Prioritizing Human Rights and Security in the World of Law: A Comparison of How the United States and the United Kingdom Interpret Exclusion Clauses.

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Abstract:

Since September 11, 2001 refugees have increasingly become victims of paranoia that they are criminals and potential terrorists, often being excluded from the Refugee Convention in the domestic courts. This paper analyzes how the United States and the United Kingdom conduct exclusion cases when a suspected or charged terrorist is to be deported, yet is appealing under Article 3 of the Convention Against Torture that they will undergo torture if returned to their country of origin. This paper does not only focus on the exclusion of refugees considered to be a terrorist and the return to a potential threat of torture, but also the extent these governments apply Article 1F Exclusion Clauses and Article 3 Convention Against Torture to their domestic cases. Reviewing exclusion cases from the domestic courts of the US and UK, this paper will analyze how the UK and US construe human rights and security in the world of law.

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Introduction

The September 11, 2001 attacks had governments around the world turning their attention to fighting terrorism. Governments reevaluated the weaknesses of their systems and the areas most vulnerable to terrorists, searching to strengthen the security of the state. While none of the nineteen hijackers were refugees, refugees have increasingly become victims of paranoia that they are criminals and potential terrorists. "The irony," Ruud Lubbers points out, "is that it is the refugee who is often the first victim of persecution and terror."[1] Yet in the aftermath of September 11, countries such as the United States and the United Kingdom have constructed their borders and laws to make refugee status more difficult and exclusion cases more common.

In the 1951 Convention on Refugees, the writers implemented exclusion clauses in order to prevent those who had committed serious crimes from benefiting from the rights of refugees. Nazi war crimes were fresh on the minds of the drafters and insinuated a move to not only make sure that the perpetrators of these heinous crimes would not go unpunished, but also to protect the communities of the receiving countries. Under Article 1F of the 1951 Convention, crimes that are grounds for exclusion include: crimes against peace, war crimes, crimes against humanity, serious non-political crime, and acts contrary to the purposes and principles of the United Nations.[2] Terrorism, while not explicitly defined or categorized in the Geneva Convention, would fall under 'serious non-political crime' and/or 'acts contrary to the purposes and principles of the United Nations.'

[1] Monette Zard, 2002, 32
[2] Article 1F. Convention and Protocol Relating to the Status of Refugees. United Nations High Commissioner for Refugees. 1951 and 1967.

However, because terrorism has not been given an international definition, the decision on 'who is a terrorist?' and 'what is terrorism?' - hence leading to, what actions fall under exclusion clauses - are thus ultimately determined by the domestic courts. Geoff Gilbert identifies the problem that international law is evaluated in domestic courts using domestic constitutions and legislation.[3] This is, thus, the issue of how the different members apply the Exclusion Clauses to their domestic legislations and who they consider falls under Article 1F. Since 9/11, some countries have exercised Exclusion clauses more frequently. Erika Feller states "concerns about exclusion have been heightened since the attacks in the United States on 11 September 2001, as States have turned increased attention to these clauses in a move to ensure that terrorists are not able to abuse asylum channels."[4] Colin Harvey explains this is because "asylum seekers are constructed as threats to security and stability, a process which legitimizes harsh legislative measures."[5] As such, governments are protecting their communities and enhancing state security by removing those who could be a cause for problems.

Nevertheless, those who are to be removed still can appeal for non-deportation if there is a threat of torture upon return. Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (also Article 3 of the European Convention on Human Rights – Art. 3 ECHR) states that 'no one shall be subject to torture.'[6] Deporting someone to a country where s/he could be tortured would go against the Geneva Convention. For this reason, the country, in

[3] Erika Feller et al, 2003, 477
[4] ibid, 14
[5] Colin Harvey, 2002, 3
[6] 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN doc. A/RES/39/46

which the refugee is seeking asylum, receives the burden of determining whether or not to violate a human right, or to risk the security of the state.

This paper analyzes how the United States and the United Kingdom conduct cases when a terrorist is to be deported, yet is appealing under Article 3 that s/he will undergo torture if returned. Deporting the terrorist despite the threat of torture, the government would essentially be placing state security over human rights. On the other hand, if Article 3 is adhered to, and the terrorist is not returned, then the government is potentially putting the state at risk.

The paper focuses on the United States and the United Kingdom for two main reasons: first, they are large receivers of refugees, and second, they were victims of gruesome terrorist attacks. The Center for Immigration Studies reported that in 2007 the United States legal and illegal immigration population was 37.9 million, accounting for one in every eight U.S. residents.[7] The UNHCR reported that in 2008 the United States "was the largest single recipient of new asylum claims among the group of industrialized countries accounting for 13 per cent of all claims lodged in 51 countries" where an "estimated 49,000 individuals submitted an application in the United States of America."[8] The United Kingdom received 30,500 applications during 2008.[9] These numbers place the United States and United Kingdom in the top three countries[10] for 'receiving countries of asylum-seekers in total number of applications' in 2008.[11] However, September 11, 2001 and July 7, 2005 are strong reminders of what terrorists who entered as immigrants were capable of doing. The governments of

[7] Statistic can be found at: http://www.cis.org/immigrants_profile_2007
[8] UNHCR: Asylum Levels and Trends in Industrialized Countries, 2009, 4-5
[9] ibid, 2009, 8
[10] While it is beyond the scope of this paper, France was also in the top three countries along the United States and the United Kingdom. However, France will not be looked at.
[11] ibid, 2009, 8

these countries tightened the laws of immigration and strengthened the ability to utilize exclusion.

I will argue that both the United Kingdom and the United States apply the Articles of the Geneva Convention to their domestic courts in line with a strong security for the state. I argue that the trend for these two countries is that the United States takes the stronger case for state security over human rights, while, the United Kingdom, with continued pressure from the ECHR, takes a stronger hold on human rights over security.

However, the issue over prioritization of these two elements is not black and white. This paper does not just focus on the exclusion of refugees considered to be a terrorist and the return to a potential threat of torture, but also the extent these governments apply Article 1F and Article 3 to their domestic cases. How pedantically do the domestic courts of the U.S. and UK follow their legislations on terrorism and exclusion? For instance, the United States Homeland Security Directive on Terrorism meticulously states that it is the policy of the U.S. to "prevent aliens who engage in or support terrorist activity from entering the United States."[12] Yet, how do the domestic courts of the U.S. interpret "support"? If a Sikh couple raises money for an organization that in return supports Sikh Student Federation Faction (SSF), a U.S. considered terrorist group[13], is that couple considered to be supporting terrorists, even though the action was indirect?[14] Or what about a Hindi of Tamil ethnicity living in northern Sri Lanka, who is faced with death threats in order to dig bunkers and fill

[12] Homeland Security, 2001

[13] List of all U.S. Government Designated Foreign Terrorist Organizations can be found at the Office of the Coordinator for Counterterrorism, Chapter 6: Terrorist Organizations at the following site: http://www.state.gov/s/ct/rls/crt/2007/103714.htm

[14] Actual events from Harpal Singh Cheema; Rajwinder Kauer, Petitioners, v. Immigration and Naturalization Service, 350 F.3d 1035 (9th Cir. 2003). Courts ruled that Cheema and his wife indeed knew about the funding to terrorist groups and were thus denied asylum and withholding of removal.

sandbags for the Liberation Tigers of Tamil Eelam, and later that Tamil escapes to seek asylum elsewhere, are his actions, while not voluntary, considered support of terrorist activity?[15] Are exceptions and special cases made, or is legislation austerely followed? It is questions such as these, which are the focus of this paper. The paper will analyze not only how the domestic courts are interpreting Article 1F and Article 3 of the Geneva Convention, but also how the domestic courts interpret their own legislative policies.

The literature on this topic has strongly focused on terrorism, immigration, or the analysis of the Geneva Convention. However, there is very little literature that directly addresses the issue of the human rights of terrorists. There is a colossal amount of literature on human rights in the war on terrorism, but this literature tends to focus more on human rights violations in Guantanamo,[16] Abu Ghraib,[17] and other similar cases. The literature on the United States and the United Kingdom, focusing on the areas of immigration and war on terrorism, has demonstrated that both have amended legislation for stricter immigration policies,[18] have a stronger focus on fighting terrorism,[19] and have been criticized for disregarding human rights.[20]

Critics have accused the United States and the United Kingdom of a lack of human rights in the war on terror. From Guantanamo to Iraq, both the U.S. and the U.K. have used methods of interrogation on imprisoned terrorists for the purpose of collecting vital information on terrorist groups. Just the same, the literature has also

[15] Actual events from R (on the application of Sivakumar) v. Immigration Appeal Tribunal, 2001 EWCA Civ 1196. Court ruled that asylum would be given based on his forced participation and well-founded fear of persecution if returned to Sri Lanka.
[16] i.e.: Saar, Erik and Viveca Novak. Inside the Wire: A Military Intelligence Soldier's Eyewitness Account of Life at Guantanamo. Penguin Press, New York, 2005.
[17] i.e.: Harbury, Jennifer. Truth, Torture, and the American way: the history and consequences of U.S. involvement in torture. Beacon Press, Boston, 2005
[18] Authors include: Perl, 2003(US); Fenwick, 2002(UK)
[19] Authors include: Martin, 2007(US); Friedrichs, 2006(UK)
[20] Authors include: Noorani, 1999(US); Harvey, 2000(UK)

equated a lack of human rights in the frequent exclusion of refugees seeking asylum. Human rights advocates have accused the United States of violating Article 3 in interrogation methods in Guantanamo. However, to what extent does the United States and the United Kingdom disregard human rights, in the event of deporting a terrorist to a place where s/he would or could be subject to torture?

