

CHAPTER VII

CONCLUSION AND SUGGESTIONS

VII.1 CONCLUSION

The principle of non-refoulement has been enshrined in Art. 33 of the Refugee Convention. It prohibits State from refouling a refugee to the territory of a state where one faces the risk of persecution on basis of race, religion, nationality, membership of social group or political opinion. The principle of non-refoulement has also been enshrined in various other international instruments such as the Convention against Torture and International Covenant on Civil and Political Rights. Any individual who has been validly classified as a refugee can claim protection under the Refugee Convention. There is a large amount of scholarly opinion to now suggest that the duty of non-refoulement exists even before the refugee status has been assessed. The duty of non-refoulement exists even before formal determination of status.

The UNHCR and a large portion of the international community have accepted that non-refoulement has achieved the status of customary international Law. Though there are still debates on whether non-refoulement has emerged as a principle of jus cogens, the UNHCR has repeatedly held that it forms jus cogens, many States also harbour the same view. Placing reliance on the large amount of scholarly opinion, one can infer that non-refoulement has been recognized as a principle of jus cogens.

Extradition on the other hand involves the surrender of an individual by the requesting State to the authorities of the requested State for the purpose of criminal prosecution. Extradition is based on the concept that an individual must be tried for the offence committed, and must not be allowed to escape lawful prosecution. It is effectuated through various bilateral and multilateral treaties, and other international instruments. The general principles of extradition and grounds for refusal of

extradition have now been recognized by various states through the forms of State practice.

Prima facie, there is a clear conflict between the two principles under international law. A State will have to try to reconcile the two conflicting obligations. Non-refoulement obligates that a State cannot extradite an individual if there is a real risk that he will be persecuted in the requesting State. Whereas Extradition law mandates that an individual must be extradited to the requesting State so that he may be tried for the offences committed.

There is a clear hierarchy of obligations, human rights must be respected and given more importance as compared to extradition law, as all States are bound by Art. 103 of the U.N Charter, which imposes a duty on States to respect obligations under the U.N. Charter, over any other treaty obligation.

The UNHCR has explicitly provided that a refugee or an asylum seeker cannot be extradited to his country of origin where he faces a risk of persecution. In respect of countries other than the State of origin, the requested State must look into the totality of circumstances in the requesting State, and ensure that there is no threat of persecution or further removal to a third country. Diplomatic assurances cannot form the only basis for extradition, as they are not legally binding on the State. State authorities or Courts can also apply the principle of proportionality or balancing of conflicting interest, the State must weigh the alleged violation of the human rights of the individual against the offence committed by him. If there is a real risk of violation of a fundamental human right, the individual cannot be extradited.

Rights can be classified as absolute rights, rights which may be restricted and rights which may be restricted in times of public emergency. Absolute rights constitute fundamental human rights, such as the right against torture, inhuman and degrading treatment etc, these rights cannot be violated, and in case of a risk of violation, extradition must be refused. There cannot be a balancing of interests. Certain rights such as right to privacy may be restricted in certain circumstances, and the balancing test must be applied. Similarly, certain rights such as the right to a fair trial can be restricted in a public emergency, and the test of proportionality must be applied. The

most essential component of refugee status and of asylum is protection against return to a country where a person has reason to fear persecution and danger. This protection has found expression in the principle of non-refoulement.

As States, particularly in the industrialized world, intensify and co-ordinate their efforts to curb irregular immigration, there is concern that the legal and administrative measures adopted, including measures to expedite asylum procedures and to shift the responsibility for considering asylum requests to other countries, may have the unintended result of placing refugees in situations that could ultimately lead to refoulement to their country of origin or other territories where their life or freedom would be threatened.

When it comes to the establishment and implementation of national procedures for the determination of refugee status, measures are therefore required to ensure that respect for the principle of non-refoulement remains the guiding principle and ultimate objective of any refugee protection regime.

VII.2 SUMMATION OF CHAPTERS

The present research work examined the conflict between the aspects concerning non-refoulement where States are under an international obligation not to return an individual in their territory and a treaty obligation of extradition where in the interest of justice it becomes important for the States to return the individual back to the requesting State. Therefore, for a clear understanding of these aspects, a summary of the findings at each stage of study is briefly summarized below:

The introduction to this research work traces the genesis and the evolution of the problem. It also specifies the research problem with the questions that bring out the scope of the research, it also details out the hypothesis, objective and significance of the research work.

