CHAPTER I

THEORETICAL AND CONCEPTUAL FRAMEWORK

There are many Conventions available which directly or indirectly refer to principle of non-refoulement and also available are treaties between countries which refer to Extradition, but in international law both these principles are in conflict with each other. The International customary norm of non-refoulement creates a bar on the countries to deport people back to their countries of origin. The first chapter dwells upon the emergence and the concepts that lie with the principle of non-refoulement and extradition treaties.

In international law the principle of non-refoulement as enumerated in Article 33(1) of the Convention on the Status of Refugees is the only document where one finds a direct reference to this principle regardless of other conventions which generally does not refer to the so called principle. Therefore, it is pertinent to note the importance of growth and emergence of principle of non-refoulement.

Refugee problems have again cropped into the spotlight with the recent Syrian Refugee crisis. The death of Alan Kurdi, a three-year-old Syrian boy, made headlines around the world, and bought into light the plight of Syrian refugees around the around. Moreover, the travel ban imposed by the U.S. president has called into question the obligation of non-refoulement owed under international law, and whether a State can completely block out refugees for a certain period. Debates on non-refoulement have become a part of the mainstream academic discussion all over the world.

I.1. BASIS FOR REFUGEE PROTECTION

Refugee problems have always existed, but awareness of the responsibility of the international community to provide protection for refugees dates only from the time of the League of Nations.[10]The League of Nations defined refugees specifically in relation to each particular country.[11] However, World War II created a huge refugee problem within Europe. Many people were forcefully displaced from their home countries, and no individual country could deal with the massive influx of people.[12] This prompted the United Nations to hold a conference in Geneva (Switzerland), which led to the creation of the Convention Relating to the Status of Refugees 1951.[13] The Convention was drafted by a combination of United Nations organs, Ad Hoc committees, and Conference of Plenipotentiaries.[14]The United Nations General Assembly established UNHCR providing for the international safeguards and call for an end to the problems of refugees.[15]This office is of a non-political character, humanitarian and social and is to relate to groups and categories of refugees.

The main purpose of the 1951 Refugee Convention is to endeavour to guarantee refugees the widest possible exercise of the fundamental rights and freedoms enshrined in the Charter of the United Nations[16] and Universal Declaration of Human Rights.[17]

[10] Erika Feller, "The Evolution of the International Refugee Protection Regime", 5 Journal of Law & Policy 129 (2001).
[11] *Id.*
[12] Wayan Parthiana, "Refugee and Extradition: Could a Refugee be Extradited", 7 Indonesian Journal of International Law 670 (2009)
[13] Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137 (in force 22 April 1954) [hereinafter Refugee Convention].
[14] James C Hathaway, "The Rights of Refugees under International Law", Cambridge University Press, 2nd Ed., 1991
[15] Goodwin-Gill & Jane Mcadam, "The Refugee in International Law", (Oxford University Press, 3rd ed., 1983).
[16] United Nations Charter, 1945, 1 U.N.T.S. XVI. (Hereinafter U.N. Charter); See also, Preamble, Refugee Convention.
[17] Universal Declaration of Human Rights (UDHR), Dec. 10, 1948, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810, See also, Sir Elihu Lauterpacht and Daniel Bethlehem, "The Scope and Content of the Principle of Non-Refoulement: Opinion", UNHCR, http://www.unhcr.org/419c75ce4.html (last seen on 6 Mar. 2017).

The scope of the 1951 Refugee convention was restricted to events which occurred before 1951, and because of events which occurred in Europe. Art 1(2) of the Convention relating to status of Refugees 1951 lays down the definition of refugees as,

> *"As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."*[18]

Though the situation of in Europe improved, refugee problems started cropping up in other parts of the world. In light of the new developments, a Colloquium on Legal Aspects of Refugee Problems was organized in Bellagio, Italy, in April 1965.[19] The meeting concluded that the 1951 Convention must be amended to provide for the new refugee situations, and overcome the discrepancy between the Convention and the Statute of Office of High Commissioner of Refugees.[20] Accordingly, it was agreed that a new protocol should be adopted to make the necessary changes. This paved way for the passage of The 1967 Protocol to the Convention Relating to the Status of Refugees [21] that amends Art. 1(2) which defines a refugee. The new definition removes the temporal and geographic limitations, eliminating the requirement that it should have been because of events occurring in Europe and before 1951. The aim of the said Protocol was to guarantee that equivalent treatment must be rendered to all "refugees," irrespective of "the" dateline of 1 January 1951. At present 145 countries are signatories to the 1951 Refugee Convention and 146 countries are signatories to the 1967 Protocol.

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[18] Art. 1, Refugee Convention.
[19] Lauterpacht, *supra note* 17.
[20] UNHCR, Colloquium on the Legal Aspects of Refugee Problems, Note by the High Commissioner, A/AC.96/INF.40, 5 May 1965.
[21] Protocol Relating to the Status of Refugees, 31 January 1967, 606 U.N.T.S. 267 (in force 4 Oct. 1967) [hereinafter 1967 Protocol].

Art. 1(F) of the 1951 refugee convention contains the exclusion clauses and the grounds on which a person can be denied refugee status:

> *F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:*
>
> *(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;*
>
> *(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;*
>
> *(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.* [22]

The principle of non-refoulement is the cornerstone of refugee law; it prohibits countries from refouling individuals within their State to another state if there is a real risk is violation of certain fundamental rights. The principle has also been enshrined in various other International Human Rights instruments. A state's non-refoulement obligations are usually invoked by an individual when he is to be deported to another state, however, this is not an exclusive ground, and can be used in any situation when a state exercises exclusive control over a person.[23] It extends to the idea of chain refoulement, indirect removal to the place of persecution.[24] It imposes a high to ensure that the person is not extradited to a third county where he may be persecuted.

[22] Art. 1(F), Refugee Convention 1951.
[23]Emanuela-Chiara Gillard, "There's No Place like Home: States' Obligations In Relation To Transfers of Persons,"available at: https://www.icrc.org/eng/assets/files/other/irrc-871-gillard.pdf (last seen on 6 Mar. 2017).
[24]Sam Blay, "Public International Law: An Australian Perspective" (Oxford University Press 2nd ed. 2005).

I.2. PROTECTION OF NON-REFOULEMENT UNDER INTERNATIONAL LAW

The principle of non-refoulement forms the underlying basis of laws relating to asylum and refugee problems internationally. Taking a clue from the privilege to look for and to call for, in different nations, the procedure of asylum, as provided in Article 14 of the Universal Declaration of Human Rights, this guideline mirrors the dedication of nations to guarantee in entirety, everyone the enjoyment of core human rights, such as, "the rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of person." Apart from the above listed rights, other rights are debilitated, in an event of an evacuee returning back to persecution.

The idea of Non-refoulement is vested in universal, and subsequent regional international refugee instruments.

I.2.i. Protection of Non-refoulement under Refugee Convention

Art. 33 of the Refugee convention 1951 and the 1967 Protocol deals with the principle of non-refoulement under International Law. Art. 33 of the Refugee Convention States,

> *"1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*
>
> *2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."*[25]

[25] Art. 33. Refugee Convention.

This principle is fundamental to the convention that no reservation is permissible from the provision.[26] Art. 33 is an acknowledgment of the international system to recognize the necessity of refugees to stay where asylum is sought. Obligation arising out of the said concept of non-refoulement must not be mixed with the right to seek asylum from protection. "*Non-refoulement"* merely forbids such actions which compel refugees to be refouled back to the place where persecution is feared, it does not impose compelling duty on states to "receive refugees."[27] It's a negative right not to *refoule* individuals back to a State where they may be persecuted. However, state's still have the right to *refoule* an individual back to a State where he does not face a risk of persecution.[28]

Some scholars have argued that there is a right of entry that flows from Art. 33 of the Convention,[29] where there exists a pertinent risk of an individual being precluded from entering at the frontiers, which then exposes the refugee to the jeopardy of persecution for a convention ground. Art. 33 also amount to a de facto duty to admit the refugee, since admission is normally the only means of avoiding the impermissible consequence of exposure to risk. [30]

The protection under Art. 33 exist only as long as the risk of persecution continues. The principle of non-refoulement does not compel a state to allow a refugee to remain in its territory if the risk has ended. It is only a momentary status which exists till the time the fear of 'persecution' exists.[31]

Article 33 forms one of the fundamental and essential provisions of the Refugee Convention, which excludes reservations to be made. Article I (1) of the 1967 Protocol thus places an obligation on contracting States. Contrasted to some of the Articles of the Convention the application of Art. 33 are independent of the legal stay of an asylum seeker inside the terrain of a State. According to the phrase *"where his life or freedom would be threatened",* the *travaux préparatoires* suggest that the

[26] Art. 42(1). Refugee Convention.
[27]Lauterpacht, *supra note* 17.
[28]Hathaway, *supra note* 14.
[29] Hathaway, *supra note* 14.
[30] Hathaway, *supra note* 14.
[31] R v. Secretary of State for the Home Department, ex parte Yogathas, [2002] UKHL 36 (UK HL, Oct. 17, 2002).

intention was not to provide for a "stricter criterion than the *words" "well-founded fear of persecution"* identified in the definition of the term "*refugee*" in Article 1 A (2). Such a provision was added for a reason so as to provide clarity on the application of the *non-refoulement* principle not merely in respect of the country of origin but also to any country where a person has a sufficient reason to fear persecution. [32]

I.2.ii. Protection of Non-refoulement under International Instruments

Besides the 1951 Refugee Convention, the non – refoulement principle has also provided for by several other international legal instruments aimed at protecting the rights of refugees.

