THE IMPACT OF INTERNATIONAL TERRORISM ON THE CONTEMPORARY LAW OF ASYLUM

BY

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Submitted in partial fulfillment of the requirements for the award of the Degree of Bachelor of Laws of the University of Zambia

November, 2004

THE UNIVERSITY OF ZAMBIA

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DATE: 03RD DECEMBER, 2004

DEDICATION

To Mulenga and Nsofwa

PREFACE

The right to seek asylum enshrined in international law. The matter is covered in the 1951 United Nations Convention Relating to the Status of Refugees and also in the Organisation of African Unity (OAU) (1969) Convention Governing the Specific Aspects of the Refugee Problems in Africa. Under the terms of these Conventions, there are exclusion clauses that guard against affording asylum to persons who have committed serious crimes The Conventions are carefully framed to exclude people who have committed particularly serious crimes (non political crimes), whilst ensuring sanctuary to those with a genuine need.

The principal aim of this essay is to assess the impact of international terrorism on the contemporary law of asylum. With the emerging threats of terrorist attacks world wide many states have been compelled to take up law reforms. These reforms have not only affected domestic criminal statutes but also those laws that deal with the recognition of refugees. This in essence has had an impact on the practice of asylum.

As states modified their laws in reaction to terrorism they have also made an effort to define who a terrorist. There are many different definitions of terrorism because each state has defined it in a different way. The essay considers definitions from three different countries and the United Nations and the conclusion is that it is not easy to come up with a universal definition of terrorism. The essay further considers the impact of these definitions on the contemporary

law of asylum. The concluding chapter of this essay offers some proposed recommendations.

It is submitted that countries redefining their laws should ensure that they do not disregard the essential principles of granting refugee to all persons fleeing persecution.

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ACKNOWLDGEMENT

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ABSTRACT

From the rainstorm of the mountains they get drenched, And because there is no shelter they hug a rock. (Psalms 24:8)

CHAPTER ONE

THE CONCEPT OF ASYLUM

The impulse to provide refuge to strangers in need is shared by virtually all cultures and religions. It is one of the most basic expressions of human solidarity. Like many forms of altruism, however, it is vulnerable in times of trouble, when individuals and states tend to become pre-occupied with their own interests. Today asylum remains the cornerstone of international refugee protection. It is the principal means through which states meet their obligations towards refugees in their territory. The grant of asylum removes the threat of forcible return and provides the refugee with sanctuary until a solution to his or her problem is found.

1.1 ASYLUM

The shape and content of the institution of asylum has varied at different points of time and culture. The concept itself has evolved over the years and has been affected by various problems and ideologies. From as early as the 18th century writers such as Grotius and Gentili described protection accorded to people who might today be regarded as refugees.[1] One might call this collection of pieces of work as the beginning of modern asylum law. This confirms the notion that the concept has a long history.

[1] For instance the early texts talk about people who were displaced internally and those fleeing their usual place of residence for various reasons including famine.

The concept itself has been in existence for at least 3,500 years in one form or another, in the texts and traditions of many different ancient societies.[2] In the Indian ancient tradition the concept has been traced to the right that every sovereign state who felt strong enough to maintain its position among the community of states had to give protection to anyone who had surrendered and taken refuge or shelter for the sake of his life. "Both secular and sacred literature abound in legends which established that it was a sacred duty of the king whose shelter any individual sook, (sought) to protect the refugee or *saranagat*[3] at all times..... The *Mahabhatha*[4] also speaks of the sacred duty of refusing to surrender a fugitive or a refugee to the enemy."[5]

The traditional view is that the right of asylum is no more than the right of each state to grant asylum to a fugitive alien.[6] This view is line with the traditional holding that international law only gives rise to rights and duties only between states, thus it is in the same light that the argument that a state is free to exclude aliens from its own territory arises. Even texts from the early period delimit no coherent doctrinal notion of asylum later on one of a particularly national discretionary or political form.

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[2] The State of the World Refugees: The challenge of Protection, (1993) Penguin, New York, 33
[3] A displaced or homeless person
[4] Holy Hindu scripture
[5] Nagendra Singh, *India and International Law: Ancient and Medieval*, (1975) Delhi, India P 48
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However, many scholars wrote of various hospitalities and protection accorded by princes or other authorities to one another and to citizens in various situations, but there was no uniformly recognised status by the name 'asylum' or any other name whose content could be assessed and whose attributes could be measured.[7] The protections and hospitalities, on which they wrote were thought to be binding, but were neither uniform nor integrated into a single doctrinal category. On the contrary they seemed to be responses to the particular need of those requesting protection.

Doctrinally, these texts speak less of a single status to be granted, which entailed particular rights and duties, than of a variety of protective activities encouraged by considerations of a universal legal and moral fabric for people who, for one reason or another, were 'unfortunate'.

Thus historically, those who were protected by states had little of importance in common. One found merchants fleeing debts, peasants seeking to escape feudal bonds or replace collapsing allegiances, children of mixed-class parentage seeking licence to trade, members of religious orders and their flocks seeking princely support or freedom of practice of their faith and traders seeking military assistance against pirates or in recovery of property at sea. Many of these individuals received the protection they sought merely by being present

[7] H Grotius , *The Law of War and Peace*, Cited in David Kennely's International Refugee Protection, Human Rights Quarterly, Vol 8 No. 1 (1986)

elsewhere, for example in a different religious area, while others received special assistance.[8]

In this early period these people were referred to as 'exiles' (voluntary and non-voluntary) and 'suppliants' but these were not status categories.[9] Exiles were those who had left home seeking to settle elsewhere as a result of some fear of a disaster. The reasons mentioned for such exile included religious persecution, criminal persecution, war, slavery, and general misfortune. It is important to note that these conditions did not trigger a legitimate exile status but merely described some of the reasons people might flee. Princes welcomed exiles not because their status triggered a duty, but because it was just to do so unless there was some reason rendering it unjust to do so. Since the welcome granted was not triggered by the doctrinal structure of the exile it was never doctrinally elaborated.

Suppliants on the other hand, referred to people requesting that a sovereign right a wrong or protect an interest. A suppliant, for example, might be an exile requesting assistance in recovering property. Although the texts reflect a general sense that such requests should be granted unless it is unjust to do so, the crucial point is that the early writings by various authors were not concerned about ascertaining an obligation but about elaborating the conditions of justice. Thus, the practice of protecting exiles from the claims of their home sovereigns is

[8] David Kennely, International Refugee Protection, Human Rights Quartely, (Vol 8 No. 1) 1986 Pg 43

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discussed, not as an aspect of asylum but as one of a number of limits upon a sovereign's ability justly to acquire and sustain rights over subjects. The granting of immunities to suppliants against persecution is taken up in the elaboration of the justice of sharing punishments among rulers and ruled, that is as a consequence of guilt, not discretion.[10]

The early European tradition differed remarkably from the vision of asylum which we see through the lenses of an international notion of refugee status. The European traditional view did not define asylum as a condition with specific international legal attributes. In the modern word however, this seems to be a failure, an absence of legal status, and a deficiency in the elaboration of International Law. It seems so because in this modern vision, to be beyond legal status is to be nothing, to be whimsy or politics.[11] In the early vision however, this lack of a definition was not a deficiency because the need for a legal status simply did not arise in a world which neither placed the sovereign at its center nor distinguished law from politics and morality. Rather, a wider range of people received, as matter of their just due, a variety of solutions in unfortunate circumstances.

