

**THE STRENGTHS AND WEAKNESSES OF THE LOSS OF PROTECTION ACCORDING TO
ARTICLES 2/33 IN 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES**

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Introduction

The purpose of this study is to understand the extent to which Articles 1F and 2/33 are used to fight terrorism and to protect international citizens against human rights violations. I will explain the background for the clauses in Articles 1F. I will go on to explain the latest developments of human rights over the past decades and to explain the future of exclusion clauses. Thirdly, I will explain the strengths and weakness of the exclusion clauses in Article 1F of the Geneva Convention.

When we consider national security, we also must pay attention to human rights. Human rights are an important consideration for states and governments who have the responsibility of protecting the physical welfare of its citizens as well as protecting the rights of persons moving in and out of its borders, particularly as asylum seekers and refugees.

The organizations involved in protecting its citizens from 'terrorism' and 'counterterrorism', as well as the many decisions made by policymakers in the arguments for and against national security in light of the need for human rights must also be explained. Migrants deserve protection, under the law, particularly the well-intentioned, yet their wellbeing and the rights of their fellow citizens may be infringed-upon or abused by states protecting their own self-interests.

1951 Convention Relating to the Status of Refugees

I will discuss the strengths and weaknesses of the loss of protection according to Articles 2/33. I will explain the solutions or strengths that circumvent the loss of protection from refoulement provision. This is not helpful in two ways: first, for individuals seeking protection; and secondly, for states in an international environment, seeking peace and protection for its citizens. When there is no clear working definition of 'terrorism' some states may try to abuse the rules of counterterrorism, even if 'diplomatic assurances' have been discussed with other states. Lastly, I will discuss the practices of states that abuse the rules of counterterrorism while at the same time assuming to protect human rights, through 'diplomatic assurances.'

Why the Convention

Relating to the Status of Refugees 1951?

"The Convention Relating to the Status of refugees was first drafted in 1951 so as to control the constant flow of people attempting to escape from horror and prosecution." The tradition of providing sanctuary

for those in danger and at risk is very ancient and universal. The 1951 Convention Relating to the Status of Refugees is the idea and basis that symbolizes and embodies this tradition.

Following the Second World War, this core principle became even more pertinent: as the answer for assuring protection on a global scale especially during periods of conflict. Article 1A(2) has as its main aim and purpose to legally protect the refugee, providing him with certain privileges and rights. The definition of 'refugee' is: "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." In order to be a refugee, one does not have to earn it, as it is more declaratory than the former status [Rudy 2004].

Having a good understanding of the meaning of 'refugee', it is now possible to explain the two main reasons for the exclusion clauses. They were to: first, recognize that a refugee's status must be protected from abuse by the prohibition of its grant to undeserving cases. If an applicant had committed serious and detrimental transgressions before entering the host country, the applicant then forfeited his rights to being protected as a 'refugee'. This is because of the fundamental link between "ideas of humanity, equity and the concept of refugee." Another major reason for this piece of legislation was to provide society with the assurance that those who had committed serious war crimes (such as in Second World War), crimes of a non-political nature, and acts in contradiction to the aims, principles and purposes of the United Nations - had not the opportunity to escape prosecution and the laws of the land. [Gilbert, G 2002]

Why Article 1F and what is its Future Use?

Every piece of legislation has its exceptions and the Convention Relating to the Status of Refugees 1951 is no different. Out of the deliberations and discussions of the convention came

Article 1F and 2)33). Its proper uses are not always applicable, on the other hand. For instance, take as an example the Nazis < genocide war crimes. These acts were so grave that perpetrators should not stand in the way of justice. Due to the injustices and past acts of others, the exclusion clauses made their way into the Convention via Article 1F.

Article 1F provides basis by determining whether a person deserves international protection (excluding a number of asylum seekers) from the

1951 Convention mandates. It must be understood that Article 1F is only to be applied sparingly and with extreme caution [Gilbert, G 2002].

The uses of Article 1F can be applied to persons only if:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations. Convention Relating to the Status of Refugees 1951

Within Article 1F there are certain 'limbs' or clauses that must be taken into consideration when making an informed decision about the fate of an individual. It is required that the case owner be precise on whether they are depending on either the (a), (b) or (c) clause of Article 1F. Just stating the whole Article 1F is not enough. However, it is possible to depend on more than one clause during the final deliberation and decision [EXCLUSION: ARTICLES 1F and 2)33) of the REFUGEE CONVENTION p6].