In **Chapter I** the research work has been conceptually and theoretically discussed to understand the contours of the existing laws and theories developed till date. It is

important for any research to begin with the conceptual analysis of the subject matter to be discussed. In this chapter the underpinnings of the concept of non-refoulement and extradition has been studied and the genesis of the both the concepts and the development of the theories on both the areas of international law has been studied. It is not only Art. 33 of the Refugee Convention 1951, that has a reference to the concept of non-refoulement, but this concept has also been dealt and provided in many other international instruments which have similar understandings as that provided in the Refugee Convention. All the major human rights instruments have in one way or the other touched upon the principle safeguarding the rights of an individual of not being returned back to the country where there can be risk to the life of the individual. Besides international instruments, there are many regional instruments which unequivocally provides for the same kinds of rights provided to an individual.

This chapter also focuses on the concept of extradition, which has also evolved and developed over time. The legal basis for extradition entails both bilateral and multilateral treaties which give an edge to the whole working and structure to effective implementation of treaties. Through this chapter, it has been shown that non-refoulement is inherently connected with a procedure aimed at identifying potential victims of persecution. The procedure can be fair and effective only if it is conducted on state territory. Accordingly, the prohibition on refoulement cannot be absolutely guaranteed without access to state territory. States can argue that they have no human rights obligations, including granting access to a refugee status determination procedure, concerning individuals who have not set foot on their territory. Once an individual is under the effective control of state officials, the state has to fulfill its human rights obligations. States can attempt to use some gray zones in international law, which result in unregulated situations to the detriment of human rights protection. However, even in these gray zone cases, human rights treaties and customary law in support of non-refoulement must be emphasized and considered. It is specifically because of these human rights protections that states' obligations to grant access to their territory in order not to expose refugees to refoulement must be clearly stated.

In this chapter, thus, it has been established that:

- a) The principle of non-refoulement has received widespread acceptance and its fundamental character has been fully recognized.
- b) The principle of non-refoulement has been incorporated in international treaties following a tradition going back to the period of the League of Nations.
- c) The principle has in particular been incorporated in the 1951 United Nations Refugee Convention and the 1967 Protocol. It has also been incorporated in many of the regional instruments like, the OAU Convention of 10 September 1969 governing the specific aspects of refugee problems in Africa; the American Convention on Human Rights of 22 November 1969.
- d) The incorporation of the principle in treaties to which numerous States in different areas of the world are parties has given the principle the character of a rule of international customary law. This view is supported by the reaffirmation of the principle in the United Nations Declaration on Territorial Asylum, in Conclusions by the Executive Committee of the High Commissioner's Programme, and in resolutions of the United Nations General Assembly.

Chapter II of the present work deals with the application of doctrine of non-refoulement in international human rights regime. International human rights law is essential in the refugee protection regime as it offers complementary and additional protection to refugees. Various international human rights instruments including at the regional level have provisions for the protection of refugees from persecution. Most human rights Conventions give effect to the principle of non-refoulement although they do not specifically mention the principle within the provisions. Indirect prohibition of non-refoulement is given through prohibitions on torture and other forms of irreparable harm.

The key issue with regards to the application of the concept of non-refoulement is that the status of the obligation of non-refoulement lacks clarity and consensus and this is evident through the varying opinions in the matter between prominent refugee

scholars as well. The prohibition against refoulement, as it stands today, is limited in nature. The lack of a clear legal status of the concept of non-refoulement as a human right has led to States using means to avoid their non-refoulement obligations altogether in the name of national security and State sovereignty. Certain authors have found that the link between refugee law and international human rights law has become weaker and there lacks a clear link between the two fields of law as national interests supersede universal obligations. The two fields, although having similar objectives of protecting persons regardless of nationality, operate separately rather than offering additional protection. This has led to the weakening of the position of the prohibition on refoulement despite it being a cornerstone in the international refugee protection framework.

The recognition of the concept of non-refoulement as a human right would enable a system of better protection to refugees by clarifying the scope and content of the right and in turn leading to the establishment of mechanisms for the supervision and protection of this right. It would also enable the establishment of international procedures for the enforcement of the right and ensuring its compliance. While non-refoulement is already considered as a peremptory norm of international human rights law, and most international human right instruments already reflect the concept of non-refoulement, the next step in the development of the concept should ideally be its recognition as a right under the human rights regime which would better enable the achievement of its objectives, making the concept more effective and cementing its scope as the cornerstone of refugee protection.

The emphasis should be on strengthening the rights of refugees under the human rights law framework. According to Fitzpatrick, the Refugee Convention is not obsolete, but is incomplete, as it has been from the outset. Only by progressive interpretation of the Convention and by recognition of extra-conventional norms has the international community been able to patch together a minimally adequate regime for the protection of forced migrants, the Refugee Convention is no more ill-suited to this age than to the one in which it was founded. A crisis exists not because the Convention fails to meet the needs of asylum-seekers, but because it meets them so well as to impose burdens that are no longer politically tolerable to the States parties

involved. Recasting non-refoulement as a human right would lead to better enforcement of the right and increasing its impact as a protection for refugees and asylum seekers.

