

## **Individual Protection versus National Security: A Balancing Test Concerning the Principle of *Non-refoulement***

Arif Ahmed

Lecturer, Department of Law & Justice, Southeast University, Dhaka, Bangladesh

---

**Abstract:** Refugees are the most persecuted and thus the most vulnerable group of people throughout the world. Over the centuries, societies have been welcoming the victims of persecution, frightened and weary strangers. The protection of persecuted people has been of paramount concern to the world community since the establishment of the United Nations (UN). The legal basis of this global protection is the customary international law. States all over the world are under an obligation not to return or expel the refugees in any manner whatsoever to the countries or territories where their lives and fundamental freedom might be threatened. Simultaneously the domestic security of the States is also a major concern. But the issue as to the nexus between protection of refugees and internal security is a complex one. The balancing test between the protection of an individual and the domestic interest of a State is inevitable in this regard. This academic piece of research intends to illustrate the method to balance between the protection needs of an individual and the security interests of the State. A balancing act can be possible through providing temporary shelter to the refugees or prolonging the expulsion process of delivering refugee status.

**Keywords:** Balancing Test, *Non-refoulement*, Protection, Refugee, Security

---

### **I. INTRODUCTION**

It is widely accepted that the principle of *non-refoulement* is the basic principle profoundly rooted in the conventional global practices for the protection of refugees. The influx of refugees cannot be managed even by strict observance of the *non-refoulement* principle if the influx gets so gigantic form that it becomes transboundary crisis of the world. Under the principle of *non-refoulement* a refugee shall not be expelled or returned in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion. [1] It is the obligation of States both under customary international law and international instruments not to send them back. It has been observed that one vital rule of international human rights law is the idea that, State control entails State responsibility and that, more specifically, ‘State competences and individual rights are two sides of the same coin.’ [2] “International law generally rejects deportation to torture, even where national security interests are at stake.” [3] A refugee may not get the protection under this principle if there are reasonable grounds that the national security would be negatively affected. [4] Indeed, it creates two situations. The former is connected with the national security interest of the State and the latter is related to the individual protection. [5] Hence, it is obvious that the balancing test is the need of the day.

### **II. AIM AND OBJECTIVES OF THE STUDY**

The sole aim of the present study is to have a profound insight into the paradox attached to the balancing test of the principle of *non-refoulement*. To be specific, the study has the following specific objectives:

1. To assess the balancing test of the principle of *non-refoulement*.
2. To reveal whether the domestic security would get priority over the individual protection.
3. To describe how and to what extent Bangladesh is bound by the principle of *non-refoulement*.
4. To point out the obligations of Bangladesh even though it is not a party to 1951 Refugee Convention.

### **III. RESEARCH METHODOLOGY**

Since this study strives to emphasize on the domestic security of a State and individual protection under the principle of *non-refoulement*, it is explorative and descriptive in nature. An effort has been made to include and analyze the latest provisions, data and case laws as to the *non-refoulement* principle, where available. Both the primary and secondary data have been used throughout the research. The key reliance is on the secondary data, different working papers, published and unpublished papers existing both at the national and global levels.

### **IV. EVOLUTION AND DESCRIPTION OF THE PRINCIPLE OF *NON-REFOULEMENT***

The most humanitarian and basic customary international law principle is the principle of *non-refoulement* that is the core basis of international refugee and human rights law and forbids the States from expelling refugees in

any manner whatsoever to the countries or frontiers where their lives or freedom might be endangered. This principle is seen by most in the international law arena, whether governments, NGOs or commentators, as fundamental to refugee law. Since its existence in the Refugee Convention in 1951, it has played a key role in how States deal with the refugees and asylum seekers. The term ‘refoulement’ derives from the French term ‘refouler’, meaning literally to drive back or to repel in the milieu of migration control summary re-conduction to the frontier of those found to have entered illegally and summary refusal of admission of those without valid documents. [6] Helene Lambert States, *Refoulement* includes and refers to expulsion, deportation, removal, extradition, sending back, return or rejection of a person from a country to the frontiers of a territory where there exists a danger of ill-treatment, i.e., persecution, torture or inhumane treatment. [7] This principle is also recognized as the principle of “temporary protection”.

Article 33 of the 1951 Convention on the Status of Refugees [8] reveals that no refugee should be returned to any country where his or her life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. This provision constitutes one of the significant aspects of the 1951 Refugee Convention, to which no reservation or derogation is allowed and the principle of *non-refoulement* is wider than Article 33 of the Convention. It also includes that *non-refoulement* forbids deriving from human rights obligations, e.g., Article 3 of the UN Conventions against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT Convention) 1984 and Article 7 of International Covenant on Civil and Political Rights (ICCPR) 1966.

It is evident that the principle mentioned here has the basis in customary international law, i.e., States that are not party to the 1951 Refugee Convention have an obligation to respect this principle under this Convention as well as under the customary international law. Persons falling within the definition of refugee under Article 1A (1), or Article 1A (2) or 2<sup>nd</sup> paragraph of Article 1D of 1951 Convention, are automatically entitled to this basic right. The principle also applies to a person seeking asylum. There is another thought as has been explained by Goodwin-Gill named “*non-refoulement* through time” that is a concept located between States’ obligation of *non-refoulement* and States’ discretion in granting asylum. This idea has been developed by Susan Akram and Terry Rempel, who argue for the establishment of a global unified temporary protection regime for the refugees of Palestine. [9]

## V. ARTICLE 33 OF THE 1951 CONVENTION: AN OVERLOOK

The principle of *non-refoulement* is confirmed by a number of legal provisions among which Article 33(1) of the 1951 Refugee Convention is perhaps the most prominent. The first paragraph of this article States that:

