



SYDNEY CENTRE FOR INTERNATIONAL LAW

FACULTY OF LAW, UNIVERSITY OF SYDNEY



Protecting Refugees in the Global “War on Terror”

Dr Ben Saul

*Director, Sydney Centre for International Law
Faculty of Law, The University of Sydney*



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INTRODUCTION

The global 'war on terror' radically reoriented western perceptions of refugees and asylum seekers, transforming concerns about the security of refugees into anxieties about the threat they pose. The pursuit of maximum physical security for citizens of western democracies in the war on terror has come at the price of radically undermining the security of refugees. Refugees have become doubly victimized – persecuted at home and marginalized abroad. Asylum seekers are increasingly deflected from gaining entry to safe countries by a variety of restrictive measures. Opportunities for resettlement in third countries remain static or in decline. The use of force against States suspected of harbouring terrorists has generated new refugee outflows at the same time that protection possibilities are diminishing. Those who do reach safety in countries of asylum find themselves increasingly subject to immigration detention,¹ return to torture or persecution – including by irregular rendition, degraded levels of protection (even amounting to inhumane or degrading treatment),² racial profiling,³ tighter citizenship tests,⁴ racial or

religious vilification,⁵ and even restrictions on what members of minority cultures may wear.⁶

This paper focuses on the growing pressure to automatically exclude suspected terrorists from refugee status since the late 1990s,⁷ including exclusion based on mere membership of terrorist organizations. As the first part of this chapter shows, such pressure has emanated from the UN General Assembly, the Security Council, regional organizations, States and even the UN High Commissioner for Refugees (UNHCR). Yet, as the remainder of the chapter illustrates, terrorism is not listed as a separate ground of exclusion in the 1951 Refugee Convention, and there is no internationally accepted definition of terrorist offences which could serve as a principled basis of exclusion. In the absence of an international definition of terrorism, operative legal reference to terrorism in exclusion decisions endangers refugees and violates international refugee law. This chapter argues foremost that exclusion must be based on an individual assessment of whether a person meets the specific criteria for exclusion in Article 1F of the 1951 Refugee Convention. Terrorist acts may qualify as excludable acts under Article 1F only if they reach an appropriate level of gravity warranting the denial of protection. Further, the existing exclusion grounds – though misapplied by some States in practice – are adequate and appropriate for addressing the serious challenges posed by modern terrorism.

1. UN GENERAL ASSEMBLY

Since 1994, UN General Assembly resolutions have urged States to (a) refrain from granting asylum to terrorists and (b) prevent refugee status being abused by involvement in terrorist activity.⁸ A Declaration of 1996 provides further that any measures taken must conform with

¹ T Miller, 'Blurring the Boundaries Between Immigration and Crime Control After September 11th' (2005) 25 Boston College Third World Law Journal 81; R Aldana, 'The September 11 Immigration Detentions and Unconstitutional Executive Legislation' (2004) 29 Southern Illinois University Law Journal 5; A Loughran, 'Congress, Categories and the Constitution: Whether Mandatory Detention of Criminal Aliens Violates Due Process' (2004) 18 Georgetown Immigration Law Journal 681; M Head, 'Security: Refugee Detained for Two Years on False ASIO Intelligence' (2005) 30 Alternative Law Journal 34.

² *R v Secretary of State for the Home Department, ex parte Adam* [2005] UKHL 66 (the UK government's denial of support to asylum seekers left them destitute, amounting to inhuman or degrading treatment contrary to article 3 of the European Convention on European Rights; a similar policy still applies in Australia: see B Saul, 'A visa that denies fundamental human rights', *The Age*, 26 May 2006, p 15).

³ S Legomsky, 'The Ethnic and Religious Profiling of Non-citizens: National Security and International Human Rights' (2005) 25 Boston College Third World Law Journal 161; A Taslitz, 'Racial Profiling, Terrorism and Time' (2005) 109 Penn State Law Review 1181; T McDonnell, 'Targeting the Foreign Born by Race and Nationality: Counter-Productive in the 'War on Terror'' (2004) 16 Pace University School of Law International Law Review 19; D Harris, 'New Risks, New Tactics: An Assessment of the Re-Assessment of Racial Profiling in the Wake of September 11, 2001' (2004) 4 Utah Law Review 913; D Hashad, 'Stolen Freedoms: Arabs, Muslims and South Asians in the Wake of Post 9/11 Backlash' (2004) 81 Denver University Law Review 735.

⁴ M Traynor, 'Citizenship in a Time of Repression' (2005) 3 Wisconsin Law Review 1; N Graham, 'Patriot Act II and Denationalisation: An Unconstitutional Attempt to Revive Stripping Americans of Their Citizenship' (2005) 52 Cleveland State Law Review 593.

⁵ See B Saul, 'Speaking of Terror: Criminalizing Incitement to Violence' (2005) 28 *University of New South Wales Law Journal* 868 (outlining the increase in the vilification of Muslim and Arab Australians since 11 September 2001).

⁶ See, eg, *R v Denbigh High School (Begum case)* [2006] UKHL 15 (UK); *Mullani v Commission scolaire Marguerite-Bourgeoys* (2006) SCC 6 (Canada); *Association United Sikhs M Shingara Mann Singh*, No 289947, Ordonnance du juge des référés du 6 mars 2006 (French Conseil d'Etat).

⁷ Before 11 September 2001, see also S Amarasingha and M Isenbecker, 'Terrorism and the Right to Asylum under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees: A Contradiction in Terms or Do Opposites Attract?' (1996) 65 *Nordic Journal of International Law* 223.

⁸ UNGA Declaration on Measures to Eliminate International Terrorism (annexed to UNGA Resolution 49/60 (1994), para 5(f); UNGA Res 51/210 (1996), annexed Declaration to Supplement the 1994 Declaration, para 3.

national and international law, including human rights, and should consider relevant information about whether an asylum seeker is subject to investigation for, is charged with, or has been convicted of, ‘offences connected with terrorism’.⁹ Thus it is not necessary for an individual to commit acts of terrorism to be considered for exclusion from asylum or refugee status, since it is enough that offences *connected with* terrorism are committed. These could, for example, include the many vaguely defined preparatory, ancillary, inchoate or group-based offences enacted by many States since 11 September 2001. The Declaration also provides that those awaiting the processing of their applications ‘may not thereby avoid prosecution for terrorist acts’,¹⁰ implying the need for more intensive screening of applicants already admitted to the determination process.

Resolutions of the General Assembly are only recommendatory and impose no legal obligations on States.¹¹ They may, however be declaratory of customary norms,¹² or evidence of emergent custom or *opinio juris*, depending on their content and conditions of adoption.¹³ When framed as general principles they may help progressively develop and consolidate customary norms.¹⁴ Resolutions may express ‘common interests’ and the ‘general will’,¹⁵ and are an important concentration of opinion in an international community of many States.¹⁶ Resolutions framed as *declarations* may have direct legal effect as authoritative interpretations of the Charter.¹⁷ A declaration is ‘a formal and solemn

instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated’.¹⁸ Declarations may be authoritative statements of the international community,¹⁹ expressing a ‘general consensus’,²⁰ creating an expectation of adherence, and potentially becoming binding as embodying customary norms.²¹ The legal authority of declarations does not, however, stem from their designation as a declaration but from their usual function of restating well-settled customary norms.²²

On balance, it is likely that the above-mentioned provisions of General Assembly resolutions concerning refugees, asylum and terrorism are hortatory or aspirational, rather than expressive of customary rules – notwithstanding their articulation in two Declarations. The enunciation of such principles is very recent and there is insufficient evidence of widespread and uniform State practice to support the view that there is any customary legal norm requiring the denial of asylum to suspected terrorists, or the prevention of the abuse of refugee status.