Applying non-refoulement as a human right increases the likelihood of State adherence to human rights, and improves the quality of monitoring activities of human rights groups. This would in turn change the focus from whether the State has acted lawfully, in terms of derogation of the prohibition on refoulement through extradition, to whether the State can be held responsible for certain conduct or whether certain conduct could be attributed to the State as being a violation of a human right or commission of human right abuses.

As seen in this chapter, non-refoulement has been given a position under the human rights regime but only implicitly. This position of refugees is crucial for ensuring that the legal protection of refugees is broadened and continue to improve over time. Various international human rights treaties provide for a right against refoulement but are limited in terms of the objectives and purposes of the treaty or convention. For instance, the provision of non-refoulement under the Convention against Torture is limited to a prohibition on torture rather than a prohibition on refoulement per se.

As explained in this chapter, the derogation of non-refoulement is evident through the existence of provisions on removal of refugees and asylum-seekers under Article 33(2) of the Refugee Convention. Due to the wordings of the provision and the formulation of Article 33 as a negative obligation of the State rather than a right of the asylum-seeker or refugee, States have successfully avoided their obligation through the exception under Article 33. Even though human rights instruments provide additional and complementary protection against refoulement, these human rights instruments too allow for extradition in certain cases. This further results in a lack of legal sanctions on States from refouling individuals and allows for its derogation.

The increasing number of instances of expulsion and extradition of refugees due to the lack of a uniform interpretation of the scope of the concept of non-refoulement has led to mass violations of the principle by States and derogation of the same which

makes the protection of the principle under the human rights regime all the more relevant in the name of state sovereignty and security. Some States have taken steps to protect their security interests that are inconsistent with the spirit or even letter of human rights law, moves which are ultimately harmful to human rights.⁸⁰⁴ The acceptance of the concept of non-refoulement as a human right would allow for its application in a more effective way and prevent such derogations from taking place. This approach would also be a more effective method of ensuring compliance with non-refoulement obligations.

The recognition of the concept of non-refoulement as a human right would provide a wider expanse of protection to refugees and fills the gaps in the Refugee Convention. Other human rights treaties fill the gaps in the Refugee Convention, 1951 by providing mechanisms or institutions for ensuring the compliance of international human rights obligations. Many authorities such as Lambert, consider resorting to human rights instruments as a better option to protecting individuals from refoulement and extradition.

The derogation of the most fundamental principle in the human rights regime, the principle of non-refoulement, takes place when States undermine the non-refoulement principle by placing short-term national interests above a potential threat to the life or freedom of refugees through extradition. The tendency of States to interpret their own and other States' duties of non-refoulement in the light of sovereign self-interest, all contribute to the potential derogation of the principle of non-refoulement.⁸⁰⁵

As non-refoulement is not considered to be a human right, derogation is allowed depending on the circumstances that justify it. The consequence of being recognized as a human right will allow the principle of non-refoulement to be applicable to everyone whose return to a territory would risk their persecution, torture, cruel, inhuman and degrading treatment or punishment, and pose a threat to their life and

⁸⁰⁴Dina Imam Supaat, "Escaping the Principle of Non-Refoulement", *International Journal of Business, Economics and Law*, Vol. 2, Issue 3, ISSN 2289-1552.

⁸⁰⁵James E. Crowe, III, "Running Afoul of the Principle of Non-refoulement: Expedited Removal under the Illegal Immigration Reform and Immigrant Responsibility Act", 18 *St. Louis U. Pub. L. Rev.* 291, (1999).

liberty regardless of their refugee status or the state's status in treaty ratification. Thus, a person who has failed to claim refugee status under the Convention or has no treaty to turn to is still entitled to protection against refoulement.

On the basis of the preceding analysis, the salient elements of the customary International law of non-refoulement in a human rights context are as follows:

- (a) Non-refoulement is a fundamental component of the customary international law.
- (b) It is focused on individuals, regardless of either Status or conduct, in respect of whom substantial grounds can be shown for believing that they would face a real risk of being subjected to torture or cruel, in human or degrading treatment or punishment.
- (c) It precludes any measure, regardless of form, which would have the effect of putting an individual at risk by removing them from a place of safety to a place of threat.
- (d) It precludes all such measures taken by or on behalf of a State, whether the measures are taken within the territory of that State or elsewhere, in circumstances in which the measures are or would be attributable to the State.
- (e) It precludes the expulsion, return, or other transfer of an individual both to a territory where they may be at risk directly or to a territory from which they may be subsequently removed to a third territory where they would be at risk.

In short, the scope and content of the customary principle of non-refoulement in the context of human rights may be expressed as follows.

