CHAPTER III

NON-REFOULEMENT AND JUS COGENS: IMPACT ON EXTRADITION MEASURES

A UK statute in 1905 identified that outcasts with a dread of oppression for political or religious reasons ought to be permitted into the nation, it was not until later that the possibility of non-refoulement of such individuals turned out to be broadly acknowledged[407]. Before 1930's the name of this Principle was not even heard of nor did it exist in the International Law. The Principle gained its importance after the World War II when there was a huge displacement of people and they started demanding for non refoulement and today the principle of non refoulement is one of the fundamental Principle of International Refuge Law and is gaining the nature of a Jus Cogens. It became the cardinal Principle of International Refugee Law after it gained its importance with the two world wars and its aftermath. With people being displaced from their home lands and forced to run away to a different country due to life threatening reasons, the need for non refoulement arose. Many seemed to have acknowledged that there was an ethical obligation to acknowledge displaced people, and not return them [408]. Thus, the Principle began its journey of being recognized by various international laws.

In 1946 the General Assembly got together and passed a determination expressing that displaced people ought not to be returned when they had 'legitimate complaints'. In 1951 provoked to a great extent by the tremendous number of evacuees in Europe taking after the war, in the end prompted the drafting of United Nations Convention

[407]Goodwin, *supra note* 15.
[408]Jane McAdam and Guy S. Goodwin Gill, "The Refugee in International Law", 3rd Ed., Clarendon Press, Oxford, (1996).

Relating to the Status of Refugee[409]. 1951 Refugee Convention became the primary instrument of refugee law. Article 33 of the Convention stated:

"No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion"

With the bloody civil war breaking in Rwanda, increase in crisis situation and pressure from UNHCR allowed refugees to keep coming in and with that the problem started to arise. With the flow of more refugees, the Tanzanian government in 1995 closed its borders. The situation over the time period is getting worst with countries fighting wars within; to countries fighting with each other, the scenario of wars, genocide, loss of human life, human rights violation, the lower class of people and subjects of war countries are facing life threats and the right to life of people at large, the very fundamental principle of human rights is at stake.

The Non refoulement Principle has been signed and accepted by 137 countries[410]. This means that 137 countries out of 196, that is more than half the world is now legally bound by the Principle and is of human importance as the Principle protects the fundamental principle of right to life.

Right to life is a moral principle based on the belief that a human being is born free and therefore has a right to live, the concept arises from issues and debates over topics like capital punishment, war, slavery (slave holding societies) where masters were capable to destroy lives of their subjects, torture, health of a person, basic dignity of human life, security of human lives from degrading treatment.

From UN Conventions to 1951 Refugee Convention to 1967 Protocol, the Non refoulement Principle which means not to return has been ratified and there are various other Conventions and Treaties that bargain specifically or by implication

[409]Robert L. Newmark "Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs", available at: www researchgate.net (1993).
[410]Treaty Status, United Nations High Commissioner for Refugees,www.unhcr.ch

with the privileges of the refugee and enshrine the non refoulement principle. The principle is significant importance mainly due to two reasons:

1. Since its inception till date the principle is the heart and soul of Refugee Law. It is the cardinal principle and cornerstone of International Refugee Law.
2. The Principle reflects the basic moral value of human rights and protects the fundamental principle of right to life, since the people who come under the term refugee have fled away from situations that are threatening to their survival or existence all together.

The right enjoyed by an individual to seek asylum from persecution, in another countries is provided in Article14 of the Universal Declaration of Human Rights[411], it is a development archive ever. Drafted by agents with various lawful and social foundations from all areas of the world, the Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 General Assembly resolution 217 A as a widespread standard of achievements for all humans and all the States. The very first line of the preamble clearly states:

'Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'[412]

The Preamble plainly mirrors that how disdain of human rights brought about brutal acts that offended the heart of humankind which led to the need to protect human rights by rule of law and to promote and develop friendly relations between member states. The members reaffirmed their confidence in major human rights and pledged to achieve and cooperate with one another to advance and safeguard regard for and recognition of human rights and their freedom.

[411]UNHCR Note on the Principle of Non-Refoulement ,UN High Commissioner for Refugees (UNHCR) November 1997, www.refworld.orgs
[412]The Universal Declaration of Human Rights, Preamble: Pg 1, www.un.org.

For the first time, the Declaration ensured fundamental human rights to be universally protected. The draft shows the dedication of the universal group to guarantee to every people the delight in human rights, similar to right to life, freedom from torture and cruel or degrading treatment or punishment and freedom and security of one's life. Thus if such rights are violated then it goes against the commitment of international community and people are still in danger.

UDHR is the prime document that catches attention of all while making laws regarding human life. Using the draft as framework the 1951 Refugee Convention, Article 33 provides for the principle of non refoulement which prevents people from being refouled to the place where there exists fear of persecution or danger to their life prevails and thus protects and upholds the Principle laid down in Article 14 of the UDHR.[413]

The 1951 Convention was recently the fundamental outline of non-refoulement being revered in global law. Therefore various settlements and traditions, managing either specifically or by implication with the privileges of outcasts, have rehashed the guideline . From time to time it has been a quick trade of the orders of the Convention, while in others the standard has been to some degree extended. Amongst others the matters of human rights and territorial association linger on picking up quality in global exchanges, these conventions will turn out to be progressively vital.

There are various other treaties and Convention that adhere to this Principle, like:
Article 13 of International Covenant on Civil and Political Rights (ICCPR), Article 3(1) of Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,1966 (CAT). Article 2(2) of the Organization of African Unity Convention Governing the Specific Aspects of Refugee problems in Africa (OAU).

Europe has likewise been a wellspring of critical assertions with respect to displaced people. Article 3 of the European Convention on Human Rights precludes torment or other barbarous, unfeeling or corrupting treatment, and along these lines gives

[413]Article 14 of the UDHR reads: Everyone has the right to seek and to enjoy in other countries asylum from persecution.

comparative assurance to displaced people as the Torture Convention[414]. Article II (1) of Council of Europe's Resolution on Minimum Guarantees for Asylum Procedures 1955, Article 22(8) of American Convention on Human Rights all mention about non refoulement. Europe's history of refoulement has been an important source regarding refugee agreements since it started gaining importance. The most indispensable part of refugee standing is to protect people from returning to a country where one's life is in danger or there is fear of persecution.

The Principle of non-refoulement has evidently undergone a considerable improvement since its development as an ambiguous ethical quality based rule to its recognition as a law of international public policy. The public policy is composed of national constitutional laws and regulations and at International level it is composed of constitutional laws and regulations regarding class of issues in a manner consistent with law and institutional customs across the nations.

The chapter is limited to an area as to how the fundamental principle of international Refugee Law has become a compelling law of Customary International Law and how with the importance that it has gained over the time period can it be called *Jus Cogens.*

Customary International Law is part of global law that arises from customs practiced over a long time and is continuous in usage. Alongside general standards of law and bargains, custom is considered amongst others by the International Court of Justice, legal advisers, the United Nations, and its part states to be among the essential wellsprings of worldwide law.

According to the International Court of Justice Statute, Customary International Law under Article 38(1) (b) states:

"International Customs, as evidence of a general practice accepted as law"[415].

Being a cardinal principle and founding stone of Refugee Law non refoulement has now turn out to be a Customary International Law. Now being a customary

[414]European Convention on Human Rights available at: www.echr.coe.int
[415]Statute Of the International Court of Justice, Chapter II available at: www.icj-cij.org

international law it has slowly started to gain the nature of Jus Cogens as non refoulement protects the asylum seekers/ the homeless from being returning to the country where their life and liberty to live is endangered. International Law is not perceived to be self-serving and rather reflects the interest of the entire international community.

With non refoulement recognized as a customary law and with its demand increasing worldwide due to growing refugee crisis some states have demanded that it should be a compelling law as signatories to the conventions and treaties on paper accept to follow, but in practicality how many follow or find ways to deviate from it cannot be monitored due to various barriers like mind of the nation while it accepts or rejects a refugee, the grounds of return cannot be proved completely etc.

As a reflection of the interaction between policy and morals, international law has a 'determinative' characteristic reflecting the interaction of interests and opinions that embodies the result of this process. Yasuaki identifies that although this does not necessarily infer an equating capability to be implemented the law is nonetheless instructive[416]. It is to say that in order to see the applicability of these international laws one has to look into the practicality of such laws in order to determine whether they are accepted as laws and do they help in any way to suffice the basic principles for which the international community was built. As theoretical consideration of many concepts are lacking weight without awareness of their implementation and conclusions being drawn on that basis as to future success. The other way to determine whether the law reflects international interests and opinions is by seeing how much the states abide by it. In order to see as to how a law becomes a part of international community one looks into the consent given by the states, by way of signing Conventions, treaties etc. by way of compulsion, the main point to note here is that international law is formed for the benefit of the international community as a whole and does not necessarily exclude the reciprocal benefits that arise from compliance by the individual actors.

[416] Yasuaki, "International Law In and With International Politics: The Functions of International Law in International Societ", European Journal of International Law 105 112, (2003).

Compliance reflects the interaction between an awareness of an ethical responsibility by a state to adhere to the law with a consideration of the status of the law as it emerged through the interactive process of development. International law is not directive but merely indicative and rationalist (obedience arises only when the state's self-interest is being promoted) perspectives may co-exist[417]. The international community's accept and sign various laws and consent to comply by them but mostly all try to use it for benefitting themselves and when it comes about taking responsibility many try to get away with it. In many cases it is allowed and if not participating that is not taking the responsibility. Well there are higher laws and the burden of which is to be shared by all if needed therefore such higher laws are known to be Jus Cogens or 'compelling law'. Jus Cogens increased during the 20th century and saw a drastic shift from higher ethical norms combined with public policy to independent consideration as the norms were in interest of the community as a whole. Therefore Jus Cogens have higher status than general International Law. Jus Cogens is 'a legal system of entirely distinctive norms guarding fundamental interests of international society, seeking also to escape the contract and edifice metaphors'[418]. The 1969 Vienna Convention saw the first formal recognition of the concept and attempt to place the concept within a positivist framework.

Being a basic Principle that gives right to live to a person, it has to be given (enforceable) as well as protected as the main aim of forming international platform was to provide security and safety to human lives which starts by giving them the basic fundamental rights of existence. The Principle is slowly becoming the Jus Cogens of international law, Jus Cogens Principles are Principles that are important from the view of basic rights and to the Principles of natural justice therefore no derogation is allowed from it.

