

REFUGEE LAW
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Terrorism and Asylum

RLI Working Paper Series
Mini Volume (Papers 31–36)

Guest editor:
James C. Simeon

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Introduction

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Introduction

Terrorism and asylum have been the intense preoccupation of the United States, the European Union (EU), African Union (AU), Organization of American States (AS) and other regional unions; the United Nations (UN) and other international organisations; the media and the public-at-large, for at least the last two decades. Both of these highly charged and politically sensitive areas have been steadily escalating in significance and relevance, particularly within refugee law, over this time. It is important to note that there were 13,400 terrorist attacks that took place in some 108 countries around the world in 2016, with 34,000 total deaths.¹ According to the Institute of Economics and Peace's Global Terrorism Index, most developed countries had a dramatic increase in the number of people who were killed due to terrorism.² The United Nations High Commissioner for Refugees' (UNHCR) *Global Trends: Forced Displacement in 2016* report stated that:

By the end of 2016, 65.6 million individuals were forcibly displaced worldwide as a result of persecution, conflict, violence, or human rights violations. That was an increase of 300,000 people over the previous year, and the world's forcibly displaced population remained at a record high.³

The report continues and states,

Over the past two decades, the global population of forcibly displaced people has grown substantially from 33.9 million in 1997 to 65.6 million in 2016, and it remains at a record high. Most of this increase was concentrated between 2012 and 2015, driven mainly by the Syrian conflict. But this rise also was due to other conflicts in the region such as in Iraq and Yemen, as well as in sub-Saharan Africa including Burundi, the Central African Republic, the Democratic Republic of the Congo, South Sudan, and Sudan. The increase of recent years has led to a major increase in displacement: from about 1 in 160 people a decade ago to 1 in 113 today.⁴

This escalating trend in forced displacement continued in 2017. The UNHCR's *Global Trends: Forced Displacement in 2017* report states:

Globally, the forcibly displaced population increased in 2017 by 2.9 million. By the end of the year, 68.5 million individuals were forcibly displaced worldwide as a result of persecution, conflict, or generalized violence. As a result, the world's forcibly displaced population remained yet again at a record high.⁵

1 National Consortium for the Study of Terrorism and Responses to Terrorism (START), *Background Report, Overview Terrorism 2016*, University of Maryland, August 2017, https://www.start.umd.edu/pubs/START_GTD_OverviewTerrorism2016_August2017.pdf (accessed 18 March 2018).

2 Adam Withnall, 'Global Terrorism Index 2016: Developed countries suffer dramatic rise in terrorism-related deaths', *The Independent*, 16 November 2016, <https://www.independent.co.uk/news/world/politics/global-terrorism-index-2016-developed-countries-suffer-dramatic-rise-deaths-a7419396.html> (accessed March 19, 2018); Chris Hughes, 'Terrorism soars with number of attacks rising 25% every year – and Isis is responsible for a third', *Mirror*, 24 January 2018, <https://www.mirror.co.uk/news/world-news/terrorism-soaring-number-attacks-rise-9684557> (accessed March 19, 2018); Institute for Economics and Peace, *Global Terrorism Index 2017, Measuring and Understanding the Impact of Terrorism*, November 2017, <http://visionofhumanity.org/app/uploads/2017/11/Global-Terrorism-Index-2017.pdf> (accessed 24 March 2018).

3 UNHCR, *Global Trends: Forced Displacement 2016*, Geneva, Switzerland: UNHCR, 2017, p. 2, <http://www.unhcr.org/5943e8a34.pdf> (accessed 18 March 2018).

4 UNHCR, *Global Trends: Forced Displacement 2016*, Geneva, Switzerland: UNHCR, 2017, p. 5, <http://www.unhcr.org/5943e8a34.pdf> (accessed 18 March 2018) (Footnotes and figures are omitted.)

5 UNHCR, *Global Trends: Forced Displacement 2017*, Geneva, Switzerland: UNHCR, 2018, p. 2, <http://www.unhcr.org/globaltrends2017/> (accessed 31 August 2018).

Astonishingly, the UNHCR estimated that on average 44,400 people were being forcibly displaced from their homes in the world each day in 2017 and that 52 per cent were children under the age of 18.⁶ The forced displacement situation in the world is clearly deteriorating to disastrous proportions and, traumatically, affecting whole generations of people.

What is especially noteworthy is that most of those who are forcibly displaced are coming out of the same regions where most of the world's terrorism is taking place.⁷ According to the National Consortium for the Study of Terrorism and the Responses to Terrorism (START), terrorist attacks are geographically concentrated. 'The vast majority of attacks (87%) and deaths (97%) occurred in the Middle East & North Africa, South Asia, and Sub-Saharan Africa.'⁸ It is noteworthy, then, that the bulk of the world's forcibly displaced are not only wracked by protracted armed conflict but also by terrorism. Indeed, just three countries, all suffering from protracted armed conflict for years, produce more than half of all of the world's refugees.⁹ The *Global Terrorism Index 2017* report underscores this point by stating:

When examining the drivers of terrorism the presence of armed conflict, political violence by governments, political exclusion and group grievances remain critical factors. The analysis finds that 99 per cent of all deaths over the last 17 years have been in countries that are either in conflict or have high levels of political terror. Political terror involves extrajudicial killings, torture and imprisonment without trial. This shows that the great majority of terrorism is used as a tactic within an armed conflict or against repressive political regimes. It also demonstrates the risks of political crackdowns and counterterrorism actions that can exacerbate existing grievances and the drivers of extremism and terrorism. Both Egypt and Turkey recorded substantially higher levels of terrorism following government crackdowns.¹⁰

In fact, the *Global Terrorism Index 2017* report examines the 'Conflict-Terrorism Nexus' and states that, 'Countries with the highest number of battle-related deaths since 2012 such as Syria, Iraq, Afghanistan and Yemen also have very high levels of terrorism.'¹¹ Indeed, the top ten countries experiencing terrorism in 2016 all feature similar characteristics.

Table 1: States most affected by terrorism in 2016

1. Iraq
2. Afghanistan
3. Nigeria
4. Syria
5. Pakistan
6. Yemen
7. Somalia
8. India
9. Turkey
10. Libya¹²

They have all been engaged in protracted armed conflict and/or extreme political violence. These ten countries map easily onto the list of principal source countries for refugees and other forced migrants in 2016.¹³

Sadly, terrorism and asylum are frequently conflated and/or confused and misunderstood; the reason for this seems to be, at least in part, that they are both rooted in protracted armed conflict.¹⁴ It is critically important that these two

6 UNHCR, *Global Trends: Forced Displacement 2017*, Geneva, Switzerland: UNHCR, 2018, p. 3, <http://www.unhcr.org/globaltrends2017/> (accessed 31 August 2018).

7 Alex P. Schmid, 'Links between Terrorism and Migration: An Exploration', ICCT Research Paper, May 2016, International Centre for Counter-Terrorism – The Hague, <https://www.icct.nl/wp-content/uploads/2016/05/Alex-P-Schmid-Links-between-Terrorism-and-Migration-1.pdf> (accessed 19 March 2018).

8 National Consortium for the Study of Terrorism and Responses to Terrorism (START), *Background Report, Overview Terrorism 2016*, University of Maryland, August 2017, p. 1, https://www.start.umd.edu/pubs/START_GTD_OverviewTerrorism2016_August2017.pdf (accessed 18 March 2018).

9 Fifty-five per cent of the world's refugees are from the Syrian Arab Republic (5.5 million), Afghanistan (2.5 million) and South Sudan (1.4 million): UNHCR, *Global Trends: Forced Displacement 2016*, Geneva, Switzerland: UNHCR, 2017, p. 5, <http://www.unhcr.org/5943e8a34.pdf> (accessed 18 March 2018), p. 3. And, in 2017, more than two-thirds of the world's refugees came from five countries: the Syrian Arab Republic (6.3 million), Afghanistan (2.6 million), South Sudan (2.4 million), Myanmar (1.2 million) and Somalia (986,400). UNHCR, *Global Trends: Forced Displacement 2017*, Geneva, Switzerland: UNHCR, 2018, p. 3, <http://www.unhcr.org/globaltrends2017/> (accessed 31 August 2018). This trend of the concentration of the percentage of more and more refugees from fewer countries is troubling and needs, obviously, to be seriously addressed by the UN and all other supranational organisations.

10 Institute for Economics and Peace, *Global Terrorism Index 2017, Measuring and Understanding the Impact of Terrorism*, November 2017, p. 34, <http://visionofhumanity.org/app/uploads/2017/11/Global-Terrorism-Index-2017.pdf> (accessed 24 March 2018).

11 Institute for Economics and Peace, *Global Terrorism Index 2017, Measuring and Understanding the Impact of Terrorism*, November 2017, <http://visionofhumanity.org/app/uploads/2017/11/Global-Terrorism-Index-2017.pdf> (accessed 24 March 2018).

12 Institute for Economics and Peace, *Global Terrorism Index 2017, Measuring and Understanding the Impact of Terrorism*, November 2017, p. 21, <http://visionofhumanity.org/app/uploads/2017/11/Global-Terrorism-Index-2017.pdf> (accessed 24 March 2018).

13 UNHCR, *Global Trends: Forced Displacement 2016*, Geneva, Switzerland: UNHCR, 2017, p. 2, <http://www.unhcr.org/5943e8a34.pdf> (accessed 18 March 2018).

14 James C. Simeon, 'Exposing Terrorism False Association with Asylum', *CARFMS Newsletter* Issue 9, Winter 2018, pp. 14–19. <http://carfms.org/wp-content/uploads/2018/01/CARFMS-newsletter-winter-2018.pdf> (accessed 18 March 2018).

highly charged emotive and contentious terms are clearly separated and not confused, and the two terms not be associated in the media's, policymakers' or the public's mind. Moreover, the many myths surrounding these two terms need to be fully exposed and discarded.¹⁵

Ever since September 11, 2001, the UN and the international community, regional unions, states and individual national civil societies, for that matter, have been preoccupied with security concerns.¹⁶ Obviously, the impact of 9/11, economically, politically, socially and psychologically, was so devastating that it resulted inevitably in severe counter-terrorism measures in an effort to limit any further terrorist incidents of this magnitude and, especially, on the territory of the United States.¹⁷ This also encompassed the field of asylum, in particular, and migration, in general.

The UN, regional unions and states, especially, understandably, the United States, focused on the 'terrorist threat' and how to combat it. Indeed, some states – the United States and France, for example – have even declared, unofficially, a 'War on Terrorism'.¹⁸ In the process, in many instances, too little attention has been paid to the curtailment of human rights in an effort to try to counter the terrorist threat. The need to examine the controversial subject of 'terrorism and asylum', at this particular time, is pertinent and, perhaps, even self-evident, given the apparent statistical trends. Given the relevance and significance of this subject in the world today, it is understandable that a workshop on 'Terrorism and asylum', would be held, followed by a special edition of the Refugee Law Initiative (RLI) Working Paper Series of some of the leading papers that were presented at the workshop, which was held by the Refugee Law Initiative at the School of Advanced Study, University of London, on 8 December 2017.

The workshop featured three panel sessions with four original papers presented at each session. Five of those 12 papers, nearly half of those that were delivered at the workshop, are included in this special edition. There was also a brief report on the workshop that can be accessed here: https://rli.sas.ac.uk/sites/default/files/files/Terrorism%20and%20Asylum%20Workshop%20Report_RLI.pdf.¹⁹

The five working papers presented here take different approaches and perspectives, and present a wide range of different views on the subject of terrorism and asylum. The following short synopses provide a brief outline and description of each of the five substantive papers that are included in this special edition.

Patricia Tuitt's contribution, 'Refugees, terrorism and Article 1 of the Refugee Convention', challenges us to consider the fundamental nature of the 1951 Convention relating to the Status of Refugees as an instrument intended first and foremost to exclude those who are deemed unworthy of international protection as refugees. Adopting a critical legal statist approach, premised on Max Weber's famous dictum that the 'state is that human community that (successfully) claims the monopoly on the legitimate use of violence within a given territory' as the fundamental basis to the law, she argues that 'states will always give the primacy to the consideration of whether a putative refugee is a terrorist before contemplating their protection needs'. In short, the so-called, Exclusion Clauses, of the 1951 Convention are central to who can be legally defined as a refugee. The argument is presented in three parts: 'European legal ideology and the Refugee Convention', 'Article 1 and the critique of the binary opposite' and 'Victims and terrorists between two

15 James C. Simeon, 'Terrorism and Asylum: Unravelling the Myths', *RLI Blog on Refugee Law and Forced Migration*, Refugee Law Initiative, School of Advanced Study, University of London, 25 January 2018, <https://rli.blogs.sas.ac.uk/2018/01/25/terrorism-and-asylum-unravelling-the-myths/> (accessed 18 March 2018).

16 World Facts, 'Worst Terrorist Attacks in World History', *worldatlas*, <https://www.worldatlas.com/articles/worst-terrorist-attacks-in-history.html> (accessed 18 March 2018) states that the September 11th attacks were the worst terrorist attack in modern history:

The September 11th attacks came as a series of four well organized terrorist attacks, planned by the Al-Qaeda, targeting the US. The attacks began on Tuesday, September 11 in 2001 and killed approximately 2,996 people, injured more than 6,000, and destroyed property and infrastructure worth more than \$10 billion. The economic loss totaled about \$3 trillion in damage to property, lives lost, lost production of goods and services, and loss of stock market wealth. This deadly attack involved four passenger airlines flying to California from the northeastern parts of the US. The United Airlines Flights 175 and American Airlines Flight 11 were crushed (sic) by the Al-Qaeda into the South and North towers in that order, in New York's World Trade Center. The four passenger planes were valued at \$385 million. In less than two hours the two 110-story towers had collapsed and the debris and fires destroying or collapsing all other structures in the compound. American Airlines Flight 77 plowed into the Pentagon, Virginia where the western side of the building collapsed. United Airlines Flight 93, the fourth plane crashed in Stonycreek Township although the attacker's aim was Washington, D.C. The replacement of destroyed buildings of the world trade center costs were between \$3 billion and \$4.5 billion, the damaged part of the Pentagon was about \$1.1 billion while the clean[-up] cost was \$1.3 billion. The infrastructure damage was between \$10 billion and \$13 billion. In response, the US launched [the] War on Terror, with the Taliban as their primary target since they had harbored the al-Qaeda terrorist group. Around the world countries also strengthened anti-terrorism laws and expanded intelligence agencies and enforcements to counter and hence prevent terrorists' attack. The al-Qaeda claimed they attacked the US for the support the country gives Israel, for the US troops in Saudi Arabia and the sanctions against Iraq. Osama bin Laden took responsibility for the attacks in 2004.

17 Kimberly Amadeo, 'How the 9/11 Attacks Still Affect the Economy Today: What's the Lasting Damage?', *the balance*, <https://www.thebalance.com/how-the-9-11-attacks-still-affect-the-economy-today-3305536> (accessed 18 March 2018); Richard Jackson, 'War on Terrorism', *United States History*, *Encyclopaedia Britannica*, undated, <https://www.britannica.com/topic/war-on-terrorism> (accessed 19 March 2018); Global Policy Forum, 'War on Terrorism', <https://www.globalpolicy.org/war-on-terrorism.html> (accessed 18 March 2018).

18 Benedicte Suzan and Philip H. Gordon, 'France, the United States and the "War on Terrorism"', *Brookings*, 2 January 2002, <https://www.brookings.edu/articles/france-the-united-states-and-the-war-on-terrorism/> (accessed 24 March 2018); Matt Schiavenza, 'France Declares its own "War on Terror"', *The Atlantic*, 10 January 2015, <https://www.theatlantic.com/international/archive/2015/01/france-declares-its-own-war-on-terror/384409/> (accessed 18 March 2018); Jethro Mullen and Margo Haddad, 'France is at War' President Francois Hollande says after ISIS attack', *CNN*, 17 November 2015, <https://edition.cnn.com/2015/11/16/world/paris-attacks/index.html> (accessed 23 March 2018); 'France's Response to Terrorism, Loss of Faith', *The Economist*, 30 July 2016, <https://www.economist.com/news/europe/21702746-french-are-growing-impatient-lofty-calls-persevere-against-terror-loss-faith> (accessed 24 March 2018).

19 James C. Simeon, 'Terrorism and Asylum Workshop Report', Refugee Law Initiative, School of Advanced Study, University of London, January 2018, https://rli.sas.ac.uk/sites/default/files/files/Terrorism%20and%20Asylum%20Workshop%20Report_RLI.pdf (accessed 18 March 2018).

centuries'. In essence, it is argued that Article 1F has risen to the fore as an effective weapon in states' use of a wide array of counter-terrorism measures to contain terrorist activities and, in the process, it has eroded the protection of asylum seekers. Moreover, the Exclusion Clauses have disproportionately affected asylum seekers coming from developing countries. It is further argued that it has been the post-colonial, critical race and feminist scholars who have been at the forefront of the challenges to the particular thought structures which rely on forceful but, ultimately, unstable binary oppositions such as the inclusion/exclusion elements of the 1951 Convention. The last part of the paper begins with the assertion that, 'If there is one area of legal life in which the adjudication upon indeterministic cases is routine, it is the law of refugee status.' It goes on to argue that there has been a noticeable shift in focus over the last few decades to the 'refugee as a terrorist'. The paper concludes with the observation that the Refugee Convention is not an innocent vehicle in the hostile environment in which refugees are forced to seek protection in the world today.

In 'An introduction to the common security narrative of terrorism and asylum and its influence on Austrian migration law', Julia Kienast undertakes an interesting analysis of how the lack of reliable information to the general public can be a fertile ground for generating emotions such as fear. She notes that this type of situation is rife for the misassociation of the two terms, terrorism and asylum. Three specific areas are examined in detail: (1) terrorism by right-wing radicals against asylum applicants and refugees, (2) terrorism as a cause for displacement, and (3) the possible involvement of forced migrants in terrorism. Austria, a country of only 8.5 million people, was overwhelmed during the height of the 'refugee crisis' in Europe in 2015 when some 600,000 migrants travelled across its borders. This situation was immediately exploited by the politicians who harnessed the 'security fear' of migration for their own political ends. Right-wing radical extremism experienced an increase by some 54 per cent in this same year and continued to increase, thereafter reaching the severity of terrorist attacks. The 2017 Austrian elections were dominated by the topic of migration. The net result was a further securitisation of migration through the continuous amendment of major portions of Austria's migration laws. It is relevant to emphasise that banned terrorist organisations – such as Al-Qaida and the Taliban in Afghanistan and parts of Pakistan, Daesh and its associates in Syria and Iraq, Al Shabab in Somalia and Boko Haram in parts of Nigeria – control large portions of territory. The key point is that people are fleeing vast areas that are essentially under the control of terrorist organisations. Following a thorough review of all of the terrorism cases in Austria over the last few years, it is noted that the number of terrorist cases involving refugees is very small relative to the total number of asylum applicants. And, it is further noted that the threat of terrorism could be counteracted through better cooperation with and support of Member States in border controls and information exchange. Likewise, better preventive radicalisation strategies could be achieved through adequate integration and future perspective programmes to address potential terrorist incidents in Austria. The paper also provides a detailed review and analysis of Austrian migration regulations and security concerns from a historical perspective. The paper outlines the paradigm shift in the securitisation of Austrian migration and refugee policies in the 1990s and, again, in 2015 to 2017 and attributes it at least, in part, to the confusion and convolution of terrorism and asylum.

The Hungarian case is of special interest. In the paper 'Fight against terrorism and the need for international protection: the Hungarian solution', Barbara Köhalmi and Anita Rozália Nagy-Nádasdi provide a subtle and detailed analysis of the situation in Hungary as it relates to terrorism and asylum. Approaching the issue from the perspective of competing human rights, citizens' rights to security and the asylum seekers' rights to international protection, the authors go on to consider the absence of a comprehensive and universal definition of what constitutes 'terrorism' and how this undermines the rights of migrants. Since the onset of the refugee crisis in 2013, the Hungarian government has undertaken a number of measures to control the flow of migrants within its borders. Stricter asylum procedures and rules, including detention, expulsion and accelerated border procedures all point to the primacy of national security over the human rights of migrants and refugees. In 2015, the Hungarian government built a fence at the Serbian-Hungarian border. At the same time, it strengthened its Office of Immigration and Asylum, national police and army, which are tasked with border protection. The speeches of the prime minister of Hungary, Viktor Orban, have been particularly alarmist and vitriolic, and have helped to blur the line between migrant and terrorist. Orban has also asserted that, with the increase in immigration in Europe, there has been an increase in crime and a decrease in public safety. In 2015, the Hungarian Criminal Code was amended several times to change the wording of what constituted an act of terrorism. It is important to emphasise that the abandonment rate, that is, the number of asylum applicants who withdraw their claims and/or fail to appear for their refugee hearings, is 65 per cent. The authors note that this high abandonment rate points to the fact that Hungary is seen as a transit country. There is also a fixation on border controls and building fences to deter irregular migration to Hungary. It is noted further that 'crimmigration' is rampant with the criminalisation of irregular migration, that is, the use of criminal measures to deal with immigration violations and vice versa. For instance, Hungary's Fundamental Law has been amended to include the special legal order that requires a two-thirds vote of parliament to enact the so-called 'terror emergency situation'. This can be invoked when a terrorist attack has taken place or there has been a significant and direct risk of it occurring. This working paper also provides a thorough review of the changes in Hungarian refugee laws and their effect on the refugee determination system. The paper concludes with the scandalous *Ahmed H.* case to illustrate how these legislative changes, both to anti-terrorism and asylum measures, have tended to operate against asylum applicants in practice.

In 'Manufacturing fear: the social component of anti-immigrant policies in the United States', Selina March provides a finely argued and deeply insightful account at how US President Donald Trump has advanced the culturally racist belief that refugees from Muslim-majority countries are a security threat, as manifest by his anti-refugee legislation. The nexus between nativism and the securitisation and criminalisation of migration are explored in the first section of the paper. The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) was introduced and passed following the 1993 World Trade Center bombing. And the September 11th coordinated terrorist attacks in New York

City, and the collapse of the Twin Towers of the World Trade Center, and on the Pentagon in Washington, DC, had a profound effect on the securitisation and criminalisation of US immigration and refugee policy, especially, on drawing a link between terrorism and refugees. The 2001 USA-PATRIOT Act and the 2005 Real ID Act, led by the 2001 UN Security Council Resolution 1373, drew the 'institutional link between asylum seekers, particularly from Muslim-majority countries, and terrorism' which reinforces 'existing cultural biases against Muslim immigrants and refugees among the American populace, paving the way for the sort of anti-refugee policies being proposed by the current [Trump] administration'. The nativist rhetoric today that is aimed at Muslim immigrants resembles the anti-immigrant sentiment of the past, which makes it easy to see how Trump's anti-Muslim rhetoric has struck a chord among certain sections of the American public. In fact, Trump has expertly played on 'existing biases and fears to launch himself to political success, and appears to be using the same tactics in his attempt to push through anti-immigration policies, and anti-refugee policies targeting asylum seekers from Muslim-majority countries'. The strategy of deliberately blurring the lines between refugees and migrants has been used to promote hardline anti-immigrant and anti-refugee policies. 'Protecting the Nation from Foreign Terrorist Entry Into the United States' executive orders were issued in 2015 following the San Bernardino attack and the need for a ban following attacks at the Pulse nightclub shooting in Orlando, Florida, and the truck attack in New York City are invoked continuously. The paper also examines Trump's effective use of social media to galvanise support for his culturally racist views, especially, through his tweets, those that continually play on the idea of protecting American ideals and the fear of terrorism. Overall, the paper underscores the significance of the nativist and anti-immigrant sentiment that is present, and historically evident, within large swaths of not only of American society, but in other societies as well, which is too often easily agitated and mobilised by the powerful emotion of fear by extreme right-wing politicians for their own policy ends.

The last contribution to this edited collection, 'Terrorism and exclusion from asylum in international and national law', argues that the present gaps and inconsistencies in international criminal law must be addressed on a priority basis, given the necessity, yet absence, of a comprehensive convention on terrorism with a universal definition of what constitutes terrorism. Currently, international humanitarian law prohibits terrorism and international criminal law has criminalised terrorism in situations of international and non-international armed conflict, but, this is less evident in situations where there is no armed conflict. There are, of course, some 19 sectoral international conventions that criminalise specific types of terrorism such as hijacking aircraft, hostage taking, the financing of terrorism and so on, and there are statutes that criminalise terrorism at the state level in non-armed conflict situations. However, this complicated mix of different statutory measures and international sectoral conventions creates a confusing situation of overlapping and divergent measures that can have possibly detrimental consequences for those who are seeking asylum. The paper commences by considering terrorism in international law and then examines three cases from the International Criminal Tribunal of the Former Yugoslavia (ICTY) – the 2001 *Krstic*, 2006 *Galic* and 2017 *Mladic* cases – to illustrate that there is a 'crime of terror' and that 'terrorising civilians' falls within the meaning of 'persecution' within international criminal law. The paper also reviews three common law Supreme Court judgments in Canada, the UK and the USA: the 2002 *Suresh*, 2010 *JS (Sri Lanka)* and the 2010 *Holder v. The Humanitarian Law Project* judgments. These Supreme Court decisions outline how national jurisprudence has upheld the constitutionality of the definition of terrorism and counter-terrorism legislation within these national jurisdictions. But it also demonstrates the divergence of terrorist measures at the state level with the USA, for instance, having the lowest standards for the exclusion of those who provide any 'material support' whatsoever for any kind of terrorist activities.

This edited collection features two general papers on various aspects of terrorism and asylum laws, from international, regional and national levels, and how this impacts on those who are seeking asylum or refugee protection and three papers that consider how terrorism and asylum have been addressed in Austria, Hungary and the United States. From these three country-specific papers it is obvious that the fear of terrorism has been exploited to advance the securitisation and criminalisation agenda to the detriment of the human rights and dignity of asylum seekers and refugees. The five papers, plus this introduction, together offer a much-needed, in-depth critical assessment of the dynamics and the resulting impact and the consequences of the misassociation of 'terrorism with asylum' on those who are seeking asylum anywhere in the world today.

We welcome your comments, thoughts, reflections and suggestions on any of these working papers or this special issue on 'Terrorism and Asylum' as a whole. We are mindful of the fact that much more work is needed on this highly relevant and significant subject in order to address two of the most pressing issues and policy concerns of our time – terrorism and asylum.

Refugees, terrorism and Article 1 of the Refugee Convention

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Abstract

Article 1 of the 1951 Convention relating to the Status of Refugees contains a definition of a refugee in which the persecuted victim and dangerous terrorist are drawn together in close proximity. It is in the interests of asylum seekers and their advocates to separate out the two dimensions of the refugee. It is in the interests of states to ensure they remain welded together. Drawing substantially on Walter Benjamin's 1921 essay 'Critique of Violence', this paper seeks to contribute to ongoing discussions concerning the increasing use by states of the paragraph F exclusion clause in Article 1. The paper argues that paragraph F always had primacy over other provisions of the Refugee Convention, and it seeks to explain why it is that, for a long time, paragraph A(2) appeared to take precedence over paragraph F.

Keywords

Individual violence, terrorism, indeterminate causes, critical theory, critique of binary oppositions, state monopoly of violence, exclusion, inclusion, law creation, law preservation.

1. Introduction

One might perhaps consider the surprising possibility that the law's interest in a monopoly of violence vis-a-vis individuals is not explained by the intention of preserving legal ends but, rather, by that of preserving the law itself; that violence, when not in the hands of the law, threatens it not by the ends that it may pursue but by its mere existence outside the law.¹

It is the fate of the refugee to give meaning to the most enduring feature of modern European legal systems. That feature is expressed in the quotation with which this paper opens. European law is fundamentally constituted in a distinction between legitimate and illegitimate violence, which pays no regard to whether the ends of violence are just or unjust, moral or immoral, ethical or unethical.

It is to ensure that the refugee condition consolidates the law's distinction between the 'means' and the 'ends' of violence² that Article 1 of the Refugee Convention³ simultaneously constructs a refugee as a potential 'persecuted' victim of the state⁴ and as a potential 'war criminal' or 'terrorist'.⁵

In drawing together, within the same text, the 'victim' of state persecution and the violent 'revolutionary', the Refugee Convention sought no opposition between the persecuted victim and the terrorist, but, rather, contained both within the potent symbol of the refugee. Thus, the first 'international' Refugee Convention expresses not an exception within European law but its exemplary case.

This is the basic premise upon which I will argue that the obligation of state signatories to the 1951 Refugee Convention to exclude a person deemed to be a terrorist from the scope of protection afforded by that instrument has always taken precedence over all other obligations imposed on state signatories, including the Article 33 duty of non-refoulement.

The exercise undertaken by states in respect to Article 1 of the Refugee Convention is to determine which side of the Janus-faced refugee, which the law itself designed, it will see reflected in an individual who comes to its borders seeking protection. Not to accept that a state will look first for the face of the terrorist is to ignore the entire history of European law.

The argument as to the pre-eminence of paragraph F of the Refugee Convention is arranged in three sections. Section 1, 'European legal ideology and the Refugee Convention', notes that a sound interpretation of any legal instrument must attend to that instrument's historical origins. However, this understanding does not take me along the usual route of historical enquiry, which is to the Refugee Convention's *travaux préparatoires*, but, instead, to a key philosophical critique of twentieth-century European legal systems.⁶ What I take from this critique is that European law will only tolerate the granting of a legal right to an individual to challenge state-sanctioned violence on the condition that the same legal right incorporates a guarantee that, at the option of the state, emergency measures can be taken to reassert the state monopoly of violence vis-à-vis that individual. The Refugee Convention incorporates such a guarantee in a definition in which those who seek its protection are contingently assigned to the category of 'war criminal' or 'terrorist'.

Against this theoretical background, I hope to advance a plausible explanation of why European states have been deploying the emergency measures authorised by the Refugee Convention at least since the very earliest stages of the 'technological revolution', which allowed refugees from across the globe to travel to European states with the intention of exercising the legal right to escape from state violence.

Having established that European legal ideology demands that any legal definition of refugee must be a *contaminated* one, the second section, 'Refugee Convention Article 1 and the critique of binary oppositions', offers an alternative to the popular reading of Article 1. The most prevalent reading would separate the paragraphs of the Article 1 definition into 'inclusion' and 'exclusion' elements, with pre-eminence being accorded to its so-called 'inclusion' elements. With reference to, among other things, the post-structuralist critique of binary oppositions, I aim to demonstrate that the approach to the interpretation of Article 1, which refugee scholars and policymakers prefer, is not as stable as it might appear.

1 Walter Benjamin, 'Critique of Violence', *Walter Benjamin: Reflections, Essays, Aphorisms, Autobiographical Writings* (New York: Schocken Books, 1995), p. 281.

2 The following is instructive: '... it is clear that the most elementary relationship within any legal system is that of ends to means, and, further, that violence can first be sought only in the realm of means, not of ends. These observations provide a critique of violence with more – and certainly different – premises than perhaps appears. For if violence is a means, a criterion for criticizing it might seem immediately available. It imposes itself in the question whether violence, in a given case, is a means to a just or an unjust end. A critique of it would then be implied in a system of just ends. This, however, is not so. For what such a system, assuming it to be secure against all doubt, would contain is not a criterion for violence itself as a principle, but, rather, the criterion for cases of its use'. Walter Benjamin, 'Critique of Violence', *Walter Benjamin: Reflections, Essays, Aphorisms, Autobiographical Writings* (New York: Schocken Books, 1995), p. 277.

3 Convention relating to the Status of Refugees, adopted in Geneva on 28 July 1951, entered into force on 22 April 1954. UNTS, vol. 189, p. 137 [hereinafter referred to as the Refugee Convention].

4 Refugee Convention, Article 1A(2).

5 Refugee Convention, Article 1F(A).

6 In addition to Walter Benjamin, 'Critique of Violence', *Walter Benjamin: Reflections, Essays, Aphorisms, Autobiographical Writings* (New York: Schocken Books, 1995), Jacques Derrida's 'Force of Law: The Mystical Foundations of Authority', *Cardozo Law Review*, 11 (Benjamin N. Cardozo School of Law, 1990), pp. 919–1047, is a key reference for legal scholarship within the traditions of critical legal studies.

The third section, 'Victims and terrorists between two centuries', attempts to reconcile the preceding parts of the argument, which assert the primacy of paragraph F, with the undeniable fact that 'paragraph F was...little used in the Twentieth Century, but [is] now...used increasingly often in the context of the escalation in international action against terrorism'.⁷ The reader might well question why paragraph F was not used more often in refugee cases if it truly expresses the principal obligation of state signatories to the Refugee Convention. As Section 1 argues, the refugee phenomenon was always vulnerable to being altered so as to consolidate the state's monopoly of violence, which the legal right contained in the Refugee Convention ostensibly undermined, and here I draw upon Helen Reece's analysis of how law alters certain social phenomena 'in order to cope with indeterministic causes'.⁸ Although Reece does not address the refugee phenomenon, I suggest her analysis can assist in understanding how the twenty-first century has been one in which the terrorist side of the face of the Convention refugee has been exposed. For most of the life of the Refugee Convention, the causes behind the refugee victim's displacement were seen as indeterminate, in contrast to the causes or sources of the refugee terrorist's violent acts, which were seen as determinate – at least relatively speaking. This century has seen a reversal, and here I offer the suggestion that the shift, which Clayton and others have observed, is fundamentally caused by the law's attempt 'to cope with indeterministic cases'.⁹

2. European legal ideology and the Refugee Convention

By what function violence can with reason seem so threatening to law, and be so feared by it, must be especially evident where its application, even in the present legal system, is still permissible.¹⁰

The 1951 Refugee Convention is a crucial marker in the development of European law in that it decrees that in certain circumstances individuals are legally entitled to withdraw from the sanctioned violence of the state. The right of an individual to challenge legally sanctioned violence carries a deep threat to the preservation of law itself, and for that reason law must render that threat impotent. The potential of the refugee victim of state persecution to exercise the legal right contained in the Refugee Convention in a way that undermines the state monopoly of violence was thus *immediately* curtailed by the construction of a refugee terrorist who poses a threat to the state and, therefore, whose life or freedom could be taken with impunity.

Under the Refugee Convention, the right to withdraw from a state is confined to state-sanctioned persecution.¹¹ This right must be supported by other states to the extent that they must not, directly or indirectly, connive at returning the individual to the state violence from which they seek legitimately to escape.¹² The objective of state persecution must be to nullify an individual's civil and political rights.¹³ Further, and as many refugee commentators have noted, the right to withdraw from a persecuting state was one intended to benefit European individuals alone.

In *Borderline Justice: The Fight for Refugee and Migrant Rights*, Frances Webber puts the issue most succinctly:

Another legal obstacle for asylum-seekers is the narrow legal definition of who is a refugee. This was not so much of an issue in the post-second world war years when there was just a trickle of deposed monarchs, ex-dictators and their secret police making their way to Britain. But with the growth of mass travel, mass migration and mass movement of refugees, the refugee definition has become highly contentious. The Home Office and refugees' lawyers are engaged in a constant struggle in the courts over the breadth of the definition, the people and the situations it covers. Although 80 per cent of the world's refugees (using the word in its ordinary, not legal sense) are women or children fleeing war or violence, most of them are not eligible for refugee status.¹⁴

Why is the legal right conferred upon an individual to 'sever' 'violent relations' or to seek a 'withdrawal' or 'estrangement' from state violence, so threatening to law? For an answer we must return to the philosophical critique of the relation between law and violence. The answer turns on the issue of whether the act of withdrawal from a pre-existing relationship (in the instant case, the withdrawal of an individual from a state in which they are domiciled) can be conceived of as a violent act of an individual, pursued in defiance of state-sanctioned violence.

7 Gina Clayton, *Textbook on Immigration and Asylum Law* (Oxford: Oxford University Press, 2016), p. 489.

8 Helen Reece, 'Losses of Chances in the Law', *Modern Law Review*, 59 (Wiley, 1996), pp. 188–206.

9 Helen Reece, 'Losses of Chances in the Law', *Modern Law Review*, 59 (Wiley, 1996), p. 206.

10 Walter Benjamin, 'Critique of Violence', *Walter Benjamin: Reflections, Essays, Aphorisms, Autobiographical Writings* (New York: Schocken Books, 1995), p. 281.

11 Note that the right extends to persecution by agents of the state. Article 1, paragraph A(2) of the Refugee Convention sets out the limited conditions in which escape from state-sanctioned violence is permitted. A refugee is one who 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable 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'.

12 This is guaranteed under Refugee Convention, Article 33. In cases where there is no country to which the state at which the asylum seeker has sought refuge can return him or her, the receiving state is effectively bound to accord the asylum seeker temporary protection at least. It is for this reason that receiving states keenly scrutinised an asylum seekers' background, and the route through which they arrived in the receiving state. An asylum seeker with dual nationality or one who travelled through a state deemed safe for asylum seekers – en route to the receiving state – is unlikely to benefit from the protection of Article 33.

13 Refugee Convention, Article 1, paragraph A(2).

14 Frances Webber, *Borderline Justice: The Fight for Refugee and Migrant Rights* (London: Pluto Press, 2012), p. 70.

Walter Benjamin would have it that the right of withdrawal from a persecuting state, in truth, is 'not a right to exercise violence, but, rather, to escape from a violence'.¹⁵ And, yet, this seeming passive withdrawal is always vulnerable to being perceived by the state as a form of aggression, which must be suppressed with force.

This much we can extrapolate from Walter Benjamin's analysis of the workers' legal right to strike, which is '...a right to...escape from a violence indirectly exercised by the employer...'¹⁶ Such an escape always promises a 'moment of violence',¹⁷ which:

...is necessarily introduced, in the form of extortion, into such an omission, if it takes place in the context of a conscious readiness to resume the suspended action under certain circumstances that either have nothing whatever to do with this action or only superficially modify it. Understood in this way, the right to strike constitutes in the view of labor, which is opposed to that of the state, the right to use force in attaining certain ends. The antithesis between the two conceptions emerges in all its bitterness in [the] face of a revolutionary general strike. In this, labor will always appeal to its right to strike, and the state will call this appeal an abuse, since the right to strike was not 'so intended,' and take emergency measures. For the state retains the right to declare that a simultaneous use of strike in all industries is illegal, since the specific reasons for strike admitted by legislation cannot be prevalent in every workshop.¹⁸

If it is thought that the example of the worker strays too far from the condition of the refugee, we need only recall the countless recent occasions on which the desperate attempts of refugees to reach European shores have been judged as an abuse of the European asylum system, which the Refugee Convention inaugurated, and which, it is said, was not intended to have extraterritorial reach.¹⁹ Just as the general strike is deemed a violent abuse of the legal right to strike because 'the specific reasons for strike admitted by legislation cannot be prevalent in every workshop',²⁰ so too is it said that the specific conditions admitted by the Refugee Convention 1951, justifying a refugee's attempt to escape state persecution, cannot be prevalent in every country across the globe. Thus, individuals not seeking to escape state persecution, which is motivated by that individual's civil or political status, are presumptively abusers of the legal right granted by the Refugee Convention and, as perceived abusers, are made to adorn the face of the refugee terrorist and not the face of the refugee victim.