The empirical analysis will be conducted through exclusion cases in the United States and the United Kingdom where the refugee is convicted of terrorist activity, or of voluntary/involuntary support of terrorism, but if deported has a risk of torture. The cases will be analyzed closely while referring back to the domestic legislations. This paper will assess what the important legislations the courts address are and if the severity of the terrorist activity of the refugee in question determines the outcome of the case. However, in order to review these cases, I will first look at the policies the United States and the United Kingdom have on exclusion, and more importantly their definition of terrorism.

The structure of this paper is as follows. The first chapter is a review of literature that introduces the literature on terrorism, human rights, and the U.S. and U.K. immigration policies. The second chapter will discuss the three Articles that are valid to this evaluation: Article 1F and Article 3. A detailed explanation of the articles will be given as well as a discussion of how the Articles interact with each other. The third chapter will apply the Articles addressed in Chapter 2 to the two case studies: the United States and the United Kingdom. The third chapter will essentially be a comparison of the two countries and their immigration courts. The chapter will begin with a comparison of how the two define terrorism and their immigration policies. The chapter will continue with an analysis of the exclusion cases.

Finally, this paper concludes with an analysis of the findings and possible new options for governments in exclusion clauses. If a country can not deport a terrorist suspect because of a risk of torture, then a third option should be on hand in order to prevent the terrorist suspect from becoming a risk to the community and, if necessary, escaping prosecution of a crime that falls under Article 1F. It should not be necessary to violate human rights for security, but we should also not risk security for the sanctity of human rights.

Chapter 1 - Literature Review

The literature on terrorism has been vast and plentiful since the September 11 attacks. Scholars, specialists, and experts have poured out their analysis, criticisms and thoughts on the subject of terrorism. Since the 9/11 attacks, the topic of terrorism has focused on the 'War on Terrorism', with the majority of the literature placing emphasis on the United States, the leader in the war against global terrorism.[21] Meanwhile literature on Europe and terrorism has focused more on terrorism within Europe, including the Irish National Liberation Army in Northern Ireland and the Basques in northern Spain, there is, however, also some literature focusing on Europe's balance of human rights while combating terrorism.[22] The Council of Europe even published its own book on "The Fight against Terrorism", which highlights the measures of fighting terrorism while respecting human rights.[23] However, numerous issues exist including how to define terrorism, and should a terrorist be granted the same human rights as any other person. In addition, as this paper will focus on, should deportation of a terrorist be halted if there is a threat of torture upon return?

The literature on human rights and terrorism grew vastly with the controversies of Guantanamo, Abu Ghraib, and other human rights abuses in the war against terror. Recent literature has highlighted the human rights abuses of interrogating and holding 'suspected' terrorists. The events of these occurrences have raised questions on the extent of human rights terrorists have. While there is no

[21] Some literature on this topic includes but is not limited to:
Parenti, 2002; Pillar, 2001; Perl, 2003
[22] E.g.: Hippel, Karin von. "Europe Confronts Terrorism." Palgrave Macmillan, New York, 2005
[23] Council of Europe. "The Fight Against Terrorism." 4th Edition. Strasbourg, 2007

doctrine listing all the rights of a terrorist, the Geneva Convention does exclude determined terrorists from the benefits of the 1951 Convention on Refugees under Article 1F.[24] While terrorism is a means of exclusion from refugee benefits, terrorists are still given the right to Article 3 of the Convention against Torture, where no one shall be subject to torture.[25] In these instances, Article 33 of the Geneva Convention, which states non-refoulement, may come into effect. Scholars have analyzed and written a plethora of literature on the interpretations and relationships of these three Articles.

Authors have closely looked at how states apply these three Articles into their domestic courts, the dilemmas of Article 1F and Article 3 and the potential abuse of Exclusion clauses. While analyzing Exclusion Clauses, Guy Goodwin-Gill mentions in his third edition of *The Refugee in International Law*[26] how some domestic courts, such as the United Kingdom and the United States, have implemented exclusion and extradition into their domestic laws and the potential abuse of the use of Exclusion clauses. Geoff Gilbert furthers this discussion with the dilemma of the Articles.[27] He makes the argument that "non-refoulement should not provide a means of impunity to serious non-political criminals."[28] The fear, he continues, is not that the refugee status will be tarnished if given to those who fall under Article 1F, but rather that the place the individual is seeking refugee status becomes a safe haven for the individual who does fall under Article 1F. He also acknowledges one of the main problems is:

> International refugee law is analyzed and expanded upon in domestic tribunals relying on domestic constitutions and legislation which might not incorporate the 1951 Convention in its original form, but combine different Articles into one

[24] Article 1F. "Convention and Protocol Relating to the Status of Refugees." United Nations High Commissioner for Refugees. 1951 and 1967.
[25] 1984 CAT A/RES/39/46
[26] Guy S Goodwin-Gill and Jane McAdam, 2007
[27] Erika Feller et al, 2003
[28] ibid, 2003, 427

> provision in a manner possibly contrary to the Convention, and without there being an 'International Refugee Tribunal' to which to appeal for an authoritative ruling on the meaning of the 1951 Convention.[29]

The issue he raises is one of the key factors of exclusion clauses. The United Nations may have documents on refugees and prohibition of torture, but the interpretations and implementation of the laws into domestic legislations are by the domestic courts. Thus, one member may very well interpret the Geneva Convention very differently from another member.

2.2 Literature and American Immigration Policies

Literature on American immigration policies has focused on the bias that is reflected in inclusion and exclusion cases. This literature has demonstrated that American policies have shown bias towards refugees coming from countries where the U.S. government opposes the policies of the other government, that the U.S. has attempted to become more humanitarian in its immigration policies, and that the interpretation of legislation can vary amongst cases.

Numerous authors have written on how the United States has shown a bias towards certain refugees coming from certain countries. During the Cold War, the United States was accepting of refugees coming from countries with communist governments. Meanwhile, refugees from certain Latin American countries with U.S. -supported dictatorships were often turned away. Gilbert et al demonstrates that this trend in American immigration has taken against countries where there appears to be

[29] ibid, 2003, 477

a "friendly relationship" compared to countries that are considered "enemies", in their example, the far-left Cuba versus the farther right Haiti.[30]

In 1980, the United States created the Refugee Act in order to abolish the bias trend and accept refugees more on a humanitarian level. Maurice Roberts analyzes how the Refugee Act of 1980 has changed Congress' view on refugee cases. Yet, similar to Gilbert's article, Marc Rosenblum recently determines, through a methodological analysis of the historical trends of American immigration, that American exclusion and inclusion largely weighs on the relationship the United States has with the state of the nationality of the refugee.[31] Rosenblum's article raises the issue of whether or not American immigration policies are still biased despite reformed legislative policies.

Despite the legislative policies, domestic cases can clearly still exhibit a bias and legislation can continue to be interpreted differently in cases. Martin et al analyze if the courts distinguish between the severity of cases and the interpretation of legislation when "terrorism" is involved. The authors specifically scrutinize the language of Congress on 'material support' through two different case studies. The authors state, "the BIA [Board of Immigration Appeals] and the courts are only beginning to consider the legal questions raised by the executive branch's interpretation of the material support provision, particular in cases involving support that was negligible or provided at the point of a gun."[32] What the authors provide is a critical look at a strict adherence to legislation despite the circumstances. In one of the cases, a Burmese woman who was found providing support in the form of money payment to the Chin National Front (CNF), a group that has used violence to oppose

[30] Loescher Gilbert and John Scanlan, 1984, 313-356
[31] Marc Rosenblum and Idean Salehyan, 2004, 677-697
[32] David Martin et al, 2007, 413

the current military dictatorship government, whose 'legislative acts' are not recognized by the United States.[33] Yet, the courts ruled that the refugee did not qualify for asylum because of the actions by the CNF mirrored terrorist activity. Thus, despite the United States not recognizing the Burmese government, the refugee, acting arguably in line with American foreign policy, and that if deported to Burma she would be subject to torture, the courts still ruled that she did not qualify for asylum because her financial assistance to the group was considered 'material support'. This case explores how courts can meticulously read legislation without considering the severity of the situation and the level of "terrorist activity" of the defendant.

