CHAPTER II

DOCTRINE OF NON-REFOULEMENT AS A HUMAN RIGHTS PRINCIPLE AND ITS APPLICATION

"*Approaching crises with criticism reminds us that crises are produced: they are negotiable narratives that can mask as well as reveal, a recognition that should be central when we respond to crises of human rights within international law."*

Benjamin Authers and Hilary Charlesworth

II.1. INTRODUCTION TO INTERNATIONAL HUMAN RIGHTS LAW

The origin of the international human rights law regime is a recent phenomenon. Until the 19th century, there was an absence of any legal framework at the international level for the promotion and protection of human rights. During this time, the international community adopted a treaty abolishing slavery and set up the International Labour Organization (ILO), in 1919 as a component of the Peace Treaty of Versailles with the aim of protecting workers' rights.[168] The First World War, created an urgency to create and set a human rights regime under the League of Nations.[169] However, these measures drastically failed when the Second World War vented.[170] The outrages in Second World War, led to the international community coming together to form the United Nations for the preservation of peace.

From then on, dramatic changes have taken place in the landscape of the human rights regime. The human rights law system evolved through the introduction of numerous human rights treaties and conventions, establishing universal human rights.

[168] A.H. Robertson, "Human Rights in the World", 15-20 (Manchester University Press, 1972).
[169] Frans Viljoen, "International Human Rights Law: A Short History", UN CHRONICLE, Vol. XLVI No. 1 & 2 2009, (Mar. 19, 2017, 16:00 PM), available at: https://unchronicle.un.org/article/international-human-rights-law-short-history.
[170] UNHCR & International Bar Association, "Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors And Lawyers," 12-15 (United Nations Publications, 2003).

The UN Charter was adopted in 1945, which led to the UN members adopting a network of treaties.[171] Under the said Charter, only those States, having ratified or acceded to particular treaties are bound to observe that to which they have explicitly agreed. [172]International human rights law, through treaties, customs and general principles, guarantee basic human rights and creates an obligation upon States to ensure the protection of these rights and refrain from the commission of human rights abuses.

Major international human rights instruments were formulated such as the Universal Declaration of Human Rights, 1948, (hereinafter referred to as 'UDHR'), the International Covenant on Civil and Political Rights (hereinafter referred to as the 'ICCPR'), 1966 and the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as the 'ICESCR'), 1966 which together constitute the International Bill of Human Rights.

The focus of international human rights regime drastically shifted from a general focus to predominantly the "minority, marginalized and oppressed groups or themes" as reflected by the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter referred to as the 'CEDAW') adopted in 1979; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (hereinafter referred to as the 'CAT'); the Convention on the Rights of the Child 1989; "and the Convention on the Rights of Persons with Disabilities, 2006. The latest treaty is the International Convention for the Protection of All Persons from Enforced Disappearances (hereinafter referred to as the 'ICED'), also adopted in 2006 but is yet to enter into force.[173]"

As far as rights of refugees being developed, it was noticed that there were instances of countries being unable or failing to fulfill its human rights responsibilities in protecting humans.[174]Finding this protection void, it called for more special need and

[171] Dinah L Shelton, "An Introduction to the History of International Human Rights Law", GW Law Faculty Publications & Other Works, 1052, (2007).
[172] M. Hertig Randall, "The History of International Human Rights Law", in R. &. G. Kolb Gloria (Ed.), Research Handbook on Human Rights and Humanitarian Law, 3-34, (2013).
[173] Frans Viljoen, *supra* note 169.
[174]G.H. Fox, "New Approaches to International Human Rights: The Sovereign State Revisited," S.H. Hashmi (Ed.), University Park PA: Pennsylvania State University Press (1997).

documentation for the rights of the refugees to be created and developed.[175]Therefore, "the Convention on the Status of Refugees (hereinafter referred to as the Refugee Convention, 1951)" was introduced and adopted in 1951. The preamble to the said Convention affirms the notion of fundamental rights and freedoms being enjoyed by each individual without discrimination, and in all equality and "thus contains a specific reference to the UDHR". The preamble emphasizes "the social and humanitarian nature of the problems which refugees encounter. Some authors even opine that the Refugee Convention has a clear humanitarian character.[176]The Convention seeks to protect the basic human rights of people who are no longer protected in their country of origin and have no a right to enjoy protection elsewhere, thus forming its objective. Refugee protection, hence serves as a substitute to national protection in times of its failure.[177]

II.2. NON-REFOULEMENT UNDER THE CONVENTION ON THE STATUS OF REFUGEES, 1951

In order to understand and examine the scope of the concept of *non-refoulement* under international human rights law, it is incumbent to gain an insight into the content of non-refoulement under the Refugee Convention, 1951. The 1951 convention on Refugees, affords wide protection for refugees who flee persecution in varied forms in the form of non- refoulement as per Article 33.Article 33(1) is of a prohibitory nature, thus preventing states from refouling a refugee "*where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."*[178]

According to the "United Nations High Commissioner for Refugees" (hereinafter referred to as 'UNHCR'), the principle of *non-refoulement*, as reflected in Article 33

[175]Volker Türk, "UNHCR's Supervisory Responsibility", RefWorld, (Mar. 12, 2017, 16:00 PM), http://www.refworld.org/docid/4fe405ef2.html.
[176] Lauterpacht & Daniel Bethlehem, "The Scope and Content of the Principle of Non-Refoulement: Opinion", Cambridge University Press, (Jun. 20, 2001).
[177]James C. Hathaway, "The Law of Refugee Status, Toronto", Butterworths, 124, (1991); UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, (Mar. 12, 2017, 16:00 PM), http://www.refworld.org/docid/4f33c8d92.html.
[178] Art. 33, Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137 (1951).

of the Refugee Convention, 1951 is fundamental and cannot be derogated from.[179]

However, Article 33(2) is not qualified and absolute and hence can be considered as an exception to the principle of *non-refoulement* provided in the Convention, which provides that the right to non-refoulement cannot be enjoyed when "*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."*[180]

During the drafting of the Convention, the prohibition on *non-refoulement* had no exceptions or restrictions.[181]However, objections to such an absolute concept of non-refoulement was objected to by States such as France and the United Kingdom who cited concerns on national security.[182] Thus, the present day non-refoulement obligation, as under the Refugee Convention, came to be limited to the exception clause in Article 33(2) of the Convention. This provision, hence is strictly construed as it provides States with an unfettered power to oust refugees who fall within the purview of Article 33(2).[183]

The application of this exception is determined on a case to case basis after determining whether the criteria for exception is met such as the individual posing a serious danger or real threat to the national security of the country in which he seeks asylum or that the refugee has been convicted of a very serious crime, the nature of which is grave and poses a possibility of the refugee being a danger to the community.[184]The determination is dependent on facts and situations that are different for each case and application of the exception clause is made with extreme restraint as return of the refugee ought to be the last resort and should unequivocally lead to an

[179]United Nations High Commissioner for Refugees (UNHCR), "Guidance Note on Extradition and International Refugee Protection", REFWORLD 2008, (Mar. 22, 2017, 17.00 PM) http://www.refworld.org/docid/481ec7d92.html.
[180] Art. 33(2), Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137 (1951).
[181]Paul Weis, "The Refugee Convention, 1951: The Travaux Preparatoires Analysed, With A Commentary", 325 (Julian Weis ed., 1995).
[182]*Ibid.*
[183] Vijay M. Padmanabhan, "To Transfer or Not to Transfer: Identifying and Protecting Relevant Human Rights Interests In Non-refoulement", 80 Fordham L. Rev., 73, (2011-2012).
[184] UNHCR, *supra note* 179.

elimination of the threat to the security of the country or danger to the community.[185]It should also be ensured that adequate safeguards are followed and that the benefit of refouling for the sake of the safety of the host state exceeds the risk the individual being refouled faces upon return.[186]

II.3.NON-REFOULEMENT UNDER THE INTERNATIONAL HUMAN RIGHTS LAW INSTRUMENTS

The prohibition on refoulement has been backed by various human rights treaties and acts as a backbone in the refugee protection framework. The principle of non-refoulement protects every human being from being sent towards territories where they may be subject to violations of fundamental human rights.

II.3.i.Non-refoulement under the Universal Declaration of Human Rights, 1948[187]

The Universal Declaration of Human Rights (UDHR) is a milestone document in the history of human rights. 10 December, 1948, witnessed the declaration being adopted by the United Nations General Assembly in Paris[188]. The preamble of the UDHR states that the declaration would strive for protecting fundamental human rights and acting as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction. [189]

The UDHR forms the primary normative basis of the UN Charter system and has given authorized human rights in the UN Charter. Since it was adopted as a

[185]L. Henkin, "Human Rights and State Sovereignty, Sibley Lecture March 1994", Georgia Journal of International and Comparative Law, (1995-1996).
[186]*Ibid.*
[187] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).
[188]*Ibid.*
[189] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, Preamble, (1948).

declaration, that lacked a binding force, it has subsequently come to be recognized as a universal yardstick of State conduct. Therefore, many of its provisions now have acquired the status of customary international law.[190]

In the framework of the human rights regime, the influence of the UDHR has been substantial. Its principles have been incorporated into the constitutions more than 185 nations now in the UN. The UDHR has also achieved the status of customary international law because people regard it "as a common standard of achievement for all people and all nations."[191]

While the UDHR does not provide an express provision providing the right against refoulement, Article 14 of the UDHR incorporates the principle of right to seek asylum. As per Article 14, "everyone has the right to seek and to enjoy in other countries asylum from persecution.[192]This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."[193]

As Article 14 of the UDHR, guarantees the right to seek asylum and be protected in other countries from the prevailing fear of persecution, the law of asylum also finds its application to "aliens receive international protection in the absence of national protection. In contrast to other rights that find their expression in human rights treaties, a right to seek and enjoy asylum does not find its express mention in any of the subsequent human rights regime under the ambit of United Nations. In fact, with the exception of Article 22(7) of the Inter-American Human Rights Convention[194] and Article 12(3) of the African Charter on Human and Peoples' Rights[195], a right to seek and enjoy asylum has not been formulated in any global or other regional human rights treaty. Nevertheless, asylum protection has found a basis in international law.

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[190]Frans Viljoen, *supra* note 169.
[191] Mary Ann Glendon, "The Rule of Law in the Universal Declaration of Human Rights", 2 Nw. J. Int'l Hum. Rts. 1 (2004).
[192] Article 14, Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, (1948).
[193]UDHR, *supra note* 187.
[194]Article 22(7), Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, (Nov. 22, 1969).
[195] Article 12(3), Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

Article 14 has been criticized as being only a vague and permissive proclamation without any co-relative obligation of admission or prohibition on refoulement. Lauterpacht described this formula as artificial to the point of flippancy[196], for there was no intention to assume even a moral obligation to grant asylum' and accordingly, no declaration would be necessary to give an individual the right to seek asylum without an assurance of receiving it.[197]

Further, "Article 14(2) of the Universal Declaration of Human Rights delivers that the right to seek and to enjoy asylum, as guaranteed in article 14(1)", "*may not be invoked in the case of prosecution genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations*".[198]

Since Article 14(2) reflects the concept that certain persons who flee persecution, despite them being refugees are nevertheless denied international protection due to the prime reason of their involvement in serious crimes and violations, this is hence covered under the exception of Article 14(2) of the Universal Declaration. "Article 14(2) of the Universal Declaration reflects the concern that those involved in war crimes, crimes against humanity, and crimes against peace, or more generally acts contrary to the purposes and principles of the United Nations should not be able to enjoy such protection, and that common-law criminals should be surrendered under applicable extradition agreements[199]."The scope and content of the limitations to the right of asylum provided for in article 14(2) of the Universal Declaration must be read in light of article 1F of the Refugee Convention as well as other relevant standards under international law.

