

**A CRITICAL STUDY OF THE IMPACT OF THE
DOCTRINE OF NON-REFOULEMENT UPON
EXTRADITION TREATIES BETWEEN COUNTRIES
FROM 1973-2014**

THESIS SUBMITTED FOR THE AWARD OF THE DEGREE OF DOCTOR OF
PHILOSOPHY IN LAW UNDER THE UNIVERSITY OF NORTH BENGAL

SUBMITTED BY

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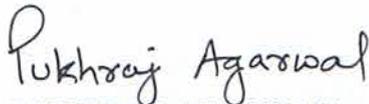
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DECLARATION

I do hereby declare that the Ph.D. thesis entitled A CRITICAL STUDY OF THE IMPACT OF THE DOCTRINE OF NON-REFOULEMENT UPON EXTRADITION TREATIES BETWEEN COUNTRIES FROM 1973-2014 has been prepared by me under the supervision of Prof. (Dr.) Gangotri Chakraborty, Professor of Department of Law, University of North Bengal and is the result of my original investigation and has neither been published in any form nor been submitted either in part, or in whole, for any degree at any University. I have incorporated the suggestions made by the panel members during the pre-submission seminar of my Ph.D. thesis.


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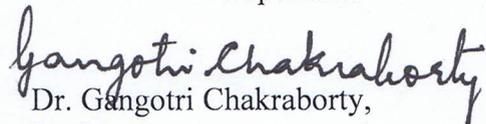
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A CRITICAL STUDY OF THE IMPACT OF THE DOCTRINE OF NON-REFOULEMENT UPON EXTRADITION TREATIES BETWEEN COUNTRIES FROM 1973-2014

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ABSTRACT

The principle of non-refoulement has been enshrined in Art. 33 of the Refugee Convention. It prohibits State from refouling a refugee to the territory of a state where he faces the risk of persecution on basis of race, religion, nationality, membership of social group or political opinion. The principle of non-refoulement has also been enshrined in various other international instruments such as the Convention against Torture and International Covenant on Civil and Political Rights. Any individual who has been validly classified as a refugee can claim protection under the Refugee Convention. Besides this, non-refoulement has also emerged in complementary areas of international law and in customary international law and has been described as a positive obligation of States applied to prevent human rights violations. Its incorporation in several human rights treaties facilitates the protection of other human rights such as the right to life and the right against torture. International human rights law strengthens the specific refugee legal framework by allowing refugees to invoke the protection of norms whose scope of application may be wider than those in the refugee regime. Where few philosophers claim that the principle has not yet received the status of jus cogens norm, the practice followed by the states claim that no derogation of the principle has been made, thus claiming it to be rule of customary international law.

Extradition involves the surrender of an individual by the requesting State to the authorities of the Requested State for the purpose of criminal prosecution. Extradition is based on the concept that an individual must be tried for the offence committed, and must not be allowed to escape lawful prosecution. Extradition is effectuated through various bilateral and multilateral treaties, and other international instruments. The general principles of extradition and grounds for refusal of extradition have now been recognized by various states through the form of State practices.

Prima facie, there is a clear conflict between the two principles under international law. Non-refoulement obligates that a State cannot extradite an individual if there is a real risk that he will be persecuted in the Requesting State. Whereas Extradition law mandates that an individual must be extradited to the requesting State so that he may

be tried for the offences committed. This thesis seeks to analyze the scope of reconciliation between these two conflicting principles for better implementation of both under International Law.

Despite this, States have tried to escape their obligations under international law by choosing to enforce extradition treaties rather than upholding the principle of non-refoulement. The practice of derogation by States through extradition treaties deprecates the protection given to refugees and allows States to escape their international law and human rights law obligations. As a result, the principle of non-refoulement becomes essentially rhetorical with a resultant erosion and limitation of the principle under the human rights regime and the weakening of its position in attaining a jus cogens norm.

These concepts therefore overlap when it comes to their contradictory approach because where one principle focuses on protecting the rights of the states, the other concept insists to keep the inherent right of the humans at a higher pedestal. This thesis, by studying the case laws throughout the year which happens to highlight this issue, tries to focus on the problem pertaining to application of these principles along with the common approach of the court regarding the same. An overview on the interests of the states has also been made wherein by making an attempt to save the interests of an individual, the same of the entire country is always been put on stake. These two concepts need to be dealt in a manner that does not derogate the international norms of human rights and mutual co-operation. An attempt has been made in this thesis that a proper analysis of cases are made and a substantial research undertaken to bring forth the nuances of both the concepts because of the very fact that, if these concepts are not reconciled then States will find it difficult to find a way out when matters are complex and two conflicting doctrines stand in the way of coming out to a solution for a complex situation.

This thesis at the end provides certain suggestions as to how both the doctrines can be reconciled and a common consensus can be reached for better implementation of these two international norms.

PREFACE

Millions of people are today forced to flee their homes as a result of conflict, discrimination, or other forms of persecution. The core instruments which deal in securing international protection to these people are the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. The principle of non-refoulement which is one of the most important principles enshrined in the Refugee Convention has been established as customary international law, prohibiting states from expelling, deporting or extraditing persons to countries where they face torture or ill-treatment. Non-refoulement is a fundamental rule of refugee law and several human rights instruments forbid the return of a person who has reason to fear for his/her life or physical integrity in his/her country of origin.

This research paper examines the overlap between extradition and non-refoulement. Extradition is a formal process whereby States grant each other mutual judicial assistance in criminal matters on the basis of bilateral or multilateral treaties or on an ad hoc basis. Non-refoulement means not to return back those seeking sanctuary because of risk or danger, in compliance with States' obligations under international refugee law, human rights law and customary international law.

Over time, both areas have undergone significant legal and practical developments. On the one hand, since the 18th century, extradition has evolved from being regarded as a matter of State practice, and entirely within the discretion of sovereign rulers, into a concept in law. Thus, extradition came to be governed by a body of rules, which for the most part reflect a consensus among States, and which have changed substantially in response to new types of crime and security concerns, such as, in particular, the emergence of a threat of international terrorism since the 1970s. This has led to restrictions on certain grounds for refusing to grant extradition and the establishment of simplified and accelerated extradition proceedings. On the other hand, developments in various areas of international law from 1945 onward have had a significant impact on the legal framework for extradition. International criminal, humanitarian and human rights law provides a basis for extradition in the absence of

inter-State agreements with respect to certain crimes, and in some cases even imposes an obligation on States to extradite or prosecute the alleged perpetrators of such crimes. At the same time, international human rights law has strengthened the position of the individual in the extradition procedure and established bars to the surrender of a wanted person if this would expose him or her to a risk of serious human rights violations. The principle of non-refoulement, as enshrined in international refugee and human rights law as well as international customary law, plays an important role in this regard and constitutes the principal element defining the legal framework for the interplay between extradition and asylum.

In this thesis I have chosen this topic due to the overlap between the principle of non-refoulement and extradition treaties where countries do not find a proper way out when it comes to the application of either of the two principles.

I acknowledge the with deep gratitude the help and assistance of all received for this work some of whom I have thanked in a separate acknowledgement

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LIST OF ABBREVIATIONS

1	Art.	Article
2.	ADAJ	Aut dedere aut judicare
3.	App. No.	Application Number
4.	ACST	Arab Convention on the Suppression of Terrorism
5.	ACtHR	American Convention on Human Rights
6.	ACHPR	African Charter on Human and Peoples' Rights
7.	AJIL	American Journal of International Law
8.	All ER	All England Law Reports
9.	CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
11.	CPPCG	Convention on the Prevention and Punishment of the Crime of Genocide
12.	CCPR	Centre for Civil and Political Rights
13.	CSEP	Convention on Simplified Extradition Procedures
14.	CEU	Council of the European Union
15.	CEEU	Convention Relating to Extradition between The Member States Of The European Union
16.	CSEEU	Convention Relating to the Simplified Extradition Procedure between The Member States Of The European Union
17.	CIL	Customary International Law
18.	Cir.	Circuit
19.	ECE	The European Convention on Extradition
20.	ECST	European Convention on the Suppression of Terrorism
21.	EHHR	European Human Rights Reports
22.	ERRC	European Roma Rights Centre
23.	ECHR	European Convention on Human Rights
24.	ECtHR	European Court of Human Rights
25.	ECHR	European Human Rights Report
26.	EWCA	England and Wales Court of Appeal

27.	EWHC	High Court of England and Wales
28.	EXCOM	Executive Committee
29.	FDEAW	Council Framework Decision of 13 June 2002 on the European Arrest warrant and the surrender procedures among Member States
30.	GC	Geneva Conventions
31.	IACHR	Inter-American Commission on Human Rights
32.	IACE	Inter-American Convention on Extradition
33.	ICC	International Criminal Court
34.	ICJ	International Court of Justice
35.	ICCPR	International Convention on Civil and Political Rights
36.	ICJ Rep.	International Court of Justice Reports
37.	ICJ Statute	Statute of the International Court of Justice
38.	ICRC	International Committee of the Red Cross
39.	IHL	International Humanitarian Law
40.	ILC	International Law Commission
41.	IRL	International Refugee Law
42.	MTE	Model Treaty on Extradition
43.	MTEU	Maastricht Treaty on European Union
44.	OAU	Organization of African Unity
45.	OEA	Organization of American States
46.	OHCHR	Office of the High Commissioner for Human Rights
47.	PIL	Public International Law
48.	PoDC	Principle of double criminality
49.	Res.	Resolution
50.	RoS	Rule of Specialty
51.	Sec.	Section
52.	SCC	Supreme Court Cases
53.	S.C.R.	Supreme Court Reporter
54.	UDHR	Universal Declaration of Human Rights
55.	U.K.	United Kingdom
56.	UKHL	United Kingdom House of Lords
57.	U.N.	United Nations

58.	UNGA	United Nations General Assembly
59.	UNGA Res.	United Nations General Assembly Resolution
60.	U.N.T.S.	United Nations Treaty Series
61.	UNHCR	United Nations High Commission for Refugees
62.	UNHRC	United Nations Human Rights Committee
63.	UN GAOR	United Nations General Assembly Official Records
64.	U.S.	United States
65.	U.S.C	U.S. Code
66.	V.	Versus
67.	VCLT	Vienna Convention on Law of Treaties
68.	VCDR	Vienna Convention on Diplomatic Relations
69.	Vol.	Volume
70.	WLR	Weekly Law Reports (UK)

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51. North Sea Continental Shelf (Germany v Denmark), 1969 I.C.J. Rep 3 (20 Feb).
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63. *Sinora v. M.E.I., F.C.T.D.*, no. 93-A-334, 1986
64. *Soering v. the United Kingdom*, Eur.Ct. H.R., Application No. 14038/88, Judgment of 7 July 1989
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A CRITICAL STUDY OF THE IMPACT OF THE DOCTRINE OF NON-REFOULEMENT UPON EXTRADITION TREATIES BETWEEN COUNTRIES FROM 1973-2014

INTRODUCTION

EVOLUTION OF PROBLEM

The idea that a State ought not to return persons to other States in certain circumstances is of comparatively recent origin. Common in the past were formal agreements between sovereigns for the reciprocal surrender of subversives, dissidents, and traitors. In the early- to mid-nineteenth century, the concept of asylum and the principle of non-extradition of political offenders began to emerge, in the sense of protection which the territorial sovereign can, and perhaps should, accord. At that time, the principle of non-extradition reflected popular sentiment that those fleeing their own, generally despotic, governments for political reasons were worthy of protection. Not until after the First World War, however, did international practice begin to recognize an emerging principle of non-return of refugees, and only in 1933 does the first reference to the principle that refugees should not be returned to their country of origin occur in an international instrument.

Prior to the 1930s this principle did not exist at international law.¹ During the first half of this century the idea that it was fundamentally wrong to return refugees to places where they would clearly be in danger was mentioned occasionally by states in agreements or statutes, or was evident in the practice of some states. Although by 1905 it had been enshrined in a UK statute that refugees with a fear of persecution for political or religious reasons should be allowed into the country, it was not until later

¹Jessica Rodger, "Defining The Parameters Of The Non-Refoulement Principle" (LLM Research Paper International Law, Laws 509)

that the idea of non-refoulement of such people became widely accepted.² It was first expressed at international law in the 1933 Convention relating to the Status of Refugees.

The word non-refoulement derives from the French *refouler*, which means to ‘drive back’ or to ‘repel’. The idea that a State ought not to return persons to other States in certain circumstances is first referred to in Article 3 of the 1933 Convention relating to the International Status of Refugees, under which the contracting parties undertook not to remove resident refugees or keep them from their territory, “by application of police measures, such as expulsions or non-admittance at the frontier (refoulement)”, unless dictated by national security or public order. Moreover, in the second paragraph, each State undertook, in any case not to refuse entry to refugees at the frontiers of their countries of origin³. The focus during this period was principally on improving administrative arrangements to facilitate local integration and resettlement; the need for “protective principles” began to emerge, but limited ratifications of instruments containing equivocal and much qualified provisions effectively prevented the consolidation of a formal principle of non-refoulement.

The 1933 Convention was not widely ratified, but a new era began with the General Assembly’s 1946 endorsement of the principle that refugees with valid objections should not be compelled to return to their country of origin. The Ad Hoc Committee on Statelessness and Related Problems initially proposed an absolute prohibition on refoulement, with no exceptions⁴. The 1951 Conference of Plenipotentiaries qualified the principle, however, by adding a paragraph to deny the benefit of non-refoulement to the refugee whom there are reasonable grounds for regarding as a danger to the security of the country..., or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. Apart from such limited situations of exception, however, the drafters of the 1951 Convention made it clear that refugees should not be returned, either to their country

² Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222

³Only eight States ratified this Convention; three of them, by reservations and declarations, emphasized their retention of sovereign competence in the matter of expulsion, while the United Kingdom at that time expressly objected to the principle of non-rejection at the frontier.

⁴United Nations Economic and Social Council, Summary Record of the Twentieth Meeting, Ad Hoc Committee on Statelessness and Related Problems, First Session, United Nations doc. E/AC.32/SR.20, (1950), 11-12, paras. 54 to 55.

of origin or to other countries in which they would be at risk.

The 1951 Convention relating to the Status of Refugees, with just one “amending” and updating Protocol adopted in 1967, is the central feature in today’s international regime of refugee protection.⁵ The Convention, which entered into force in 1954, is by far the most widely ratified refugee treaty, and remains central also to the protection activities of the United Nations High Commissioner for Refugees (UNHCR).

In the aftermath of the Second World War, refugees and displaced persons were high on the international agenda. At its first session in 1946, the United Nations General Assembly recognized not only the urgency of the problem, but also the cardinal principle that “no refugees or displaced persons who have finally and definitely ... expressed valid objections to returning to their countries of origin ... shall be compelled to return ...”⁶. The United Nations’ first post-war response was a specialized agency, the International Refugee Organization (IRO, 1946-1952), but notwithstanding its success in providing protection and assistance and facilitating solutions, it was expensive and also caught up in the politics of the Cold War. It was therefore decided to replace it with a temporary, initially non-operational agency, and to complement the new institution with revised treaty provisions on the status of refugees.

Just six years before its conclusion, the Charter of the United Nations had identified the principles of sovereignty, independence, and non-interference within the reserved domain of domestic jurisdiction as fundamental to the success of the Organization⁷. In December 1948, the General Assembly adopted the Universal Declaration of Human Rights, which recognizes that, “Everyone has the right to seek and to enjoy in other countries asylum from persecution”⁸, but the individual was only then beginning to be seen as the beneficiary of human rights in international law. This concern, prompted largely by the huge number of refugees in Europe following the war, eventually led to the drafting of the United Nations Convention Relating to the Status of Refugees, which was signed in 1951.

⁵Some 144 States, out of a total United Nations membership of 192 have now ratified either one or both of these instruments (as of August 2008).

⁶ Resolution 8 (I) of 12 February 1946.

⁷ Article 2 of the Charter of the United Nations

⁸ Article 14, paragraph 1

However problems have arisen regarding the interpretation of Article 33. Debate continues to surround the issue of whether or not a refugee must be inside the state in order for the right to accrue to them. There was also discussion as to whether a refugee had to meet the strict requirements of the Convention before they could be granted the right of non-refoulement.

STATEMENT OF PROBLEM

The interplay between extradition and questions related to international refugee protection needs to be examined against the background of extradition law and practice. The principle of non-refoulement may arise to preclude a member state from transferring an individual where there is a risk of a 'flagrant denial of justice'. The safeguards in extradition law overlap to some extent with the State's non-refoulement obligations and policies under international refugee and human rights law. In case of asylum seekers too there is a silent and invisible operation of doctrine of refoulement. The international community must address whether asylum-seekers are entitled to enter the territory of the state where they seek asylum if the policies of that country are in violation of human rights and whether states are under an obligation.

HYPOTHESIS

Non-refoulement obligations deriving from international human rights law operates as bars to extradition under certain circumstances. There is a need to reconcile the doctrine of non-refoulement and doctrine of extradition in order to make extradition and asylum a more effective and successful process.

RESEARCH QUESTIONS

1. What are reasons for a state to abstain from removing a non national?
2. What is the nature of such practice? Is it bilateral, regional or universal?
3. Is there any evidence that abstention from removal is due to a sense of obligation, rather than discretion?

4. Where do the obligations of non-refoulement come from, and what are their status, scope and content under international law?
5. Whether the person whose extradition is sought (the “wanted person”) is a refugee or asylum-seeker, his or her special protection needs must be taken into consideration or not?
6. The prohibition on extradition where there is a real risk of a flagrant denial of justice, “non-refoulement” rule applies in this context or not?

METHODOLOGY

The present study will be a *doctrinal method of research*, where an extensive literature review will be done, which will include text-books, articles appearing in different journals, statutory laws, International instruments as well as case-laws.

Doctrinal method shall be employed because abundant literature is available on the issue including, primary sources such as UNHCR reports, International Conventions and International cases, and secondary sources available in the form of scholarly articles, books, journals, and data collected by international organizations. However, the aspect of reconciliation of non-refoulement and extradition treaties is not dealt with in any of the research conducted.

OBJECTIVE OF THE STUDY

The objective of the study is to analyze the impact of doctrine of the non-refoulement upon extradition treaties and reconcile the doctrine of non-refoulement and doctrine of extradition in order to make the process of extradition and asylum a more effective and successful process. The researcher also wishes to explore areas in international human rights to find ways for effective implementation of doctrine of non-refoulement while taking into consideration extradition processes.

SIGNIFICANCE OF THE RESEARCH

The research is significant in that it will seek ways to consolidate the doctrines of non-refoulement and extradition when states find it an uncertain legal ground when attempting to invoke non-refoulement principle. The research is significant as it will define the parameters of both the doctrines and the research will look into the various issues and impediments between the countries which use grey areas of non-refoulement principle to get around their international obligations. The research is also significant as it will study different cases over a period of 40 years where there has been impact of doctrine of non-refoulement upon extradition treaties.

SCHEME OF THE STUDY

INTRODUCTION

The chapter deals with a brief insight into the topic of research. It will introduce the reader to the main topic of research. There is a conflict between a state's duty not to refoule an individual back to the country where he faces persecution, and on the other hand, to adhere to its duties under extradition treaties and perform them in good faith. It is essential to reconcile this overlap, for better implementation of both the principles under International Law. This chapter also deals with the reasoning for undertaking the present research and the objective and significance of the present research work.

CHAPTER I: THEORETICAL AND CONCEPTUAL FRAMEWORK

This chapter aims to lay down the theoretical and conceptual framework of the principle of non-refoulement, and seeks to find out the obligation of a state under extradition treaties. Moreover, it clearly identifies the conflict between the principles under International Law and the problems which could arise as a result of the same. This chapter will also focus on the understanding behind the concepts of non-refoulement and extradition; their origin and jurisprudential aspects of the concepts are enumerated in this chapter.

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

This chapter deals with the current position of the concept of non-refoulement under international law, the nature and scope of the principle. In international law the prohibition on refoulement has been developed in various legal instruments, on both a global and a regional level. The present chapter will also include the treatment and implementation of the principle of non-refoulement as an international obligation by States.

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

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

While the protection of refugees against refoulement under international human rights law is now well established, the nature of the obligation to protect leaves a margin of appreciation to States on the ways in which this may be achieved.

This chapter will also provide a contemporary account of the principle of non-refoulement as a human right under international law. This chapter has been divided

into the following sections:

- Derogation of the concept of non-refoulement via extradition treaties: A human rights perspective- Article 33 of the Refugee Convention, 1951 also applies to extradition. This chapter focuses on the conflict of international obligations Article 33 may create when the extradition treaty does not contain a safeguarding clause on non-refoulement. In this situation, the State may have to choose between complying with its obligation of non-refoulement and its obligation under the extradition treaty. Unless it is accepted that the principle of non-refoulement has been crystallized into a human right, the legality of its derogation through extradition treaties remains unclear.
- Strengthening Non-refoulement as a Human Right: A Solution to the problem of Derogation- This chapter considers whether a new understanding of the principle of non-refoulement is possible by adopting the perspective of non-refoulement as a human right and if any derogation of the same through extradition would be violative of the State's positive obligation of non-refoulement. This chapter will also touch upon the difference in treatment of the principle of non-refoulement as a right by States.

CHAPTER III: NON-REFOULEMENT AND JUS COGENS: IMPACT ON EXTRADITION MEASURES

This chapter deals with the prohibition of torture as a part of customary international law, which has attained the rank of a peremptory norm of international law, or jus cogens. It includes as a fundamental and inherent component, the prohibition of refoulement to a risk of torture and therefore imposes an absolute ban on any form of forcible return to a danger of torture, which is binding on all states, including those, which have not become party to the relevant instruments.

This chapter emphasizes on the need for evaluating the principle of non-refoulement as a principle of customary international law and how has this principle of international law been derogated by countries. Besides dealing the issues of jus cogens aspects of non-refoulement, the chapter also dwells upon the impact of such measures on extradition treaties and whether states are under any obligation to extradite a requested person to the state requesting or not.

This chapter deals with the overlap that arises when the application of the principles of Non-Refoulement and Extradition comes in question due to their contradictory approach. Extradition leads to removal of a person from a requested state to the requesting state for criminal prosecution or punishment but Refugee law or International Human Rights Law bars the concept of Extradition by imposing an obligation on states to refuse such practices when it results in the violation of fundamental rights of the individual concerned. Such developments may also result in conflict between national law and obligations under international treaties or conventions.

CHAPTER IV: PRINCIPLE OF NON-REFOULEMENT AND THE DOCTRINE OF EXTRADITION: A STUDY OF CASES FROM 1973 TO 2014

This chapter deals with the approach of the court through various case laws where the overlap of the principles of non-refoulement and extradition arises. The case studies would focus on decisions taken up by the court between the years 1973 to 2016. The chapter seeks to analyze various international and national cases relating to non-refoulement and extradition, which have examined the overlap between the two principles. The traditional view laid down in the *Soering case*, which affords absolute protection to the refugee under Art. 3 of the European Convention of Human Rights, has been diluted in more recent cases such as the *Vilvarajah case*.

It is very important as this stage of research that after analyzing the theory behind both the concepts, that a detailed case study is made for which this chapter is dedicated to at least 40-50 cases spanning between 40 years. These cases decided by the International Court of Justice, European Court of Human Rights, American

Courts, Canada's Supreme Court, are very important for the present study. The most important cases like Soering's Case; Haitian Citizen's case, Vilvirajah's case, Saadi's case, Ahmad's case are all landmark judgements and have been discussed and analyzed in this chapter.

CHAPTER V: PROTECTION OF REFUGEES AND THE DOCTRINE OF NON-REFOULEMENT IN INDIA

This chapter deals with the current Indian position with respect to the protection of refugees and asylum-seekers. India has not yet signed or ratified either the 1951 Geneva Convention Relating to the Status of Refugees or its 1967 Protocol. Moreover, and despite very significant numbers of displaced persons entering India since independence, no provision is made in the domestic law of India for refugees or asylum-seekers. However, notwithstanding India's continuing failure to accede to the principal international instruments for the protection of refugees (the 1951 Convention and its Protocol), it is now bound by a rich complex of international human rights norms that combine to significantly constrain its discretion with respect to the treatment of foreign nationals and, in particular, its obligations in respect of non-refoulement. These obligations begin with the widely accepted guarantees against refoulement found in the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC). Perhaps more surprisingly, these also include parallel guarantees against refoulement as found in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and in the Convention against Torture (CAT). India, in its capacity as a member of the UNHCR's Executive Committee (ExCom) since 1995, has now joined statements that find the guarantee of non-refoulement to be a non-derogable or jus cogens norm.

This chapter provides a revised account of the extent of the non-refoulement obligations of India and builds on the emerging body of literature addressing the complementary or subsidiary protection of refugees. However, it also seeks to engage with the practical detail of the admission and protection regime for persons seeking international protection in India, and the manner in which international standards can be incorporated and relied on at Indian law. As such, it aims to provide something like

a comprehensive account of the role of international law in defining and controlling the protection of foreign nationals in India. In doing so, it seeks to go beyond a discussion of the legal standards per se, and afford a clear and accessible reference point for those advocates engaged in protection work on behalf of foreign nationals in India, either informally as part of the UN and non-governmental community, or in the context of litigation on behalf of such claimants at the international and the domestic Indian level.

CHAPTER VI: RECONCILING EXTRADITION WITH NON-REFOULEMENT

This chapter seeks to reconcile the conflicting principles, for better implementation of both the concepts under International Law. It analyses various tests laid down by the court with respect to balancing of interests and proposes solutions to reconcile the principle of non-refoulement and extradition treaties.

After analyzing the cases in detail, the focus of this chapter is to reconcile both the principles in greater detail. This chapter's main aim is to provide a base for a substantial understanding before reaching to conclusion and suggestion. Therefore, this chapter acts as a precursor to the last chapter which deals with conclusion and suggestion. This chapter sets the tone for reaching to a consensus about the aspects covered in earlier chapters.

CHAPTER VI: CONCLUSION AND SUGGESTIONS

The final chapter aims to provide a comprehensive conclusion to the conflict between the obligations of non-refoulement and extradition law. The suggestions provided in this chapter are based on chapters dealing with human rights and suggests as to solution for derogation of the principle of non-refoulement under the human rights regime, suggestions are also drawn after conducting a detailed case study and the last part of the suggestions deal with the possible solutions available for reconciling the conflicting doctrines of non-refoulement and extradition.

LITERATURE REVIEW

In International law protection of asylum seekers has been a matter of great concern because of the different categories of such asylum seekers. The problems of such a grave nature was tried to be resolved by the Convention on Status of Refugees 1951, under which a special reference was made for the protection of refugees against returning them back to their countries of origin known as the principle of '*non-refoulement*' under Article 33 of the Convention on Status of Refugees. But the Convention itself fails to address a peculiar situation as to application of this principle in 'Extradition Treaties'. There are some other works highlighting on the matter concerning the problems of refugees but still available books on refugee laws and practices are insufficient in dealing with the problem of interplay between Non-refoulement and Extradition Treaties. While working on the present topic sharp dearth of text materials has been noticed dealing with a countries obligations and situations arising during extradition process and the countries obligation not to return the asylum seeker back to the country of origin where he has a well founded fear of being persecuted.

As far as the present research on the area of Impact of the Doctrine of Non-refoulement upon Extradition Treaties between countries is concerned, the text books available on International Law as well as books exclusively covering Refugee Laws and Extradition Laws have been thoroughly reviewed. Besides these, articles as appearing in different journals, statutory laws, international conventions relevant to the research topic and also the relevant international case laws have also been reviewed for the purpose of getting acquainted with the studies already done in respect of the research problem.

For the purpose of present study the following books which more or less deal with the subject matter have been looked into and they are:

1. B.S. Chimni (Ed.), "International Refugee Law: A Reader", New Delhi, Sage Publications, 2000.
2. Guy S. Goodwin-Gill, "The Refugee in International Law", Oxford, Clarendon Press. 1983.

3. Kees Wouters, "International Legal Standards for the Protection from Refoulement", Intersentia, Mortsel, 2009.
4. J. C. Hathaway, "The Rights of Refugees under International Law", Cambridge University Press, 2005.
5. M. Foster, "International Refugee Law and Socio-Economic Rights: Refuge from Deprivation", Cambridge University Press, 2007.
6. J. McAdam, "Complementary Protection in International Refugee Law", Oxford University Press, Incorporated, 2007
7. Rathin Bandopadhyay, "Human Rights of the Non-citizens: Law and Reality", Deep and Deep Publications Pvt. Ltd. 2007.

All the above mentioned books deal with the laws relating to refugee protection, definition of refugees and their status in different situations and refer briefly to the principle of non-refoulement. Some of the text books mentioned above even has references to the Extradition Treaties which more or less deal with the municipal laws relating to extradition treaty between countries. These books try to make the reader understand the concept of refugee laws in international law and plausible attempts have been made to explain the rules of asylum, refugees including non-refoulement and extradition. They endeavour on giving detailed general idea on the refugee laws and the tenets of refugee laws and problems. As far as specifically principle of non-refoulement is concerned, the books do not contain any special reference to the problems faced by a country during extraditing a fugitive and complying with the international norm of non-refoulement. Some of the books have emphasized on the *jus cogens* nature of principle of non-refoulement which again aggravates the problem faced by the states and also gives reason for this research work, as because if the principle of non-refoulement is accepted as *jus cogens* in international law than it becomes obligatory for the states to abstain from extraditing a fugitive. The present research tries to find out the solution to this problem faced by States dealing with the concept of non-refoulement, extradition treaties and refugee laws which are under the broad regime of International Law as because these specific area is not addressed in the text books since they deal with the general concepts of refugee laws without giving any special reference to the interface between extradition treaties and non-refoulement.

BOOK REVIEW

For the purpose of the research the following books have been reviewed:

1. B.S. Chimni (Ed.), “International Refugee Law: A Reader”, New Delhi, Sage Publications, 2000.

B.S. Chimni, who is a Professor of International Law at the School of International Studies, Jawaharlal Nehru University in New Delhi, is known as a leading scholar in both international law and international refugee law. His book is a welcome literature and indispensable tool for everyone interested in international law. The book is divided into eight chapters, dealing with the various aspects of international refugee protection, including the refugee definition, asylum, rights and duties of refugees and the UNHCR. In the Chapter II Professor Chimni has successively examined asylum, the historical background, non-refoulement and temporary protection, but Professor Chimni besides discussing about the existence of the legal principle of burden sharing fails to make an analysis of the country’s dilemma when it comes across two very important international obligations. One is its inter-country extradition obligation and the other the internationally accepted norm of non-refoulement, which is the basis of the present research.

2. J. C. Hathaway, “The Rights of Refugees under International Law”, Cambridge University Press, 2005.

Director, Program in Refugee and Asylum Law Member of University of Michigan Law School Faculty, the author has focused on interpreting the definition of refugee contained in the Convention. Very little has been written about the rights contained in other Articles of the Convention including the principle of non-refoulement contained in Article 33. The author tries to highlight on the different categories of rights bestowed upon refugees by the Convention but somewhere fails to address the situation where the people who flee their country due to fear of persecution and take refuge in another country. The international norm of non-refoulement thus comes into play and in return hampers the extradition process. Thus, the present study will try to

focus on those matters where such states granting refuge will not be in a state of dilemma.

3. Guy S. Goodwin-Gill, "The Refugee in International Law", Oxford, Clarendon Press, 1983.

The author of this valuable book is an official of the office of the United Nations High Commissioner for Refugees (UNHCR). His earlier *International Law and the Movement of Persons between States* (Oxford, 1978), based on his PhD thesis, paved the way for the present work. It is the combination of practical familiarity with his subject-matter and solid academic judgment that makes this book the useful resource it has already become to those involved in work for the protection of refugees. The book begins appropriately by defining the concept of the refugee. Two crucial chapters follow on the notions of non-refoulement and asylum. The author argues convincingly that there is now a customary international law obligation of non-refoulement. He also accepts that there is no such obligation to grant asylum. A person may have a human right to seek asylum, but not to receive it. The author argues cogently, however, that States, while not obliged to grant asylum, are required to treat the refugee in accordance with such standards as will permit an appropriate solution, whether voluntary repatriation, local integration, or resettlement in another country. However, besides working on the appropriate solution the author still fails to point the peculiar situation arising during the extradition of a fugitive. Whether a state is obliged to return or to grant him refuge is yet not clear.

4. J. McAdam, "Complementary Protection in International Refugee Law", Oxford University Press, Incorporated, 2007.

Dr. Jane McAdam is a Lecturer in law at the University of Sydney. She has worked on a variety of projects with UNHCR, the European Union, the Czech-Helsinki Committee, Amnesty International, the Refugee Council of Australia and the Refugee Studies Centre at the University of Oxford. She is the former General Editor of the *Oxford University Commonwealth Law Journal* and is currently a member of the Editorial Board of the *Sydney Law Review*. She is also a member of the Management Committee of the Refugee Advice and Casework Service in Sydney. This book

provides a comprehensive analysis of complementary protection, from its historical development through to its contemporary application. By examining the human rights foundations of the Convention, the architecture of Convention rights, regional examples of complementary protection, and principles of non-discrimination, the book argues that the Convention acts as a type of *lex specialis* for persons in need of international protection, providing a specialized blueprint for legal status, irrespective of the legal source of the protection obligation. But relating to the present study the author is silent on many aspects of the principle of non-refoulement which is the main concern of the present study.

5. M. Foster, “International Refugee Law and Socio-Economic Rights Refuge from Deprivation”, Cambridge University Press, 2007.

Michelle Foster is a Senior Lecturer and Director of the Research Programme in International Refugee Law at the Institute for International Law and the Humanities, University of Melbourne Law School. A range of emerging refugee claims is beginning to challenge the boundaries of the Refugee Convention regime and question traditional distinctions between 'economic migrants' and 'political refugees'. His book identifies the conceptual and analytical challenges presented by claims based on socio-economic deprivation, and assesses the extent to which these challenges may be overcome by a creative interpretation of the Refugee Convention, consistent with correct principles of international treaty interpretation. The central argument is that, notwithstanding the dichotomy between 'economic migrants' and 'political refugees', the Refugee Convention is capable of accommodating a more complex analysis which recognizes that many claims based on socio-economic deprivation are indeed properly considered within its purview. The author while specifically dealing with the dichotomy between 'economic migrants' and 'political refugees' has not stressed upon the dichotomy between the principle of non-refoulement and extradition treaty which is sought to be evaluated in the present study.

6. Rathin Bandhopadhyay, "Human Rights of the Non-citizens: Law and Reality", Deep and Deep Publications Pvt. Ltd. 2007.

The book written by Dr. Rathin Bandhopadhyay is an eye opener for the scholars, students who are pursuing their study in international law and specially the plights of the refugees. In his book he has tried to highlight the human rights situation of non-citizens and what are the laws applicable to these people who are citizens of no country. In this context Dr. Rathin Bandhopadhyay, has pointed that the principle of non-refoulement is an international norm and has established itself as pre-emptory norm. The evolution of the principle has been dealt with and its link with other international instruments has been discussed.

7. Kees Wouters, "International Legal Standards for the Protection from Refoulement", Intersentia, Mortsels, 2009.

Kees Wouters worked as a legal officer at the refugee department of the Dutch section of Amnesty International and in the legal aid department of the national office of the Dutch Council for Refugees. He became a staff member and lecturer at the Office of Human Rights Studies and Social Development of Mahidol University in Thailand. Wouters' book provides an analysis of other instruments that support and better define the concept and nature of non-refoulement. In particular, the author starts from the point of view that the international protection underlying refugee status is based on the prevention of human rights violations. The structure of the book is based on the author's analysis of the main international legal instruments constituting the legal background to non-refoulement. But, for the purpose of understanding the concept of human rights in international refugee laws the author has not explained as to what would be the position of the a state which grants asylum to the person fearing persecution. The work rather offers the basis for further exploration of this challenging principle under general international law, and in particular for the protection of the fundamental rights of those seeking refuge from persecution abroad.

ARTICLES

Apart from text-books, various articles, published by different journals have been reviewed for the purpose of finding out the works, research and studies already done and also for understanding the present position regarding the research work proposed to be done. The articles and papers surveyed are as follows:

1. Sibylle Kapferer, "The Interface between Extradition and Asylum", Legal and Protection Policy Research Series, Department Of International Protection, PPLA/2003/05 November 2003.

The paper examines the relation between extradition and asylum. The author who is a UNHCR consultant has tried to emphasize on International criminal, humanitarian and human rights law which provides a basis for extradition in the absence of inter-State agreements with respect to certain crimes, and pointed out that in some cases it even imposes an obligation on States to extradite or prosecute the alleged perpetrators of such crimes. At the same time, the author has stressed upon international human rights law which has strengthened the position of the individual in the extradition procedure and established bars to the surrender of a wanted person if this would expose him or her to a risk of serious human rights violations. The author has asserted that the principle of non-refoulement, as enshrined in international refugee and human rights law as well as international customary law, plays an important role in this regard and constitutes the principal element defining the legal framework for the interplay between extradition and asylum.

2. Jessica Rodger, "Defining the Parameters of the Non-refoulement Principle", LLM Research Paper, International Law (Laws 509).

The author is a Faculty of Law in Victoria University of Wellington. The author in this paper examines the principle of non-refoulement, which protects refugees from being returned to places where their lives or freedoms could be threatened. It looks in detail at the principle itself; its status at international law and in what circumstances it applies; before going on to look at state practice with respect to non-refoulement. The

Author argues that current policies being implemented by states, such as temporary protection and the safe third country rule are endangering the principle, and the refugee regime itself. The paper also considers ways in which the current system could be changed in order to protect the non-refoulement principle, while still catering to the needs of the states.

3. Ellen F. D' Angelo, "Non-refoulement: The Search for a Consistent Interpretation of Article 33", *Vanderbilt Journal of International Law*, Vol. 42, 279, 2009.

The author a J.D. Candidate in Vanderbilt University Law School has in this article asserted on the principle of non-refoulement and its proper interpretation. According to the author, the 1951 Convention clearly outlines non-refoulement as an obligation of the state signatories. The author is of the view that the international debate focuses on the correct interpretation and scope of the principle in practice. A restrictive reading of Article 33 suggests that non-refoulement has narrow application to only those refugees who have already entered the territory of a receiving state. The author asserts that because of these varied interpretations, the implementation of non-refoulement is inconsistent among states and the destiny of many refugees depends upon whether they reach the border of a state that interprets Article 33 more favourably than its neighbour. The author in this note argues for the necessity of a consistent international approach to the implementation of non-refoulement and analyzes the differing interpretations of Article 33 through judicial decisions to determine the state's legal, rather than political, position on the duty of non-refoulement.

4. Alice Farmer, "Non-refoulement and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refuge Protection", *Georgetown Immigration law Journal*, Vol. 23:1, 2008.

The author in the present article has asserted that non-refoulement has attained the status of customary international law and is now considered a *jus cogens* norm, that is, a peremptory norm of international law from which no derogation is permitted. The author in the present paper argues that if non-refoulement in the refugee context

has emerged as a *jus cogens* norm, in effect moving beyond treaty law, then the treaty-based exceptions to non-refoulement must be re-examined and strictly limited. He holds the view that if the principle is accepted as *jus cogens* then the norm is absolute, unconditional, and assuming a place in the hierarchy of international law above that of treaties.

5. Eva Kapustova, “Different Perceptions of the Obligations Not to Refoule: The European and the Canadian Approach”, Central European University, April 06, 2012.

The author in the present article relying on the two very important international decisions of *Suresh v. Canada* and *Saadi v. Italy*, decided by the Supreme Court of Canada and European Court of Human Rights, holds that while refoulement where a real risk of ill-treatment exists is absolutely prohibited under the ECHR, deportation to torture could be found justified by the Supreme Court of Canada given exceptional circumstances. The author argues that returning individuals is contentious especially when there is a risk they would face ill-treatment upon return. The issue at stake is how to reconcile the protection of national security with the protection against refoulement to ill-treatment and whether certain circumstances could ever justify extradition to face torture or other forms of ill-treatment.

6. Ruma Mandal, “Protection Mechanisms Outside the 1951 Convention (“Complementary Protection”)), Legal and Protection Policy Research Series, Department of International Protection, UNHCR, PPLA/2005/02, June 2005

The author an external consultant with the UNHCR explores the variety of ways in which states have provided protection from removal for individuals falling outside the scope of the 1951 Convention and/or its 1967 Protocol and the international legal framework. The author has tried to shed some light on the distinction between Convention refugees and other refugees under UNHCR’s mandate to investigate non-refoulement obligations under international law including human rights treaties and regional refugee instruments that may benefit non- Convention refugees. Examination has been on those aspects of international law that may have an impact

on the procedures adopted by States for identifying persons other than Convention refugees who may be protected from removal and the appropriate standard of treatment of such individuals. The author in the present work has given special emphasis to the concept of “complementary protection” which according to the author is essentially associated with practices that have evolved in industrialized states to provide protection from return for individuals considered outside the scope of the 1951 Convention.

7. Vladislava Stoyanova, “The Principle Of Non-Refoulement And The Right Of Asylum-Seekers To Enter State Territory”, *Interdisciplinary Journal of Human Rights Law*, Vol. 3:1 2008-2009.

The author an MA candidate in Human Rights, Legal Studies Department, Central European University, in this article has addressed that whether asylum-seekers are entitled to enter the territory of the state where they seek asylum and whether states are under an obligation to provide asylum-seekers access to their territory. The author in this paper argues that there cannot be protection from refoulement without access to state territory. The author presents views in asylum literature on the relation between non-refoulement and access to state territory. The author holds the view that in order to uphold the principle of non-refoulement, and therefore state’s obligations under international law, a state has to conduct a fair and effective refugee status determination procedure, which is possible only within that state’s territory.

8. Guy S. Goodwin-Gill, “The Principle of Non-Refoulement'. Its Standing and Scope in International Law”, A Study prepared for the Division of International Protection Office of the United Nations High Commissioner for Refugees, *International Journal of Refugee Law*, 1993.

The purpose of this paper is to establish as clearly as possible the present standing and scope of the principle of non-refoulement in international law. It looks at the modern meaning of the rule, at its origins and at the discussions which accompanied its incorporation into the 1951 Convention relating to the Status of Refugees. The author argues that Non-refoulement is not only important as a treaty-based rule,

however, but also as a principle of customary international law. The differences between the two types of norms are examined, and the variations in nature, scope and content are considered with reference to the inclusion of the principle in a variety of treaties, declarations and resolutions. The possible application of non-refoulement or an analogous principle of refuge to those outside the 1951 Convention/1967 Protocol is briefly considered, as is the relationship between non-refoulement and asylum. The author concludes that the principle of non-refoulement, both as a treaty and as a custom-based norm, extends to every individual having a well founded fear of persecution, or who faces a substantial risk of torture, or possible other serious violations of fundamental human rights. The principle of non-refoulement prohibits the return of such individual by any means whatsoever, including refusal of admission at the frontier, deportation, expulsion, forcible return no matter the place of interception, and extradition.

9. Cordula Droege, “Transfers of Detainees: Legal Framework, Non-Refoulement and Contemporary Challenges”, *International Review of the Red Cross*, Vol. 90 Number 871 September 2008.

The author is a Legal adviser in the Legal Division, International Committee of the Red Cross and in this paper outlines the legal framework that governs transfers of individuals, and in particular the international law principle of non-refoulement and other obstacles to transfers. The author addresses some of the new legal and practical challenges arising in detention and transfers in the context of multinational operations abroad and analyses the contemporary practice of transfer agreements.

10. Omar N. Chaudhary, “Turning Back An Assessment Of Non-Refoulement Under Indian Law”, *Economic and Political Weekly*, Vol. 39, July 17, 2004.

The author in the present paper has made an assessment of principle of non-refoulement under Indian laws. He argues that India is a ‘refugee receiving’ country rather than ‘refugee producing country’ hence, it is one thing to say that India’s practice conforms to international norms, but it is quite another to say the same for India’s laws. India not being a signatory to the Convention on the Status of Refugees

1951, still has kept the principle of non-refoulement alive. The author makes a comparative study between the different Articles of the Convention and its relevance with the Indian Constitution and other municipal laws passed in India. The author at last holds the view that, India needs more commitment from other countries before it can accede to the Convention or any other international commitment to refugee rights.

11. Sir Elihu Lauterpacht and Daniel Bethlehem, “The Scope And Content Of The Principle Of Non-Refoulement: Opinion”, Global Consultations on International Protection/Second Track, 20 June 2001.

This expert paper was presented at a round table on the issue, in the context of the Global Consultations on International Protection, which were organized by UNHCR in 2000-2002. The authors in this article examine the scope and content of the principle of non-refoulement in international law. The authors have commented on the interpretation and application of the principle of non-refoulement in general. The authors in this paper have highlighted the contexts in which principle of non-refoulement is applicable and at the end of the paper Status of ratifications of key international instruments which include a non-refoulement component and Constitutional and legislative provisions importing the principle of non-refoulement into municipal law have been incorporated by the authors which gives an bird’s eye view to the ratifications made and application of this principle in various municipal laws.

12. Robert L. Newmark, “Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs”, Washington University Law Review Vol.71, Issue 3 (1993).

The author in this note examines the legal development of the non-refoulement concept and explores various international interpretations of the concept of *non-refoulement* in practice. He sets out to examine the recent judicial interpretations of state obligations by courts in the United States and then proposes a universal definition of the territorial reach of the non-refoulement obligation to provide protection against refoulement to asylum-seekers regardless of where they are found.

13. Vijay Padmanabhan, “To Transfer or Not to Transfer: Identifying and Protecting Human Rights Interests in Non- Refoulement”, *Fordham Law Review*, Vol.80, Issue 1, 2011.

The author is an Assistant Professor of Law, Vanderbilt University Law School and asserts that Human rights law imposes upon States an absolute duty not to transfer an individual to another State where there are substantial grounds for believing he or she will be tortured or subjected to cruel, inhuman, or degrading treatment. He holds the view that the principle of non-refoulement emanates from the theory of human rights and emphasizes on a situation when a state runs into a conflict while applying the principle of non-refoulement to protect its citizens from aliens suspected of involvement in terrorism. In his article the author has tried to argue that there is a clash of human rights duties that arises in these transfer situations.

14. Tor Krever, “Mopping-up”: UNHCR, Neutrality and Non-Refoulement since the Cold War”, *Chinese Journal of International Law*, 2011.

The author in this article offers a critical reassessment of UNHCR’s evolution and traces the curve of UNHCR’s recent development to the early 1990s and argues that the use of a humanitarian discourse masks what is fundamentally a shift to policies of containment and the pursuit of State, not refugee, interests which have undermined UNHCR’s protection mandate. The author asserts that the post cold war era bears the mark of an altogether different impress in understanding and functioning of the UNHCR.

15. Rene Bruin and Kees Wouters, “Terrorism and the Non-Derogability of Non-refoulement”, *International Journal of Refugee Law*, Vol. 15, no.1.

The authors in this article have focused on non-derogability of some of the most important obligations of non-refoulement. The authors have talked about striking a balance between the national security of a State and the obligation to provide protection against refoulement. They argue that in international law no uniform or

single definition of terrorism exists and if they flee they should not be granted safe haven. For the purpose of their paper, the authors have discussed the judgement pronounced by the Canadian Supreme Court in the case of *Suresh v. Canada* and have discussed several developments that have a direct influence on obligations of non-refoulement.

16. Jari Pirjola, “Shadows in Paradise – Exploring Non-Refoulement as an Open Concept”, *International Journal of Refugee Law*. Vol 19, no. 4, 2007

The author is a Senior Legal Adviser at Parliament of Finland, Office for the Parliamentary Ombudsman and the purpose of this article is to explore non-refoulement as an open and ambiguous concept. The author in the present article has focused on relevancy of principle of non-refoulement embodied in Article 33 of the Refugee Convention and other Human rights instruments that somewhere or the other deal with the principle and holds that Human rights in general and also the principle of non-refoulement are open to interpretation and debate because of the way in which human rights norms have been inscribed in different conventions. In this article the author has tried to interpret different words found in the language written in Article 33 of the Refugee Convention 1951 and have provided alternative interpretations to these words that suit best the international norms of refugee protection vis-a-vis human rights.

17. Aoife Duffy, “Expulsion to Face Torture? Non-refoulement in International Law”, *International Journal of Refugee Law*, Vol. 20, no. 3, October 2008.

The author is a Postgraduate research fellow, The Irish Centre for Human Rights, NUI Galway, Ireland and in this article has examined the status of non-refoulement in international law in respect to three key areas: refugee law, human rights law and international customary law. The author has specifically highlighted on the categories excluded from being referred as refugees from the definition of refugee provided in the 1951 Refugee Convention. The findings of the article suggests that while a prohibition on refoulement is part of international human rights law and

international customary law, the evidence that non-refoulement has acquired the status of a *jus cogens* norm is less than convincing.

18. Chooi Fong, "Some Legal Aspects Of The Search For Admission Into Other States Of Persons Leaving The Indo-Chinese Peninsula In Small Boats", *British Yearbook of International Law* (1981) 52(1)

The author is an LL.M. (London) and in this article emphasizes on the principle that refugee laws and maintenance of international peace and security have close relationship. This study examines some of the legal aspects of the search for admission into other States by the Indo-Chinese boat people and for this questions of determination of eligibility, asylum, admission, non-refoulement and expulsion is examined.

19. John Dugard And Christine Van Den Wyngaë, "Reconciling Extradition With Human Rights", *The American Journal Of International Law*, Vol. 92, No. 187, 1998

In this article the authors examine the impact of human rights on extradition and the present study approaches the subject of extradition and human rights from the perspectives of international and comparative law. This article with its special emphasis on the case *Soering v. United Kingdom*, the authors have asserted on various aspects of extradition treaties embodied in municipal laws. The authors argue that, there is a tension between the claim for the inclusion of human rights in the extradition process and the demand for more effective international cooperation in the suppression of crime, which resembles the tension in many national legal systems between the "law and order" and human rights approaches to criminal justice.