Martin et al's article raises the question whether the United States place state security over human rights. The U.S. claims to abide by human rights. Yet, A.G. Noorani, in her article "Amnesty and Human Rights in the U.S." argues that the U.S. is a hypocrite "in claiming to be a champion of human rights."[34] Many critics of Guantanamo and the Iraq War would also agree the United States lacks in human rights defense, especially in the face of state security. Thus, perhaps the question of "does the United States place security over human rights?" lies beyond the scope of this paper, but the question rather is whether immigration cases that involve 'determined terrorists' who face torture upon return, in fact are denied non-refoulement and are returned despite Article 3.

[33] ibid, 421
[34] A.G. Noorani, 1999, 2375

2.3 Literature and British Immigration Policies

The United Kingdom, similar to the United States, has faced immense criticisms on the human rights abuse front, many of those related to immigration aspects.[35] Up until the 1950's, the United Kingdom was a country of emigrants. Even then, most of the UK's immigration in the post-WWII era was from the Commonwealth states. However, as the country began to receive immigration at a faster rate from all varieties of location, the government tightened the strands of immigration flow into the country.[36] The attacks on September 11, 2001 brought dramatic and swift policy changes on immigration. As such, much of the literature on British immigration policies refers to migration trends, criticism of new post-9/11 immigration policies, and the lack of protection of human rights.

Colin Harvey addresses the criticisms of UK asylum in his book "Seeking Asylum in the UK: Problems and Prospects." He states "that the UK has constructed a legal regime which has been subjected to sustained criticism from a variety of quarters."[37] He later makes the argument that "the UK, like many other European states, has advanced a policy anchored in the principles of deterrence and restriction."[38] However, the book was published in 2000, before the 9/11 attacks. Thus, Harvey's book demonstrates that UK asylum was under criticism before the excuse of 9/11 for harsher exclusion clauses.

[35] Christian Joppke 1998,131
[36] Randall Hansen, 2000, 244
[37] Colin Harvey, 2000, 137
[38] ibid, 138

The Anti-Terrorism, Crime and Security Act (ATCSA), which was adopted by Parliament on December 13, 2001, only three months after the 9/11 attacks, certifies under Section 21 that international terrorists can be deported from the United Kingdom.[39] Though this section is a further implementation of Article 1F of the 1951 Convention, critics argue that an emphasis will be placed on exclusion over human rights. Evelien Brouwer argues that in Section 21 of the ATCSA the protection of the refugee is dismissed and exclusion can prevail since the decision does not require an ample evaluation of the situation in order to exclude someone from protection.[40] Randall Hansen furthers the discussion in his analysis of the British governments efforts to restrict immigration through primary and secondary legislation.[41]

Similar to the United States, a question rises as to how the domestic courts utilize these Articles in exclusion cases. How is the UK prioritizing human rights and security? Under the ATCSA, a terrorist can be deported from the UK. However, in the event that that terrorist would be subject to torture, how does the UK handle the case?

2.4 Conclusion

Cases that involve Exclusion and Article 3 CAT/ECHR will be further looked at in Chapter Three when a look at cases from the United States and the United Kingdom will be analyzed and compared. Furthering the literature already written on these two countries' policies', an analysis will be made of how these two countries implement the Geneva Convention in their domestic policies - specifically Article 1F, Article 33, and Article 3 – and how the domestic courts interpret their own domestic

[39] Section 21 of the Anti-Terrorism, Crime and Security Act 2001, can be found at: http://www.opsi.gov.uk/acts/acts2001/ukpga_20010024_en_1
[40] Evelien Brouwer, 2003, 414
[41] Randall Hansen, 2000, 244

legislations in real cases. A dilemma has already been established on the lack of a definition for terrorism, and the disparate interpretations and usage of Exclusion clauses in domestic courts. The paper will attempt to further the argument on the interpretation the United States and the United Kingdom make with Exclusion clauses, terrorism and human rights, while following the question, how these countries construe human rights and security in the world of law.

Chapter 2 - Exclusion and Torture Clauses

For the purpose of this paper, it is important to understand certain Articles of Conventions of the United Nations: specifically Article 33 and Article 1F of the Convention on the Status of Refugees and Article 3 of the Convention on Torture. It is important to note the relationship of theses Articles and whether they conflict in any way during interpretation of the Conventions. Numerous domestic cases in the United Kingdom and the United States have shown that courts will easily rule that Article 1F applies, but because of Article 3, deportation is halted. These cases show that while the domestic courts of these two countries still hold the power to interpret the United Nations conventions in their own way, they tend to comply with the convention rules. Also, it is seen that Article 3 Prohibition Against Torture heavily weighs in the decision on deportation despite state security.

The 1951 Convention on the Status of Refugees is the United Nations' principal legal document on the definition of refugees, their rights, and the legal obligations of the states. In Article 1, for the definition of the term "refugee", the Convention states that:

> (1) Has been considered a refugee…(according to the interwar arrangements and the IRO constitution.
> (2) As a result of events occurring before 1 January 1951 and owing to 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.[42]

[42] Article 1. Convention and Protocol Relating to the Status of Refugees. United Nations High Commissioner for Refugees. 1951 and 1967.

Thus, the refugee must show that he or she has a "well-founded fear of persecution".

Yet, in order to prevent an abuse of the rights and privileges of refugee status, the writers of the convention included an exclusion clause under Article 1F, in order to prevent those who have committed horrendous acts of crime from benefiting from the convention. Article 1F has prevented those who have committed war crimes and genocide, such as in the former Yugoslavia or Rwanda from receiving asylum and escaping prosecution for their crimes.

When the drafters of the convention wrote the document, with the Nazi genocide and war crimes fresh on their minds, they determined that there were certain crimes that were so execrable that those who committed these crimes did not deserve protection from the law. As Volker Türk states, "certain acts are so grave that they render their perpetrators undeserving of international protection and the refugee framework should not stand in the way of serious criminals facing justice."[43] The drafters wanted to avoid the abuse of the refugee status and also that those who had committed heinous crimes during the Second World War did not escape prosecution. The exclusion clauses forces perpetrators of certain horrific crimes to meet justice as well as protect the host community from security dangers. "The purpose of the exclusion clauses is therefore to deny refugee protection to certain individuals while leaving law enforcement to other legal processes."[44]

Article 1F lists three ways in which a person can be denied refugee status. The article reads as follows:

> F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that.

[43] Erika Feller et al, 2003, 29.
[44] UNHCR. "Exclusion from Refugee Status." Global Consultations on International Protection. 3-4 May 2001.

> (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.[45]

Terrorism would fall under Article 1F(b), 'a serious non-political crime', as well as, in some instances, under Article 1F(c), 'contrary to the purposes and principles of the United Nations.' In order for a refugee to fall under Article 1F(b), the crime must have been preceding the entry to the country of refuge.

However, terrorism has not been directly defined. That is, the Convention on Refugee Status has not labeled which activities are considered to fall under terrorism and thus would fall under Article 1F(a) or Article 1F(b) for exclusion. Because of a lack of a clear international definition on terrorism, a concern of the interpretation pertaining to 'non-political crimes' was brought to issue as "the area on which State practice varies the most, and is therefore the subject of closest scrutiny."[46] As a result, the interpretations differ in different state jurisdictions on what is considered terrorism and what is considered a non-political crime.

Since there is no internationally agreed upon definition of terrorism, states are left to define this vague term on their own. While some states may not even have definitions implemented into their domestic laws, governments such as the United States, the United Kingdom, and the European Union have created their own definitions on terrorism. However, Geoff Gilbert recognizes a dilemma with this situation:

> Part of the problem is that international refugee law is analyzed and expanded upon in domestic tribunals relying on

[45] Article 1F. Convention and Protocol Relating to the Status of Refugees. United Nations High Commissioner for Refugees. 1951 and 1967.
[46] Erika Feller et al, 2003, 29.

> domestic constitutions and legislation which might not incorporate the 1951 Convention in its original form, but combine different Articles into one provision in a manner possibly contrary to the Convention, and without there being an 'International Refugee Tribunal' to which to appeal for an authoritative ruling on the meaning of the 1951 Convention.[47]

As Gilbert says the drafters of the Geneva Convention and CAT can draft the articles on refugees and torture, but the interpretation of how these articles are carried out relies on the domestic courts of each member state.

The United States government, for instance, may view terrorist activity very differently from the government of Iran or Syria. What the U.S. views as terrorists, other governments may view as a group of oppressed people fighting for freedom using very desperate measures. In very banal terms, 'one man's terrorist is another's freedom fighter.'