1. The Principles Concerning Treatment of Refugees,[33] adopted by the Asian African Legal Consultative Committee enshrines *non-refoulement* in Art. III (3),

> *"No one seeking asylum in accordance with these Principles should, except for overriding reasons of national security or safeguarding the populations, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory."*[34]

2. The Declaration on Territorial Asylum [35] adopted unanimously by the United Nations General Assembly in 1967 , provides for *non-refoulement* under Art. 3 as follows,

> *"No person referred to in article 1, paragraph 1 [seeking asylum from persecution], shall be subjected to measures such as rejection*

[32]UN High Commissioner for Refugees (UNHCR), UNHCR Note on the Principle of Non-Refoulement, November 1997, available at: http://www.refworld.org/docid/438c6d972.html
[33]Bangkok Principles on the Status and Treatment of Refugees, 31 December 1966 [hereinafter Bangkok Principles].
[34] Art. III (3), Bangkok Principles.
[35]Declaration on Territorial Asylum, Art 3, G.A. Res. 2312, 22 U.N GAOR Supp. (No. 16) at 81, U.N Doc.A/6716" (1967) [hereinafter Declaration on Territorial Asylum].

at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution."

3. The Organization of Africa Unity Convention Governing the Specific Aspects of Refugee Problems in Africa,[36] espouses the principle of *non-refoulement* under Art. II (3), which states,

"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 for the reasons set out in Article I, paragraphs 1 and 2 [concerning persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, or who is compelled to leave his country of origin or place of habitual residence in order to seek refuge from external aggression, occupation, foreign domination or events seriously disturbing public order]."[37]

4. The Cartagena Declaration of 1984[38] under Section III, para 5 states,

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

Non-refoulement has also been widely recognized under human rights law and has been incorporated into various Human rights instruments. *Non-refoulement* is also a constituent part of the prohibition on torture or cruel, inhuman or degrading treatment

[36]Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 U.N.T.S. 45 (in force 20 Jun. 1974) [hereinafter OAU Convention].
[37] Art. II(3), OAU convention.
[38]Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984 [hereinafter Cartagena Declaration].

or punishment.[39] Art. 3 of the Torture Convention expressly provides that,

> *"No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."*[40]

Art. 7 of the International Covenant on Civil and Political Rights,[41] provides that no person shall be shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[42] The UN Human Rights Committee in its General Comment No. 20 (1992), has interpreted it to include the aspect of *non-refoulement* as,

> *"States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement."*

Non-refoulement has also been included in various conventions relating to extradition, European Convention on Extradition, 1952,[43] provides that a state must not extradite, if it believes that the individual is going to be prosecuted or punished on account of his race, religion, nationality or political opinion," or that that there would be a prejudice to a person's position for any of these existing reasons.[44]

Although having a clear mention of the prohibitions, the bodies monitoring human rights believe that in a situation where, a state takes action, it would then result in blatant violation of its obligations thus resulting in exposing an individual to the risk of ill-treatment proscribed by the relevant human rights instrument. [45] In such

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[39]Gillard, *supra note* 23.
[40]Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, G.A. res. 39/46, 39 U.N. G.A.O.R. Supp. (No. 51) at 197, U.N. Doc. A/39/51; 1465 U.N.T.S. 85 [hereinafter Torture Convention].
[41] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S.171, 1057 U.N.T.S. 407. [hereinafter ICCPR].
[42] Art. 7, ICCPR.
[43] European Convention on Extradition, 13 December 1957, ETS 24. (in force 18 April 1960) [hereinafter European Convention on Extradition].
[44]Art. 3(2), European Convention on Extradition
[45]Gillard, *supra note* 23.

circumstances, a state would be held to be violating its obligations as imposed under human rights law, as a violation is said to have occurred not only by its own acts but also if it knowingly places a person in a situation where it is probable that his or her rights will be violated by an another state. This is based on the requirement that all the member States should provide for the security of rights provided in the Covenant to all the persons residing in their territory.[46]

By taking into account the 1951 Convention, Torture Convention and the International Covenant on Civil and political rights,[47] 169 countries, forming a vast majority of the international community are bound by the principle of non-refoulement through one treaty or the other. This number would further increase, when other international legal instruments are taken into consideration.

I.3. BENEFICIARIES OF THE PROTECTION

Under Art. 3 of the 1933 Convention, only refugees who have been permitted to reside regularly were entitled to claim the prohibition of *refoulement.*[48] Accordingly, the original drafts of non-refoulement contained in the 1951 Refugee Convention seemed also included this restriction.[49] Therefore, this prohibition applied to the states granting asylum to the refugees arriving in their territories.

However, the text submitted by a non- governmental organization called Agudas Israel World Organization was selected by the Ad Hoc Committee on Statelessness and Related problems.[50] The draft submitted by Agudas differed from the previous drafts, as it was a combination of concepts of non-refoulement and non- return to the risk of persecution into a single provision for all refugees, without any need for authorised arrival. As this fundamental conceptual shift, did not attract any objects it

[46]Joseph v. Canada , Case 11.092, Report No. 27/93, Inter-Am.C.H.R., OEA/Ser.L/V/II.85 Doc. 9 rev. at 32 (1994), Inter-American Commission on Human Rights (IACHR), 6 October 1993.
[47]International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 1057 U.N.T.S. 407. [hereinafter ICCPR].
[48]Hathaway, *supra note* 14; "Convention relating to the International Status of Refugees, 159 LNTS 3663, done Oct. 28, 1933, entered into force June 13, 1935 (1933 Refugee Convention)" [hereinafter 1933 Refugee Convention], at Art. 3.
[49]United Nations, Proposal for a Draft Convention, U.N. Doc. E/AC.32/2, Jan. 17, 1950.
[50] The text was selected over the official drafts submitted by other governments. Hathaway, *supra* note 14, at 303.

was assumed that the prior permission to reside was not a relevant issue, and proceeded on that basis.[51] In an event where, individuals are accorded a formal recognition of refugee status either under the 1951 Convention or the 1967 Protocol, the observation of the principle of non-refoulement must not pose a problem.

In this regard, attention should be drawn to the fact that the status determined of a refugee for his stay in a country is just of a declaratory nature. Therefore, this means that, even if there is no such procedure for recognition a refugee is still protected by the concept of non-refoulement. Absence of a formal recognition as a refugee does not preclude that the person concerned possesses refugee status and is therefore protected by the principle of non-refoulement.

Further, the non-refoulement principle calls for contracting states to protect asylum applicants against return to a place where there exists a threat to their life or freedom till an assurance has been received by the state that there does not exist any circumstances of such threats in the mere future and that, therefore, they are not refugees anymore. The fact being that initially, every refugee possesses a character of an asylum applicant; therefore, to protect refugees, it becomes essential that asylum applicants are treated on the assumption of being refugees until determination of their position has been determined. Absence of this practice in place, the non-refoulement principle would fail to afford protection for refugee individuals, as they would apprehend being cast off at the borders or otherwise sent back to the place where persecution is feared, on the grounds that their claim for refugee status had failed. The said core principle finds its application to all refugees, regardless of them being officially recognized or not that is, even before a decision can be made on an application for refugee status has been specifically acknowledged by the UNHCR Executive Committee in its Conclusion No. 6 on Non-Refoulement. And indeed, where a special procedure for the determination of refugee status under the 1951 Convention and the 1967 Protocol exists, the applicant is almost invariably protected against refoulement pending a determination of his or her refugee status.

[51]UN High Commissioner for Refugees, UNHCR Note on the Principle of Non-Refoulement, http://www.refworld.org/docid/438c6d972.html (last seen on 19 March 2016).

However, a variable state of affairs exists where, the principle of non-refoulement is observed, but its observance creates a problem. This may in return cause a difficulty for the individual concerned as he may tend to find himself in a State which is not a party to the 1951 Convention or the 1967 Protocol, or which, although a party to these instruments, has not established a formal procedure for determining refugee status. The authorities of the country of asylum may have allowed the refugee to reside there with a normal residence permit or may simply have tolerated his or her presence and not have found it necessary formally to document his or her recognition as a refugee. In other cases, the person concerned may have omitted to make a formal request to be considered a refugee.