Article 53 of the Vienna Convention explicitly states[419]:

"A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a

[417]Koh, H. "Why Do Nations Obey Laws?" Yale Law Journal 2599, (1996).
[418]Christenson, G. "Jus Cogens: Guarding Interests Fundamental to International Society", Virginia Journal of International Law 585 587, (1988).
[419]Vienna Convention on the Law of Treaties, Article 53, 1969, Pg14, available at: https:treaties.un.org,

peremptory norm of general international law is a norm accepted and recognize by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

In order to determine whether a principle is a Jus Cogens, the international law Commission attached two conditions that is recognition and acceptance by International community and the ability to modify a norm suggesting the moral or ethical foundation on which the norm is based are open to change or interpretation. With many international organizations recognizing it as Jus Cogens it still does not have solid evidence that it has become one, the main hurdle being the use of traditional methods by the nations and the domains of power within the framework which are yet to work properly for sufficiently making the principle a standard of Jus Cogens. In order to determine whether a principle is a rule of Jus Cogens one looks into the characteristics that make a principle/ law higher than the other laws like it's non-derogable nature, for the prospects of the whole of the world community, An 'ethical minimum' and Non-Consensual and relationship with Sovereignty. According to International Law Commission[420] peremptory norms are such that they generate strong interpretative Principles which will resolve all or most apparent conflicts. Though there is no current International body to implement or address breach of Jus Cogens so that it can be practically implemented and governed but it is widely accepted by the International society as they are not simply between two or more states but on a universal level[421].

The aim of writing this chapter is to recognize the changes that will occur to the exceptions Article 33 (2) of Non refoulement that arise not out of treaties but out of the circumstances, if the Principle is a Jus Cogens. The conditions cannot be invalidated at the same time `it cannot be left to use by asylum providing countries as an excuse to return humans whose right to life is at risk. The conditions cannot be removed due to national security reasons, at the same time it cannot be left to use as a weapon of excuse to return the refuges else many lives that actually need protection will be risked.

[420] James Crawford, "Fourth Report of the Special Rapporteur", A/CN.4/517; A/CN.4/517/Add. 1)207
[421] *Supra note* 418.

The larger part opinionated assessment is that the standard has after some time procured the status of standard global law [422]. But larger question looms over the fact that whether non-refoulement has really obtained the standing of jus cogens in international law?

III.1 NON REFOULEMENT AS A NORMATIVE CHARACTER OF CUSTOMARY INTERNATIONAL LAW

III.1.i Development of the Principle of Non refoulement

> *"Everyone has the right to seek and to enjoy in other countries asylum from persecution"*[423]

The requirement for global acknowledgment of human rights was left after the drastic affects of the two world wars where millions were murdered, killed; genocides happened at large scales and mass violation of human rights. This lead to international conferences between various countries that came together to maintain International peace and cooperation and most importantly Human Rights protection. With various constitutions around the world providing there people fundamental basic human rights and providing protection through laws in case of any violation. Now countries around the world have come together to co-operate with one another in one or the other ways, now all are interconnected to the international community and are legally bound to provide protection to people looking for refuge in other countries after fleeing from their home country.

The Principle is linked with the movement of people known as refugee, to read the Principle we should first know who a refugee is. In simple lay man term a person who has been required to go away from their country so as to escape war, persecution, or natural disaster.

[422]Nils Coleman, "Non refoulement Revised Renewed Review of the Status of the Principle of Non refoulement as Customary International Law", 5 Eur. J. Migration & L. 23 (2003).
[423]Article 14, paragraph 1, The Universal Declaration of Human Rights.

1951 Refugee Convention provides for the definition of Refugee as:

"owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country[424]."

The Macquarie dictionary defines refugee as

"*One who flees for refuge or safety, especially to a foreign country, as in time of political upheaval, war etc.*" [425]

As per the United Nations High Commissioner for Refugees in its 1999 *Statistical Overview,* refugees are amongst those who are recognized under the 1951 Refugee Convention; the 1969 Organization for African Unity; Convention on Refugee Problems in Africa; persons granted humanitarian or comparable status; and persons approved temporary protection[426].

Simply someone, who has been forced to leave a country because of war or for religious or political reasons[427], and is forced to move to another foreign land due to fear of life or threat.

The provision defining the meaning of "refugee" under Article 1 (A) 2 of the Refugee Convention has three basic characteristics of a refugee:

- They are outside their country of origin or outside the country of their former habitual residence
- They are unable or unwilling to avail themselves of the protection of that country owing to a well-founded fear of being persecuted and

[424]Article 1A of the Convention on the Status of Refugees, 1951.
[425]Adrienne Millbank, "The Problem with the 1951 Refugee Convention", Parliamentary Library, available at: www.aph.gov.au.
[426]Refugee and Others of Concern to UNHCR, www.unhcr.org, Statistical overview1999.
[427] www.merriam-webster.com

- The persecution feared is based on at least one of five grounds: race, religion, nationality, membership of a particular social group, or political opinion

It is pertinent to mention here that "asylum seekers" are those who have applied for refugee status but have not been granted the status.

The commitment under Article 33 of the 1951 Refugee Convention known as the standard of Non refoulement secures return of a displaced person to a nation of region where he/she would be at the danger of persecution. The article clearly states that none of the contracting parties in manner whatsoever might refoule a man to a domain where his life or opportunity is undermined because of his race, religion, nationality, individual from a specific social gathering or political supposition. Refugees are people who cross international borders due to fear of being persecuted. Persecution is subjecting one to hostility and ill-treatment that is to abuse, ill-treat, maltreat, torture, punish, victimize, oppress or harass or annoy that is to hound, molest, pester, bother, annoy, bully, terrorize.

Fear of Persecution can happen on five grounds[428]:

- Race
- Religion
- Nationality
- Member of a particular social group
- Political opinion

Organization of African Unity in 1969 acknowledged the definition of refugee and extended it to comprise that not only persecution is a factor but also "acts of external aggression, occupation, domination by foreign powers or serious disturbances of public order" are also to be looked into while expanding the meaning of as to who is a refugee and the criteria's to accept them[429].

[428] Office of UNHCR ,Convention and Protocol relating to the Status of Refugees, Public Information service, 1967

[429]Refugees and Displaced Persons, Human Rights Education Associates', February 23,(2011).

III.2. HISTORY OF RECOGNITION OF NON REFOULEMENT AS A LEGAL PRINCIPLE OF INTERNATIONAL LAW

According to UNHCR there were around 19.5 million refugees approximately by the end of 2014. The act to return a refugee is known as refoulement, it originates from the French word *"refoule"* which means to return. The Principle of non-refoulement, which is measured as a part of International Refugee Law, is the cornerstone and the primary establishment of displaced person law and in this manner authoritative on all states. It is likewise fused in a few other human rights instruments, such as the 1984 Convention against Torture, which precludes any persuasive expulsion of people to a nation where there might be a genuine danger of threat to his life or freedom.

The refugee affairs started with the creation of League of Nations in 1921, when High Commission for Refugees appointed Fridtj of Nansen as its head to assist approximately 1500000 people who had fled Russian Revolution of 1917 and the succeeding civil war, fleeing the Communist Government.[430]

In 1930 the Nansen International Office for Refugees, made Nansen Passport and a refuge travel document that was a notable achievement and was awarded with Nobel Peace prize in 1938[431] and 14 nations ratified the 1933 Refugee Convention. The rise of Nazi in 1933 led to a tremendous upsurge in the number of refugee from Germany which led to the creation of High Commission. From 1933 to 1939, 2 million Jews fled the Nazi land and were able to find refuge in France and 55,000 in Palestine.

By 1938 both the Nansen Office and High Commission were broken up and supplanted by the workplace of the High Commissioner for Refugees under the security of the League of Nations. The outbreak of World War II increased conflict and political instability across Europe and China and towards the end of the war Europe had around 40 million refugees by 1953 Europe was left with around 250000 refugees most of them old, crippled, infirm, disabled.

[430]James E. Hassell, "American Philosophy Society", pg 1, ISBN 0-87169-817-X.
[431]The Nobel Peace Prize 1938 :Nansen International Office for refugees, Nobelprize.org

The two World wars brought out the worst of the refugee situation. There were millions without land, sanitation, health; security more over here was grave violation of human rights through torture, slavery, sex trade, inhumane degrading treatment towards humans etc. This war in history gave birth to 'the need for international cooperation and security of humans' and that the human rights are of fundamental importance and that in no way anyone has a right to violate it because during Joseph Stalin's reign, who was the leader of Soviet Union in mid 1920's, genocide of humans occurred within his reign but the other States did not respond as it was internal matter of Soviet Union according to the International community and it was not there problem nor their concern. It was popularly believed that the Red Terror was started by him where mass killings, torture and systematic oppression was conducted, many innocent souls lost their lives but none outside were concerned[432].

The term refoulement means to return, Non refoulement was born and heard when people who ran away from Hitler's land to neighboring countries started to demand for non refoulement due to fear of being executed if returned. Slowly many people around Europe who ran away for safety of their life, started demanding for Non refoulement .With increasing needs the Principle of non refoulement originated from Europe with few countries within, agreed and signed and slowly many more international treaties, Conventions, conferences held also recognized and helped making it an international Principle and a way to protect violation of human life in any form like cruelty, slavery, torture, genocide, sex trade.

The Principle of non-refoulement emerges out of a global aggregate memory of the disappointment of countries amid World War II to give a place of refuge to displaced people escaping certain genocide on account of the Nazi administration. Today, the Principle of non-refoulement apparently shields people from being ousted from nations and has turned into a noteworthy Principle of International Refugee Law. In 1947, the International Refugee Organization (IRO) was founded by the United Nations General Assembly. The IRO being the first international agency dealt expansively with all aspects relating to refugees' lives. The organization was not a success and in 1949 through General assembly's resolution 319(IV) United Nations

[432]The Record of the Red Terror published 1975.

High Commissioner for Refugees was founded for three years initially. Its command was set out in statute through determination 428(V) of UN General Assembly. As per UNHCR it is compulsory to give on a non-political and compassionate premise, international insurance to displaced people and to look for lasting answers for them. Formation of such organizations and its work was mainly Euro centric but after the signing of 1951 Convention, soon it was observed that the refugee problem was not exclusively constrained to Europe. In 1956 UNCHR was drawn in Hungary a year later it was working with refugee situations in Hong Kong, Algeria. In 1960 decolonization led to refugee problems in Africa that was bigger than Europe as there were no durable solutions available and with this work the UNHCR organization operations grew like never before.1967 Convention for refugee was broader and it removed geographical barriers and by 1970 UNHCR operations grew globally.

By 80's the organization faced new challenges like the member states seemed reluctant to accept and relocate the refugees because of the sharp ascent in their number. The refugee situations were now arising out of socio-eco problem, inter-ethnic conflicts and UNHCR was heavily burdened by now. With 1994 Rwandan Genocide and role of media in highlighting such crisis, UNHCR now tightened its belt, to uphold and work towards the mandate that it promised when they came into existence.

The Principle of Non refoulement does not arise out of treaties, laws or Convention but out of a situation which needs to be attended as it is a matter of human life. UNCHR is doing everything to perform its function that is to preserve the rights and welfare of refugees. It ensures that everyone can put into effect their right to seek asylum and find a safe refugee. With the organization dedicated to its commitment, it's now important that the members to UN should also fulfill their obligation by obeying to the Principle of Non refoulement helps in achieving the goals for which it was formed. The Principle has gained significant importance in recent times which has helped many but its exceptions on the other hand has been used by member states to return back many to the place from which they ran.[433]

[433]Note on International Protection, EXCOM Report, A/AC.96/728, August 2, 1989, available at: www.unhcr.org.