While the United Nations has spoken more pronouncedly against terrorism in recent years, declarations and conventions against terrorism continue to lack a clear definition. The Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism 49/60 of 9 December 1994[48] has no definition of terrorism but states that the methods and means of terrorism go against the purposes and principles of the United Nations. Similarly, the UNGA Res. 53/108 on Measures to Eliminate International Terrorism states that:

> Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of political, philosophical, ideological, racial, ethnic, religious or other nature that might invoked to justify them.[49]

[47] Erika Feller et al, 2003: 426
[48] 'Declaration to Supplement the 1994 Declaration on Measure to Eliminate International Terrorism', 49/60 of 9 Dec 1994
[49] UNGA Res. 53/108

In addition, the 1998 International Convention for the Suppression of Terrorist Bombings[50] avoids a definition on terrorism, but "outlaws those international bombings in public places causing death or serious bodily injury or extensive destruction resulting in major economic loss."[51] Even the International Convention for the Suppression of the Financing of Terrorism[52] takes a definition of terrorism based on the United Nations conventions and declarations. Therefore, there is no internationally recognized definition of terrorism. Definitions and interpretations of terrorism, as well as non-political crimes, are, thus, left potentially to be antithetically determined by the domestic courts of the member states.

Along with Article 1F, the writers of the 1951 Convention implemented a 'no return' clause under Article 33 of the Convention on Refugee Status, which gives refugees the right of non-refoulement and prohibits states from sending refugees back to their origins if a "well-founded fear of persecution" indeed exists:

> No contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion.[53]

The article continues by saying that:

> The benefit of the present provision 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 which 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.

[50] International Convention for the Suppression of Terrorist Bombings, 1997
[51] Erika Feller et al, 2003, 442
[52] International Convention for the Suppression of the Financing of Terrorism. 1999
[53] Article 33(1). Convention and Protocol Relating to the Status of Refugees. United Nations High Commissioner for Refugees. 1951 and 1967.

Thus, Article 33 reiterates Article 1F that certain persons are not capable of having the benefits of the 1951 Convention. However, while a terrorist may be excluded from the 1951 Convention, non-refoulement in the form of withholding deportation may still be enforced if there is a probability of torture.

Article 3 of the 'UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (also known as CAT) prohibits anyone from being subject to torture.[54] The CAT does not exclude anyone from the rights that it provides. A judge in the Canadian Courts once ruled during a deportation hearing of a terrorist who would be tortured upon return that:

> Article 33 of the Refugee Convention protects, in a limited war, refugees from threats to life and freedom from all sources. By contrast, the CAT protects everyone, without derogation, from state-sponsored torture.[55]

Thus, terrorists may be excluded from the benefits of the 1951 Convention on Refugee Status, but they are not excluded from the basic human rights that no one shall be subject to torture. If upon deportation, the terrorist may be exposed to torture, then non-refoulement is enacted.

In the case of Ward vs. Canada,[56] the defendant's appeal for non-deportation was granted based on the threat of torture and execution if returned to Northern Ireland. Ward was a member of the Irish National Liberation Army (INLA) in Northern Ireland. While watching hostages who were to be killed, Ward, morally, helped the hostages escape. The INLA found out, detained Ward, tortured him, and sentenced him to death. When Ward escaped the INLA and sought police protection, he was detained for taking

[54] UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.
[55] 1966 International Covenant on Civil and Political Rights
[56] Canada (Attorney General) v. Ward, 1993

part in a hostage take with the INLA. After three years in prison in Northern Ireland, Ward was able to escape to Canada on an Irish passport and sought asylum. At first the Canadian Minister of Employment and Immigration determined that Ward was a threat to the Canadian community and Canadian state, acknowledging him as a member of a terrorist group. The courts stated that:

> Exclusions on the basis of criminality have been carefully drafted in the Immigration Act to avoid the admission of claimants who may pose a threat to the Canadian government or to the lives or property of the residents of Canada.[57]

However, while Ward was determined as a threat to the community, the courts eventually ruled that upon his return to Northern Ireland, he would be subjected to torture and possible death. Thus, the deportation appeal was accepted.

In a similar case, the case of Suresh vs. Canada, the defendant was detained and sentenced to deportation before the Supreme Court of Canada eventually accepted the UNHCR's argument in the 1951 Convention.[58] The case describes that in 1995, the applicant, Manickavasagam Suresh, arrived in Canada from Sri Lanka and applied for immigrant status. However, the Canadian Security Intelligence Service detained him because he was determined as a member and fundraiser of the Liberation Tigers of Tamil Eelam, "an organization alleged to be engaged in terrorist activity in Sri Lanka," but "whose members are also subject to torture in Sri Lanka."[59] The Federal Court declared the applicant "a danger to the security of Canada under s. 53(1)(b) of the Act."[60] Notwithstanding the decision that the applicant was a member of a group

[57] Canada (Attorney General) v. Ward, 1993
[58] Suresh v. Canada, 2002
[59] ibid, 2002
[60] ibid, 2002

that committed terrorist acts, the applicant was given a new deportation hearing because it is known that members of the Liberation Tigers of Tamil Eelam are subject to torture in Sri Lanka. The Federal Court re-evaluated the deportation of the applicant. The courts stated that, "Canadian law and international norms reject deportation to torture. Canadian law views torture as inconsistent with fundamental justice."[61] The Court ruled in favor of Article 3 of the Convention on Torture.

However, comparable to the problem of states defining terrorism or interpreting the 1951 Convention, states may interpret differently the importance of human rights and the security of the state. While Article 3 may prevent a terrorist from being deported because of a threat to torture if returned, the state in which the applicant is in takes the burden of harboring a potential danger to its community. Volker Türk explains:

> There must be a rational connection between the removal of the refugee and the elimination of the danger, refoulement must be the last possible resort to eliminate the danger, and the danger the country of refuge must outweigh the risk to the refuge upon refoulement.[62]

In other words, the danger of the states must be at a higher risk than the danger of the refugee in order for non-refoulement not to apply. Türk continues that "International law generally rejects deportation to torture, even where national security interests are at stake."[63] But the interpretation of the risk and the implementation of carrying out non-refoulement are based on the state. In one Canadian case, the courts ruled that, "the rejection of state action leading to torture generally, and deportation to torture specifically" as "virtually categoric", insisting that "both domestic and international jurisprudence suggest that torture is so abhorrent that it will almost always be

[61] ibid, 2002
[62] Erika Feller et al, 2003, 12
[63] ibid, 12

disproportionate to interest on the other side of the balance, even security interests."[64] Nevertheless, it continues to be determined how national, regional, and international courts will establish cases on the danger to the state and the threat to torture upon return.

In the next chapter, the United States, the United Kingdom, and the European Court on Human Rights will be compared in how they identify the risk to the state versus the threat of torture upon return for accused terrorists. How do these states/regions construe human rights and security of the state.

[64] Erika Feller et al, 2003, 13

Chapter 3 - The Domestic Courts

3.1 Defining Terrorism

As mentioned in the previous chapter, there is no international definition for terrorism. While the United Nations has made declarations on fighting terrorism, a clear definition continues to be needed. Many have endeavored to find a definition, yet as one author stated "a definition is no easier to find than the Holy Grail."[65] Jörg Friedrichs asks, "who shall have the power to define international terrorism?"[66] Ultimately, he argues, defining international terrorism is determining the international public enemy. Referring to the German political theorist of the early 20th century, Carl Schmitt, Friedrichs presents the dilemma of who decides the international public enemy. While the 'Third World regimes' agree with the West that "terrorism is a common threat", they would like to "tie these hegemonic powers [specifically the United States and the United Kingdom] by a legal definition."[67] However, it is the lack of a legal definition that allows these 'hegemonic powers' like the United States and the United Kingdom to determine who the international public enemy is, who they prefer to label this way on a case-by-case basis.

In addition, it is the lack of a legal definition that allows the United States and the United Kingdom, as well as the European Union, to create their own definitions of terrorism, and essentially determine whom the public enemy is. Lord Carlile of the British House of Lords determines that defining terrorism "is the result of a search

[65] G. Levitt, 1986, 97
[66] Jörg Friedrichs, 2006, 69
[67] ibid, 2006, 70

more for a classification than a definition."[68] Yet it is this 'classification' that the United States, the United Kingdom, and the European Union have searched for in order to determine who is a terrorist and who falls under Article 1F. While the United States and the United Kingdom have similar definitions, they differ enough to alter certain policies.

After 9/11, the U.S. Congress brought new provisions into legislation towards terrorism. The United States has defined terrorism under the Federal Criminal Code, 18 U.S.C. §2331, as:

> …Activities that involve violent… or life-threatening acts… that are a violation of the criminal laws of the United States or of any State and… appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping…[69]

As such, any activity or event that merely resembles the definition can result in exclusion from entry and/or asylum. Only a month after the 9/11 attacks, Homeland Security released a Presidential Directive highlighting the points of preventing terrorist sympathizers and supporters from entering the US.[70] The directive declares:

> It is the policy of the United States to work aggressively to prevent aliens who engage in or support terrorist activity from entering the United States and to detain, prosecute or deport any such aliens who are within the United States…deny entry into the United States of aliens associated with, suspected of being engaged in, or supporting terrorist activity; and locate, detain, prosecute, or deport any such aliens already present in the United States.[71]

[68] Lord Carlile, 2007, 7
[69] US Code, Title 18, Chapter 113B, Terrorism, 2007
[70] Homeland Security, 2001
[71] Homeland Security, 2001:

Several reports and policies have emerged since the 2001 Directive where terrorist acts, aiding, and support are defined.[72] The 2001 Directive clearly states that even aiding terrorists will result in exclusion and possible deportation.