Even so, regardless of their status in public international law, UNHCR regards such resolutions as binding on itself.²³ The essential difficulty is that the 1996 Declaration implies ‘an automatic link between asylum and terrorism’ and suggests that refugee law does not already adequately prevent the abuse of asylum by terrorists.²⁴ The Declaration does not define terrorism and therefore invites States to unilaterally (and subjectively) identify and exclude ‘terrorists’,²⁵ regardless of the existing legal grounds of exclusion in Article 1F of the 1951 Refugee Convention.

Recommending ‘peremptory exclusion’ of terrorists is of ‘questionable propriety’ in the

⁹ 1996 UNGA Declaration, *ibid*, para 3.

¹⁰ *Ibid*, para 4.

¹¹ UNGA issues non-binding recommendations under articles 10–11 of the UN Charter; see B Simma (ed), *The Charter of the United Nations: A Commentary* (OUP, New York, 2002) 237–241.

¹² *Tadic (Interlocutory Appeal)* ICTY-94-1 (2 Oct 1995), ¶112. On the diverse effects of resolutions, see M Öberg, ‘The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ’ (2005) 16 EJIL 879.

¹³ *Legality of the Threat or Use of Nuclear Weapons* (1996) 35 ILM 809, 826; *Military and Paramilitary Activities (Nicaragua v US)* (1986) ICJ Reports 14, ¶188; *Texaco v Libya* (1978) 17 ILM 1, 28, ¶83; R Higgins, *The Development of International Law through the Political Organs of the United Nations* (OUP, Oxford, 1963), 5; I Brownlie, *Principles of Public International Law* (5th ed, Clarendon, Oxford, 1998), 14; P Sands and P Klein, *Bowett’s Law of International Institutions* (5th ed, Sweet and Maxwell, London, 2001), 29; C Parry, *The Sources and Evidence of International Law* (MUP, Manchester, 1965), 113; R Falk, ‘On the Quasi-Legislative Competence of the General Assembly’ (1966) 60 AJIL 782; see generally J Castaneda, *Legal Effects of United Nations Resolutions* (Columbia Univ Press, NY, 1969).

¹⁴ Brownlie, *ibid*, 14.

¹⁵ O Schachter, *International Law in Theory and Practice* (Martinus Nijhoff, Dordrecht, 1991), 85.

¹⁶ L Hannikainen, ‘Customary Law: Are Rumours of its Death Exaggerated?’, Paper at ESIL Conf, Florence, 13–15 May 2004; Higgins, n6, 2.

¹⁷ Brownlie, n13, 15; Schachter, n15, 85; I Shearer, *Starke’s International Law* (11th edn, Butterworths, London, 1994), 46–47.

¹⁸ UN Office of Legal Affairs, Memorandum (1962) 34 UNESCOR Supp 8, 15, UN Doc E/CN.4/1/610.

¹⁹ E Schwelb, *Human Rights and the International Community* (Quadrangle Books, Chicago, 1964), 70.

²⁰ R Jennings and A Watts (eds), *Oppenheim’s International Law: vol I* (9th edn, Longman, London, 1992), 45.

²¹ UNOLA, n18; see also G Arangio-Ruiz, ‘The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations’ (1972–III) 137 *Recueil des cours* 419, 431.

²² K Wolfke, *Custom in Present International Law* (2nd edn, Martinus Nijhoff, Dordrecht, 1993), 85.

²³ M Kingsley Nyinah, ‘Exclusion Under Article 1F: Some Reflections on Context, Principles and Practice’ (2000) 12 IJRL (Special Supp) 295, 312.

²⁴ Kingsley Nyinah, *ibid*, 312–313; 1996 UNGA Declaration, n8, paras 3–4.

²⁵ Kingsley Nyinah, *ibid*, 313; J Hathaway and C Harvey, ‘Framing Refugee Protection in the New World Order’ (2001) 34 Cornell Intl LJ 257, 269.

absence of a definition.²⁶ There is no accepted international legal definition of terrorism²⁷ which could be used as the basis for exclusion, and national definitions are widely divergent²⁸—potentially leading to incongruous exclusion results. Since some national definitions criminalize relatively minor conduct, reliance on such definitions in exclusion decisions endangers refugees in need of protection. While there may indeed be cogent policy reasons for defining terrorism,²⁹ until the international community agrees on a definition, reference to the term is of little legal or practical use in excluding undeserving persons from international protection.

2. UN SECURITY COUNCIL

Compounding the approach of the General Assembly, in Resolution 1269 (1999), the Security Council called on States to deny safe haven to those who plan, finance or commit terrorist acts (by apprehending, prosecuting or extraditing them) and to refrain from granting refugee status to terrorists.³⁰ Resolution 1373 (2001), enacted under Chapter VII of the UN Charter (which supplies the Council with powers to bind States in maintaining international security), similarly called upon States to prevent the granting of refugee status to those who plan, facilitate or participate in terrorism, and to ensure that refugee status ‘is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists’.³¹

While many of the provisions in Resolution 1373 are mandatory and require States to implement them, the asylum measures in Resolution 1373 are only recommendatory. Under Article 103 of the UN Charter, mandatory measures under Chapter VII could override existing international refugee law in the event of a conflict.³² Though non-binding, the resolution

‘reinforces the perception that the institution of asylum is somehow a terrorist’s refuge’ and has provoked a ‘wave’ of restrictive national laws.³³ In supervising the implementation of Resolution 1373, the Security Council’s Counter-Terrorism Committee has given the impression that States are required to exclude terrorists, without full application of international refugee law.

None of these resolutions provides any definition of terrorism for the purpose of excluding terrorists from asylum, thus conferring discretion on States to unilaterally determine who is excludable. Considering the wide range of conduct covered by national definitions, this risks excluding persons who have not committed acts grave enough to be excluded under Article 1F of the Refugee Convention. It was only in Resolution 1566 of late (2004) that the Council adopted a non-binding, working definition of terrorism, as follows:

criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, *intimidate a population* or *compel a government or an international organization* to do or to abstain from doing any act, *which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism...*³⁴

The resolution presents a relatively narrow definition, limited to acts constituting sectoral treaty offences (such as hijacking, hostage taking or bombing, which typically involve serious international violence endangering life or property), which are *also* intended to create terror, intimidate a population, or coerce a government or organization. It thus combines elements of the definitions of terrorism in the General Assembly’s 1994 Declaration and the 1999 Terrorist Financing Convention.³⁵ The definition does not, however, require a political or other motive, thus encompassing private acts which terrorize, intimidate or coerce.

²⁶ Hathaway and Harvey, *ibid*, 269.

²⁷ See B Saul, *Defining Terrorism in International Law* (Oxford University Press, Oxford, 2006).

²⁸ *Ibid*, 262-269.

²⁹ See B Saul, ‘Reasons for Defining and Criminalizing Terrorism in International Law’ (2006) 6 Mexican Year Book of International Law 419.

³⁰ UNSC Res 1269 (1999), para 4.

³¹ UNSC Res 1373 (2001), para 3(f)-(g). UNSC Res 1377 (2001), Annexed Declaration, also underlined States’ obligation to deny safe haven to terrorists.

³² As occurred in the ICJ’s interim decision in the Lockerbie case: *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v UK) (Provisional*

Measures) (1992) ICJ Reports 3. Although if the principle of non-refoulement is *jus cogens*, the lawfulness of mandatory Security Council measures requiring States to violate non-refoulement would be highly questionable.

³³ M Zard, ‘Exclusion, Terrorism and the Refugee Convention’ (2002) 13 Forced Migration Rev 32, 32.

³⁴ UNSC Res 1566 (2004), ¶3 [emphasis added].