III.3 RATIFICATION OF THE PRINCIPLE THROUGH VARIOUS OTHER CONVENTIONS AND TREATIES

The Principle is recognized and ratified by various international laws by members that made its significance legal and the parties are bound by legality to follow it.

III.3.i. Article 33 of the 1951Convention Relating to the Status of Refugees

1. No contracting State expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion

2. The benefit of the present provision may not, however, be claimed by a refugee whom here 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.

III.3.ii. 1966 Principles Concerning Treatment of Refugees, adopted by the Asian-African Legal Consultative Committee

Article III (3) states that:

No one seeking asylum in accordance with these Principles should, except for overriding reasons of national security or safeguarding the populations, be subjected to measures such as rejection at the frontier, return or expulsion.

III.3.iii. 1967 Declaration on Territorial Asylum adopted unanimously by the United Nations General Assembly (UNGA) as Resolution 2132 (XXII), 14 December 1967, Article 3 of which provides

No person referred to in article 1, paragraph 1 [seeking asylum from persecution], shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion.

III.3.iv. 1969 Organization of Africa Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, Article II (3) 1969 of which provides

No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2 concerning persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, or who is compelled to leave his country of origin or place of habitual residence in order to seek refuge from external aggression, occupation, foreign domination or events seriously disturbing public order.

III.3.v. 1969 American Convention on Human Rights

Article 22(8): 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

III.3.vi. 1984 Cartagena Declaration, Section III, paragraph 5 of which reiterates

The importance and meaning of the Principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a corner-stone of the International protection of refugees. This Principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *Jus Cogens.*

III.3.vii. Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides

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.

III.3.viii. UN Human Rights Committee, in its General Comment No. 20 (1992), to include a non-refoulement component as follows

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

III.3.ix. Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms has been interpreted by the European Court of Human Rights

With such a large number of Conventions and greater part of the global group bound by a few or the other bargain, they are bound not to return. Thus with so many treaties, Conventions adopting the Principle of Non refoulement all these legal documents pile up as legal evidence that clearly show the acceptance of the Principle

at International level and almost all the states through one or the other treaty, Convention are bound by this Principle.

III.4. NON REFOULEMENT AS A PRINCIPLE OF INTERNATIONAL CUSTOMARY LAW

Non-refoulement is yet indeed the cardinal principle and cornerstone of the International Refugee Law. With the cruelty of the two world wars and the horrible destruction of the equal and inalienable rights of human beings were recognised, UDHR reaffirmed the belief in basic human rights, the dignity and value of human beings and the equal rights of men and women and is written in the UN Charter. The Principle being enshrined in many international documents and the states in one or the other way being bound by it, the protection of refugees that is a fundamental right is now drawing more attention from the world. With more and more countries joining in the Refugee Convention, the essential moral responsibility to help refugees and providing them with safe havens or refuge is now developing into a legal obligation within the International community.

As provided by Article 38 of the Statute of the International Court of Justice, the Court is required to apply inter alia global custom as confirmation of a general practice acknowledged as law. The Office of the United Nations High Commissioner for Refugees is of the supposition that the Principle of non-refoulement fulfils this necessity and constitutes a control of International Customary Law. In addition in Conclusion No. 25 embraced at its 23rd Session in 1982, the Executive Committee of the High Commissioner's Program reaffirmed the fundamental Principles of International insurance and specifically the Principle of non-refoulement which was logically securing the character of an authoritative run of international law [434]

With the above mentioned legal Conventions, treaties that have been mentioning about the principle of non refoulement constitute the fundamental part of shelter and worldwide evacuee assurance. The substance of the standard can be understood as that

[434]UN High Commissioner for Refugees (UNHCR), "The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93" , 31 January 1994,available at :www.refworld.org

State possibly will not necessitate an individual to go back to a space where he might be exhibited to abuse. The language utilized as a part of Article 33 Section 1 of the 1951 United Nations Refugee Convention is "the place his life or opportunity would be undermined by virtue of his race, religion, nationality, participation of a specific social gathering or political feeling". Given that the motivation driving the standard is to make sure that displaced people are secured nearby such persuading return.

This perspective states that the standard of non-refoulement has turned into a tenet of universal standard law and depends on a steady way consolidated with an acknowledgment with respect to States that the guideline would have a regulating disposition. The conclusion, therefore, is upheld in one of the ways that the guideline would be consolidated in worldwide bargains received at almost all the inclusive and local levels to which a substantial number of States have ended up gatherings. This guideline has, additionally, been affirmed in the 1967 United Nations Declaration on Territorial Asylum. Finally, the rule has been productively reaffirmed in completions of the UNHCR Executive Committee and in resolutions got by the United Nations General Assembly.

This way the States have thought that it was important to give such clarifications or supports can sensibly be viewed as a certain affirmation of their acknowledgment of the principle. In this association, one can refer to the judgment of the International Court of Justice of 27 June 1986, case regarding Military and Paramilitary Activities in and against Nicaragua, *Nicaragua v. United States of America* which comprised the accompanying proclamation:

In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself,

then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule. [435]

According to the office of UNHCR, practices of the government together with the procurements of nation's domestic enactment which have customarily fused the concept of non-refoulement compares to the criterion for the arrangement of international standard law that is a homogeneous practice consolidated with a developing lawful fervour. The perspective that non refoulement is a standard worldwide law is emphatically upheld by the steady reaffirmation through sanction of the principle by different states in one or the other path as said above.

The rule of non-refoulement has additionally been reliably alluded to by the United Nations General Assembly in its different resolutions on the High Commissioner's Annual Report. The Office of UNHCR considers that the references to the Principle of non-refoulement, by various treaties and Conventions as mentioned above, taken together with the previously mentioned Conclusions of the Executive Committee constitute additional confirmation of its acknowledgment as a fundamental standardizing Principle .

States to abstain from measures which endanger the establishment of asylum, specifically the arrival or ejection of displaced people and refugees in opposition to crucial disallowances against these practices. [436]

Even the General assembly has from time to time acknowledged the Principle, the UNHCR the main authority for handling refugee situation addresses it to be a normative Principle and the Conventions, treaties give legal sanction to the Principle. Thus with the above mentioned reasons one can conclude that:

(1) The guideline of non-refoulement has gotten across the broad acknowledgment and its central nature has been completely perceived.

[435]I.C.J. Reports 1986 page 88 paragraph 186
[436]Resolution44/137 United Nations General Assembly, December 15, 1989.

(2) The guideline of non-refoulement has been fused inside worldwide settlements taking after a Convention doing a reversal to the time of the League of Nations.

(3) The rule has particularly been provided in the 1951 United Nations Refugee Convention and the 1967 Protocol to which 125 States are parties. It has also been combined with the OAU Convention, 1969, which regulates the definite parts of fleeing individual issues in Africa and also in the American Convention on Human Rights, 1969.

(4) The hardening of the standard in course of action to which diverse States in various areas of the world are parties have given the rule the character of a general standard law. This perspective is supported by the reaffirmation of the rule in the United Nations Declaration on Territorial Asylum, in conclusion by the Executive Committee of the High Commissioner's Program and in determination of the United Nations General Assembly

(5) The rule of non-refoulement incorporates non-dismissal, if such dismissal would bring about an asylum seeker being coercively thrown back to a nation of oppression.

(6) The rule of non-refoulement, along with non-dismissal has additionally been acknowledged in the act of States and the basic character has not been truly addressed.

(7) In perspective of the above mentioned , it is concluded thus, that the standard of non-refoulement has procured a regulating nature and comprises a guideline of global standard law, thus the principle of non refoulement is a customary international law.

III.5 NON REFOULEMENT, GAINING CHARACTERISTIC OF JUS COGENS

"When every other safeguard fails, asylum in a foreign country becomes the ultimate human right"[437].

III.5.i. Introduction to the concept of Jus Cogens

Describing the commitment of non-refoulement as Jus Cogens may be an effective weapon to ensure the assurance of people and their human rights. In this manner, it is vital to check whether the commitment of non-refoulement is acknowledged and perceived as an authoritative standard of international law[438].

In spite of the hesitance of states to tie themselves through bargains, the UNHCR has looked to have the Principle of non-refoulement portrayed as an authoritative standard of international law. Recently the principle of non refoulement has started gaining importance as the Principle of Jus Cogens. Jus Cogens principle refers to certain elementary, overriding principles of international law, from which no derogation is ever endorsed. Jus Cogens literally mean compelling law.

The Convention of Internationally recognized Jus Cogens was created under a solid impact built by regular law ideas that said that states can't be completely free in setting up their contractual relations. States were compelled to regard certain principal standards profoundly established universally. The force of a state looking for bargains is repressed when it goes up against a super-standard of jus cogens. At last, Jus Cogens are tenets, which compare to the crucial standard of global open arrangement and which cannot be modified until a resulting standard of the same benchmark is built up. Implication can be drawn that the arrangement of the principles of Jus Cogens is progressively better looked at than the other customary laws of world community. It is the very action of settlement, making expect the general guideline which agrees to the global open strategy and thus acknowledged by the worldwide

[437] Atle Grahl , "Refugee Expert", University of Cincinnati Law Review,1995
[438] US China Law Review, 2005

group largely. Rules instead of the possibility of Jus Cogens could be seen as void[439], since such principles restrict the essential standards of global open approach.

Jus Cogens has gained the status of international customary rules for two reasons firstly they circumscribe the ability of the states to make or change guidelines of International Law . Secondly it prevents international communities from derogating from the fundamental rules of international public policy as violations of norms will be seriously damaging to the international legal system[440].

Renowned Professor Oppenheim states in his book '*THE CREATION OF STATES IN INTERNATIONAL LAW'* that there exists a number of universally recognized Principle *"that rendered any conflicting treaty void therefore the peremptory effect of such Principles was itself a unanimously recognized customary rule of International Law"*. For example treaties providing for slavery are void for opposing the universally recognized principle of prohibition of slavery. The Principles of Jus Cogens has gained favour through judicial acceptance by Permanent Court of International Justice through cases like *Pablo Najera Case 1928, Oscar Chinn Case 1934 and Bosnian-Serbia case* where Judge Lauterpacht express's his opinion that the Security Council had debased the genocide prohibition therefore violating the Jus Cogens.

The Vienna Convention on the Law of Treaties recognizing the norm of Jus Cogens in Article 53, states:

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

[439]James Crawford, "*The Creation of States In International Law",* (1979), available at: www.oupcanada.com

[440] Michael Byers, "Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules", 66 Nordic J. Int'l L. nos. 2-3 211, 219-220 (1997)

To determine a model of general international law to be a Jus Cogens there are four criteria's to be seen:

(1) Status as a norm of general international law;
(2) Acceptance by the international community of states as a whole;
(3) Immunity from derogation; and
(4) Modifiable only by a new norm having the same status.