The United Kingdom first defined terrorism under the Prevention of Terrorism (Temporary Provisions) Act 1989. Terrorism was defined as "…the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear." However, as Lord Carlile of Berriew Q.C. points out in his report on the Definition of Terrorism, the definition was very broad. As he reveals, the definition was very broad in the sense of what actions it included. He continues by stating that "it restricted in terms of intention/design, in that it excluded violence for a religious end, or for a non-political ideological end."[73] The definition was amended in the Terrorism Act 2000, where the current definition of terrorism used in the UK legal system is found in Section 1, Terrorism Act 2000.[74]

Two months after the 9/11 attacks, Parliament introduced the Anti-Terrorism, Crime and Security Act 2001 (ATCSA). Section 21 of the ATCSA certified that an international terrorist could be deported from the UK.[75] However, in December 2004, *Part 4 Immigration and Asylum* of the Act was found contradictory with the European Court of Human Rights. Part 4 of the Act "certified - and subsequently indefinitely detain without charge or trial -- non-deportable foreign nationals as 'suspected international terrorists' and a 'national security risk'"[76] The main issue is that foreigners could be detained without trial and deported regardless of human rights

[72] Other policy reports include but are not limited to: 108th Congress Report, House of Representatives, Second Session, "Intelligence Reform and Terrorism Prevention Act of 2004. – and – Garcia, Michael John. "Immigration: Terrorist Grounds for Exclusion and Removal of Aliens." *CRS Report for Congress*. 22 January 2008
[73] Lord Carlile, 2007, 3
[74] Section, Terrorism Act 2000
[75] Section 21, ATCSA 2001, found at: http://www.opsi.gov.uk/acts/acts2001/ukpga_20010024_en_1
[76] Found at: http://www.amnesty.org/en/library/asset/EUR45/033/2004/en/d72c9bb2-d544-11dd-8a23-d58a49c0d652/eur450332004en.html

violation. On December 16, 2004, the Law Lords ruled that it was unlawful to detain without trial nine foreigners at HM Prison Belmarsh under Part 4 of the ATCSA.[77] Following the ruling, the ATCSA was replaced by the Prevention of Terrorism Act 2005:

> An Act to provide for the making against individuals involved in terrorism-related activity of orders imposing obligations on them for purposes connected with preventing or restricting their further involvement in such activity; to make provision about appeals and other proceedings relating to such orders; and for connected purposes.[78]

The Prevention of Terrorism Act allows the Home Secretary to impose 'control orders' on those suspected of involvement with terrorism and restricts the individual's liberty for the purpose of "protecting members of the public from risk of terrorism."[79] Similar to the U.S.A. Patriot Act, the 'control orders' forces the individual who has a 'control order' imposed on him/her to be subject to a search of his personal belongs and residency, restriction of movement, and strict temporary rules to what s/he can or cannot do.

Both countries provide that terrorism includes a type of violent act against a population for the reasons of intimidation or harm. Yet while the two definitions may mirror each other, it is how the definitions are thus applied to the domestic legislations that differ. Both the United States and the United Kingdom have applied the definition in order to create Acts that give vast executive powers; in the US the Patriot Act of 2001, and in the UK the Prevention of Terrorism 2005. Referring back to Friedrich's claim, it is perhaps in favor of to the Western powers, such as the US and the UK, that there is no international legal definition of the term terrorism. After

[77] A(FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent), 16 December 2004: http://www.parliament.the-stationery-office.co.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm
[78] Prevent of Terrorism Act 2005, Chapter 2. Found at: http://www.opsi.gov.uk/acts/acts2005/ukpga_20050002_en_1
[79] ibid

the United Nations failed to agree on an Anti-Terror Action in September 2005, critics wondered if the US's and UK's initiative "was really intended to solve the problem of a consensus definition of international terrorism, or whether it was not rather meant to raise the stakes so high that the entire project would fail altogether."[80] Though the UK was one of the few countries in Europe to have a definition of terrorism before 9/11, it opposed a definition at the UN. The British permanent representative at the UN said in October 2001:[81]

> There is common ground amongst us all on what constitutes terrorism. What looks, smells and kills like terrorism is terrorism…but there are also wars and armed struggles where actions can be characterized, for metaphorical and rhetorical force, as terrorist. This is a highly controversial and subjective area, on which, because of the legitimate spectrum of viewpoints within the United Nations membership, we will never reach full consensus…Our job now is to confront and eradicate terrorism pure and simple: the use of violence without honor, discrimination or regard for human decency.[82]

Since the 9/11 attacks, and again after the July 2005 attacks, the UK along with the US have taken strong measures on the front against terrorism. As for a lack of an international legal definition, it is in the US's and UK's advantage that no definition exists. Without one, the two countries are free to define the term themselves, and determine who the international public enemy is on a case-by-case basis. And as Friedrich argues, in so determining the public enemy in this manner, "the United States has been acting according to an old motto coined by a Roman lawyer: 'Omnis definitio in iure periculosa.'"[83] As such, the

[80] Jörg Friedrichs, 2006, 82
[81] ibid, 2006, 84
[82] Greenstock in UN Doc. A/56/PV.12 (1 Oct. 2001)
[83] ibid, 2006, 89
"Any definition in law is dangerous" (Iavolenus).

US and the UK are free to determine who falls under their provisions for terrorism and who qualifies for exclusion.

3.2 Refugee Law of the United States and the United Kingdom

3.2.1 United States

The United States was created and built on by immigrants. Many of those immigrants came to the U.S. seeking refuge from their home government for reasons that include religion, race, and ethnicity. Yet, in the realm of humanitarianism, the United States has not always had its borders open to all refugees, showing a bias to applicants from certain countries and backgrounds.

When the Geneva Convention first implemented the 1951 Convention on Refugees, the United States did not ratify it. Further, "the 1952 Immigration and Nationality Act (INA) made no provisions for humanitarian admissions."[84] It was not until thousands of Hungarians flowed over the closed borders of Hungary into Western Europe that Eisenhower was forced to respond with the Refugee-Escapee Act of 1957, which implemented refugee admission as one fleeing from Communism or a communist-dominated country.[85] It was not until the United Nations 1967 Protocol to the Refugee Convention did the United States, after immense domestic pressure, ratify the treaty on humanitarian grounds.[86] However, even with the ratification, Congress failed to implement the Convention into legislation.

Throughout the Cold War, the United States continued to define refugees as those fleeing from communism. A bias was shown towards refugees coming from

[84] Marc Rosenblum et al, 2004, 683
[85] Maurice Roberts, 1982, 4
[86] U.S. Senate, 1968

Cuba versus refugees coming from Haiti, and Nicaraguans over Guatemalans though both had similar conditions for refugee admittance. The latter groups of refugees came from U.S. supported governments compared to their counter-parts fleeing leftist governments.

Not until the 1980 Refugee Act, did the United States abandon the anti-communist definition for the United Nation's criteria.[87] Nevertheless, Marc Rosenblum and Idean Salehyan make the argument in their analysis of U.S. immigration policies that:

> U.S. Asylum policy favored countries with which the United States had military ties and positive diplomatic relations during the Cold War (in addition to discriminating against Cold War adversaries); but in the post-Cold War period, U.S. asylum enforcement favored trade partners and sought to prevent undocumented immigration.[88]

Thus, while the United States eventually implemented humanitarian guidelines based on the United Nations into its immigration policies, it continued to have a bias towards certain refugees depending on their origin. Since 9/11, for security purposes, the United States has scrutinized refugees and immigrants coming from Muslim countries.

On September 11, 2001, the attacks in New York City, Washington, and Pennsylvania, drastically changed American domestic and foreign policies. Immigration policies cringed tighter. Congress implemented new policies that defined terrorism and who fell under the categories of being a terrorist as seen in the previous section on *Defining Terrorism*. Since 9/11, Congress has continually expanded the conditions to which one can be considered a terrorist and thus qualify for deportation.