Why was Article 1F drafted in the first place? Its main aim was to solve the problem of deciding who is worthy of being a citizen and who doesn't have this right because of previous criminal acts against the state. How Article 1F unfolded developed over a period of time following the initial 1951 Convention meetings.

Let us now look at the background of 1F. The driving force for Article 1F in the 1951 Convention was to provide legislation that supports Article 2)14) of the Universal Declaration of Human Rights, which states that "the right to asylum may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purpose and object of the United Nations". Refugee status is regulated and controlled by three acts whose sole purpose is to oblige UNHCR and States and to deny the benefits of particular individuals who may have otherwise qualified as refugees. These three acts are: Article 1F of the 1951 Convention; article I(5) of the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (hereinafter "OAU Convention"); and Paragraph 7(d) of the United Nations High Commissioner for Refugees (UNHCR) Statute [Daniella M. Rudy]

Why Articles(2) & (1)33)

Article 1)33) states: “No Contracting State shall expel or return a refugee (refouler) in any manner whatsoever.” Meaning, that no kind of transfer is accepted, this including extradition. This is particularly expressed in the Convention against Torture, where to extradite a refugee is certainly forbidden [Hasselberg 2009].

An important, revealing and relevant point is made by Article 2)33): that a refugee’s need for protection and the state’s security needs to be weighed in line with the facts. Article 2)33) goes on to state “The benefit of the present provision [article 1)33)] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in where he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country” [Hasselberg 2009].

The relations between the clauses in Article 33 are not clear because 2)33) may or may not be absolute. This is mainly because some states have practices of using certain crimes as an exclusion clause and this ultimately will not be in accordance with the requirement to make an individual assessment [Hasselberg 2009]

There must be made a distinction between Article 1F and 2)33). In the latter article, 2)33), refugee status ownership is already recognized – meaning the refugee will be returned to his country of origin if he is posing a threat. This is an exception to the non-refoulement principle of Article 1)33) [Rudy May 2004]. In addition,

Article 1F is different because its main aim is about limiting the protection due to reasons of actions in the past – as opposed to Article 2)33) which intention is to exclude future threats [Hasselberg 2009].

The exclusion clause in article 2)33) has as its main task to balance the security risks to the state against the risk of torture to the individual. The state cannot decide if a conviction of an offence or activity is enough to exclude a person from protection. Each individual must be assessed on a case by case basis. For this reason “the seriousness of the security threat has to stand in proportion to the risk for the person intended to be returned.” [Hasselberg 2009]

Strengths of the Exclusion Clause

An exclusion cause has much strength, particularly during an individual’s initial determination assessment. It becomes a necessary and mandatory part of the international law process. When there is no other law in place, exclusion clauses are not an option but an indispensable factor in deciding a refugee’s status.

Only when an individual's acts are specifically and "obviously" clear according to the mandates of Article 1F concerning unacceptable crimes, and not contrary to its list of specifications, is an individual excluded.

The exclusion clause has two rationales: in the first instance, offending persons may be guilty of certain acts that are too grave to warrant international protection; in the second, the whole refugee exclusion clause framework must have as its aim the protection of human rights (the humanitarian efforts of the 1951 Convention) [Rudy 2004].

Today we need Article 1F, mainly because of the recent events in war-stricken countries. For example, conflicts have occurred in the Former Yugoslavia, Great Lakes and Rwanda which have given the impetus for clarifying the meaning of the exclusion clause. Due to the great injustice during the Rwanda 1994 genocide, international tribunals were necessary for the eradication of appalling crimes committed there. This led to the Nuremberg Tribunals which occurred after the Second World War [Rudy 2004].

Deciding which individuals are in need of state protection was of major concern because there were survivors and perpetrators of the genocide who migrated all at once. The repercussion of not sorting these two types would have been disastrous unfortunately for those seeking justice and safe haven [Rudy 2004].

The main purpose of the principles and purposes of the United Nations is to act as a guide for States and quasi-states in relation to each other. Article 1F(c) is used to provide justice to a broader circle of persons acting on behalf of these States so as to stop and prevent specific security and peace threats [Rudy 2004].