*“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”.*

Though this was intended to be an absolute right, States remained concern about the attrition of their sovereignty that this could create. Hence, the second paragraph of Article 33 of the Convention was tacked on, providing that the right of *non-refoulement* could not be claimed by someone who was seen as a risk to the security of the country, or who had been convicted of a ‘particularly serious crime’. Almost all regional and global human rights treaties [10] and a number of other global instruments [11] contain prohibitions regarding *refoulement*. Consequently, at present an overwhelming majority of States are party to at least one treaty binding it to the principle of *non-refoulement*. Since 2013, 145 States (as of August 5, 2013) have signed the 1951 Convention, thus accepting the principle of *non-refoulement* expressed therein. [12]

The problems have arisen regarding the interpretation of Article 33 and debate continues to surround the issue as to whether or not a refugee must be within the State in order for the right to accrue to them. If so, States would be entirely in their rights to turn away asylum-seekers at the borders or ships at sea. [13] There was also an argument as to whether a refugee had to meet the strict requirements of the Convention before they could be granted the right of *non-refoulement*. Through the function of the UN High Commissioner on Refugees (UNHCR), and common State practice, it has been accepted that Article 33 applies to all refugees, whether or not they fit the set definition. [14]

## VI. JUSTIFICATIONS OF HUMAN RIGHTS LAW WITH BALANCING TEST: SOME FEATURES

1. As a common issue, human rights law prescribes balancing to mediate between the opposing rights claimed. There are express provisions in multilateral human rights treaties directing the balancing test, e.g., European Convention on Human Rights (ECHR), [15] the International Covenant on Civil and Political Rights (ICCPR), [16] and the International Covenant on Economic, Social and Cultural Rights (ICESCR), [17] and newer rights provisions in the domestic constitutions, e.g., in South Africa and India. [18] Even in the United States, where rights provisions do not express balancing requirements, but balancing tests have been employed in the 4<sup>th</sup>

Amendment [19] and the Due Process Analysis, [20] and balancing considerations enter other parts of constitutional law. [21] It is obvious that the balancing test is the need of the day.

2. These balancing tests regularly require comparison of unlike interests, e.g., in assessing a national law forbidding holocaust refutation violates the right to free speech, human rights law balances individual freedom of expression with State's need to protect its people from harmful speech. Balancing is also needed to mediate between conflicting individual rights.

3. States can strike the balance between the rights and restrictions differently, but, the boundary of admiration granted to State is not unlimited so that State can use it in derogation of the key object of law and public policy, e.g., except violating the ECHR this boundary has allowed Poland and Ireland to maintain more restrictive abortion laws, while other parties like the UK provide women much freer access to terminate unwanted pregnancies [22] and thus the balancing act is inevitable.

Thus it is observed that there are instances representing that adopting a balancing approach in the *non-refoulement* perspective would be less complicated than suggested by the human rights critics who are in favor of bias and uncertainty test. It would allow States discretion in the first instance to determine how to trade off the duty to protect the public from dangerous aliens, with the duty to protect the aliens from post-transfer mistreatment. These decisions are subject to comment or even legal review by human rights bodies pushing States to make decisions that fall within their acceptable limits. [23] There are following benefits of adopting a balancing approach:

- a) A balancing approach allows the law to account for all relevant rights at issue, in transferring determinations, through maximizing the best rights fulfillment. It encourages States to make openly the rights trade-off by creating transparency within the strictures of the law. [24]
- b) Greater State transparency and a legal rule, that reflects all relevant interests, improve the ability of human rights institutions to monitor transfer decisions and diplomatic assurances. [25]
- c) A balancing approach to *non-refoulement* protection would remove a powerful obstacle to State agreement to additional *non-refoulement* obligations. It provides an avenue to address refugee concerns regarding the balancing test. The scale of prohibited post-transfer mistreatment ranges from the most intense acts like extra judicial killing, torture etc; to somewhat less intense acts like cruel, inhuman, or degrading treatment etc; to still less intense acts like denial of fair trial, forced conscription of children etc. [26]

Likewise, the risks an alien may pose to the State where he is located varies from very significant acts like mass casualty terror operation; to somewhat significant acts like kidnapping or hijacking; to still less significant acts like financial and other material support to terrorist organizations. Through moving to a balancing approach to *non-refoulement*, States could adapt the protection provided based on consideration of both the kind of post-transfer maltreatment and risk to society anticipated. [27] Thus, it contains the risk of an alien who may commit financial crimes which may not warrant transfer to torture, it may permit transfers where voting rights may be deprived. Such an approach would encourage States to accept new *non-refoulement* duties, with reduced concerns regarding the security consequences of such a move. [28]

## VII. UNCERTAINTY AND BIAS-A SUPERFLUOUS REALITY: A CRITIC OF THE BALANCING TEST

The problems of insecurity and bias might cause critics of the doctrine nonetheless to argue that balancing is unlikely to produce a rights-optimal result in transmitting decisions despite the status of balancing as the traditional method for mediating between competing rights claimed and the benefits suggested in the above. States are infamously prejudiced against the interests of aliens, particularly those alleged as precarious to the society or State as a whole. [29] This biasness to the State security rather than individual is improved by some genuine political pressures. States might face to favor the rights of its public over those of aliens present in the society. [30] A real apprehension is that biasness may lead to the overvaluing the rights of the public and underestimating the rights of the transferee. This biasness may be given easy effect in *non-refoulement* for the complexity in assessing factors relevant to a balancing fortitude. Under a balancing approach, States should consider factors, e.g., the risk that the alien will be mistreated after transfer; the intensity of mistreatment; the risk the alien poses to the State where he is located; the nature of that risk; and the likelihood that risk will be averted through *refoulement* or as its alternatives. Given epistemic uncertainty as to these factors, there is an opening for bias to color State assessment. [31]