[87] U.S. House, 1979, 168
[88] Marc Rosenblum et al, 693

With regards to identifying state security versus a threat to torture upon return, Congress has taken a strict accordance to upholding state security. While the 1951 Convention determines exclusion based on the crimes committed by the perpetrator, Congress furthers that statement with regards to the security of the country, stating that non-refoulement is not available when "there are reasonable grounds for regarding the alien as a danger to the security of the United States."[89] Martin et al adds that:

> Congress has also added a provision to the withholding statute that equates in terrorist activity (and certain other connections with terrorism) with posing a security danger to the United States, INA § 241(b)(3)(B)(last sentence), and has added an explicitly ban on asylum for those involved in terrorist activity.[90]

Yet as Martin et al discusses in his article, terrorist activity does not just include a direct role in 'violent terrorist acts', but aiding or sympathizing with terrorist groups can also lead to deportation for an immigrant or refugee.[91] Even those who were forced to aid terrorist groups, but then fled, are still excluded from protection under this U.S. law. As such, a poor farmer in Sri Lanka who was forced to provide food and shelter to the Tamil Tigers or take the risk of the group harming his family would be excluded from protection just the same as the terrorist who flew one of the planes into the World Trade Center.

3.2.2 United Kingdom

The United Kingdom, on the other hand, did not become a country with a mass influx of immigrants until the post World War II era. Yet, as of 2008, the

[89] INA § 241(b)(3)(B)(iv)
[90] David Martin, 2007, 411
[91] ibid, 2007, 413

UNHCR ranks the United Kingdom as the third highest receiver of immigrants.[92] After July 7, the British Parliament tightened the reigns of immigration and deportation. Despite an issue that deportation, in the event that there is a threat to torture, would violate Article 3, Tony Blair made the statement after the July 7 attacks that deportation was a necessity to national security:

> The circumstances of our national security have now self-evidently changed and we believe we can get the necessary assurances from the countries to which we will return the deportees, against their being subject to torture or ill-treatment contrary to Article 3.[93]

The United Kingdom exerted its opinion on the European Court of Human Rights in the case of Saadi v Italy. When the ECHR determined that deportation of Saadi, an accused terrorist, would be a breach of Article 3 ECHR, the United Kingdom argued otherwise. As the third-party intervener, the United Kingdom argued:

> The threat presented by the person to be deported must be a factor to be assessed in relation to the possibility and the nature of the potential ill-treatment…national-security considerations must influence the standard of proof required from the applicant. In other words, if the respondent State adduced evidence that there was a threat to nationally security, stronger evidence had to be adduced to prove that the applicant would be at risk of ill treatment in the receiving country.[94]

The United Kingdom has, thus argued for a balance of human rights with state security.

[92] UNHCR: Asylum Levels and Trends in Industrialized Countries, 2009, 4-5
[93] Prime Minister Tony Blair, 2005
[94] Saadi v. Italy, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, 28 February 2008, available at: http://www.unhcr.org/refworld/docid/47c6882e2.html

3.3 Exclusion Cases

After reviewing several cases that included exclusion under Article 1F and withholding of removal under Article 3 of the CAT in the domestic courts of the US and the UK, several outcomes were discovered. First, the American and British courts do apply the Geneva Convention into domestic legislation and they do interpret them as fully as possible. Second, within the domestic systems, there are discrepancies among the interpretations. Both the US and the UK have a hierarchy of courts in immigration cases. While the lower courts tend to find the applicants more than not ineligible for asylum and withholding of deportation, the higher courts tend to take a deeper analysis and interpretation of the laws and evidence and frequently reverse the decision of the previous courts.

In the United States, the asylum process is complex partly because it involves two agencies: the U.S. Citizenship and Immigration Services (USCIS), located in the Department of Homeland Security, and the other is the Executive Office for Immigration Review (EOIR), located in the Justice Department. Deportation hearings are considered defensive asylum cases and are heard in the Immigration Court (Executive Office for Immigration Review) by an Immigration Judge.[95] If the Immigration Judge denies the petition, the applicant may appeal at the Board of Immigration Appeals (BIA). The BIA "is the highest administrative body for interpreting and applying immigration laws. It is authorized up to 15 Board Members, including the Chairman and Vice Chairman who share responsibility for Board management."[96] Decisions of the Board "are binding on all DHS officers and

[95] Trac Immigration. "The Asylum Process." 2009: http://trac.syr.edu/immigration/reports/159/
[96] United States Department of Justice. "Board of Immigration Appeals". Found at: http://www.usdoj.gov/eoir/biainfo.htm

Immigration Judges unless modified or overruled by the Attorney General or a Federal court. All Board decisions are subject to judicial review in the Federal courts."[97] While the BIA is the highest body to interpret and apply the immigration laws, the United States Courts of Appeals[98] can hear appeals denied by the BIA, and overrule the decision.

In the United Kingdom, asylum cases are heard first by the Secretary of State for the Home Department, also known as the Home Secretary. Similar to the U.S. Courts of Appeals, asylum petitions denied by the Home Secretary are reviewed in the Court of Appeal Civil Division.[99] The highest court the case will reach is the House of Lords, the highest court in the UK and the supreme court of appeal.[100]

The third outcome found was that cases are indeed taken on a case-by-case basis, where the level of participation of terrorist activity is closely taken in review. The cases are split up into two different groups: those accused of voluntary terrorist activity and those claiming they participated by involuntary means.

3.3.1 Terrorist Participation

In the cases where the applicant for asylum was accused of or found guilty of 'terrorist activity', thus falling under Article 1F, asylum and withholding of deportation were immediately denied in the lower courts. However, a higher court either reversed the ruling or remanded for further proceedings.

[97] ibid
[98] Information on the U.S. Courts of Appeals can be found at: http://www.uscourts.gov/courtsofappeals.html
[99] For more information on the Court of Appeal Civil Division: http://www.hmcourts-service.gov.uk/cms/civilappeals.htm
[100] The House of Lords: http://www.parliament.uk/

In the case of *Anwar Haddam,*[101] the applicant was denied twice by two US immigration judges before the BIA rejected the Immigration judges' findings that the applicant is ineligible for asylum based on his danger to the security of the United States and persecution of others. The BIA acknowledges that even if the applicant was found ineligible for asylum, under the CAT, he would be eligible for deferral of removal. The case proceeds as Anwar Haddam was found excludable under section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(7)(A)(i)(I)[102] because he was found to "had assisted in and incited the persecution of others" while in Algeria. The applicant was ordered excluded and deported from the United States. Yet, a deferral to Algeria was made in consideration of the CAT. The BIA later found that the Immigration Judge "erred in finding that there were 'reasonable grounds' for concluding that the applicant himself is a danger to the security of the United States," the decision of deferral of removal.

Similar to the United States, the United Kingdom's lowest courts tend to deny the refugees asylum, but whose decisions the higher courts usually reverse. In numerous exclusion cases in the UK, the Home Secretary will deny the application for asylum, but the appeal will be granted when presented in the Court of Appeal. For instance, the UK sees countless cases of ethnic Tamils coming from Sri Lanka seeking asylum. Many of the refugees file protection under that the Sri Lankan government has tortured them because the government claims they are part of the terrorist group LTTE. In the *R v Secretary of State for the Home Department*[103] case,

[101] Anwar Haddam vs. Immigration and Naturalization Service, A2000 (BIA 2000)
Similar Case: Nicolas Michael Singh, Petitioner v U.S. Attorney General, Respondent. 21 F.3d 1626 (3rd Cir. 2009)
[102] Section under Title 8 – Aliens and Nationality - that states who qualifies has Inadmissible aliens
[103] R v. Secretary of State for the Home Department, Ex parte Sivakumar (FC), [2003] UKHL 14, United Kingdom: House of Lords, 20 March 2003, available at: http://www.unhcr.org/refworld/docid/3f588eedb.html

the House of Lords granted an appeal for a new tribunal of asylum and non-deportation only after the evidence was analyzed whether or not the applicant was tortured because he was an accused terrorist or because he was being persecuted because of his race and nationality. Lord Hutton, one of the sitting judges on the case, declared, "the principle issue which arises is whether the persecution which the applicant feared was for reasons of race or membership of particular social group or political opinion."[104] The Home Secretary first denied him asylum stating that "Counsel for the Home Secretary submitted that persecution by agents of the state in the process of investigating suspected terrorist acts necessarily falls outside the protective net of Article 1A." The special adjudicator of the Home Department concluded the ill treatment of the application was "not the result of any political opinions he might have thought to hold, but of being suspected, however unjustly, of involvement in violent terrorism." However, Lord Hutton ruled that:

> The acts of torture inflicted in such a sub-human way on the applicant were not inflicted solely for the reason of obtaining information to combat Tamil terrorism but were inflicted, at any rate in part, by reason of the torturers' deep antagonism towards him because he was a Tamil, and the torture was therefore inflicted for reasons of race or membership of a particular social group or political opinion.

The ruling was to remit the case to the Immigration Appeal Tribunal with the new conclusions on the status of the applicant being tortured, not because of suspicions he was a terrorist, but based on his race and nationality. If the courts found that the Sri Lankans tortured him because of terrorist suspicion, he would not fall under Article 1A, but could fall under Article 1F.