No person shall be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or return to a territory where substantial grounds can be shown for believing that he or she would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment. This principle allows of no limitation or exception.

Chapter III focuses on the essential content of the principle of non-refoulement as customary law. The status of non-refoulement is still in question because even though its application is completely absolute, the practice followed by the states still does not show their belief in the principle as a customary International Law. With the approach of the human rights law towards the principle of non-refoulement, the courts through its decisions has made sure that their rights should be kept at a higher pedestal. The only need for the courts is to direct their attention towards Article 33(2) of the Refugee Convention, because these exceptions are the only reason why some of the states have been challenging the court's decision of not to refoule any person to a place where they have a fear of persecution. The problem somewhere lies in the codification of different statutes as well the focus of each one of it differs from other. However, when it comes to the approach of the court through cases where both non-refoulement and extradition rule applies; it has been taken into consideration that the priority has always been given to non-refoulement.

It is the prominent duty of the state to provide justice to each and every citizen and if such right is taken away by the states then it also takes away the right to secure justice by the citizens of that state. On the other hand the rights of the requested State get affected because by giving importance to the rights of an accused they might be putting the life or right of their citizens at stake. If a person is accused of committing a crime in a state and the other state is giving him protection then that does not take away the probability of the chances where the person can commit crime in that particular country as well. But the requested states instead of focusing on this point chose to give importance to their right defined by the human rights law to not return a person where they might face risk, hence, keeping rights of the citizens at stake. Such issues are also to be addressed by the court and international committees before determining the principle of non-refoulement as a jus cogens norm because in securing right of one individual, right of other individual gets affected. When it comes to passing of an extradition request it has been noted that even such requests when considered individually are not absolute. In few cases where the courts have considered to pass such extradition requests it has been noted that such requests even if passed, are passed with exceptions. Such exceptions include offences political in nature. The states believe that indulging them in a situation where the internal law of the requested country is involved then they try to stay out of the matter and try not to

interfere in the internal laws of the country. On the other hand where the court finds that there exist extradition treaty between two countries on the basis of which they will have to oblige with the request made by the requesting state, they do allow the requested state to pass such decisions but on the assurances that they will not pass death penalty as a punishment against the applicant.

However, such assurances are also questionable when it comes to their legal validity. International Organizations like UNHCR has expressed their doubt on the diplomatic assurances through their submission in “Note on Diplomatic assurances”. They submitted that states usually have a proper established procedure when it comes to them inflicting torture in form of punishments on the people who are accused of having committed an offence. So even if they give assurances, it will be anyways hard for the state to get through the whole process and determine what kind of treatment has been taking place against the accused. Moreover, when a state passes an extradition request made by the requesting country it becomes hard for them to take it back. Once an applicant is sent to a country, they cannot be brought back to the country. Hence, it is important for the countries to look at every proper consensus before taking such step. Risking the life of an individual would be the last thing a country would like to do, keeping international standards in consideration.

Looking at the pertaining situations it is clear that the application of the principle of non-refoulement takes the place of a norm of jus cogens as shown by the state practice the only problem which lies in its acceptance is the exception laid down in the 1951 Refugee Convention. Even going through the study of various case laws it has been taken into consideration that non-refoulement has always been kept at a higher pedestal than extradition. It is a compulsory obligation on the states to make sure human rights should always be kept supreme. Wherever they see even a little bit of possibility in which individuals’ right can get affected they prohibit such transfer. However, this approach has also been questioned by various parties in case laws. They state that the courts give decision with respect to the applicant being exposed to torture on the basis of notes by the international organizations regarding cases which might have happened many years back. With time, the rules and policies of a country also change. Without happening of certain event, the presumption that particular event will anyways happen make the approach of the court unambiguous. In this way, it is

always the rights of the states which will end up getting affected, being it by not being able to try a person who committed offence in their jurisdiction and not being given value on the assurances being provided with respect to passing of death penalty as a punishment.

Therefore, the conclusion drawn with the help of the research in this chapter is that the principle of non-refoulement applies in every case of extradition, where the respected authorities of the court are of the view that the rights of the individual concerned will get affected and the probability of him being exposed to torture and cruel punishments is high. It constitutes a major important role in asylum along with international refugee law. The wideness in the approach of the principle comes through its establishment in human rights law. The law makes it compulsory for the states to hold human rights supreme. So in cases like extradition where removal of an individual from a state is concerned, the rights of individuals automatically get involved. Even if certain country does not grant refugee status to person and holds that principles governing non-refoulement under international law cannot apply to the person, the establishment of the principle under human rights law makes its scope wider. So even if not having refugee status prohibits an individual to seek protection under international refugee law, the establishment of the principle under human rights law comes into picture.

