Chapter one

General introduction

1.1 Background of the study

The principle of *non-refoulement* sets forth an obligation on the international community to guarantee all persons the protection from being returned to a place where they are at risk of persecution or danger. The principle is relevant in several contexts, and besides being a cornerstone of international refugee law, the principle can be found in numerous international and regional human rights treaties. The observance of *non-refoulement* is deeply linked to the determination of refugee status.[1] This means that the procedures for identifying refugee status must ensure a protection against refoulement.[2]

*Non-refoulement*is most famously expressed in Article 33 of the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention). The first paragraph of the article states that no party to the treaty shall expel or return a refugee to the territory where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. The second paragraph states that the benefits of the first paragraph cannot be claimed by a refugee if there are reasonable grounds to regard him as a danger to the security of the country in which he is, or if he has been convicted of a particularly serious crime and therefore constitutes a danger to the community of the country he is in. These exceptions, which are outlined in the second paragraph, will be referred to as the national security exception and the public order exception.

[1] *UNHCR Note on the Principle of Non-Refoulement, 1997.*
[2] *ibid*

At the time of the drafting of the 1951 Refugee Convention, the idea of exceptions to *non-refoulement*was controversial, as the principle was considered so fundamental that no exceptions should be allowed.[3] However, as global security threats have developed to a new level, states seem to be increasingly willing to accept that there may be exceptions to *non - refoulement*. Currently states are practicing diplomatic assurances against torture in returning the unwanted foreign national due to national security reason without violating their international obligation under the non refoulment principle. However the diplomatic assurance by itself is associated with many problems that in effect or in reality violations of the non refoulment principle due to unreliable nature of the assurances in protecting the basic human right of freedom from torture.

There is also counter terrorism measure that is greatly affecting the principle of non refoulment. after the September 9/11 attack countries are making a lot of change in reforming their domestic anti terrorism law in protecting their own national security in response to mass problems posed by terrorism act. However this measure are affecting the basic principles of non refoulment as the countries are using the in abusive ways in returning or expulsion, or closure of border to prohibit a refugee entering their country under the cover of national security. As a result many innocent asylum seeker or refugee right are violated.

Currently, there are almost 66 million forcibly displaced persons in the world, according to the UNHCR.[4] Nearly 20 million, of which half are children, fulfill the requirements for refugee status. 86 percent of the world's refugees are currently hosted by less wealthy countries.[5] The UNHCR has called it a global crisis and called upon wealthier states to Share the burden.

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[3] Farmer, Alice, Non-refoulement and Jus cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection, 2009, 23 (1), Georgetown Immigration Law Journal p.10(here in after farmer)

[4] *http://www.unhcr.org/55842cb46.html last accessed 2016-12-12.*

[5] *http://www.unhcr.org/55842cb46.html last accessed 2016-12-12.*

1.2 statement of the problem

Under international law state has a duty to protect the right individual in general and refugee rights in particular. Under international refugee law there is a principle non- refoulment which prohibit the return of an individual to a country in which he or she may be persecuted. However, after the terrorist attack on 11 september2001, it is permitted to strike balance between the national security of state and the obligation to provide protection against refoulment. It is clear that the perpetrators, planners or facilitators to be prosecuted. If they flee prosecution no safe haven should be granted. However, in recent years this principle is facing huge problem, countries are giving overemphasized concentration to national security by disregarding their obligation under the principle of non refoulment and affecting the right of innocent refugee and asylum seeker by deporting from their country to their home where they may danger to their lives

Sometimes states are using diplomatic assurance in refouling refugees to their original home countries whom they think as a threat to their national security. The country practices this in order to observe their obligaton under the non refoulmentBut this refugee may encounter prosecution, torture and detention once they returned back to their original country.

1.3 Research question

- Does the application and practice of diplomatic assurance affect the principle of non- refoulment)?
- Does the diplomatic assurance have a legal base under international hum human right law?

- Is there the means of monitoring post- return of diplomatic assurance
- Does the diplomatic assurance in returning the refugee to his/her original countries affect the right of refugee against detention, torture, and prosecution?
- Does the countries fully discharging their obligation of non-refoulment when they practice diplomatic assurances?
- Whether the country is excused from international obligation in case of dealing with the counter terrorism?
- Does the non refoulment is absolute in all context

1.4 Objective of the study

A, General objective

- To show the gap between law and practice and clearly show the current challenges affecting the right of refugees under the guise of diplomatic assurances

B, Specific objective

- To analyze global of and regional law on principle of non-refoulment in refugees law context and other human right instrument
- To examine the international jurisprudence with respect to non-refoulment principle
- To indicate and critically examine the its current challenges for implementation of non- refoulment

- To analyze the legality of diplomatic assurances in international under human right bodies
- To indicate how the using diplomatic assurance cannot protect the refugees from torture.
- To elaborate the principle of non-refoulment
- To show the law and practice of the state regarding non refoulment obligation

1.5 The Research Methodology

Taking in to account the research questions and the objective of the study, the methodology that better enables me to answer these questions and achieve the desired goal is doctrinal legal research methodology.

The justification to use this kind of research design is, since the topic under study focuses on assessing the implementation of non refoulment: challenges associated with diplomatic assurances, referring to the appropriate laws in the books and legislations will be the only way to address the research questions. Primary sources like conventions and proclamations, as well as secondary sources like the books and journals are consulted.

1.6. Scope of the Study

Due to financial and other reasons, the research under study is thematically limited to analyzing the implementation of non refoulment and challenges associated with diplomatic assurances and counter terrorism effect on this principle

1.7. Significance of the Study

Upon the completion of this research, it is expected that, it may be beneficial in many respects. For example,

- It may help as an input to the literature in law school, so that the students and instructors may refer it to get information about the refugee law.
- Help the activist or those who work on the refugee by giving more information regarding this basic principle

1.8. Limitations of the Study

While I have been undertaking this research, I have encountered many constraints and shortages. These are:-

- Lack of appropriate and enough reference materials that enable me to undertake the research
- Financial constraints: since such kind of works need expenditures, it has effect on the shallow pocket persons like me.
- Time constraints: although the time it may consume is not as such long time, since the students of the graduating class to which I belong have been preparing ourselves for the National Law School Exit Exam,

1.9. Organization of the Study

To achieve the objective of the research, and to answer the research question, the contents of this thesis are divided in to four chapters.

Chapter one presents introductory matters such as background of the study, research objectives, significances of the study, research questions, research methodology, scope of the study, limitations and organization of the study.

Chapter two discusses about the definition of refugees,non-refoulment and other related concepts .It also deal with international legal standards on the principle of non refoulment .Chapter three deals with the implementation of non refoulment; challenges associated with diplomatic assurances

Finally, chapter four winds up the research by drawing conclusion and forwarding recommendations.

Chapter two

General overview of Refugee, non refoulment and related concepts

2.1 Definition of refugee

In an attempt to analyze the complex definition of a refugee, we have to go to back to its origins and how it has evolved from a person seeking sanctuary in the past into what's known today a person fleeing home due to a well-founded fear of persecution, resulting into his in ability or unwillingness to return.

Etymologically speaking the word refugee is linked to the Latin word refugium, meaning refuge or to flee back, from re "back" and "fuge".(6) as for the word asylum this was originally derived from the greek word 'a' meaning "not" and 'sulo' means right to pillage. By putting these two words together the Greeks referred to a place where pillage was forbidden. (7)

A wide and an important definition of refugee are provided in The 1951 conventionrelating to the status of refugee under article 1(2) Define refugee as Follows: refugee is the one who

> '' owing to a well-founded fear of persecution for reasons of race, religion nationality membership in 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 is unable or owing to such fear is unwilling to return it.[8]

There are certain elements are provided under this convention they are the following one:Outside the country of nationality or habitual residence ,well-founded fear, persecution, for reasons of a ground set out in the 1951

[6] Walter w.skeat,the concise Dictionary of English etymology, words worth editions, ware, Hertford ship , 1993,p.164
[7] Ibid, subparagraph 3
[8] UN general assembly (GA), convention relating to the status of refugees, 28 July 1951, Art 1A(2)(here in after convention)

convention and unable or un willing to avail oneself of protection of the country of nationality or habitual residence

It should be noted however that these elements are closely interrelated and should be applied in the context of anintegrated and holistic analysis, taking in to account all the relevant circumstancesof the case. Care should also be taken to ensure that the convention is interpreted and applied in the way that is sensitive and responsive to the full range of reasons for and manifestation of persecution.[9]

The definition of refugee under regional instrument is found in the organization for African unity (OAU) 1969 convention on the specific aspects of refugee problem in Africa. This convention first incorporates the 1951 refugee conventions definition but it include new grounds by extending protection to all person compelled to flee across national borders by reason of any man-made disaster whether or not they can be said to fear persecution :

> The term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality[10]

The OAU definition recognizes that four important modifications of the convention definition are required in order to accommodate the specific context of abuse in states of the developing country.[11]

First, it acknowledges the reality that fundamental forms of abuse may occur not only as a result of the calculated acts of governments of the refugee's origin, but also as a result of that government's loss of authority due to external aggression, occupation, or foreign domination. The

[9] UNHCR, manual on mandate on Refugee Status Determination 2005,p.20
[10] OAU CONVENTION on specific aspects of refugee problems in Africa, 1969 ,article 1(2) (here in after OAU convention)
[11] James C. Hathaway and Michel Foster : The law of refugee status, second edition , Cambridge University Press, 2014 Pp17-18

anticipated harm is no less wrong because it is inflicted by a foreign power in control of a state rather than by governments of that state perse. this modification simply recognizes the need to examine refugee claim from the perspective of the de facto, rather than the formal ,authority structure with in the country of origin.

Second, it refers to the pattern of pre-world war II refugee accords in recognizing the concept of group disfranchisement. by its reference to persons who leave their country in consequence of broadly based phenomena such as external aggression,occupation, foreign domination or any other event that seriously disturb public order, the OAU recognizes the legitimacy of flight in circumstances of generalized danger.

Third, it leaves open the possibility that the basis or rational for the harm may be indeterminate. So long as a person is “compelled” to seek refugee because of some anticipated series disruption of public order, she need not be in a position to demonstrate any linkage between her personal status (or that of some collectivity of which she is a member) and the impending harm. Because the African standard emphasizes assessment of the gravity of the disruption of public order rather than motives for flight, individuals are largely able to decide for themselves when harm is sufficiently proximate to warrant flight

The fourth is that The OAU convention also extends international protection to person who sake to escape serious disruption of public order “in either part or the whole” of their country of origin.this to represent departure from the past practice in which it was generally assumed that a person compelled to flight should make a reasonable efforts to seek protection to seek protection with in a safe part of his own country (if one exists) before looking refugee abroadThe definition of refugee is found under the declaration adopted by the organization of American state in 1984. In recognition of the inadequacy of the convention definition to embrace the

many involuntary migrants from generalized violence and oppressions in Central America, The definition is similar to that enacted by the by the organization of African unity. In addition to convention refugee, protection is extended to

> "person who have fled their country because their lives, safety, freedom have been threatened by generalized violence ,foreign aggression internal conflicts , massive violation of human rights or other circumstances which have seriously disturbed public order"[12]

The OAS definition shares some of the innovative characteristics of the organization of African unity[13] first; it acknowledges the legitimacy of claims grounded in the action of external power by virtue of its reference to flight stemming from foreign aggression. Second, it offers qualified acceptance of the notion of group determination and claims in which the basis or rational for harm is indeterminate. Finally, the OAS definition unlike its African counterparts does not explicitly extend protection to persons who flee serious disturbance of public order that affects only part of their country.