20. Katharina Rohl, “Fleeing Violence And Poverty : Non-Refoulement Obligations Under The European Convention Of Human Rights”, New Issues In Refugee Research, Evaluation And Policy Analysis Unit, United Nations High Commissioner For Refugees, Working Paper No. 111

The author of this paper outlines the problem which Article 3 of European Convention of Human Rights (ECHR), protection is designed to address: the gap between the demand for refugee protection and the legal mechanisms currently available to afford such protection, including other provisions of the ECHR. The author tries to establish the boundaries of the concepts of ‘torture’, ‘inhuman’, ‘degrading’ and ‘treatment’ as developed in the case law and the peculiarities of the applicability of Article 3 to cases of extraterritorial jurisdiction is addressed.

21. Pilar Villanueva Sainz-Prado, “The Contemporary Relevance of the 1951 Convention Relating to the Status of Refugees”, *International Journal of Human Rights*, Vol.6, No. 2 (Summer 2002).

This article aims to establish through an analysis of both the status of refugees and its importance and the principle of non-refoulement and its reach, the contemporary relevance of the 1951 Refugee Convention and its sustainability in dealing with refugee problems. The author of the article stresses upon giving special attention to refugee groups such as children, women and IDPs to make refugee law a complete and effective law.

22. UNHCR, “Guidance Note on Extradition and International Refugee Protection”, UNHCR, Legal and Protection Policy Research Series, PPLA/2003/05, November 2003.

The Office of the United Nations High Commissioner for Refugees (UNHCR) issues Guidance Notes pursuant to its mandate, as contained in the 1950 *Statute of the Office of the United Nations High Commissioner for Refugees*, in conjunction with Article 35 of the *1951 Convention relating to the Status of Refugees* and Article II of its *1967 Protocol*. Through analysing international legal principles and related materials,

Guidance Notes seek to clarify applicable law and legal standards relating to specific thematic issues with the aim of providing guidance in the particular area concerned. The ultimate purpose of this note is to clarify UNHCR's position on substantive and procedural issues which arise where an extradition request concerns a refugee or asylum-seeker. This note provides a detailed examination of the requested State's non-refoulement obligations under international refugee and human rights law in the context of extradition proceedings concerning a refugee or an asylum-seeker. It also explores the extent to which existing principles and provisions of extradition law correlate with the principle of non-refoulement. Questions related to extradition procedures are also addressed, including the safeguards required to ensure full consideration of the special situation of refugees and asylum-seekers and the appropriate relationship between extradition and asylum procedures. The Note also examines the role of UNHCR in extradition proceedings affecting persons of concern to it and considers the ways in which information related to an extradition request may affect eligibility for international refugee protection and highlights procedural safeguards in asylum procedures which are relevant where an asylum-seeker is also the subject of an extradition request. The Note presents concluding observations on the interrelation between extradition and asylum and the need to ensure that the extradition practice of States is consistent with their obligations under international law.

23. UN High Commissioner for Refugees, "Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol", 26 January 2007

In this advisory opinion, the Office of the United Nations High Commissioner for Refugees (UNHCR) addresses the question of the extraterritorial application of the principle of non-refoulement under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. The opinion provides an overview of States' non-refoulement obligations with regard to refugees and asylum-seekers under international refugee and human rights law. It focuses more specifically on the extraterritorial application of these obligations and sets out UNHCR's position with

regard to the territorial scope of States' non-refoulement obligations under the 1951 Convention and its 1967 Protocol.

24. Christine Van den Wyngaert, "Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?" 39 (4) *The International and Comparative Law Quarterly* 757-779 (Oct. 1990).

Christine Van den Wyngaert is an International Criminal Law expert and has served as a judge at the International Criminal Court since 2009. She has also served as a judge at the International Criminal Tribunal for Former Yugoslavia, and as an ad hoc judge at the International Court of Justice.

The article seeks to understand the extent of rights which are applicable when extradition requests are made by a state. It goes on to recognize the duty of the requested state to protect human rights, when an extradition request is made by another state. The author then considers if human rights override extradition treaty obligations, and specifically identifies those rights which would pose an obstacle to extradition. The article makes a differentiation between various categories of human rights, and specifies that certain human rights which are absolute must be protected and extradition requests denied, however in cases of human rights which are not essential, the extradition request must be honoured. It is concluded that application of human rights to extradition treaties would not amount to opening Pandoras's box, and is not as problematic in international law as it would seem. The article places a lot of importance on human rights, and does not take into account the aspect of non-refoulement under refugee law. It also fails to reconcile the overlap between non-refoulement and extradition treaties.

25. John Dugard & Christine Van den Wyngaert, "Reconciling Extradition with Human Rights," 92 (2) *The American Journal of International Law* 187-212 (Apr., 1998)

John Dugard is a South African professor of International Law who specializes in areas of public international law, international criminal law and human rights. He specializes in Public International Law and International Criminal Law. Christine Van

den Wyngaert is an International Criminal Law expert and has served as a judge at the International Criminal Court.

The article identifies the conflict between the general interest of the community to extradite accused persons, and the need to protect an individual's fundamental human rights. The authors go on to identify various cases wherein the court has upheld basic human rights over a state's duty to extradite a person. The article alienates different categories of human rights which have been given importance by courts including, Death penalty, torture, cruel inhuman or degrading treatment, corporal punishments, discrimination and the right to a fair trial. It is argued that undue emphasis on human rights would impinge on the duty of the state to extradite persons and render justice. As a solution to the problem, the paper suggests that human rights must be classified into 3 categories, 1) rights which may be restricted for protection of public order, such as right to privacy freedom of speech and expression, 2) Absolute rights which cannot be derogated from under any circumstances, such as torture, and cruel inhuman or degrading punishment, and 3) Rights which can only be restricted in times of emergency, such as right to a fair trial. The article suggests that in the first case, extradition requests cannot be denied on the grounds of human rights, and maintenance of public order must be given due importance, in the second case however, extradition requests must be denied, as otherwise an individual's basic human rights would be denied. Finally, with respect to the third category, extradition requests can be denied in case of absence of an emergency situation. Therefore, through these means, the authors seek to balance the conflict between human rights and extradition treaties.

However, the article does not deal with the principle of non-refoulement under refugee law and consider its effect on extradition treaties. Moreover, it does not analyze solutions to help reconcile the two conflicting principles under international law.

26. Wayan Parthiana, "Refugee and Extradition: Could a Refugee be Extradited", 7 Indonesian Journal of International Law 670 (2009)

Wayan Parthiana, in his article states that refugees are forced to flee their home state due to persecution and cross into the boundaries of other nations. He makes a differentiation between legal and illegal refugees, illegal refugees are those who use the privilege of becoming refugees in order to escape from lawful prosecution in their home state, or in third countries and legal refugees are those who are held to be refugees by the UNHCR and domestic agencies, in accordance with the 1951 Refugee Convention and 1967 protocol. It is contended that Illegal refugees can be lawfully extradited, in accordance with the extradition procedures, but legal refugees cannot be extradited under any circumstances.

Though the author has clearly identified the problem, that is whether a refugee can be extradited, the classification of refugees as legal and illegal refugees is vague. The differentiation fails to deal with persons who might have committed crimes, but still face persecution in their home state. It fails to take into account Art.3 of the Convention against torture, which has been recognized as a *jus cogens* principle, which prohibits states from returning a person to a state where he would be subjected to torture, on return to the requesting state. Furthermore, it is extremely difficult to identify the mental element involved, as to the reason for a person to claim refugee status, whether it was to escape persecution, or merely legal prosecution.

27. Jens Vedsted-Hansen, "European non-refoulement Revisited", 55 Scandinavian Studies in Law 269 (2010).

Jens Vedsted-Hansen is a professor of law at Aarhus University, Denmark. He specializes in areas including Public International Law, Human Rights and immigration and asylum law. The author talks about the criteria for the application of Art. 3 of the European convention of Human Rights in cases relating to refoulement, and the absolute nature of protection given under Art 3. More specifically deals with the reconsideration of the absolute protection, and the possible requirement of individualised persecution of the person and special distinguishing features test as laid down in the *Vilvajah case*. It also deals with the harmonization of EU asylum law in

light of recent case laws. Other important interpretations of Art. 3 have also been considered by the author.

However, the article places undue emphasis on Art. 3 of the ECHR, and adequately analyze the principle of non-refoulement under refugee law. Moreover, it fails to link it with extradition treaties and the duty of the state to extradite.

INTERNATIONAL INSTRUMENTS

After reviewing some of the available texts, books and articles on the present study, it becomes expedient to analyze the Convention upon which the present work is centered around that is the **Refugee Convention 1951 and its Protocol 1967**. This Convention deals with the principle of non-refoulement under Article 33 and also sets out some of the exceptions to this principle in Article 33(2). However, the present Convention having an authority in international refugee protection lacks in many areas. Some of these areas are discussed hereunder:

1. Article 1A, paragraph 1, of the 1951 Convention applies the term “refugee”, first, to any person considered a refugee under earlier international arrangements. Article 1A, paragraph 2, read together with the 1967 Protocol and without the time limit, then offers a general definition of the refugee as including any person who is outside their country of origin and unable or unwilling to return there or to avail themselves of its protection, on account of a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular group, or political opinion. Stateless persons may also be refugees in this sense, where country of origin (citizenship) is understood as “country of former habitual residence”. Those who possess more than one nationality will only be considered as refugees within the Convention if such other nationality or nationalities are ineffective (that is, do not provide protection).

2. The refugee must be “outside” his or her country of origin, and the fact of having fled, of having crossed an international frontier, is an intrinsic part of the quality of refugee, understood in its ordinary sense. However, it is not necessary to have fled by reason of fear of persecution, or even actually to have been persecuted. The fear of persecution looks to the future, and can also emerge during an individual’s absence from their home country, for example, as a result of intervening political change.

Although the risk of persecution is central to the refugee definition, “persecution” itself is not defined in the 1951 Convention. Articles 31 and 33 refer to those whose life or freedom “was” or “would be” threatened, so clearly it includes the threat of death, or the threat of torture, or cruel, inhuman or degrading treatment or punishment. A comprehensive analysis is required for the general notion to be related to developments within the broad field of human rights contained in 1984 Convention against Torture, Article 7; 1966 International Covenant on Civil and Political Rights, Article 3; 1950 European Convention on Human Rights, Article 6; 1969 American Convention on Human Rights, Article 5; 1981 African Charter of Human and Peoples’ Rights.

3. Besides identifying the essential characteristics of the refugee, States party to the Convention also accept a number of specific obligations which are crucial to achieving the goal of protection, and thereafter an appropriate solution. Foremost among these is the principle of non-refoulement. As set out in the Convention, this prescribes broadly that no refugee should be returned in any manner whatsoever to any country where he or she would be at risk of persecution.⁹

However, The Convention is sometimes portrayed as a relic of the cold war and as inadequate in the face of “new” refugees from ethnic violence and gender-based persecution. It is also said to be insensitive to security concerns, particularly terrorism and organized crime, and even redundant, given the protection now due in principle to everyone under international human rights law.

⁹ See also article 3, 1984 Convention against Torture, which extends the same protection where there are substantial grounds for believing that a person to be returned would be in danger of being tortured.

4. The Convention does not deal with the question of admission, and neither does it oblige a State of refuge to accord asylum as such, or provide for the sharing of responsibilities. The Convention also does not address the question of “causes” of flight, or make provision for prevention; its scope does not include internally displaced persons, and it is not concerned with the better management of international migration.

5. The Convention also fails to address the situation whether a fugitive absconding from the country where he has committed crime and seeking refuge in another country can be termed as a ‘refugee’ within the meaning of the Convention and if so then what shall be the duty of the state in which such fugitive is seeking refuge. In such matters the Convention does not specify nor does it define the scope of principle of non-refoulement where a state has to extradite a fugitive to the requesting state. Whether a state is under an obligation to extradite or not to return is a matter of question which the Convention does not answer.

Thus, the present study is an attempt to focus on these core issues that the Convention has failed to address and find a way out so that the states are not in a dilemma to extradite a fugitive or oblige by the principle of non-refoulement which has been accepted as a jus cogens principle in international law.

UNHCR REPORTS

1. UNHCR Guidance note on extradition

The UNHCR guidance notes seek to clarify the applicable law and legal standards relating to specific issues. The ultimate purpose is to enhance the delivery of protection to refugees and asylum-seekers.

The guidance note analyses the scope and content of the principle of non-refoulement under International law. The guidance note seeks to identify the hierarchy of obligations under International law, it is directed that obligations under Refugee law

and Human rights law take precedence over those derived from extradition treaties. The guidance note suggests that every state must incorporate domestic legislations incorporating the principles of non-refoulement. Other aspects such as the political offence exception and the specialty clause are also discussed. Lastly, the guidance note deals with the aspect of procedure, and determination of a person's status as a refugee, and grounds for disqualification. The Guidance note fails to reconcile the conflict between non-refoulement and extradition treaties.

CASES

1. Soering v. the United Kingdom, Eur.Ct. H.R., Application No. 14038/88, Judgment of 7 July 1989

Soering, a German national and his girlfriend, Elizabeth Haysom, were wanted in the U.S for the murder of Elizabeth's parents in Virginia. The couples had fled to Europe and were arrested in United Kingdom for cheque fraud. Soering's extradition was requested by the United States under the 1972 extradition treaty. Soering challenged the extradition order of the U.K government before the European Commission of Human Rights, which referred the case to the European Court of Human Rights. The Court held that United Kingdom was barred from extraditing Soering to the United States, under Art. 3 of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment or punishment, as there was a real risk that he would be subjected to inhuman or degrading treatment by being kept on death row for a prolonged period. The court also stated that though the actual human rights violation would take place outside the territory of the requested state, the state would still be responsible for any consequences of extradition.

The *Soering case* is a landmark judgement which provides absolute protection for Human Rights under International Law. The case however, does not try to reconcile non-refoulement and extradition treaties.

2. Chitat Ng v. Canada, Human Rights Committee, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (7 Jan. 1994)

Chitat Ng, a British subject, and resident of the United States, was detained in Canada. The United States formally requested the author's extradition to stand trial in California for multiple kidnappings and murders. If convicted, he could have faced the death penalty. Mr. Ng was extradited by Canada, without seeking any assurances from the U.S that the death penalty won't be imposed, though clause 6 of the extradition treaty with the U.S provided for it.

The Human Rights Committee held that if death penalty was imposed on Mr. Ng, execution by gas asphyxiation, it would constitute cruel and inhuman treatment, in violation of article 7 of the International Covenant on Civil and Political Rights. Accordingly, Canada, has failed to comply with its obligations under the Covenant, by extraditing Mr. Ng without having sought and received assurances that he would not be executed.

The Human Rights Committee failed to identify the overlap between non-refoulement and extradition treaties, and reconcile both the principle for better implementation of International Law.

3. Chahal v. United Kingdom, Eur.Ct. H.R., Application no.22414/93, Report of 27 June 1995

Chahal, an Indian citizen had entered U.K illegally and had subsequently applied to regularize his stay, he was granted indefinite leave to remain. In 1984, Mr. Chahal travelled to Punjab, wherein he was baptized at the golden temple and adopted orthodox Sikhism. He also took up the case for an independent Punjab. After a 21-day detention in an Indian prison, he was allowed to return to the U.K. In U.K he actively took up the cause of a separate homeland for Sikhs, and was even arrested under provisions of the Prevention of Terrorism Act for involvement in a conspiracy to kill Mr. Rajiv Gandhi. The U.K government felt that he was a threat to national security and served a deportation order. Mr. Chahal sought a judicial review of the order, and

the case went up to the European Court of Human Rights.

The ECHR laid emphasis on the fundamental nature of Art.3, and stated that that it would apply to persons, irrespective of their conduct. The ECHR barred U.K government's decision to deport Mr. Chahal to India.

The case emphasizes on the absolute nature of Art. 3 and the prohibition to refoulement in case of any threat of torture. The Court failed to analyze the overlap between non-refoulement and extradition treaties, and the means to reconcile the overlap.

4. Saadi v. United Kingdom, Eur.Ct. H.R., Application no.13229/03, Report of 29 Jan 2008

The Tunisian applicant had been prosecuted in Italy for involvement in international terrorism, and convicted for parts of the charges, resulting in an order for deportation to Tunisia, where he had been sentenced in absentia to twenty years of imprisonment for membership of a terrorist organization and for incitement to terrorism.

The Court restated the general principle that Art. 3 is absolute, and provides protection irrespective of an individual's previous conduct. The court did not accept the arguments put forward by the intervening U.K government, that the requested state cannot be held responsible for possible future violations in the state requesting extradition and in when the person is a threat to national security, there needs to be stronger evidence of proof of ill-treatment. The Court held that the requested state is bound to follow the convention and refuse extradition in case of foreseeable ill-treatment in the requested state, and there cannot be a different standard for proof for different persons claiming violation of Art. 3. The case did not address the overlap between non-refoulement and extradition treaties, and the means to reconcile this difference.

5. Vilvarajah and others v. United Kingdom, Eur.Ct. H.R., Application no. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, Judgment of 30 October 1991.

Five Sri Lankan Tamils fled to the United Kingdom to escape from persecution. Their request for asylum was refused by U.K, and were returned to Sri Lanka. On his return, they continued to suffer ill treatment at the hands of the government. They filed a complaint before the ECHR, Strasbourg.

Regarding violation of Art. 3 the court held that Art. 3 provides absolute protection, however, the Court must look into whether there is individualized ill treatment. Furthermore, ill-treatment must fall under a minimum level of severity to fall under Art. 3. The court held that the complainants had failed to establish that their personal position was any worse than the generality of other members of the Tamil community or other young male Tamils who were returning to their country. A mere possibility of ill-treatment, however, in such circumstances, is not in itself sufficient to give rise to a breach of Article 3.

The court clearly analyzed the scope and extent of Art. 3 of the European Convention of Human Rights, and restricted the scope of Art. 3 from the absolute protection which was laid down in the *Soering case*. The court has not considered the conflict between *non-refoulement* and extradition treaties and means to address this conflict.

6. T.I v. United Kingdom, Appl. No. 43844/98, Council of Europe: European Court of Human Rights, 7 March 2000.

In this case, the European Court of Human Rights held that the principle of non-refoulement is the cornerstone of asylum and of international refugee protection and such principle has found expression in a number of international instruments and treaties and asserted that principles of refugee law and human rights law are used together in order to provide protection to refugees. However, the Court did not clearly establish the human right and international character to the principle of non-refoulement.

CHAPTER I

THEORETICAL AND CONCEPTUAL FRAMEWORK

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

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

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

I.1. BASIS FOR REFUGEE PROTECTION

Refugee problems have always existed, but awareness of the responsibility of the international community to provide protection for refugees dates only from the time of the League of Nations.¹⁰The League of Nations defined refugees specifically in relation to each particular country.¹¹ However, World War II created a huge refugee problem within Europe. Many people were forcefully displaced from their home countries, and no individual country could deal with the massive influx of people.¹² This prompted the United Nations to hold a conference in Geneva (Switzerland), which led to the creation of the Convention Relating to the Status of Refugees 1951.¹³ The Convention was drafted by a combination of United Nations organs, Ad Hoc committees, and Conference of Plenipotentiaries.¹⁴The United Nations General Assembly established UNHCR providing for the international safeguards and call for an end to the problems of refugees.¹⁵This office is of a non-political character, humanitarian and social and is to relate to groups and categories of refugees.

The main purpose of the 1951 Refugee Convention is to endeavour to guarantee refugees the widest possible exercise of the fundamental rights and freedoms enshrined in the Charter of the United Nations¹⁶ and Universal Declaration of Human Rights.¹⁷

¹⁰ Erika Feller, "The Evolution of the International Refugee Protection Regime", 5 Journal of Law & Policy 129 (2001).

¹¹*Id.*

¹²Wayan Parthiana, "Refugee and Extradition: Could a Refugee be Extradited", 7 Indonesian Journal of International Law 670 (2009)

¹³ Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137 (in force 22 April 1954) [hereinafter Refugee Convention].

¹⁴James C Hathaway, "The Rights of Refugees under International Law", Cambridge University Press, 2nd Ed., 1991

¹⁵Goodwin-Gill & Jane Mcadam, "The Refugee in International Law", (Oxford University Press, 3rd ed., 1983).

¹⁶ United Nations Charter, 1945, 1 U.N.T.S. XVI. (Hereinafter U.N. Charter); See also, Preamble, Refugee Convention.

¹⁷ Universal Declaration of Human Rights (UDHR), Dec. 10, 1948, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810, See also, Sir Elihu Lauterpacht and Daniel Bethlehem, "The Scope and Content of the Principle of Non-Refoulement: Opinion", UNHCR, <http://www.unhcr.org/419c75ce4.html> (last seen on 6 Mar. 2017).

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

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

Though the situation of in Europe improved, refugee problems started cropping up in other parts of the world. In light of the new developments, a Colloquium on Legal Aspects of Refugee Problems was organized in Bellagio, Italy, in April 1965.¹⁹ The meeting concluded that the 1951 Convention must be amended to provide for the new refugee situations, and overcome the discrepancy between the Convention and the Statute of Office of High Commissioner of Refugees.²⁰ Accordingly, it was agreed that a new protocol should be adopted to make the necessary changes. This paved way for the passage of The 1967 Protocol to the Convention Relating to the Status of Refugees ²¹ that amends Art. 1(2) which defines a refugee. The new definition removes the temporal and geographic limitations, eliminating the requirement that it should have been because of events occurring in Europe and before 1951. The aim of the said Protocol was to guarantee that equivalent treatment must be rendered to all “refugees,” irrespective of “the” dateline of 1 January 1951. At present 145 countries are signatories to the 1951 Refugee Convention and 146 countries are signatories to the 1967 Protocol.

¹⁸ Art. 1, Refugee Convention.

¹⁹Lauterpacht, *supra note* 17.

²⁰ UNHCR, Colloquium on the Legal Aspects of Refugee Problems, Note by the High Commissioner, A/AC.96/INF.40, 5 May 1965.

²¹ Protocol Relating to the Status of Refugees, 31 January 1967, 606 U.N.T.S. 267 (in force 4 Oct. 1967) [hereinafter 1967 Protocol].

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

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

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

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

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations. ²²

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

²² Art. 1(F), Refugee Convention 1951.

²³ Emanuela-Chiara Gillard, "There's No Place like Home: States' Obligations In Relation To Transfers of Persons," available at: <https://www.icrc.org/eng/assets/files/other/irrc-871-gillard.pdf> (last seen on 6 Mar. 2017).

²⁴ Sam Blay, "Public International Law: An Australian Perspective" (Oxford University Press 2nd ed. 2005).

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

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

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

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

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

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

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”²⁵

²⁵ Art. 33. Refugee Convention.

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

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

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

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

²⁶ Art. 42(1). Refugee Convention.

²⁷ Lauterpacht, *supra* note 17.

²⁸ Hathaway, *supra* note 14.

²⁹ Hathaway, *supra* note 14.

³⁰ Hathaway, *supra* note 14.

³¹ R v. Secretary of State for the Home Department, ex parte Yogathas, [2002] UKHL 36 (UK HL, Oct. 17, 2002).

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

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

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

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

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

2. The Declaration on Territorial Asylum³⁵ adopted unanimously by the United Nations General Assembly in 1967 , provides for *non-refoulement* under Art. 3 as follows,

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

³²UN High Commissioner for Refugees (UNHCR), UNHCR Note on the Principle of Non-Refoulement, November 1997, available at: <http://www.refworld.org/docid/438c6d972.html>

³³Bangkok Principles on the Status and Treatment of Refugees, 31 December 1966 [hereinafter Bangkok Principles].

³⁴ Art. III (3), Bangkok Principles.

³⁵Declaration on Territorial Asylum, Art 3, G.A. Res. 2312, 22 U.N GAOR Supp. (No. 16) at 81, U.N Doc.A/6716” (1967) [hereinafter Declaration on Territorial Asylum].

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

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

“No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2 [concerning persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, or who is compelled to leave his country of origin or place of habitual residence in order to seek refuge from external aggression, occupation, foreign domination or events seriously disturbing public order].”³⁷

4. The Cartagena Declaration of 1984³⁸ under Section III, para 5 states,

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

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

³⁶Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 U.N.T.S. 45 (in force 20 Jun. 1974) [hereinafter OAU Convention].

³⁷ Art. II(3), OAU convention.

³⁸Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984 [hereinafter Cartagena Declaration].

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

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

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

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

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

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

³⁹Gillard, *supra note 23*.

⁴⁰Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, G.A. res. 39/46, 39 U.N. G.A.O.R. Supp. (No. 51) at 197, U.N. Doc. A/39/51; 1465 U.N.T.S. 85 [hereinafter Torture Convention].

⁴¹ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S.171, 1057 U.N.T.S. 407. [hereinafter ICCPR].

⁴² Art. 7, ICCPR.

⁴³ European Convention on Extradition, 13 December 1957, ETS 24. (in force 18 April 1960) [hereinafter European Convention on Extradition].

⁴⁴Art. 3(2), European Convention on Extradition

⁴⁵Gillard, *supra note 23*.

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

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

I.3. BENEFICIARIES OF THE PROTECTION

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

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

⁴⁶Joseph v. Canada, Case 11.092, Report No. 27/93, Inter-Am.C.H.R., OEA/Ser.L/V/II.85 Doc. 9 rev. at 32 (1994), Inter-American Commission on Human Rights (IACHR), 6 October 1993.

⁴⁷International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 1057 U.N.T.S. 407. [hereinafter ICCPR].

⁴⁸Hathaway, *supra* note 14; "Convention relating to the International Status of Refugees, 159 LNTS 3663, done Oct. 28, 1933, entered into force June 13, 1935 (1933 Refugee Convention)" [hereinafter 1933 Refugee Convention], at Art. 3.

⁴⁹United Nations, Proposal for a Draft Convention, U.N. Doc. E/AC.32/2, Jan. 17, 1950.

⁵⁰The text was selected over the official drafts submitted by other governments. Hathaway, *supra* note 14, at 303.

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

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

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

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

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

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

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

This issue also relates to mass influxes and the concept of temporary protection. The concept of temporary protection has been well-defined as a means, in situations of large-scale influx and in view of the impracticality of conducting individual refugee status determination procedures, for providing protection to groups or categories of persons who are in need of international protection. It is primarily conceived as an emergency protection measure of short duration in response to large-scale influxes, guaranteeing admission to safety, protection from non-refoulement⁵² and respect for an appropriate standard of treatment. While the practice of granting temporary refuge, or asylum, on a temporary basis to refugees has often been employed in situations of large-scale influx in various regions, UNHCR first formally recommended the granting of temporary protection to persons fleeing the conflict and human rights abuses in the former Yugoslavia.

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

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

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

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

⁵⁴ Hathaway, *supra* note 14.

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

I.4. NATURE OF PRINCIPLE OF NON-REFOULEMENT

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

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

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

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

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

⁵⁷Hathaway, *supra note* 14.

⁵⁸ *European Roma Rights Centre and Others v. the Immigration Officer at Prague Airport and the Secretary of State for the Home Department*, (2003) EWCA Civ 666. [Hereinafter *European Roma Rights case*].

⁵⁹ Hathaway, *supra note* 14.

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

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

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

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

⁶⁰ Hathaway, *supra note* 14.

⁶¹ European Roma Rights case, *supra note* 58

⁶² Hathaway, *supra note* 14.

⁶³ James C. Hathaway and Thomas Gammeltoft-Hansen, "Non-Refoulement in a World of Cooperative Deterrence", Law & Economics Working Papers 106 (2014).

⁶⁴ Hathaway, *supra note* 14.

⁶⁵ Kneebone, *supra note* 56.

⁶⁶ European Roma Rights case, *supra note* 58

⁶⁷ Goodwin, *supra note* 15.

individuals.⁶⁸

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

Apart from these drawbacks, non-refoulement provides robust protection to refugees. It is not only limited to the expulsion of refugees, but also includes *non-admittance* at the frontiers of the State. In fact the 1933 Convention, on which the 1951 convention has been based on, explicitly codified this obligation under Art. 3.⁷² This comprehensive definition is in accordance with the executive powers enjoyed by border authorities of State to admit or deny entry to refugees.⁷³ The UNHCR directives and various debates of the Ad Hoc Committee on Statelessness and Related Problems show a clear commitment to this basic understanding that non-admittance at the border is normally impermissible.⁷⁴ However, there is an absence consensus on the point of law as to whether *non-admittance* at the border would constitute a breach of Art. 33 and many States argue the contrary.

I.4.i. Origin of the Rule

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

⁶⁸ ICCPR, Art. 2; Goodwin, *supra* note 15 at 245.

⁶⁹ *State v. Haitian Ctrs. Council* 509 U.S. 155 (1993).

⁷⁰ *Id.*

⁷¹ Kneebone, *supra* note 56.

⁷² Art. 3, 1933 Refugee convention.

⁷³ Hathaway, *supra* note 14.

⁷⁴ Hathaway, *supra* note 14.

formal agreements between sovereigns for the reciprocal surrender of subversives, dissidents, and traitors.⁷⁵ In the early- to mid-nineteenth century, the concept of asylum and the principle of non-extradition of political offenders began to emerge, in the sense of protection which the territorial sovereign can, and perhaps should, accord. At that time, the principle of non-extradition reflected popular sentiment that those fleeing their own, generally despotic, governments for political reasons were worthy of protection. Not until after the First World War, however, did international practice begin to recognize an emerging principle of non-return of refugees, and only in 1933⁷⁶ does the first reference to the principle that refugees should not be returned to their country of origin occur in an international instrument.⁷⁷ In Article 3 of the Convention relating to the International Status of Refugees, the contracting parties undertook not to remove resident refugees or keep them from their territory, by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*), unless dictated by national security or public order. Moreover, in the second paragraph, each State undertook in any case not to refuse entry to refugees at the frontiers of their countries of origin. Only eight States ratified this Convention; three of them, by reservations and declarations, emphasized their retention of sovereign competence in the matter of expulsion, while the United Kingdom at that time expressly objected to the principle of non-rejection at the frontier.

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

⁷⁵ Goodwin-Gill, G.S, "International Law and the Movement of Persons between States", 143 (1978).

⁷⁶In the 1933 Convention Relating to the International Status of Refugees, Article 3 states that the contracting state-parties undertook not to remove resident refugees from their territory. Only eight states ratified the Convention.

⁷⁷Under a 1928 arrangement (89 LNTS no. 2005), States had adopted a recommendation (no. 7), 'that measures for expelling foreigners or for taking such other action against them be avoided or suspended in regard to Russian and Armenian refugees in cases where the person concerned is not in a position to enter a neighbouring country in a regular manner '. However, the recommendation was not to apply to a refugee who had entered a State in intentional violation of national law.

⁷⁸Art. 4, Provisional arrangement concerning the status of refugees coming from Germany, 1936 : 171 LNTS no. 3952; official text in English and French . The arrangement was definitively signed by seven States; the United Kingdom excluded refugees subject to extradition proceedings from the ambit of art. 4, and likewise, for most purpose, refugees admitted for a temporary visit or purpose. Art. 5, Convention concerning the Status of Refugees coming from Germany, 1938 : 192 LNTS no. 4461 ; official texts in English and French . The Convention was ratified by only three States; the United Kingdom repeated its 1936 reservations.

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

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

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

Post Second World War, a new era started. In February 1946, the United Nations General Assembly expressly declared that refugees or displaced persons who have expressed valid objections to returning to their country of origin should not be compelled to do so⁸¹. This was followed by the creation of the International Refugee Organization as a specialized agency, charged with resolving the problems of displacement left from the Second World War, the Universal Declaration of Human Rights proclaimed the right to seek and to enjoy asylum from persecution, and in due course the United Nations turned its attention to new instruments and agencies. ⁸²

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

⁷⁹ The 1938 Convention substituted 'measures of expulsion or reconduction...

⁸⁰The 1936 arrangement read: 'refugees shall not be sent back across the frontier of the Reich'; the 1938 Convention provided that States parties 'undertake' not to reconduct refugees to German territory'.

⁸¹ UNGA Res. 8(1), 12 Feb 1946 para. (c)(ii).

⁸²See also the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Convention of 12 August 1949)

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

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

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

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

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

⁸³ “Peremptory” is defined as: “Imperative; final; decisive; absolute; conclusive; positive; not admitting of question, delay, reconsideration or of any alternative. Self-determined; arbitrary; not requiring any cause to be shown.” Black’s Law Dictionary (Sixth Edition, 1990), p.1136.

⁸⁴ Ian Brownlie, “Principles of Public International Law”, 515 (Clarendon Press, Fifth Edition, 1998).

⁸⁵ Vienna Convention on the Law of Treaties, art. 53, opened for signature 23 May 1969, 1155 U.N.T.S. 331, (in force 27 January 1980) [hereinafter VCLT] Article 53 Treaties Conflicting with a Peremptory Norm of General International Law (JUS COGENS). If a treaty conflicts with a peremptory norm of international, it will be void. Peremptory norms of international law is a norm which is recognized and accepted by the international community as a whole and form a norm which cannot be derogated from, and can only be modified by a subsequent norm of similar character.

⁸⁶ Art. 53, Vienna Convention on the Law of Treaties, art. 53, opened for signature 23 May 1969, 1155 U.N.T.S. 331, (in force 27 January 1980) [hereinafter VCLT] Article 53 Treaties Conflicting with a Peremptory Norm of General International Law (JUS COGENS) If a treaty conflicts with a peremptory norm of international, it will be void. Peremptory norms of international law is a norm which is recognized and accepted by the international community as a whole and form a norm which cannot be derogated from, and can only be modified by a subsequent norm of similar character.

⁸⁷ B.S. Chimni, “International Refugee Law: A Reader,” Sage Publications, 1st ed. 2000.

and applies to measures such as rejection at the frontier⁸⁸ and even extradition.⁸⁹ Secondly, it is contended that, the principle of non-refoulement has been further established in international law, by extending its application to a broader category of refugees.⁹⁰

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

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

⁸⁸ Article II, para 3 of the OAU Convention. See also Art. 3, Declaration on Territorial Asylum.

⁸⁹ Guy S. Goodwin, “Non refoulement and New Asylum Seekers” in H el ene Lambert, “International Refugee Law” (Farnham Publishers, 2010).

⁹⁰ *Id.* See also, OAU Convention and Cartagena Convention.

⁹¹ Report of United Nations Law High Commissioner for Refugees.

⁹² Goodwin, *supra* note 15.

⁹³ Ian Brownlie, “System of Law of Nations: State Responsibility”, (Clarendon Press 1st ed. 1983).

⁹⁴ Military and Paramilitary Activities in and against Nicaragua (The Republic of Nicaragua v. The United States of America), Merits, 1986 I.C.J. 14 (June 27) [hereinafter *Nicar. v. U.S.*].

⁹⁵ Lauterpach, *supra* note 17.

⁹⁶ North Sea Continental Shelf (Germany v Denmark), 1969 I.C.J. Rep 3 (20 Feb). Lauterpach, *supra* note 17.

⁹⁷ *Id.*

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

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

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

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

⁹⁸*Id.*

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

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

¹⁰¹Sir Robert Jennings and Arthur Watts, “*Oppenheim’s International Law*” 27 (Oxford University Press, 9th ed, 2008).

¹⁰²C Wilfred Jenks, “*The Prospects of International Adjudication*”, 225 (Oceana Publications, 1st ed. 1964).

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

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

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

¹⁰³Brownlie, *supra* note 84.2012).

¹⁰⁴*Id.*

¹⁰⁵ S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

¹⁰⁶North Sea Continental Shelf (Germany v Denmark), 1969 I.C.J. Rep 3 (20 Feb).

¹⁰⁷1985 Note on International protection, Thirty sixth Session of the Executive committee of the High Commissioner's Programme, para. 17, U.N Doc.a/ac.96/660 (1985). See also Note on International Protection, Thirty Fifth Session of the Executive Committee of the High Commissioners's Programme, para. 15, U.N Doc.A/AC.96/643 (1984).

¹⁰⁸K. Hailbronner, "Nonrefoulement and 'Humanitarian' Refugees: Customary International Law or Wishful Legal Thinking?" 26 Virginia Journal of International Law 858, 128–129 (1986).

¹⁰⁹ *Id.*

¹¹⁰ *Ibid.*

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

I.4.iv. Measures of Refoulement

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

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

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

¹¹¹ *Ibid.*

¹¹² James C Hathaway, "Refugee Rights: Report on a Comparative Survey", (York Lanes Press, 1st ed. 1995).

¹¹³ *State v. Haitian Centers Council* 113 S.Ct. 2549 1993.

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

I.4.v. Territorial application

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I.5. EXTRADITION

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

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

¹¹⁶UNHCR, Guidance Note on Extradition and International Refugee Protection, UNHCR, <http://www.coe.int/t/dghl/standardsetting/pc->

¹¹⁷ Art. 1, Refugee Convention.

their life liberty or freedom are significantly threatened.

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

I.6. HISTORY OF EXTRADITION

Extradition law and practice evolved over more than thirty centuries. International law placed certain limitations on the power of the sovereign¹¹⁹, such as respect for the territorial integrity of other nations, which resulted in a formal process to recover wanted fugitives.¹²⁰ The evolution of exceptions aimed at protecting individual rights in recent times, however, such as judicial review and the political offense exception, increased the protection afforded to individual rights within the context of extradition law.

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

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

¹¹⁸Sibylle Kapferer, “The Interface between Extradition and Asylum”, Geneva: UNHCR 2003, Legal and Protection Policy Research Series, PLA/2003/05, (2003).

¹¹⁹A New Emerging World Order: Reflections of Tradition and Progression through the Eyes of Two Courts, David H. Herrold, 2 TULSA J. COMP. & INr'i. L. 143, 145 (1994). The sovereign nation has the ability to create boundaries and select a form of government. Sovereign nations also maintain the right to order their internal and external affairs without interference.

¹²⁰The purpose of restricting sovereignty through treaties is: Extradition treaties confer upon the contracting States a greater degree of control over certain citizens of the States with which they contract. They set forth particular guidelines by which a transfer of nationals may occur, thus putting into place a means by which a State may lawfully, and with respect for the sovereignty of the other, exercise jurisdiction over a particular national of the other State.

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

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

I.6.ii.Modern Extradition Law and Practice

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

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

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

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

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

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

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

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

I.7. JURISPRUDENTIAL ASPECTS CONCERNING EXTRADITION

As the extradition law developed, international law recognized the importance of Human Rights and protecting the individual from the atrocities forced by the States themselves. Naturalism¹²⁴ slowly replaced positivism¹²⁵ as the dominant theory of international law. Extradition procedure also changed, becoming more formalized and developing various exceptions and limitations. Recently, nations have begun to circumvent extradition law in response to modern crimes and frustrated law

¹²³Kai I. Rebane, "Extradition and Individual Rights: The Need for an International Criminal Court to Safeguard Individual Rights", *Fordham International Law Journal* Volume 19, Issue 4 (1995).

¹²⁴Douglas J. Sylvester, "Customary International Law, Forcible Abduction, and America's Return to the Savage State", 42 *BUFF. L. Rev.* 555, 608 (1994). Natural law believes that all law derives from natural sources, is generally applicable, and limits sovereignty.

¹²⁵*Id.* at 609. In positivist theory, law derives from the practice of states and the conduct of international relations through treaty and custom.

enforcement. International law derives from two sources. Customary law¹²⁶ arises from the practice of nations¹²⁷ and judicial opinion.¹²⁸ Conventional law¹²⁹ derives from treaties and conventions. Two main schools of thought exist regarding individual rights in international law.¹³⁰ The *traditional*, or *positivist*, approach claims that individuals only have rights as expressly provided in treaties and by nations. The *natural law* approach, however, asserts that certain rights derive from the natural order of things and that these rights are universal and perpetual, existing outside the framework of laws.

I.7.i. Pre-World War II

Historically, international law was dominated by the positivist school.¹³¹ Individuals were denied standing under international law to allege violations of their rights. Although some individual rights in international law existed in practice, they were extremely limited. The positivist school argues that standing for individuals is a privilege, only available under an express treaty provision. Positivists oppose the theory that standing is a naturally granted right. Nations are the only subjects¹³² of international law, according to positivists, and the individual obtains benefits by virtue of her nation's rights, not her own. Until World War II, individuals were not subjects under international law.

I.7.ii. Post-World War II

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

¹²⁶Joseph G. Starke, "Introduction to International Law", Customary law is a practice that has obtained the force of law through repetition and usage.

¹²⁷ Id. The practice of nations refers to diplomatic relations, the practice of international organs, the laws of nations, decisions of national courts, and national military or administrative practices.

¹²⁸Starke, Id, at 144. Courts examine the sources of law and determine whether a practice is sufficiently established as to be considered a custom.

¹²⁹Id. Conventional law may embody custom but it also may include provisions that are not established but which the contracting parties agree to. Since 1945, most international law has been codified and now falls under the rubric of conventional law.

¹³⁰ James L. Brierly, "The Law of Nations", 49-56, Clarendon Press, (1963)

¹³¹Positivism rose to supremacy during the eighteenth and nineteenth centuries.

¹³²According to text-book writers, a subject of international law is an entity capable of possessing international rights and duties and endowed with the capacity to take legal action in the international plane.

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

I.7.iii. The Re-emergence

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

I.7.iii.a. the UDHR

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

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

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

followed by a stream of international declarations¹³⁵ and covenants¹³⁶ which, whether binding outright or via customary international law, reshaped the status of the individual. The principles of the UDHR, while not legally binding, are considered implicit in U.N. membership. The UDHR represents a consensus of U.N. Member States and forms part of customary law. The UDHR prohibits arbitrary arrest, detention, or exile of individuals by nations.¹³⁷ The UDHR allows individuals to seek asylum from persecution,¹³⁸ and draws a distinction between political and non-political crimes. The declaration entitles the individual to a fair and public hearing by an impartial tribunal to determine her rights and any charges brought against her.¹³⁹

I.7.iii.b.The ICCPR

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

¹³⁵William D. Auman, "International Human Rights Law: A Development Overview and Application within the U.S. Criminal Justice System", 20 N.C. CENr. LJ. 1, 8 (1992). A declaration is simply a general statement of intent or principle declared by a group or organization.

¹³⁶A covenant is legally binding on those nations that sign and ratify it.

¹³⁷UDHR, Article IX

¹³⁸Id, Article XIV.

¹³⁹UDHR, Article X.

¹⁴⁰These obligations include the freedom from arbitrary deprivation of life, from torture, from cruel, inhumane, or degrading punishment, and other rights previously referred to in the Universal Declaration of Human Rights.

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

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

I.9. LEGAL BASIS FOR EXTRADITION

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

¹⁴¹In France, the President issues an extradition decree after a judge certifies the request.

¹⁴²*Id.*

I.9.i. Bilateral Extradition Treaties

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

I.9.ii. Multi-lateral Extradition Treaties

Multilateral extradition treaties set out mutual obligations for all the member states to extradite an offender, in accordance with the extradition treaty. The U.N model treaty for extradition¹⁴⁵ is to act as the basis for developing extradition treaties. However, differences arise frequently to provide for the difference between common law and civil law countries.

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

I.9.iii. Extradition under other International Instruments

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

¹⁴³*Id.*

¹⁴⁴P. Malanczuk, “Akehurst’s Modern Introduction to International Law”, (Routledge, London, New York 7th rev. ed. 1997).

¹⁴⁵Model Treaty on Extradition, 14 December 1990, U.N. GAOR, A/RES/45/116.

¹⁴⁶ Organization of American States (OAS), Inter-American Convention on Extradition, 25 February 1981.

¹⁴⁷ Kapferer, *supra* note 118.

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

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

Crimes against humanity and war crimes have been recognized as *erga omnes* obligations which are owed to the world at large. Further, they find recognition as “*jus cogens* principles, or peremptory norms of international law.” In case of such offences every state has the jurisdiction to investigate, prosecute and punish the offenders. Certain international instruments expressly provide for extradition of persons who commit such crimes,¹⁴⁸ example- Art. 7(2) of the Genocide Convention 1948.¹⁴⁹

International law, does however establish a general obligation to extradite or prosecute, *aut dedere aut judicare* that provides, if a state refuses to extradite, the state must impeach the person in the courts falling within its own jurisdiction. This principle has also been codified in various conventions and multi-lateral treaties such as the Torture Convention¹⁵⁰

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

Various anti-terrorism conventions and treaties impose an obligation on member state to extradite the offender so that he may be tried for his crimes such as the European Convention on the Suppression of Terrorism¹⁵¹ and Arab Convention on the Suppression of Terrorism.¹⁵²

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

¹⁴⁸ Kapferer, *supra* note 118.

¹⁴⁹ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277 (in force 12 Jan 1951) [hereinafter Genocide Convention].

¹⁵⁰ Art. 7(1), Torture Convention.

¹⁵¹ European Convention on the Suppression of Terrorism, 27 January 1977, ETS No. 90 (in force 4 Aug. 1978).

¹⁵² Arab Convention on the Suppression of Terrorism, 22 April 1998 (in force 22 April 1998).

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

I.10. GENERAL PRINCIPLES OF EXTRADITION

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

1. Extradition request

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

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

¹⁵³ Lauterpacht, *supra* note 17.

¹⁵⁴ Lauterpacht, *supra* note 17..Article 12(1) of the European Convention on Extradition (1957)

¹⁵⁵ Lauterpacht, *supra* note 17..Article 11 of the Inter-American Convention on Extradition (1981)

¹⁵⁶ Kapferer, *supra* note 118.

¹⁵⁷ Kapferer, *supra* note 118.

adduced against the individual.¹⁵⁸

2. Extraditable offence

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

3. Double Criminality

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

4. Specialty principle

As per the said principle, a person can be prosecuted by the requesting state, only for a felony he has been extradited for, under the extradition request. The State cannot charge him with any other offence, without the permission of the requested State.¹⁶¹ Moreover, the extradition of a person to a third State by the requesting state void of the permission of the requested state¹⁶² stands prohibited. However, many modern treaties and conventions dilute the double criminality and specialty principle.

¹⁵⁸A. Jones, "Jones on Extradition and Mutual Legal Assistance", (Sweet & Maxwell, London 3rd ed. 2001).

¹⁵⁹Kapferer, *supra* note 118.

¹⁶⁰*Id.* See, for example, Article 1(1) of the European Convention on Extradition (1957); Article 3(1) of the Inter-American Convention on Extradition (1981)

¹⁶¹ Kapferer, *supra* note 118.

¹⁶² Brownlie, *supra* note 84.

I.11. GROUNDS FOR REFUSING EXTRADITION

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

1. Political Offence exemption

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

2. Discrimination clause

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

¹⁶³ Brownlie, *supra* note 84.

¹⁶⁴ Kapferer, *supra* note 118.

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

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

- National

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

- Fundamental principle of justice and fairness

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

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

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

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

¹⁶⁶Kapferer, *supra* note 118.

¹⁶⁷Gilbert, *supra* note 165.

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

CHAPTER II

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

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

Benjamin Authers and Hilary Charlesworth

II.1. INTRODUCTION TO INTERNATIONAL HUMAN RIGHTS LAW

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

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

¹⁶⁸A.H. Robertson, “Human Rights in the World”, 15-20 (Manchester University Press, 1972).

¹⁶⁹ Frans Viljoen, “International Human Rights Law: A Short History”, UN CHRONICLE, Vol. XLVI No. 1 & 2 2009, (Mar. 19, 2017, 16:00 PM), available at: <https://unchronicle.un.org/article/international-human-rights-law-short-history>.

¹⁷⁰ UNHCR & International Bar Association, “Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors And Lawyers,” 12-15 (United Nations Publications, 2003).

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

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

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

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

¹⁷¹ Dinah L Shelton, "An Introduction to the History of International Human Rights Law", GW Law Faculty Publications & Other Works, 1052, (2007).

¹⁷² M. Hertig Randall, "The History of International Human Rights Law", in R. & G. Kolb Gloria (Ed.), Research Handbook on Human Rights and Humanitarian Law, 3-34, (2013).

¹⁷³ Frans Viljoen, *supra* note 169.

¹⁷⁴ G.H. Fox, "New Approaches to International Human Rights: The Sovereign State Revisited," S.H. Hashmi (Ed.), University Park PA: Pennsylvania State University Press (1997).

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

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

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

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

¹⁷⁵Volker Türk, “UNHCR’s Supervisory Responsibility”, RefWorld, (Mar. 12, 2017, 16:00 PM), <http://www.refworld.org/docid/4fe405ef2.html>.

¹⁷⁶ Lauterpacht & Daniel Bethlehem, “The Scope and Content of the Principle of Non-Refoulement: Opinion”, Cambridge University Press, (Jun. 20, 2001).

¹⁷⁷James C. Hathaway, “The Law of Refugee Status, Toronto”, Butterworths, 124, (1991); UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, (Mar. 12, 2017, 16:00 PM), <http://www.refworld.org/docid/4f33c8d92.html>.

¹⁷⁸ Art. 33, Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137 (1951).

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

However, Article 33(2) is not qualified and absolute and hence can be considered as an exception to the principle of *non-refoulement* provided in the Convention, which provides that the right to non-refoulement cannot be enjoyed when “*there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*”¹⁸⁰

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

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

¹⁷⁹United Nations High Commissioner for Refugees (UNHCR), “Guidance Note on Extradition and International Refugee Protection”, REF WORLD 2008, (Mar. 22, 2017, 17.00 PM) <http://www.refworld.org/docid/481ec7d92.html>.

¹⁸⁰ Art. 33(2), Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137 (1951).

¹⁸¹Paul Weis, “The Refugee Convention, 1951: The Travaux Préparatoires Analysed, With A Commentary”, 325 (Julian Weis ed., 1995).