Others have used different frameworks through which to expose the law's complicity in the staging of refugees coming mainly from developing states as inherently suspect. So well documented is this important theme of refugee scholarship that extensive comment here is not warranted.²¹ I addressed this theme in an earlier essay, writing of a European legal ideology:

Based upon a particularised conception of fault...increasingly utilised in asylum determination process to 'baffle' the asylum-seeker, and thus to present her as either 'bogus' or simply not credible. In particular, in assessing her 'well-founded fear of persecution' westernised concepts of reasonability are used, often inappropriately and non-contextually, to impugn the reasonableness of the refugee claimant's fear of persecution. A particular example relates to refugees who, often prompted by the very fear of authority which compels their flight from their country of nationality, fail to bring their asylum claim promptly to the authorities of the receiving state. This failure is often perceived by the receiving state as a cynical attempt to circumvent the normal asylum processes, rather than the expression of a fear of authority which has a rational psychological basis.²²

15 Walter Benjamin, 'Critique of Violence', *Walter Benjamin: Reflections, Essays, Aphorisms, Autobiographical Writings* (New York: Schocken Books, 1995), p. 281.

16 Walter Benjamin, 'Critique of Violence', *Walter Benjamin: Reflections, Essays, Aphorisms, Autobiographical Writings* (New York: Schocken Books, 1995), p. 281.

17 Walter Benjamin, 'Critique of Violence', *Walter Benjamin: Reflections, Essays, Aphorisms, Autobiographical Writings* (New York: Schocken Books, 1995), p. 281.

18 Walter Benjamin, 'Critique of Violence', *Walter Benjamin: Reflections, Essays, Aphorisms, Autobiographical Writings* (New York: Schocken Books, 1995), pp. 281–2.

19 One of the more compelling analyses of the situation of so-called boat refugees is situated within the Australian context. However, the analysis, which follows, holds good for this account of European law: 'The rhetorical battle that raged in the press over the Tampa incident was marked by hesitancy over how to refer to the people at the centre of the drama. They were referred to as asylum-seekers, queue jumpers, refugees, boat people and, most ubiquitously, illegals. Of all these, illegal was the easiest, as the needs of accuracy and of generalisation coincided. To refer to these people as illegal entrants was legally correct given Australia's universal visa requirement. Illegal was also a label that obscured difference and individuality, labelling all in one swathe. It seemed that certainty about national identifiers was difficult to come by, making the label "illegal" a better catch-all on this count as well. Thus, illegal was treated as a neutral term': Catherine Dauvergne, 'Making People Illegal' in Peter Fitzpatrick and Patricia Tuitt (eds), *Critical Beings: Law, Nation and the Global Subject* (Aldershot: Ashgate, 2004), pp. 83–101. For further discussion, see Patricia Tuitt, 'A-Legality and the Death of the Refugee', *Law and Critique*, 27 (Springer, 2016), pp. 5–7.

20 Walter Benjamin, 'Critique of Violence', *Walter Benjamin: Reflections, Essays, Aphorisms, Autobiographical Writings* (New York: Schocken Books, 1995), p. 282.

21 See, for example, Liz Fekete, 'Inside Racist Europe' in Tony Bunyan (ed.), *State Watching the New Europe: A Handbook on the European State* (Nottingham: Statewatch, 1994), esp. pp. 154–6; J. Hocke, 'Beyond Humanitarianism: The Need for Political Will to Resolve Today's Refugee Problem' in Gil Loescher and Laila Monahan (eds), *Refugees and International Relations* (Oxford: Clarendon Press, 1990).

22 See Patricia Tuitt, 'Defining the Refugee by Race: The European Response to "New" Asylum-seekers' in Paddy Ireland and Per Leleng (eds), *The Critical Lawyers' Handbook 2* (London: Pluto Press, 1997), pp. 96–107.

It is against a background which has seen individuals fleeing serious human rights abuses being associated with terrorist organisations and international organised crime, such as drug and people trafficking, that I suggest, in the introduction to this working paper, that for several decades European states have been deploying the emergency measures authorised by the Refugee Convention. It is during this period too that individuals from across the globe have joined academics, practitioners and policymakers in testing and stretching the 1951 European Refugee Convention definition so as to secure the safety of individuals fleeing natural disaster, generalised violence and gender related violence in particular. To put the point in Walter Benjamin's terms, these global actors have shown a 'conscious readiness'²³ to use the legal right contained in the Refugee Convention in ways not originally intended. In this effort, asylum seekers and their advocates will appeal to the legal right enshrined within the Refugee Convention, 'and the state will call this appeal an abuse ... and take emergency measures'.²⁴

3. Article 1 of the Refugee Convention and the critique of binary oppositions

This part of the paper supplements the first part's largely theoretical discussion of why European law dictates that states will always give primacy to the consideration of whether a putative refugee is a terrorist before contemplating their protection needs. The obligation to protect states and its citizens and residents from terrorist threat is expressed in paragraph F (a) of Article 1 of the Refugee Convention. This, and the other elements of paragraph F, are most commonly read as stating exceptional principles of exclusion, which take second place to the so-called inclusion elements of Article 1, of which paragraph A(2) is the principal example. This part interrogates the popular reading of Refugee Convention Article 1. The popular reading is exemplified in the extract (below) from the Lisbon Expert Round Table's Advisory Opinion, which was published in May 2001. In its view, paragraph F's secondary status is such that consideration as to its application should never be considered first. Although I do not dispute that paragraph F sets out a principle of exclusion, I suggest that the experts' opinion is overly influenced by the evidently unstable opposition between inclusion and exclusion.

A holistic approach to refugee status determination should be taken, and in principle the inclusion elements of the refugee definition should be considered before exclusion. There are a number of reasons of policy, legal and practical in nature, for doing this.

- Exclusion before inclusion risks criminalising refugees;
- Exclusion is exceptional and it is not appropriate to consider an exception first;
- Non-inclusion, without having to address the question of exclusion, is possible in a number of cases, thereby avoiding complex issues;
- Inclusion first enables consideration to be given to protection obligations to family members;
- Inclusion before exclusion allows proper distinction to be drawn between prosecution and persecution;
- Textually, the 1951 Convention would appear to provide more clearly for inclusion before exclusion, such an interpretation being consistent in particular with the language of Article 1F (b)...²⁵

Taking a 'holistic approach to refugee status determination demands that we note the significance of the fact that the subtitle to Article 1 makes explicit that the *entire* Article provides a 'Definition of the term "refugee"'.²⁶ To aid a 'holistic' approach requires a quite fundamental shift in language so that we correctly refer to the various elements of Article 1 as paragraphs contained in an Article, rather than, as our language conventions currently do, assign to each element (paragraph) the independent status of an Article. It is for this reason that this paper only uses the prefix 'Article' when referencing Refugee Convention Article 1 in its entirety. What is commonly referred to as Article 1A(2) and Article 1F are referred to in this paper as paragraph A(2) and paragraph F, respectively. Thus, the Article 1 legal definition of Refugee is composed over six paragraphs (A–F) and also contains several subclauses. Paragraphs A and B contain the clauses which writers commonly refer to as the inclusion elements of the Convention. Paragraph A(2) is the most commonly cited element of the refugee definition. Indeed, it is an element which has, for all intents and purposes, virtually eclipsed all other elements of the Convention which purport to define the refugee. In paragraph A(2) we find the requirement of alienage, the requirement for proof of state persecution on civil and political grounds and the mental or psychic condition of the Refugee, which the Convention attempts to capture in the notion of a 'well-founded fear'.

Less remarked upon aspects of the so-called inclusion elements of the refugee definition are the obligation on a putative refugee with dual/multiple nationality to establish a fear of persecution in relation to each state in which they are a

23 Walter Benjamin, 'Critique of Violence', *Walter Benjamin: Reflections, Essays, Aphorisms, Autobiographical Writings* (New York: Schocken Books, 1995), p. 282.

24 Walter Benjamin, 'Critique of Violence', *Walter Benjamin: Reflections, Essays, Aphorisms, Autobiographical Writings* (New York: Schocken Books, 1995), p. 282.

25 Lisbon Expert Roundtable, *Global Consultations on International Protection* (UNHCR, 2001), <http://www.unhcr.org/3b38938a4.pdf> (accessed on 2.7.2018), paras 15–16.

26 Refugee Convention, Article 1A(2).

national or is domiciled if they are to avail themselves of the protection of the Convention. In paragraph (B) is contained a clause which, put at its lowest, privileges European refugees and European refugee-producing phenomena. The 1967 Protocol to the Convention²⁷ formally nullified the geographical limitations to the Convention of the original Paragraph (B). Yet, as Section 1 of this paper sought to demonstrate, Paragraph (B) has left more than a trace on the field of refugee protection. It is to be recalled that Section 1 suggests that the very existence of an asylum seeker outside of the geographical and cultural frame of Europe is sufficient to indicate to European states an intention to use the legal rights granted under the Refugee Convention in ways not intended, since non-Europeans were not the intended recipients of the legal right. Paragraphs C–E contain a number of clauses which set out circumstances in which, despite meeting the requirements of paragraph A(2), the Refugee Convention will cease to apply. In summary, these are instances where an individual whose original victimhood was accepted is deemed no longer to have the need for the protection of a surrogate state. This brings us to the element of the refugee definition which complements paragraph A(2)'s victim portrayal of the refugee with the refugee's other, more sinister, face. Paragraph F provides:

The provisions of this convention shall not apply to any person with respect to who there are serious reasons for considering that:

- (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.²⁸

Paragraph F (a) expresses the legal relation between refugees and terrorism. It requires a state to disqualify from the scope of its protection a person who has committed a crime against peace. In a recent evaluation of the scope of paragraph 1F, Frances Webber stated that '...Article 1F(a) crimes...need not be committed in the context of armed conflict. Clearly, civilians as well as military personnel may be guilty of the acts...' ²⁹ Concerned as I am with the question of how the law confronts individual violence which carries a law-making capacity,³⁰ I will confine my focus here to the element of Article 1 which addresses the occasions when 'civilians' orchestrate crimes against the peace. The Article 1 notion of a crime against the peace is consistent with ordinary ideas of what comprises a terrorist act. We tend to designate as terrorism instances of indiscriminate violence occurring in peacetime, which has the aim of furthering ideological, religious or political goals. Therefore, to argue, as I do, that the Refugee Convention was founded upon forging a deep and enduring relation between refugees and terrorism, I need not look at any other elements of paragraph F, despite the self-evident fact that other activities listed there might also properly be designated terrorist activities.

Whilst the Lisbon experts purported to read the text of paragraph F as an indivisible whole when analysing the refugee definition, there remains a distinct tendency in refugee discourse to separate the element of paragraph A(2) from the rest of the Article 1 definition of refugee. What has brought about this privileging of paragraph A(2) over other elements of Article 1? A clue to the answer lies in the designation of paragraph A(2) as an inclusion element, in contrast to the designation of paragraph F as an exclusion element. This form of categorising phenomena is deeply imbued in language and thought, and, therefore, has had a profound impact on our understanding of the force of the refugee definition. The exclusion/inclusion distinction, which underpins the Lisbon experts' advice, provides a classic instance of the way in which social phenomena are arranged according to binary oppositions. Apart from the opposition of inclusion/exclusion, much of intellectual and practical life is ordered according to other fundamental oppositions, most notably, oppositions between speech and writing, and absence and presence. What is particular about this form of oppositional thinking is the accompanying tendency to attribute positive and negative qualities to the oppositions that are thereby constructed. In this sense, exclusion is not only radically opposed to inclusion; it is also *negative* in the sense that to be excluded must be less desirable than to be included.

Although beyond the scope of this paper, the field of philosophy contains an extensive post-structuralist critique of binary oppositions. The origins of the critique are often attributed to the philosopher Ferdinand Saussure.³¹ The practical output of philosophical works which problematise binary oppositions is most evident in scholarship produced with the objective of interrogating various positions of dominance in modernity, such as race and gender dominance. Thus, it is that post-colonial, critical race and feminist scholars have been forefront of challenges to the particular thought structures which rely on forceful, but ultimately unstable, binary oppositions. In the field of international law, possibly the greatest practical instance of a realisation of how hard these oppositions work to oppress individuals is the progress

27 Protocol relating to the Status of Refugees, adopted in New York on 31 January 1967, entered into force on 4 October 1967. UNTS, vol. 606, p. 267 [hereinafter referred to as the Protocol to the Refugee Convention].

28 Refugee Convention, Article 1, paragraph F.

29 Frances Webber, *Exclusion from Refugee Status under Article 1F of the Convention* (Rights in Exile Programme, undated), <http://www.refugeelawinformation.org/exclusion-clause> (accessed on 2.7.2018). Also, for an analysis of refugee exclusion clauses, see Sarah Singer, 'Undesirable and Unreturnable' in the United Kingdom, *Refugee Survey Quarterly*, 36 (Oxford University Press, 2017), pp. 9–34.

30 Per Benjamin '... law sees violence in the hands of individuals as a danger undermining the legal system. As a danger nullifying legal ends and the legal executive? Certainly not; for then violence as such would not be condemned, but only that directed to illegal ends': Walter Benjamin, 'Critique of Violence', *Walter Benjamin: Reflections, Essays, Aphorisms, Autobiographical Writings* (New York: Schocken Books, 1995), p. 280.

31 See, for example, David Holdcroft, *Saussure: Signs, System and Arbitrariness* (Cambridge: Cambridge University Press, 1991). More relevant to the argument in this paper would be Peter Fitzpatrick's various theoretical works on modern law, such as *The Mythology of Modern Law* (London and New York: Routledge, 1992) and *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 1999).

towards the recognition of minority rights. Minority rights rest fundamentally on the premise that it is possible to be over-included within a nation's ideology and structures. Addressed to the refugee context, Catherine Dauvergne has argued:

The dynamics of globalization are shifting the boundaries of the insider-outsider dichotomy. Formerly, this boundary fitted neatly around the border of the nation, with discrete categories of 'us' and 'them' corresponding to legal categories of citizen and alien.³²

The logic of the insider/outsider to which Dauvergne alludes shares the same underlying structure as that represented in the framework of inclusion/exclusion, which the Lisbon group sought to exploit, with the laudable aim of according the refugee greater protection. And yet, it is precisely these oppositions that legally, politically and socially marginalised groups have identified as a key instrument with which their marginal positions are maintained. Let us reflect again on the Lisbon experts' proposition that it is not appropriate to consider exclusion before inclusion. There is a practical example of both the unstable opposing of inclusion and exclusion, and of the equally unstable privileging of inclusion over exclusion. Those who criticise oppositional thought would claim that the instability of the oppositions is revealed at the very moment of their assertion.

In this light, I would suggest that the Lisbon experts' opinion reveals just how unhelpful it is to attempt to conceive of any of the elements of the Article 1 definition of refugee, as set in opposition to any other. As I have argued in the first section of this paper, at the same time as granting individuals the right to challenge state-sanctioned violence, European law preserved the right of the state to condemn that same individual for their capacity to bring about 'new law', aided by the legal right which they are now perceived to be abusing. Pending a radical resetting of the fundamental terms within which European legal systems gain their legitimacy, we must accept that the legal refugee must be composed of both victim and terrorist, and thus was ruined at its origin.

If, for the purposes of this exercise, we discard the opposition between exclusion and inclusion and exclusion in evaluating the Article 1 refugee definition, what do we find? To begin with, we must note that nowhere in relation to paragraph A(2) is there any mandatory obligation imposed on states. The Refugee Convention only unequivocally places mandatory obligations on states in relation to a finding of the terrorist (or otherwise violent) face of the refugee. It is not in dispute that where the paragraph applies, F obliges states to disapply the Convention and its protective regime. As Frances Webber states:

If someone falls within the exclusion clauses of Article 1F, exclusion from refugee status is mandatory. States have no discretion to grant refugee status to those whose actions place them outside its protection.³³

Equally beyond dispute is the fact that the finding that a person falls within the scope of paragraph A(2) does not carry the positive right to command asylum.³⁴ Lacking support from within the terms of paragraph F, those commentators who seek to assert the primacy of paragraph 1A(2) are compelled to seek support from outside the Article 1 definition. Article 33 is then brought in to aid the effort. The well-known principle of non-refoulement stipulates that:

No contracting state shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territory where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.³⁵

Despite the undoubted force of Article 33, its negative protection can only be accessed via paragraph A(2). In short, there is no element within the Article 1 definition which competes in force with the categorical nature of the obligation contained in paragraph F.

Geoff Gilbert is one of the leading scholars of refugee law who has taken a more nuanced approach to the question. He asks:

Does Article 1F have priority in status determination, such that Article 1A is redundant if grounds for exclusion under Article 1F are proven? Is it akin to an admissibility test applied to those seeking to apply for refugee status?³⁶

It is to be noted that his conclusion points to a difference in approach between policymakers and academics, on the one hand, and courts and tribunals, on the other hand:

32 Catherine Dauvergne, 'Making People Illegal' in Peter Fitzpatrick and Patricia Tuitt (eds), *Critical Beings: Law, Nation and the Global Subject* (Aldershot: Ashgate, 2004), p. 84.

33 Frances Webber, *Exclusion from Refugee Status under Article 1F of the Convention* (Rights in Exile Programme, undated), <http://www.refugeelawinformation.org/exclusion-clause> (accessed on 2.7.2018).

34 See UNHCR, *Advisory Opinion on the Extra-territorial Application of Non-refoulement Obligations under the 1951 Convention on the Status of Refugees, and its 1967 Protocol* (Geneva: UNHCR, 2007), para 8, <http://www.unhcr.org/4d9486929.pdf> (accessed on 2.7.2018).

35 Refugee Convention, Article 33.

36 Geoff Gilbert, *Current Issues in the Application of the Exclusion Clauses* (Cambridge: Cambridge University Press, 2003), <http://www.refworld.org/docid/470a33baO.html/> (accessed on 15.7.2018), p. 464.

The view held by a significant number of States is that application of Article 1F precedes refugee status determination under Article 1A(2). The Canadian Federal Court of Appeal has held that there is no need to consider whether the claimant falls within Article 1A(2) if she falls within Article 1F. On the other hand, paragraph 141 of the UNHCR Handbook propounds that it will normally be during the determination process under Article 1A(2) that the exclusionary factors will come to light, but there is nothing to stop a State dispensing with determination where it is aware that a person would not qualify as a result of Article 1F. The UNHCR Guidelines on Exclusion also presume that the exclusion clauses will only be applied 'after the adjudicator is satisfied that the individual fulfils the criteria for refugee status ... Furthermore, Article 1F assumes that but for the exclusionary provision, the applicant would otherwise be an arguable case for refugee status. Indeed, to apply Article 1F before Article 1A(2) indicates a presumption that all applicants for refugee status are potentially excludable.³⁷

Ultimately, Gilbert sides with the majority view, concluding that 'given that Article 1F speaks of 'crimes' and 'guilt', one would expect the immigration authorities to adopt a presumption of innocence and apply Article 1A(2) first It may be that a special case can be made for always determining refugee status before seeing whether Article 1F(b) excludes the applicant'.³⁸

Notwithstanding the support to be found from several distinguished scholars, such as Gilbert, I would suggest that there are sufficient grounds upon which to dispute the claim by the Lisbon experts that, 'textually, the 1951 Refugee Convention would appear to provide more clearly for inclusion before exclusion'.³⁹ The approach of the expert group is heavily reliant on a discredited binary opposition which it is doubtful that the Courts support when adjudicating on refugee claims.⁴⁰ Analysing the UK Tribunal's decision in *AS v Sri Lanka* [2013], Gina Clayton records how the Tribunal dismissed as 'artificial' the suggestion that the issue of exclusion should be separated from consideration of the merits of the asylum claim.⁴¹ It was true that the Tribunal was dealing with a case in which the 'evidence for exclusion was substantially the same evidence as that for the asylum claim', but the Tribunal's conclusion that deciding the issues 'sequentially'⁴² did not accord with a common sense approach, illustrates that it readily comprehended the 'artificial' nature of the exclusion/inclusion opposition. Although little of value can be gleaned from one case, I would suggest that the inclusion/exclusion opposition so central to popular readings of paragraph 1F is already undergoing a necessary exercise of deconstruction in the process of practical adjudication on asylum claims in which questions of national security are raised.

4. Victims and terrorists between two centuries

The secondary status usually attributed to Refugee Convention Article 1, paragraph F cannot be explained away entirely by conventions of thought and language. Until relatively recently, paragraph F has not been subject to the same level of attention from scholars, policymakers and judges that has been accorded to paragraph A(2). This is because the issues about which paragraph F is concerned were not thought to pose special levels of evidential uncertainty when compared to the issues about which paragraph A(2) is concerned. For most of the life of the Refugee Convention, a significant level of uncertainty surrounded the causes behind the refugee victim's displacement. In contrast, the causes or sources of the refugee terrorist's violent acts were more easily identified. This century has seen much less certainty over the source of the terror threat. Viewed in this light, the approach of courts to paragraphs A(2) and F is structurally indistinct. What has altered is the perception that objective evidential uncertainty attends the circumstances of those seeking to come within the scope of paragraph A(2). The perception now is that objective evidential uncertainty attends the question of whether a putative refugee falls within the scope of paragraph F. As Helen Reece argues:

In order to cope with indeterministic cases, the courts have to make some adjustment to their world view and the smallest concession possible is to retain causation as a deterministic concept but to alter the phenomenon found to have been caused.⁴³

If there is one area of legal life in which the adjudication upon indeterministic cases is routine, it is the law of refugee status. The case law on refugee claims is marked by the fact that the ordinary rules governing the standard of proof are displaced. The longest period in the history of the Refugee Convention was when the refugee victim of state-

37 Geoff Gilbert, *Current Issues in the Application of the Exclusion Clauses* (Cambridge: Cambridge University Press, 2003), <http://www.refworld.org/docid/470a33baO.html/> (accessed on 15.7.2018), pp. 464–5. For another analysis that focuses on the practice of courts, see David Kosar, 'Inclusion Before Exclusion or Vice Versa: What the Qualification Directive and the Court of Justice Do (Not) Say', *International Journal of Refugee Law*, 25 (Oxford University Press, 2013), pp. 87–119.

38 Geoff Gilbert, *Current Issues in the Application of the Exclusion Clauses* (Cambridge: Cambridge University Press, 2003), <http://www.refworld.org/docid/470a33baO.html/> (accessed on 15.7.2018), p. 466.

39 Lisbon Expert Roundtable, *Global Consultations on International Protection* (UNHCR, 2001), <http://www.unhcr.org/3b38938a4.pdf> (accessed on 2.7.2018), paras 15–16.

40 Lisbon Expert Roundtable, *Global Consultations on International Protection* (UNHCR, 2001), <http://www.unhcr.org/3b38938a4.pdf> (accessed on 2.7.2018), paras 15–16.

41 Gina Clayton, *Textbook on Immigration and Asylum Law* (Oxford: Oxford University Press, 2016), p. 500.

42 Gina Clayton, *Textbook on Immigration and Asylum Law* (Oxford: Oxford University Press, 2016), p. 206.

43 Helen Reece, 'Losses of Chances in the Law', *Modern Law Review*, 59 (Wiley, 1996), p. 206.

sanctioned violence prompted the kind of adjustments of which Reece speaks. Together with the unfortunate way in which the dichotomy between exclusion/inclusion has influenced interpretations of Article 1, the perceived indeterminate nature of the causes of a refugee's decision to sever the relationship with their state of nationality or domicile explains the focus of courts, scholars, practitioners, activists and policymakers on paragraph A(2) and, until recently, their relative intellectual inactivity in relation to paragraph F. Now that the refugee victim no longer poses problems of indeterminacy to the court, the focus has shifted to the indeterminate case of the refugee terrorist. It is important to stress that however profound the effects of this shift in focus, it did not bring onto the field of refugee law an idea of a refugee terrorist that was not previously there.

There are a number of distinct legal fields from which we can observe how the legislature and the judiciary respond to objective 'uncertainty in the external world'.⁴⁴ In essence, the response is to depart from ordinary principles governing the treatment of evidence. This departure, in turn, infects the standard of proof. It is an approach which greatly expands the life and scope of the entity towards which the evidential allowance is directed. As stated in the introduction to this paper, for much of the Refugee Convention's history, it was the estranged refugee victim who was the object of the law's approach in cases where it perceives that no amount of available evidence will solve the legal question(s) raised in the case. Now, as I will hope to show, this approach has been trained upon the politically or ideologically active 'revolutionary' refugee. The life and scope of paragraph 1F has been expanded, but its position in the hierarchy of norms governing refugee status has not altered. The drafters of the Convention quite evidently intended that states should give thought to the question of whether a person seeking admission onto their territory poses a threat to peace before considering whether that same person's situation gives rise to a legitimate claim to state protection.

Let us look more closely at Reece's argument. Questions raised in the course of adjudication which can be answered through the marshalling together of evidence (even if that evidence is very difficult of access) produces what Reece would designate as epistemological uncertainty, against which the ordinary standard of proof of balance of probabilities in civil cases and beyond reasonable doubt in criminal cases will not yield. In contrast, questions raised in relation to which 'even unlimited evidence would not help to determine an issue'⁴⁵ justifies relieving the party who bears the burden of proof of strict compliance with usual demands as to how evidence is produced as well as regards the quality and quantity of the evidence.

Evidential uncertainty is an inherent feature in the process of adjudication, but it is particularly acute in the context of adjudication of claims under the Refugee Convention. In terms of proof of conformity with the refugee definition under paragraph A(2), formal exposition of the standard of proof would suggest that a high degree of objective uncertainty surrounds the causes of refugee flight. *Ex parte Sivakumaran*⁴⁶ remains good law and sets the 'reasonable chance' 'substantial grounds for thinking' and 'serious chance' standard. Later cases speak of a 'real risk' or posit a standard far below that of the ordinary balance of probabilities, for example, in advancing the test expressed in terms of a one in ten chance *PS (Sri Lanka) v SSHD*.⁴⁷ Yet, it must be said that these formal statements of the standard of proof relating to the element of paragraph A(2) of the Refugee Convention sit oddly with concepts like the safe third country or safe country of origin. It is hard to entertain the idea that certain states are presumptively safe for refugees, in the sense that such a state will neither persecute a refugee nor send that refugee to a state where they may be persecuted, and yet maintain that there is an inherent objective evidential uncertainty around the causes and sources of the plight of the refugee. It is equally hard to resist the conclusion that since the close of the last century, the conviction that the causes behind the refugee phenomena can be identified and fixed has taken a strong hold.⁴⁸

The same time frame has seen a discourse in which threats to international peace and security are dislocated from identifiable political groupings. As stated earlier, the terrorist threat is perceived as unlocatable and therefore unknowable. Geoff Gilbert says:

The past decade has seen ever more restrictive responses to asylum seekers trying to obtain refugee status in Western Europe and North America. The increased interest in Article 1F can be seen as part of that trend. Only 'deserving' refugees should be granted Convention status. The consequence is that Article 1F is becoming more intrinsic to status determination with the concomitant danger that all applicants are perceived as potentially excludable.⁴⁹

Gilbert's observations are sound and yet a textbook exposition of the standard of proof which the state relying on the paragraph F(a) clause must bear, when deciding whether and to what extent to train its emergency measures against a refugee, would suggest that evidence of crimes against peace are highly accessible. These texts posit a standard of proof lying somewhere between the balance of probabilities and beyond reasonable doubt. In *Al-Sirri and DD*

44 Helen Reece, 'Losses of Chances in the Law', *Modern Law Review*, 59 (Wiley, 1996), p. 204.

45 Helen Reece, 'Losses of Chances in the Law', *Modern Law Review*, 59 (Wiley, 1996), p. 197.

46 [1988] AC 958.

47 [2008] EWHC Civ 1213.

48 'That states can reliably determine whether another state is likely or not to produce refugees is a view which has underpinned refugee policy in the United Kingdom and in other ... European countries in recent years ... whilst safe country concepts are implicit in the idea of refugee, the refugee's security has become less assured since "safety" and its companion notion "fear" have been conceived of as justiciable': Patricia Tuit, 'The Precarious Safety of the Refugee' in Alice Bloch and Carl Levy (eds), *Refugees, Citizenship and Social Policy in Europe* (Basingstoke: Macmillan Press, 1999), pp. 91–104.

49 Geoff Gilbert, *Current Issues in the Application of the Exclusion Clauses* (Cambridge: Cambridge University Press, 2003), <http://www.refworld.org/docid/470a33baO.html/> (accessed on 15.7.2018), p. 429. See also Asha Kaushal and Catherine Dauvergne, 'The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions', *International Journal of Refugee Law*, 23 (Oxford University Press, 2011), pp. 54–90.

(*Afghanistan*) v SSHD⁵⁰ the Supreme Court in the UK concluded that the phrase ‘serious reasons to consider’ in the text of Article 1F imported a standard that was more exacting than that of balance of probabilities. In the view of the court, there is unlikely to be sufficiently serious reasons ‘justifying application of the exclusion clause unless the decision maker is satisfied on the balance of probabilities that an applicant has engaged in one or more of the acts prohibited under Article 1F’.⁵¹

Against these pronouncements we see the emergence of the Special Immigration Appeals Tribunal (SIAC), a judicial body whose practices would seem to sit uncomfortably with the proposition that paragraph F should be interpreted restrictively and applied cautiously. The Commission is notorious for the fact that neither those subject to deportation nor their lawyers are entitled to see evidence that is deemed to be sensitive on national security grounds. In substitution for the legal representation most individuals can expect to receive when faced with a serious risk to their freedom, individuals placed before the Commission’s jurisdiction is represented by a ‘special advocate’. The principle of open justice, whereby cases are heard in open court that members of the public are permitted to enter, does not apply to the Commission. It seems that only evidence obtained through torture is inadmissible to the Commission. Despite the closed nature of its scrutiny processes, the Commission’s findings of fact cannot be impugned other than on grounds of perversity.

Considerations of space preclude detailed exploration of the Commission’s jurisprudence but it will play a large part in the wider research project, of which this paper forms a part. However, the case of *Home Secretary v Rehman* [2003]⁵² cannot escape without a mention, since it provides the best illustration of how determinedly the law will reassert its monopoly of violence in the face of the fear (often not very well-founded) of individual violence of a potentially law-making character. Ironically, *Rehman* was a case in which SIAC was unprepared to accept the Secretary of State’s assessment of the threat posed by *Rehman* ‘who was alleged to have provided support for insurgents in Kashmir’.⁵³ The case went to the highest court of appeal, with neither the court of appeal nor the House of Lords being willing to accept that SIAC had the power to substitute its assessment of a risk to national security for the Secretary of State’s risk assessment. Of SIAC, Frances Webber states:

National security deportees, nearly all Muslim men ... face a system where fundamental principles of justice – including the presumption of innocence, equality of arms, the right to know what is said against them – are routinely violated. The secrecy that shrouds the intelligence services have been breached in places, but not for those seeking deportation, exclusion or denial of citizenship on national security grounds. Worse, there does not have to be any specific allegation; it might just be their associations or their reading matter which makes them a ‘danger’ to national security. And what constitutes such a danger has been stretched beyond imagining.⁵⁴

It is difficult to explain the Commission’s existence unless we accept that, in the UK context, it is the now-vulnerable state and not the refugee who is the recipient of the law’s allowances when assessing risks to national security. Such risks are said to be ‘speculative’ in nature. In short, such risks produce the uncertainty in the world, in the face of which courts grant themselves a quite extraordinary degree of discretion.⁵⁵

5. Conclusion

International counter-terrorism measures have prompted renewed interest in the scope and applicability of paragraph F of the Refugee Convention. Scholars have responded to this shift in the focus of refugee discourse and practice in varying ways. My response, as represented in this paper, is to revisit, once again, the fundamental question: who is a refugee? That the 1951 Refugee Convention is not an innocent vehicle in the increasingly hostile environment in which refugees are forced to seek protection is a fact of which I have long been reconciled. However, but for the Refugee Law Initiative workshop on refugees and terrorism, I would not have been encouraged to examine paragraph F in light of its functioning as part of the refugee definition. Having now completed the first stages of what will be a longer project, I have an even better grasp of how very deeply the law of refugee status reflected, and continues to reflect, a legal system that is violent at its very core.

Aided substantially by Walter Benjamin’s philosophical account of the relation between law and violence as exemplified in the operations of twentieth-century European legal systems, the task I set myself was to present a plausible account of how the proposition that Refugee Convention Article 1, paragraph F represents the primary obligation on states could be sustained, notwithstanding the extensive academic commentary which would indicate that paragraph F imposes on states a secondary obligation, one that is necessarily subordinate to the obligations contained in paragraph A(2) and in Article 33. I hope I have gone some way in convincing the reader that the threat that counter-terrorism measures would erode the protection of asylum seekers was always present in the refugee status determination regime which the 1951 Convention established.

50 [2012] UKSC 54.

51 [2012] UKSC 54.

52 [2003] AC 153.

53 Frances Webber, *Borderline Justice: The Fight for Refugee and Migrant Rights* (London: Pluto Press, 2012), p. 183.

54 Frances Webber, *Borderline Justice: The Fight for Refugee and Migrant Rights* (London: Pluto Press, 2012), p. 180.

55 Gina Clayton, *Textbook on Immigration and Asylum Law* (Oxford: Oxford University Press, 2016), p. 489.

This paper ends where it begins, with a fitting quotation from Benjamin's 'Critique of Violence':

All violence as a means is either lawmaking or law-preserving. If it lays claim to neither of these predicates, it forfeits all validity. It follows, however, that all violence as a means, even in the most favorable case, is implicated in the problematic nature of law itself. And, if the importance of these problems cannot be assessed with certainty at this stage of the investigation, law nevertheless appears, from what has been said, in so ambiguous a moral light that the question poses itself whether there are no other than violent means for regulating conflicting human interests.⁵⁶

⁵⁶ Walter Benjamin, 'Critique of Violence', *Walter Benjamin: Reflections, Essays, Aphorisms, Autobiographical Writings* (New York: Schocken Books, 1995), p. 287.

An introduction to the common security narrative of terrorism and asylum and its influence on Austrian migration law

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Abstract

In recent years, public discourse has been dominated by the topics of terrorism and asylum. Due to the commonly under-complex portrayal of both issues and their links, the discourse has come to a convolution that mostly remains unsupported by facts. Despite this, it has had profound consequences for the individuals concerned in everyday life as well as in the legal order. This paper seeks to contribute to a new approach on the topic and clear its mythical character by deconstructing its elements, reviewing its development and pointing out its visible consequences. For this purpose, the paper highlights three possible correlations between terrorism and asylum from an Austrian perspective: terrorism against asylum applicants, terrorism as a cause of displacement and the possibility of forced migrants participating in terrorist acts. The latter correlation, in particular, although it is the most present in the discourse, is actually less strong than is publicly perceived. Most importantly, the respective claims of a general terrorism threat emanating from forced migrants remain empirically unsupported. So, why is it that this collective suspicion has such a strong dominance in the Western media, politics and the minds of citizens?

The emergence of a public hysteria around terrorism has been observed repeatedly in communicative and psychological studies since 2001. Also, the existence of a fear of migration has been pointed out by scholars several times. Both of these phenomena feed into the 'security narrative', based on which citizens become increasingly willing to endure interferences by the state with their rights and those of others. Hence, this paper argues that the combination of the fear of terrorism with the fear of migration has become an extraordinarily strong tool for political mobilisation, fostered through the active involvement of the media and politicians. The reasons for the use of this political 'superpower' and the subsequent renaissance of securitisation trends in migration law seem to lie in a sudden increase in asylum applications, the perceived 'otherness' of the arriving society and an economic decline in a hostile political climate.

Keywords

asylum, migration, terrorism, security, securitisation

1. Introduction

Terrorism and asylum have become two of the most controversial political issues in recent decades. Both topics are obscured within a space of many claims and few facts, as reliable information is hardly accessible or verifiable for the ordinary citizen. Furthermore, the estimation of real risks is usually difficult for the individual. Therefore, this lack of transparency has become a fertile ground for generating emotion, especially fear. In consequence, both subjects are frequently misused for the purpose of political mobilisation. This commonality has one unfortunate result: a vague correlation has been established between the two issues – sometimes simply by the mere act of putting both terms into one sentence or paragraph repeatedly. The actual correlation between terrorism and asylum, however, remains inadequately reflected in Austria.

The following paper examines this vague link more closely to contribute to its demystification by looking at current numbers and tracing the claims back to their origins. For this purpose, along with several basic facts and figures about the Austrian situation, the second section reviews possible commonalities of terrorism and asylum. The third section sets out how both issues are accompanied by a strong fear of security loss and, thereby, feed into the 'security narrative'. The last section recalls how the mystification of the link plays into the securitisation trend of Austrian migration law and how this dynamic developed historically. Furthermore, several recent legal amendments will be reviewed in this regard. The topic of securitisation is evidently not new and not limited to Austria or to migration issues alone.¹ However, Austria has experienced migration from many perspectives – it has produced refugees and it has received refugees – which therefore makes it a suitable study example.² For this reason, the aim is to make basic information about the Austrian perspective on the phenomenon accessible to readers outside the German-speaking community as well.