A decision to exclude a refugee on the basis of committing a serious terrorist attack or such other crime that jeopardizes international security must be taken in accordance with appropriate procedural guarantees. It is important that Article 1F(c) only be applied when there is sufficient evidence to suspect that an individual is contravening the United Nations and international communities' goals of combating terrorism and producing a secure state [Hasselberg 2009].

The European Commission, in its fight against terrorism, made it clear via a working paper aimed at member states that exclusion clauses in Article 1(f) of the Geneva Convention must be 'rigorously and scrupulously' applied. Among the many suggestions for the improvement of surveillance upon entering countries were: pre-entry screening along with strict visa policy, biometric data, and improved operations between

asylum authorities of the State and border guards, immigration and intelligence services. [Levy 2003]

Weaknesses of the Exclusion Clause

The exclusion clauses provide a great dilemma for those who are seeking refuge within international immigration. The clause is meant to protect individuals from persecution yet if a person once persecuted and now seeks refuge from the same persecution, then the State has a real moral dilemma. Certain individuals genuinely need protection and they are striving along-side those who are unworthy of this same protection [Rudy May 2004].

Even though the clause sought to protect refugees, over time its effectiveness has become weaker due to recent events. It is important to note that the acts of terrorism and other non-State actors were not foreseeable at the time of the drafting of the 1951 Convention. Such significant yet grave acts appeared later and this raised the question whether existing legislation was effective enough to protect the citizen by preventing certain individuals to enter a State before a major event occurred. [Rudy May 2004]

Other articles may be necessary because Article 1F will not provide full protection. Hence, a distinction must be made between Article 1F, Article 1D, Article 1E and Articles 32 and 2)33). Those seeking protection under Article 1D receive it from United Nations agencies and organs other than UNHCR. Persons who do not need international protection will fall under Article 1E. Those individuals who pose a danger to the host state "in the future" (future risk) will be dealt with under Articles 32 and 2)33) [Guidelines on international protection UNHCR].

States Protect Citizen's Human Rights

A person is stripped of protection if Article 1F is applied but what needs to be done with a person is not specifically outlined in the article. Hence, the person could be still protected under the principle of non-refoulment. In this case, a state can forfeit responsibility by failing to expel or returning a person to their country of origin. Hence, a person who is alleged to be involved in terrorist acts may have a right to stay if he or she has proven to be a subject of torture. Protection is still granted in HRL and Refugee Convention would in this case not be applicable [Hasselberg 2009].

Governments and human rights advocates are split on their view of states role in protecting citizens and ensuring democracy. Governments believe that human rights and democracy are only protected by states

and breaches to security must be eliminated. On the other hand, human rights groups believe that human rights and the rule of law will not be protected and effective if states undermine these two fundamental principles. [Hasselberg 2009]

Organizations that protect citizens from ‘terrorism’ and ‘counter terrorism’

There is a feeling that terrorism is on the rise and that States are in the business of expelling certain groups because of their affiliations based on political, ethnic or national, religious criteria. The UNHCR is one such organization that feels this to be true. Contrary to a commonly held feeling within the international law community, Article 2(33) of the 1951 Refugee Convention does not adhere to the expulsion of individual refugees, only provided they pose a danger to security of a community. In any case, a person’s return to persecution should not outweigh the danger in question. Likewise, UNHCR feels that expulsion is warranted only if clear evidence is given that an individual can prove he is not guilty. This whole process must be reached in accordance with due process of law [Addressing Security Concerns without Undermining Refugee Protection- UNHCR’s perspective p5].

Following the terrorist attacks of September 11, international law has evolved and developed along with policies of many states. After the attacks of 11/9 the international atmosphere has become a place of increased conflict where a solution has become almost unattainable due to either side not understanding the others arguments. [Hasselberg 2009]

The UNHCR’s policies have been used as good policy as well as bad. States have used it to their advantage to block refugees from entering whilst others have used it to treat asylum seekers fairly and with justice. Take for example the USA which, during the Cold War, had kept the UNHCR at arm’s length so that it could use its refugee and asylum policy to contend with the Eastern Bloc [Levy 2003].