The significance of the principles of Jus Cogens was affirmed by the pattern to apply it past the law of bargains, specifically, in the law of state responsibility. In the case of Nicaragua Case[441] the International Court of Justice certified the Jus Cogens as an acknowledged doctrine of International Law; it depended on the preclusion on the utilization of compel as being "a prominent case of a control of universal law having the character of Jus Cogens*"*

Michale Byers of the Duke College Law School[442], states two reasons contributing as variables in the advancement of Jus Cogens rules. Initial, an arrangement can't tie its gatherings' capacities to alter the arrangement terms nor to ease the gathering's commitments under it, for example, through a consequent arrangement to which all the same gatherings have assented. Second, all by and large acknowledged Jus Cogens controls apply all around however none of the arrangements, which have classified these tenets, have been generally sanctioned. Neither any settlement, nor the Charter of the United Nations, can set up a tenet of wide-ranging worldwide law. Settlements could just make commitments amongst gatherings. They are higher guidelines that bear general estimations of the International people wholly acknowledging the expansive dominant part of states which must add up to widespread lawful commitment.

[441]Nicaragua v. United States of America,27 June,1986,available at:www.icj.org
[442]Byers *supra note* 440

III.5.ii Non refoulement and Jus Cogens

The former Chairman of the Drafting Committee of the Vienna Conference, M.K. Yasseen, states, on the Law of Treaties, that,

"There is no question of requiring a rule to be accepted and recognized as peremptory by all States. It would be enough if a very large majority did so; that would mean that, if one state in isolation refused to accept the peremptory character of a rule, or if that state was supported by a very small number of states, the acceptance and recognition of the peremptory character of the rule by the international community as a whole would not be affected"[443]

He states that "no country should have the right of rejection. Though there are no special sources for creating constitutional or basic principles in the present international legal order but there is constant process of development in the international legal field and Jus Cogens norms are widely accepted by the international community therefore its existence on basis of lack of executing machinery cannot be denied". Jus Cogens is an International higher norm made by the community to oblige the community as a whole to not violate certain fundamental basic rights of humans like Prohibition of Genocide, Prohibition of Slavery, Prohibition of Torture, and Prohibition of violation of human rights and with its recognition from Vienna Convention and other international cases the Principle of Jus Cogens cannot be denied.

The principle of non refoulement is a part of customary law and since its inception it has gathered a lot of importance as a fundamental Principle many state take it to be a norm of Jus Cogens but the question remains that, has the Principle of Non refoulement gained the character Jus Cogens?

According to Goodwin Gill, senior human rights scholar, "the fundamental principle of Refugee Law is a part of customary international law." Indeed, even the

[443]Kamrul Hossain "The Concept of Jus Cogens and the Obligation Under the U.N. Charter", 3 Santa Clara J. INT'L L.72(2005) Vol.1

International associations, for example, United Nations General Assembly alongside UNHCR have routinely affirmed non-refoulement when in doubt of International Customary Law with no state protests[444]. The commitment of non refoulement can be characterized as jus cogens through various EXCOM conclusions and the State practices which has been seen, for example: In Latin America the principle has been adopted in their 1984 Cartagena Declaration on Refugees.

Article 33 unequivocally endorses that displaced people ought not to be returned back to the places where their life or opportunity would be debilitated by virtue of their race, religion, nationality, participation of an especially social group or political opinion, and this Principle might not be derogated under any conditions. The Principle helps in protecting the ultimate right of a human when every other safeguard to protect oneself fails.

III.6. JUS COGENS NATURE OF NON REFOULEMENT

Confirmation of the jus cogens nature of non-refoulement is to be found in the State practice which has developed in Latin America on the premise of the 1984 Cartagena Declaration on Refugees. The affirmation sets out the significance and importance of the principle of non-refoulement (counting the preclusion of dismissal at the frontier) as a foundation of the global assurance of evacuees. This Principle is fundamental as to displace people and in the current situation with international law; it ought to be recognized and observed as principle of jus cogens.[445] It's a need for protection of human rights; the States in these three ways tries to get away with their International Obligation.

The point of reclassifying non-refoulement is to diminish the flighty variables in the procurement, and confine the attentiveness in understanding it. As a matter of first importance, it is to push the rule that individuals might appreciate the central rights and opportunity without segregation, and the hope that all the states, perceiving the social and helpful nature of the issue of displaced people, will do all that they can to keep this issue from turning into a reason for pressure among states. Contracting

[444] The Refugee in International Law, OUP,1996, pg 167
[445] Arthur Helton and Eliana Jacobs, "What is Forced Migration?", 13 *Ceo. Imm. L.J.* 526, (1999).

gatherings are obliged to respect the rule of non-refoulement for their own purpose to minimize the damage coming about because of the exile issue. Article 33 ought to be deciphered comprehensively; along these lines, exiles observed in wherever are to be ensured and refoulement in any way is disallowed.

Though UNHCR, United nations General Assembly, Article33 itself has words "should not" clearly explicitly stating that refoulement of refugees should be disallowed at the borders of territories where the life or freedom of an individual would be endangered. Though the Principle is internationally recognized and widely accepted by two- third of the world countries and many have started accepting it as a moral and legal obligation to accept the refugees and provide them a safe haven, still many states try to get away with it.

Article 33 states 'at the frontiers', to which the states use their own interpretation to abide by the Principle at the same time by finding the loop holes in the wording they try to shunt away their moral obligation.

There are three ways in which States were seen derogating from the Principle of Non refoulement and getting rid of their responsibility[446]:

1. Refugees physically present in the territory of the state:

Often seen in developed countries, they apply excessively restrictive interpretations to the definition given in the Refugee Convention leading to rejection of genuine refugees as the principle of non refoulement given in the Refugee Convention provides exceptions that enumerates some practical grounds wherein refugee can be returned in case they pose a threat to the national security.US and other countries have been seen using these ways within their territory, to return refugees back in the name of national security. So state's repelling refugees within the territory violates the Principle, if this return does not go on the ground of protecting the citizens of their own country[447].

[446] US-China Law Review 2005.
[447] Refugees Rights Report on a Comparative Survey, New York Lanes Press, 1995.

2. **Refugees at or near the Frontier States**:

States have also been practicing of returning refugees before they even reach the frontiers of their territory as the definition under Article 33[448] does not cover it. In 1979 it was seen in the famous *Thai Government v. Vietnamese*[449] boater case that even before reaching the land of Thailand the Thailand government forcibly returned the boaters having refugees from Vietnam, from the sea before they could reach their frontier.

Even American Government was seen practicing the same; they were found interdicting on the high sea to return the refugees before they could reach the American Territory. They were later held internationally responsible for violating the international obligation towards the refugee protection.

According to the Haitian Court the Convention does not have exterritorial validity, which on international understanding violates the character of non refoulement and dismisses the central point of Refugee Convention. It also discounts basic obligations of international law provided by the United Nations to which these countries have been members.

3. Evolution of arms length non –entrée policies:

Another grave contemporary risk to outcast assurance is grounded in a third variation of refoulement, in particular, the poisonous new practices of non-entree, which expect to reject undesirable vagrants through preventive and a safe distance measures. Non-entrée strategies incorporate the burden of visa prerequisite on the nationals of veritable outcast delivering nations implemented through bearer sanctions; first host nation and safe third nation rules applying to displaced people who don't go straightforwardly to the nation where they look for refuge, et cetera. Convincing human emergencies don't obviously suffice to ensure the security of displaced people.

[448] Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951.
[449]Scott McKenzie, "Return Trip to Reality", *South China Morning Post* (Hong Kong) (24 September 1989).

The safe distance non-entree arrangement that allows return uncovers the constraints of the present guideline of non-refoulement. Furthermore, even all the more significantly, deal and the act of refoulement that it licenses additionally uncover the impediments of utilizing the confounding oust, return and refoule. The sprint of taking care of this issue is to rethink Article 33 of the Refugee Tradition, which has been said above.

Duty towards non-refoulement is of utmost importance in the Refugee Convention[450]. Through this concept the signatories to the Convention expressed their will and pledge that refugees would not be sent back to a place where there is a fear of death or imprisonment or any act that is degrading to a human.

The obligation of non-refoulement is widely acknowledged and is greatly esteemed within international law which shows that it has attained the status of Customary International Law[451] but as a Jus Cogens, its status is yet not clear.

Customary international law comes about because of a general and reliable practice of states took after from a feeling of legitimate commitment [452]. Specifically, the Restatement says that "International agreements create law for the states parties thereto *and* may lead to the creation of customary international law [for states which are not parties] when such agreements are intended for adherence by states generally and are in fact widely accepted."

The Principle no doubt is of utmost importance from worldwide recognition, to states general practice it is widely being seen that states who are signatories to the Principle of Non refoulement, through one or the other legal obligation practice and have started accepting it as an international moral obligation to protect human from circumstances where they face death or any act offensive towards human like torture, cruelty.

[450]Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951.
U.S.T. 6259, 6261, 189 U.N.T.S. 150, 152 entered into force Apr. 22, 1954
[451]Yale Hum. Rts. & Dev. L.J. 183 (1999).
[452]The Restatement Law, American Jurisprudence, the Restatements of the Law are a set of treatises on legal subjects that seek to inform judges and lawyers about general Principles of common law.

Professor Goodwin-Gill argues that, "there is substantial, if not conclusive, authority that the Principle is binding in all states, independently of specific assent. State practice before 1951 is, at the least, equivocal as to whether, in that year, Article 33 of the Convention reflected or crystallized a rule of customary international law"[453]. Article 3 of the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment prohibits any refoulement to a country where there are "substantial grounds" for believing an individual might be a sufferer of torture[454]

Article 3 of the European Convention on Human Rights provides to any country the right of non-refoulement where the person would be subjected to torture or inhuman or degrading treatment. In total, the international community has showed its consistent respect for non-refoulement[455].Non refoulement thus, guards a refugee from persecution, however, this term still lacks a universally established definition. In refugee context this principle protects the fundamental norm of right to life, in fact the Principle offers absolute protection in context of cruel, inhuman or degrading treatment that are less accepted in International Law.

For instance death penalty has no prohibition on itself under International Law but when the penalty of death penalty would amount to cruel, inhuman or degrading treatment then it should not be allowed. The European Court of Human Rights prohibited the refugees return, the case falls under Article 3 of the European Convention which permits no exception to the Non refoulement Principle[456].

Jus Cogens norms are thus understood as integral part of the international legal regime which are clear of the law of treaties and take the place of agreements between the States. Jus Cogens draws in the entire group and cannot be restricted to local or bi-

[453] The Refugee in International Law, 97 (1983), available at: www.global.oup.com.
[454]Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Feb. 4,1985, 23 I.L.M. 1027, as modified, 24 I.L.M. 535 (entered into force June 26,1987).
[455]David Scott, "The Individual Rights to Asylum Under Article 3 of the European Convention on Human Rights, in Transnational Legal Problems of Refugees", 477 (1987).
[456]Soering v. United Kingdom, 161 Eur. Ct. H.R. 1, 34-36 (holding that extradition to face cruel, inhuman or degrading treatment, which could arise from the imposition of the death penalty in certain circumstances, would be contrary to the spirit and intendment of Article 3). The Soering Case, 85 AM. J. INT'L L. 128, 138-139 (1991)

lateral standards. A Principle to become a Jus Cogens one has to see the consensus emerging on two levels firstly the categorical level and secondly the normative level. The first level focuses on the primary nature of the absolute norm and looks into the factors that make it a higher norm and the second level examines whether the norm is recognized as a Jus Cogens under International Law. Even the 1984 Cartagena declaration refers the principle to be the cornerstone of refugee law and states that the principle is basic as to refugees and in the current situation with international law ought to be recognized as Jus Cogens.