Such situations call for the strict rigorous observance of the principle of non-refoulement, irrespective of the formal documentation of the concerned individual as a refugee. However, the recognition of a person as a refugee, whether under UNHCR's mandate or under the 1951 Convention or the 1967 Protocol, is declaratory in nature, and, second, that the principle of non-refoulement is a norm of customary international law.

Providing safe haven to people fleeing armed conflict or civil strife, regardless of them being under the mandate of 1951 Convention, is commonly accepted by States as a part of their humanitarian duty. Such protection provided to individuals who have not been identified as refugees are given by the states on a humanitarian ground or under an obligation under international law. It is pertinent to note that most of the above countries are signatories to international conventions which could be invoked in certain circumstances against the return of some non-convention refugees to a place where their lives, freedom or other fundamental rights would be in jeopardy, notably the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or the European Human Rights Convention. Although these instruments may not provide protection against refoulement as broad as that provided in Africa by the OAU Refugee Convention, they give rise to international obligations towards some persons in need of international protection who would not come within the terms of the 1951 Convention.

This issue also relates to mass influxes and the concept of temporary protection. The concept of temporary protection has been well-defined as a means, in situations of large-scale influx and in view of the impracticality of conducting individual refugee status determination procedures, for providing protection to groups or categories of persons who are in need of international protection. It is primarily conceived as an emergency protection measure of short duration in response to large-scale influxes, guaranteeing admission to safety, protection from non-refoulement[52] and respect for an appropriate standard of treatment. While the practice of granting temporary refuge, or asylum, on a temporary basis to refugees has often been employed in situations of large-scale influx in various regions, UNHCR first formally recommended the granting of temporary protection to persons fleeing the conflict and human rights abuses in the former Yugoslavia.

The aspect of non-refoulement and its application to the people requiring "temporary protection" find its relevance by an analysis of the reasoning that, among its beneficiaries, there exist refugees in the sense of the 1951 Convention and also because they are asylum-seekers who have not had their claims determined. This linkage is well-recognized in The EU proposal concerning temporary protection, submitted by the Commission, which finds an express mention of the non-refoulement principle in its preamble.

The obligation towards the non-refoulement principle, therefore, exists even before the State has formally assessed refugee status.[53] It is the de facto circumstances and not certified official authentication of the circumstances, which escalates refugee status.[54] Unfeigned refugees may be denied their legal rights, pending formal assessment by the State party. It is often the case that formal status determination is a drawn-out process of verification by domestic authorities. Without immediate assessment, the State cannot be able to implement the Convention in good faith. In order to provide for this, though other convention rights may be dependent on formal

[52]Executive Committee Conclusion No. 22 para. II A 2. In all cases the fundamental principle of non-refoulement - including non-rejection at the frontier - must be scrupulously observed

[53] Brian Gorlick, "The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees", 11 International Journal of Refugee Law 47 (1999); "UNHCR's Global Consultations on International Protection", 116 (Cambridge University Press, 2003); Goodwin, *supra note* 15.

[54] Hathaway, *supra note* 14.

determination, a small number of rights, including the non-refoulement are not dependent on formal determination.[55] In principle, it would apply to all persons irrespective of whether they fall under the strict definition of refugee, and good faith implementation of the principle requires that a State must consider whether a person is entitled to protection before refouling them.[56]

I.4. NATURE OF PRINCIPLE OF NON-REFOULEMENT

The duty of non-refoulement must be derived from a combined reading of Art. 1 and Art. 33 of the Refugee Convention. Art. 1 defines who is a refugee and restricts protection to persons who have committed crimes, and are trying to escape valid prosecution. Art. 33 define the scope and extent of a state's duty not to *refoule* an individual back to a State where he faces real risk of persecution.

There is an inherent limitation placed under Art. 33, protection under it can only be claimed by persons who are refugees, hence no rights can be claimed by individuals who are hitherto to leave their country. Art. 1 defines refugees as persons who are outside the country of their nationality.[57]

The issue was discussed in the European *Roma Rights Centre case*,[58] wherein the court deliberated on the pre-entry clearance procedure followed by British authorities at the Prague airport. If the British authorities felt that they would claim asylum on reaching United Kingdom, they would not be refused entry. It was argued that the method was discriminatory towards Romas, who were more likely to be refused entry under the procedure.[59]

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[55]UNHCR, P. Weis, The Refugee Convention, 1951: The Travaux Pre ´paratoires Analysed with a Commentary by Dr. Paul Weis (posthumously pub'd., 1995) (Weis, Travaux), at 303, 341.

[56]Susan Kneebone, "Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives", (Cambridge University Press, 1st ed., 2009).

[57]Hathaway, *supra note* 14.

[58] 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. [Hereinafter European Roma Rights case].

[59] Hathaway, *supra note* 14.

Though it was accepted that the main aim was to reduce the number of asylum seekers in The U.K, and majority of them being Romani ethnic origin, the key issue that the Court had to consider was if the scheme so premeditated to prevent asylum claims in the U.K was inconsistent with U.K's obligation under international law.[60] The Court of Appeal answered in the negative, it held that Art. 33 of the Convention had no direct application to the Prague operation. Art. 33only applied to refugees, and a refugee is defined as someone necessarily outside the country of his nationality". It forbids refoulement of an individual to the frontiers of a state where he may face persecution and, it does not include "an action which causes someone to remain on the same side of the frontier as they began; nor can such a person be said to have been returned to any frontier.[61]

The interpretation of the court is legally sound,[62] though it points out the gap in protection between non-refoulement and the idea of access to asylum. This gap is usually covered by Art. 12 of the ICCPR and other international human right instruments.

Similarly, Art. 33 does not protect asylum seekers from *non-entree',* measures which places visa controls on nationals of refugee producing States.[63] Visa controls include crude mechanisms that fail to distinguish between persons at risk of persecution and others.[64]

Non-refoulement must also be examined in light of the aspect of extra territoriality. It is common for States to adopt interceptions, interdictions and process asylum seekers away from the mainland.[65] As can be inferred from the *Roma Rights case*,[66] Art. 33 does not have extra territorial application, however most scholars state that Art. 33 does indeed have extra territorial application.[67] This is based on the idea that the State is responsible when it exercises effective control over territory or

[60] Hathaway, *supra note* 14.
[61]European Roma Rights case, *supra note* 58
[62]Hathaway, *supra note* 14.
[63]James C. Hathaway and Thomas Gammeltoft-Hansen, "Non-Refoulement in a World of Cooperative Deterrence", Law & Economics Working Papers 106 (2014).
[64]Hathaway, *supra note* 14.
[65] Kneebone, *supra note* 56.
[66]European Roma Rights case, *supra note* 58
[67] Goodwin, *supra note* 15.

individuals.[68]

In the case of *Sale v. Haitian Centres Council*[69] a restraining order was sought against an Executive Order which directed the Coast Guard to intercept vessels illegally transporting passengers from Haiti to the U.S. and to return those passengers to Haiti. [70] Devoid of determination of their status as refugees, but this could be undertaken only beyond the territorial sea of the United States. The Court held that Art. 33 obligated the signatory state only with respect to aliens within its territory, and Art. 33 do not have extra territorial application. The Court primarily relied on national legislation to uphold the executive order. It is due to this reason, that the judgement has been severely criticized by scholars, and the popular scholarly opinion remains that Art. 33 have extra-territorial application.[71]

Apart from these drawbacks, non-refoulement provides robust protection to refugees. It is not only limited to the expulsion of refugees, but also includes *non-admittance* at the frontiers of the State. In fact the 1933 Convention, on which the 1951 convention has been based on, explicitly codified this obligation under Art. 3.[72] This comprehensive definition is in accordance with the executive powers enjoyed by border authorities of State to admit or deny entry to refugees. [73] The UNHCR directives and various debates of the Ad Hoc Committee on Statelessness and Related Problems show a clear commitment to this basic understanding that non-admittance at the border is normally impermissible.[74] However, there is an absence consensus on the point of law as to whether *non-admittance* at the border would constitute a breach of Art. 33 and many States argue the contrary.