The paper is largely based on literature research in the fields of law, sociology, communication and political sciences as well as on research on past and present amendments of Austrian migration law. It takes into account relevant figures as provided by the Austrian government. It is, however, not based on an independent empirical study of terrorism cases that involve forced migrants in Austria, since no significant jurisprudence on the subject exists or is publicly available at present.³ Yet, several recent studies on radicalisation in Austria and beyond were taken into account insofar as they discuss typologies of perpetrators and can elucidate the public figures. In this regard, more specific research on the correlation of forced migration and the potential for radicalisation should be encouraged to provide deeper insights for the purpose of informed state policies. Such research might provide counter-arguments to some dangerous claims and put actual incidents in perspective relative to the number of asylum applications received.⁴ The hope persists that, once fact-based information is communicated appropriately, the discourse might take a turn to a more substantial and solution-oriented direction.

Although irregular migrants, refugees and asylum applicants commonly form the core of the group targeted by the aforementioned rhetoric, the persons referred to are usually not explicitly specified and several terms are used interchangeably in the public discourse. Often, they are simply summarised by the term 'migrants'. This paper reflects this notion by using the terms of the respective source of information where possible or the term that describes the relevant group best. It will refrain from using the term 'refugees' as the author upholds the definition of this term by the Convention relating to the Status of Refugees⁵ and, hence, it would fall short of describing the broader group of persons affected by the studied phenomenon. Therefore, the most commonly used terms will be 'asylum applicants' (meaning persons who seek to apply for asylum or have already lodged an application), 'forced migrants' (referring to both asylum applicants and recognised refugees) or 'irregular migrants' (pointing to their entrance into the territory without prior allowance regardless of a subsequent asylum procedure) in opposition to 'voluntary/labour/regular migration'. The term 'displaced persons', similar to forced migrants, refers to people who have had to leave their homes, but takes a broader, global or macro-level perspective, as it is independent of a subsequent act of migration and does not take a European or national viewpoint.

2. Facts, figures and correlations

With respect to Austria, three conceivable links between the issues of terrorism and asylum exist: terrorism by right-wing radicals against asylum applicants, terrorism as a cause for displacement and the possible involvement of forced migrants in terrorism. This section will begin with a brief outline of the Austrian facts and figures on asylum and terrorism, and afterwards it will examine separately each of these three possible links. Although the first two issues are of equal importance and remain under-reported, the focus remains on the third possibility, since it is the most relevant for the securitisation of migration law.

¹ Compare, for example, Elspeth Guild and Anneliese Baldaccini (eds), *Terrorism and the Foreigner: A Decade of Tension around the Rule of Law in Europe* (Brill Nijhoff, 2007) with similar studies on the securitisation phenomenon in the UK, Germany, France, the Netherlands and Italy.

² Magdalena Pöschl, 'Migration Und Mobilität' (2015) Gutachten für den 19 Österreichischen Juristentag Bd I/1 7, 99 ff.

³ The judicature research for the present study was finalised in March 2018.

⁴ Compare, for example, Alex Nowrasteh, 'Terrorism and Immigration – A Risk Analysis' (2016) 798 CATO Institute: https://object.cato.org/sites/cato.org/files/pubs/pdf/pa798_1_1.pdf (accessed 28 June 2018).

⁵ Art. 1 Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Geneva Refugee Convention – GRC).

In 2015, Austria was one of the European Union (EU) Member States most affected by the movement of irregular migrants.⁶ The arrival of 88,340 asylum applications – and an estimated 600,000 people crossing the country to reach other destinations⁷ – led to a temporary overburdening of the reception system in this small central European country with a population of about 8.5 million.⁸ The dramatic scenes of stranded people waiting for trains and searching for shelter received great attention by the media and citizens – with good and bad consequences: on the one hand, it generated strong solidarity and the engagement of civil society;⁹ on the other hand, it was greeted with scepticism by different parts of society and politicians quickly knew how to use this polarised attention.¹⁰

Two years later, the numbers have normalised,¹¹ but the picture stuck. The political campaigns for the 2017 election to the Austrian National Assembly were still strongly dominated by the topic of migration, especially in the context of security issues.¹² The general ‘security fear’ in view of migration is complemented by the fact that Austria is equally affected by the fear of violent extremist terrorism¹³ that has befallen Western societies since 2001.¹⁴

This fear clearly contradicts present figures. In fact, Austria is not much affected by terrorism compared to other European countries.¹⁵ Yet, several forms of terrorist activities have been added into new sections of the criminal code since 2002 and adapted several times since. The criminal offences rank from the participation in a terrorist organisation in § 278b Austrian Criminal Code (StGB) to the prohibition of the incitement or approval of terrorist crimes in § 282a StGB.¹⁶ The purpose of their introduction was to conform to international and European agreements for combatting terrorism and to create a legal basis for preventive anti-terrorism measures at their earliest stages.¹⁷ Yet, the convictions under these criminal offences remain low: in 2014, there were only two convictions, 21 in 2015 and 43 in 2016. Most of them did not concern actual terrorist attacks on Austrian soil, but preparatory acts (such as the financing of organisations and incitement) or participating in a terrorist organisation or terrorist criminal offences in other states such as Syria (i.e. ‘foreign-fighters’).¹⁸

6 See, for example, ‘Countries under the Most Strain in the European Migration Crisis’ (*The New York Times*, 22 December 2015): <https://www.nytimes.com/interactive/2015/08/28/world/europe/countries-under-strain-from-european-migration-crisis.html> (accessed 28 January 2018).

7 ‘Asyl & Flucht im Jahr 2015 – Ein Rückblick | Medien Servicestelle Neue ÖsterreicherInnen’ (*Medien-Servicestelle Neue ÖsterreicherInnen*, 22 December 2015): http://medienservicestelle.at/migration_bewegt/2015/12/22/asyl-flucht-im-jahr-2015-ein-rueckblick/ (accessed 28 January 2018).

8 ‘Asylstatistik 2016’ (Bundesministerium für Inneres, Sektion III – Recht 2016): <http://www.bmi.gv.at/Downloads/start.aspx> (accessed 1 December 2017). How the arrival of this many forced migrants in 2015 played out in Austria is well portrayed in Wolfgang Gratz, *Das Management der Flüchtlingskrise: Never Let a Good Crisis Go to Waste* (NWV, Neuer Wissenschaftlicher Verlag, 2016).

9 See, for example, the initiative ‘Train of Hope’, which received several human rights awards for its commitments during this time: ‘Train of Hope – Flüchtlingshilfe’ (*Train of Hope*): http://www.trainofhope.at/_www_/ (accessed 28 January 2018). See also ‘Vienna – 150.000 People Standing in Solidarity with Refugees in Europe | Solidar’ (*solidar*, 10 May 2015): <http://www.solidar.org/en/news/vienna-150-000-people-standing-in-solidarity-with-refugees-in-europe> (accessed 28 January 2018).

10 See, for example, ‘Austrian Minister Wants to Replicate Australian Model for Refugees’ (*EURACTIV.com*, 6 June 2016): <https://www.euractiv.com/section/justice-home-affairs/news/austrian-minister-wants-to-replicate-australian-model-for-migrants/> (accessed 29 January 2018); Christoph Hasselbach, ‘Austria’s Rapid Reversal in Refugee Policy’ (*dw.com*, 3 March 2016): <http://www.dw.com/en/austrias-rapid-reversal-in-refugee-policy/a-19092684> (accessed 1 February 2018).

11 In 2016 the applications decreased by almost 50 per cent to 42,285 and in 2017 by another 40 per cent to 24,296 applications. See ‘Asylstatistik Dezember 2017’ (Bundesministerium für Inneres, Sektion III – Recht 2017): <http://www.bmi.gv.at/Downloads/start.aspx> (accessed 28 January 2018). In 2014 Austria received 28,064 applications: ‘Asylstatistik 2016’ (Bundesministerium für Inneres, Sektion III – Recht 2016) 4; <http://www.bmi.gv.at/Downloads/start.aspx> (accessed 1 December 2017).

12 ‘Themen, die die Wahl entscheiden: Migration vor Sozialem’ (*DiePresse.com* (12 October 2017): https://diepresse.com/home/innenpolitik/nationalratswahl/5301717/Umfrage_Themen-die-die-Wahl-entscheiden_Migration-vor-Sozialem (accessed 29 January 2018).

13 For the choice of wording see, for example, Richard Stengel, ‘Opinion: Why Saying “Radical Islamic Terrorism” isn’t Enough’ (*The New York Times*, 13 February 2017): <https://www.nytimes.com/2017/02/13/opinion/why-saying-radical-islamic-terrorism-isnt-enough.html> (accessed 8 March 2018).

14 See also Anneliese Baldaccini, ‘Introduction’ in Elspeth Guild and Anneliese Baldaccini (eds), *Terrorism and the Foreigner: A Decade of Tension around the Rule of Law in Europe* (Brill Nijhoff, 2007) xiv. For a study on how this fear developed in the United States, see David L. Altheide, ‘Terrorism and the Politics of Fear’ (2006) 6 *Cultural Studies ↔ Critical Methodologies* 415.

15 See visualisation at ‘GTD World Map: 45 Years of Terrorism’ (*Global Terrorism Database*, 2016): https://www.start.umd.edu/gtd/images/START_GlobalTerrorismDatabase_TerroristAttacksConcentrationIntensityMap_45Years.png (accessed 27 June 2018). See further ‘Global Terrorism Index 2017’ (Institute for Economics and Peace, 2017) 10 ff: <http://visionofhumanity.org/app/uploads/2017/11/Global-Terrorism-Index-2017.pdf> (accessed 4 July 2018).

16 See § 278b–d Strafgesetzbuch (StGB) [*Criminal Code*] introduced by BGBl 2002/134; § 278e StGB introduced by BGBl 2010/108; § 278f StGB introduced by BGBl I 2011/103; § 282a StGB introduced by BGBl I 2011/103.

17 See ErläutRV 1166 BlgNR 21. GP for the reform of the Austrian criminal code in 2002; and ErläutRV 674 BlgNR 24. GP for the reform in 2010.

18 According to ‘Statistik-Austria’ the convictions are as follows. In 2014: one conviction for participation in a terrorist organisation (§ 278b StGB) and one conviction for the incitement of terrorist offences (§ 282a StGB). In 2015: 17 convictions under § 278b StGB, one conviction for the instruction of terrorist offences (§ 278f StGB), three convictions under § 282a StGB. In 2016: 33 convictions under § 278b StGB, two convictions for terrorist criminal offences (§ 278c StGB), one conviction for education for terrorist purposes (§ 278e StGB), 7 convictions under § 282a StGB: <http://statcube.at/statistik.at/ext/statcube/jsf/tableView/tableView.xhtml#> (accessed 1 December 2017).

2.1. Right-wing radicalism directed against asylum applicants

The fear of radicalisation is mostly directed at foreigners, especially irregular migrants.¹⁹ However, right-wing radicalism is actually the more serious concern with regard to the numbers. Radicalism targeting migrants has drastically increased in the recent years.²⁰ In 2015, the Austrian security authorities registered an increase of 54.1 per cent in right-wing extremist, xenophobic/racist, Islamophobic and anti-Semitic criminal acts. In comparison, 2014 the increase was 2.3 per cent. In 2016, this worrisome trend continued with an increase of 13.6 per cent.²¹ In some cases, these offences even reached the severity of terrorist acts as defined by the Global Terrorism Database (GTD).²²

Although this trend is one of the largest concerns in the field of radicalism, according to the Austrian Federal Office for Constitutional Protection and Terrorism Prevention (BVT), it seems to be underrepresented in the public discourse. On the contrary, the circumstance in which these right-wing radical incidents increased so dramatically in 2015 – when migration and asylum had been the most discussed topics for several months – indicates the strong influence on public opinion of the media. Therefore, the increase in right-wing radicalism constitutes one of the problems created, or at least intensified, by right-wing populism and politics built on fear.

2.2. Terrorism as a root-cause of displacement

The misled public discourse further fails to acknowledge the background of many forced migrants. Most of the persons applying for asylum in Austria are from Afghanistan, Syria, Iraq and Pakistan. Nigeria, Somalia and Morocco too are among the most frequent countries of origin.²³ A similar distribution has been seen in the statistics for many years now and several spikes in countries of origin in the last decade mirror the incidents and occurrences in these countries. For instance, Syrian applicants more than doubled from 2010 to 2011 and in every year since, whereas before the numbers were relatively steady.²⁴

Evidently, the root causes of people displacement as well as paths of migration are manifold and it would go beyond the purpose and scope of this paper to discuss all of them.²⁵ However, it is generally known that groups listed as internationally banned terrorist organisations trouble several of the mentioned states and, in some, these groups have claimed power over large territories. The rule of Al-Qaida and the Taliban in Afghanistan and parts of Pakistan, the rule of Daesh and its associates in parts of Syria and Iraq, and the dominance of Al Shabab in Somalia and Boko Haram in Nigeria are some obvious examples.²⁶

This is not to say that every asylum applicant from these countries is persecuted by terrorist organisations *per se*. Persecution in the sense of the Geneva Refugee Convention would require the individual to be personally persecuted

19 See also Anneliese Baldaccini, 'Introduction' in Elspeth Guild and Anneliese Baldaccini (eds), *Terrorism and the Foreigner: A Decade of Tension around the Rule of Law in Europe* (Brill Nijhoff, 2007) xiv.

20 That this development affects several OECD members was shown in 'Global Terrorism Index 2017' (Institute for Economics and Peace, 2017), 57: <http://visionofhumanity.org/app/uploads/2017/11/Global-Terrorism-Index-2017.pdf> (accessed 4 July 2018).

21 'Verfassungsschutzbericht 2016' (Bundesministerium für Inneres, Bundesamt für Verfassungsschutz und Terrorismusbekämpfung (BVT) 2016) 12: <http://www.bmi.gv.at/205/start.aspx> (accessed 11 February 2017); 'Verfassungsschutzbericht 2015' (Bundesministerium für Inneres, Bundesamt für Verfassungsschutz und Terrorismusbekämpfung (BVT) 2015) 12: <http://www.bmi.gv.at/205/start.aspx> (accessed 11 February 2017); 'Verfassungsschutzbericht 2014' (Bundesministerium für Inneres, Bundesamt für Verfassungsschutz und Terrorismusbekämpfung (BVT) 2014) 17: <http://www.bmi.gv.at/205/start.aspx> (accessed 11 February 2017).

22 'GTD Search Results' (*Global Terrorism Database*): https://www.start.umd.edu/gtd/search/Results.aspx?page=1&casualties_type=&casualties_max=&country=15&count=100&expanded=yes&charttype=line&chart=overtime&ob=GTDID&od=desc#results-table (accessed 1 December 2017). Evidently, the line between radical right-wing violence against asylum applicants and terrorism is blurry as no official definition of the term exists; for the definitions used by GTD, see 'Data Collection Methodology' (*Global Terrorism Database*): <http://www.start.umd.edu/gtd/using-gtd/> (accessed 8 March 2018).

23 'Asylstatistik 2016' (Bundesministerium für Inneres, Sektion III – Recht 2016): <http://www.bmi.gv.at/Downloads/start.aspx> (accessed 1 December 2017).

24 Asylum applications of Syrian nationals to Austria: 2006 – 88; 2007 – 166; 2008 – 140; 2009 – 279; 2010 – 194; 2011 – 422; 2012 – 915; 2013 – 1,991; 2014 – 7,730; 2015 – 25,563. Numbers have been largely available in the public asylum statistics of the Ministry of the Interior: 'Asylstatistik [2005–2015]' (Bundesministerium für Inneres): <http://www.bmi.gv.at/Downloads/start.aspx> or communicated via email after enquiry to the Ministry.

25 For an overview of persons, methods and routes of 'illegal' migration to Austria see, for example, Andreas Schloenhardt (ed.), *Schlepperkriminalität in Österreich* (NWV Verlag GmbH, 2017).

26 No worldwide list of terrorist organisations exists. However, the UN Security Council has enacted several resolutions dealing with such entities (the first was UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267 (1999) dealing with Al-Qaida/Taliban) and has established a Counter-Terrorism Committee. Equally, the EU has adopted two regulations to deal with terrorist organisations, which have been continuously amended: Council Regulation (EC) 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan [2002] OJ L139/9; Council Regulation (EC) 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism [2001] OJ L344/70. Furthermore, Interpol and several governments maintain their own lists of suspected individuals and entities. Two of the more accessible lists are the Australian government's list: <https://www.nationalsecurity.gov.au/listedterroristorganisations/pages/default.aspx> (accessed 31 January 2018), and the German government's list: http://www.bnd.bund.de/DE/Themen/Lagebeitraege/IslamistischerTerrorismus/IslamistischerTerrorismus_node.html (accessed 22 February 2018). For concrete information about the security situation in the aforementioned countries, see, for example, European Asylum Support Office (EASO), 'Country Reports': <https://www.easo.europa.eu/information-analysis/country-origin-information/country-reports> (accessed 1 February 2018).

for 'reasons of race, religion, nationality, membership of a particular social group or political opinion'.²⁷ The exact interpretation of the scope of these terms, of course, remains an ongoing task of judicature. However, many asylum applicants are found to be personally persecuted by terrorist organisations and some have received protection in the past for this reason and because their state of origin was not capable of protecting them.²⁸ However, those who are not found to be personally persecuted may still suffer the consequences of living under a radical regime or as a result of other influences of terrorist organisations, from instability and a lack of freedom to (civil) war.²⁹

Hence, it becomes evident that terrorism is, indeed, one of the underlying reasons for many asylum applications in Austria, as these people flee from radical activities in their home countries and the instability that ensues. At the same time, people in an unstable environment might be more prone to join terrorist organisations themselves and so the instability is perpetuated.³⁰ In this setting, 'terrorism' (i.e. radicalisation) and 'asylum' (i.e., forced displacement) seem to be two sides of the same coin, which would both benefit from the stabilisation of the respective region. Taking care of the root causes of forced displacement, therefore, equals effective terrorism prevention in several ways.

2.3. Forced migrants' involvement in terrorism

In light of this knowledge, the common allegation that forced migrants could be involved in terrorism seems even more destructive. The basis of the claims are twofold: first, the fear exists that terrorists could arrive in the Schengen zone among the masses of irregular migrants.³¹ Second, it seems possible that their vulnerable situation makes them easy prey for radicalisation.³² It should not be concluded that these fears are utterly unreasonable and that the perceived threats should not be taken seriously. However, in view of the severity of the claims and their political consequences – not only for the individuals accused, but commonly for all asylum applicants and migrants – such concerns should not be voiced in an inconsiderate manner and without validation.

The GTD registered only three terrorist attacks between 2014 and 2016 on Austrian soil. Two of them are attributed to unknown perpetrator groups. However, both were directed against asylum reception centres and, hence, are likely to have been right-wing motivated. The third was an attack on a Turkish institution by the Kurdistan Workers' Party (PKK).³³ None of them involved an asylum applicant or refugee on the side of perpetrators.³⁴

27 Art. 1 Geneva Refugee Convention.

28 See, for example, decisions by the Austrian Administrative Court concerning Algeria in VwGH, 19 June 2001, 200/01/0170, 0171, and VwGH, 12 March 2002, 99/01/0205.

29 See 'Global Terrorism Index 2017' (Institute for Economics and Peace, 2017) 62: <http://visionofhumanity.org/app/uploads/2017/11/Global-Terrorism-Index-2017.pdf> (accessed 4 July 2018).

30 See, for example, Jerrold M. Post, Keven G. Ruby and Eric D. Shaw, 'The Radical Group in Context: 2. Identification of Critical Elements in the Analysis of Risk for Terrorism by Radical Group Type' (2002) 25 *Studies in Conflict & Terrorism* 101, 113 who found that '[...] two variables, 1.1 Historically Rooted Culture of Violence, and 1.2 Current Communal Conflict were judged to be of high significance nearly across the board for the four major terrorist group categories [...]. See further Magnus Ranstorp, 'The Root Causes of Violent Extremism' (Radicalisation Awareness Network (RAN) 2016) Issue Paper 3: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/radicalisation_awareness_network/ran-papers/docs/issue_paper_root_causes_jan2016_en.pdf (accessed 4 July 2018), who describes radicalisation factors '[...] as a kaleidoscope of factors, creating infinite individual combinations. There are some basic primary colours which create complex interlocking combinations: 1) individual socio-psychological factors; 2) social factors; 3) political factors; 4) ideological and religious dimensions; 5) the role of culture and identity issues; 6) trauma and other trigger mechanisms; and three other factors that are a motor for radicalisation: 7) group dynamics; 8) radicalisers/groomers; and, 9) the role of social media. It is the combined interplay of some of these factors that causes violent extremism.' See also Barbara Sude, David Stebbins and Sarah Weiland, 'Lessening the Risk of Refugee Radicalization' (RAND Corporation 2015) 4 f: <https://www.rand.org/pubs/perspectives/PE166.html> (accessed 4 July 2018).

31 See also Anneliese Baldaccini, 'Introduction' in Elspeth Guild and Anneliese Baldaccini (eds), *Terrorism and the Foreigner: A Decade of Tension around the Rule of Law in Europe* (Brill Nijhoff, 2007) xviii, xxi.

32 So for instance, Christina Schori-Liang, 'Leaderless Jihad in a Leaderless World: The Future of Terror' in 'Global Terrorism Index 2017' (Institute for Economics and Peace, 2017), 88, 90 f: <http://visionofhumanity.org/app/uploads/2017/11/Global-Terrorism-Index-2017.pdf> (accessed 4 July 2018). See many studies on general root causes of radicalisation, for example, Barbara Sude, David Stebbins and Sarah Weiland, 'Lessening the Risk of Refugee Radicalization' (RAND Corporation, 2015) 4 f: <https://www.rand.org/pubs/perspectives/PE166.html> (accessed 4 July 2018); 'Handbook on the Management of Violent Extremist Prisoners and the Prevention of Radicalization to Violence in Prisons' (United Nations Office on Drugs and Crime (UNODC) 2016), 58 ff: http://www.unodc.org/pdf/criminal_justice/Handbook_on_VEPs.pdf (accessed 7 April 2018); Magnus Ranstorp, 'The Root Causes of Violent Extremism' (Radicalisation Awareness Network (RAN) 2016) Issue Paper 3: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/radicalisation_awareness_network/ran-papers/docs/issue_paper_root_causes_jan2016_en.pdf (accessed 4 July 2018). Evidently, these studies are not specified on the radicalisation of forced migrants. However, forced migrants usually have a great risk of exposure to some of the key factors, such as conflict, traumatisation and victimisation, stigmatisation and marginalisation. This exposure depends to a large part on the reception conditions in host countries. See also Barbara Sude, David Stebbins and Sarah Weiland, 'Lessening the Risk of Refugee Radicalization' (RAND Corporation 2015), 4 f: <https://www.rand.org/pubs/perspectives/PE166.html> (accessed 4 July 2018).

33 'GTD Search Results' (*Global Terrorism Database*): https://www.start.umd.edu/gtd/search/Results.aspx?page=1&casualties_type=&casualties_max=&country=15&count=100&expanded=yes&charttype=line&chart=overtime&ob=GTDID&od=desc#results-table (accessed 1 December 2017). See also 'Austrian Asylum Center Hit by Molotov Cocktail' (*The Express Tribune*, 28 November 2016): <https://tribune.com.pk/story/1246669/austrian-asylum-center-hit-molotov-cocktail/> (accessed 1 December 2017); 'Brandstiftung bei Unterkunft für Flüchtlinge in Oberösterreich' (*derStandard.at*, 1 June 2016): <http://derstandard.at/2000037998380/Neugebautes-Fluechtlingsheim-in-Oberoesterreich-abgebrannt> (accessed 1 December 2017).

34 A study in the United States found an immensely small risk emanating from forced migrants as well. See Alex Nowrasteh, 'Terrorism and Immigration – A Risk Analysis' (2016) 798 CATO Institute: https://object.cato.org/sites/cato.org/files/pubs/pdf/pa798_1_1.pdf (accessed 28 June 2018).

In addition, convictions for other terrorist crimes remain low in Austria (in 2014: 2; in 2015: 21 and in 2016: 43). Although members of the Austrian government regularly refer to a potential threat from forced migrants,³⁵ the state does not provide public statistics on the motives and profiles of perpetrators of terrorist offences or on the involvement of forced migrants in particular. However, Austria reported 26 convictions for terrorist offences in 2016 to Eurojust, of which 26 were considered 'jihadist terrorism'.³⁶ Austria further reported '*several cases of individuals suspected of terrorism among the migrants staying in, or travelling through, its territory*'³⁷ without further specification of their profiles. In general, information about these few convictions, which would allow the involvement of forced migrants to be assessed, is for the most part not publicly accessible. In criminal proceedings, only the jurisprudence of the last instance is published on principle. Administrative proceedings could give information about cases, in which the right to asylum or other protection was revoked based on involvement in terrorist activities. However, this is only accessible in the second instance in front of the Federal Administrative Court. The administrative decisions of the Austrian Federal Office for Immigration and Asylum (BFA) are not published.³⁸

Of the accessible cases, not many show the conviction of forced migrants for terrorism. The search within the jurisprudence of the Austrian Federal Administrative Court found 11 cases. All of these available cases concerned appeals to the Federal Administrative Court from citizens of the Russian Federation with Chechen ethnicity, whose asylum claims were rejected or their protection revoked after they were convicted of terrorism under § 278b StGB. Among these 11 cases are two groups (of five and three persons respectively) who attempted to leave Austria together to join the jihad in Syria.³⁹

The provisional findings obtained from the explorative inspection of these published cases confirm the results of recent empirical studies conducted on radicalisation in Austria. Hofinger and Schmidinger's study, for example, reveals clearly that the general radicalisation potential is very narrowly distributed among two demographic groups: juvenile and Chechen sub-culture.⁴⁰ These findings are supported by further studies on radicalisation in Austria.⁴¹ The Chechen group, so far, constitutes the only group of forced migrants in Austria of whom several individuals have been confirmed to have been involved in terrorism. Most of them arrived in Austria in the 2000s after fleeing the second Chechen war and seem to be motivated by a strong resentment against the Russian government. Partly for this reason, they join the jihad not because of their strong religious ideology but because of a common enemy, as Russia supports the Syrian government in the ongoing armed conflict.⁴² Hofinger and Schmidinger's study also suggests that eight Syrian and Iraqi asylum applicants are currently under trial.⁴³ Hence, it is possible that future research in Austria will reveal different results as a result of the new demographics of forced migration since 2015.

Conclusively, the cases above concern persons from one very specific group of forced migrants and seem to offer only limited explanatory power on a general level. The combination of a small number of cases and an irregular distribution of nationality renders the sample unpromising in terms of achieving significant general assertions on potential threats emanating from the very heterogeneous group of forced migrants. Furthermore, as long as future convictions do not extremely exceed the present figures, these cases stand in very small relation to the numbers of asylum applications. Nevertheless, this argument does not seem to carry much weight in a 'post-factual world'.⁴⁴

35 See, for example, most recently 'Kickl gegen verpflichtende Flüchtlingsverteilung' (*derStandard.at*, 25 January 2018): <https://derstandard.at/2000072981743/Kickl-gegen-verpflichtende-Fluechtlingsverteilung-in-EU> (accessed 22 February 2018).

36 'Terrorism Situation and Trend Report 2017' (Europol 2017). 51 f: https://www.europol.europa.eu/sites/default/files/documents/tesat2017_0.pdf (accessed 26 November 2018). Austria further reported two convictions in 2014 and 29 convictions in 2015. These numbers do not match the figures published by 'Statistik Austria': <http://statcube.at/statistik.at/ext/statcube/jsf/tableView/tableView.xhtml#> (accessed 1 December 2017). The reasons thereof could not be retraced from the TE-SAT report.

37 'Terrorism Situation and Trend Report 2017' (Europol 2017), 14.

38 The research on relevant jurisprudence was conducted on the government website for the publication of jurisdiction: <https://www.ris.bka.gv.at/Judikatur/> (accessed 14 February 2018). The search (a) within convictions of the Austrian criminal courts for terrorist acts under §§ 278b–d and § 282a of the Austrian Criminal Code (StGB) matched no results, and (b) within jurisdiction of the Austrian Federal Administrative Court, the Austrian Supreme Administrative Court and the Austrian Constitutional Court matched 11 cases.

39 See, for example, BVwG 31.01.2018, W211 1428789-2 (VwGH 16.04.2017, Ra 2017/19/0016), BVwG 11.01.2018, W140 2167860-3. See also the most recent judgment as reported by Manfred Seeh, 'Milde Urteile im Terrorprozess: Anklage erwägt Berufung' (*DiePresse.com*, 15 February 2018): https://diepresse.com/home/panorama/oesterreich/5372459/Milde-Urteile-im-Terrorprozess_Anklage-erwaegt-Berufung (accessed 19 February 2018).

40 Veronika Hofinger and Thomas Schmidinger, 'Endbericht zur Begleitforschung: Deradikalisierung im Gefängnis' (Institute for the Sociology of Law and Criminology 2017), 4: <https://www.irks.at/publikationen/studien/2017/deradikalisierung-im-gef%C3%A4ngnis.html> (accessed 15 February 2018).

41 See, for example, interview with Ramazan Demir in Academic Council on the United Nations System (ACUNS) Liaison Office Vienna (ed.), (*De*)Radikalisierung von Jugendlichen – Phänomene, Akteure und Lösungen (forthcoming) 112; Ednan Aslan and Evrim Ersan Akkılıç, 'Islamistische Radikalisierung – Biografische Verläufe im Kontext der religiösen Sozialisation und des radikalen Milieus' (Asyl-, Migrations- und Integrationsfonds (AMIF) 2017): http://iits.univie.ac.at/fileadmin/user_upload/p_iits/Pictures_colleagues/radikalisierung_2017_07_19_onlineversion_einzelseiten.pdf (accessed 20 February 2018).

42 For the situation of Chechens in Austria, their reasons for radicalisation (among them 'collective grievances and victimization') and how the revocation of their protection contradicts de-radicalisation efforts, see Veronika Hofinger and Thomas Schmidinger, 'Endbericht zur Begleitforschung: Deradikalisierung im Gefängnis' (Institute for the Sociology of Law and Criminology 2017), 21 ff, 38 ff, 141 ff: <https://www.irks.at/publikationen/studien/2017/deradikalisierung-im-gef%C3%A4ngnis.html> (accessed 15 February 2018).

43 See particularly Veronika Hofinger and Thomas Schmidinger, 'Endbericht zur Begleitforschung: Deradikalisierung im Gefängnis' (Institute for the Sociology of Law and Criminology 2017), FN 20 40 ff 4: <https://www.irks.at/publikationen/studien/2017/deradikalisierung-im-gef%C3%A4ngnis.html> (accessed 15 February 2018). The study further states that three suspects of the attacks in Paris on 13 November 2015 and in Brussels on 22 March 2016 had been in Austrian prisons before their extradition to France, but these cases were unavailable for scientific research (p. 42 f).

44 See, for example, the infamous statement made by Donald Trump Jr. when he compared Syrian refugees to skittles: Christine Hauser, 'Donald

Eventually, empirical analysis can only inform about the size of an existing risk, that is, the probability of terrorist incidents being undertaken by forced migrants. Whether the respective number is actually sufficient to raise national security concerns and whether the prognosis of a national security threat can allow derogations from basic rights are then, first and foremost, legal and, ultimately, political questions. For the legal scholar, the answers are to be found in existing human rights provision and the principle of proportionality.⁴⁵ The same is true for the question of whether convictions of terrorism should entail different consequences from those of other serious crimes. This difficult weighing of interests occupies the minds of many legal scholars.⁴⁶

On a practical level, radicalisation among forced migrants on Austrian territory might be better met by preventive measures that offer them an adequate future perspective and integration, instead of isolation and stigmatisation. Such actions are clearly indicated by research, but remain political decisions as well.⁴⁷ A severe problem in this regard remains the irregular migration status, which the revocation of protection often leads to, when the individual cannot be returned, in spite of a conviction of terrorism.⁴⁸ In these cases, the person is rendered even more stigmatised and excluded from society and is forced into precarious physical and psychological living conditions. All of these have been observed to have negative effects on radicalisation.⁴⁹ Hence, security concerns are not usually solved by the revocation of protection, but are, at best, geographically shifted.⁵⁰

3. The security fear

As demonstrated, the evidence for concerns exists, but it remains thin on the ground. At this time no asylum applicant or refugee has been convicted for the attempt of a terrorist act in Austria. Also, very few forced migrants have radicalised here and attempted to join the jihad elsewhere, and those who have belong to a specific category. Hence, the threat that forced migrants will participate in terrorist acts appears vanishingly low with regard to, both the probability of attacks and the number of convicted forced migrants in relation to the overall numbers of arrivals. Yet a widespread security fear persists in the public imagination which seems to have roots in the fear of terrorism, on the one hand, and the fear of migration, on the other.

After the terrorist attacks on 11 September 2001, the media landscape changed drastically in terms of form, frequency and manner of reporting. Several psychological studies have been conducted that show the influence of media output on the public and politics since then.⁵¹ As Altheide points out, media coverage linking the topics of terrorism, fear and victimisation has increased enormously since 2001.⁵² This study also demonstrated that, with time, the frequent use of the word 'terrorism' increases fear by the 'association of words with certain problems and issues'.⁵³ Furthermore, a field experiment by Lerner et al. on the influence of emotions on risk judgement showed that the emotion of fear perpetuates pessimism in the United States. In their study, respondents estimated their personal probability of being hurt in a terror attack at 20 per cent and that of the average American at 48 per cent.⁵⁴ Austrians also seem overly pessimistic about their proximity to terror attacks. According to a 2016 study, 10 per cent are certain that a future attack

Trump Jr. Compares Syrian Refugees to Skittles that "Would Kill You" (*The New York Times*, 20 September 2016): <https://www.nytimes.com/2016/09/21/us/politics/donald-trump-jr-faces-backlash-after-comparing-syrian-refugees-to-skittles-that-can-kill.html> (accessed 28 June 2018). This stands in strong contradiction to empirical evidence of the risk: see, for example, the analysis in Alex Nowrasteh, 'Terrorism and Immigration – A Risk Analysis' (2016) 798 *CATO Institute*, 1: https://object.cato.org/sites/cato.org/files/pubs/pdf/pa798_1_1.pdf (accessed 28 June 2018), stating that '[...] the chance of an American being murdered in a terrorist attack caused by a refugee is 1 in 3.64 billion per year while the chance of being murdered in an attack committed by an illegal immigrant is an astronomical 1 in 10.9 billion per year. By contrast, the chance of being murdered by a tourist on a B visa, the most common tourist visa, is 1 in 3.9 million per year'.

45 Anneliese Baldaccini, 'Introduction' in Elspeth Guild and Anneliese Baldaccini (eds), *Terrorism and the foreigner: A decade of tension around the rule of law in Europe* (Brill: Nijhoff, 2007) xv f.

46 See, for example, other authors in this special issue. See further Jens Vedsted-Hansen, 'The European Convention on Human Rights, Counter-Terrorism, and Refugee Protection' (2010) 29 *Refugee Survey Quarterly* 189; James C Simeon, 'Complicity and Culpability and the Exclusion of Terrorists From Convention Refugee Status Post-9/11' (2010) 29 *Refugee Survey Quarterly* 104.

47 Compare Stijn Sieckelink and Amy-Jane Gielen, 'Protective and Promotive Factors Building Resilience against Violent Radicalisation' (Radicalisation Awareness Network (RAN) 2018) Issue Paper 6 f: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/radicalisation_awareness_network/ran-papers/docs/ran_paper_protective_factors_042018_en.pdf (accessed 4 July 2018).

48 For the dimensions of irregular status issues see, for example, Kevin Hinterberger, 'Die Mehrebenenendimension Aufenthaltsrechtlicher Irregularität. Konzeptionelle Überlegungen zum Auftreten Irregulärer Migration in der EU (The Multi-Level Dimension of Residential Irregularity. Conceptual Observations on the Appearance of Irregular Migration in the EU)' in Daniel Thym and Tobias Klarmann (eds), *Unionsbürgerschaft und Migration im aktuellen Europarecht* (Nomos 2017): <https://papers.ssrn.com/abstract=2946865> (accessed 8 March 2018).

49 Veronika Hofinger and Thomas Schmidinger, 'Endbericht zur Begleitforschung: Deradikalisierung im Gefängnis' (Institute for the Sociology of Law and Criminology 2017), 141 ff: <https://www.irks.at/publikationen/studien/2017/deradikalisierung-im-gef%C3%A4ngnis.html> (accessed 15 February 2018).

50 See also Elisabeth Kath, 'Abschiebung von Schutzbedürftigen bei Straffälligkeit und Terrorismusverdacht' in Tobias Brings-Wiesen and Frederik Ferreau (eds), *40 Jahre 'Deutscher Herbst': Neue Überlegungen zu Sicherheit und Recht – Tagungsband zum JuWissDay 2017 in Köln* (Nomos, 2018).

51 See, for example, David L. Altheide, 'Terrorism and the Politics of Fear' (2006) 6 *Cultural Studies ↔ Critical Methodologies* 423 ff; Sonia Suchday, Amina Benkhokha and Anthony F. Santoro, 'Globalization and Media: A Mediator between Terrorism and Fear: A Post-9/11 Perspective' in Derek Chadee (ed.), *Psychology of Fear, Crime, and the Media: International Perspectives* (Routledge, Taylor and Francis, 2016); Jennifer S. Lerner and others, 'Effects of Fear and Anger on Perceived Risks of Terrorism: A National Field Experiment' (2003) 14 *Psychological Science* 144.

52 David L. Altheide, 'Terrorism and the Politics of Fear' (2006) 6 *Cultural Studies ↔ Critical Methodologies* 426.

53 David L. Altheide, 'Terrorism and the Politics of Fear' (2006) 6 *Cultural Studies ↔ Critical Methodologies* 419.

54 Jennifer S. Lerner and others, 'Effects of Fear and Anger on Perceived Risks of Terrorism: A National Field Experiment' (2003) 14 *Psychological Science* 148, 150.

in Austria is unavoidable; another 38 per cent believe terror attacks might occur in Austria.⁵⁵ This might equally be the result of the broad media coverage the topic receives.