The Geneva Convention has stood its ground throughout certain decades. We see this from the mid 70’s to the mid 90’s by a survey of parliamentary debates regarding the reform of refugee and asylum law in countries such as Germany, Switzerland and the UK. Survey after survey showed that not one parliamentarian demanded a renunciation of the Geneva Convention by the governments in their respective countries. [Levy 2003]

Many asylum seekers in the UK are trying to escape state terror and fundamentalism . They can be excluded from protection if UK laws are not defined and exclusive. This proves to be a dilemma and concern

for persons coming from the top five applicant nationalities in UK: Iran, China, Somalia, Iraq and Zimbabwe. Human rights abuses and injustices are a major concern for these countries [Addressing Security Concerns without Undermining Refugee Protection- UNHCR's perspective p1].

Strengths

In terms of inalienable human rights, security should be considered a first and foremost measure in the protection of a state's citizen. [Hasselberg 2009]

Becoming a victim of recent events would be very easy for 'bona fide refugees and asylum seekers.' However, the UNHCR has the view that rather than change the whole refugee protection regime, a cautious application of the exclusion clause is what is needed. [Schoenholtz. Hojaiban 2008]

Because of the perceived threats, governments have made it clear that there should be exceptions to interpretation of rules. They argue that the foremost aim and responsibility of government is to protect its citizens from terrorism. This takes precedence over the rights of an individual since security must be looked at as a human right, even though it collides with other rights of an individual. There needs to be a balance between the rights so that security is kept in check and citizens are protected.

Many governments along with the European Commission's working document have argued that a change in refoulement is necessary with a balance between human rights and other rights. In their view, they argue that absolute prohibition must be made relative to the protection of citizens. Terrorism is a violation of basic human rights and states have an obligation to protect its citizens. Such arguments have been debated before ECtHR in the case of Saadi and Ramzy. [Hasselberg 2009]

Within Proposal form and its preamble of September 2001 ,12 and its revision of April 2004, state clearly that 'terrorists' are excluded from refugee protection because their acts are contrary to the purposes and principles of the United Nations. Europe now has as its main aim to control the movement of suspected terrorist and those asylum seekers or refugees who support international terrorist acts. It is made clear that public order and national security are of paramount importance and that it takes precedence over individual terrorist's human rights. [Schoenholtz. Hojaiban 2008]

Weaknesses

Unfortunately, new policies which ban the entrance of terrorists to European countries have meant that bona fide refugees and asylum seekers have been made suspect and fearful of being turned-away. In the view of European policymakers, they saw asylum as a "liability in the fight against international terrorism," and believed that "more safeguards were needed to prevent the use of international refugee protection as a safe haven by those who had committed terrorist acts elsewhere." [Schoenholtz. Hojaiban 2008]

Policies such as forced migration caused by forced war and persecution, as opposed to forced migration caused by economic hardship have produced a strong link that has put the Geneva Convention into disrepute by undermining its aims. This has led to the re-positioning of some 90 percent asylum seekers throughout Europe, who were not granted full Convention status in the 1990's but were given permission to remain in member states under ad hoc conditions [Levy 2003]

Definition of 'Terrorism' and 'Terrorist Acts' Not Clear

No clear definition of terrorism is provided by the United Nations. The definition of 'terrorism' has remained elusive and difficult to explain, yet, The United Nations has unanimously reached a consensus that it must be eliminated and corrected. [Rudy May 2004] (see The Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism 60/49 of 9 December 199465).

That being said, there is a paragraph (2 of The Declaration) which states that terrorism is contrary to their purposes and principles. [Gilbert, G.2002]

In light of this ambiguity, and consequently, because there is no working international legal definition of 'terrorism', regional governments and states have been left to devise their own interpretations [Schoenholtz, Hojaiban]

New ways of trying to describe certain acts are put in place, in order to compensate for this lack of meaning. For instance, those who commit terrorist acts (terrorists) are excluded only on the grounds that they have committed crimes against peace or humanity, a war crime, a serious non-political crime, or an act contrary to the purposes and principles of the United Nations; as outlined in Article 1F. Experts agree that the terrorist acts committed in London, Madrid, New York and Washington were covered by Article 1F. [KENYA AND COUNTERTERRORISM: A TIME FOR CHANGE]

It should be made clear and repeated here that because 'terrorism'

is hard to define, states have not a working definition to go by which leads to complications and ambiguity. Binding norms regulating how states shall combat terrorism only exists which leads to confusion. How can states act on something if there is no clear definition? Only misinterpretation results and the opportunity to use the definition in a fraudulent and dishonest way, often then not, occur. For example, states may use the term in an inclusive way to uphold their own obligations and interests. Also, they may use the term to exploit and strike down political opponents and other groups. [KENYA AND COUNTERTERRORISM: A TIME FOR CHANGE]

In response to the Commission Working Document and the Council Framework Decision, The European council on refugees and Exiles (ECRE) were concerned about the definition of 'terrorism' and 'terrorist group' in regards to the exclusion clause. ECRE objected to the automatic application of the exclusion clauses because a definite term for 'terrorism' is not available by the state and therefore can not be applied meaningfully. According to ECRE, attention and focus should be on the underlying offences and personal involvement in criminal crimes according to the excludable clause under Article 1F [Schoenholtz, Hojaiban].