³⁵ UNGA 1994 Declaration, n8, para 3; International Convention for the Suppression of the Financing of Terrorism, adopted 9 Dec 1999, entered into force 10 April 2002, in UNGA Resolution 54/109, art 2(1)(b).

Consequently, some of the distinctiveness of terrorism – as *political* violence – is lost. Moreover, it is far from clear that all acts regarded as terrorist by the resolution would be excludable under international refugee law, particularly proportionate political offences which are proximately directed against repressive government officials and institutions.³⁶

3. UN DRAFT COMPREHENSIVE ANTI-TERRORISM CONVENTION

A draft UN Comprehensive Terrorism Convention has been under negotiation since 2000, which attempts to define terrorism generically as a transnational crime.³⁷ Draft Article 7 proposes to require States to ensure ‘that refugee status is not granted to any person in respect of whom there are serious reasons for considering that he or she has committed’ a terrorist offence. While such measures must be taken ‘in conformity with the relevant provisions of national and international law, including international human rights law’, the aim is to exclude from refugee status persons who commit terrorist offences as defined. The preamble baldly states that the Refugee Convention does not protect perpetrators of terrorist acts, while noting that the principle of *non-refoulement* must be complied with.³⁸ The draft Convention potentially gives rise to conflict with refugee law, where terrorist offences in the draft Convention are not of sufficient gravity to warrant exclusion in refugee law. On the one hand, any such conflict might be resolved by applying the rule that the treaty which is later in time prevails,³⁹ thus overriding the 1951 Refugee Convention and limiting its application, at least as between those States which become parties to both treaties. On the other hand, there is an argument that because refugee status serves protective, humanitarian and human rights-based purposes, its preservation should trump the ordinary conflict rule. Moreover, if it is accepted that non-refoulement to persecution is a peremptory norm of international law (*jus cogens*)⁴⁰ – though this is uncertain – then States would be prohibited from

returning any suspected terrorist to persecution (where that person does not otherwise satisfy the exclusion criteria of Article 1F).

4. REGIONAL MEASURES

Regional organizations have also contributed to the growing pressure to exclude suspected terrorists from asylum. In the Americas, the Inter-American Convention against Terrorism 2002 requires States to exclude from refugee status persons in relation to whom there are ‘serious reasons’ for considering that they have committed an offence in the listed international treaties (eg hijacking, hostage taking, etc). This may have the effect of automatically excluding the defence of duress for those who, for example, commit hijacking to escape persecution, where there is an imminent threat of serious unavoidable harm. Such cases occurred in the 1950s when Czechs fled communism and again in the 1990s with refugees fleeing from Iraq and Afghanistan.⁴¹ Similarly, in Europe, Council of Europe Guidelines of 2002 state that refugee status ‘must be refused’ where the State has serious grounds to believe that the asylum seeker has ‘participated in terrorist activities’.⁴² No definition of ‘terrorist activities’ or what constitutes ‘participation’ is supplied, so it is possible that conduct which is not serious enough to warrant exclusion may be treated as excludable. The most developed regional initiative on the exclusion of terrorists from asylum is, however, to be found in European Union law.⁴³

5. EUROPEAN UNION

In the EU, a Common Position on Combating Terrorism of December 2001 *requires* States to (1) deny safe haven and the use of EU territory to terrorists (Arts 6-7); and prevent the movement of terrorists (Art 10). It also requires States, before granting refugee status, to ensure that an asylum seeker has not ‘planned, facilitated or

³⁶ See further below.

³⁷ See Saul, n27, 184-190.

³⁸ 2000– UN Draft Comprehensive Anti-Terrorism Convention, preamble.

³⁹ 1969 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 Jan 1980, 1155 UNTS 331), Art 30.

⁴⁰ J Allain, ‘The *jus cogens* Nature of *non-refoulement*’ (2001) 13 International Journal of Refugee Law 533.

⁴¹ *R v Abdul-Hussein*, CA (Crim Div), 17 Dec 1998; [1999] Crim LR 570; *R v Saji* [2003] EWCA Crim 1809; *US v Tiede*, Criminal Case 78–001 (US Ct for Berlin) (1980) 19 ILM 179.

⁴² Council of Europe, Guidelines on human rights and the fight against terrorism, 15 July 2002, paragraph XII(1).

⁴³ See also E Brouwer, ‘Immigration, Asylum and Terrorism: A Changing Dynamic – Legal and Practical Developments in the EU in Response to the Terrorist Attacks of 11.09’ (2002) 4 European J of Migration and Law 399; S Olivier, ‘Citizens and Noncitizens in Europe: European Union Measures against Terrorism after September 11’ (2005) 25 Boston College Third World LJ 197.

participated in the commission of terrorist acts’ (Art 16). It further requires States to ‘ensure that refugee status is not abused by the perpetrators, organisers or facilitators of terrorist acts and that claims of political motivation are not recognised as grounds for refusing requests for the extradition of alleged terrorists’ (Art 17).

The Common Position does not contain a definition of terrorism to be applied for the purposes of asylum determination or refugee exclusion, although the Annex lists the major international sectoral anti-terrorism treaties,⁴⁴ thus partly illustrating its conception of terrorism. The definition of terrorism in a 2002 EU Framework Decision on Combating Terrorism may also be the relevant applicable definition.⁴⁵ If this is the case, UNHCR has warned that the lesser offences in the EU Framework Decision—extortion, theft or robbery, and unlawful seizure of or damage to public facilities—may not be serious enough to activate the exclusion clauses.⁴⁶

Further impetus for the legal reforms concerning terrorism and exclusion came from an EU Commission Working Document of December 2001, which states that an EU definition of terrorism ‘may be a basis for relying on Article 1(F)(b)’ as well as being ‘a helpful way of illuminating UN standards of... “terrorist acts”’ for exclusion under Article 1F. It also suggests that the linking terrorism to the grounds of exclusion may also trigger the use of accelerated asylum assessment regimes with fewer procedural rights, allowing for claims to be dismissed as ‘manifestly unfounded’. This is despite the insistence by the European Parliament that the inclusion clauses of the 1951

Refugee Convention should be considered before exclusion.⁴⁷

Ultimately, Article 12 of the EU Council Qualification Directive of April 2004 incorporated the exclusion clauses in Article 1F of the 1951 Refugee Convention into binding EU legislation. While Article 1F(a) of the Convention remains unchanged, Article 1F(b) is supplemented by the statement that ‘particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes’.⁴⁸ This widens the scope of Article 1F(b) by providing a legislative basis on which to exclude atrocious crimes, beyond the text of Article 1F(b). The UK House of Lords noted that this ‘plainly affords a narrower ground for claiming asylum’,⁴⁹ restricting judicial formulation of the scope of the provision.

Moreover, in incorporating Article 1F(c) of the 1951 Refugee Convention, the EU Directive notes that the UN purposes and principles referred to in that Article are ‘set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations’. A recital was also added to the Directive’s preamble which explicitly recognizes that UN resolutions on combating terrorism declare that terrorist acts are contrary to UN purposes and principles (Recital 22), although in the absence of any international definition of terrorism, such assertions are far from uncontroversial. Another recital states that the notion of national security and public order covers cases where a person belongs to an association which supports international terrorism or supports such an association (Recital 28). Although only of interpretive value, these recitals do not draw any distinction between terrorist acts of lesser gravity and those which reach a level of seriousness warranting exclusion under the specific terms of Article 1F.