With a principle being so wide, it is obvious that it will contradict with some or the other defined principle. In this case, the principle focuses on rights of the individual at such a great extent that it overlooks the possibility of it affecting the rights of the states. States have the responsibility of protecting its national interest and security. They have to make sure that each and every person gets to exercise their right and that justice is served to the entire country. Such norm prohibits the countries from doing the same. If an individual commits a crime then the approach of the authorities is to punish him for the same. If in a situation that individual leaves the country and enters into another country that does not mean that he should not be tried for the crime being committed by him. Human rights norms do the same. It prohibits an individual from getting punishment from the crimes being committed by him under the term of him being subjected to torture, cruel or degrading treatment under several human rights conventions. States while announcing punishments have reasonable grounds for doing

the same. A Human Rights law questioning the action of the state is in itself a disheartening approach. The objective of the state is to consider the entire population as whole. If they consider rights of one person, in that approach the rights of others get affected. Like if the principle of non-refoulement prohibits a person to be extradited to a country, then while protecting the right of that particular individual, the laws affects the justice to be served to those people who got affected by the actions of that person. It is therefore important to concentrate on the various kinds of punishments and drawing a mutual consensus between the states regarding on what basis extradition can be granted.

On the basis of the expressions of non-refoulement identified, the essential content of the principle of non-refoulement at customary law may be stated as follows:

(a) No person shall be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or return to a territory where substantial grounds can be shown for believing that he or she would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment. This principle allows of no limitation or exception.

(b) No person seeking asylum may be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or to return to a territory where he or she may face a threat of persecution or a threat to life, physical integrity, or liberty. This principle allows of no limitation or exception.

(c) Overriding reasons of national security or public safety will permit a State to derogate from the principle of non-refoulement, in which the threat of persecution does not equate to and would not be regarded as being on a par with a danger of torture or cruel, inhuman or degrading treatment or punishment and would not come within the scope of other non-derogable customary principles of human rights. The application of these exceptions is conditional on the strict compliance with principles of due process of law and the requirement that all reasonable steps must first be taken to secure the admission of the individual concerned to a safe third country.

In view of the above, it can thus be considered that the principle of non-refoulement has acquired a normative character and constitutes a rule of international customary law.

Chapter IV entails a detailed case study between 1973 and 2014. The cases are analyzed with a view to bring in more clarity to the existing conflicts between the two principles. The cases have been discussed with a range of 10 years starting from 1973 until 2014. With the study of the cases through different years it has been noticed that earlier the courts were very strict with their approach with respect to the overlap. They stated that rights of the individuals hold the main importance. The court has always established the point that the right of the individual or the person who has approached the court with such difficulties should be given importance keeping human rights law in mind. Although with such approach arises various conflicts as well. The points which have been brought to the notice with regard to this approach by the court have been put forward through various questions before the rule of law.

The requested state secures their right of protecting the applicant by rejecting such extradition request, but the point is that it ends up affecting the right of the requesting state, where the applicant is accused of an offence has not been brought into light. The question of national security of the state is also left unanswered. The fact that the exception to non refoulement consists of national security as reason, is important for the courts to determine. The chances of national security getting affected lies in both, the requested state as well as the requesting state. Requesting state because, in cases where the accused is charged with an offence of criminal in nature, such decisions takes away the right of the state to try him in their court under their municipal law. Along with the right to try, the right of the people who got affected because of such offence is also left unanswered.

In any way an individual should not be exposed to a situation where there were chances of them being exposed to risk. Although they failed to focus on the reason because of which they were supposed to be put in this situation. The courts never elaborated on the acts of the individuals, which made them leave the country and the country asking them to be returned on the very first place. They just focused on the kind of treatment they will be exposed to upon such return. There is a need for the

court to put a light on the same. But with the growing years they have started focusing on the same. Their approach has taken a broader view when they have started taking decision of passing such extradition request. But it still comes with death penalty as an exception. The other point to be noted is that if there is already an existing point of political offence as an exception to the extradition then the approach or the overlap of the non-refoulement should be inspected. There is a need for the states and courts to come together to decide on a common phenomenon in which such problems regarding overlap can be solved. For which the approach of the requested state should not be to only protect their rights of not getting the individual exposed to a risk-facing situation, but they should also take into consideration along with the courts the right of the requesting state to try such individuals. Therefore, there is a need for the international community to come together and decide a way in which rights of both the states can be restored and such overlap can be solved as well.

In dealing with the conflict of this overlap, Courts have laid down the traditional view in the *Soering* case. The *Soering* threshold stipulates that in case of a real risk that the individual may be subjected to torture or inhuman or degrading treatment, the extradition request is bound to be rejected. In case of violation of other rights, the Court must apply the flagrant violation test, to determine whether there will be a flagrant violation of the individual's rights in the requested State. The same ruling has been followed in a series of other cases, such as the *Bader case*, *Chahal v. U.K* and in *Ahmed v. Austria*.