Furthermore, terrorists and governments alike can benefit from this side effect of free media reporting on terrorism. For terrorists, it is a declared goal to create fear and hysteria in the public. This is only possible when information about an attack circulates and receives attention. In addition, the disseminated information is often oversimplified and, therefore, misleading. But politicians and governments can also make use of an emotionally charged audience.⁵⁶ The generated fear creates public support for otherwise unpopular security measures that touch upon individual rights.⁵⁷ A common populist tool is the imagery of a 'crisis' that must be handled and managed by the state, giving the population a sense of protection and control by the government. It is important to note that politicians are a frequent source for media reports and can thereby actively frame the public discourse. Moreover, by setting a certain issue on their agenda, creating legislation and specialised institutions, state actors can influence how certain topics will be portrayed.⁵⁸ The Austrian population seems to respond well to these triggers: 57 per cent support more state agency to prevent the country from terrorist attacks.⁵⁹

Similarly to terrorism, migration, asylum and refugees were hot topics for the media for a long time, and increasingly since 2015. These topics have the potential to generate fear in the public. In the aforementioned study on the perception of security by Austrians, 74 per cent stated that they dreaded the 'continuous refugee stream'.⁶⁰ At the same time, Austria is one of the countries where the attitude of citizens towards immigration has grown increasingly negative in the recent years, as studies by *The European Social Survey* in 2014 and 2016 indicate.⁶¹ In a historical legal study, Pöschl identified six specific fears of migration that reoccur consistently.⁶² Among them is the fear of security loss, which has much in common with the fear of terrorism. All these fears are various forms of the same emotion and 'logic', which cumulates in a vague sense of disapproval that shapes public opinion. Evidently, migration is a topic that is a heavily prejudiced phenomenon in many regards and, just like terrorism, it has a very 'intimate relationship'⁶³ with fear. This allows politicians to benefit from the public support created by this fear. Furthermore, the social process of 'othering' plays an important role for allowing the unequal treatment of migrants.⁶⁴

In conclusion, the – coincidental or purposeful – mingling of these two top media concerns, which have so many commonalities on a conceptual level, should not come as a surprise. Unfortunately, the converging of the terms 'terrorism' and 'asylum' often occurs in the form of claims that forced migrants *might* participate in terrorism acts and neglects other possible correlations and interdependencies. Despite the few suspicious incidents involving forced migrants and the even fewer incidents where these suspicions turned out to be founded in fact, the news of asylum applicants participating in terrorism is spread all over the media. A great abundance of examples exist in online media that illustrates this kind of fear-spreading and emotional rhetoric. For instance, the former Austrian minister of the interior, who famously called himself the 'security minister', warned about terrorism in social media and took a strong stand against the 'unlimited and uncontrolled' reception of refugees.⁶⁵ In general, migration was a constant topic in the

55 'Österreicher haben Angst vor Terror' (*DiePresse.com*, 10 August 2016): <https://diepresse.com/home/panorama/oesterreich/5066874/Oesterreicher-haben-Angst-vor-Terror> (accessed 22 February 2018).

56 See also Nils Coleman, 'From Gulf War to Gulf War – Years of Security Concern in Immigration and Asylum Policies at European Level' in Elspeth Guild and Anneliese Baldaccini (eds), *Terrorism and the Foreigner: A Decade of Tension around the Rule of Law in Europe* (Brill Nijhoff, 2007) 83 f; Anneliese Baldaccini, 'Introduction' in Elspeth Guild and Anneliese Baldaccini (eds), *Terrorism and the foreigner: A decade of tension around the rule of law in Europe* (Brill: Nijhoff, 2007) xviii.

57 See David L. Altheide, 'Terrorism and the Politics of Fear' (2006) 6 *Cultural Studies ↔ Critical Methodologies* 417, 426 ff; Sonia Suchday, Amina Benkhokha and Anthony F. Santoro, 'Globalization and Media: A Mediator between Terrorism and Fear: A Post-9/11 Perspective' in Derek Chadee (ed.), *Psychology of Fear, Crime, and the Media: International Perspectives* (Routledge, Taylor and Francis, 2016) 107 ff.

58 See also Tom Cockcroft, 'Late Modernity, Risk and the Construction of Fear of Crime' in Gorazd Meško and others (eds), *Crime, Media and Fear of Crime* (Tipografija, 2009) 19 f; David L. Altheide, 'Terrorism and the Politics of Fear' (2006) 6 *Cultural Studies ↔ Critical Methodologies* 418 ff, 432 ff.

59 See 'Österreicher haben Angst vor Terror' *DiePresse.com* (10 August 2016): <https://diepresse.com/home/panorama/oesterreich/5066874/Oesterreicher-haben-Angst-vor-Terror> (accessed 22 February 2018).

60 See 'Österreicher haben Angst vor Terror' *DiePresse.com* (10 August 2016): <https://diepresse.com/home/panorama/oesterreich/5066874/Oesterreicher-haben-Angst-vor-Terror> (accessed 22 February 2018).

61 James Dennison and Andrew Geddes, 'OP-ED: Are Europeans Turning against Asylum Seekers and Refugees?' (*European Council on Refugees and Exiles (ECRE)*, 17 November 2017): <https://www.ecre.org/op-ed-are-europeans-turning-against-asylum-seekers-and-refugees/> (accessed 21 November 2017).

62 Magdalena Pöschl, 'Migration Und Mobilität' (2015) Gutachten für den 19. Österreichischen Juristentag Bd I/1 9 ff. These include: (1) the fear of poverty (social perspective); (2) the fear of infiltration by outer enemies (foreign-policy perspective); (3) the fear of security loss (security perspective); (4) the fear of foreign diseases – or nowadays rather the exploitation of the health system (health perspective); (5) financial fears (economic perspective); and (6) the fear of 'otherness' (cultural perspective). For similar observations in Germany, see Jürgen Bast, *Aufenthaltsrecht und Migrationssteuerung* (Mohr Siebeck, 2011).

63 For the 'intimate relationship' between fear and terrorism see Sonia Suchday, Amina Benkhokha and Anthony F. Santoro, 'Globalization and Media: A Mediator between Terrorism and Fear: A Post-9/11 Perspective' in Derek Chadee (ed.), *Psychology of Fear, Crime, and the Media: International Perspectives* (Routledge, Taylor and Francis, 2016) 98 ff.

64 See David L. Altheide, 'Terrorism and the Politics of Fear' (2006) 6 *Cultural Studies ↔ Critical Methodologies* 419 f. For the social process of 'othering' and how it is regulating discourse, see Michael Schwalbe and others, 'Generic Processes in the Reproduction of Inequality: An Interactionist Analysis' (2000) 79 *Social Forces* 419, 434 ff.

65 See, for example, 'SPÖ nimmt Innenminister Sobotka ins Visier' (*vol.at*): <http://www.vol.at/spoe-nimmt-innenminister-sobotka-ins-visier/5179444> (accessed 2 February 2018).

recent election campaigns and often was spoken about in terms that expressed vague security concerns.⁶⁶ This is also reflected in various newspaper headlines such as 'Three Asylum Applicants Arrested for Participation in Terror Militia', 'Terror: Lifelong Arrest for Asylum Seeker' and so on.⁶⁷

However, Austria is not alone in facing this issue and the phenomenon of 'security fear' in the context of migration is nothing new.⁶⁸ What is new is the current sociohistorical context and that, along with the fear of other criminal acts and the disturbance of public order, terrorist acts committed by refugees now forms one further aspect of this fear. According to a survey by IPSOS conducted in 2017, the fear that terrorist 'moles' could find their way into a country by hiding among the refugee masses is persistent in many countries around the world – mostly among persons with a conservative value orientation. The study revealed that 59 per cent of the questioned persons agreed to the statement: 'There are terrorists pretending to be refugees who will enter my country to cause violence and destruction.'⁶⁹

The Austrian Federal Office for Constitutional Protection and Terrorism Prevention (BVT) recognises this problem in its annual report. It holds that it is mostly EU citizens who are involved in the armed conflict ('foreign-fighters') who pose a great threat to the stabilisation of Syria and Iraq, and who might spread radicalisation to Europe. It further states that the greatest potential for radicalisation generally exists among juveniles, not asylum applicants.⁷⁰ The report, moreover, warns that single incidents and suspicions might further increase right-wing radicalisation in Austria, which it also acknowledges to pose a severe threat to the public order.⁷¹ Subsequently, the report admits that the public discourse on migration was framed by recent terrorist attacks in Europe and, consequently, the topics of migration movements and terrorism became conflated. However, in the very next sentence the report points out that the BVT receives regular hints of terrorists hiding among the transiting refugees, without giving further explanation.⁷² This statement is repeated in another which further informs readers that several Syrian and Iraqi suspects are currently under pre-trial detention. The motives of terrorists to travel with the refugee stream are claimed to be a demonstration of their power and to spread fear and mistrust against refugees.⁷³ Hence the report serves as an illustrative example of the contradictory behaviour of state institutions towards the issue. It seems that experts have achieved a certain degree of sensitivity for this frequent convolution of the issues in the public sector and that state actors still enmesh themselves in the same problem by issuing vague statements without backing this up with evidence or further information.

4. Securitisation trends in Austrian migration law

4.1. Historical overview: Austrian migration regulation and increasing security concerns

In Austria, the regulation of migration began in the early modern era. When poverty increased and churches were not capable of taking care of the poor any more, regional communities had to take over this task. Then, migration was first and foremost a social issue. In the early eighteenth century, the Habsburg monarchy received migrants and refugees from the Ottoman Empire. This occasion remains the first known countrywide, systematic regulation of the entrance, travel and residence of migrants in Europe. Despite the strict border regime of the Habsburg monarchy – mainly the result of epidemic plagues and customs – these people were predominantly seen as a welcome economic opportunity.⁷⁴ Alongside this 'health and economic perspective', a 'cultural perspective' played a role as well. For instance, Jewish and Osman migrants were reportedly perceived with mistrust and their loyalty was called into question.⁷⁵ In contrast, the monarchy admitted refugees fleeing the French Revolution, with the only precondition being that they could provide

66 See, for example, Thomas Mayer, 'Doskozil Und Kurz: "Darf keine illegale Migration nach Europa geben"' (*derStandard.at*, 8 September 2017): <http://derstandard.at/2000063809822/Kurz-Doskozil-ist-Partner-fuer-restriktive-Migrationspolitik> (accessed 5 December 2017).

67 See, for example, 'Salzburg: Asylwerber Wegen Terror-Verdachts Festgenommen' (*kleinezeitung.at*, 24 January 2017): <http://www.kleinezeitung.at/oesterreich/5159067/> (accessed 1 December 2017); 'Terror: Lebenslange Haft Für Asylwerber (27)' (*krone.at*, 24 July 2017): <http://www.krone.at/580173> (accessed 1 December 2017); 'Drei Asylwerber Wegen Beteiligung an Terrormiliz Verhaftet' (*DiePresse.com*, 17 June 2016): <https://diepresse.com/home/panorama/oesterreich/5023240/Drei-Asylwerber-wegen-Beteiligung-an-Terrormiliz-verhaftet> (accessed 1 December 2017).

68 Magdalena Pöschl, 'Migration Und Mobilität' (2015) Gutachten für den 19. Österreichischen Juristentag Bd I/1, 9 ff.

69 IPSOS, 'Global Views on Immigration and the Refugee Crisis', 22: https://www.ipsos.com/sites/default/files/ct/news/documents/2017-09/ipsos-global-advisor-immigration-refugee-crisis-slides_0.pdf (accessed 21 November 2017). See also James Dennison and Andrew Geddes, 'OP-ED: Are Europeans Turning against Asylum Seekers and Refugees?' (*European Council on Refugees and Exiles (ECRE)*, 17 November 2017): <https://www.ecre.org/op-ed-are-europeans-turning-against-asylum-seekers-and-refugees/> (accessed 21 November 2017).

70 'Verfassungsschutzbericht 2016' (Bundesministerium für Inneres, Bundesamt für Verfassungsschutz und Terrorismusbekämpfung (BVT) 2016) 23 f; compare also 'Who were the Paris Attackers?' (*BBC News*, 27 April 2016): <http://www.bbc.com/news/world-europe-34832512> (accessed 5 February 2018).

71 'Verfassungsschutzbericht 2016' (Bundesministerium für Inneres, Bundesamt für Verfassungsschutz und Terrorismusbekämpfung (BVT) 2016) 24.

72 'Unter dem Eindruck der Anschläge in Europa wurden bzw. werden im öffentlichen Diskurs die aktuellen Migrations- und Flüchtlingsbewegungen in Zusammenhang mit dem „Extremismus bzw. Terrorismus“ thematisiert bzw. miteinander vermischt. Dem BVT liegen mehrere Hinweise vor, die darauf hindeuten, dass es unter den hier aufhaltigen oder durchreisenden Migranten Sympathisanten bzw. Mitglieder dschihadistischer Gruppen oder Personen aus Syrien oder dem Irak gibt, die wegen Straftaten bzgl. Terrorismus verdächtig sind.' (*Verfassungsschutzbericht 2016*) (Bundesministerium für Inneres, Bundesamt für Verfassungsschutz und Terrorismusbekämpfung (BVT) 2016) 24.

73 'Verfassungsschutzbericht 2016' (Bundesministerium für Inneres, Bundesamt für Verfassungsschutz und Terrorismusbekämpfung (BVT) 2016) 35.

74 See Jovan Pešalj, 'The Mobility Control of the Ottoman Migrants in the Habsburg Monarchy in the Second Half of the Eighteenth Century' in Harald Heppner and Eva Posch (eds), *Encounters in Europe's Southeast: The Habsburg Empire and the Orthodox World in the Eighteenth and Nineteenth Centuries*, vol. 5 (Winkler, 2012).

75 Jürgen Streihammer, 'Als Die Habsburger Europas Erste Moderne Grenze Zogen' (*DiePresse.com*, 16 September 2016): <https://diepresse.com/home/zeitgeschichte/5083388/Als-die-Habsburger-Europas-erste-moderne-Grenze-zogen> (accessed 5 December 2017).

for themselves.⁷⁶ Although this example illustrates the social and economic perspective again, it also points out the different treatment meted out to both groups. The reason seems to be that the cultural perspective was not a great issue for the French refugees, due to their similar socialisation.

After World Wars I and II, many displaced persons sought refuge in Austria. The actual number remains unclear to this day. Among them were Jews, war prisoners, forcibly recruited workers from Russia, France, Italy and Poland as well as many forced migrants from Poland and Romania and about one million displaced ethnic Germans.⁷⁷ After 1945, Austria hosted more than two million forced migrants, many of whom arrived during one of four large displacement crises. The first occurred in 1956, when 180,000 persons fled Hungary (following their 114,000 fellow countrymen, who had already arrived after World War II). Austria, in search for its new geopolitical role, granted the Hungarians asylum without further delay.⁷⁸ The next group of 162,000 Czechs and Slovaks fleeing the Warsaw Pact troops came in 1968. Twelve years later, 150,000 Poles arrived in Austria, of whom about 30,000 applied for asylum.⁷⁹

Up until then, forced migrants were tolerably accepted by Austrian society.⁸⁰ Moreover, until the 1970s Austria was rather seen as a country of emigration, of transit and of first response for the displaced, who would soon return to their homes.⁸¹ Apart from that, migration was primarily perceived as the temporary reception of foreign workers (*Gastarbeiter*). After many Austrians migrated to neighbouring countries in the 1960s, national industry required foreign workers to fill the employment gap. For this purpose, bilateral agreements with Spain, Yugoslavia and Turkey were introduced that simplified the reception of these workers under the precondition that they would remain temporary.⁸² The fact that many of these workers eventually happened to migrate permanently was overlooked for a long time. Consequently, Austria failed to provide a sophisticated policy on the issue, but instead let the labour market regulate it. This led to an accumulation of non-integrated migrants that, with the oil crisis and the ensuing decline of economic prosperity in the 1970s, prepared the ground for a fundamental change in migration policies.⁸³

From 1975 onwards, it was no longer deemed sufficient to consider migration from a merely economic perspective. For the first time, public security and public order were to be considered in the recruitment of labour forces.⁸⁴ Despite this, its regulation still remained with the Ministry of Social Administration and its social partners.⁸⁵ Most political 'refugees' from Turkey after the military coup of 1980 and from Poland after the violent suppression of the democratic movement in 1981 found their way to Austria by way of labour migration, since this route was still easier than applying for asylum.⁸⁶ Hence, the policy shift was not yet substantial, but the security perspective was to become increasingly important and, with that, the executive's role in curbing the immigration flow.

4.2. The 1990s: the securitisation shift

The mindset completely changed with the break-up of communist regimes in Eastern Europe, the fall of the Iron Curtain and the immigration wave it caused for Austria in the 1990s. In the aftermath of the Balkan armed conflicts more than 100,000 persons from Croatia, Bosnia and the Kosovo arrived in Austria.⁸⁷

76 Friedemann Pestel, 'Französische Revolutionsmigration nach 1789' (*Europäische Geschichte Online (EGO)*, 24 February 2017) MN 20 f: <http://www.ieg-ego.eu/pestelf-2017-de> (accessed 30 April 2017); see also Edmund Burke, 'First Letter on a Regicide Peace' in Edmund Burke, *Revolutionary Writings: 'Reflections on the Revolution in France' and the 'First Letter on a Regicide Peace'* (ed.), Iain Hampsher-Monk (Cambridge University Press, 2014).

77 Magdalena Pöschl, 'Migration Und Mobilität' (2015) Gutachten für den 19. Österreichischen Juristentag Bd I/1 29 ff; see also Michael Jandl and Albert Kraler, 'Austria: A Country of Immigration?' (*Migration Policy Institute*, 1 March 2003): <https://www.migrationpolicy.org/article/austria-country-immigration> (accessed 3 February 2018).

78 Brigitta Zierer, 'Willkommene Ungarnflüchtlinge 1956?' in Gernot Heiss and Oliver Rathkolb (eds), *Asylland wider Willen: Flüchtlinge in Österreich im europäischen Kontext seit 1914* (J & V Edition, 1995) 163.

79 Michael Jandl and Albert Kraler, 'Austria: A Country of Immigration?' (*Migration Policy Institute*, 1 March 2003): <https://www.migrationpolicy.org/article/austria-country-immigration> (accessed 3 February 2018); UNHCR Austria, 'Asylum Country with Tradition': http://www.unis.unvienna.org/documents/unis/25vic/25years_vic_unhcr.pdf (accessed 5 December 2017).

80 Magdalena Pöschl, 'Migration Und Mobilität' (2015) Gutachten für den 19. Österreichischen Juristentag Bd I/1 144.

81 Susanne Mauthner-Weber, 'Was Man von Bisherigen Flucht-Bewegungen Lernen Kann' (*kurier.at*, 17 October 2016): <https://kurier.at/wissen/konferenz-ueber-migration-und-integration-was-man-von-bisherigen-flucht-bewegungen-lernen-kann/225.697.239> (accessed 4 December 2017).

82 Agreement between Austria and Spain on the recruitment of Spanish workers and their employment in Austria as introduced by BGBl 1962/193 and amended by BGBl 1969/26; agreement between Austria and Turkey on the recruitment of Turkish workers and their employment in Austria as introduced by BGBl 1964/164; agreement between Austria and the Federal Republic of Yugoslavia on the employment of Yugoslavian employees in Austria as introduced by BGBl 1966/42. Magdalena Pöschl, 'Migration Und Mobilität' (2015) Gutachten für den 19. Österreichischen Juristentag Bd I/1 33.

83 Magdalena Pöschl, 'Migration Und Mobilität' (2015) Gutachten für den 19. Österreichischen Juristentag Bd I/1 34, 38; Johan Wets, 'The Turkish Community in Austria and Belgium: The Challenge of Integration' (2006) 7 *Turkish Studies* 85, 87.

84 See §§ 13, 14 Ausländerbeschäftigungsgesetz (AuslBG) [*Foreigner Employment Act*] 1975 as introduced by BGBl 1975/218.

85 § 35 AuslBG 1975.

86 Magdalena Pöschl, 'Migration Und Mobilität' (2015) Gutachten für den 19. Österreichischen Juristentag Bd I/1 41; Johan Wets, 'The Turkish Community in Austria and Belgium: The Challenge of Integration' (2006) 7 *Turkish Studies* 87; Paul Lewis, 'Austria Braces for Flood of New Polish Refugees' (*The New York Times*, 24 December 1981): <http://www.nytimes.com/1981/12/24/world/austria-braces-for-flood-of-new-polish-refugees.html> (accessed 4 December 2017).

87 UNHCR Austria, 'Asylum Country with Tradition': http://www.unis.unvienna.org/documents/unis/25vic/25years_vic_unhcr.pdf (accessed 5 December 2017); Magdalena Pöschl, 'Migration Und Mobilität' (2015) Gutachten für den 19. Österreichischen Juristentag Bd I/161.

In 1991, as part of a large reform of migration law, the existing provision was replaced by a new Asylum Act⁸⁸ in order to adapt to the 'sudden influx of asylum claims' and 'Austria's new geopolitical role'.⁸⁹ The legislative material to this amendment highlights several interesting parallels to the situation nowadays: first, a sudden increase of asylum applications occurred, more than tripling within the five years from 1985 (6,724) to 1990 (22,798).⁹⁰ This is also true for the years 2014 (28,064) to 2015 (88,340).⁹¹ Second, the social rejection of refugees from the Balkans – similar to that of the Ottoman migrants in the eighteenth century – suggests that one underlying issue might have been the perceived 'otherness' of the arriving society. This could also be true for the current refugees, who primarily come from the Middle East or Africa.⁹² Third, political and economic factors are evident as well. The economy was declining and the topic of migration was on the top of domestic politics as right-wing populism was flourishing. For instance, the Austrian populist Freedom Party (FPÖ) ran a petition against migration called 'Austria First'⁹³ and demanded 'zero immigration'.⁹⁴ The proposal for the new Asylum Act also claimed that the asylum seekers were not refugees in accordance with the definition of the Geneva Refugee Convention, but migrants in search for a better life (*Wirtschaftsflüchtlinge*) and suggested that they were abusing the asylum system for a temporary residence in Austria by staying at least for the time of the asylum procedure until their claim was denied. Hence, a great reform of the Austrian asylum system was necessary.⁹⁵

In consequence, the paradigm shifted from employment policy to security policy and, symptomatically, was taken from the hands of the Ministry of Employment and its social partners and placed in the hands of the Ministry of the Interior.⁹⁶ The reform involved, among other things:

- the creation of a specialised Federal Asylum Agency,
- the acceleration of proceedings – for example, in obviously founded or non-founded cases, the authorities had to proceed without further investigation after the first hearing,⁹⁷
- a great extension of the immigration police's competences – for example, pushbacks at the border, custody pending deportation up to six months, deportation without procedure when caught within seven days of illegal entrance (with no suspensive effect of remedy after entering illegally), and
- the authority to enter houses.⁹⁸

In this way most migrants who were caught entering Austrian territory illegally were deported within one or two weeks after their entry.⁹⁹ In this context, the fight against migrant smuggling was emphasised: sanctions were raised and even smuggling without any financial benefits for the perpetrator was penalised.¹⁰⁰ Furthermore, data collection and exchange were introduced for certain suspicious foreigners and asylum applicants.¹⁰¹ At the time, the only instance to prevent the legislature from departing too much from a humanitarian course was the Austrian Constitutional Court.

Despite these restrictions on the right to asylum, Austria also introduced a new legal instrument to deal with mass migration: § 12 of the new Residence Act allowed the government to enact a regulation on the reception of whole groups of aliens fleeing from armed conflict, which it made use of for the reception of Bosnians from 1993 until 1997.¹⁰² This instrument is comparable to the Temporary Protection Directive (TPD) of the EU, which was also developed in face of the Balkan crises and the masses of displaced persons they caused.¹⁰³ It can only be presumed that this

88 Bundesgesetz über die Gewährung von Asyl (Asylgesetz – AsylG) [Asylum Act] 1991 as introduced by BGBl 1992/8.

89 Reasoning for the introduction of a new Asylum Act 1991 in RV 270 BlgNR 18. GP 8; see also AB 328 BlgNR 18. GP; see Michael Jandl and Albert Kraler, 'Austria: A Country of Immigration?' (*Migration Policy Institute*, 1 March 2003): <https://www.migrationpolicy.org/article/austria-country-immigration> (accessed 3 February 2018).

90 RV 270 BlgNR 18. GP 10.

91 Asylstatistik 2016' (Bundesministerium für Inneres, Sektion III – Recht 2016): <http://www.bmi.gv.at/Downloads/start.aspx> (accessed 1 December 2017) 4.

92 Asylstatistik 2016' (Bundesministerium für Inneres, Sektion III – Recht 2016): <http://www.bmi.gv.at/Downloads/start.aspx> (accessed 1 December 2017) 5.

93 Magdalena Pöschl, 'Migration Und Mobilität' (2015) Gutachten für den 19. Österreichischen Juristentag Bd I/1 144 ff.

94 Michael Jandl and Albert Kraler, 'Austria: A Country of Immigration?' (*Migration Policy Institute*, 1 March 2003): <https://www.migrationpolicy.org/article/austria-country-immigration> (accessed 3 February 2018).

95 RV 270 BlgNR 18. GP 10.

96 Johannes Peyrl, Thomas Neugschwendtner and Christian Schmaus, *Fremdenrecht* (2017) 35 ff.

97 See § 17 AsylG 1991, BGBl 1992/8.

98 §§ 17 para 2, 18, 27 para 3, 35, 41, 47, 50 Fremdenengesetz (FrG) [*Alien Act*] BGBl 1992/838; see reasoning for the introduction of the Alien Act 1992 in RV 692 BlgNR 18. GP; see also AB 869 BlgNR 18. GP.

99 Ulrike Davy, 'Die Neuordnung des österreichischen Asylrechts' (1993) 2 *Zeitschrift für Ausländerrecht und Ausländerpolitik* 70, 71 f; see §§ 17 para 2, 18, 27 para 3, 35 FrG 1992.

100 §§ 80 ff FrG 1992; RV 692 BlgNR 18. GP 60.

101 §§ 72 ff FrG 1992; § 15 AsylG 1991.

102 § 12 Aufenthaltsgesetz (AufenthaltG) [*Residence Act*] 1993 BGBl 1992/466; see further regulation of the Austrian government on the number of admissions under the Residence Act, BGBl 1993/402 and the regulations of the Austrian government on the admission of displaced citizens of Bosnia-Herzegovina, BGBl 1994/368, BGBl 1994/1038, BGBl 1995/389, BGBl 1996/299 and BGBl II 1997/215.

103 Directive 2001/55/EC of July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons

efficient instrument was later dropped for similar reasons as the TPD, in particular, the concern that it was creating a 'pull factor'.¹⁰⁴

Hereafter, the many relevant provisions that together form the Austrian asylum system have been amended and altered more than 80 times, not counting the underlying provisions of Union law.¹⁰⁵ Most of them can be summarised under the goals of accelerating procedures, reducing the workload of state agencies and courts, and reducing the 'misuse' of asylum claims. These apparently hysterical reactions in the legislation placed a further burden on the already exhausted legal professionals of administrative offices, courts, law firms and NGOs, which constantly have to adapt to ever-new provisions and deal with great backlogs which cause procedural delays. In addition, the legal situation for the applicants became increasingly non-transparent and, thereby, undercuts legal certainty. Furthermore, the provisions of the Austrian asylum procedure contain many differences compared to the ordinary administrative procedure – the necessity of which is not always evident.¹⁰⁶

Out of these many amendments, two especially are worth noting. In 2005 another comprehensive reform of the Austrian migration law was undertaken, which introduced several provisions into the new Aliens Act with explicit reference to terrorism as a reason to refuse visas or issue exclusion orders, for example.¹⁰⁷ This amendment, of course, must be viewed in the context of the generally emerging terrorism awareness at that time. It illustrates how the issues of terrorism and forced migration also became legally intertwined. In 2014, during an overall reform of Austrian administrative procedure, the asylum system became re-embedded within ordinary administrative procedure. However, the new Austrian Federal Office for Immigration and Asylum (BFA) was now given two contradictory tasks: the evaluation of asylum claims and the termination of residence. This implies a danger that humanitarian concerns will be viewed from the security perspective of the immigration police and that their decisions will not be taken from an entirely objective point, as the single administrative body will find itself on the fence between two differing obligations.¹⁰⁸ Also, many of the particularities of the asylum procedures remained, in spite of the reform.

4.3. *Status quo: enhanced securitisation from 2015 until 2017*

As mentioned above, from 2014 to 2015 asylum applications approximately tripled from 28,064 to 88,340.¹⁰⁹ Given the extensive media coverage, among other factors, this put the Austrian nation in a condition that could be described as 'polarised shock'. As ordinary citizens and politicians became drawn into a highly emotional debate over the right answer to the 'refugee crisis', legislation was enhanced as well. The frequency of amendments increased dramatically, as a consequence: since 2015, the Asylum Act has been amended six times;¹¹⁰ the Alien Police Act, seven times;¹¹¹ the procedural law, 12 times;¹¹² the Residence Act, seven times;¹¹³ and the Citizenship Act, three times.¹¹⁴ At the same time, four amendments each of the Security Police Act¹¹⁵ and the Border Control Act¹¹⁶ took place. Furthermore, a State Police Protection Act¹¹⁷ was introduced that assigned advanced investigation competences to the police for the purpose of state protection against terrorism, among other powers. This indicates that the fields of law, migration law and security law were similarly affected by the great 'security lack' narrative as described above. On the social level the law also changed noticeably: a new Integration Act was introduced that obliged asylum applicants to learn German and

and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12 (Temporary Protection Directive – TPD); for an in-depth analysis of the TPD and the obstacles to its implementation, see Hanne Beirens and others, 'Study on the Temporary Protection Directive – Final Report' (2016 Study for the Directorate-General for Migration and Home Affairs of the European Commission): https://ec.europa.eu/home-affairs/sites/homeaffairs/files/elibrary/documents/policies/asylum/temporary-protection/docs/final_report_evaluation_tpd_en.pdf (accessed 6 November 2017).

104 See Beirens et al., 33.

105 For a more detailed listing of relevant provisions, see Franz Merli, 'Das Asylrecht als Experimentierfeld: Einführung' in Franz Merli and Magdalena Pöschl (eds), *Das Asylrecht als Experimentierfeld: Eine Analyse seiner Besonderheiten aus vergleichender Sicht* (MANZ, 2017) 2 ff.

106 Magdalena Pöschl, 'Migration Und Mobilität' (2015) Gutachten für den 19. Österreichischen Juristentag Bd I/1 7, 62 f.

107 RV 925 BlgNR 22. GP.

108 Magdalena Pöschl, 'Migration Und Mobilität' (2015) Gutachten für den 19. Österreichischen Juristentag Bd I/1, 65.

109 Asylstatistik 2016' (Bundesministerium für Inneres, Sektion III – Recht 2016): <http://www.bmi.gv.at/Downloads/start.aspx> (accessed 1 December 2017), 4.

110 Asylgesetz (AsylG) [Asylum Act] 2005 BGBl I 2005/100 as amended by BGBl I 2015/70, BGBl I 2016/10, BGBl I 2016/24, BGBl I 2017/68, BGBl I 2017/84 and BGBl I 2017/145.

111 Fremdenpolizeigesetz (FPG) [Alien Police Act] 2005 BGBl I 2005/100 as amended by BGBl I 2015/70, BGBl I 2015/121, BGBl I 2016/24, BGBl I 2017/68, BGBl I 2017/84, BGBl I 2017/145 and BGBl I 2018/32.

112 BFA-Einrichtungsgesetz (BFA-G) BGBl I 2012/87 as amended by BGBl I 2015/70; BFA-Verfahrensgesetz (BFA-VG) BGBl I 2012/87 as amended by BGBl I 2015/41, BGBl I 2015/70, BGBl I 2015/84, BGBl I 2016/16, BGBl I 2016/24, BGBl I 2016/25, BGBl I 2017/17, BGBl I 2017/84, BGBl I 2017/140, BGBl I 2017/145 and BGBl I 2018/32.

113 Niederlassungs- und Aufenthaltsgesetz (NAG) [Residence Act] BGBl 2005/100 as amended by BGBl I 2015/70, BGBl I 2015/119, BGBl I 2015/122, BGBl I 2017/68, BGBl I 2017/84, BGBl I 2017/145 and BGBl I 2018/32.

114 Staatsbürgerschaftsgesetz (StbG) [Citizenship Act] BGBl 1985/311 as amended by BGBl I 2017/39, BGBl I 2017/68, and BGBl I 2018/32.

115 Sicherheitspolizeigesetz (SPG) [Security Police Act] BGBl 1991/566 as amended by BGBl I 2016/5, BGBl I 2016/61, BGBl I 2017/130 and BGBl I 2018/29.

116 Grenzkontrollgesetz (GreKoG) [Border Control Act] BGBl 1996/435 as amended by BGBl I 2016/25, BGBl I 2017/84, BGBl I 2017/45 and BGBl I 2018/32.

117 Polizeiliches Staatsschutzgesetz (PStSG) [State Police Protection Act] as introduced by BGBl I 2016/5.

undertake 'Austrian values courses'.¹¹⁸ Furthermore, social benefits were cut on the federal as well as on the state level with several further amendments.¹¹⁹ Most of these alterations occurred within two main reforms in 2015 and again in 2017. Further amendments are expected.¹²⁰

Substantially, these amendments continued the trend of securitisation as did the last big reform which entered into force on 1 November 2017.¹²¹ To facilitate the acceleration of procedures, it will be possible to revoke the right to asylum not only after a criminal conviction, but also in the earlier stages of the procedure, and should be completed within one month. This harsh acceleration, in contradiction of the principle *in dubio pro reo*, was justified on the basis of security considerations.¹²² Also, a notification of the date of forced return is not obligatory anymore and, if the person was informed, remedies do not now have suspensive effect.¹²³ These amendments are comprehensible from the pragmatic point of view of authorities. However, they have severe consequences for the concerned individuals, who are taken out of their homes unexpectedly, without chance to make any preparations and experience strong interference in their personal rights.¹²⁴

Further, the competences of the immigration police were extended. For instance, custody pending deportation can now last up to 18 months in extreme cases and will, in practice, affect more persons than before.¹²⁵ House searches are permitted under less strict conditions; for example, whole asylum centres can be searched, even if there is only one suspect (of illegal migration, for example) residing there.¹²⁶ More severely, coercive powers were conferred upon private security personnel in asylum reception centres without concrete description of the conditions thereof.¹²⁷

In addition, sanctions for migrant smuggling were increased. In the case of illegal entrance, stay or neglecting the obligation to exit – which, in fact, happens with every denied asylum application – a fine up to €15,000 (or six weeks of custody) can be imposed. This fine is 15 times higher than before, an increase that seems disproportionate. Further, the administrative offence of 'false statement in front of security authorities' was introduced.¹²⁸ Data collection and distribution were expanded.¹²⁹ As stated above, social support for persons whose asylum claim was denied was abolished, thereby leading many to become homeless. The latter seems self-defeating, even from the perspective of public interest. If these individuals become homeless or cease to reside in state facilities, they will become more difficult to locate as a consequence and, therefore, the provision rather contradicts public order.¹³⁰

These amendments received harsh critique from NGOs taking care of asylum applicants, scholars, UNHCR and the Austrian Data Protection Agency, among others. Many of these statements accused the government, in very clear words, of setting populist measures in contradiction not only of human rights obligations, but also to what would be useful and appropriate to achieving the goal of preventing security gaps.¹³¹ Without discussing the amendments in detail, it can be stated that the government resorted to the very tendencies and instruments of securitisation that were already developed in the 1990s: acceleration, detention, returns/deportation, data collection, extension of police competences, establishing control by closing borders and fighting migrant smuggling.

Notably, many of the listed amendments proclaimed to be tackling security threats due to migration. In some materials, terrorism and migration were explicitly or vaguely convoluted. For instance, phrases like 'the prevention of terrorism in a globalised world'¹³² or 'quicker and more adequate possibilities of reaction to threats like terrorism in the migration and asylum law'¹³³ found their way into government bills. The latter referred to the possible exclusion of persons who

118 §§ 4, 5 Integrationsgesetz [Integration Act] BGBl I 2017/68 as amended by BGBl I 2017/86 and BGBl I 2018/37.

119 Bundesgrundversorgungsgesetz 2005 (GVG-Bund) [Federal Reception Act] BGBl 1991/405 as amended by BGBl I 2015/70, BGBl I 2017/84 and BGBl 2017/145; for the state level see, for example, NÖ Grundversorgungsgesetz (GVG-NÖ) [Lower Austrian Reception Act] LGBl 9240-0 as amended by LGBl 2015/80 and LGBl 2017/63; NÖ Mindestsicherungsgesetz [Lower Austrian Basic Care Act] LGBl 9205-0 as amended by LGBl 2015/71, LGBl 2015/96, LGBl 2016/24, LGBl 2016/103, LGBl 2017/63 and LGBl 2018/12.

120 Another amendment was already suggested in May 2018; see Fremdenrechtsänderungsgesetz (FrÄG) [Migration Law Amendment Act] 2018 proposed by 38/ME 26. GP. The legislative procedure was not finalised by the point of submission of this paper.

121 FrÄG I + II 2017 proposed by 279/ME and 2285/A 25. GP and made known by BGBl I 2017/84 and BGBl I 2017/145; the subsequent list of amendments is by no means exhaustive, but rather exemplary.

122 § 7 para 2, 27 para 3 AsylG; see 279/ME Erläut 25. GP 2.

123 § 12a para 3/2 AsylG; see 279/ME Erläut 25. GP 28.

124 See also Caritas, 'Stellungnahme zum FrÄG I 2017 (27/SN-279/ME 25. GP)' 9: https://www.parlament.gv.at/PAKT/VHG/XXV/SNME/SNME_08637/index.shtml (accessed 4 February 2018); Katharina Beclin, 'Stellungnahme zum FrÄG I 2017 (41/SN-279/ME 25. GP)' 4: https://www.parlament.gv.at/PAKT/VHG/XXV/SNME/SNME_08743/index.shtml (accessed 4 February 2018).

125 § 7 para 2 AsylG; see 279/ME Erläut 25. GP 28.

126 § 35a ff FPG; see 279/ME Erläut 25. GP 11.

127 § 9 para 3a GVG-Bund; see 279/ME Erläut 25. GP 32.

128 § 120 FPG; see 279/ME Erläut 25. GP 26 ff; see also critically Katharina Beclin, 'Stellungnahme zum FrÄG I 2017 (41/SN-279/ME 25. GP)' 3: https://www.parlament.gv.at/PAKT/VHG/XXV/SNME/SNME_08743/index.shtml (accessed 4 February 2018).

129 §§ 34 ff NAG; see 279/ME Erläut 25. GP 9.