The references to claims grounded in '' internal conflicts'' and ''massive violation of human right'' provide helpful clarification of established principles, but its substantive terms do not break new ground. Any situation of internal conflict would surely "disturb public order" and hence be included within the general language of both the OAU and OAS definitions.[14]

Over all the OAS definition of refugee status marks something of compromise between the convention standard and the very broad OAU conceptualization

The other regional definition of refugee is found under the council of Europe which has introduced standards of refugee protection that go

[12] Declaration De Cartagena, November, 1984
[13] See note 6 above, pp18-19
[14] ibid

beyond the convention definition, although the changes are significantly more modest than the OAS and OAU. In the parliamentary assembly‘s recommendation 773 in 1976 the council expressed its concern in regard to the situation of de “de facto” refuges that is ,persons who either have not been formally recognized as convention refugees or who are unable or un willing for … other valid reasons to return to their countries of origin.[15]

Definition of refugee is also provided under Ethiopian refugee proclamation no.409/2004.this definition is more expanded than the 1951 convention relating to the status of refugee in grounds of persecution but it is direct copy of the organization for African unity (OAU) 1969 convention on the specific aspects of refugee problem in Africa without any modification to it. It define refugee as the one who:

> 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. it also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.[16]

2.2 **The Criteria and Procedures to Determine the Refugee Status**

When we say criteria under the refugee laws, a person is a refugee as soon as the criteria contained in the definition of refugee are fulfilled.[17] The

[15]Council of Europe, parliamentary assembly recommendation 773(1976).
[16]Refugee proclamation, proclamation no. 409/2004, Federal Negarit gazette,10th year, no.54,19th july, 2004 (Here in after the Proclamation), art 4 (1 and 2)
[17]Ms. Jastram Kate and Ms. Achiron Marilyn, Hand book of refugee protection: guide to international Refugee

burden of proof to show that he/she is among the persons included in the definition of refugee, lies on the applicant or asylum seeker.[18]

However, the criteria included in the definition may vary according to the treaty to which the host state is a party. For instance, the 1951 refugee convention provide certain criteria which the refugee should fulfill in order to get the status of refugee among that one is that: he/she should be outside the country of nationality or if stateless person outside of the country of his habitual residence.[19]The other one is that, there should be a well-founded fear this fear may be a subjective if there is anticipation of some form of harm or predicament or objective one in which there is a reasonable possibility that the fear will be realized up on return[20]. The other criteria is that of persecution, it encompass serious human rights violations as well as other kinds of serious harm or intolerable predicament[21].the other criteria is that a person should met the convention ground: this grounds are: race, religion, nationality, membership of a particular social group and on grounds of political opinion[22]. The last criteria is that when a person is unable or (owing to well-founded fear of persecution) unwilling to avail him or herself of the protection of the country of nationality.[23]These last criteria contain two things in it; one is that "being unable" implies circumstance beyond the control of person concerned. For instance, a country may be unable to extend proper protection in a state of war, civil war, or other grave disturbance. The second one is "being un willing" implies that when a person refuses to accept the protection of that country due to his or her well-founded fear of persecution.[24] Therefore, if a person fulfills the above mentioned criteria of

Law, UNHCR (2001), p.8.
[18]Ibid, p.41
[19] UNHCR,manual mandate of refugee status determination (1 October, 2005) pp.21-
[20] Ibid,p.23
[21] Ibid,p.26
[22] Ibid, p.30
[23] Ibid, p. 38
[24] Ibid, 39

the convention he/she can get the status of refugee. But in the case of African refugees‟ Convention, a person who does not fulfill the criteria of refugee under the 1951 convention is included. Moreover, as in any other human right instruments, international and/or regional refugee convention are considered only as a minimum standard and hence, states are free to adopt a refugee criteria/definition which is more inclusive; but not restrictive.[25]

So, a person who does not fulfill the criteria under international and regional refugee treaties may fulfill the criteria under domestic laws, if such law give better protection, and be considered as a refugee. Despite the fact that a person (asylum seeker) becomes refugee, not because of states recognition but because he/she is a refugee,[26] identifying whether such person really meets the criteria under refugee law needs a procedure. Unfortunately, regarding the procedure there is no universally accepted procedure in the international and regional instruments in this regard.[27]As a result, the Executive Committee of the High Commissioners Program on their meeting in October 1977 recommended that, refugee status determination procedures should satisfy certain basic requirements.[28] Those requirements[29], which reflect the special situation of the applicant for refugee status, would ensure that the applicant is provided with certain essential guarantees are listed as follows.

I. The competent official to whom the applicant addresses him/herself at the border or in territory of contracting states should have clear instruction for dealing with cases which might come within the purview of the relevant international instrument. He/she should be required to act in accordance

[25]Ibid, p.51.
[26] Ibid
[27]GizachewAdmassu: Refugee Law teaching material,(2009), (Justice and Legal System Research
Institute), un published, (2009) p.92.
[28]Ibid.
[29]Ibid, p. 93

with the principle of non-refoulment and to refer such case to a higher authority.

II. The applicant should receive the necessary guidance to the procedure to be followed.

III. There should be a clearly identified authority with responsibility for examining requests for refugee status and taking a decision in the first instances.

IV. The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authority concerned and he/she should also be given the opportunity of which they should be duly informed to contact a representative of UNHCR

V. If the applicant is recognized as a refugee; he /she should be informed accordingly and issued with document to certify his refugee status.

VI. If the applicant is not recognized, he should be given a reasonable time to appeal for formal reconsideration of the decision, either to the same or different authority, whether administrative or judicial.

VII. The applicant should be permitted to remain in the country pending decision on his Initial request by that competent authority referred above under number III, unless it has been established by that authority that his request is clearly abusive. He should also be permitted to remain in the country, while an appeal to a higher administrative authority or to the court is pending.

2.3 Refugee VS asylum seeker

There is a great deal of confusion about the difference between an asylum seeker and a refugee and often the terms are used interchangeably or incorrectly. An asylum seeker is someone who is seeking international protection but whose claim for refugee status has not yet been determined.

In contrast, a refugee is someone who has been recognized under the 1951 Convention relating to the status of refugees to be a refugee. The Convention defines a 'refugee' as any person who:

> … 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 ofthat 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 …[30]

The definition of 'refugee' does not cover other individuals or groups of people who leave their country only because of war or other civil disturbance, famine, natural disasters or in order to seek a better life. As the UNHCR explains: Refugees flee because of the threat of persecution and cannot return safely to their homes in the prevailing circumstances. An economic migrant normally leaves a country voluntarily to seek a better life. Should they elect to return home, they would continue to receive the protection of their government[31]

2.4 Refugee VS Economic migrant

A migrant is a person who, for reason other than those contained in the definition of the convention, voluntary leaves his country in order to take up his residence elsewhere. He may be moved by desire for change or adventure, or by family or other reason of a personal nature. If he is moved exclusively for economic considerations, he is an economic migrant not a refugee.[32]

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[30] . UNHCR, Convention relating to the status of refugees, UNHCR, Geneva, 2007, p. 16, (accessed on December 12, 2016) http://www.unhcr.org/3b66c2aa10.pdf

[31] UNHCR, 'Who are refugees?', UNHCR website,(accessed on 12-11-2016) http://unhcr.org.ua/main.php?article_id=5&view=ful

[32] UNHCR, handbook on procedures and criteria for determining refugee status under the 1951 convention and the 1967 protocol relating to the status of refugee , (1979), paragraph 62

The distinction between an economic migrant and refugee is however sometimes blurred in the same way as the distinction between economic and political measures in an applicant's country of origin is not always clear. Behind economic measures affecting a person's livelihood there may be racial, religious, political aims or intentions directed against a particular group. Where economic measures destroy the existence of a particular section of the population (e.g. withdrawal of trading rights from, or discriminatory or excessive taxation of a specific ethnic or religious group)[33], the victim may according to the circumstance become refugee on leaving the country .

Whether the same would apply to victims of general economic measures (i.e. those that are applied to the whole population without discrimination) would depend on the circumstance of the case. Objections to the general economic measures are not by themselves good reason for claiming refugee status. On the other hand, what appear at the first sight to be primarily an economic motive for departure may in reality also involve a political element, and it may be the political opinion of the individual that expose him to serious consequences, rather than his objections to the economic measures themselves.[34]

We can also differentiate the difference between economic migration and refugees based on the legal framework which protect both the group. Refugees are defined and protected in international law. The 1952 refugee convention and its 1967 protocol as well as other legal texts such as OAU refugee convention, remain the cornerstone of modern refugee convention.[35] however when we see migrants with the exception of some international instruments such as UN convention on the protection of the rights of all migrant workers and members of their family, most individual

[33] Ibid
[34] Ibid paragraph 63
[35] Ibid

countries deal with migrants under their own immigration laws and processes."[36]

2.5 Refugee VS internally displaced person

The term refugee is also different from internally displaced person. In the common parlance, people tend to think of refugees, rather in discriminately as those who have been forced to flee their homes, whether or not they have actually left their own country. However, according to international law, a person, and merits the label (of refugee) only if he or she has crossed internationally recognized border to escape a well-founded fear of persecution.[37] Thus, border crossing sometimes is one important dividing line between both groups of persons. This has led to common description of international refugees and external refuges, the former referring to what is known as internally displaced person (IDP). It is asserted that the legal definition of refugees is based on the premise that the bond between the citizen and the state has severed. But this is not the case for IDP's who always find themselves within the territorial limit of the state concerned. The rationale behind border crossing as a core requirement for acquiring refugee status was derived from the principle of state sovereignty. That is, the protection and assistance of those persons within their own national territory whether displaced or not primarily falls on the government of that state. This is because the problem raised by IDP's is invariably part of the international affairs of the state.[38]

2.6 definition of non-refoulment

One of the challenges of academic writing consists in presenting complex concepts in an understandable way to a wide public of readers. This definitely applies to the concept of non-refoulement, which at first sight

[36]Ibid
[37] Thomas G. Weiss. "wither international efforts for IDPs" journal of peace research paper vol.no 3(1999) p,363
[38] Phuong page 21

might appear ‘incomprehensible’ to a neutral reader. However, in reality the obligation of States ‘not to refoule’ is rather straightforward and not so difficult to understand. Various definitions of the non-refoulement principle are available throughout the academic literature in the field of refugee law, but the most comprehensive conceptual definition is the following one put forward by Lauterpacht and Bethlehem:

> “Non-refoulement is a concept which prohibits States from returning a refugee or asylum seeker to territories where there is a risk that his or her life will be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion.”

In other words, non-refoulement is a principle that prohibits or imposes limits on governments to expel or return non-citizens / aliens (whether they are asylum seekers or refugees) to other countries where their life or physical well-being might be endangered. It is broadly accepted that non-refoulement only applies to non-nationals or ‘aliens’ (both terms will be used interchangeably throughout this thesis). From the outset, this is important to note because an entirely different regime applies to nationals. This is most clearly reflected in thefact that a state cannot expel its own nationals.

2.7 Historical background of non refoulment

The term non refoulment drives from the French refouler, which means to drive back or to repel, as of an enemy who fails to breach ones defenses.[39] In the context of immigration control in continental Europe, refoulment is a term of art covering, in particular, summary reconduction to the frontier of those discovered to have entered illegally and summery refusal of admission of those without valid papers. Refoulement is thus to be distinguished from expulsion or deportation, the more formal process where by a lawfully resident alien may be required to leave a state, or be forcibly removed.

[39] Goodwin-Gill, Guy S “the refugee in international law (second edition).oxford university press (1996),p.117

The idea that a state ought not to return person to other states in certain circumstances is of comparatively recent origin.[40]Common in the past where formal agreements between sovereign for the reciprocal surrender of subversives, dissidents and traitors. Only in the early –to mid-ninetieth century It was period of political turmoil in Europe and South America, as well as of mass movements of populations occasioned by pogroms against Jewish and Christian minorities in Russia and Ottoman Empire.

A sense of a need to protect the persecuted can be gathered from the united kingdom's 1905 alien acts where section one made an exception to refusal of entry for want of means in respect of 'those seeking to avoid persecution or punishment on religious or political grounds or for an offence of political character or persecution involving dander of imprisonment or danger to life or limbs on account of religious belief.no until after the first world war, however did international practice begin to accept the notion of non -return, and only in 1993 does the first reference to the principle that refugee should not be returned to their country of origin in an international instrument.in article 3 of the 1933 of the convention relating to the international status of refugees, the contracting parties undertook no to remove resident refugee or keep them from their teritoory, by application of police measures, such as expulsions or non-admittance at frontier(refoulment),' unless dictated by national security or public order .each state undertook 'in many case not to refoul entry to refugees at frontier of their countries of origin,' only eight state ratified this convention, however; three of them, by reservation and declarations, emphasized their retention of sovereign competence in the matter of expulsion, while united kingdom expressly objected to principle of no rejection at frontier.

