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The Principle of Non-Refoulement of Refugees: Balancing National Security Protection and Human Rights Standards

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Abstract: The importance of the research is the growing threat of security which is being experienced by States, especially in the aspect of terrorism, the rising number of refugees worldwide and the obligation of countries under the non-refoulement. As the world is overflowing with refugees, a basic question arises: is it possible to strike the balance between non-refoulement and the legitimate state security interests of states? In particular, can states balance their duty not to bring refugees back to states where they could be exposed to persecution with their own national security concerns and desire to expel persons perceived as a security threat? The purpose of this study would be to respond to these questions by an analytical study on the applicable legal framework. It has a doctrinal approach, examines the terms of international treaties, like the Refugee Convention of 1951, and the jurisprudence of international courts, which is a valuable source of international law. The research also relies on the travaux préparatoires of the 1951 Refugee Convention, interpretation and comments from the various UN human rights organizations.. we will use An analytical approach applied to international convention texts and international judicial rulings.

Keywords: International Human Rights Law, Public International Law, International Refugee Conventions.

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1. Introduction

Non-refoulement is a fundamental obligation in the global legal system for refugees. It calls on states to not return a refugee or resident to a state where that man is at peril of persecution, torture or other grave violations of his or her life or liberty. This principle has become of increasing importance as a key principle of international protection, which forms part of the 1951 Convention of the Status of Refugees, the 1950 (ECHR) and other international and regional documents. National security is a primary concern that States aim to safeguard, which is closely tied to their sovereignty, territorial integrity and security of their citizens from all types of security threats, such as terrorism, illegal migration, cross-border risks etc. The importance of the research is the growing threat of security which is being experienced by States, especially in the aspect of terrorism, the rising number of refugees worldwide and the obligation of countries under the non-refoulement. As the world is overflowing with refugees, a basic question arises: is it possible to strike the balance between non-refoulement and the legitimate state security interests of states? In particular, can states balance their duty not to bring refugees back to states where they could be exposed to persecution with their own national security concerns and desire to expel persons perceived as a security threat? If it is, what is a way to achieve this balance?

The purpose of this study would be to respond to these questions by an analytical study on the applicable legal framework [1]. It has a doctrinal approach, examines the terms of international treaties, like the Refugee Convention of 1951, and the jurisprudence of international courts, which is a valuable source of international law. The research also relies on the travaux préparatoires of the 1951 Refugee Convention, interpretation and comments from the various UN humane rights organizations.

Besides, the possibility of a link among non-refoulement and state security is explored critically. The main concern is whether the balancing of interests principle is acceptable under international law in cases where a refugee is threatened with removal by the host state due to being perceived as a hazard to the host country security.

To achieve this objective, the study first defines the scope and legal nature of non-refoulement under both global refugee law and globally recognized humane rights law [2]. It then examines the extent to which national security may operate as an exemption to non-refoulement, with referring to the jurisprudence of international courts. Finally, it evaluates the legal implications of balancing a state's interest in safeguarding its national security against its obligation to respect non-refoulement.

Research Objective: To determine whether a balance could be achieved between the non-refoulement and national security requirements; in other words, whether national security can be considered an exception to prohibiting refoulement.

Research Problem: The increasing security threats (e.g., terrorism) and the influx of large numbers of refugees, some of whom may pose risks to state security, juxtaposed with non-refoulement and humane rights rules, especially (ECHR) trend toward an absolute prohibition of refoulement [3].

Methodology: An analytical approach applied to international convention texts and international judicial rulings.

2. Materials and Methods

The Principle of Non-Refoulement in the 1951 Refugee Convention

The 1951 Refugee Convention bans getting any asylumseeker or refugee back to a homeland where their lifetime or liberty might undoubtedly be at risk. This is explicitly stated in **Article 33** (1) "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." (2) where there are justifications for considering the refugee as a peril to the security of the country where they are present, or the refugee is sentenced by a absolute judgment of a especially severe crime, is a peril to the society of that state.

It is evident that the first paragraph of this provision establishes the banning of refoulement, whereas the second paragraph sets out the limited exceptions to that prohibition. The Convention further reinforces this approach through Articles 1 and 2. In particular, Article 1(F): that the Convention shan't be applied to any man with regard to whom there are verilous reasons for believing that "He or she 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."

The wording of Article 33 demonstrates that the prohibition of refoulement is intended to be comprehensive. The words "in any manner whatsoever" necessitate a liberal reading of the clause. In this regard, the ban applies to all acts of forced deportation, expulsion, rejection at the frontier, return, and similar acts. This seemingly broad reading also applies to extradition; there is no text reference to include extradition in the prohibition. In other words, nothing in the Convention suggests that the prohibiting refoulement excludes extradition. Although international law cannot recognize an absolute or general right to asylum, this does not entitle states to discard asylum seekers at their borders where they have a well-based anxiety of persecution or other severe harm. States that are unwilling to admit refugees may instead transfer them to a safe 3rd state or adopt other lawful solutions, provided that such measures do not expose them to persecution, torture, or death.