Several authors have also noted that States do not easily recognize the right of asylum under the UDHR and have been unwilling to pledge themselves in international conventions to the individual's right to asylum.[200] Because most states

[196] Nan Li, "States' Practice Of Non-refoulement And Suggestions On Avoiding The Derogation", 2 US-China Law Review, 63, No.12 (Serial No.13), (2005).
[197]*Id.* at 64.
[198]Article 14(2), Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, Preamble, (1948).
[199]Sibylle Kapferer, "Article 14(2) of the Universal Declaration of Human Rights and Exclusion from International Refugee Protection", Refugee Survey Quarterly, 53-57, (2008).
[200]Morten Kjaerum, "Article 14 in The Universal Declaration Of Human Rights: A Commentary", 220 (Asborn Eide et al. eds., (1992); Hailbronner, *supra note* 108, at 184.

adhere to this view, the grant of asylum in such states is discretionary with the State, making it less effective.[201] Since the declaration itself is not binding in nature, the link between Article 14 of the UDHR and Article 33 of the Refugee Convention has not been clearly established. While Article 14 provides for the right to asylum, which is an important part of the right against refoulement, Article 14 only provides complementary protection to a small extent. In the case of *Sale v. Haitian Centers Council, Inc*.[202], the United States did not consider State's obligation not to refoule under Article 33 of the Convention included an obligation to admit an asylum seeker.[203]Though the right to asylum is not easily recognized by states, many states admit the duty not to return a forced migrant under the principle of non-refoulement.[204] Therefore, while there is protection given under the UDHR, such protection is limited in nature. The asylum-seeker or refugee still has the option of seeking protection under other treaties under human rights law from refoulement.

II.3.ii. Non-refoulement under the European Convention on Human Rights, 1950[205]

The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, was opened for signature in Rome on 4 November 1950 and came into force in 1953.[206] It was the first instrument to give effect to certain rights stated in the Universal Declaration of Human Rights and make them binding.[207] The framers of the Convention sought to pursue the aims of the Council of Europe through the maintenance and further realization of human rights and fundamental freedoms. [208]Since its adoption in 1950 the Convention has been amended a number of times and supplemented with many

[201] Roman Boed, "A Journey to Asylum", 22 Hum. Rts., 26, 26-50(1995).
[202] Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993)
[203] Goodwin, *supra note* 15.
[204]Id. at 132.
[205]Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, (1950).
[206] Ibid.
[207]F.G. Jacobs & R.C.A. White, "The European Convention on Human Rights", Oxford: Clarendon Press, (1996).
[208]Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, ETS 5.

rights in addition to those set forth in the original text.[209]

Similar to the provisions under the Convention against Torture, Article 3 of the ECHR states "that no one shall be subjected to torture or to inhuman or degrading treatment or punishment." In the landmark case of *Soering v. the United Kingdom*[210], Article 3 of the ECHR was reiterated as the fundamental value of the democratic societies making up the Council of Europe and emphasized those similar provisions could be found in other global and regional treaties. The Court also held that Article 3 is generally recognized as an internationally accepted standard. [211]

In the *Chahal* case[212], the British Government claimed an implied limitation to Article 3 entitling Contracting States to expel an alien to a receiving State even where a real risk of ill-treatment existed if such removal was required on national security grounds.[213] In the alternative, it was argued that the threat posed by an individual to the national security of the Contracting State was a factor to be weighed in the balance when considering the issues under Article 3, taking into account that there are varying degrees of risk of ill-treatment. The Court rejected this reasoning, reiterating that Article 3 enshrines one of the most fundamental values of democratic society and that, despite the immense difficulties faced by States in modem times in protecting their communities from terrorist violence,'' Absolute torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct has a total prohibition in the convention. [214]

Consequently, the Court stated that the prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases.[215] Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment

[209]Id.
[210]Soering v. The United Kingdom, No. 1/1989/161/217, Council of Europe: European Court of Human Rights, (1989).
[211]Ibid.
[212]Chahal v. The United Kingdom, No. 70/1995/576/662, Council of Europe: European Court of Human Rights, (15 Nov. 1996).
[213]Ibid.
[214]Jens Vedsted-Hansen, "European Non-refoulement Revisited", 55 Scandinavian Stud. L.269 (2010).
[215] Chahal v. The United Kingdom, supra note 45.

is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous cannot be a material consideration.[216] The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees.[217] Courts have also looked at the implied positive obligations of States and had felt the need to weigh applicant rights against the interests of the community as a large.[218]

In *Saadi v. Italy*[219], the Court enumerated "the general principles of States' responsibility, primarily absolute prohibition under ECHR Article 3, irrespective of the victim's conduct." The Court noted that all that increasingly, States have been facing immense difficulties in modem times in protecting their communities from terrorist violence. Therefore, the scale of terrorism and the threat posed by it to the community cannot be underestimated. It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. That must not, however, call into question the absolute nature of Article 3. [220]

Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. The Court has repeatedly held that there can be no derogation from that rule. [221]

The *Chahal* case reiterated that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State.[222] Regardless of the conduct of the person which may be dangerous, such action cannot be taken into account, with the consequence that the

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[216]C. Costello, "The European Asylum Procedures Directive in Legal Context", Geneva: UNHCR 2006, New Issues in Refugee Research, Research Paper No. 134,(2006).
[217]Ellen F. D'angelo, "Non-refoulement: The Search for a Consistent Interpretation of Article 33", 42 Vand. J. Transnat'l L, Vol. 279 (2009).
[218]Id. at 21.
[219]Saadi v. Italy, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, (28 Feb. 2008).
[220]Saadi v. Italy, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, (28 Feb. 2008).
[221]Vedsted-Hansen, supra note 214 at 74.
[222] Chahal v. The United Kingdom., *supra note* 212.

protection afforded by Article 3 is broader than that provided for in Articles 32 and 33 of the 1951 United Nations Convention relating to the Status of Refugees.

In terms of implicit refoulement that may take place during extradition, the intent of the State or absence thereof of a State putting a person at risk of torture or treatment prohibited under Article 3 is irrelevant.[223] The focus is on the result of such action taken by States, i.e. an individual being subjected to a substantial risk of torture, rather than the intent with which such action was initiated or justified, for instance, on the basis of protecting the security of the State from acts of terrorism or other acts which jeopardize the national security. This emphasizes the absolute nature of the prohibition and its non-derogability. It cements the obligation of States to ensure that the principle of non-refoulement is complied with.

The test for determining the submission to the principle of non-refoulement has evolved over time with varying degrees or standards of proof. It was initially held that the risk of torture upon return must be a certain or imminent threat, rather than be a potential risk. This was reflected in the contentions raised by United Kingdom in the Soering case wherein the State contended that the Article 3 should only be applied in those occasions where the treatment or punishment abroad is certain, imminent or serious.[224]

The European Court of Human Rights has now, however, lowered the threshold by stating that the presence of a genuine risk of torture is adequate to bar the extradition or refoulement of one to a country one faces such a risk. The Court has clarified this position in the *Abdurrahim Incedursun v. The Netherlands*[225] case wherein it was held that the test is whether it has been shown that there are substantial grounds for believing that the person concerned, if extradited, would face a real risk of being subjected to torture or inhuman or degrading shown that there are substantial grounds for believing that the person concerned, if extradited, would face a real risk of being

[223] Katharina Röhl, "Fleeing Violence and Poverty: Non-refoulement Obligations under the European Convention of Human Rights", UNHCR (Working Paper No. 111), (2005).
[224] Soering v. United Kingdom, *supra* note 210.
[225] Abdurrahim Incedursun v. The Netherlands, No. 33124/96, Council of Europe: European Court of Human Rights, para. 27, (22 Jun. 1999).

subjected to torture or inhuman or degrading treatment in the requesting country.[226]

This change in the threshold for risk of torture has been attributed to the recognition of the gravity of the consequences of return, the potential of a person being subjected to torture and the irreparable suffering that may be caused. The lowered threshold also aims at ensuring the objective of the Article is achieved and safeguarded. The absolute nature of Article 3 can be seen through such liberal interpretation to the term 'risk of torture' wherein even a mere possibility of torture or a probable risk would suffice rather than a certain, imminent threat of torture or actual instances of violation of Article 3.

Moreover, the lack of an exception clause to Article 3 of the Convention or its Protocols stresses its nature as an absolute, non-derogable obligation of State parties. In the leading case of *Cruz Varas and Others v. Sweden*[227], the Court indicated that the risk of torture upon return is determined during the final stages of the court proceedings. In the *Vilvarajah and Others v. United Kingdom*[228]case where several Tamilian asylum seekers were reverted back to Sri Lanka and upon their return, were exposed to torture, the Court held that the action of the State in refouling the asylum seekers was not in violation of the State's obligations under Article 3 as the State's finding in this case was based on the non-existence of any relevant substantial grounds showing there was a pertinent risk to the asylum seekers. Similarly, asylum seekers from Kurdistan who were returned after having their asylum claim rejected since the State found that there was no substantial risk due to the availability of 'internal flight alternatives', were subjected to torture upon their return to Turkey.[229]
The line establishing what constitutes a real risk of torture therefore seems blurry and should be laid down after ensuring that the protection given under Article 3 is not weakened. A liberal interpretation would be preferred considering the gravity of the consequences and threat of torture upon return.

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[226]*Ibid.*
[227] Cruz Varas and Others v. Sweden, No. 46/1990/237/307, Council of Europe: European Court of Human Rights, para. 76, 20 March 1991, (20 Mar. 1991).
[228] Vilvarajah and Others v. United Kingdom,No. 45/1990/236/302-306, Council of Europe: European Court of Human Rights, para. 111, (30 Oct. 1991).
[229]Liza Schuster, "The Realities of a New Asylum Paradigm, Centre on Migration, Policy and Society", University of Oxford, Working Paper WP-05-20, (2005).

II.3.iii.Non-refoulement under the International Covenant on Civil and Political Rights, 1966

The United Nations International Covenant on Civil and Political Rights (ICCPR) was adopted by the United Nations' General Assembly on December 19, 1966, and it came into force on March 23, 1976.The ICCPR is supplemented by two Optional Protocols. The First Optional Protocol grants individuals the right to complain about violations to life by prohibiting the death penalty. According to the Human Rights Committee the object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide efficacious supervisory machinery for the obligations undertaken.[230]

The Covenant consists of a preamble and 53 articles divided into six parts. Part I contains the right of self-determination of peoples. Part II contains various general provisions in support of the substantive rights listed in Part III. Part IV deals with the establishment and operation of the Human Rights Committee and the monitoring of the implementation and enforcement of the Covenant. Part V contains two specific Articles regarding interpretation and Part VI contains final treaty clauses dealing with the signing, accession, ratification and entry into force of the Covenant. The ICCPR attempts to ensure the protection of civil and political rights. The International Covenant on Economic Social and Cultural Rights, the Universal Declaration of Human Rights, and the ICCPR and its two Optional Protocols, are collectively known as the International Bill of Rights.

The ICCPR recognizes the inherent dignity of each individual and undertakes to promote conditions within states to allow the enjoyment of civil and political rights. Countries that have ratified the Covenant are obligated to protect and preserve basic human rights and compelled to take administrative, judicial, and legislative process to

[230]UN General Assembly, International Covenant on Civil and Political Rights, Preamble, 16 Dec. 1966, U.N.T.S, vol. 999, p. 171.

protect the rights enshrined in the treaty and to provide an effective remedy.[231] There are currently 74 signatories and 168 parties to the ICCPR.

Although there are no express provisions protecting the right to non-refoulement, nevertheless, Article 6 of the ICCPR provides for "*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*"[232] In a situation of genocide resulting in deprivation of life, the contracting states in such a case shall not be authorized under the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide. [233]

According to Article 7 of the ICCPR, '*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation'*.[234]

Article 13 of the ICCPR states that "*An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."*[235] This provision creates a bar of refoulement by providing that removal or expulsion of a person only when it is in accordance with law and provides an opportunity to the individual to be heard to object such refoulement. This opportunity could be used to contend that such expulsion may lead to a violation of human rights obligations, including the obligation of non-refoulement.

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[231] *Ibid.*
[232] Article 6, UN General Assembly, International Covenant on Civil and Political Rights, 16 Dec. 1966, U.N.T.S, vol. 999, p. 171.
[233] *Ibid*.
[234] Art. 7, UN General Assembly, International Covenant on Civil and Political Rights, 16 Dec. 1966, U.N.T.S, vol. 999, p. 171.
[235] Art. 13, UN General Assembly, International Covenant on Civil and Political Rights, 16 Dec. 1966, U.N.T.S, vol. 999, p. 171.