The nineteenth century positivist typically viewed asylum as a sovereign right of states, a vision at odds with both our own and its predecessor. This notion

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[9] H Grotius , *The Law of War and Peace*, (1625) P 232 Cited in David Kennely, International Refugee Protection, Human Rights Quarterly (Vol 8 No. 1)
[10] Kennely P 43
[11] Kennely, P 45

developed progressively as scholars differentiated international from municipal law and positive law from morality and politics.[12]

Does a state in fact owe a duty to admit aliens in its territory as a duty of the norm of international law? Some writers such as Weis stated that general International law as at it is at present constitute the so called right of asylum of states not to individuals.[13] What seems to come out is the proposition that asylum is actually owed to the state and not an individual. This proposition has been supported by writers such Professor O'Connel who argued that the state is not obliged to admit aliens to its territory.[14] From these views expressed it can be seen that there is a conclusion that while states may have an obligation *vis-a-vis* the international community, it still remains up to the state to decide whether to grant asylum or not. However, for matters concerning a person fleeing from political, religious, or racial persecution the state seems to have a moral obligation to admit such an alien into its territory.

A question one may ask is whether the state must be allowed to regard asylum as a matter of moral obligations to the effect that the state can solely decide to send back a person fleeing and return him to a place where there is an imminent danger to his life. This view is historical as can be observed from the facts that were illustrated above. Earlier there was no notion of legal status as such

[12] Richard Plender, *International Migration Law*, 2nd Edition, (1988), Martinus Nijhoff Publishers, P 123
[13]Paul Weis, *Legal aspects of the 1951 Convention Relating to the Status of Refugees*, (1953) Martinus Nijhoff Publishers 478
[14]D O'Connel, International Law, Human Rights Quarterly, 1970, Volume II, 740

although there has been a shift in the rule in modern international law. The right to asylum has now been recognised as part of human rights, thus as a right it entails that it has to be respected. Although, it is a special type of right as it is applicable to a particular category of persons i.e. it is not of general application like other types of human rights.

The starting point in the treatment of contemporary law of asylum is the consideration of a right to asylum. It must be admitted that there ought to be a distinction of course between the right of asylum (or the right to grant asylum) and the right to asylum which is more controversial. These two rights are treated as compatible dimensions of international law of asylum because one is seen to be a right of one sovereign against another while the other is seen to be an individual's right against a sovereign[15]. The controversy about these rights is seen as a deficiency or a failure in the legal regime to provide adequately for both of these rights. It is argued that a well articulated legal regime could provide for both the aspirations to protect sovereign autonomy (the right of asylum) and an international scheme of refugee protection (right to asylum) which is of great concern to this essay.

Although this distinction has not been successfully translated into distinguishable legal rights, scholars have recognised that an individual's right to be granted asylum can conflict with a sovereign right to grant asylum. This is so especially, if that sovereign right is understood to imply not simply the

expectations of international recognition of asylums granted, but also unfettered discretion to refuse to grant asylum. As a result given the relationship between asylum and national sovereign authority, when these two rights have been seen to conflict the right of asylum has prevailed.[16]

It is admitted that a wholly discretionary right of asylum threatens the international legal character of that right by depriving it of any grounding in mutual sovereign respect. As a result, scholars have continued to discuss the right to asylum, seeking either to rehabilitate it within a regime dominated by the right of asylum or to strengthen it by scholarly advocacy, convention drafting or practice. The debates about the right to asylum which have ensued are familiar. Most commentators have concluded that there is no right to asylum, although they recognise that there may be other obligations such as municipal rights, non-extradition, *non refoulement,* and humanitarian duties protecting asylum seekers. Other commentators argue that there is now a right to asylum, although, they recognise that the right may be a qualified one, progressively developing, subject to exceptions, or not fully enforceable or accepted.

The right to asylum like all other human rights must be recognised by all states. It is a humanitarian act that must not be hindered on unfounded grounds like security concerns by a host state.

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[15] Kennely, P 56
[16] Kennely, Ibid

Perhaps, the drawing up of Conventions has been a boost to the enforcement of the right to asylum by giving it a legal status in contemporary international law. Several conventions have been drawn up that seem to guarantee an individual's right to asylum. The Universal Declaration of Human Rights Article 14(1) establishes the standard that everyone has a right to seek and enjoy asylum. As Professor Greig commented on that article "a case can be made for the proposition that a right of asylum has been established by the practice of States as part of customary international law."[17]

For all its importance, the status of asylum in international law is ambiguous. According to the Universal Declaration of Human Rights (UDHR), "Everyone has the right to seek and to enjoy in other countries asylum from persecution. Yet, this does not provide that asylum is an absolute right. For no binding treaty or convention obliges states to grant asylum. There is a gap between the individual's right to seek asylum and the state's discretion in providing it.

As earlier noted, prior to the nineteenth century authors were not concerned about ascertaining an obligation but about elaborating justice. It is only in the modern period with its emphasis on sovereign discretion that the view has come to prevail to be beyond legal theory. As seen from the language of the Universal Declaration of Human Rights Article 14, merely provides that everyone has a right to seek asylum but not to be granted.

However, it may be right to point out that since the question of asylum has now become more or less part of International law custom one may venture to question as to what extent this custom is to be respected by the state parties. Professor Grahl-Madsen commented on this right saying "our generation has witnessed an impressive development towards an internationally guaranteed right for the individual to be granted asylum.....the right to gain admission to a country of refugee still belongs to the moral sphere" However, he notes that it has been strengthened by the adoption of the Declaration on Territorial Asylum and resolutions 67 and 14 by the General Assembly of the United Nations and the Committee of Ministers of the Council of Europe respectively. Thus from this view it can be deduced that adoption of such instruments goes beyond the moral obligation of states but encompasses the principle of *non refoulement* and further includes non rejection at the frontier. This has strengthened the refugee's moral choice to be given asylum if they are in need of it.

1.2 REFUGEES AND ASYLUM

No discussion on asylum would be complete without reference to refugees and their legal status with regard to the concept of asylum. Certain events in historical times have been seen as part of the history of refugees. Events such as the world war and the Russian revolution have been categorised as a wake up call to the international community with regard for a need to protect asylum seekers. World War I and the Russian Revolution prompted a further

[17] D Greig , The Protection of Refugees and Customary International Law,. 8 Aust YIL (1983) p130

reinforcement of controls and restrictions on grounds of national security. By the 1920's most receiving states in Europe and overseas had erected solid walls, with well-policed narrow gates to provide for temporary workers established and in the case of overseas countries family members of the previous immigrants as well as a small number of new settlers preferably from the 'founding nationalities'. An additional feature of the regime was the adoption by the 20th Century's authoritarian states of draconian barriers against exit, to prevent their populations from voting with their 'feet' against the political regime and from undermining economic policies.