Defining a 'terrorist act' as a crime against humanity or war crime, as opposed to a 'criminal act' is an important factor in deciding whether an individual would be deprived of international protection. The following are two definitions of terrorism as stated in Article 3 of the Council Framework Decision (Treaty on European Union of 13 June 2002).

First, 'terrorist offences' include "extortion, theft, robbery, and damage to public transport." Secondly, 'terrorist group' is the aim of "intimidating or seriously altering or destroying the political, economic or social structure of a country." Also, in the article, 'terrorist group' is a structured organization established over a period of time, of more than two persons, acting in concert to commit terrorist offences." Terrorist offences and atrocities have been committed by the Nazis in the Holocaust and could be described as criminal offences but they are not crimes that deprive an individual of international protection [Schoenholtz, Hojaiban] and (Official Journal of the European Communities L 3/164)

The German Parliament adopted The Anti-Terrorism Act 2002 and mandated that entrance by asylum seekers and refugees is dependent on fulfilling certain criteria. This became the fundamental, guiding principles for the German Parliament, even though the definition of 'terrorism' and 'support' were vague definitions which could lead to further confusion. Schoenholtz, Hojaiban]

The German Parliament made it even more difficult for persons to enter and reside, after the terrorist attacks in Madrid on March 11th 2004.

A new immigration law called the Residence Act 2004 put in effect more stringent laws including giving more power to the Lander (police from German 'states' who carry out deportations) to deport non-citizens even without prior deportation orders. Schoenholtz, Hojaiban]

Germany was not the only country that adopted this new policy of assuring that terrorists are identified and removed if national security is at risk. The United Kingdom also passed relevant acts such as The Anti-Terrorism, Crime and Security Act (December, 2001) which provided the Home Secretary power to deem a non-citizen as an 'international terrorist', should sufficient there be enough concern and belief that the person is under suspect. Schoenholtz, Hojaiban]

Tony Blair, Prime Minister of Britain announced a "comprehensive framework for action in dealing with the terrorist threat in Britain." After the bomb attacks on London Transport on July 2005, those committing terrorist acts were supposed to be deported to countries that practice torture and other ill treatments on new grounds for exclusion and deportation 'diplomatic assurances'. Any person associated 'terrorist acts' was automatically refused asylum [Schoenholtz, Hojaiban]

The Secretary of State is free to issue certificates stating that appellants are not entitled to protection of the Refugee Convention, through Section 55 of the Immigration, Asylum and Nationality Act 2006. UNHCR are concerned about this law as it allows the UK government to broadly measure the Refugee Convention exclusion clauses whilst denying persons international protection if they do not fall within the scope of these clauses. UNHCR stated that "exclusion clauses contemplate acts of a very grave nature and impact on international peace and security" [Andrew I. Schoenholtz Jennifer Hojaiban]

UNHCR, law experts and states agree that persons must be excluded according to the rules of Article 1F. Those terrorists who were responsible for the Madrid, U.S. and London acts must be persecuted and excluded from refugee protection. However, states have defined the term 'terrorism' too broadly, so as to lessen the protection for victims of the persecution of the perpetrators of these acts. [Human Rights, Terrorism and Counter-terrorism]

Following the 11/9 attacks on the Twin Towers, the EU had made it a requirement for member states to investigate asylum seekers and refugees in order to insure that such persons had not planned, participated in nor facilitated in the commission of terrorist acts. Righting the wrongs of immigration became the agenda setter after the attacks on the Twin Towers. [Levy 2002]

States That Abuse the Rules of Counter Terrorism

As we saw in the previous section, there are some disagreements as to what constitutes a 'Terrorist Act'. Without a clear definition some states may find loop-holes in the legislature to further their own self-interests. Such ambiguity leads to legal conflicts (particularly concerning arrest and detention) and the sometimes unfair movement of suspected migrants from one jurisdiction to another.