Yet in cases where the applicants were found to fall under Article 1F, they were still granted at minimum non-deportation due to a threat of torture upon return.

[104] Case with similar issue: Gnanam v Secretary of State for the Home Department, 1999 Imm A.R. 436

In the case of *Yasser al-Sirri v Secretary of State for the Home Department*[105], the applicant was found guilty in Egypt of belonging to a terrorist organization. Further, the United States made an extradition request on Mr. al-Sirri, charging him with "providing material support to a terrorist organization, namely IG, and solicitation of crimes of violence." The applicant applied for asylum and when that was denied, appealed for non-deportation under Article 3 of the CAT. However, the Court of Appeal in this case ruled that since the Home Secretary denied the applicant of asylum based on the Egyptian convictions and the US grand jury indictment, and not on English findings, that the matter would have to be remitted for reconsideration.

Even when the English findings have shown that the applicant is or was a member of a terrorist organization, a minimal grant of non-deportation is given. As in the case of *MH (Syria) v Secretary of State for the Home Department*[106], the applicant was found to be excluded under the Article 1F for her participation in the Kurdistan Workers' Party (PKK).[107] Originally refused by the Secretary of State for asylum and protection of human rights, MH's appeal for human rights protection under Article 3 ECHR was granted under the second Immigration Judge, while she was denied asylum under Article 1F.

In these cases, a threat to the community appears not to have been great enough for the courts to deny withholding of deportation of the applicants. Even in the case of *HS (Terrorist Suspect – risk) v Secretary of State for the Home Department*[108], where HS was arrested by the anti-terrorist branch of the [UK]

[105] Yasser al-Sirri v. Secretary of State for the Home Department – and – United Nations High Commissioner for Refugees, 2009 EWCA Civ 222
[106] MH v. Secretary of State for the Home Department –and- DS v. Secretary of State for the Home Department, 2008 EWCA Civ 226
[107] A separatist militant organization recognized as a terrorist group by the EU and US. Formerly the PKK, now known as Kongra-Gel: http://www.state.gov/s/ct/rls/other/des/123085.htm
[108] HS (Terrorist Suspect – risk) Algeria CG v Secretary of State for the Home Department, 2008 UKAIT 00048

Metropolitan police, a strong case was made against his deportation on the fact that Algeria severely torture accused terrorists and a return to a threat of torture would be a prohibition of Article 3 ECHR. Despite a potential threat to the security of the state, the courts ruled that an appeal of deportation was allowed on both refugee and Article 3 ECHR grounds.

However, unlike the United Kingdom, the United States takes into strong consideration the threat the applicant holds towards the security of the state. Where Anwar Haddam was first denied withholding of deportation because the Immigration Judge found him a threat to the security of the United States before the BIA later found that he held no threat to the community, the applicant in *RE A—H--, Respondent v Board of Immigration Appeals*[109] was found "excludable" and ordered excluded by the Attorney General. The applicant, a leader-in-exile of the Islamic Salvation Front of Algeria,[110] was denied not only asylum but also withholding of deportation because there were "reasonable grounds for regarding [the applicant] as a danger to the security of the United States." The Attorney General noted that the phrase "danger to the security of the United States" means:

> Any non-trivial risk to the Nation's defense, foreign relations, or economic interest, and there are "reasonable grounds for regarding" an alien as a danger to the national security where there is information that would permit a reasonable person to believe that the alien may pose such a danger.

Similar to *HS v Secretary of State for the Home Department*, the US courts acknowledge that the applicant, if returned to Algeria risks the threat of torture and/or death. The Attorney General ruled, "The respondent presently faces a threat to his life or freedom if removed to Algeria." However, where the United States differs, is that

[109] A—H--, Respondent v. Immigration and Naturalization Service, 23 I. & N. Dec 774 (BIA 2005)
[110] "Terrorist acts committed by the armed Islamist groups in Algeria, including the bombing of civilian targets and the widespread murders of journalists and intellectuals on account of their political opinions or religious beliefs, constitute the persecution of others."

it does not automatically withhold deportation because of this threat to torture. In this case, the Attorney General remanded for further proceedings on the applicant's deportation and deferral of removal to Algeria. 'Deferral of removal' falls under §§ 241(b)(3), of the Immigration and Nationality Act of 1952, which implements the obligations under the CAT into US legislation. With deferral of removal, the government continues to have the "ability to remove the person to a third country where he or she would not be tortured."[111] In *A—H--, Respondent v Board of Immigration Appeals,* the government can still have the ability to remove the applicant to a third country, other than Algeria, where he will neither face torture nor be a threat to the security of the United States.[112]

The disparity among the courts raises the issue of the intended language of exclusion. As different states interpret international law differently, domestic courts may interpret domestic legislations differently. The U.S. Congress, for instance, included 'material support' as means of terrorist participation and, thus, means for exclusion. It's exactly what Congress intended to mean by 'material support' is the problem. The definition of 'material support' of terrorist activity includes:

> To commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training[113]

In this language, providing food and shelter to members of a terrorist organization would be means for exclusion from asylum.

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[111] Deferral of Removal. 1999. Found at: http://www.vkblaw.com/law/deferral.htm
[112] Similar case with deferral of removal: Harpal Singh Cheema; Rajwinder Kauer, Petitioners, v. Immigration and Naturalization Service, 350 F.3d 1035 (3rd Cir. 2003)
[113] INA § 212(a)(3)(B)(iv)(VI)

In *Charangeet Singh-Kaur v. Ashcroft*[114], the issue was whether or not Singh knowingly provided 'material support' to a terrorist organization.[115] Singh claimed membership in the Babbar Khalsa Group, a group he provides was to "protect and promote the Sikh faith." He also claimed membership in the Sant Jarnail Sing Bhindrawala Militant Group, whose goals were "to fight for and protect the religious and political cause of Sikh community." The Board of Immigration Appeals first ruled:

> We find that the described actions, of offering food and helping to arrange shelter for persons, constitute "material support," as contemplated by section 212(a)(3)(B)(iii) of the Act. The respondent further admitted that he had offered the described support to "militants who were engaged in terrorist activities." *See* Tr. at 65. As these militants were members of groups which were designated as terrorist organizations, by the United States Department of State, and on account of the respondent's admission that he was aware of their terrorist activities, we find that the respondent did in fact offer persons, who had committed and were planning to commit terrorist activities, material support. Capricious or manifestly contrary to the statute.'" Ahmed v. Ashcroft, 341 F.3d
> 214, 216-217 (3d Cir. 2003).

As such, the BIA concluded that Congress intended INA § 212(a)(3)(B)(iv)(VI) to "include provision of food and setting up tents within the definition of 'material support.'" The Attorney General determined:

> Although Singh himself denied participating directly in any violence, substantial evidence supports the BIA's determination that he knew or should have known the militant Sikhs to whom he provided food and shelter had committed or planned to commit terrorist activities within the meaning of the statute. That is sufficient to render Singh inadmissible under INA § 212(a)(3)(B)(iv)(VI)(bb). Because he was inadmissible, Singh did not meet the requirements for adjustment of status. INA § 245(a), 8 U.S.C. § 1252(a).

However, the issue in this case is the interpretation by the different courts of the language of Congress.

That the BIA's finding cannot be upheld is underscored

[114] Charangeet Singh-Kaur, Petitioner v. John Ashcroft, Attorney General United States of America, Respondent 385 F.3d 293 (3rd Cir. 2004)
[115] Similar case: Harpal Singh Cheema; Rajwinder Kauer, Petitioners, v. Immigration and Naturalization Service, 350 F.3d 1035 (3rd Cir. 2003)

> through the government's suggestion at oral argument that the provision of a cup of water to a terrorist could constitute "material support." I have no doubt that under the right facts; the provision of a single glass of water to a terrorist could be material support. If bin Laden were dying of thirst and asked for a cup of water to permit him to walk another half mile and detonate a weapon of mass destruction, such support "material" out of the statute.

The question remains, as to what exactly is designated as 'material support'. As such, the BIA has yet to prove that food and tents are considered 'material support.'

In a similar case, *Matter of S-K-*[116], the respondent was a member of the Chin National Front ("CNF"), a group not on the U.S. State Department's Foreign Terrorist Organizations List, but "an organization which uses land mines and engages in armed conflict with the Burmese Government."[117] The respondent provided money and other support to this organization. Upon seeking asylum in the US from the repressive Burmese government, she was denied on the basis of providing 'material support' to a group that uses violence for political means. The Immigration Judge ordered the respondent's deferral of removal under the CAT.[118]

3.3.2 Involuntary Participation

Forced participation is a harsh reality of many internal and external conflicts. Participation by force usually includes death threats to the individual or harm to family members if they refused to offer help or support. Many refugees have claimed that they were forced to help terrorist organizations. However, forced participation does not automatically remove the refugees from falling under 'terrorist activity'.