It is important here to determine whether an alien poses a risk to the State where he is located and this often requires assessment of intelligence information. [32] Even the best intelligence information cannot predict with certainty what an individual plans to do. The US and numerous European States have publicized arrests of terrorism suspects as important captures, only to later discover the individual had minimal connection to terrorist activity. There is also doubt as to the extent to which the receiving State actually would take steps to mitigate the threat posed after transfer. For instance, the US credited assurances from Kuwait that two

Guantanamo detainees would be monitored and be prevented from returning to terrorist activity after repatriation. The detainees evaded Kuwaiti security after transfer, and ended up as suicide bombers in Iraq. [33]

Placing a thumb on the scale for the rights of aliens is a compromise between the current rule and a pure proportionality test: limited over-enforcement of the rights of the alien is permissible to address the risk of bias, without completely overlooking the rights of the public. The degree of over-enforcement could be increased or decreased depending upon the level of concern about bias. The more attention the balancing test pays to bias, the closer it moves toward the current rule and the fewer the benefits of a balancing approach. [34]

### **VIII. REDUCING BIAS AND UNCERTAINTY: A METHOD OF THOUGHTS AND FUEL FOR ACTION**

A rationally greater expulsion process is required to decrease bias and uncertainty in this process. This process may be described in two manners: (1) Greater process would increase the chances that relevant government assessments of risk may be caught and remedied; and (2) A reasonably long and detailed process bears the logic and explanations with it at every step. Thus probability of ensuring transparency and accountability becomes high and doing any arbitrariness becomes difficult. [35] The experience of other States suggests this concern is overstated. Judges in Canada and in Europe have reviewed intelligence information to ascertain threat levels and risk of post-transfer mistreatment, including review of assurances to determine whether those assurances are sufficient to support transfer. The Committee Against Torture (CAT) has been critical of the US for not allowing alien terrorism suspects to play a greater role in the determination of whether or not there is a substantial risk of mistreatment after transfer. It may be still more difficult to assess threat information without giving an alien the opportunity to respond to that information. [36] Identifying the human rights competition at issue in *non-refoulement* is important for at least three reasons:

a) The post 9/11 talk among human rights bodies, States, and scholars has lingered the security-rights debates and these debates are ultimately unfulfilling as neither side has anything of value to offer the other. The developing idea of obligation to protect recognizes that protecting the public is not only a vital security imperative for States, but also a human rights obligation. This fact has yet to fully pervade the thinking of human rights actors. Once it does so, it would allow the human rights bodies and groups to speak to States through addressing the actual rights competition driving State action, thereby increasing the impact of monitoring activities.

b) For the act of identifying the separate State responsibilities necessary for the fulfillment of a human right that can lead to better enforcement of that right. One of the most significant insights of Shue's duty typology are that it is never preferable to have protection duties do all the work as doing so almost certainly results in rights violations. [37] But this is exactly what is happening with the torture norm, as the onus for torture prevention is placed on the sending State as opposed to the receiving State. Ridiculously the largest number of communications heard by the CAT is against Sweden, a State with no history of torture, alleging violations of *non-refoulement* obligations. [38] While *non-refoulement* should play a key role in advancing the prohibition on torture, it should not play the only human rights bodies and groups need to increase efforts to fight torture in States where the practice actually occurs. For instance, human rights groups would be well served to work on improving diplomatic assurances practice to place an appropriate burden on the receiving State, which as the actual torturer bears the greatest culpability for the wrongdoing. [39]

c) For human rights law works well when the law recognizes State interests and then seeks to cabin those interests in reasonable bounds. For this reason the balancing tests are recognized by it. The human rights bodies and groups play an important role in pressuring States to keep their balance within reasonable bounds. Applying this model to *non-refoulement* increases the likelihood of State adherence to human rights, and improves the quality of monitoring activities of human rights groups. As such human rights law can consider placing a thumb on the scale in favor of the rights of aliens, and increasing the procedural requirements associated with expulsion.

### **IX. RISKS RAISED BY TERRORISM AND STATES' CONCERN REGARDING NON-REFOULEMENT CASES**

In April 2009, ten Pakistani men who were detained by British police in the United Kingdom (UK) on student visas for alleged involvement in a plot to bomb a British shopping center in a 'mass casualty' operation on behalf of al Qaida. [40] On that plea British police had the 10 men under surveillance based on intercepted e-mails and other information suggesting an imminent attack on a Manchester mall. Police were forced to move to detain the suspects at once upon getting details of the plot but the police's plans to prevent it that were discovered by the press. The resulting premature raids turned up no explosives or bomb-making equipment, leading the British government to conclude terrorism charges could not be brought against the suspects. [41] The British government moved to expel them to Pakistan, including Abid Naseer, whose presence in the UK were 'a threat to national security'. [42] The accused Naseer denied the finding that he posed a threat to the

national security of the UK and opposed removal on the ground that he faced a real risk of torture in Pakistan. Transfer under such circumstances would violate Article 3 of the European Convention on Human Rights (ECHR). Hopefully the European Courts of Human Rights (ECtHR) has interpreted the principle of *non-refoulement* to include an implied duty not to transfer individuals to a State where they face real risk of torture after transfer. The Special Immigration Appeals Commission (SIAC) also ruled in Naseer's favor. [43]

This led Justice Milting to conclude that Naseer was an Al Qaida operative who posed and still poses a serious threat to the national security of the UK. Despite he held that deportation to Pakistan was not permissible. He applied the principle of *non-refoulement*. The SIAC noted the history of Pakistani intelligence officials mistreating alleged Islamic militants, and refused to accept British government's argument that the public notoriety of the case would ensure Naseer's safety. The decision left British government with few options to mitigate the 'serious threat to the national security of UK.' posed by Naseer. Lack of the physical evidence linking Naseer to the bomb plot barred the prosecution of the case. Preventive deportation pending deportation, in similar circumstance in another case, was found to violate the ECHR held by the British Court. Deportation to a third country was virtually impossible because no State would be to accept a suspected al Qaida terrorist for resettlement. The British government was left imposing control orders, or parole-like restrictions, on Naseer's movement and employment, with the knowledge that similar restrictions have been easily evaded by others in the past. [44]