¹⁸²*Ibid.*

¹⁸³ Vijay M. Padmanabhan, “To Transfer or Not to Transfer: Identifying and Protecting Relevant Human Rights Interests In Non-refoulement”, 80 Fordham L. Rev., 73, (2011-2012).

¹⁸⁴ UNHCR, *supra note* 179.

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

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

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

II.3.i. Non-refoulement under the Universal Declaration of Human Rights, 1948¹⁸⁷

The Universal Declaration of Human Rights (UDHR) is a milestone document in the history of human rights. 10 December, 1948, witnessed the declaration being adopted by the United Nations General Assembly in Paris¹⁸⁸. The preamble of the UDHR states that the declaration would strive for protecting fundamental human rights and acting as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.¹⁸⁹

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

¹⁸⁵L. Henkin, "Human Rights and State Sovereignty, Sibley Lecture March 1994", Georgia Journal of International and Comparative Law, (1995-1996).

¹⁸⁶*Ibid.*

¹⁸⁷ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

¹⁸⁸*Ibid.*

¹⁸⁹ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, Preamble, (1948).

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

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

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

As Article 14 of the UDHR, guarantees the right to seek asylum and be protected in other countries from the prevailing fear of persecution, the law of asylum also finds its application to "aliens receive international protection in the absence of national protection. In contrast to other rights that find their expression in human rights treaties, a right to seek and enjoy asylum does not find its express mention in any of the subsequent human rights regime under the ambit of United Nations. In fact, with the exception of Article 22(7) of the Inter-American Human Rights Convention¹⁹⁴ and Article 12(3) of the African Charter on Human and Peoples' Rights¹⁹⁵, a right to seek and enjoy asylum has not been formulated in any global or other regional human rights treaty. Nevertheless, asylum protection has found a basis in international law.

¹⁹⁰Frans Viljoen, *supra* note 169.

¹⁹¹ Mary Ann Glendon, "The Rule of Law in the Universal Declaration of Human Rights", 2 Nw. J. Int'l Hum. Rts. 1 (2004).

¹⁹² Article 14, Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, (1948).

¹⁹³UDHR, *supra* note 187.

¹⁹⁴Article 22(7), Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, (Nov. 22, 1969).

¹⁹⁵ Article 12(3), Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

Article 14 has been criticized as being only a vague and permissive proclamation without any co-relative obligation of admission or prohibition on refoulement. Lauterpacht described this formula as artificial to the point of flippancy¹⁹⁶, for there was no intention to assume even a moral obligation to grant asylum' and accordingly, no declaration would be necessary to give an individual the right to seek asylum without an assurance of receiving it.¹⁹⁷

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

Since Article 14(2) reflects the concept that certain persons who flee persecution, despite them being refugees are nevertheless denied international protection due to the prime reason of their involvement in serious crimes and violations, this is hence covered under the exception of Article 14(2) of the Universal Declaration. "Article 14(2) of the Universal Declaration reflects the concern that those involved in war crimes, crimes against humanity, and crimes against peace, or more generally acts contrary to the purposes and principles of the United Nations should not be able to enjoy such protection, and that common-law criminals should be surrendered under applicable extradition agreements¹⁹⁹." The scope and content of the limitations to the right of asylum provided for in article 14(2) of the Universal Declaration must be read in light of article 1F of the Refugee Convention as well as other relevant standards under international law.

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

¹⁹⁶ Nan Li, "States' Practice Of Non-refoulement And Suggestions On Avoiding The Derogation", 2 US-China Law Review, 63, No.12 (Serial No.13), (2005).

¹⁹⁷*Id.* at 64.

¹⁹⁸Article 14(2), Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, Preamble, (1948).

¹⁹⁹Sibylle Kapferer, "Article 14(2) of the Universal Declaration of Human Rights and Exclusion from International Refugee Protection", Refugee Survey Quarterly, 53-57, (2008).

²⁰⁰Morten Kjaerum, "Article 14 in The Universal Declaration Of Human Rights: A Commentary", 220 (Asborn Eide et al. eds., (1992); Hailbronner, *supra note* 108, at 184.

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

II.3.ii. Non-refoulement under the European Convention on Human Rights, 1950²⁰⁵

The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, was opened for signature in Rome on 4 November 1950 and came into force in 1953.²⁰⁶ It was the first instrument to give effect to certain rights stated in the Universal Declaration of Human Rights and make them binding.²⁰⁷ The framers of the Convention sought to pursue the aims of the Council of Europe through the maintenance and further realization of human rights and fundamental freedoms.²⁰⁸ Since its adoption in 1950 the Convention has been amended a number of times and supplemented with many

²⁰¹ Roman Boed, "A Journey to Asylum", 22 Hum. Rts., 26, 26-50(1995).

²⁰² *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993)

²⁰³ Goodwin, *supra note* 15.

²⁰⁴ *Id.* at 132.

²⁰⁵ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, (1950).

²⁰⁶ *Ibid.*

²⁰⁷ F.G. Jacobs & R.C.A. White, "The European Convention on Human Rights", Oxford: Clarendon Press, (1996).

²⁰⁸ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, ETS 5.

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

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

In the *Chahal* case²¹², the British Government claimed an implied limitation to Article 3 entitling Contracting States to expel an alien to a receiving State even where a real risk of ill-treatment existed if such removal was required on national security grounds.²¹³ In the alternative, it was argued that the threat posed by an individual to the national security of the Contracting State was a factor to be weighed in the balance when considering the issues under Article 3, taking into account that there are varying degrees of risk of ill-treatment. The Court rejected this reasoning, reiterating that Article 3 enshrines one of the most fundamental values of democratic society and that, despite the immense difficulties faced by States in modern times in protecting their communities from terrorist violence,” Absolute torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct has a total prohibition in the convention.²¹⁴

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

²⁰⁹Id.

²¹⁰*Soering v. The United Kingdom*, No. 1/1989/161/217, Council of Europe: European Court of Human Rights, (1989).

²¹¹*Ibid.*

²¹²*Chahal v. The United Kingdom*, No. 70/1995/576/662, Council of Europe: European Court of Human Rights, (15 Nov. 1996).

²¹³*Ibid.*

²¹⁴Jens Vedsted-Hansen, “European Non-refoulement Revisited”, 55 *Scandinavian Stud. L.*269 (2010).

²¹⁵ *Chahal v. The United Kingdom*, *supra* note 45.

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

In *Saadi v. Italy*²¹⁹, the Court enumerated “the general principles of States' responsibility, primarily absolute prohibition under ECHR Article 3, irrespective of the victim's conduct.” The Court noted that all that increasingly, States have been facing immense difficulties in modern times in protecting their communities from terrorist violence. Therefore, the scale of terrorism and the threat posed by it to the community cannot be underestimated. It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. That must not, however, call into question the absolute nature of Article 3.²²⁰

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

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

²¹⁶C. Costello, “The European Asylum Procedures Directive in Legal Context”, Geneva: UNHCR 2006, New Issues in Refugee Research, Research Paper No. 134, (2006).

²¹⁷Ellen F. D'angelo, “Non-refoulement: The Search for a Consistent Interpretation of Article 33”, 42 Vand. J. Transnat'l L, Vol. 279 (2009).

²¹⁸Id. at 21.

²¹⁹Saadi v. Italy, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, (28 Feb. 2008).

²²⁰Saadi v. Italy, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, (28 Feb. 2008).

²²¹Vedsted-Hansen, supra note 214 at 74.

²²²Chahal v. The United Kingdom., supra note 212.

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

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

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

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

²²³ Katharina Röhl, "Fleeing Violence and Poverty: Non-refoulement Obligations under the European Convention of Human Rights", UNHCR (Working Paper No. 111), (2005).

²²⁴ *Soering v. United Kingdom*, *supra* note 210.

²²⁵ *Abdurrahim Incedursun v. The Netherlands*, No. 33124/96, Council of Europe: European Court of Human Rights, para. 27, (22 Jun. 1999).

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

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

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

²²⁶*Ibid.*

²²⁷ *Cruz Varas and Others v. Sweden*, No. 46/1990/237/307, Council of Europe: European Court of Human Rights, para. 76, 20 March 1991, (20 Mar. 1991).

²²⁸ *Vilvarajah and Others v. United Kingdom*, No. 45/1990/236/302-306, Council of Europe: European Court of Human Rights, para. 111, (30 Oct. 1991).

²²⁹ Liza Schuster, “The Realities of a New Asylum Paradigm, Centre on Migration, Policy and Society”, University of Oxford, Working Paper WP-05-20, (2005).

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

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

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

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

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

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

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

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

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

²³¹ *Ibid.*

²³² Article 6, UN General Assembly, International Covenant on Civil and Political Rights, 16 Dec. 1966, U.N.T.S., vol. 999, p. 171.

²³³ *Ibid.*

²³⁴ Art. 7, UN General Assembly, International Covenant on Civil and Political Rights, 16 Dec. 1966, U.N.T.S., vol. 999, p. 171.

²³⁵ Art. 13, UN General Assembly, International Covenant on Civil and Political Rights, 16 Dec. 1966, U.N.T.S., vol. 999, p. 171.

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

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

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

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

²³⁶Roman Boed, *supra* note 201 at 16.

²³⁷ UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, (1992).

²³⁸ *C. v. Australia*, CCPR/C/76/D/900/1999, UN Human Rights Committee (HRC), para. 4.13, (2000).

²³⁹P.R. Ghandhi, “The Human Rights Committee and Articles 7 and 10(1) of the International Covenant on Civil and Political Rights, 1966”, *Dalhousie Law Journal*, 758-759, 1990.

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

The unqualified character of Article 7 has been acknowledged by the Human Rights Committee in its General Comment Number 20²⁴⁰. According to the Committee no justification or extenuating circumstances may be invoked to excuse a violation of Article 7 of the ICCPR for any reason.

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

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

²⁴⁰UN Human Rights Committee (HRC), *supra note 237*.

²⁴¹Human Rights Watch, “Empty Promises: Diplomatic Assurances No Safeguard against Torture”, Apr. 1, 2004, Vol.16 No.4 (D), Refworld (Mar. 22, 2017, 17.00 PM), <http://www.refworld.org/docid/415c039b4.html>.

²⁴²UN Human Rights Committee (HRC), *supra note 237*.

²⁴³Den Heijer, M., “Whose Rights and Which Rights? The Continuing Story of Non-refoulement Under the European Convention on Human Rights”, 10(3) European Journal Of Migration And Law, 277-314 (2008).

²⁴⁴Vadislava Stoyanova, “The Principle of Non-refoulement and the Right of Asylum-Seekers to Enter State Territory”, 3(1) Interdisciplinary J. of Human Rights Law, (2008).

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

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

A similar reasoning has been followed by the HRC to determine that “Article 7 of the ICCPR provides an outright protection against transfer of an individual to face torture or cruel, inhuman, or degrading treatment.”²⁴⁹ In General Comment 31²⁵⁰, the Committee went further and implied from Article 2 of the ICCPR imposes a broader obligation so as not to transfer a person where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 and 7 of the Covenant, without further defining the potential range of post-transfer risk that could limit transfer²⁵¹. The HRC, like the ECtHR, failed to take notice of potential differences between negative and positive State duties. The HRC also did not address the impact of the rule on the State's security interests.

²⁴⁵Mansour Ahani v. Canada, CCPR/C/80/D/1051/2002, UN Human Rights Committee (HRC), (Jun. 15, 2004).

²⁴⁶S. Joseph, J. Schultz & M. Castan, “The International Covenant on Civil and Political Rights. Cases, Materials, and Commentary”, Oxford: Oxford University Press (2000).

²⁴⁷Id.

²⁴⁸Jens Vedsted-Hansen, *supra* note 214.

²⁴⁹UN Human Rights Committee (HRC), *supra* note 237.

²⁵⁰UN Human Rights Committee (HRC), General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, (May. 26, 2004).

²⁵¹UN Human Rights Committee (HRC), General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, (May. 26, 2004).

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

The prominence of Article 6 of the ICCPR in the background of refoulement is mainly found in the framework of extradition in terms of death penalty. Interestingly, the International Convention for the Protection of all persons from Enforced Disappearance, 2006²⁵³ also prohibits the transfer of persons who risk the death penalty under Article 16. Article 6(1) affords a protection mechanism to people by way of affording protection to “victims of war and general violence”, in particular in situations where the State is unable or unwilling to provide adequate protection. In that regard a situation of general or indiscriminate violence may be serious enough to invoke the prohibition on refoulement under Article 6.

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

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

²⁵²I. Boerefijn, “The Reporting Procedure under the Covenant on Civil and Political Rights, Practice and Procedures of the Human Rights Committee”, Antwerpen [etc.]: Intersentia (1999).

²⁵³ Art. 16, UN General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, U.N.T.S., vol. 2716, 3, Dec. 20, 2006; Doc.A/61/448; C.N.737.2008.

²⁵⁴*Torres v. Finland*, CCPR/C/38/D/291/1988, UN Human Rights Committee (HRC), (1990).

²⁵⁵ S. Joseph, J. Schultz & M. Castan, *supra* note 246.

II.3.iv. Non-refoulement under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984²⁵⁶

The United Nations General Assembly on 10 December 1984²⁵⁷ adopted the landmark instrument of Convention against Torture, which subsequently came into force on 26 June 1987 with the objective of reinforcing existing prohibitions, as mentioned in its preamble, and preventing torture and acts that amount to cruel, inhuman or degrading treatment. The Convention consists of 33 articles less than 3 parts with the first part providing for the definition of torture and stating the obligations of State parties, the second part establishing the Committee against Torture and providing implementation mechanisms and the third part providing for treaty provisions.

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

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

²⁵⁶Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

²⁵⁷Ibid.

²⁵⁸Human Rights Watch, *supra note* 241.

²⁵⁹European Court of Human Rights, Annual Report to The Commission on Human Rights, 2002, (Mar. 22, 2017, 16.30 PM), http://www.echr.coe.int/Documents/Annual_report_2002_ENG.pdf.

The CAT seeks to protect various human rights including the prevention on refoulement. Article 3 of the CAT enshrines the concept of non-refoulement stating that

*“No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”*²⁶⁰

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

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

A State party is forbidden from expelling, returning or extraditing a person to another State by virtue of Article 3 of the Convention, in the same manner as provided for under Article 33 of the Refugee Convention, 1951.²⁶⁴ Article 3 of the CAT provides an absolute prohibition on refoulement of anyone residing within the precincts of the

²⁶⁰Art.3, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment Or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

²⁶¹ *Tapia Paez v. Sweden*, UN Doc CAT/C/18/D/39/1996, (Apr. 28, 1997).

²⁶² Human Rights Watch, *supra note* 241.

²⁶³Art. 3(2), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

²⁶⁴Art.3, *Ibid*.

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

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

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

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

²⁶⁵Art. 1, Convention against Torture and Other Cruel, Inhuman Or Degrading Treatment Or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

²⁶⁶D.J. Miller, “Holding States to their Convention Obligations: The United Nations Convention against Torture and the Need for a Broad Interpretation of State Action”, *Georgetown Immigration Law Journal*, 318, (2003).

²⁶⁷*A.S. v. Sweden*, CAT/C/25/D/149/1999, UN Committee against Torture (CAT), (2001).

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

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

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

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

²⁶⁸Vadislava Stoyanova, supra note 244.

²⁶⁹Julia Mink, "EU Asylum Law and Human Rights Protection: Revisiting the Principle of Non-refoulement and The Prohibition of Torture and other Forms of Ill-Treatment", 14 European Journal of Migration and Law 122, 119-149, (2012).

²⁷⁰D.J. Miller, Id 266 at 318.

²⁷¹ U.N. Comm. Against Torture, Conclusions and Recommendations of the Committee Against Torture: Canada, T 4(a), U.N. Doc. CAT/C/CR/34/CAN (July 7, 2005)

²⁷²Special Rapporteur of the Comm'n on Human Rights, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Transmitted by Note of the Secretary-General, 28, U.N. Doc. A/59/234 (Sept. 1, 2004).

²⁷³*Suresh v. the Minister of Citizenship and Immigration; the Attorney General of Canada* SCC No. 27790, 14(1) Int. J. Refugee Law 141-157 (2002).

²⁷⁴U.N. Comm. against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture: Canada, 4(a), U.N. Doc. CAT/C/CR/34/CAN (July 7, 2005).

²⁷⁵ D.J. Miller, supra note 266 at 318.

²⁷⁶ Id. at 126.

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

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

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

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

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

²⁷⁷ Mink, *supra* note 269, at 127.

²⁷⁸ Art.3, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment Or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

²⁷⁹ G.H. Fox, *supra* note 174.

²⁸⁰ Karin Landgren, "Deflecting International Protection by Treaty: Bilateral And Multilateral Accords On Extradition, Readmission And The Inadmissibility of Asylum Requests", UNHCR Working Paper No. 10, UNHCR, (Jun. 1999).

such as Refugee Convention, 1951.²⁸¹ This position of refugees is crucial for ensuring that the legal protection of refugees are broadened and continue to improve over time. Moreover, other human rights treaties fill the gaps of the Refugee Convention, 1951 by providing mechanisms or institutions for ensuring the compliance of international human rights obligations. For instance, “the Committee against Torture (CAT) and the European Court of Human Rights” has been crucial in protecting refugee rights and interpreting the scope of these rights.

While the duty of non-refoulement is the cornerstone of international refugee law, it also applies under human rights law and humanitarian law²⁸², fields which seek to fulfill the same objectives as the concept of non-refoulement, i.e., protection from undue and unnecessary harm and protection of fundamental rights. Under international human rights law, an individual will be protected from refoulement through the application of various human rights instruments especially when the country of origin or the country to which the individual is to be refouled has a history or potential of human rights violations.

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

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

²⁸¹Id. at 12.

²⁸² Karen Parker, “Human Rights and Humanitarian Law”, 7 Whittier L. Rev., 675 (1985).

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

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

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

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

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

²⁸³Roman Boed, Supra note 201.

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

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

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

At the regional level in Europe, extradition can take place under the 1957 European Extradition Convention and its Additional Protocols which was adopted by the Council of Europe, along with the various applicable bilateral treaties. The European Union too has adopted the 1995 Convention on Simplified Extradition Procedures²⁸⁷ and the 1996 Convention Relating to Extradition between the Member States of the

²⁸⁴Robert Cryer, et. al., "Introduction to International Criminal Law and Procedure", 93 (2nd ed. 2010).

²⁸⁵UNHCR, *supra note* 179.

²⁸⁶*Ibid.*

²⁸⁷Convention on Simplified Extradition Procedures, OJ C78, (1995)

European Union²⁸⁸. These conventions offer simplified proceedings and reduced grounds for refusal but they have not been widely ratified.²⁸⁹ The European Arrest Warrant was also introduced, replacing the traditional extradition schemes and establishing a system wherein a warrant issued in one State would be recognized in other member States with minimal formalities.²⁹⁰

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

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

²⁸⁸Convention Relating to Extradition between The Member States Of The European Union, OJ C313, (1996).

²⁸⁹Robert Cryer, *supra* note 284.

²⁹⁰*Ibid.*

²⁹¹Robert Cryer, *supra* note 284

²⁹²K Wouters, “International Legal Standards for the Protection from Refoulement”, Antwerpen, Intersentia, (2009).

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

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

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

²⁹³Ibid.

²⁹⁴John Dugard & Christine Van Den Wyngaert, “Reconciling Extradition with Human Rights”, 92 Am. J. Int’l L.187 (1998).

²⁹⁵ UNHCR, *supra note* 179.

²⁹⁶Ibid.

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

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

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

²⁹⁷The United Nations, Charter of the United Nations, 1 U.N.T.S XVI, art. 103 (Oct 24, 1945).

²⁹⁸The United Nations, Charter of the United Nations, 1 U.N.T.S XVI, art. 55(C) and 56 (Oct 24, 1945).

²⁹⁹Kapferer, *supra note* 118.

³⁰⁰Dugard and Wyngaert, *supra note* 294

³⁰¹Id. at 198.

non-refoulement obligations under Article 33.

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

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

An example of such an application has been reflected in ‘discrimination clauses’ where the State must refuse extradition if it is intended for political motives or with the intent of discrimination or persecution³⁰⁴. Various international agreements include a common clause which prevents extradition when there is a reason to believe that such extradition is being done for a discriminatory purpose. This common clause was inspired by the non-refoulement principle and seeks to ensure certain minimum guarantees before an individual is to be extradited.³⁰⁵

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

³⁰²Dugard and Wyngaert, *supra* note 294

³⁰³K Wouters, *supra* note 292.

³⁰⁴Kapferer, *supra* note 118.

³⁰⁵*Ibid.*

³⁰⁶Karin Landgren, *supra* note 280.

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

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

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

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

³⁰⁷ *Ibid.*

³⁰⁸ K Wouters, *supra* note 292 at 30.

³⁰⁹ *Ibid.*

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

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

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

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

³¹⁰K Wouters, *supra* note 292 at 198.

³¹¹ *Agiza v. Sweden*, CAT Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005).

³¹²*Harkins and Edwards v. the United Kingdom*, Nos. 9146/07 and 32650/07, Council of Europe: European Court of Human Rights, (17 Jan. 2012).

³¹³ECtHR, *Shamayev and 12 others v Georgia and Russia*, 12 April 2005, Appl. No. 36378/02, paras. 342 and 343, (2005).

³¹⁴*Ibid.*

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

The Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment of Punishment, Manfred Nowak, in a report on cases involving diplomatic assurances to the UNGA in 2005³¹⁵, stated that assurances are variable and ineffective in the protection against torture and ill-treatment. Such assurances are sought usually from States where the practice of torture is systematic. It was also found in the report that post-return monitoring mechanisms have proven to be no guarantee against torture.³¹⁶ Since diplomatic assurances are not legally binding, they carry no legal effect and no accountability if breached and the person whom the assurances aim to protect has no recourse if the assurances are violated.

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

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

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

³¹⁵Special Rapporteur on Torture, Report of The Special Rapporteur on Torture and Other Cruel, Inhuman Or Degrading Treatment Or Punishment, A/60/316, para. 51, (30 Aug. 2005).

³¹⁶*Ibid.*

³¹⁷*Ibid.*

³¹⁸ Vадislava, Stoyanova, *supra* note 244

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

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

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

³¹⁹ Den Heijer, *supra* note 243.

³²⁰ *Soering v. United Kingdom*, *supra* note 210.

³²¹ Battjes, H., “The Soering Threshold: Why only Fundamental Values Prohibit Refoulement in ECtHR Case Law”, 11 *European Journal of Migration And Law*, 205-19, (2009).

³²² *Ibid.*

³²³ *D v. United Kingdom*, (1997) 24 EHRR 423 (ECtHR).

constituting violation of Art 3 of the ECHR.³²⁴

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

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

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

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

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

³²⁴*Ibid.*

³²⁵Vadislava Stoyanova, *supra* note 244.

³²⁶Durieux, Jean-François and Mcadam, Jane. "Non-refoulement Through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies", 16 International Journal Of Refugee Law, 4 (2004).

There arises a possibility of conflict when proscription on refoulement prohibits removal to areas where there is a real risk of harm other than harm which amounts to torture. Further, the said issue of a conflict of treaty obligations has been addressed to some extent by the Committee³²⁷.

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

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

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

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

³²⁷HRC, General Comment No. 15: The Position of Aliens under the Covenant, (Apr. 11, 1986).

³²⁸Durieux, Jean-François and Mcadam, Jane, *supra* note 326.

³²⁹ *Kindler v. Canada*, Communication No. 470/1991, U.N. Doc. CCPR/C/48/D/470/1991 (1993).

³³⁰ *C. v. Australia*, *supra* note 238.

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

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

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

Extradition is explicitly prohibited by Article 3 of the Convention against Torture if there are substantial grounds for believing that the extradited person would be in danger of being subjected to torture after extradition. Article 3 of the 1984 Convention expressly provides that no State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

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

³³¹ *Ibid.*

³³² *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1.

³³³ UNHCR, *supra note* 179.

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

At the European level, the interpretation of Article 3 of the European Convention on Human Rights, as developed by the European Commission of Human Rights, was confirmed by the European Court of Human Rights in the *Soering* judgment³³⁵ in 1989, dealing with the issue of extradition of an offender who was likely to be exposed to inhuman treatment after his prospective conviction in the requesting non-European State. In the landmark case of *Soering v. the United Kingdom*³³⁶, the Court failed to take note of the 1972 Extradition Agreement between the United Kingdom and the United States.

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

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

³³⁴Durieux, Jean-Francois And Mcadam, Jane, *supra* note 326.

³³⁵*Soering v. United Kingdom*, *supra* note 210.

³³⁶*Ibid.*

³³⁷Jens Vedsted-Hansen, *supra* note 214.

requesting country.³³⁸

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

In the *Vilvarajah* judgment³⁴¹, the Court held that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including Article 3, to control the entry, residence and expulsion of aliens. Moreover, it must be noted that the right to political asylum is not contained in either the Convention or its Protocols.³⁴²

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

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

³³⁸Battjes, H., *supra* note 321.

³³⁹*Ibid.*

³⁴⁰Durieux, Jean-Francois And Mcadam, *supra* note 326.

³⁴¹*Vilvarajah and others v. United Kingdom*, *supra* note 228.

³⁴²*Ibid.*

³⁴³*Aswat v. The United Kingdom*, ECHR, No. 17299/12, (2013).

³⁴⁴Ellen F. D’angelo, *supra* note 50 at 217

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

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

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

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

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

³⁴⁵Durieux, Jean-François and Mcadam, *supra* note 326.

³⁴⁶Ellen F. D’angelo, *supra* note 50 at 217.

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

The Executive Committee of the UNHCR's Programme, in light of the principle of non-refoulement, recognizes that refugees should be protected in regard to extradition to a country where they have well-founded reasons to fear persecution on the grounds enumerated in Article 1 A(2) of the 1951 Convention and called upon States to ensure that the principle of non-refoulement is duly taken into account in treaties relating to extradition and as appropriate in national legislation³⁴⁸. The UNHCR expressed the hope that due regard be had to the principle of non-refoulement in the application of existing treaties relating to extradition.

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

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

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

³⁴⁷Karin Landgren, *supra* note 280.

³⁴⁸ UNHCR, *supra* note 179.

³⁴⁹Art. 33(2), Refugee Convention 1951.

³⁵⁰ UNHCR, *supra* note 179.

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

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

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

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

³⁵¹Dhayakpa v. Minister for Immigration & Ethnic Affairs (1995) 62 FCR 556, 563 (Austl.)

³⁵²Letter from Thomas Albrecht, Deputy Regional Representative, UNHCR, to Paul Engelmayer, Wilmer Hale, RefWorld (Jan. 6, 2006, 16:35 PM), <http://www.unhcr.org/refworld/pdfid/43de2da94.pdf>.

³⁵³Kapferer, *supra note* 118.

³⁵⁴Dugard & Wyngaert, *supra note* 294.

³⁵⁵*Ibid.*

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

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

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

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

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

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

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

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

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

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

³⁵⁷OHCHR, “What are Human Rights”, OHCHR, (Mar. 12, 2017, 16:00 PM), <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>.

³⁵⁸ Dinah L. Shelton, *supra* note 171.

³⁵⁹ Olivier de Schutter, “International Human Rights Law: Cases, Materials, Commentary, Cambridge”, Cambridge University Press, (2010).

³⁶⁰M. Nowak, “U.N. Covenant on Civil and Political Rights, CCPR Commentary”, Kehl: N.P. Engel Publishers, (1993).

³⁶¹R. Jennings & A. Watts (eds.), “Oppenheim’s International Law”, Volume I. Parts 2 to 4, London: Longman, (9th ed. 1992).”

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

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

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

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

³⁶²*Ibid.*

³⁶³Meron, “Extraterritoriality of Human Rights Treaties”, *AJIL*, 78-81, (1995).

³⁶⁴*Ibid.*

³⁶⁵R. Bruin & K. Wouters, “Terrorism and the Non-derogability of Non-refoulement”, *IJRL*, 22, (2003).

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

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

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

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

While the duty of non-refoulement is the cornerstone of international refugee law, it also applies under human rights law and humanitarian law³⁶⁷; fields which seek to fulfill the same objectives as the concept of non-refoulement, i.e., protection from undue and unnecessary harm and protection of fundamental rights. Under international human rights law, an individual will be protected from refoulement through the application of various human rights instruments especially when the

³⁶⁶Durieux, Jean-François and Mcadam, *supra* note 326.

³⁶⁷Karen Parker, *supra* note 282.

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

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

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

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

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

³⁶⁸S.L. David, "A Foul Immigration Policy: U.S. Misinterpretation of the Non Refoulement Obligation under the Convention against Torture", New York Law School Journal of Human Rights, 2003, 773, (2003).

³⁶⁹Roman Boed, *supra* note 201.

such implicit prohibitions of *refoulement*.³⁷⁰

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

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

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

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

³⁷⁰Karin Landgren, *supra* note 280 at 113.

³⁷¹Battjes, *supra* note 321 at 5.

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

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

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

In the context of the right to be protected from refoulement, States do have a prime obligation to refrain from expelling an individual to a country where he may be at risk of being subjected to serious harm³⁷⁵. However, depending on the facts and circumstances so as to provide effective protection States may also have the obligation to take action by, for example, allowing an individual to enter its territory.

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

³⁷²H. Lambert, "Protection against Refoulement from Europe: Human Rights Law Comes To the Rescue", ICLQ, 523, (1999).

³⁷³D.J.Miller, *supra* note 266 at 318.

³⁷⁴*Ibid.*

³⁷⁵Durieux, Jean-Francois and Mcadam, *supra* note 326.

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

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

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

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

³⁷⁶Olivier de Schutter, *supra* note 359.

³⁷⁷P.R. Gandhi, *supra* note 239.

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

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

The emphasis should be on strengthening the rights of refugees under the human rights law framework. According to Fitzpatrick³⁷⁹, the Refugee Convention is not obsolete, but is incomplete, as it has been from the outset. Only by progressive interpretation of the Convention and by recognition of extra-conventional norms has the international community been able to patch together a minimally adequate regime for the protection of forced migrants, the Refugee Convention is no more ill-suited to this age than to the one in which it was founded. Furthermore, there exists a distinct crisis not due to the failure of the convention to meet the needs of asylum-seekers, but because it meets them so well as to impose burdens that are no longer politically tolerable to the States parties involved.³⁸⁰

The limitations of the concept of non-refoulement as existing under the 1951 Refugee Convention as compared to the human rights regime and the need for it to be re-casted as a human right have been analyzed as follows:

³⁷⁸Karin Landgren, *supra* note 280 at 13.

³⁷⁹Joan Fitzpatrick, "Flight from Asylum", *Virginia Journal of International Law*, Vol. 35, No.1, 31(1994).

³⁸⁰*Ibid*

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

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

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

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

³⁸¹Helene Lambert, "The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Reunion", *Int J Refugee Law*; 11 (3): 443-450, (1999).

³⁸²*Ibid.*

³⁸³G.S. Goodwin-Gill, "The Haitian Refoulement Case: A Comment", *Int J Refugee Law*, 103-109, (1994).

³⁸⁴Art. 22(8), American Human Rights Convention, OAS Treaty Series, No.36 1144 U.N.T.S., 123; 9 ILM (1969).

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

Protection under the human rights regime is non-discriminatory in nature, in the sense that it protects all individuals notwithstanding their nationality or legal status as a refugee, migrant or asylum-seeker or whether the person has entered the country illegally. The human rights approach to non-refoulement provides a wider expanse of protection to refugees and fills the gaps in the Refugee Convention. This approach, based on moral consideration, is also considered to be a more effective method of ensuring compliance with non-refoulement obligations³⁸⁵.

The increasing number of instances of expulsion and extradition of refugees due to the lack of a uniform interpretation of the scope of the concept of non-refoulement has led to mass violations of the principle by States and derogation of the same which makes the protection of the principle under the human rights regime all the more relevant in the name of state sovereignty and security³⁸⁶. This has further been established by the Strasbourg judges on numerous occasions stating that under general international law a state has the right, in virtue of its sovereignty, to control the entry and exit of foreigners into and out of its territory³⁸⁷.

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

³⁸⁵Katharina Röhl, *supra* note 223 at 46.

³⁸⁶*Ibid.*

³⁸⁷W. Suntinger, "The Principle of Non-refoulement: Looking Rather to Geneva than to Strasbourg?" *Austrian Journal of Public and International Law*, 221-226, (1995).

³⁸⁸Vadislava Stoyanova, *supra* note 244.

rights treaties such as the CAT, ICCPR, ECHR and the UDHR are wide-ranging and such treaties often provide for mechanisms for the supervision and monitoring of compliance with human rights treaty obligations. Many authorities such as Lambert consider resorting to human rights instruments as a better option to protecting individuals from refoulement and extradition³⁸⁹. On the other hand, the Refugee Convention does not provide for an enforcement mechanism and therefore, makes the effectiveness of the refoulement prohibition superfluous.

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

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

³⁸⁹H. Lambert, *supra* note 372.

³⁹⁰J. Pirjola, “Shadows in Paradise – Exploring Non-refoulement as an Open Concept”, *IJRL*, 653-600 (2007).

³⁹¹R. Bernhardt, “Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights”, *GYIL*, 11-14, (1999).

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

The absolute nature of the concept of non-refoulement under the certain human rights instruments has been emphasized by the courts in various cases such as the case of *Ireland v. United Kingdom*³⁹³ and *Chahal v. United Kingdom*³⁹⁴ where the Court categorically stated that the prohibition on refoulement is absolute in cases of torture.

The UNHCR's Director of International Protection also remarked that refugees enjoy a wide variety of rights under different treaties in addition to specific refugee treaties such as Refugee Convention, 1951.³⁹⁵ This position of refugees is crucial for ensuring that the legal protection of refugees are broadened and continue to improve over time. Moreover, other human rights treaties fill the gaps in the Refugee Convention, 1951 by providing mechanisms or institutions for ensuring the compliance of international human rights obligations. For instance, the Committee against Torture (CAT) and the European Court of Human Rights has been crucial in protecting refugee rights and interpreting the scope of these rights.

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

³⁹²*Ibid.*

³⁹³*Ireland v United Kingdom*, No. 5310/71, Series A no 25, 65, ECHR 1, (1978).

³⁹⁴*Chahal v. United Kingdom*, Eur.Ct. H.R., Application no.22414/93, Report of 27 June 1995

³⁹⁵*Ibid.*

³⁹⁶ *Ibid.*

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

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

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

³⁹⁷Olivier de Schutter, *supra* note 359.

³⁹⁸ICJ, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion), ICJ Reports 1951, 51 (May 28, 1951).

³⁹⁹ Bernhardt, *supra* note 391 at 143.

⁴⁰⁰Article 31(3)(c), Vienna Convention on the Law of Treaties, 23 May 1969, 115 U.N.T.S. 331 (1969).

⁴⁰¹Olivier de Schutter, *supra* note 359.

⁴⁰²Joan Fitzpatrick, "Flight from Asylum", Virginia Journal of International Law, Vol. 35, No.1, 31 (1994).

a human being.”⁴⁰³

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

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

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

⁴⁰³HRC, General Comment No. 24 (1994), *CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, CCPR/C/21/Rev.1/Add.6, para. 24, (Nov. 4, 1994).

⁴⁰⁴Vijay M Padmanabhan, *supra* note 183.

⁴⁰⁵A. Orakhelashvili, “Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights”, *EJIL*, 559-562, (2003).

⁴⁰⁶*Ibid.*

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

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 acknowledged⁴⁰⁷. 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 Refugee 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 them⁴⁰⁸. 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

⁴⁰⁷Goodwin, *supra note* 15.

⁴⁰⁸Jane McAdam and Guy S. Goodwin Gill, "The Refugee in International Law", 3rd Ed., Clarendon Press, Oxford, (1996).

Relating to the Status of Refugee⁴⁰⁹. 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 countries⁴¹⁰. 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

⁴⁰⁹Robert L. Newmark “Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs”, available at: www.researchgate.net (1993).

⁴¹⁰Treaty 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 Article 14 of the Universal Declaration of Human Rights⁴¹¹, 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.

⁴¹¹UNHCR Note on the Principle of Non-Refoulement ,UN High Commissioner for Refugees (UNHCR) November 1997, www.refworld.org

⁴¹²The 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

⁴¹³Article 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 Convention⁴¹⁴. 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

⁴¹⁴European Convention on Human Rights available at: www.echr.coe.int

⁴¹⁵Statute 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 instructive⁴¹⁶. 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-exist⁴¹⁷. 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 states⁴¹⁹:

"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

⁴¹⁷Koh, H. "Why Do Nations Obey Laws?" Yale Law Journal 2599, (1996).

⁴¹⁸Christenson, G. "Jus Cogens: Guarding Interests Fundamental to International Society", Virginia Journal of International Law 585 587, (1988).

⁴¹⁹Vienna 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 Commission⁴²⁰ 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 level⁴²¹.

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 refugees 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 law⁴²². 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.

⁴²²Nils 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).

⁴²³Article 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 protection⁴²⁶.

Simply someone, who has been forced to leave a country because of war or for religious or political reasons⁴²⁷, 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

⁴²⁴Article 1A of the Convention on the Status of Refugees, 1951.

⁴²⁵Adrienne Millbank, "The Problem with the 1951 Refugee Convention", Parliamentary Library, available at: www.aph.gov.au.

⁴²⁶Refugee 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 grounds⁴²⁸:

- 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 them⁴²⁹.

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

⁴²⁹Refugees 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 "*refouler*" 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 Fridtjof 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 1938⁴³¹ 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.

⁴³⁰James E. Hassell, "American Philosophy Society", pg 1, ISBN 0-87169-817-X.

⁴³¹The 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 concerned⁴³².

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

⁴³²The 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 refuge. 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

⁴³³Note 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 1951 Convention 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

⁴³⁴UN 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.

⁴³⁵I.C.J. Reports 1986 page 88 paragraph 186

⁴³⁶Resolution44/137 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 law⁴³⁸.

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

⁴³⁷Atle 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 void⁴³⁹, 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 system⁴⁴⁰.

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".

⁴³⁹James 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 Case⁴⁴¹ 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 School⁴⁴², 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.

⁴⁴¹Nicaragua v. United States of America, 27 June, 1986, available at: www.icj.org

⁴⁴²Byers *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

⁴⁴³Kamrul 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 protests⁴⁴⁴. 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, Article 33 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 responsibility⁴⁴⁶:

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 country⁴⁴⁷.

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 33⁴⁴⁸ 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 extraterritorial 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.

⁴⁴⁹Scott 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 refole. 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 Convention⁴⁵⁰. 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 Law⁴⁵¹ 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 commitment⁴⁵². 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.

⁴⁵⁰Convention 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

⁴⁵¹Yale Hum. Rts. & Dev. L.J. 183 (1999).

⁴⁵²The 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 torture⁴⁵⁴

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-refoulement⁴⁵⁵. 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 Principle⁴⁵⁶.

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 Nations⁴⁵⁸.

⁴⁵⁷Article 33 (2) of the 1951 Refugee Convention

⁴⁵⁸Refugee 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 their 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 Bosnian 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 their 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.tjisl.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 is 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 Khan⁴⁶⁴ 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 where 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 status⁴⁶⁵.

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 resort⁴⁶⁶.

Similarly a Canadian court⁴⁶⁷ 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 Handbook⁴⁶⁸ 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 civilians⁴⁶⁹.

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

⁴⁶⁸Handbook 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 Frenescu and stated that ‘if the immigrant had committed a serious crime, he was necessarily a danger⁴⁷⁰’, 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 I. & 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 be 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.

⁴⁷¹1951 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 resides⁴⁷⁵ 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.

⁴⁷⁴UNHCR, 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 determining 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 with 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.

⁴⁷⁶Soering v. United Kingdom, Application No. 14038/88; Ahmed v. Austria, Application No. 25964/94.

⁴⁷⁷ Security Council Resolution S/RES/1624 (2005)

⁴⁷⁸Stefanovska, *supra* 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, *supra* 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 Convention⁴⁸⁰. 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 refole 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

⁴⁷⁹Stefanovska, *supra* note 472, at 3

⁴⁸⁰ 1951 Refugee Convention, Art. 33(2).

⁴⁸¹ Stefanovska, *supra* note 472, at 3

⁴⁸²UNHCR, 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.

⁴⁸⁷Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002, SCC 1.

⁴⁸⁸Special 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 crimes⁴⁹¹, 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 in 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 lay 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, *supra* 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 UNHRC⁵⁰² 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 Prisoners⁵⁰⁵ 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.

⁵⁰⁰ Dugard and Wyngaert, *supra* note 294, at 35.

⁵⁰¹ *Ng v. Canada*, 98 ILR 479.

⁵⁰² Known as United Nations Human Rights Committee.

⁵⁰³ *Ng v. Canada*, *supra* note 95, at 38.

⁵⁰⁴ Dugard and Wyngaert, *supra* note 294, at 35.

⁵⁰⁵ Resolution 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 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 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.

CHAPTER IV

PRINCIPLE OF NON-REFOULEMENT AND THE DOCTRINE OF EXTRADITION: A STUDY OF CASES FROM 1973 TO 2014

IV.1 INTRODUCTION

The present chapter focuses on the detailed case study and their analysis on the conflict between the principle of non-refoulement and extradition between the years 1973 to 2014. These chapters have been divided into section which deals with a period of 10 years and the cases pertaining to the same are discussed there under.

IV.2. CASES BETWEEN 1973 AND 1983

In the case of *Kakis v. Government of the Republic of Cyprus*⁵⁰⁹, the applicant was accused of having an important part in the EOKA killing which happened in the year 1973. Based on such accusation, the government of Cyprus filed an application seeking his Extradition. After the warrant regarding his arrest was filed, the applicant left his house and has been hiding since 15 months. He then settled in England along with Mr. Alexandrou who was the applicant's only alibi witness, who swore that he would not return to give evidence in Cyprus. The authorities of the state after finding the applicant wanted him to be extradited to which he stated that the steps taken by the authorities are unjust and oppressive. The authorities were blamed by the applicant for their delay in finding the applicant and then carrying on the process of Extradition. The court in this case regarded that the fact the authorities carried out the process so late is not enough to prove that the process has been unjust. The court

⁵⁰⁹[1978] 1 WLR 779, [1978] 2 All ER 634

regarded that the hindrance in the extradition proceedings was brought about by the applicant himself. If he would have not left the place of his residence and kept hiding for months he would have not gone through such delay. Therefore his extradition request was held valid by the court.

IV.3. CASES BETWEEN 1983 AND 1993

The case of *Canada v. Schmidt*⁵¹⁰, concerns extradition of the respondent who was being accused of kidnapping and child stealing of a two year old girl based on the extradition treaty signed between the United States of America and Canada. In this case, Schmidt hereby referred as respondent with the help of her son and her son's friend was suspected to have kidnapped a girl of two years from a Cleveland sidewalk. She was taken to New York and then raised her as her own child. On the other hand, the child's parents, the complainants complained to the authorities regarding her absence. When the authorities could not find the child, the father in anguish committed suicide.

After two years when the respondent attended a family reunion along with her daughter, she happened to meet a particular person who helped the complainants in the process of finding their daughter. He recognized the child and informed about the same to the Cleveland police authorities after which she was returned to her parents.

After the respondent was arrested, she was charged with the federal offence of kidnapping and the state offence of child stealing .

The respondent accepted the charges of abduction, which was filed against her, but in defense she contended that she believed the child to be illegitimate daughter of her son and was living with her mother in a home of bad reputation.⁵¹¹ Even though the court did not found her guilty for kidnapping, the state offence of child stealing was still pending against her. In the middle of the case, the respondent left the country and returned back to the Canada. The authorities therefore filed an extradition request against her based on the Canada-United States extradition treaty following which the Canadian authorities arrested her.

⁵¹⁰[1987] 1 S.C.R. 500, 524

⁵¹¹Ibid.

In her defense the representatives of the respondent stated that she will not have the benefit of raising her previous federal prosecution in bar of her prosecution under state law.⁵¹² While under the Fifth Amendment of the Constitution of the United States, a person is protected from double jeopardy against federal prosecutions that provision does not apply to the states although at some point the cruelty of harassment by multiple prosecutions, by a state that would violate the due process clause of the Fourteenth Amendment.⁵¹³ Basically, the contention, which the respondent was trying to put forward, was that the proceedings, which could have taken against her for the same in the origin of her country, would be different from the standards of the foreign trial. The court based its judgment on the basis of Section 6 of the Canadian charter on rights and freedoms, which state that every individual has a right to life, liberty and security. They should not be deprived of these rights unless required by the general principles of elemental justice. They extended the article and connected with Section 7 that protected the rights of the respondent in the extradition proceedings and subjected her to the protection under the charter.

In the case of *Soering v. United Kingdom*⁵¹⁴, Mr. Jens Soering, a German national who was detained in the United Kingdom prison, filed an application against United Kingdom for his pending extradition to United States of America, where he is charged for committing murder in the commonwealth of Virginia. He was accused of murdering his girlfriend's parents, which both the applicant and his girlfriend, Miss Haysom's planned together. Moreover, the police investigator from the Sheriff's Department of Bedford Country stated that the applicant has also confessed of him being guilty for committing murder in the presence of him and other two police officers.

The government of the United States of America requested the applicant's and Miss Haysom's extradition under the terms of the Extradition Treaty which was signed between the United Kingdom and United States of America. Upon the request for extradition made by the United States of America, the government of United Kingdom contended that since they have abolished death penalty in their state it

⁵¹²[1987] 1 S.C.R. 500, at para. 8 available at <https://scc-csc.lexum.com/scc-csc/scccsc/en/item/210/index.do>

⁵¹³Dugard and Wyngaert, *supra note* 294 at 187.

⁵¹⁴ [1989] 11 E.H.R.R 439

becomes the duty of the government of USA to make sure that the application is not subjected to such death penalty. Even if such order of death penalty is passed then it becomes the duty of the government to make sure that it is not implemented. Later a German prosecutor in prison interviewed the applicant. The applicant to the prosecutor claimed that he had no intentions of killing the deceased and also he had no conversation with Miss Haysom with respect to such activity. The Government of Federal republic of Germany thus requested the extradition of the applicant on the basis of the Extradition Treaty signed between both the countries and also that the country had right to exercise its jurisdiction over the applicant.

To the Extradition request made by Germany the government of United Kingdom informed that the United States had already submitted a request for the extradition of Mr Soering with the sufficient evidence. Therefore, the United Kingdom Government opted to follow the normal process by the considering the application of U.S.A first. They also expanded their point by stating that they had already asked the government of USA to provide confirmation for not subjecting the applicant to death penalty, only after which such extradition process shall follow. Moreover, they also got assurance through a diplomatic note stating that no such punishment of death penalty will be awarded to the applicant.

Later on, while the proceedings were going on the government of United Kingdom got notification that the USA was planning to award the applicant the punishment of death penalty because according to them the crime that the claimant committed deserved capital punishment.

The applicant therefore claimed that if he will be extradited then that would lead to violation of Article 3 of the ECHR, which would be pushing him to circumstances where the authorities are already aware would expose him to death penalty. So the court held that the decision of Secretary of State to extradite the applicant to United Kingdom would expose him to inhuman conditions and torture and would also lead to contravention of Article 3.

In the case of *Immigration and Naturalization Service v. Elias-Zacarias*⁵¹⁵, Respondent was a native of Guatemala, who was caught for entering the United States without inspection. While the deportation proceedings conducted by the Immigration and Naturalization Service (INS), the petitioner took place the respondent accepted his mistake for illegally entering the country. Moreover, along with that he requested the authorities to provide him asylum and to withhold his deportation. The respondent to support his asylum request informed the authorities that he was afraid of the guerrillas in his country. Since they tried recruiting him once, he had the fear that they would return and will force him to go against the government. The Immigration judge held that the respondent was unsuccessful in establishing any type of persecution or a well founded fear of persecution on account of either race, religion, nationality, membership in a particular social group, or political opinion and hence he could not be granted asylum. Hence, she held that the deportation proceedings against the respondent will not stop. The case even after being denied by the BIA went further to the Court of Appeals for the Ninth Circuit. The court ruled that the acts of conscription by a non-governmental group constitute persecution on account of political opinion, and determined that the respondent had a well founded fear of such conscription.⁵¹⁶

The Court of Appeals stated that Section 208(a) of the Immigration and Nationality Act⁵¹⁷, authorized the Attorney General, in his discretion, to grant asylum to an alien who is a refugee as defined in the Act, i.e. an alien who is unable or unwilling to return to his home county because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion⁵¹⁸ According to the Court of Appeal, the attempt made by the Guerrilla Organization to conscript a person into its military forces constitutes persecution on account of political opinion because the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and because the persecutors' motive in carrying out the kidnapping is political.⁵¹⁹ The INS to the point established by the Court of Appeal explained that the motive behind guerrilla

⁵¹⁵ 502 U.S 478 (1992)

⁵¹⁶ Ng v. Canada, 98 ILR 479.

⁵¹⁷ 8 U.S.C & 1158(a)

⁵¹⁸ *Supra note* 516.

⁵¹⁹ *Ibid.*

movement is completely opposite to how it has been portrayed. There are people who are in support of these movements, few of the reasons being fear of combat, a desire to be with family and friends or to have a better standard of living in civilian life. They also explained that in the entire case it has also not been established that the guerillas wanted to persecute the respondent because his refusal was politically based. On the points laid down by the INS, respondent in his defence stated that not having a political opinion is itself the affirmative expression of a political opinion.⁵²⁰ Moreover the court laid down that it is not necessary under the statute that an applicant applying for asylum has to prove the action of his persecutors and the reason behind it. The only thing the respondent needed to prove is a well founded fear of persecution on account of political opinion.⁵²¹ This according to the court was properly established in this case. Therefore, going by the decision of the Court of Appeals the applicant had well founded fear of persecution on account of his political opinion and hence gave him permission to seek asylum in the United States.