The principle of non refoulement has no doubt gained the utmost importance but to declare it as a Jus Cogens we have to look into the exceptions provided by the Principle itself.

Article 33(2) provides for the exceptions to Non refoulement, which provides that: "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."[457]

Article (1)(F) of 1951 Convention states that provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
> (c) he has been guilty of acts contrary to the purposes and Principles of the United Nations[458].

[457]Article 33 (2) of the 1951 Refugee Convention
[458]Refugee Convention 1951 and Protocol Relating to the Status of Refugee 1967.

If the Principle is a Jus Cogens then the exceptions are invalid as Jus Cogens Principles are Principles from where no derogation is allowed. Can the exceptions be removed; as these are exceptions arise out of situations and not out of treaty making? The exceptions provided by the Principle itself are provided to make sure that security of the hosting state is not put to threat. The basic logic is that though the Principle protects the very fundamental Principle of human life that is right to life but to protect the right to life of such people the hosting state cannot put the life of its citizens at threat. In simple terms to protect the others we cannot jeopardize the safety of our own people which is valid and sound so how are the exceptions to be seen.

III.7. IMMUNITY FROM DEROGATION IF IT IS A JUS COGENS PRINCIPLE

If the principle of non-refoulement is a Jus Cogens principle then can the exceptions be removed? The exception clearly states:

Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

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

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

c) he has been guilty of acts contrary to the purposes and principles of the United Nations, the principle shall not apply to people who are a danger to the host country.

If the exceptions are removed then the mere importance of the Principle will be lost as it protects a fundamental norm of life but with no exceptions the people who are not genuine might infiltrate into the host countries that will cause mass destruction and security threat is the hosting states for example the 9/11 attack on world trade centre.

III.7.i. Need for Derogation

The Paris Attack on November thirteenth, 2015 France had seen exceptional assaults on its capital that brought about the death of 130 individuals. Eight terrorists sorted out in three gatherings occupied with suicide bombings, prisoner taking, and shootings as they completed terrorist acts at the State de France stadium, Le Bataclan show lobby, and at a few eateries and bistros. While the French powers keep on researching the brutal terrorist act that essentially expanded a feeling of unreliability among the French and their kindred European natives, various European pioneers are bringing their worries up concerning the progressing displaced person emergency while censuring the EU's reaction.

Indeed, only couple of hours after the assaults, the pioneer of French far-right National Front gathering, Marie Le Pen, guaranteed that the French government ought to confine vagrants from entering the nation Amid the weekend taking after the terrorist demonstrations, pioneers in Czech Republic, Germany, and Poland guaranteed that there is an immediate association between the inundation of Syrian displaced people and Paris assaults as it got to be realized that no less than one of the terrorists embroiled in the assaults acted like an outcast from Syria. Shine government went above and beyond by asserting that Poland is not willing to partake in the EU's resettlement program any more.

Not long after, Slovak Prime Minister Robert Fico discharged an announcement where he asserted that Muslims in Slovakia and all over Europe are a generous danger to the security of the entire area.

In Germany, a nation that set an illustration for other European states by inviting a huge number of displaced people on its domain, commentators of Angela Merkel are criticizing so as to attempt to make household weights the developed Willkommenskultur while alluding to the increased security concerns and late Paris assaults with a specific end goal to avoid further uncontrolled movement.

Europe is as of now encountering its biggest emergency in an era and the displaced person issue for sure compounds the absolute most problems that need to be addressed. It bothers the present challenges experienced by Greece that is attempting to stay above water; it gives apprehensions to the British voters who yet need to figure out if or not Britain ought to stay in the EU in a submission guaranteed by Mr. Cameron; it break down the relations in the middle of Germany and eastern European countries; and it lessens a feeling of the European solidarity when it is expected to address Russia's forceful state of mind and activities.

The new level of risk is for sure transcending Europe; in any case, it turns out to be clearer that present reactions of numerous European pioneers are not going to prompt a production of viable procedures that are required to take care of the most squeezing issues.

Mass inundation of exiles absolutely represents a significant risk to the European countries, in any case it is imperative to remember that, as it was said by the President of the European Commission Jean-Claude Juncker, "the individuals who composed [Paris] assaults and those that executed them are precisely those that the displaced people are escaping and not the inverse."[459] While the reality of the matter is that ISIS agents can enter European countries putting on a show to be evacuees, it doesn't imply that each and every haven seeker is a terrorist. Indeed, it is presently realized that no less than six terrorists who led assaults in Paris ended up being European nationals, not displaced people. Urgent point that European pioneers need to consider is that quiet welcome and convenience of Syrian displaced people is not just ethically right, it will likewise diminish the disorder and the likelihood of jihadist belief system spreading everywhere throughout the exile focuses and groups along these lines prompting end of the enlisting asset that ISIS can use. In the event that radical reactions and activities will take after, a huge number of baffled shelter seekers can be changed into potential ISIS initiates and this can prompt unimaginable results. Germany's reaction to the flood of exiles and its Willkommenskultur ought not be basically deserted and censured as a result of the Paris assaults. By welcoming a huge number of displaced people Germany avoided philanthropic emergency and tended to

[459] Cologne Attacks' Profound Impact on Europe, available at: www.bbc.com.

the issue in a composed way realizing that on the off chance that it would not do as such, issue could transform into a complete confusion. This methodology ought to serve as a case to other European countries.

With mass influx of refugees the states who even want to open there land to the needed will think twice before opening it specially after the Paris Attack the attack happened right at the time when the European countries were holding talks with each other to look after the refugee crisis happening in Europe due to war in Syria. Thus the exceptions cannot be removed.

Then are the exceptions to be kept. The exceptions are needed for states security reasons but are they being reasonably used?

In case of *Croatia-Bosnia Herzegovina* 1992[460], Croatia held around 260000 of internally displaced people along with 340000 Boasnian refugees by 1991-92 due to genocide situations in its and nearby countries because of which the financial burden of Croatia was around USD 66million a month second next to its defense expenditure. In spite of repeated requests for help from international community's no one helped after which the state cited financial and economic reasons as justification for the closure of border as there was no other way to reduce the burden of finance, land problem, food and security issues. This case shows us that in name of international obligation even if states are following the rules even they till certain point can help but ones their needs grow and there resources started to deplete then states will try to look after their needs and its citizens' needs rather than needs of refugees. In the above case Croatia cannot be held liable as it did whatever it could do in its capacity to help the needy but now there need was in crisis too. US Scenario as to the practice of non-refoulement in the United States it becomes pertinent to determine here that the United States is not party to the 1951 Convention but rather is social event to the 1967 Protocol and thus has to follow the tenet of non-refoulement

[460] 5 Eur. J. Migration & L. 23 2003

The status and use of the standard of non-refoulement in the United States can be represented looking into *Immigration and Naturalization Service v. Predrag Stevic*[461] and the case *Immigration and Naturalization Service v Luz Marina, Cardoza-Fonseca*[462] U.S. displaced person enactment. In 1968 the United States acquiesced to the United Nations Protocol Relating to the Status of Refugees. The Protocol bound the gatherings to agree to the substantive procurements of Article 2 through 34 of the Convention. The U.S. President and the Senate trusted that the Protocol was to a great extent steady with existing law

It was chosen in the cases that the domestic law was a more liberal than the Protocol. In the act of the United States with respect to the guideline of non-refoulement one can perceive alleged "Outright State Sovereignty Approach," the states after assuming total state power either approach or interpret their non-refoulement commitment under the 1951 Convention as pertinent just when a man looking for evacuee status effectively reach their borders.

The U.S. draws closer to non-refoulement in a comparable way by finding a way to keep displaced people from achieving its outskirts. A standout amongst the most critical samples of this "Supreme State Sovereignty Approach" is the U.S. work on in regards to the Haitians. The U.S. administration requested the Coast Guard to block vessels on the high seas containing Haitians endeavoring to move to the United States and returned them to Haiti

The U.S. Incomparable Court in *Sale v. Haitian Centers Council*[463] administered the right printed translation of Article 33 and did not disallow the U.S. Coast Guard from capturing Haitian outcasts before they achieved the fringe. Court started by taking note that in light of a plain printed perusing, Article 33 cannot make a difference extraterritorially given an analogous utilization of the expressions "remove or give back," the interaction between Article 33 (1) and Article 33 (2), and the arranging history of the 1951 Convention . The Supreme Court held "in light of the fact that the content of Article 33 can't sensibly be perused to say anything at all in regards to a

[461] 467 U.S. 407 (1984)
[462] 480 U.S. 421
[463]SC 509 U.S. 155 , available at: www.tjsl.edu, 1993

country's activities towards outsiders outside its own particular domain, it doesn't forbid such activities of keeping refuge seekers from coming to the border."

The above case contended that the United States was breaking its worldwide law commitment of non-refoulement, which was revered in the 1980 Refugee Act, by blocking ships from Haiti and abruptly returning them without satisfactorily viewing to find out whether any of the asylum seekers had substantial cases to displaced person status. The Supreme Court, be that as it may, found for the Federal Government, by perusing the non-refoulement guideline to just apply once a shelter seeker had entered the United States

Different changes were introduced to the refuge framework set up by this enactment since 1980. They have occurred both by means of enactment and through the choices of the Courts. Interim security (TP), for instance, is turning out to be progressively prominent in the U.S. as an approach to manage refuge seekers. Additionally, in 1994 regulations were gone trying to "streamline" the haven process, and make it simpler to get rid of sham or unimportant cases. In any case, these changes did not seem to be adequate, subsequently the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) were removed in 1996. This demonstration was said to have made 'significant changes' in the law pertinent to asylum seekers landing in the U.S. Among these progressions were the presentation of a sped up evacuation process and numerical confinements set on specific classes of exiles.

The United States Refugee Act was passed in 1980. The foremost inspiration for the establishment of the Refugee Act, 1980 was a yearning to change and standardize the methodology representing the confirmation of displaced people into the United States. Be that as it may, there was an issue with the dialect in Article 243 and 208 of the Refugee Act of 1980 and Article 33 of the 1951 Convention. This issue was talked about in the aforementioned cases with respect to the expelling of displaced person Stevic back to his nation of origin and in regards to the shelter of Cardoza-Fonseca

III.8. IS IT A JUS COGENS?

The exceptions are needed and cannot be removed as they are there to protect the states from dangerous situations like these. Thus one can conclude that though the principle is a fundamental norm that protects the right to life holds an important place in international law but with exception and lack of state practice seen around the world it can be said that the Principle is as important as a Jus Cogens but is not and can never be a Jus Cogens Principle. As states in one or other way still continue to deviate from their obligation and as there in no proper machinery to look at the activities of the state and with exceptions holding important place as the Principle they cannot be ever removed. The states however will continue to misuse the exceptions to deviate their international responsibility towards such situation.