Under Art.1(A)(2) of the 1951 Refugee Convention, a refugee could be any man who, due to a well-based fear of oppression on grounds of race, religion, nationality, membership of a particular social grouping, or political viewpoint, is outside their state of nationality and is incapable or, owing to such fear, disinclined to avail themselves of the protection of that country. Where the individual is stateless, the same definition applies to a person who is outdoor of their country of former habitual residence and is disable or disinclined to return due to such fear. This concept also brings into focus another issue, whether or not the non-refoulement extends to people who weren't formally acknowledged as refugees under the host state's domestic law, or whether it also applies to those whose presence might be considered 'irregular' under the local law of the host state.

The more favorable interpretation is that the Convention may not require a host state to formally recognize the refugee status of an individual in order to apply to him. Refugee status could be statement based not constitutive; an individual is a refugee as they conform to the Convention definition, not because a state has officially recognized them as such. The Convention therefore applies to anyone who is in the country of asylum illegally. Non-refoulement' is applied to any land in which the refugee's lifetime or freedom is at peril. It is not limited to the country where the refugee was originally from. The Convention notably uses the word "territories" instead of "states", thus extending the protection's scope. This encompasses cases where a refugee has been transferred to a third state where they might be subsequently transfer to a country once they suffer from persecution or other severe harm, which is usually referred to as chain refoulement (or indirect refoulement).

Article 1(A)(2)'s definition of refugee, which is rooted in a man's well-based fear of persecution, is closely linked with the standard in Article 33 that prohibits return where the refugee's lifetime and/or freedom could possibly be at risk. The two provisions are therefore logically linked, both of them are related with the threat posed by persecution based upon race, religious, national, membership of a particular social grouping or politically oriented attitude. The responsibilities under non-refoulement are international duties of whole States Parties to the Convention for all parts of the State. They are also applicable to persons and bodies enjoying governmental authority over the state in agreement with the principles of state responsibility in international law in general. Accordingly, the prohibition applies to behavior of the homeland within and out its land (if applicable).

3. Results

3.1 Non-Refoulement in Human Rights Law (ICCPR) 1966

Torturing and more harsh, nonhuman and belittling treatment and punishment are recognized as human rights and prohibited under the (ICCPR). Articl.7 of the Covenant states that "No one shall be subjected by his own will to any form of torture or to cruel, inhuman or degrading treatment or punishment" particularly that anyone "shall be subjected without his free consent to medical or scientific experimentation." Art.7 offers an absolute right which applies to all persons, without exception. While the ICCPR does not make specific reference to asylum, nor to non-refoulement, the UNHRC has construed the Covenant as covering non-refoulement.

The Committee emphasised in General Comment No. 20 on Art.7, and later in its jurisprudence and in General Comment No. 31 on the way of obligations concerning States Parties under the Covenant that a duty of non-refoulement is included in the Covenant. It said all States Parties have the obligation under Arti.2 to respect and maintain the Covenant rights of all people on their region and subject to their jurisdiction [4]. This obligation bans countries from transferring, expelling, extraditing, or otherwise taking away a man to a territory where there are considerable reasons for believing that they would encounter a peril of irreparable harm, i.e. violations of Articl.7. The prohibition also extends to chain refoulement, where a man is sent to a third country from which they might subsequently be removed to a place where such risks exist. Accordingly, the obligation of non-refoulement under the ICCPR is absolute. It is not rested to exceptions based on the person's status, the grounds on which

protection is sought, or considerations of national security [5]. If a genuine peril of torturing or other forms of irreparable harm banned by the Covenant exist, a state may not lawfully remove the individual under any circumstances.

3.2 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984

The (CAT) adopts an absolute prohibiting of refoulement. **Articl3(1)** states: *"No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."*

It's to be noticed that the wording of this provision prohibits torture only, and does not refer to cruel, inhuman, or belittling treatment or punishment. Accordingly, it'd be interpreted narrowly, unlike the corresponding provision in the ICCPR. Nevertheless, as with the right recognized under the Covenant, the above provision enforces an absolute prohibition on refoulement, even where removal is justified on grounds of the state's national security. The Committee against Torture has also maintained that the above provision extends to chain refoulement.