In the first half of the 19th century, the refugees originated mostly in Europe. In the 1930s, with the onset of the depression and mounting international tensions, the gates were everywhere shut even tighter, making it almost impossible for the persecuted to find a haven. The inability to expel the Jews from Europe contributed to the Nazi's decision to undertake instead their mass murder. The Nazis also forcibly relocated very large number of workers through out occupied Europe. Huge populations were further uprooted at the end of the war, including this time Germans who had previously migrated to Eastern Europe, as well as masses fleeing the advancing Russian armies, the imposition of Polish and Soviet dominated regimes. Most of these were relocated in West Germany, the United Sates and Canada.[18]

[18] The State of the World Refugee, the Challenge of Protection , Peguin Books, 1993, Pg 36

In the early post war period, the Western countries undertook to atone for tragedies experienced, by providing international mechanisms for protecting and assisting refugees. Although these were initially destined to deal with the sequels of past persecution, subsequently most Western states welcomed people escaping from European countries under communist rule. But except for Germany until 1960, Hungary in 1956, the numbers were quite small. Meanwhile, however, the process that had generated refugees in Europe for many centuries began to engulf other parts of the world starting with the partition of India and Pakistan in 1947 and Palestine the following year. There were also massive displacements from the continental China to Taiwan, from North to South to Korea and from North to South Vietnam.[19]

The displacement and the increasing number of people fleeing their places of habitual residence for various reasons preceded the legal regime on asylum. It was these events that led to the International community's recognition of the need to respond to the emerging crisis.

1.3 NON REFOULMENT

The principle of *Non refoulement* is a cornerstone of refugee protection. It bars states from returning refugees to a place where they would risk persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. There are three types of state practice that offends the principle of *non refoulement* and these are; the return of refugees physically

[19] The State of the World Refugee, the Challenge of Protection , Peguin Books, 1993, Pg 36

present in the territory of the state, the return of refugees at or near the border and the evolution of arms-length non entrée policies. In instances where states have refused to recognise a right of asylum, they have at least accepted the obligation of *non refoulement* provided in Article 33(1) of the 1951 United Nations Convention Relating to the Status of refugees. Broadly speaking, it prescribes that "no refugee should be returned to any country where he or she is likely to face persecution or torture." The principle of *non refoulement* has also come to be embodied in other international instruments. For example Article 3 of the 1984 Convention against Torture states:

1. No State party shall expel, return (*refouler*) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass violation of human rights.

The principle of *non refoulement* is not absolute however, Article 33 (2) of the 1951 convention states 'the benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as danger to the security of the country in which he is, or who having been

convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country." This means that certain categories of persons may be excluded from the benefit of the Convention and the principle of *non refoulement* becomes inapplicable. The provisions relating to the persons exempted from the benefit of the Convention are referred to as the Exclusion clauses.

It is important to note that the 1951 convention was drafted with a specific target group of asylum seekers in mind. It does not quite deal with the individual asylum seekers that could either preclude formal determination of refugee status or/and exclude a lasting solution. Moreover, the asylum seekers may include those who fall within the broader definition of refugee definition contained in the Organization of African Unity Convention Governing the Specific Aspects of Refugees or the 1984 Cartagena Declaration. In the context of protection of asylum seekers in situations of large scale influx the executive committee of the United Nations High Commissioner for Refugees (UNHCR) adopted conclusion No. 22 in 1981 which insists on the provision of temporary refuge through the act of admission.

A key question however, which arises with respect to the principle of *non refoulement* is whether it forms a part of customary international law. If it does, does its scope extend to non-Convention refugees? Arriving at a determination that a principle or norm has evolved into a customary law principle or norm is

an inherently difficult exercise, for it turns on the evaluation of material and psychological evidence which lends itself to diverse interpretations.[20] Other writers have however, taken a stance on the subject. Guy Goodwill-Gill argues the case for customary status and its extension to the non-Convention refugees while Kay Hailbronner is against, whereas James Hathaway aspires to occupy middle ground. Recently Goodwill-Gill has modified his approach and maintains that the obligation of the state to observe the principle of *non refoulement* implies at least temporary refuge in the face of imminent danger and extending to persons outside the Convention refugee definition in so far as they may be said to lack governmental protection against harmful events.

The status that asylum has ascended to in contemporary international law can be taken to confirm that asylum has evolved to become part of international law custom. It is therefore argued that state parties must take up the challenge of ensuring the protection of asylum seekers. On the African continent for instance asylum is more than just a state party's obligation. Asylum seekers in Africa do not only have a right to seek asylum but also to be granted.[21] The principle of *non refoulement* is meant to guard against the forced return of refugees to a place where there is a threat on their right. For instance it is a violation of the principle of *non refoulement* and violation of Article 32 of the 1951 Convention if a refugee is returned to a place of origin without giving him a fair determination process.

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[20] David Kennedy, *International Legal Structures, (*1987) Baden Baden, London, United Kingdom, P 81
[21] Convention Governing the Specific Aspects of Refugee Problems in Africa

1.4 REFUGEE DETERMINATION PROCEDURE

Refugee determination procedure is of great concern to the question of asylum and thus this discussion of asylum would be incomplete without a mention of the refugee determination procedure. International refugee law protects the right of persons who have fled a country to seek asylum in another if they have a well-founded fear of persecution should they be returned to the country they have fled. The United Nations in responding to the problem of the increasing number of refugees in the mid 20th century draw up the 1951 Convention.

Not all persons fleeing for whatever reasons are considered refugees. The 1951 Convention and indeed the Convention Governing the Specific Aspects of Refugee Problem in Africa (hereinafter referred to as the OAU Convention) have guidelines on the determination of the refugee. The 1951 Convention provides in Article 1A (2) that the term refugee shall apply to any person who "as a result of events occurring before 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; 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. It is important to state that the time limit is no longer relevant as the Protocol of 1967 broadened the

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application of the Convention to other refugees not necessarily falling within the requirement of the January, 1951 time frame.

Basically, to qualify as a refugee under the 1951 Convention one ought to satisfy the conditions as specified and catch word is that of well founded fear of persecution. As the United Nations High Commissioner for Refugees (UNHCR) points out, determination of refugees will require an evaluation of the applicant's statement and not necessarily the prevailing situation in the country of origin. Although, the prevailing situation in the country of origin may be referred to in the determination process it is argued that the applicant must be evaluated on the face of his story and afforded a benefit of the doubt. Thus the element of fear entails a state of mind which is rather subjective, although it is qualified with the need for the fear to be well founded. Thus in the determination of refugee status the well founded fear of persecution must be based not on any other forms of persecution but that of race, religion, nationality, membership of a particular social group or political opinion. Membership of a particular social group is quite encompassing and may include gender, whereby one is being persecuted for belonging to a given gender or indeed it may include married women if it can be shown that the person was being persecuted simply by being in that class or group of persons. However, the applicant must show that the government or relevant authorities did not offer to protect him from the claimed persecution or indeed, that they were in fact the perpetrators of the acts.

The Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) on the other hand has a more broadened definition of a refugee. Article 1(1) provides that "the term refugee shall mean every person, who 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, 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." As can be seen from this provision the OAU Convention is quite clear that the provision of asylum is a humanitarian act without political overtones.

However, of particular interest is Article 1 (2) which broadens the definition of refugee to include persons who "owing to external aggression, occupation, foreign dominion, or events seriously disturbing public order in either part or whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality." This provision broadens the recognition of refugees to include those that have been affected by other factors such as foreign occupation and civil war. This means that even persons who are fleeing for other reasons besides those that have been outlined in the UN Refugee

convention do qualify under this provision. It has been said that a law is usually characteristic of the history, needs and aspirations of a people, this is reflected in the OAU Convention which reflects the history of the continent. Many African countries have been ravaged by civil wars and it was the desire of African leaders to find possible solutions to address the emerging number of refugees on the continent. Bearing in mind that they (the African Leaders) unlike their European counterparts were facing a different problem altogether.