Despite there being no formal specific non-refoulement provision in the International Covenant on Civil and Political Rights, yet it prohibits torture. The United Nations Human Rights Committee has construed this prohibition of torture to include a prohibition of refoulement.[236]

As per the 'Human Rights Committee,' State shall not eliminate a person to another country where substantial grounds exist of irreparable harm being caused to a person, such as mentioned under Article 6 and 7 of the ICCPR. While the earlier interpretations of the provisions of the ICCPR did not include the concept of non-refoulement, the Human Rights Committee, while in its 'Second General Comment on Article 7 in 1992, the Committee explicitly' indicated that States parties are under an obligation not to expose individuals to the danger of torture, cruel, inhuman or degrading treatment or punishment that they may face upon return to another country by way of their extradition, expulsion or refoulement. [237]

Besides the above, an individual is protected by virtue of Article 7of the ICCPR which includes persecution as defined under the Refugee Convention. This is testified in the case of *C. v Australia*(2002)[238],where the Committee considered the fact that "the complainant had been granted refugee status in Australia based on a well-founded fear of persecution in Iran as an Assyrian Christian." According to the State party, predominant factors such as discrimination experienced in employment, education and housing, difficulties in practicing his religion and the deteriorating human rights situation in Iran at the time played an important criterion in accepting and granting complainant's application for refugee status.

Articles 6(1) and 7 of the ICCPR are formulated in absolute terms in the sense that there exists no scope for any exceptions or limitations for reasons such as public order, public health or national security.[239] Furthermore, in situations of public

[236]Roman Boed, *supra* note 201 at 16.
[237] UN Human Rights Committee (HRC), *CCPR General Comment No. 20*: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), (1992).
[238] C. v. Australia, CCPR/C/76/D/900/1999, UN Human Rights Committee (HRC), para. 4.13, (2000).
[239]P.R. Ghandhi, "The Human Rights Committee and Articles 7 and 10(1) of the International Covenant on Civil and Political Rights, 1966", Dalhousie Law Journal, 758-759, 1990.

emergency threatening the life of the nation Articles 6 and 7 of the ICCPR cannot be derogated from.

The unqualified character of Article 7 has been acknowledged by the Human Rights Committee in its General Comment Number 20[240].According to the Committee no justification or extenuating circumstances may be invoked to excuse a violation of Article 7 of the ICCPR for any reason.

According to the UNHRC, the principle of non-refoulement is innate in the wordings of Article 7 of the ICCPR which provides for a prohibition on the expulsion of a person to his home or any country where he or she might be at risk of suffering upon such return.[241]States cannot derogate from the obligations under Article 7 by leaving an individual unprotected to the "risk of torture, cruel, inhuman or degrading" punishment by return through extradition, expulsion or refoulement.[242]

The non-derogability nature of Articles 6 and 7 was again confirmed by the Human Rights Committee in General Comment Number 29 concerning States of Emergency (2001).[243] The absolute character of Articles 6 and 7 prohibits, for example, authorization under national law to use certain methods of torture while interrogating suspected terrorists. However, according to the Human Rights Committee, these techniques amount to a violation of Article 7 in any circumstances.[244]Looking at the absolute character of Article 7, the Committee considered that no justification for torture or other cruel, inhuman or degrading treatment or punishment could be made. Therefore, the principle of proportionality could not justify the use of inhumane treatment. In relation to the prohibition on refoulement its absolute character was acknowledged by the Human Rights Committee in various views.

[240]UN Human Rights Committee (HRC), *supra note* 237.
[241]Human Rights Watch, "Empty Promises: Diplomatic Assurances No Safeguard against Torture", Apr. l, 2004, Vol.16 No.4 (D), Refworld (Mar. 22, 2017, 17.00 PM), http://www.refworld.org/docid/415c039b4.html.
[242]UN Human Rights Committee (HRC), *supra note* 237.
[243]Den Heijer, M., "Whose Rights and Which Rights? The Continuing Story of Non-refoulement Under the European Convention on Human Rights", 10(3) European Journal Of Migration And Law, 277-314 (2008).
[244]Vadislava Stoyanova, "The Principle of Non-refoulement and the Right of Asylum-Seekers to Enter State Territory", 3(1) Interdisciplinary J. of Human Rights Law, (2008).

In *Ahaniv Canada*[245], the Committee restated the unqualified nature and character of Article 7 and the prohibition on refoulement it entails. This was based on the judgment of the Supreme Court of Canada and the Committee had stated that deportation of an individual where a substantial risk of torture had been found to exist was necessarily precluded in all circumstances. [246]

The prohibition on refoulement developed by way of Articles 6 and 7 of the ICCPR forms a negative obligation on States parties, whereby they are prohibited from forcibly expelling a person to an area where there is a risk of inhumane, cruelty and ill-treatment.[247]The said total prohibition on refoulement covers all forms of forced removal, including extradition of a criminal, expulsion or deportation of an alien. The said prohibition exists until the real risk of subjection to harm proscribed by Articles 6 and 7 of the ICCPR exist. [248]

A similar reasoning has been followed by the HRC to determine that "Article 7 of the ICCPR provides an outright protection against transfer of an individual to face torture or cruel, inhuman, or degrading treatment."[249] In General Comment 31[250], the Committee went further and implied from Article 2 of the ICCPR imposes a broader obligation so as not to transfer a person where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 and 7 of the Covenant, without further defining the potential range of post-transfer risk that could limit transfer[251].The HRC, like the ECtHR, failed to take notice of potential differences between negative and positive State duties. The HRC also did not address the impact of the rule on the State's security interests.

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[245]Mansour Ahani v. Canada, CCPR/C/80/D/1051/2002, UN Human Rights Committee (HRC), (Jun. 15, 2004).
[246]S. Joseph, J. Schultz & M. Castan, "The International Covenant on Civil and Political Rights. Cases, Materials, and Commentary", Oxford: Oxford University Press (2000).
[247]Id.
[248] Jens Vedsted-Hansen, supra note 214.
[249]UN Human Rights Committee (HRC), *supra note* 237.
[250]UN Human Rights Committee (HRC), General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, (May. 26, 2004).
[251]UN Human Rights Committee (HRC), General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, (May. 26, 2004).

The ICCPR also requires expulsion to be undertaken consistent with other provisions of the Covenant. Procedurally, human rights law only requires that the alien be allowed to submit the reasons against expulsion to a competent authority that need not be a court; to appeal to a higher authority that need not be a court; and to be represented during expulsion proceedings.[252]

The prominence of Article 6 of the ICCPR in the background of refoulement is mainly found in the framework of extradition in terms of death penalty. Interestingly, the International Convention for the Protection of all persons from Enforced Disappearance, 2006[253] also prohibits the transfer of persons who risk the death penalty under Article 16. Article 6(1) affords a protection mechanism to people by way of affording protection to "victims of war and general violence", in particular in situations where the State is unable or unwilling to provide adequate protection. In that regard a situation of general or indiscriminate violence may be serious enough to invoke the prohibition on refoulement under Article 6.

In March, 1989, in the case of *Torres v. Finland* (1990)[254] which involved Spanish national who complained that his extradition by Finland to Spain, the Committee held that the extradition would amount to breach of Article 7 of the ICCPR because he would be at risk of being subjected to treatment contrary to Article 7 of the ICCPR.[255]

Moreover, Article 12 of the ICCPR stipulates freedom to leave any country and forbids any arbitrary "deprivation of the right to enter one's own country"; but the ICCPR does not provide for any right of entry to seek asylum.

[252]I. Boerefijn, "The Reporting Procedure under the Covenant on Civil and Political Rights, Practice and Procedures of the Human Rights Committee", Antwerpen [etc.]: Intersentia (1999).
[253] Art. 16, UN General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, U.N.T.S., vol. 2716, 3, Dec. 20, 2006; Doc.A/61/448; C.N.737.2008.
[254]Torres v. Finland, CCPR/C/38/D/291/1988, UN Human Rights Committee (HRC), (1990).
[255] S. Joseph, J. Schultz & M. Castan, supra note 246.

II.3.iv. Non-refoulement under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984[256]

The United Nations General Assembly on 10 December 1984[257] adopted the landmark instrument of Convention against Torture, which subsequently came into force on 26 June 1987 with the objective of reinforcing existing prohibitions, as mentioned in its preamble, and preventing torture and acts that amount to cruel, inhuman or degrading treatment. The Convention consists of 33 articles less than 3 parts with the first part providing for the definition of torture and stating the obligations of State parties, the second part establishing the Committee against Torture and providing implementation mechanisms and the third part providing for treaty provisions.

While there is no express individual rights, the provisions of the Convention protect individuals from torture by establishing the obligation of States. The Convention also introduced the Optional Protocol to the Convention which was implemented in 2002 by the United Nations General Assembly for the purpose of supplementing the Convention.

This prohibition on torture is considered to so be fundamental in the human rights regime that there can be no exception or derogation of the violation of the same, even if there are fears of commission of acts of terrorism by the individual at risk of torture upon being refouled.[258]The Special Rapporteur on Torture in 2002 stated that "*the legal and moral basis for the prohibition against torture and other cruel, inhuman, or degrading treatment or punishment is absolute and imperative and must under no circumstances yield or be subordinated to other interests, policies, and practices*."[259]

[256]Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.
[257]Ibid.
[258]Human Rights Watch, *supra note* 241.
[259]European Court of Human Rights, Annual Report to The Commission on Human Rights, 2002, (Mar. 22, 2017, 16.30 PM), http://www.echr.coe.int/Documents/Annual_report_2002_ENG.pdf.

The CAT seeks to protect various human rights including the prevention on refoulement. Article 3 of the CAT enshrines the concept of non-refoulement stating 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*."[260]

The Article provides an express prohibition on refouling a person when such person faces a risk of torture upon their return. In the case of *Tapia Paez v. Sweden*[261], it was held that the principle of non-refoulement as stated in Article 3 was absolute and therefore, while determining whether the risk of torture exists depending on the facts and circumstances of each case. The nature of the activities in which the person concerned engaged cannot be a substantial contemplation when making a determination under article 3 of the Convention.[262] The host nation would be under an obligation to reject the idea of refouling the individual if such risk of torture is found to exist.

Since the Article does not qualify any eligibility criteria for its application, it offers a wider protection. The proficient authorities should necessarily take into consideration all relevant factors, especially the State's human rights record, while determining whether a person is at risk of being subjected to torture.[263] The principle of non-refoulement as enshrined under Article 3 is applicable to all persons irrespective of their nationality or legal status of a person as a refugee.

A State party is forbidden from expelling, returning or extraditing a person to another State by virtue of Article 3 of the Convention, in the same manner as provided for under Article 33 of the Refugee Convention, 1951.[264] Article 3 of the CAT provides an absolute prohibition on refoulement of anyone residing within the precincts of the

[260]Art.3, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment Or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.
[261] Tapia Paez v. Sweden, UN Doc CAT/C/18/D/39/1996, (Apr. 28, 1997).
[262] Human Rights Watch, *supra note* 241.
[263]Art. 3(2), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.
[264]Art.3, Ibid.

