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

INTRODUCTION

EVOLUTION OF PROBLEM

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

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

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

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

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

The 1933 Convention was not widely ratified, but a new era began with the General Assembly's 1946 endorsement of the principle that refugees with valid objections should not be compelled to return to their country of origin. The Ad Hoc Committee on Statelessness and Related Problems initially proposed an absolute prohibition on refoulement, with no exceptions[4]. The 1951 Conference of Plenipotentiaries qualified the principle, however, by adding a paragraph to deny the benefit of non-refoulement to the refugee whom there are reasonable grounds for regarding as a danger to the security of the country..., or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. Apart from such limited situations of exception, however, the drafters of the 1951 Convention made it clear that refugees should not be returned, either to their country

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

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

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

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

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

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

Just six years before its conclusion, the Charter of the United Nations had identified the principles of sovereignty, independence, and non-interference within the reserved domain of domestic jurisdiction as fundamental to the success of the Organization[7]. In December 1948, the General Assembly adopted the Universal Declaration of Human Rights, which recognizes that, "Everyone has the right to seek and to enjoy in other countries asylum from persecution"[8], but the individual was only then beginning to be seen as the beneficiary of human rights in international law. This concern, prompted largely by the huge number of refugees in Europe following the war, eventually led to the drafting of the United Nations Convention Relating to the Status of Refugees, which was signed in 1951.

[5]Some 144 States, out of a total United Nations membership of 192 have now ratified either one or both of these instruments (as of August 2008).
[6] Resolution 8 (I) of 12 February 1946.
[7] Article 2 of the Charter of the United Nations
[8] Article 14, paragraph 1

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

STATEMENT OF PROBLEM

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

HYPOTHESIS

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

RESEARCH QUESTIONS

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

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

METHODOLOGY

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

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

OBJECTIVE OF THE STUDY

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

SIGNIFICANCE OF THE RESEARCH

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

SCHEME OF THE STUDY

INTRODUCTION

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

CHAPTER I: THEORETICAL AND CONCEPTUAL FRAMEWORK

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

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

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

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

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

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

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

into the following sections:

- Derogation of the concept of non-refoulement via extradition treaties: A human rights perspective- Article 33 of the Refugee Convention, 1951 also applies to extradition. This chapter focuses on the conflict of international obligations Article 33 may create when the extradition treaty does not contain a safeguarding clause on non-refoulement. In this situation, the State may have to choose between complying with its obligation of non-refoulement and its obligation under the extradition treaty. Unless it is accepted that the principle of non-refoulement has been crystallized into a human right, the legality of it derogation through extradition treaties remains unclear.

- Strengthening Non-refoulement as a Human Right: A Solution to the problem of Derogation- This chapter considers whether a new understanding of the principle of non-refoulement is possible by adopting the perspective of non-refoulement as a human right and if any derogation of the same through extradition would be violative of the State's positive obligation of non-refoulement. This chapter will also touch upon the difference in treatment of the principle of non-refoulement as a right by States.

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

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

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

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

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

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

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

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

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

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

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

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

CHAPTER VI: RECONCILING EXTRADITION WITH NON-REFOULEMENT

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

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

CHAPTER VI: CONCLUSION AND SUGGESTIONS

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