In addition, the EU Directive on Minimum Procedures of 1 December 2005 permits States to prioritize or accelerate determination procedures if an applicant ‘clearly does not qualify’ as a refugee under the Qualification Directive or is a danger to national security or public order (Art 23(4)).⁵⁰ According

⁴⁴ Convention on Offences Committed on Board Aircraft 1963; Convention for the Unlawful Seizure of Aircraft 1970; Convention for the Suppression of Unlawful Acts Against the Safety of Aircraft 1971; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Personnel 1973; European Convention for the Suppression of Terrorism 1977; Convention Against the Taking of Hostages 1979; Convention on the Physical Protection of Nuclear Materials 1980; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation 1988; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms on the Continental Shelf 1988; Convention on the Marking of Plastic Explosives for the Purpose of Detection 1991; UN Convention for the Suppression of Terrorist Bombings 1997; UN Convention for the Suppression of Financing of Terrorism 1999.

⁴⁵ EU Framework Decision on Combating Terrorism (2002/475/JHA) [2002] OJ L164/3, 22 June 2002, entered into force 22 June 2002, art 1(1).

⁴⁶ UNHCR (Department of International Protection), Preliminary Observations: European Commission Proposal for a Council Framework Decision on Combating Terrorism, Geneva, October 2001, para 2.

⁴⁷ European Parliament, Session Document, Report of the Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs on Asylum: Common Procedure and Internal Security (2002/2053(COS)), 22 July 2002, FINAL A5-0257/2002, para 9.

⁴⁸ EU Council Qualification Directive (2004), Art 14(2)(b).

⁴⁹ *Sepe v Secretary of State for the Home Department* [2003] UKHL 15, para 16.

⁵⁰ EU Council Directive 2005/85/EC on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee

to an interpretive recital in the Qualification Directive, this allows asylum claims of suspected terrorists to be expedited. In such cases, an application may be considered ‘manifestly unfounded’.⁵¹ Yet, elementary considerations of procedural fairness require that the claims of suspected terrorists must be considered in the same manner as all other claims.⁵² Exclusion should only be based on an individualized determination of an individual’s personal circumstances and a full and proper assessment of all the evidence.⁵³ Curtailed procedures, and considering exclusion before inclusion, risk prematurely returning a person to persecution before a full evaluation of the merits of the claim.

Recent EU legislation also conflates the exclusion clauses in Article 1F of the Refugee Convention with withdrawal of status on security grounds in Article 33(2). Article 14(5) of the EU Qualification Directive permits refugee status to be refused on grounds equivalent to those in Article 33(2) of the Convention. This blurring of the exception to *non-refoulement* (where a person is a danger to the country of asylum)⁵⁴ with the grounds of exclusion from refugee status is incompatible with the 1951 Refugee Convention. Whereas Article 1F concerns past acts outside the country of refuge,⁵⁵ Article 33(2) focuses on the future risk posed by an individual to the country of asylum⁵⁶ (although past acts may be evidence of future risk). The wider scope of Article 33(2) cannot be used as a fourth exclusion clause supplementing Article 1F.

6. ARTICLE 1F OF THE 1951 REFUGEE CONVENTION

In light of these international and regional trends towards the restriction of refugee status for suspected terrorists, it is important to consider

whether the existing provisions of international refugee law are sufficient to protect the security of States and communities from the risk of terrorism. In the first place, concerns about the threat of terrorism have antecedents in the refugee protection regime which immediately preceded the 1951 Refugee Convention. The 1946 Constitution of the International Refugee Organization (IRO) had excluded from the IRO’s mandate persons who ‘participated in any terrorist organization’ after the war.⁵⁷ In practice, for example, this led to the exclusion of Zionist IRGUN members in Palestine.⁵⁸

Whereas the IRO Constitution explicitly excluded those involved with terrorist organizations from protection, the drafters of the 1951 Refugee Convention did not decide to incorporate any similar exclusionary provision in the Convention. The reasons for this are unclear from the record. It is unlikely that the drafters myopically believed that terrorism no longer posed an international threat, given the history of diplomatic crises which it provoked in the pre-war League of Nations and considering its persistence during and after the Second World War.

Rather, so soon after the Second World War, which involved myriad forms of violence, the drafters were necessarily well aware of the security concerns of States and the variety of threats that they faced. In general, the drafting record reveals that rather than particularizing all of the many specific types of crime or harm that warranted exclusion, States preferred to establish overarching categories which would encompass the most serious kinds of threats. It is probable that the drafters realized that many serious violent acts of terrorism would fall within the enumerated exclusion grounds without the need to explicitly mention terrorism. At the same time, this approach meant that less serious acts of terrorism would not necessarily warrant exclusion. It is notable that an attempt by Italy and Israel in 1973 to explicitly exclude terrorists from any possible treaty on territorial asylum⁵⁹

Status, 1 Dec 2005, EU Official Journal L326/13 (13 Dec 2005), Arts 23(4)(b) and Art 23(4)(m) respectively.

⁵¹ Ibid, Art 29(2).

⁵² Lawyers Committee for Human Rights, ‘Safeguarding the Rights of Refugees under the Exclusion Clauses’ (2000) 12 IJRL (Special Supp) 317, 334.

⁵³ M Bliss, ‘Serious Reasons for Considering’: Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses’ (2000) 12 IJRL (Special Supp) 92, 130-131.

⁵⁴ See further below.

⁵⁵ *Gurung v Secretary of State for the Home Department* [2002] UKIAT 4870, 14 Oct 2002; [2003] Imm AR 115; [2003] INLR 133 (Collins J, A Mackey, HH Storey), para 102.

⁵⁶ UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 4 Sept 2003, HCR/GIP/03/05; (2003) 15 IJRL 492; para 4.

⁵⁷ IRO Constitution 1946 (18 UNTS 3, adopted by UNGA res 77 of 15 Dec 1946, entered into force 20 Aug 1948), Annex I, Part II, article 6(a); see also L Holborn, *The International Refugee Organization* (Oxford University Press, London, 1956), 205-208.

⁵⁸ IRO, *Manual for Eligibility Officers* (IP, Geneva, 1950), 39(1), ¶42, Case No Geneva 4495.

⁵⁹ Addendum 2 to the Report of the United Nations High Commissioner for Refugees, ‘Question of Asylum’, UNGAOR (28th Session), Supp 12B (A/9012/Add.2), New York, 1973. No treaty on territorial asylum was ever adopted and the earlier Declaration on Territorial Asylum (adopted

did not appear to gather much support, although for a variety of other reasons no such treaty was ever adopted.

The next section explores the circumstances in which ‘terrorists’ may be excludable under Article 1F of the 1951 Refugee Convention as adopted. Terrorist acts will qualify as excludable acts under Article 1F if they reach an appropriate level of gravity warranting denial of protection. Yet, as a UK tribunal stated in *Thayabaran*: ‘The question is not whether the appellant can be characterized as a terrorist, but rather whether the words of the exemption clause apply to him’.⁶⁰ Exclusion must be based on individual responsibility and be determined on a case by case basis, according to the legal criteria specified in Article 1F—not by automatic exclusion of all suspected terrorists, which risks denying procedural fairness and ultimately breaching the prohibition on returning a person to persecution.

(a) Article 1F(a): International Crimes

Under Article 1F(a) of the Refugee Convention, exclusion is required where there are serious reasons for considering that a person has committed a crime against peace, war crime, or crime against humanity.⁶¹ Particularly after 11 September 2001, there is an ongoing debate about whether non-State actors can commit aggression in the rare circumstances where no State can be held internationally responsible. However, in most cases terrorism is unlikely to constitute a crime against peace (aggression) because it will not cross the requisite threshold of gravity of violence. In any case, there have been no prosecutions for crimes against peace since the Nuremberg trials after the Second World War⁶² and it is doubtful whether aggression constitutes a customary international crime.

by UNGA resolution 2312 (XXII) of 14 Dec 1967) contains no reference to the exclusion of terrorists.