In the *Matter of Mogharrabi*⁵²², the respondents were inhabitants and citizens of Iran who were inside the United States as non-immigrant students. They were allowed to stay in the country till a specific date, but both of them ended up overstaying their visit. Upon their deportation as ordered by the Immigration and Naturalization Service (INS), they upheld the same by filing an application seeking for asylum and withholding of deportation. The authorities to this application stated that in order to establish the appropriate grounds for a grant of asylum, it is the duty of the respondents to establish that they are refugee within the meaning of Section 101(a)(42)(A) of the Immigration and Nationality Act. They also stated that in order to determine themselves as refugees they need to demonstrate their unwillingness to return to their country because of persecution or a well founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.⁵²³ The respondents in order to establish their fear of persecution explained the situation faced by him in the Iranian Interests Section at the Algerian Embassy where his was to document his continuing student status in order to enable him to continue receiving

⁵²⁰*Supra note 516.*

⁵²¹*Supra note 516.*

⁵²²19 I&N Dec. 439 (BIA 1987), United States Board of Immigration Appeals, 12 June 1987, available at: http://www.refworld.org/cases,USA_BIA,3ae6b6b11c.html [accessed 11 March 2016]

⁵²³*Ibid.*

funds from relatives . Further incidents occurred because of which the student working in the embassy drew a gun at the respondent and his friend. As a result of such an incident, the respondent is of the view that he is now known to Khomeini officials because of which he has a suitable reason to fear persecution if returned to Iran. He also testified on participating in the demonstrations that took place in United States against the Khomeini.⁵²⁴

The court after looking at both the sides concluded that “the respondents did have a reasonable fear of persecution based on his political opinions to be plausible, detailed, and coherent.”⁵²⁵ Moreover, the political views of the respondent were completely derogatory regarding the ruling party, which makes it reasonable why his life will be in danger keeping in mind his statement made to the agents of the Khomeini regime. Therefore, the applicant was granted the asylum.

IV.4. CASES BETWEEN 1993 AND 2003

In *United States v. Lui Kin-Hong*⁵²⁶, the extradition of the respondent was being sought by the United States on the reliability of the extradition treaty signed between the United States of America and Hong Kong. In this case the respondent was charged in Hong Kong for committing the offence of conspiring to receive money amounting to over 3 million U.S dollars as bribe from a company called as Wing Wah Company. The respondent who worked as a senior officer a company called Brown & Williamson Co. became the director of exports upon its affiliation with the British American Tobacco Co. He was held responsible for taking bribes for a virtual monopoly on the export of specific brands of cigarettes to the People’s Republic of China and to Taiwan.⁵²⁷ One of the shareholders of the company who used to work with the respondent gave the important evidence related to the case when the investigation was being done by the Hong Kong Independent Commission against Corruption. Later on it was found out that the shareholder was abducted, tortured and killed by few of the people who are expected to be involved in the forgery done by the respondent in order to stop him from testifying against the respondent.

⁵²⁴Dugard and Wyngaert, *supra note* 294, at 35.

⁵²⁵*Ibid.*

⁵²⁶110 F3d 103 (1st Cir. 1997)

⁵²⁷*Ibid.*

In the year 2005, at the request of the United Kingdom who was substituting on behalf of Hong Kong, the authorities of United States detained the respondent at Boston's Logan Airport. The arrest was not made on the extradition request of the respondent by Hong Kong for the charges he was held responsible along with the fact that he has not returned to the country nor did he have any of such intentions.

The extradition request was made with regard to the Extradition Treaty between the government of the United States of America and the Government of the United Kingdom of Great Britain, where the United Kingdom as mentioned above requested for the respondent's extradition on behalf of the Hong Kong. Therefore, the original treaty was actually made applicable to the Hong Kong, among other British territories, by an exchange of the diplomatic notes ⁵²⁸

The government of the United States contended that respondent and his acts or the crime committed by him lies within the plain term of the treaty signed between the United Kingdom and the United States. It is the responsibility of the court to go by each term mentioned in the treaty. The main objective of the treaty when signed was to fight the battle against the crime, and in this case the purpose behind the extradition needs to be sought. Moreover, the authorities also stated that the court cannot rely on the terms of prohibition on refoulement or non-refoulement because he has no proper grounds to prove his fear of persecution on the grounds of race, religion, nationality, political opinion. Along with the basic principle of non-refoulement the court also looked at the only exception to the extradition treaties considered by the court which is that of committing a political offense. The respondent also cannot claim that the crime committed by him is political in nature because of which his extradition process needs to be challenged.

The court therefore held that the ultimate safeguard that extradition proceedings which were brought before the courts of the United States, comply with the clause which talks about the due process of the constitution. Therefore, they did not found any stage unconstitutional because of which such process needs to be withheld. Hence, the extradition process of the respondent was granted by the court.

⁵²⁸United States Court of Appeals, 1st Cir. No. 97-1084

In the case of *GRB v. Sweden*⁵²⁹, the applicant was a Peruvian citizen having residence in Sweden where an application was filed by her seeking asylum. She claimed that the immigration authorities forcing her to go back to Peru will amount to the violation of Article 3 of the CAT.

The applicant states that her family is one of the politically dynamic families in Pilcomayo in the Department of Junin. Her parents were members of the Communist Party of Peru and took active participation in the party meeting which used to take place in their home. Along with her parents even the applicant started taking interest in the party matters and became a part of it. After completing her education in medicine from Ukraine the applicant went to Peru to visit her parents where she intended to stay for few months.

During the time she went to Peru, she got to know that the political conditions in the state are not proper. The house of her parents was being searched by the government soldiers and when being caught they were taken to prison and were badly beaten and tormented before they were discharged. The applicant was therefore warned to return back to Ukraine as her life was at risk if she would have stayed in Peru for few more days. Even after knowing that her life was at risk, the applicant decided to visit her parents during which she was raped and was in wrongful confinement for two nights. Since the police authorities did not take any interest in the torture faced by the applicant, she decided to return back to Ukraine.

The applicant therefore went to Sweden seeking for asylum where the Swedish Immigration Board rejected her application on the ground that there was no proof that she was persecuted by the Peruvian authorities and moreover the actions by the soldiers could not be considered as persecution but criminal activities by the authorities. The Aliens Appeals Board also rejected the application filed by the applicant. They stated that the risk of persecution from non-governmental entities can be considered as a ground to grant refugee status in exceptional cases but could not in this case because an internal flight alternative existed in this case. Internal flight or relocation alternative is a concept that is considered in refugee status determination

⁵²⁹CAT/C/20/D/083/1997

which have been located in the well founded fear of being persecuted and others in the unwilling or unable to avail himself of the protection of that country clause.⁵³⁰ The applicant after this filed another two applicants claiming for refugee status on humanitarian grounds but both were rejected by the Aliens Appeals Board.

The applicant contended that that if she will be returned back to Peru there exists considerable hazard for her to be subjected to torment by the experts for which interior flight does not count as a safe solution.⁵³¹

The state party with respect to determination of Refugee status explained their process in detail. According to Sweden, determination of Refugee Status can be done in two ways, either by the Swedish Board of Immigration or by the Aliens Appeals Board. In cases where either of the board cannot follow up with the process they forward the same directly to the government for their decision. So in cases where both the board do not refer the application to the state, they themselves cannot consider such applications directly. In such circumstances, the board prohibits any kind of meddling by the government, the parliament or any other public authority. Hence, the state contended that both the boards have the independence like that of a court of law and they do not have power to interfere in their decisions.⁵³² Moreover they also contended that to acquire residence permit in Sweden it is important for the alien to establish that he or she experiences a fear of being subjected to capital punishment or to torture or other inhuman or degrading treatment or punishment.⁵³³ They also claimed that if an alien is refused entry then he or she can reapply for a residence permit if the application is based on circumstances which have not been previously examined in the case and if either the alien is entitled to asylum in Sweden or if it will otherwise be in conflict with humanitarian requirements to enforce the decision on refusal of entry or expulsion .⁵³⁴

⁵³⁰UNHCR, Guidelines on International Protection: “Internal Flight or Relocation Alternative” within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, (July 23, 2003), <http://www.unhcr.org/3f28d5cd4.pdf>

⁵³¹CAT/C/20/D/083/1997, UN Committee Against Torture (CAT), 15 May 1998, available at: <http://www.refworld.org/cases,CAT,3f588ee53.html>

⁵³²[1987]1 S.C.R. 500.

⁵³³Section 4 of the Aliens Act (Amendment)

⁵³⁴Section 5(b) of the Aliens Act’1997

The committee while deciding the case held that the claims made by the applicant in this case are not at all in dispute. The fact that she left Peru in 1985 proves that since then she has been politically inactive so there are no chances of her been subjected to torture by the Peruvian Authorities. They also expanded their decision on the point that the applicant has to establish substantial and proper grounds in order to prove that she would be in danger of being subjected to torture. The committee considered that “the issue where the state party has an obligation to refrain from expelling a person, who might risk pain or suffering inflicted by a non-governmental entity without the consent or acquiescence of the Government, falls outside the scope of Article 3 of the Convention against Torture”.⁵³⁵

The committee after taking into considerations the medical evidence and the serious condition of the applicant held that she suffered severely from the incident which occurred during her visit to Peru. Moreover, the fact that such condition was the consequence of her deportation will not be a sufficient ground to prove the cruel, inhuman or degrading treatment established by the Article 16 of the convention against torture convention, which is attributable to the state party. Hence, the committee held that there has been no violations by the state party with respect to the contentions established by the applicant. In the case of *József Németh and Józsefné Németh v. Barreau du Québec, Québec Immigration Lawyers Association and Canadian Council for Refugees (Németh v. Canada (Justice))*⁵³⁶, Némeths, a couple of Roma ethnic origin arrived in Canada in 2001. After coming to Canada they applied for refugee status for themselves and their children, alleging that acts of violence, which has been committed against them in their country of origin, Hungary. In the year 2002, the Némeths and their children were granted refugee status after which they later became permanent residents. Few years later, Hungary issued an international arrest warrant in respect of a charge of fraud that had been laid against the Némeths and requested Canada to extradite them. The Minister of Justice eventually ordered the Court of Appeal to upheld their surrender in charge for extradition and the decision on review. The issues which were in question in this case were that: Whether the Minister has the legal authority to surrender for extradition a

⁵³⁵*Supra note 531.*

⁵³⁶2010 SCC 56, [2010] 3 S.C.R. 281

refugee whose refugee status has not ceased or been revoked? And if so, did the Minister exercise that authority reasonably in this case?

In this case, the Minister's approach to the exercise of his powers failed to give sufficient weight or scope to Canada's non-refoulement obligations in light of which those powers must be interpreted and applied. The Minister's consideration of the Némeths' case was fundamentally flawed. He focused exclusively on s. 44(1)(a) of the EA in requiring the Némeths to establish, on the balance of probabilities, that they would face persecution on their return to Hungary and that the persecution they face would shock the conscience or be fundamentally unacceptable to Canadian society. He imposed too high a threshold for determining whether the Némeths would face persecution on their return and placed the burden of proof on this issue on the Némeths notwithstanding the earlier finding that they were refugees. Further, the Minister failed to address s. 44(1)(b) which is the most relevant provision of the EA in relation to their surrender. The Minister applied incorrect legal principles and acted unreasonably in reaching his conclusions. Therefore, in this case the appeal was allowed and the matter was remitted to the Minister of Justice for reconsideration ⁵³⁷

In another landmark judgment, *Ahmed v. Austria*⁵³⁸, Mr. Ahmed⁵³⁹ was a Somali citizen living in Graz. In the year 1990, he left Somalia and reached Vienna Airport where he requested for refugee status. Few days later the lower Austria Public Security Authority interviewed him. During his interview he stated that his uncle had been an active member of the United Somali Congress⁵⁴⁰. He further stated that his father and brother were also executed only for the reason that his uncle had been a part of the USC. Hence, because of the close link of his family they have always been in the line of suspects because of which even the car of the applicant was confiscated and he was physically assaulted for the same. He therefore, because of the fear of being arrested and executed left Somalia.

⁵³⁷Supreme court judgments, *Nemeth v. Canada*, (Nov. 25, 2011), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7899/index.do>

⁵³⁸[1996] ECHR 63

⁵³⁹Hereby referred as "the applicant"

⁵⁴⁰Hereby referred as "the USC"

The Syria Public Security Authority, at first rejected his refugee application but on appeal the authorities reversed their decision and granted him refugee status within the meaning of the Geneva Convention. They analyzed the situation in Somalia and came to the conclusion that the applicant cannot be returned to his homeland because of the activities of the opposition group and the general situation prevailing in the country. Such situation increases his chances of facing persecution in the country.

Later in the year 1994, on the charges of hitting a passerby in the face along with the offence of trying to commit robbery by making an attempt to steal his pocket, the Federal Refugee Office in Graz ordered the forfeiture of Refugee Status of the applicant. In the light of these charges the applicant was put behind bars for two and a half years on accounts of attempted robbery. Even the appeal made by the applicant was dismissed on the grounds that in accordance with Section 5(1)(3) of the Right to Asylum Act, the refugee status stands to lose on the grounds of him committing a particular serious crime, which in this case holds evidential relevance.

While he was serving his sentence period, the Graz Federal Police Authority lodged an exclusion order against the applicant holding that the applicant committed a very serious crime. Therefore, there can be chances of him committing such crimes again. Such kind of activities can affect the public peace and security of the security so it was necessary for the state to pass such expulsion order.

The applicant in his defence brought the attention of the authorities to the current situation prevailing in Somalia because of which he had to apply for refugee status on the very first stage. He pointed out that the situation in Somalia has become even worse than what it was before. The group also known as the Hawiye clan, of which he was a member, has been targeted by the party in power in the country because of their relationship. Therefore, if he will be returned to the country in such situation his life would be at major risk.

The authorities looked at it with two different perspectives. One perspective was if they will stop this expulsion then the peace of the society at large would get affected but if they will carry on their decision then the society as a whole will be benefitted. In this case, the authorities kept the interest of the society as a priority over personal interest

of the applicant constituting him as a danger to the community. They also contended that there are no proper reasons to consider that upon the applicants transfer to Somalia he might suffer treatment, which is prohibited under the Aliens Act.

When the case went to the court, they came up with their own set of interpretations based upon the facts of the case. As provided in Article 3 of the Convention the court was of the view that since the agencies granted refugee status to the applicant, it makes it clear that they were very well aware of the fear of persecution the applicant will face in his home country in the very first place. Moreover, the only reason why the applicant lost his refugee status was because of criminal conviction, which as a reason was not justified to put his life at risk by getting him extradited. Therefore, the court opined that that the order of extradition of the applicant to Somalia will be in contradiction to Article 3 of the Convention. It is the obligation of the state not to deport him till the time the applicant has a real danger to his life or has an existing fear of persecution. The court also insisted the authorities to take the liability of the losses the applicant had to face during the time period in which he was forced to be in prison, so it becomes their responsibility to cover all the pecuniary damages the applicant had to bear during that time period as well.⁵⁴¹

In *D v. The United Kingdom*⁵⁴², the applicant was born in St. Kitts and has lived there for most of his life. The applicant in the year 1989 visited his family living in United States. During the period of his stay there he was arrested in the year 1991 on the charges for possessing cocaine and was put behind bars for a period of three years. In the term of his 1-year imprisonment, he was thoroughly observed and was therefore paroled for his good behavior and was deported to St. Kitts in 1993.

After being deported, the applicant took leave to visit United Kingdom as a visitor. At the airport he was caught with cocaine valuing 120,000 pounds sterling (GBP). Therefore, the officer in charge of immigration refused to grant him permission to enter the United Kingdom on the pretext of public good and provided him notice with respect to his removal to St. Kitts as soon as possible. He was again arrested and prosecuted for possessing and being involved in importing drugs for which he was

⁵⁴¹*Supra* note 531.

⁵⁴²146/1996/767/964, Council of Europe: European Court of Human Rights, 2 May 1997

again sentenced to six years imprisonment.

In the year 1994, during the time the applicant was serving his prison sentence, it was noted that he suffered an attack of *pneumocystis carinii* pneumonia⁵⁴³ and was diagnosed as HIV⁵⁴⁴ positive and suffering from acquired immunodeficiency syndrome⁵⁴⁵. The court looking at the infection and chronic conditions of the applicant granted him a compassionate leave to be with his mother. Immediately after his release, the authorities gave orders for the applicant's exclusion to St. Kitts. On such directions passed by the immigration authorities the advocates of the applicant requested the Secretary of State to grant him leave from such removal on compassionate grounds since his removal to St. Kitts would put him in a peril. Such removal at this stage would hasten his death and expose him to a real risk of dying under most distressing circumstances and thus inhuman treatment with no medical treatment, no shelter, no family support in receiving country. They expanded their argument by stating that such circumstances would put humanitarian considerations at stake and the removal would thus end up violating Article 3 of the European Convention on Human Rights⁵⁴⁶ which states the "no one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Thus, the court held that during such conditions it becomes the responsibility of the authorities to make sure that person is not subjected to live in such inhumane conditions where his life is at risk. Therefore, the court granted him leave from such expulsion and ordered the respondent state to pay him a specific amount as compensation.

In the case of *Chitat Ng v. Canada*⁵⁴⁷, The petitioner, Charles Chitat was a British born in Hong Kong, and residing in the United States of America. He was detained in a prison in Alberta, Canada and was extradited to United States of America. The petitioner questioned the decision of his extradition on the contention of him being a sufferer of an abuse of his human rights by Canada. He was arrested, charged and

⁵⁴³Hereby referred as "PCP"

⁵⁴⁴Also known as Human immunodeficiency virus

⁵⁴⁵Hereby referred as "AIDS"

⁵⁴⁶The aim of convention is to maintain and realise Human Rights and Fundamental Freedoms.

⁵⁴⁷Communication No. 469/1991, U.N Doc. CCPR/C/49/D/469/1991 (1994)

convicted for making an attempt to commit theft in a store and shooting a security guard including kidnapping and 12 murders for which the United States wanted to stand trial in California.

According to the contention laid down by the petitioner, Canada and the United States has entered or signed an extradition treaty. According to Article 6 of the Extradition Treaty:

When the offence for which extradition is requested is punishable by death under the laws of the requesting state and the laws of the requested state do not permit such punishment for that offence, extradition may be refused unless the requesting state provides such assurances as the requested state considers sufficient that the death penalty shall not be imposed or, if imposed, shall not be executed.

The applicant moved the Federal Court for a review of the Minister's decision to prove his contentions. The supreme court of Canada to which held that "the petitioner's extradition without assurances as to the imposition of the death penalty did not contravene Canada's constitutional protection for human rights nor the standards of the international community." Thus, the petitioner was extradited the day when the decision was passed.

The petitioner appealed against the decision of his extradition stating that such action violated Articles 6,7,9,10,14 and 26 of the Covenant. He further added that the execution of the death sentence by gas asphyxiation, as provided for under California statutes, constitutes cruel and inhuman treatment or punishment per se, and that the conditions on death row are cruel, inhuman and degrading. He further contended that the judicial procedures in the California, in as much as they related specifically to capital punishment, do not meet basic requirements of justice. He alleged that in the United States racial bias influences the imposition of the death penalty.⁵⁴⁸ The state in its response to claim made by the petitioner against the accusation for which he was held responsible stated that the petitioner has no right to establish himself as a victim in this case since he made allegations based on some uncertain future events whose

⁵⁴⁸U.N Doc. CCPR/C/49/D/469/1991 (1994)

possibility to occur are not predictable and that they are completely reliant upon the law of the United States' authorities. They also established that the petitioner along with this has also failed to validate his allegations with respect to any of the possibility of his ill-treatment in the United States which might infringe his human rights under the international law.⁵⁴⁹

In response to laid down by the State, the petitioner stated that they are not challenging his right of not to be extradited but only claims that they he should not be handed over to the United states' authorities without getting the assurance that the punishment of death penalty will not be imposed on him.

The committee after looking at the contentions established down by both the parties, decided to consider each one of them individually. They first considered the contention, which the state party came up with regarding the claim by the petitioner is inadmissible. In cases where an individual is legally extradited, in such cases the state party cannot be expected to be held liable for the violation of the rights of the person which takes place in another country over which the state party cannot expand its jurisdiction or be expected to do so. The committee with this respect expanded its view that if a country can foresee the possibility of such violations to occur even before passing the order of extradition or expulsion, then such decision would definitely lead to the violation of the International Covenant by the state party itself. The foresee ability however, means that although there was a violation of rights by the state at current but no such situations would occur in the future.

The committee with its furtherance to the above-mentioned issue decided to take into consideration whether the state party is in violation of the covenant by virtue of its decision to extradite the author under the Extradition Treaty of 1976 entered into between the United States and Canada along with the Extradition Act of 1985 .

The committee laid down that in order to consider whether the Extradition order passed by the state party is valid consideration should be on the merits of the circumstances because of which the order for passed, the extradition procedure, and

⁵⁴⁹International Covenant on Civil and Political Rights (ICCPR)

all its effects. With respect to the question raised by the committee on the extradition process followed by Canada, the state party elaborated by stating that “the Extradition Act and the terms of the applicable treaty with the respective state governing Extradition process is followed by Canada.” “The Canadian Charter of Rights and Freedoms, which forms part of the constitution of Canada and embodies many of the rights protected by the Covenant, applies.” Under Canadian law, extradition is a two-step process, the first involves a hearing in which a judge considers whether in matters of extradition a factual and legal basis exists or not. The second step in the extradition process begins following the exhaustion of the appeals in the judicial phase . Therefore, the decision in such case depends on factors such as, “Canada’s obligations under the applicable extradition treaty, the character of the crime for which expulsion is sought.” Along with these processes, it is also the duty of the Minister to consider the terms of the Canadian Charter of Rights and Freedoms and the various instruments, including the Covenant, which outline Canada’s international human rights obligations.⁵⁵⁰

After looking at the state’s explanation with respect to the process of extradition followed in the country, the commission diverted their attention on the final contention laid down by the petitioner. The contention of him questioning the implementation of the punishment the death penalty imposed on him after such extradition. The state party stated that “the Government of Canada does not use extradition as a vehicle for imposing its concepts of Criminal Law policy on other states. Moreover in the absence of exceptional circumstances, Canada would be dictating to the requesting state, in this case which is United States regarding how it should punish its criminal law offenders.” The Canadian Government recognized such governance as an intrusion with the internal matters of another state.

Looking at the explanations made from the side of both the parties the Human Rights Committee opined that the process of extradition is valid but it becomes the responsibility of the state passing such order to make sure that the rights of the person does not get affected. Especially in the cases where such degrading treatment is easily predictable the states have to be even more careful. Therefore the Committee in their

⁵⁵⁰Communication No. 469/1991, U.N Doc. CCPR/C/49/D/469/1991 (1994)

decision asked the state party to make such representations because of which “it can be possible to avoid the imposition of death penalty and appeals to them to ensure that a similar situation should not arise in future”.

In the case of *Suresh v. Canada (Manickavagsagam Suresh v. The Minister of Citizenship and Immigration)*⁵⁵¹, Suresh was a Tamil from Sri Lanka, who came to Canada and was found to be a Convention refugee. The Canadian Security Intelligence Service claimed that he was a member and fundraiser of the Liberation Tigers of Tamil Eelam because of which the government of Canada apprehended him and initiated deportation proceedings against the applicants on the grounds of security. The organization, of which he was being considered a member, was an organization engaged in terrorist activity and the members of this organization are subjected to torture in Sri Lanka.⁵⁵² The Federal Court after the proceedings, in accordance with Section 40.1 of the Immigration Act held that Suresh should be deported. Following which the Minister of Citizenship and Immigration issued an official opinion declaring him to be a danger to the security of Canada under Section 53(1) (b) of the Act. The appellant after which applied for judicial review challenging the decision of the Minister. He contended that the decision taken by the minister was unreasonable and also that the procedures laid down under the Aliens Act were unfair. He expanded his contentions by stating that the Act infringed Sections 7, 2(b) and 2(d) of the Canadian Charter of Rights and Freedoms.

The court held that the appellant has the right to a new deportation hearing. The court examined the Immigration Act and the Canadian Charter of Rights and Freedoms⁵⁵³ and was of the view that “deportation to face torture is generally unconstitutional and that some of the procedures followed by the authorities in this case did not meet the constitutional requirements at all”.

The issue brought in question by the court whether deportation on the basis of mere membership in an alleged terrorist organization unjustifiably infringes the rights provided in the charter of free expression and free association and whether the

⁵⁵¹1999 CanLII 8314 (F.C); 65 C.R.R (2d) 344; 173 F.T.R 1

⁵⁵²[2002] 1 SCR 3, 2002 SCC 1

⁵⁵³Hereby referred to as “Charter”

deportation scheme of Canada contains adequate procedural safeguards to ensure that refugees are not expelled to a risk of torture or death.⁵⁵⁴

The court regarded that in order to manifest evil of terrorism the government of Canada should not end up taking certain steps that would compromise values that are essential to the Canada's democratic society which are liberty and the principles of natural justice. The court held that deporting a refugee to a situation where there are substantial chances of risk of torture would end up violating Section 7 of the Charter. It is the responsibility of the Minister of Citizenship and Immigration to exercise his discretion to expel a refugee under the Immigration Act accordingly. The court also held the arguments made by the state regarding appellant being a threat to the security of Canada constitutionally vague. With respect to Immigration Act, the court was of the view that the Sections 19 and 53(1) (b) of the act stands in violation with the right of expression and free association guaranteed in the Charter. Hence, the court accepted the appellants appeal that on returning him to Sri Lanka, he will have to face risk of torture therefore they allowed him to stay in Canada.

The case of *Chahal v. The United Kingdom*⁵⁵⁵ involves four applicants. These all are Sikhs and are the members of the same family. Mr. Karamjit Singh Chahal⁵⁵⁶, an Indian Citizen entered United Kingdom illegally in the year 1971 searching for employment. After few years he made an application to the Home Office to grant him a stay, which was granted to him under the terms and conditions for an illegal entrant to reside in United Kingdom and hence has been detained for the purposes of deportation.⁵⁵⁷ Darshan Kaur Chahal⁵⁵⁸, an Indian citizen, came to England after getting married to the first applicant along with their two children who were given birth in the United Kingdom and hence possessed British nationality. Both the applicants thus applied for British citizen out of which the first applicants request was rejected and the second applicant request is yet to be determined.

⁵⁵⁴*Supra note 552.*

⁵⁵⁵[1996] ECHR 54

⁵⁵⁶Hereby referred as the "first applicant"

⁵⁵⁷*Supra note 555.*

⁵⁵⁸Hereby referred as the "second applicant"

The applicants visited Punjab to meet their relatives. During their stay they visited Golden Temple numerous occasions. During his stay the first applicant was baptized after which he began to follow Sikhism, the result of which was that he started taking active participation in sorting out detached resistance in support of self-governance for Punjab.⁵⁵⁹ Later on the police authorities of Punjab arrested him because of his practices. He was then kept in detention. After his detention period got over he came back to United Kingdom after which he never visited India again.

After coming back to the United Kingdom, the first applicant became representative of the Sikh community and helped organizing demonstrations in London to demonstrate against the actions taken by the Indian Government, and started serving as a member of the committee of the Gurudwara in Belvedere.⁵⁶⁰ He therefore played an important part in the foundation and organization of the International Sikh Youth Federation.

In the year 1985, the first applicant was arrested for being a part of the plot to kill the then Prime Minister of India, Mr. Rajiv Gandhi. He was accused of the charges under the Prevention of Terrorism Act 1984. The authorities did not enough evidence to prove their contention because of which he was released.

Also in the year 1986, he was again arrested and questioned for being involved in an ISYF conspiracy to murder temperate Sikhs in the United Kingdom.⁵⁶¹ Therefore, a deportation order was issued against the first applicant because of his political activities and criminal investigations taken against him, and was detained until the European Court of Human Rights set out its ruling.

The Home Secretary contended that it was important for the state to carry out the extradition proceedings for the betterment of the internal security of the United Kingdom. Moreover, the crimes committed by the applicant were political nature and hence, the case gave a view of international fight against terrorism.

⁵⁵⁹Aliens Act'1997, Sec. 5(b).

⁵⁶⁰*Ibid.*

⁵⁶¹*Ibid.*

The first applicant in his defence claimed that he has a well founded fear of persecution upon being returned to India.⁵⁶² He applied for political asylum on the grounds that he will be subjected to torture and persecution because of the legal situations he was being involved in. These included his detention in Punjab prison, political activities in United Kingdom, evidence regarding his parents and relatives being tortured in India before, interest shown by the Indian national press in his Sikh militancy and reports of Amnesty international of the torture and murder of those perceived to be Sikh militants by the Indian authorities, particularly the Punjab police.⁵⁶³

The authorities stated that the incidents which happened with applicant during his visit to India are not relevant because those incidents were partly because of the tension at that time in Punjab and has no connection with this issue. They also stated the grounds on the basis of which they intend to deport the applicant which includes him being the central figure in directing the support for terrorism, playing major role in group's agenda of threats focused towards others, being involved in providing monetary benefits and supplying arms to terrorists in Punjab, having a history of violent involvement in Sikh terrorism and for having being planning and moderating terrorist attacks in India, UK and other countries respectively.

With respect to Article 3 of ECHR the court looked at various factors involved. First, they focused on the point of time for the assessment of the risk. The court focused on the point that it is important to consider the risk the applicant will be subjected to in case of deportation and if such real risk of ill-treatment and torture actually exists. To consider this point, the court went on to do the assessment of the risk of ill-treatment. It was established by several reports that security forces in India violated the human rights and that such violations happened at a disquieting rate. Amnesty international in its written submissions informed the court that "prominent Sikh separatists still faced a serious risk of disappearance, detention without charge or trial, torture and extrajudicial execution, mostly at the hands of the Punjab police."⁵⁶⁴ The court stated that even though there has been improvement in the political conditions prevalent in

⁵⁶²1951 Refugee Convention

⁵⁶³*Supra note 555*

⁵⁶⁴*Ibid.*

Punjab there has been no recent material to consider as an evidence for the same. The Court was of the opinion that applicant, if returned to India, would be most at risk from the Punjab security forces acting either within or outside State boundaries, because the problems with respect to human rights issue still persist in the state. The court strongly considered the United Nations' Special Rapporteur on torture which has described the practice of torture upon those in police custody as "endemic" and has complained that inadequate measures are taken to bring those responsible to justice. The National Human rights commission has also drawn attention to the problems of widespread, often fatal, mistreatment of prisoners and has called for a systematic reform of the police throughout India.⁵⁶⁵

Therefore, the court held that in case if the applicant will be expelled back to India, it will violate Article 3 of ECHR. The applicant also claimed for damages under Para 4 of Article 5 of the Convention. It enumerates that "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful"⁵⁶⁶. He contended the fact that since he was accused to be threat to the national security, the domestic courts from considering whether his detention has been lawful and appropriate. The commission further considered that contention under Article 12 of the Convention. It includes "Everyone whose rights and freedoms are set forth in this convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".⁵⁶⁷ Therefore the ECHR found violation of Article 3, Article 5 para 4 and Article 13. They stated that Article 3 provides absolute guarantees with respect to no exclusion, so UK relying on national security as a reason to expel the applicant cannot be consider as a valid reason as there is a real risk of ill-treatment exists if he will be deported to India.

⁵⁶⁵Ibid.

⁵⁶⁶Article 5 para 4 of European Convention on Human Rights

⁵⁶⁷Article 13 of the European Convention on Human Rights

IV.5. CASES BETWEEN 2003 AND 2013

In the case of *Abid Naseer v. United States of America*, the petitioner, a citizen of Pakistan of 24 years of age was residing in the United Kingdom on student visa and studied in Manchester and Liverpool. He was arrested in the month of July by the police officers on suspicion of playing a major role in a plan to attack indeterminate targets in Manchester. On the other hand, the United States of America came forward with its contention to put Naseer on examination for his involvement in plotting to place bombs in the United Kingdom, New York and Norway as well.⁵⁶⁸

The case was then brought before the Westminster Magistrates court where the decision lied in their hands with respect to the petitioner's extradition. They had to consider whether his case proceeding should continue in the United Kingdom or he should be extradited to United States of America on their request for terrorist offences that took place in their country along with the other two countries as well.

According to the United States of America authorities the petitioner, i.e. Abid Naseer was alleged to be guilty for three charges which included⁵⁶⁹:

Firstly, for providing material support or resources to a designated foreign terrorist organization, specifically Al-Qaeda, in violation of 18 United States Code sections 2339B that is punishable by a maximum penalty of 15 years of imprisonment.

Secondly, for conducting conspiracy to provide material support to a foreign terrorist organization, specifically Al-Qaeda, in violation of 18 United States Code section 2339B, that is punishable by a maximum penalty of 15 years of imprisonment.

Thirdly, for conspiracy to use a destructive device during and in relation to one or more crimes of violence, specifically for providing and conspiring to provide material support to a designated foreign terrorist organisation, in

⁵⁶⁸ 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).

⁵⁶⁹ The United States of America put forward that the petitioner, Abid Naseer was working under the assistance of Al-Qaeda and was the source of UK contact in the whole broad international network. They also stated that Abid Naseer was planning bomb attacks in the United Kingdom under the their direction and control of the terrorist group.

violation of 18 United States Code, Section 924 i.e punishable by a maximum penalty of life.

Furthermore, the evidence showcased by the United States of America highlighted that “there were communications, e-mails about weddings, marriage, girlfriends, and computers and weather which were used as codes that referred to attacks, bomb ingredients, travel documents and target sites.”

They further contended that before preparing to conduct a terrorist attack in Manchester, England Naseer received proper training from Al-Qaeda in Pakistan where he was taught the ways to purchase ingredients and components for explosives, conducted reconnaissance at several possible target locations, transported reconnaissance photographs back and forth to Pakistan and thus, maintained frequent e-mail contact with Al-Qaeda during the entire period.

The advocates representing the petitioner were against the whole process of extradition because they apprehended that if he was deported back to Pakistan, he could be tortured or killed by Pakistan’s secret services. The government of United States to which gave their assurance that they will not pass any such order for deporting Naseer back to Pakistan.

The court of Westminster Magistrates’ approved the application made by the US for extraditing the applicant which was later sent to the Home Secretary for approval according to Section 87 of the Extradition Act 2003. This case after the approval of the extradition request was fought in the United States Department of Justice under the cause title *United States of America v. Abid Naseer*.

In the case of *Gafarov v. Russia*⁵⁷⁰, the petitioner was born in the year 1973 and since then till the time of his arrest he lived in Khudzhand, Tajikistan. In the year 2005, several people in the city were arrested on suspicion of them being a part of a transnational Islamic Organization being called as Hizb-ut-Tahrir, which was banned in several countries like Russia, Germany and some Central Asian Republics. The

⁵⁷⁰Application No. 25404/09

petitioner was able to know that some people who were arrested along with him submitted that he was one of the members of the said organization. Later, the prosecutor's office of the Sogdiyskiy Region of Tajikistan initiated criminal proceedings against the petitioner on notion of membership of a radical organization.⁵⁷¹

He was alleged of being closely involved with the Islamic Organization by printing out leaflets and religious literature for them. Because of which he was arrested and put behind bars. The charges he was suspected for committing were:

- Having studied extremist literature secretly,
- For working with the organization as an IT specialist.
- For printing out their leaflets and other literature and for distributing it among people who are not members of the said organization secretly.

It was further noticed that while he was in custody, the petitioner escaped the prison and was accused of hiding somewhere in the Tajikistan for few months after which he moved to Russia. In the year 2008, he was arrested in Moscow after which the Tajikistan Prosecutor office requested the Russian Prosecutor Office for the extradition of the petitioner to Tajikistan for the charges he was being accused of connected with his membership to the Islamic Organization.

The Russian Prosecutor Office decided that "Gafarov should be extradited to Tajikistan on the ground that he had not obtained Russian Citizenship and there were no particular criteria for which he should not be extradited to Tajikistan."

After dismissal of his complaint by the City Court he appealed to the Supreme Court stating that if he is sent back to Tajikistan, he will face a risk of being tortured in breach of Article 3 of the European Convention of Human Rights⁵⁷². He pleaded defence under Article 13 and Article 5 of the Convention⁵⁷³ stating that "he had no efficient remedies in respect of his allegations of possible ill-treatment in Tajikistan

⁵⁷¹*Ibid.*

⁵⁷²It prohibits torture and inhuman or degrading treatment or punishment.

⁵⁷³ European Convention of Human Rights

and also contended that his detention has been unlawful in such case.”

In year 2010, the European Court of Human Rights held that “the extradition of Gaforov by the Russian Authorities to Tajikistan would violate Russia’s obligation under the European Convention on Human Rights to respect the principle of non-refoulement in countries specifically where there is a real risk that the extradite would be subject to torture or inhuman or degrading treatment”⁵⁷⁴. Moreover, he was sought by the authorities on the basis of suspicion being a member of such organization which are being measured as terrorist organizations by the Russian and Tajik authorities.

The court held that “the respondent state is to pay the applicant, within three months from the date on which the judgment becomes final in accordance to the convention. The court also held that the suspect did not have at his disposal any procedure for a judicial review of the lawfulness of its detention pending extradition, and that at least part of this detention period was not in accordance with the law, in breach of Article 5 of the European Convention of Human Rights.”⁵⁷⁵

In the case of *Mamatkulov and Askurov v. Turkey*⁵⁷⁶, The applicants Mamatkulov and Askurov were residents of Uzbekistan and were members of an opposition party. The first applicant, Mr. Rustam Mamatkulov was arrested in Istanbul and after two days of which the second applicant, Mr. Zainiddin Askarov was also arrested in Turkey. After getting the information regarding their arrest by the authorities of Turkey the Republic of Uzbekistan requested his Extradition under a bilateral treaty with the country. It was contended by the state that both the applicants were suspected of Homicide, causing injuries to others by the explosion of a bomb in Uzbekistan and an attempted terrorist attack on the president of Uzbekistan. They further substantiated their claim by stating that such offences committed by the applicants are considered as “ordinary criminal” offences and accordingly the order to remand the applicants in custody to which an extradition request was made. Such claims were put forward in the extradition proceedings, which were conducted by the

⁵⁷⁴The aim of the Convention is to maintain and realize Human rights and Fundamental Freedoms.

⁵⁷⁵Judgment of the ECHR (Application no. 25404/09) - Strasbourg

⁵⁷⁶(46827/99) 14 B.H.R.C 149 (ECHR)

Turkish Public Prosecutor in the Turkish criminal courts.

The candidates to such claims made by the state fought that the offences for which they were being held at risk were political in nature and the individuals submitting such political offences in Uzbekistan were first captured by the specialists and were then subjected to torment in jail.

The applicants took the case to the European Court of Human Rights, who directed the Turkish government on the Rule 39 of the Rules of Court to conduct due court proceeding before subjecting them to such extradition. After a court meeting, the Turkish government issued an order for the extradition of both the applicants'. Even after passing of such order, at least for a period of 8 years the applicants were not sent to Uzbekistan, by which time the court had met and had decided to extend the interim measure until further notice. After their return to Uzbekistan, the Supreme Court there found the applicants guilty and sentenced them to 20 and 11 years imprisonment respectively, the former being the maximum sentence possible under the Uzbek Criminal Code.⁵⁷⁷

In the original applications filed by the applicants to the court they specifically relied on the European Convention on Human Rights⁵⁷⁸, specifically referring to certain Articles including Article 2 including their right to life, Article 3 including right of the applicants not to be subjected to torture or to inhuman or degrading treatment or punishment and Article 6 talking about their right to fair trial. Along with relying on the Articles of the ECHR, they also requested the court to take Rule 39 of the Rules of Court in consideration. The court reviewed the application filed by the Applicants and looking at its nature they decided to admit the same. The Chamber in its judgment, reversed the earlier decision passed by them and found Turkey in violation of Article 34 for failing to comply with Rule 39. The court further did not find any violation with respect to Article 3 or Article 6 of the Convention. The Turkish Government then requested, the case to be referred to the Grand Chamber for a review. The court decided the case by taking into account the individual capacity of Articles 2 and 3,

⁵⁷⁷Bryony Poynor, "Mamatkulov and Askurov v. Turkey: The Relevance of Articles 6 to Extradition Proceedings, Case Comment", *European Human Rights Law Review*, 2005

⁵⁷⁸ Hereby referred as "ECHR"

Article 6(1) and Article 34 of the Convention.

IV.5.i. Articles 2 and 3 of European Convention on Human Rights

The grand chamber decided to consider Articles 2 and 3 together rather than considering them individually. Under these Articles the counsels for the applicants claimed that after their extradition they were unable to contact them and moreover they also gave reference of reports by various international forums responsible for investigating human rights violations to claim that the prison conditions in Uzbek were unacceptable and the inmates were regularly subjected to ill-treatment. They further submitted that the applicants' full admission of accusations to the Uzbek authorities, identical to those they had refuted with evidence during the extradition proceedings in Turkey, demonstrated that they were tortured to accept their guilt for the crimes they had not committed.⁵⁷⁹

The Turkish government questioned the claims made by the counsel for the petitioners by stating that in order for the Extradition to amount to breach of Article 3, they must come with clear and certain grounds with proper evidence proving the fact that substantial grounds existed for believing that such treatment would occur.

The court under this point held that an assessment of liability should be made in light of the material placed before it and with reference to those facts, which were known, or ought to have been known, by the Turkey at the time of the Extradition. In this case to prove their point the State provided them with their medical certificates and the current situation prevailing in the country, which according to the court reliable enough to prove the point that the applicants were in good health. But the counsels reiterated it by putting forward a set of conditions making the court to think about its decision again. They stated that consideration should be given to the report submitted by the third party interveners, Human Rights Watch and AIRE Centre⁵⁸⁰ which stated that although there has been no direct torture inflicted on the applicants but their relatives has been subjected to such torture. They also contended that there has been certain situations where the prisoners of Uzbekistan prison, who were being subjected

⁵⁷⁹Communication No. 469/1991, U.N Doc. CCPR/C/49/D/469/1991 (1994).

⁵⁸⁰Advice on Individual Rights in Europe Centre

to punishment for committing offences political in nature has died as a result of ill-treatment. Such point does not reduce the probability of the applicants being subjected to such treatment in future. They also contended that the assurances given the government of Uzbekistan could not be relied upon because of the lack of Judicial Supervision of the security forces in Uzbekistan. Upon voting the majority of the judges agreed to the point that the evidence provided by the counsels was insufficient to conclude that the applicants were at the real risk of being subjected to torture or inhuman or degrading treatment or punishment and hence there was no proper ground to believe that Article 3 was violated.

IV.5.ii Article 6(1) of European Convention on Human Rights

The application challenged the violation of their right to fair trial on two grounds. Firstly, by challenging the Extradition proceedings that took place in Turkey contending it to be violating Article 6(1) because of the reason that they were not allowed to access all the matter in their case file or to argue in the court for the offences they were alleged with. Secondly, they contended that there could be no fair trial in the criminal proceedings in Uzbekistan, which violated Article 6(1) extraterritorially and also a claim was made that they might face a real risk of being sentenced to death and executed. They were not allowed to communicate to get into detailing of the case until their trial actually started along with no choice of representation. The court under this point considered there has been insufficient evidence to show that any possible irregularities in the trial were liable to constitute a flagrant denial of justice and hence, held that there has been no violation of Article 6 as contended by the applicants.

IV.5.iii. Article 34 of the European Court of Human Rights

The applicants submitted that because of the extradition order passed by the court it was impossible for them to make inquires and obtain evidence in order to support their allegations made by them subjecting to breach of Article 3 thus constituting a breach of the rights to individual petition under Article 34. The counsels of the applicants took the focus of the courts towards the International perspective which

included a look at UN Human Rights Committee, UN Committee against Torture, the Inter-American Court of Human Rights and International Court of Justice Jurisprudence. The representatives of the applicants stated that they were mostly unsuccessful in their attempts to contact the applicants and that there should be equality of arms for the duration of the proceedings to which the court established that a breach of Rule 39 could be seen as infuriating any ensuing violation of Article 3 and could hinder their rights under Article 34. The judges after considering all the arguments concurred that there was a violation of Article 34 but then they took the view that not all breaches of indications made pursuant to Rule 39 would result in such violation, and that for indications made by the court to become binding, legislation would be needed rather than judicial action.

In the case of *Saadi v Italy*⁵⁸¹, the applicant Nassim Saadi, a Tunisian national, was born in 1974 lived in Milan (Italy), and was married to an Italian national. The case focuses on the Extradition of the applicant to Tunisia, where the applicant claimed to have been sentenced in 2005, in his absence, to 20 years imprisonment for membership of terrorist organization acting abroad in peacetime and for incitement to terrorism. During the year 2001, the applicant was issued with an Italian residence permit for family reasons which were valid only till October 2002, when Mr. Saadi was arrested on the suspicion of terrorism and was put in a pre-trial imprisonment. The authorities alleged that he was involved as a conspirator to commit attacks not only on Italy but also on other States and also involved in acts of provocation to arouse terror and receive stolen goods. However, on May 2005, Milan Assize Court amended the offence of international terrorism to criminal conspiracy. They held him guilty of the said offences along with that of forgery and receiving, and sentenced him to four years and six months imprisonment. “After getting released on August 2006, the Minister of the Interior ordered him to be deported to Tunisia, applying the provisions of the law on urgent measures to combat international terrorism.” The observation made by the Minister included that “it was apparent from the documents in the file that the applicant has played an active role in an organization responsible for providing logistical and financial support to persons belonging to fundamentalist

⁵⁸¹“Application No. 37201/06, judgment of the Grand Chamber, 28 February 2008, available at <http://hudoc.echr.coe.int/eng?i=001-85276>”

Islamist cells in Italy and abroad.” Thus, Mr. Saadi requested for getting political asylum, which got rejected on September 2006, therefore, he lodged an application with the European Court of Human Rights under Rule 39, which talks about interim measures of the Rules of Court, the court thereby asked the Italian Government to put hold on the Applicant’s expulsion until further notice. On May 2007 the Italian embassy in Tunis asked “the Tunisian Government to provide a copy of the alleged judgment convicting the applicant in Tunisia, along with diplomatic assurances that, if the applicant were to be deported to Tunisia, he would not be subjected to treatment contrary to Article 3 of the European Convention on Human Rights, that he would have the right to have the proceedings reopened and that he would receive a fair trial.”

The applicant alleged that enforcement of his deportation to Tunisia would expose him to the risk of being subjected to torture or inhuman and degrading treatment contrary to Article 3 of the Convention, which discusses about prohibition of torture and inhuman or degrading treatment. Relying on Right to Fair Trial⁵⁸², the applicant further complained of a flagrant denial of justice he had allegedly suffered in Tunisia on account of being convicted in his absence and by a military court. Under Article 8, which gives right to respect for private and family life, he alleged that his deportation to Tunisia would deprive his partner and his son of his presence and support. Lastly, relying in Article 1 of Protocol No. 7, procedural safeguards relating to expulsion of aliens, he complained that his expulsion was neither necessary to protect public order nor grounded on reasons of national security

Italy and the United Kingdom claimed that the climate of international terrorism called into question the appropriateness of the ECHR’s existing jurisprudence on states’ non-refoulement obligation under Article 3 of the European Convention on Human Rights (European Convention). Article 3 had earlier been interpreted to prohibit return or extradition of individuals to states in which they faced a real risk of torture, inhuman or degrading treatment. Both states also claimed that diplomatic assurances from a receiving state were sufficient to satisfy a sending state’s Article 3 obligations. The ECHR unanimously reasserted its existing jurisprudence and noted that involvement in terrorism did not affect an individual’s absolute rights under

⁵⁸²Article 6 of the Convention

Article 3 Although the ECTHR accepted the right of contracting states to control the entry, residence and expulsion of aliens from the state and confirmed that there is no Convention regarding right to political asylum. It also reasserted its longstanding position that state action relating to expulsion is restrained by the absolute nature of Article 3 and hence it is an implied obligation to not send individuals to a state where they are at real risk of prohibited treatment. The absolute nature of the prohibition on torture, inhuman and degrading treatment or punishment enshrines one of the fundamental values of democratic societies and must therefore be maintained, even in times of emergency or war. In spite of the fact that States have to undergo immense difficulties in combating the contemporary international terrorist threat, one's suspected involvement in terrorist activity does not take away from the absolute nature of their rights under Article 3 as it is absolute, irrespective of the victim's conduct, the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3.

As a result of the absolute nature of Article 3, the Court rejected the UK's argument that the test to be applied when assessing whether expulsion would engage Article 3 ought to (a) allow for the community interest to be weighed against the individual's rights; and (b) be assessed on a more likely than not standard where the individual is considered to pose a threat to national security .

Regarding the first claim, the Court held that conduct of the individual being deported is irrelevant to Article 3 assessments. In this respect, Article 3 in fact provides a greater degree of protection than that afforded by Articles 32 and 33 of the 1951 United Nations Convention relating to the Status of Refugees . The Court also held that "the UK's proposal of balancing the risk to the individual and the dangerousness of the individual was misconceived."

The prospect that the applicant may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment that the person may be subject to on return. This contention led the Court to reject the UK's second claim that, where an individual is considered to pose a considerable danger to national security, Article 3 would only be breached if he were "more likely than not" to be subjected to prohibited treatment in the receiving state . This would place a higher

burden of proof on the applicant than that which is required under the ECTHR's established jurisprudence, which speaks of a real risk of prohibited treatment. Having reaffirmed the real risk standard of proof, the Court also reasserted its principles of assessing an Article 3 claim from previous jurisprudence. In this context, the Court held that "when assessing risk it would consider evidence lay before it by the applicant, who generally has the burden of proof in these circumstances, but may also consider evidence obtained by the Court. Using this evidence, the Court will examine the foreseeable consequences of the proposed expulsion bearing in mind the situation there and [the applicant's] personal circumstances." Thus, although an Article 3 assessment is necessarily speculative, it takes into account the circumstances of the case in the context of what the sending state knew or ought to have known at the time of the deportation and is carried out in a measured and cautious manner. Employing these principles in the present case the Court found that there were substantial grounds to believe that Saadi was at a real risk of being subjected to treatment prohibited by Article 3 upon return to Tunisia and, as a result, that his deportation would constitute a breach of Italy's obligations under Article 3 of the Convention.