Prince Sadruddin Aga Khan[464] while making an opening statement to High Commissioner of UNHCR about the violations that still were happening in his country said when we consider more recent trends in regard to international protection, the resulting global picture at the present time leaves no room for complacency. On the contrary, it shows clearly that a major effort in the part of the international community is urgently needed to arrive at acceptable solutions for outstanding problems and to achieve a further measure of progress.

Thus the Principle through various legal documents and renowned scholars and writers in International Law might have gained the status of Jus Cogens but in practicality it cannot be a Jus Cogens due to the following reasons:

- Many states still do and will continue to shed away their moral legal responsibility and with no machinery to keep a check at the state's decision for refoulement, the violation of the Principle will continue to happen.
- The exceptions provided by the Principle itself are as important as the Principle in itself they cannot be declared void as the Jus Cogens norm demands for no derogation but this type of derogation is needed for situations were security of state and its people are at risk.

[464] Statements by High Commissioner, 3rd Oct, 1997, available at: www.unhcr.org

- Many states still not accept the Principle in totality then the question of it being a fundamental Principle is out of the lead. With states not accepting it as a fundamental Principle they will never accept the seriousness and that it is a principle of Jus Cogens.

Thus the principle of non refoulement is the cardinal and fundamental Principle of International Refugee Law, it is also a customary international law but a norm of Jus Cogens, it's yet not that convincing. No doubt, it is an important rule as important as other higher laws due to its fundamental characteristic that protects the right to life but it is not as important to be kept at the place of Jus Cogens due to the following reasons:

1. Status as a norm of general international law:

The principle of Non refoulement is a general norm of International law. It is a part of customary laws that is shown in the above chapter. A law becomes a custom when it is accepted and used for a period of time, the usage of such a custom should be of importance to make it a law. The principle is a recognized law ratified by various treaties and conventions and has been used and practiced by most of the signatory members. Many states take the principle as a moral obligation that needs to be fulfilled

2. International community's acceptance of states as a whole:

If one looks into the reports produced by the authority governing the refugee situations that is the UNHCR we see that approximately 140 countries out of the total 194 have ratified the principle and most try to fulfill their obligation related to the principle. Though the overall international community is not part of the convention but seeing the number of states involved, it is clear that the international community in fields of refugee protection has gained a lot as two third of the world has welcomed, accepted and ratified it.

3. Immunity from derogation:

Article 33(2) of the 1951 Convention provides exceptions to the Principle of Non refoulement that arises out of situations and then later out of legal documents.

The exceptions allow a person to be returned back in case he is a danger to the national security or to the society that hosts them. The exceptions are a need as all displaces humans might not be genuine, with a large inflow of people there might be people who might use the situation to infiltrate into the other state to harm them for example 9/11 attack. The signatory members may abide by the obligation but for how long even the states hosting such people have a limitation as seen in the Croatia's case.

4. Amendable only by a new norm having the same status:

The principle is regarded as an important principle on humanitarian grounds the exceptions are needed to secure themselves than provide protection to others.

The principle is a very important principle in today's time but it cannot be a Jus Cogens as derogation becomes a need in certain cases and then return has to be done. Moreover, there are no proper machineries to look into the decision taken by a state on return of a person. The states have machinery to control their inner system but how much are they reliable and if talking about International community then they hardly will be too able to monitor each and every case and situation. As of now even the basic monitoring of people is an issue then controlling all the stages of human movement in refugee situations is beyond control forever.

The violation of the principles will continue to happen and cannot be stopped in future also so the aim is to control the situation and bring it to such a stage that less human lives are put at stake, less human sufferings happen and less panic among the human occurs.

With the research conducted, it is observed by the researcher that the Principle of Non refoulement with usage of time has been legally accepted by most of the International Community by way of ratification through various conventions/treaties, is thus an International Customary law.

The Principle is the cardinal principle and now with its demand and usage increasing it has been established as a customary law by the international community. With so much of importance and the need of such principle that protects the basic right to life the question arose whether it can be put into the category of Jus Cogens. Jus Cogens are laws higher than the general laws which do not permit any derogation, the community has to abide by the law and fulfill their obligation towards the global community as they are compelling laws. Jus Cogens norms are higher laws than the general ones, the community may or may not abide by the general laws but higher laws protect certain fundamental rights, overriding principles of International law that are to be followed by the human society like right to life, prohibition against slavery, prohibition against torture, prohibition of genocide.

The framers of the Refugee Convention argued whether the country where refugees flee should have discretion in providing with the exceptions, or whether they should be made mandatory bar for receiving refugees. The United States however was of the view that the host country should have the discretion to grant refugee status even if the individual fell into one of the categorical exceptions to refugee status[465].

The concluding bargain was that avoidance would be made compulsorily just for those people who had been conferred under Article 1(F) (a) "wrongdoing against peace, an atrocity, or a wrongdoing against mankind." All different exemptions were to be connected at the host nation's discretion. If carefully observed then one can see that the during the making of the Refugee Convention the drafters not only tried but indented to create a balance between protecting refugees even those with a criminal background and protecting host countries from potentially dangerous criminals.

[465] 2 Yale Hum. Rts. & Dev. L.J. 183 (1999)

There are basically two classes of exemptions which can be relevant to the obligation of non-refoulement which are provided inside Article 33 and are particular to non-refoulement. These exemptions contained inside Article 1(F), also identify with the meaning of outcast. A couple of correspondents have proclaimed that a man with an Article 33 case to non-refoulement is not affected by the definitional exclusions of Article 1. However, in light of the fact that Article 33 particularly utilizes the expression "outcast" (rather than "individual" or "individuals") and on the grounds that Article 1 expresses that these exemptions apply to every single one of the Convention's insurances, one might sensibly reason that Article 33 fuses the extra Article 1 special cases. At the point when one considers the soul of Article 33, which is to give supreme insurance to the most at-danger people, it is unusual to infer that the Article 33 prerequisites force a weight well ahead of that forced upon the standard evacuee seeker. However, an entirely literary methodology would bolster the perspective that a participant country could pertain the Article 1 special cases to an individual looking for non-refoulement without abusing the Refugee Convention.

Renowned scholar Gunnel Stenberg submits that the "security" condition is intended to be more prohibitive than the "especially genuine wrongdoing" statement that takes after. He battles that just "evacuees who genuinely undermine the establishments of the State or even its presence" fall under this Article due to the tight appropriateness and the evidentiary worries, by and by, the "security" bar seems to have been to a great extent subsumed under the "especially genuine wrongdoing".

Article 1(F)(a) of the Refugee Convention expressly avoids from the meaning of "displaced person" people who have perpetrated wrongdoings against peace, violations against humankind and atrocities.

The definition’s words have to be interpreted in such a manner that only the true culprits falling under it shall be returned.

- **Particular serious crimes**

The United Nation High Commissioner for Refugees (UNHCR) rules take after such methodology, expressing that: if a wrong is committed by a refugee does it

make him a threat to the group is a question of fact. An individual, who is sentenced for a capital wrongdoing which has been conferred in a condition of enthusiastic anxiety or in preservation instinct, would not amount to a risk to the group.

Second question while one applies this bar is whether these types of crimes can be referred to as "particularly serious." Many scholars, jurists advise that a balancing approach to the definition has to be applied to take out the true essence of "particularly serious", the drafters certainly tried to make it a very narrow exception as the wordings clearly state 'Particularly serious crime and offence'.

This was done so that the host countries could not give any reason for the refugees return back to the fringes of a country where his life or freedom was in threat. Keeping that in mind UNHCR strictly following the wording that is following the contextual approach issues the following guidelines to its signatories, that when all the measures to prevent a refugee seeker, from causing harm to the society fails, that is he is dangerous to the society due to the nature of crime or criminal tag that he got, only then he must be returned back as a last resort[466].

Similarly a Canadian court[467] held that the person facing persecution in the home country is to be seen as criteria while determining their nature of crime and whether they are danger to the community that they shall be returned back.

- **Genuine Non Political Crime Committed Outside the nation of exile:**

The drafters anticipated that it would apply just to individuals who had executed infringement before segment into the host country and who were escapees from value, not people who had been sentenced and served their time. This understanding has been received by a few nations, it was seen during the 1980's when US faced around 125,000 Cuban refugees seeking entry, it asked UNHCR for guidelines which laid down the contextual approach.

[466] Yale Hum. Rts. & Dev. L.J. 183, pg 8, (1999).
[467] Re Chu and minister of Citizenship and Immigration ,July 1998

In the event that individual had conferred crime, assault, rape, youngster attack, injuring, arson, trafficking in drugs or furnished burglary, there should be an assumption of "genuine, non-political wrongdoing.

In case of burglary, stealing, stolen property, assault joined by utilization of weapons, harm to people, hazardous medications or proof of periodic criminal direct then the wrongdoing is a non political wrongdoing.

The UNHCR Handbook[468] shows that, in deciding if a wrongdoing is "political", an adjudicator ought to look to its inclination, the characters' intention, regardless of whether there is a nearby and direct causal connection between the wrongdoing and the political target committed by the refuge seeker. UNHCR additionally expresses that the political component ought to exceed the custom-based law wrongdoing component, and the demonstration ought not to be "grossly out of extent" to the political target. It goes ahead to state that there ought to be a harmony between nature of wrongdoing against the seriousness of the potential abuse, and UNHCR being the head and authority looking after refugee, crisis indicates that the drafters intended to draft it in this way.

According to the Canadian Federal Court 'one must look at the attack ants the targets in an attack to determine whether a person is a freedom fighter or a terrorist. Political crime attackers will happen on military or government while terrorist attackers attack civilians[469]'.

In US by 1982, Board of Immigrations Appeals started using the contextual approach that was suggested by renowned scholars and other Convention state parties. In The *Matter of Frentescu* case it was held that while adjudicating the seriousness of a crime, one should look at certain figures as the way of the conviction, the conditions and hidden realities of the conviction, the sort of sentence forced, and, in particular, regardless of whether the sort and conditions of the wrongdoing show that the outsider will be a peril to the group but in 1990 the Eleventh Circuit Court had

[468]Handbook of Procedures and Criteria for Determining Refugee Status 152 (1992), available at: www.unhcr.org

[469] In the case mentioned, the Canadian court deported an Iranian claimant who had bombed the shops of merchants who supported the Ayatollah.

rejected what was said in case of Frentescu and stated that 'if the immigrant had committed a serious crime, he was necessarily a danger[470]', BIA followed what was said in the case and now any crime determined to be 'particular serious' meant the accused to be danger to the society. If the meaning of 'particularly serious crimes' is to be expanded then, immigrants with valid claims for non-refoulement will be returned back. The words written by drafters were inserted so that only those who are a serious threat to the society shall be returned back so that they cannot harm the community that accepts refugee. The basic Principle being to protect one we cannot harm our own people. The principle does not fall under Article 53 of the Vienna convention as Article 64 provides a more sensible framework; it states "*Protect the general interests of the international Community through safeguarding the uniform operation of Jus Cogens".*

The article states to ensure the general interests of the community therefore the Convention is not in a general sense in strife with the rise of non-refoulement as a jus cogens standard just if the arrangements of the settlement clashing with the higher law can legitimately be viewed as detachable from whatever is left of the bargain then it is still respected to be substantial.