⁶⁰ Quoted in *Gurung v SSHD* [2002] UKIAT 4870, 15 Oct 2002, (2002) 14 IJRL 382, para 98; see also *T v Secretary of State for the Home Department* [1995] 2 All ER 1042, [1995] 1 WLR 545; *T v Secretary of State for the Home Department* [1996] 2 All ER 865, [1996] 2 WLR 766; *Amirthalingam* (11561), 10 Nov 1994; *Nanthakumar* (11619), 22 Nov 1994; *Arulendran* (11827), 19 Jan 1995.

⁶¹ See generally J Pejić, ‘Article 1F(a): The Notion of International Crimes’ (2000) 12 IJRL 11; Matthew Zagor, ‘Persecutor or Persecuted? Exclusion under Article 1F(A) and 1F(B) of the Refugee Convention’ (2000) 23 UNSWLJ 164-190.

⁶² The crime of aggression is included in the Rome Statute of the International Criminal Court (Art 5) but is yet to be defined at a future codification conference.

During armed conflict, terrorist acts may constitute a war crime in some circumstances, such as where deliberate indiscriminate attacks are made on civilians, or for acts such as hostage taking. There are also specialised terrorism offences in international humanitarian law,⁶³ including (in international armed conflict) prohibitions on measures of terrorism (Fourth Geneva Convention, Art 33(1)) and on spreading terror among civilians (Protocol I, Art 51(2)). Similar prohibitions exist in non-international armed conflicts (Protocol II, Art 51(2) (spreading terror); Art 4(2)(d), Protocol II (acts of terrorism)). In *Galic* (2003), the ICTY found that the sniping and shelling civilians in Sarajevo was intended to spread terror and constituted a war crime.⁶⁴

Further, in limited circumstances, terrorist acts may amount to crimes against humanity where the physical conduct involved is prohibited and committed as part of a widespread or systematic attack on a civilian population. There is, however, no special crime against humanity of terrorism, despite efforts by some States to formulate and classify terrorism as such.⁶⁵

(b) Article 1F(b): Serious Non-Political Crime

Under Article 1F(b) of the Refugee Convention, refugee status cannot be granted to a person where there are ‘serious reasons’ for considering that ‘he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee’.⁶⁶ There is little international agreement on the precise meaning of the terms ‘serious’, ‘criminal’ and ‘non-political’. Many national courts draw by analogy on the ‘political’ offence exception in extradition law, which is clearly related to Article 1F(b), but they are not identical in scope. Whereas extradition law is largely a product of national and bilateral law, and therefore highly variable, Article 1F(b) is an *international* law treaty provision, implying that it should be interpreted by reference to a common international standard

⁶³ Saul, n27, chapter 5.

⁶⁴ *Galic* case, ICTY-98-29-T (5 Dec 2003).

⁶⁵ Saul, n27, 181.

⁶⁶ See generally W Kälin and J Künzli, ‘Article 1F(b): Freedom Fighters, Terrorists and the Notion of Serious Political Crimes’ (2000) 12 IJRL 46; Zagor, n61; Martin Gottwald, ‘Asylum Claims and Drug Offences: the Seriousness Threshold of Article 1F(b) of the 1951 Convention and the UN Drug Conventions’ (2006) 18 IJRL 81.

rather than by recourse to divergent, unilateral national definitions.

Is 'terrorism' serious, criminal, and non-political? In the absence of a common and binding international definition, the position varies in different national legal systems. Some regional treaties, the UN General Assembly and Security Council, and many national criminal laws all regard terrorism as serious and criminal. Both the 1999 Terrorist Financing Convention and the 1997 Terrorist Bombings Convention included provisions excluding their respective offences from the political offence exception in extradition law (though they are silent in relation to refugee status).⁶⁷

Tests used by different courts to determine whether an offence is political for extradition purposes include whether violent acts are indiscriminate or atrocious,⁶⁸ or too remote from, or disproportionate to, a political end.⁶⁹ Courts have applied similar factors in interpreting the meaning of serious non-political crimes in refugee law.⁷⁰ Terrorist acts often fail these tests for being disproportionate, remote, barbarous and so on. It is not certain, however, that terrorist acts will always fail the test, particularly where terrorist acts are a response to severe and systematic State repression, where there is an irreconcilable asymmetry of resources between the State and its opponents, and all other means of redress have failed.⁷¹ Individual criminal law defences of duress and necessity are relevant, as in cases of asylum seekers who hijack aircraft (without killing anyone) in order to escape from persecution.⁷²

Recently, some courts have used the term 'terrorism' in an attempt to characterise acts as non-political and as a less subjective and

judgmental test than the tests described above. In *T v Home Secretary* (1996), Lord Mustill said in the UK House of Lords that:

criteria such as remoteness, causation, atrociousness and proportionality seem too subjective to found the consistency of decision which must surely be essential in a jurisdiction of this kind. By contrast, once it is made clear that terrorism is not simply a label for violent conduct of which the speaker deeply disapproves, the term is capable of definition and objective application.⁷³

Lord Mustill invoked the 1937 League of Nations Terrorism Convention definition as 'serviceable', that is: 'criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public'.⁷⁴ Lord Slynn agreed with that definition, adding that terrorism may also include acts 'likely to cause, injury to persons who have no connection with the government of the state', though that definition was not intended to be exhaustive.

In *Suresh*, a national security case (involving Article 33 rather than 1F), involvement in 'terrorism' in Canada was a basis for deportation, but terrorism was not defined in the relevant legislation.⁷⁵ The Canadian Supreme Court found it unnecessary to define terrorism 'exhaustively' for the limited purposes of the immigration proceedings but adopted a working definition based on in Article 2(1)(b) of the Terrorist Financing Convention:

Any... act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

In contrast, other courts have been more sceptical of using terrorism until it is defined. As

⁶⁷ 1997 Terrorist Bombings Convention, Art 11 and 1999 Terrorist Financing Convention, Art 14.

⁶⁸ *Ellis v O'Dea*, Record No 441 SS/1990 (30 Jul 1990), transcript, 36; *Della Savia*, Swiss Federal Tribunal (26 Nov 1969) 95 ATF I, 469; *Morlacci*, Swiss Federal Tribunal (12 Dec 1975), 101 ATF Ia, 605; *Re Atta (Mahmoud Abed)* (1989) 706 F Supp 1032, approved (1990) 910 F 2d 1063.

⁶⁹ *McGlinchey v Wren* [1983] Irish L Rep Monthly 169; *Shannon v Fanning* [1984] IR 548; *Folkerts v Public Prosecutor* (1978) 74 ILR 498; *Kavic, Bjelanovic and Arsenijevic*, 78 ATF, I, 39 (30 Apr 1952) (Switzerland); *Eain v Wilkes* (1981) 641 F 2d 504, cert den (1981) 454 US 894; *Artukovic v Rison* (1986) 628 F Supp 1370; 784 F 2d 1354 (1986); *In re Nappi* (1952) 19 Int L Rep 375; *Ktir v Ministère Public Fédéral* (1961) 34 Int L Rep 123; *Re Kelly and MacFarlane* [1987] *Nederlanse Jurisprudentie* 931; *Gil v Canada* [1995] 1 FC 508.

⁷⁰ *T v Home Secretary* [1996] 2 All ER 865; *McMullen v INS* (1986) 788 F 2d 591; *Minister for Immigration v Singh* [2002] HCA 7; *Re Gil and Minister of Employment and Immigration* (1994) 119 DLR (4th) 497; *Zrig v Canada (Minister of Citizenship and Immigration)* (CA) [2003] 3 FC 761.

⁷¹ For example, such acts might be considered 'illegal but justifiable' in pursuit of the 'collective defence of human rights': Saul, n27, 116-120.

⁷² See n41.

⁷³ *T v Home Secretary* (1996) (Lord Mustill), n70.