130 § 2 para 7 GVG-Bund; see the expert opinion on the first migration law amendment in 2017: Caritas, 'Stellungnahme zum FrÄG I 2017 (27/SN-279/ME 25. GP)' 16 https://www.parlament.gv.at/PAKT/VHG/XXV/SNME/SNME_08637/index.shtml (accessed 4 February 2018).

131 See, for example, Caritas, 'Stellungnahme zum FrÄG I 2017 (27/SN-279/ME 25. GP)' 2 https://www.parlament.gv.at/PAKT/VHG/XXV/SNME/SNME_08637/index.shtml (accessed 4 February 2018); all expert opinions [Stellungnahmen] on the FrÄG I 2017 are available in German at: https://www.parlament.gv.at/PAKT/VHG/XXV/ME/ME_00279/index.shtml (accessed 4 February 2018).

132 ErläutRV 763 BIGNR 25. GP 1.

133 Vorblatt RV 582 BlgNR 25. GP 1.

are *mere suspects* of terrorism from travel documents and the non-suspensive effect of their remedies.¹³⁴ In particular, an exception to the right to asylum was introduced for persons who are – due to ‘substantial reasons’ – presumed to threaten national security, with reference to ‘current events’ and the threat posed by extremism and terrorism. Additionally, with reference to terrorism, the forced return of *suspects* became allowed without taking exceptions due to residence consolidation into regard.¹³⁵

The similarities of the 1991/92 and 2015/17 amendments point out that, currently, migration law is experiencing a regression to a similar state to when the security narrative directed policies for the first time. Such a development, however, would signify a negation of the humanitarian progress made in the last two decades, which has been achieved in a joint effort by stakeholders in Austria and Europe. In particular, EU legislation has provided a strong impetus for Austrian migration law in the sense that it tends to fulfil the minimum standards prescribed by EU secondary law. However, in some instances, it tries to undercut them as well: for example, Austrian law imposes the obligation on vulnerable groups of asylum applicants to hand medical reports to the Austrian authorities, thereby contradicting the meaning of Article 21 Reception Directive.¹³⁶ Furthermore, the restriction of asylum applicants’ access to the labour market does not correspond to Article 15 of the Reception Directive.¹³⁷ Despite such digressions, the influence of European law and the judicature of both European courts are undeniable. It safeguards certain standards, which the Austrian constitution alone (for lack of codification of social rights and restriction of many basic rights to Austrian citizens) could not guarantee.

5. Conclusion

In conclusion, the trend of securitisation is currently experiencing a strong renaissance in Austria. For migration law this implies a regression to the policies and instruments of the 1990s. The rights of asylum applicants are restricted based on vague hints at a security deficit that is not supported by facts. The explanatory notes of several government proposals include arguments about increased security needs in a globalised world and sometimes even mention security threats, including terrorism, by migrants and refugees without further explanation. In the last year, such sentences became fewer in the explanatory notes accompanying legislative proposals and the government is now limiting itself to *presuming* a general threat to national security and public order emanating from migrants. However, other documents produced by the ministries contain similar wording and undefined presumptions, not to mention the media appearances of some members of government.¹³⁸

This kind of rhetoric incites security fears and perpetuates the security narrative. The fear of terrorism is only one of several aspects of the security concerns about forced migration. The concern also includes the fear of criminal acts committed by migrants and the general disturbance of public order. However, terrorism has proven to be a very strong rhetorical instrument and the frequent use of the words ‘terror’ and ‘migration’ within one sentence on the topic of state security has far-reaching effects on the psychological state of the population. In addition, migration law is not the only field that is been drawn into the securitisation trend. Security, generally, has become one of the highest values in the Western ‘post-heroic’ society. Advocates of privacy rights, the right to fair trial and the right to assembly find themselves in a defensive position as well.¹³⁹

In consequence, not just specific provisions have been introduced to tackle those suspected of terrorism – instead, the whole of migration law has become more rigorous and the rights of forced migrants restricted. Furthermore, migration related offences, making forced migration a crime per se, have been developed.¹⁴⁰ In some cases, the restriction of suspected asylum applicants’ rights go even further than those in criminal procedures (for example, detention, house searches), although the potential acts only form administrative offences. Hence, these provisions must be questioned with regard to their proportionality and necessity.¹⁴¹

Moreover, asylum applicants are individuals who, by Austria’s ratification of several international treaties and human rights conventions, have been granted subjective rights. Most of these provisions contain exceptions, which allow for a restriction of these rights in the public interest, especially in the interest of national security and public order, insofar

134 Vorblatt RV 582 BlgNR 25. GP 1.

135 ErläutRV 582 BlgNR 25. GP 4, 11 in implementation of Art 14, para 4, lit a of European Parliament and Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9.

136 Compare § 15 AsylG and Art 15 European Parliament and Council Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180/96.

137 See, for example, AB 1599 BlgNR 25. GP discussing resolution proposal 740/A(E) 25. GP.

138 See above in section 3 and section 4 (3).

139 See Ralph Janik, ‘Den Ausnahmestand (Neu) Denken: Zwischen Prävention Und “Extremen Notfall” in Manuel Aigner and others (eds), *Recht und Krise* (Jan Sramek, 2017) 29.

140 For this topic, commonly known by the term ‘crimmigration’, see, for example, Maartje van der Woude, Vanessa Barker and Joanne van der Leun, ‘Crimmigration in Europe’ (2017) 14 *European Journal of Criminology* 3; César Cuauhtémoc García Hernández, ‘What is Crimmigration Law?’ (2017) 17 *Insights on Law & Society*: <https://www.americanbar.org/publications/insights-on-law-and-society/2017/spring2017/what-is-crimmigration-law.html> (accessed 5 February 2018).

141 Caritas, ‘Stellungnahme zum FrÄG I 2017 (27/SN-279/ME 25. GP)’ 9: https://www.parlament.gv.at/PAKT/VHG/XXV/SNME/SNME_08637/index.shtml (accessed 4 February 2018); Katharina Beclin, ‘Stellungnahme zum FrÄG I 2017 (41/SN-279/ME 25. GP)’ 3; Katharina Beclin, ‘Stellungnahme zum FrÄG I 2017 (41/SN-279/ME 25. GP)’ 4: https://www.parlament.gv.at/PAKT/VHG/XXV/SNME/SNME_08743/index.shtml (accessed 4 February 2018).

as they remain proportional.¹⁴² Hence, to justify further restrictions on forced migrants' rights, it seems to be morally, politically and legally necessary to take on this security perspective. The claim is now that forced migrants constitute a threat, which the state, its institutions and the population must reasonably and justifiably be defended against. Keeping this in mind, it becomes unlikely that the security narrative is an unintentional result of the confusion of two different, but equally complex, transnational issues: terrorism and asylum – intertwined primarily by common root causes.¹⁴³ More likely, it seems to be a purposeful framing of asylum applicants and refugees as a general threat to national security and public order, undermining the humanitarian perspective in order to achieve a certain political agenda. This agenda of securitisation not only scapegoats vulnerable human beings, but it also neglects expert opinions which are calling for a better understanding of the root causes of terrorism and forced migration in order to develop sustainable strategies for the future.

¹⁴² See, for example, art. 15 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended); or art. 4 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

¹⁴³ See above in section 2 (2).

The fight against terrorism and the need for international protection: the Hungarian solution

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Abstract

The recent refugee crisis in Europe has drawn attention to the relationship between asylum and terrorism. Despite there being no demonstrable link between seeking asylum and terrorism, certain States have introduced strict measures to strengthen national security and manage the flow of migration. This negatively affects the human rights of asylum seekers. A citizen's right to security and an asylum seeker's right to international protection are being painted as competing with each other, when they ought to be seen as equally necessary. The right balance between the two sets of interests should be found through the adequate interpretation and implementation of binding international norms. Through a detailed analysis of the Hungarian case, this paper presents the way in which national security interests prevail over the human rights of asylum seekers.

Keywords

asylum, terrorism, human rights, national security

1. Introduction

This paper aims at examining the right to international protection by mapping the correlation between terrorism and international refugee law. As a starting point, we examine how human rights and the security interests of the state clash in the context of the terror threat. After discussing the legal concept of terrorism, international protection and basic principles of international human rights law, in order to put the paper in its context, we present how the terror threat has affected the legislation and the concept of asylum in Hungary since 2015. At the national level, legislative changes show a certain pattern. In this context, citizens' right to security concurs with asylum seekers' right to protection. However, national security interests and the fight against terrorism are also human rights issues as refugees' right to international protection, and therefore they should not be considered as competing interests. After analysing the Hungarian legislative solutions for handling the migration crisis, its implementation will be presented through a case study.

2. International context

2.1. *Right to security versus right to protection*

Today, the competing security interests of individuals and communities is an emerging issue in the migration context, in particular when citizens' right to security concurs with asylum seekers' right to protection. Nevertheless, there are certain legal checks and balances that provide guidance for enforcing these rights or – from the state's perspective – fulfilling these obligations. As a consequence of the 9/11 terror attacks, terrorism has had a significant negative impact on the concept of asylum, and the question of whether individual rights or national security is more important has become the core of migration debates.

In general, states have obligation to protect their nationals as well as more abstract values such as national interest. On the one hand, they have to play an active role in protecting the interests of a whole nation and its own nationals. On the other hand, all other individuals living or residing in its territory have the right to be protected and secured from any assault that might threaten their existence. In the security context, the national interest has a well-defined meaning and national security agencies operate as a system of protection. In an aftermath of such an assault, the need for protection may be invoked if a large number of foreign nationals appear at the state borders. Historically, it is evident that states have different reactions and responses to emigration and immigration as a natural dichotomy from the humanitarian approach to identarian populism. However, ideally the right to security covers the duty of the state to protect the existence and dignity of all human beings. Nevertheless, there is a common ground between citizens and migrants or asylum seekers: both groups have human rights.

In this regard, the United Nations High Commissioner for Refugees (hereinafter UNHCR) expresses its serious concerns about bona fide asylum seekers who may be the victims of public prejudice and restrictive legislative or administrative measures of anti-terrorism policies. Concerns about international terrorism result in the criminalisation of asylum seekers and refugees. They have to face harsh difficulties in an increasing number of states, either accessing procedures or proving the validity of their claims stemming from their ethnicity or their mode of arrival.¹

Asylum seekers have a right to security (protection) and immigration/border controls have to be in line with international human rights obligations. National security interests and the duty for the protection of asylum seekers and refugees are 'complementary and mutually reinforcing'. National security interests and the fight against terrorism as a policy tool for ensuring protection are also human rights issues, such as refugees' right to international protection, and therefore they should not be considered as competing interests.

This argument may be supported by the fact that refugees and asylum seekers are often the primary victims of insecurity and terrorism. In this regard, a coherent interpretation of the definition of 'refugee', as well as the adequate application of the exclusion clauses, may resolve the imbalance between the security interests of the state and the humanitarian interests of those in need of international protection. Additionally, UNHCR also recognises the legitimate security interests of states and supports the fight against terrorism. In its view, terrorists should not benefit from refugee status in order to preserve the integrity of the concept of asylum.²

According to the UN Commission on Human Rights, national security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or its threat of force. National security concerns may not be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats and may not be used as a pretext for imposing vague or arbitrary limitations, and may only be invoked when adequate safeguards and effective remedies against abuse exist. In the Commission's view, the systematic violation of human rights undermines the essence of national security and may jeopardise international peace and security.³

1 'Addressing Security Concerns without Undermining Refugee Protection – UNHCR's Perspective', p. 1 <http://www.un.org/en/sc/ctc/specialmeetings/2011/docs/unhcr-security-refugee-protection.pdf> (last accessed 22 January 2018).

2 J. C. Murillo, 'The Legitimate Security Interests of the State and International Refugee Protection', 6 (10) Sur. Revista Internacional de Direitos Humanos (2009) http://www.scielo.br/scielo.php?pid=S1806-64452009000100007&script=sci_arttext&lng=en (last accessed 30 December 2017).

3 UN Commission on Human Rights, 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights', 28 September 1984, E/CN.4/1985/4, paras 29–32.

Yet 'undesirable' asylum seekers and refugees are only the tip of the iceberg. A wider universe of 'undesirable' aliens exists in the view of states, including individuals deemed to be dangerous to society or suspected or convicted of having committed (sometimes relatively minor) crimes abroad or in the host country. Here, too, the trend of 'securitising' migration control has had profound effects on both the scale and the nature of the problem.⁴

As a conclusion, we may state that international law recognises the states' right to security and asylum seekers' right to protection as equally legitimate interests. However, it is problematic how effective the implementation of human rights obligations, such as the principle of non-refoulement, can be in practice in the context of national security.

2.2. What is terrorism?

The United Nations has not yet adopted a comprehensive definition of terrorism and the existing international legal instruments define only certain acts and its core elements. Terrorism is commonly referred as acts of violence that target civilians in the pursuit of political or ideological aims. The UN General Assembly's Declaration on Measures to Eliminate International Terrorism stated that terrorism includes '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' and that such acts 'are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them'.⁵

In its resolution, the UN Security Council referred to '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'.⁶

In 2000, in Resolution 55/1581 the General Assembly requested its Ad Hoc Committee, which had previously elaborated two sectoral instruments in the field of terrorism,⁷ to elaborate a comprehensive convention on international terrorism. The General Assembly is still working on the adoption of this document, which would complement the existing sectoral anti-terrorism regulations. Its draft Article 2 contains the following definition of terrorism: 'unlawfully and intentionally' causing, attempting or threatening to cause: '(a) death or serious bodily injury to any person; or (b) serious damage to public or private property, including a place of public use, a state or government facility, a public transportation system, an infrastructure facility or the environment; or (c) damage to property, places, facilities, or systems (...), resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act'. Unfortunately, the negotiations of the Comprehensive Terrorism Convention are deadlocked due to the disagreement among the Member States over the definition of terrorism.

2.3. What is international refugee protection?

2.3.1. Right to asylum

First of all, it has to be noted that asylum is solely the institution for protection and must be differentiated from refugee status which refers to the beneficiaries of protection and the content of protection.⁸

The right to asylum is historically rooted in an ancient juridical concept according to which a person persecuted by their own country may be protected by another sovereign authority, for example, a state or a church. Later, the right of sanctuary was first codified by King Ethelbert of Kent who considered the right of sanctuary to be being inviolable and under royal protection; which evolved into the contemporary meaning of right to asylum.⁹ In Prakash Sinha's view 'the basis of asylum was found in the sovereignty of the city or state, instead of the religious sanctity of the places of refuge'.¹⁰ Today, the idea of global protection is a part of customary international law, as rendering victims of persecution to their persecutor is a violation of the non-refoulement principle.¹¹

4 David James Cantor, Joris van Wijk, Sarah Singer and Maarten P. Bolhuis 'The Emperor's New Clothing: National Responses to "Undesirable and Unreturnable" Aliens under Asylum and Immigration Law', 1 (36) *Refugee Survey Quarterly* (2017), p. 3. <https://academic.oup.com/rsq/article-abstract/36/1/1/2897762?redirectedFrom=fulltext> (last accessed 15 January 2018).

5 UN General Assembly, 'Measures to Eliminate International Terrorism: Resolution Adopted by the General Assembly', 17 February 1995, A/RES/49/60 point 1.3.

6 UN Security Council, 'Security Council Resolution 1566 (2004) [Concerning Threats to International Peace and Security Caused by Terrorism]', 8 October 2004, S/RES/1566 (2004) point 3.

7 In its resolution 51/210 (1996), the General Assembly decided to establish an ad hoc committee to elaborate an international convention for the suppression of terrorist bombings and an international convention for the suppression of acts of nuclear terrorism, and later to develop a comprehensive legal framework of conventions concerning international terrorism.

8 M.-T. Gil-Bazo, 'Asylum as a General Principle of International Law', 27 *International Journal of Refugee Law* (2015), pp. 3–28.

9 P. Sinha, *Asylum and international law* (Martinus Nijhoff Publishers, 1971), p. 14.

10 P. Sinha, *Asylum and international law* (Martinus Nijhoff Publishers, 1971), p. 15.

11 A. Ahmed, 'Individual Protection versus National Security: A Balancing Test Concerning the Principle of Non-refoulement', 21 *International Organization of Scientific Research – Journal of Humanities and Social Science* (2016), pp. 30–40, 31–2.

The right to asylum has already been codified by multilateral treaties. Article 14 of the Universal Declaration of Human Rights¹² states that 'everyone has the right to seek and to enjoy in other countries asylum from persecution'. The 1951 Geneva Convention defines the elements for eligibility for asylum more precisely; according to this, a refugee is a person 'who is outside their own country's territory or place of habitual residence in case of stateless persons owing to well-founded fear of persecution on one or more of the protected grounds: race, nationality, religion, political opinion and belonging in any particular social group and is unable or, owing to such fear, is unwilling to avail himself of the protection of the country of nationality or habitual residence and as a result of such events, is unable or, owing to such fear, is unwilling to return to it'.¹³

In cases where people are not eligible for asylum, they can be removed from the territory of the state. However, there is a limitation that may cause a different type of protection beside asylum. As regards the extradition, expulsion or deportation of individuals, the European Court of Human Rights (hereinafter ECtHR) has also declared that Article 3 of the European Convention on Human Rights (hereinafter ECHR) prohibits in absolute terms expulsion if the person concerned would face a real risk of torture or inhuman or degrading treatment or punishment in the country of destination.¹⁴

In sum, the historical idea of asylum as an expression of sovereignty has been linked to the right of individuals to be granted asylum and has been recognised by international human rights instruments as refugee protection. Based on this, we may state that asylum is a general principle of international human rights law that is legally binding when it comes to the interpretation of states' obligations towards individuals seeking protection.¹⁵

2.3.2. Exclusion clauses

The Geneva Convention is the first international treaty on asylum that contains regulations about criminals. According to the *travaux préparatoires* they wanted to ensure that criminals who committed crimes against humanity, war crimes or acted against the aims of the UN's purposes and principles would not be able to avoid their punishment under the umbrella of refugee protection. Article 1F is an exhaustive list of reasons with a wide range of interpretation.¹⁶ When the State Party applies Article 1F in a case, the well-based suspicion about the commitment of such crimes is enough, with a thorough examination of all circumstances of the case concerned. Only by its place in the treaty can the exclusion clauses be interpreted to invoke the proportionality test; that is, first of all, the authority shall ensure that the applicant is fit to withstand the conditions of recognition, otherwise, certain people would be deprived of their right to an examination of their claim, which leads to the criminalisation of applicants.

Thus, Article 1F of the 1951 Geneva Convention provides the possibility for states to exclude certain asylum seekers and refugees from refugee status. By establishing the system of exclusion clauses, states sought to achieve two legitimate goals. On the one hand, they wanted to protect refugee status from abuse by prohibiting its grant in undeserving cases and, on the other hand, they wanted to ensure that those who had committed grave crimes in World War II, other serious non-political crimes or who were guilty of acts contrary to the purposes and principles of the United Nations be punished. Nevertheless, due to the fact that the application of Article 1F imposes limitation on a humanitarian provision, it should be interpreted restrictively and be applied only in particular and legally well-based circumstances.¹⁷

Article 1F (a) states that 'the provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes'.

In the European context, the Common European Asylum System (hereinafter CEAS) is the legal framework that EU Member States created in order to apply shared competences prescribed in Articles 3 and 4 of the Treaty of European Union. The CEAS is a collection of secondary legislation in the field of asylum and, as such, all Member States implemented its provisions. In our context, the recast Qualification Directive¹⁸ and the recast Asylum Procedures Directive¹⁹ are those that define the possibility and procedure of exclusion of applicants based on national security concerns. As of 2010 the European Court of Justice (hereinafter ECJ) has gradually crystallised its jurisprudence concerning exclusion from international protection based on security concerns linking EU's asylum law and anti-terrorism law.²⁰ The ECJ

12 UN General Assembly, 'Universal Declaration of Human Rights', 10 December 1948, 217 A (III).

13 Article 1A, paragraph (2) ECHR.

14 N. Mole and Ch. Meredith, 'Asylum and the European Convention on Human Rights', 9 *Human Rights Files*, Council of Europe Publishing (2010), p. 23. <http://www.refworld.org/pdfid/4ee9b0972.pdf> (last accessed 2 September 2017).

15 M.-T. Gil-Bazo, 'Asylum as a General Principle of International Law', 27 *International Journal of Refugee Law* (2015), pp. 3–28.

16 F. Nicholson and J. Kumin, 'A guide to international refugee protection and building state asylum systems', UNHCR, 'Handbook' (2017), pp. 147–8.

17 G. Gilbert, 'Current Issues in the Application of the Exclusion Clauses', UNHCR: background paper for an expert roundtable discussion on exclusion organised as part of the Global Consultations on International Protection in the context of the 50th anniversary of the 1951 Convention relating to the Status of Refugees, p. 2. <http://www.unhcr.org/uk/419dba514.pdf> (last accessed 23 October 2017); <http://www.refugeelawreader.org/en/en/english/african-framework-for-refugee-protection/iii4-protection-challenges-in-africa/iii41-exclusion-clause/9452-gilbert-current-issues-in-the-application-of-the-exclusion-clauses-1/file.html> (last accessed 20 September 2017).

18 Article 4 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJL 337, 20.12.2011, pp. 9–26.

19 Article 23 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJL 180, 29.6.2013, pp. 60–95.

20 Joined Cases C-57/09 and C-101/09 *Bundesrepublik Deutschland v B and D*, EU:C:2010:661; Case C-373/13 *H.T. v Land Baden-Württemberg*,

analysed the previous Qualification Directive,²¹ in particular, its exclusion clause in light of the Geneva Convention. It also examined the relationship between the application of the Qualification Directive and EU legislation on the fight against terrorism.

Both the Qualification Directive and its recast version reflect Article 1F of the Geneva Convention by providing that a person should be excluded from eligibility for refugee status for acts contrary to the principles and purposes of the United Nations, including acts of terrorism, as well as those who instigate or otherwise participate in the commission of these acts.

Simultaneously, the ECtHR also gradually established its position on this matter.²² In general, the ECtHR states are required to strike the right balance between their obligation to protect national security and their obligation to respect human rights laid down in the Convention. When examining whether national security measures comply with the Convention, the ECtHR very cautiously examines the particular circumstances of the case.

2.4. Non-refoulement and national security

The principle of non-refoulement is a fundamental basis of international refugee law as well as customary international law.²³ Article 33 of the 1951 Geneva Convention provides that no refugee should be returned to any country where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion from which no derogation is allowed. The principle of non-refoulement signifies an inherent conflict with state sovereignty as it infringes on a state's right to exercise control over its own borders and those who reside within them. In legal proceedings immediately following World War II, non-refoulement was considered as a distinct right, which could be abridged under certain circumstances.²⁴

The terror attacks committed by perpetrators with migratory background have shifted the focus to migration and transformed it into a global concern. In this context, states' international obligation to protect refugees meets their internal security interests thus making it a highly complex issue and where applying the balancing test is inevitable.²⁵ In case of conflict between individual rights and national security interests in the migratory context, there are two possible scenarios to resolve that conflict. The protection needs of an individual may get priority based on concrete international instruments that impose an obligation on states with regard to the non-refoulement principle (for example, the 1951 Geneva Convention or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment²⁶).²⁷ In addition, the principle of non-refoulement also has a binding effect on states as a part of customary international law. Furthermore, there are judicial decisions that support the approach according to which individual protection would get priority,²⁸ although they are judicial decisions that gave priority to national security under the doctrine of bias and uncertainty.²⁹

2.5. Is security the primary value?

Security is privileged over values in various political philosophies, which gives an important role to the state as the protector of the physical security of people and their property. According to classical social contractarians, the dangerousness of life is in the 'state of nature' and by 'signing' the social contract, people voluntarily renounce a certain part of their individual freedom in exchange for their security and the protection provided by a legitimate political authority (state). As a result, providing security becomes a primary obligation of the state since that is what individuals have contracted for in submitting to state authority.³⁰ The communitarian idea also privileges security over individual

EU:C:2015:413; Case C-573/14 *Commissaire général aux réfugiés et aux apatrides v Mostafa Lounani*, EU:C:2017:71.

21 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJL 304/12, 30.9.2004, pp. 12–23.

22 For some ECtHR cases on arbitrary detention, the case of *Nolan and K. v. Russia*, Application no. 2512/04; Case of *Mikolenko v. Estonia*, Application no. 10664/05; Case of *Louled Massoud v. Malta*, Application no. 24340/08; Case of *Amie and others v. Bulgaria*, Application no. 58149/08; Case of *Suso Musa v. Malta*, Application no. 42337/12.

23 UNHCR, 'The Principle of Non-Refoulement as a Norm of Customary International Law, Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93', 31 January 1994. <http://www.refworld.org/docid/437b6db64.html> (last accessed 23 September 2017).

24 V. Padmanabhan, 'To Transfer or not to Transfer: Identifying and Protecting Relevant Human Rights Interests in Non-Refoulement', 80 *Fordham Law Review* (2011), pp. 73–123.

25 A. Ahmed, 'Individual Protection versus National Security: A Balancing Test Concerning the Principle of Non-refoulement', 21 *International Organization of Scientific Research – Journal of Humanities and Social Science* (2016), p. 1.

26 UN General Assembly, 'Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

27 See also ICCPR, 'The 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee problems in Africa (OAU Convention)'; ECHR, 'Charter of Fundamental Rights of the European Union'; 'American Convention on Human Rights'; 'The Third and Fourth Geneva Conventions of 1949'.

28 See *Soering v United Kingdom* (1989) 11 EHRR 439; *Chahal v. United Kingdom* (1997) 23 EHRR 413.

29 *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1, [2002] 1 S.C.R. 3.

30 D. Boucher and P. Kelly (eds), *The Social Contract From Hobbes to Rawls* (Routledge, 1994), pp. 2–10.

privacy. Additionally, the inherently limited nature of privacy also supports an argument for the primacy of security over privacy, since people tend to require security rather than more than privacy.³¹

Immigration and emigration are always linked to the concept of sovereignty, meaning that the state has the right to decide who can enter and leave its territory. The bar to this right is the value of hospitality, an ancient ethical-moral concept. Although, there is no modern-day international migration law, there is a history of legislation concerning the rights of a sovereign regarding immigration concurring with the obligation of hospitality. From Vitoria and Grotius, who created a balanced construction between emigration and immigration, to Pufendorf, who broke that up by considering emigration as a national's prerogative and immigration as subject to the discretionary power of the sovereign. Wolff created the notion of territorial sovereignty, which entitled the state to adjudicate over migration matters, and hospitality as charity. Vattel was the one who reassured that emigration is a fundamental right when a state is not able to protect its own citizens. Admission is qualified by an internal duty of innocent passage. Instead of acknowledging the unbridled discretion of states, Vattel endorses a right to illegal entry when there is no other means to flee from a danger or to procure one's own means of subsistence.³²

States have the obligation under international human rights law to ensure the personal security of individuals under their jurisdiction where a threat (known or suspected) exists, including terrorist threats. In order to fulfil their obligations, 'states have a right and a duty to take effective counter-terrorism measures, to prevent and deter future terrorist attacks and to prosecute those that are responsible for carrying out such acts'. Nevertheless, anti-terrorism measures must comply with other international obligations of the states, including obligations under international human rights, refugee and humanitarian law.³³

On the one hand, terrorists aim at destabilising states by causing the destruction of their governmental system, democracy and the rule of law, as well as by threatening its citizens. On the other hand, states have established new, rigorous policies and legislation in order to combat terrorism and these responses may have negative consequences for their residents (e.g. extrajudicial renditions, unlawful and indefinite detention and torture). As a result, terrorism has a significant negative impact on human rights and their enforcement, in particular the civil rights and physical integrity.

3. Migration and terrorism in the Hungarian context

Since the outbreak of the migration crisis in 2013, the Hungarian government has introduced several measures – including practical and legislative acts – to manage the gradually increasing then decreasing flows of migrants. At the legislative level, stricter rules have been introduced in the field of asylum, and immigration laws as well as new offences related to the border closure have been criminalised. As for the asylum legislation, establishing the new system of asylum detention and the expulsion ordered by the asylum authority, introducing border and accelerated procedures as well as creating a new emergency situation indicate the primacy of national security interest over human rights in the government's policy.

In 2015, as a response to the refugee protection crisis, a border fence was raised on the Serbian-Hungarian border, capacity building and structural reorganisation within the Office of Immigration and Asylum as well as the national police have been implemented, and the army has also been involved in the border protection tasks. Furthermore, in the government's new policy, terrorism is strongly linked to migrants and refugees, and the line between migrants and terrorist is gradually blurring through statements such as: 'as a result of the uncontrolled flow of migrants we cannot know how many terrorists arrived in Europe among the refugees. Terror is a threat as it demands lives and we do not know how many terrorists have been brought in Europe, how many of them are still here and we cannot know what to expect. Therefore, we should know we are in danger. In Europe, there are many migrants, the criminality has increased and public safety has decreased.' According to the prime minister of Hungary Viktor Orbán, the 'quota system means spreading terrorism across Europe'. This political rhetoric keeps the issue centre stage, but there is very little evidence to support its national relevance.³⁴

3.1. The concept of terrorism in Hungary

Terrorism as an umbrella term and as such it cannot be easily defined and interpreted. It contains actions with different circumstances, goals, results and methods applied. It is always supported by an intention to strike back or to intimidate opponents associated with a political or ideological theory in order to legitimise it. Someone's freedom fighter is another's terrorist, according to the aphorism.

31 J. A. Chandler, 'Personal Privacy versus National Security: Clarifying and Reframing the Trade-off' in I. Kerr, C. Lucock and V. Steeves (eds), *On the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (Oxford University Press, 2009), pp. 121–38.

32 V. Chetail, 'The Architecture of International Migration Law: A Deconstructivist Design of Complexity and Contradiction', 111 *American Journal of International Law* (unbound) (2017), p. 19.

33 OHCHR Fact Sheet No. 32: 'Human Rights, Terrorism and Counter-terrorism', pp. 5–9, <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf> (last accessed 10 January 2018).

34 Vékony, Dorottya 'A menekültek mint politikai ellenség Orbán Viktor beszédeiben', 1 *Politikatudományi tanulmányok* (2016), pp. 5–6. http://epa.oszk.hu/02600/02692/00003/pdf/EPA02692_politanulmanyok_2016_21-29.pdf (last accessed 31 January 2018).

In the Hungarian context, an act of terrorism³⁵ means a violent crime against the persons or any criminal offence that endangers the public or involves the use of arms (e.g., homicide, kidnapping, violation of personal freedom offences against transport security, assault on a person entrusted with public functions, assault on a person aiding a public official or a person entrusted with public functions, assault on a person under international protection, etc.) in order to: coerce a government agency, another state or an international body into doing, not doing or countenancing something; intimidate the general public; or conspire to change or disrupt the constitutional, economic or social order of another state; or to disrupt the operation of an international organisation. The act of terrorism is an offence against public security as it endangers the lives and properties of citizens. Related to acts of terrorism is a failure to report a terrorist act to the authorities, financing terrorism by providing or collecting funds or providing material assistance to commit such crimes as well as supporting the activities of the terrorist group, which is also punishable by imprisonment.

After the onset of the migration crisis in 2015, the Hungarian Criminal Code has been amended several times. The amendments changed the wording of an act of terrorism and added the act of organising a terrorist group as the basic form of the offence. Any kind of acts committed with direct intention may be regarded as organising a terrorist group and the concrete creation of the group is not a condition for punishment. As of 27 July 2016, if someone travels through the country or leaves the country in order to join a terrorist group, this is also punishable as a form of preparation for a felony.

The Hungarian courts also interpreted the act of terrorism in their jurisprudence. For example, in a case in 1999, a person was convicted of holding hostage his former partner and her daughter; however, he intended to release them in exchange for a ransom. In 1992, the court recognised that if a perpetrator demands that the police leave the site in order to release a hostage who was captured during the robbery; it amounts to an act of terrorism, in multiple counts of the offence, with robbery. These judgments applied the initial version of the notion of act of terrorism, namely, that it was a special form of kidnapping and extortion. The first major legislative amendment was made in 2003, when the distinction was made between kidnapping and act of terrorism, taking into account who is addressed to act or pay the ransom. According to the national courts' practice, if the police file a charge of an act of terrorism, it is established.³⁶ In 2012, the court stated in its *ratio decidendi* that threatening with the act of terrorism by using explosives in a public space can be regarded as a felony only if the perpetrator has the explosive, otherwise, it is only an empty threat.³⁷ Since 2010, the investigation and prevention of an act of terrorism is conducted by the Centre of Counter-Terrorism (CCT)³⁸ in light of prevention being the most effective measure against terrorism. The CCT, which merged the units that dealt with national security issues within the police, is the primary agency for the prevention of terrorism. Its composition determines the main profile of the CCT: investigation and deterrence of actions related to terrorism. Additionally, as a signal of slight democratic control over the institution, the chief of police is subjected to a parliamentary hearing. From a legislative point of view, the CCT was a practical response to the lack of legislation concerning terrorism.³⁹

Today, terrorism is characterised by its armed nature, publicity (mass media), as well as violence and intimidation. The main tools of the terrorist have also changed. By using information technology, terrorist groups can operate in a more hidden and efficient way and their identification becomes more difficult. 'Terrorist acts may be performed anywhere, anytime, against anyone and in any way.'⁴⁰ Members of terrorist groups can easily obtain information on immigration and border control systems, and by abusing the legal channels (e.g., tourism) they can easily travel through or stay for shorter or longer periods in the territory of the states.⁴¹

3.2. Migration crisis and criminality

According to experts, there is no concrete evidence to prove that terrorists systematically use the migration flows as a channel to Europe.⁴² A member of the CCT argued that it is clear that the terrorist groups do not hide among migrants because it is dangerous and they protect their 'assets'.⁴³ In Hungary, in spite of the gradually increasing numbers of migrants since 2013,⁴⁴ the number of foreign perpetrators is at a lower level compared to the total number

35 Section 314.1: 'Any person who commits a violent crime against the persons referred to in Subsection (4) or commits a criminal offense that endangers the public or involves the use of arms in order to: a) coerce a government agency, another State or an international body into doing, not doing or countenancing something; b) intimidate the general public; c) conspire to change or disrupt the constitutional, economic or social order of another State, or to disrupt the operation of an international organization; is guilty of a felony punishable by imprisonment between ten to twenty years or life imprisonment.'

36 Magyar Büntetőjog, *Kommentár a gyakorlat számára (a 2012. évi C. törvény, az új Btk. kommentárja)* (2016) (eds), Akác József, Belegi József, Katona Sándor, Kónya István, Márki Zoltán, Mészár Róza, Molnár Gábor Miklós and Soós László, 1191–1202.

37 EBD.2012.B.14. If a lower court takes a decision that affects a wide range of society or on issues of utmost importance to the public interest, the Supreme Court (Kuria of Hungary) orders its publication of this case law as a so-called 'elvi bírósági döntés' or EBD (principle court decision). This one was a criminal law case.

38 Governmental Decree No. 232/2010 (VIII.19.) on the Centre of Counter-terrorism.

39 Péter Hack, 'Hungary's New Counter-Terrorism Centre?' in Petra Bárd (ed.), *The Rule of Law and Terrorism* (HVG Orac, 2015).

40 Zoltán Havasi, 'A terrorizmus és a jog', 4 (7) *Nemzetvédelmi Egyetemi Közlemények* (2003).

41 Zoltán Havasi, 'A terrorizmus és a jog', 4 (7) *Nemzetvédelmi Egyetemi Közlemények* (2003), p. 5.

42 European Police Office, *European Union Terrorism Situation and Trend Report (TE-SAT)*, (2016), p. 7, <https://www.europol.europa.eu/activities-services/main-reports/european-union-terrorism-situation-and-trend-report-te-sat-2016> (accessed 27 December 2018).

43 Miklós Böröcz, 'A migrációs válság terrorkockázata', 22 (2) *Terror&Elhárítás* (2016).

44 By 2017 this increase had come to an end. Asylum application numbers are the same as they were before the refugee protection crisis. See Eurostat. http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics (last accessed 27 November 2018).

of perpetrators. Nevertheless, in 2015 a slight increase was experienced due to the creation of new criminal acts⁴⁵ that can be committed by foreign nationals. The list of crimes does not include any terrorism-related act. Between 2011 and 2015 the main criminal acts committed by foreign nationals were: falsification of public documents, theft, vandalism, breaching entry bans, human smuggling, falsification of private documents, illegal crossing of the border fence, budgetary fraud, road accidents and drug abuse.⁴⁶

One of the reasons for a comparatively low number of perpetrators with a migration background is the fact that Hungary is still a transit country for the asylum seekers, in spite of EU efforts to harmonise under the CEAS. In 2016, 28,803 out of the total number of refugee determination procedures of 48,229 (some of these applications were lodged in 2015) were ceased, mainly due to absconding. In 2017, the rate of the ceased procedure was 65 per cent in parallel with the decreasing number of asylum applications. The total number of expulsions of third-country nationals was 734 in 2015, 845 in 2016 and 440 in 2017 until November, according to the statistics of the national asylum and immigration authority.⁴⁷

4. The Hungarian solution to the refugee protection crisis: protecting national interests

4.1. Legislative amendments in 2015

There are different calculations, but we share its conclusions: the substantive evaluation of the applications is left to another EU Member State – unless the person simply remains in the EU without authorisation.⁴⁸ Behind the current refugee protection crisis, there might be a more structural one. The border police were integrated into the general police forces in 2010 which created systematic problems in the control of immigration according to scientific research studies on this field.⁴⁹

As a response to the mass influx of migrants, the Hungarian government technically closed the Hungarian-Serbian border with a barbed wire fence in order to stop illegal border-crossing of migrants.⁵⁰ A fence deters; nevertheless, if one wishes to cross it, then it becomes a tool of obstructing access to protection.⁵¹ Although the EU asylum legislation contradicts the use of these obstacles, it hampers the right to access to the territory. However, from a national security perspective, it was praised as the solution to be followed by other EU Member States to protect EU external borders and as the most effective way to fight against terrorism.⁵²

Simultaneously, the Hungarian Criminal Code was also amended by the Act CXL of 2015,⁵³ entered into force on the 15 September 2015. It introduced the following criminal acts: the unlawful crossing of the border fence (Section 352/A); vandalism of the border fence (Section 352/B); and the obstruction of construction works on the border fence (Section 352/C).⁵⁴ The introduction of these criminal acts greatly contributed to the amendment of the expulsion regulations in the case of the perpetrators of these acts where an executable term of imprisonment should be imposed and expulsion may not be omitted.⁵⁵ The punishment for entering the territory of Hungary irregularly of a ban from the whole Schengen area is one in a broad sense, and accompanies the expulsion order served on those asylum seekers who are returnable to a safe third country and/or who were subject to a formal criminal procedure for having crossed the fence irregularly.⁵⁶

Those who cross the border fence illegally and are caught on the scene and arrested, apply for asylum just after they are sentenced. As a result, the execution of the sentence is suspended for the duration of the asylum determination procedure. This phenomenon was reported by UNHCR as malpractice but this did not lead to any change in the legislation.⁵⁷

45 Szabolcs Mátyás, 'Külföldi bűnelkövetők területi és strukturális jellemzői Magyarországon' in Zoltán Hautzinger (ed.), *A migráció bűnügyi hatásai* (Magyar Rendészettudományi Társaság Migrációs Tagozat, 2016), p. 87.