State. A literal interpretation of Article 3 would imply that a person is only protected from being refouled if there prevails a danger of him being exposed to torment only as well-defined under Article 1.Further, violations such as cruel, inhuman or degrading treatment would not entitle a person to protection under Article 3 as the wording of the provision does not expressly say so and limits itself to protection from torture. Moreover, the definition on torture itself as provided under Article 1 of the Convention may restrict the application of the non-refoulement principle found in Article 3. According to Article 1 of the Convention, torture, for the purposes of this Convention, is defined as:

> "*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions"*.[265]

As stated under Article 1, torture would not include instances of pain or suffering only from inherent or incidental lawful sanctions. However, in practice, courts have refrained from making any distinction between acts amounting to torture and acts inflicting pain or suffering arising from inherent or incidental lawful sanctions.[266]

For instance, in the case of *A.S v. Sweden*,[267] it was held that the removal/refoulement of the individual in question would violate the principle of bar on refoulement, stated under Article 3 of the Convention as such individual would be subjected to stoning to

[265]Art. 1, Convention against Torture and Other Cruel, Inhuman Or Degrading Treatment Or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.
[266]D.J. Miller, "Holding States to their Convention Obligations: The United Nations Convention against Torture and the Need for a Broad Interpretation of State Action", Georgetown Immigration Law Journal, 318, (2003).
[267]A.S. v. Sweden, CAT/C/25/D/149/1999, UN Committee against Torture (CAT), (2001).

death for committing adultery.[268] However, the fact that such punishment is prescribed by the laws of Iran would make such an act backed by lawful sanctions of the State and therefore, would be excluded as per the Article 1 of the Convention.[269]

The Committee against Torture and other human rights players has interpreted Article 3 as an absolute manifestation of the right to be free from torture based on the Convention's link to the ECHR.[270] The Committee against Torture has repeatedly stated its view that Article 3 does not allow for any exceptions.[271]Similarly, the U.N. Special Rapporteur on the Question of Torture has characterized Article 3 as absolute, viewing the absence of permissible exceptions as derivative of the absolute nature of the negative duty not to torture.[272]

The Committee against Torture specifically criticized the *Suresh*[273] decision, stating that it was concerned with the failure of the Supreme Court of Canada to recognize the absolute nature of the protection of article 3 of the Convention, which is not subject to any exception whatsoever.[274]

The Convention also excludes torture at the hands of non-state parties unless such non-state party acts in official capacity at the behest of the State itself.[275] Since the Article provides for all relevant considerations to be taken into account, the scope of application of the non-refoulement principle is widened.[276]Article 3, is absolute in nature and it implies that none is to be excluded from availing the protection from refoulement. It implies that no one can be detached by a State party merely because

[268]Vadislava Stoyanova, supra note 244.
[269]Julia Mink, "EU Asylum Law and Human Rights Protection: Revisiting the Principle of Non-refoulement and The Prohibition of Torture and other Forms of Ill-Treatment", 14 European Journal of Migration and Law 122, 119-149, (2012).
[270] D.J. Miller, Id 266 at 318.
[271] U.N. Comm. Against Torture, Conclusions and Recommendations of the Committee Against Torture: Canada, T 4(a), U.N. Doc. CAT/C/CR/34/CAN (July 7, 2005)
[272]Special Rapporteur of the Comm'n on Human Rights, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Transmitted by Note of the Secretary-General, 28, U.N. Doc. A/59/234 (Sept. 1, 2004).
[273]Suresh v. the Minister of Citizenship and Immigration; the Attorney General of Canada SCC No. 27790, 14(1) Int. J. Refugee Law 141-157 (2002).
[274]U.N. Comm. against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture: Canada, 4(a), U.N. Doc. CAT/C/CR/34/CAN (July 7, 2005).
[275] D.J. Miller, supra note 266 at 318.
[276] Id. at 126.

he poses a threat to the national security of that State or its people or because he has committed serious criminal offences within a State party to the Convention and is therefore ineligible for asylum under domestic law. [277]

Article 3 of the Convention is a comprehensive one and hence includes within its ambit all forms of forced removal, including the extradition of a criminal and the expulsion or deportation of an alien, and finds its application to all situations of forced removal. [278]

II.4. ANALYSIS OF THE CONCEPT OF NON-REFOULEMENT UNDER INTERNATIONAL HUMAN RIGHTS LAW

Treaties concerning human rights are characterized by their ability to generate objective frameworks for the establishment and setting safeguards for protection of the rights of individuals, regardless of nationality, which cannot be circumscribed by states through inter-state agreements. However, there is little record of state compliance with international human rights obligations.[279] This may be due to the lack of adequate incentives or pressure upon States to ensure compliance.

Certain authors have found that the intricate connection between refugee law and international human rights law has become weaker and there lacks a clear link between the two fields of law as national interests supersede universal obligations.[280] The two fields, although having similar objectives of protecting persons regardless of nationality, operate separately rather than offering additional protection. The UNHCR's Director of International Protection also remarked that refugees enjoy a wide variety of rights under different treaties in addition to specific refugee treaties

[277] Mink, supra note 269, at 127.
[278] Art.3, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment Or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.
[279] G.H. Fox, supra note 174.
[280] Karin Landgren, "Deflecting International Protection by Treaty: Bilateral And Multilateral Accords On Extradition, Readmission And The Inadmissibility of Asylum Requests", UNHCR Working Paper No. 10, UNHCR, (Jun. 1999).

such as Refugee Convention, 1951.[281] This position of refugees is crucial for ensuring that the legal protection of refugees are broadened and continue to improve over time. Moreover, other human rights treaties fill the gaps of the Refugee Convention, 1951 by providing mechanisms or institutions for ensuring the compliance of international human rights obligations. For instance, "the Committee against Torture (CAT) and the European Court of Human Rights" has been crucial in protecting refugee rights and interpreting the scope of these rights.

While the duty of non-refoulement is the cornerstone of international refugee law, it also applies under human rights law and humanitarian law[282], fields which seek to fulfill the same objectives as the concept of non-refoulement, i.e., protection from undue and unnecessary harm and protection of fundamental rights. Under international human rights law, an individual will be protected from refoulement through the application of various human rights instruments especially when the country of origin or the country to which the individual is to be refouled has a history or potential of human rights violations.

This obligation has been enshrined in several human rights treaties such as the Convention against Torture (CAT), the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). Refugee protection is further strengthened by International human rights law, which strengthens the specific refugee legal framework, which allows refugees to invoke the protection of norms whose scope of application may be wider than those in the refugee regime, such as for instance, the absolute prohibition of refoulement to situations where there is a real risk of torture or inhuman or degrading treatment or punishment.

These human rights instruments, such as the CAT, ICCPR, ECHR, reflect the concept of non-refoulement, and as a result, widen its scope as seen in the CAT which provides for an absolute prohibition of the principle of non-refoulement when

[281] Id. at 12.
[282] Karen Parker, "Human Rights and Humanitarian Law", 7 Whittier L. Rev., 675 (1985).

there is a risk of torture upon return. However, what needs to be analyzed is the extent of the reflection of the principle of NR in these instruments and the nature and content of the obligation on States.

With the well- established concept of non-refoulement, the nature of the obligation to protect leaves a margin of appreciation to States on the ways in which this may be achieved. The 1993 World Refugee Survey prepared by the U.S. Committee for Refugees noted that "numerous states expelled aliens under questionable procedures, which could result in refoulement of genuine refugees among those returned."[283]

The obligation of non-refoulement under international human rights law harmonize the existing refugee protection regime and widens the scope of protection from grave violations of human rights to all persons regardless of refugee status. Although certain human rights instruments do not expressly provide for the concept of non-refoulement, certain provisions implicitly do offer some form of protection similar to that offered under the obligation of non-refoulement.

II.5. DEROGATION OF THE PRINCIPLE OF NON-REFOULEMENT UNDER INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

The principle of non-refoulement is considered to be a binding negative obligation on States and is a cornerstone in the refugee protection framework. States have, however, found various ways to derogate from this principle without their actions being deemed illegal in nature. This has been done through the use of extradition treaties, exploitation of the lack of a uniform interpretation of the scope and nature of the non-refoulement principle and the inconsistent State practice of the application of the principle as a human right. This part of Chapter 2 seeks to examine the State practice of derogation of the non-refoulement principle through the use of extradition provisions under the human rights regime and examine whether this problem can be solved by cementing the nature and character of the principle of non-refoulement as a human right.

[283]Roman Boed, Supra note 201.

II.5.i. Derogation of the concept of non-refoulement via extradition treaties: A human rights perspective

Criminal law and international refugee law may overlap at times, and when this takes place States may opt for the measure of extradition of the refugee or asylum-seeker. Where States have agreed upon the extradition of a refugee or asylum-seeker, special protections apply and certain facts and circumstances such as the vulnerable position of the person being extradited and the effect on the person's human rights must be taken into consideration.

Extradition refers to the surrender of a person by one State to another, the person being either accused of an extraditable crime in the requesting States or unlawfully at large after conviction.[284] Extradition is a formal process for the purpose of criminal prosecution of the enforcement of a sentence. [285]Extradition is generally done through the use of bilateral treaties between the State extraditing and the State requesting extradition and seeks to ensure that individuals committing certain crimes are held accountable for their actions and that justice is met. The extradition proceedings are to adhere to the laws of the requested State and the extradition treaty entered. Extradition also allows States to combat impunity, terrorism and other transnational crimes.[286]Extradition law has evolved over time to include several other types of crime and have been shaped by anti-terrorism conventions and other treaties which lay down that a person responsible for the commission of these crimes is to be extradited.

At the regional level in Europe, extradition can take place under the 1957 European Extradition Convention and it's Additional Protocols which was adopted by the Council of Europe, along with the various applicable bilateral treaties. The European Union too has adopted the 1995 Convention on Simplified Extradition Procedures[287] and the 1996 Convention Relating to Extradition between the Member States of the

[284]Robert Cryer, et. al., "Introduction to International Criminal Law and Procedure", 93 (2nd ed. 2010).
[285]UNHCR, *supra note* 179.
[286]Ibid.
[287]Convention on Simplified Extradition Procedures, OJ C78, (1995)

European Union[288].These conventions offer simplified proceedings and reduced grounds for refusal but they have not been widely ratified.[289] The European Arrest Warrant was also introduced, replacing the traditional extradition schemes and establishing a system wherein a warrant issued in one State would be recognized in other member States with minimal formalities.[290]

Extradition proceedings, as established in the concerned extradition agreement, should seek to ensure that the formal requirements as well as the rights of the person being extradited are followed and protected. The traditional view is that it is the responsibility of the State Parties to ensure the above, whereas a new approach developed under the human rights regime suggests that the individual may claim independently his or her rights during the extradition proceedings, thereby providing an additional ground for the refusal of extradition in case the rights of the individual may be violated and ensuring the prevention of any violation of fundamental rights.[291]

Various treaty provisions dealing with the concept of prohibition on refoulement may be in apparent conflict with other provisions laid in treaties, particularly those dealing with extradition. [292]Extradition treaties, in this sense may hence clash with "treaty obligations between the duty to extradite stemming from an extradition treaty on the one hand and the duty of non-refoulement as enshrined in international refugee law and human rights law."The conflict may also be attributed to human rights treaty obligations which expressly prohibit extradition or require the fulfillment of strict conditions before extradition of an individual can be carried out. These strict requirements apply during extradition proceedings and the State being requested to extradite an individual is at liberty to refuse such request or impose conditions upon the requesting State before proceedings are initiated.

[288]Convention Relating to Extradition between The Member States Of The European Union, OJ C313, (1996).
[289]Robert Cryer, supra note 284.
[290]Ibid.
[291]Robert Cryer, *supra* note 284
[292]K Wouters, "International Legal Standards for the Protection from Refoulement", Antwerpen, Intersentia, (2009).

This conflict can become apparent when the State is under a duty to extradite but at the same time is necessarily bound by *non-refoulement* duties under human rights treaties.[293] As there exists no hierarchy of treaties under the international law, thus Human rights treaties, therefore, are treated no differently from other treaties, including extradition treaties, as regards priority, "except where jus cogens norms are concerned." In case of such conflict, extradition would be barred in case it results in a violation of a jus cogens norm, such as the right against torture provided in the CAT and rendering the treaty void. Several authors have noted that, no requested state should have difficulty in justifying a refusal to extradite a person to a state in which he is likely to be subjected to torture, due to the prime jus cogens character. [294]

Since the concept of non-refoulement has not yet received such a status, nor is it a human right, States still engage in the fulfillment of extradition duties at the cost of causing violations to the principle of non-refoulement. There may be a possibility of resolving such conflicts of obligations by prioritizing human rights treaties which are multilateral treaties of higher normative value, over extradition treaties which only have a limited application. This approach has been endorsed by the UNHCR which stated that when such conflicts arise, bars to the surrender of an individual under international refugee and human rights law prevail over any obligation to extradite.[295]

Following this approach, obligations under the human rights regime will supersede other obligations, including those for the prevention of terrorism which also have to follow human rights norms."This was reiterated in the Plan of Action annexed to the United Nations Global Counter-Terrorism Strategy adopted by the General Assembly on 6 September 2006," wherein it was stated that human rights law, international refugee law and humanitarian law obligations would precede other obligations such as those under extradition treaties.[296]

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[293]Ibid.
[294]John Dugard & Christine Van Den Wyngaert, "Reconciling Extradition with Human Rights", 92 Am. J. Int'l L.187 (1998).
[295] UNHCR, *supra note* 179.
[296]Ibid.