Article II (2) of the OAU Convention states that "the grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any member state.

It is critical that this essay considers the refugee definitions so as to be able to consider how the state parties to the respective Conventions have regarded these definitions. From the definitions considered it can be deduced that the refugee is considered a vulnerable person in need of protection. Thus of particular concern to this essay is how effective this protection has been in light of terrorism.

The Conventions considered above indicate the responsibility placed on member countries to provide protection to persons fleeing persecution, so the challenge is how effective these protective measures have been in light of the growing concern over the problem of International terrorism.

CHAPTER TWO

THE CONCEPT OF TERRORISM

It is not uncommon to relate the word terrorism to Osama Bin Laden*,[22] nor is it uncommon to relate terrorism to the events of September, 11 2001 that saw the bombing of the World Trade Center and the Pentagon in New York. However, it is not easy to define terrorism nor, is it easy to categorise exactly what kind of activities can be termed terrorist actions. Thus, the purpose of this chapter will be the word terrorism and also to embark on a journey to trace the origins of terrorism so as to understand it in its modern context.

The chapter will also consider some of the International Legal Instruments that have been drawn in an effort to define and curb terrorism. This will help set the background for the discussion to follow in the latter chapter, where the essay will consider the legal regimes that have emerged in response to terrorism and their impact on the contemporary law of asylum.

2.1 HISTORY OF TERRORISM

The word terrorism first came into use during the French Revolution (1789-1799). "The word *terreur* described the reign of terror used by Maximilien Robespierre and the Drectorre."[23] In 1793, the Jacobins, a group led primarily by Maximilien Robespierre, seized control of France and adopted a policy of

[22] *Leader of the Al Qaeda Network, a group that has often claimed responsibility for several terrorist terrorist acts

ruthless violence against their opponents. The period of Jacobin rule became known as the Reign of Terror, in which thousands of people were executed by guillotine, including Louis XVI, the King of France, and his wife, Marie Antoinette. In a 47-day period, more than 1,376 people were executed. In 1794, Robespierre found himself under the blade of the guillotine. Members of his own party by order of the National Convention executed him, the assembly that took over the governing of France after, the monarchy was overturned.

However, politically motivated violence for different aims and by different persons can be referred back to antiquity and has always existed. For instance, in the period 1090 and 1256 there was an Islamic accession sect that committed a number of murders in Asia.

Though, terrorism may be traced to antiquity, it was not until half of the 19th century that it was a systematically used as a means of propaganda of political action or revolution of the masses. There are also acts of terrorism directed at heads of state and members of government, for instance history records a number of assassinations of influential names. To mention but a few, there was the assassination of the Austrian Archduke Franz Ferdinard by Serbian terrorists on June 28th, 1914 which was one of the factors that led to World War I. Then there was the assassination of the French foreign minister and the King of Yugoslavia and shortly afterwards the Australian Chancellor was assassinated in

[23] M Bothe, *ABC-Weapons*, (1995) Dordrecht, The Netherlands, Pg 1220

1943.[24]

Perhaps the most devastating terrorist action has been the one experienced not so long ago in the United States of America. The suicidal collision of hijacked commercial airliners into the World Trade Centre and the Pentagon on September 11th, 2001. This event has been described as the most destructive terrorist attack in the world. The news media reported and has been reporting the full extent of the September 11 attacks in New York. Before the deaths of more than 3,000 people in those attacks (September 11th, 2001), the most devastating single terrorist attack had claimed the lives of about 380 people. This was the largest number of deaths recorded in terrorist related attacks.

2.2 CONTEMPORARY TERRORISM

In understanding contemporary terrorism the starting point would be to define what terrorism is. The definition of terrorism will vary from one legal system to another. The saying that one mans terrorist is another mans freedom fighter is not too far-fetched as the different definitions of terrorism confirm that the term changes from place to place.

In considering the various definition of terrorism the differences that are encountered can be attributed to the fact that terrorist acts are not the end in itself but are a means to an end. The terrorist has certain goals and he uses these

[24] M Bothe, *ABC-Weapons*, (1995) Dordrecht, The Netherlands, P 1220

acts to achieve that goal. Mathew J Morgan lists three factors as being behind the new wave of terrorism. These, he notes are cultural which includes religion, political and organisational, and technological factors. These are discussed below in detail.

2.3 CULTURAL FACTORS

On cultural factors he distinguishes religious terrorists from those with religious components but whose primary goals are political. He notes that between 1980 and 1992 religiously motivated terrorism has grown almost six fold. Quoting Paul Hoffman, he asserts, "The religious imperative for terrorism is the most important characteristic of terrorism today." Today's terrorists groups are highly influenced by religion to the extent that their acts such as suicide bombings are increasingly seen as sacramental or transcendental on spiritual level. Thus, through this sacrifice they justify their violence. As Wilkinson notes secular terrorists may view indiscriminate violence as immoral, on the other hand their counter parts (the religious terrorist) view it as morally justified and constitutes a righteous and necessary advancement of their religious cause. This has been seen to be the major force behind religiously motivated terrorism. It is the desire or the need to purify a society or to remove a 'sinful' regime through the only mean the followers know best that is violence.[25]

2.4 POLITICAL AND ORGANISATIONAL FACTORS

On the other hand Wilkinson notes that there is another influencing factor in the trend of contemporary terrorism. This he identifies as political and organisational factors. He points out that a number of developments on the international scene have created conditions ripe for mass-casualty terrorism. Gross inequalities in economic resources and standards of living between different parts of the world are often a popular reason for the ardency and viciousness of contemporary terrorism.

Although, it is important to point out that there is no hard evidence in blue print to clearly mark poverty as a cause of terrorism nor is there a correlation between the two. Many terrorists see the trend in modernisation as a threat to their way of life and the differences in development levels as a practice set on them by the western world in effort to erode their way of life. For instance the intrusion of Western values and institutions into the Islamic world through the process of free market globalisation is an alternative explanation for the growth of terrorism, which is the weaker party's method of choice to hit back.

There is no doubt that the trend in globalisation has had an impact on the strengths of terrorism as observed by John Arquilla, David Ronfeldt and Michelle Zanin in their book, *Networks, Netwar and Information age Terrorism.* The authors note that in addition to international political changes,

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[25] M J Morgan, *The Origins of the New Terrorism*, Parameters, New York, United States of America (2003)

developments in organisational practice have enhanced the lethality of terrorism. As corporations have evolved organisationally, so have terrorist organisations. The learned authors attribute the advancement in terrorism to the move in the organisational structure where the terrorist groups have ceased to be more of a command driven structure. Thus, through the strong conviction of one faithful, a terrorist attack may be launched without the necessity for a command from their leader. This trend may even explain the rising number of solo suicide bombers.

2.5 TECHNOLOGICAL FACTOR

In addition to the cultural and religious motivations of terrorist and the organisational enabling factors, technology has evolved in ways that provide unprecedented opportunities for terrorists. Mathew J Morgan notes that non nuclear weapons of mass destruction and information technology have created opportunities for terrorists that are more threatening than radiological terrorism because these alternatives are more probable. He notes that as the trends in terrorism reach fullness, increasing proclivity toward mass-casualty terrorism, terrorists may increasingly turn to Weapons of Mass Destruction (WMDs) that will better fit their objective and moralities.