46 Szabolcs Mátyás, 'Külföldi bűnelkövetők területi és strukturális jellemzői Magyarországon' in Zoltán Hautzinger (ed.), *A migráció bűnügyi hatásai* (Magyar Rendészettudományi Társaság Migrációs Tagozat, 2016), p. 73.

47 Annual statistics for 2015–2016 and statistics between I-XI.201–I-XI. 2017, Office of Immigration and Asylum. http://bevandorlas.hu/index.php?option=com_k2&view=item&layout=item&id=492&Itemid=1259&lang=en (last accessed 4 December 2017).

48 Boldizsár Nagy, 'Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation' (16), *German Law Journal* (2017), p. 1037.

49 Balázs Laufer, 'A migráció rendvédelmi és nemzetbiztonsági kihívásai', PhD thesis, National Public Service University, Budapest, 2013.

50 See a rendkívüli bevándorlási nyomás kezelése érdekében szükséges egyes intézkedésekről szóló 1401/2015 (VI. 17.) Korm. Határozatban.

51 Nagy, 'Hungarian Asylum Law and Policy in 2015–2016' (n 48), p. 1061.

52 Miklós Böröcz, 'A migrációs válság terrorkockázata', 22 (2) *Terror & Elhárítás* (2016), p. 20.

53 Enacted by Act CXL in 2015.

54 The illegal crossing of the 175 km-long fence was made a criminal act by introducing Articles 352 A, B and C into the Criminal Code. A maximum of three years' imprisonment threatens all who cross the fence illegally (Article 352A). Under Article 352B, damaging the fence is a separate crime which carries a maximum penalty of five years' imprisonment. Even obstructing the construction of the fence was made a separate crime under Article 352C. Crossing the international border where no fence has been erected remains a minor offence.

55 Sándor Madai, 'A „tömeges bevándorlás okozta válsághelyzet” kezelésének büntető anyagi jogi eszközei hazánkban'. In (ed.), Zoltán Hautzinger, *A migráció bűnügyi hatásai* (Magyar Rendészettudományi Társaság Migrációs Tagozat 2016), p. 246.

56 Nagy, 'Hungarian Asylum Law and Policy in 2015–2016' (n 48), p. 1065.

57 UN High Commissioner for Refugees (UNHCR), 'Hungary as a Country of Asylum. Observations on Restrictive Legal Measures and Subsequent

According to the relevant statistics, between September 2015 and June 2016, a total number of 2,898 persons were charged, nine persons were detained, 18 house arrests were ordered, 2,753 persons were sentenced to expulsion, 3 cases ended by cassation, 1 case ended with executed imprisonment, and others sentenced from 3 months up to 18 months' imprisonment.⁵⁸

The above-mentioned changes clearly reflect the 'crimmigration' phenomenon whereby immigration is not regarded as part of civil or administrative law but as criminal law, thus those persons become the perpetrators who did not commit any other crime and are punished solely because they circumvented immigration rules and border controls. This kind of attitude is significant in Hungary as established border controls and large-scale application of exclusions are based on the assumption that foreigners may, indeed, be criminals or may have committed entry-related crimes, including human smuggling.⁵⁹

The Act LXXX of 2007 on asylum was also amended September 2015 by making it possible for the government to introduce a state of emergency due to the mass influx of migrants on recommendation of the minister of the interior.⁶⁰ The special state of emergency was introduced in two counties for the first time, later was extended to four more counties close to the Serbian border and, by March 2016, to the whole territory of the country. The state of emergency can be initiated by the chief of police and the general director of the immigration and asylum authority and their requests remain confidential for 10 years.⁶¹ This so called 'crisis situation caused by mass migration' is not a special state order and may be ordered if the daily number of asylum application is higher than 500 or there are more than 1,000 people in the transit zones. Besides these objective cases, it can be ordered if the public order, security or public health of a city is in danger. The crisis situation caused by mass migration entitles the police to enter private homes under suspicion without a warrant, take real estate into state use, as well as mobile items owned or possessed by other state or municipal agencies. When none of the legally prescribed conditions is met probably, this only serves the securitising intent.⁶²

The rules of expulsion have also changed in the Criminal Code. As of 15 September 2015, an additional requirement, namely, 'legally staying on the territory of Hungary', was added to 'respect for family life'.⁶³ This means that illegal migrants may be expelled regardless of the right to respect for family life.⁶⁴ Moreover, expulsion may not be omitted if an executable term of imprisonment is imposed for an unlawful crossing of border barrier, vandalism of a border barrier or obstruction of construction works on a border barrier. If expulsion is ordered for a specific term, it shall be double of the term of imprisonment, but must be at least two years. Permanent expulsion may be imposed upon a person who was sentenced to a term of imprisonment of ten years or more, and the presence of the perpetrator in the country is assessed as posing a potential and considerable risk to public safety, taking into account the severity of the criminal offence, the nature of the act and the connections of the perpetrator.⁶⁵

The immigration authority is responsible for ordering the expulsion of third country nationals (hereinafter TCNs). There is only limited evidence demonstrating that a return decision was issued for a national security interest.⁶⁶

Currently, TCNs staying irregularly in the territory of the Member States are faced with the increasing phenomenon of criminalisation of irregular entry or stay sanctioned with criminal penalties such as fines, house confinement or imprisonment. The relations between immigration law and criminal law as well as national penal measures (imposed as a punishment for illegal migration) compatibility with the Return Directive and EU Charter have been reported. This prolific jurisprudence has been the result of national courts addressing preliminary references to the ECJ concerning the imprisonment of TCNs in return procedures for the crime of irregular entry or stay.⁶⁷

Practice Implemented between July 2015 and March 2016', May 2016, <http://www.refworld.org/docid/57319d514.html> (last accessed 31 January 2018).

58 According to the response of State Attorney General to the Parliament in 2016.

59 Nagy, 'Hungarian Asylum Law and Policy in 2015–2016' (n 48), p. 1044.

60 Sándor Madai, 'A „tömeges bevándorlás okozta válsághelyzet” kezelésének büntető anyagi jogi eszközei hazánkban'. In (ed.), Zoltán Hautzinger, *A migráció bűnügyi hatásai* (Magyar Rendészettudományi Társaság Migrációs Tagozat 2016), p. 247.

61 'Féléves a törvényellenes országos válsághelyzet' Presshelsinki (9 September 2016), http://helsinkifigyelo.blog.hu/2016/09/09/feleves_a_torvenyellenes_oroszagos_valsaghelyzet (accessed 28 November 2018).

62 Nagy, 'Hungarian Asylum Law and Policy in 2015–2016' (n 48), p. 1061.

63 Article 59 (4): 'Expulsion may only be imposed upon a person sentenced to a term of imprisonment of ten years or more: a) who has been residing in the territory of Hungary legitimately for not less than ten years; or, b) who is lawfully residing in the territory of Hungary and whose right to family union would be injured; provided that the presence of the perpetrator in the country is assessed as posing a potential and considerable risk to public safety.'

64 Sándor Madai, 'A „tömeges bevándorlás okozta válsághelyzet” kezelésének büntető anyagi jogi eszközei hazánkban'. In (ed.), Zoltán Hautzinger, *A migráció bűnügyi hatásai* (Magyar Rendészettudományi Társaság Migrációs Tagozat 2016), pp. 254–5.

65 Sándor Madai, 'A „tömeges bevándorlás okozta válsághelyzet” kezelésének büntető anyagi jogi eszközei hazánkban'. In (ed.), Zoltán Hautzinger, *A migráció bűnügyi hatásai* (Magyar Rendészettudományi Társaság Migrációs Tagozat 2016), p. 254, and Criminal Code Articles 60. 2a and 60.3.

66 Boldizsár Nagy, 'National Synthesis Report – Hungary Report on the Hungarian Court Cases Implementing the Return Directive (2008/115/EC)', ss 13–15, <http://euredial.eu/docs/publications/national-synthesis-reports/HUNGARY.pdf> (last accessed 6 December 2017).

67 http://cadmus.eui.eu/bitstream/handle/1814/45185/MPC_REDIAL_2016_05.pdf?sequence=1&isAllowed=y (last accessed 20 January 2018).

4.2. Legislative amendments in 2016

In order to manage the migration crisis as well as to cope with the new type of security challenges, the Hungarian government also initiated the amendment of the Fundamental Law introducing a new special state order. A terror threat could not be referred under any previous special legal order regimes as they were established to handle classical interstate challenges, therefore, a new kind of special legal order has been introduced – the so-called terror emergency situation. A terror emergency situation may be ordered by a two-thirds majority of the members of the Hungarian parliament if a terror attack or a significant and direct risk has occurred. In the case of a terror emergency situation, extraordinary measures (e.g., extraordinary use of the national army; tightening border controls, regardless of international standards and conventions; ordering curfew; enhanced control of communication channels, etc.)⁶⁸ may be taken, derogating from the normal operation of the state established by the Fundamental Law in order to prevent any terror attack and to protect citizens.⁶⁹

After the radical change in national migration policy in 2015, the countrywide billboard campaigns in 2015,⁷⁰ the national questionnaire on migration⁷¹ in 2016, the referendum on 2 October 2016⁷² and the attempted seventh amendment of the Fundamental Law in the autumn of 2016, the Hungarian Constitutional Court (hereinafter CC) declared in its decision (No. 22/2016 (XII.6) AB) that Hungary's constitutional identity is rooted in its 'historical constitution'. Consequently, constitutional identity cannot be waived by way of an international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood. Therefore, the protection of constitutional identity shall remain the duty of the CC as long as Hungary is a sovereign state.⁷³ The background of this decision was a constitutional complaint concerning the legality of the relocation decision of the European Council.⁷⁴ The complaint assumed that its implementation might constitute a collective expulsion of TCNs which would be an infringement not only of Article XIV of the Fundamental Law prohibiting the collective expulsion of aliens but also of international law in general.⁷⁵ Nevertheless, the CC did not rule over this question because the Article E of the Fundamental Law applied the complaint to interpret the constitutional identity.

By these steps, the government and parliament intentionally replaced the figure of the refugee in need of protection with the (imagined) illegal migrant, who arrives in an unlawful manner and has only sinister intentions, against whom Hungary has to be defended.⁷⁶

4.3. National security considerations in the Hungarian asylum procedure

First of all, it has to be noted that we should take into account not only the legal but also the political and sociological perspectives in order to describe the situation properly, as Boldizsar Nagy did in his study of non-legal disciplines to describe these events, not just because 'migration lawyers, including refugee lawyers, rarely bother with locating their research beyond the positivist-comparativist jurisprudential space' but because, otherwise, these changes could not be understandable.⁷⁷ Nevertheless, in this paper, we discuss only legislative changes.

During the negotiations of the recast Qualification Directive⁷⁸ (QDII), the contradiction between the Geneva Convention and QDII regarding exclusion based on national security issues was discussed. Some of the national experts argued that there is no contradiction between the regulations. The Geneva Convention is an international treaty that can be interpreted differently. By reading Article 32 and 33 it is clear that the goal of the treaty is not to protect those who pose

68 Act CXIII of 2011 on national defence.

69 Daniel Kuli, 'Nyolcadik utas a terrorista', *Ars Boni* (23 November 2016), <http://arsboni.hu/nyolcadik-utas-terrorista/> (last accessed 4 December 2017).

70 The billboards carried one of the campaign's three messages: 'If you come to Hungary, you must respect our laws'; 'If you come to Hungary, you must respect our culture'; and, finally, 'If you come to Hungary, you must not take the jobs of the Hungarians.' In a clear indication of their intended audience, all of the billboards were in Hungarian. In September, a new set of the billboards and advertisements, both in print and online, appeared, referring back to the 'results' of the national consultation, with the following text: 'The people have decided: The country must be defended.'

71 The questionnaire included leading questions such as: 'Do you think that Hungary could be the target of an act of terror in the next few years?' and 'Do you agree with the view that migrants illegally crossing the Hungarian border should be returned to their own countries within the shortest possible time?' It also asked whether, in contrast to Brussels' lenient policy, the government should introduce more stringent regulations and whether Hungarian citizens were in support of this, including that 'migrants illegally crossing the Hungarian border could be taken into custody', <http://www.kormany.hu/en/prime-minister-soffice/news/national-consultation-on-immigration-to-begin> (last accessed 30 January 2018).

72 The government website translated the question as: 'Do you agree that the European Union should have the power to impose the compulsory relocation of non-Hungarian citizens to Hungary without the consent of the National Assembly of Hungary?'

73 22/2016 (XII. 9.) CC decision, http://hunconcourt.hu/uploads/sites/3/2017/11/en_22_2016.pdf (accessed 28 November 2018).

74 Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

75 Anita Nagy-Nádasdi and Barbara Kohalmi, 'Hungarian Constitutional Identity and the ECJ Decision on Refugee Quota', <http://verfassungsblog.de/hungarian-constitutional-identity-and-the-ecj-decision-on-refugee-quota/> (last accessed 30 December 2017).

76 Nagy, 'Hungarian Asylum Law and Policy in 2015–2016' (n 48), p. 1057.

77 Nagy, 'Hungarian Asylum Law and Policy in 2015–2016' (n 48), p. 1040.

78 Council of the European Union, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 20 December 2011, OJL 337/9-337/26, 20.12.2011.

a threat to the security of a country. This teleological interpretation is supported by the practical interpretation, too.⁷⁹ On the other hand, the wording of the QDII states that exclusion is only a possibility, which was not implemented into the national legislation. As result, those who pose a threat to national security could not be recognised by the state as the beneficiaries of international protection. However, it may happen. Nevertheless, the practice of the Hungarian authorities remained unchanged and the opinion of the national security agency is still regarded as expert opinion and, as such, it has a binding effect on the asylum agency according the general administrative law.⁸⁰ Therefore, if the national security agency signalled its concern, the applicant was rejected. Nevertheless, the judicial branch did not share this interpretation of the legislation because the national security agency could not have the authority to decide over the recognition but only to provide the information of whether the person poses a threat to the national security or not.⁸¹ If the answer was positive, this could not be an obstacle to the asylum procedure.⁸² The UNHCR expressed its concern during the drafting process of QDII because the new wording changed the time of the acts committed from application to issuance of residence permit which is against the declarative approach of the recognition of the agency.⁸³

What does national security interest mean in the Hungarian legal framework? The Act CXXV of 1995 on the national security services defines national interest to ensure the autonomy of Hungary and the protection of the legal order, such as, among others,⁸⁴ the detection and prevention of terrorist acts, illicit arms and drug trafficking, and the illegal trafficking of internationally controlled products and technologies.

The main areas where we identified legislative changes in the asylum system in relation to national security or national interest are the following: detention of asylum seekers, issuance of travel documents, shortening the duration of the procedure by introducing a single procedure and an accelerated procedure, as well as the application of Geneva Convention 1F(c).

First, major legislative amendments linking the asylum regime to security interests were introduced in 2013. It not only reflected the second phase of the CEAS but has also tried to further improve the national asylum system while preventing possible abuses. The national regulation is in compliance with UNHCR guidelines⁸⁵ on detention: the detention may only be ordered on the basis of an individual assessment and the full consideration of alternative options. The detention of asylum seekers must be exceptional (a measure of last resort) and has to be proportionate to the objectives to be achieved. As a consequence, as of July 2013, a person seeking asylum may be – and frequently is – detained if their entitlement to stay is exclusively based on the submission of an application for recognition where it is necessary for the protection of national security or public order.⁸⁶ Detention can be maintained during the court proceedings as well, as was advised by the group of judicial experts on asylum, the Curia, next to the Supreme Court of Hungary.⁸⁷ However, a national security risk in itself is not sufficient for ordering detention as it also requires ‘any other basis’ as laid down in Article 5 of the ECHR. Typically, the lawful arrest or detention of a person to prevent their affecting an unauthorised entry into the country or of a person against whom action is being taken with a view to affect their deportation or extradition is the primary purpose of the detention.⁸⁸ As the wide use of detention rose, so did the critics, but the tendency did not stop.⁸⁹

79 Árpád Szép, ‘A nemzetbiztonsági szempont erősödése a menedékjogi törvényben’ (The emerging national security notion in the Act on Asylum Law). In (ed.), Zoltán Hautzinger, *A migráció bünygyi hatásai* (Magyar Rendészettudományi Társaság Migrációs Tagozat 2016), p. 304.

80 Árpád Szép, ‘A nemzetbiztonsági szempont erősödése a menedékjogi törvényben’ (The emerging national security notion in the Act on Asylum Law). In (ed.), Zoltán Hautzinger, *A migráció bünygyi hatásai* (Magyar Rendészettudományi Társaság Migrációs Tagozat 2016), p. 309.

81 Árpád Szép, ‘A nemzetbiztonsági szempont erősödése a menedékjogi törvényben’ (The emerging national security notion in the Act on Asylum Law). In (ed.), Zoltán Hautzinger, *A migráció bünygyi hatásai* (Magyar Rendészettudományi Társaság Migrációs Tagozat 2016), p. 305.

82 This approach of the judicial branch shows a resemblance to the current ECJ preliminary judgment in the C-473/16, F case, where the expert opinion cannot be the sole reason of rejection.

83 UN High Commissioner for Refugees (UNHCR), UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJL 304/12, 30.9.2004, 28 January 2005, <http://www.refworld.org/docid/4200d8354.html> (last accessed 31 January 2018), p. 27.

84 Article 74: ‘the detection of attempts to attack the country’s independence and territorial integrity; the discovery and elimination of disguised aspirations that hurt or threaten the political, economic, national defense interests of the country; the acquisition of information required for governmental decisions abroad; detecting and eliminating disguised efforts to change the legal order of the country to ensure the exercise of basic human rights; to represent democratization based on a multiparty system; and to alter or disturb the operation of legitimate institutions.’

85 UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012): ‘Governments may need to detain a particular individual who presents a threat to national security. [50] Even though determining what constitutes a national security threat lies primarily within the domain of the government, the measures taken (such as detention) need to comply with the standards in these Guidelines, in particular that the detention is necessary, proportionate to the threat, non-discriminatory, and subject to judicial oversight.’ [39] <http://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html> (accessed 28 November 2018).

86 Article 31/A 1. d. of Act LXXX of 2007 on Asylum Law.

87 The summary of the judicial and legal expert group stated that the necessity and prolongation of the detention cannot be affected by the fact that the judicial part has commenced. The detention can be prolonged even though the administrative procedure has already finished (p. 64), translated by the authors, http://kuria-birosag.hu/hu/joggyak_csop/menekultugyi-joggyakorlat-elemzo-csoport-osszefoglalo-velemenye (last accessed 20 January 2018).

88 Árpád Szép, ‘A nemzetbiztonsági szempont erősödése a menedékjogi törvényben’ (The emerging national security notion in the Act on Asylum Law). In (ed.), Zoltán Hautzinger, *A migráció bünygyi hatásai* (Magyar Rendészettudományi Társaság Migrációs Tagozat 2016), p. 307.

89 In 2012 UNHCR expressed concern about the serious challenges asylum seekers faced in accessing protection in Hungary. It noted that, ‘Since April 2010, asylum detention has become the rule rather than the exception’ and mentioned that practice between 2008 and 2010 was unlawful. It continued to criticise the regime after 2010 for lack of effective remedies, unpredictability and the lack of legitimate aims in many cases. UNHCR, ‘Hungary as a Country of Asylum’ (24 April 2012), <http://www.refworld.org/docid/4f9167db2.html> (accessed 28 November 2018).

Secondly, according to the relevant provisions of the Asylum Act the issuance of travel documents for persons granted refugee or subsidiary protection status may be denied based on national security reasons.⁹⁰ It is justified by the fact that the person concerned may constitute a national security threat only upon travelling abroad and that national security concerns may only be raised after recognition and, therefore, the person may apply for a travel document during the withdrawal procedure.⁹¹

Thirdly, as of 1 August 2015, the asylum procedure has become a single procedure in which each relevant aspect of the case, including national security concerns, is considered by the asylum authority and its partner authorities (e.g. the CCT and the Office of Constitutional Protection (hereinafter OCP)). The OCP is involved in each asylum case and has to decide whether the person concerned constitutes a risk to national security within eight days. The amendment of the previous Act on Administrative Procedures⁹² ended the possibility of extending the procedural time of the OCP in asylum cases and, as a result, the OCP had to give an expert opinion within eight days in thousands of cases. Besides the relatively short deadline, the lack of personal interviews was another factor that has had negative impact on the asylum procedure. As a result, their procedure started to run both separately and in parallel with the asylum procedure. They might not know about the details of identity or any relevant information that the applicant revealed during the interview. Some have even suggested turning back to the old regime that applied before 2008 when the OCP examined the cases only after the asylum interviews finished.⁹³ The high rate of absconding made the request for their expert opinion ineffective. The CCT also provides expert opinion on migration-terrorism nexus in accordance with its regulations.

Fourthly, the application of an asylum seeker may be decided in an accelerated procedure when the applicant may pose a threat to Hungary's national security for a serious reason.⁹⁴ This provision may limit the applicants' procedural rights as they have short time limit within which to demonstrate their well-founded reasons applying for asylum, which ultimately might have a negative impact on their case. By this amendment, long debate was decided: posing a risk to national security is a reason to reject the claim. This amendment was part of the transposition package of the Article 14.4–5 of the recast QD II,⁹⁵ which does not oblige states to reject these applicants, but certainly opens up that possibility of choosing less favourable options. But certainly, it raises the question of compliance with Article 1F of the Geneva Convention. The accelerated procedure is to be finished within 15 days; courts have 8 days to decide on these appeals. The appeal does not have suspensive effect, thus rejected applicants could be removed from the country before the first judicial hearing.

Fifthly, legislative changes have also made clear that refugee status may not be granted to those foreigners whose stay in Hungary poses a risk to national security. And, for practical reasons, the amendment of the Asylum Act declared that in the application of Article 1F(c) of the Geneva Convention, the following, in particular, shall be contrary to the purposes and principles of the United Nations: acts of terrorism, financing terrorism and incitement to these acts.⁹⁶

The act of terrorism may be defined variously in different legal systems but, in general, contains common elements such as posing a danger to people or objects; the use of force; targeting undefined groups of people or a certain group of vulnerable people or states or representatives of the state in order to achieve a certain aim. In light of this broad definition, Article 1F(b) can be used, if, as UNHCR guidelines suggest, the test of proportionality and causality could be applied, the perpetrator is personally responsible for the result and the action happened outside the country of asylum before the application.

From a legal point of view the serious non-political act may be interpreted as a terrorist activity but, in general political terms, motivations are also a significant element of the definition in general. The political action needs to have a close and causal relationship between the political will and the result of such action, and *a contrario* we may assume the non-political act is the one when one of these elements are missing. The extradition treaties may shed light on the political actions and provide help to understand non-political actions. Furthermore, the *travaux préparatoires* of Article 1F suggests that only those persons who are excluded from protection who can be extradited, but this suggestion does not appear in the text of the treaty.

Finally, as of August 2015 in its decision to reject international protection, the asylum authority may also decide on the expulsion of those persons who are not entitled to stay in the territory of Hungary. This provision has a negative impact on asylum seekers as they do not have any independent procedure and remedy against the decision, and the duration of the right to stay in the territory is significantly decreased. Nevertheless, it is not contrary to international or European

90 Section 10, paragraph 3, point (a) in Act LXXX of 2007 on Act on Asylum Law.

91 Árpád Szép, 'A nemzetbiztonsági szempont erősödése a menedékjogi törvényben' (The emerging national security notion in the Act on Asylum Law). In (ed.), Zoltán Hautzinger, *A migráció bűnügyi hatásai* (Magyar Rendészettudományi Társaság Migrációs Tagozat 2016), p. 300.

92 Act CXL of 2004 on the general rules of administrative proceedings and services, not in force since 1 January 2018.

93 Árpád Szép, 'A nemzetbiztonsági szempont erősödése a menedékjogi törvényben' (The emerging national security notion in the Act on Asylum Law). In (ed.), Zoltán Hautzinger, *A migráció bűnügyi hatásai* (Magyar Rendészettudományi Társaság Migrációs Tagozat 2016), pp. 309–310.

94 Article 51.7(j) in Act LXXX of 2007 on Asylum Law.

95 Article 14.4: 'Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, when: (a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present; (b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State' and 5: 'In situations described in paragraph 4, Member States may decide not to grant status to a refugee, where such a decision has not yet been taken.'

96 Árpád Szép, 'A nemzetbiztonsági szempont erősödése a menedékjogi törvényben' (The emerging national security notion in the Act on Asylum Law). In (ed.), Zoltán Hautzinger, *A migráció bűnügyi hatásai* (Magyar Rendészettudományi Társaság Migrációs Tagozat 2016), p. 310.

law, but the need for this amendment is rooted in a duplicated system. Previously, the asylum authority only examined whether the expulsion of a rejected applicant is in line with the principle of non-refoulement and confirmed if the applicant can be expelled. The immigration authority decided on the question of expulsion. Now, the asylum authority can state if that person has to be expelled.⁹⁷

5. Case study: Ahmed H. case

The refugee protection crisis evoked a change in atmosphere at the border after September 2015. The show case of Ahmed H., arising from the Hungarian government's policy on reducing the rights of migrants and the introduction of new counter-terrorism measures, is worth considering. It is a good example of the consequences of the current anti-migrant attitude. As was mentioned above and introduced in detail in other articles,⁹⁸ the members of the government continuously maintain that every single migrant poses a public security and terror risk, immigration and terrorism go hand in hand, and refer to a 'demonstrable connection' existing between the two phenomena, based on no concrete evidence.

In August 2015, Ahmed H. left his family home in Cyprus to go and help his elderly parents and six other family members to flee Syria and find safety in Europe. In the middle of September 2015, they reached the Hungarian-Serbian border at Röszke/Horgos, among hundreds of other migrants. The border had been already closed by the newly erected fence.

On 16 September 2015, clashes broke out with the Hungarian police when the crowd attempted to break through the gate and border fence. Hungarian police responded with tear gas and water cannon, injuring dozens. Several people threw stones, including Ahmed H. However, according to the video footage, Ahmed was using a megaphone to call on both sides to remain calm.

Dozens were arrested, including Ahmed's father and mother. Ahmed's parents, along with eight others, were charged with illegal entry while participating in a mass riot. They spent eight months in detention and were only released in July 2016. After their release, Ahmed and the rest of the family managed to make their way to Budapest. At a train station there Ahmed was singled out and arrested, during which seven false passports were discovered in his bag which the Hungarian police used as part of the evidence to charge him with an act of terrorism. These were that he allegedly incited a crowd to violence, repeatedly threatened the security forces and then joined the disturbances that took place on 16 September 2015. He was also charged with illegally crossing the border.

The whole trial received vast media coverage in order to initiate the pressure on the actors. One of the translators was charged with obstruction of justice because of mistranslation. The application and interpretation of the notion of act of terror prescribed in the Criminal Code was extremely vague.

During the first instance trial, concerns were raised about the witness testimony. Nevertheless, the Hungarian court found him guilty of an act of terror, under Hungary's extremely vague counter-terrorism laws, and sentenced him to 10 years' imprisonment. At least two-thirds of his term must be served before his permanent expulsion from the country.

The appellate court ordered the retrial of the case after his new defence lawyer found 205 procedural mistakes in the proceeding of the court of first instance. The second instance court referred the case back to the first instance court to reconsider the terrorism charges due to a lack of reasoning and interpretation.

The State Attorney General questioned the legality of the decision before the Hungarian Supreme Court, arguing that the appellate court could have used the second-instance procedure to make up for the shortcomings it identified in the case in its justification for dismissing the first-instance ruling. The Supreme Court (Curia of Hungary) has ruled that a Szeged appellate court's dismissal of a first-instance ruling and order of a retrial in the Ahmed H. case is unlawful. According to the Curia, the decision, involving a Syrian national convicted under terrorism charges in connection with a mass disturbance at the Röszke border crossing in 2015, would not affect the ongoing case, describing its ruling as a procedural matter for future reference.

Consequently, the trial continued at first instance again in January 2018. The Attorney General questioned the legality of the decision of retrial at Supreme Court, stating the appellate court may have corrected the sentence of the lower court. This request does not set back the pretrial, though. The attorney initiated a 17-year-prison term. According to the latest news, the video footage examined by the first-instance court confirms Ahmed's statements that he did not intend to threaten the police, but instead to negotiate with them.⁹⁹ After the last trial, none of the evidence demonstrates the concrete intention and preparation of a terrorist activity, therefore, it is doubtful whether the court will be able to resist the political pressure that has accompanied this case.

97 Árpád Szép, 'A 2015-ös migrációs válságra adott menedékjogi válaszok. Jogszabály-módosítással a tömeges beáramlás ellen?' (Responses of asylum law on the migration crisis 2015. Against the mass influx with legal amendments?). In (ed.), Peter Tálas, *Magyarország és a 2015-ös európai migrációs válság Tanulmányok*, http://archiv.akfi.uni-nke.hu/uploads/media_items/nke_114_7_2017_magyarorszag_es_a_2015_os_migracios_valsag.original.pdf (last accessed 30 January 2018).

98 Nagy, 'Hungarian Asylum Law and Policy in 2015–2016' (n 48).

99 <https://www.amnesty.org/en/latest/news/2016/11/how-a-family-man-in-cyprus-ended-up-in-a-hungarian-jail-cell-accused-of-terrorism/> (last accessed 3 December 2017); <https://www.amnesty.org/en/latest/news/2017/06/hungary-appeal-court-orders-retrial-of-man-convicted-of-terrorism-for-throwing-stones/> (last accessed 3 December 2017); <http://abouthungary.hu/news-in-brief/hungarys-supreme-court-finds-dismissal-in-ahmed-h-case-unlawful/> (last accessed 14 January 2018); https://index.hu/belfold/2017/08/25/a_kuriahoz_fordult_a_legfobb_ugyesz_ahmed_h_ugyeben/ (last accessed 14 January 2018).

In March 2018, Ahmed H. was sentenced to seven years' imprisonment, which is not yet final, with the case referred again to the second-instance court.

6. Conclusion

Based on the above we may conclude that terrorism itself as well as counter-terrorism measures both have a huge negative impact on asylum seekers' right to international protection. As a result of the state's security concerns, restrictive legislative changes (e.g., accelerated asylum procedures, detention and removal as well as the criminalisation of illegal entry) directly affect those in need of international protection. Despite the current political pressure on migration and asylum, the right to international protection and national security interests should be seen as complementary, not conflicting aims or values. International law recognises states' right to security and asylum seekers' right to protection as equally legitimate interests, but the implementation of human rights obligations in practice in the national security context is questionable. A fair balance between the two interests should be found through the interpretation of binding international and European law.

As a response to the refugee protection crisis, Hungary opts for protecting national interest above humanitarianism. Instead of a single legal definition, the meaning of the national interest has become more and more complex due to the high political and legal attention given to this topic. National security considerations have gradually been incorporated in the asylum legislation in order to lower the risk of abusing the migration flows by potential terrorists.

Manufacturing fear: The social component of anti-immigration policies in the United States

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Abstract

There is no doubt that the Western world has seen a rise of anti-immigration movements over the past few years, and the United States is a prime example of that. Immigration was a key issue in the 2016 presidential elections, and continues to be a widely discussed and debated topic that reaches far beyond the political world. Although this anti-immigration sentiment is not exclusively linked to the fear of terrorism, much of it does find its basis in fear-mongering which links terrorism with immigration. The plight of asylum seekers, particularly those from Muslim-majority countries, has been swept up in this tide, evidenced by hardline policies that attempt to limit the number of refugees accepted by the United States, as well as where those refugees may originate from. Although such policies have been met with legal challenges, support for them can be seen in parts of the general US populace, proving that such policies are not purely driven by political forces.

This paper asserts that the Trump campaign and administration has employed targeted strategies in a concerted effort to advance a culturally racist belief that refugees from Muslim-majority countries are a security threat in an effort to codify this belief through anti-refugee legislation. The analysis centres on how the Trump campaign and administration has used fear of terrorism and a blurring of lines between migrants and refugees to stoke anti-refugee sentiment in the USA, and examines the weight of the social component in driving policy against the legal hurdles that these anti-refugee policies have faced to date. Specifically, the analysis draws on critical race theory to examine Trump's use of the news, political statements and social media to advance this narrative, and how the interplay between cultural and institutional racism influences anti-refugee sentiment and policy.

Keywords

Immigration, critical race theory, Trump, asylum policy

1. Introduction: A rising tide

There is no doubt that the Western world is experiencing a wave of nativist rhetoric and anti-immigration policies, and the plight of some of the world's most vulnerable people is being swept up in this tide. The United States, in particular, has seen a rise in anti-immigration sentiment and policy, with immigration taking the spotlight in the 2016 presidential election. President Trump's campaign flourished under existing biases among the American populace, as he expertly stoked an ever-more pervasive fear of terrorism and the unknown to, ultimately, win the presidency. Since coming to power, the Trump administration has continued to employ the same fear-mongering tactics and policy positions that put him in power, and has continuously attempted to push through hardline anti-immigration policies under the guise of 'Making America great again'. Such policies have made the current administration's stance abundantly clear: a 'great' America is one in which immigrants, including refugees, are generally unwelcome. The executive orders in question, titled 'Protecting the Nation from Foreign Terrorist Entry Into the United States',¹ have particularly targeted immigrants and refugees from Muslim-majority countries and have sought to inextricably link Muslim immigrants and refugees with terrorism.

It is essential to note that, although Trump serves as the figurehead for current anti-immigration policies, there are several social components driving these policies which are no less influential or important. Policy is not created in a vacuum and the social components under which these policies are created, drive the policies themselves and can greatly influence their potential success or failure. The social components at play include existing biases, insecurities and fears, and increased social and political polarisation, among many others; these can be generally classed as the worldview of the American populace. There are a number of tools which drive this worldview, including the news, political statements and social media. This is of course not an exhaustive list of the factors that influence opinion-forming, but these factors, in particular, have received a great deal of attention for their impact on driving this worldview.

This paper analyses how the threat of terrorism has been used to stoke anti-refugee sentiment in the USA, paving the way for the series of executive orders commonly referred to as the 'travel ban' or 'Muslim ban'. It includes a brief discussion on the history of nativism and the securitisation of asylum policy in the USA as it relates to contemporary policy. What follows is an analysis, informed by critical race theory, of how the Trump administration has actively utilised news, social media and political statements to foster an environment of cultural racism that blurs the line between migrants and refugees, and links refugees from Muslim-majority countries with terrorism, in an attempt to codify this bias in the form of anti-immigration policies. The social components at play in anti-refugee sentiment and policies, particularly the interplay between cultural and institutional racism, are analysed against the legal challenges that have already been presented, and the potential impacts these policies have on refugees in the US and more generally is examined.

2. Critical race theory

Critical race theory developed as an offshoot of critical legal studies in America in the 1980s and has continued to evolve since. The central tenet of critical race theory rejects the idea of legal neutrality, asserting that racism is so deeply ingrained in American society that a 'colour-blind' analysis of US law only serves to reinforce existing racial hierarchies. Also central to critical race theory is the idea of race as a function of power; critical race theorists 'urge recognizing race not as an inherent characteristic of people but instead [as] a product of social practices'². Related to this is the concept of evolving 'whiteness' and 'other-ing', which has played a role in US immigration policy; this is explored further below in the review of how targets of nativist immigration policies have shifted over time. These core tenets of critical race theory make it a useful tool for an analysis of US immigration law and policy through an examination of the influence of both intentional and unconscious biases.

3. Securitisation and nativism in US immigration policy

...certainly, nativism played a role in the refusal of the U.S. public to accept Jewish refugees from the Second World War; in public acceptance of Japanese internment camps during the same period; in the continued deportations of Mexican migrants; and in resistance to the resettlement of Vietnamese refugees in the 1970s, to name just a few examples.³

It is important to note that, tempting as it may be to make the claim, the Trump administration's anti-immigrant rhetoric is not new in the context of American history. This is not to say that the current wave of anti-immigrant rhetoric is any less concerning, but, it is essential to go beyond current policy to get a full picture of the social components at

1 Whitehouse.gov (2017). *EXECUTIVE ORDER 13769: PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES*. [online] Available at: <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states> [Accessed 1 Nov. 2017]; Whitehouse.gov (2017). *EXECUTIVE ORDER 13780: PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES*. [online] Available at: <https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states> [Accessed 1 Nov. 2017].

2 The Bridge Project (2017). *Critical Race Theory*. [online] Berkman Klein Center. Available at: <https://cyber.harvard.edu/bridge/CriticalTheory/critical4.htm> [Accessed 25 June 2018].

3 Young, J (2017). Making America 1920 Again? Nativism and US Immigration, Past and Present. *Journal on Migration and Human Security*, 5(1), pp.217–235, p. 227.

play today. An in-depth analysis of anti-immigrant rhetoric and policies is beyond the scope of this paper, but a brief discussion of this history is key to framing the central analysis of the Trump administration's exploitation of existing cultural bias against Muslims in particular and immigrants more generally. It is also essential to analyse how the link between refugees and national security has developed over time.