While the Vienna Convention on the Law of Treaties does not provide for a hierarchy of treaties, the Charter of the United Nations states that the obligations under the Charter would supersede obligations under other international agreements.[297]These obligations contain human rights obligations wherein States have the duty to work towards fulfilling the purposes and aims of the UN such as the observance of human rights and fundamental freedoms for all individuals regardless of race, religion, sex or language. [298] Articles 55(c) and 56 of the UN Charter call for the member States to promote universal respect for and observance of human rights and fundamental freedoms for all without discrimination, and pledge themselves to take joint and separate action in co-operation with the United Nations for the achievement of this purpose. Therefore, it is argued that extradition would be barred when it is likely to result in breaches of human rights commitments, particularly the obligation of non-refoulement. [299]

This has been emphasized in the *Soering* judgment wherein the Court held that a State is bound by its human rights obligations with respect to extradition. Article 11 of the European Extradition Convention also reflects this condition. Following the European Arrest Warrant, judicial human rights considerations are now mandatory in the extradition proceedings of some countries, for example the United Kingdom and Ireland.[300]

In circumstances where the individual is sought to be extradited to a country which is not his or her country of origin, the State which must extradite should take into consideration international human rights and non-refoulement obligations under Article 33 and potential violations of the same upon the person's return.[301] Extradition should not lead to the persecution of the individual, or torture or other harms which was the reason for the individual seeking asylum in the first place. Ideally, the State extraditing would consider the human rights record of the requesting State and the threat of removal to a third country after extradition which would violate

[297]The United Nations, Charter of the United Nations, 1 U.N.T.S XVI, art. 103 (Oct 24, 1945).
[298]The United Nations, Charter of the United Nations, 1 U.N.T.S XVI, art. 55(C) and 56 (Oct 24, 1945).
[299]Kapferer, *supra note* 118.
[300]Dugard and Wyngaert, *supra note* 294
[301] Id. at 198.

non-refoulement obligations under Article 33.

Therefore, the State extraditing the refugee or asylum-seeker must ensure that no violation of basic human rights of the individual upon extradition. However, there has been much difference in the application of this principle from State to State as domestic legislation and procedural rights of an individual being extradited differ.[302] Certain authors have also opposed the view that human rights obligations should supersede obligations under extradition treaties for the reason that "Articles 55(c) and 56 of the UN Charter and the preamble to the Vienna Convention do not create clear identifiable obligations for States, but rather generate generic aims which States must pledge to carry out and promote those values," and that such an interpretation of human rights obligation treaties preceding extradition orders has little chance of being successfully implemented.[303]

If international human rights law, along with the norm of non-refoulement, provide a bar to extradition of a refugee or asylum-seeker in certain circumstances, especially when the individual would be at risk of persecution once again after extradition, this would offer additional safeguards and protection to asylum-seekers and refugees.

An example of such an application has been reflected in 'discrimination clauses' where the State must refuse extradition if it is intended for political motives or with the intent of discrimination or persecution[304]. Various international agreements include a common clause which prevents extradition when there is a reason to believe that such extradition is being done for a discriminatory purpose. This common clause was inspired by the non-refoulement principle and seeks to ensure certain minimum guarantees before an individual is to be extradited.[305]

European Courts have recently considered allegations that extradition may lead to a serious violation of human rights when the individual to be extradited is able to support his or her claim.[306]Generally, States may apply conditions before granting

[302]Dugard and Wyngaert, *supra note* 294
[303]K Wouters, *supra* note 292.
[304]Kapferer, *supra* note 118.
[305]*Ibid.*
[306]Karin Landgren, *supra* note 280.

extradition.[307]In order to ensure that extradition leads to no fundamental or human rights violations, States have been involved in the practice of giving the other diplomatic assurance on various concerns such as assurances on providing the individual a fair trial, adequate detention facilities and conditions, assurances to not execute the individual or sentence them to death to be executed elsewhere, guarantees against torture, etc.[308]

Usually, diplomatic assurances are sought on an individual basis and relate directly to the individual concerned. There is however a recent development of using them as general clauses concerning the treatment of deportees in bilateral agreements. For example, in August 2005 the United Kingdom signed a Memorandum of Understanding (MoU) with Jordan regulating the deportation of people which contains a remark that the United Kingdom and Jordan will comply with their human rights obligations under international law regarding people who are returned under this MoU.[309]

Assurances should not only comply with non-refoulement and other human rights obligations but also prevent persecution of the individual being extradited at the hands of the requesting State. These assurances should be devoid of any risk of torture, persecution or irreparable harm. Persecution would encompass its meaning under both the Refugee Convention and international human rights law of "denial of life and liberty, torture and cruel, inhuman or degrading treatment."

Diplomatic assurances between the States that such violations will not take place should be accepted with caution due to the lack of effectiveness of such assurances, as stated earlier. If the State was to accept such diplomatic assurances, it should ensure that the requesting State's assurance can be relied upon and that there would be no violation of international human rights obligations.

[307] *Ibid.*
[308] K Wouters, *supra* note 292 at 30.
[309] *Ibid.*

However, in practice, these assurances provide little protection and offer a watered-down version of the principle of non-refoulement. Even if the assurances themselves guarantee state that compliance will be made in accordance with non-refoulement obligations, the system provides for no monitoring mechanism to ensure compliance or detect derogation.[310] Often there is no penal or sanction provision in case derogations do come to light.

In the case of *Agiza v Sweden*[311], the Committee against Torture concluded that Sweden was in violation of Article 3 of the CAT as the assertions attained by Sweden provided for no enforcement mechanisms and failed to protect the person being extradited from a serious threat of ill-treatment upon his extradition to Egypt.

In *Harkins and Edwards v. the United Kingdom*, the issue concerned the complaint of two men that, if the UK were to extradite them to the US, they risked the death penalty or sentences of life imprisonment without parole. The Court rejected as inadmissible the complaints concerning the alleged risk of death penalty, considering that the diplomatic assurances were clear and sufficient to remove any risk that the applicants could be sentenced to death if extradited, particularly as the US had a long history of respect for democracy, human rights and the rule of law.[312]

In *Shamayev and Others v. Georgia and Russia*[313], 13 Russian citizens of Chechen origin claimed that their extradition from Georgia to Russia would expose them to a real risk of subjection to ill-treatment proscribed in Article 3 of the ECHR as well as to being sentenced to death. The Russian authorities provided an assurance stating that no ill-treatment would be meted out to them. With regard to the one applicant whose extradition was imminent, the Court concluded that his extradition would be in breach of Article 3 of the ECHR because five applicants already extradited were subjected to torture upon their return.[314] Here, the behaviour of the Russian authorities

[310]K Wouters, *supra* note 292 at 198.
[311] Agiza v. Sweden, CAT Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005).
[312]Harkins and Edwards v. the United Kingdom, Nos. 9146/07 and 32650/07, Council of Europe: European Court of Human Rights, (17 Jan. 2012).
[313]ECtHR, Shamayev and 12 others v Georgia and Russia, 12 April 2005, Appl. No. 36378/02, paras. 342 and 343, (2005).
[314]*Ibid.*

illustrates that giving diplomatic assurances and being a party to the ECHR are no guarantee that the State will actually comply with the assurances given or with its obligations under the Convention.

The Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment of Punishment, Manfred Nowak, in a report on cases involving diplomatic assurances to the UNGA in 2005[315], stated that assurances are variable and ineffective in the protection against torture and ill-treatment. Such assurances are sought usually from States where the practice of torture is systematic. It was also found in the report that post-return monitoring mechanisms have proven to be no guarantee against torture.[316] Since diplomatic assurances are not legally binding, they carry no legal effect and no accountability if breached and the person whom the assurances aim to protect has no recourse if the assurances are violated.

The Special Rapporteur was therefore of the opinion that States cannot diplomatic assurances cannot be resorted to as a safeguard against torture and ill-treatment when there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return.[317]

II.5.ii. Extradition under the European Convention on Human Rights, 1950

As has already been stated above, the prohibition on refoulement is applicable in extradition situations. In such a context, a conflict of treaty obligations may occur, in that an extradition treaty may oblige the State to extradite an individual and the prohibition on refoulement under Article 3 ECHR prohibits the State from doing so. [318]

[315]Special Rapporteur on Torture, Report of The Special Rapporteur on Torture and Other Cruel, Inhuman Or Degrading Treatment Or Punishment, A/60/316, para. 51, (30 Aug. 2005).
[316]*Ibid.*
[317]*Ibid.*
[318] Vadislava, Stoyanova, *supra* note 244

Notably, the absolute character of Article 3 ECHR does not resolve the conflict. A conflict of treaty obligations raises questions of priority and responsibility, except when there is a conflict between a treaty obligation and a rule of jus cogens. [319]Generally, the Court does not delve into the issue of conflict of obligations between extradition treaty obligations and obligations under Article 3 of the ECHR. In *Soering v the United Kingdom*, the Court ignored the 1972 Extradition Agreement between the United Kingdom and the United States . The UK–US Extradition Agreement did have a clause dealing with potential conflict with other international obligations in the perspective of death penalty, but not for its obligation to ensure there was no risk of torture or other forms of proscribed ill-treatment.[320]

In the *Soering* case, the Court made an explicit reference to Article 3 ECHR as preserving one of the central values of nations constituting the Council of Europe and lay emphasis on that similar provisions could be found in other global and regional treaties. The Court concluded that Article 3 is generally recognized as an internationally accepted standard. [321]

The Court also stated that Article 1 cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention. [322] In the case of *D v. United Kingdom*[323], the court noted the fundamental importance and absolute character of Article 3 of the ECHR, stating that the court must look at where the source of the risk of proscribed treatment in the receiving country stems from . The ECHR concluded that in view of the exceptional circumstances and merely considering applicant's illness, the implementation of the decision to eliminate him would amount to irrational and inhuman treatment by the respondent State, thus

[319] Den Heijer, *supra* note 243.
[320] Soering v. United Kingdom, *supra note* 210.
[321]Battjes, H., "The Soering Threshold: Why only Fundamental Values Prohibit Refoulement in ECtHR Case Law", 11 European Journal of Migration And Law, 205-19, (2009).
[322]*Ibid.*
[323] D v. United Kingdom, (1997) 24 EHRR 423 (ECtHR).

constituting violation of Art 3 of the ECHR.[324]

Moreover, The European Court of Human Rights has consistently indicated that the principle of non-refoulement is integral in Article 3 and becomes applicable in any instance where the individual to be extradited faced a real risk of torture upon their extradition.

II.5.iii. Extradition under the International Covenant on Civil and Political Rights, 1966

The committee expressly prohibits extradition, where there are substantial grounds for believing that there is an actual risk of irreparable harm, such as that contemplated by Articles 6 and 7 of the ICCPR.

It was earlier argued by the State party that extradition was beyond the scope of the Covenant. The Human Rights Committee declared the complaint admissible and considered that it raised new and complex questions with regard to the compatibility of the Covenant with extradition to face capital punishment. Importantly, the Committee noted that the author did not claim that extradition as such would be in violation of the Covenant, but rather that the circumstances related to the effects of extradition. [325]

It is now well established that extradition falls within the scope of the Covenant when there is a real risk that the individual's rights under the Covenant will be violated upon his extradition.[326] In cases where the Covenant prohibits extradition on the basis of the prohibition on refoulement and an extradition treaty may oblige a State party to extradite the person concerned, a conflict of treaty obligations may arise.

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[324]*Ibid*.
[325]Vadislava Stoyanova, *supra* note 244.
[326]Durieux, Jean-Franqois and Mcadam, Jane. "Non-refoulement Through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies", 16 International Journal Of Refugee Law, 4 (2004).

There arises a possibility of conflict when proscription on refoulement prohibits removal to areas where there is a real risk of harm other than harm which amounts to torture. Further, the said issue of a conflict of treaty obligations has been addressed to some extent by the Committee[327].

The Human Rights Committee prioritizes the right to life and the prohibition on the imposition of and subjection to the death penalty under Article 6(1) ICCPR in the context of the prohibition on refoulement over obligations to extradite a person in cases in which the State party has abolished the death penalty and there is no assurance that the death penalty will not be carried out or when the death penalty is carried out in an inhumane manner as proscribed by Article 7 ICCPR.