Walter Laquer's New Terrorism emphasises the availability of very powerful weapons of mass destruction as the major current danger facing the industrialised world. He adds that aside the nuclear weapons there are a variety

of biological and chemical weapons that pose great danger and are available to terrorists. These weapons have been used and the threat of their use has often been used by terrorist organisations to demand certain actions from states or governments. The adverse effect of these biological methods can cause a strain on the governments. As observed in the Asian brush with Severe Acute Respiratory Syndrome (SARS), the associated panic and uncertainty can take a large economic and political toll- not to mention the cost in human suffering for those exposed to the pathogen.[26]

It is important to point out that this outbreak of SARS was not attributed to terrorism, but has been used in this context simply to show how biological or chemical weapons may strain a country and its population at large.

Paul Wilkinson pondered the indiscriminateness among terrorists and attributed this upsurge to several reasons. First he notes that there has been a saturation of the media with images of terrorist atrocities and has raised the bar on the level of destruction that will attract headline attention. He notes that terrorist will be influenced to launch such huge attacks that will lead to wide spread attention by the media. Wilkinson also adds that terrorists have been more attracted to civilian targets as they pose a lower risk to themselves. He further adds that there has been a shift from the politically minded terrorists to those who are influenced by religion. However, Wilkinson's factors for the upswing in

[26] Harvey W Kushner , *The Future of Terrorism: Violence in the New Millennium*, (Sage Publications) London, (1988), p. 164

terrorism, have been attacked as lacking in their description of terrorist strategy. Some writers have added their own factors as having affected contemporary terrorism.

2.6 THE LEGAL FRAMEWORK

Having traced the history of terrorism and having discussed the various factors attributed to the trend in contemporary terrorism, it is important to turn to the legal framework concerning terrorism as a contemporary problem. Terrorism has become a common word in modern vocabulary and has also raised eyebrows as human rights are being discussed in the wake of the war against terror. In this vain one may ask what exactly is terrorism in the international legal sphere.

Most scholars have noted that terrorism includes those acts of violence that are based on religious fanaticism. However, Walter Laquer in his book *The New Terrorism: Fanaticism and the Arms of Mass Destruction,* warns against trying to categorise terrorism or define terrorism at all, arguing that there are many types of terrorism. Walter instead emphasises that there are just as many particularities of various terrorist movements and approaches. Thus it is not important to categorise terrorism but to consider it generally.

The World or indeed the International community became alive to the problem of terrorism as early as the days of the League of Nations. The League started

addressing the problems of terrorism in 1937. A Convention on the Prevention and Punishment of Terrorism was drafted and signed by 24 states, although it never came into force and was only ratified by India. This Convention defined terrorism as "all criminal acts directed against a State intended or calculated to create a state of terror in the minds of particular persons or persons in the general public." This definition talks about criminal acts and so one can argue as to what constitutes a criminal act i.e. under what legal system. This definition is simply not clear enough.

In an attempt to define terrorism, there are two major obstacles that must be overcome in order to arrive at a universally accepted definition of terrorism. First, it is necessary to distinguish between three different conceptions of terrorism i.e. terrorism as a crime itself, terrorism as a method to perpetuate other crimes and terrorism as an act of war. When terrorism is conceived as a crime, its elements and defenses can be identified and analysed. When terrorism is conceived as a method to perpetuate other crimes, it will sometimes overlap with other crimes like crimes against humanity, genocide, war crimes rape etc. When terrorism is conceived as an act of war, the laws of war will cover the legal responses of terrorism. State responses to terrorism require the balancing of a state's right to defend itself proportionally against threats of the illegal use of aggression, as included under the United Nations Charter.[27] Thus, as states respond to threats of terror they ought to do so within the legal framework that

[27] Tyler Raimo, Winning at the Expense of Law: The Ramifications of Expanding Counter-Terrorism Law Enforcement Jurisdiction Overseas, 14 AM Law Review 1473, (1994)

satisfies the UN aspirations especially the protection of human rights.

The second obstacle to overcome in an attempt to arrive at a universally accepted definition of the term is the necessity to resolve its underlying paradoxes. Terrorism is a phenomena steeped in varying and often times conflicting political and ideological beliefs. Given that states have a fundamental right to self-defence and the right to self determination, thus one may ask whether terrorism becomes legitimate if it is perpetuated in self defence or in an attempt to achieve self determination.

In the United Nations Resolution 54/109 of 1999, the UN condemned all acts, methods and practice of terrorism as criminal, and unjustifiable, wherever and by whom ever committed. The UN also noted 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. The UN reiterated that regardless of whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify these acts these acts will still be labeled as terrorist acts.

2.7 ZAMBIA'S DEFINITION OF TERRORISM

In Zambia, though there is no legislation that defines terrorism, there is some legislation under the criminal law that indicates as to what acts amount to

terrorism. The Penal Code Chapter 87 of the Laws of Zambia provides specific acts that are offences against public security, which appear closer to the definition of terrorist acts. Part VII of the Act provides *inter-alia* the offence of treason and sedition. Of particular interest Section 5 provides certain acts that amount to sedition. These include *inter-alia,* acts that excite the people of Zambia to attempt to procure the alteration by lawful means, of any other matter in Zambia as to bring into hatred or contempt or to excite disaffection against the administration of justice in Zambia or to raise discontent or disaffection among the people of Zambia. Others include the promotion of feelings of ill will or hostility between different communities or different parts of a community to promote feelings of ill will or hostility between different classes of the population of Zambia among others.

These provisions are mostly aimed at the safeguard of public security. Another example of such legislation is The Preservation of Public Security Act Chapter 112 of the Laws of Zambia. The preamble reads as follows; An Act to make provision for the preservation of public security; and to provide for matters incidental. The definition of public security under Section 2 of the Act includes the securing of the safety of persons and property, the maintenance of supplies and services essential to the life of the community, the prevention and suppression of violence, intimidation, disorder and crime, the prevention and suppression of mutiny, rebellion and concerted defiance of, and disobedience to, the law and lawful authority, and the maintenance of the administration of

justice. This Act comes into operation whenever there is a state of emergency declared by the President in accordance with the provisions of the Constitution.

Zambia may be said to have experienced some form of terrorism although not of international character. In the early 1970's a group led by Adamson Mushala started a political uprising that led to a declaration of a state of emergency. Although, Mushala was killed in 1983 some of the suspected members and supporters of his group were arrested and prosecuted. In the case of **LEONARD MUNGABANGABA v THE ATTORNEY-GENERAL (1981) Z.R. 183 (H.C.)** which involved a suspected Mushala supporter, the court referred to Mushala and his supporters as carrying out terrorist activities, mainly in the North - Western Province of the Republic of Zambia. It was also contended that by their unlawful activities they were challenging and attempting to subvert the lawfully constituted authority of the Government of the Republic of Zambia. It is from this background that classification of terrorist activities may stem from in the Zambian legal system. From the words of the court it appears that Mushala's group were involved in terrorist acts. However, these people were charged under the Penal Code and the charges hinged on the issue of subverting the lawfully constituted authority of the government and also had a bias towards preservation of public security.