There has been a change in the view of the court, wherein the court has tried to impose the requirement of special distinguishing features. In the *Vilvarajah case*, the Court has authoritatively held that the applicant must prove that his situation is worse than any other individual, and he faces an individualized risk of persecution in the requesting case. Various scholars have argued that the Court must adopt this higher standard of individualized ill treatment.

The court has incessantly tried to broaden the scope of non-refoulement, especially in the case of violation of the fundamental human rights of the individual, by providing absolute protection. The individualized ill-treatment requirement, forces the individual to prove persecution on basis of race, religion, nationality, membership of

social group or political opinion. Adopting this test would however lead to various problems, the Court's constant effort to expand the duty of non-refoulement beyond Art. 33 of the Refugee Convention would be stifled. It instead of broadening the scope of non-refoulement, the Court would be narrowing down the protection provided under the other international instruments to the requirement of Art. 33 of the Refugee Convention.

Looking at the approach of the court when it comes to contradiction of the principle of non-refoulement and extradition treaties, it has been taken into consideration that the courts have been extremely inclined towards giving human rights principle more weightage than extradition. According to them implementing the extradition procedures takes away rights of the person as it exposes them to certain situations where they might face risk of being exploited and be exposed to inhuman situations which can affect the person physically and mentally. They have also spoken about the assurances which are given by the state in matters where the courts decide to not impose death penalty as a punishment. In *The Queen on the application of Philip Harkins v. The Secretary of State for the Home Department v. Government of the United States of America* the court established that they do not find any reason as to why assurances provided by the state in form of diplomatic notes can be regarded as illegal. State, as an entity holds the supreme authority and if they are giving their word regarding a particular case then that should hold a lot of legal confidence. If surety provided by the states will not be considered important in that way it will end up affecting state relations and will spoil the international harmony. If states cannot trust each other's words, then the mutual assistance, which is required by the states in order to prevent this overlap, will never take place.

Based on a thorough analysis of extradition cases as well, the UK House of Lords found that a substantial point of difference between extradition and asylum is that where the former is in issue the political nature of the offence is an exception to a general duty to return the fugitive, whereas in relation to asylum there is a general duty not to perform a refoulement unless the crime is non-political. The High Court of Australia also adopted a similar approach, noting the recognition, in earlier jurisprudence, of the overlap between the exemption from extradition and the exception from refugee status, yet stating that, "in using judicial opinion expressed in

the context of extradition cases, it is important to remember the significant differences that exist between the operation of the law of extradition and the grant of asylum to refugees.”

Chapter V focuses on Indian legal framework on refugee laws and the concept of non-refoulement, where, in the chapter, even an attempt is made to compare refugee systems in India and Europe. It can however be summed up that, in the absence of accession to the Refugee Convention, India’s treatment of refugees and asylum-seekers on its territory and/or in its jurisdiction is now very significantly constrained by its obligations at international law. The non-refoulement obligation found in Article 33 of the 1951 Convention has been supplemented by a wide range of complementary instruments that impose their own obligations of non-return. While the CAT is unique in containing an express and non-derogable obligation of non-return, a similar right has now been read into the ICCPR and the CRC by their respective supervising committees. Both the HRC and the Committee on the Rights of the Child have now made plain that the right of non-refoulement as found in the ICCPR and the CRC relates to the breadth of rights in each convention, and not merely a subset of core or non-derogable rights.⁸⁰⁶

In addition, there is now very considerable state practice in support of a customary norm of non-refoulement in the refugee context where there is a real risk of persecution, torture or cruel, inhuman or degrading treatment or punishment, or a threat to life, physical integrity or liberty. This is joined to a parallel norm in the human rights context which, properly constructed, prohibits return to situations where there is a real risk of a violation of human rights reaching a level of seriousness akin (but not limited) to torture or cruel, inhuman or degrading treatment or punishment and, in particular, where the violation feared will cause irreparable harm to the individual concerned. It is almost certainly the case that the prohibition of return to situations of torture is now itself a norm *jus cogens*, in large part due to its relationship to the more general norm prohibiting torture. In its capacity as a member

⁸⁰⁶U.N. Comm. on the Rights of the Child, General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, para. 27, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005) [hereinafter General Comment 6]. For a comprehensive explanation of the Committee’s guidance in respect to non-refoulement, see Alice Farmer, A Commentary on the Committee on the Rights of the Child’s Definition of Non-Refoulement for Children: Broad Protection for Fundamental Rights, 80 FORDHAM L. REV. 39 (2011).

of Ex Com, the Indian state itself has acknowledged the non-derogable nature of the norm prohibiting refoulement in the refugee context.