By reference to Article 16(2) of the CAT and the exception in Articl.33(2) of the 1951 Refugee Convention, it may be argued that the Convention against Torture conflicts with the exemptions provided for in the Refugee Convention. Article 16(2) provides "The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition." In light of these provisions, and the exceptions contained in Articl.33(2) of the 1951 Refugee Convention, non-refoulement is expressly recognized in the Convention against Torturing. Reference to the travaux préparatoires of the Convention against Torturing indicates that the aim of Article 16 was to let the application of any other treaty or legal provisions that provide greater protection against torturing [6].

3.3 Non-Refoulement in the Jurisprudence of the European Court of Human Rights

Before examining the position of the European Court of Human Rights on the principle of non-refoulement, it'd be vital to consider how the ECHR addresses this issue.

3.4 Non-Refoulement in the (ECHR) 1950

The non-refoulement is regarded as the most key principles embraced by the ECHR, and it constitutes a cornerstone of the European human rights system. Although the Convention has no express provision establishing the principle of non-refoulement, the ECHR has derived the principle through its interpretation of Articl.3 of the Convention, which states "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

In every case, the Court has affirmed that a State is in breaching of Articl.3 when it expels, extradites or deports a person to the other State where there are substantial grounds of belief that the person could be at risk of torture or ill-treatment. Non-refoulement was firmly entrenched in the ECHR and expanded to cover all persons under the jurisdiction of the State, like refugees, asylum-seekers and even foreign nationals who are not refugees but are in the jurisdiction of the State. The ECHR recognition of the non-refoulement is closely connected to the same principle in the 1984 UN CAT, which in Article 3 bans sending a man back to a State where there are considerable reasons for thinking that they will pump into peril of torturing [7], [8]. This connection between these two conventions strengthens non-refoulement as a rule of global law that'd not be derogated from. The principle has become one of the fundamental limitations on the powers of States receiving migrants and refugees and has consequently become a cornerstone of the ECHR system.

3.5 The Position of the ECHR

While the 1951 Refugee Convention expressly recognizes non-refoulement and sets out exceptions under which a refugee may be denied the protection of that principle, the ECHR has a fundamental part in the improvement and broad application of the principle through its expansive interpretation of the provisions of the 1950 ECHR. Non-refoulement has evolved progressively through the jurisprudence of the ECHR. In its early decisions, the Court affirmed that the obligations of the receiving State (the

host State) are delimited to refraining from committing violations against a refugee [9]. Rather, those obligations also extend to refraining from extraditing, expelling, or otherwise removing any person to another State where there are great reasons for thinking that the man might encounter a genuine peril of torturing or ill-treated.

The case law of the ECHR has consistently recognized non-refoulement as a central part of the ECHR system. An examination of refugee protection and the guarantees afforded by the non-refoulement lacks an understanding of the position adopted by the ECHR in this regard. Accordingly, developing non-refoulement in the jurisprudence of the ECHR will be investigated in the following five sections [10].

3.6 Consolidating Non-Refoulement in Court Decisions

Out of its earliest jurisprudence, the ECHR has applied the non-refoulement. This is clearly reflected in the following judgments:

a. Soering v. United Kingdom

The truth of the case is that Soering, a German national residing in the UK, was sought for extradition to the US in connection with a criminal offence. The ECHR refused his extradition because it found that he would be exposed to what is known in American law as the "death row phenomenon." The Court held that exposure to such treatment could make nonhuman treatment contrary to Articl.3 of ECHR. This judgment is regarded as the foundation upon which the ECHR system established and reinforced non-refoulement [11].

b. Cruz Varas and Others v. Sweden

In this case, the Court held that States are under an obligation to examine an asylum seeker's claims concerning the risk of torture. It further held that a State may incur international responsibility if it rejects such a claim without first determining whether a genuine hazard of torture exists. The Court therefore recognized that States are required to make a risk assessment before implementing a decision to remove or expel an individual.

c. Vilvarajah and Others v. UK

In this part, the Court developed what has become known as the "real risk" standard. It asserted that States have an obligation to consider the asylum seeker's case and the situation of his or her human rights in the State accepting him [12].

Emphasizing the Absolute Prohibition for Non-Refoulement in Case of Torture Risk

d. Chahal v. United Kingdom

Non-refoulement has been considered to be laid down in Chahal v. UK, even if the man is thought to be a menace to the state security of the State. In this case, the UK looked for deport Mr. Chahal, an Indian national, on the ground that he posed a menace to British homeland security. After the case was fetched before ECHR, the Court held that the proposed deportation could violate Articl.3 of the ECHR. It ruled that Article 3 is absolute in nature and does not permit any balancing between the public security interests of the State and the presence of a genuine hazard that the man might be vulnerable to torturing. The Court further held that no balancing may be undertaken between the requirements of national security and the presence of a genuine hazard to the refugee's lifeTIME in the form of torture [13]. This judgment constitutes a strong foundation for rejecting refoulement regardless of the seriousness of the individual whom the receiving