[40] ibid

Agreements regarding refugees from Germany in 1936 and 1938 also contained some limitation on expulsion or return[41]. they 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 to be expelled or sent back across the frontier save for reasons of national security or public order ; and even in such cases, governments undertook not to return refugees to the place of danger. The necessary arrangements to proceed to another country or to take advantage of the arrangements made for them with that object

Action in inter-war period focused principally on improving administrative arrangements to facilitate resettlements and relieve the burden on countries of first asylum. The need for protective principles for refugees began to emerge, but limited ratifications of instruments containing equivocal and much qualified provision effectively prevented consolidation of the formal principle of non refouulment . Nevertheless, the period was also remarkable for the every large number of refugees not in fact sent back to their country of origin, whether they fled Russia after the revolution, Spain, Germany, or Ottoman Empire.[42]

Following the Second World War, a new era began. In February 1946, the United Nations expressly accepted that ‘refugees or displaced people’ who have expressed valid objections to returning to their country of origin should not be compelled to do so. The international refugee organization was established on the same year, charged with resolving the problem of displacement left over from the war; some 1,620,000 refuge were assisted with resettlements and integration, while many others fleeing political developments in eastern Europe were readily admitted to western countries.[43]

[41] ibid
[42] ibid
[43] ibid

In 1949 the United Nations economic and social council appointed ad hoc committee to consider the desirability of preparing revised and consolidated convention relating to the international status of refugees and stateless persons and if they consider such a course desirable, draft the text of such convention. The ad hoc committee on statelessness and related problems meet twice in New York in January –February and august 1950 and drew up the following provision, considered so fundamental that no exceptions were proposed:

> 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, or political opinion[44]

During this same period, however, state resisted inclusion of a right to be granted asylum, both in the 1948 universal declaration of human rights an in the 1951 convention. The 1951 conference of plenipotentiaries also had concerns regarding the absoluteness of non refoulments, adding the following paragraph to what was to become article 33:

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

Apart from certain situations of exceptions, the drafter of the 1951 convention clearly intended that refugee not be returned, either to the country of origin or to other countries in which they would be at risk

As expressed in article 33, the principle of non refoulment raises questions as to its personal scope and relation to the issues of admissions and non-rejection at the frontier.it is a rule clearly designed to benefit the refugee, the person who in the sense of article 1 of the convention, has a well-

[44] ibid

founded fear of being persecuted on grounds of race religion nationality ,membership of a particular social group, or political opinion.in principle its benefit ,ought not to be predicated up on formal recognition of refugee status which, indeed, many be impractical in the absence of effective procedures or in the case of mass influx . Likewise, it would scarcely be consonant with consideration of good faith for a state to seek to avoid the principle of non refoulment by declining to make a determination of status.[45]

From the point of general, as opposed to treaty based international law, the issue is rendered more problematic by developments in refugee definition, as well as by doubts as to the scope and standing of non refoulments outside the relevant international instruments. Recent extension of the UNHCR's mandate may be purely functional, in that they authorize the channeling of material assistance but do not justify the exercise of protection.[46] States have in turn argued that, in regard to expanded class, their obligations are humanitarian rather than legal. state practice in case of mass influx offers some support for the view that non refoulment or the an analogous principle of refugee , applies both to the individual refugee with the well-founded fear of persecution and to the frequently large groups of persons who do not in fact enjoy the protection of the government of their country of origin in certainly fairly well-defined circumstances.

2.8 international Legal instruments on non refoulment principle

[45] ibid
[46] ibid

2.8.1 The 1951 Convention and 1967 Protocol relating to the Status of Refugees

As non-refoulement is a principle primarily developed in the context of refugee law, it is not surprising that the most important specific instruments dealing with the issue are the 1951Refugee Convention and its subsequent 1967 Protocol. Both the Convention and the Protocol were adopted through a UN General Assembly resolution. The Convention provided an overview of the rights of refugees and codified in a comprehensive manner the content of previous attempts to establish refugee regimes.

As such, the Convention is combined with the Protocol are the most valuable refugee instrument with international applicability. Thus, the Convention and the Protocol are to be considered to form the core of the international community's response with regards to the protection of refugees, also because of their wide ratification (see below). In addition, the UN General Assembly as well as several regional organizations such as the Council of Europe (CoE) and the Organization of American States (OAS) have frequently called upon their members to become Parties to these instruments. It is therefore difficult to overestimate their importance. The next section will look at what type of rights the Convention and Protocol put forward.

2.8.1.1. The scope of the rights contained in the Convention and Protocol

In terms of the actual content of the various provisions in these instruments, both the Convention and Protocol provide for a workable definition of the term 'refugee' and also set minimum standards for the treatment of persons that are considered to be falling within this category of refugees. On the one hand, these standards relate to "the legal status of

refugees in their country of asylum, their rights and obligations, including the right to be protected against forcible return or refoulement, to a territory where their lives or freedom would be threatened."[47] On the other hand, they also specify "States' obligations, including a duty to cooperate with UNHCR in the exercise of its functions and facilitating its duty of supervising the application of the Convention."[48]

The provisions contained both in the Convention and its subsequent Protocol specify a variety of rights, albeit with a different character. Some of the rights enumerated in the Convention and Protocol are universal human rights, and basically form reiterations of rights mentioned in crucial human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) and its counterpart in the area of socio-economic and cultural rights, the ICESCR. Such rights include for example the right to religious freedom, the right to protection against discrimination, the right to work and education. Other rights are typically designed for a refugee situation, and include rights such as the prohibition for states to impose penalties on refugees who entered the territory unlawfully (Article 31 of the Refugee Convention), the prohibition for states to expel lawful refugees apart from the exceptions of national security and public order (Article 32) and the non-refoulement principle contained in Article 33.

2.8.1.2. The content of the principle of non-refoulement

Having at this point some insight in the different types of provisions contained in the Refugee Convention, the principle of non-refoulement can be identified and explained. Indeed, the most commonly and widely cited treaty source for the principle of non- refoulement is Article 33 of the 1951 Refugee Convention. This principle should be considered as "the primary response of the international community to the need of refugees to enter

[47] UN high commissioner for refugees(UNHCR), refugee protection guide to international refugee law(1 December 200, paragraph 10
[48] id

and remain in an asylum state[49]. It consists of two sub-provisions, with the former outlining the principle as such and the latter defining the exceptions that are allowed. Article 33 (1) outlines the principle and reads as follows:

> "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." [50]

As laid out here, the principle contains a number of distinctive elements. Firstly, the object of the provision is clearly specified in referring to 'refugees'. An analysis of what exactly this means will be presented below. Secondly, there is a clear reference to 'a threat for someone's life or freedom'. Thirdly, the provision lists a number of so-called 'Convention grounds' of persecution, notably 'race, religion, nationality, membership of a particular social group or political opinion'.

Taking into account that this provision has to be read in the context of the Convention as a whole, a number of crucial observations can be made with regard to its applicability. Firstly, as an evident rule in international law, the Refugee Convention and its subsequent Protocol – like any other treaty – only binds those states that are Party to the treaty. This is important since it means that Article 33 will only apply to those States that are party to one or both of these instruments.[51]Having said this, the Refugee Convention presents itself as one of the most widely ratified treaties when it comes to rights of aliens, and therefore has considerable influence.[52]

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[49] James Hathaway, the right of refugees under international law (Cambridge: Cambridge university press, 2005)300.

[50] UN General Assembly, Convention Relating to the Status of Refugees, Article 33 (1), 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at : http://www.unhcr.org/refworld/docid/3be01b964.html [accessed 14 December 2016]

[51] Lauterpacht and Bethlehem, "The Scope and Content of the Principle of Non-Refoulement" p. 106.

[52] According to the UN treaty database, currently 145 states are Parties to the 1951 Refugee Convention and 146 states are Party to the 1967 Protocol. An important exception is the United States which is only Party to the 1967 Protocol, and not to the original Convention. (See United Nations Treaty Collection, website consulted on 13/12/2016).

Apart from the fact that the Refugee Convention and subsequent Protocol present themselves as widely ratified international instruments with considerable influence, another remarkable feature is the fact that the non-refoulement obligation contained in Article 33 has to be read as a non-derogable obligation in the context of both the Convention and the Protocol.[53]Both legal instruments contain a 'reservation' provision, which clearly specifies that it does not allow any reservations to Article 33.[54]From a public international law perspective, the fact that no reservations are allowed to the non-refoulement principle is a clear indication of its broad acceptance and might indicate the emergence of a 'juscogens' norm. Whether this is actually the case will be explored at a later stage in this thesis.

2.8.1.3. Who is protected by the prohibition of refoulement?

Going back to the distinctive elements identified above as part of the non-refoulement provision in Article 33, it clearly refers to 'a refugee' as the subject of this provision. Therefore, before being able to adequately assess the scope of this provision, it is essential to determine who exactly 'a refugee' is. One of the major contributions of the Refugee Convention is that it spells out a clear, comprehensive and workable definition. Reading

[53]Lauterpacht and Bethlehem, 107; Hathaway, p. 96.

[54] Article 42 of the Convention Relating to the Status of Refugees puts forward that "any state may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1), 33, 36 – 46 inclusive". Article VII of the Protocol Relating to the Status of Refugees reaffirms this: ".. any state may make reservations … in respect of the application in accordance with article I of the present Protocol of any provisions of the Convention other than those contained in an articles 1, 3, 4, 16 (1), and 33 thereof …"

Article 1 of the Convention and Article 1 of the Protocol in conjunction, one can distill the following definition of a 'refugee':

> "any person who is 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, 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 …"[55]

Clearly a number of fundamental elements are present in this definition. First of all, there is the element of 'being outside the country of his or her nationality or former habitual residence'. Nationality here refers to citizenship and is meant to make the distinction between persons who have a nationality versus stateless persons. The phrase referring to 'country of former habitual residence' is of application to stateless people. This first element of the definition is crucial since it is a general requirement that international protection cannot come into play as long as a person is within the territorial jurisdiction of his home country. [56] However, this does not translate itself into the requirement that the person in question should have left his country in an illegal manner, or on the basis of a well-founded fear. It is possible for a person not to be a refugee when he or she left his country, but to become one at a later date. A person becomes such a 'refugee sur place' either due to circumstances arising in his country of origin during his absence (such as regime changes or coup d'états) or as a result of his own actions (such as by expressing his political views in his current country of residence).

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[55]UN General Assembly, Convention Relating to the Status of Refugees, Article 1; Protocol Relating to the Status of Refugees, Article 1.

[56] UN 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 (December 2011), available at: http://www.unhcr.org/refworld/docid/4f33c8d92.html [accessed 20 December 2016], paragraphs 88 and 94 – 96.

Secondly, a key part of the definition refers to the element of a 'well-founded fear of being persecuted'. The element of fear is a subjective notion, considered to be a state of mind and requiring an evaluation of the applicant's statements. However, this subjective element of fear is complemented by the adjective 'well-founded', implying that the state of mind must be grounded in an objective situation. Both elements therefore play a role when determining refugee status.

In addition, it is important to note that there is only one motive that is being singled out here, namely 'a well-founded fear of persecution'. As a matter of definition of refugee status, this rules out all other types of motivations that persons might have when leaving their respective countries, such as famine, the occurrence of natural disasters (flooding,hurricanes…) or simply people that migrate for economic reasons. Especially this last category of so-called 'economic refugees' [57] forms a substantial part of contemporary migratory flows. Also, it is difficult to come up with a consistent definition of what is understood by 'persecution'. While it is clear from Article 33 of the Refugee Convention that a threat to life or freedom will be considered as persecution, it is less clear which other forms of threats or actions would fall under this category.