⁷⁴ For an analysis of the 1937 League of Nations Convention, see B Saul, 'The Legal Response of the League of Nations to Terrorism' (2006) 4 *Journal of International Criminal Justice* 78.

⁷⁵ *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR; 2002 SCC 1.

stated by the UK Immigration Appeals Tribunal in *Gurung*:

until such time as we have an accepted international definition of terrorism and one which clearly matches up with definitions contained within sub-clauses of Art 1F, it remains important to note material differences between Art 1F offences and terrorist offences. Regular use of the concept of terrorism as a tool for identifying crimes contrary to Art 1F must await definitive codification by the international community.⁷⁶

In *Singh*, Justice Gaudron of the Australian High Court similarly stated of terrorism that ‘such descriptions are imprecise and may, on that account, involve over-simplification. Moreover, and more to the point, they find no expression in the text of the Convention itself.’⁷⁷

In light of different national approaches, the European Council for Refugees and Exiles has called for terrorism to be internationally defined to encourage clarity in the application of the exclusion clauses.⁷⁸ The draft UN Comprehensive Anti-Terrorism Convention could, for instance, include a provision depoliticizing terrorism and regarding it explicitly as non-political for the purposes of Article 1F(b). The definition of terrorist offences would have to be appropriately narrow – and the conduct covered appropriately serious – so that minor conduct did not give rise to exclusion. US Department of Justice statistics show that most terrorist convictions since 2001 in the US have resulted in prison sentences of 12 months or less,⁷⁹ suggesting that terrorist offences are capturing relatively minor conduct.

(c) Article 1F(c): Acts Contrary to UN Purposes and Principles

Under Article 1(F)(c) of the Refugee Convention, refugee status cannot be granted to a person where there are ‘serious reasons’ for

considering that ‘he has been guilty of acts contrary to the purposes and principles of the United Nations’.⁸⁰ UN purposes and principles are specified in Articles 1 and 2 of the UN Charter, and are dynamic not static, but also very broad and vague, encompassing aspirations such as: peace and security, friendly relations among states, self-determination, and international cooperation. While UNHCR does not regard this provision as an independent ground of exclusion, some courts have disagreed and applied it as a distinct ground. Due to its inherent vagueness and potential for abuse, Article 1(F)(c) arguably should be interpreted restrictively so as not to prematurely exclude deserving refugees.

In the Canadian case of *Pushpanathan*, the test for acts contrary to UN purposes and principles was as follows: (1) a consensus in international law that acts constitute sufficiently serious and sustained violations of fundamental human rights so as to amount to persecution, or (2) acts are explicitly recognized as contrary to the UN purposes and principles (including in international decisions and resolutions). Acts found to be contrary to UN purposes and principles under these tests included torture, terrorism, hostage taking, and apartheid, but not drug trafficking.

Certainly a number of UN Security Council resolutions have regarded terrorism as contrary to UN purposes and principles.⁸¹ Although these resolutions are non-binding, it might be questioned whether these political organs are competent to ‘reinvent’ UN purposes and principles without following the proper procedures for amending the UN Charter.⁸² It can, however, be more plausibly argued that these resolutions are merely interpreting the scope of existing Charter provisions, rather than inventing new principles and purposes.

An increasing number of cases have excluded persons on this ground for terrorism. In applying Article 1F(c) to terrorist acts, each act should be assessed individually to determine whether it is contrary to UN principles and purposes, and it is not sufficient to rely on a blanket assertion that every terrorist act is excludable. Some terrorist acts may not be serious enough to threaten UN purposes and

⁷⁶ *Gurung*, n55, para 100.

⁷⁷ *MIMA v Singh* [2002] HCA 7 (Gaudron J); see also M-A Kenny, ‘Terrorism and Exclusion under the Refugee Convention’ (2003) Issue 82 Reform 37.

⁷⁸ European Council on Refugees and Exiles (ECRE), Comments on the Commission Working Document on the relationship between safeguarding internal security and complying with international protection obligations and instruments, London, May 2002.

⁷⁹ Transactional Records Access Clearinghouse (TRAC), ‘Criminal Terrorism Enforcement since the 9/11/01 Attacks’, Special Report, 8 Dec 2003.

⁸⁰ See generally E Kwakwa, ‘Article 1F(c): Acts Contrary to the Purposes and Principles of the United Nations’ (2000) 12 IJRL 79.

⁸¹ UNSC Resolutions 1373 (2001) para 5; 1269 (1999) para 3; 1377 (2001) annexed Declaration; and 1624 (2005), preamble.

⁸² UN Charter, Arts 108-109.

principles, particularly some preparatory, ancillary or inchoate offences, those relating to membership of, or association with, terrorist organizations, and emerging offences of the incitement or even glorification of terrorism.⁸³

Traditionally, only State officials or agents fell within Article 1F(c), since the UN Charter is primarily addressed to States. However, courts have increasingly recognized that non-State actors can commit acts of comparable severity. In *Pushpanathan*, the court stated that:

Although it may be more difficult for a non-state actor to perpetrate human rights violations on a scale amounting to persecution without the State thereby implicitly adopting those acts, the possibility shoramiruld not be excluded...⁸⁴

This is particularly the case where organizations exercise quasi-governmental authority, or pursue political objectives. In *Sivakumar*, a Canadian court stated:

it can no longer be said that individuals without any connection to the state, especially those involved in paramilitary or armed revolutionary movements, can be immune from the reach of international criminal law. On the contrary, they are now governed by it.⁸⁵

It is therefore arguable that Article 1F(c) extends to private terrorist organizations.

7. MEMBERSHIP OF TERRORIST ORGANIZATIONS

Given the individualized nature of the determination of refugee status, exclusion must necessarily be based on an evaluation of individual responsibility for excludable conduct under Article 1F. Individual responsibility includes not only *committing* excludable conduct but also liability for acts such as ordering, soliciting, inducing, aiding, abetting, attempting to commit crime, and contributing to a common purpose.⁸⁶ The doctrine of command

responsibility is also relevant to the attribution of conduct to an individual during armed conflict.

Since 11 September 2001, States have increasingly resorted to the proscription (or banning) of organizations deemed (often by political rather than judicial authorities) to be involved with, or connected to, terrorism.⁸⁷ There is an inherent danger that individuals adjudged (under national law) to be members or associates of such organizations will find themselves automatically excluded from refugee protection, notwithstanding any independent consideration of their personal responsibility for involvement in actual terrorist acts or offences.

Mere membership of, or loose association with, a terrorist organization is not legally sufficient to exclude an individual under Article 1F of the 1951 Refugee Convention, and personal and knowing participation in excludable crimes is necessary. Exclusion may, however, be based on the inchoate offence of complicity, a reasonable test for which was established in the Canadian case of *Ramirez*: (1) voluntary membership in a violent, criminal organization; (2) personal and knowing participation in its acts; and (3) failure to disassociate from the group at the earliest safe opportunity.⁸⁸

More controversially, the court in *Ramirez* also stated that 'where an organization is principally directed to a limited, brutal purpose, such as a secret police activity, *mere membership* may by necessity involve personal and knowing participation in persecutorial acts'.⁸⁹ Similarly, in *Gurung*, a UK tribunal found that mere membership of such groups may almost be sufficient for exclusion.⁹⁰ This approach was endorsed after 11 September 2001 by UNHCR, which stated that proof of voluntary membership of a notoriously violent group gives rise to a rebuttable presumption of individual responsibility.⁹¹ The presumption will be particularly strong where the individual is in a position of authority in the organization, and where the organization uses terrorist methods. Factors considered relevant to rebutting the presumption include: the voluntariness of membership, the role and position of the

⁸³ See Saul, n5.

⁸⁴ *Pushpanathan v Canada* [1998] 1 SCR 982.