Expanding Refugee Protection

e. T.I. v. UK

In this judgment, the Court developed a new concept for protecting refugees from the risk of refoulement, known as "indirect refoulement". Under this concept, States are needed to warrant that the third State to which an individual is to be returned provides an adequate level of human rights protection. A State may incur responsibility if the third State subsequently returns the individual to a state they encounter a hazard of torturing or persecution there.

f. Saadi v. Italy

It is regarded as the most imperative cases in developing the doctrine of non-refoulement. The Court restated non-refoulement even with respect to persons accused of terrorist actions. It believed that counter-terrorism measures could not be permitted to be used as justification for refoulement if there were a genuine risk they could be

counted on torturing [14]. The Court also added that Articl.3 of the ECHR can be an absolute standard without any exceptions.

3.7 Introducing Additional Criteria to the Non-Refoulement

3.7.1 M.S.S. v. Belgium and Greece

The Court held that the receiving State, Belgium, had breached Article 3 of the ECHR when it got an asylumseeker back to Greece, considering that the asylum measures and accepting conditions for refugees in Greece were extremely poor. The Court required the receiving State to check the actual human rights condition in the third State, namely the State of reception, before departing an asylum seeker to it. It should be noticed that the ECHR does not adopt the principle of balancing between the State's national security requirements and the risk of torture faced by the individual. Instead, the Court tends to prohibit the refoulement of refugees in an absolute manner where there is a hazard of torturing or the nonhuman treatment in Articl.3 of the ECHR [15].

The judgments delivered by the Court in *Chahal v. UK* and *Saadi v. Italy* confirm its position rejecting refoulement or expulsion where there is a real risk facing the refugee who is to be returned.

Although the Court has not departed from its position in its recent judgments, namely that the prohibition of refoulement is absolute, it has adopted a stricter approach regarding the establishment of the presence of a "real risk" to the lifetime of the refugee in each individual case. The case that illustrates this approach is *H.A. v. United Kingdom*. In this case, the applicant, a stateless Palestinian, submitted an application to the Court concerning the UK decision to deport him to the Ain al-Hilweh refugee camp in Lebanon [16]. He claimed that this would put him in danger of violence in that country, and would also make him liable to compulsory military service in that country.

The Court considered the documents filed by the applicant and settled that there was no "real risk" to cross the threshold necessary for a finding of violating Art.3. However, it concluded there would be no infringement of the ECHR if the UK continued with the deportation of the asylum seeker. The Court's decision in this case reveals that it has started to demand adequate individual evidence in each case for the existence of a genuine hazard that the refugee will encounter torturing or nonhuman treated.

4. Conclusion

Non-refoulement is a foundation, and an essential one at that, of both the global safety regime for refugees and the wider globally recognized human rights protection regime. It is also commonly acknowledged as part of customary global law and many scholars also claim that it got to the level of peremptory norm (*jus cogens*). This is enshrined in Articl.33 of the Convention of the Status of Refugees, 1951 and in many international human rights treaties. It is impossible however to abstractly limit its scope under international law in the abstract, but rather its use is determined by the legal context in which it is called for. The non-refoulement of the 1951 Refugee Convention can therefore be considered an inherent right of refugees. It is not a right cherished in the framework of the Convention in absolute terms, though. That person must first be settled to be a refugee according to the Convention before he or she can claim protection under the Convention. That is, an asylumseeker must meet the legal requirement for refugee status and not be covered by the Convention's exclusion clauses. This position reflects the broader principle that prohibiting torturing itself is a peremptory norm of global law. Although several States have challenged this interpretation before domestic courts and, in particular, before the ECHR, international human rights law remains unequivocal: no person may be forcibly returned to face torture, and this prohibition admits of no exceptions. Accordingly, international human rights law sees non-refoulement as an absolute and non-derogably recognized right. It's be noted that where a man is ruled out of refugee status under Art.1 of the 1951 Refugee Convention, and therefore faces removal or transfer to a territory where their existence or freedom may be endangered by persecution or other serious harm, that individual cannot invoke the protection of non-refoulement under the refugee law regime. The rationale for according priority to national security is to protect human

rights of the State's own population. While the central aim of international humane rights law is protecting the rights of entire people with no discrimination, it nevertheless continues to permit States, to some extent, to distinguish among residents and non-citizens. From this perspective, the expulsion of a terrorist or a man reasonably assumed of terrorism may appear justified in the eyes of the State's citizens. Such measures apply only to non-citizens, since a State cannot expel one of its own nationals on the basis of terrorism allegations. Promote international burden-sharing. There is a need for better coordination between the refugee-hosting countries, so that frontline or receiving countries are not unduly burdened with refugee hosting.

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