Strict use of the standards of nullity would scarcely suit circumstances where the arrangement was expected to not get into conflicts with higher laws as they contradict with them as they later emerged. The solution is to narrow down the provisions and strict interpretation has to be applied as nullifying the provisions is not an appropriate situations and if the principle is again and again matched with the status of jus cogens then the exceptions should be further limited, they must to subjected to very clear limitations as states might misuse them to deviate from their obligation.

Since the rule has been revered in the 1951 Convention, the guideline has turned into a built up rule of standard global law and is a principal standard of the community. The guideline ensures people shape confronting circumstances where there fundamental human rights will be abused. The exemptions have never picked up a comparative level of accord as the standard itself; rather, their usage has been

[470] Matter of Carballe, 19 1. & N. Dec. 357,360 (B.I.A. 1986)

argumentative, broken and regionalized.

III.9. NON-REFOULEMENT AND EXTRADITION TREATIES: OVERLAP

III.9.i. The link between Extradition and non-refoulement

The factor that links extradition to non-refoulement is the point that non-refoulement aims to protect the rights of an individual or refugees or asylum seekers. Extradition on the other hands aims to protect the right of the states or requested states. The 1951 Convention relating to Status of Refugees is states that: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would the threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion."[471]

Even though the article provides protection to refugees it does not preclude refugee's chances of getting extradited in certain situations. Article 33(2) acts an exception which prevents the absolute nature of the principle. It states that if the court is of the view that the national security of a country is at stake because of a particular refugee then he will not be subjected to the security guaranteed to the refugees under Article 33(1).

The relationship that persisted between different countries with respect to extradition was generally governed by bilateral and multilateral extradition treaties acting along with their respective national legislations.[472] Treaties concerning the Extradition generally include the types of offences with respect to which Extradition can sought, if extradition is granted what kind of treatment or the degree of punishment a state can give to the refugees and all the necessary requirements with respect to the documents supporting the claim or the evidence required to by the requesting state regarding the treatment the refugee will undergo.

[471] 1951 Refugee Convention, Art. 33(1).
[472] Vesna Stefanovska, "The concept of political and Terrorist offences in Extradition matters; A Legal perspective", 3 Vol. 11 No. 34, ESJ, 69, 71 Dec (2015).

The practice of Extradition is supported by various treaties governing human rights internationally, conventions prohibiting the practice of terrorism and other instruments dealing with crimes happening across borders of the nations. They provide that a person should be convicted for the offences he has been held liable. Yet certain non-refoulement obligations under international refugee law which also form a part of international human rights law who aims to restrict extradition absolutely.[473] Such conflicts were also addressed in various international programmes. The Executive Committee of the UNHCR's Programme, while discussing about various problems of extradition affecting refugees stated certain points which should be considered important, including recognition of the principle as a fundamental character, protection to be given to refugees on the grounds justified in 1951 Convention under Article 1A(2), prominent role of the states in such cases of conflicts where their responsibility lies in showing mutual assistance to each other and to make sure that non-refoulement hold importance over extradition during such conflicts.[474]

III.9.ii. The overlap

When it comes to protection against refoulement as defined in international human rights law there is a mandatory prohibition to extradition in international human rights law there is a mandatory prohibition to extradition in any case where a person who is being searched by the state authorities has a possibility of getting exposed to a real risk of torture in such cases of extradition

The principle of prohibition of refoulement established by international human rights law with respect to a real risk of irreparable harm extends to all people who is governed by a state under whose jurisdiction the individual resides [475] These rights also extends to refugees and asylum-seekers as they are just a subset of human rights law, whose scope is wider than the refugee convention with respect to providing protection who have the fear of being subjected to real risk of torture. The European Court of Human Rights has held in judgment that the

[473] Ibid.
[474]UNHCR, Executive Committee, Problems of Extradition Affecting Refugees, Conclusion No. 17, (Oct. 16, 1980),http://www.unhcr.org/excom/exconc/3ae68c4423/problems-extradition-affecting-refugees.html.
[475] Stefanovska, *supra* note 472, at 3

obligation under the non-refoulement principles is inherently guaranteed to make sure that no person is subjected to torture or to inhuman or degrading treatment or punishment defined under Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and that this obligations automatically apply whenever there is a real risk to face such treatment as a result of forcible removal, including extradition [476]

While determing its decision whether to extradite a person or not, the state parties fears to violate rules on both the sides. As it is clear that extradition process carries out on the basis of multilateral and bilateral treaties signed between states, if they will follow the fundamental principle of human right by prohibiting refoulement they will be violating the treaty. On the other hand if they will follow the treaty, then they will end up violating the human rights principle. In both the cases, it the state who is always juggling in a situation where they have to decide one principle over the other because in the both the ways they will be violating some norm or the other. But the rule has been laid down that the obligations under international refugee and human rights law are to be considered more important than the treaties which the states sign which each other with the motive to fight terrorism.[477] In this regard, international organizations like United Nations Security Council and General Assembly have appreciated the efforts taken by the state to fight terrorism, a problem existing in all the nations but they lay down the conditions of it to be made in accordance with the human rights treaties which lays down the standard in which right of an individual needs to be protected and it becomes the responsibility of the states to comply with such international standards.[478]This approach expected from the states is itself questionable because for the national security and protection of the states even if they will try to punish the people involved, they cannot pass capital punishment for the crime committed by the people because then the principles of human rights and refugee law come into consideration. So the absoluteness of the human rights law at some point or the other will hamper the actions of the states taken for the national security at some stage.

[476]Soering v. United Kingdom, Application No. 14038/88; Ahmed v. Austria, Application No. 25964/94.
[477] Security Council Resolution S/RES/1624 (2005)
[478]Stefanovska, s*upra* note 472, at 3 Soering v. United Kingdom, Application No. 14038/88; Ahmed v. Austria, Application No. 25964/94.
[478] Security Council Resolution S/RES/1624 (2005)
[478] Stefanovska, s*upra* note 472, at 3

The problem arises when it comes to the application of non-refoulement and extradition treaties because of their contradicting natures. Under refugee law, extradition request of a refugee is prohibited in accordance with the rules laid down under Article 33(1) of the 1951 Convention; also being a customary international law such extradition process should be declined.[479]Therefore, non-refoulement as a principle defined in refugee law bars the application of extradition, unless the authorities have detailed reasons that the requested person falls within the exceptions elaborated under Article 33(2) of the Convention[480]. The exception clause also does not hold much importance because even if the requested person falls within the exception clause, the obligations provided by the human rights law restrict the state to refoule the person in any way possible. This rule applies even in the cases where the state requesting such extradition has given its assurances with respect to the fear of persecution of the individual being requested that upon transfer he will not be exposed to any kind of torture or any such treatment which includes inhuman or degrading punishment.[481]

These decisions decided by the states or the assurances given by the requesting state often arise through the diplomatic notes. According to UNHCR, undertakings of this kind, should not be considered as a final word on behalf of the state requesting such extradition because it will end up affecting the rights guaranteed to the refugee under the refugee convention.[482] This position prevails because the individual has already been awarded with the refugee status which means that the state has already recognized his fear of persecution and in this position if they will accept the extradition request it would lead to them going against the protection assured by the 1951 convention even if such acceptance has been based on some diplomatic surety.[483]

In terms of seeking Extradition request, along with the refugee's country of origin a third country can also request for Extradition request provided they have to give assurances to the requested country that the refugee will not be exposed to any kind of

[479]Stefanovska, s*upra* note 472, at 3
[480] 1951 Refugee Convention, Art. 33(2).
[481] Stefanovska, s*upra* note 472, at 3
[482]UNHCR, Factum of the Intervenor, UNHCR, Suresh v. the Minister of Citizenship and Immigration; the Attorney General of Canada,Vol No. 14(1)" Int J Refugee Law,141,144 (2002)
[483] Ibid.

risk where there will be chances of him facing persecution or will expose him to any kind of punishment leading to torture or causing any other irreparable harm in that country. This issue was recently pointed out by the court in the judgment of *Abid Naseer* v. *United States of America*[484], where U.S.A sought for extradition of the applicant where he was held liable for committing crimes in the U.K and U.S.A. The applicant in this case regarded that if the U.S.A's request for his extradition will be granted, there were chances of him getting extradited to Pakistan where had well-founded fear of persecution existing. To such contention the U.S.A gave assurances that such transfer will not happen which the United Kingdom took into consideration and extradited the applicant's case. It becomes the responsibility of the requested state to examine all the relevant circumstances and situations likely to occur on such transfer and to make sure that the right of refugee should not be affected in any way possible.

Under the norms governed by human rights it has been pointed out that a state can take the decision of extraditing a person to the country of his origin based on such diplomatic assurances provided they are reliable enough to make the requested country believe that the rights of the individual will not be violated.[485] The nature of the assurances which the requested state looks upto while deciding such kind of extradition requests includes certain criteria which the requesting state should satisfy. The criteria which are required to be established or the assurances which are required to be provided by the requesting state has to lay down its foundation with respect to two points. Firstly they need to establish a reasonable intention to dispose the risk to the individual concerned and secondly on the side from the requested state to consider such request being made in good faith.[486]

To determine whether such diplomatic assurances can be consider reliable where the cases involved includes death penalty as a probable punishment is comparatively easier to determine the consensus in the cases which involves a risk of torture or other

[484] Abid Naseer v. USA, Criminal Docket No. 10-19 (S-4) (RJD)
[485] Stefanovska, *supra* note 472, at 3
[486]UNHCR,"UNHCR Note on Diplomatic Assurances and International Refugee Protection, Protection Operations and and Legal Advice Section Divison of International Protection Services," (Aug.2006),http://www.unhcr.ch/fileadmin/unhcr_data/UNHCR_Note_on_Diplomatic_Assurances_and_International_Refugee_Protection.pdf

forms of ill-treatment.[487] With respect to diplomatic assurances it has been taken into consideration they do not hold any legal capacity. These assurances only work till the time the person convicted has to be returned back to the requesting country. The states do not provide with any accountability which needs to be sorted once the person is been transferred. It has been noticed through many reports that in certain cases where such transfers take place these assurances do not work, and people end up suffering even more. So in cases where there are reasonable grounds to believe that requested person will be exposed to torture then such assurances do not any validity."[488]

Along with international committees and international documents the states also takes an effort to include such prohibition to refoulement related clauses in their national legislations. The municipal laws of different countries also includes the provisions which prohibits extraditions of the refugee, if there are existing circumstances showcasing the risk of torture or other human rights violations, serious in nature.[489] UNHCR lays down that there should be specific provisions in the national legislation of the states which would make it compulsory for the states to refuse such extradition request of an individual seeking refuge or asylum in cases where if such request will be allowed it would lead to inconsistency of the non-refoulement obligations established under either refugee law or human rights law.[490]

The main problem with this point arises when even if the State's are required to provide assurances to the requested state; their assurances do not hold any importance. This approach therefore creates a problem where even if diplomatic assurances cannot be held reliable then at what stage can a states' right be protected. It creates an unambiguous approach by the human rights treaties. If a state has serious and genuine reason to punish a person who is accused of committing a crime of high degree affecting population at large then just to protect the rights of a person, does it give authority to the human rights treaties to violate the rights of the millions of people whose security is affected because of the presence of these people who has committed crime including serious offences.