Further, this prohibition on refoulement came to be first affirmed by the Human Rights Committee, in a decision on the merits of an individual complaint in *Kindler v Canada* (1993).[328]The case questioned both Articles 6 and 7 of the ICCPR. The Committee found that extradition would be a violation of the ICCPR, stating that if a State extradites a person within its jurisdiction in circumstances such as that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.[329]

In *C. v Australia* (2002)[330], a person had been convicted of aggravated burglary and threats to kill, for which he was sentenced to three-and-a-half years' imprisonment. For this reason, Australia wanted to deport him in spite of his refugee status. The Committee concluded that he could not be deported because he had a real risk of being subjected to ill-treatment.

In two other individual cases involving refoulement, the Human Rights Committee remained silent about the fact that the individuals concerned had been convicted of various crimes and posed a threat to the State party's public order and/or national

[327]HRC, General Comment No. 15: The Position of Aliens under the Covenant, (Apr. 11, 1986).
[328]Durieux, Jean-Franqois and Mcadam, Jane, supra note 326.
[329] Kindler v. Canada, Communication No. 470/1991, U.N. Doc. CCPR/C/48/D/470/1991 (1993).
[330] C. v. Australia, *supra note* 238.

security.[331] Clearly, criminal conviction is not a material consideration for the Committee with regard to the prohibition on refoulement.

In 2005, the HRC criticized the *Suresh v. Canada* decision as a violation of Article 7 of the ICCPR. In its concluding observations to Canada, the HRC wrote, no person, without any exception, even those suspected of presenting a danger to national security or the safety of any person, and even during a state of emergency, may be deported to a country where he/she runs the risk of being subjected to torture or cruel, inhuman or degrading treatment.[332]

II.5.iv. Extradition under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

Extradition is explicitly prohibited by Article 3 of the Convention against Torture if there are substantial grounds for believing that the extradited person would be in danger of being subjected to torture after extradition. Article 3 of the 1984 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.

This also has its application to States that are not parties to the Convention as the proscription of torture has developed the status of a jus cogens norm.[333]However, the applicability of the same absolute prohibition in circumstances where the individual may be faced with cruel, inhuman or degrading treatment is still unclear.This may give rise to a conflict of treaty obligations, as extradition is frequently covered by bilateral or multilateral extradition treaties. During the drafting of the Convention against Torture considerable attention was given to the problem of conflicting treaty obligations.

[331] *Ibid.*
[332]Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002 SCC 1.
[333]UNHCR, *supra note* 179.

The Committee against Torture seems to acknowledge the importance and prevalence of protection under Article 3 when there is a conflict with an extradition obligation.[334]The Committee has on many occasions sought clarification of the measures taken by the States parties to the Convention to ensure that people were not extradited to a State where the risk of being subjected to torture existed. A prohibition on refoulement which aims to prevent subjection to torture must prevail over any legal obligation to extradite a person to a State in which he is likely to be subjected to torture.

At the European level, the interpretation of Article 3 of the European Convention on Human Rights, as developed by the European Commission of Human Rights, was confirmed by the European Court of Human Rights in the Soering judgment[335] in 1989, dealing with the issue of extradition of an offender who was likely to be exposed to inhuman treatment after his prospective conviction in the requesting non-European State. In the landmark case of Soering *v. the United Kingdom*[336], the Court failed to take note of the 1972 Extradition Agreement between the United Kingdom and the United States.

Subsequent judgments clarified the scope of this protection as well as its absolute nature, in that the European Court of Human Rights held the prohibition of refoulement applicable not only to cases concerning extradition, but also to decisions to expel aliens applying for asylum in a Convention State and other aliens who are considered undesirable in the territory.[337]

The Court extended the scope of applicability of Article 3 stating that in its *Soering* judgment of 7 July 1989 the Court held that the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the

[334]Durieux, Jean-Franqois And Mcadam, Jane, *supra* note 326.
[335]Soering v. United Kingdom, *supra* note 210.
[336] *Ibid.*
[337]Jens Vedsted-Hansen, *supra* note 214.

requesting country.[338]

The Court also held that "in so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment."[339] Although the present case concerns expulsion as opposed to a decision to extradite, the Court considers that the above principle also applies to expulsion decisions and a fortiori to cases of actual expulsion.[340]

In the *Vilvarajah* judgment[341], the Court held that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including Article 3, to control the entry, residence and expulsion of aliens. Moreover, it must be noted that the right to political asylum is not contained in either the Convention or its Protocols.[342]

Other humanitarian grounds must also be taken into consideration. In the case of *Aswat v. the United Kingdom*,[343] the Court held that Mr. Aswat's extradition would amount to a violation of Article 3 (prohibition of inhuman and degrading treatment) solely on account of the current severity of his mental illness.

Nonetheless, the Court upheld the principle that expulsion by a Contracting State of an asylum seeker may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he was returned.[344]

[338]Battjes, H., *supra* note 321.
[339] *Ibid.*
[340]Durieux, Jean-Franqois And Mcadam, *supra* note 326.
[341]Vilvarajah and others v. United Kingdom, *supra note* 228.
[342] *Ibid.*
[343]Aswat v. The United Kingdom, ECHR, No. 17299/12, (2013).
[344]Ellen F. D'angelo, *supra* note 50 at 217

Extradition is explicitly prohibited by Article 3 of the Convention against Torture if there are substantial grounds for believing that the extradited person would be in danger of being subjected to torture after extradition. This may give rise to a conflict of treaty obligations, as extradition is frequently covered by bilateral or multilateral extradition treaties. During the drafting of the Convention against Torture considerable attention was given to the problem of conflicting treaty obligations.

In the last report (1984) of the Working Group set up by the Commission on Human Rights to draft the Convention against Torture,[345] it was explicitly mentioned that States parties to the Convention might wish, at the time of signature or ratification of the Convention or accession thereto, to declare that they did not consider themselves to be bound by Article 3 of the Convention in so far as the Article might not be compatible with obligations under extradition treaties.

However, no reservations or declarations have been made.[346] The Committee against Torture seems to acknowledge the importance and prevalence of protection under Article 3 when there is a conflict with an extradition obligation. The Committee has on many occasions sought clarification of the measures taken by the States parties to the Convention to ensure that people were not extradited to a State where the risk of being subjected to torture. In none of the cases in which the complainant was threatened with extradition was there a conflict of treaty obligations.

II.5.v. Extradition under the Convention on the Status of Refugee, 1951: Whether the Refugee Convention, 1951 permits extradition?

Even though Article 33(1) does not make any express mention to extradition being a prohibited act of the Refugee Convention, it is still covered by that Article. The phrase 'in any manner whatsoever' formulated in Article 33(1) finds that every

[345]Durieux, Jean-Franqois and Mcadam, *supra* note 326.
[346]Ellen F. D'angelo, *supra* note 50at 217.

possible form of expulsion or return, including extradition, is included.[347]

The Executive Committee of the UNHCR's Programme, in light of the principle of non-refoulement, recognizes that refugees should be protected in regard to extradition to a country where they have well-founded reasons to fear persecution on the grounds enumerated in Article 1 A(2) of the 1951 Convention and called upon States to ensure that the principle of non-refoulement is duly taken into account in treaties relating to extradition and as appropriate in national legislation[348]. The UNHCR expressed the hope that due regard be had to the principle of non-refoulement in the application of existing treaties relating to extradition.

The refugee or asylum-seeker may be extradited if it is conclusively determined that non-refoulement obligations as well as obligations under the human rights regime will be complied with. The Refugee Convention, therefore, does not prohibit extradition. People who are suspected of having committed certain serious crimes are excluded from refugee protection under Article 1F of the Refugee Convention and are therefore not protected by Article 33(1), and may thus be extradited. In addition, other suspected criminals whom there are reasonable grounds to regard as a danger to the security of the country in which they are (Article 33(2)) may also be extradited.[349]

In cases where the State requesting for extradition is the country of origin, it is incumbent upon the extraditing State to abide with non-refoulement obligations under Article 33 of the Refugee Convention as well as human rights obligations. Therefore, there exists a bar on the State from extraditing such individual, including during the appeal stages of the asylum proceedings.[350]

States have often proceeded with extraditing individuals in spite of the non-refoulement obligation under Article 33 of the Refugee Convention by claiming that there exists no potential obligation under the Convention to weigh up the degree of

[347]Karin Landgren, *supra* note 280.
[348] UNHCR, *supra note* 179.
[349]Art. 33(2), Refugee Convention 1951.
[350] UNHCR, *supra note* 179.

seriousness of a serious crime against the possible harm to the applicant upon extradition.[351] The UNHCR has, however, explained that refoulement under Article 33(2) can be allowed for only when the gravity of danger posed by the individual outweighs the degree of persecution feared after return.[352]

Extradition to the country of origin may lead to the same persecution the refugee or asylum-seeker was trying to flee. Such a person cannot be extradited unless it is found that such person falls under the exception provided in Article 33(2) of the Refugee Convention.[353]If it is found that the individual does fall under the exception clause, then such individual is no longer protected under the refugee law framework and can be extradited. However, even during such extradition, the State must ensure compliance with obligations under the human rights regime.

During extradition proceedings, all substantive and procedural conditions must be met while refouling an individual under Article 33(2).[354] Article 33(2) does not, however, have any significant impact on the application of *non-refoulement* as enshrined in international human rights law which provides broader protection.

This obligation to adhere to human right norms applies even when diplomatic assurances have been given as the extradition of the refugee or asylum-seeker to his or her country of origin would defeat the purpose of the protection given to refugees under the Convention,[355] and would make such person highly susceptible to persecution at the hands of the country of origin. Since the extraditing country would have already assessed the refugee status of the individual before extradition, subsequent extradition would violate Article 33 and be inconsistent with the refugee protection framework.

[351]Dhayakpa v. Minister for Immigration & Ethnic Affairs (1995) 62 FCR 556, 563 (Austl.)
[352]Letter from Thomas Albrecht, Deputy Regional Representative, UNHCR, to Paul Engelmayer, Wilmer Hale, RefWorld (Jan. 6, 2006, 16:35 PM), http://www.unhcr.org/refworld/pdfid/43de2da94.pdf.
[353]Kapferer, *supra note* 118.
[354] Dugard & Wyngaert, *supra note* 294.
[355] *Ibid.*

II.5.vi. Analysis of the Derogation of the Concept of Non-refoulement via extradition treaties under the human rights regime

The recourse of extradition treaties to avoid non-refoulement obligations is available to States through the provisions of various human rights treaties, including the Refugee Convention, as described above. Interestingly, even the unqualified nature of the exclusion on refoulement under certain human rights instruments such as the ECHR and the ICCPR do not address the issue of conflicting treaty obligations of States entering extradition treaties. Neither have Courts provided a consistent interpretation to the duty of non-refoulement over the duty to extradite. Due to this, States have focused on fulfilling short term extradition obligations over acting on their responsibility of non-refoulement.

The lack of a hierarchy of treaties also exacerbates this problem as there is no legal basis for placing human rights treaties on a pedestal over extradition treaties. However, a bar on extradition which may lead to the derogation of the non-refoulement principle has been interpreted within the human rights obligations of a State by the UNHCR which view has been supported by other authors. States, along with certain scholars have opposed the adoption of this approach as the concept of non-refoulement has not accomplished a jus cogens prominence and are not a human right and therefore are of a lesser pedigree than say the prohibition on torture.[356]

Moreover, the protection against refoulement provided by these human rights instruments are limited in nature as they apply only in certain circumstances or when certain kinds of harm are likely to be faced by the person being extradited, although these provisions in themselves often do not provide for exceptions. The provisions on the prohibition on refoulement in the CAT applies only to instances where the individual being extradited faces a tangible genuine menace of torture, and not other forms of harm or persecution. This has been the trend under the ECHR as well. The non-refoulement principle under the ICCPR is constrained to instances when a person may be sentenced to the death penalty after extradition.

[356]K Wouters, *supra* note 292 at 126.

While safeguards under extradition treaties itself have been developed such as the discrimination clause and diplomatic assurances, the effectiveness of these safeguards have often been questioned due to the lack of an effective monitoring mechanism or legal sanctions for the violation of the same.