Thirdly and lastly, the refugee definition as laid out previously refers to a number of grounds for persecution, notably 'race, religion, nationality, membership of a particular social group or political opinion'. These grounds are also called Convention-grounds and are reiterated throughout the Refugee Convention in a number of important clauses, including the non-refoulement provision. In most situations there will be considerable overlap between these categories, since a person will often be persecuted for a variety of reasons.[58] For example, it is not so difficult to imagine a refugee

[57] Goodwin-Gill and McAdam, The Refugee in International Law, 15

[58] UN 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, paragraph 67.

context concerning a member of a particular social group in a country characterized by religious diversity, or a member of the political opposition in such a religiously fragmented country.

While indeed there might be a lot of overlap in terms of Convention grounds in individual cases, it is however worth highlighting the 'membership of a particular social group' as a crucial ground. This forms the one ground that is not static but rather dynamic in nature (together with the element of political opinion – however this to a lesser extent). Race, religion and nationality on the other hand can be considered as more 'permanent' or static elements of a person's identity. Therefore, the 'membership of a particular social group' ground is the Convention ground that continues to make the Refugee Convention relevant today and is likely to do so in the distant future.

All the above might lead us to the conclusion that the prohibition not to refoule only applies to persons who have been formally recognized as refugees. This is an often made mistake and it is clearly not the case: the obligation not to refoule does not depend on a status determination of whether a person is a refugee or not. Article 33 does not refer to the issue of 'recognition' of a refugee. Indeed, as mentioned in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status:

"A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee[59] simply stated; this implies that a person is a refugee even if that person has not yet been formally recognized through the necessary administrative procedures. If this were not the case, states could basically circumvent the protective regime established by the

[59]Id at paragraph 28.

Refugee Convention through postponing or refusing refugee status altogether.[60]Therefore, one has to consider the receipt or attribution of refugee status as something of declaratory nature rather than of constitutive nature.

2.8.1.4. Limitations to the principle of non-refoulement

As mentioned before, Article 33 of the Refugee Convention is structured in a particular way, with the main principle of non-refoulement being spelled out in Article 33 (1) and the exceptions to this principle contained in Article 33 (2). In the previous sections, the focus has been on the first subparagraph of Article 33. The drafters of the Convention however found it necessary to limit the scope of the principle of non-refoulement, by including a second subparagraph in Article 33, which reads as follows:

"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"[61]

This paragraph lays out two grounds for limiting or restricting the applicability of the non-refoulement principle, namely when the refugee constitutes a danger to the security of the host country (established on the basis of so-called 'reasonable grounds') or when he or she forms a danger to the community of that country (confirmed by a final conviction for committing a serious criminal offence). These two exceptions can be typified under the form of the 'criminality exception' and the 'national security exception'.[62]An example of the national security exception could be a person who is considered to be a potential terrorist suspect, while an example of

[60]Supra note 51 at p. 116 – 117.

[61]UN General Assembly, Convention Relating to the Status of Refugees, Article 33 (2).
[62] Among others, Hathaway uses these terms in The Rights of Refugees under International Law

the criminality exception could be an alien who has been criminally convicted for manslaughter.

The provision clearly allows for some margin of appreciation for Contracting States since it speaks of ‘reasonable grounds’. In other words, there is no clear one-size-fits-all standard for determining whether a refugee can be considered a danger to the security or community of a country. Both exceptions are also clearly formulated as prospective threats, resulting in a certain element of prophesy-making (looking into the future). Noteworthy also is that the provision does not specify the type of acts that form a threat to the national security, nor does it specify what should be considered as a ‘particularly serious’ crime. What is clear is that in the latter case it should concern a ‘final judgment’, meaning a judgment from which there is no possibility of appeal anymore.[63]Mere suspicions are therefore not considered as sufficient basis.

In light of this provision (Art. 33 (2)) it becomes clear that the prohibition of non- refoulement is not phrased in absolute terms. The Convention itself allows Contracting States a certain room to manoeuver, in the sense that the provisions are formulated in a way that they leave states some scope in assessing other imperatives. The impact of the exceptions provided for in Article 33(2) should certainly not be underestimated, since it allows for the asylum country “to expel or return even refugees who face the risk of extremely serious forms of persecution”.[64]However, section 2 will illustrate that through the impact of general human rights standards, a rather restrictive interpretation of these exception clauses has been generally accepted.

In addition to these two exceptions explicitly contained in the text of Article 33, it is crucial to note that there is also a general exception with regards to

[63]Supra note 51 at p.135.
[64] Supra note 44, p. 344.

the applicability of the Convention contained in Article I, point F of the Convention. In this sense, it is required that a person does not fall within one of the exclusion grounds of Article 1 (F) in order to get the possibility to have the other enumerated right clauses applied to him. This illustrates the importance of reading the Convention and Protocol in a comprehensive, all-encompassing manner. Article 1(F) relates to the definition of the term refugee, and reads as follows:

> "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."[65]

In other words, the drafters of this provision appear to have had the intention to avoid a situation of abuse of rights, where for example war criminals or leaders of dictatorial regimes characterized by human rights violations would be able to apply for protection under the Refugee Convention.[66] Sub-paragraph 1(F) (a) provides for an explicit exclusion of war criminals and persons having committed crimes against peace or crimes against humanity. It is not surprising that this was the initial focus of the drafters after the experiences of World War II and the Nuremburg tribunal.

Sub-paragraph (b) however is the more controversial and practical one in this exclusion clause, referring to the commission of serious non-political

[65] UN General Assembly, Convention Relating to the Status of Refugees, Article 1 (F).
[66] "At the time when the Convention was drafted, the memory of the trials of major war criminals was still very much alive, and there was agreement on the part of States that war criminals should not be protected. There was also a desire on the part of States to deny admission to their territories of criminals who would present a danger to security and public order." (UN 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, paragraph 148).

crimes prior to recognition as a refugee and outside the host refuge country. The idea behind Article 1(F)(b) clearly was to

> "Ensure that refugee law does not benefit fugitives from justice."[67] Again, this is a provision allowing for a wide margin of interpretation in determining what exactly a serious crime' is. The fact that the crime has to be of 'non-political' nature is clearly intended to avoid having to take difficult decisions about what exactly constitutes a political crime and what not.

In addition to the difficulty of defining such a political crime, there are also inherent dangers in having developed (Western) countries pronouncing themselves on political affairs of third countries, thereby for example unwillingly or unknowingly legitimizing certain political regimes and practices associated with these regimes. More importantly however, since 'political opinion' is listed as a possible ground for persecution under the non- refoulement clause, it would make absolutely no sense to consider 'political' crimes as a ground for exclusion of the applicability of the Refugee Convention.

2.8.2Non-refoulmentunder international human right instrument

2.8.2.1 International Covenant on civil and political right

The International Covenant on Civil and Political Rights (ICCPR) addresses non- refoulement through its Article 7, which states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". This is a non-derogable provision and to interpret what exactly this means, the General Comments issued by the UN Human Rights Committee[68] (UN HRC) are instructive. With regards to the prohibition of

[67] Hathaway, The Rights of Refugees under International Law, p. 344
[68] "The Human Rights Committee is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its State

torture contained in Article 7 of the ICCPR, the UN HRC produced a General Comment No. 20 in which it touched upon the issue of non-refoulement, stating the following: "[…] 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."[69] In other words, the absolute prohibition contained in Article 7 of theICCPR also concerns refoulement of people.

2.8.2.2Convention against torture

Article 3 (1) reads as follows: "[n]o 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

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parties. All States parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially one year after acceding to the Covenant and then whenever the Committee requests (usually every four years). The Committee examines each report and addresses its concerns and recommendations to the State party in the form of "concluding observations".

In addition to the reporting procedure, article 41 of the Covenant provides for the Committee to consider inter- state complaints. Furthermore, the First Optional Protocol to the Covenant gives the Committee competence to examine individual complaints with regard to alleged violations of the Covenant by States parties to the Protocol. The full competence of the Committee extends to the Second Optional Protocol to the Covenant on the abolition of the death penalty with regard to States who have accepted the Protocol. The Committee meets in Geneva or New York and normally holds three sessions per year. The Committee also publishes its interpretation of the content of human rights provisions, known as general comments on thematic issues or its methods of work." (Source: Office of the United Nations High Commissioner for Human Rights, http://www2.ohchr.org/english/bodies/hrc/)

[69] UN Human Rights Committee (HRC), CCPR General Comment No. 20: Article 7 (Prohibition of Torture or Other Cruel or Degrading Treatment or Punishment), 10 March 1992, available at: http://www.unhchr.ch/tbs/doc.nsf/0/6924291970754969c12563ed004c8ae5 [accessed 12 December 2016], paragraph 9.

subjected to torture" [70]More importantly, this provision is formulated in absolute terms – in contrast to the 1951 Refugee Convention – and does not allow for exceptions to the prohibition of refoulement. Also, the principle of refoulement in this case only relates to torture as such, and not to inhuman or degrading treatment (such as in the case of the provisions in the ICCPR and the ECHR), thereby rendering its scope a bit more restrictive. What exactly constitutes torture is comprehensively defined in Article 1 of the UN CAT Convention. Crucial however is the threshold or standard of proof specified in Article 3 of the UN Convention against Torture, which speaks of 'substantial grounds'. This implies a 'foreseeable, real and personal risk' of torture",[71] which is generally assessed on the basis of the person's activities (both in his or her country of origin as well as the current country of residence) but also by taking into account the general human rights situation in the country of return. The next paragraph will show that there has been considerable interaction between the UN CAT and one of the most impressive regional systems of human rights protection, the ECHR

2.8.3 Non refoulment under regional instrument

2.8.3.1European Convention on Human Right

The fact that there is no explicit non-refoulement provision in the ECHR does not mean that it has no jurisprudence on the matter. On the contrary, extensive jurisprudence regarding the prohibition of refoulement can be found in the ECHR case law, mostly under the heading of Article 3 of the ECHR. This article strongly resembles Article 7 of the ICCPR, which has been analyzed earlier. It reads as follows: "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment". Like Article

[70] UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: http://treaties.un.org/doc/publication/UNTS/Volume%201465/v1465. pdf [accessed 12 December 2016], Article 3.

[71] Goodwin-Gill, The Refugee in International Law, p.304

3 of the UN CAT it is phrased in absolute terms, as a non-derogable provision. In addition, it is expressly forbidden to derogate from this absolute prohibition of torture, inhuman and other degrading treatment, even in times of emergency.[72] Regarding its scope however, it can be considered to be wider than its corresponding provision in the Convention against Torture, since it encompasses not only torture but also other forms of inhuman and degrading treatment. What is clear is that the non-refoulement principle in the context of the ECHR is to a large extent judge-made.

While indeed most non-refoulement cases are brought under article 3 of the ECHR, the principle can also arise under other articles of the Convention. Indeed, "the European Court of Human Rights has stated that the removal of a person from a State Party may give rise to a protection issue under article2, the right to life, or article 3, and exceptionally under articles 6."[73] In addition, claims under article 8 relating to the right to respect for private and family life might also involve the principle of non-refoulement.[74] The lack of cases successfully brought under these headings is for a large extent due to the fact that most cases involve challenges on a variety of grounds, often including article 3. This has the effect that – when the ECtHR identifies a violation under article 3, which triggers protection against refoulement – it usually does not go on by analyzing "the protection capacity of the other provisions".[75] It also begs the question whether it is in any way advisable to start examining the 'refoulement protection capacity' of these

[72] See Article 15 (2) of the ECHR, which reads as follows: "No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision."(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, Council of Europe Treaty Series, No. 5, available at: http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf [accessed 12 December 2016], Article 15 (2)).

[73] See note 66, at p 361

[74] Ibid pp 318 – 321

[75] Ibid at 317.

other Convention articles, since most of them take the form of qualified provisions (unlike article 3 which is framed in an absolute way).[76] Indeed, this might result in a weakening of the principle of non-refoulement.