It is important that migrants know how to execute their human rights. Rights for being arrested and detention are covered by international human rights law. Migrants must be aware that they have the right to be informed about the reasons for their arrest and the charges incurred [Schoenholtz, Hojaiban]

These laws of detention apply equally to Africa. Several states have the legislation in order to allow persons at the borders to be protected from Member States. According to Article 3)2) of the Convention Governing Aspects of Refugee Problems in Africa states that, "[n]o person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion which would compel him to return or to remain in a territory, where his life, physical integrity or liberty would be threatened". Likewise in Article 1)33) of the Convention Relating to the Status of Refugees prohibits the expulsion or return of an individual, "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". [KENYA AND counter terrorism: A TIME FOR CHANGE]

It is important to view these judgments of national court law because we can see the general changes in the public opinion and the rectification of human rights issues. As regards judgments, even though they do not affect international law directly, still the judgments affect the opinion juris. Legal conflicts are solved on a national level, although case law reflects human rights status. [KENYA AND COUNTERTERRORISM: A TIME FOR CHANGE]

Kenya's borders have had a task at regulating the number of individuals attempting to cross the border. Although, individual assessments are part of Kenya's obligations there have been massive returns in the hundreds of people fleeing conflict. Each individual is suppose to be assessed by Articles 2)33) and 1F but this obligation on behalf of the Kenyan government has been lax. [KENYA AND COUNTERTERRORISM: A TIME FOR CHANGE]

An example of this type of judgment is the Suresh66 case from the Supreme Court in Canada. An individual's human rights are weighed I

light of other obligations and interests of the state. It was stated before the court that “We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified” [Hasselberg 2009]

Within international human rights law there is also the absolute principle of non-refoulement. Under this legislation persons are prohibited from returning, being extradited, deported or transferred to a country if they are at risk of ill-treatment or torture. This principle is in direct contrast to international refugee law because international human rights law applies whether a person is seeking asylum or not. Individuals are protected under this law no matter how dangerous they conducted themselves. For example we take the case of Mohamed Abdulmalik, who was transferred to Guantanamo Bay – a move that may have violated the absolute principle of nonrefoulment (see Articles 3 of the CAT, 5 of the African Charter and 7 of the ICCPR). [KENYA AND COUNTERTERRORISM: A TIME FOR CHANGE]

The non-refoulement scenario has its limitations in international law - expressly in the Refugee Convention whereby it might be possible to return a person to a dangerous situation. But non-refoulement against torture is explained by CAT, ECtHR and HRC, as absolute. Nonetheless, some human rights are described as non-derogable (rights that states cannot violate under any circumstances). Because of this protection against non-refoulement, as is explained as absolute to HRL, then indeed the returning to a dangerous situation (non-refoulement) may indeed be without exclusions and non-derogable. [Hasselberg 2009]

When a person can not be extradited according to the principle of non-refoulement then there is a dilemma. If extradition is out of the question then the only alternative is prosecution. However, certain terrorist activities are not easy to prosecute and reaching a conviction through normal criminal proceedings is unattainable. As well as this, there is no generic definition for ‘terrorism’ so this makes extradition a problem. Also, the crime must be recognized in both states (the host country and the one extradited to) along with be recognized as non-political. A state can refuse extradition if the crime is considered political. Both states must agree that as to the nature of the crime. If the sending state does not find an activity criminal then the person can not be extradited because there are no grounds for persecution. Secondly, persecuting and eventually extraditing a suspected terrorist might be difficult due to the fact that criminal offences usually have already occurred whilst security threats are in the future. Hence, predicted criminal activity and eventually criminality is not custom in rule of law and a threat may not be

enough to persecute. [Hasselberg 2009]

Governments have been known to use “Diplomatic assurances” as a means to send undesirable foreigners to other countries. One of the governments assures the other that it won’t torture or prosecute. This is a clever means of getting around the international banning of torture.

Persons sent back on these grounds include those with extradition warrants for ordinary crimes, failed asylum seekers and deportees following conviction [“Diplomatic Assurances” against Torture Questions and Answers]

Growing opinion has indicated that diplomatic assurances do not work because governments are covering up their real obligations as protectors of the people. Diplomatic assurances can not protect people from torture and it appears that governments are engaged in wishful thinking.