As a final matter the Court briefly considered the claim that a state's Article 3 obligations could be satisfied by means of diplomatic assurances from the receiving state. While the Court implied that diplomatic assurances might be sufficient in some cases, it did not find the representations of the Tunisian government sufficient in this case. These representations merely outlined that Tunisian law would be applied to Saadi. However the Court held that the mere existence of domestic prohibitions on torture and ill-treatment was not sufficient to ensure the adequate protection of an individual's Article 3 rights if reliable sources report that prohibited treatment is either engaged in or tolerated by the receiving state. When assessing the sufficiency of any particular diplomatic assurances, the Court is obliged to consider whether the assurances provide a sufficient guarantee of protection from prohibited treatment in their practical application and taking the circumstances into account. As the assurance was insufficient to adequately protect the applicants' absolute Article 3 rights, and as there was a real risk of torture or ill treatment in the absence of adequate assurances,

deportation of the applicants would violate Article 3.⁵⁸³

In another case of *The Queen (On application of Adel Abdul Bary and Khalid Al Fawwaz) v. The Secretary of State for the Home Department*⁵⁸⁴, the court discussed about the fact that in order to establish that there are substantial ground to fear torture which would be faced by the claimant what the degree of proof required to be given by the authorities seeking such Extradition. In this case the United States of America accused two claimants viz .*Adel Abdul Bary and Khalid Al Fawaz* on the charges of murder of its citizens and diplomats along with other internationally protected persons living in the country for whose security they automatically become liable. The government related the known Osama Bin Laden, as a key figure involved with these set of synchronized bombings which took place in United States embassies in Nairobi and Dar Es Salaam for which are claimants are being held responsible.

After the investigation of the case took place, the government of United States of America filed an Extradition application of the two claimants along with a third person known as Eiderous. The proceedings of the case were governed by the Extradition Act 1989 and the magistrate in the same took the decision to send them to United States of America. Out of the three suspects, two of them being the claimants the court decided not to involve the third person because of his ill health, who eventually died in few years.

With respect to the extradition proceedings the United States of America through its Diplomatic Notes provided assurance to the Secretary of the State that, if the permission to extradite the claimants will be granted then the State takes the responsibility to make sure that:

- Death Penalty will not be granted or requested as a punishment,
- The claimants will be prosecuted in accordance with the rules of law. Due rights and protections will be provided to them before a federal court, and

⁵⁸³Fiona De Londras, “Saadi v Italy, European Court of Human Rights Reasserts Absolute Prohibition”, *American Society of International Law*, Vol. 12, Issue 9, (May 13, 2008) available at: <https://www.asil.org/insights/volume/12/issue/9/saadi-v-italy-european-court-human-rights-reasserts-absolute-prohibition>

⁵⁸⁴[2009] EWHC 2068

- The claimants will not in any case be treated as an enemy combatant neither they should be prosecuted before a military commission.

The entire point regarding which the case has been put on focus is with respect to Article 3 of the European Convention on Human Rights and Fundamental Freedom⁵⁸⁵. It focuses entirely on the rights of the people against whom Extradition application has been sought. It states that “No person shall be subjected to torture or to inhuman or degrading treatment or punishment”. This right is a basic right awarded to every human and it becomes the responsibility of the state to make sure such rights does not stands violative by any state agency or authority.

Along with the granting the sentence of Death Penalty the other point which was to be considered was the condition of the prison where the prisoners were supposed to be kept. It was taken into account that this also holds important criteria. It was stated that various prisoners suffered mental problems because of such conditions therefore this should be given equal priority as well.

It was brought to the notice of the court that out of the two claimants, Adel Abdul Bary, who was detained in Long Lartin prison at that time suffered from a recurrent depressive illness. Moreover, his report by one of the doctors pointed out he had “a history of low mood, disturbed sleep, disturbed appetite, anhedonia reduced energy, disturbed concentration, hopelessness and suicidal feelings which together reflected a severe depressive disorder”⁵⁸⁶. Further, it was also claimed that in such condition if the claimant will be extradited to the United States of America, his mental health will deteriorate which will in fact increase the probability of him trying to commit suicide.

The government of the United States sent a letter through the U.S. Department of Justice to the Home Office and tried to find an answer to the query posed by the representatives of the claimants had with respect to them being tortured in the United States prisons. The letter offered a guarantee under Eighth Amendment of U.S Constitution which restricts any kind of brutal as well as strange punishment. Moreover it also provided that the prison officials should provide the inmates with

⁵⁸⁵Hereby referred as “UCHR”

⁵⁸⁶Hereby referred as the “first applicant”.

humane condition inside the prisons as well as to provide them with adequate food, shelter, clothing, medical facilities and that reasonable measures should be taken to guarantee the minimum standards of safety to the inmates.

The court in this case established that when a claimant files an application on the basis that upon Extradition his rights will be violated in the place where he will be extradited, the burden of proof lies entirely on the claimants. They have to establish proper grounds with respect to their rights getting violated and that upon Extradition they will face torture. Therefore, the court held that the claimants failed to establish their fear of persecution in the United States of America. Moreover, they also stated that all the assurances provided by the government comes out to be reliable enough that the claimants will not face torture with respect to which complete confidence on the authorities is a must. Hence, the court allowed the Extradition request filed by the United States of America.

In the case of *Muminov v. Russia*⁵⁸⁷, Muminov⁵⁸⁸ was an Uzbek national who came to Russia and got himself registered as a temporary resident for a particular time period specifically from December 2005 to March 2006. After living in Russia for few years he filed for an application to renew his residence registration along with an application to apply for Russian Citizenship. The respective authorities concerned rejected both his applications. Moreover in the year 2005 the Uzbek authorities initiated criminal proceedings against the applicant by filing an arrest warrant claiming him to be a member of a transnational Islamic Organization.

On the basis of such charges the applicant was arrested in Russia following which Uzbek Prosecutor General's Office filed an application requesting Extradition of the applicant. Russian authorities further rejected the request because some of the charges on which the Uzbek authorities wanted to punish the applicant were not regarded as an offence under the Russian Law. During the time he was in custody of the Russian Authorities, he thoroughly made applications seeking for refugee status along with a temporary asylum requested which were subsequently refused by the government. Later he was also held responsible for unlawfully residing in Russia for which he was

⁵⁸⁷(2011) 52 E.H.R.R. 23

⁵⁸⁸Hereby referred as the "Applicant"

tried in the year 2006 and therefore was arrested for the same. Following which the authorities ordered for his administrative expulsion. It was further noticed that while the hearing for the same was going on the applicant was not granted any legal representation neither he was allowed to speak to put forward his contentions.

The applicant thus lodged an appeal where he contended relief for an interim measure under Rule 39 of the Rules of Court to prevent his removal to Uzbekistan. Even after filing such appeal the court granted his removal. After his removal to Uzbekistan the applicant was sentenced to five and a half years of custody. Throughout the whole process the counsels of the applicants tried approaching him or tried getting access of his location but it all failed.

The applicant thus on the basis of Article 3 and Article 13, claimed that his expulsion had put him at risk of ill-treatment and there has been no effort from the side of the court with respect to his pending appeal. Further, by relying on Article 3 and 5 the claimant also claimed that his detention to Uzbekistan has been unlawful and the detention of the applicant was not conducted with due diligence.

The court after looking at the contentions and claims made by the claimant came to the conclusion that the court before passing such order of expulsion should ensure that he should not be subjected to any torture or ill treatment in the country where he will be extradited. Although out of all the claims made by the claimant and his representatives the court only considered the complaint concerning risk of ill treatment in Uzbekistan and Russia, the inefficiency of domestic remedies, unlawfulness of deprivation of liberty and unavailability of judicial review of detention as admissible.⁵⁸⁹The Uzbekistan authorities with respect to their process of extradition held that the applicant has the freedom to leave country after serving his period of punishment. They also ensured the representatives that the state also takes the responsibility that the applicant will not be further extradited to any third party where his rights will be violated or will stand in question.

⁵⁸⁹[1996] ECHR 54.

The court in conclusion held that there had been a violation of Article 3 and Article 13 where the applicant expulsion to Uzbekistan has been unlawful and that the court failed to provide effective and accessible remedy to the applicant regarding the same.

IV.6. CASES BETWEEN 2013 AND 2016

In the case of *The Queen on the application of Philip Harkins v. the Secretary of State for the Home Department v. the Government of the United States of America*⁵⁹⁰, Mr. Harkins⁵⁹¹ who was born in Scotland and raised by his grandparents was taken to the USA at the age of 14 to live with his parents. On August 1999 Mr. Harkins was arrested in Florida on charges of suspicion of the murder and attempted robbery of Joshua Hayes⁵⁹². Upon getting investigated by the police with respect to the murder of the deceased he informed them that the night when the murder of deceased took place he was at home with his fiancée, Keisha Thompson, where his friend Mr. Terry Glover dropped him.

Going by the information provided by Mr. Harkins, Mr. Glover was arrested and further investigated. The Co-accused in his statement to the police authorities denied having any kind of information with respect to the murder but later on he went on to confess the fact that he and the claimant along with Mr. Randle were jointly reliable for the murder of the deceased.

The police authorities upon such confession went on to discuss the same with the claimant where he denied all the allegations put on him by Mr. Glover. Further, the authorities went on to question his fiancé, who accepted the fact that the day when the murder of the deceased took place the claimant was present with her in her house. After further investigation and looking at the statements of the people who were supposed to be present at the location where murder happened, the authorities came to the conclusion that there is no involvement of the claimant in this case and all the charges for which he was being held liable were being further dropped.

⁵⁹⁰[2014] EWHC 3609

⁵⁹¹Hereby known as the “Claimant”

⁵⁹²Hereby known as the “Deceased”

In the year 2000, a different prosecutor was arranged somehow for a meeting with Mr. Glover regarding the case. The meeting ended up with a written agreement between the prosecutor and him which stated that “he has accepted to allow the police to conduct an investigation with his co-operation.” It was taken into consideration that because of the nature and history of the case there occurred some problems because of which Mr. Glover was not able to consult the Attorneys properly. Moreover, this agreement also stated that in the time period of this investigation any information, any part of the conversation or material which will be provided by Mr. Glover to the prosecutors will, in any case not be used against him and will be used only against Mr. Harkins with respect to his cases. When questioned about such procedure being followed in this case which is completely unusual it was stated that such procedures happen only in the rarest of the rare cases and being the circumstances of this case totally unusual such procedures need to be followed.

As a result of the agreement which was signed between the prosecutor and Mr. Glover the State gave its consent to not charge him with murder but instead contended that he will be charged with the other particular offences like that of robbery and being a source of the first degree murder to which he duly agreed. As soon as the agreement was signed the claimant was further charged with murder of the deceased and attempted robbery. Moreover, during the entire case preceding the claimant was not provided with any information with respect to the entire case scenario along with which he was only given the information that the death penalty would be sought against him in this case. The counsels of the claimants raised objections against the late filing of the case because of which a pre-trial conference was scheduled. As a result of which the claimant was therefore released on an unconditional bail by the authorities. The case proceedings extended throughout the years 2000 and 2001 during which the claimant attended all the court proceedings which required him to be present in the court. After attending the proceedings continuously, looking at the delay which has been taking place in the case the claimant travelled to the United Kingdom to stay along with his grandparents. After few years the claimant again got involved in an accident in Scotland because of which he was charged with an offence of killing a person because of rash and negligent driving. However, the claimant was arrested in the hospital itself because of the provisional arrest warrant issued by the

Bow Street Magistrates' Court pursuant to the Extradition Act 1999⁵⁹³. While the proceedings of this case was going on the government of United States of America on the charges of murder and attempt to robbery filed an extradition application against the claimant. The claimant in his defence claimed that such application of extradition would hamper his interest because it was contended by the opposition party that he should be given death penalty to which the court gave its verification that the State of Florida had reserved the notice provided by them earlier with their intention to award the claimant with death penalty and instead they are trying to pursue life sentence. The claimant extended their argument by stating that the court cannot rely on the evidence provided by the united states government, bringing the agreement the prosecutor signed with Mr. Glover and hence, the credibility of such documents are always questionable.

The counsel of the claimants questioned the evidence provided by the state on various grounds. The first ground being that there has been insufficient evidence provided by the state claiming such extradition. Secondly, it was being claimed that the manner in which the state has obtained such evidence is improper. Signing an agreement with Mr. Glover and assuring him that he will not be charged for claims being made against him only to prove their point amounts to abuse of power. Thirdly, they claimed that the time gap between the case proceedings and also the time taken by the court to announce its decision or to request claimant's extradition will be unjust according to rules of law. Lastly, they questioned the undertaking given by the state with respect to death penalty to be not given to the claimant comes out to be inadequate and not reliable.

The Extradition Application against the claimant was made solely on the basis of the affidavit submitted by Mr. Glover on this case. The affidavit contained completely different picture of the case which was different from the original facts being stated.

The claimant thus submitted that the affidavit filed by Mr. Glover should not be the sole reason behind the application for his Extradition. Along with this point he also

⁵⁹³[2007] EWHC 639

stated that it was very clear by the circumstances that such statement was obtained because of the abuse of process by the side of the prosecution. This ground should have been sufficient for the Secretary of the State to not rely on such statements and pass such an order of Extradition. Therefore, the Secretary of State concluded that “this was not a case in which the claimant’s extradition is barred because the application of his return is not made in good faith in the interests of justice.”⁵⁹⁴

The claimant also questioned the guarantee provided by the state with respect to the punishment of death penalty. He expanded his contention by stating that the circumstances in which the Secretary of the State passed the decision of Extradition is irrational and also it infringes claimant’s rights under Articles 2⁵⁹⁵ and 3⁵⁹⁶ of the European Convention on Human Rights. Also Section 12(2) (b) of the Extradition Act 1989 provides in relevant part: “the Secretary of State may decide to make no order for the return of a person accused or convicted of an offence not punishable with death in Great Britain if that person could be or has been sentenced to death for that offence in the country by which the request for his return is made.”⁵⁹⁷

The claimant contends that the conviction on the charge of first degree murder amounts to the punishment of death penalty in the state of Florida. He supported his argument by stating that there has already been a case reported in Florida, where the prosecution did not even requested the court for the death penalty but they still went on to implement the same.

The court, after looking at the arguments by both the parties was of the view that there was no negligence on part of the Secretary of State while considering the diplomatic note by Mr. Glover and in holding it to be effective. Moreover the assurance given by the state that the death penalty would not be sought or imposed seems to be reliable. Therefore the court concluded that “the order for the return of the claimant to the United States of America is neither unjust nor oppressive, or nor does it constitute a breach of the claimant’s rights under the European Convention on Human Rights.” Hence, the order of extradition was passed.

⁵⁹⁴Refugee Convention, 1951, Art. 33

⁵⁹⁵Article 2 of the Convention talks about Right to Life.

⁵⁹⁶Article 3 of the Convention talks about Prohibition of Torture.

⁵⁹⁷*Supra note 593*

Therefore, after conducting a detailed analysis of the cases between 1973 and 2016, it can be formulated that, although there exists the *jus cogens* principle of non-refoulement, there is confusion amongst state parties whether to extradite an individual or not. Even the courts sometimes find it difficult to come to a conclusion as to determine the status of that individual. It can also be observed through these cases that the municipal laws in general and immigration or extradition laws of the countries in particular are given more weightage when it comes to the security of a country. The pretexts of national security and the nature of crime committed play an important role in determining the status of an individual.

The process of whether to extradite an individual or not to refoule him depends on case to case basis and is a rigorous assessment of the wanted person's eligibility for refugee protection, based on a careful examination of all relevant facts and due observance of procedural fairness compliance. As seen above, persons responsible for crimes may not qualify for refugee status, either because they do not meet the inclusion criteria of the refugee definition set out in Article 1A(2) of the 1951 Convention, or because their involvement in certain serious crimes or heinous acts gives rise to an exclusion clause of Article 1F of the 1951 Convention.

However where an extradition request concerns a refugee or an asylum-seeker, States must ensure compliance with their protection obligations under international refugee and human rights law. These obligations form part of the legal framework governing extradition and most importantly, in considering the extradition of a refugee or an asylum-seeker, States are bound to ensure full respect for the principle of non-refoulement under international refugee and human rights law. Extradition and asylum processes must be coordinated in such a way as to enable States to rely on extradition as an effective tool in preventing impunity and fighting transnational crime in a manner which is fully consistent with their international protection obligations.

CHAPTER V

PROTECTION OF REFUGEES AND THE DOCTRINE OF NON-REFOULEMENT IN INDIA

V.1. INTRODUCTION

A brief look at the refugee scenario in India will help appreciate in the proper perspective, the complexities of law enforcement in a variety of situations impinging upon the refugees. India has been home to refugees for centuries. From the time when almost the entire Zoroastrian community took refuge in India fleeing from the persecution they were then subjected to on religious grounds in Iran, India has, from time to time continued to receive a large number of refugees from different countries, not necessarily from the neighbouring countries alone. The most significant thing which deserves to be taken note of is that, there has not been a single occasion of any refugee originating from the Indian soil except the trans-boundary movement of the people during the partition of the country in 1947. On the other hand, it has invariably been a receiving country and in the process, enlarging its multi-cultural and multi-ethnic fabric. In keeping with its secular policies, India has been the home to refugees belonging to all religions and sects. It is relevant to point out that since its independence India has received refugees not only from some of its neighbouring countries but distant countries like Afghanistan, Iran, Iraq, Somalia, Sudan and Uganda.

India shares seven land borders and one sea border with countries in varied states of conflict and war. In comparison to the neighbouring countries, India has a tolerant secular democratic government which is conducive for being a natural destination for frighten and weary victims of persecution. The country has faced numerous influxes

over many millennia and also has the history of integrating some of them into its multi-ethnic society. Diversity, stability and relatively well established rule of law made India a safe resort for people fleeing persecution and instability in their country of origin.

Tolerance and goodwill made India a haven for refugees from very early times. In Indian tradition, a stranger who comes as guest is referred to as *Athithi* and the host is expected to treat him as God next only to mother, father and preceptor. For example Jews, fleeing from Roman persecution, found refuge in *Cranganore* in Kerala in 68 AD and from there they moved to different parts of the country. There was a flourishing Jewish community in Cochin, until they migrated to Israel after the Second World War. Parsis came to the West Coast of India from Persia with their sacred fire, fearing persecution from the Muslims. Even today, a miniscule community of Parsis, numbering around 100,000, is proud to be an integral part of the Indian nation and contributing to the educational, economic, industrial and cultural advancement of the country.⁵⁹⁸

The South Asian sub-continent has often witnessed situations where refugees from one or the other neighbouring countries have crossed over to India. Considering the sensitivities of national and regional politics in the sub-continent, the problem of refugee crossing over to India cannot be totally disassociated from the overall security issues relevant locally. At the end of 1999, India had well over 2, 51,400 refugees, who do not include those from countries like Afghanistan, Iran, Iraq, Somalia, Sudan and Uganda.

V.2. ACCORDING REFUGEE STATUS

Even though India has been the home for a large number and variety of refugees throughout the past, India has dealt with the issues of ‘refugees’ on a bilateral basis. India, has been observing a ‘refugee regime’ which generally conforms to the international instruments on the subject without, however, giving a formal shape to the practices adopted by it in the form of a separate statute. Refugees are no doubt

⁵⁹⁸Suryanarayan, V., “Need for National Refugee Law”, ISIL Year Book of International Humanitarian and Refugee law, 2001. Available at <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/15.htm>

‘foreigners’. Even though there may be a case to distinguish them from the rest of the ‘foreigners’, the current position in India is that they are dealt with under the existing Indian laws, both general and special, which are otherwise applicable to all foreigners. This is because there is no separate law to deal with ‘refugees’. UNHCR often plays a complementary role to the efforts of the Government, particularly in regard to verification about the individual’s background and the general circumstances prevailing in the country of origin. That agency also plays an important role in the resettlement of refugees etc.

It may be restated for purposes of clarity and understanding that a refugee⁵⁹⁹ is defined as one who is outside the country of nationality (or even country of habitual residence) due to one of the five grounds, namely, a well-founded fear of persecution on the basis of religion, race, nationality or membership of a political or social group. In some countries, a person who flees his home country because of armed conflicts or wars or other generalized violation of human rights and who may not be targeted on account of any of the five grounds specified above, is excluded from the purview of the above definition of ‘refugee’. In many countries a difference is sought to be made between persecution effected by State agents and the one affected by non-state agents as may be the case in places where ‘rebel’ ‘terrorist’ and such other groups are active. Under such circumstances it is only those who are affected by the action of the State agents who are held to fulfill the definition of ‘refugee’ and not the latter.

One of the principal elements to satisfy a claim to refugee status is that the claimant must be genuinely at risk. Various legal tests have developed which concern the standard of proof that is required to satisfy what constitutes being genuinely at risk or having a genuine well founded fear of persecution. Some of these tests have been articulated by courts in a number of countries⁶⁰⁰. In the case of *INS vs Cardoza Fouseca*⁶⁰¹ interpretation of the well founded fear standard would indicate that “so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is not enough that persecution

⁵⁹⁹See Article 1(A) (2) of the 1951 Convention on Refugees.

⁶⁰⁰Mary Crock, “Apart from US or to Part of US? Immigrant’s Rights, Public Opinion and the Rule of Law”, 49-76. *International Journal of Refugee Law*, Vol.10 (1998)

⁶⁰¹467 US Supreme Court Case, 407 (1987).

is a reasonable possibility...” The above standard was considered in *R vs. Secretary for the Home Department*⁶⁰², the case of *ex parte Sivakumaran*⁶⁰³. The judgement suggested that the *test* should consider whether there is an evidence of a real and substantial danger of persecution. The Canadian Federal Court of Appeal considered the above and disapproved the House of Lords formulation in *Joseph Adjei vs. Ministry of Employment & Immigration*⁶⁰⁴. They considered the reasonable chance standard.

Therefore, in sum, in considering the above tests what can be gathered is a rather liberal standard which requires that if,there is an objective evidence to show that there is a reasonable possibility or chance of relevant prosecution in the claimant’s state of origin, the claim should be adjudged well founded.

In the case of India, the decision as to whether to treat a person or a group of persons as refugees or not is taken on the merits and circumstances of the cases coming before it. The Government of India (GOI) may be often seen as following a policy of bilateralism in dealing with persons seeking to be refugees. For example, Afghan refugees of Indian origin and others, who entered India through Pakistan without any travel documents, were allowed entry through the Indo-Pakistan border till 1993. Most of the refugees had entered India through the Attari border near Amritsar in Punjab. Subsequent to 1993, the Government altered its policy of permitting Afghan refugees freely into India.

In the case of a large number of them (many of them were Afghan Sikhs and Afghan Hindus) who had to flee from Afghanistan under circumstances which fulfilled one or more of the grounds specified earlier for being treated as a ‘refugee’, the GOI did not officially treat them as refugees. However, the UNHCR with the consent of the GOI recognized them as refugees under its mandate and is rendering assistance to them. In such cases, even though the local Government is kept in the picture, the UNHCR becomes responsible to look after them as well as ‘administer’ them and also to ensure that such refugees do not in any way violate the code of conduct governing

⁶⁰²(1988), 1 All ER 193 (H.L)

⁶⁰³Sivakumaran, House of Lords Decision (1988) 1 ALL ER 193.

⁶⁰⁴Joseph Adjei, Canadian Federal Court of Appeal (1989), Imm. L.R. (2d) 169.

them.

In contrast, in 1989, when the Myanmar authorities started suppressing the pro-democracy movement in that country and about 3,000 nationals of that country sought refuge in India, the GOI declared that in accordance with well accepted international norms defining refugee status, no genuine refugee from Myanmar would be turned back and in fact, they were accepted as refugees by the GOI. Similar is the case of Sri Lankan Tamil refugees crossing the sea to enter the southern Indian State of Tamil Nadu. The Government of India followed a specific refugee policy regarding Sri Lankan refugees and permitted them entry despite the fact that the refugees did not have travel documents.

In cases where the Government of India recognizes the claim of refugee status of a particular group of refugees, there is minimal interference if any, caused to the refugees. This is the case even though there may be no official declaration of any policy of grant of refugee status to that group. However, there are instances where refugees recognized by the Government of India and issued with valid refugee identity documents by the government, are later prosecuted for illegal entry/over stay. The National Human Rights Commission had taken up successfully the cause of a number of Sri Lankan Tamil refugees who had been likewise prosecuted.

V.3. INDIA'S INTERNATIONAL COMMITMENTS

The Republic of India maintains a deeply ambiguous position with respect to the protection of refugees and asylum-seekers. India has not yet signed or ratified either the 1951 Geneva Convention Relating to the Status of Refugees (hereinafter 1951 Geneva Convention, 1951 Convention or Refugee Convention) or its 1967 Protocol.⁶⁰⁵ Moreover, and despite very significant numbers of displaced persons entering India since independence, no provision is made in the domestic law of India for refugees or asylum-seekers. The 1946 Foreigners Act defines a “foreigner” as

⁶⁰⁵See Protocol relating to the Status of Refugees, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSO&tabid=2&mtdsg_no=V5&chapter=5&lang=en#Participants (last visited Feb. 17, 2015) for a current list of signatories and parties to the 1967 Protocol Relating to the Status of Refugees

anyone who is “not a citizen of India”⁶⁰⁶ and makes sweeping provision for orders restricting their entry,⁶⁰⁷ exit,⁶⁰⁸ place of residence within India,⁶⁰⁹ and personal associations,⁶¹⁰ as well as ultimately, for their arrest and detention.⁶¹¹ The Citizenship Act 1955 (as amended) defines all foreigners who enter India without valid travel documents as “illegal migrants.”⁶¹²

Neither Act provides for the entry or non-refoulement of asylum-seekers or refugees. For the purposes of Indian law, asylum-seekers are merely one variety of foreigner and subject to the same sweeping powers regulating their entry and removal from the country. Moreover, and despite acceding to membership of the UNHCR Executive Committee (ExCom) in 1995, India has almost entirely restricted UNHCR operations in the country to their main office in New Delhi. Asylum-seekers who wish to apply for refugee status from UNHCR pursuant to its own mandate (“mandate refugee status”) or material assistance must travel to New Delhi in order to contact UNHCR directly. This, in turn, has acted as a powerful incentive for refugees to relocate to New Delhi and so contributed to the growing population of urban refugees in the capital.⁶¹³

It may appear, therefore, as if the entry and protection policies of India in respect to persons seeking international protection (both asylum-seekers and those seeking alternative forms of complementary or subsidiary protection) remain wholly

⁶⁰⁶Foreigners Act, No. 31 of 1946, Sec. 2(a), INDIA CODE (2014) [hereinafter Foreigners Act], available at <http://indiacode.nic.in>.

⁶⁰⁷Id. Sec. 3(1)(a); Foreigners Order, 1948, No. 9/9/46-Political (EW), Gazette of India, pt. I, sec. 1, at 198, Sec.3(1)(a) (Feb. 14, 1948) [hereinafter Foreigners Order].

⁶⁰⁸Foreigners Act, *supra note* 606, Sec. 3(2) (b); Foreigners Order, *supra note* 607, Sec. 5(1)(a).

⁶⁰⁹Foreigners Act, *supra note* 606, Sec. 3(2)(e)(i); Foreigners Order, *supra note* 607, Sec. 11; cf. Convention relating to the Status of Refugees, arts. 26, 31(2), July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

⁶¹⁰Foreigners Act, *supra note* 606, Sec. 3(1)(e)(ii).

⁶¹¹Foreigners Act, *supra note* 606, Sec. 3(1)(g).

⁶¹²The Citizenship (Amendment) Act, 2004, No. 6, Acts of Parliament, Sec. 2(1)(b), 2004 (India) [hereinafter Citizenship Act]; cf. Refugee Convention, *supra note* 599, Sec. 31(1)

⁶¹³U.N. High Comm’r for Refugees, Policy Dev. & Evaluation Serv., Destination Delhi: A Review of the Implementation of UNHCR’s Urban Refugee Policy in India’s Capital City, U.N. Doc. PDES/2013/09 (July 2013) (by MaryBethMorand& Jeff Crisp), available at <http://www.unhcr.org/51f66e7d9.pdf>; Women’s Refugee Comm’n, Bright Lights, Big City: Urban Refugees Struggle to Make a Living in New Delhi (2011), available at <https://womensrefugeecommission.org/component/zdocs/document/733-bright-lights-bigcity-urban-refugees-struggle-to-make-a-living-in-new-delhi>; Parveen Parmar, Emily Aaronson, Margeaux Fischer & Kelli N. O’Laughlin, Burmese Refugee Experience Accessing Health Care in New Delhi: A Qualitative Study, 33 Refugee Surv. Q. 1 (2014).

discretionary. However, notwithstanding India's continuing failure to accede to the principal international instruments for the protection of refugees (the 1951 Convention and its Protocol), it is now bound by a rich complex of international human rights norms that combine to significantly constrain its discretion with respect to the treatment of foreign nationals and, in particular, its obligations in respect of non-refoulement. These obligations begin with the widely accepted guarantees against refoulement found in the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC). Perhaps more surprisingly, these also include parallel guarantees against refoulement as found in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and in the Convention against Torture (CAT). India has not yet ratified the CAT, and so remains as only a signatory to this treaty. Reliance is placed on Article 18 of the Vienna Convention on the Law of Treaties (VCLT) to argue that, given the central importance of the guarantee against refoulement to the object and purpose of the CAT, the prohibition of refoulement found in Article 3 of the CAT now binds India, notwithstanding its continuing failure to finally ratify this treaty.

While these norms may appear superficially disparate, they have now converged sufficiently in international practice to permit the construction of a single "standard" rule with respect to non-refoulement as it applies to India. This is of particular significance for India as, in its capacity as a member of the UNHCR's Executive Committee (Ex Com) since 1995, it has now joined statements that find the guarantee of non-refoulement to be a non-derogable or *jus cogens* norm. To the extent that these norms can be construed to ground a single or general rule against refoulement in the way is also a non-derogable one in both international practice and the now publicly stated view of the Indian state. Insofar as this chapter provides a revised account of the extent of the non-refoulement obligations in the ICESCR and (with respect to signatory states) the CAT, it builds on the emerging body of literature addressing the complementary⁶¹⁴ or subsidiary⁶¹⁵ protection of refugees. However, it also seeks to

⁶¹⁴See, e.g., U.N. High Comm'r for Refugees, Policy Dev. & Evaluation Serv., *New Issues In Refugee Research*, Research Paper No. 238, *Filling the Protection Gap: Current Trends in Complementary Protection in Canada, Mexico and Australia* (May 2012) (by Nicole Dicker & Joanna Mansfield), available at <http://www.unhcr.org/4fc872719.pdf>; U.N. High Comm'r for Refugees, Dep't Of Int'l Prot., Prot. Policy & Legal Advice Section, *Legal And Protection Policy Research Series: Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")*, U.N. Doc.

engage with the practical detail of the admission and protection regime for persons seeking international protection in India, and the manner in which international standards can be incorporated and relied on at Indian law. As such, it aims to provide something like a comprehensive account of the role of international law in defining and controlling the protection of foreign nationals in India. In doing so, it seeks to go beyond a discussion of the legal standards per se, and afford a clear and accessible reference point for those advocates engaged in protection work on behalf of foreign nationals in India, either informally as part of the UN and non-governmental community, or in the context of litigation on behalf of such claimants at the international and the domestic Indian level.

V.4. THE REFUGEE POPULATION IN INDIA

The movements of refugees and displaced persons have seriously affected India and other South Asian countries. This region has witnessed a number of refugee movements both from within the region as well as outside the region. About 12.04% of the global refugee population continues to remain in this region.⁶¹⁶ The geographic location of India has made the place an approachable zone for the refugees. They enter and stay in India legally or illegally. India is the home of refugees belonging to all religion and sects. As well as from the neighbouring countries, India also has received refugees from distant countries like Afghanistan, Ethiopia, Iran, Iraq, Liberia, Somalia and Sudan. According to the World Refugee Survey 2009 conducted by the U.S. Committee for Refugees and Immigrants, there are some 411,000 refugees and asylum seekers in India, who forced to flee conflict or persecution in their country of origin.⁶¹⁷

PPLA/2005/02 (June 2005) (by Ruma Mandal), available at <http://www.unhcr.org/435df0aa2.html>; Jane Mcadam, "Complementary Protection In International Refugee Law", (2007).

⁶¹⁵Council Directive 2004/83, of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, art. 15, 2004 O.J. (L 304) 12, 19 (EC) [hereinafter Qualification Directive]; Directive 2011/95, of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast), Art. 15, 2011 O.J. (L 337) 9, 18 (EU) [hereinafter Qualification Directive Recast].

⁶¹⁶Veerabhadran Vijayakumar, "A Critical Analysis of Refugee Protection in South Asia", 8 *Refugee*, Vol.19, No.2, (January 2001)

⁶¹⁷USCRI, World Refugee Survey 2009, Available at <http://www.refugees.org>

Refugees in India can be classified as mandate or non-mandate refugees. Those refugees who are under the protection of the United Nations High Commissioner for Refugees (UNHCR) are known as mandate refugees. Non-mandate refugees are those who are under the direct protection of the Government of India. Most of the refugees are non-mandate refugees. Government of India prefers to discuss refugee issues at a bilateral level with the country of origin of the refugees.⁶¹⁸ The following paragraphs focus on the present refugee population in India with their country of origin.

V.4.i. Refugees during Partition of India

The story of refugees in independent India begins with the partition of the country in the year 1947.⁶¹⁹ When the British left India in 1947, they divided the country into two independent dominions, the India and the Pakistan. Because of this division, there was a natural flow of Muslims towards East and West Pakistan and the Hindus towards India.⁶²⁰ Nearly 8.5 million people migrated from India to Pakistan and 6.5 million from Pakistan to India.⁶²¹ An estimated 15 to 20 million people who were persecuted or had the fear of being persecuted left their properties, trade and business behind in an attempt to cross the newly established borders. These people, who were known as refugees, evacuees, migrants or displaced persons, according to different rules, regulations and statues in India and Pakistan got settled with the series of efforts taken by the respective governments. It is worth mentioning that the newly established Pakistan had two dominions, the east and the west, and it had become the reason for further flow of refugees at a latter point of time. The large scale of displacement of population from 1946 to 1971 came in three waves. The first wave was from 1946 to 1958, the second was from 1958 to 1963 and the third was from 1964 to 1971.⁶²²

⁶¹⁸Zutshi, R. Trakroo., ed., “Refugee and the Law”, 58, Human Rights Law Network, New Delhi.

⁶¹⁹B.S.Chimni, ed., “International Refugee Law a Reader”, 462, Sage Publication, New Delhi, 2000

⁶²⁰Vijayakumar, *supra note* 616 at p.8.

⁶²¹Zutshi, Ragini Trakroo., ed, *supra note* 618 at p.60.

⁶²²Asha Hans, “Refugee Women and Children: Need for Protection And Care”, in Samaddar, R., ed., “Refugees and the State Practices and Asylum and Care in India, 1947-2000”, 360, Sage Publication, 2003

V.4.ii. Bangladeshi Refugees

In the year 1971 East Pakistan, now Bangladesh seceded from Pakistan. Brutal repression was unleashed by Pakistan in present day Bangladesh during March 1971. As a result, there was massive exodus of nearly 10 million refugees from East Pakistan into Indian Territory. Most of the refugees were Bengali Hindus who were especially open to attack by the armed forces. Out of the 10 million, 7 million refugees were put up in camps while other 3 millions stayed with friends or relatives outside the camps.⁶²³ A total of 9,544,012 officially recorded refugees migrated from East Pakistan to India between April 1 and mid October 1971. This flow of refugees into India is unparalleled in modern history. These refugees were continued to stay in India until the year 1973 and many of them stayed back in India with their friends and relatives. Predominantly, from these 2 to 3 million refugees were living with the relatives and friends in the state of West Bengal, while some thousands remained in the neighbouring states of India including the state of Assam and Tripura. The number of people who stayed back without being identified by the authorities as foreigners is very high.

As a result of atrocities committed by the Pakistani military forces, refugees started pouring into the bordering Indian states including West Bengal, Tripura, Assam and Meghalaya towards the end of March 1971. East Pakistan had a population of 75 million in 1971. About 10 million of them came to India as refugees. In West Bengal, the influx of refugees was mostly in the border districts of Nadia, 24 Parganas, Murshidabad, Malda, West Dinajpur, Jalpaiguri and Cooch Behar. About 40 lakh refugees took shelter in West Bengal. In 1971 the total population of Tripura was 15.56 lakh. The number of refugees from East Pakistan was 13.42 lakh. Due to influx the population almost doubled in the towns of Agartala, Dharmanagar, Udaipur, Belonia and Kailasahar. The influx of refugees into Assam had been mostly in the districts of Cachar and Dhubri initially and then spread over into Karimganj, Silchar, Goalpara and other parts of Assam. In Meghalaya, the influx of refugees had taken place mainly in the districts of Shillong and Tura. As against the total population of

⁶²³B.S. Chimni, *supra note* 619 at p.496-97.

about 5 lakh, the total number of refugees in the State was about 5.6 lakh.⁶²⁴

The refugees returned home quickly after the liberation of Bangladesh. The process of repatriation of these refugees to the newly established Bangladesh was in fact very quick and encouraging for the host country. It was recorded by the United Nations High Commissioner for Refugees that a daily average of 210,000 persons were crossing the Bangladesh border in the process of repatriation during the months of January and February in the year 1972 from India. All these refugees were returning from India to their native places in East Bengal.

V.4.iii. Chakma Refugees

Chakma people belong to Tibet-Burmese language family. Most of them migrated from Myanmar to the Chittagong Hill Tract Region, now in Bangladesh. They have been fighting for developmental autonomy since the British period. The Chakma refugees, the tribal groups consisting of Chakmas, Murangs and Tripuras migrated to the territories of Assam, Tripura, Arunachal Pradesh, Mizoram and Meghalaya after the partition of India in the year 1947. The Kaptai Hydro Electric Project that inundated over 5,400 acres of agricultural land depriving 100,000 tribals from their home heightened this discontent during the year 1963. As result about 45,000 Chakmas left for India and settled in the north-eastern region. Due to Islamisation of newly established Bangladesh and also because of a scheme for settlement of Bengali Muslims in the Chittagong Hill Tract Region, a conflict arose between the Chakmas and these settlers. The incident again forced 18,000 Chakmas to flee to the Indian border and entered the state of Mizoram in the year 1979.

The refugees were initially sheltered in the government camps in Assam. They were later shifted to a camp within the State of Arunachal Pradesh which was then known as North-East Frontier Agency (NEFA). The refugees numbered 81,000 by the year 1981. After the liberation of the Bangladesh, about 50,000 refugees have been repatriated back to Chittagong Hill Tract by the year 1998.⁶²⁵

⁶²⁴K.C Saha, "The Genocide of 1971 and the Refugee Influx in the East", in Samaddar, R., Ed., *supra note* 6221 at p. 212-224.

⁶²⁵B.S. Chimni, *supra note* 619 at p.496-97.

V.4.iv. Tibetan Refugees

Following the Chinese incursion in 1951, China continued to perpetrate human rights violations in Tibet. The efforts of the Dalai Lama, the religious and political leader of Tibet, to find a peaceful solution to the ongoing violence proved futile and his personal security was threatened.⁶²⁶ In 1959, the Dalai Lama and his followers fled Tibet and came to India seeking asylum. The then Prime Minister of India, Mr. Jawaharlal Nehru granted asylum to them. These Tibetan refugees continue to stay in India even today. By 1993, there were 133,000 Tibetan refugees in South Asia out of which India alone host about 120,000 of them in 42 settlements spread over different provinces of India. Apart from the settlements, there are 88 scattered communities in different parts of India, including Himachal Pradesh, Ladakh, Arunachal Pradesh, Karnataka, Uttar Pradesh, Madhya Pradesh, Sikkim, West Bengal, Maharashtra and Orissa. At present, there are approximately 150,000 Tibetan Refugees living in India.

V.4.v. Sri Lankan Refugees

The British took a large section of people of Tamil origin from India to Sri Lanka and employed them in tea estate and other agricultural activities. They were living in Sri Lanka from generations. But with the introduction of the Citizenship Acts in Sri Lanka in the year 1948 and 1949, they were rendered stateless. India had been giving refuge to about 338,000 stateless persons from Sri Lanka during the year 1964 to 1987 as result of various agreements between the Government of India and Sri Lanka. Apart from this, there have been other major refugee flows from Sri Lanka into the State of Tamil Nadu, in southern India.

The Sri Lankan refugees arrived in Tamil Nadu in four waves. The first exodus of refugees occurred on 24 July 1983, soon after the communal holocaust in Sri Lanka and it continued till 29 July 1987 when the India-Sri Lanka Accord was signed. During that period, 134,053 Sri Lankan Tamils entered India. Following the signing of the Accord, the refugees began to return to the island. Between December 1987 to

⁶²⁶Human Rights Law Network (HRLN), Report of Refugee Populations in India, November 2007. available at [http://www.hrln.org/admin/issue/subpdf/Refugee population in India.pdf](http://www.hrln.org/admin/issue/subpdf/Refugee%20population%20in%20India.pdf)

August 1989, 25,585 refugees and non-camp Sri Lankan nationals returned to Sri Lanka by chartered ships. During the second wave of refugees, a number of 122,000 Sri Lankan Tamils came to Tamil Nadu in India. Out of these, 115,680 were destitute and accommodated in the camps. The refugees once again started coming to Tamil Nadu by April 1995. By the year 2002, 23,256 refugees had reached Tamil Nadu. Gradually the flow of refugees became a trickle and completely stopped following the cease fire agreement in the country in the year 2002. During the cease fire period, from 2002 to 2006, 9,793 refugees living in the camps and outside were returned to their country with UNHCR assistance. There was a fourth flow of refugees which started from early 2006 whose whereabouts had been remained unreported.⁶²⁷

There are four categories of Sri Lankan Tamil refugees in the State of Tamil Nadu in India. The first category is the refugees in camp. According to Tamil Nadu Government, there are 73,241 refugees who live in 115 camps in 26 districts in the State. The second category is the recognized refugees outside the camps. There are 31,802 refugees having refugee certificate issued by the office of the Collector who live outside the camps of their own. Nearly 80,000 Sri Lankan nationals are living in the different parts of the State, who come India with valid travel documents. These refugees comprise the third category. The fourth category is consists of those persons who have alleged link with the militant groups in Sri Lanka and they are kept in special camp in Chengalpet. According to informed sources there are 50 Sri Lankans who are detained in the camp.⁶²⁸

According to World Refugee Survey, 2009, India hosted around 96,000 Sri Lankans, mostly Tamils fleeing fighting between the Liberation Tigers of Tamil Eelam and Sri Lankan armed forces. About 73,300 stay in more than a hundred camps in Tamil Nadu State and 26,300 outside the camps but registered with the nearest police stations. About 2,800 more entered in 2008.

⁶²⁷Dr. V. Suryanarayan, "Sri Lanka: Focus On the Sri Lankan Tamil Refugees", South Asia Analysis Group, Paper No. 3502, 13 November 2009. Available at <http://www.southasiaanalysis.org>

⁶²⁸ *Ibid*

V.4.vi. Bhutanese Refugees

Ethnic Nepalese people started arriving in Bhutan in significant numbers in the early 20th century. By the 1980 they accounted for a quarter of the Bhutanese population. In the mid to late 1980, the authorities began to view the growing numbers of Hindu Nepalese in Bhutan as a direct threat to Bhutanese ethnic identity. After this time, discriminatory measures were employed to restrict the Nepalese from government service jobs, from obtaining promotions and receiving passports. Alongside these measures, the government introduced a national campaign to revive traditional culture. Teaching Nepali as a second language in schools was banned and Bhutanese national dress was to be worn at school as well as on official occasions. A census was carried out in the early 1980 which determined the number of Nepalese living in Bhutan. As a result of the census, the Citizenship Act of 1985 was enacted which set out new conditions for citizenship of Bhutan. A great number of Hindu Nepalese became illegal residents overnight. The only way to regain it was to prove their residence in Bhutan for the previous 15 years. As a result, many naturalized citizens lost their status. The Act also allowed for any naturalized citizen to be stripped of his or her status if they had shown, by act or speech, to be 'disloyal' to the King, country, or people of Bhutan. This provision has been used frequently to revoke citizenship from Hindu Nepalese under the pretext of 'disloyalty'. Expulsions of Hindu Nepalese who fell afoul of the Citizenship Act began in 1988. Street protests and hunger strikes took place in the south to demonstrate against the measures taken against the Hindu Nepalese population.

In response to the protests by the ethnic Nepalese in Bhutan in the south against their deportation and discrimination, the presence military of the Government increased. After several raids and bombings, the Bhutanese authority ordered the closure of local Nepalese schools, clinics, and development programs. Many ethnic Nepalese were forcibly evicted and forced to cross the Indian borders into Assam and West Bengal. The Indian states would not accept the expelled Bhutanese and they were forced to move on. Most went through Nepal to go back into India at different entry points, while approximately 100,000 stayed in UNHCR refugee camps in Nepal. There are between 15,000 and 30,000 ethnic Nepalis living in India. For them, obtaining

recognition as refugees remains an impossible task.

Since 1949, Bhutanese citizens have been permitted to move freely across the Indian border. An open border between India and Nepal and India and Bhutan is provided for by a treaty between the respective states, last updated in February 2007. A reciprocal arrangement between Indian and Bhutan grants its citizens equal treatment and privileges. The right to residence, study, and work are guaranteed without the need for identity papers. For this reason, the Indian government has not acknowledged the ethnic Nepalese Bhutanese who were forced to flee to be refugees, and nor has it provided any sort of assistance. The UNHCR does not carry out status determination for the Bhutanese. This is most likely due to the friendship treaty between the two countries.

V.4.vii.Burmese Refugees

In 1962, the democratically elected government of Burma fell to a military coup. Ever since military leaders have ruthlessly ruled Burma and held its people in an iron grip.⁶²⁹ Like other neighbours of Burma, India hosts a large and growing refugee population from Burma. The Burmese refugee population in India is overwhelmingly from Chin ethnic minority group, with smaller Kachin, Arakanand Burman Population as well.⁶³⁰

Some 500,000 ethnic Chin people live in the Burma's northwest Chin State and another 700,000 Chin live in the other parts of Burma. Although the Chin Community in Burma is comparatively small, the Chins are ethnically diverse as Burma itself. There are six main Chin tribes which can further be divided into at least 60 different sub-tribal categories. However, despite their diversity, the Chins are unified through a common history, geographical homeland, traditional practices and ethnic identity. In the predominantly Buddhist country, 90 percent of Chin population are Christians. In Chin State of Burma, widespread ethnic and religious discrimination along with rapid

⁶²⁹Chin Human Rights Organization (CHRO), "Waiting on the Margins: An Assessment of the Situation of the Chin Community in Delhi, India", April 2009

⁶³⁰Refugees International, "India: Close the Gap for Burmese Refugees", Field Report, December 9 2009. Available at http://www.refugeesinternational.org/sites/default/files/120909_india_closegap.pdf

militarization has resulted in an overabundance of human rights abuses at the hands of Burma army. Such rampant human rights abuses have forced thousands of Chins to leave their homes, families and friends and livelihoods in Burma in order to seek refuge in neighbouring lands.

Due to repressive measures, brutal torture, persecution and political turmoil, Burmese refugees and asylum seekers are taking shelter in neighbouring countries including Thailand, Bangladesh, Malaysia, Chins and India. Burmese refugees in India live primarily in two places: the Northeast States of Mizoram and, to a lesser extent, Manipur and the capital city of Delhi. Some 75,000 to 100,000 ethnic Chin from Burma are currently living on Indo-Burma border in the northeastern state of Mizoram. The United Nations High Commissioner for Refugees has recognized about 3,000 to 4,000 Burmese living in Delhi. It estimated that over 600 Burmese refugees are finding their way to Delhi each month.

V.4.viii. Afghan Refugees

Following the Soviet intervention in Afghanistan in the 1979, a large number of Afghan Sikhs and Hindus along with ethnic Afghans, took refuge in India. The second major influx of Afghan refugees began in 1991-92, after the fall of Najibullah regime. However the Government of India does not officially treat them as refugees but allowed the UNHCR to operate some programme for them. The UNHCR recognise some of them under its mandate and assist them.⁶³¹ According to World Refugee Survey, 2009, an estimated 30,000 Afghans remained in the country although only about 9,000 held UNHCR mandate status. The Government of India has issued most of the Afghan nationals' valid residential permits and allowed them to stay in the country until a durable solution is found. According to the United Nations High Commissioner for refugees as many as 4,000 Hindu and Sikh afghan refugees have shown interest in applying for India citizenship.