As a last note, it is worth mentioning that the European Convention on Human Rights also contains a 'conformity clause' in Article 53. This means that the rights contained in the ECHR and their subsequent interpretation cannot go counter to the "human rights and fundamental freedoms ensured under the laws of any High Contracting Party or under any other agreement to which it is a party."[77] In other words, the rights contained in the ECHR have to be interpreted in line with international human rights agreements, such as the Convention against Torture and the ICCPR. This is visible in the ECtHR judgments, which frequently refer to such international instruments as authoritative sources.

2.7.4 Non- refoulment as a norm of customary international law

Various scholars have put forward the hypothesis that non-refoulement can and should be considered at this stage as a norm of customary international law. Some even go further in stating that the principle can be considered as 'juscogens'. This is important because if non- refoulement is classified as a norm of customary international law, it is binding on all States, including the ones that are not party to the Refugee Convention or the Convention against Torture. In other words, this would give the obligation 'not to refoule' a higher moral and legal character as well as making it binding on all countries, regardless of the conventions and treaties they have ratified. As will become clear, opinions vary on whether this is actually the case.

[76] For example, article 8 of the European Convention on Human Rights (respect for private and family life) is a qualified right and involves a balancing test between the interest of the individual and the (potential) legitimate public interest(s).
[77] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 53

The threshold for a rule to become part of customary international law has been clearly formulated by the International Court of Justice in the North Sea Continental Shelf Judgment. [78]Apart from 'consistent State practice', the existence of a norm of customary international law requires 'opiniojuris', or "the understanding held by States that the practice at issue is obligatory due to the existence of a rule requiring it."[79] With this in mind, the that the UNHCR for example clearly takes the view that the principle of non-refoulement satisfies these criteria and can therefore be considered as a rule of customary international law. In taking this position, it mainly refers to the non-refouling practice of non-signatory States to the Refugee Convention, the implicit acceptance through multiple responses, explanations and justifications by States to the UNHCR when performing acts of refoulement, and ministerial declarations referring to the customary international law character of the principle of non-refoulement.[80] In addition, reference is being made to the prohibition of refoulement to a risk of torture, cruel, inhuman or degrading treatment or punishment as derivative and an intrinsic component of the general absolute rule prohibiting torture.[81] The latter norm is widely accepted as a norm of customary international law, and has even been accorded the status of so-called 'peremptory norm' or 'juscogens'.[82] According to UNHCR and Human

[78] See International Court of Justice, North Sea Continental Shelf Judgment, 1969, ICJ Reports: para.77, which outlined the threshold as follows: "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."

[79] UN High Commissioner for Refugees, Advisory Opinion on the Extraterritorial Application of Non- Refoulement Obligations, paragraph 14.

[80] Ibid, paragraphs 15 – 16.

[81] Theo Van Boven, former UN Special Rapporteur on Torture, clearly highlighted that "[t]he principle of non- refoulement is an inherent part of the overall absolute and imperative nature of the prohibition of torture and other forms of ill-treatment." (UN Commission on Human Rights, Report of the Special Rapporteur on Torture Theo van Boven to the General Assembly: Torture and other cruel, inhuman or degrading treatment or punishment, 1 September 2004, A/59/324, available at: http://www.unhcr.org/refworld/docid/4267be1b4.html [accessed 20 December 2016]).

Rights Watch this also points in the direction of the principle of non-refoulement being a norm of customary international law.[83]

This last argument also forms the core of Lauterpacht and Bethlehem's elaboration about the customary law character of non-refoulement. In their analysis, they managed to identify a central core[84] of the customary principle of non-refoulement, stating a clear conclusion that"non-refoulement must be regarded as a principle of customary international law."[85]

Bruin and Wouters consider the principle of non-refoulement to have an absolute or non- derogable character as well, insisting mainly on the fact that the different non-refoulement obligations cannot be seen separately but work rather in a mutually reinforcing way. In other words, even though the

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[82] Jeffrey G. Johnston, "The Risk of Torture as a Basis for Refusing Extradition and the Use of Diplomatic Assurances to Protect against Torture after 9/11," International Criminal Law Review 11 (2011): 6.

[83] UN High Commissioner for Refugees, Advisory Opinion on the Extraterritorial Application of Non- Refoulement Obligations, paragraphs 21 and 22

[84] According to Lauterpacht and ("The Scope and Content of the Principle of Non-Refoulement", pp.163 – 164), the essential content of the customary principle of non-refoulement consists of the following:

"(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) In circumstances which do not come within the scope of paragraph 1, no person seeking asylum may be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or to return to a territory where he or she may face a threat of persecution or a threat to life, physical integrity, or liberty. Save as provided in paragraph 3, 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 expressed in paragraph 2 in circumstances 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."

[85] Ibid, at p 149

1951 Refugee Convention contains grounds for exceptions, subsequent treaties, including human rights treaties and interpretations provided through case law have an impact on the interpretation of these grounds contained in Article 33 (2). While clearly emphasizing the absolute nature of the obligation not to refoule, they also recognize that " the major practical problem remains the burden of proof to be able to actually characterize the obligation of non-refoulement as a peremptory norm of general international law and to claim this in a court of law.[86]

Allain takes the debate even a step further by insisting on the jus cogens nature of non- refoulement. Indeed, "if it can be demonstrated that the notion of non-refoulement has attained the normative value of jus cogens, then states are precluded from transgressing this norm in anyway whatsoever.[87] Proclaiming the non-refoulement principle as 'juscogens' would clearly strengthen the protection for individuals, but the fluid nature of the concept does not make it easy to come to such a conclusion. Allain departs from the point that the principle forms part of customary international law and then refers to a number of elements, including the UNHCR EXCOM (Executive Committee) conclusions,[88] the 1984 Cartagena Declaration on Refugees (which confirms the jus cogens nature of non-refoulement) and finally – as a secondary source of authority – the numerous international scholars and publicists who consider that non-refoulement has indeed achieved this status of jus cogens.[89] When confronted with the fact that there are so many violations of the principle of non-refoulement, Allain responds by insisting that this is "irrelevant for its legal standing".[90]

[86] René Bruin and KeesWouters, "Terrorism and the Non-derogability of Non-Refoulement," International Journal of Refugee Law 15 (2003): p.26.

[87] Jean Allain, "Insisting on the Jus Cogens Nature of Non-Refoulement" in The Refugee Convention at Fifty – A view from Forced Migration Studies, ed. J. van Selm et al. (Oxford: Lexington Books, 2003), p. 81.

[88] More specifically, Allain refers to the EXCOM Conclusions 25, 55 and 79 adopted by the UNHCR in 1982, 1989 and 1996

[89] Allain, Jus Cogens Nature of Non-Refoulement, p. 85.

[90] Ibid, 86

Stronger even, in line with the reasoning laid out by the International Court of Justice, these violations (which can be considered as instances of state practice) do not threaten it, but rather reinforce its nature as jus cogens norm (if they are treated as actual violations).

However, other prominent scholars, such as Hathaway, clearly disagree with this reasoning, criticizing the rather liberal interpretation of the two elements that give rise to a customary norm, namely state practice and opinion juris. Illustrative of his position is the following quote: “ccustomary law is not simply a matter of words, wherever spoken and

However, frequently recited: custom can evolve only through interstate practice in which governments effectively agree to be bound through the medium of their conduct. This standard simply is not yet met in the case of the duty of non-refoulement.[91]Various elements are put forward to back up this claim, notably the fact that when reviewing state practice, refoulement forms to this date rather the norm than the exception; the fact that the large majority of states on the Asian continent have not accepted that there is such a thing as an obligation of non-refoulement; and the fact that – while yes, most countries are now bound by a certain type of non-refoulement duty – the great variety in the nature of these various legal obligations makes that one cannot speak of a common ‘opiniojuris’. Hathaway also points to the dangers of what he calls “the persistent overstatement of the reach ofcustom”[92] including the possible rejection by courts of claims presented in such a way as well as the more fundamental risk of diluting the value of customary law as a whole by rendering it rhetorical rather than actually legally binding. His conclusion is fairly straightforward, by stating that “there is insufficient evidence to justify the claim that the duty to avoid the refoulement of refugees has evolved at the universal level beyond the scope of Art. 33 of the Refugee Convention.[93]

[91] Supra note 66 at p363
[92]Ibid, 365.
[93]Ibid, 363.

As a concluding note, from the short literature review presented here it becomes clear that declaring the principle of non-refoulement as a norm of customary international law (let alone as a peremptory norm of general international law or 'juscogens') is far from a straightforward exercise. One rationale for trying to establish such a clear consensus about the jus cogens nature of this principle is that it would have serious implications in practice, rendering any conflicting treaty obligation or norm 'void'.[94]However, given the wide overlap and additional protection provided by other international law standards, it is questionable whether this exercise should actually be undertaken, taking into account the risk of diluting customary international law as demonstrated by Hathaway. Therefore, the protective regime with Art. 33 of the Refugee Convention as a central core complemented by the various human rights standards which speak to the issue of non-refoulement, already seems to provide an extensive and sufficient protection to refugees. While indeed there may be something to be gained by having non- refoulement recognized as a jus cogens norm, the costs related to the quest towards this might outweigh the benefits.

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[94] Article 53 of the 1969 Vienna Convention on the Law of Treaties says the following about treaties conflicting with 'juscogens': "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."

Chapter three

Implementation of the principle of non refoulment and Challenges associated diplomatic assurances

3.1 introductions

In the aftermath of 9/11 and with the ‘war on terror’ raging on, countries increasingly started to experience the existence of a sharp trade-off between national security and the respect for human rights. In order to get around this trade-off, states showed a remarkable inventiveness in trying to find alternative mechanisms to deal with security threats and terrorist suspects without thereby breaching their international human rights obligations. One of the solutions that states came up with in this context is

the practice of requesting diplomatic assurances when extraditing an unwanted foreign national. Therefore this chapter deal with defining the concept of diplomatic assurance against torture, challenges associated with it and finally deal with non refoulment and counter terrorism in general

3.2. **Defining diplomatic assurances**

Giving a single, comprehensive definition of what exactly 'diplomatic assurances' are is not as straightforward as it seems. The term refers more to an extensive and varied area of state practice rather than a concrete, clearly delineated format. One of the most detailed definitions is the one put forward by the UN Refugee Agency (UNHCR), an international authority in the field of refugee issues. They define diplomatic assurances in the following way:

> "an undertaking by the receiving State to the effect that the person concerned will be treated in accordance with conditions set by the sending State or, more generally, in keeping with its human rights obligations under international law."[95]

In other words, the concept refers to a practice whereby the government of a state who wants to send a person back to his or her country of origin (for a variety of reasons, including being a potential terrorist suspect or more generally forming a security threat to that country) imposes certain conditions on the government of the receiving state. These could for example take the form of promises not to apply the death penalty, promises that the person in question will not be tortured, assurances of receiving a fair trial in case the person is being charged with certain crimes etc.

It is important to note that these diplomatic assurances were not invented in the post-9/11 context. Rather, they were an existing and quite frequently

[95] UN High Commissioner for Refugees, UNHCR Note on Diplomatic Assurances and International Refugee Protection, August 2006, available at: http://www.unhcr.org/refworld/docid/44dc81164.html [accessed 9 December 2016].

used practice by Western states, albeit with a different purpose. As Izumo rightly notes, "before diplomatic assurances against torture became a hot topic in 'the war on terror,' European countries utilized diplomatic assurances primarily in the context of extradition for common (non-political) crimes." [96] Mostly these assurances took the form of diplomatic guarantees against the application of the death penalty, whereby requesting such assurances was generally considered as a not particularly contentious/controversial practice.[97] Criticism by human rights organizations and NGO's in this field was virtually non-existent.[98] Part of the reason for this lack of controversy relates to the fact that assurances against the death penalty are easier to monitor and breaches of these assurances can be identified (and avoided) before the violation takes place. Another factor of importance is that several cases involved extradition to United States, where the death penalty is still in operation but its reliable human rights record implied that one could safely rely on diplomatic assurances being respected in such cases.[99]

The presence of diplomatic assurances in practice before answering this question, it is crucial to note that the events of 9/11 constituted a fundamental 'breaking point' in the use of diplomatic assurances. Both scholars[100] as well as human rights NGO's such as Human Rights Watch[101] have recognized that in the aftermath of 9/11 a new situation arose. Not

[96] Alice Izumo, "Diplomatic Assurances against Torture and Ill-treatment: European Court of Human Rights Jurisprudence, " Columbia Human Rights Law Review 42 (2010): 235.