A Circuit Judge for the U.S. Attorney General denied asylum and withholding

[116] Matter of S-K-, 23 I&N Dec. 936 (BIA 2006)
[117] ibid

[118] In 2008, the CNF were no longer considered a terrorist group, and the respondent was granted asylum and the deferral of removal was vacated: Matter of S-K-, 24 I&N Dec. 475 (BIA 2008)

of removal to Rolando Hernandez in the *Hernandez v Janet Reno*[119] case because he had "assisted or otherwise participated in the persecution of [a] person on account of…political opinion" within the meaning of § § 101(a)(42) and 243(h)(2)(A) of the Act.[120] Hernandez claims that the Organization for People in Arms (ORPA) in his native-country, Guatemala, "impressed him into its service." He filed for appeal against deportation, citing Article 3 of CAT, that if returned to Guatemala he would risk persecution, torture and death by the ORPA for deserting them. However, based on Hernandez failing to meet his burden of proving otherwise, the courts found him ineligible for asylum and denied withholding of deportation.

In cases of involuntary participation, the U.S. courts hold that the refugee must prove their credibility. The Court of Appeals granted asylum and withholding of deportation under the CAT in the cases of *Sasetharan Arulampalam v Attorney General*[121] and *Matter of Rodriguez-Majano*[122] only after they proved their "testimony as credible."

Similarly, the United Kingdom applies the burden of proof the refugee to demonstrate his credibility that their participation was pressed upon by force. In *R (on the application of Sivakumar) v Immigration Appeal Tribunal Court of Appeal (Civil Division)*[123], the Appellant, an ethnic-Tamil from northern Sri Lanka, claimed he was forced to aid the LTTE and in so-doing, was taken in by the Sri Lankan forces and tortured on multiple occasions. The appellant was only granted asylum and withholding of deportation after the court determined that his mistreatment by Sri

[119] Rolando Hernandez, Petitioner, v. Janet Reno, n1 Attorney General, U.S. Department of Justice, 258 F.3d 806 (8th Circuit 2001)
[120] Similar case: Fernando Gomez v U.S. Attorney General, 11th Cir. 2009
[121] Sasetharan Arulampalam, Petitioner, v. John Ashcroft, Attorney General, Respondent, 353 F.3d 679 (9th Cir. 2003)
[122] Rodriguez Majano v Immigration and Naturalization Service, 19 I. & N. Dec. 811 (BIA 1988)
[123] R (on the application of Sivakumar) v. Immigration Appeal Tribunal, 2001 EWCA Civ 1196

Lankan forces was not because of suspicion of him being a member of the LTTE, but because of his ethnicity and race as a Tamil.

Determining cases where the refugee claims involuntary participation in 'terrorist activity' can therefore be problematic and delicate. However, it is important for these governments to take into consideration the involuntary participation factor. Otherwise, child soldiers, sex slaves, and the numerous other participants forced into association with terrorist activity or other war crimes, would have to all be excluded under the terminology of the governments' legislations.

3.3.3 Conclusion:

It is important to remember that in everything there are always exceptions. While the courts of the United States and the United Kingdom follow a trend in interpretation and systemic function, there can always be exceptions to these generalizations. These exceptions arrive because the courts of both countries consider each case individually.

Both are also similar in their interpretations by the courts. The lower courts – the Immigration Judges and the Home Secretary – tend to heavily weigh on state security, denying the refugee asylum and withholding of deportation. As the case moves up the ranks of courts, the higher courts tend to evaluate and interpret the laws closer, weighing Article 3 under the CAT and other exceptional evidence that would cause the refugee to be eligible for asylum and withholding of deportation. Discrepancies in interpretation among the courts are shown to be strong, with the higher courts often referring to the lower courts as "erring on law," and often "reject [their] findings," remanding the case for further proceedings.

Where the two legal systems differ, and the most important point for the argument of this paper, is the consideration of state security. While Article 1F excludes for the purposes of protecting the host community, Article 3 hinders deportation. The cases have shown that the courts, in most cases the higher courts, heavily refer to Article 3 when there is a threat of torture. Yet, in the event that the refugee continues to pose a threat to the security of the state, the US and the UK differ in their court outcomes.

In the cases reviewed, the UK courts rarely made mention to a threat to state security, but rather concentrated on granting the applicant withholding of deportation because of Article 3. The United States, on the other hand, frequently presented each case with the question of what threat the refugee poses to the security of the United States. Repeatedly, the Immigration Court and the BIA would claim the refugee posed a threat to security – as seen in the case of *A—H--, Respondent v Board of Immigration Appeals* and *Anwar Haddam*- and was, thus, ineligible for withholding of deportation. The Court of Appeals would many times reverse the ruling; however, in the circumstances that it agreed with the rulings of the lower courts, the refugee would be found "excludable" and "ordered excluded." In the event that a threat to torture exists and Article 3 would apply to force a non-return to the country of origin, the United States did not disregard the human rights clause in place of the security of the community. Instead, a deferral of removal is ruled, which in states that the refugee is either on temporary withholding of deportation or removed to a third country, where a threat of torture ceases to exist.

Human rights have shown that they play a heavy role in court cases that involve Article 3. At least for the United States, state security continues to play an important element in court decisions, while trying to uphold the Geneva Convention.

While the UK appeared to loudly voice deportation in regards to state security, the cases reviewed did not appear to represent that.

Conclusion:

Despite the United Kingdom and the United States being criticized for their lack of human rights, in the area of immigration, the higher courts for both domestic immigration courts have shown to favor human rights in the event when a threat to torture exists and Article 3 is applied. The judges in the US courts evaluate to make clear that there is no threat to the security of the state should non-deportation to the origin of the country be implemented under Article 3. However, providing the courts find a threat to the security of the state, a deferral of removal is granted. Under the deferral of removal, the alien is either granted temporary withholding of deportation until viewed safe to return without threat of torture, or deferred to a third country. The United Kingdom, on the other hand, made no reference in any of the cases of a third country deferral.

However, in the event of a risk to the security of the state, the United States' system appears more logical. A deferral to a third country does not jeopardize the security of the state, but at the same time there is no violation of human rights under Article 3. The problem would be finding a third country, which would then bear the burden, to receive the alien.

As with any paper, there are limitations to this research. First, it should be noted that while the majority of the cases were post-9/11, a few were decided before. While these cases may not contribute to the post-9/11 paranoia, they contributed to how the courts handle cases where exclusion is decided yet deportation is withheld under Article 3 due to a threat to torture.

Second, a broader analysis with more case studies would give a better analysis. In this paper, the United States and the United Kingdom were chosen based

on their copious amount of immigrants since 9/11, and because they were both victims of gruesome terrorist attacks. However, the United States and the United Kingdom are very similar in policies and legislation. Their position on the war on terror has made their actions quite similar to each other. A fuller analysis would include a variable that was not so similar. France, for instance, ranks in the top three with the United States and the United Kingdom with countries receiving the most immigrants.[124] However, France has not had a terrorist attack on the scale of September 11 or July 7 as the US and UK have. France, does, on the other, receive a large amount of immigrants from northern Africa, an area that has seen an increase in Muslim extremists and terrorist members with nationalities from this region. The paper presented two cases from Algeria where both aliens were found excluded from the Refugee Convention due to a past of persecution of others based on their religion nationality or race. It would be, then, interesting to view how France interprets Exclusion clauses, with an influx of immigrants coming from a Muslim extremist majority region. However, unlike the US and the UK, France has not been supportive of the Iraq and Afghanistan war, but rather has been incredibly vocal against it. Its opinions on counter-terrorism measures often clash with those of the US-UK coalition. This aspect is another reason why France would be a sufficient third variable.

Perhaps a better third variable would be Spain. Similar to the US and UK, Spain has had its devastating terrorist attack in Madrid on March 11, 2004. Unlike the US and the UK, however, Spain pulled its troops out of Iraq soon after the Madrid bombings. Yet, Spain receives a large influx of immigrants and refugees flowing from

[124] UNHCR: Asylum Levels and Trends in Industrialized Countries, 2009, 4-5

northern Africa. Thus, Spain would be a variable with a devastating terrorist attack, large immigration population – especially from northern Africa, and a less support supporter for the counterterrorism methods taken by the US and UK.

A deeper analysis would also include what happens to the refugees who have been excluded from the refugee convention, but under the circumstance are not allowed to be returned under Article 3. The United States analyzes the severity of the threat to security. If the threat is high, then the alien is deferred to a third country. However, who are these third countries and how does the US choose them? For the United Kingdom, what happens to the alien who cannot be deported? Is he brought back into society despite a threat to the community? Or is he imprisoned because of the presented threat? These are further questions that if having fewer limitations, would be beneficial to answer.

However, due to the limitations on this research paper, which included a limitation on time and a limitation on length, a comparison and analysis with more variables is beyond the scope of this paper and is best left for a further analysis on how states interpret Exclusion clauses and prioritize human rights and state security.

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