⁶³¹Zutshi, R. Trakroo, *supra note* 618 at p.58

V.5. REFUGEES AND THE INDIAN LEGAL FRAMEWORK

While India has neither acceded to the 1951 Convention nor introduced a domestic regime for the protection of refugees, this is not to say that there have not been any attempts to revise Indian immigration law so as to make appropriate provision. In 1995, a drafting committee led by Justice P. N. Bhagwati, a former chief justice of the Indian Supreme Court, prepared a model law on asylum-seekers and refugees under the auspices of the regional consultations on refugees and migratory movements in South Asia initiative.⁶³² The model law was substantially revised in 2006, as the Refugees and Asylum Seekers (Protection) Bill by the Public Interest Legal Support and Research Centre.⁶³³ While the definition of a refugee in the revised bill remained the same, the new draft dropped many of the rights included in article 13 of the original model law in order to accommodate objections from the intelligence and security establishment.⁶³⁴ The rights dropped included the right of a refugee to choose their place of residence and to move freely within the country, the right to adequate housing, healthcare and primary education, and the right to freely access employment. However, these changes were insufficient to overcome the objections of the security establishment.⁶³⁵ Ultimately, neither bill was successful in obtaining the support of the Indian cabinet nor they were introduced before the Indian parliament.

V.5.i. Constitutional Provisions

There are a few Articles of the Indian Constitution which are equally applicable to refugees on the Indian soil in the same way as they are applicable to the Indian

⁶³²Model National Law on Refugees, 1 ISIL Y.B. Int'l Humanitarian & Refugee L. 295 (2001); Arjun Nair, IPCS Research Papers No. 11, National Refugee Law for India: Benefits And Roadblocks 1, 2 n.7 (2007), available at http://www.ipcs.org/pdf_file/issue/51462796IPCS-ResearchPaper11-ArjunNair.pdf.

⁶³³Nita Bhalla, "Lack of India Refugee Law Leaves Many in Limbo", Thomson Reuters Found. (Mar. 25, 2017, 17:24 GMT), available at: <http://www.trust.org/item/20100325172400-d70r9/>.

⁶³⁴Home Ministry's Refugee Bill Worries Security Agencies, Rediff News (Oct. 19, 2009, 14:52 IST), available at: <http://news.rediff.com/report/2009/oct/19/home-ministrys-refugee-bill-worries-security-agencies.htm>.

⁶³⁵Some Refugees are More Equal, Telegraph (Calcutta), Dec. 26, 2012, available at: http://www.telegraphindia.com/1121226/jsp/opinion/story_16361434.jsp (Security forces argued that this would pose a danger to national security as India shares porous borders with neighbouring countries. 'This provision would have allowed illegal migrants to come to India under the garb of a refugee', says a Border Security Force official.).

Citizens.⁶³⁶The Supreme Court of India has consistently held that the Fundamental Right enshrined under Article 21 of the Indian Constitution regarding the Right to life and personal liberty, applies to all irrespective of the fact whether they are citizens of India or aliens. The various High Courts in India have liberally adopted the rules of natural justice to refugee issues, along with recognition of the United Nations High Commissioner for Refugees (UNHCR) as playing an important role in the protection of refugees. The Hon'ble High Court of Guwahati has in various judgements, recognized the refugee issue and permitted refugees to approach the UNHCR for determination of their refugee status, while staying the deportation orders issued by the district court or the administration.

In the matter of *Gurunathan and others vs. Government of India*⁶³⁷ and others and in the matter of *A.C.Mohd. Siddique vs. Government of India and others*,⁶³⁸the High Court of Madras expressed its unwillingness to let any Sri Lankan refugees to be forced to return to Sri Lanka against their will. In the case of *P. Nedumaran vs. Union Of India*⁶³⁹ before the Madras High Court, Sri Lankan refugees had prayed for a writ of mandamus directing the Union of India and the State of Tamil Nadu to permit UNHCR officials to check the voluntariness of the refugees in going back to Sri Lanka, and to permit those refugees who did not want to return to continue to stay in the camps in India. The Hon'ble Court was pleased to hold that since the UNHCR was involved in ascertaining the voluntariness of the refugees' return to Sri Lanka, hence being a World Agency, it is not for the Court to consider whether the consent is voluntary or not. Further, the Court acknowledged the competence and impartiality of the representatives of UNHCR. The Bombay High Court in the matter of *Syed Ata Mohammadi vs. Union of India*⁶⁴⁰ was pleased to direct that there is no question of deporting the Iranian refugee to Iran, since he has been recognized as a refugee by the UNHCR. The Hon'ble Court further permitted the refugee to travel to whichever country he desired. Such an order is in line with the internationally accepted principles of *non-refoulement* of refugees to their country of origin.

⁶³⁶Articles,14,20 and 21 of the Indian Constitution.

⁶³⁷WP No.S 6708 and 7916 of 1992

⁶³⁸1998(47) DRJ(DB)p.74.

⁶³⁹1993 (2) ALT 291

⁶⁴⁰Criminal writ petition no.7504/1994 at the Bombay High Court

The Supreme Court of India has in a number of cases stayed deportation of refugees such as *Maiwand's Trust of Afghan Human Freedom vs. State of Punjab*⁶⁴¹; and *N.D.Pancholi vs. State of Punjab & Others*⁶⁴². In the matter of *Malavika Karlekar vs. Union of India*⁶⁴³, the Supreme Court directed stay of deportation of the Andaman Island Burmese refugees, since “their claim for refugee status was pending determination and a *prima facie* case is made out for grant of refugee status.” The Supreme Court judgement in the Chakma refugee case clearly declared that no one shall be deprived of his or her life or liberty without the due process of law. Earlier judgements of the Supreme Court in *Luis De Raedt vs. Union of India*⁶⁴⁴ and also *State of Arunachal Pradesh vs. Khudiram Chakma*⁶⁴⁵, had also stressed the same point.

In the case of *Louis De Raedt v. Union of India*, the Supreme Court again confirmed that Article 21 of the Indian Constitution, the right to the protection of life and liberty, applies to foreign nationals.⁶⁴⁶ The obvious next step for the court would be to find that this Article prohibits the removal of foreign nationals to situations in which their life or liberty would be threatened. This would be consistent with India's obligations at international law and faithful to the substance of the Article itself.⁶⁴⁷

In partial reliance on *De Raedt*, the Supreme Court has subsequently been asked on at least two occasions to rule on the forced displacement of foreign nationals in India. In the case of *State of Arunachal Pradesh v. Khudiram Chakma*,⁶⁴⁸ the state government of Arunachal Pradesh had ordered the forced relocation of a group of Chakma

⁶⁴¹Crl. WP No.125 & 126 of 1986.

⁶⁴²*N.D. Pancholi vs. State of Punjab & Others* [WP (civil) No. 1294 of 1987, *unreported*].

⁶⁴³Crl. WP No.243 of 1988.

⁶⁴⁴(1991) 3SCC 544.

⁶⁴⁵1994 Supp. (1) SCC 615.

⁶⁴⁶India Constitution, Art. 21 (Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.).

⁶⁴⁷*Louis De Raedt v. Union Of India*, (1991) 3 S.C.R. 554, para. 13 (India)(The fundamental right of the foreigner is confined to Article 21 for life and liberty and does not include the right to reside and settle in this country as mentioned in Article 19(1)(e), which is applicable only to the citizens of this country.); *Hans Muller of Nuremburg v. Superintendent, Presidency Jail Calcutta*, (1955) 1 S.C.R. 1284, 1298 (India)

⁶⁴⁸*State of Arunachal Pradesh v. Khudiram Chakma and Khudiram Chakma v. State of Arunachal*, (1994 Supp.) 1 S.C.C. 615 (1993) (India).

family's that originated from the former East Pakistan (now Bangladesh)⁶⁴⁹ and had settled within the so called inner line, a "protected area" for purposes of the Foreigners (Protected Areas) Order 1958.⁶⁵⁰ Their settlement in the area was deemed illegal and their claim to be citizens of India (and resulting entitlement to enhanced constitutional protection) was rejected.⁶⁵¹ As such, the court was unwilling to intervene to prevent their forced removal by the state government.⁶⁵²

In the slightly later case of *National Human Rights Commission v. State of Arunachal Pradesh & Others*, the Supreme Court was asked to make an order to protect the Article 21 rights of a large group (approximately 65,000) of Chakmas in Arunachal Pradesh.⁶⁵³ They feared continuing violence and harassment led by a student group, the All Arunachal Pradesh Students Union that sought the expulsion of all "foreigners" from the state.⁶⁵⁴ While the court made an order for their physical protection, it is notable that this was made with respect to a non-state actor, and not directed toward the state (either Arunachal Pradesh or the Union of India itself).⁶⁵⁵ While the court also ordered the State of Arunachal Pradesh to refrain from removing any of the individuals concerned, this was done on the understanding that they were in the process of applying for Indian citizenship. The order itself was limited to the period "while the application of any individual Chakma is pending consideration.

⁶⁴⁹Sabyasachi Basu Ray Chaudhury, "Uprooted Twice: Refugees from the Chittagong Hill Tracts", in "Refugees and the State: Practices of Asylum and Care in India", 221-224 (Sage Publication New Delhi, 2000) [hereinafter *Refugees and the State*].

⁶⁵⁰Foreigners (Protected Areas) Order, 1958, G.S.R. 713, Gazette of India, pt. II, Sec. 3, sub sec. 1, at 657 (Aug. 23, 1958).

⁶⁵¹Chakma, (1994 Supp.) 1 S.C.C. 615, para. 63 (Insofar as the appellants and the Chakmas were residing in Miao Sub-Division of Tirap District in Arunachal Pradesh long before 1985 they cannot be regarded as the citizens of India. We find it difficult to appreciate the argument of Mr. Gobinda Mukhoty, learned counsel, that the accident of the appellants living in Arunachal Pradesh should not deprive them of citizenship. In this connection, it is worthwhile to note that Section 6-A of the Citizenship Act come to be incorporated by Amending Act as a result of Assam Accord. If law lays down certain conditions for acquiring citizenship, we cannot disregard the law...).

⁶⁵²Chakma, (1994 Supp.) 1 S.C.C. 615, para. 74 (Even then what is that is sought to be done to the appellants? They are asked to settle in Maitripur and Gautampur villages from Miao. Certainly setting the Chakmas in a particular place is a matter of policy. This Court cannot enter into the wisdom of such a policy, in view of what has been stated above, Arunachal Pradesh is strategically important with Bhutan in the West, Tibet and China in the North and North-East, Burma (Myanmar) in the East.).

⁶⁵³*National Human Rights Commission v. State Of Arunachal Pradesh*, (1996) 1 S.C.C. 742 (India)

⁶⁵⁴*Id.*, paras. 3–6.

⁶⁵⁵*Id.* para. 21(3) (The quit notices and ultimatums issued by the AAPSU and any other group which tantamount to threats to the life and liberty of each and every Chakma should be dealt with by the first respondent in accordance with law).

It is unclear from the facts of each case whether the Chakma facing removal from their homes in Arunachal Pradesh would have ultimately faced removal from India. Nevertheless, in each case the Supreme Court had the opportunity to confirm that Article 21 of the Indian Constitution granted a right against forced removal in situations where an individual's life or freedom would be threatened, and signally failed to do so. As such, the position in Indian law with respect to the protection of foreigners from forced displacement remains very largely as was described by the court in the 1955 case of *Hans Muller of Nuremburg v. Superintendent, Presidency Jail Calcutta and Others*:

*“The Foreigners Act confers the power to expel foreigners from India. It vests the Central Government with absolute and unfettered discretion and, as there is no provision fettering this discretion in the Constitution, an unrestricted right to expel remains.”*⁶⁵⁶

V.6. NON-REFOULEMENT AS CUSTOMARY LAW

It is now widely accepted that running alongside the obligations under the conventions already discussed is a broad customary norm of non-refoulement.⁶⁵⁷ In consequence, even those states that have not yet acceded to a convention that contains

⁶⁵⁶Hans Muller, (1955) 1 S.C.R. at 1298.

⁶⁵⁷Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, Dec. 12-13, 2001, pmbl. para. 4, U.N. Doc. HCR/MMSP/2001/09 (Jan. 16, 2002) (Acknowledging the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of non-refoulement, whose applicability is embedded in customary international law.); No. 6 (XXVIII) Non-Refoulement (1977), in EXCOM CONCLUSIONS, para. (a); No. 22 (XXXII) Protection of Asylum-Seekers in Situations of Large Scale Influx (1981), in EXCOM CONCLUSIONS, para. II. (A)(2); No. 25 (XXXIII) General (1982), in EXCOM CONCLUSIONS, para. (b); No. 79 (XLVII) General (1996), in EXCOM CONCLUSIONS, para. (j); No. 81 (XLVIII) General (1997), in EXCOM CONCLUSIONS, para. (i); Summary Conclusions: The Principle of Non-refoulement, Expert Roundtable, Cambridge, July 2001, in *Refugee Protection In International Law*; ([T]hough a minority of commentators continue to deny the existence of non-refoulement as a principle of customary international law, the general consensus is that it has now attained that status. It encompasses non-refoulement to persecution, based on Article 33 of the 1951 Convention, and also to torture or cruel, inhuman or degrading treatment or punishment.); Anne T. Gallagher, “The International Law of Human Trafficking”, 347 (2010); Nils Coleman, “Renewed Review of the Status 23 (2003). For a clear summary account of UNHCR’s role in developing the principle of non-refoulement as a principle of customary international law, see Corinne Lewis, “UNHCR and International Refugee Law”, 124–25 (2012). For a vigorous dissent from the majority position, see James C. Hathaway, “Leveraging Asylum”, 45 *TEX. INT’L L.J.* 503, 506 (2010).

a prohibition of refoulement are bound by this rule.⁶⁵⁸ However, a customary norm will also continue to bind states even after they have acceded to a treaty that reflects, either in whole or in part, the substance of that norm. In this case, the conventional and customary norms run parallel to one another and, assuming they are not inconsistent, may be applied in the alternative.⁶⁵⁹ Inevitably, the two categories of norms will be closely related, with the conventional norms serving as good evidence of the *opinio juris* of states and, as such, playing a key role in the later crystallization of related customary norms.⁶⁶⁰

The most authoritative and widely cited study on this point is the opinion prepared by Lauterpacht and Bethlehem as part of the 2001 UNHCR Global Consultations.⁶⁶¹ Lauterpacht and Bethlehem concluded that “170 of the 189 members of the UN, or around 90 per cent of the membership, are party to one or more conventions which include non-refoulement as an essential component.” It is significant that these calculations include the wide variety of conventions, such as the ICCPR, the CAT, the European Convention on Human Rights,⁶⁶² the Organization of African Unity (OAU) Refugee Convention,⁶⁶³ the American Convention on Human Rights,⁶⁶⁴ and the Banjul Charter⁶⁶⁵ that make provision for non-refoulement (either expressly or as interpreted) outside the strict definition of a refugee in the 1951 Refugee Convention, and with respect to torture and threats to life.⁶⁶⁶ As such,

⁶⁵⁸Vienna Convention on Law of Treaties, Art. 38 (Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.).

⁶⁵⁹Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, ¶ 73 (Nov. 26); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 174–79 (July 27); North Sea Continental Shelf Cases (Ger./Den.; Ger./Neth.), 1969 I.C.J. 3, ¶¶ 64, 70–74 (Feb. 20).

⁶⁶⁰North Sea Continental Shelf Cases, 1969 I.C.J. 3, ¶¶ 70–71; Nicaragua v. U.S., 1986 I.C.J. 14, ¶ 183; Brownlie, *supra note* 84.

⁶⁶¹Geoff Gilbert, “Human Rights, Refugees and Other Displaced Persons in International Law”, *Hierarchy in International Law* 185 (Erika De Wet & Jure Vidmar eds., 2012) (Lauterpacht and Bethlehem have conclusively shown that non-refoulement is a norm of customary international law)

⁶⁶²See ECHR; *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) para. 88 (1989); *Cruz Varas v. Sweden*, 201 Eur. Ct. H.R. (ser. A) para. 69 (1991); *Vilvarajah v. United Kingdom*, 215 Eur. Ct. H.R. (ser. A) paras. 102–03 (1991); *Chahal v. United Kingdom*, 1996-V Eur. Ct. H.R. 1831, paras. 73–74, 79–81 (1996).

⁶⁶³Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45

⁶⁶⁴American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR].

⁶⁶⁵African (Banjul) Charter on Human and Peoples' Rights art. 2, June 27, 1981, 21 I.L.M. 58 (1982) [hereinafter Banjul Charter];

⁶⁶⁶James C. Hathaway, “The Law Of Refugee Status”, 109 (1991); Cf. Exec. Comm., Note on International Protection, para. 6, U.N. Doc. EC/48/SC/CRP.27 (May 25, 1998).

Lauterpacht and Bethlehem distinguish between the customary norms against refoulement as it applies in the refugee context and as it applies in the human rights context more generally. They conclude that in the refugee context, the customary norm against refoulement prohibits return where there is a real chance of persecution, torture or cruel, inhuman, or degrading treatment or punishment, or a threat to life, physical integrity, or liberty. The prohibition of refoulement is subject to exceptions on grounds of national security and public safety akin to those found in Article 33(2) of the Refugee Convention, save where there is risk of persecution that equates to or is of equal seriousness with torture or cruel, inhuman, or degrading treatment or punishment.” Moreover, as the prohibition against torture is consistently framed in concert with the injunction against cruel, inhuman, or degrading treatment or punishment,⁶⁶⁷ all of these elements should be incorporated into a single prohibition at customary law.

In the human rights context, the customary prohibition against return is limited to situations where there is a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment. The customary prohibition of return to situations where there is a real risk of torture (whether in the refugee or general human rights context) is non-derogable and does not admit of exceptions. This is consistent with both conventional practice and the jurisprudence of the European Court of Human Rights (ECtHR) and the HRC.⁶⁶⁸ In parallel with the right of non-refoulement as found in the ICCPR, the ICESCR, the CRC, and the CAT, the customary norm as it relates to aliens generally (and not specifically those individuals seeking or having obtained refugee status) does not require a causal nexus to be established between the ill-treatment feared and a particular Convention ground, such as race or religion.

⁶⁶⁷Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 5, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); ICCPR, Art. 6; CRC, Art. 37(a); ACHR, Art. 5(2); Banjul Charter, Art. 5; ECHR, Art. 3.

⁶⁶⁸ICCPR, Arts. 4(2), 5(1); General Comment 20, para. 3; U.N. Human Rights Comm., General Comment 24: General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant, para. 10, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994); ECHR, supra note 135, arts. 15(2), 17; *Chahal v. United Kingdom*, 1996-V Eur. Ct. H.R. 1831, para. 79 (1996); ACHR, Art. 27; CAT, Art. 2(2). The Banjul Charter makes no provision for derogations. See generally Banjul Charter.

V.6.i. Indian Legal Framework and Non- refoulement

The question of whether non-refoulement rises to the level of a jus cogens norm in the refugee context is comparatively straight-forward as it applies to India, as the government has now made clear its own position in respect of this issue. In 1996, UNHCR Ex Com concluded that, “the principle of non-refoulement is not subject to derogation.”⁶⁶⁹ This is particularly significant as India became a member of Ex Com in 1995 and so was a member of the committee during the time that this conclusion was discussed and agreed.

Ex Com conclusions are adopted by consensus, and during the process leading up to their adoption member states of the committee have the opportunity to express any reservations in respect of their content.⁶⁷⁰ As such, the conclusions, as eventually adopted, can be fairly said to express the settled views of the member States. It is plain, therefore, that India has now accepted non-refoulement as a customary norm jus cogens. Even if India had sought to repudiate the substance of Conclusion in the past, more than 18 years have now elapsed since its adoption. It would be remarkable if India sought to disavow their agreement at this very late stage, particularly following a period in which the norm itself has grown increasingly entrenched and, indeed, India has not indicated any desire to do so.

Moreover, even in the absence of India’s own express view with respect to this matter, there is now very considerable state practice in support of this proposition.⁶⁷¹ As such, it is now perfectly correct to interpret India’s obligations of non-refoulement with respect to situations of persecution; torture or cruel, inhuman or degrading treatment or punishment; or a threat to life, physical integrity or liberty as a peremptory norm of international law. While the question of the jus cogens status of

⁶⁶⁹No. 79 (XLVII) General (1996), in EXCOM CONCLUSIONS, para. (j).

⁶⁷⁰U.N. High Comm’r for Refugees, London UNHCR response to the DCA Consultation Paper: Asylum and Immigration Tribunal – The Legal Aid Arrangements for Onward Appeals 1 n.1 (Dec. 2004), available at:http://www.unhcr.org.uk/fileadmin/user_upload/docs/UNHCR_response_to_the_DCA_consultation_paper.pdf.

⁶⁷¹*Üner v. Netherlands*, 2006-XII Eur. Ct. H.R. 129; *Boultif v. Switzerland*, 2001-IX Eur. Ct. H.R. 119; *Beldjoudi v. France*, 234-A Eur. Ct. H.R. (ser. A) (1992); *Maslov v. Austria*, 2008-III Eur. Ct. H.R. 301; Agnès Hurwitz, “The Collective Responsibility Of States To Protect Refugees”, 189 (2009); Richard McKee, “Definite Article: Application of Article 8 in Removal Cases”, 14, IMMIGR. L. DIG., Spring 2008.

non-refoulement remains controversial, such an interpretation is consistent with India's own view of its obligations on this point.

Enunciating the example of the Indian judiciary, which is often regarded as the 'protector of the rights of people', various judgements have been pronounced by the High Courts and the Supreme Court to enforce the liberty of the refugees. By virtue of Articles 14 and 21 of the Constitution of India, which applies both to citizens and non-citizens, courts have tried to liberalize the rights of equality and rights of life and personal liberty, respectively. As in case of *Ktaer Abbas Habib Al Qutaiifi v Union of India & Ors*,⁶⁷² non-refoulement was recognized under Article 21 by the Gujarat High Court. The Gujarat High Court elaborately dealt with the Indian constitutional provisions along with international instruments to emphasize on their right of non-refoulement. While delivering the judgement, the court emphasized on the protection and dignified life of the refugees relying upon the Indian Constitution. Since, these refugees did not pose threat to the security of India and they had the proof of the fear of persecution, the court established the principle of non-refoulement.

Apart from above-mentioned articles, Article 22 of the Indian Constitution also applies to refugees, meaning thereby the refugees also possess the right of protection against arbitrary arrest. Moreover, they also can practice their religion as per Article 25 of the Constitution.

The Indian judiciary has played a vital role in promoting the interests of the refugees. Henceforth, in case of an unreported judgement *Dr Malvika Karlekar v Union of India*⁶⁷³, the apex court by belaying the refoulement of the Andaman Island Burmese refugees asked for their status verification.⁶⁷⁴ It reflects that those who want to seek the protection in another country cannot be sent back to their country of origin if the status determination of such persons is pending in the present country. The same proposition was held by the Madras High Court in the case of *P Nedumaran v Union of India*,⁶⁷⁵ where the court asked the Sri Lankan refugees to stay in India till their status determination by the UNHCR.

⁶⁷²1999 Cri. L.J. 919

⁶⁷³Criminal Writ Petition No. 583 of 1992 dated 25.09.1992

⁶⁷⁴*Zonthansangpuii v State of Manipur* (Civil Rule No. 1981 of 1989 and No. 515 of 1990)

⁶⁷⁵ 1993(2) ALT 291

In *NHRC V State of Arunachal Pradesh*,⁶⁷⁶ the apex court again emphasized on protection of rights of the refugees in India to preserve the constitutional culture. The court held that the rule of law is the predominant segment in the Indian context. The Constitutional sway in a country like India reflects the right to equality and thus, ensures right to dignified life to citizens as well as non-citizens. The court in this case directed not to refoule the Chakma refugees who were the nationals of the Bangladesh on the basis of principle of non-refoulement. Re-establishing the position of non-refoulement, the Bombay High Court in case of *Syed Ata Mohammadi V Union of India*,⁶⁷⁷ pointed out that the Iranian refugees cannot be ostracized to the Iran where they have fear of persecution.

V.6.ii.The Expanding Breadth of Non-Refoulement

The practical effect of the human rights treaty regimes to which India is a signatory or party will, to a large extent, depend on the precise contours of the various domestic protection regimes as they already apply in India, and the manner in which norms at the international and domestic level interact on a case-by-case basis. Of fundamental importance, however, to all persons displaced to India is the basic principle of non-refoulement.⁶⁷⁸ The centrality of this principle for the protection of refugees and asylum-seekers has been repeatedly affirmed by the UNHCR ExCom,⁶⁷⁹ the UN General Assembly,⁶⁸⁰ the most learned writers in this field,⁶⁸¹ and, recently, all states

⁶⁷⁶ 1996 SCC (1) 742

⁶⁷⁷ Criminal writ petition no. 7504/1994 at the Bombay High Court.

⁶⁷⁸ For a detailed discussion of this principle in the context of both the 1951 Refugee Convention and at general human rights law, see Guy S. Goodwin-Gill & Jane Mcadam, *supra note* 15 at 201– 354; Hathaway, *supra note* 14, at 278–369.

⁶⁷⁹ See, e.g., No. 17 (XXXI) Problems of Extradition Affecting Refugees (1980), in Conclusions Adopted by the Executive Committee on the International Protection of Refugees: 1975-2009 (Conclusion NO. 1-109) at 22, para. (b) (United Nations High Comm'r for Refugees, ed., 2009) [hereinafter EXCOM CONCLUSIONS], available at <http://www.refworld.org/pdfid/4b28bf1f2.pdf>; No. 65 (XLII) General (1991), in EXCOM CONCLUSIONS, para. (c); No. 79 (XLVII) General (1996), in EXCOM CONCLUSIONS, para. (j); No. 42 (XXXVII) Accession to International Instruments and their Implementation (1986), in EXCOM CONCLUSIONS, para. (c).

⁶⁸⁰ See, e.g., G.A. Res. 48/116, para. 3, U.N. Doc. A/RES/48/116 (Mar. 24, 1994); G.A. Res. 49/169, para. 4, U.N. Doc. A/RES/49/169 (Feb. 24, 1995); G.A. Res. 50/152, para. 3, U.N. Doc. A/RES/50/152 (Feb. 9, 1996); G.A. Res. 51/75, para. 3, U.N. Doc. A/RES/51/75 (Feb. 12, 1997).

⁶⁸¹ Vincent Chetail, “Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations Between Refugee Law and Human Rights Law”, in *Human Rights and Immigration* 29 (Ruth Rubio-Marín ed., 2014); Hathaway, *supra note* 14, at 279.

parties to the 1951 Geneva Convention and its 1967 Protocol.⁶⁸² Before any other rights can become relevant, refugees and asylum-seekers must be granted admission to the territory of an asylum state and be assured of their right to remain there. As an injunction framed in “negative terms,”⁶⁸³ the right of non-refoulement cannot provide a right of entry *per se*.⁶⁸⁴ However, as admission to the territory of the asylum State will, in practice, often be the only way to avoid returning an asylum-seeker to a country where they have reason to fear serious mistreatment, it will frequently amount to a *de facto* right of admission.⁶⁸⁵

Any discussion of the principle of non-refoulement under international law must begin with Article 33 of the 1951 Convention.⁶⁸⁶ It is now plain, however, that this principle has expanded significantly beyond the terms of the Refugee Convention itself to draw on elements of international and regional human rights law and customary international law.⁶⁸⁷ This is of particular importance where individuals seeking protection fall outside the refugee definition in Article 1A(2) of the 1951 Geneva Convention and so are unable to avail themselves of the right of non-refoulement in Article 33. Where, for example, the persecution they fear is not for one of the five Convention grounds (race, religion, nationality, political opinion or particular social group), a claimant will lack the so-called persecution nexus essential

⁶⁸²Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Statues of Refugees, Dec. 12-13, 2001, pmb. para. 4, U.N. Doc. HCR/MMSP/2001/09 (Jan. 16, 2002).

⁶⁸³M38/2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 131, para. 39, 199 ALR 290, 75 ALD 360 (Austl.).

⁶⁸⁴U.N. Econ. & Soc. Council, Ad Hoc Committee on Refugees and Stateless Persons, 2d Sess., 40th mtg. at 33, U.N. Doc. E/AC.32/SR.40 (Sept. 27, 1950) (Statement of Mr. Weis of the International Refugee Organisation) (“Mr. WEIS (International Refugee Organization) wished to add to the remarks of the representative of Israel only that article 28 meant exactly what it said. It imposed a negative duty forbidding the expulsion of any refugee to certain territories but did not impose the obligation to allow a refugee to take up residence.”). For a searching and authoritative analysis of the question of whether the principle of non-refoulement implies a right of admission, see Thomas Gammel, “Access to Asylum: International Refugee Law and the Globalisation of Migration Control”, 47–59 (2011).

⁶⁸⁵Brian Opeskin, Richard Perruchoud & Jillyanne Redpath eds, “Refugees and Asylum”, Foundations of International Migration Law 177, 193 (2012).

⁶⁸⁶Refugee Convention, 1951, Art. 33 (1. No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion; 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country)

⁶⁸⁷See Mcadam, *supra note* 614. See Michelle Foster, “Non-Refoulement on the Basis of Socio Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law”, 2009 N.Z. L. REV. 257, 267–78 (2009) [hereinafter Foster NZLR], for a very helpful discussion of the basis for the extension of this concept, for which she finds there is “surprisingly little clarity.”

to making out a claim to refugee status under the Convention.⁶⁸⁸ As such, they would be unable to avail themselves of protection from refoulement under Article 33. This would be so, regardless of whether they continue to have a well-founded fear of persecution for other, non-Convention grounds. In this case, protection from refoulement under general international law or complementary protection will be the key device for ensuring their safety. Insofar as the various elements of complementary protection provide protection from refoulement outside the 1951 Geneva Convention, this should also be the first point of reference for the protection of forced migrants in states, like India, that are not yet parties to the Refugee Convention.

V.7. INDIA'S MEASURES FOR FULFILLING INTERNATIONAL OBLIGATIONS

India has taken numerous steps and measures to fulfill its international obligations in respect of refugees. Some of the more important ones merit detailed mention.

- **Entry into India**

The Government of India has followed a fairly liberal policy of granting refuge to various groups of refugees though some groups have been recognized and some other groups have not been, often keeping in view the security concerns of the nation. However, the emerging trend of past refugee experiences bear testimony to the fact that entry into India for most refugee groups is in keeping with international principles of protection and non-refoulement. Further, such entry is not determined by reasons of religion or any other form of discrimination. It may be pointed out that India has granted refuge to Buddhist Tibetans, Hindus and Christians of Sri Lanka, Hindus and Muslims from the then East Pakistan, Hindus, Muslims, Christians and Buddhists from Bangladesh and Sikhs and Muslims from Afghanistan etc.

⁶⁸⁸Andreas Zimmerman & Claudia Mahler, "Article 1A, in The 1951 Convention Relating To The Status of Refugees And Its 1967 Protocol: A Commentary", 281, 374, para. 2 (Zimmerman ed., 2011); James C. Hathaway, "The Causal Nexus in International Refugee Law", 23 MICH. J. INT'L L. 207, 208 (2002)

- **Work Permits**

There is no concept of work permits in India, although refugees who are granted residence permits do find employment in the informal sector, without facing any objection from the administration. In fact, Tibetan refugees have been granted loans and other facilities for self-employment. Similarly, most Sri Lankan Tamils have been granted freedom of movement within the camp areas, enabling work facilities for them as casual labour. Similarly, Chakma and Afghan refugees have also been engaging in gainful, even if it is in minor forms of employment.

- **Freedoms**

Generally, refugees are allowed freedom concerning their movement, practice of religion and residence. In case of refugees whose entry into India is either legal or is subsequently legalized, there is limited interference by the administration regarding these basic freedoms. However, those refugees who enter India illegally or overstay beyond permissible limits, have strict restrictions imposed upon them in accordance with the statutes governing refugees in India i.e., The Foreigners Act, 1946, Foreigners Order, Passport Act etc.

- **Handling Refugees Legally**

From the moment of entry of a refugee into the Indian territory, the laws of India would apply to him/her. Therefore, enforcement and security personnel who have to deal with refugees cannot overlook the legal requirements which have to be adhered to by them. In the following paragraphs an attempt has been made to identify some common situations which may be faced by enforcement and security personnel in dealing with refugees. An attempt has also been made to suggest possible courses of action within the legal framework.

The main purpose of this attempt is twofold. Firstly, it will help to focus on the need for showing due concern for human rights. Secondly, it is also important to create awareness about the unavoidable compulsions, which forced the person concerned to

take refuge in the country and the inherent and unmistakable poignant human situation in the entire episode. It is pertinent to remember that the circumstances and facts pertaining to each refugee may be peculiar and different from the rest. In such cases, therefore, it is extremely important to ascertain, understand and appreciate the background of the compelling circumstances of each of the cases so that the law of the land may be applied in the most appropriate manner. It is in this context that the legal provisions, directions and guidelines, if any, issued by competent courts as also the practical experience gained in dealing with such cases, would come in handy.

Keeping the above aspects in view, some of the more important situations relevant to security personnel are enumerated below. An attempt has been made to highlight the more feasible options which could be considered in dealing with refugees. It goes without saying that these options have to be exercised within the legal framework of the country.

- **At the Point of Entry**

Refugees may enter India by land, air and/or sea. Depending upon the point of entry, they will come into initial contact with immigration authorities at airports or sea-ports or with the border guarding authorities at the border check-posts. It is relevant to point out that more often than not; a refugee would be without valid travel documents or valid identity documents making his/her entry into the country 'illegal'. Since India has not yet incorporated the principle of non-refoulement in its legal statutes, the person concerned would have to face the prospect of being arrested and prosecuted as per the laws of the land. However, this should not be held against the intending refugee to debar entry as a matter of course. Therefore, the agency which comes into contact with the refugee initially will have to satisfy itself about the bonafide of the intending refugee instead of pre-emptory refusing entry. Under the circumstances, the ends of justice would be met if the person seeking refuge does not have valid travel documents, is arrested and produced in a court of law for appropriate judicial action. In the meanwhile, even as that person is under judicial detention, the security agency will have opportunity to verify his claims and also to notify the concerned competent authority in government to take decision in the matter. In such cases the help of the UNHCR could also be sought so that that agency would be in a position to help speed

up the process of verification and also to render suitable help in finalizing the legal process.

- **Detention**

A refugee may face detention as soon as he/she illegally crosses the international border into India. It is pertinent to appreciate that the refugee has at that moment just entered an unknown country, after fleeing to save his/her life from his/her own country of origin. He/she may have undergone severe trauma of loss of family and friends in his/her homeland or en route India. The refugee in such situations may be unable to explain his/her background during initial interrogation, giving rise to apprehension on the part of local authorities regarding the genuineness of his/her subsequent refugee claim. He/she may be suspected to be a spy or infiltrator in the light of inconsistent statements that may have been made by him/her to the authorities. This is bound to be further compounded if the refugee is not in possession of the usual 'travel documents'. In fact, it would be very unreasonable to expect him/her to possess valid travel documents, considering the background of his/her having to escape from his/her own country. The same may result in further interrogation and continued detention pending registration of FIR (First Information Report, which is usually the basis of the start of 'investigation'). In such a situation there may be no course of action open to the refugee to follow, since he/she has no family to lean on locally and who may be aware of his/her plight. Further, the refugee would not be in a position to get a message across to any person outside regarding his/her predicament. What is more, because of the peculiarities of the circumstances, the refugee may be detained in a remote place further compounding an already difficult and unnerving situation.

In such circumstances it would be quite justified for the security agency to register a case under the provisions of IPC/Foreigners' Act etc. and even arrest the refugee and forward him/her to the court having local jurisdiction. In case the refugee desires legal help it is desirable that the local 'legal-aid cell' may be allowed to be contacted by the refugee. Where such facilities are not available and the refugee is not in a position to hire legal services on his/her own, the court may be requested to notify the UNHCR to render help to the refugee to seek legal assistance. If any local NGO is available

and willing, their services may also be sought to help out the refugee.

- **Lack of Medical Aid in Detention**

While in detention the refugee may be suffering from some physical ailment requiring immediate medical attention. In the event that the detaining authority does not provide the requisite medical aid, the same may result in devastating consequences. In some cases court's directions can be obtained and appropriate medical attention and treatment given to the refugee. Here again, NGOs can play a very useful role. In the case of a Palestinian refugee who was detained at the international airport in New Delhi consequent to a deportation order pending against him, a writ petition was filed to obtain the Delhi High Court's order that the refugee be provided at least the basic necessities like food and medical care. Knowledge of such cases would help security personnel to foresee and where necessary, seek the help of an agency like the UNHCR or a local NGO to render necessary help to the refugee.

- **Detention of Women Refugees**

Most courts are of the opinion that in cases where there has been no grave breach of law by the accused woman (refugee), she may be released on bail pending trial. In the specific case of Marui, an Iraqi refugee who fled persecution from Iraq with her husband and children, the family was arrested in New Delhi. However, Marui being a woman, was released on bail soon thereafter though her husband continued to be in detention till much later. Even after such a release, it is quite possible that the woman may find herself in some predicament having been suddenly isolated in a foreign country. In such specific cases, it would make the task of the security officials easier if they liaised with the UNHCR or any local NGO to provide the much needed psychological support to the refugee woman. Also, in such cases where deportation orders are passed by the courts, the UNHCR can help to rehabilitate the concerned refugee in another sympathetic country. Knowledge on the part of security and enforcement officials of such available options would help in perpetuating humanitarian attitude on the part of security officials.

- **Detention of Refugee Children**

Refugee children face many problems which deserve to be treated with due sensitivity, care and caution by the authorities concerned. Usually, access is provided to detained mothers to meet their children and tend to their needs. There are, however, cases of sufficiently grown up refugee children who may be between the ages of 15 and 18 years of age and who may be detained for non possession of valid travel documents. Such a problem mostly arises due to the fact that children are not granted separate residential permits but are included in their parent's permits. In cases involving children who do not possess separate residential permits, the UNHCR may be in a position to help sort out the problem, particularly because in cases where refugee children are separated from their families, UNHCR makes all possible attempts to reunite them. Therefore, it will be advantageous if the security agency concerned seeks the help and assistance of the UNHCR in such matters.

In the specific case of Winston Venojan, a Sri Lankan Tamil refugee, thanks to the UNHCR, the 17 year old boy, who had got separated from his parents, was reunited with them. In this case the boy was arrested on landing at New Delhi. Bail was, however, granted to him within a short time. In genuine cases of this kind, the security agency should always consider not to oppose bail. In the meanwhile, the UNHCR got clearance from the British Immigration and Nationality Department for the boy to travel to the UK. However, the refugee could not be permitted to leave the country till the disposal of the case for the violation of some of the legal provisions under the Indian laws. Luckily this matter was speedily disposed off on the intervention of the Delhi High court. Once the court's orders were obtained, the refugee was provided with Red Cross travel documents to travel to London. The security agency can further help in such genuine case by speedy investigation and filing of charge sheet in time.

- **Securing that the Refugee is not Untraceable on Release from Detention**

Release of a refugee from detention is often fraught with legalities. Courts are sometimes reluctant to direct release of the refugee without ensuring about securing his/her presence in a specific place. The primary concern of courts while barring the deportation of refugees is that the refugee should not become untraceable. In some cases of this kind, courts have agreed that the refugee may be handed over into the care of UNHCR. This would ensure that the refugee will be available whenever wanted. In addition, the UNHCR would take care of the refugee till the legal issue is disposed of. In cases where the UNHCR refuses to take custody of the said refugees, there will be no alternative but to send the refugees back to jail.

- **Securing against Re-arrest on Release from Detention**

The refugee on release from prison after serving his/her sentence may still not be having valid travel documents. In such circumstances, the refugee may face the risk of re-arrest while commuting from the prison to secure residential permit/refugee certificate etc., Hence the authorities are often requested to provide police escort to the refugee to enable him to reach the authorised place safely and to secure documents for valid stay in India. This measure would help speed up to regularize the stay in India, which is desirable from both the point of view of security as well as humanitarian considerations.

V. 8 COMPARATIVE ANALYSIS BETWEEN INDIAN AND EUROPEAN REFUGEE LAW FRAMEWORK

In the European setting two very separate performing actors both have critical effect on asylum and related protection issues. To begin with, the Council of Europe, including 47 nations, addresses general human rights security, and its exercises have huge ramifications for the legitimate position of haven candidates and outcasts. Second, the European Union (EU) an association that is altogether separate from the

Council of Europe, in spite of the fact that the EU's 28 Member States are at the same time individuals from the Council of Europe has set out on a dynamic program to grow new lawful standards influencing migration, fringes, and shelter.

In spite of the fact that the focal worry of the EU is the fruitful working of the inward market (a business opportunity for the free development of products, people, administrations, and capital over the inner outskirts), the EU extended its extension in 1999 to incorporate movement and refuge. Without a doubt, the EU has embraced three five-year programs (the latest Stockholm Program enduring until the point when 2014) keeping in mind the end goal to make a Common European Asylum System proposed to be founded on a fit elucidation and use of the 1951 Geneva Convention.

Inside the Council of Europe one of the principle difficulties to evacuee assurance comes from the perpetually expanding case heap of the European Court of Human Rights. Convention No. 14 to the Convention, planned to improve the Court's ability, has up to this point not settled the developing accumulation. Inside the EU one of the focal difficulties is that, regardless of the objective of building up a Common European Asylum System, truly basic gauges and practices are still a long way from a reality, in spite of enhancements in the recast refuge instruments received in 2011-13. What's more, the EU is putting expanded need on outside relocation control measures; these activities unavoidably confine access to shelter strategies, and in this way limit access to insurance, for obscure quantities of people needing universal assurance. There was a wide range of proposals from the EU institutions for reforms in 2015. Two EU policy commitments were put into question: the Dublin system of allocation of responsibility for asylum seekers, made primarily on the basis of the first country through which they entered the EU; and the Schengen area an area in Europe without internal border controls. As refugees travelled across the EU searching for a hospitable place to seek refuge, the Dublin system became irrelevant, and the option of border controls became increasingly attractive to some countries as a way to deter refugees.⁶⁸⁹

⁶⁸⁹Elspeth Guild et al, "What is happening to the Schengen borders?" CEPS Liberty and Security in Europe Papers, No 86 (2015).

There is no Refugee particular enactment in India nor is India a signatory to the 1951 Convention or its 1967 Protocol. In any case, India is a signatory to the International Covenant on Civil and Political Rights (ICCPR), and the UN Convention against Torture, in spite of the fact that we are yet to endorse the later. India is by and by an individual from the Executive Board of trustees of the UNHCR and it involves the duty to submit to universal measures on the treatment of displaced people. The absence of a firm national arrangement for displaced people has prompted the selection of Adhoc Regulatory measures to manage specific displaced person convergences. These measures are frequently conflicting with each other, bringing about contrasts of approach, for example, shifting criteria for assurance of displaced person status, and shifting gauges of treatment. Since there is no evacuee law in India, displaced people are dealt with under the law relevant to outsiders. The Government of India alone decides evacuee status. Displaced people are enrolled under the 1939 Registration Act, which is relevant to all outsiders entering the nation. The 1946 Outsider's Act is the main enactment for the direction of non-natives. It engages the Government of India to control the passage, nearness and flight of outsiders in India, however "outsiders" itself is no place characterized. Section 3(1) of the Foreigners Order of 1948 sets out the ability to concede or deny authorization to a non-native to enter India. This arrangement sets out the general commitment that no non-native ought to enter India without approval. This Section can be limited if an individual does not have a legitimate international ID or visa, however the administration can absolve people when it so craves. In spite of the fact that it is identified with unlawful vagrants, the exception arrangement is pertinent to displaced people. This Section is additionally administered by the Passport Act of 1967.

A model national law on evacuees and asylum searchers was figured at the Fifth Regional Consultations on Refugee and Migratory Movement in South Asia in 1998. Endeavors started in 1994 toward drafting a lawful component for exile insurance in South Asia with the arrangement of the Eminent Persons Group (EPG), an activity of Sadako Ogata, a previous UN High Commissioner for Refugees. The EPG was going by previous Chief Justice of India, Mr. P. N. Bhagwati and furthermore involved Justice Dorab Patel from Pakistan, Dr. Kamal Hossain from Bangladesh, Mr. Risikesh Shah from Nepal and Mr. Bradman Weerakoon from Sri Lanka. Following conferences in Colombo, New Delhi and Dhaka, the Model Law for Refugee

Protection was received in 1997.⁶⁹⁰

Consistent need was communicated in the conference procedure for a statutory displaced person assurance administration in India. The National Human Rights Commission (NHRC) delegated an Expert Committee on Refugee Protection to look at substantive and procedural extensiveness of the Model Law and to propose changes in that. The procedure was helped by Dr. Rajeev Dhavan, Director, Public Interest Legal Support and Research Center (PILSARC), New Delhi. The Expert Committee at long last proposed the 'Exile and Asylum Seekers (Protection) Bill 2006'.

The Refugees and Asylum Seekers (Protection) Bill 2006 looks to accommodate the foundation of a powerful framework to ensure displaced people and shelter searchers in the nation. The Bill gives the meaning of displaced person and incorporates the rule of outcast status. Other than including the rights and obligations of exiles in the nation, the Bill contains arrangements identified with mass deluge and also arrangements on willful repatriation. In the introduction itself, the Bill looks to name the Commissioner of Refugees and to constitute the Refugee Appellate Board to freely decide claims for asylum.

Thus, India has provided shelter to these refugees for centuries for both geopolitical and socio-economic reasons. Political upheaval occurring in unstable countries bordering India often forced citizens to seek refuge elsewhere. Additionally, ethnic and religious persecution forced minorities to join similar peoples in India's multi-ethnic and multilingual society. Better opportunities to start afresh and improved living conditions also contributed to India's appeal. Needless to say that India has an important role in the treatment of refugees because of its position as a leader in South Asia, setting an example for other states in the region, and it shelters one of the largest Refugee populations in the world. India's lack of clear standards for the treatment of refugee groups, however, is resulting in violations of the international norms for the treatment of refugees. Its policies are discriminatory and inequitable, even to members of the same group.

⁶⁹⁰South Asia Human Rights Documentation Center (SAHRDC), Refugee Protection in India, October 1997. Available at <http://www.hrdc.net/sahrhc>

Although Tibetan refugees who arrived prior to 1980 received adequate assistance from the Indian government, assistance to the Tibetan refugees who arrived after 1980 has declined greatly forcing them to live in inhumane conditions. These inconsistent policies demonstrate that India should adopt basic standards of treatment for the refugees living inside its borders. In order for India to bring its refugee law into conformity with the international community, only improving its domestic laws is insufficient because it will continue to reject international assistance and monitoring of refugee groups. India should reform its refugee policies and accede to the Refugee Convention or its Protocol. The ratification of 1951 Convention Relating to the Status of Refugees is a statement of intent unless it is enforceable in domestic courts. Since the Government of India is not even considering the ratification of the 1951 Refugee Convention, its enforcement in domestic legislation or development of a refugee legal regime is a far cry. A consistent legal framework is vital to the prevention of political ad-hocism, which often translates into forcible repatriation for refugees. The issue is not only development of domestic legislation but also how to ensure that both the UNHCR and the Government of India strictly abide by their own standards and principles. For the refugees, the latter remains the immediate concern and the UNHCR has manifestly failed to address the issue of protection. The zeal to protect refugees from ad hoc administrative policies, and to prevent their deportation by means of the activist approach of the courts, NHRC and NGOs has its limitations. Legal framework is needed to provide for the protection, rehabilitation and repatriation of refugees. However, the need for a Specific Refugee Law in India has to be viewed not only from the humanitarian point of view, but also from the point of view of national security, territorial integrity, and sovereignty of the State on the one hand, and India's geo-political position in South Asia on the other hand. The attempt to fill the void with judicial creativity can only be a temporary phase. Legislation alone may provide permanent solutions.

A general rule can be formulated on this basis: India is prohibited from removing, rejecting, or otherwise returning individuals to situations where there is a real risk of a violation of human rights rising to a level of seriousness akin (but not limited) to torture or cruel, inhuman or degrading treatment or punishment and, in particular, where the violation feared will cause irreparable harm to the individual concerned. This reflects the position at both conventional and customary international law as it

relates to India. The seriousness of the feared violation is to be assessed on an individual basis taking into account all of the circumstances relevant to each case, including the cumulative or discriminatory effect of the relevant violations. Relevant circumstances include the age, sex, and health of the victim, and the particular mental and physical effects of the violations on them. Violations of non-derogable rights will always be of sufficient seriousness to ground a claim of non-return.

At the same time, India has, through its own state practice in accession to more general human rights conventions like the ICCPR, the ICESCR, and the CRC, in becoming a signatory to CAT, and in its role as a member of the UNHCR ExCom, contributed importantly to the development of a far more sweeping and unconditional norm of non-refoulement. This is now binding on India as a matter of both customary and conventional international law. As such, the ongoing national security debate with respect to accession now seems both at odds with the core of Indian state practice and otiose to India's legal obligations.

CHAPTER VI

RECONCILING EXTRADITION WITH NON- REFOULEMENT

Human rights must be considered while determining the extradition request. The foundation for the discrimination clauses in most of the extradition treaties are laid by the perspectives of human rights. However, the traditional view was governed by the principle that states have the exclusive power to deal with the matters of extradition. Individual here was only considered as an object under international law, which is unable to assert his own human rights, and can only oppose the extradition on grounds that it was violative of the treaty, for example, the offence committed was not covered under the treaty.⁶⁹¹ However, this traditional notion has changed, under international law. An analysis of the case study in the fourth chapter clearly points to this view.

Human rights do not stand in the way of extradition.⁶⁹² Extradition is an important method of ensuring that those who have committed crimes are held accountable and justice is ensured. It is an instrument for cooperation between states, so that those who have committed crimes cannot escape the law. When a valid extradition request is made by a State, The requested state would face a conflict between the principles of non-refoulement and extradition. In such cases a direct conflict arises between the conflicting provisions under international law.

VI.1 HIERARCHY OF OBLIGATIONS

It is important to understand the hierarchy of obligations under international law, and which obligation must be accorded greater importance.

⁶⁹¹David A. Sadof, "Bringing International Fugitives to Justice: Extradition and its Alternatives", (Cambridge University Press, 1st ed., 2016).