A general rule can be formulated on this basis: India is prohibited from removing, rejecting, or otherwise returning individuals to situations where there is a real risk of a violation of human rights rising to a level of seriousness akin (but not limited) to torture or cruel, inhuman or degrading treatment or punishment and, in particular, where the violation feared will cause irreparable harm to the individual concerned. This reflects the position at both conventional and customary international law as it relates to India. The seriousness of the feared violation is to be assessed on an individual basis taking into account all of the circumstances relevant to each case, including the cumulative or discriminatory effect of the relevant violations. Relevant circumstances include the age, sex, and health of the victim, and the particular mental and physical effects of the violations on them. Violations of non-derogable rights will always be of sufficient seriousness to ground a claim of non-return.

At the same time, India has, through its own state practice in accession to more general human rights conventions like the ICCPR, the ICESCR, and the CRC, in becoming a signatory to CAT, and in its role as a member of the UNHCR Ex Com, contributed importantly to the development of a far more sweeping and unconditional norm of non-refoulement. This is now binding on India as a matter of both customary and conventional international law. As such, the ongoing national security debate with respect to accession now seems both at odds with the core of Indian state practice and otiose to India's legal obligations. This is not to suggest, however, that the clock, as it pertains to the protection of displaced persons, can be turned back.

Of course, the right of non-refoulement itself, while central to the protection of refugees and other displaced persons is not the sum total of rights to which they are entitled. While space does not permit a detailed examination of the complex of rights available to forced migrants at international human rights law, or their effect on current protection standards, certainly it begins with the right of non-discrimination. At present, however, the various different communities of refugees and forced migrants in India receive dramatically unequal treatment. While Tibetan refugees arriving prior to 1979 are registered by the state as refugees and granted access to

public services on virtually equal footing with Indian nationals, ethnic Chin refugees in Mizoram State are virtually ignored by Indian authorities.⁸⁰⁷ As national authorities continue to forbid UNHCR to operate in Mizoram state, Chin refugees seeking mandate refugee status and material assistance are forced to travel to the main UNHCR office in New Delhi. This, in turn, contributes to the rapidly growing population of urban refugees in the capital.⁸⁰⁸

India will remain bound by its obligations with respect to non-refoulement, regardless of what legal reforms it undertakes (or fails to undertake) at the domestic level. However, only a comprehensive national regime in line with the terms of the 1951 Refugee Convention and the current demands of international human rights law will allow it to admit and protect forced migrants in a manner consistent with its own international obligations, and to a standard that reflects its apparent commitment, as a member of UNHCR's Ex Com, to the protection of refugees.

In Chapter VI focus is laid on the reconciliation between the two conflicting concepts. In this chapter, certain methods have been researched upon where there can be a brought a balance between the concepts of non-refoulement and extradition. These two concepts can be reconciled through a number of methods, Conditional extradition based on the premise that the extradition request shall be granted only if the requesting State agrees to honour the rights of the individual. The requested State can also apply the principle of *aut dedere aut judicare* and try the individual in its national Courts, or grant extradition on the condition that the offender must serve his sentence in the Requested State.

⁸⁰⁷Matthew Wilch, Jenny Yang & Zo Tum Hmung, "Seeking Refuge: The Chin People In Mizoram State", India 82 (2011), available at: <http://media.virbcdn.com/files/b3/FileItem-222256SeekingRefugeTheChinPeopleinMizoramStateIndia1211pdf22912.pdf> (Chins have no legal status and no legal standing to protect themselves; they are not officially included in the food safety net program that India provides for the poor; and they are not recognized or responded to as refugees who have additional vulnerabilities beyond poverty)

⁸⁰⁸Bleak Prospects for Chin Refugees in India, IRIN (June 21, 2012), <http://www.irinnews.org/report/95699/myanmar-bleak-prospects-for-chin-refugees-in-india> (UNHCR says there are more than 10,000 Chins in New Delhi, of whom nearly 7,000 are recognized as refugees, and fewer than 600 were resettled from New Delhi in 2011, mostly to the United States)

The political offence exception states that an individual cannot be extradited for committing a political offence. The specialty principle states that an individual can be prosecuted only for the offence for which he has been extradited. The model treaty on extradition provides that an individual cannot be extradited if he is going to face persecution. It also contains the other safeguards such as the political offence exception and specialty principle. The safeguards which otherwise cannot be legally enforced, have achieved legal backing, as they have been codified in the form of a treaty. The State parties are bound by the provisions of the treaty.