⁸⁵ *Sivakumar v Canada (Minister of Employment and Immigration)* (CA) [1994] 1 FC 433.

⁸⁶ See, eg, 1998 Rome Statute of the ICC, Art 25.

⁸⁷ See, eg, Commonwealth Criminal Code Act 1995 (Australia), Division 102.

⁸⁸ *Ramirez v Canada (Minister of Employment and Immigration)* [1992] 2 FC 306.

⁸⁹ Emphasis added.

⁹⁰ See n55.

⁹¹ UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F, 4 Sept 2003, HCR/GIP/03/05, para 26.

individual in the organization and their ability to influence it, the actual activities of the group and of the individual, and the fragmentation of groups and loss of control over parts of the group. Disassociation is not required if the person would encounter serious personal risk.

Such an approach is not desirable. It reverses the burden of proof for asylum applicants who already encounter considerable difficulties in making out their claims. There is a real danger that the application of the presumption will lead to automatic and peremptory exclusion, without affording a fair procedure which allows full and proper consideration of an individual's particular circumstances and degree of responsibility. There are also a number of other serious difficulties with presumptions of personal and knowing participation based on membership of a group.

Firstly, there are difficulties in establishing membership of, or association with, terrorist organizations. Unlike members of the various Nazi criminal organizations declared illegal at Nuremberg,⁹² members do not carry membership cards and there are no membership lists; decentralized, clandestine operations are a hallmark of modern terrorist groups. Moreover, exclusion may flow from very tenuous links to terrorist organizations. For example, in *Suresh*, members were defined to include *associates of members* – a circular definition which results in an infinite regression of exclusion based on remote links, leading to the possible exclusion of family, friends, teachers and so on. Further, some organizations are complex structures which combine humanitarian or charitable activities with terrorist purposes, exposing some members to unwarranted exclusion.

Secondly, there are difficulties in identifying terrorist organizations. UNHCR suggests that both international lists of terrorist organizations (provided by the UN Security Council) and national lists may be relevant sources for identifying terrorist organizations in exclusion decisions. Yet, national lists are open to political manipulation by governments against their opponents, and influenced by foreign policy considerations, and different States have very

different definitions of terrorism and procedures for outlawing terrorist organizations.⁹³ These factors will inevitably lead to inappropriate exclusions in some jurisdictions. Moreover, the legal criteria for proscribing terrorist organizations may fail to account for the variety of non-justiciable factors which bear on the legitimacy of an organization: its public support; its democratic aims; whether it is resisting severe oppression; its use of limited means or the confinement of targets; whether violence is proportional and used as last resort; and whether there is any entitlement to combatancy in armed conflict.

Where decision-makers themselves are required to identify terrorist organizations in individual refugee status determinations, without the benefit of any prior proscription, it is questionable whether front-line decision-makers can easily make such complex judgments. Factors such as entitlement to combatant immunity in armed conflict are objectively verifiable by reference to treaty provisions and customary rules, and norms of proportionality are also recognized at international law. Yet it is far more difficult for a decision-maker to assess subjective matters such as the existence of the rule of law in another State, the availability of peaceful means of redress and whether such means have been exhausted, and the gravity of oppression necessary to justify violent resistance. Although human rights standards provide some guidance, the factual judgments involved are extremely difficult. Many of these factors are non-justiciable political questions, with no applicable legal standards.

United States legislation has gone farthest in automatically excluding persons from applying for asylum if they if they are engaged in terrorist activity (broadly defined) or members of foreign terrorist organizations (also defined widely).⁹⁴ A strict approach is taken to the identification of

⁹² 1945 Nuremberg Charter, Art 9 gave the International Military Tribunal at Nuremberg power to declare organizations criminal in the trial of any individual member, while Art 10 allowed national authorities to prosecute individuals for membership of such organizations, whose criminality could not then be challenged (incorporated in Control Council Law No 10, Art II(1)(d)). The IMT declared criminal the Nazi Leadership Corps, Gestapo, SD, and SS.

⁹³ The 2002 EU Framework Decision, n45, defines a 'terrorist group' as 'a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences'. A 'structured group' is then defined as 'a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure'.

⁹⁴ Immigration and Nationality Act (US), s 212(a)(3)(B), 8 USC §1182(a)(3)(B); see generally Georgetown University Law Centre (Human Rights Institute), 'Unintended Consequences: Refugee Victims of the War on Terror', Refugee Fact-Finding Investigation, May 2006; A Schoenholtz, 'Refugee Protection in the United States Post-September 11' (2005) 36 Columbia Human Rights Law Review 323; D Kanstroom, 'Legal Lines in Shifting Sand: Immigration Law and Human Rights in the Wake of September 11th' (2005) 25 Boston College Third World Law Journal 1.

terrorist organizations by sole reference to their use of violence, precluding consideration of the organization's purposes or goals or the nature of the regime that they oppose. For example, in 2006 a person who gave 'material support' to a Burmese opposition group (by donating funds) was barred from asylum, despite the group's commitment to democratic goals and the use of force only in self-defence.⁹⁵ Statutory bars based on membership of proscribed organizations undermine basic standards of procedural fairness, because exclusion is not based on a determination of personal involvement in, and individual responsibility for, specific excludable conduct.

8. EXPULSION OF REFUGEES: ARTICLE 33(2)

Under Article 33(2) of the 1951 Refugee Convention, *non-refoulement* 'may not... 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 judgement of a particularly serious crime, constitutes a danger to the community of that country'. This exception to non-refoulement is distinct from the Article 1F exclusion clauses (and from the grounds of expulsion of lawfully present refugees under Article 32 of the Convention),⁹⁶ though State practice sometimes confuses them. Indeed, Article 14(5) of the EU Qualification Directive provides that the grounds for withdrawal of protection in Article 33(2) of the Refugee Convention may be used as a basis for excluding persons *before* they are granted refugee status. This effectively establishes a fourth exclusion clause which is incompatible with the 1951 Refugee Convention, and comes in addition to the even broader 'bad character' or health screening grounds which may exclude refugees in some jurisdictions.⁹⁷ In New Zealand, security risk certificates have been issued to exclude suspected terrorists on a much lower standard of harm than that envisaged by Article 33(2).⁹⁸

People subject to expulsion under Article 33(2) are still entitled to complementary forms of

human right protection, such as the prohibition on return to torture or inhuman or degrading treatment. As the European Court of Human Rights stated in *Chahal*:

Article 3 enshrines one of the most fundamental values of democratic society.... The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct... Article 3 makes no provision for exceptions and no derogation from it is permissible... even in the event of a public emergency threatening the life of the nation...⁹⁹

International treaties (such as the ICCPR and the Torture Convention) only explicitly prevent refoulement to *torture*, but not return to inhuman and degrading treatment or punishment, although the latter conduct is prohibited under European human rights law and arguably under customary international law.¹⁰⁰ This has encouraged States to 'contract out' ill-treatment of detainees to less scrupulous States, for interrogation purposes.¹⁰¹ Recent research by Human Rights Watch has shown that diplomatic assurances have failed to protect deportees from ill-treatment in many jurisdictions involved in the 'war on terror'.¹⁰² Suspected terrorists are particularly at risk of torture, including while in the custody of rights-respecting liberal democracies. There has also been pressure to weaken the absolute character of the prohibition on return to torture, such as by a proposed judicial 'torture warrant'.¹⁰³

Further, in *Suresh*, a Canadian court found that deportation of a suspected terrorist to torture might be justified 'in exceptional circumstances' of State security.¹⁰⁴ The decision

⁹⁵ *In re S-K, Respondent*, 23 I&N Dec 936 (BIA 2006).