⁶⁹² Soering v. the United Kingdom, Eur.Ct. H.R., Application No. 14038/88, Judgment of 7 July 1989

VI.1.i Conflict between extradition agreements and conventions

A state would face conflicting obligations under its extradition treaty, and human right convention. The state would have a duty to extradite on the basis of a valid extradition request, but the state is also bound to refuse extradition in certain cases. Various conventions have attempted to resolve this conflict. Art. 28 of the European convention on Extradition⁶⁹³ clearly state that its provisions would supersede any treaty or agreement dealing with extradition between state parties.⁶⁹⁴

Art. 30 of the Vienna Convention on Law of Treaties⁶⁹⁵ lays down the rules to govern the functioning of two treaties on the same issue, which can be summed as, treaties which are passed later will prevail over the ones which are passed in an earlier date and the more specific ones will prevail over the general treaties.⁶⁹⁶

VI.1.ii Conflict between extradition obligation and obligation under other international treaties

The aforementioned rules would only apply in cases where both the treaties deal with the same subject matter. A state would often face conflicting obligations under its extradition treaty, and human right convention. The human rights on which the status of *jus cogens* or peremptory norms of international law has been conferred, some of the Articles like Art. 53 and 64 of the Vienna Convention on Law of Treaties⁶⁹⁷ would apply. Obligations provided in any treaty are void if it is in conflict with the principle of *jus cogens*.⁶⁹⁸ A state is always prohibited from extraditing an individual to the state where he might be tortured or subjected to cruel, inhuman or degrading

⁶⁹³European Convention on Extradition, 13 December 1957, ETS 24. (in force 18 April 1960) [Hereinafter European Convention on Extradition].

⁶⁹⁴Kapferer, *supra note* 118.

⁶⁹⁵Vienna Convention on the Law of Treaties, Art. 53, opened for signature 23 May 1969, 1155 U.N.T.S. 331, (in force 27 January 1980) [hereinafter VCLT] Article 53 Treaties Conflicting With A Peremptory Norm Of General International Law (Jus Cogens)

If a treaty conflicts with a peremptory norm of international, it will be void. Peremptory norms of international law is a norm which is recognized and accepted by the international community as a whole and form a norm which cannot be derogated from, and can only be modified by a subsequent norm of similar character.

⁶⁹⁶ Kapferer, *supra note* 118.

⁶⁹⁷ VCLT, *supra note* 695.

⁶⁹⁸ Hossain, *supra note* 443.

punishment. As this has attained the status of *jus cogens*, it would always prevail over a state's obligation to extradite the offender. However, in relation in human right obligations which have not yet attained the status of *jus cogens*, Art, 55(c)⁶⁹⁹ and 56⁷⁰⁰ of the U.N. Charter obligates State's to protect and promote human rights. Furthermore, Art. 103⁷⁰¹ of the U.N. Charter states that in case of conflict between the obligations of the U.N. Charter and under any other international instrument, the obligation under the U.N. will prevail.⁷⁰² Thus, possible violation of human rights takes precedence over the duty to extradite.⁷⁰³

VI.1.iii. Conflict between Extradition Obligation and Obligation under Customary International Law

With regard to a conflict between an extradition obligation and a human right obligation which has attained the status of customary international law, as a general rule, the latter will prevail.⁷⁰⁴ It is opined that this is particularly the case with regard to *non-refoulement* obligations. Customary international obligation will always prevail over obligations under extradition law.⁷⁰⁵ The importance given to human rights does not depend only depend on specific provisions obligating the same,⁷⁰⁶ but on the primacy of the obligations due their special nature.⁷⁰⁷

VI.2 LEGAL AND ILLEGAL REFUGEES

Wayan Parthiana, argues that the entire conflict can be resolved by making a differentiation between legal and illegal refugees. Legal refugees are those who have been classified as refugees under the 1951 Refugee Convention and the 1967

⁶⁹⁹Art. 55(c), United Nations Charter, 1945, 1 U.N.T.S. XVI. (Hereinafter U.N. Charter); See also, Preamble, Refugee Convention.

⁷⁰⁰ Art. 56, U.N. Charter, *Id.*

⁷⁰¹ Art. 103, U.N. Charter, *Id.*

⁷⁰² Rain Liivoja, "The Scope of the Supremacy Clause of the United Nations Charter", 57 *International and Comparative Law Quarterly* 583 (2008).

⁷⁰³ Kapferer, *supra* note 118.

⁷⁰⁴ Kapferer, *supra* note 118.

⁷⁰⁵ Liivoja, *supra* note 702.

⁷⁰⁶UNHCR Guidance Note on Extradition and International Refugee Protection, <http://www.coe.int/t/dghl/standardsetting/pc-> ; Article 6, Organization of American States (OAS), Inter-American Convention on Extradition, 25 February 1981.

⁷⁰⁷ Malcolm N. Shaw, "International Law", Cambridge University Press, 6th ed., 2010.

Protocol. Illegal refugees are those who have committed crimes in their home state and have fled to escape valid prosecution, these persons fall under the exclusion classes under Art. 1(F) of the Refugee Convention, and can be validly extradited.

All the refugees who stay in a country cannot be classified as legal refugees. In other cases, a person might be classified as a refugee, but would lose his status, after commission of a crime. This is why a differentiation has to be made between legal and illegal refugee.

The UNHCR along with the authorities of the host country in whose territory the refugees are located is involved in the refugee determination process. Other international organizations can also be involved in the process, if considered necessary.⁷⁰⁸ Those who are validly classified as refugees in accordance with the convention are identified as being legal refugees. Legal refugees would enjoy all the rights and obligations endowed on a valid refugee. Individuals who don't qualify are termed as illegal refugees.⁷⁰⁹

Convention Countries and the UNHCR are not bound to provide protection to illegal refugees. The drafting committee was aware that such groups cannot be afforded international protection⁷¹⁰ and Art. 1(F) of 1951 Refugee Convention explicitly provides for the same.

The exclusion clause clearly states that the convention will not apply to an individual who has “committed a crime against peace, war crime, or crime against humanity; or has committed a serious non-political crime; or has been guilty of acts contrary to the principles of the United Nations.”⁷¹¹

⁷⁰⁸ Liivoja, *supra note* 702.

⁷⁰⁹ Ibid.

⁷¹⁰ Shaw, *supra note* 707.

⁷¹¹ Art. 1(F), Refugee Convention, 1951.

VI.2.i. Analysis of the Classification

The exclusion clause has been incorporated along the lines of the International Military Tribunal statute,⁷¹² which provided for three categories of crimes for which individual criminal responsibility can be imposed.⁷¹³ The International Military Tribunal to prosecute Nazi and Japanese officials accused of committing such crimes during World War II. The drafters of the 1951 convention found to provide for the exceptions in the Convention.

Persons who have committed serious non-political crimes in their previous country cannot be enjoined with refugee status as this would allow them to escape from valid prosecution for the crimes committed. The Article also provides for the well accepted political offense exception, which states that a person cannot be extradited if he is wanted for commission of a political offence. A person cannot be held responsible merely for opposing the established government, due to his unique political beliefs. This protects the right of individuals to espouse their views and beliefs.

If an individual has committed acts contrary to the purposes, objectives and principles of the UN, he cannot claim protection under the Refugee Convention.⁷¹⁴ The subject and purpose of the UN are broadly contained in Art. 1 of the United Nations Charter.⁷¹⁵ Whereas, the principles of UN can be found under Art. 2 of the UN Charter.⁷¹⁶ Art. 1 and 2 of the U.N Charter have been recognized as jus cogens principles, and cannot be violated under any circumstances.

Refugees are civilians who have not participated in war crimes, or are trying to escape from valid prosecution or have committed acts contrary to the purpose of the

⁷¹²Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis.

⁷¹³James C Simeon, "The Application and Interpretation of International Humanitarian Law and International Criminal Law in the Exclusion of those Refugee Claimants who have Committed War Crimes and/or Crimes Against Humanity in Canada", 27(1) Int. J. Refugee Law 75 (2015).

⁷¹⁴ UNHCR Standing Committee, Note on the Exclusion Clauses Note on the Exclusion Clauses, UNHCR, <http://www.unhcr.org/excom/standcom/3ae68cf68/note-exclusion-clauses.html> (last seen on 3 Feb. 2017).

⁷¹⁵ Art. 1, U.N. Charter, *supra* note 699

⁷¹⁶ Art. 2, U.N. Charter, *supra* note 699.

United Nations.⁷¹⁷

However, the UNHCR and the authorities of the host country will often find it difficult to apply the principles and classify a person as a refugee. Practically, the refugee determination process is a difficult one, and merits serious consideration. There the problem often arises as to how to determine whether an individual would fall under Art. 1(F) of the Refugee Convention.

If refugee status is refused to an individual, he must be given clear and cogent reasons for refusal of refugee status. He must also be given an opportunity to appeal against the decision, either through the national authorities or through the mechanism set up by the UNHCR. It can also be taken up at the international level, for example, specifically in case of Europe; individuals can approach the European Court of Human Rights. However, this is based on each region and many parts of the world lack such a mechanism.

The Refugee Convention does not talk about how illegal refugees must be treated.⁷¹⁸ This is because the Refugee Convention only protects those who have been classified as legal refugees, those who are classified as illegal refugees are outside the scope of the convention.⁷¹⁹

The host state will treat such individuals as illegal aliens; the state is entitled to apply its national laws against such persons, and the accepted standard of international laws. The state is however, bound to protect human rights of the individuals.

The host country could conduct a criminal trial to prosecute the individual for illegal entry into the country. Art. 31 of the convention only applies to legal refugees and not illegal refugees, so illegal refugees can be prosecuted for illegal entry and holding

⁷¹⁷U.N. High Commissioner For Refugees, “Handbook And Guidelines On Procedures And Criteria For Determining Refugee Status Under The 1951 Convention And The 1967 Protocol Relating To The Status Of Refugees”, (UNHCR HCR/1p/4/Eng/Rev. 3, 2011).

⁷¹⁸Adrienne Millbank, “The Problem With the 1951 Refugee Convention”, http://www.Aph.Gov.Au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Pubs/Rp/Rp0001/01rp05 (Last Seen on 3 Feb. 2016).

⁷¹⁹U.N. High Commissioner For Refugees, “Report On International Protection, UNHCR <http://www.unhcr.Org/Excom/Excomrep/3ae68c044/Report-International-Protection-Submitted-High-Commissioner.html> (Last Seen On 3 Feb. 2016).

false documents.⁷²⁰ The court can also impose an expulsion order, directing him to leave the country after undergoing the sentence imposed on him. The drawback of such a solution is that cases will take a long time to be decided, as the court must judge the person on daily basis. The individual can be returned to his own country or to any other third country as long as the state accepts him.

Illegal refugees can also be ordered to leave the State and returned to the State where he came from. A state is entitled to take any action against any person in its territory, as long as it does not contravene international law.⁷²¹ Questions can be raised on the legality of such actions, as it could potentially violate Art. 33 of the Refugee Convention. By deporting illegal refugees, States would violate their obligations of *non-refoulement* enshrined in Art. 33 of the Convention.⁷²²

However, Wayan Parthiana argues that the power to deport persons within the territory of the Country is the sovereign power of the country to maintain security and order within the country.⁷²³ He states as illegal refugees are not entitled to protection under the Refugee Convention, they cannot claim protection under the principle of *non-refoulement*.⁷²⁴ Their presence in the host country is illegal and the State is authorized under international law to deport such individuals.

The host country can also prosecute the individuals for the crimes committed by them before entering the State, if it has jurisdiction to prosecute such crimes. In case the host country does not have jurisdiction over the offence, the only option left is to deport the person to the State where crime was committed.

Particularly with respect to individuals who have committed war crimes, genocide, crimes against humanity, the host country can exercise jurisdiction over such offences based on universal principles.⁷²⁵ Such issues can be tried on basis of domestic or international conventions which provide for its punishment. Countries may face

⁷²⁰Goodwin, *supra* note 15.

⁷²¹ Responsibility of States for internationally wrongful acts, A/RES/62/61 (8 Jan. 2008).

⁷²²Jessica, *supra* note 1.

⁷²³ Parthiana, *supra* note 12.

⁷²⁴ Parthiana, *supra* note 12.

⁷²⁵ Wolfgang Kaleck, "From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008", 30 Mich. J. Int'l L. 927 (2009).

practical problems while conducting trial such as gathering evidence, obtaining testimony of witnesses etc, as the crime has been committed in the territory of different State.

A state can seek mutual assistance, while prosecuting such crimes; however, it is subject to whether the countries are bound by an agreement. Obtaining evidence in the absence of evidence would be a difficult task; however, states may mutually help each other based on good relations.

After the establishment of the International Criminal Court in by the Rome Statute, a perpetrator may be held responsible for commission of such a crime and punished accordingly. For the Court to exercise jurisdiction, host countries must be signatories to the Rome statute and accept the jurisdiction of the International Criminal Court.⁷²⁶

A legal refugee cannot be extradited under international law. The refugee left his home state to escape from persecution on basis of his race, religion, nationality, membership of social group or political opinion, and not to flee from valid prosecution. Secondly, in order to extradite a person, the state must have criminal jurisdiction to prosecute the person for the crimes committed. If the refugee is not associated with the crime, he cannot be extradited.⁷²⁷

If a refugee is found to have committed a crime, after the refugee determination process, the host country must bring the issue to attention of the UNHCR. If the UNHCR is satisfied, it can revoke the refugee status of a person.⁷²⁸ Once this is done, the individual ceases to be a legal refugee, and can be validly extradited to the requesting state.

Illegal refugees who have committed serious non-political crimes, genocide, crimes against humanity and war crimes can be validly extradited. Even in case of commission of other crimes, an illegal refugee can be extradited by the host state, as long as the request has been validly made, as specified in the extradition treaty. An

⁷²⁶ Dapo Akande, "The jurisdiction of the International Criminal Court over Nationals of Non- Parties: Legal Basis and Limits", 1 J Int. Criminal Justice 618 (2003).

⁷²⁷ Geoff Gilbert & Anna Magdalena Rusch, "Jurisdictional Competence Through Protection: To What Extent Can States Prosecute the Prior Crimes of Those to Whom They Have Extended Refuge?" 12(5) J Int. Criminal Justice 1093 (2014).

⁷²⁸ Kneebone, *supra note* 56.

individual can be extradited in the absence of an extradition treaty, based on good relationship between the two countries.⁷²⁹ The extradition would be based on national legislations, and international law on extradition.

Legal refugees cannot be extradited because their status as a refugee has been determined the UNHCR and the national legal authorities in accordance with the Refugee Convention.

Wayan Parthiana clearly identifies the problem in question, that is whether a refugee can be extradited. This differentiation between legal and illegal refugees is however, preliminary and basic. It does not account for situations where the individual would be subjected to individualized ill-treatment or torture in the requesting state. There are many situations where a person might be an illegal refugee, but his fundamental human rights would be at peril if extradited to the requesting state. The solution does not take into account the various cases which have been discussed in the case analysis. However, an interesting inference can deduced from the analysis, the solution proposed is similar and falls in line with the individualized ill treatment requirement.

VI.3. UNHCR'S VIEW

The UNHCR's guidance note on extradition⁷³⁰ seeks to clarify the principles of *non-refoulement* and extradition, and set out a state's response to such situations.

VI.3.i Extradition request

VI.3.i.a. Request for Extradition from the refugee's country of origin

Under Art. 33 of the Refugee Convention, if the refugee making a request is a national of the requesting State, the State is bound to deny the extradition request. *Non-refoulement* imposes a prohibitory bar on extradition in such cases, unless the

⁷²⁹ M.Cherif Bassiouni, "International Extradition and World Public Order", A.W Sijthoff, 1st ed. 1974.

⁷³⁰ UNHCR Guidance Note on Extradition and International Refugee Protection, *supra* note 706.

individual comes under the exception of Art. 33(2). However, even in such circumstances, the State is bound to honour its obligations under human right conventions.⁷³¹

In cases where the requesting state has given diplomatic assurances that the individual will not be tortured or persecuted upon return, such undertakings should not be relied upon by the requested state.⁷³² If a person has already been given protection under Art. 33(1), which means that he faces risk of persecution on basis of his race, religion, nationality, membership of social group or political opinion, assurances from the same government which is the agent of persecution cannot be relied upon.⁷³³

VI.3.i.b. Request for Extradition from State other than the State of origin

Indeed, even in situations where the asking for State is not the same as the refugee's State of inception, the State must look into whether non-refoulement and other human rights would be violated upon extradition. The State must ensure that extradition does not expose him to torture or persecution or allow for him to be further extradited to the country of origin, or a third state.⁷³⁴ The State must delve into the situation with regard to the factual circumstances in the country, the diplomatic assurances and a totality of all the relevant circumstances.

An individual may however be refouled back only if there are sufficient political assurances given that removes the risk of serious human right violations.⁷³⁵ It needs to be ensured that the assurances are suitable means to remove the risk of persecution, and the requested state considers it to be reliable.⁷³⁶

⁷³¹UNHCR, Note on Diplomatic Assurances and International Refugee Protection, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=44dc81164> (last seen on 19 March 2017).

⁷³²UNHCR, Factum of the Intervenor, Suresh v. the Minister of Citizenship and Immigration; the Attorney General of Canada SCC No. 27790” 14(1) Int. J. Refugee Law 141-157 (2002).

⁷³³ *Id.*

⁷³⁴UNHCR Guidance Note on Extradition and International Refugee Protection, *supra* note 706.

⁷³⁵ UNHCR Guidance Note on Extradition and International Refugee Protection”, *supra* note 706.

⁷³⁶*Id.* UNHCR, Note on Diplomatic Assurances and International Refugee Protection, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=44dc81164> (last seen on 19 March 2016).

In regard to diplomatic assurances provided in cases of risk of torture, the Special Rapporteur on Torture or other Cruel, Inhuman or Degrading Treatment or Punishment has stated that assurances are sought only from those states where there is a danger to life and torture is rampant. Moreover, diplomatic assurances are not legally binding, and the State cannot be held liable in case of violation.⁷³⁷ If the assurance is violated, the individual cannot claim any legal remedy. Under these circumstances, the requested state cannot rely on diplomatic assurances.⁷³⁸

The UNHCR guidance note suggests that diplomatic assurances given by a country other than refugee's country of origin, the State must again examine the request on grounds of whether there is a risk of persecution, or further transfer to the country of origin

VI.3.ii Asylum seekers

VI.3.ii.a. Request for Extradition from the asylum-seekers country of origin

Under Art. 33(1) of the Refugee Convention, Asylum-seekers are also protected against refoulement, during the pendency of the asylum proceedings.⁷³⁹ The request State cannot extradite an individual to his country of origin during the pendency of his claim for asylum, including the appeal state.⁷⁴⁰ This would apply even in cases where diplomatic assurances have been provided by the requesting state. Diplomatic assurances have to be weighed in light of whether it fully removes the risk of persecution. The country must also take into account factors such as past experiences wherein diplomatic assurances have been adhered to, existence of monitoring mechanisms etc.⁷⁴¹

⁷³⁷Amnesty International, "Dangerous Deals Europe's Reliance on 'Diplomatic Assurances' against torture", available at: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/201/201101/20110124_705dangerousdeals_en.pdf (last seen on 19 March 2016).

⁷³⁸Human Rights Watch, "Still at Risk: Diplomatic Assurances No Safeguard Against Torture", available at: <http://www.refworld.org/docid/42c3bd400.html> (last seen on 19 March 2016).

⁷³⁹ William Thomas Worster, "The Evolving Definition of the Refugee in Contemporary International Law", 30 Berkeley J. Int'l Law. 94 (2012).

⁷⁴⁰ UNHCR, Note on Diplomatic Assurances and International Refugee Protection, *supra* note 731; UN High Commissioner for Refugees, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, <http://www.refworld.org/docid/45f17a1a4.html> (last seen on 19 March 2016).

⁷⁴¹ *Id.*

VI.3.ii.b. Extradition request from a country other than the asylum seekers country of origin

When an extradition request is made by a country other than the asylum seekers country of origin, the State must analyze the risks which could be faced by the individual on extradition.⁷⁴² The must take into consideration its obligations under refugee law and human right conventions. Diplomatic assurances must be considered in light of the overall situation and whether it would expose the individual to persecution, torture, or other inhuman or degrading treatment.⁷⁴³

If the individual would face the risk of persecution, or further removal to the country of origin, refoulement would be precluded under Art. 33(1) of the Refugee Convention.⁷⁴⁴ The Requested State must also ensure adherence to its human rights treaties and conventions.

The UNHCR guidance note on extradition and non-refoulement explicitly mandates that a state may only surrender the individual to the requesting state if it would not amount to a infringement of its non-refoulement obligation under International Law.⁷⁴⁵ Even if extradited, the State must ensure that the individual has access to a fair and clear asylum procedure.⁷⁴⁶

VI.3.iii. Safeguards to ensure protection of the principle of non-refoulement

VI.3.iii.a Extradition request concerning a refugee recognized by the requested State

When the requested state has recognized an individual as a refugee and an extradition request is made by his country of origin, then in such cases the authorities

⁷⁴² Battjes, *supra* note 321.

⁷⁴³ UNHCR, Note on Diplomatic Assurances and International Refugee Protection, *supra* note 731.

⁷⁴⁴ Jean Allain, "The Jus Cogens Nature of Non-Refoulement", 13 International Journal of Refugee Law 53 (2001).

⁷⁴⁵ UNHCR Guidance Note on Extradition and International Refugee Protection, *supra* note 706.

⁷⁴⁶ Kapferer, *supra* note 118.

of the requested state have clearly recognized the well-founded fear of persecution fostered by the refugee, and will be binding on all the state organs and institutions dealing with the extradition request.⁷⁴⁷ An individual, thus, would be entitled to the protection offered under Art. 33(1) of the convention, and cannot be refouled.

National legislations of certain countries may sometimes specifically state that the extradition authorities are not bound the decision made by the asylum authorities of the same State. In such circumstances, the requested State is bound to ensure that its action is in consonance with its duties of non-refoulement under the norms of refugee and human rights laws.⁷⁴⁸ The person who has already been determined to be a refugee, the authorities must have due regard to the prohibition on refoulement placed in Art. 33(1) of the Refugee Convention. The extradition authorities must take a holistic view with regard to all the facts and circumstances of the case to determine whether a risk of persecution exists. This would apply even in cases where the country is other than the country of origin.

VI.3.iii.b. Extradition request concerning a refugee recognized by a country other than the requested State

The requested state must look into the treatment which would be meted out the individual in the requesting state, and his status in the country. Once an individual has been given the status of a refugee, after a valid refugee determination process, the decision may not be called into question by other State parties. Once a State party has validly classified a person as a refugee, it must not raise doubt about by another state party, but in special cases, where the person would not have qualified as a refugee, for example, individual made fraudulent claims to be considered as a refugee.

VI.3.iii.c. Extradition request concerning a refugee recognized by UNHCR

When the UNHCR has classified an individual as a refugee, State's must accept this classification. The UNHCR has an international mandate to protect the interests of

⁷⁴⁷ UNHCR Guidance Note on Extradition and International Refugee Protection, *supra* note 706.

⁷⁴⁸ *Id.*

refugees, States must respect and co-operate with the decision of the UNHCR. The UNHCR also has a supervisory responsibility under Art. 35 of the Refugee Convention.⁷⁴⁹

VI.4 PROPORTIONALITY AND THE BALANCING OF INTERESTS IN THE EXTRADITION PROCESS

Extradition and human rights have always been linked together, subsequent to World War II, bilateral treaties have always included a clause excluding extradition if the requesting state fails to give an assurance that death penalty will not be imposed.⁷⁵⁰ Additionally, refoulement is barred when the individual is going to be persecuted on the basis of his race, religion, nationality, membership of social group or political opinion.⁷⁵¹ This clause is based on Art. 33 of the Refugee Convention and has also been incorporated in various other extradition agreements.⁷⁵²

The U.N model Treaty on Extradition⁷⁵³ bars extradition if the person will be prosecuted on basis of race, religion, nationality, ethnic origin, political opinion, sex or status and if the person will not receive the minimum guarantees in criminal proceedings as mentioned in the ICCPR.

Many European States have also express provisions in national legislations which prohibit extradition in case of a real risk of violation of human rights. In 1981, the Swiss legislature adopted a new extradition law which links human rights and extradition law.⁷⁵⁴ Similarly, in Ireland the constitutional safeguards have served as a basis for denial of extradition requests, courts have refused extradition on the ground that there is a real risk of violation of basic human rights as guaranteed by the Irish Constitution.⁷⁵⁵

⁷⁴⁹ Goodwin, *supra note* 15.

⁷⁵⁰ Art. 11, European Convention on Extradition, *supra note* 3.

⁷⁵¹ Art. 3(2), European Convention on Extradition, *supra note* 3.

⁷⁵² U.S.- U.K. Supplementary Extradition Treaty of 1985. The International Convention against the Taking of Hostages of 1979, The Inter-American Convention on Extradition and the Commonwealth Scheme for the Rendition of Fugitive Offenders of 1990 contain similar provisions.

⁷⁵³ Model Treaty on Extradition, A/RES/45/116 (14 Dec. 1990).

⁷⁵⁴ Dugard and Wyngaert, *supra note* 294

⁷⁵⁵ Finucane v. McMahon I.L.R.M 505 (1990).

VI.4.i Basis for Priority of Human Rights over Municipal Law and Extradition Treaties

National and international courts have often given more importance to the possible violation of human right treaties and have accorded it greater importance than extradition treaties. This is primarily because of various human rights conventions forming a part of *jus cogens*, or peremptory norms of international law. Also, human right conventions form a part of *ordre public* of international community⁷⁵⁶ or the rule of law of a particular region and govern the relation between states in that region.

In some instances a domestic court will be required to choose between competing treaty obligations, as in *The Netherlands v. Short*,⁷⁵⁷ and in these cases the interest of the requested state in compliance with its treaty obligations will be the decisive factor.

VI.4.ii. Human rights which obstruct extradition

There are certain human rights, the violation of which would bar refoulement, however, other human rights might not be as pivotal to completely bar extradition. Christine argues that all human rights do not enjoy the same amount of protection with regard to extradition. There is no clear criteria to determine what is a fundamental human right which would prohibit extradition and what is not. Though there are certain general criteria to determine ordinary right and a higher right, there is no uniformity with respect state practice, and a clear hierarchy cannot be drawn up. However, such a classification is useful and would help guide the Courts in coming to a conclusion while dealing with the conflict between extradition and non-refoulement. Rights are classified into three broad categories,

1. Rights which may be restricted for certain purposes such as maintenance of law and order, protection of freedom of others etc.⁷⁵⁸ These rights include freedom of speech, right to privacy etc.

⁷⁵⁶ P. v. Office Federal de la Police ATF 117 Ib 337, 340 (1991).

⁷⁵⁷ *The Netherlands v. Short* 22 NETH. YB. INT'L L. 432 (1991).

⁷⁵⁸ Dugard and Wyngaert, *supra note* 294

2. Absolute rights which cannot be restricted under any circumstances. These rights cannot be violated even in times of war. These rights include prohibition against torture, cruel, inhuman or degrading punishment.⁷⁵⁹
3. Rights which may be restricted only in cases of emergence. These rights include the right to a fair trial etc.⁷⁶⁰

VI.4.ii.a. Rights that may be restricted for certain purposes

These rights may be restricted for specific purposes, such as the suppression of crime etc. When an individual claims a violation of his right, the State will try to balance the conflicting interests, suppression of crime and the possible violation of a person's right to privacy.

In the case of *X v. Bundesamt für Polizeiwesen*,⁷⁶¹ the Swiss Court held that suppression of crime superseded the violation of right to privacy of X. In certain rare cases, this balancing of interest could also weigh in favour of the individual, for eg if it was a small offence. However, such a result rarely occurs.

VI.4.ii.b. Absolute rights

If the individual claims the possible violation of an absolute right, the proportionality test cannot be applied. This follows from the ruling in *Chahal* judgement,⁷⁶² when there is a real risk of violation that a fundamental human right will be violated, extradition must be refused. There cannot be a balancing of interest with respect to suppression of crime and violation of the individual's rights. Prohibition against torture, cruel, inhuman or degrading punishment are absolute rights which cannot be violated. However, there is still no clear consensus among on what would constitute cruel, inhuman or degrading treatment.⁷⁶³ For example, death row phenomenon, certain states interpret the death penalty to constitute cruel, inhuman or degrading

⁷⁵⁹ Dugard and Wyngaert, *supra note 294*

⁷⁶⁰ Dugard and Wyngaert, *supra note 294*

⁷⁶¹ *X v. Bundesamt für Polizeiwesen* ATF 117 lb 210 (1991).

⁷⁶² *Chahal v. United Kingdom*, Eur.Ct. H.R., Application no.22414/93, Report of 27 June 1995

⁷⁶³ Méndez, Juan E., "The Death Penalty and the Absolute Prohibition of Torture and Cruel, Inhuman, and Degrading Treatment or Punishment", available at: <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1849&context=hrbrief> (last seen on 19 March 2017).

punishment, however certain states do not. There is divergence among states as to the interpretation of what constitutes cruel or inhuman punishment. This could lead to situations where an individual could be extradited, though there is denial of an absolute right, because the requested State does not interpret it to be an absolute right.⁷⁶⁴

VI.4.ii.c. Rights that may be restricted only in time of war or other public emergency

These rights can be restricted only in certain circumstances. Various human rights instruments and national legislations provide that these rights can be restricted in specific circumstances, such as times of war or public emergency.⁷⁶⁵ Under normal circumstances extradition requests will be refused, if fair trial is jeopardized, however in times of war, such a requirement may be waived off. However, in such circumstances, the requested state would apply the proportionality test and weigh the seriousness of the offence committed, and the risk of violation of the right. Many domestic Courts have applied such a test to make a determination.

In line with the Soering doctrine, only flagrant violations of other rights can be considered to refuse extradition requests. The burden of proof falls on the individual to prove that there is a real risk of violation of basic human rights.⁷⁶⁶

VI.5 OTHER POSSIBLE SOLUTIONS

VI.5.i. Conditional Extradition

Conditions can be imposed while extraditing an individual. The specialty principle mandates that the individual can be prosecuted only for the offence for which he has

⁷⁶⁴ Dugard and Wyngaert, *supra note* 294

⁷⁶⁵ United Nations. Office of the High Commissioner for Human Rights, "Human Rights In The Administration Of Justice: A Manual On Human Rights For Judges, Presecutors And Lawyers", (United Nations Publication 1st ed. 2003).

⁷⁶⁶ Soering, *supra note* 210.

been extradited.⁷⁶⁷ If the requesting state does not comply with the condition after extradition, it would amount to a breach of treaty.⁷⁶⁸ In case of the death penalty exception, the requested state tries to obtain an assurance that the individual will not be subject to the death penalty.⁷⁶⁹ The requested state can also impose a condition that the individual has to be returned to the country after trial, to serve his sentence.

In cases where the requested state expressly seeks an assurance from the requesting state that the individual will not be subjected to cruel, inhuman or degrading treatment, the requesting state is unlikely to be pleased.⁷⁷⁰ Such acts constitute state practice. In the case of extradition of Zaid Abu Eain to Israel in the year 1982, the U.S. authorities secured an undertaking from the Israeli authorities that he would be tried by a Civil Court and have access to a fair trial.⁷⁷¹

In 1996, Dennis Hurley, a Canadian citizen was extradited by the Canadian government to Mexico, on the condition that his safety must be ensured, and Canadian authorities would be allowed to visit him and communicate with him to ensure his rights are protected.⁷⁷² By this method the requested State can ensure that the assurances provided are being followed.

The Swiss Federal Tribunal in the *Dharmarajah case*,⁷⁷³ allowed for extradition on the condition that death penalty must not be imposed, a new trial must be held instead of the previous one which was held in absentia, and procedural safeguards must be observed. In subsequent decisions the Swiss courts have approved conditional extradition as means of securing the individual's rights.

The requested State, can require the requesting State to provide assurances that the human rights of the individual will be safeguarded. Moreover, even if assurances are

⁷⁶⁷M. Cherif Bassiouni, "International Extradition: United States Law and Practice", (Oxford University Press 6th ed. 2014).

⁷⁶⁸ R v. Parisien, [1988] 1 S.C.R. 950 (Can.), 92 ILR 683, 686.

⁷⁶⁹ Craig R. Roecks, "Extradition, Human Rights and the Death Penalty: When Nations must refuse to extradite a person charged with capital crime", 75 California Western International Law Journal 189 (1994).

⁷⁷⁰ Dugard and Wyngaert, *supra note* 294.

⁷⁷¹ Dugard and Wyngaert, *supra note* 294.

⁷⁷² Dugard and Wyngaert, *supra note* 294.

⁷⁷³ Dharmarajah, ATF 107 Id. 68.

provided, the State may impose a further condition that its authorities may visit the individual in the other state, to ensure that the assurances are being adhered to.⁷⁷⁴ Monitoring can be carried by consular and diplomatic officers of the requested state, who routinely monitor the prosecution of their own nationals which would help bring together a state's incompatible obligations under human rights law and extradition law. It would also be more acceptable to the requesting state, and conditional extradition has been accepted as state practice.

Conditional extradition is not a straight-jacket solution which will work in all situations. The International Association of Penal Law in 1979 refused to accept a proposal to classify conditional extradition as a general practice, to permit restrictions on the use of political offence exception.⁷⁷⁵ It was held that though the system has worked in certain instances, a system cannot be developed to implement a common system among all states. It was primarily depend on the conditions imposed, and more importantly, the successful use of monitoring mechanisms. In many cases the requesting State may decline to take any action after the individual has been extradited, despite of the insistence of the requested State. Wang Jianye was extradited to China for an offence which could be punished by death, on the condition that the death penalty would not be imposed on or sentence to prison for a period more than fifteen years. The individual was executed 1 year after extradition.⁷⁷⁶

VI.5.ii. Aut Dedere aut Judicare

The principle of *Aut dedere aut Judicare*, obligates that States must either extradite or try the individual in their own Courts, various conventions governing terrorism, and other unlawful activities have incorporated this provision. These conventions provide jurisdiction to many States to try the offenders, so the crime may be tried in the jurisdiction of any of the States.⁷⁷⁷

⁷⁷⁴ Dugard and Wyngaert, *supra note* 294

⁷⁷⁵ Christine Van Den Wyngaert, "The Political Offence Exception to Extradition :Defining the Issues and Finding a Feasible Alternative", (Springer 1st ed. 1981).

⁷⁷⁶ Dugard and Wyngaert, *supra note* 294

⁷⁷⁷ Andre de Rocha Ferreira, "The obligation to Extradite or Prosecute", available at: <https://www.ufrgs.br/ufrgsmun/2013/wp-content/uploads/2013/10/The-obligation-to-extradite-or-prosecute-aut-dedere-aut-judicare.pdf> (last seen on 19 March 2016).

However, crimes which are considered to be national crimes cannot be prosecuted in other jurisdictions, especially in case of common law countries where territoriality is the basis for jurisdiction. But the principle can be applied to a limited extent. Civil law countries exercise jurisdiction on basis of both territoriality and jurisdiction, and in recent times, common law countries have begun to exercise jurisdiction to cover offences committed by their nationals.⁷⁷⁸ In cases where the requested State has the jurisdiction to try the individual whose extradition has been sought, and there is a real risk of violation of fundamental human rights. The State may deny refoulement and try the case in its national courts.

There are many drawbacks of this solution. The requested State would not have the necessary evidence, and would be forced to ask the requesting State to provide evidence.⁷⁷⁹ The requesting would not be inclined to co-operate, after being denied the extradition request.⁷⁸⁰ Moreover, the evidence provided will also be suspect, as the requested State has denied the extradition on the grounds that the individual would be subject to persecution, so any evidence provided would also be subject to suspicion. Thus, there are very few cases where the *aut judicare* principle can act as a solution.

VI.5.iii. Other methods to reconcile the conflicting principles

The other relevant principles by which the conflict between the two principles can be resolved, deal with various methods by which the requested state can safeguard its own interest and the interest of the individual. The methods are briefly mentioned hereunder

The rule of specialty mandates that the state cannot prosecute an individual for crimes other than those for which he was extradited, without the permission of the requested State.⁷⁸¹ Even in cases where the individual is to be removed further to the

⁷⁷⁸ Certain common law countries have enacted laws to prosecute their nationals for organizing sex tourism in other countries. Part III A, Australian Crimes Act, 1914.

⁷⁷⁹ Fannie Lafontaine, “Universal Jurisdiction - the Realistic Utopia”, 10 (5) J. Int. Criminal Justice 1277 (2012).

⁷⁸⁰ Raphaël van Steenberghe, “The Obligation to Extradite or Prosecute: Clarifying its Nature”, 9(5) J. Int. Criminal Justice 1089 (2011).

⁷⁸¹ John J. Barrett III, “The Doctrine of Specialty: A Traditional Approach to the Issue of Standing”, 29 Case Western Reserve Journal of International Law 299 (1997).

third country to be tried for offences committed there, extradition law obligates that the State must first seek the permission of the requested State. Extradition law also provides for the requested state to allow for the individual to be extradited and tried in the requesting state, on one of the conditions that the individual will be available to be returned to it to serve his sentence.

Though the aforementioned principles act as safeguards to protect the interests of the individual, they do not *per se* provide complete protection to individual against persecution, torture, or cruel or inhuman punishment. Even in cases where Art. 33(2) applies, safeguards provided under provisions of international human rights law must be followed.

VI.5.iii.a. Political Offence Exception

The political offence exception is well established in international law. It is recognized as a principle under which extradition can be refused by the requested State. The Model Treaty on Extradition provides that an extradition request can be rejected, if the offence is considered to be an offence of political nature in the requested State.⁷⁸²

Bilateral and Multilateral treaties also incorporate the political offence exception. Political offence under these treaties are defined in negative terms, by excluding certain particular offences from the political offence exception, such as murder of head of state or any offence against life.⁷⁸³

The Convention on Organized Crime does not provide for a specific exemption, but still prohibits *refoulement* if there is a real risk that the individual is going to be persecuted on the basis of his race, religion, nationality, membership of social group or political opinion.⁷⁸⁴ This is equivalent to the principle of non-refoulement as contained in Art. 33 of the Refugee Convention. However, this does not encompass the traditional political offence exception, and it is often difficult to prove an

⁷⁸² Art. 3(a), Model Treaty on Extradition, 14 December 1990, U.N. GAOR, A/RES/45/116.

⁷⁸³ Gavan Griffith and Claire Harris, "Recent Developments in the Law of Extradition", 6 *Melb. J. Int'l L.* 33 (2005).

⁷⁸⁴ Art. 16, Organized Crime Convention.

individualized risk of persecution.

It is often difficult to provide an exhaustive definition for political offence. There is no doubt that it is supposed to include non violent protest against the head of the State. However, apart from this, there is no clarity on what crimes can be covered under this exception. The lack of consensus among States, has led to confusion regarding the definition of political offence.⁷⁸⁵

The definition of political offence is qualified by technical criteria, such as proportionality, that is the offence committed must be in proportion to the political end sought to be achieved . However, such tests have been severely criticized, as they are very subjective and overtly depends on the judge's values on what can be considered permissible political acts.⁷⁸⁶ Unfortunately, National Courts are not equipped to deal with such issues, even when they do, they are inclined to reject the extradition request of the requesting State.⁷⁸⁷

Certain Domestic legislations also define political offence. However, it is often found that the domestic legislations are based on the other criminal laws in the Country, and are idiosyncratic to the State, so a common definition cannot be evolved.

Also, the political offence exception can easily be misused, and can interfere with prosecution of terrorist related offences. It is for these reasons that the political offence exception is losing popularity as a method of reconciliation. There is a shift towards having stronger extradition treaties, with lesser exemptions.⁷⁸⁸

VI.5.iii.b. Principle of Specialty

The rule of specialty, states that an individual who has been extradited can only be tried for the offence he was extradited for. The requesting State is barred from prosecuting him for any other offence. Certain scholars, such as Cherif Bassiouni also

⁷⁸⁵ *Schtraks v Government of Israel* [1964] AC 556, 591

⁷⁸⁶ Geoff Gilbert, "Terrorism and the Political Offence Exemption Reappraised", 34 *International and Comparative Law Quarterly* 695 (1985).

⁷⁸⁷ Steven Lubet, "Extradition Reform: Executive Discretion and Judicial Participation in the Extradition of Political Terrorists", 15 *Cornell International Law Journal* 24 (1982)".

⁷⁸⁸ Griffith, *supra note* 783.

argue that the principle of specialty has attained the Status of customary international law.⁷⁸⁹ It has been incorporated in various other international instruments and conventions.

The Model Treaty on Extradition provides that an individual may not be detained, prosecuted, or re-extradited to a third State, except for the offence for which the extradition request was granted, or with the permission of the requested State,⁷⁹⁰ The Rome Statute also enshrines the same principle. A person can only be tried by the Court for the offence for which he has been surrendered, unless the Court requests the State to waive the rights, and the State consents.⁷⁹¹

This is based on the principle of State sovereignty. The traditional view provides that extradition is primarily an issue amongst States, wherein the requested State renounces its sovereign powers over the individual in its territory, and transfers him to the requesting State.⁷⁹²

The principle of specialty also protects the human rights of the individual who is extradited. Particularly, it effectuates compliance with the other guarantees provided by the Requesting State, including political offence exception and double criminality. It prevents the Requesting State from misusing the extradition process, and ensures adherence to the other guarantees built into the extradition process.⁷⁹³

The Model Treaty on Extradition also mandates the prior permission of the Requested State to prosecute the individual for other offences. However, the permission to prosecute can only be provided for those offences mentioned in the extradition treaty, therefore, providing for the other safeguards such as political offence exception and double criminality.

⁷⁸⁹M.Charif Bassiouni, "International Extradition And World Public Order", (A.W Sijthoff, 1st ed. 1974

⁷⁹⁰ Art. 14, Model Treaty on Extradition, *supra note* 782.

⁷⁹¹ Art. 101, Rome Statute.

⁷⁹²Clive Nicholls, "The Law of Extradition and Mutual Assistance: International Criminal Law, Practice and Procedure", (Cameron May 2nd ed. 2002),

⁷⁹³ Griffith, *supra note* 783.

However, practically, the rule of specialty faces a huge a problem, many States provide for extradition completely disregard the rule, after the individual has been extradited. There is dwindling respect for the rule under international law. For example, several States in the U.S have simply disregarded the rule.

VI.5.iii.c. Model Treaty on Extradition

In order to counter transnational crimes such as terrorism and drug trafficking, extradition has been recognized as an integral tool.⁷⁹⁴ In light of extradition emerging as an important tool, the United Nations General Assembly adopted the *Model Treaty on Extradition*.⁷⁹⁵ It is an effective method of countering new and serious forms of crimes.⁷⁹⁶

Recently, newer multilateral agreements have been adopted, containing model Treaties on Extradition, such as the Organized Crime Convention.⁷⁹⁷ It states that organized crime shall be considered as an extraditable offence, and in the absence of an extradition treaty, the Convention shall be deemed to act as the legal basis for the extradition.⁷⁹⁸

The *Model Treaty on Extradition* contains obligatory grounds for refusing extradition if the extradition request has been made to prosecute the individual on basis of his race, religion, nationality, sex, ethnic group, status or political opinion.⁷⁹⁹ Moreover, it also prohibits refoulement if the individual would be subjected to torture, or cruel inhuman or degrading treatment in the requested State. These provisions incorporate the current legal position on non-refoulement under international law.⁸⁰⁰

Though these provisions are clear, confusions arise when put into practice. It is to be noted the burden of proof is on the individual to prove that there is a real risk of

⁷⁹⁴Standing Committee on Treaties, Parliament of Australia, Report 40: Extradition - A Review of Australia's Law and Policy (2001)

⁷⁹⁵ Model Treaty on Extradition, *supra note* 782.

⁷⁹⁶ Preamble, Model Treaty on Extradition, *supra note* 782.

⁷⁹⁷ United Nations Convention against Transnational Organized Crime, A/RES/55/25 (8 Jan. 2001).

⁷⁹⁸ Griffith, *supra note* 783.

⁷⁹⁹ Art. 3, Model Treaty on Extradition, *supra note* 782.

⁸⁰⁰ Griffith, *supra note* 783.

persecution in the requested State. However, the individual will need to gather substantial amount to resources, in order to do that. It is often the case that refugees lack resources, monetary, or otherwise. It would be difficult for an individual to gather the resources necessary to put up a strong defence. Moreover, it would be difficult for him to gather evidence in the requested State.

Additionally, it would also be problematic to convince the authorities of the requested State about the threat of persecution, when the requested State has close relations with the Requesting State.⁸⁰¹ In the case of *R v. Secretary of State*,⁸⁰² a British national was to be extradited to Hong Kong and tried, as he had accepted bribes. The extradition order was challenged on the ground that the trial will take place after the transfer of power from Hong Kong to the People's Republic of China, and there was a possibility of being subjected to death penalty, because China had death penalty for serious crimes.

Lord Hope, held that though, there was a risk that China would not follow the principle of rule of law, and provides a fair trial, which was based on the previous conduct of the People's Republic of China, optimism of future human rights in Hong Kong is not unreasonable. Past conduct with conduct with China is not the only basis for the future relationship with Hong Kong.⁸⁰³

However, this is not always the case, as has been analyzed in the previous chapter, Courts refused extradition in various cases where a real risk of persecution has been proved.

VI.6 RECONCILIATION OF THE PRINCIPLES

There are a number of ways in which the principle of *non-refoulement* and Extradition Treaties can be reconciled, but pivotal to this understanding is the fact that the principle of *non-refoulement* has achieved the status of customary international law and has also been accepted as a principle of *jus cogens*.

⁸⁰¹ Griffith, *supra note* 783.

⁸⁰² *R v Secretary of State for the Home Department; Ex parte Launder*, 3 All ER 961,967 (1997).

⁸⁰³ *Id.*

Courts must respect that absolute rights cannot be violated, and extradition must be refused in such cases. In case of other rights, Courts must apply the proportionality test and balance the conflicting interests.

The Requested State can also allow for conditional extradition on the individual, on the grounds that the basic human rights of the individual must be respected. However, this can only be in case the Requesting country is other than the country of origin. *Refoulement* back to the country of origin is prohibited. The principle of *aut dedere aut judicare* can also be incorporated. The Requested State can conduct the trial in its own courts; can extradite the individual on the condition that he must be returned to serve his sentence in its territory.

The Model Treaty on Extradition helps reconcile the conflicting principles by providing for an exception to extradition in case of persecution on basis of race, religion, nationality or ethnic origin of the individual. It also provides for the political offence exception, which mandates that an individual cannot be extradited for a political offence. The principle of specialty has also been incorporated into the treaty, so the individual can only be prosecuted for the offence for which he has been extradited.

The Model Treaty on Extradition provides legal basis for the political offence exception and the specialty principle, it codifies both the principles. Additionally, it is legally binding on all the State parties to the Convention. Thus, States can be held legally responsible, in case of breach of their obligation.

One of the most pertinent questions that arise after understanding and analyzing the concepts of extradition and non-refoulement is whether there is any scope of reconciling both the principles in international law to which an answer is sought in this chapter which deals with the possibilities of reconciling both the concepts.

While international refugee law does not in itself stand in the way of extradition, its principles and requirements impose certain conditions on the lawfulness of extradition, which need to be taken into consideration by the requested State. Any decision concerning the extradition of a refugee or asylum-seeker must be in

compliance with the principle of non-refoulement, as guaranteed under the 1951 Convention and customary international law. The principle of non-refoulement overlaps to some extent with a number of refusal grounds under extradition law, most importantly the political offence exemption, where it is still applicable, the discrimination clause, certain refusal grounds related to notions of justice and fairness and the rule of specialty. However, there are differences resulting, on the one hand, from the mandatory character of the non-refoulement principle and, on the other, from its link to certain grounds for a risk to life or freedom, and, except where there is a risk of torture, cruel, inhuman or degrading treatment upon return, its applicability only to refugees and asylum-seekers.

CHAPTER VII

CONCLUSION AND SUGGESTIONS

VII.1 CONCLUSION

The principle of non-refoulement has been enshrined in Art. 33 of the Refugee Convention. It prohibits State from refouling a refugee to the territory of a state where one faces the risk of persecution on basis of race, religion, nationality, membership of social group or political opinion. The principle of non-refoulement has also been enshrined in various other international instruments such as the Convention against Torture and International Covenant on Civil and Political Rights. Any individual who has been validly classified as a refugee can claim protection under the Refugee Convention. There is a large amount of scholarly opinion to now suggest that the duty of non-refoulement exists even before the refugee status has been assessed. The duty of non-refoulement exists even before formal determination of status.

The UNHCR and a large portion of the international community have accepted that non-refoulement has achieved the status of customary international Law. Though there are still debates on whether non-refoulement has emerged as a principle of jus cogens, the UNHCR has repeatedly held that it forms jus cogens, many States also harbour the same view. Placing reliance on the large amount of scholarly opinion, one can infer that non-refoulement has been recognized as a principle of jus cogens.

Extradition on the other hand involves the surrender of an individual by the requesting State to the authorities of the requested State for the purpose of criminal prosecution. Extradition is based on the concept that an individual must be tried for the offence committed, and must not be allowed to escape lawful prosecution. It is effectuated through various bilateral and multilateral treaties, and other international instruments. The general principles of extradition and grounds for refusal of

extradition have now been recognized by various states through the forms of State practice.

Prima facie, there is a clear conflict between the two principles under international law. A State will have to try to reconcile the two conflicting obligations. Non-refoulement obligates that a State cannot extradite an individual if there is a real risk that he will be persecuted in the requesting State. Whereas Extradition law mandates that an individual must be extradited to the requesting State so that he may be tried for the offences committed.