VII.3. SUGGESTIONS

Based on an analysis of the implications of State s' obligation to comply with the principle of non-refoulement and after analyzing the concepts in the backdrop of the case analysis done between 1973 and 2014, and in the light of the foregoing discussions, the researcher humbly submits the following suggestions:

1. The concept of non-refoulement should be recast and recognized as a human right in order to strengthen its position under international human rights law and be more effective in the protection of refugees and asylum-seekers.
2. The provisions dealing with the concept of non-refoulement under the human rights regime should be made stronger by broadening its application to all forms of persecution faced by a refugee or asylum-seeker as provided under Article 1(A) (2) of the Refugee Convention.
3. In situations of conflict of treaty obligations between extradition treaties and human rights instruments, ensuring the principle of non-refoulement is adhered to and not violated should be of utmost importance.
4. For the purpose of resolving such conflicts, human rights treaties should take precedence over extradition treaties when such treaties result in the violation of human rights obligations, including the obligation of non-refoulement, and should be declared void.

5. When States resort to extradition in violation of non-refoulement principle, such an action should be treated as a violation of a human right rather than the rejection of the applicability of the principle of non-refoulement by the State.
6. In the case of extradition, the potential threat of persecution of the individual as provided under the non-refoulement regime should take precedence over national concerns and threats of security. States would consequently be unable to use State sovereignty and limited resources as an excuse to derogate from the prohibition on refoulement.
7. The fact that an extradition request has been submitted cannot render an asylum application inadmissible without further proceedings, nor is it of itself a sufficient basis for rejecting an asylum application as manifestly unfounded.

Suggestions after conducting a detailed case study between 1973 and 2014

1. Overview of the exception clause of Non-Refoulement under Art. 33(2) of the Refugee Convention

It is important for the courts along with the internationally recognized authorities to have a proper view of the exception clause. Even though the practice followed by the states shows that the nature of non-refoulement is absolute because it is always the human rights laws, which is considered as supreme authority, there is also a need for the courts to limit such exception. Various scholars and authors claim that it is the exception clause which makes the principle more absolute or a jus cogens norm but such approach has yet non been recognized internationally. It is the only criteria, which is keeping the principle away from being recognized as jus cogens norm even when it is assumed that it is a rule of customary international law.

2. Due weightage to be given to exception clause

Along with non-refoulement the extradition treaties should be given due importance as well. When the concept of extradition has a limitation or it gives exception to political offences then there should be no such step, which will make the presence of the entire concept vague. Such absoluteness will make the whole existence of the principle unjustified. If states have an exception to not return refugees who are being convicted for political offences, then the idea of them not returning refugees where they fear that they will be exposed to torture should also be examined clearly.

3. Proper analysis of the punishments

If it goes by the states to consider torture or cruel treatment the any punishment to which the individual or the claimant will be exposed to will come in the same category. It is important for the states and mostly court to analyze each punishment separately and to consider with a proper approach as to whether such punishment will come under category. For e.g. death penalty can be recognized as a cruel penalty but imprisonment for 14 years not because the individual must have committed such offence because of which the states would want to bring him to court.

4. Rights of the states and Human Rights should be given due importance

Keeping human rights at a higher pedestal always is not the right approach. States have the responsibility of national security and due importance should be given to the same. This lies totally in the hands of the courts to consider each case properly and to decide which party should be held liable. It also includes considering the rights of the citizens of a particular country, which will be effected. The right of the requesting state is as important as that of the requested state. Hence, both should be kept as an equal staging.

Suggestions to reconcile the principle of non-refoulement and extradition treaties

1. A State must respect its non-refoulement obligations; the principle of non-refoulement has been accepted as a principle of customary international law, and also as a jus cogens norm of international Law. Peremptory norms of International Law must be followed and cannot be violated.
2. Traditionally, there is a clear conflict between the two principles under International Law; Courts can seek to minimize this conflict by application of the test of proportionality, in case of rights which can be restricted. However, with respect to absolute rights, it must be ensured that a State complies with its non-refoulement obligations and does not extradite the individual under any circumstances.
3. While dealing with an extradition request from a country other than the country of origin, the Requested State must take into account all the relevant factors into consideration, and apply the proportionality test before extraditing the individual.
4. The Model Treaty on Extradition has encompassed various principles of extradition law and non-refoulement obligations and created a fine balance between them. State's must become parties to the Model Treaty on Extradition and further develop its bilateral and multilateral extradition agreements on basis of the Model Treaty. When State's become parties to the Model Treaty, and subsequently develop their own agreements on basis of the treaty, they can be held responsible in case of breach of obligations. Development of similar treaties will bring about uniformity in extradition agreements.
5. The Requested State must have due regard to the principles of specialty and double criminality. The same principles can be effectively incorporated by the Requested State through conditional extradition.