I.4.i. Origin of the Rule

The idea that a State ought not to return persons to other States in certain circumstances is of comparatively of a recent origin. Back on the past, there existed

[68] ICCPR, Art. 2; Goodwin, *supra* note 15 at 245.
[69] State v. Haitian Ctrs. Council 509 U.S. 155 (1993).
[70] *Id.*
[71] Kneebone, *supra note* 56.
[72] Art. 3, 1933 Refugee convention.
[73] Hathaway, *supra note* 14.
[74] Hathaway, *supra note* 14.

formal agreements between sovereigns for the reciprocal surrender of subversives, dissidents, and traitors. [75] In the early- to mid-nineteenth century, the concept of asylum and the principle of non-extradition of political offenders began to emerge, in the sense of protection which the territorial sovereign can, and perhaps should, accord. At that time, the principle of non-extradition reflected popular sentiment that those fleeing their own, generally despotic, governments for political reasons were worthy of protection. Not until after the First World War, however, did international practice begin to recognize an emerging principle of non-return of refugees, and only in 1933[76] does the first reference to the principle that refugees should not be returned to their country of origin occur in an international instrument. [77] In Article 3 of the Convention relating to the International Status of Refugees, the contracting parties undertook not to remove resident refugees or keep them from their territory, by application of police measures, such as expulsions or non-admittance at the frontier (refoulement), unless dictated by national security or public order. Moreover, in the second paragraph, each State undertook in any case not to refuse entry to refugees at the frontiers of their countries of origin. Only eight States ratified this Convention; three of them, by reservations and declarations, emphasized their retention of sovereign competence in the matter of expulsion, while the United Kingdom at that time expressly objected to the principle of non-rejection at the frontier.

Back in 1936 and 1938, there existed agreements regarding refugees from Germany which contained limitations on expulsion or return of refugees. [78] These instruments varied slightly: broadly, refugees required to leave a contracting State were to be allowed a suitable period to make arrangements; lawfully resident refugees were not

[75] Goodwin-GiII, G.S, "International Law and the Movement of Persons between States", 143 (1978).
[76]In the 1933 Convention Relating to the International Status of Refugees, Article 3 states that the contracting state-parties undertook not to remove resident refugees from their territory. Only eight states ratified the Convention.
[77]Under a 1928 arrangement (89 LNTS no. 2005), States had adopted a recommendation (no. 7), 'that measures for expelling foreigners or for taking such other action against them be avoided or suspended in regard to Russian and Armenian refugees in cases where the person concerned is not in a position to enter a neighbouring country in a regular manner '. However, the recommendation was not to apply to a refugee who had entered a State in intentional violation of national law.
[78]Art. 4, Provisional arrangement concerning the status of refugees coming from Germany, 1936 : 171 LNTS no. 3952; official text in English and French . The arrangement was definitively signed by seven States; the United Kingdom excluded refugees subject to extradition proceedings from the ambit of art. 4, and likewise, for most purpose, refugees admitted for a temporary visit or purpose. Art. 5, Convention concerning the Status of Refugees coming from Germany, 1938 : 192 LNTS no. 4461 ; official texts in English and French . The Convention was ratified by only three States; the United Kingdom repeated its 1936 reservations.

to be expelled or sent back across the frontier [79] save "for reasons of national security or public order"; and even in such cases, governments undertook not to return refugees to the German Reich, [80] unless they have been warned and have refused to make the necessary arrangements to proceed to another country or to take advantage of the arrangements made for them with that object.

Moreover, providing for administrative arrangements to make easy local incorporation and relocation were the principle focus during this period. The need for protective principles' began to emerge, but limited ratifications of instruments containing equivocal and much qualified provisions effectively prevented the consolidation of a formal principle of non-refoulement.

Article 45 of the 1949 Geneva Convention on the Protection of Civilian Persons provides: "Protected Persons shall not be transferred to a Power which is not a party to the Convention. In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs."

Post Second World War, a new era started. In February 1946, the United Nations General Assembly expressly declared that refugees or displaced persons who have expressed valid objections to returning to their country of origin should not be compelled to do so[81]. This was followed by the creation of the International Refugee Organization as a specialized agency, charged with resolving the problems of displacement left from the Second World War, the Universal Declaration of Human Rights proclaimed the right to seek and to enjoy asylum from persecution, and in due course the United Nations turned its attention to new instruments and agencies. [82]

Finally, Article 33 was incorporated in the 1951 UN Refugee Convention which provides for the principle of non-refoulement and states: “No Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontier of

[79] The 1938 Convention substituted 'measures of expulsion or reconduction...
[80]The 1936 arrangement read: 'refugees shall not be sent back across the frontier of the Reich '; the 1938 Convention provided that States parties 'undertake' not to reconduct refugees to German territory'.
[81] UNGA Res. 8(1), 12 Feb 1946 para. (c)(ii).
[82]See also the Geneva Convention Relative to the Protection of Civilian Persons in Time of Uar (Fourth Convention of 12 August 1949)

territories where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion."

The most important change which was brought about in the principle of non-refoulement by the 1967 Protocol, was it did away with the time and geographical limitation stipulated in the 1951 Convention, which had the effect of covering individuals recognized as refugees after the 1st of January 1951 that too without any geographical limitation.

I.4.ii. Non-Refoulement as a principle of Jus Cogens

The concept of jus cogens in international law encompasses the notion of peremptory norms in international law. [83]Jus cogens comprise of a set of certain overriding principles in international law that form a body of jus cogens.[84]In accordance with Article 53 of the VCLT,[85] any treaty formed in violation of jus cogens, will be void. Furthermore, it goes on to define jus cogens as a norm accepted by the international community of States as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of international law having the same character.[86]

As analyzed by Professor B.S. Chimni,[87] Guy S Goodwin is of the opinion that non-refoulement has developed as a principle of jus cogens under international law. It is argued that firstly, the duty of non-refoulement extends beyond expulsion and return

[83] "Peremptory" is defined as: "Imperative; final; decisive; absolute; conclusive; positive; not admitting of question, delay, reconsideration or of any alternative. Self-determined; arbitrary; not requiring any cause to be shown." Black's Law Dictionary (Sixth Edition, 1990), p.1136.
[84]Ian Brownlie, "Principles of Public International Law", 515 (Clarendon Press, Fifth Edition, 1998).
[85]Vienna Convention on the Law of Treaties, art. 53, opened for signature 23 May 1969, 1155 U.N.T.S. 331, (in force 27 January 1980) [hereinafter VCLT]Article 53 Treaties Conflicting with a Peremptory Norm of General International Law (JUS COGENS) .If a treaty conflicts with a peremptory norm of international, it will be void. Peremptory norms of international law is a norm which is recognized and accepted by the international community as a whole and form a norm which cannot be derogated from, and can only be modified by a subsequent norm of similar character.
[86]Art. 53, Vienna Convention on the Law of Treaties, art. 53, opened for signature 23 May 1969, 1155 U.N.T.S. 331, (in force 27 January 1980) [hereinafter VCLT] Article 53 Treaties Conflicting with a Peremptory Norm of General International Law (JUS COGENS)If a treaty conflicts with a peremptory norm of international, it will be void. Peremptory norms of international law is a norm which is recognized and accepted by the international community as a whole and form a norm which cannot be derogated from, and can only be modified by a subsequent norm of similar character.
[87]B.S. Chimni, "International Refugee Law: A Reader," Sage Publications, 1st ed. 2000.

and applies to measures such as rejection at the frontier[88] and even extradition.[89] Secondly, it is contended that, the principle of non-refoulement has been further established in international law, by extending its application to a broader category of refugees.[90]

The principle of non-refoulement has independent application i.e. it is not dependent on any formal determination of refugee status by a state or an international organization. [91] A State which returns foreign nationals to a country, which is known to produce refugees, or have a consistently poor human rights record, or to be in a civil war or situation of disorder, must necessarily justify its actions in light of the conditions prevailing in the country of origin.[92] Furthermore, a State may be held liable for breach of duty of non-refoulement regardless of notions of fault, either directly for the act of omission of its officials, or indirectly where it is legal and administrative systems fail to provide a remedy which is required by an applicable international standard.[93]

Lauterpatch on the other hand, relies on treaties in order to establish non-refoulement as a custom. The International Court of Justice in the *Nicaragua case*[94] held that the exclusion of threat or use of force in Article 2(4) of the UN Charter also applies as a principle of customary international law.[95] In the *North Sea Continental Shelf Case*,[96] the Court held that the rules laid down in a treaty or a convention, can in certain cases be regarded as "*as reflecting, or as crystallizing, received or at least emergent rules of customary international law.*"[97] Further, the Court identified three elements, firstly, the rule should be of a fundamentally norm-creating character such

[88] Article II, para 3 of the OAU Convention. See also Art. 3, Declaration on Territorial Asylum.
[89] Guy S. Goodwin, "Non refoulement and New Asylum Seekers" in Hélène Lambert, "International Refugee Law" (Farnham Publishers, 2010).
[90] *Id*. See also, OAU Convention and Cartagena Convention.
[91] Report of United Nations Law High Commissioner for Refugees.
[92] Goodwin, *supra note* 15.
[93] Ian Brownlie, "System of Law of Nations: State Responsibility", (Clarendon Press 1st ed. 1983).
[94] Military and Paramilitary Activities in and against Nicaragua (The Republic of Nicaragua v. The United States of America), Merits, 1986 I.C.J. 14 (June 27) [hereinafter *Nicar. v. U.S.*].
[95] Lauterpacht, *supra note* 17.
[96] North Sea Continental Shelf (Germany v Denmark), 1969 I.C.J. Rep 3 (20 Feb). Lauterpacht, *supra* note 17.
[97] *Id.*

as could be regarded as forming the basis of a general rule of law.[98] Secondly, even without the passage of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected. Thirdly, State practice should have been both extensive and virtually uniform– and should have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved. Lauterpacht states that all the aforementioned conditions have been fulfilled, thus non-refoulement would amount to a custom.