3.1. Securitisation in immigration policy

US immigration and refugee policy was greatly influenced by the geopolitical context in which it was developed, as was international refugee law. International refugee law developed on the heels of World War II, in the midst of a global movement towards codification of human rights; at the same time, US refugee policy began to develop with a close link to foreign policy relating to the Cold War. Initially, US refugee policy 'only allowed refugees from Communist countries or the Middle East',⁴ reflecting a concerted effort to paint the USA as a haven for those fleeing oppressive regimes. It was not until the 1980 Refugee Act that the US began to align its own policies with those laid out in the 1967 Protocol Relating to the Status of Refugees, to which it was a party. The initial linking of refugee policy with foreign policy concerns set the stage for ongoing securitisation of refugee policy that continues to this day.

A telling example of policy relating to the securitisation and criminalisation of refugee flows is the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which was passed following the 1993 World Trade Center bombing. The IIRIRA introduced a number of security-related immigration measures, many of which 'undermine both refugees' access to protection in the United States and U.S. treaty obligations'⁵. This sets a major precedent for US actions relating to refugees following acts of terror and has helped to pave the way for continued links between refugee and national security policy. Interestingly, however, even following the 1993 World Trade Center bombing and the 1996 IIRIRA, 'applicants from countries labelled by the U.S. government as state sponsors of terrorism have a consistently high average grant rate, as do applicants from countries with known al-Qaeda activity'⁶. As Holmes and Keith point out, this mirrors Cold War-era refugee policy,⁷ suggesting a continued attempt on the part of the USA to advance foreign policy objectives by establishing a perception of the country as a safe haven for refugees fleeing from terrorism in their own countries, even as it erects barriers to limit the number of refugees resettled in the USA.

The terrorist attacks on 11 September 2001, and the myriad of policies that followed, represent a turning point in US refugee policy that moves from securitisation of refugee policy, in line with foreign policy objectives, to a criminalisation of refugees as a threat to national security. Three policies are of particular importance in examining refugee policy post-9/11: the 2001 Security Council Resolution 1373, the 2001 USA-PATRIOT Act, and the 2005 Real ID Act. Each of these policies codified a link between terrorism and refugees, on both a national and international level, and grants of asylum to Arabic-speaking applicants and those from a country considered by the USA to be a state sponsor of terrorism sharply declined.⁸ In this, there is a concerted move by the USA from foreign policy objectives that has the USA standing as an alternative to oppressive regimes in the Middle East, to a country unwelcoming and even hostile towards those fleeing such regimes. The institutional link between asylum seekers, particularly from Muslim-majority countries, and terrorism also further enforces existing cultural biases against Muslim immigrants and refugees among the American populace, paving the way for the sort of anti-refugee policies being proposed by the current administration.

3.2. Nativism in immigration policy

Alongside developments in securitisation and criminalisation in refugee policy, it is important to note how nativism has influenced and shaped such policies over time. As set out below, the USA has a long history of nativism long preceding refugee policy, which has strongly influenced immigration policy over time. National pride and the concept of what it means to be an American play a large role in US nativism, as do economic insecurity and, later, fear of terrorism. The result is an evolving idea of 'other-ness' which has shifted over time, taking aim at different subsets of immigrant populations depending on the day-to-day realities of the American populace at any given time.

In the late 1800s and early 1900s, nativist rhetoric was directed against Asian and certain European immigrants, both for their 'perceived inability to assimilate'⁹ and 'because of the labour competition that they represented'¹⁰. Although many of the beliefs associated with immigrants were factually unwarranted, they had a defining influence on policy

4 Holmes, J. and Keith, L. (2010). Does the Fear of Terrorists Trump the Fear of Persecution in Asylum Outcomes in the Post-September 11 Era? *PS: Political Science & Politics*, 43(03), p. 431.

5 Acer, E. and Byrne, O. (2017). How the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 has Undermined US Refugee Protection Obligations and Wasted Government Resources. *Journal on Migration and Human Security*, 5(2), p. 357.

6 Holmes, J. and Keith, L. (2010). Does the Fear of Terrorists Trump the Fear of Persecution in Asylum Outcomes in the Post-September 11 Era? *PS: Political Science & Politics*, 43(03), p. 433.

7 Holmes, J. and Keith, L. (2010). Does the Fear of Terrorists Trump the Fear of Persecution in Asylum Outcomes in the Post-September 11 Era? *PS: Political Science & Politics*, 43(03), p. 433.

8 Holmes, J. and Keith, L. (2010). Does the Fear of Terrorists Trump the Fear of Persecution in Asylum Outcomes in the Post-September 11 Era? *PS: Political Science & Politics*, 43(03), p. 435.

9 Young, J. (2017). Making America 1920 Again? Nativism and US Immigration, Past and Present. *Journal on Migration and Human Security*, 5(1), pp.217-235, p. 220.

10 Young, J. (2017). Making America 1920 Again? Nativism and US Immigration, Past and Present. *Journal on Migration and Human Security*, 5(1), pp.217-235, p. 222.

throughout that time period, leading to strict immigration policies designed to preserve the idea of the American way of life. Throughout this same time period, and into the 1920s, 'The increased presence of Mexican migrants in the United States drew out the same xenophobia and nativism that had been directed towards Asians and Europeans'¹¹; however, there was a lack of immigration policies directed against Mexican migrants, due largely to their central role in the US economy.¹² Later, spikes in illegal immigration along the southern border led to a number of policies attempting to control and restrict undocumented migration, which helped to further the nativist narrative of Mexican immigrants as threats to the lifestyle and economic wellbeing of US citizens. This clearly illustrates the link between the social and the political, and the selective actions taken by policymakers in relation to nativist rhetoric.

As Young points out, current nativist rhetoric against Muslim immigrants bears a striking resemblance to earlier nativism, pointing out that 'Muslim immigrants are perceived by nativists to be inherently dangerous because of their purported links to religious extremists – a fear that echoes historical fears about the potentially dangerous political affiliations of specific immigrant groups during the early twentieth century.'¹³ Combining this bias with institutionalised links between refugees and terrorists in the USA and international policy, it is easy to see how Trump's anti-Muslim rhetoric has struck a chord among portions of the American public. Anti-Muslim and anti-immigrant rhetoric has become a political strategy for certain politicians in the USA, one that is likely to garner support among parts of the US electorate. Trump's ascent to the presidency suggests that it is still relevant – and effective.

Throughout his campaign, and continuing into his time as president, Trump has continuously drummed up support through aggressive anti-Muslim and anti-immigrant rhetoric. As outlined below, he has expertly played on existing biases and fears to launch himself to political success, and appears to be using the same tactics in his attempt to push through anti-immigration policies and anti-refugee policies targeting asylum seekers from Muslim-majority countries. It is clear that the social and political factors at play today are certainly not new in the context of US history, and Trump is tapping into a resurgence in nativist rhetoric that is a disturbing echo of past nativism to shape his policies.

4. Manufacturing fear

Mob mentality against disenfranchised groups and open hatred never happens overnight, but rather, it's a long and troubling process that starts off with seemingly harmless statements and framing of narratives and ends with the president of a nation enacting actual policies that begin the process of either banning those groups – or far worse.¹⁴

Trump has employed several strategies to cultivate the worldview that refugees constitute a danger to American society. These strategies rely heavily on existing biases, insecurities and fears, and increased social and political polarisation to gain traction and legitimacy on an individual basis. Two of the key strategies that have been used to legitimise this worldview are grouping refugees with other migrants, and making a factually unwarranted link between refugees and terrorism. The Trump administration has relied heavily on these strategies in particular to influence the worldview of large sections of the American populace in an attempt to manufacture the cultural racism necessary to push through executive orders banning or significantly curtailing the number of refugees from certain Muslim-majority countries from resettling in the USA. These strategies are particularly influential because they serve to reframe the way refugees are viewed by painting them as people who have not only chosen to leave their country for the USA but have also done so with malintent.

4.1. Refugees as migrants

One might think that refugees would elicit an almost knee-jerk sympathy given the tragic circumstances that drove their migration, but perceptions of refugees are often tied up with geopolitical considerations and domestic political realities.¹⁵

Grouping refugees with other migrants serves clear social and political purposes. Socially, when refugees are grouped with other migrants, it serves to change 'the narrative from one of vulnerable people seeking help and sanctuary to one of people choosing the circumstances of their situation'¹⁶. This creates distance from the sympathy that refugees should typically elicit. Grouping refugees with other migrants also serves to blur the lines between various forms of immigration, allowing for a blanket condemnation of immigrants that plays on inherent biases without any associated

11 Young, J (2017). Making America 1920 Again? Nativism and US Immigration, Past and Present. *Journal on Migration and Human Security*, 5(1), pp.217–235, p. 224.

12 Young, J (2017). Making America 1920 Again? Nativism and US Immigration, Past and Present. *Journal on Migration and Human Security*, 5(1), pp.217–235, p. 225.

13 Young, J (2017). Making America 1920 Again? Nativism and US Immigration, Past and Present. *Journal on Migration and Human Security*, 5(1), pp.217–235, p. 228.

14 Khan, N (2017). *Calculated Anti-Muslim Tweets*. [online] US News. Available at: <https://www.usnews.com/opinion/civil-wars/articles/2017-11-30/donald-trump-further-islamophobia-by-retweeting-anti-muslim-propaganda> [Accessed 6 Nov. 2017].

15 Scribner, T (2017). You are Not Welcome Here Anymore: Restoring Support for Refugee Resettlement in the Age of Trump. *Journal on Migration and Human Security*, 5(2), p. 264.

16 Wigglesworth, S (2016). *Refugees and the Narrative of Choice: Why Language Matters*. Development in Action. Available at: <http://www.developmentinaction.org/refugees-and-the-narrative-of-choice-why-language-matters/> [Accessed 4 Nov. 2017].

feelings of guilt. In the context of the USA, there has been, and continues to be, a tendency to blame immigration for economic insecurities and 'While refugees and economic migrants have traditionally been treated separately within Western legal traditions, popular discourse on immigration often conflates the two categories.'¹⁷ The result is that refugees are not only viewed unsympathetically, but, along with immigrants generally, as scapegoats for economic insecurities on an individual and a national level. Discourse on refugees that incorporate this narrative of choice seriously risks undermining the imperative to protect, and helps to make hardline policies more palatable to the American public. The political implications that arise from this shift in narrative are clear: it is less challenging to pass legislation against a vulnerable group of people – refugees – if the public does not see them as vulnerable. By playing into inherent biases and economic insecurities of a portion of the American populace, the Trump campaign and his administration have garnered support for hardline anti-immigration policies that include placing extreme limitations and restrictions on refugees.

4.2. Refugees as terrorists

At times of high anxiety, political communities tend to become less tolerant, more insular places.¹⁸

Perhaps one of the most influential strategies that has been used to influence the worldview of the American people is the systematic linking of refugees, particularly those from Muslim-majority countries, with terrorism. This is, of course, not a US-specific problem: throughout the Western world, Islamophobia has spread, to the detriment of refugees displaced from the Middle East. There have been concerted efforts on the part of a number of influential people to establish a link between Muslims and terrorism, and even to link specifically refugees to acts of terror. These unwarranted links have even been codified in the realm of international law, notably in Security Council Resolution 1373, which 'linked refugee status with acts of terrorism, thus reinforcing a general trend towards the securitisation and criminalisation of refugee flows'¹⁹. Such codification serves only to legitimise the culturally racist belief that Muslims are dangerous, which paves the way for passage of restrictive, bigoted legislation and policy. The overall result 'has been a reconfiguration of refugee policy and a reconnecting of humanitarian and security interests which has enabled a discourse antithetical to the universal right to asylum'²⁰. In this way, existing bias and preconceived notions influenced policy, which in turn reinforced these beliefs, further legitimising the need for additional institutionally racist policies. Although Trump has not exclusively used these tactics, he has shown himself to be an expert at the type of fearmongering tactics that paint refugees as potential terrorists. This is a telling example of the interplay between cultural and institutional racism, and is a clear roadmap to how this interplay is being used by the current administration to push through hardline anti-immigration and anti-refugee policies.

There are several factors which influence our worldview, and to examine each of them is far beyond the scope of this paper. There are, however, a few tools which have been particularly influential in blurring the lines between refugees and migrants, and in advancing the unwarranted link between refugees and terrorism. These include the news, political statements and social media. These tools are particularly relevant due to the Trump campaign and administration's systematic and methodical use of them to advance a culturally racist narrative of refugees as a threat to the USA and its people. Examining Trump's use of these tools through the lens of critical race theory results in a clear picture: there is a concerted effort to advance a cultural narrative that is fearful of and hostile towards refugees, which in turn serves to normalise institutionally racist legislation.

4.3. Refugees in the news

We increasingly live in two Americas. And those two Americas have very separate sources of news.²¹

It is difficult to find a more telling example of the extreme social and political polarisation in America than the news; far-right and far-left news sources continue to gain traction, and traditionally centrist or neutral news sources continue to move further from the middle in an attempt to maintain viewership. Trump has shown an uncanny ability to exploit this polarisation to his own advantage, raising the profile of far-right news sources and lambasting left-leaning news sources as 'fake news'. The result is a support base that is increasingly reliant on extreme news sources – including notoriously questionable sites such as Breitbart, InfoWars, Gateway Pundit, Conservative Treehouse and Truthfeed²²

17 Blitz, B (2017). Another Story: What Public Opinion Data Tells Us about Refugee and Humanitarian Policy. *Journal on Migration and Human Security*, 5(2), p. 394.

18 Gibney, M. J (2002). Security and the Ethics of Asylum after 11 September. *Forced Migration Review*, 13, p. 42.

19 Ahlborn, C (2011). The Normative Erosion of International Refugee Protection through UN Security Council Practice. *Leiden Journal of International Law*, 24(04), p. 1023.

20 Blitz, B (2017). Another Story: What Public Opinion Data Tells Us about Refugee and Humanitarian Policy. *Journal on Migration and Human Security*, 5(2), p. 381.

21 Blake, A (2017). *Analysis: Trump Backers' Alarming Reliance on Hoax and Conspiracy Theory Websites, in 1 Chart*. [online] Washington Post. Available at: https://www.washingtonpost.com/news/the-fix/wp/2017/08/22/trump-backers-disturbing-reliance-on-hoax-and-conspiracy-theory-websites-in-1-chart/?utm_term=.9dca78052f68 [Accessed 3 Nov. 2017].

22 Blake, A (2017). *Analysis: Trump Backers' Alarming Reliance on Hoax and Conspiracy Theory Websites, in 1 Chart*. [online] Washington Post. Available at: https://www.washingtonpost.com/news/the-fix/wp/2017/08/22/trump-backers-disturbing-reliance-on-hoax-and-conspiracy-theory-websites-in-1-chart/?utm_term=.9dca78052f68 [Accessed 3 Nov. 2017].

– and outwardly dismissive of more traditional news sources. Trump's appointment of Steve Bannon, of Breitbart, to his cabinet served to further legitimise these far-right news sources, elevating their profile among his supporters and deepening existing polarisation among the American public. On the other side, by constantly degrading other news sources as 'fake news', Trump seeks to undermine any reporting that does not explicitly support his own agenda. This serves to further enhance social and political polarisation in the USA, with each side trusting only their own news sources and dismissing others as illegitimate. Trump has used existing polarisation to further extremist far-right news among his supporters and diminish any news sources that do not support his agenda. These tactics have served to divide the American public even further and to pave the way for divisive policy.

With Trump making concerted efforts to elevate far-right news sources, and his supporters becoming increasingly reliant on them, it is essential to note how they have reported on immigration and refugees and how they have enabled the Trump administration's continued effort to solidify a culturally racist link between refugees and terrorism. In a variety of reports, the site InfoWars continuously places the word refugees in quotation marks, in an apparent move to call into question the legitimacy of their refugee status. This is a departure from international norms, which define an asylum seeker as a person seeking refugee status and a refugee as a confirmed refugee by definition. After a Swedish report deemed such behaviour as a hateful act in and of itself, the site lambasted it, claiming '... the Swedish government is now overtly asserting that telling the truth about the "refugee crisis" is an act of "hate". This represents an unprecedented attack on free speech and an Orwellian sign of what's to come.'²³ Such reporting illustrates the strategies employed by the Trump campaign and administration to blur the line between refugees and migrants, and to call into question the legitimacy of refugee claims.

Such sites have also produced an extensive number of articles linking refugees with violence, and linking Islam with terrorism. In a report on the resettlement of refugees from Australia's offshore processing centre on Manus Island to the USA, Breitbart reports 'that unlike what mainstream media reports claim, the refugees are not vulnerable foreign nationals fleeing destruction, but in fact, destructors themselves that could wreak havoc on the US region where they are resettled'²⁴. Reporting on Trump's 'Protecting the Nation from Foreign Terrorist Entry into the United States' executive order, Breitbart paints opposition to the policy as a 'hysterical reaction' and 'emotional theater', claiming 'We're being effectively told by the theatrical class to tolerate a certain amount of Islamic terrorism because their feelings would be hurt by the tough measures we need protest (sic) ourselves from a tough enemy.'²⁵ Such reporting serves to inextricably link refugees, particularly those from Muslim-majority countries, with terrorism, further advancing culturally racist narratives. At the same time, these reports play on existing social and political polarisation, and delegitimise contrasting reports and opinions. It is important to note that, although far-right extremist reports certainly play a significant role in advancing the narrative that refugees, particularly those from Muslim-majority countries, represent a national security threat, more traditional news outlets share part of the blame, as they 'gave Trump millions in free airtime to spew his vitriol and bigoted ideas, yet they rarely (if ever) brought on Muslims to counter his lies'²⁶.

4.4. Refugees in political statements

Throughout his campaign and continuing into his time as president, Trump has built his political brand on a foundation of anti-immigrant rhetoric. The provisions banning refugees and immigration from certain countries proposed in his series of 'Protecting the Nation from Foreign Terrorist Entry into the United States' executive orders is certainly not a departure, nor is it new. In fact, 'Trump first championed his Muslim travel ban in December of 2015 following the San Bernardino attack'²⁷ and has continuously invoked the need for a ban following attacks 'that involve perpetrators with foreign ties – including...the Pulse nightclub shooting; and the truck attack in New York City'²⁸. This stance, which is founded on the culturally racist belief that Muslim refugees are terrorists, became a defining part of Trump's campaign and continues to define his administration and Trump has effectively used political statements to advance this narrative.

When it comes to political statements, the phrasing and choice of words is of the utmost importance. These choices define the message and the narrative, and the political nature of these statements means that the wrong choices can have far-reaching social and political ramifications. Trump himself appeared to acknowledge this point, as he made Obama and Clinton's general refusal to use the phrase 'radical Islamic terror' a sticking point throughout his campaign. Both the Obama administration and the Bush administration refused to use the phrase in order to 'make a clear distinction between Islam as a religion built on peaceful precepts and the acts of terrorism carried out by extremists

23 Watson, P (2017). *Swedish Government Report Says Putting the Word 'Refugees' in Quotation Marks is 'Hate'*. [online] Infowars. Available at: <https://www.infowars.com/swedish-government-report-says-putting-the-word-refugees-in-quotation-marks-is-hate/> [Accessed 5 Nov. 2017].

24 Binder, J (2017). *Report: Middle East Refugees to Begin Arriving to U.S. from Australia*. [online] Breitbart. Available at: <http://www.breitbart.com/texas/2017/10/01/report-middle-east-refugees-to-begin-arriving-to-us-from-australia/> [Accessed 5 Nov. 2017].

25 Hayward, J (2017). *Seven Inconvenient Facts About Trump's Refugee Actions – Breitbart*. [online] Breitbart. Available at: <http://www.breitbart.com/big-government/2017/01/29/trumps-immigration-pause-sober-defenses-vs-hysterical-criticism/> [Accessed 5 Nov. 2017].

26 Khan, N (2017). *Calculated Anti-Muslim Tweets*. [online] US News. Available at: <https://www.usnews.com/opinion/civil-wars/articles/2017-11-30/donald-trump-further-islamophobia-by-retweeting-anti-muslim-propaganda> [Accessed 6 Nov. 2017].

27 Khan, N (2017). *Calculated Anti-Muslim Tweets*. [online] US News. Available at: <https://www.usnews.com/opinion/civil-wars/articles/2017-11-30/donald-trump-further-islamophobia-by-retweeting-anti-muslim-propaganda> [Accessed 6 Nov. 2017].

28 Keneally, M (2017). *How Trump's Reactions to Mass Attacks Differ for US-born Suspects like Devin Kelley*. [online] ABC News. Available at: <http://abcnews.go.com/US/texas-church-shooting-trumps-reaction-mass-attacks-differs/story?id=50962471> [Accessed 28 Oct. 2017].

who adhere to radical interpretations of the religion'²⁹. On the other hand, the Trump campaign did not attempt to maintain this distinction and sought to inextricably link Muslims with terrorism. In a speech following the 2016 shooting at an Orlando nightclub, Trump used the phrase 'Radical Islam' 16 times; he frames 'Radical Islam' as incompatible with American values and denounced Clinton's earlier statements calling Muslims a 'peaceful and tolerant people... [who] have nothing whatsoever to do with terrorism'³⁰. In his own comments on Muslim communities, Trump noted 'Our government has been admitting ever-growing numbers, year after year, without any effective plan for our security,' and calls on them to 'cooperate with law enforcement and turn in the people who they know are bad – and they do know where they are.'³¹ In this same speech, Trump made four mentions of refugees, each time linking them with a threat to national security with statements such as: 'under the Clinton plan, you'd be admitting hundreds of thousands of refugees from the Middle East with no system to vet them, or to prevent the radicalisation of their children' and 'We have to stop the tremendous flow of Syrian refugees into the United States – we don't know who they are, they have no documentation, and we don't know what they're planning.'³²

This speech is emblematic of Trump's political statements regarding Islam, terrorism, immigration and refugees, and his effort to use the threat of terrorism to stoke anti-refugee sentiment. Advancing this cultural racism provides a clear path to institutionalising these racist beliefs, which Trump has attempted to do with his series of 'travel ban' executive orders. The links to this social narrative are clear in the text of the acts, beginning with the title, 'Protecting the Nation from Foreign Terrorist Entry Into the United States'. From the start, the executive orders, each with the same name, frame the immigration restrictions in the context of national security; this inextricably links migrants and refugees from the named countries with terrorism and a threat to national security, aligning with the cultural narrative. On refugees, the executive order states that '...the entry of nationals of Syria as refugees is detrimental to the interests of the United States' and that '...the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States.'³³

The act also includes a provision requiring the Secretary of Homeland Security to

...collect and make publicly available within 180 days, and every 180 days thereafter:

- (i) information regarding the number of foreign nationals in the United States who have been charged with terrorism-related offenses while in the United States; convicted of terrorism-related offenses while in the United States; or removed from the United States based on terrorism-related activity, affiliation, or material support to a terrorism-related organization, or any other national security reasons since the date of this order or the last reporting period, whichever is later;
- (ii) information regarding the number of foreign nationals in the United States who have been radicalized after entry into the United States and engaged in terrorism-related acts, or who have provided material support to terrorism-related organizations in countries that pose a threat to the United States, since the date of this order or the last reporting period, whichever is later.³⁴

This provision further links immigrants and refugees with terrorism by advancing a narrative that such reporting is inherently necessary. Executive Order 13780, a revised version of Executive Order 13769 presented under the same name, links refugees even further with terrorism, a likely response to the legal challenges met by the first executive order. In an attempt to prevent further legal challenges, the Trump administration included more context in Executive Order 13780, attempting to justify the need for the provisions outlined. This justification takes aim at refugees a number of times, with statements such as: 'Terrorist groups have sought to infiltrate several nations through refugee programs'³⁵; '...hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States. They have included not just persons who came here legally on visas but also individuals who first entered the country as refugees,³⁶ and, 'The Attorney General has reported to me that more than 300 persons who entered the United States

29 Phelps, J (2017). *Why President Obama won't Use the Term 'Radical Islam'*. [online] ABC News. Available at: <http://abcnews.go.com/Politics/president-obama-term-radical-islam/story?id=39815449> [Accessed 4 Nov. 2017].

30 Clinton, H (2017). Twitter. [online] Twitter.com. Available at: <https://twitter.com/hillaryclinton/status/667371059885301761?lang=en> [Accessed 2 Nov. 2017]

31 Trump, D (2016). *Donald J. Trump Addresses Terrorism, Immigration, and National Security*, Speech made at Saint Anselm College, Manchester, NH, 13 June.

32 Trump, D (2016). *Donald J. Trump Addresses Terrorism, Immigration, and National Security*, Speech made at Saint Anselm College, Manchester, NH, 13 June.

33 Whitehouse.gov (2017). *EXECUTIVE ORDER 13769: PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES*. [online] Available at: <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states> [Accessed 1 Nov. 2017], p. 8979.

34 Whitehouse.gov (2017). *EXECUTIVE ORDER 13769: PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES*. [online] Available at: <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states> [Accessed 1 Nov. 2017], p. 8981.

35 Whitehouse.gov (2017). *EXECUTIVE ORDER 13780: PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES*. [online] Available at: <https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states> [Accessed 1 Nov. 2017], p. 13210.

36 Whitehouse.gov (2017). *EXECUTIVE ORDER 13780: PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES*. [online] Available at: <https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states> [Accessed 1 Nov. 2017], p. 13212.

as refugees are currently the subjects of counterterrorism investigations.³⁷ The similarities between the sentiments in Trump's campaign speeches and in his legislation make the link between cultural and institutional racism abundantly clear.

4.5. Refugees in social media

In the United States, Mr. Trump's tweets were welcomed by a former Ku Klux Klan leader, David Duke, who wrote on Twitter: 'Thank God for Trump! That's why we love him!'³⁸

The place of social media, particularly Twitter, in Trump's campaign and administration cannot be underestimated. Trump has used it to make headlines, call out world leaders and even to announce policy. There has also been a great deal of research of the echo chamber effect and hyper-personalisation in social media, and on how these factors influence opinion-forming.³⁹ This is an issue that continues to live in the spotlight, with speculation and investigations into Russia's use of targeted social media advertisements and what role these may have played in influencing the results of the 2016 presidential election. With this in mind, it is crucial to examine Trump's continued reliance on Twitter in light of how he has used it to advance culturally racist views against refugees.

Leading up to his campaign and continuing to this day, Trump has used Twitter as a stream-of-consciousness to present his thoughts and opinions on various topics and issues, and as a means for attacking political opponents, media outlets and, occasionally, members of the general public. While it is easy to dismiss such wide-ranging and half-formed proclamations as random, Trump has in fact utilised Twitter in a targeted manner. A recent study analysing Trump's Twitter feed found that his tendency to combine moral ideas such as duty with emotional ideas such as fear, into a moral-emotional idea such as hate, increased their effectiveness.⁴⁰ Trump has continuously played into these ideas – a duty to protect American ideals and a fear of terrorism – in his posts about refugees to gain traction among his supporters. From his personal Twitter account, @realDonaldTrump, Trump has tweeted about refugees 22 times as of February 2017, with the majority of these tweets occurring from 2015–2017; he has not mentioned refugees from the @potus account.⁴¹ Of these tweets, not a single one has mentioned refugees in a positive light and the large majority of them link refugees with terrorism and national security threats. During the campaign, Trump frequently tweeted about Clinton's plan for resettling Syrian refugees, stating 'ISIS has infiltrated countries all over Europe by posing as refugees'⁴² and that it was 'Time to get smart and protect America!'⁴³ Since becoming president, Trump has used tweets about refugees to emphasise the need for passing his executive orders, stating, 'Our legal system is broken! 77% of refugees allowed into U.S. since travel reprieve hail from seven suspect countries.' (WT) SO DANGEROUS!⁴⁴ Trump retweeted a series of videos originally posted by Jayda Fransen of Britain First, which were titled 'Muslim migrant beats up Dutch boy on crutches!', 'Muslim destroys a Statue of Virgin Mary!' and 'Islamist mob pushes teenage boy off roof and beats him to death!'⁴⁵ This is despite the fact that the videos are unverified and Britain First has been condemned for its pervasive and often violent anti-Islam rhetoric.^{46,47} In this, it is clear that the Trump campaign and administration is making a concerted effort to link Islam with terrorism, even going so far as to use factually inaccurate sources, in an attempt to codify and institutionalise a culturally racist narrative.

37 Whitehouse.gov (2017). *EXECUTIVE ORDER 13780: PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES*. [online] Available at: <https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states> [Accessed 1 Nov. 2017], p. 13212

38 Baker, P. and Sullivan, E (2017). *Trump Shares Inflammatory Anti-Muslim Videos, and Britain's Leader Condemns Them*. [online] Mobile.nytimes.com. Available at: <https://mobile.nytimes.com/2017/11/29/us/politics/trump-anti-muslim-videos-jayda-fransen.html?referer=> [Accessed 1 Dec. 2017].

39 March, S (2017). *New Village, Same Inequalities? Exploring Global Stratification in Social Media and its Political Implications*, Paper presented at DEN 2017: The End of the Global?, London, 5–6 May 2017.

40 Brady, W., Wills, J., Jost, J., Tucker, J. and Van Bavel, J (2017). *Emotion Shapes the Diffusion of Moralized Content in Social Networks*. *Proceedings of the National Academy of Sciences*, 114(28), pp.7313–7318.

41 Trump Twitter Archive, <http://www.trumptwitterarchive.com/archive> [Viewed 25 October 2017].

42 Trump Twitter Archive, <http://www.trumptwitterarchive.com/archive> [Viewed 25 October 2017].

43 Trump Twitter Archive, <http://www.trumptwitterarchive.com/archive> [Viewed 25 October 2017].

44 Trump Twitter Archive, <http://www.trumptwitterarchive.com/archive> [Viewed 25 October 2017].

45 Baker, P. and Sullivan, E (2017). *Trump Shares Inflammatory Anti-Muslim Videos, and Britain's Leader Condemns Them*. [online] Mobile.nytimes.com. Available at: <https://mobile.nytimes.com/2017/11/29/us/politics/trump-anti-muslim-videos-jayda-fransen.html?referer=> [Accessed 1 Dec. 2017].

46 Wright, P (2016). *Britain First's Holy War: Home Office Condemns 'Anti-Muslim Propaganda' as Petition Calls for Group to Be Banned*. [online] International Business Times UK. Available at: <https://www.ibtimes.co.uk/britain-firsts-holy-war-home-office-condemns-anti-muslim-propaganda-petition-cals-group-1540893> [Accessed 5 Nov. 2017].

47 Baker, P. and Sullivan, E (2017). *Trump Shares Inflammatory Anti-Muslim Videos, and Britain's Leader Condemns Them*. [online] Mobile.nytimes.com. Available at: <https://mobile.nytimes.com/2017/11/29/us/politics/trump-anti-muslim-videos-jayda-fransen.html?referer=> [Accessed 1 Dec. 2017].

5. Codifying cultural racism

The cultural underpinnings – the pre-political conditions – will continue to shape the context in which specific legislative proposals and administrative actions will be deemed viable, elections will be won and lost, and policies will be shaped that affect the lives of millions, including refugees.⁴⁸

The above analysis provides a clear picture of how Trump has used various tools and strategies to advance the culturally racist narrative that refugees are terrorists, as well as how advancing such rhetoric paves the way for codification of such racism in the form of policy and legislation. Passing such policies institutionalises the link between refugees and terrorists, lending weight to the cultural bias, which in turn reinforces the institutional need. In this way, the interplay between cultural and institutional racism becomes a cycle which is difficult to break. This is all in spite of the fact that there is little evidence of any real link between refugees and terrorism, and in spite of the fact that the large majority of terrorist attacks in the USA since 2001 have been carried out by US nationals.⁴⁹ Rather than rely on facts, the Trump campaign and administration has relied on increasing social and political polarisation, and existing fears and biases, to stoke anti-refugee sentiment among his supporters. Playing on a generalised fear of terrorism has proven particularly effective, partially due to the fact that terrorism-related fears ranked second and fourth in a 2016 survey of American fears.⁵⁰ All of these factors come into play to create an American populace that is increasingly turning towards nativism and away from refugee protection.

Of course, it is important to note that Trump's anti-refugee policies have been met with social, legal and political challenges. There are certainly sections of the American populace and legislators that are mobilising to prevent such policies from being enacted, and these movements should not be discounted. There are also laws in place at the national and international level which have prevented, and could continue to prevent, portions of the proposed policies from being passed. The question that remains is what sway these roadblocks hold against the rising tide of nativism and xenophobia among Trump and his supporters. As discussed, the social components at play greatly influence policy and they can drive the success or failure of Trump's anti-refugee legislation. Cultural racism is a very powerful force and cultural and institutional racism work to reinforce one another. Passing institutionally racist legislation or policy that codifies the culturally racist narrative advanced by the Trump administration would give further weight to that narrative, which would in turn reinforce the need for such policies.

The recent decision by the US Supreme Court on the latest version of the Executive Order suggests that cultural racism continues to play a major role in immigration law and policy. In the 5–4 decision, the majority ruled for the Trump administration, noting: 'The Proclamation is expressly premised on legitimate purposes...The text says nothing about religion.'⁵¹ In the dissent, Sotomayor strongly condemns the ruling, noting the importance of considering the context in which the policy was developed and pointing out that the changes made from one Executive Order to the next 'cannot conceal an unassailable fact: the words of the President and his advisors create the strong perception that the Proclamation is contaminated by impermissible discriminatory animus against Islam and its followers.'⁵² The dissent underscores the importance of analysing more than simply the letter of the law, emphasising that a policy can indeed be discriminatory without explicitly reading it as such. Although legal and social challenges are currently being mounted against the ruling, it serves to further codify culturally racist views against Muslim immigrants and asylum seekers. Such codification within the USA could potentially have far-reaching outcomes – a movement by the USA away from refugee protection could set a devastating precedent, leaving the world's refugees even more vulnerable.

6. Concluding remarks: Breaking the cycle

...the present refugee crisis represents not a crisis of numbers, but of policy...there is little to suggest that the current 'crisis' in terms of refugee numbers and global protection capacity is an insurmountable challenge.⁵³

There is a pressing need among world leaders and the international community to address the global refugee crisis, and part of this means addressing the social components at play in nativist and anti-refugee sentiment within the USA and around the world. With this rhetoric, 'By virtue of being escapees from violent conflict and human rights violations...refugees are often construed as carriers of the instability and insecurity that led to their initial departure.'⁵⁴ Trump and the USA alone did not create the culturally racist narrative linking refugees with terrorism, nor is he the

48 Scribner, T (2017). You are Not Welcome Here Anymore: Restoring Support for Refugee Resettlement in the Age of Trump. *Journal on Migration and Human Security*, 5(2), p. 279.

49 Schwartz, F. and Kesling, B (2017). *Countries under U.S. Entry Ban Aren't Main Sources of Terror Attacks*. [online] WSJ. Available at: <https://www.wsj.com/articles/countries-under-u-s-entry-ban-arent-main-sources-of-terror-attacks-1485708300> [Accessed 2 Nov. 2017].

50 Anderson, J (2017). *The Psychology of Why 94 Deaths from Terrorism are Scarier than 301,797 Deaths from Guns*. [online] Quartz. Available at: <https://qz.com/898207/the-psychology-of-why-americans-are-more-scared-of-terrorism-than-guns-though-guns-are-3210-times-likelier-to-kill-them/> [Accessed 2 Nov. 2017].

51 Trump, *President of the United States, et al. v. Hawaii et al.* 585 U.S. (2018). No. 17–965. Supreme Court of the United States (26 June 2018), p. 34.

52 Trump, *President of the United States, et al. v. Hawaii et al.* 585 U.S. (2018). No. 17–965. Supreme Court of the United States (26 June 2018), p. 13.

53 Gammeltoft-Hansen, T. and Tan, N (2017). The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy. *Journal on Migration and Human Security*, 5(1), p. 45.

54 Gibney, M. J (2002). Security and the Ethics of Asylum after 11 September. *Forced Migration Review*, 13, pp. 40–42, p. 41.

only one advancing it. It is essential to examine and understand the origin and context of cultural and institutional racism directed against refugees and to begin to break down the interplay between these forces. Understanding the history of nativist rhetoric and how it has been used to advance legislation in the past could provide a roadmap for how to avoid codifying racism in the future. International refugee law could stand as one roadblock to passing anti-refugee legislation, but it is limited in many ways, and national laws ultimately stand the best chance of preventing such policies from being enacted.

Amid the current wave of securitisation and nativism, this analysis placed current rhetoric in a historical context by examining the trends which have helped to shape US immigration policy over time. Through application of critical race theory to the news, social media and political statements, a number of trends become clear; namely, that there is a concerted effort by the Trump administration to advance narratives blurring the lines between refugees and other migrants and connecting Muslim immigrants with terrorism. These trends underscore the importance of considering the social components which help to shape and determine the success of policy, as there is a strong link between cultural and institutional racism. Although the policy analysed continues to face social and legal challenges within the USA, the recent US Supreme Court Decision to uphold Executive Order 13780 is indicative of the role cultural racism can play in the codification process and why it is important to critically examine the context in which laws and policies are developed.

The key takeaway from analysing the Trump administration and campaign's use of strategies and tools to advance a narrative of refugees as terrorists from a critical race theory perspective is that there are many factors at play that extend far beyond Trump. There is a history of anti-immigration and nativist rhetoric within the USA and a precedent of linking refugees with terrorism that extends far beyond American borders. There are a number of existing biases and fears among the American public that are readily used by politicians to advance their own agendas, which has also been seen in other countries. The issues here run much deeper than individual racism on the part of Trump and his supporters, and an understanding of these deeper cultural and institutional narratives is essential to truly comprehend the scale of the problem. Refugees have been swept up in a tide of misdirected fear, anger and hatred fuelled by misinformation and fearmongering, and it threatens to undermine international protection commitments if we are not vigilant.

Terrorism and exclusion from asylum in international and national law

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Abstract

There is no question that terrorism is a serious international crime that is prohibited in both international humanitarian and criminal law. Those who are responsible for terrorist activities can be excluded from refugee protection and, more specifically, from Convention refugee status under Article 1F the 1951 Refugee Convention and Statutory or Mandate refugee status under Section 7(d) of the Annex of the 1950 Statute of the Office of the High Commissioner for Refugees, among other international refugee rights instruments. It is argued that the absence of a comprehensive international convention on terrorism with a universal definition of what constitutes terrorism, 19 sectoral international conventions that cover different aspects of terrorism (such as hijacking, bombing, hostage taking, etc.) and a variance in the definitions of what constitutes terrorism among states has created gaps and shortcomings in international criminal law, especially in a non-armed conflict or a non-war setting. These serious gaps and shortcomings in international criminal law have a direct negative impact on international refugee law that results in a detrimental effect on national refugee status determination systems and for the exclusion of those who are involved in terrorist activities, either directly or indirectly. A comparative legal analysis of three leading judgments of the International Criminal Tribunal of the Former Yugoslavia (ICTY) – *Krstic*, *Galic* and *Mladic*, who were all convicted for the crime of terror and/or terrorising civilians – and three terrorism and asylum cases – *Suresh*, *JS(Sri Lanka)* and *Holder v. Humanitarian Law Project*, decided by the respective supreme courts of Canada, the UK and the USA – reveals the gaps and divergencies across jurisdictions and the different branches of international law on terrorism. The result is confusion, which has also contributed to the conflation of terrorism and asylum. Accordingly, these gaps and deficiencies in international criminal law, it is submitted, need to be addressed by the UN, states and the international community, as a priority.