[97] Amnesty International, Human Rights Watch and International Commission of Jurists, "Reject rather than regulate – Call on Council of Europe member states not to establish minimum standards for the use of diplomatic assurances in transfers to risk of torture and other ill-treatment" (2 December 2005): 12.

[98] Human Rights Watch for example acknowledged that "the use of assurances against the death penalty simply acknowledges the different legal approaches of two states" and that "it is much easier to monitor an assurance against the death penalty and protest such a breach before an execution happens." (See Human Rights Watch, "Diplomatic Assurances against Torture – Questions and Answers" (November 2006): 2).

[99] Supra note 96 at p 253.

[100] Ibid 237 and 238

only did the practice of diplomatic assurances gain new momentum (in terms of frequency of use) after the attacks of 9/11 but there was also a thematic expansion of the use of diplomatic assurances, from death penalty cases towards the area of terrorism cases. Assurances were increasingly being used as safeguards against torture and other forms of ill treatment, provoking a storm of protest from a variety of actors as well as creating new challenges for the courts that had to interpret the validity of these assurances.

The most detailed accounts of the use of diplomatic assurances come from the hand of human rights NGO's, notably from various overviews provided by Human Rights Watch.[102] Nonetheless, it is clearly difficult to provide exact numbers of the actual use of diplomatic assurances, since states are not under any obligation to report or make these assurances available to the public in any way. Human Rights Watch acknowledges this when highlighting that:

> "The use of diplomatic assurances is not well-documented and practice appears to vary among states, regions, and legal jurisdictions. Few jurisdictions expressly provide for the use of diplomatic assurances in law."[103]

This lack of transparency contributes to a large extent to the mysterious atmosphere surrounding the use of assurances, with negotiations taking place at political level and the assurances being subject to typical trade-offs and compromises. One possible recommendation therefore could be to address this lack of transparency through obliging states to report on their use of diplomatic assurances. Various options for such reporting could be envisaged: one option would be through registering them centrally at the United Nations by means of a harmonized procedure, but a more simple and

[101] Human Rights Watch, "Still at Risk: Diplomatic Assurances No Safeguard against Torture, " Vol. 17 No. 4 (April 2005): 3.
[102] However, even Human Rights Watch highlighted in their reports that these did not form exhaustive surveys but only reflect relevant information available to them
[103] Id ,p.6

easier implementable option would be to include such reporting on 'diplomatic assurances' as an element of states reporting obligations under one of the United Nations mechanisms (for example in the Universal Periodic Review process or in the reporting guidelines under the UN Convention against Torture (UN CAT)).Therefore, as a concluding note, one can state that diplomatic assurances are clearly not a novel phenomenon (both for states in using them as for courts in interpreting their validity). However, they have become a much more widely debated issue given their application in the context of the war on terror.[104] Exact figures of how extensively diplomatic assurances are being used by states are unfortunately not available, with some information being delivered by human rights NGO's. This is mostly due to the high level of secrecy and non-transparency associated with these practices. One option therefore would be to oblige states to report when they resort to diplomatic assurances. The next section will present an in-depth overview of the challenges that diplomatic assurances pose.

3.3. The challenges associated with diplomatic assurances

A survey of the literature on diplomatic assurances reveals several problematic aspects of the use of diplomatic assurances against torture and other forms of ill treatment. Some of these challenges address the question whether effective protection can be achieved through diplomatic assurances; others raise more fundamental questions about the engagement with States whose very record of human rights violations makes such assurances necessary. The present section will present an overview of the main arguments against the use of diplomatic assurances to mitigate the risk of torture. In this respect, the following summary by Larsaeus is illustrative of the challenges associated with diplomatic assurances:

[104] Diplomatic assurances have not only been discussed in legal scholarship but have become a topic of debate in the media as well. See for example The Guardian, "Amnesty attacks UK no-torture pacts" (http://www.theguardian.com/uk/2010/apr/12/amnesty-torture-deportation-diplomacy), 12 April 2010; The Guardian, "Abu Qatada deported from UK" (http://www.theguardian.com/world/2013/jul/07/abu-qatada-deported-from-uk), 7 July 2013.

> "… the critique so far has primarily revolved around three main arguments: the prohibition of torture is absolute; assurances are used in relation to States that torture and therefore cannot be trusted; monitoring is hard or impossible."[105]

In what follows, these points of criticism will be discussed in greater detail. A first set of challenges contra the use of diplomatic assurances with regard to torture risks situate themselves in the legal sphere. As Johnston rightly notes, a fundamental question is "… whether reliance on assurances in the context of torture is permissible under international human rights law." More fundamentally, a first challenge relates to the question whether diplomatic assurances could ever be reconciled with the absolute prohibition of torture and ill-treatment under international law. In other words, are diplomatic assurances legal? This is an important consideration to make, since if diplomatic assurances are considered an illegal practice under international law, states would have a hard time justifying their use. Johnston conducts a comprehensive analysis on this question, which he concludes with an affirmative response. Reviewing scholarly opinions, statements of authoritative persons in this field as well as decisions reviewing deportation and extradition orders involving assurances, his analysis ends as follows:

> "… The practice by states of relying on diplomatic assurances against torture as conditions of removing persons to other countries, including through extradition, is not precluded under international human rights law. Rather, assurances form a relevant consideration in assessing whether a removal decision would expose a person to be returned to a substantial danger of being tortured."[106]

[105] Nina Larsaeus, "The use of diplomatic assurances in the prevention of prohibited treatment" (MSc. Diss., Refugee Studies Centre (University of Oxford), 2006): 2-3.

[106] Jeffrey G. Johnston, "The Risk of Torture as a Basis for Refusing Extradition and the Use of Diplomatic Assurances to Protect against Torture after 9/11," International Criminal Law Review 11 (2011): 13.

Indeed, academic scholars seem to be in agreement that international human rights law, notably the UN Convention against Torture (UN CAT) and its Article 3, does not exclude the possibility of states resorting to diplomatic assurances. Article 3 lays out a prohibition of refoulement in case of 'substantial grounds' for believing that someone would be in danger of being subjected to torture, and specifies that authorities have to take into account 'relevant considerations'. While the provision specifically highlights one specific relevant consideration that states might take into account (a pattern of systematic gross human rights violations), this does not preclude taking into account other relevant considerations, including the presence of diplomatic assurances.[107]

In addition, the jurisprudence from the UN Human Rights Committee (Alzery v. Sweden), the UN Committee against Torture (Agiza v. Sweden) and the European Court of Human Rights (in the cases of Chahal and Saadi) shows that the legality 'as such' of states requesting and obtaining diplomatic assurances is not questioned. It is important to note that human rights bodies have not declared the practice of diplomatic assurances illegal. Even a renowned skeptic of the use of diplomatic assurances like former UN Special Rapporteur on Torture Theo van Boven agreed that "resort to diplomatic assurances should not be ruled out a priori."[108]

Having said this, the fact that it is not as such illegal to resort to assurances against torture does not speak to the variety of challenges associated with their functioning in practice. Apart from the crucial question regarding the legality of diplomatic assurances, other legal arguments contra mostly speak to the legal unenforceability of such assurances. When assurances

[107] Michael John Garcia, "Renditions: Constraints Imposed by Laws on Torture" (2005); A. John Rasdan, "A More Regular Process for Irregular Rendition" (2006); Robert M. Chesney, "Leaving Guantanamo: The Law of International Detainee Transfers (2005-2006)

[108] UN General Assembly, Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, 1 September 2004, A/59/324, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/498/52/PDF/N0449852.pdf?OpenElement [accessed 23 December 2016]: paragraph 40.

are breached, in other words when a person is tortured despite assurances of the contrary "there is no mechanism that would enable a person subject to the assurances to enforce them or hold the sending or receiving government accountable."[109] The fact that they are the product of a diplomatic exercise between two states which has not been subscribed to by the person in question, contributes to a great extent to this legal unenforceability.

Some observers and human rights watchdogs however go a step further and assert that diplomatic assurances have therefore no legal effect at all.[110] This is worth investigating somewhat deeper, since it is highly relevant for the question whether diplomatic assurances are having the effect of eroding international human right norms, such as the principle of non-refoulement.

Noll performed an interesting analysis in this regard, looking at the 'aide-mémoires'[111] in the case of Ahmed Agiza and Muhammed El Zary, deported by Sweden to Egypt through means of diplomatic assurances. His analysis is constructed on the observation that one first has to answer 'the question of the binding nature' of these instruments before starting to look at their relation and impact on the broader human rights regime. To see whether these are legally binding instruments, Noll verified whether the diplomatic assurances in this case were exchanged 'with the intention to create obligations under international law'. Both the fact that "the guarantees were a sine qua non for the legality of removal" and that "certain elements of the guarantees exceed pre-existing Egyptian obligations under international treaty law" [112] pointed in the direction that Sweden and Egypt

[109] See note 101 at p 26
[110] Ibid p.21
[111] An'aide-mémoire' is generally defined as "a memorandum summarizing the items of an agreement. It contains key points made by a diplomat in an official conversation." (see U.S. Legal Dictionary, http://definitions.uslegal.com/)

[112] Id.

did indeed intend to create obligations under international law.

Even though Noll's conclusion that "it must be presumed that states therefore generally intend to create binding obligations when signing up to such diplomatic assurances"[113] appears to go too broad and might seem premature in light of the limited scope of his analysis, it does highlight a very important element with regard to the legal status of diplomatic assurances. There appears to be a fundamental distinction between the 'legal enforceability' of diplomatic assurances on the one hand and their intended 'legal effects' on the other hand. Both terms are not identical and incorporate a substantively different meaning. In this sense, while states appear to have the intention to create obligations under international law when concluding diplomatic assurances, the practical application of these assurances seems to indicate that it is very difficult for the person – who constitutes the actual subject of the arrangement – to make these obligations 'hard' in a legal way through holding the respective governments accountable for breaches of the assurances in question.

A second set of challenges contra the use of diplomatic assurances can be grouped under the heading of 'moral' arguments. One of the most fundamental challenges is that concluding these diplomatic assurances with states that practice torture might be perceived as implicitly condoning the systematic nature of such torture practices. Yuval Ginbar, legal advisor to Amnesty International used a very powerful metaphor in his observations about the use of diplomatic assurances: asking for the creation of such an island of protection comes dangerously close to accepting the ocean of abuse that surrounds it."[114] In other words, the fact that a sending country resorts to diplomatic assurances implies that it takes a very realistic perspective on the human rights situation in the receiving country, at least

[113] Ibid at 11
[114] Yuval Ginbar, cited in Human Rights Watch, "Still at Risk," 23

acknowledging that there is a systematic problem of torture. One could therefore wonder whether diplomatic assurances are in such a situation not the easy way out?

Another challenge relates to the element of 'good faith' or trust which forms a core concept in the practice of diplomatic assurances, regardless of the fact whether these have legal effect or not. The argument human rights NGO's often put forward is that states that violate their customary international law obligations – especially the prohibition of torture –in most cases even deny that torture is taking place. An excerpt from Human Rights Watch is illustrative in this regard: "Indeed, states that torture routinely accompany their flagrant violations with insistent denials of abuse, often despite overwhelming evidence to the contrary"[115]

In other words, the fact that these states not only commit torture but also that they are consistently lying about it, implies that diplomatic assurances concluded with such states cannot be considered to meet the 'good faith' threshold. In addition, some commentators also point towards the lack of 'good faith' on the part of the sending state when concluding diplomatic assurances with reputed torture states.