Scholars have constantly criticized the stand of the Court in the Nicaragua case with regard to opinion juris, as the Court had held that even voting on a General Assembly resolution in the U.N would constitute opinion juris, necessary for a custom.[99] This is due to the fact that States often vote on basis of political considerations, rather than legal considerations, in the General Assembly, thus such a strict standard of opinion juris must not have been laid down.

I.4.iii. Non- Refoulement as Customary Principle of International Law

Art 38(1) (b) of the ICJ statute talks about custom as a source of law. "International custom as evidence of a general practice accepted as law."[100] Custom is a clear and continuous habit of doing certain actions which has grown up under the aegis of the conviction that these actions are, according to international law, obligatory or right.[101] The terms of Art 38(1)(b) makes it clear that there are two essential elements,[102] namely State Practice and *Opinio Juris*.

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[98] *Id.*

[99] Anthony D'Amato, Nicaragua and International Law: The "Academic" and the "Real" (1985), Availableat:http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1134&context=facultyworkingpapes (last seen on 3 Mar. 2016).

[100] Statute of the International Court of Justice, 1945, 1 U.N.T.S. 993, Article 38(1)(b) [hereinafter ICJ Statute];

[101] Sir Robert Jennings and Arthur Watts, "Oppenhiem's International Law" 27 (Oxford University Press, 9th ed, 2008).

[102] C Wilfred Jenks, "The Prospects of International Adjudication", 225 (Oceana Publications, 1st ed. 1964).

State practice refers to a general practice of States under international law. In order to constitute State Practice, uniformity and consistency of practice is required. Even though complete uniformity of practice is not required, substantial uniformity is required.[103] Additionally generality of practice must also be proved,[104] thus ensuring that a significant number of states follow the practice.

Furthermore, opinion juris must be established. *Opinio juris sive necessitates*, refers to the subjective element. In the Lotus case,[105] the ICJ held that State practice must have been based on there being conscious of having an international duty. Therefore, mere State practice would not suffice; this would have to be backed by the evidence of a belief that the practice is rendered obligatory by the existence of a rule of law requiring it.[106]

Kay Hailbronner argues that the UNHCR has frequently observed the principle of non-refoulement to be a peremptory norm.[107] However it is unclear whether UNHCR intended it to be understood as *de lege ferenda* or a state of *de lege lata*.[108] Despite the 1951 Convention being ratified by a large number of countries, states such as Eastern Europe, Asian and Near East have consistently refused to ratify refugee agreements containing non-refoulement clauses.[109] Similarly, the drafting history of the United Nations Declaration on Territorial Asylum and statements made during the 1977 Conference on Territorial Asylum, reflect a reluctance to enter into legally binding obligations to admit large number of refugees on the basis of temporary stay.[110] Furthermore, the UNHCR's extended mandate and its repeated recommendations that de facto refugees must be permitted to remain in the territory and not refouled back would not constitute State Practice. The activities of UNHCR are clear and should not be tangled with State Practice, the UNHCR is a special body

[103]Brownlie, *supra note* 84.2012).
[104]Id.
[105] S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).
[106]North Sea Continental Shelf (Germany v Denmark), 1969 I.C.J. Rep 3 (20 Feb).
[107]1985 Note on International protection, Thirty sixth Session of the Executive committee of the High Commissioner's Pragramme, para. 17, U.N Doc.a/ac.96/660 (1985). See also Note on International Protection, Thirty Fifth Session of the Executive Committee of the High Commissioners's Programme, para. 15, U.N Doc.A/AC.96/643 (1984).
[108]K. Hailbronner, "Nonrefoulement and 'Humanitarian' Refugees: Customary International Law or Wishful Legal Thinking?" 26 Virginia Journal of International Law 858, 128–129 (1986).
[109] Id.
[110] *Ibid.*

entrusted with an obligation to perform benevolent humanitarian errands, and looking after the interest of refugees. Similarly, extension of UNHCR's mandate with regard to de facto refugees would not constitute the necessary opinion juris required to constitute a custom.[111] UNHCR's repeated recommendations can only be considered as a proposal *de lege ferenda*, how the law ought to be. James C. Hathaway has provided a variety of instances, wherein Art 33 of the Convention has come under attack, due to lack of state practice. States have adopted various techniques to repel refugees from the border, such as the push backs executed by the Thai government in response to Vietnamese boat people.[112] Border guards in Austria have the authority to deny entry to refugees who do not come directly from the State to fear persecution. The border guards assess claims, based on limited evidence, and without prescribed guidelines. Similarly, in the case of *State v. Haitian Centers Council*,[113] the U.S Supreme Court upheld that the policy of returning Haitian refugees interdicted in international waters without screening.

I.4.iv. Measures of Refoulement

There exists various course of refoulement and are said to include expulsion/deportation orders against refugees, return of refugees to countries of origin or unsafe third countries, electrified fences to prevent entry, non-admission of stowaway asylum-seekers and push-offs of boat arrivals or interdictions on the high seas.

In cases where refugees or asylum-seekers who may be refugees are subjected, either directly or indirectly, to such measures of return, be it in the form of rejection, expulsion or otherwise, to territories where their life or freedom are threatened, the principle of non-refoulement is said to be violated.

Furthermore, with regards to the nature and purpose of the principle, it also finds its application in extradition law. Thus, unless a refugee is protected against extradition

[111] *Ibid.*
[112] James C Hathaway, "Refugee Rights: Report on a Comparative Survey", (York Lanes Press, 1st ed. 1995).
[113] State v. Haitian Centers Council 113 S.Ct. 2549 1993.

to a country where he or she has reason to fear persecution, such a protection cannot be said to be complete. The principle of non-refoulement that figures in various international instruments is broad enough to cover extradition. This applies in particular as regards the wording of Article 33 (1) of the 1951 Convention. Most extradition conventions also anticipate a safeguard against extradition to countries of persecution.[114]

I.4.v. Territorial application

Since the purpose of the principle of non-refoulement is to ensure that refugees are protected against forcible return to situations of danger it applies both within a State's territory and to rejection at its borders. It also applies outside the territory of States. In essence, it is applicable wherever States act.

It has been argued that the principle of non-refoulement is not binding on a State outside its own national territory, so that a Government may return refugees directly to persecution provided they have not yet reached or crossed its borders. This claim is clearly inconsistent with the purpose, and is contrary to the spirit, of the 1951 Convention and its 1967 Protocol, as well as of international refugee law generally. No such territorial limitation applies, for instance, to UNHCR's mandate to provide international protection to refugees. In fact, UNHCR's position on interdiction-at-sea is that this is inconsistent with the international refugee protection regime, especially since, among those leaving, there may be people who have concerns about their physical security and safety. There must be a possibility for these people to reach safety and have their protection needs assessed and met. Interdiction and compulsory return preclude this.

I.4.vi. Principle of non-refoulement and its Exception

Though the principle of non-refoulement is fundamental it still has certain exceptions appended to it in the Convention itself:

[114] See for instance Article 5 of the European Convention on the Suppression of Terrorism.

Article 33 (2) of the 1951 Convention provides that the benefit of the non-refoulement principle may not be claimed by a refugee 'whom there are reasonable grounds for regarding as a danger to the security of the country ... or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country'. This means in essence that refugees can exceptionally be returned on two grounds: (i) in case of threat to the national security of the host country; and (ii) in case their proven criminal nature and record constitute a danger to the community. The various elements of these extreme and exceptional circumstances need, however, to be interpreted.

With regard to the 'national security' exception (that is, having reasonable grounds for regarding the person as a danger to the security of the country), while the evaluation of the danger remains within the province of the national authorities, the term clearly implies a threat of a different kind than a threat to 'public order' or even to 'the community'.[115] It follows from state practice and the Convention *travaux preparations* that criminal offences without any specific national security implications are not to be deemed threats to national security, and that national security exceptions to non-refoulement are not appropriate in local or isolated threats to law and order.