II.6. STRENGTHENING NON-REFOULEMENT AS A HUMAN RIGHT: A SOLUTION

II.6.i. Scope and Nature of Human Rights

Human rights are variable in nature, in the sense of being in totality, interdependent, inalienable and indivisible rights inherent to all human beings, without discrimination based on nationality, creed, religion, sex, or any other distinguishing factor.[357] International human rights law, through treaties, customs and general principles, guarantees these rights and creates an obligation upon State Governments to ensure the protection of these rights and refrain from the commission of violation of these rights.[358] Human rights law include within their ambit, universal rights of individuals and obligations of States to protect and fulfill these basic privileges by taking positive action to promote those rights and refraining from acts that amount to human rights abuses.[359]

Generally, human rights treaties afford protection to individuals and not corporations or juridical persons regardless of their legal or social status and thus prohibiting any form of discrimination.[360]Under this regime, individuals are the beneficiaries of human rights and States act as the main actors or duty bearers and are thus obliged to protect these rights.[361] By and large, human rights treaties, by way of provisions create rights for individuals and impose obligations and responsibilities on States. Hence,

[357]OHCHR, "What are Human Rights", OHCHR, (Mar. 12, 2017, 16:00 PM), http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx.
[358] Dinah L Shelton, *supra* note 171.
[359] Olivier de Schutter, "International Human Rights Law: Cases, Materials, Commentary, Cambridge", Cambridge University Press, (2010).
[360]M. Nowak, "U.N. Covenant on Civil and Political Rights, CCPR Commentary", Kehl: N.P. Engel Publishers, (1993).
[361]R. Jennings & A. Watts (eds.), "Oppenheim's International Law", Volume I. Parts 2 to 4, London: Longman, (9th ed. 1992)."

member States which are party to a human rights convention bear a common as per the convention to ensure that individuals get the benefit of the rights provided for in the treaty.[362]

The responsibility to protect human rights is primarily territorial, i.e. it is based on the sovereignty of States and limited by the sovereign territorial rights of other States. In common parlance, there is a prime obligation imposed on the states to ensure and check the protection of human rights to individual subjects falling within their territory.[363].Yet, human rights maybe limited and are granted only to citizens who have the nationality of the State, or to those who are lawfully residing in the State.64For example, under Article 25 of the ICCPR only citizens have a right to vote and to be elected, and under Article 12(1) of the ICCPR only people who are lawfully within the territory of a State shall have the right to liberty of movement. Broadly, the right to be protected from the peril of refoulement is universal and is available to all regardless of nationality or legal or social status.

However, human rights protection is not solely and exclusively territorial as in certain circumstances, state parties are responsible for ensuring human rights protection to people even outside their territory, this is because the individual involved is either a national of the State or is within the jurisdiction of that State. The latter is a significant condition with regard to protection from refoulement. Moreover, according to Meron, 'an arrow territorial interpretation of human rights treaties is anathema to the basic idea of human rights, which is to ensure that a State should respect human rights of persons over whom it exercises jurisdiction'[364]; in other words, for whom a State is responsible or over whom it has control.

Certain human rights are formulated in outright terms, implying that the text in the form of provisions doesn't favour many exceptions, for instance, for reasons of public interest or national security. Secondly, these rights cannot be derogated from instances of war or for reasons of public emergency.[365] This category of human rights

[362]*Ibid*.
[363]Meron, "Extraterritoriality of Human Rights Treaties", AJIL, 78-81, (1995).
[364]*Ibid*.
[365]R. Bruin & K. Wouters, "Terrorism and the Non-derogability of Non-refoulement", IJRL, 22, (2003).

can be easily identified by a thorough look at the various human rights treaties. The text of, for example, the prohibition on torture and other cruel, inhuman or degrading treatment or punishment is laid down in Article 3 of the ECHR, and Article 7 of the ICCPR does not allow any exceptions to this prohibition for reasons such as national security, public order, public health or morals or the rights and freedoms of others. These provisions contain no limitation clause.

Furthermore, Articles 15(2) of the ECHR and 4(2) of the ICCPR respectively do not allow for derogations from these provisions in times of war or public emergency. Though the existence of a category of absolute human rights is widely accepted, the scope and content are still open for debate.[366]

II.6.ii The scope and character of the prohibition on refoulement under the human rights regime

The unqualified principle of refoulement is a primary cornerstone of international asylum protection through which places a bar on the states to expel a person to his country of origin, or any other country for that matter, where there exists a potential risk of being subjected to serious harm or serious human rights violations. As discussed in the previous chapter, this ban against expulsion shelters the concerned individual concerned, thereby allowing him to receive protection from being forced to go, directly or indirectly, to a territory where he may be at risk or in danger of serious harm. In general, it refers to the protection or freedom from seizure or harm provided by a State.

While the duty of non-refoulement is the cornerstone of international refugee law, it also applies under human rights law and humanitarian law[367]; fields which seek to fulfill the same objectives as the concept of non-refoulement, i.e., protection from undue and unnecessary harm and protection of fundamental rights. Under international human rights law, an individual will be protected from refoulement through the application of various human rights instruments especially when the

[366]Durieux, Jean-Franqois and Mcadam, *supra* note 326.
[367]Karen Parker, *supra* note 282.

country of origin or the country to which the individual is to be refouled has a history or potential of human rights violations. This obligation has been enshrined in several human rights treaties such as the Convention against Torture (CAT), the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR).

International human rights law strengthens the specific refugee legal framework by allowing refugees to invoke the protection of norms whose scope of application may be wider than those in the refugee regime, such as for instance, the absolute prohibition of refoulement to situations where there is a real risk of torture or inhuman or degrading treatment or punishment.

Various human rights instruments, such as the CAT, ICCPR, ECHR, reflect the concept of non-refoulement, and as a result, widen its scope as seen in the CAT which provides for an absolute prohibition of the principle of *non-refoulement* when there is a risk of torture upon return.[368] However, what needs to be analyzed is the extent of the reflection of the principle of non-refoulement in these instruments and the nature and content of the obligation on States.

Even though the of refugees against refoulement under international human rights law is now well established, the nature of the obligation to protect leaves a scope for appreciation to States on the ways in which this may be achieved. The 1993 World Refugee Survey prepared by the U.S. Committee for Refugees noted that numerous states "expelled aliens under questionable procedures, which could result in refoulement of genuine refugees among those returned."[369]

The argument regarding the scope of implicit non-refoulement is yet to be clarified. It has not yet been unambiguously established exactly which human rights contain ancillary prohibitions of refoulement, [or how we are] to identify the delimitations of

[368]S.L. David, "A Foul Immigration Policy: U.S. Misinterpretation of the Non Refoulement Obligation under the Convention against Torture", New York Law School Journal of Human Rights, 2003, 773, (2003).
[369]Roman Boed, *supra* note 201.

such implicit prohibitions of *refoulement* .[370]

The obligation of non-refoulement under international human rights law complement the existing refugee protection regime and widens the scope of protection from grave violations of human rights to all persons regardless of refugee status. Although certain human rights instruments do not expressly provide for the concept of non-refoulement, certain provisions implicitly do offer some form of protection similar to that offered under the obligation of non-refoulement.

The concept of asylum deals with the protection of an individual from proscribed harm or human rights violations, the protection being provided by a State other than the individual's own State, i.e. his country of nationality or habitual residence.[371]This obligation is primarily negative in its nature. The obligation includes all forms of measures by which a person is removed or forced to go and is irrespective of the legal context in which the removal takes place. For example, it includes the deportation or expulsion of an alien as well as the extradition of a criminal.

Besides creating negative obligations, the prohibition on refoulement also creates positiveobligationsfortheState.Statesmayberequiredtotakecertainactionswhich prevent people from being forcibly removed to a country where they are at risk. For example, States may be obliged to allow the individual to enter their territory, or to organize and allow people access to a protection status determination procedure. In general, the right to be protected from refoulement correlates with the general obligation on States to ensure effective protection. Such duty may comprise a single duty to refrain from acting (negative obligation) or to act (positive obligation), or it may comprise multiple duties, including both negative and positive obligations.

There is an absolute duty imposed upon states, through the regime of human rights law, not to transfer an individual to another State where there are substantial grounds for believing he or she will be tortured or subjected to cruel, inhuman, or degrading

[370]Karin Landgren, *supra* note 280 at 113.
[371]Battjes, *supra* note 321 at 5.

treatment.[372] This protection from refoulement emanates from a theory of human rights that recognizes rights fulfillment requires States to protect those within their jurisdiction from rights violations perpetrated by third parties, including other States.

The prohibition on refoulement prohibits the forced direct or indirect removal of an individual to a country or territory where he runs a risk of being subjected to human rights violations. This may be the individual's country of nationality or habitual residence or any other country, territory or area where such a risk exists.

The object and purpose of the prohibition on refoulement is the prevention of human rights violations; the prohibition is prospective in scope and not intended to right past wrongs.[373] In general, the prohibition is an expression of the preventive approach to human rights violations.[374] A State is responsible for not putting the individual into a situation of risk. The prohibition on refoulement is independent of the risk materializing, i.e. whether or not certain human rights are violated. In that regard the prohibition does not entail the co-responsibility of the removing State for the human rights violation which may or may not occur; it entails an independent responsibility.

In the context of the right to be protected from refoulement, States do have a prime obligation to refrain from expelling an individual to a country where he may be at risk of being subjected to serious harm[375]. However, depending on the facts and circumstances so as to provide effective protection States may also have the obligation to take action by, for example, allowing an individual to enter its territory.

The exact nature and content of the States' obligations to protect the individual right of non-refoulement depends on the specific formulation and interpretation of the right and the specific context in which the right is being invoked. In general, States have an obligation to respect individual human rights, but may also have an obligation to protect and fulfill such a right, implying obligations to take action rather than to

[372]H. Lambert, "Protection against Refoulement from Europe: Human Rights Law Comes To the Rescue", ICLQ, 523, (1999).
[373]D.J.Miller, *supra* note 266 at 318.
[374]*Ibid.*
[375]Durieux, Jean-Franqois and Mcadam, *supra* note 326.

refrain from acting.[376] As such, the right to be protected from refoulement may be proscriptive as well as prescriptive in nature and may entail both positive and negative obligations for States depending on how they can best guarantee effective protection from refoulement.

The prohibition on refoulement in varied forms is laid down in varied international human rights law instruments as discussed earlier and has become the back bone of the protection framework for asylum seekers and refugees. Traditionally, the term '*refoulement'* reflects the obligation of States under Article 33 of the Refugee Convention not to refoule a refugee to a country where his life or freedom may be endangered.

The concept of non-refoulement under the human rights regime has been formulated either in "direct proscriptive terms or developed in the context" of a general proscriptive human right. This is evidenced in human rights treaties such as the Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment. Express provisions on the prohibition of refoulement can be found in Article 33 of the Refugee Convention and Article 3 of CAT. Furthermore, such a prohibition is also carried forward by the European Court of Human Rights in accordance with the general prohibition on torture and inhuman and degrading treatment and punishment as laid down in Article 3 of the ECHR, and by the Human Rights Committee in accordance with a similar prohibition contained in Article 7 of the ICCPR.[377] However, the problem with these provisions is that they were formulated in terms of proscriptive obligations of States rather than rights of individuals.

Developments in human rights law resulted in the drastic shift from categorically preferring State security interests to a similar preference for the rights of the asylum seeker. Scholars believe that the above developments have resulted in making the security exception in the Refugee Convention superfluous.

[376]Olivier de Schutter, *supra* note 359.
[377]P.R. Ghandhi, *supra* note 239.

II.6.iii. Recasting the Concept of Non-refoulement as an instrument of Human Right Protection

The prohibition against refoulement, as it stands today, is limited in nature. The lack of a clear legal status of the concept of non-refoulement as a human right has led to States using means to avoid their non-refoulement obligations altogether in the name of national security and State sovereignty. Certain authors have found that the relation between refugee law and international human rights law has become weaker and there lacks a clear link between the two fields of law as national interests supersede universal obligations.[378] The two fields, although having similar objectives of protecting persons regardless of nationality, operate separately rather than offering additional protection. This has led to the weakening of the position of the prohibition on refoulement despite it being a cornerstone in the international refugee protection framework.