There have been situations in which one state may request that a person be extradited, even though the death penalty has been abolished whilst another state may requests for the death penalty to go ahead. Differences in assuring punishment occur between states regarding specific types of torture. It may be legal in one state whilst unacceptable in another. Some of the differences are as follows: that in international law, a ban on the death penalty does not exist whilst torture does. In some countries torture is not at all recognized whilst capital punishment is acceptable. Governments on the receiving and sending end must promise to respect the treaty and to not practice torture when called upon to do so. Admitting to torture is very difficult for some governments, even though torture does take place. Hence, it’s monitoring (torture) is very difficult because it is a secret and detailing diplomatic assurances is hard to conduct due to these hidden agendas. Discussing torture and removals is very difficult and rarely done openly by governments. Combining this with diplomacy and the situations become even more difficult to monitor. [Hasselberg 2009]

Case study: Sweden and Egypt

One such case involved the extradition of two terrorists who were transferred by the police from Sweden to Egypt. Both men, who sought asylum in Sweden were deported to Egypt , though the Swedish government knew that Egypt was well known for mistreating political opponents. Later on, both men claimed that they had been tortured whilst in Egypt. [Hasselberg 2009]

Sweden, on the other hand had a different story. Sweden claimed that they had acted correctly and justly, according to national security.

[Hasselberg 2009] Egypt in turn, provided a diplomatic assurance to Sweden, assuring that both men would be treated correctly. Egypt also assured that Egyptian law would remain just by respecting the men's human rights [Hasselberg 2009].

Consequently, Sweden asserted that the men would be treated correctly without torture and that the assurance removed the risk of mistreatment. They supported their decisions and assertions that sending them back was not an act of refoulement. "the use of diplomatic assurances could also be regarded as a circumvention of the principle of non-refoulement [Hasselberg 2009]."

The prohibition against 'refoulement' and the protection of persons who may be in danger of torture if sent back is covered in The United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. A definition of 'torture' is covered in this document.

Protection and security offered by The Committee against Torture (CAT) is absolute and there are no exceptions to article 3. Also, state security is not relevant because of this principle of non-refoulement [Hasselberg 2009].

Article 1Fb) was used by the Swedish government to conclude that the two terrorists were guilty of serious non-political, and hence would have to be excluded without protection from the Refugee convention. Whether their terrorists acts were political or not was up to discussion but some states agree that terrorism is a very sound reason for denying a refugee status. [Hasselberg 2009]

Case Study: UK Home Office

Tony Blair, former Prime Minister of UK has been a major proponent of a case involving four Egyptian men. In the case of Youssef v Home Office, the ex Prime Minister intervened and made a few demands on the Home Office. According to Blair "the rules of the game are changing" and he demanded that the Home Office should "get them back". In response to the assurances of the Home Office he also did not agree with the handling of matters and the lengthy and confusing mechanistic approach. He said. "This is a bit much. Why do we need all these things?" [Hasselberg 2009]

CONCLUSION

We have seen in this essay that the state has the right to protect its citizens from human rights abuses and terrorism. Often the rights and welfare of innocent and peaceful people are violated by those individuals responsible for the terrorist crimes and also by the states themselves who are supposed to protect its citizens. There have been many laws passed in order to do this. Organizations and Conventions such as UNHCR, The Geneva Convention, The United Nations, and The Committee against Torture have provided documentation and mandates, so as to make the relocation of migrant persons more equitable and fair. Unfortunately, clauses and acts have been lacking in providing workable definitions that are universal and applicable to neighboring states and jurisdictions.

A more comprehensive definition of 'terrorism' and 'terrorist acts' has been needed and the meaning of what it means to be a criminal, refugee, asylum seeker and good citizen has been through many changes since the Geneva Convention Act was passed. Articles such as 1F and 33 have also developed and evolved. International law and criminal law have had to determine what exactly is a 'terrorist' and what it means to protect innocent asylum seekers and refugees.

Articles 1F and 33 have their strengths and weaknesses while some citizens fight to protect their human rights. Coupled with this internal struggle is the other problem of contending with states that abuse the human rights of its and other's citizens by practicing counter-terrorism, along with the getting around the diplomatic assurances issue. The only way that these important global issues can be rectified is by careful discussion, continued amendments to existing legislature and the support of humanitarian organizations and policymakers, who continue to make a difference by lobbying for human rights.