The case of *Naseer* is an example of the serious security consequences that may result from providing *non-refoulement* protection in a post 9/11 world. The principle of *non-refoulement* has been justified by human rights bodies and advocates as well as through many UNHCR Ex. Com. [45] Conclusions, [46] which works as *opinion juris*, as a part of the *jus cogens* prohibition on torture and cruel, inhuman, or degrading treatment. [47] These bodies have concluded that there are no exceptions to *non-refoulement* either. In recent years, human rights bodies also have sought to expand the scope of *non-refoulement* protection to other human rights abuses such as enforced disappearance, unfair post-transfer trial, or recruitment of a child as soldier, etc. Conversely States have raised security concerns as an argument against further expansion of *non-refoulement* as it rejected a proposal limiting expulsion of aliens to situations where the alien had been convicted of one of a list of criminal offences. [48]

Similar rationale led the US to argue against *non-refoulement* protection from cruel, inhuman and degrading treatment in the Convention against Torture (CAT). There is another reason for States for trying to avoid *non-refoulement* so as to avoid risk of civilian casualties posed by a dangerous alien. As such State's decision on expulsion should not be arbitrary and the alien should be allowed to submit his or her opinion or reasoning against expulsion to competent authority. In addition, the alien must have the right to appeal and the right to be represented by a lawyer or proper representative. [49] As these are criminal cases, therefore, sufficient quantum of evidence is required to meet the high burden of proof. Terrorism investigation often requires action before the plot is completed in order to avoid risks to innocent lives. But the obligation for action can conflict with the necessity to collect evidence to meet the burden of proof. As we see in the *Naseer case*, where the threat of the media to reveal the existence of an investigation compel the police to act before the plan to blow up executed resulting in insufficient prosecution evidence. The need for early action also means that detention may occur before the defendants have apparently committed a crime under the laws of the State. This requirement can impede prosecution of terror suspects.

The criminal offences often cause troublesome to the State. Due to non-evidentiary problem, as it was the case in *Saadi vs. Italy*, [50] where the Italian government had admissible evidence that the defendant was in communication with Islamic extremists about plans to attack unspecified targets in Europe. While Saadi was charged with conspiracy to commit terrorism, the Court reduced the charge because under Italian law, terrorism requires proof that the target of the attack was not a participant in an armed conflict. That means those were targeted did not participate in armed conflict. In other words they were civilians. The Italians lacked specific enough evidence of the planned targets for the attack to make a terrorism case. The issue of incapacitation arises again at the completion of the sentence, except where a life sentence or death is imposed. Italian courts convicted Saadi of forgery, and he served a 4 and a half year sentence, but Italy was again confronted with how to mitigate his threat at the end of the sentence. By contrast, once repatriated an alien may be restricted from further access to the State. [51] These difficulties with criminal prosecution have led many scholars, and some States, [52] to suggest that administrative detention, or detention based on future dangerousness of a terrorist suspect, be made available. But State may find administrative detention an unappealing alternative to repatriation of aliens for more than one reason. [53]

## **X. TERRORISM VERSUS PRINCIPLE OF NON-REFOULEMENT: A BATTLE**

The term terrorism is so vague of which there is neither an academic nor an international legal consensus regarding its proper definition. [54] As such various legal systems and government agencies use different definitions of "terrorism". The world community has been too slow to formulate a universally agreed upon,

legally binding definition of terrorism. For these difficulties the term “terrorism” has politically and emotionally been applied. [55] Since 1963 a number of global and regional treaties have been drafted and adopted from a ‘sectoral’ [56] approach in which specific crimes have been defined that are commonly viewed as terrorist acts. [57] Hijacking, kidnapping and bombing are among these offences. It stems from these treaties that terrorism is a collective term for a number of serious offences for which persons should be prosecuted. In parallel with the criminal law codification efforts, some UN organs have put forward some broad political definitions of terrorism. [58] The international community has worked on two comprehensive counter-terrorism treaties also which have not been finalized yet. [59] This legal concept does not seem to correspond with the current political train of thought. For example, the European Union (EU), Canada and the US have all drafted lists of terrorist groups. The mere fact that a person is a member of a listed organization suffices to label this person as a terrorist. [60] It will not be necessary to determine whether or not this person is responsible for any act described in the above treaties. At most one can argue that members of the listed groups have committed acts in the past. Therefore, the suspicion might exist that this person was one way or the other involved in these acts. But for upholding justice, an individual assessment needs to be made whether or not such person can be held criminally responsible for a certain terrorist act. The presumption of innocence is very important in this regard. [61]

The thin line between fighting for freedom or self-determination and terrorism became clear during the negotiations on drafting a Statute for the International Criminal Court (ICC). Negotiations were held to include terrorism as one of the crimes for which the ICC should have jurisdiction. No agreement was reached on a definition of terrorism. So far a number of States suggested defining terrorism as a crime against humanity. [62] This proposal was rejected, *inter alia* by the US, for the following reasons: i) the offence was not clearly defined; ii) the inclusion of terrorism as a crime would politicize the ICC; iii) some terrorist acts would not be sufficiently serious to warrant prosecution by an international court; iv) prosecution and punishment by national courts was considered more efficient; and v) the ICC Statute does not make any difference between terrorism and the struggle for self-determination. [63] So, the viewpoint of US is: *terrorism is a political term and not a legal term*. In fact, the unavoidable fact is the attack on the World Trade Center and Pentagon on 11<sup>th</sup> September, 2001 has led to serious worldwide discussions. Many changes have been suggested in the field of migration and asylum. The fear of new attack has led to new case law and a number of proposals in which the issue of national security is gaining momentum. In applying obligations of *non-refoulement*, the attacks on US could mean a turning point. Several resolutions have been adopted within the UN, both by the General assembly and by the Security Council. [64] Regarding asylum law Security Council resolution 1373 (28<sup>th</sup> September, 2001) is of major importance. In resolution 1373, the Security Council authorizes States to:

- (f) Take appropriate measures in conformity with the relevant provision of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker lies not planned, facilitated or participated in the commission of terrorist acts;
- (g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists.