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[487]Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002, SCC 1.
[488]Special Rapporteur on Torture and other cruel, Inhuman or Degrading Treatment of Punishment, Interim Report to the General Assembly, U.N Doc. A/60/316 (Aug. 30, 2005)
[489] Kapferer *supra note* 118.
[490] Stefanovska, *Supra* note 472, at 3.

III.9.iii Effects of the overlap

These problems have led to an increase in the rate of transnational and international crimes to which the international community has responded by creating new institutions and spreading the scope of bilateral and multilateral treaties, the motive of whose existence is to fight the battle against transnational crimes[491], promote the existence of extradition, and authorize and establish the need of mutual assistance between the states.[492] The overlap arises when the authorities tries to link principles of human rights in the cases where there is a need of extradition process to be followed, which in a way hampers the efforts taken by the international community to fight the crime prevailing in the international legal system.[493]

The existence of the problem was at first pointed out by the ECHR. The court in the well known case of *Soering* v. *United Kingdom*[494], established that: "The motive of the ECHR is to establish harmony between state's rights to request extradition of a person who is suspected of committing a crime in its jurisdiction and an individual's basic rights. Along with the development of the nations, there has been an alarming rate at which the problem of terrorism has been growing. This problem has established a defined concern on the behalf of the states, for which the only right thing will be to withhold the people guilty of committing such offences. In such cases it is important to bring back those people who has fled from the country and put them on trial. In such cases, the established rules of non-refoulement will only end up affecting the population of the country whose rights have been put at risk with such rules. Therefore, there is a need to establish proper balance between these principles to serve what is right."[495]

As discussed above extradition treaties are signed between two countries where they agree on certain consensus with respect to the treatment of the refugees. In the recent extradition system, these treaties also include certain clauses which give main importance towards safeguarding the individual rights which is the most important

[491] Soering v. United Kingdom, (1989) 11 E.H.R.R 439.
[492] Dugard and Wyngaert, *supra note* 294 at 187.
[493] *Id.* at 89.
[494] Soering v. United Kingdom, *supra note* 210.
[495] *Id.* at 89.

motive of human rights law. When a municipal court refuses extradition the ground being violation of basic human rights of an individual by the requesting state if he is extradited, or when an international court or other institution finds a state breaching its obligations defined in human rights treaty for having extradited the person, priority in this case will be accorded to the norms established by the human rights treaty over those by the extradition treaty.[496] The situations where the request to extradition has been denied takes place mostly keeping in mind the right or the interest of the person involved. It becomes the responsibility of the state to also take into consideration the obligations provided in the treaty and the rights of the requesting state along with the requested case which should comply with the basic factors and obligations mentioned in the treaty.

Authors John Dugard and Christine Van den Wyngaert, in their article determined that in cases where human rights gets priority over domestic extradition statutes and international extradition agreements, the point in issue is what part of human rights are being protected over these international agreements and treaties. It is therefore necessary to properly examine the principal rights that have been established to obstruct extradition to determine whether any rules or guidelines have begun to emerge from judicial decisions or state practice.[497]

The first punishment which was discussed by the authors was that of Death Penalty. It has been considered that there exist various human rights protocols which insist that death penalty should be abolished as a punishment. In certain situations, it was explained that there has been circumstances where the requested state has asked for assurances from the requesting state with respect to such punishments. States requesting extradition has to give assurances to person involved along with the state that he will not be given death penalty as punishment incase extradition being allowed. However, such assurances are not considered important because they are not legally binding and secondly, no obligation can be implied on the court with respect to certain decisions. The decisions of the court are always based on the degree of crime committed by the person. Also this is a subject on which the requesting state cannot impose its values on the requested state and therefore they are expected to be

[496] Dugard and Wyngaert, *supra* note 294, at 35.
[497] *Id.* at 35

sensitive to the convictions and values of the requested state and be prepared to give firm affirmation that is no situation ever the death penalty will be imposed on the extraditee.[498]

The second punishment discussed was that of Torture which is barred under every convention establishing human rights. International instruments like 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, the 1985 Inter-American Convention to Prevent and Punish Torture, and the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment lays down direct prohibition of such kind of treatment. Under human rights, the prohibition towards torture has established itself as a properly defined jus cogens norm where the principle is automatically binding on the states.[499]

The other punishment prohibited by the human rights laws is that of Cruel, Inhuman or Degrading Treatment or Punishment. Status of such punishment is still not clear because even if it marks its presence in every human right convention, its broadness makes it questionable. Even the perspective of the same is questionable because for every person who has committed crime for him any punishment will be regarded as cruel, inhuman or degrading. It becomes the responsibility of authorities in laying down proper criteria to determine what all punishments qualify to come under this category. The different kinds of punishments which qualify under these categories have been discussed individually by the court through various case laws. These punishments include death row phenomenon, capital punishment causing prolonged suffering, corporal punishment, Prison sentences and conditions, harsh interrogations methods, discrimination, right to the opportunity of fair trial and right to privacy. The court felt the need to discuss the problems with the application of these punishments through various case laws along with the fact whether these should be the reasons to prohibit the extradition process. Examining these punishments individually is important to determine whether all the punishments end up having affect on extradition process as a violation of human rights or not.

[498] Dugard and Wyngaert, s*upra* note 294, at 35
[499] *Id.* at 35

- **Death row phenomenon:** Many nations still have death penalty as a punishment defined in their respective penal laws. The court through different rulings laid down that when a requesting state rejects an extradition request of a requesting state on the ground that the requested person will be exposed to the punishment of death penalty then it automatically becomes their responsibility to make sure they themselves do not have death penalty as a punishment in their municipal laws. A state cannot reject an extradition request giving a particular punishment as an excuse when they themselves follow it as a part of their municipal laws. Therefore, the problem with death row phenomenon will continue as an obstacle to extradition as long as international law tolerates the death penalty.[500]

- **Capital punishment causing prolonged suffering:** This point was established by court in various cases, one case being that of *Ng* v. *Canada*[501]. The UNHRC[502] was of the view that California's practice of executing death penalty took place by executing gas asphyxiation, which takes more than ten minutes to cause death, resulted in prolonged suffering constituting cruel and inhuman treatment within the ambit of Article 7 of the ICCPR.[503]. It was therefore that the best interest of the states is to offer guarantee to the requested state that the punishment of death penalty will not be carried forward because anyways every act leading to death penalty will inflict pain and suffering.[504]

- **Corporal Punishment:** This form of punishment is prohibited by Article 31 of the UN Standard Minimum Rules for the Treatment of Prisoners[505] and it has also been held to be in violation of the prohibition on human or degrading treatment by the European Court of Human Rights.[506] There is therefore a necessary requirement from the requesting states to provide assurances to the requested state with respect to such punishment.

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[500] Dugard and Wyngaert, s*upra* note 294, at 35.
[501] Ng v. Canada, 98 ILR 479.
[502] Known as United Nations Human Rights Committee.
[503] Ng v. Canada, s*upra* note 95, at 38.
[504] Dugard and Wyngaert, *supra* note 294, at 35.
[505] Resoultion 663 C (XXIV) of July, 1957, UN ESCOR, 24th Sess. Supp. No. 1, at 11, UN Doc. E/3048 (1957).
[506] Dugard and Wyngaert, *supra note* 294 at 35; Tyrer v. United Kingdom, 26 E.C.H.R (1978).

- **Prison sentences and conditions:** There are various ways in which a person is kept in prisons; some may even lead to treatment prohibited under the convention. It is based on the conditions prevailing in the prisons in a particular state, like gross overcrowding, which qualify as inhuman and degrading treatment. A condition to extradition of this kind would exclude extradition of this kind would exclude extradition altogether to countries where the prison conditions are bad.[507]

- **Harsh interrogation methods:** The ECHR in many cases regarded that the techniques comprising of intimidatory interrogation would constitute inhuman and degrading treatment. Therefore, if a country is of the view that upon transfer a person would be subjected to such methods then they have the right to reject such e extradition requests. These opinions can be based on procedures being followed or opted by that particular country in separate cases where the issue has been brought up to the court of law. In order to determine what includes harsh interrogation methods the Dutch Supreme Court laid down that the responsibility completely lies on the court to decide the same. If on the other hand, the allegation is one of potential violations in the future, the decision is made by the Minister of Justice.[508]

- **Discrimination:** Article 3(2) of the European Convention on Extradition of 1957 recognized prohibition of discriminatory treatment. It states that the requested state should reject the request made for extradition of an individual on charges of attempting to do or for doing an offence criminal in nature and if the state apprehends that on allowing such request that person will be exposed to persecution on the basis of race, religion, nationality or political opinion.

- **The Right to a Fair and Reasonable Trial:** The opportunity of a fair trial and the right to be tried by a proper court are the most important civil and political rights. The court has repeatedly held that these rights at a prominent place and cannot be put on stake, not even in cases where crimes of high level are involved like terrorism or organized crime. A person should never be denied his right to fair trial. Every person has the right to representation in the

[507] Tyrer v. United Kingdom, *Id.*
[508] Dugard and Wyngaert, *supra note* 294 at 35.

court, which includes right to put his side of the case which is included in right to a fair trial.

Therefore, the arguments made by the requesting state under regional and universal international human rights instruments ensure that all persons who come within their territory gets access to all the rights which are provided to them in the respective convention. It has been noticed that human rights obligations at every stage prohibit the proceedings of extradition process. It is thereby necessary to keep a balance between the two principles through which the international battle against the crime can be fought with mutual assistance and corporation between the states.

Therefore, after analyzing the concept of non-refoulement in the background of it being a principle of jus cogens, it can be concluded that the principle of non-refoulement is one of the most fundamental aspects covering the rights of refugees in international law provided in the 1951 Convention. Since its inception, this principle has also been recognized as one the established principle of customary law, which is rather also considered as a pre-emptory norm of international law. It protects an individual from return to their country where there is a risk of life and any derogation from this particular aspect is not recognized under the aegis of principle of non-refoulement. Yet, the exceptions to non-refoulement articulated in Article 33(2) of the Convention render that international legal protection incomplete. The exceptions have never garnered a similar level of consensus as the norm itself; rather, their implementation has been contentious, fractured, and regionalized. Also the fact that the overlap between non-refoulement and extradition treaties is one of the many problems faced by countries in respecting either the rights of an individual or the duty bound State to adhere to the customary international law which the principle of non-refoulement has gained over time.