With regard to the interpretation of the 'particularly serious crime'-exception, two basic elements can be focused upon. First, as Article 33 (2) is an exception to a principle, it is to be interpreted and implemented in a restrictive manner, as confirmed by Executive Committee Conclusion No. 7. Second, given the seriousness of an expulsion for the refugee, such a decision should involve a careful examination of the question of proportionality between the danger to the security of the community or the gravity of the crime, and the persecution feared. The application of this exception must be the last recourse to deal with a case reasonably.

For Article 33 (2) to apply, therefore, it is generally agreed that the crime itself must be of a very grave nature. UNHCR has recommended that such measures should only be considered when one or several convictions are indicative of the basically criminal,

[115]In *Reg. vs. Bouchereau, 2CMLR 800, 1977*, the European Court of Justice ruled that there must be a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.

persistent nature of the person and where other measures, such as detention, assigned residence or resettlement in another country are not practical to prevent him or her from endangering the community. Read in conjunction with Articles 31 and 32 of the 1951 Convention, a State should allow a refugee a reasonable period of time and all necessary facilities to obtain admission into another country, and initiate refoulement only when all efforts to obtain admission into another country have failed.

In conclusion, in view of the serious consequences to a refugee of being returned to a country where he or she is in danger of persecution, the exception provided for in Article 33 (2) should be applied with the greatest caution. It is necessary to take fully into account all the circumstances of the case and, where the refugee has been convicted of a serious criminal offence, anything that provides for their reintegration should be looked after for.

It should also be noted that such exceptions based on factors relating to the person concerned do not figure in other instruments, neither in the international refugee instruments nor in international human rights law. The 1969 OAU Convention, for example, does not provide for expulsion or refoulement of refugees under any circumstances. Instead, it calls on Member States to appeal to other Member States should they find difficulty in continuing to grant asylum.

I.4.vii. Non-refoulement and the Safe Third Country Concept

One of the problems that may arise in applying the safe third country concept to asylum-seekers is the difficulty of determining whether another country in which an asylum-seeker can reasonably be expected to request asylum, will, in fact, accept responsibility for examining his or her request and, if appropriate, granting asylum. UNHCR is aware of a number of instances where asylum-seekers have been refused admission and returned to a country through which they had passed, only to be summarily sent onwards from there, without an examination of their claim, either to their country of origin or to another, clearly unsafe country. Where asylum-seekers are returned to third countries, this needs to be implemented with due regard to the principle of non-refoulement. Without the prior consent and the co-operation of the

country to which an asylum-seeker is returned, there is a grave risk that an asylum-seekers claim may not receive a fair hearing there and that a refugee may be sent on, directly or indirectly, to persecution, in violation of the principle of non-refoulement and of Article 33 of the 1951 Convention.

In UNHCR's view, the proper application of the safe third country concept requires identifying a country that will actually accept responsibility for examining the asylum request and hence ensure that refugees and asylum-seekers receive 'somewhere' the protection they require.

If asylum-seekers are to be returned to a country where effective protection is conditional upon the determination of the asylum claim, then assured access to a refugee status determination procedure that is consistent with the 1951 Convention and 1967 Protocol is a prerequisite for such return. It is accordingly necessary to establish both that access to the refugee status determination procedure will be granted and that the procedure includes the necessary safeguards to ensure compliance with Article 33 of the 1951 Convention, including safeguards to ensure respect for the principle of non-refoulement in case the asylum-seeker is sent to yet another country on the grounds that protection and asylum could be obtained there.

I.5. EXTRADITION

Extradition is a formal process involving the surrender of a person by one State (the "requested State") to the authorities of another State (the "requesting State") for the purpose of criminal prosecution or the enforcement of a sentence.[116]

At first glance, it reflects a direct conflict between the principle of non-refoulement and extradition treaties. It must be remembered that the 1951 Convention and the 1967 Protocol does not apply to persons who have criminal conduct in their country of origin.[117] The main concern here being that persons fleeing persecution rather than prosecution are adequately protected against refoulement, (return) to a country where

[116]UNHCR, Guidance Note on Extradition and International Refugee Protection, UNHCR, http://www.coe.int/t/dghl/standardsetting/pc-
[117] Art. 1, Refugee Convention.

their life liberty or freedom are significantly threatened.

Extradition has traditionally been under the discretion of the sovereign, in the beginning of 18th century, extradition began to emerge under International law. The common interest of states to exercise jurisdiction over offenders and the need for co-operation has led to the development of legal rules relating to extradition.[118]

I.6. HISTORY OF EXTRADITION

Extradition law and practice evolved over more than thirty centuries. International law placed certain limitations on the power of the sovereign[119], such as respect for the territorial integrity of other nations, which resulted in a formal process to recover wanted fugitives. [120] The evolution of exceptions aimed at protecting individual rights in recent times, however, such as judicial review and the political offense exception, increased the protection afforded to individual rights within the context of extradition law.

I.6.i. History of Extradition Law Pre-1834

The practice of extradition dates back to over three thousand years. During this period, treaties and custom slowly formalized the extradition process and placed limitations on the pursuit of fugitives. The basic tenet of international law, respect for the territorial sovereignty of other nations, both encouraged extradition treaties and discouraged irregular rendition.

[118]Sibylle Kapferer, "The Interface between Extradition and Asylum", Geneva: UNHCR 2003, Legal and Protection Policy Research Series, PLA/2003/05, (2003).
[119]A New Emerging World Order: Reflections of Tradition and Progression through the Eyes of Two Courts, David H. Herrold, 2 TULSA J. COMP. & INr'i. L. 143, 145 (1994). The sovereign nation has the ability to create boundaries and select a form of government. Sovereign nations also maintain the right to order their internal and external affairs without interference.
[120]The purpose of restricting sovereignty through treaties is: Extradition treaties confer upon the contracting States a greater degree of control over certain citizens of the States with which they contract. They set forth particular guidelines by which a transfer of nationals may occur, thus putting into place a means by which a State may lawfully, and with respect for the sovereignty of the other, exercise jurisdiction over a particular national of the other State.

The practice of extradition originated in the ancient middle- and far-eastern civilizations as a matter of courtesy and good will between sovereigns. The earliest recorded extradition treaty dates to 1280 B.C., between Ramses II, the Pharaoh of Egypt, and King Hattusli III of the Hittites, and provided for the mutual return of criminals. The first, similar provision appeared in Western Europe in 1174 A.D., between Henry II of England and William the Lion, King of Scotland. Over the following centuries, however, extradition remained an ad hoc arrangement between sovereigns, performed as a need arose.

During the seventeenth to nineteenth centuries, the Chinese Qing State extradited criminals from neighbouring Korea, Vietnam, and Burma on the basis of reciprocity.[121] The Chinese authorities extended their control over the rendition process by instructing the returned individual's government as to the proper method of punishment. In general, ancient treaties for the surrender of criminals targeted what today would be considered political offenses. As late as the end of the seventeenth century, political offenders were not granted any special protection from extradition. [122]

I.6.ii.Modern Extradition Law and Practice

With the origin of formal agreements like bilateral and multilateral agreements, in the late nineteenth century, the modern approach to extradition law started gaining ground. Both common and civil law nations developed formal extradition procedures, with some variation between the two. Extraterritoriality remains a limitation on rendition. In addition, dual criminality, specialty, and a political offense exception developed as defenses to extradition.

The formalization of extradition took place through bilateral, multilateral, and regional treaties and agreements. Further, common features and procedures

[121] Imperial China's Border Control Law, R. Randle Edwards "1 J. CHINESE L. 33, 40 (1987). No formal agreements were signed; instead, the parties acted on the basis of tacit understanding with respect to reciprocity."

[122]Two treaties made by Charles II of England with Denmark in 1661 and with the States-General in 1662 were specifically aimed at the surrender of regicides.

developed. Although differences arose between civil and common law practice and provisions, the basic form of extradition agreements still remained the same.

I.6.iii. Development of Multilateral and Bilateral Agreements

Most current extradition treaties are bilateral. The growth of bilateral treaties began in the 1800's, as several countries established bilateral treaties that defined extradition laws. During this same period, countries also formed regional agreements aimed at replacing, supplementing, or complementing already existing bilateral treaties. These regional agreements took the form of conventions, whereby nations arranged to adopt reciprocal national legislation modeled after an agreed formula.