The text indicates that Member States are called upon to exclude terrorists from refugee status under Article 1F of the 1951 Refugee Convention even though their actions may be politically motivated. In this resolution terrorism is conceptualized as acts that can be defined as terrorism. Persons who have committed, planned or in one way or the other contributed to these acts are excludable. States are required to prevent terrorists in this regard despite the fact there has been no international definition of terrorism exists. It remains the prerogative of States to decide who is excludable from refugee status as a terrorist or not. Based on this resolution, could it be said that a member of an alleged terrorist organization only be the ground of his excluding from refugee status? One can argue, if being a member in it a terrorist act. That rule is nowhere to be found. The relevant questions for excluding a person from refugee status is whether or not membership of and sympathizing with an alleged terrorist organization a legitimate ground. In the UN Draft Comprehensive Convention on International terrorism, currently under negotiation in UN Ad Hoc Committee, [65] membership of a terrorist organization in itself is not listed as an offence within the meaning of this Convention. Even though exclusion does not seem to be in accordance with this draft Convention or resolution 1373, there is a genuine danger that the listing of an organization as terrorist organization will have a significant impact on exclusion cases. Yet, the international community has no uniform idea as to which organization should be characterized as a terrorist organization. For example, Canada and US had both listed the Tamil opposition group in Sri Lanka, the LTTE (now dissolved), as terrorist organization. The LTTE was not mentioned on a list prepared by the EU. It is obvious that characterizing an organization as terrorists is, to a large extent, based on a political motivation and can have profound political impact. [66] Similar cases are found in Palestine movement and Kashmir freedom movement.

Besides, reasons for fleeing home country should be extended in different *non-refoulement* provisions paying a heed to the present refugee situation and demand of time. As we know, debate continues over whether or not a refugee must be *inside* the State in order for the right to *non-refoulement* accrues to him. Therefore, change is also required in different *non-refoulement* provisions so that they apply to refugees 'wherever found'. Exceptions in *non-refoulement* provisions also need to be clearly specified. [67] The mere fact that a person is a member of a listed organization should not suffice to label this person as a terrorist. Because we know that characterizing an organization as terrorists is, to a large extent, based on a political motivation and can have profound political impact. State authorities dealing with *non-refoulement* issue and human rights bodies should be more active, prudent and pragmatic regarding the matter. [68]

## XI. FINDINGS OF THE STUDY

If there is any conflict between national security of a State and individual protection, it might create the following situations:

### (A) Protection needs of individual would get priority:

Some may think that in any way individual protection should not be neglected. It is the obligation of the States concerned both under international instruments and customary international law not to expel or return them where there is risk of persecution. Under the following international instruments States have the obligations towards refugees with regard to the *non-refoulement* principle:

1. The UN Convention on the Status of Refugees, 1951.
2. The International Covenant on Civil and political Rights (ICCPR), 1966.
3. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.
4. The Organization of African Unity Convention Governing the Specific Aspects of Refugee problems in Africa (OAU Convention), 1969.
5. The European Convention on Human Rights, 1950.
6. The Charter of Fundamental Rights of the European Union, 2009.
7. The Council of Europe's Resolution on Minimum Guarantees for Asylum procedures, 1995.
8. The American Convention on Human Rights 1978.
9. The International Convention for the Protection of all Persons from Enforced Disappearance, 2010.
10. The Third Geneva Convention, 1949.
11. The Fourth Geneva Convention, 1949.

Furthermore, the principle of *non-refoulement* is a part of customary international law. As article 38 of the ICJ statute annotates that customary international law is one of the sources of international law. Under article 38 of the ICJ statutes States have the obligations under international law towards refugees. In addition there are judicial decisions in this regard which support the view that individual protection would get priority. The cases are-

(a) *Soering vs. UK* [69]

(b) *Chahal vs. United Kingdom* [70]

(c) *Ahmed vs. Austria* [71]

The case of *Soering vs. UK* established the principle that a State would be in violation if its obligations under ECHR if it extradites an individual to a State, in this case the USA, where that individual was likely to face inhuman or degrading treatment or torture contrary to article 3 ECHR. The Court held as follows:

*"In the Court's view this inherent obligation not to extradite also intends to cases in which the fugitive would be faced in the receiving State by real risk of exposure to inhuman and degrading treatment or punishment prescribed by that Article."*

The most significant authority confirming the *Soering* principle to deportation case is *Chahal vs. United Kingdom*, the applicant an Indian national belonging to Sikh population, was suspected of having terrorist acts. He had asked for asylum in the UK. Though, the British authority considered a balancing act between the national security of UK and the protection needs of Chahal to be necessary, the European Court ruled that the absolute character of article 3 does not permit deportation to India if there is a real risk of being subjected to torture or inhuman or degrading treatment or punishment, irrespective of the conduct of the applicant or a possible danger to the national security of the UK. The Court concluded that "if returned to India, Chahal would run a real risk of being subjected to torture or inhuman or degrading treatment or punishment". Hence the deportation would lead to a violation of article 3 ECHR. The Court concluded that article 3 ECHR does not allow any balancing act between the security interests of State parties and the protection needs of individuals.