⁹⁶ Note that Sweden historically provided for the expulsion of 'presumptive terrorists' belonging to groups which endangered Sweden under its Aliens Act 1980, s 30: see G Stenberg, *Non-Expulsion and Non-Refoulement* (Iustus Förlag, Uppsala, 1989), 155-156.

⁹⁷ See, eg, Migration Act 1958 (Australia), s 501.

⁹⁸ *Attorney-General of NZ v Zaoui* [2005] NZSC 38.

⁹⁹ *Chahal v UK* [1996] ECHR 54, para 79.

¹⁰⁰ E Lauterpacht and D Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion' in E Feller, V Türk, and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003).

¹⁰¹ See B Saul, 'Torturing Terrorists After September 11: Dershowitz' Torture Warrant' (2004) 27 *International Journal of Law and Psychiatry* 645.

¹⁰² Human Rights Watch, 'Empty Promises: Diplomatic Assurances No Safeguard against Torture', Washington DC, April 2004: hrw.org/reports/2004/un0404 (18 June 2004).

¹⁰³ A Dershowitz, *Why Terrorism Works* (Yale University Press, New Haven, 2002), chapter 4.

¹⁰⁴ *Suresh*, n75; see also S Bourgon, 'The Impact of Terrorism on the Principle of "Non-refoulement" of Refugees: The *Suresh* Case before the

is contrary to international law, because the absolute prohibition leaves no room for ‘balancing’ the risk of torture against national security interests. Yet the thrust of this decision received apparent support from the EU Commission in a Working Paper after 11 September 2001, which stated that

the European Court of Human Rights may in the future again have to rule on questions relating to the interpretation of Article 3, in particular on the question in how far there can be a ‘balancing act’ between the protection needs of the individual, set off against the security interests of a state.¹⁰⁵

This was considered particularly relevant to the ‘unresolved’ legal position of persons excluded from protection but who are not removable,¹⁰⁶ especially given the use of indefinite detention by some States.¹⁰⁷ Such a view seeks to undermine the absolute nature of the existing prohibition on return to torture and is unnecessary in light of less invasive alternatives such as control orders in the country of asylum.¹⁰⁸

9. THE EXCLUSION CLAUSES ARE TOO PUNITIVE

The absolute nature of *non-refoulement* to torture contrasts starkly with the lesser protection afforded to refugees under both the Article 1F exclusion clauses and the Article 33(2) exception to *non-refoulement* to persecution. Similarly, whereas people subject to extradition may benefit from a non-discrimination clause, preventing return to discriminatory prosecutions, no such protection applies to those returned to persecution under refugee law.

The denial of protection in refugee law to persons because they are ‘unworthy’ is plainly outdated given developments in modern human rights law. Human rights are *rights*, not privileges, and cannot be suspended for bad behaviour.

While the human rights of serious domestic criminals may be limited on objective, public interest grounds (for instance, imprisonment is a legitimate restriction on freedom of movement), a serious domestic criminal cannot be racially vilified or sexually harassed—unlike persons excluded from refugee status who may be returned to such treatment. Domestically, States do not permit criminals to face persecution or discrimination simply because they become ‘undeserving’ of protection. Perhaps it is time to revise the Refugee Convention to more fully respect human dignity.

Decisions not to exclude a person, or to offer them complementary protection, need not result in impunity for serious criminals.¹⁰⁹ For treaty crimes of quasi-universal jurisdiction, such as hijacking or hostage taking, prosecution in the State of refuge may be an alternative to return to persecution. Prosecution before the International Criminal Court or ad hoc international or hybrid criminal tribunals may also be a possibility. Impunity may, however, occur in a narrow range of cases, where persons are not returnable but no extraterritorial jurisdictional basis exists. Although the *aut dedere aut judicare* (prosecute or extradite) principle has expanded to cover an increasing range of serious crimes, it does not necessarily apply to all excludable acts under Article 1F. This gap has been partially filled by the assertion of universal jurisdiction over (nationally defined) terrorist offences by an increasing number of States since 11 September 2001,¹¹⁰ narrowing the prospect of impunity.

10. CONCLUSION

There is little evidence that international refugee law has been misused by suspected terrorists to gain admission to other States or as a means of safe haven. None of the 11 September 2001 hijackers was a refugee or asylum seeker.¹¹¹ As the Howard League of Penal Reform wrote to the League of Nations in the 1930s, of the one and a quarter million refugees from the Russian and former Turkish empires assisted by the

Supreme Court of Canada’ (2003) 1 Journal of International Criminal Justice 169; O Okafor and P Okoronkwo, ‘Re-configuring *Non-refoulement*? The *Suresh* Decision, ‘Security Relativism’, and the International Human Rights Imperative’ (2003) 15 IJRL 30; R Bruin and K Wouters, ‘Terrorism and the Non-derogability of *Non-refoulement*’ (2003) 15 IJRL 5.

¹⁰⁵ EU Commission Working Document, The Relationship between Safeguarding Internal Security and Complying with International protection obligations and instruments, COM (2001) 743 final, 5 Dec 2001, para 2.3.1.

¹⁰⁶ *Ibid*, para 2.4.

¹⁰⁷ Anti-Terrorism, Crime and Security Act 2001 (UK), ss 21-33.

¹⁰⁸ See, eg, Prevention of Terrorism Act 2005 (UK), s1; Anti-Terrorism Act (No 2) 2005 (Australia), schedule 4.

¹⁰⁹ See generally J Fitzpatrick, ‘The Post-Exclusion Phase: Extradition, Prosecution and Expulsion’ (2000) 12 IJRL 272.

¹¹⁰ Saul, n27, 269.

¹¹¹ G Gilbert, ‘Protection after September 11th’ (2003) 15 IJRL 1, 1; J Fitzpatrick, ‘Speaking Law to Power: The War against Terrorism and Human Rights’ (2003) 14 European JIL 241, 258.

League, there was only one recorded terrorist case.¹¹²

Terrorists are far more likely to pursue illegal migration channels to infiltrate a State than to use asylum procedures. Asylum seekers are subject to rigorous identity and security checks, document verification, administrative scrutiny and suspicion of credibility, and, in some States, mandatory administrative detention.¹¹³ (It is even less likely that terrorists will seek entry through offshore resettlement programs, given the scarcity of resettlement places and the lengthy waiting periods involved.)

It is important to reject unwarranted linkages between terrorists and asylum,¹¹⁴ brought about by international, regional and domestic political pressure without clear-sighted consideration of the adequacy of existing legal principles. International refugee law does not provide safe haven for terrorists and does not prevent prosecution of suspects.¹¹⁵ As UNHCR notes, ‘any discussion on security safeguards should start from the assumption that refugees are themselves escaping persecution and violence—including terrorist acts’.¹¹⁶ Attention should focus on the security of refugees themselves, not just the security threats posed by refugees.¹¹⁷

¹¹² Letter from the Howard League for Penal Reform (London) to the Secretary General of the League of Nations, 27 Mar 1935, LoN Archives Geneva Doc 3A/15105/15085/VI.

¹¹³ Australia detains all asylum seekers arriving in Australia without permission: see M Crock, B Saul and A Dastyari, *Future Seekers II: Refugees and Irregular Migration in Australia* (Federation Press, Sydney, 2006), chapters 10-11.

¹¹⁴ R Lubbers, ‘Message to the Special Meeting on Terrorism and International Law at the International Institute of Humanitarian Law’, San Remo, 30 May 2002; Kingsely Nyinah, 312; Zard, n33, 33.

¹¹⁵ V Turk, ‘Forced Migration and Security’ (2003) 15 IJRL 113, 114, 118.

¹¹⁶ Lubbers, n114.

¹¹⁷ Turk, n115, 113, 122; UNHCR, *Agenda for Protection* (2nd ed, Geneva, 2003), Goal 4, 66-69.