Countries who are signatories to multilateral treaties are bound to honour the extradition implications of those agreements. Multilateral treaties provide a basis for extradition from countries whose extradition laws require a treaty, and justify extradition from those countries that rely on international law. Nations made various attempts to create a general, comprehensive convention on extradition. Conflicting legal systems, divergent political interests, and national jealousies, however, frustrated these efforts. [123]

I.7. JURISPRUDENTIAL ASPECTS CONCERNING EXTRADITION

As the extradition law developed, international law recognized the importance of Human Rights and protecting the individual from the atrocities forced by the States themselves. Naturalism[124] slowly replaced positivism[125]as the dominant theory of international law. Extradition procedure also changed, becoming more formalized and developing various exceptions and limitations. Recently, nations have begun to circumvent extradition law in response to modern crimes and frustrated law

[123]Kai I. Rebane, "Extradition and Individual Rights: The Need for an International Criminal Court to Safeguard Individual Rights", Fordham International Law Journal Volume 19, Issue 4 (1995).
[124]Douglas J. Sylvester, "Customary International Law, Forcible Abduction, and America's Return to the Savage State", 42 BUFF. L. Rev. 555, 608 (1994). Natural law believes that all law derives from natural sources, is generally applicable, and limits sovereignty.
[125]Id. at 609. In positivist theory, law derives from the practice of states and the conduct of international relations through treaty and custom.

enforcement. International law derives from two sources. Customary law[126] arises from the practice of nations[127] and judicial opinion.[128] Conventional law[129] derives from treaties and conventions. Two main schools of thought exist regarding individual rights in international law. [130] The *traditional,* or *positivist,* approach claims that individuals only have rights as expressly provided in treaties and by nations. The *natural law* approach, however, asserts that certain rights derive from the natural order of things and that these rights are universal and perpetual, existing outside the framework of laws.

I.7.i. Pre-World War II

Historically, international law was dominated by the positivist school.[131] Individuals were denied standing under international law to allege violations of their rights. Although some individual rights in international law existed in practice, they were extremely limited. The positivist school argues that standing for individuals is a privilege, only available under an express treaty provision. Positivists oppose the theory that standing is a naturally granted right. Nations are the only subjects[132] of international law, according to positivists, and the individual obtains benefits by virtue of her nation's rights, not her own. Until World War II, individuals were not subjects under international law.

I.7.ii. Post-World War II

The World War II paved way for naturalism being developed as a predominant theory in international law. Contrasting positive law, which contends that nations can

[126]Joseph G. Starke, "Introduction to International Law", Customary law is a practice that has obtained the force of law through repetition and usage.
[127] Id. The practice of nations refers to diplomatic relations, the practice of international organs, the laws of nations, decisions of national courts, and national military or administrative practices.
[128]Starke, Id, at 144. Courts examine the sources of law and determine whether a practice is sufficiently established as to be considered a custom.
[129]Id. Conventional law may embody custom but it also may include provisions that are not established but which the contracting parties agree to. Since 1945, most international law has been codified and now falls under the rubric of conventional law.
[130] James L. Brierly, "The Law of Nations", 49-56, Clarendon Press, (1963)
[131]Positivism rose to supremacy during the eighteenth and nineteenth centuries.
[132]According to text-book writers, a subject of international law is an entity capable of possessing international rights and duties and endowed with the capacity to take legal action in the international plane.

give and take away individual rights, the individual rights guaranteed by natural law are both permanent and universal. The importance of human rights and individuals is now recognized and embodied by the International law and the system as a whole.

I.7.iii. The Re-emergence

Human rights began to be viewed in the light of natural law by The United Nations and the world at large. Moreover, The right to life, the right to self-determination, freedom from torture or cruel and unusual punishment, and freedom of thought and conscience form a part of these natural individual rights. Subsequently, these above mentioned rights together with other key individual human rights were adopted in various international documents. Furthermore, these rights are asserted, listed and subsequently adopted by landmark instruments such as the U.N. Charter, [133] UDHR, ICCPR, and adopted by approximately fifty additional Declarations and Conventions on specialized issues, such as genocide and terrorism. With the universal adoption of individual rights the status of the individual in international law was revolutionized and provided for clear, enumerated individual entitlements. The changing blend of international practice and documents, statutes, and constitutions paved way for the emergence of rights. The growth of individual rights has been slow but steady during the latter half of this century, beginning with the UDHR after World War II.[134] ICCPR interpretations further expanded individual rights.

I.7.iii.a. the UDHR

The UDHR, which interprets the U.N. Charter and contains a list of human rights, is considered a basic component of customary international law. It was

[133]U.N. Charter Art. 2, 14. "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."

[134]According to the author, individual rights growth developed through the assertion of international concerns about human rights in the U.N. Charter, followed by their listing in the UDHR, their elaboration in the ICCPR, and finally their adoption by additional, specialized agreements.

followed by a stream of international declarations[135] and covenants[136] which, whether binding outright or via customary international law, reshaped the status of the individual. The principles of the UDHR, while not legally binding, are considered implicit in U.N. membership. The UDHR represents a consensus of U.N. Member States and forms part of customary law. The UDHR prohibits arbitrary arrest, detention, or exile of individuals by nations.[137] The UDHR allows individuals to seek asylum from persecution,[138] and draws a distinction between political and non-political crimes. The declaration entitles the individual to a fair and public hearing by an impartial tribunal to determine her rights and any charges brought against her. [139]

I.7.iii.b.The ICCPR

The ICCPR makes specific and binding the obligations assumed under the UDHR.[140] As a covenant that is legally binding on those nations that sign and ratify it, the ICCPR differs from the UDHR, which is a non-binding declaration. Because the ICCPR is an international treaty, it forms part of conventional international law. The ICCPR is designed to protect individuals from arbitrary government action, specifically arbitrary arrest and detention. The U.N. Human Rights Committee, which interprets the ICCPR, has declared that irregular rendition violates the agreement. The ICCPR also guarantees the right of all people to political self-determination.

[135]William D. Auman, "International Human Rights Law: A Development Overview and Application within the U.S. Criminal Justice System", 20 N.C. CENr. LJ. 1, 8 (1992). A declaration is simply a general statement of intent or principle declared by a group or organization.
[136]A covenant is legally binding on those nations that sign and ratify it.
[137]UDHR, Article IX
[138]Id, Article XIV.
[139]UDHR, Article X.
[140]These obligations include the freedom from arbitrary deprivation of life, from torture, from cruel, inhumane, or degrading punishment, and other rights previously referred to in the Universal Declaration of Human Rights.

I.8. THE PROCESS OF EXTRADITION IN COMMON AND CIVIL LAW SYSTEMS

Common law and Civil law nations have a great deal of differences so as to the practice of extradition processes. In normal parlance, an extradition procedure requires that a formal extradition request be made to or through the executive, who then sets in motion, or allows the requesting nation to begin, judicial action. There exists certain "common law nation" where the executive takes the call, as to whether to extradite, although the judiciary often certifies that the crimes charged satisfy the particular extradition treaty's provisions. In this regard example can be drawn from the extradition processes of the US and the U.K. wherein, The Secretary of State, in the United States, is the authority to render the final verdict to extradite after a certification of the reviewing court of sufficient evidence being made available to extradite. Likewise, in the United Kingdom, Secretary of State adopts whether to issue a warrant of surrender after a review of the request by a special magistrate. Though several civil law countries yet retain exclusive executive controls, most of them now require at least minimal judicial review of the extradition process. [141] As regards to common law countries, the requesting country has to meet an established test of finding a probable cause. On the other hand, in civil law countries, a formal request is considered as a prima facie evidence, that is sufficient to grant extradition if all other treaty obligations are met.

I.9. LEGAL BASIS FOR EXTRADITION

The obligation of extradition is not merely a concept of international law, but more importantly is a theory of comity, a favour accorded to one nation by another. a legal obligation exits on the requested state to extradite a person to the requesting state based on bilateral or multilateral extradition treaties, or if such requested state is a member of an international convention that establishes a onus to hand over for example in cases of genocide, war crimes etc.[142]

[141] In France, the President issues an extradition decree after a judge certifies the request.
[142] *Id.*

I.9.i. Bilateral Extradition Treaties

Bilateral extradition treaties exist between two states, and establish a reciprocal duty on both states to extradite an offender under the terms of the extradition treaty. In certain cases national law may require an underlying extradition treaty, to validly extradite a person.[143] However, International law does not specify any such requirement, in certain cases national law may provide that an offender can be extradited even in absence of an extradition treaty.[144]

I.9.ii. Multi-lateral Extradition Treaties

Multilateral extradition treaties set out mutual obligations for all the member states to extradite an offender, in accordance with the extradition treaty. The U.N model treaty for extradition[145] is to act as the basis for developing extradition treaties. However, differences arise frequently to provide for the difference between common law and civil law countries.

States have found it easier to enter into regional extradition treaties, such as with Europe. The regional agreements include, Convention on Extradition of the League of Arab States (1952), Inter-American Convention on Extradition (1981),[146]South African Development Community (SADC) Protocol on Extradition (2002) and "Convention Relating to Extradition between Member States of the European Union (1996)"among others.[147]

I.9.iii. Extradition under other International Instruments

International law, lays down the rule of extradition with respect to certain offences. Particularly in instance of offences such as crimes against humanity, war-crimes etc.

