amount to the positive discharge of the duty of state to determine the status of persons not enjoying the protection of its own country? The answer to this question is negative for it is insufficient to shift the burden solely to UNHCR because its power and capability in the country is very limited and it has no power to execute its findings for lack of administrative and prerogative powers as possessed by the executive. UNHCR will never able to replace a government own agency that could be armed with various powers and legislations that can be easily implemented by the executive and then judicially applied.

We shall now proceed to briefly analyse a number of judicial review cases in Hong Kong that deals with the duty of state under the *non-refoulement* principle. Contrary to Malaysia which has never been forced to answer refugees claim in court, these cases are an important comparison and guidance for the application on *non-refoulement* in Malaysian territory. The cases under study were considered together at the High Court of the Hong Kong Special Administrative Region,<sup>17</sup> in which the applicants of all the cases have sought judicial review against the decision of the UNHCR for not recognising them as refugees and then the decline upon appeal. They also sought for a number of declaratory reliefs. In *C v Director of Immigration*, the court needs to determine first, whether the principle of *non-refoulement* is a customary international law; and second, whether the rule applied in Hong Kong and thus requires the authority to administer a refugee determination mechanism. Three issues considered under the case of *C* are useful in understanding the application of customary international law in Malaysia and the duties of state arising out of the obligation. As Hong Kong is not a party to the CRSR,<sup>18</sup> its refugee applications are being process independently by the UNHCR office. It was decided by the court that the principle of *non-refoulement* do exist in customary international law but the rule is found to be in contradiction to Hong Kong law and has been repudiated by Hong Kong authority rendering the rule not to be applicable in Hong Kong. As the result, there is no requirement for Hong Kong to establish a refugee screening mechanism as claimed. At the same time, the court has failed to decide Hong Kong's *non-refoulement* obligation under CAT.

This case is very relevant in the discussion of Malaysia's obligation under the principle of *non-refoulement* because Hong Kong shares some common characteristics with Malaysia. Both jurisdictions are not party to the CRSR while persistently adhering to the policy of not granting refugee status and has no provisions of refugee protection and handling. Refugee registration and determination of application for refugee status are being handled by the UNHCR at the respective territory exclusively without any involvement by the government. It must be pointed out that apart from screening mechanism by the UNHCR, Hong Kong has another parallel mechanism established by the authority to decide the application of protection for torture claims under CAT. Malaysia however, has no screening mechanism established by its own agency.

<sup>17</sup> *C v Director Of Immigration* (Constitutional And Administrative Law List No. 132 Of 2006); *AK v Director Of Immigration* ( Constitutional And Administrative Law List No. 1 Of 2007); *KMF v Director Of Immigration And Secretary For Security* (Constitutional And Administrative Law List No. 43 Of 2007); *VK v Director Of Immigration* (Constitutional And Administrative Law List No. 44 Of 2007); *BF v Director Of Immigration And Secretary For Security* (Constitutional And Administrative Law List No. 48 Of 2007); and *YAM v Director Of Immigration* (Constitutional And Administrative Law List No. 82 Of 2007).

<sup>18</sup> China is a party to the CRSR but Hong Kong resisted the application of the convention in its territory.

The court in C claimed that even though Hong Kong is bound by the principle of *non-refoulement*, the obligation was repudiated by the authority; but offers no reasoning to support this decision, and that the doctrine of incorporation does not apply in Hong Kong mainly due to the inconsistency of the principle to the domestic law of Hong Kong. This inconsistency, according to Hartmann J. was construed from the lack of domestic legislation providing protection for refugees and therefore customary rule of *non-refoulement* is not deemed part of Hong Kong law.

### **Malaysia's Failure to Provide Screening Mechanism for Refugee/ Asylum Seekers Violates its Customary International Law Obligations**

The discussion above has shown that Malaysia has failed to fulfil its obligation under the *non-refoulement* principle as a customary international law rule. Malaysia's absolute and full dependence on UNHCR in processing refugee claims is an insufficient discharge of its duty under the rule. There is lack of transparency and review/ appeal avenue available to applicants.<sup>19</sup> Furthermore, even though a special court is set up to expedite trials of immigration detainees, the purpose is not to determine whether the detainee is in fact a refugee but rather to decide if the person has violated the provisions of the Immigration Act 1956 for illegal entry and stay.

### **CONCLUSION**

Discussion in this study has shown that the position of the *non-refoulement* principle as a customary is apparent and that evidence to cast out its status are not convincing enough. It is also shown clear that Malaysia's action or response to refugees especially refugee children which conform to international standard are not merely humanitarian gestures but have been carried out of its sense of obligation to international norms. The defence of persistent objector's rule cannot be substantiated for lack of clear and consistent protestation. There were in fact actions that further supported Malaysia's sense of legal obligation in connection to the principle of *non-refoulement*. Thus, Malaysia should ensure that its administrative, legislative and judicial branch will strive to satisfy the duties encompassed under the principle.

Protection against return does not only apply specifically to refugees alone as in general, it exists to prohibit the removal, expulsion or extradition of any person to a territory where he/she is liable to face persecution, torture and threat to life and liberty. In fact, the principle of *non-refoulement* is also a component of protection in the prohibition of torture, a peremptory norm of international law or *jus cogens*. Therefore, persons claiming protection against torture shall be treated in accordance with the principle of *non-refoulement*.

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<sup>19</sup> This problem is not exclusive to Malaysia alone. The Hong Kong cases as discussed above also commented on the lack of transparency of the UNHCR's determination process. In Michael Kagan, "'The Beleaguered Gatekeeper: Protection Challenges Posed By UNHCR Refugee Status Determination' (2006) 18 *I.J.R.L.* 1- 43, the writer asserted that UNHCR's work in determining refugee claims was affected by inadequate procedural safeguards; primacy of government policy; and the missing link and connection between UNHCR determination and government conduct and domestic law. The writer believe that similar condition is present in Malaysia.

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