The emphasis should be on strengthening the rights of refugees under the human rights law framework. According to Fitzpatrick[379], the Refugee Convention is not obsolete, but is incomplete, as it has been from the outset. Only by progressive interpretation of the Convention and by recognition of extra-conventional norms has the international community been able to patch together a minimally adequate regime for the protection of forced migrants, the Refugee Convention is no more ill-suited to this age than to the one in which it was founded. Furthermore, there exists a distinct crisis not due to the failure of the convention to meet the needs of asylum-seekers, but because it meets them so well as to impose burdens that are no longer politically tolerable to the States parties involved.[380]

The limitations of the concept of non-refoulement as existing under the1951Refugee Convention as compared to the human rights regime and the need for it to be re-casted as a human right have been analyzed as follows:

[378]Karin Landgren, *supra* note 280at 13.
[379]Joan Fitzpatrick, "Flight from Asylum", Virginia Journal of International Law, Vol. 35, No.1, 31(1994).
[380]Ibid

Firstly, the concept of non-refoulement under the Refugee Convention is limited as compared to the obligation imposed by the principle of non-refoulement under the human rights regime as the refugee convention requires the judiciary to interpret the scope and application of the principle and limits its application to only refugees recognized under the convention and asylum seekers in anticipation of a decision on their legal status as refugees.[381]

Secondly, the obligation of non-refoulement is State-centric in the Refugee Convention as it provides for a negative obligation of the State rather than a right of an asylum-seeker or refugee, which is the general pattern of human rights instruments.

Thirdly, the Convention also permits for instances of derogation of the obligation and exceptions for the same under Article 33(2) whereas most international human rights instruments are non-derogable and are without exception as well as without reservation. This is evidenced by Article 3 of the ECHR, Article 6 and 7 of the ICCPR and Article 3 of the CAT which are absolute in nature, unconditional and without exception. Under the ECHR, non-refoulement to inhuman and degrading treatment, whatever the source.[382]

These provisions reflect individual rights and corresponding obligations of States, or vice versa, under which the individual has a right to be protected from refoulement and the State has a general obligation to ensure that right. [383] Regional treaties have also reiterated this. For instance, Article 22 (8) of the American Human Rights Convention adopted in November 1969 provides that in no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions.[384] Even though the non-refoulement obligations are limited under the Refugee

[381]Helene Lambert, "The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Reunion", Int J Refugee Law; 11 (3): 443-450, (1999).
[382]Ibid.
[383]G.S. Goodwin-Gill, "The Haitian Refoulement Case: A Comment", Int J Refugee Law, 103-109, (1994).
[384]Art. 22(8), American Human Rights Convention, OAS Treaty Series, No.36 1144 U.N.T.S., 123; 9 ILM (1969).

Convention due to exception clauses, the obligation under human rights instruments is much vaster in scope and often do not provide for any exception clause.

Protection under the human rights regime is non-discriminatory in nature, in the sense that it protects all individuals notwithstanding their nationality or legal status as a refugee, migrant or asylum-seeker or whether the person has entered the country illegally. The human rights approach to non-refoulement provides a wider expanse of protection to refugees and fills the gaps in the Refugee Convention. This approach, based on moral consideration, is also considered to be a more effective method of ensuring compliance with non-refoulement obligations[385].

The increasing number of instances of expulsion and extradition of refugees due to the lack of a uniform interpretation of the scope of the concept of non-refoulement has led to mass violations of the principle by States and derogation of the same which makes the protection of the principle under the human rights regime all the more relevant in the name of state sovereignty and security[386] This has further been established by the Strasbourg judges on numerous occasions stating that under general international law a state has the right, in virtue of its sovereignty, to control the entry and exit of foreigners into and out of its territory[387].

Fourthly, human rights treaties are characterized by their ability in generating objective frameworks for the establishment and protection of the rights of individuals, regardless of nationality, which cannot be circumscribed by states through inter-state agreements.[388] Mechanisms for the supervision and monitoring of the workings and application of the human rights instruments also facilitate its compliance. Human rights instruments provide for institutions and mechanisms to ensure the enforcement of the rights stated within the instrument. Examples of this can be seen through the establishment of the Committee against Torture, the European Commission on Human Rights, etc. The non-refoulement obligations provided by way of human

[385]Katharina Röhl, *supra* note 223 at 46.
[386] *Ibid.*
[387]W. Suntinger, "The Principle of Non-refoulement: Looking Rather to Geneva than to Strasbourg?" Austrian Journal of Public and International Law,"221-226, (1995).
[388]VadislavaStoyanova, *supra* note 244.

rights treaties such as the CAT, ICCPR, ECHR and the UDHR are wide-ranging and such treaties often provide for mechanisms for the supervision and monitoring of compliance with human rights treaty obligations. Many authorities such as Lambert consider resorting to human rights instruments as a better option to protecting individuals from refoulement and extradition[389]. On the other hand, the Refugee Convention does not provide for an enforcement mechanism and therefore, makes the effectiveness of the refoulement prohibition superfluous.

Fifthly, the human rights regime provides for a more expansive and liberal interpretation and is often without exception, unlike the Refugee Convention. The interpretation of human rights treaties in particular possesses two main characteristics. First, such treaties call for a dynamic or evolutive interpretation and, secondly, they call for a liberal interpretation of rights and an arrow interpretation restrictions. Human rights treaties are constitutional in character and intrinsically allow an evolutive interpretation, in light of social and political developments.[390] They are phrased in broad and general terms which allows for different interpretations which may vary and develop over time.

Even though the Vienna Convention on the Law of Treaties is silent on this matter, the object and purpose of human rights treaties imply a liberal interpretation of rights. The object and purpose of human rights treaties are to create long term and solid legal protection system for individuals. Therefore, human rights treaties are interpreted liberally or progressively in view of individual human rights protection. A restrictive interpretation of treaties is not, as such, supported by the Vienna Convention.[391] Judge Bernhardt, a former President of the European Court on Human Rights, suggested that 'treaty obligations are in case of doubt and in principle not to be interpreted in favour of State sovereignty. It is obvious that this conclusion can have considerable consequences for human rights conventions. Every effective protection of individual freedoms restricts State sovereignty, and it is by no means State sovereignty which in case of doubt has priority. Quite to the contrary, the object and purpose of human

[389]H. Lambert, *supra* note 372.
[390] J. Pirjola, "Shadows in Paradise – Exploring Non-refoulement as an Open Concept", IJRL, 653-600 (2007).
[391]R. Bernhardt, "Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights", GYIL, 11-14, (1999).

rights treaties may often lead to a broader interpretation of individual rights on the one hand and restrictions on State activities on the other'.[392]

The absolute nature of the concept of non-refoulement under the certain human rights instruments has been emphasized by the courts in various cases such as the case of *Ireland v. United Kingdom*[393] and *Chahal v. United Kingdom*[394] where the Court categorically stated that the prohibition on refoulement is absolute in cases of torture. The UNHCR's Director of International Protection also remarked that refugees enjoy a wide variety of rights under different treaties in addition to specific refugee treaties such as Refugee Convention, 1951.[395] This position of refugees is crucial for ensuring that the legal protection of refugees are broadened and continue to improve over time. Moreover, other human rights treaties fill the gaps in the Refugee Convention, 1951 by providing mechanisms or institutions for ensuring the compliance of international human rights obligations. For instance, the Committee against Torture (CAT) and the European Court of Human Rights has been crucial in protecting refugee rights and interpreting the scope of these rights.

The human rights framework may be able to establish a broader interpretation of the concept of non-refoulement and provide answers to issues of burden-sharing between States. According to one author placing refugee law into the system of human rights may, therefore, facilitate the development of a solution to the question of State responsibility, and also entail the development of more satisfactory principles and agreements relating to the question of third countries. If an agreed solution can be found to the question of State responsibility, it would provide for a clear understanding of the relations among, and the respective responsibilities of, the State of origin, the State of asylum and any other third States.[396]

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[392] *Ibid.*
[393] Ireland v United Kingdom, No. 5310/71, Series A no 25, 65, ECHR 1, (1978).
[394] Chahal v. United Kingdom, Eur.Ct. H.R., Application no.22414/93, Report of 27 June 1995
[395] *Ibid.*
[396] *Ibid.*

It is pertinent that special character of such treaties, i.e. the protection of individual human rights, is borne in mind.[397]In case of any ambiguity in the terms of the treaty, it must be resolved in favour of an interpretation which is consistent with the treaty's humanitarian character.[398] The interpretation promotes the practical and effective application of human rights.[399]

Any relevant rules of international law may also be taken into account when clarifying the interpretation of a treaty.[400] Many human rights treaties cover the same rights and freedoms or cover one specific right. Reference to other human rights treaties is therefore an important method of interpretation. Reference to relevant rules of international law leads to the mutual influence of human rights treaties and their respective subject related provisions.[401]The use of subsequent practice and relevant rules of international law may, however, not limit the scope or effect of the rights listed in the treaty which is an important advantage in protection of these rights. This may never lead to a departure from the text, context or object and purpose of the treaty.

Sixthly, reservations to human rights treaties are also uncommon and most sovereign nations are parties to various human rights instruments. Since State parties to human rights instruments have a duty to all persons, including non-nationals within their territory, the State is obligated to protect the human rights of such persons along with the rights of their own citizens. According to Fitzpatrick, "the possibility of making reservations is hard to be reconciled with the character and contents of human rights obligations as a minimum standard'.[402] Reservations to human rights norms will not easily be accepted. The Human Rights Committee has stated that: 'it is desirable, in principle that States accept the full range of obligations, because the human rights norms are the legal expression of the essential rights that every person is entitled to as

[397]Olivier de Schutter, supra note 359.
[398]ICJ, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion), ICJ Reports 1951, 51 (May 28, 1951).
[399] Bernhardt, *supra* note 391 at 143.
[400]Article 31(3)(c), Vienna Convention on the Law of Treaties, 23 May 1969, 115 U.N.T.S. 331 (1969).
[401]Olivier de Schutter, *supra* note 359.
[402]Joan Fitzpatrick, "Flight from Asylum", Virginia Journal of International Law, Vol. 35, No.1, 31 (1994).

a human being."[403]

Moreover, developments in the human rights regime have led to an evolving standard of protection offered to refugees and has shown signs of a growing scope of refugee protection. The instruments under the human rights regime have similar objectives as that of the Refugee Convention. The more frequent development and liberal jurisprudence of human rights instruments adds to the strength of the rights enshrined within these instruments.

Certain authors criticize the application of the concept of non-refoulement as a human right on the ground that such acceptance fails to take into account, concerns such as competing resources and conflicting rights of State security and national protection and the constraints on the State in managing its population and protecting its citizens from potential threats and substantial risks of harm to its own communities and citizens.[404] It is also debated that with constant developments in human rights law, States will ultimately lose the capacity to use admission and expulsion to protect the public from the threats posed by dangerous aliens who come from States with poor human rights records. [405] Examples of this can be seen through State practices such as that of States like Canada, the United Kingdom, and the United States, for whom existing non-refoulement obligations have proven difficult to follow given security considerations, are rejecting additional obligations of this sort because the protection duty is viewed as too onerous.[406] The view is that there is no normative justification for imposing upon States an absolute non-refoulement obligation since non-refoulement has a significantly less standing than other duties such as the duty to avoid committing torture and cruel, inhuman, or degrading treatment.

On the basis of the preceding analysis, it can be concluded that, the principle of non-refoulement emanates from the theory of human rights because of the fact that human

[403]HRC, General Comment No. 24 (1994), *CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, CCPR/C/21/Rev.1/Add.6, para. 24, (Nov. 4, 1994).
[404]Vijay M Padmanabhan, *supra* note 183.
[405]A. Orakhelashvili, "Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*"*, EJIL, 559-562, (2003).
[406]*Ibid*.

rights imposes upon States an absolute duty not to return an individual to another State where there are substantial grounds for believing he or she will be tortured or subjected to torment. Also the recognition of the concept of non-refoulement as a human right would enable a system of better protection to refugees by clarifying the scope and content of the right and in turn leading to the establishment of mechanisms for the supervision and protection of this right. It would enable the establishment of international procedures for the enforcement of the right and ensuring its compliance. While non-refoulement is already considered as a peremptory norm of international human rights law, and most international human right instruments already reflect the concept of non-refoulement, the next step in the development of the concept should ideally be its recognition as a right under the human rights regime which would better enable the achievement of its objectives, making the concept more effective and cementing its scope as the cornerstone of refugee protection.