[143]*Id.*
[144]P. Malanczuk, "Akehurst's Modern Introduction to International Law", (Routledge, London, New York 7th rev. ed. 1997).
[145]Model Treaty on Extradition, 14 December 1990, U.N. GAOR, A/RES/45/116.
[146] Organization of American States (OAS), Inter-American Convention on Extradition, 25 February 1981.
[147] Kapferer, *supra* note 118.

International conventions provide for the extradition of such offenders, and additionally, customary international law plays a major role in the absence of a treaty.

I.9.iii.a.Crimes against humanity and war crimes

Crimes against humanity and war crimes have been recognized as *erga omnes* obligations which are owed to the world at large. Further, they find recognition as "*jus cogens* principles, or peremptory norms of international law." In case of such offences every state has the jurisdiction to investigate, prosecute and punish the offenders. Certain international instruments expressly provide for extradition of persons who commit such crimes,[148] example- Art. 7(2) of the Genocide Convention 1948.[149]

International law, does however establish a general obligation to extradite or prosecute, *aut dedere aut judicare* that provides, if a state refuses to extradite, the state must impeach the person in the courts falling within its own jurisdiction. This principle has also been codified in various conventions and multi-lateral treaties such as the Torture Convention[150]

I.9.iii.b.Terrorism and other transnational crimes

Various anti-terrorism conventions and treaties impose an obligation on member state to extradite the offender so that he may be tried for his crimes such as the European Convention on the Suppression of Terrorism[151] and Arab Convention on the Suppression of Terrorism.[152]

The principle of *aut dedere aut judicare* applies in case of terrorism as well. States are bound to either extradite the individual or prosecute him in their national court for the crime committed. Most states are bound by various bi lateral and multi-lateral

[148] Kapferer, *supra* note 118.
[149] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277 (in force 12 Jan 1951) [hereinafter Genocide Convention].
[150] Art. 7(1), Torture Convention.
[151] European Convention on the Suppression of Terrorism, 27 January 1977, ETS No. 90 (in force 4 Aug. 1978).
[152] Arab Convention on the Suppression of Terrorism, 22 April 1998 (in force 22 April 1998).

extradition treaties, refugee law and International Human Rights instruments also place a bar on extradition of the person.[153]

I.10. GENERAL PRINCIPLES OF EXTRADITION

Under International law different states have their own idiosyncratic laws with respect to extradition of individuals for crimes committed. This is because of the changes between civil and common law countries. However, over the last few decades, there has been harmonization in the international legal framework, through amendments to national laws, bilateral and multilateral extradition treaties. Although there exist differences, yet certain common requirements can be gauged from the laws of different States. Certain broad similarities can be identified; Sibylle Kapferer has distinguished certain core principles as follows:

1. Extradition request

Requesting state must present a formal extradition request to the requested state. A formal request for arrest and surrender of person through diplomatic channels.[154] In certain cases, this can also be done though simpler procedures, as specified in the treaty.[155] The extradition request must specify the person and the offence committed by him. Additionally, the requesting state is also required to produce the arrest warrant, text of relevant laws which have been broken, information for identifying the offender and description of the offences committed by the individual.[156]

The required evidence must also be provided for the same. However, there is a difference between common law and civil law countries, common law countries usually require a higher standard of evidence, prima facie evidence, which shows that the individual has committed the crime.[157] This standard has now been reduced in newer treaties to bring about uniformity, it is now sufficient if the relevant evidence is

[153] Lauterpacht, *supra note* 17.
[154]Lauterpacht, *supra note* 17..Article 12(1) of the European Convention on Extradition (1957)
[155]Lauterpacht, *supra note* 17..Article 11 of the Inter-American Convention on Extradition (1981)
[156] Kapferer, *supra* note 118.
[157] Kapferer, *supra* note 118.

adduced against the individual.[158]

2. Extraditable offence

The only situation when extradition may be allowed is, when the offence constitutes an extraditable offence. Older bi-lateral and multi-lateral extradition treaties contain a list of offences which would constitute extraditable offences. However, the definitions of crimes differ in every state, and this method has become out-dated. Accordingly, modern extradition treaties define extraditable offence as an act punishable by custodial sentence for a certain period of time, which is a crime in the requesting state and the requested State.[159]

3. Double Criminality

An extradition request is only accepted if the act has been categorized as an offence in the authority of both the requesting state and the requested state.[160]An offence is considered to be an extraditable offence, as long as it is criminalized in both the States, even it has different definitions. This position has however, been significantly changed due to various developments in Europe.

4. Specialty principle

As per the said principle, a person can be prosecuted by the requesting state, only for a felony he has been extradited for, under the extradition request. The State cannot charge him with any other offence, without the permission of the requested State.[161] Moreover, the extradition of a person to a third State by the requesting stated void of the permission of the requested state[162]stands prohibited. However, many modern treaties and conventions dilute the double criminality and specialty principle.

[158]A. Jones, "Jones on Extradition and Mutual Legal Assistance", (Sweet & Maxwell, London 3rd ed. 2001).
[159]Kapferer, *supra* note 118.
[160]*Id.* See, for example, Article 1(1) of the European Convention on Extradition (1957); Article 3(1) of the Inter-American Convention on Extradition (1981)
[161] Kapferer, *supra* note 118.
[162] Brownlie, *supra note* 84.

I.11. GROUNDS FOR REFUSING EXTRADITION

The law purporting extradition offers certain grounds for an extradition request to be rejected. Extradition can be refused on basis of national laws of each state. Various bi-lateral and multi-lateral treaties also provide for grounds for refusal of extradition. International human Right instruments prohibit extradition, if it violates the fundamental human rights of the individual.[163] Extradition is broadly refused on the following grounds,

1. Political Offence exemption

The political offence exemption provides that an individual need not be extradited, if the offence for the person is to be tried is of a political nature. A person cannot be extradited for committing a political offence. This exemption was carved out not to protect the interest of the individual, but to safeguard friendly relations with the requesting state. Wide acceptance of the general rule would mean that State's would not view refusal to extradite as unlawful interference in its internal matters.[164] Moreover, States have always regarded the right to give asylum and refuse extradition as a sovereign right. It is also closely linked to political liberalism and individuals fighting against oppressive regimes must be provided protection from their own State.[165]

2. Discrimination clause

The discrimination clause states that a person cannot be extradited to the requesting state if he to be prosecuted on the basis of discrimination. This has special reference to Art.33 of the Refugee Convention, which prohibits the *refoulement* of a person to the frontiers of a state wherein his may be in danger on the basis of certain discrimination.

[163] Brownlie, *supra note* 84.
[164] Kapferer, *supra* note 118.
[165] Kapferer, *supra* note 118; See also, G. Gilbert, "Transnational Fugitive Offenders in International Law", (Martinus Nijhoff Publishers, The Hague, Boston, London 1998).

3. Other grounds on basis of which extradition can be refused as follows:

- National

If the requested person is a national of the requested state the extradition request is refused. Though common law countries do not bar extradition on the grounds of nationality since they usually exercise jurisdiction on the basis of territoriality, civil law countries usually refuse to extradite their own nationals, as they exercise jurisdiction on the basis of the principle of nationality, so the courts exercise jurisdiction over extra territorial crimes committed by their nations.[166] This gap is slowly being remedied through bi-lateral extradition treaties entered into by Civil law countries, which permit for extradition of their nationals.[167]

- Fundamental principle of justice and fairness

There are a number of grounds to refuse extradition on fundamental principles of justice and fairness, such as,

- If the person has already been convicted or punished for the offence committed, then the principle of double jeopardy applies. A person cannot be punished twice for the same crime.
- If extradition is requested on basis of a judgement *in absentia* and the individual did not have an opportunity to put forward his defence.
- The offence is barred by the statute of limitation.
- If the individual enjoys protection from prosecution, for eg. a diplomat.
- If one fears being subjected to capital punishment in the requesting state.
- Other grounds

Extradition requests are sometimes refused on the basis of other humanitarian considerations such as old age, illness etc.

Thus, through this chapter what emerges is that, the UNHCR's considered view and the principle of non-refoulement being supported by jurisprudence and the work of jurists, which reflects wide acceptance and thus makes it a norm of customary

[166]Kapferer, *supra note* 118.
[167]Gilbert, *supra* note 165.

international law. This view is hence based on a consistent State practice combined with recognition on the part of States that the principle has a normative character. The principle as reflected in Article 33 has been incorporated in international treaties adopted at both universal and a regional level which witnesses a large number of States as parties to it. Further, the said principle has also been systematically reiterated in Conclusions of the Executive Committee and in resolutions adopted by the General Assembly, thus validating international consensus in this respect and providing important guidelines for the interpretation of the aforementioned provisions. Further, the scope and content of Extradition treaty has developed and widened overtime. The legal basis for extradition entails both bilateral and multilateral treaties which give an edge to the whole working and structure to effective implementation of treaties.