2.8 THE AMERICAN DEFINITION

In the United States of America Anti Terrorism Act and the Death Penalty Act

of 1996, International terrorism is defined as the unlawful use of violence against the United States, citizens of the United States or any other nation, outside the boundaries of the United States, apparently intended to intimidate or coerce a civilian population, influence government policy, or to affect the conduct of a government for political or social objectives. In recent developments in the United States, there has been a shift from the way terrorism is perceived. In the past the government classified it as a crime and applied legal means as a primary tool to fight it. This shift has occurred because the U.S. now perceives terrorism as acts of war and so they have moved away from reactive counter terrorism law enforcement methods to more proactive techniques in fighting international terrorism.

In its war against terrorism the United States now uses expanded law enforcement and agencies like the Federal Bureau of Investigations (FBI) to fight terrorism and these agencies have their working definition of terrorism. In the United States Federal system, each state determines what constitutes terrorism under its domestic criminal or penal code.[28]

The United States Congress has not been able to reach a consensus on a working definition of terrorism. The executive branch has also not developed a coordinated position on the meaning of the term. The absence of a generally

[28] For example the Arkansas Criminal Code provides that a person commits the offence of terroristic threatening if, with the purpose of terrorising another, he threatens to cause death or serious physical injury or substantial property damage to another person.

accepted definition of terrorism in the United States allows the government to craft variant or vague definitions which can result in an erosion of civil rights and the possible abuse of power by the state in the name of fighting terrorism and protecting national security.

However, for our purposes we consider the definition in the 1996 Anti Terrorism Act which seems to be in line with some of the basic elements essential to classify terrorism as guided by the United Nations. The definition as illustrated above points to the unlawful use of violence against the United States, citizens of the United States or any other nation, outside the boundaries of the United States, apparently intended to intimidate or coerce a civilian population, influence government policy, or to affect the conduct of a government for political or social objectives.

Further, the disadvantage of this definition is that it does not list specific acts as acts of terrorism hence it is left to the policy makers to determine who is and who is not committing terrorist acts. A subjective definition leaves too much room for political bias to affect the decision. Civil rights groups have condemned this definition as likely to cause bad results not only within the USA itself but also outside the Unites States. Some parties have pointed out the fact that such a definition can lead to different groups being classified as terrorist groups simply from the judgement of the Secretary of state. This is rather too subjective.

For instance, in defining crimes for which refugees must be excluded the United States of America has widened the scope in the Homeland Security Act all in an effort to curb terrorism. These measures have had a serious impact on the asylum seekers' rights.

2.9. THE BRITISH DEFINITION

In the United Kingdom, the definition of terrorism has undergone an evolutionary process. The Prevention of Terrorism (Temporary Provision) Act of 1984 and the Prevention of Terrorism (Temporary Provision) Act 1989 defines terrorism 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.

This definition is overly broad, it expansively includes civilians in the category of any section of the public (which could include combatants) and it limits the goal of political benefit. One may argue that this definition which points to the perpetration of violence without requirement of intent could produce odd results. As for instance, demonstrators for a political cause that end up in a brawl might be deemed terrorists or even an accidental killing by the police or the army, which is hardly an act of terror, might fall within this definition.[29]

[29]Emmanuel Gross, Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend itself and the Protection of Human Rights, 6 U C L A. (Cited in Susan

In 1996 Lord Lloyd defined terrorism as use of violence against persons or property or the threat to use such violence, to intimidate or coerce a government, the public, or any section of the public in order to promote political, social, or ideological objectives.[30]

This definition seems to remedy the earlier one that placed limitations on goals of terrorist actions, it modifies the act of violence by describing it as serious violence. However, it is also lacking as it maintains the element of civilians in the broad category i.e. any section of the public.

In 1999, the British government defined terrorism even more broadly to include expressions of extremism by groups such as the Animal Liberation Front that had only one issue as its cause.

The more recent United Kingdom Terrorism Act of 2000 defines terrorism in Section 1(1) as "the use or threat of action where the action falls within subsection (2) ('i.e. violence, serious damage, endangering life, etc) and (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public and (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause."

Tiefenbrum's A Semiotic Approach to a Legal definition of Terrorism, (2002)

[30] Lord Lloyd, Inquiry into Legislation against Terrorism, (HL) March 1999

Terrorist action is further defined in Section 1(2) as acts involving serious violence against a person, serious damage to property, acts that endanger a person's life, other than that of the person committing the action; acts that create a serious risk to the health or safety of the public or a section of the public, or acts designed to interfere with or disrupt an electronic system. Thus, English law continues to list specific acts in its definition of terrorism. It lists such acts as environmental terrorism, biological terrorism, and even computer hacking as acts of terrorism.

The risk on asylum is increased further by the Terrorism Act of 2000 which extends powers of detention and makes inciting or funding terrorism abroad into criminal offences. As though this is not enough the Emergency Anti Terrorism, Crime and Security Bill further allows for indefinite detention without legal process but with the right to appeal for foreign nationals. It also has an allowance for derogation from Article 5 of European Convention on Human Rights.

As a matter of comparative law, United States law and United Kingdom law are quite different with regard to the definition of terrorism. The United Kingdom Terrorism Act of 2000 provides a broad definition of the criminal acts of terrorism and also specifically names certain terrorist acts. In contrast the United States 1994 Anti Terrorism Act includes the element of intent but soften

it by adding the adverb 'apparently' to the element of intent (apparently intended to intimidate or coerce a civilian population). The United States Law on terrorism does not specifically list the acts that constitute terrorist acts.

2.10 THE AFRICAN DEFINITION

The Organization of African Unity (OAU) now the African Union (AU) has defined terrorism in the OAU Convention on the Prevention and Combating of Terrorism of 1999. Terrorist act means any act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles.

Secondly those acts that disrupt any public service, the delivery of any essential service to the public or to create a public emergency, create general insurrection in a State, any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in any given instrument. This definition of terrorism is quite wide and impacts

negatively on the right to asylum. From the acts that have been identified as constituting terrorism, it is not easy to identify which acts are purely domestic criminal offences of a state party and those that are part of international terrorism.

The problem is further compounded by Article 3(1) of the convention. The Article provides that acts such as the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts. This means that it is not easy to distinguish politically motivated terrorism from acts of liberalisation because one may argue that it is not terrorism but merely a means to achieve political independence. Although, Article 3(2) provides that political, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act. It is also not easy to categorically state how and when certain acts that are motivated by the listed factors cease to be legitimate for it can be contended that certain so called terrorist actions are meant to safeguard the beliefs (including religious) beliefs of the people.

The African leaders have further committed themselves to taking up measures to develop and strengthen methods of controlling and monitoring land, sea and air borders and customs and immigration check-points in order to pre-empt any

infiltration by individuals or groups involved in the planning, organization and execution of terrorist acts. This in itself is a very strong measure taken up by the African countries. Increased border and immigration controls have often disadvantaged asylum seekers. It has also been a shift from the principle of the African ideal of the right to seek and be granted asylum.

This essay contends that these measures taken up by the African countries to counter terrorism have grossly affected the right to seek asylum. For instance a report by Amnesty International (2001) shows that there has been a reduction in refugee numbers in Africa not because there has been reduction in conflicts but because countries have taken up stringent border controls. The report states that many have been denied their fundamental human rights and their right to seek asylum.