### (B) The National security would get priority:

Some people think that national security would get priority under the doctrine of bias and uncertainty. They refer the case of *Suresh vs. Canada* [72] in their favor. In the Suresh case, the Supreme Court of Canada considered whether Canadian law precluded deportation to a country where Suresh had risk of being tortured. Related questions were concerned with when there is a danger to the national security of Canada and whether mere membership of an alleged terrorist organization sufficed. The main legal issue indicated a balancing act between the protection needs of Suresh and the security interests of Canada. According to the Canadian Supreme Court a balancing act is permitted but need to be in accordance with the principles of fundamental justice. These principles are defined by Canadian municipal law and applicable international law. In spite of small theoretical possibility to apply a balancing test the Supreme Court leaves the door open that 'in an exceptional case such deportation might be justified in the balancing approach (paragraph 129). Ultimately, Suresh was deported to Sri Lanka, as he was a member of LTTE, though he did not committed any act of violence in Canada.

## XII. SOME SPECIFIC RECOMMENDATIONS

1. The individual protection should override the national security: Individual protection should get priority over national security. That means protection should never be neglected at any cost.
2. The individual protection should be protected in such a way so that national security must not be hampered.
3. A balancing test should be used: Individual Protection and national security should supplementary and complementary. Both of them should be ensured in an integrated way.
4. The doctrine of bias and uncertainty should be ignored: Only national security should never get priority. Human rights should not be ignored in the name of national security.
5. Under the balancing test refugees should be given protection at least for temporary period: By using balancing test the persons who are victim of persecution can be given protection for temporary period.
6. The principle of burden Sharing can be used to solve the problem: By using burden sharing principle, balancing test can be ensured. Under this principle if they are protected for temporary period, they can be shifted in another country with the assistance of UNHCR.
7. The principle of relocation can be used in this regard: By using this principle if they are given protection, then they can be relocated later on. It is another way of implementing balancing test.
8. An extended expulsion process can be used for facing the situation: By delaying the process of expulsion and giving temporary protection, this problem can be solved.

## XIII. CONCLUDING REMARKS

To conclude, if there is any conflict between national security and individual protection, then individual protection should not be neglected. Individual protection should be protected in such a way so that it might not harm the national security of the State. In addition it is too risky for the refugees from human rights perspective to return or expel them where there is a fear of being persecuted on return without any formal process of expulsion. [73] For this they may be given the protection for temporary period or a prolonged expulsion process would be an option. Human rights bodies and groups need to increase their efforts to combat torture in States where the practice actually occurs because the burden of protection is mainly on the receiving State, which as the actual torturer bears the greatest culpability for the wrongdoing. [74] The politicization of terrorism issue needs to be stopped by adopting a comprehensive international convention on terrorism, giving a precise definition of the term 'terrorism' in it. So that, States can come with clean hand and they can be judged with clean mind regarding the issue of 'war on terror versus States' *non-refoulement* concerns'.

## REFERENCES

- [1] Mahendra P. Lama, "Managing Refugees in South Asia: Protection, Aid, State Behavior and Regional Approach," Occasional Paper No.4, Refugee and Migratory Movements Research Unit (RMMRU), Dhaka (April, 2000) 36.
- [2] *Non-Refoulement* and Extraterritorial Immigration Control, the Case of Immigration Liaison Officers, Seminar in International Law: EU External and Internal Security Univ. - Prof. MMag. Dr. August Reinisch, LL.M /Mag. Melanie Fink, Spring Term 2013, Faculty of Law, University of Vienna.
- [3] *Suresh vs. Canada* (Minister of Citizenship and Immigration) 2002 SCC 1 at p. 75.
- [4] Chowdhury R. Abrar, "Legal Protection of Refugees in South Asia," *Forced Migration Review*, Vol. 10, 2004, 1.
- [5] Uttam Kumar Das, "Refugee Rights: Legal Position and Practices in Bangladesh," in *Human Rights and Domestic Implementation Mechanism*, ed. Mizanur Rahman (Dhaka: ELCOP, 2006), 157.
- [6] G. S. Goodwin-Gill, *The Refugee in International Law*, 2<sup>nd</sup> edition (Oxford: Clarendon Press, 1996), 117.
- [7] Md. Towhidul Islam, "Protection of Refugees against Refoulement," *The Dhaka University Studies*, Part - F, Vol - 15, No. 1 (June, 2004): 35 - 38.
- [8] Approved at a special UN Conference on 28<sup>th</sup> July, 1951 and entered into force on 22<sup>nd</sup> April, 1954.