There is a clear hierarchy of obligations, human rights must be respected and given more importance as compared to extradition law, as all States are bound by Art. 103 of the U.N Charter, which imposes a duty on States to respect obligations under the U.N. Charter, over any other treaty obligation.

The UNHCR has explicitly provided that a refugee or an asylum seeker cannot be extradited to his country of origin where he faces a risk of persecution. In respect of countries other than the State of origin, the requested State must look into the totality of circumstances in the requesting State, and ensure that there is no threat of persecution or further removal to a third country. Diplomatic assurances cannot form the only basis for extradition, as they are not legally binding on the State. State authorities or Courts can also apply the principle of proportionality or balancing of conflicting interest, the State must weigh the alleged violation of the human rights of the individual against the offence committed by him. If there is a real risk of violation of a fundamental human right, the individual cannot be extradited.

Rights can be classified as absolute rights, rights which may be restricted and rights which may be restricted in times of public emergency. Absolute rights constitute fundamental human rights, such as the right against torture, inhuman and degrading treatment etc, these rights cannot be violated, and in case of a risk of violation, extradition must be refused. There cannot be a balancing of interests. Certain rights such as right to privacy may be restricted in certain circumstances, and the balancing test must be applied. Similarly, certain rights such as the right to a fair trial can be restricted in a public emergency, and the test of proportionality must be applied. The

most essential component of refugee status and of asylum is protection against return to a country where a person has reason to fear persecution and danger. This protection has found expression in the principle of non-refoulement.

As States, particularly in the industrialized world, intensify and co-ordinate their efforts to curb irregular immigration, there is concern that the legal and administrative measures adopted, including measures to expedite asylum procedures and to shift the responsibility for considering asylum requests to other countries, may have the unintended result of placing refugees in situations that could ultimately lead to refoulement to their country of origin or other territories where their life or freedom would be threatened.

When it comes to the establishment and implementation of national procedures for the determination of refugee status, measures are therefore required to ensure that respect for the principle of non-refoulement remains the guiding principle and ultimate objective of any refugee protection regime.

VII.2 SUMMATION OF CHAPTERS

The present research work examined the conflict between the aspects concerning non-refoulement where States are under an international obligation not to return an individual in their territory and a treaty obligation of extradition where in the interest of justice it becomes important for the States to return the individual back to the requesting State. Therefore, for a clear understanding of these aspects, a summary of the findings at each stage of study is briefly summarized below:

The introduction to this research work traces the genesis and the evolution of the problem. It also specifies the research problem with the questions that bring out the scope of the research, it also details out the hypothesis, objective and significance of the research work.

In **Chapter I** the research work has been conceptually and theoretically discussed to understand the contours of the existing laws and theories developed till date. It is

important for any research to begin with the conceptual analysis of the subject matter to be discussed. In this chapter the underpinnings of the concept of non-refoulement and extradition has been studied and the genesis of the both the concepts and the development of the theories on both the areas of international law has been studied. It is not only Art. 33 of the Refugee Convention 1951, that has a reference to the concept of non-refoulement, but this concept has also been dealt and provided in many other international instruments which have similar understandings as that provided in the Refugee Convention. All the major human rights instruments have in one way or the other touched upon the principle safeguarding the rights of an individual of not being returned back to the country where there can be risk to the life of the individual. Besides international instruments, there are many regional instruments which unequivocally provides for the same kinds of rights provided to an individual.

This chapter also focuses on the concept of extradition, which has also evolved and developed over time. The legal basis for extradition entails both bilateral and multilateral treaties which give an edge to the whole working and structure to effective implementation of treaties. Through this chapter, it has been shown that non-refoulement is inherently connected with a procedure aimed at identifying potential victims of persecution. The procedure can be fair and effective only if it is conducted on state territory. Accordingly, the prohibition on refoulement cannot be absolutely guaranteed without access to state territory. States can argue that they have no human rights obligations, including granting access to a refugee status determination procedure, concerning individuals who have not set foot on their territory. Once an individual is under the effective control of state officials, the state has to fulfill its human rights obligations. States can attempt to use some gray zones in international law, which result in unregulated situations to the detriment of human rights protection. However, even in these gray zone cases, human rights treaties and customary law in support of non-refoulement must be emphasized and considered. It is specifically because of these human rights protections that states' obligations to grant access to their territory in order not to expose refugees to refoulement must be clearly stated.

In this chapter, thus, it has been established that:

- a) The principle of non-refoulement has received widespread acceptance and its fundamental character has been fully recognized.
- b) The principle of non-refoulement has been incorporated in international treaties following a tradition going back to the period of the League of Nations.
- c) The principle has in particular been incorporated in the 1951 United Nations Refugee Convention and the 1967 Protocol. It has also been incorporated in many of the regional instruments like, the OAU Convention of 10 September 1969 governing the specific aspects of refugee problems in Africa; the American Convention on Human Rights of 22 November 1969.
- d) The incorporation of the principle in treaties to which numerous States in different areas of the world are parties has given the principle the character of a rule of international customary law. This view is supported by the reaffirmation of the principle in the United Nations Declaration on Territorial Asylum, in Conclusions by the Executive Committee of the High Commissioner's Programme, and in resolutions of the United Nations General Assembly.

Chapter II of the present work deals with the application of doctrine of non-refoulement in international human rights regime. International human rights law is essential in the refugee protection regime as it offers complementary and additional protection to refugees. Various international human rights instruments including at the regional level have provisions for the protection of refugees from persecution. Most human rights Conventions give effect to the principle of non-refoulement although they do not specifically mention the principle within the provisions. Indirect prohibition of non-refoulement is given through prohibitions on torture and other forms of irreparable harm.

The key issue with regards to the application of the concept of non-refoulement is that the status of the obligation of non-refoulement lacks clarity and consensus and this is evident through the varying opinions in the matter between prominent refugee

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

The recognition of the concept of non-refoulement as a human right would enable a system of better protection to refugees by clarifying the scope and content of the right and in turn leading to the establishment of mechanisms for the supervision and protection of this right. It would also enable the establishment of international procedures for the enforcement of the right and ensuring its compliance. While non-refoulement is already considered as a peremptory norm of international human rights law, and most international human right instruments already reflect the concept of non-refoulement, the next step in the development of the concept should ideally be its recognition as a right under the human rights regime which would better enable the achievement of its objectives, making the concept more effective and cementing its scope as the cornerstone of refugee protection.

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

involved. Recasting non-refoulement as a human right would lead to better enforcement of the right and increasing its impact as a protection for refugees and asylum seekers.

Applying non-refoulement as a human right increases the likelihood of State adherence to human rights, and improves the quality of monitoring activities of human rights groups. This would in turn change the focus from whether the State has acted lawfully, in terms of derogation of the prohibition on refoulement through extradition, to whether the State can be held responsible for certain conduct or whether certain conduct could be attributed to the State as being a violation of a human right or commission of human right abuses.

As seen in this chapter, non-refoulement has been given a position under the human rights regime but only implicitly. This position of refugees is crucial for ensuring that the legal protection of refugees is broadened and continue to improve over time. Various international human rights treaties provide for a right against refoulement but are limited in terms of the objectives and purposes of the treaty or convention. For instance, the provision of non-refoulement under the Convention against Torture is limited to a prohibition on torture rather than a prohibition on refoulement per se.

As explained in this chapter, the derogation of non-refoulement is evident through the existence of provisions on removal of refugees and asylum-seekers under Article 33(2) of the Refugee Convention. Due to the wordings of the provision and the formulation of Article 33 as a negative obligation of the State rather than a right of the asylum-seeker or refugee, States have successfully avoided their obligation through the exception under Article 33. Even though human rights instruments provide additional and complementary protection against refoulement, these human rights instruments too allow for extradition in certain cases. This further results in a lack of legal sanctions on States from refouling individuals and allows for its derogation.

The increasing number of instances of expulsion and extradition of refugees due to the lack of a uniform interpretation of the scope of the concept of non-refoulement has led to mass violations of the principle by States and derogation of the same which

makes the protection of the principle under the human rights regime all the more relevant in the name of state sovereignty and security. Some States have taken steps to protect their security interests that are inconsistent with the spirit or even letter of human rights law, moves which are ultimately harmful to human rights.⁸⁰⁴ The acceptance of the concept of non-refoulement as a human right would allow for its application in a more effective way and prevent such derogations from taking place. This approach would also be a more effective method of ensuring compliance with non-refoulement obligations.

The recognition of the concept of non-refoulement as a human right would provide a wider expanse of protection to refugees and fills the gaps in the Refugee Convention. Other human rights treaties fill the gaps in the Refugee Convention, 1951 by providing mechanisms or institutions for ensuring the compliance of international human rights obligations. Many authorities such as Lambert, consider resorting to human rights instruments as a better option to protecting individuals from refoulement and extradition.

The derogation of the most fundamental principle in the human rights regime, the principle of non-refoulement, takes place when States undermine the non-refoulement principle by placing short-term national interests above a potential threat to the life or freedom of refugees through extradition. The tendency of States to interpret their own and other States' duties of non-refoulement in the light of sovereign self-interest, all contribute to the potential derogation of the principle of non-refoulement.⁸⁰⁵

As non-refoulement is not considered to be a human right, derogation is allowed depending on the circumstances that justify it. The consequence of being recognized as a human right will allow the principle of non-refoulement to be applicable to everyone whose return to a territory would risk their persecution, torture, cruel, inhuman and degrading treatment or punishment, and pose a threat to their life and

⁸⁰⁴Dina Imam Supaat, "Escaping the Principle of Non-Refoulement", *International Journal of Business, Economics and Law*, Vol. 2, Issue 3, ISSN 2289-1552.

⁸⁰⁵James E. Crowe, III, "Running Afoul of the Principle of Non-refoulement: Expedited Removal under the Illegal Immigration Reform and Immigrant Responsibility Act", 18 *St. Louis U. Pub. L. Rev.* 291, (1999).

liberty regardless of their refugee status or the state's status in treaty ratification. Thus, a person who has failed to claim refugee status under the Convention or has no treaty to turn to is still entitled to protection against refoulement.

On the basis of the preceding analysis, the salient elements of the customary International law of non-refoulement in a human rights context are as follows:

- (a) Non-refoulement is a fundamental component of the customary international law.
- (b) It is focused on individuals, regardless of either Status or conduct, in respect of whom substantial grounds can be shown for believing that they would face a real risk of being subjected to torture or cruel, in human or degrading treatment or punishment.
- (c) It precludes any measure, regardless of form, which would have the effect of putting an individual at risk by removing them from a place of safety to a place of threat.
- (d) It precludes all such measures taken by or on behalf of a State, whether the measures are taken within the territory of that State or elsewhere, in circumstances in which the measures are or would be attributable to the State.
- (e) It precludes the expulsion, return, or other transfer of an individual both to a territory where they may be at risk directly or to a territory from which they may be subsequently removed to a third territory where they would be at risk.

In short, the scope and content of the customary principle of non-refoulement in the context of human rights may be expressed as follows.

No person shall be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or return to a territory where substantial grounds can be shown for believing that he or she would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment. This principle allows of no limitation or exception.

Chapter III focuses on the essential content of the principle of non-refoulement as customary law. The status of non-refoulement is still in question because even though its application is completely absolute, the practice followed by the states still does not show their belief in the principle as a customary International Law. With the approach of the human rights law towards the principle of non-refoulement, the courts through its decisions has made sure that their rights should be kept at a higher pedestal. The only need for the courts is to direct their attention towards Article 33(2) of the Refugee Convention, because these exceptions are the only reason why some of the states have been challenging the court's decision of not to refoule any person to a place where they have a fear of persecution. The problem somewhere lies in the codification of different statutes as well the focus of each one of it differs from other. However, when it comes to the approach of the court through cases where both non-refoulement and extradition rule applies; it has been taken into consideration that the priority has always been given to non-refoulement.

It is the prominent duty of the state to provide justice to each and every citizen and if such right is taken away by the states then it also takes away the right to secure justice by the citizens of that state. On the other hand the rights of the requested State get affected because by giving importance to the rights of an accused they might be putting the life or right of their citizens at stake. If a person is accused of committing a crime in a state and the other state is giving him protection then that does not take away the probability of the chances where the person can commit crime in that particular country as well. But the requested states instead of focusing on this point chose to give importance to their right defined by the human rights law to not return a person where they might face risk, hence, keeping rights of the citizens at stake. Such issues are also to be addressed by the court and international committees before determining the principle of non-refoulement as a jus cogens norm because in securing right of one individual, right of other individual gets affected. When it comes to passing of an extradition request it has been noted that even such requests when considered individually are not absolute. In few cases where the courts have considered to pass such extradition requests it has been noted that such requests even if passed, are passed with exceptions. Such exceptions include offences political in nature. The states believe that indulging them in a situation where the internal law of the requested country is involved then they try to stay out of the matter and try not to

interfere in the internal laws of the country. On the other hand where the court finds that there exist extradition treaty between two countries on the basis of which they will have to oblige with the request made by the requesting state, they do allow the requested state to pass such decisions but on the assurances that they will not pass death penalty as a punishment against the applicant.

However, such assurances are also questionable when it comes to their legal validity. International Organizations like UNHCR has expressed their doubt on the diplomatic assurances through their submission in “Note on Diplomatic assurances”. They submitted that states usually have a proper established procedure when it comes to them inflicting torture in form of punishments on the people who are accused of having committed an offence. So even if they give assurances, it will be anyways hard for the state to get through the whole process and determine what kind of treatment has been taking place against the accused. Moreover, when a state passes an extradition request made by the requesting country it becomes hard for them to take it back. Once an applicant is sent to a country, they cannot be brought back to the country. Hence, it is important for the countries to look at every proper consensus before taking such step. Risking the life of an individual would be the last thing a country would like to do, keeping international standards in consideration.

Looking at the pertaining situations it is clear that the application of the principle of non-refoulement takes the place of a norm of jus cogens as shown by the state practice the only problem which lies in its acceptance is the exception laid down in the 1951 Refugee Convention. Even going through the study of various case laws it has been taken into consideration that non-refoulement has always been kept at a higher pedestal than extradition. It is a compulsory obligation on the states to make sure human rights should always be kept supreme. Wherever they see even a little bit of possibility in which individuals’ right can get affected they prohibit such transfer. However, this approach has also been questioned by various parties in case laws. They state that the courts give decision with respect to the applicant being exposed to torture on the basis of notes by the international organizations regarding cases which might have happened many years back. With time, the rules and policies of a country also change. Without happening of certain event, the presumption that particular event will anyways happen make the approach of the court unambiguous. In this way, it is

always the rights of the states which will end up getting affected, being it by not being able to try a person who committed offence in their jurisdiction and not being given value on the assurances being provided with respect to passing of death penalty as a punishment.

Therefore, the conclusion drawn with the help of the research in this chapter is that the principle of non-refoulement applies in every case of extradition, where the respected authorities of the court are of the view that the rights of the individual concerned will get affected and the probability of him being exposed to torture and cruel punishments is high. It constitutes a major important role in asylum along with international refugee law. The wideness in the approach of the principle comes through its establishment in human rights law. The law makes it compulsory for the states to hold human rights supreme. So in cases like extradition where removal of an individual from a state is concerned, the rights of individuals automatically get involved. Even if certain country does not grant refugee status to person and holds that principles governing non-refoulement under international law cannot apply to the person, the establishment of the principle under human rights law makes its scope wider. So even if not having refugee status prohibits an individual to seek protection under international refugee law, the establishment of the principle under human rights law comes into picture.

With a principle being so wide, it is obvious that it will contradict with some or the other defined principle. In this case, the principle focuses on rights of the individual at such a great extent that it overlooks the possibility of it affecting the rights of the states. States have the responsibility of protecting its national interest and security. They have to make sure that each and every person gets to exercise their right and that justice is served to the entire country. Such norm prohibits the countries from doing the same. If an individual commits a crime then the approach of the authorities is to punish him for the same. If in a situation that individual leaves the country and enters into another country that does not mean that he should not be tried for the crime being committed by him. Human rights norms do the same. It prohibits an individual from getting punishment from the crimes being committed by him under the term of him being subjected to torture, cruel or degrading treatment under several human rights conventions. States while announcing punishments have reasonable grounds for doing

the same. A Human Rights law questioning the action of the state is in itself a disheartening approach. The objective of the state is to consider the entire population as whole. If they consider rights of one person, in that approach the rights of others get affected. Like if the principle of non-refoulement prohibits a person to be extradited to a country, then while protecting the right of that particular individual, the laws affects the justice to be served to those people who got affected by the actions of that person. It is therefore important to concentrate on the various kinds of punishments and drawing a mutual consensus between the states regarding on what basis extradition can be granted.

On the basis of the expressions of non-refoulement identified, the essential content of the principle of non-refoulement at customary law may be stated as follows:

(a) No person shall be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or return to a territory where substantial grounds can be shown for believing that he or she would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment. This principle allows of no limitation or exception.

(b) No person seeking asylum may be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or to return to a territory where he or she may face a threat of persecution or a threat to life, physical integrity, or liberty. This principle allows of no limitation or exception.

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

In view of the above, it can thus be considered that the principle of non-refoulement has acquired a normative character and constitutes a rule of international customary law.

Chapter IV entails a detailed case study between 1973 and 2014. The cases are analyzed with a view to bring in more clarity to the existing conflicts between the two principles. The cases have been discussed with a range of 10 years starting from 1973 until 2014. With the study of the cases through different years it has been noticed that earlier the courts were very strict with their approach with respect to the overlap. They stated that rights of the individuals hold the main importance. The court has always established the point that the right of the individual or the person who has approached the court with such difficulties should be given importance keeping human rights law in mind. Although with such approach arises various conflicts as well. The points which have been brought to the notice with regard to this approach by the court have been put forward through various questions before the rule of law.

The requested state secures their right of protecting the applicant by rejecting such extradition request, but the point is that it ends up affecting the right of the requesting state, where the applicant is accused of an offence has not been brought into light. The question of national security of the state is also left unanswered. The fact that the exception to non refoulement consists of national security as reason, is important for the courts to determine. The chances of national security getting affected lies in both, the requested state as well as the requesting state. Requesting state because, in cases where the accused is charged with an offence of criminal in nature, such decisions takes away the right of the state to try him in their court under their municipal law. Along with the right to try, the right of the people who got affected because of such offence is also left unanswered.

In any way an individual should not be exposed to a situation where there were chances of them being exposed to risk. Although they failed to focus on the reason because of which they were supposed to be put in this situation. The courts never elaborated on the acts of the individuals, which made them leave the country and the country asking them to be returned on the very first place. They just focused on the kind of treatment they will be exposed to upon such return. There is a need for the

court to put a light on the same. But with the growing years they have started focusing on the same. Their approach has taken a broader view when they have started taking decision of passing such extradition request. But it still comes with death penalty as an exception. The other point to be noted is that if there is already an existing point of political offence as an exception to the extradition then the approach or the overlap of the non-refoulement should be inspected. There is a need for the states and courts to come together to decide on a common phenomenon in which such problems regarding overlap can be solved. For which the approach of the requested state should not be to only protect their rights of not getting the individual exposed to a risk-facing situation, but they should also take into consideration along with the courts the right of the requesting state to try such individuals. Therefore, there is a need for the international community to come together and decide a way in which rights of both the states can be restored and such overlap can be solved as well.

In dealing with the conflict of this overlap, Courts have laid down the traditional view in the *Soering* case. The *Soering* threshold stipulates that in case of a real risk that the individual may be subjected to torture or inhuman or degrading treatment, the extradition request is bound to be rejected. In case of violation of other rights, the Court must apply the flagrant violation test, to determine whether there will be a flagrant violation of the individual's rights in the requested State. The same ruling has been followed in a series of other cases, such as the *Bader case*, *Chahal v. U.K* and in *Ahmed v. Austria*.

There has been a change in the view of the court, wherein the court has tried to impose the requirement of special distinguishing features. In the *Vilvarajah case*, the Court has authoritatively held that the applicant must prove that his situation is worse than any other individual, and he faces an individualized risk of persecution in the requesting case. Various scholars have argued that the Court must adopt this higher standard of individualized ill treatment.

The court has incessantly tried to broaden the scope of non-refoulement, especially in the case of violation of the fundamental human rights of the individual, by providing absolute protection. The individualized ill-treatment requirement, forces the individual to prove persecution on basis of race, religion, nationality, membership of

social group or political opinion. Adopting this test would however lead to various problems, the Court's constant effort to expand the duty of non-refoulement beyond Art. 33 of the Refugee Convention would be stifled. It instead of broadening the scope of non-refoulement, the Court would be narrowing down the protection provided under the other international instruments to the requirement of Art. 33 of the Refugee Convention.

Looking at the approach of the court when it comes to contradiction of the principle of non-refoulement and extradition treaties, it has been taken into consideration that the courts have been extremely inclined towards giving human rights principle more weightage than extradition. According to them implementing the extradition procedures takes away rights of the person as it exposes them to certain situations where they might face risk of being exploited and be exposed to inhuman situations which can affect the person physically and mentally. They have also spoken about the assurances which are given by the state in matters where the courts decide to not impose death penalty as a punishment. In *The Queen on the application of Philip Harkins v. The Secretary of State for the Home Department v. Government of the United States of America* the court established that they do not find any reason as to why assurances provided by the state in form of diplomatic notes can be regarded as illegal. State, as an entity holds the supreme authority and if they are giving their word regarding a particular case then that should hold a lot of legal confidence. If surety provided by the states will not be considered important in that way it will end up affecting state relations and will spoil the international harmony. If states cannot trust each other's words, then the mutual assistance, which is required by the states in order to prevent this overlap, will never take place.

Based on a thorough analysis of extradition cases as well, the UK House of Lords found that a substantial point of difference between extradition and asylum is that where the former is in issue the political nature of the offence is an exception to a general duty to return the fugitive, whereas in relation to asylum there is a general duty not to perform a refoulement unless the crime is non-political. The High Court of Australia also adopted a similar approach, noting the recognition, in earlier jurisprudence, of the overlap between the exemption from extradition and the exception from refugee status, yet stating that, "in using judicial opinion expressed in

the context of extradition cases, it is important to remember the significant differences that exist between the operation of the law of extradition and the grant of asylum to refugees.”

Chapter V focuses on Indian legal framework on refugee laws and the concept of non-refoulement, where, in the chapter, even an attempt is made to compare refugee systems in India and Europe. It can however be summed up that, in the absence of accession to the Refugee Convention, India’s treatment of refugees and asylum-seekers on its territory and/or in its jurisdiction is now very significantly constrained by its obligations at international law. The non-refoulement obligation found in Article 33 of the 1951 Convention has been supplemented by a wide range of complementary instruments that impose their own obligations of non-return. While the CAT is unique in containing an express and non-derogable obligation of non-return, a similar right has now been read into the ICCPR and the CRC by their respective supervising committees. Both the HRC and the Committee on the Rights of the Child have now made plain that the right of non-refoulement as found in the ICCPR and the CRC relates to the breadth of rights in each convention, and not merely a subset of core or non-derogable rights.⁸⁰⁶

In addition, there is now very considerable state practice in support of a customary norm of non-refoulement in the refugee context where there is a real risk of persecution, torture or cruel, inhuman or degrading treatment or punishment, or a threat to life, physical integrity or liberty. This is joined to a parallel norm in the human rights context which, properly constructed, prohibits return to situations where there is a real risk of a violation of human rights reaching a level of seriousness akin (but not limited) to torture or cruel, inhuman or degrading treatment or punishment and, in particular, where the violation feared will cause irreparable harm to the individual concerned. It is almost certainly the case that the prohibition of return to situations of torture is now itself a norm *jus cogens*, in large part due to its relationship to the more general norm prohibiting torture. In its capacity as a member

⁸⁰⁶U.N. Comm. on the Rights of the Child, General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, para. 27, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005) [hereinafter General Comment 6]. For a comprehensive explanation of the Committee’s guidance in respect to non-refoulement, see Alice Farmer, A Commentary on the Committee on the Rights of the Child’s Definition of Non-Refoulement for Children: Broad Protection for Fundamental Rights, 80 *FORDHAM L. REV.* 39 (2011).

of Ex Com, the Indian state itself has acknowledged the non-derogable nature of the norm prohibiting refoulement in the refugee context.

A general rule can be formulated on this basis: India is prohibited from removing, rejecting, or otherwise returning individuals to situations where there is a real risk of a violation of human rights rising to a level of seriousness akin (but not limited) to torture or cruel, inhuman or degrading treatment or punishment and, in particular, where the violation feared will cause irreparable harm to the individual concerned. This reflects the position at both conventional and customary international law as it relates to India. The seriousness of the feared violation is to be assessed on an individual basis taking into account all of the circumstances relevant to each case, including the cumulative or discriminatory effect of the relevant violations. Relevant circumstances include the age, sex, and health of the victim, and the particular mental and physical effects of the violations on them. Violations of non-derogable rights will always be of sufficient seriousness to ground a claim of non-return.

At the same time, India has, through its own state practice in accession to more general human rights conventions like the ICCPR, the ICESCR, and the CRC, in becoming a signatory to CAT, and in its role as a member of the UNHCR Ex Com, contributed importantly to the development of a far more sweeping and unconditional norm of non-refoulement. This is now binding on India as a matter of both customary and conventional international law. As such, the ongoing national security debate with respect to accession now seems both at odds with the core of Indian state practice and otiose to India's legal obligations. This is not to suggest, however, that the clock, as it pertains to the protection of displaced persons, can be turned back.

Of course, the right of non-refoulement itself, while central to the protection of refugees and other displaced persons is not the sum total of rights to which they are entitled. While space does not permit a detailed examination of the complex of rights available to forced migrants at international human rights law, or their effect on current protection standards, certainly it begins with the right of non-discrimination. At present, however, the various different communities of refugees and forced migrants in India receive dramatically unequal treatment. While Tibetan refugees arriving prior to 1979 are registered by the state as refugees and granted access to

public services on virtually equal footing with Indian nationals, ethnic Chin refugees in Mizoram State are virtually ignored by Indian authorities.⁸⁰⁷ As national authorities continue to forbid UNHCR to operate in Mizoram state, Chin refugees seeking mandate refugee status and material assistance are forced to travel to the main UNHCR office in New Delhi. This, in turn, contributes to the rapidly growing population of urban refugees in the capital.⁸⁰⁸

India will remain bound by its obligations with respect to non-refoulement, regardless of what legal reforms it undertakes (or fails to undertake) at the domestic level. However, only a comprehensive national regime in line with the terms of the 1951 Refugee Convention and the current demands of international human rights law will allow it to admit and protect forced migrants in a manner consistent with its own international obligations, and to a standard that reflects its apparent commitment, as a member of UNHCR's Ex Com, to the protection of refugees.

In Chapter VI focus is laid on the reconciliation between the two conflicting concepts. In this chapter, certain methods have been researched upon where there can be a brought a balance between the concepts of non-refoulement and extradition. These two concepts can be reconciled through a number of methods, Conditional extradition based on the premise that the extradition request shall be granted only if the requesting State agrees to honour the rights of the individual. The requested State can also apply the principle of *aut dedere aut judicare* and try the individual in its national Courts, or grant extradition on the condition that the offender must serve his sentence in the Requested State.

⁸⁰⁷Matthew Wilch, Jenny Yang & Zo Tum Hmung, "Seeking Refuge: The Chin People In Mizoram State", India 82 (2011), available at: <http://media.virbcdn.com/files/b3/FileItem-222256SeekingRefugeTheChinPeopleinMizoramStateIndia1211pdf22912.pdf> (Chins have no legal status and no legal standing to protect themselves; they are not officially included in the food safety net program that India provides for the poor; and they are not recognized or responded to as refugees who have additional vulnerabilities beyond poverty)

⁸⁰⁸Bleak Prospects for Chin Refugees in India, IRIN (June 21, 2012), <http://www.irinnews.org/report/95699/myanmar-bleak-prospects-for-chin-refugees-in-india> (UNHCR says there are more than 10,000 Chins in New Delhi, of whom nearly 7,000 are recognized as refugees, and fewer than 600 were resettled from New Delhi in 2011, mostly to the United States)

The political offence exception states that an individual cannot be extradited for committing a political offence. The specialty principle states that an individual can be prosecuted only for the offence for which he has been extradited. The model treaty on extradition provides that an individual cannot be extradited if he is going to face persecution. It also contains the other safeguards such as the political offence exception and specialty principle. The safeguards which otherwise cannot be legally enforced, have achieved legal backing, as they have been codified in the form of a treaty. The State parties are bound by the provisions of the treaty.

VII.3. SUGGESTIONS

Based on an analysis of the implications of State s' obligation to comply with the principle of non-refoulement and after analyzing the concepts in the backdrop of the case analysis done between 1973 and 2014, and in the light of the foregoing discussions, the researcher humbly submits the following suggestions:

1. The concept of non-refoulement should be recast and recognized as a human right in order to strengthen its position under international human rights law and be more effective in the protection of refugees and asylum-seekers.
2. The provisions dealing with the concept of non-refoulement under the human rights regime should be made stronger by broadening its application to all forms of persecution faced by a refugee or asylum-seeker as provided under Article 1(A) (2) of the Refugee Convention.
3. In situations of conflict of treaty obligations between extradition treaties and human rights instruments, ensuring the principle of non-refoulement is adhered to and not violated should be of utmost importance.
4. For the purpose of resolving such conflicts, human rights treaties should take precedence over extradition treaties when such treaties result in the violation of human rights obligations, including the obligation of non-refoulement, and should be declared void.

5. When States resort to extradition in violation of non-refoulement principle, such an action should be treated as a violation of a human right rather than the rejection of the applicability of the principle of non-refoulement by the State.
6. In the case of extradition, the potential threat of persecution of the individual as provided under the non-refoulement regime should take precedence over national concerns and threats of security. States would consequently be unable to use State sovereignty and limited resources as an excuse to derogate from the prohibition on refoulement.
7. The fact that an extradition request has been submitted cannot render an asylum application inadmissible without further proceedings, nor is it of itself a sufficient basis for rejecting an asylum application as manifestly unfounded.

Suggestions after conducting a detailed case study between 1973 and 2014

1. Overview of the exception clause of Non-Refoulement under Art. 33(2) of the Refugee Convention

It is important for the courts along with the internationally recognized authorities to have a proper view of the exception clause. Even though the practice followed by the states shows that the nature of non-refoulement is absolute because it is always the human rights laws, which is considered as supreme authority, there is also a need for the courts to limit such exception. Various scholars and authors claim that it is the exception clause which makes the principle more absolute or a jus cogens norm but such approach has yet non been recognized internationally. It is the only criteria, which is keeping the principle away from being recognized as jus cogens norm even when it is assumed that it is a rule of customary international law.

2. Due weightage to be given to exception clause

Along with non-refoulement the extradition treaties should be given due importance as well. When the concept of extradition has a limitation or it gives exception to political offences then there should be no such step, which will make the presence of the entire concept vague. Such absoluteness will make the whole existence of the principle unjustified. If states have an exception to not return refugees who are being convicted for political offences, then the idea of them not returning refugees where they fear that they will be exposed to torture should also be examined clearly.

3. Proper analysis of the punishments

If it goes by the states to consider torture or cruel treatment the any punishment to which the individual or the claimant will be exposed to will come in the same category. It is important for the states and mostly court to analyze each punishment separately and to consider with a proper approach as to whether such punishment will come under category. For e.g. death penalty can be recognized as a cruel penalty but imprisonment for 14 years not because the individual must have committed such offence because of which the states would want to bring him to court.

4. Rights of the states and Human Rights should be given due importance

Keeping human rights at a higher pedestal always is not the right approach. States have the responsibility of national security and due importance should be given to the same. This lies totally in the hands of the courts to consider each case properly and to decide which party should be held liable. It also includes considering the rights of the citizens of a particular country, which will be effected. The right of the requesting state is as important as that of the requested state. Hence, both should be kept as an equal staging.

Suggestions to reconcile the principle of non-refoulement and extradition treaties

1. A State must respect its non-refoulement obligations; the principle of non-refoulement has been accepted as a principle of customary international law, and also as a jus cogens norm of international Law. Peremptory norms of International Law must be followed and cannot be violated.
2. Traditionally, there is a clear conflict between the two principles under International Law; Courts can seek to minimize this conflict by application of the test of proportionality, in case of rights which can be restricted. However, with respect to absolute rights, it must be ensured that a State complies with its non-refoulement obligations and does not extradite the individual under any circumstances.
3. While dealing with an extradition request from a country other than the country of origin, the Requested State must take into account all the relevant factors into consideration, and apply the proportionality test before extraditing the individual.
4. The Model Treaty on Extradition has encompassed various principles of extradition law and non-refoulement obligations and created a fine balance between them. State's must become parties to the Model Treaty on Extradition and further develop its bilateral and multilateral extradition agreements on basis of the Model Treaty. When State's become parties to the Model Treaty, and subsequently develop their own agreements on basis of the treaty, they can be held responsible in case of breach of obligations. Development of similar treaties will bring about uniformity in extradition agreements.
5. The Requested State must have due regard to the principles of specialty and double criminality. The same principles can be effectively incorporated by the Requested State through conditional extradition.

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STATE'S OBLIGATION OF NON-REFOULEMENT
UNDER REFUGEE PROTECTION: SCOPE AND
CONTENT UNDER INTERNATIONAL LAW

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I.1. INTRODUCTION

Non-refoulement is a principle of international law which forbids the rendering of a true victim of persecution to his or her persecutor. Generally, the persecutor in mind is a state actor. It is a principle of both the customary and crucial law of nations. Non-refoulement is a key facet of refugee law that concerns protecting refugees from being returned or expelled to places where their lives or freedoms could be threatened. Unlike political asylum, which applies to those who can prove a well-grounded fear of persecution based on certain category of persons, non-refoulement refers to the generic repatriation of people, including refugees into war zones and other disaster locales.

It is debatable whether non-refoulement is a *jus cogens* (peremptory norm) of international law that forbids the expulsion of a person into a jurisdiction, usually his or her home-country, where that person might be again subjected to persecution. Two basic conditions to determine the refugee status of an individual are as follows: (i) there must be fleeing from the country of origin of the person; (ii) there must be a well-founded fear of persecution.

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The United Nations High Commissioner for Refugees (UNHCR) has been charged by the United Nations General Assembly with the responsibility of providing international protection to refugees and other persons within its mandate and of seeking permanent solutions to the problem of refugees by assisting governments and private organizations.

As set forth in its Statute, UNHCR fulfils its international protection mandate by, *inter alia*, promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto. UNHCR's supervisory responsibility under its Statute is mirrored in Article 35 of the 1951 Convention and Article II of the 1967 Protocol. UNHCR's interpretation of the provisions of the 1951 Convention and 1967 Protocol is considered an authoritative view which should be taken into account when deciding on questions of refugee law.

I.2. NON-REFOULEMENT OBLIGATIONS UNDER INTERNATIONAL LAW

I.2.1. UNDER INTERNATIONAL REFUGEE LAW

1. THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL

The principle of *non-refoulement* constitutes the cornerstone of international refugee protection. It is enshrined in Article 33 of the 1951 Convention, which is also binding on State Parties to the 1967 Protocol. Article 33(1) of the 1951 Convention provides:



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

The protection against *refoulement* under Article 33(1) applies to any person who is a refugee under the terms of the 1951 Convention, that is, anyone who meets the requirements of the refugee definition contained in

Article 1A(2) of the 1951 Convention (the –inclusionll criteria) and does not come within the scope of one of its exclusion provisions. Given that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfils the criteria contained in the refugee definition, refugee status determination is declaratory in nature: a person does not become a refugee because of recognition, but is recognized because he or she is a refugee. It follows that the principle of *non-refoulement* applies not only to recognized refugees, but also to those who have not had their status formally declared. The principle of *non-refoulement* is of particular relevance to asylum-seekers. As such persons may be refugees, it is an established principle of international refugee law that they should not be returned or expelled pending a final determination of their status.⁸⁰⁹

The prohibition of *refoulement* to a danger of persecution under international refugee law is applicable to any form of forcible removal, including

⁸⁰⁹ Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, UNHCR [THE UN REFUGEE AGENCY], p. 2-3 (January 26th, 2007), <http://www.unhcr.org/4d9486929.pdf>.



deportation, expulsion, extradition, informal transfer or -renditions, and non-admission at the border in the circumstances described below. This is evident from the wording of Article 33(1) of the 1951 Convention, which refers to expulsion or returns (*refoulement*) -in any manner whatsoever⁸¹⁰. It applies not only in respect of return to the country of origin or, in the case of a stateless person, the country of former habitual residence, but also to any other place where a person has reason to fear threats to his or her life or freedom related to one or more of the grounds set out in the 1951 Convention, or from where he or she risks being sent to such a risk.

The principle of *non-refoulement* as provided for in Article 33(1) of the 1951 Convention does not, as such, entail a right of the individual to be granted asylum in a particular State. It does mean, however, that where States are not prepared to grant asylum to persons who are seeking international protection on their territory, they must adopt a course that does not result in their removal, directly or indirectly, to a place where their lives or freedom would be in danger on account of their race, religion, nationality, membership of a particular social group or political opinion. As a general rule, in order to give effect to their obligations under the 1951 Convention and/or 1967 Protocol, States will be required to grant individuals seeking international protection access to the territory and to fair and efficient asylum procedures.⁸¹⁰

The *non-refoulement* obligation under Article 33 of the 1951 Convention is binding on all organs of a State party to the 1951 Convention and/or the 1967 Protocol as well as any other person or entity acting on its behalf. The obligation under Article 33(1) of the 1951 Convention not to send a refugee

⁸¹⁰ Ibid.



or asylum-seeker to a country where he or she may be at risk of persecution is not subject to territorial restrictions; it applies wherever the State in question exercises jurisdiction.

Exceptions to the principle of *non-refoulement* under the 1951 Convention are permitted only in the circumstances expressly provided for in Article 33(2), which stipulates that:

—The benefit of [Article 33(1)] 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 [or she] is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

The application of this provision requires an individualized determination by the country in which the refugee is that he or she comes within one of the two categories provided for under Article 33(2) of the 1951 Convention.

The provisions of Article 33(2) of the 1951 Convention do not affect the host State's *non-refoulement* obligations under international human rights law, which permit no exceptions. Thus, the host State would be barred from removing a refugee if this would result in exposing him or her, for example, to a substantial risk of torture. Similar considerations apply with regard to the prohibition of *refoulement* to other forms of irreparable harm.

Within the framework of the 1951 Convention/1967 Protocol, the principle of *non-refoulement* constitutes an essential and non-derogable component of international refugee protection. The central importance of the obligation not



to return a refugee to a risk of persecution is reflected in Article 42(1) of the 1951 Convention and Article VII(1) of the 1967 Protocol, which list Article 33 as one of the provisions of the 1951 Convention to which no reservations are permitted. The fundamental and non-derogable character of the principle of *non-refoulement* has also been reaffirmed by the Executive Committee of UNHCR in numerous Conclusions since 1977. Similarly, the General Assembly has called upon States —to respect the fundamental principle of *non-refoulement*, which is not subject to derogation.⁸¹¹

I.2.II.OTHER INTERNATIONAL INSTRUMENTS

States' *non-refoulement* obligations with respect to refugees are also found in regional treaties, notably the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa and the 1969 American Convention on Human Rights. *Non-refoulement* provisions modeled on Article 33(1) of the 1951 Convention have also been incorporated into extradition treaties as well as a number of anti-terrorism conventions both at the universal and regional level. Moreover, the principle of *non-refoulement* has been reaffirmed in the 1984 Cartagena Declaration on Refugees and other important non-binding international texts, including, in particular, the Declaration on Territorial Asylum adopted by the United Nations General Assembly on 14 December 1967.

⁸¹¹ UNHCR, *supra* note 1, at p. 4-5.



I.2.iii.UNDER CUSTOMARY INTERNATIONAL LAW

Article 38(1)(b) of the Statute of the International Court of Justice lists -international custom, as evidence of a general practice accepted as law, as one of the sources of law which it applies when deciding disputes in accordance with international law. For a rule to become part of customary international law, two elements are required: consistent State practice and *opinio juris*, that is, the understanding held by States that the practice at issue is obligatory due to the existence of a rule requiring it.

UNHCR is of the view that the prohibition of *refoulement* of refugees, as enshrined in Article 33 of the 1951 Convention and complemented by *non-refoulement* obligations under international human rights law, satisfies these criteria and constitutes a rule of customary international law. As such, it is binding on all States, including those which have not yet become party to the 1951 Convention and/or its 1967 Protocol. In this regard, UNHCR notes, *inter alia*, the practice of non-signatory States hosting large numbers of refugees, often in mass influx situations. Moreover, exercising its supervisory function, UNHCR has closely followed the practice of Governments in relation to the application of the principle of *non-refoulement*, both by States Party to the 1951 Convention and/or 1967 Protocol and by States which have not adhered to either instrument. In UNHCR's experience, States have overwhelmingly indicated that they accept the principle of *non-refoulement* as binding, as demonstrated, *inter alia*, in numerous instances where States have responded to UNHCR's representations by providing justifications of cases of actual or intended *refoulement*, thus implicitly confirming their acceptance of the principle.



In a Declaration which was adopted at the Ministerial Meeting of States Parties of 12–13 December 2001 and subsequently endorsed by the General Assembly, the States party to the 1951 Convention and/or 1967 Protocol acknowledged –...the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law.¶ At the regional level, the customary international law character of the principle of *non-refoulement* has also been re-affirmed in a Declaration adopted by Latin American States participating at a gathering to celebrate the twentieth anniversary of the 1984 Cartagena Declaration.⁸¹²

I.3. NON-REFOULEMENT OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW

I.3.I. INTERNATIONAL HUMAN RIGHTS TREATIES

Non-refoulement obligations complementing the obligations under the 1951 Convention, which preceded the major human rights treaties, have also been established under international human rights law. More specifically, States are bound not to transfer any individual to another country if this would result in exposing him or her to serious human rights violations, notably arbitrary deprivation of life, or torture or other cruel, inhuman or degrading treatment or punishment. An explicit *non-refoulement* provision is contained in Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which prohibits the

⁸¹² UNHCR, *supra* note 1, at p. 5-8



removal of a person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

Obligations under the 1966 Covenant on Civil and Political Rights, as interpreted by the Human Rights Committee, also encompass the obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 [right to life] and 7 [right to be free from torture or other cruel, inhuman or degrading treatment or punishment] of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The prohibition of *refoulement* to a risk of serious human rights violations, particularly torture and other forms of ill-treatment, is also firmly established under regional human rights treaties.

The prohibition of *refoulement* to a country where the person concerned would face a real risk of irreparable harm such as violations of the right to life or the right to be free from torture or cruel, inhuman or degrading treatment or punishment extends to all persons who may be within a State's territory or subject to its jurisdiction, including asylum seekers and refugees, and applies with regard to the country to which removal is to be effected or any other country to which the person may subsequently be removed. It is non-derogable and applies in all circumstances, including in the context of measures to combat terrorism and during times of armed conflict.



I.4. PROHIBITION OF TORTURE UNDER CUSTOMARY INTERNATIONAL LAW

The prohibition of torture is also part of customary international law, which has attained the rank of a peremptory norm of international law, or *jus cogens*. It includes, as a fundamental and inherent component, the prohibition of *refoulement* to a risk of torture, and thus imposes an absolute ban on any form of forcible return to a danger of torture which is binding on all States, including those which have not become party to the relevant instruments. The prohibition of arbitrary deprivation of life, which also includes an inherent obligation not to send any person to a country where there is a real risk that he or she may be exposed to such treatment, also forms part of customary international law. The prohibition of *refoulement* to a risk of cruel, inhuman or degrading treatment or punishment, as codified in universal as well as regional human rights treaties is in the process of becoming customary international law, at the very least at regional level.

Under the above-mentioned obligations, States have a duty to establish, prior to implementing any removal measure, that the person whom it intends to remove from their territory or jurisdiction would not be exposed to a danger of serious human rights violations such as those mentioned above. If such a risk exists, the State is precluded from forcibly removing the individual concerned.⁸¹³

⁸¹³ UNHCR, *supra* note 1, at p. 8



I.5. STATE PRACTICE: FROM BREACHING TO CIRCUMVENTING

Despite the principle of non-refoulement being firmly grounded in international law, states' practices do not always conform to it. Rather, states may either blatantly breach their non-refoulement obligation or craftily conceive ways to circumvent their obligations, at times insisting that the protection against refoulement only extends to asylum seekers either at the border or within the territory of a state. The *Sale v. Haitian Centers Council* (1993)⁸¹⁴ and *Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others* (2004)⁸¹⁵ cases are two prime examples of where states contested the extraterritorial application of the principle and successfully prevented the notion of protection from even being triggered.

The *Sale* case dated back to September 1981, when the US and Haiti entered into an agreement authorizing the US Coast Guard to intercept vessels in high seas, which were engaged in the illegal transportation of Haitian migrants to US shores. Following the 1992 Executive Order by President Bush, the Coast Guard started repatriating Haitians, depriving them of any opportunity to establish their qualification as refugees. When the case found its way to the US Supreme Court, the Court denied relief to the plaintiffs on the grounds that the non-refoulement obligation only applies for those who are –at the border or within a country, not the high seas.

⁸¹⁴ 11. 6. 509 U.S. 155

⁸¹⁵ [2004] UKHL 55.



Meanwhile, the *Roma* case stemmed from a 2001 bilateral agreement between the United Kingdom and the Czech Republic which would permit British immigration officers to -pre-clear (to give or refuse permission to enter the UK) all passengers at Prague Airport before they boarded any aircraft bound for the UK, which was labeled a response to the increasing number of asylum applications made by Czech nationals of Roma ethnicities to the UK. In this case, the UK Appellate Court adjudged that the principle of non-refoulement does not apply to those who have yet to -leave their country of origin.

Now the question arises as to whether the principle of non-refoulement strictly applies to asylum-seekers at the border and within the territory of destination state, as claimed by the US and UK in the abovementioned cases, or whether it can also apply extraterritorially.⁸¹⁶

I.6. EXTRATERRITORIALITY OF NON-REFOULEMENT: FROM TREATY INTERPRETATION TO UNHCR ACKNOWLEDGMENT

Article 31(1) of the 1969 Vienna Convention rules that a treaty shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in light of its object and purpose. If the principle of non-refoulement were to be strictly interpreted to apply only at the border and

⁸¹⁶ Leila Nasr, *The Extraterritoriality of the Principle of Non-Refoulement: A Critique of the Sale case and Roma case*, LSE HUMAN RIGHTS, THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE (Feb. 9th, 2016), <http://blogs.lse.ac.uk/humanrights/2016/02/09/the-extraterritoriality-of-the-principle-of-non-refoulement-a-critique-of-the-sale-case-and-roma-case/>.



within a state's territory, states could assume extremely wide latitude in preventing asylum seekers from ever being protected by the principle.

In both cases, this is exactly what the US and the UK have practiced. The US authorities intercepted the Haitians in the high seas *before* they even reached US territorial waters; whereas the UK immigration officers pre- cleared the Romas *before* they even boarded the plane, arguing without qualms that the people have not arrived at their border and that they are therefore not under the protection of non-refoulement. In other words, they seek to avoid the obligation by -doing indirectly what they are not allowed to do directly. It must be determined whether such an interpretation is in line with the object and purpose of the 1951 Convention; that is, the protection of refugee's fundamental rights and freedoms.

The United Nations Refugee Agency (UNHCR) itself has affirmed the extraterritoriality of the principle of non-refoulement in its Advisory Opinion. The international community also seems to concur with UNHCR in this respect. The Inter-American Commission of Human Rights, for instance, in 1997 expressed its disagreement with the conclusion reached by the Court in the *Sale* case that the principle of non-refoulement does not apply extraterritorially.⁸¹⁷

⁸¹⁷ Ibid.



I.7. GENERAL OBLIGATION TO PROTECT REFUGEES

All refugees are entitled to protection by virtue of being human beings. The State, as a sovereign entity, also has rights and obligations as a subject of international law. The refugee who arrives in search of asylum is not an apparent threat to national security, absent particular circumstances, but in drafting various treaties covering this field, States have never been blind to the needs interests with respect to refugees and/or asylum-seekers.⁸¹⁸ States are merely apprehensive that large numbers of refugees might pose a threat to national security, especially in the light of the recent terrorist attacks that took place in Paris, carried out by members of ISIS who had entered France on the pretext of being Syrian refugees. However, with the United Nations Security Resolution,⁸¹⁹ international protection of refugees became problematic. The measures which States are required to take will clearly impact what is considered a fair regime and the implementation of international obligations. In short, those aspects of the rule of law that require procedural standards of justice and the separation of executive and judicial functions are at risk.

I.8.CONCLUSION

In a nutshell, it is clear that Nation States are under a clear obligation to not send refugees back to their country of origin when there is a clear apprehension in their minds that they will be persecuted upon their return. Various laws provide for the obligations of States with respect to refugees

⁸¹⁸ Guy S. Goodwin-Gill, *Forced Migration: Refugees, Rights and Security*, FORCED MIGRATION, HUMAN RIGHTS AND SECURITY, p. 3-6 (Oxford and Portland, Oregon, 1st Edition, 2008).

⁸¹⁹ UNSC Res 1373 (September 28th, 2001).



and compel them to comply with widely accepted principles of international cooperation and humanitarian law. Refugees must be viewed by States as human beings in crisis and not as obstacles. States on decent diplomatic must at the very least come to a consensus on how to properly enforce the rights of such displaced and marginalized people without causing diplomatic or international mistrust or a communication gap. Although it is understandable that they would fear for the safety of their own people, it is imperative that they provide protection to those who genuinely fear being persecuted. A thorough background check of refugees is essential while at the same time meting out to refugees the dignity, compassion and empathy that they deserve.