2.11 THE UNITED NATIONS DEFINITION

The United Nations Definition of Terrorism contained in a critical 1991 General Assembly Resolution reflects the consensus of the General Assembly and resolves the issue of whether terrorism constitutes a legal response by a state to safeguard its undeniable right to self determination and self defence. The definition contained in the General Assembly Resolution of 1991 has reappeared in several subsequent resolutions. This definition makes it clear that even though all people have a certain right to freedom and independence, and the right to struggle legitimately to achieve this end, notwithstanding these

rights, peoples fighting against colonial domination may not resort to the acts prescribed in the Anti Terrorism conventions.[31]

Just from the onset one may notice the different approaches taken up by the UN in comparisons to the African leadership. In the UN definition there is a clear indication that in fighting colonial domination people should not resort to the acts described in the Anti-Terrorism Act. So the question one may ask is how then should one distinguish which means to use in fighting for political independence? As may be re-called independence of many African countries was preceded by violent clashes and uprising. So can one then term these as terrorist or freedom fighters? It is therefore, not an easy task to come up with a universally accepted definition of terrorism. This is why in an attempt to define terrorism asylum seekers have been caught in the middle and are being denied a fundamental right to seek asylum.

The 1991 resolution defines terrorism as "any 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 a political, philosophical, ideological, racial, ethnic, religious other nature, that may be invoked to justify them.

[31] Micheal P Scharf, Rebels with a Cause: the Minds and Morality of Political Offenders, (2002) 96 AJIL p278.

The Secretary General of the United Nations, Kofi Anan further reinforced the United Nations blanket prohibition of terrorism. He noted that a terrorist strikes at the very heart of everything the United Nations stands for. Kofi added that it presents a global threat to democracy, the rule of law, human rights and stability and the methods and practice of terrorism are criminal and unjustifiable whoever commits them and wherever they occur. [32]

From the stance taken by the United Nations it can be noted that terrorism has been identified as an international problem worth of concern. The United Nations has on many occasions condemned terrorist actions that have occurred in the world.

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[32] International Instruments Relating to the Prevention and Suppression of International terrorism, United Nations (2001) in Preface.

CHAPTER THREE

ADDRESSING SECURITY CONCERNS

In this concluding chapter we consider the impact of international terrorism on the contemporary law of asylum. Recognising the issues raised in the two chapters above, this last chapter will make an overall assessment and recommendations on the topic at hand.

3.1 OBSERVATIONS

In the aftermath of the attacks of 11 September 2001, security considerations have permeated policy responses on a wide range of issues. Many states have taken up measures directed at eliminating and effectively combat international terrorism. The concern is quite legitimate and ought to be supported to ensure that there is no avenue for those promoting terrorist acts. This includes those that are seeking a safe haven as refugees.

The main concern in regard to these measures taken by states is that asylum seekers may be victimised as a result of public prejudice and unduly restrictive legislative or administrative measures. It is also of concern that carefully built refugee protection standards may be eroded. As the UNHCR observes in its report, current anxieties about international terrorism risk fueling a growing

trend towards the criminalization of asylum seekers. [33]

Asylum seekers are increasingly facing a difficult time in a number of states. This is either through accessing procedures or overcoming presumptions about the validity of their claims. These prejudices are often stemming from their ethnicity or even mode of arrival. The UNHCR observes that the fact that a refugee arrives illegally should not vitiate the basis of his claim. Neither should the fact that they have a certain ethnic background which may be shared by those who have committed grave crimes does not mean they, themselves are to be excluded.

It is important to stress that as states consider their own security concerns, they ought to take into account the fact that refugees are themselves escaping persecution and violence, including terrorist acts and are thus not perpetrators themselves. Another important point to consider is that international refugee protection instruments are not aimed at providing a safe haven for terrorists and do not protect them from criminal prosecution.[34] Thus dealing with the terrorist threat in the context of asylum should not necessitate the amendment of the principles on which refugee protection is based, but should instead benefit states as they review procedural measures where necessary.

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[33] UNHCR Perspective, Addressing Security Concerns Without Undermining Refugee Protection, (2001) Report

[34] For instance the exclusion clauses in the United Nation 1951 Convention on Refugees, provides instances of persons to whom the protection should not be accorded and these include persons who have

3.2 RECOMMENDATIONS

It is here recommended that whatever definition any state prefers, it is paramount that human rights are respected. In this regard the right to asylum must not be undermined. From the observations made in this essay, the recommendation for reform are hereunder listed:

(i) Admission/Access to refugee status determination

Many states have embarked on measures aimed at strengthening border controls as one way of identifying security threats at the point if entry. Increased security checks, including the use of finger prints are an understandable measure but they may be a risk of overburdening the refugee determination procedure. Profiling and screening based on religious or racial characteristics is discriminatory and inappropriate.

The summary rejection of asylum seekers at the borders or points of entry may amount to *refoulement.* As observed under the American legal system would be asylum seekers may be rejected right at the border and returned to the same place they are fleeing. It is therefore recommended that since all persons have the right to seek asylum and to acquire individual refugee status every country must ensure that it lives up to this challenge. Each claim even if there is a suspicion of involvement in grave criminal acts, must be determined on its own merit and not against negative and discriminatory presumptions deriving from the nationality, ethnic origin or religious faith of the claimant.

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committed non political offences.

For instance, the United States has long viewed itself as the land of the free and the protector of the persecuted, in the words of Emma Lazarus[35], the "Mother of Exiles." In fact, U.S. concern for the plight of refugees during the Second World War was instrumental in the development of the modern international refugee protection system.

Sadly however, "world-wide welcome" no longer glows from the Statue of Liberty's torch upon the exiles. Instead, handcuffs, shackles, and imprisonment too often await those who arrive seeking protection from persecution. The imprisonment of arriving asylum seekers, a practice that has expanded dramatically in the aftermath of the September 11 bombings, and has been reinforced by the restrictive provisions of changes to immigration law made in the Homeland Security Act. The expedited removal provisions of asylum procedures from the Immigration and Naturalisation Service (INS) to the New Homeland Department has resulted in lengthy detentions of asylum seekers who flee to the U.S. without valid travel documents.[36]

As a result, those who arrive in the United States of America seeking freedom and protection are routinely detained for months, and sometimes for years, while their asylum cases are pending. Detention of asylum seekers is inherently undesirable as it can have a significant impact on their ability to

[35] Emma Lazarous was a nineteenth century Jewish poet famous for her struggle for the rights of Jews

access the asylum process. The United States and indeed the United Kingdom are state parties to the 1967 Protocol relating to the status of refugees (1967 Protocol).[37] As such these countries are bound by the protocol and the substantive provisions of the 1951 Convention relating to the Status of refugees. Article 1(1) of the 1967 Protocol incorporates by reference Articles 2 through 34 of the 1951 Convention.