- [9] Susan M. Akram and Terry Rempel, "Temporary Protection as an Instrument for Implementing the Right of Return for Palestinian Refugees," 22 *Boston University International Law Journals*, No. 1 (2004): 161.
- [10] As part of the prohibition of torture: Cf. Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 7 of the 1966 International Covenant on Civil and Political Rights and its interpretation by the UN Human Rights Committee in its General Comment No. 20 (1992), Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 22(8) of the 1969 American Convention on Human Rights; or explicitly as in Article 19(2) of the 2000 Charter of Fundamental Rights of the European Union.
- [11]. Article 3(1) of the 1967 Declaration on Territorial Asylum, adopted unanimously by the UNGA Resolution 2132 (XXII), Article II (3) of the 1969 Organization of Africa Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, Section III (5) of the 1984 Cartagena Declaration and Article 3(2) of the 1957 European Convention on Extradition, Article 4(5) of the 1981 Inter-American Convention on Extradition.
- [12] UNHCR 'Treaty Status'. Cf. [www.unhcr.ch/html/menu3/b/treaty2ref.htm](http://www.unhcr.ch/html/menu3/b/treaty2ref.htm). (Accessed on 21<sup>st</sup> August, 2015).
- [13] G. S. Goodwin-Gill, *The Refugee in International Law*, 2<sup>nd</sup> edition, (Oxford: Clarendon Press, 1996), 190.
- [14]. Uttam Kumar Das, "Refugee Rights: Legal Position and Practices in Bangladesh," in *Human Rights and Domestic Implementation Mechanism*, ed. Mizanur Rahman (Dhaka: ELCOP, 2006), 163.
- [15] ECHR, 1950. Articles 8, 9.
- [16] UNGA, International Covenant on Civil and Political Rights, 16<sup>th</sup> December, 1966, *UN Treaty Series*, Vol. 999, p. 171, available at [www.refworld.org/docid/3ae6b3aa0.html](http://www.refworld.org/docid/3ae6b3aa0.html) (accessed 17<sup>th</sup> August, 2015); See, e.g., ICCPR, Article 18.
- [17] ICESCR, 1966. Article 2 (1).
- [18] Article 41, the Constitution of the Republic of India.
- [19] *Stone vs. Paweli*, 428 US 465, 490-91 (1976).
- [20] *Matlew vs. Eldridge*, 424 US 319, 334-J5 (1976).
- [21] For instance, the levels of scrutiny employed to determine whether government legislation restricting fundamental rights meets constitutional muster has an implicit proportionality component.
- [22] M. Shah Alam, "1951 Convention Relating to the Status of Refugees: Need for Accession by Bangladesh," Key-note paper presented at the seminar on "The 1951 Refugee Convention: Need for Accession by Bangladesh" organized by Bangladesh Bar Council, Dhaka, November 4, 2000, 2.
- [23]. Bharat B. Das, "A Refugee's Problem-Humanitarian Approach," *ISIL Yearbook of International Humanitarian and Refugee Law*, No. V (2005): 206.
- [24] Vitit Muntarbhorn, "Protection and assistance for refugees in armed conflicts and internal disturbances: Reflections on the Mandates of the International Red Cross and Red Crescent Movement and the Office of the UNHCR," *International Review of the Red Cross*, No. 265 (July-August, 1988): 359.
- [25]. Gil Loescher, "The UNHCR and World Politics: State Interests vs. Institutional Autonomy," *International Migration Review* 35, No. 1 (2001): 19.
- [26] Naima Haider, "Understanding the Meaning of 'Persecution' from 'Gender' Perspective," *The Dhaka University Studies*, Part-F, Vol - 15, No. 2 (December, 2004): 35.
- [27] M. Giuffre, "State Responsibility beyond Borders: What Legal Basis for Italy's Push-backs of Libya?" *International Journal of Refugee Law*, No. 24 (2013): 43.
- [28] Harun Ur Rashid, *Refugee Law*, (Dhaka: Anupam Gyan Bhandar, 2000), 39.
- [29] Christiane Wilke and Paula Willis, "The Exploitation of Vulnerability: Dimensions of Citizenship and Rightlessness in Canada's Security Certificate Legislation," *Windsor Yearbook of Access to Justice*, No. 26 (2008): 27-53.
- [30]. Robert J. Currie, "Charter without Borders? The Supreme Court of Canada, Transnational Crime and Constitutional Rights and Freedoms," *Dalhousie Law Journal*, No. 27 (2004): 260.
- [31]. Bharat B. Das, "A Refugee's Problem-Humanitarian Approach," *ISIL Yearbook of International Humanitarian and Refugee Law*, No. V (2005): 151.
- [32]. The risk averted through refoulement should consider at least three factors: The intensity of the threat anticipated, its likelihood of occurrence, and the likelihood the threat will be averted through transfer.
- [33]. Christiane Wilke and Paula Willis, "The Exploitation of Vulnerability: Dimensions of Citizenship and Rightlessness in Canada's Security Certificate Legislation," *Windsor Yearbook of Access to Justice*, No. 26 (2008): 210
- [34] Brian Gorlick, "Legal Regime for Refugee Care," in *Peace Studies: An Introduction to the Concept, Scope and Themes*, ed. Ranabir Samaddar, (New Delhi: Sage Publications, 2004), 95.