A third and final category of challenges against the use of diplomatic assurances can be grouped under the heading of 'practical implementation'. Human Rights Watch for example points to a number of such practical problems, a first one being the limits of diplomacy. Diplomacy as a lever for human rights protection presents a conundrum, since: "the tender arts of negotiation and compromise that characterize diplomacy can undermine straightforward and assertive human rights protection. The fundamental right to be free from torture, however, is not negotiable or permitting of

[115] Supra note 101 at p.2

compromise."[116]

Diplomatic relations are in their nature an exercise in dancing on a tight rope, with diplomats being focused on maintaining friendly relations with partner governments rather than confronting them with touchy issues of potential friction, such as cases of non-respect for human rights. In addition – as already referred to above – diplomatic relations are characterized by a strong degree of confidentiality and lack of transparency, which is not really conducive for their public accountability.

Another practical challenge is linked to the lack of incentive on the part of both governmental sides to come forward and admit breaches of diplomatic assurances and therefore instances of torture. As highlighted before, receiving governments that either condone or systematically practice torture will not be particularly inspired to reveal this to the outside world since this would imply admitting a breach of their international law obligations. Rather, they will continue to deny that abuse is taking place. On the other hand sending governments will also not feel very comfortable in revealing breaches of diplomatic assurances, mostly for two reasons. Firstly, there is the difficult diplomatic balancing exercise that needs to take place, during which human rights very often are not in the top drawer. Secondly, discovery of torture in a case where diplomatic assurances were concluded would have as a logical consequence that the sending state would be shamed in having to acknowledge that it violated the principle of non-refoulement.

All of this makes that states are unlikely to take steps in response to non-compliance with assurances, mainly because of the lack of incentives. At least one author even broadened this conclusion to human rights treaties in

[116] Ibid, p. 19.

general, referring to the fact that "human rights law stands out as an area of international law in which countries have little incentive to police noncompliance with treaties or norms."[117]In other areas of international law, either financial incentive push states towards complying with international obligations, or the danger of so-called 'retaliatory non-compliance 'deters states from free riding. Indeed, the most effective instrument in the arena of human rights law appears to the practice of 'naming and shaming', with loss of reputation and international prestige as the most important (negative) incentive for states to comply with human rights law.

Finally, a third practical challenge is often referred to as the inherent limitations of post-return monitoring. It has to be said that certainly not all situations of diplomatic assurances are characterized by a monitoring mechanism after return to the receiving state.[118] Both through heightened pressure of human rights NGO's as well as a result of heightened judicial scrutiny, sending states are now increasingly incorporating post-return monitoring mechanisms as an additional safeguard in their assurances.[119] Such a monitoring role can either be taken up by members of the diplomatic staff of the sending state sur place or –ideally – by an independent monitoring institution (often in the form of a local human rights NGO) appointed in the actual assurances themselves and tasked to perform this function.

Generally it is assumed that these monitoring schemes serve a dual purpose: on the one hand they should act as a disincentive, discouraging

[117] Oona Hathaway, "Do Human Rights Treaties Make a Difference," 111 Yale L.J. 1935 (June 2002), p. 1938, cited in Human Rights Watch, "Still at Risk," 21

[118] "The vast majority of written diplomatic assurances contain no provision for independent monitoring of a person after he or she is returned." (Human Rights Watch, "Still at Risk," 24).

[119] For example, in the recent Abu Qatada case, a local Jordanian NGO (the Adaleh Centre for Human Rights Studies) was tasked with monitoring the assurances. (UN High Commissioner for Human Rights Louise Arbour 2005)

the receiving state to act contrary to the assurances since breaches might be detected more easily; on the other hand they are intended to serve as an accountability mechanism. However, critics point to the inherent contradiction that is associated with the use of such monitoring mechanisms, since the use of these already implies certain distrust on the part of sending states with regard to the effectiveness of diplomatic assurances as such. This skeptical view is best illustrated by a statement from Louise Arbour (former UN High Commissioner for Human Rights) on the effectiveness of post-return monitoring mechanisms:

"Short of very intrusive and sophisticated monitoring measures, such as around-the-clock video surveillance there is little oversight that could guarantee that the risk of torture will be obliterated in a particular case."[120]

Crucially however, the assumptions underlying the above-mentioned basic functions that these monitoring schemes should fulfill are inherently flawed. The assumption that instances of torture are easy to observe does not correspond with the reality on the ground: torture is mostly taking place in secret, performed by people who are often specialists in concealing it. Therefore, it seems highly unrealistic to expect that untrained diplomatic personnel would be able to detect such abuse. Also, torture victims are often afraid to speak up and reveal abuse, Since they might be subjected to retaliation afterwards. In light of these critical points, Amnesty International, Human Rights Watch and the International Commission of Jurists came to the conclusion that "post-return monitoring arrangements are largely symbolic."

3.4 The legality of diplomatic assurance against torture before international human rights bodies

[120] Statement by UN High Commissioner for Human Rights Louise Arbour, New York, 7 December 2005.

There is increase in the practice of diplomatic assurances since2001 .An important indication of the extent to which the practice of diplomatic assurances risks eroding the non-refoulement obligation is therefore provided by the jurisprudence of relevant international human rights bodies. It has become clear that a number of key general human rights standards are relevant for interpreting the scope of the obligation of non-refoulement. On the international level, these are in particular Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN CAT). The corresponding (quasi-) judicial bodies that provide both authoritative interpretations of the scope of these international standards through means of General Comments as well as adopt views on individual petitions are the UN Human Rights Committee (UN HRC) in relation to the ICCPR on the one hand and the UN Committee against Torture (CAT Committee) in relation to the above-mentioned Convention Against Torture (UN CAT) on the other hand. Let see some of the case that was brought before the human right bodies

4.3.1The case-law of the UN Committee against Torture

Starting with the relevant jurisprudence of the CAT Committee, a number of cases can be identified in which the relevance of diplomatic assurances against torture and other ill treatment has been considered. All of these cases revolved around the legality of a deportation or extradition under Article 3 of the UN Convention against Torture.

The case is between Agiza vs. Sweden (2005), which was intrinsically linked to the Attia case.[121]Ahmed Agiza was an Egyptian national suspected and tried in Egypt for possible terrorist involvement whose asylum application

[121] Agiza v. Sweden, Communication No. 233/2003, CAT/C/34/D/233/2003, 20 May 2005.

in Sweden was rejected. As a result of this, he was deported back to Egypt. In the adoption of its Views, the CAT Committee used the same language as in Attia v. Sweden regarding the importance of a 'personal risk' of being tortured in order to find a violation of Article 3 of the UN CAT. However, it came to an entirely different conclusion, both in terms of finding a violation as in terms of the assessment of the diplomatic assurances involved. Referring to the awareness of the Swedish government of the existence of widespread torture practices in Egyptian prisons, the fact that its own security intelligence services considered Agiza as a terrorist threat as well as the fact that the intelligence services of two other States were highly interested in Agiza, made the CAT Committee conclude the following:

> *"The State party's expulsion of the complainant was in breach of article 3 of the Convention. The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk."*[122]

In a remarkable paragraph, the Committee also referred back to its Views adopted in the Attia v. Sweden case of two years earlier, where it considered the diplomatic assurances as being satisfactory. With the facts of both cases being closely linked, the Committee found it necessary to outline the crucial differences that resulted in its adoption of a different conclusion. Of particular significance in this regard was the fact that "the Swedish government had failed to fully disclose [to the Committee] a January 2002 monitoring report"[123] containing evidence of mistreatment of Ahmed Agiza while in Egyptian custody. The Committee made it clear that this constituted a flagrant violation of the State party's obligation to fully cooperate with the Committee.

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[122] 114 Agiza v. Sweden, Communication No. 233/2003, CAT/C/34/D/233/2003, 20 May 2005, paragraph 13.4.

[123] Amnesty International, "Dangerous Deals: Europe's Reliance on 'Diplomatic Assurances' Against Torture" (April 2010),

In addition, the CAT Committee appeared to take into account the increasing amount of available information regarding the rendition programme led by the US government together with numerous states in the context of the 'war on terror' post 9/11.[124]By the time the Agiza case reached the Committee, more and more information about these practices had become publicly available. In addition, it had become evident by this time that Egypt had already breached the fair trial guarantee contained in the diplomatic assurances, which the Committee considered as being indicative and "going to the weight that can be attached to the assurances as a whole."[125]At the same time Egypt had also shown itself unable or unwilling to initiate an independent investigation into the torture allegations, as repeatedly demanded by Swedish officials.

In sum, one can safely say that the CAT Committee with its opinion in the Agiza case has clearly taken a more cautious and skeptical approach towards the use of diplomatic assurances, when comparing it with its earlier Views adopted in the Attia case. However, in doing this, the CAT Committee continued to apply the same principled approach, referring to the need to have 'substantial grounds for believing' that a person would be in danger of being subjected to torture. In evaluating whether such substantial grounds exist, it continued to emphasize the importance of a 'personalized risk' of being subjected to torture, with the general human rights situation in the country in question being considered as one of the relevant considerations to be taken into account but not necessarily a determining factor. Finally,

[124] See the reference to "the progressively wider discovery of information as to the scope of measures undertaken by numerous States to expose individuals suspected of involvement in terrorism to risks of torture abroad" in Agiza v. Sweden, Communication No. 233/2003, CAT/C/34/D/233/2003, 20 May 2005, paragraph 13.5.

[125] Agiza v. Sweden, Communication No. 233/2003, CAT/C/34/D/233/2003, 20 May 2005, paragraph 13.5.

the CAT Committee's concluding statement in the Agiza case also points to the importance of the presence of an enforcement mechanism as a criterion that might be taken into account in assessing the reliability of diplomatic assurances. In this case the committee was focused on the lack of enforcement mechanism once the person is refouled to his home country. Thus he may face torture and other ill treatment. The country is indirectly violating the principle of non refoulment by expelling the person to a place where he face a torture because there is no proper enforcement mechanism .

4.3.2 The case-law of the UN Human Rights Committee

The second important international body that has pronounced itself on the use of diplomatic assurances in relation to the issue of non-refoulement is the UN Human Rights Committee (UN HRC). However, the number of relevant cases before the HRC are less numerous than before the CAT Committee.

A leading case in the Committee's jurisprudence on diplomatic assurances is the case of Mohammed Alzery v. Sweden, which the Committee decided in 2006. [126] The case concerned the expulsion of an Egyptian national involved in government opposition activities (and suspected terrorism), from Sweden to Egypt. The Swedish government had obtained so called 'aide-memoires' from the Egyptian authorities, in the form of "diplomatic assurances against torture and ill treatment, the death penalty, and unfair trial, prior to transfer."[127] The Committee started by analyzing whether the expulsion of Mr. Alzery from Sweden to Egypt "exposed him to a real risk of

[126] Mohammed Alzery v. Sweden, Communication No. 1416/2005, ICCPR/C/88/D/1416/2005, 10 November 2006. Paragraphs 11.3 to 11.5 of the Views adopted by the Human Rights Committee (HRC) are most relevant for our analysis here.
[127] Amnesty International, "Dangerous Deals: Europe's Reliance on 'Diplomatic Assurances' Against Torture" (April 2010), 15.

torture or other ill-treatment in the receiving State, in breach of the prohibition on refoulement contained in article 7 of the Covenant."[128]

In explaining its approach to whether such a 'real risk' was present or not, the HRC clearly stated that it 'must consider' all relevant factual elements, including the general human rights situation in a country, the existence and content of diplomatic assurances, and the existence and implementation of enforcement mechanisms in relation to such assurances.[129]The HRC then addressed the case at hand by highlighting a number of problematic elements, including the fact that the only reason the State Party relied on the diplomatic assurances was because it believed that these would have the effect of reducing the risk of ill treatment to an extent sufficient to avoid breaching the non-refoulement principle. In other words, without resorting to diplomatic assurances, the removal of Mr. Alzery would always have run counter to international human rights obligations. Other problematic elements were the absence of monitoring mechanisms ensuring the enforcement of the assurances, the lack of effective implementation arrangements (which manifested itself through the fact that visits by Swedish Embassy personnel only started five weeks after the actual extradition took place), and the lack of conformity of these visits with international good practice standards in this field.[130]

As a logical conclusion, the Committee stated in its Views that the removal of Mohammed Alzery constituted a violation of article 7 of the ICCPR, since "the State party has not shown that the diplomatic assurances procured were in fact sufficient in the present case to eliminate the risk of ill-

[128] Supra note 126 at paragraph 11.3.