The right to liberty is a fundamental human right set out in the Universal Declaration of Human Rights (UDHR)[38] and the International Covenant on Civil and Political Rights (ICCPR).[39] Both instruments specify that no one should be arbitrary deprived of his or her liberty. According to the Human Rights Committee (HRC) the term arbitrary is to be given a broad application which is not to be equated with "against the law"

In a landmark decision concerning a Cambodian asylum seeker in Australia, the HRC determined that detention should not continue beyond the period for which the state can provide appropriate justification. For example the fact of illegal entry may indicate a need for investigation and there may be other factors

[36] Human rights first report indicates that there has been an increase in the number of detainees more especially individuals seeking asylum in the US (www.humanrightsfirst.org)
[37] The 1967 Protocol Relating to the Status of Refugees, adopted 31st January 1967, entered into force 4th October, 1967. The US acceded to the Protocol in 1968
[38] UDHR Article 9 (no one shall be subjected to arbitrary arrest, detention or exile
[39] ICCPR Article 9 (Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall deprived of his liberty except on such grounds and in accordance with such procedure as are established by law)

particular to the individual such as likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary even if entry is illegal.[40]

This case involved a Cambodian national who arrived in Australia by boat together with 25 other Cambodian nationals including his family, on 25th November 1989. He applied for status under the 1951 Convention Relating to the status of Refugees and its 1967 Protocol. His application was rejected formally in 1992 and he and other Cambodian nationals he had arrived with were detained from 21st December 1989 and his application was only later reviewed in 1990. Through out this period the detainees did not have any legal representation. Following intercession by concerned parties the minister of Immigration allowed the New South Wales Legal Aid Commission to review the detainees' cases. Later on 20th May, 1991 the author together with other detainees were informed that their cases had been rejected and they were given 28 days to appeal. They were later taken to another detention center where they were refused access to legal counsel and any form of communication. Hence this complaint arose out of these detention and delays. Counsel for the author argued that the author was detained arbitrary. The Committee with reference to the 1951 convention and Conclusion No. 44 (1986) of the Executive Committee of the Program of the UNHCR, observed that international treaty law and

[40] A V Australia (communication No. 560/1993. UN Doc CCPR/C/59/D/560/1993

customary international law require that detention of asylum seekers be avoided as a general rule.

The assessment should also, be sensitive to certain additional considerations. Firstly, crimes may not be of the same level of gravity as terrorist violence sufficient to warrant exclusion, in which case one has to take into account the consequences upon return of the person to his or her country of origin. Secondly, even though exclusion proceedings do not equate with a full criminal trial, the standard of proof ("serious reasons") has to be a higher threshold than a mere "reasonable suspicion". In the case of an indictment by an international criminal tribunal, this standard would automatically be met and moreover no further individual assessment would be necessary. Thirdly, exclusion requires individual liability, that is, the personal and knowing involvement of the individual in acts of terrorism.

Where, however, there is sufficient proof that an asylum-seeker belongs to an extremist international terrorist group, such as those involved in the September 11 attacks, voluntary membership could be presumed to amount to personal and knowing participation, or at least acquiescence amounting to complicity in the crimes in question. In asylum procedures, a rebuttable presumption of individual liability could be introduced to handle such cases. Drawing up lists of international terrorist organizations at the international level would facilitate the application of this procedural device since such certification at the international level would carry considerable weight in contrast to lists established by one

country alone. The position of the individual in the organization concerned, including the voluntariness of his or her membership, as well as the fragmentation of certain groups would, however, need to be taken into account.

(ii) Cancellation of refugee status

Generalised suspicions based solely on religious, ethnic or national origin or political affiliation does not justify a general review process. Cancellation of refugee status normally only follows evidence of fraud or misrepresentation as regarding facts central to the refugee decision. This does not mean that refugee status should be cancelled, if it emerges that one of the exclusion clauses would have applied to the individual, had all the relevant facts been known. Terrorist activity after arrival should normally lead to prosecution locally and/or expulsion, rather than cancellation of status. Cancellation of refugee status should be the least considered option.

(iii) Expulsion, including to the country of origin

As states consider the application for refugee status it is highly likely in light of the war against terror that they may be inclined to expel groups or individuals based on religious, ethnic or national origin or political affiliation, on the mere assumption that they may be involved in terrorism. International law, in particular Article 33(2) of the 1951 Refugee Convention, does not prohibit the expulsion of recognized refugees, provided however that it is established in the individual case that the person constitutes a danger to the security or the

community of the country of refuge. It is submitted that this danger should outweigh the danger of returning the asylum seeker to persecution.

It is therefore important to stress that the decision for expulsion must be reached in accordance with due process of the law which substantiates the security threat and allows the individual to provide any evidence which might counter the allegations.

Expulsion and exclusion are two different processes. Exclusion from refugee status is motivated by the severity of crimes committed in the past. It prevents fugitives from escaping justice for such crimes, just as, simultaneously, most importantly, it protects the institution of asylum from abuse. Persons excluded do not deserve international refugee protection. While expulsion aims at protecting the country of refuge and hinges on the appreciation of a present or future threat. The threshold for returning refugees to their country of origin, as an exception to the *non-refoulement* principle has to be particularly stringent.

(iv) Extradition

International refugee law does not preclude the extradition for prosecution purposes of recognized refugees, much less of asylum-seekers. Extradition should, however, be granted only after the corresponding legal proceedings have been completed, and where it has been shown that the extradition is not

being requested solely or principally as a means to return a person to a country for purposes which in fact amount to persecution.

Although extradition clauses in recent international conventions no longer contain the political offence exemption for terrorist offences, they retain the non-persecution safeguard. It is recommended that the retention of this safeguard be mandatory rather than optional. In case of a pending asylum procedure, it is conceivable that further consideration of the asylum claim be deferred until the proceedings in the extradition process enable informed decision making on whether or not exclusion from refugee status is justified. If the asylum-seeker is found excludable following consideration of his or her fear of persecution, the extradition could be decided upon without reassessing the persecution element. If the asylum-seeker is not excluded and it is assessed that extradition would indeed amount to return to persecution, prosecution in the country of asylum is in this regard, the appropriate response.

(v) Increasing criminal law enforcement

It is recommended that a comprehensive Convention on Terrorism and other international or regional instruments be developed and adopted, to assist the international community as well as to serve as an agreed framework for national legislation. There should be a closure of jurisdictional loopholes and clarity about the definition of terrorist offences as this would probably prove to be essential for combating terrorism effectively. It is further recommended that

governments must ensure that the terms of international instruments and of domestic legislation do not imply any unwarranted linkages between asylum seekers, refugees and terrorists. There must be a clear distinction amongst these terms as that is the only way refugee protection will be enhanced.

In addition, definitions need to be quite precise. If definitions are too broad and vague, there is a risk that the "terrorist" label could be abused by some for political ends, for example to criminalize activities of political opponents. It could well lead to recriminations amounting to persecution. The definition of terrorist offences is moreover likely to influence the interpretation and application of the exclusion clauses of the 1951 Refugee Convention in the future.

CONCLUSION

The references to the Universal Declaration of Human Rights of 1948 in the Preamble to the Refugee Convention serve to highlight the fact that refugee protection must be seen as an integral part of human rights protection, both regarding civil and political rights and economic, social and cultural rights. All international and national efforts for refugees especially with regard to asylum, must therefore proceed from the standpoint of obligations to which States have adhered through the respect for human rights. Asylum states must ensure that any changes to their legal regime are effective, fundamental and durable before proceeding to withdraw recognition of refugee status. Refugee status should be maintained unless someone falls clearly within one of the cessation clauses for it is not encouraged that a constant review of the refugee status be enhanced.

Though, it is admitted that governments are entitled to take action to defend people in their jurisdictions from violent attacks, the source of concern is the manner in which states have responded to the terrorist wave. It is argued that the sates must respond or act within the framework of human rights and humanitarian law that has been tried and tested over a period of time. The purpose of anti-terrorism measures must be to protect human rights and democracy not to undermine the fundamental values respected by human. Therefore, the nature and manner of implementation must be fully consistent with this principle.

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