- [35]. Manoj Kumar Sinha, "Protection of Refugees through Human Rights Instruments: Indian Perspective" in *Forced Migration in the South Asian Region: Displacement, Human Rights and Conflict Resolutions*, ed. Om Prakash Mishra (New Delhi: Manak Publishers, 2004), 433-452.
- [36] G. Schneider, "the Cooperation Duties of Asylum Seekers", 1<sup>st</sup> edition (Cambridge: Cambridge University Press, 2007), 49.
- [37][37]. Shue, *Basic Rights: Subsistence, Affluence, and US foreign Policy* (1980) 61. Shue explained the three distinct State duties as follows: (1) the duty to avoid: negative duty not to violate the right in question; (2) the duty to protect: positive duty to prevent third parties from violating the right; and (3) the duty to aid: positive duty to take steps to allow individuals to realize their right.
- [38] J. Hathaway, "the Rights of Refugees under International Law", (Cambridge: Cambridge University Press, 2005).
- [39] B.S. Chimni, "The Law and Politics of Regional Solution of the Refugee Problem: The Case of South Asia"- (An earlier version of this paper was presented at the "Conference of Scholars and other Professionals Working on Refugees and Displaced Persons in south Asia" organized by the RCSS in Rajendrapur, Dhaka, Bangladesh, February 9-11, 1998), 47.
- [40] John P. Burns, "Deportations Case Presents Test of British Government," in *New York Times*, 19<sup>th</sup> May, 2014.
- [41] S. Kapferer, "Cancellation of Refugee Status, UNHCR Legal and Protection Policy Research Series," *Department of International Protection*, PPLA /2003/02, March, 2003, 59.
- [42] Immigration Rules, pt. 9, 322(5) (UK), Cf. < [www.ukba.homeoffice.gov.uk/](http://www.ukba.homeoffice.gov.uk/) > (accessed on 5<sup>th</sup> March, 2015).
- [43]. *Naseer vs. Secretary of State for the Home Department* [18<sup>th</sup> May, 2010] No. SC77/80/2 1/82/83/09 (Special Immigration Appeals Comm'n), slip op. 1 37 (UK), Cf. <<http://www.siac.tribunals.gov.uk/pdf>> (accessed on 8<sup>th</sup> March, 2014).
- [44] Aye Chan, "The Development of a Muslim Enclave in Arakan (now Rakhine) State of Burma (now Myanmar)," *SOAS Bulletin of Burma Research*, no. 3(2) (2005): 17.
- [45]. UN High Commissioner for Refugees' Executive Committee.
- [46] UNHCR Executive Committee Conclusion, No. 17 (XXXI), 1980.
- [47] Restatement (3<sup>rd</sup>) of Foreign Relations § 702 cmt. No (1987) (describing as *jus cogens* prohibitions on 'torture or other cruel, inhuman or degrading treatment or punishment').
- [48]. Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 291 and n.5 (2<sup>nd</sup> rev. ed. 2005).
- [49] Akhtaruzzaman, *Legal Protection of Refugees under Bangladesh Laws*, (Dhaka: ELCOP, 2006), 175-190.
- [50] Appeal No. 37201/06, 49 Eur. H.R. Rep. 730 (2008).
- [51] Joel Brinkley, "From Afghanistan to Saudi Arabia, via Guantanamo," *The New York Times*, 16<sup>th</sup> October, 2004, 4.
- [52]. In his speech at National Archives in May 2009, President Obama argued that the US needed to consider new detention authority to prevent the 'release of individuals who endanger the American people.' President Barack Obama, Remarks by the President on National Security (21<sup>st</sup> May, 2009), Cf.[www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-on-National-Security-5-21-09](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-National-Security-5-21-09).
- [53]. AKM Ahsan Ullah, "Rohingya Refugee to Bangladesh: Historical Exclusions and Contemporary Marginalization", *Journal of Immigrants and Refugee Studies*, 139-161.
- [54] Myra Williamson, "Terrorism, War and International Law: The Legality of the Use of Force against Afghanistan in 2001", (Ashgate Publishing, 2009) 38, Cf. <http://books.google.com/books>.
- [55] Bruce Hoffman, "Inside Terrorism", (New York: Columbia University Press, 1998), 32.
- [56] Andrea Gioia, "The UN Conventions on the Prevention and Suppression of International Terrorism," in *International Cooperation in Counter-terrorism: The UN and Regional Organizations in the Fight against Terrorism*, ed. Giuseppe Nesi, (2006), 4.
- [57] The Global Conventions: 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1979; Convention Against the Taking of Hostages, 1999; International Convention for the Suppression on the financing of Terrorism; Regional Conventions: 1977 European Convention on the Suppression of Terrorism, 1987; SAARC Regional Convention on Suppression of Terrorism.
- [58] UN Security Council Resolution 1566, 2004; see also the UN General Assembly Resolution 51/210, on 17<sup>th</sup> December, 1996.
- [59] The League of Nations 1937 Convention for the Prevention and Punishment of Terrorism that never entered into force, and the proposed Comprehensive Convention on International Terrorism.
- [60] Breet D. Schaefer, "The UN Must Stop Enabling the Burmese Regime", (The Heritage Foundation, 2007), 91.

- [61] UN Security Council Resolution 1566, 2004; see also the UNGA Resolution 51/210, on 17<sup>th</sup> December, 1996.
- [62]. UN doc.A/CONR 183/CJ/L 27.
- [63] Antonio Cassese, "Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law," *European Journal of International Law*, (2001), Cf. <http://www.ejil.org>.
- [64] UNGA Resolution 56/1, 18<sup>th</sup> September 2001; SC Resolution 1368, 12<sup>th</sup> September, 2001; SC Resolution 1373, 28<sup>th</sup> September 2001; SC Resolution 1377, 12<sup>th</sup> November, 2001.
- [65] The 14<sup>th</sup> session of the Ad Hoc Committee met from 12-16 April, 2009 at UN Headquarters in New York.
- [66] Chowdhury R. Abrar, "Legal Protection of Refugees in South Asia," *Forced Migration Review*, Vol. 10, 2004, 19.
- [67] Uttam Kumar Das, "Refugee Rights: Legal Position and Practices in Bangladesh," in *Human Rights and Domestic Implementation Mechanism*, ed. Mizanur Rahman (Dhaka: ELCOP, 2006), 15.
- [68]. Harun Ur Rashid, *Refugee Law*, (Dhaka: Anupam Gyan Bhandar, 2000), 69.
- [69]. *Soering vs. the UK*, (1989) 11 EHRR 439
- [70] *Chahal vs. United Kingdom*, (15<sup>th</sup> Nov. 1996), ECtHR, Appl. No. 22414/93
- [71] *Ahmed vs. Austria*, (17<sup>th</sup> Dec, 1996), Appl. No. 25964/94.
- [72] *Suresh vs. Canada*, (11<sup>th</sup> Jan, 2002), Supreme Court of Canada, 2002 SCC 1, File No. 27790.
- [73] Chowdhury R. Abrar, "Legal Protection of Refugees in South Asia," *Forced Migration Review*, Vol. 10, 2004, 1.
- [74]. Uttam Kumar Das, "Refugee Rights: Legal Position and Practices in Bangladesh," in *Human Rights and Domestic Implementation Mechanism*, ed. Mizanur Rahman (Dhaka: ELCOP, 2006), 101.