[129] Ibid.

[130] Ibid, paragraph 11.4.

treatment to a level consistent with the requirements of article 7 of the Covenant."[131]

A last remarkable observation in relation to the Alzery case is that the Human Rights Committee had also the opportunity to pronounce itself on whether the expulsion of Alzery through means of diplomatic assurances amounted to a breach of the right to a fair trial as well, but decided not to pronounce

Concluding remark

In both case there is a violation of state obligation under the convention and treaty. The state resort to the diplomatic assurance because they want not to violate the obligation under non - refoulment principle and to reduce ill treatment however the state does not provide the means of enforcement. as a result there is high probability in which a person may face torture and other ill treatment once he is refouled , therefore the practice does not guarantee the complete protection from torture that was provided under the CAT, ICCPR and other human right .therefore , state practice of diplomatic assurance is violation non -refoulment under international human right standards.

3.5 Non-refoulement and counter-terrorism

There is no international consensus on the definition of terrorism.[132] There is also no uniform international list of terrorist organizations.[133] The classification of an organization as a terrorist organization is highly politically motivated, which subsequently renders the definition of terrorism highly political. Therefore, this thesis deals with terrorism as a non-legal term. Shortly after the attacks on the World Trade Center and the Pentagon on 11 September 2001, the UNSC issued resolution 1373, calling upon states to combat terrorism. The resolution called upon states to exclude from refugee status, pursuant to Article 1F of the 1951 Refugee Convention,

[131] Ibid, paragraph 11.5.

[132] Bruin and Wouters, 2003, p. 5
[133] Ibid p. 8.

those who have planned, facilitated or participated in terrorist crimes.[134] The resolution did not include a definition on terrorism; subsequently such a definition was left to the discretion of states.[135] In 2003, UNSC resolution 1456, also dealing with counter-terrorism, made a reference to human rights considerations when combating terrorism and resolution 1566 subsequently spelled out a contextual definition on terrorism. According to Bruin and Wouters, the mere membership of a terrorist organization cannot be considered a terrorist act. However, there is a danger that the fact that an individual is a member of a particular terrorist organization will suffice to, in practice, exclude the individual from refugee status or the protection against refoulement.[136] The United States currently rely heavily on the language of the national security exception in Article 33(2) to exclude the right to non-refoulement with regard to refugees who are suspected to have links to terrorism.[137]Since the events of September 11 2001, many states have imposed stricter counter-terror measures.[138]There is a great potential for national security concerns to be prioritized over refugee protection, given current concerns of global terrorism.[139]According to Bruin and Wouters, states are responsible not only to protect individuals in need of protection, but also to hold individuals criminally accountable for their acts. The current practice of exclusion and expulsion neglects both these responsibilities.[140] The objective of asylum law is to protect the individual from violations of fundamental human rights. This objective has, post 9/11 and the advent of global terrorism, become subject for discussion.[141] This is further evidence of the politicization of asylum law and

[134] UNSCR 1373, para.3 (g).
[135] Supra note 132 pp 7-8
[136] Ibid,p.5
[137] Supra note 3 at , p. 37.
[138] ibid
[139] ibid
[140] Supara note 132. Pp.15,29
[141] Ibid, p.25

how the current approach to the “war on terrorism” is harmful to human rights.[142]

For instance, in recent years, Al-Shabaab has also carried out a string of attacks on civilians in Kenya, including killing at least 147 people at Garissa University in April 2015[143]. Mall gate attack in Kenya due to this the Kenyan governments takes brutal measures against Somali refugees in Kenya through detaining mass, returning many asylum seeker and reached decision up to closure of the dadaab camp the largest refugee center in Kenya as announced by Dr. Eng Karanja Kibicho, interior ministry principal secretary, that the government would no longer host refugees and was disbanding its Department of Refugee Affairs, which processes refugee registration. He also said the government would close refugee camps “within the shortest possible time” because of national security concerns.[144]

Under international law, individuals enjoy the “right to seek and to enjoy in other countries asylum from persecution”[145] This right necessarily entails the right to enter a state for the purposes of making an asylum application and thus does not permit rejection at the border before the application has been processed and considered. Article 2(3) of the Convention Governing Specific Aspects of Refugee Problems in Africa sets out that, “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 or to remain in a territory, where his life, physical integrity or liberty would be threatened”. Similarly, Article 33(1) of the Convention Relating to the Status of Refugees prohibits the expulsion or return of an individual, “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

[142]Ibid, p.29

[143] Human rights watch available at https://www.hrw.org/news/2016/05/06/kenya-ending-refugee-hosting-closing-camps (accessed on February 2017)

[144] ibid

[145] UDHR ,Art.14(1)states that, “ everyone has the right to seek and to enjoy in other countries asylum from persecution”

group or political opinion". These provisions are particularly relevant in the context of the border closure, given that the individuals seeking to enter Kenya were fleeing conflict. Kenya's announcement on May 6, 2016 [146]that it would no longer host refugees is contrary to principles it has pledged to respect.

Despite the Kenyan government's frequent statements that Somali refugees in Kenya are responsible for Kenya's insecurity, officials have not provided credible evidence linking Somali refugees to any terrorist attacks in Kenya.[147] Human Rights Watch is not aware of convictions of Somali refugees in connection with any attack in Kenya. At the same time, Kenyan police have targeted Somali refugees and ethnic Somali Kenyans in discriminatory and abusive law enforcement operations, such as mass arrests and round-ups during Usalama Watch in 2014.

The United Nations refugee agency (UNHCR) has said that Kenya and other governments should not return anyone to parts of south-central Somalia where there is fighting, or that remain under control of armed groups like Al-Shabaab. This formal advice is based on international and Kenyan law, which prohibits the forced return of refugees or asylum seekers to any place where they face a real risk of persecution or other serious harm. The threat Al-Shabaab poses in Somalia and Kenya is real, but that doesn't negate Kenya's obligation to abide by international refugee law. Therefore, states are violating the non refoulment principle through under the cover of national security (counter-terrorism measures) as a result failed implementation of non refoulment principle.

[146] Supra note 143
[147] ibid

Chapter four

Conclusion and recommendation

4.1Conclusion

Non-refoulement is a vital part of refugee protection and protection of human rights. The principle is a part of international customary law, and by some considered an emerging peremptory norm. It is famously expressed in Article 33 of the 1951 Refugee Convention as well as various human rights treaties. The status of the principle cannot be generally defined in international law. The same can be said about the scope of the principle, which depends on the legal context in which it is applied. It can be concluded, from the above, that non-refoulement in the 1951 Refugee

Convention is a fundamental right. However, it is not an absolute right. Firstly, one must be considered a refugee under the Convention to enjoy the right to non-refoulement. This means, not only must an individual satisfy the terms of Article 1A (2) defining who is a refugee, the individual must also avoid exclusion under Article 1F. Furthermore, the second paragraph of Article 33 permits exceptions to the principle in cases of public order and national security. Therefore, in order to enjoy the right to non-refoulement under the 1951 Refugee Convention, an individual must satisfy the terms of refugee status under the Convention, he or she cannot have committed crimes of such nature that he or she could be excluded from refugee status, and the country of refuge cannot have reasons to believe he or she poses a threat to public order or national security. In cases where the refugee has committed terrorist acts, it is firstly the exclusion clause in Article 1F that is relevant. However, the threshold for the exclusion clause is very high, and simply being a suspected terrorist or a member of a terrorist organization may not suffice to satisfy the terms of the article. In these cases, Article 33(2) becomes highly relevant. Although some commentators find the national security exception in Article 33(2) superfluous, as terrorist crimes are already covered by the exclusion clause, the paragraph is frequently used by states to deny refugees the right to non-refoulement.

Unlike in international refugee law, non-refoulement in international human rights law is generally considered an absolute, non-derogable right. Unlike the prohibition on refoulement in refugee law, which applies only to refugees, the prohibition in human rights law applies to all individuals. However, as international refugee law prohibits refoulement to a “territory where the person’s life or freedom would be threatened”, human rights treaties prohibit refoulement to face torture or other ill treatment. These are the underlying rights being protected by non-refoulement.

However, after the 9/11 attack state has developed new mechanism in which it expel or remove the unwanted foreign nationals whom they suspect as a threat to the national security without breaching their obligation of non refoulment under human right and refugee law through practice of diplomatic assurances. As per this practice state entered in to agreement between themselves not to torture their own nationals when he/she is deported to home. But this practice has been associated with many problems, the often raised claim of an increased use of diplomatic assurances proved however more difficult to verify, given the limited empirical evidence available and the inherent secrecy and fundamental lack of transparency associated with these undertakings. What has become clear however is that there are a number of fundamental challenges associated with the practice of using diplomatic assurances against torture – revolving around a variety of legal, moral and practical elements, which have been raised regularly by various human rights NGO's and other prominent observers. The legal unenforceability of assurances, the inadequacy of using diplomacy as a tool for human rights protection, and problems associated with post-return monitoring mechanisms are only a few examples of these. One can therefore safely say that the use of diplomatic assurances against torture and ill-treatment is a controversial practice in the current-day international law arena. due to this challenges associated with this practice, it is unreliable in protecting fundamental right of a person free from torture .therefore the state who resort to this practice is breaching their obligation under non refoulment

The largest part of this thesis has been dedicated to an examination of the case law of a variety of human rights bodies, starting with the relevant international human rights bodies (the UN Committee against Torture and the ICCPR's Human Rights Committee). Despite the limited jurisprudence available, it has become clear that neither body completely excludes the use of diplomatic assurances as such. While the case law as it stands does not

reveal any extensive criteria, both judicial organs have emphasized a case-by-case approach and focused their analysis on whether the diplomatic assurances in question have had an impact on the existence of a ‘personal’ or ‘real’ risk for the person to which they should apply. Furthermore, the importance of post-return monitoring arrangements has been regularly emphasized, while diplomatic assurances have also been characterized as ‘unreliable’ in situations of ‘systematic practice of torture’.

Since the event of September 11september 11 2001 many states have imposed stricter counter terror measures there is a great potential for national security concern to be prioritized over refugee protection given current concern of global terrorism as a result many countries started to enact severe domestic law that exclude legitimate refugee from gaining status, expulsion from the country whom they suspect as a threat to national security, closure of refugee camp, due to this the countries are fail to implement in to their obligation of non refoulement under international law

4.2 Recommendation

Based on the above mentioned I researcher recommend the following solution:

- The countries as much as possible refrain from violating non refoulment principle under the cover of diplomatic assurances in which there is no clear rule and procedure under international law. it is better if the countries do not use this types of practice unless there is means securing a person from torture and other ill treatment once he returned
- It is better if countries refrain from sending back a person for whatever reason if the receiving countries had previously bad human right violation record or where it is known by the sending countries from relevant source that receiving countries are well known by systematic violation of human right. If the country did while it knew the later , it is impliedly violating Its international obligation and recognizing torture
- There should be a proper monitoring mechanism whether the torture is happened or not once a person is returned to his original countries by sending countries or by non-governmental organization
- Countries should be transparent whenever they use diplomatic assurance a there should be mechanism that oblige state to disclose information regarding the refouled person to his countries and the mysterious atmosphere surround the use of diplomatic assurances should be avoided

- I recommend that, since the right to be free from torture is fundamental human right it should not be done through diplomacy in which main objective is to maintain friendly relationship rather than protecting this fundamental right.
- Assurances are at odds with the very nature of human rights. In many cases in which diplomatic assurances are sought the “non-refoulement” principle may apply to an individual. As an absolute human right, it should not be jeopardized by non-binding agreements between States, in which the individual has no part.
- I recommend that ,There should be a mechanism in which a person who is affected by the agreement between two nations get remedial nature when his right to free from a torture is affected as a result of such agreements
- The country should refrain from breaching their international obligation of non refoulment principle by counter terrorism measures and under the name of national security

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