LITERATURE REVIEW

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

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

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

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

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

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

BOOK REVIEW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARTICLES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

INTERNATIONAL INSTRUMENTS

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

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

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

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

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

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

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

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

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

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

UNHCR REPORTS

1. UNHCR Guidance note on extradition

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

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

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

CASES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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