Keywords

Terrorism, crime of terrorism, infliction of terror, spreading terror among the civilian population, crimes against humanity, asylum, voluntary, knowing and significant contribution, material support bar

Terror is [...] the intentional deprivation of a sense of security...

And it's not just [...] the fear that comes from being nearby the combat. This is a fear calculated to demoralize, to disrupt, to take away any sense of security from a body of people who have nothing [...] to do with the combat.¹

1. Introduction

The United Nations (UN) has often identified terrorism as a pressing priority and concern for the international community. For instance, in January 2013, the then Secretary-General of the UN, Ban Ki-moon, stated at a high-level meeting of the Security Council, 'Nothing can justify terrorism – ever.'² The UN Security Council has advanced a 'comprehensive approach to terrorism'. Following an open debate on this approach to terrorism, the President of the UN Security Council at the time concluded the debate with a statement, 'expressing [the] body's deep concern over the terrorist threat and its determination to combat it by all means in all its forms and manifestations, in line with the United Nations Charter and international law'.³

From a legal perspective, there is no doubt that international humanitarian law has definitively prohibited terrorism. The 1949 Geneva Conventions and the two Additional Protocols of 1977 have outlawed terrorism in situations of either international or non-international armed conflict or war. Article 33 of the Fourth Geneva Convention, Relative to the Protection of Civilians in Times of War, states, in part, that,

No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.⁴

The Additional Protocol to the Geneva Conventions of the 12 August 1949, and Related to the Protection of Victims of International Armed Conflicts (Protocol I) states at Article 51(2),

Article 51 – Protection of the civilian population

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.⁵

The Additional Protocol to the Geneva Conventions of 1949, and Related to the Protection of Victims of Non-International Armed Conflicts (Protocol II) states, in no uncertain terms, that,

Article 4. FUNDAMENTAL GUARANTEES

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:

(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; ...

(d) Acts of terrorism; ...

¹ Prosecution closing arguments, 9 October 2007, *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Trial Chamber, Judgement, 12 December 2007, para. 885. [Abbreviated as in the original.]

² United Nations, Meetings Coverage and Press Releases, Security Council, SC/10882, 'Nothing Can Justify Terrorism – Ever,' Says Secretary-General, as Security Council Hears from Some 50 Speakers in Day-Long Debate, 15 January 2013, <https://www.un.org/press/en/2013/sc10882.doc.htm> (accessed 15 March 2018).

³ United Nations, Meetings Coverage and Press Releases, Security Council, SC/10882, 'Nothing Can Justify Terrorism – Ever,' Says Secretary-General, as Security Council Hears from Some 50 Speakers in Day-Long Debate, 15 January 2013, <https://www.un.org/press/en/2013/sc10882.doc.htm> (accessed 15 March 2018). United Nations Security Council, S/2013/3, 3 January 2013, Letter dated 1 January 2013 from the Permanent Representative of Pakistan to the United Nations addressed to the Secretary-General. The concept note prepared by the President of the Security Council is found at (S/2013/3). See also the United Nations Global Counter-Terrorism Strategy at the United Nations Office of Counter-Terrorism, Counter Terrorism Implementation Task Force, 'UN Global Counter-Terrorism Strategy', <https://www.un.org/counterterrorism/ctitf/en/un-global-counter-terrorism-strategy> (accessed 16 March 2018).

⁴ The Geneva Conventions of 12 August 1949, *Four Geneva Convention Relative to the Protection of Civilians in Times of War of 12 August 1949*, Article 33, p. 162, <https://www.icrc.org/eng/assets/files/publications/icrc-002-0173.pdf> (accessed 14 March 2018).

⁵ United Nations, Treaty Series, Vol. 75, *Protocol Additional to the Geneva Conventions of 12 August 1949 and Related to the Protection of Victims of International Armed Conflicts (Protocol I)*, adopted 8 June 1977, <https://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17513-English.pdf> (accessed 15 March 2018). [Emphasis added.]

(h) threats to commit any of the foregoing acts.⁶

And Article 13 of Additional Protocol II states, as follows:

Article 13. PROTECTION OF THE CIVILIAN POPULATION

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.⁷

International criminal law has also criminalised terrorism and can be found in the statutes of some of the international criminal tribunals, including the International Criminal Tribunal for Rwanda (ICTR) and the Special Court of Sierra Leone (SCSL). Laura Paredi has noted that, 'The crime of "acts of terrorism" is included among the war crimes list in the Statutes of the ICTR and SCSL. Conversely, the ICTY and ICC Statutes omit any reference to this kind of war crime. The omission did not impede the ICTY from establishing its jurisdiction over the crime of terror.'⁸

Clearly, international humanitarian law and international criminal law have prohibited and criminalised terrorism in situations of international and non-international armed conflict.

Keeping the foregoing elemental points in mind regarding the UN's efforts to address the growing scourge of terrorism through a comprehensive approach and the prohibition and criminalisation of terrorism in international humanitarian and criminal law, it is perhaps prosaic to state that not all groups can be legally recognised as refugees, even if they have a well-founded fear of persecution on one or more of the five grounds: race, religion, nationality, membership in a particular social group and political opinion, and their state is either unwilling or unable to provide adequate protection.⁹ All those who are responsible for serious national and international crimes are excluded from refugee protection.¹⁰ This does not imply that they are not protected by the peremptory norm of non-refoulement¹¹ or are ineligible for other forms of international protection of their most fundamental human rights and dignity as persons. It simply means they cannot be recognised legally as refugees and receive the human rights protection that are guaranteed under various international instruments, including, the seminal 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

Certain categories of persons are, therefore, excluded from refugee protection due to their serious criminality. Article 1F of the 1951 Convention identifies three such categories of persons: (1) those who have committed a crime against peace, a war crime or a crime against humanity, as defined by the international instruments that have been drawn up to make provisions for such crimes; (2) those who have committed a serious non-political crime outside the country of refuge prior to their admission in that country as a refugee; and (3) those who are guilty of actions that are contrary to the purposes and principles of the United Nations.¹²

What is evident from this categorisation of individuals who are ineligible for refugee protection is that they include the most serious national and international crimes. Although, admittedly, 'acts contrary to the purposes and principles of the United Nations' appears to be a rather broad, open-ended and expansive provision that could encompass a great deal, there is general consensus that Article 1F should be applied restrictively and that Article 1F(c), according to the UNHCR, would include 'crimes capable of affecting international peace, security and peaceful relations between states

6 United Nations, Treaty Series, Vol. 75, *Protocol Additional to the Geneva Conventions of 12 August 1949 and Related to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, adopted 8 June 1977, <https://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17513-English.pdf> (accessed 15 March 2018).

7 United Nations, Treaty Series, Vol. 75, *Protocol Additional to the Geneva Conventions of 12 August 1949 and Related to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, adopted 8 June 1977, <https://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17513-English.pdf> (accessed 15 March 2018).

8 Laura Paredi, *The War Crime of Terror: An Analysis of International Jurisprudence*, International Crimes Database, ICD Brief 11, June 2015, p. 2, http://www.internationalcrimesdatabase.org/upload/documents/20150610T161554-Laura%20Paredi%20ICD%20Brief_final.pdf (accessed 15 March 2018). See 6 Article 4(d), Statute of the International Criminal Tribunal for Rwanda, adopted by UN Security Council, Res. N. 955, 8 November 1994, and 7 Article 3(d), (h), Statute of the Special Court for Sierra Leone, UN Security Council Resolution 1315 (2000), 14 August 2000.

9 Convention relating to the Status of Refugees, Geneva, 28 July 1951, in force 22 April 1954, 1949 UNTS 137, and the Protocol relating to the Status of Refugees, New York, 31 January 1967, in force 4 October 1967, 19 UNTS 6223, 6257.

10 Article 1F of the Convention relating to the Status of Refugees and other international refugee rights instruments such as the UN General Assembly, Declaration on Territorial Asylum, 14 December 1967, A/RES/2312(XXII), see Article 1(2), Article 3(2) and Article 4; Organization of African Unity (OAU) Convention, Governing Specific Aspects of Refugee Problems in Africa, Addis Abbaba, 10 September 1969, in force 10 June 1974, UNTS 14691, see Article 4(f), Article 5; Cartagena Declaration on Refugees, Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena Des Indias, Colombia, 22 November 1984, Section 3(3).

11 Lauterpacht and Bethlehem state that 'Non-refoulement is a concept, which prohibits States from returning a refugee or asylum seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion.' Sir Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion' in *Refugee Protection in International Law*, edited by Erica Feller, Volker Turk, Frances Nicholson (Cambridge: Cambridge University Press, 2003), p. 89.

12 Convention relating to the Status of Refugees, Geneva, 28 July 1951, in force 22 April 1954, 1949 UNTS 137. Article 1F(a), (b), and (c).

would fall within this clause, as would serious and sustained violations of human rights.¹³

Those persons who are liable for serious criminality, of either a national or international nature, 'self-exclude themselves' from refugee protection.¹⁴ If their 'intention' is to cause grave harm to others, through either direct or indirect perpetration, then they are, more likely than not, responsible for producing refugees, on the basis of a well-founded fear of persecution, on one or more of the five Convention grounds. As a consequence, it would be anomalous, indeed, to be providing refugee protection to those who are responsible for persecuting others and for producing refugees.

Those who are involved in terrorist actions or activities would be excluded from refugee protection because they would be responsible for the murder or serious injury of persons and the severe damage or destruction of property in an effort to terrorise a population and thereby advance their political ambitions. Hence, terrorists and their accomplices would be liable for serious criminality and excluded from refugee protection.¹⁵

Joseph Rikhof notes that most of the discussion and jurisprudence on exclusion and terrorism have been under Articles 1F(b) and (c) of the 1951 Convention relating to the Status of Refugees.¹⁶ Although this is true of national and international refugee law, it is not the case for international criminal law, particularly in a war setting or armed conflict, whether international or non-international, that has identified terrorism as not only persecutory, but as a crime against humanity. This would incorporate terrorist actions and activities under Article 1F(a) as a crime against humanity, if not a war crime. Presumably, in theory, it could also fall within the category of a 'crime against peace' or the 'crime of aggression', given the type of the terrorist attack, its fundamental nature, scope and the extent of its destructive impact. International criminal law has also identified the 'crime of terror' in situations of armed conflict. Consequently, it is important to stress that terrorism has been prohibited under international humanitarian law and criminalised under international criminal law.

This paper will argue that the absence of a comprehensive international convention on terrorism, with a universal definition of what constitutes terrorism, 19 sectoral international conventions that cover different aspects of terrorism (such as hijacking, bombing, hostage taking, etc.) and a variance in definitions of what constitutes terrorism has created gaps and shortcomings in international criminal law, especially in a non-armed conflict or non-war setting. In addition, a number of jurisdictions have turned to the 1998 Rome Statute, which established the International Criminal Court (ICC), to define what constitutes serious international crimes such as genocide, war crimes, crimes against humanity and aggression. However, the 1998 Rome Statute does not include terrorism within its provisions and it does not fall within the jurisdiction of the ICC. Accordingly, the paper argues, these serious gaps and shortcomings in international criminal law, which impact directly on international refugee law, can have a detrimental effect on national refugee status determination systems as well as for the exclusion of those who are involved in terrorist activities, either directly or indirectly, and who seek asylum. There is a potential for these shortcomings in international criminal law and, especially, within a non-armed conflict situation to benefit inadvertently those it is intended to exclude from refugee protection, even when applied restrictively. Thus, it is argued that these gaps, inconsistencies and deficiencies in international criminal law ought to be addressed by the United Nations and its agencies as well as the international community as a priority. A failure to do so could potentially lead to the delegitimation of the international refugee protection system by the provision of refugee protection to those who ought to be excluded.

The paper is presented in four parts. The first provides a broad overview of terrorism in international law and underscores the key point that terrorism is accepted as a serious international crime. Secondly, it considers three leading judgments of the International Criminal Tribunal of the Former Yugoslavia (ICTY) that deal with the 'crime of terror' and 'persecution', which also encompasses 'terrorizing civilians' as a crime against humanity.¹⁷ Thirdly, the paper goes on to consider and comparatively analyse three leading common law supreme court judgments on terrorism in Canada, the United Kingdom, and the United States. The conclusions reflect on the current state of international humanitarian and criminal law, and its existing gaps and shortcomings and call on the UN, its agencies and the international community to address these gaps and deficiencies as a priority. The confusion and conflation between terrorism and asylum leaves the current international refugee system potentially in a precarious position vis-à-vis terrorism and the exclusion from refugee protection of those who are involved in terrorist activities.

13 *Al-Sirri (Asylum-Exclusion-Article 1F(c))*, [2016] UKUT 448 (IAC), paragraph 14, page 8.

14 Those who wilfully choose to act immorally and to commit a crime must bear the consequences of their immorality and/or criminality. The well-known aphorism, 'If you can't do the time, don't do the crime' seems apropos here.

15 Joseph Rikhof, *The Criminal Refugee: The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law* (Dordrecht, The Netherlands: Republic of Letters Publishing, 2012).

16 Joseph Rikhof, *The Criminal Refugee: The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law* (Dordrecht, The Netherlands: Republic of Letters Publishing, 2012), p. 307.

17 The International Criminal Tribunal of the Former Yugoslavia completed its mandate on 21 December 2017. It was established by UN Security Council Resolution 829 on 23 May 1993. United Nations Mechanism for International Criminal Tribunals. United Nations, International Criminal Tribunal for the Former Yugoslavia, <http://www.icty.org/> (accessed 13 March 2018). The work of both the ICTY and the International Criminal Tribunal for Rwanda (ICTR) is being carried on by the Mechanism for International Criminal Tribunals (MICT), <http://www.unmict.org/en> (accessed 13 March 2018).

2. Terrorism and international law

Terrorism, certainly, is considered to be a serious crime, whether it is fundamentally national or international.¹⁸ And, it can be persecutory if it targets groups deliberately on any of the five grounds of the 1951 Convention.¹⁹ Assessing the United Nations' efforts in criminalising terrorism, Michael Lawless states:

Thus, it is simply not possible to assert that terrorism is not prohibited by the international community, or that terrorism is not an international crime. On the contrary, it is abundantly clear that the UN has deliberated over the course of many years on the topic of terrorism, and the ultimate result of those deliberations has been the creation of a comprehensive prohibition on terrorism as a means of effecting political change, irrespective of any laudatory purpose or change sought by the terrorist.²⁰

Indeed, the United Nations has negotiated some 19 conventions and protocols on specific acts of terrorism, from the seizure of aircraft, the taking of hostages, to violence at airports, terrorist bombings, terrorist financing, nuclear terrorism and so on.²¹ However, there is no universally accepted definition of the highly contentious and emotive term 'terrorism'.²²

Although a comprehensive international convention on terrorism has eluded the United Nations to date, there is a possibility that such a comprehensive convention may be realised in due course.²³ If for no other reason, than those states and groups that now justify the use of extreme violence, including terrorism, in their struggle against oppression for the achievement of, for instance, their right to self-determination, come to realise that the use of terrorism, particularly against their own citizens, is a totally absurd rationale that can never be justified. Or those states that oppose a comprehensive convention on terrorism because they are concerned that their military personnel might be charged, tried and convicted for terrorism in the fulfilment of their military objectives and missions come to realise that terrorism is already prohibited under international humanitarian law and criminalised under international criminal law.²⁴ The fact that there has been no agreed universal definition of terrorism does not mean that terrorism is impossible to define. While strongly in favour of a comprehensive international convention on terrorism, Ben Saul and other legal scholars are not as sanguine in their views on the achievement of such a comprehensive convention in international law.²⁵

If terrorism is a serious international crime, then it must surely be subject to prosecution under international criminal law. It is worth noting that international criminal law has been defined as 'the branch of public international law that deals with direct criminal responsibility of individuals'.²⁶ Robert Cryer has noted that international criminal law can be summed up in the famous statement of the Nuremberg International Military Tribunal (IMT) that,

... [i]ndividuals have international duties which transcend the national obligations of obedience imposed by the individual State ... crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.²⁷

18 Government of Canada, Department of Justice, 'About the Anti-terrorism Act', 26 July 2017, <http://www.justice.gc.ca/eng/cj-jp/ns-sn/act-loi.html> (accessed 8 February 2018); The Crown Prosecutor's Service (CPS), 'Terrorism', (2017), <https://www.cps.gov.uk/terrorism> (accessed 8 February 2018); Michael Lawless, 'Terrorism: An International Crime?', *Canadian Military Journal*, (2008), Vol. 9, No. 2, pp. 27–39, <http://www.journal.forces.gc.ca/vo9/no2/05-lawless-eng.asp> (accessed 8 February 2018).

19 Canadian Council for Refugees, Comments on Bill C-36, Anti-Terrorism Act, 5 November 2001, <http://ccrweb.ca/en/comments-bill-c-36-anti-terrorism-act> (accessed 8 February 2018).

20 Michael Lawless, 'Terrorism: An International Crime?', *Canadian Military Journal*, (2008), Vol. 9, No. 2, p.31.

21 United Nations Office of Counter-Terrorism, International Law Instruments, <http://www.un.org/en/counterterrorism/legal-instruments.shtml> (accessed 8 February 2018).

22 Anna Maria Brennan, 'The Difficulties in Defining Terrorism in International Law', *Human Rights in Ireland*, 11 October 2011, <http://humanrights.ie/international-law/international-human-rights/the-difficulties-in-defining-terrorism-under-international-law/> (accessed 12 February 2018); Human Rights Voices, UN 101, 'There is no UN Definition of Terrorism', http://www.humanrightsvoces.org/EYEontheUN/un_101/facts/?p=61 (accessed 12 February 2018); Jean-Marc Sorel, 'Some Questions About the Definition of Terrorism and the Fight Against its Financing', *European Journal of International Law*, (2003), Vol. 14, No. 2, pp. 365–378. <http://www.ejil.org/pdfs/14/2/420.pdf> (accessed 12 February 2018); Sean Larkin, QC, 'Why Can't We Agree on a Definition of Terrorism?', *OpenMind*, 16 December 2013, <https://www.bbvaopenmind.com/en/why-cant-we-agree-on-a-definition-of-terrorism/> (accessed 12 February 2018).

23 United Nations, Ad Hoc and Special Committees, Established on the Recommendations of the Sixth Committee, Ad Hoc Committee established by General Assembly resolution 51/210 of the 17 September 1996, Last Updated 22 September 2017, <http://legal.un.org/committees/terrorism/> (accessed 9 February 2018); Mahmoud Hmoud, 'Negotiating the Draft Comprehensive Convention on International Terrorism', *Journal of International Criminal Justice*, 4 (2006), pp. 1031–1043.

24 International Committee of the Red Cross, IHL Database, Customary IHL, Rule 2: Violence Aimed at Spreading Terror Among the Civilian Population, 'Rule 2: Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited', https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule2 (accessed 11 February 2018).

25 Ben Saul, 'The Emerging International Law of Terrorism', in *Terrorism*, edited by Ben Saul (Oxford: Hart Publishing Ltd., 2012); Ben Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2006); Alex Conte, *Human Rights in the Prevention and Punishment of Terrorism: Commonwealth Approaches: The United Kingdom, Canada, Australia and New Zealand* (Berlin, Heidelberg: Springer-Verlag, 2010), file:///C:/Users/esouser/Favorites/Downloads/9783642116070-c1.pdf (accessed 13 March 2018).

26 Robert Cryer, 'International Criminal Law', in *International Law*, edited by Malcolm D. Evans, fourth edition, (Oxford: Oxford University Press, 2014), p. 752.

27 Robert Cryer, 'International Criminal Law', in *International Law*, edited by Malcolm D. Evans, fourth edition, (Oxford: Oxford University Press, 2014), p. 752.

It is also important to underscore that for international crimes, the locus of the criminal prohibition is the international legal order but these crimes can also be criminalised in the domestic legal orders as well. Most states have criminalised terrorism within their domestic legal orders and typically within their criminal codes, including Canada and the United States.²⁸ Indeed, there are differences in how Canada and the United States have defined terrorism, which has raised a number of concerns.²⁹ In fact, states have defined terrorism in various ways and they have sought to prosecute those individuals whom they suspected of being involved in terrorist activities. Various criticisms have been levelled at states for having legislated vague and over-broad definitions of terrorism and the term 'terrorist'. The attendant effect could lead to an 'abuse of power' by the state.³⁰ The way that the term terrorism is defined can have 'a vital effect in determining the overall scope and application of anti-terrorism law regime'.³¹ The legislative basis of how the term terrorism is defined clearly affects how the courts, in a respective jurisdiction, will apply the term to the factual situation of any case before them and interpret it.

With respect to international criminal law, there are only four clear crimes that are called the 'core' international crimes: genocide, war crimes, crimes against humanity and aggression. These core crimes are found in the Rome Statute of the International Criminal Court (ICC).³² Noticeably absent from this list of core international crimes is terrorism. A number of legal scholars have called for terrorism to be included as a 'core' international crime that should come under the jurisdiction of the ICC.³³ Indeed, it was originally intended to include terrorism as one of the most serious international crimes under the ICC's jurisdiction. As Alex Conte has stated,

It was proposed, within the draft Statute, to include terrorism within the Court's jurisdiction, but the failure of States to agree upon a definition of the term resulted in the crime being removed from the scope of the Court's jurisdiction and subject matter of the constitutive treaty.³⁴

As previously noted, there is no universally accepted definition of terrorism; nonetheless, there is a clear prohibition of terrorism in international humanitarian law, both in terms of customary international and treaty law as well.³⁵ In addition, despite its highly contentious judgment, the Appeals Chamber of the Special Tribunal of Lebanon issued a landmark ruling that a definition of terrorism has emerged in customary international law that consists of:

... [t]he following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.³⁶

28 Criminal Code (R.S.C., 1985, c. C-46), Part II.1, see Government of Canada, Justice Laws, <http://laws-lois.justice.gc.ca/eng/acts/C-46/page-12.html> (accessed 10 February 2018); 18 U.S. Code Chapter 113B – TERRORISM, see Cornell Law School, Legal Information Institute (LII), <https://www.law.cornell.edu/uscode/text/18/part-II/chapter-113B> (accessed 10 February 2018).

29 James C. Simeon, 'The Evolving Common Law Jurisprudence Combatting the Threat of Terrorism in the United Kingdom, United States, and Canada', Public Law Seminar, Paper 38, LLM Course, Faculty of Law, University of Cambridge, 1 May 2017 (with the author).

30 Keiran Hardy and George Williams, 'What is "Terrorism"? Assessing Domestic Legal Definitions', *UCLA Journal of International Law and Foreign Affairs*, (2011), Vol. 16, p. 83, https://webmail-1.hermes.cam.ac.uk/?_task=mail&_action=get&_mbox=INBOX&_uid=270&_part=2&_frame=1&_extwin=1 (accessed 10 February 2018).

31 Keiran Hardy and George Williams, 'What is "Terrorism"? Assessing Domestic Legal Definitions', *UCLA Journal of International Law and Foreign Affairs*, (2011), Vol. 16, p. 83, https://webmail-1.hermes.cam.ac.uk/?_task=mail&_action=get&_mbox=INBOX&_uid=270&_part=2&_frame=1&_extwin=1 (accessed 10 February 2018).

32 Rome Statute of the International Criminal Court, Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. Part 2, Jurisdiction, Admissibility, and Applicable Law, Article 5, Crimes within the jurisdiction of the Court. The Statute entered into force on 1 July 2002, [http://legal.un.org/icc/statute/english/rome_statute\(e\).pdf](http://legal.un.org/icc/statute/english/rome_statute(e).pdf) (accessed 10 February 2018).

33 Peter J. Wertheim, 'Should "Grave Crimes of International Terrorism" be Included in the Jurisdiction of the International Criminal Court?', *Policy and Society*, (2003) Vol. 22, No. 2, pp. 1–21, DOI: 10.1016/S1449-4035(03)70017-4, [https://doi.org/10.1016/S1449-4035\(03\)70017-4](https://doi.org/10.1016/S1449-4035(03)70017-4) (accessed 10 February 2018); Julie Sharma, 'The Challenge for the International Criminal Court: Terrorism', *Legal Services India*, undated, <http://www.legalserviceindia.com/article/I247--International-Criminal-Court--Terrorism.html> (accessed 10 February 2018); Aviv Cohen, 'Prosecuting Terrorists at the International Criminal Court: Reevaluating an Unused Tool to Combat Terrorism', *Michigan State International Law Review*, (2012), Vol. 20, No. 2, pp. 219–257, <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1080&context=ilr> (accessed 11 February 2018).

34 Alex Conte, *Human Rights in the Prevention and Punishment of Terrorism: Commonwealth Approaches: The United Kingdom, Canada, Australia and New Zealand* (Berlin, Heidelberg: Springer-Verlag, 2010), p. 20.

35 International Committee of the Red Cross, *IHL Database, Customary IHL*, Practice Related to Rule 2: Violence Aimed of Spreading Terror Among the Civilian Population, 1. Treaties; 2. Other Instruments; 3. Military Manuals; 4. National Legislation; 5. National Case Law; 6. Other National Practice; 7. United Nations; 8. Other International Organizations; 9. International Conference; 10. International and Mixed Judicial and Quasi-Judicial Bodies; 11. International Red Cross and Red Crescent Movement; 12. Other, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule2 (accessed 11 February 2018).

36 Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I (16 February 2011), <https://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/appeals-chamber/534-f0936> (accessed 11 February 2018).

Indeed, this judgment was consistent with Presiding Judge Antonio Cassese's previous publications on this very question.³⁷ The judgment received widespread criticism upon its release.³⁸ Nonetheless, it has broken new legal ground, no matter how 'radical' and 'unconventional' a judgment at the international level. In the end, it does add to the growing consensus that there is a commonly accepted definition of terrorism in customary international law. Moreover, it could be argued that it is far from precedential, given that the ICTY essentially came to the same conclusion in a series of criminal prosecutions of senior military officials following the Bosnian War.³⁹ This will be dealt with more thoroughly in the next section of the paper which deals with the three ICTY judgments. But suffice it to say that the joint Appeals Chamber of the ICTY and ICTR came to the following conclusion in the *Galic* case:

In light of the foregoing, the Appeals Chamber finds that the prohibition of terror against the civilian population as enshrined in Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II clearly belonged to customary international law from at least the time of its inclusion in those treaties.⁴⁰

3. Leading International Criminal Tribunal of the Former Yugoslavia (ICTY) cases on the crime of terrorism

The three cases briefly outlined below illustrate that there is a 'crime of terror', as recognised by the United Nations ICTY, in the situation of a war or armed conflict and, specifically, a non-international armed conflict. The finding is premised on customary international humanitarian law or the laws or customs of war. This is a crucial ruling that emerged in several major cases before the ICTY which included the following: 2001 *Krstic*, 2006 *Galic* and 2017 *Mladic*. The criminal prosecution of these three perpetrators of the most serious international crimes by these former senior military officers, which included the crime of terror and persecution that encompasses, terrorising civilians, marked a significant step forward with respect to terrorism in international criminal law.

3.1. *Prosecutor v. Radislav Krstic, Case No. IT-98-33-T, Judgment, 2 August 2001*

Radislav Krstic was Chief of Staff/Deputy Commander of the Drina Corps of the Bosnian Serb Army (VRS). He was appointed Commander of the Drina Corps on 13 July 1995. Krstic was indicted by the ICTY on one count of genocide, one count of complicity to commit genocide and five counts of crimes against humanity, including persecution (Count 6) and four counts of violations of the laws or customs of war.⁴¹ He was the first person convicted by the ICTY for genocide and was initially sentenced to 46 years in prison, but on appeal the sentence was reduced to 35 years on the lesser charge of aiding and abetting genocide. Krstic was indicted for his part in the murder of 8,000 Bosnian prisoners of war and civilians in the Srebrenica massacre in Europe's worst atrocity since World War II.⁴²

Under the Prosecutor's Amended Indictment, Krstic was charged with persecution on the sixth count that included the following:

37 Antonio Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law', *Journal of International Criminal Justice*, (2006), Vol. 4, pp. 933–958, doi:10.1093/jicj/mql074; Antonio Cassese, 'Terrorism as an International Crime' in *Enforcing International Law Norms Against Terrorism*, edited by Andrea Bianchi, and Yasmin Naqvi (Oxford: Hart Publishing, 2004), pp. 213–226; Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law*, third Edition, (Oxford: Oxford University Press, 2013), Chapter 8, Terrorism.

38 Ben Saul, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism', *Leiden Journal of International Law*, (2011), Vol. 24, pp. 677–700. https://www.cambridge.org/core/services/aop-cambridge-core/content/view/045D641D5847AD86B2E507B3A5E2CC40/S0922156511000203a.pdf/legislating_from_a_radical_hague_the_united_nations_special_tribunal_for_lebanon_invents_an_international_crime_of_transnational_terrorism.pdf (accessed 12 February 2018); Ben Saul, 'The Special Tribunal for Lebanon and Terrorism as an International Crime: Reflections on the Judicial Function' (6 September 2012) in *The Ashgate Research Companion to International Criminal Law*, edited by W. Schabas, Y. McDermott, N. Hayes and M. Varaki, (Ashgate: Farnham, forthcoming); Sydney Law School Research Paper No. 12/64, available at SSRN, <https://ssrn.com/abstract=2142324> (accessed 12 February 2018); Almiro Clere, 'An Examination of the Special Tribunal for Lebanon's Explosive Declaration of "Terrorism" at Customary International Law', A dissertation in partial fulfilment of the requirements of the degree of Bachelor of Laws (Honours), University of Otago, October 2012, <http://www.otago.ac.nz/law/research/journals/otago043934.pdf> (accessed 12 February 2018); Marko Milanovic, 'Special Tribunal for Lebanon Delivers Interlocutory Decision on Applicable Law', *EJIL: Talk!*, 16 February 2011, <https://www.ejiltalk.org/special-tribunal-for-lebanon-delivers-interlocutory-decision-on-applicable-law/> (accessed 12 February 2018);

39 John R. Lampe, 'Bosnian Conflict, European History, 1992–1995', *Encyclopedia Britannica*, undated, <https://www.britannica.com/event/Bosnian-conflict> (accessed 19 February 2018); Robert Cryer, 'Prosecutor v. Galic and the War Crime of Terror Bombing', *Israel Defense Forces Law Review*, (2006) Vol. 2, pp. 75–102; Marlies Glasius, 'Terror, Terrorizing, Terrorism: Instilling Fear as a Crime in the Cases of Radovan Karadzic and Charles Taylor' in *Narratives of Law and Justice in the International Courtrooms, Former Yugoslavia and Beyond*, edited by Dubravka Zarkov and Marlies Glasius (New York: Springer International Publishing, 2014), pp. 45–61; Roberta Arnold, 'Terrorism, War Crimes and the International Criminal Court' in *Research Handbook on International Law and Terrorism*, edited by Ben Saul (Cheltenham: Edward Elgar Publishing Ltd., 2014), pp. 282–297; Laura Paredi, *The War Crime of Terror: An Analysis of International Jurisprudence*, International Crimes Database, ICD Brief 11, June 2015, pp. 4–5, http://www.internationalcrimesdatabase.org/upload/documents/20150610T161554-Laura%20Paredi%20ICD%20Brief_final.pdf (accessed 15 March 2018).

40 *Prosecutor v. Stanislav Galic*, Case No. IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006, paragraph 90.

41 United Nations, International Criminal Tribunal for the Former Yugoslavia, Case Information Sheet, Radislav Krstic (T98-33), undated, http://www.icty.org/x/cases/krstic/cis/en/cis_krstic_en.pdf (accessed 18 February 2018).

42 R. Jeffrey Smith, 'Srebrenica Massacre, Bosnian History 1995', *Encyclopedia Britannica*, <https://www.britannica.com/event/Srebrenica-massacre> (accessed 18 February 2018).

30. Beginning on 11 July 1995 and continuing through 1 November 1995, RADISLAV KRSTIC committed, planned, instigated, ordered, or otherwise aided and abetted the planning, preparation, or execution of a crime against humanity, that is, the persecutions of Bosnian Muslim civilians on political, racial, or religious grounds, in Srebrenica and its surroundings.

31. The crime of persecutions was perpetrated, executed, and carried out by or through the following means:

- a. the murder of thousands of Bosnian Muslim civilians, including men, women, children, and elderly persons;
- b. the cruel and inhumane treatment of Bosnian Muslim civilians, including severe beatings;
- c. the terrorising of Bosnian Muslim civilians;
- d. the destruction of personal property of Bosnian Muslims; and,
- e. the deportation or forcible transfer of Bosnian Muslims from the Srebrenica enclave.

By these acts or omissions, and the acts and omissions described in paragraphs 4, 6, 7, 11, and 22 through 26, RADISLAV KRSTIC committed:

COUNT 6: Persecutions on political, racial and religious grounds, a CRIME AGAINST HUMANITY, punishable under Articles 5(h), and 7(1) and 7(3) of the Statute of the Tribunal.⁴³

Within the 'crime of persecutions', it is evident, as emphasised, that the 'terrorising of civilians' is included as part of this crime. At paragraph 534 of the Trial Chamber's judgment, it is noted that the crime of persecutions was defined; more significantly, it was identified as a crime against humanity and one of the core international crimes for which persons who were responsible for such crimes could be prosecuted. Wherein it states:

...bearing in mind that the crime of persecutions has been defined, in the *Kupre{ki}* Judgement, as 'the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5'.⁴⁴

At paragraphs 536 and 537, the Trial Chamber goes on to state:

536. The Trial Chamber has previously determined that a widespread and systematic attack was launched against the Bosnian Muslim population of Srebrenica from 11 July onwards, by reason of their belonging to the Bosnian Muslim group.

537. The humanitarian crisis in Poto~ari, the burning of homes in Srebrenica and Poto~ari, the terrorisation of Bosnian Muslim civilians, the murder of thousands of Bosnian Muslim civilians, in Poto~ari or in carefully orchestrated mass scale executions, and the forcible transfer of the women, children and elderly out of the territory controlled by the Bosnian Serbs, constitute persecutory acts.⁴⁵

The Trial Chamber then went on to conclude that the crime of persecution was committed in the enclave of Srebrenica. However, the key point that needs to be stressed here is that the crime of persecution includes acts of terrorism against a civilian population.

3.2. *Prosecutor v. Stanislav Galic, Case No. IT-98-29-A, Judgment, 30 November 2006*

Stanislav Galic was a Bosnian Serb commander of the Sarajevo-Romanija Corps of the Army of Republika Srpska (VRS) during the Bosnian War. He served in this capacity from 7 September 1992 to 10 August 1994.⁴⁶ The 'Siege of Sarajevo' was one of the longest in the modern history of warfare and lasted for close to four years (5 April 1992 to 29 February 1996).⁴⁷ The ICTY indicted Galic for individual responsibility on a list of charges that included murder, inhuman acts other than murder, crimes against humanity, unlawfully inflicting terror upon civilians, attacks on civilians and violations of the laws and customs of war.⁴⁸ According to the indictment, 'The attacks on Sarajevo civilians were often unrelated to

43 *The Prosecutor of the Tribunal Against Radislav Krstic, Amended Indictment, Case No. IT-99-33*, <http://www.icty.org/x/cases/krstic/ind/en/krs-1ai991027e.pdf> (accessed 18 February 2018). [Emphasis added.]

44 *Prosecutor v. Radislav Krstic, Case No. IT-98-33-T, Judgement 2 August 2001*, paragraph 534, <http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf> (accessed 18 February 2018).

45 *Prosecutor v. Radislav Krstic, Case No. IT-98-33-T, Judgement 2 August 2001*, paragraphs 536 and 537, <http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf> (accessed 18 February 2018).

46 *Prosecutor v. Stanislav Galic, Case No. IT-98-29-A, Judgment, 30 November 2006*, <http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf> (accessed 17 February 2018).

47 BBC News Europe, 'Sarajevo 1992–1995: Looking Back After 20 years', 10 April 2012, <http://www.bbc.co.uk/news/world-europe-17617775> (accessed 18 February 2018).

48 *The Prosecutor of the Tribunal Against Stanislav Galic, Dragomir Milosevic, Indictment, Case No. 98-29-I, undated*, <http://www.icty.org/x/cases/galic/ind/en/gal-ii011102e.pdf> (accessed 17 February 2018).

military actions and were designed to keep the inhabitants in a constant state of terror.⁴⁹

Galic was indicted specifically for the 'Infliction of Terror', which stated, in part, that he had 'conducted a protracted campaign of shelling and sniping upon the civilian population thereby inflicting terror and mental suffering upon its civilian population'.⁵⁰

By his acts and omissions, STANISLAV GALIC is responsible for:

COUNT 1: Violations of the Laws or Customs of War (unlawfully inflicting terror upon civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949) punishable under Article 3 of the Statute of the Tribunal.⁵¹

After assessing the evidence presented on the charge of the 'infliction of terror' the ICTY came to the decision that, 'The Accused knew or should have known that this was so. Terror as a crime within international humanitarian law was made effective in this case by treaty law. The Tribunal has jurisdiction *ratione materiae* by way of Article 3 of the Statute'.⁵²

Following his appeal, the ICTY Appeal Chamber increased Galic's sentence to life imprisonment.⁵³ Laura Paredi has noted that, 'In 2003, Stanislav Galic, commander of the Bosnian Serb forces, became the first person to be convicted for the spreading of terror among the civilian population and, in particular, the first case in which terror was considered as an autonomous war crime'.⁵⁴

3.3. *Prosecutor v. Ratko Mladic, Case No. IT-09-92-T, Judgment, Volumes I to V, 22 November 2017*

Ratko Mladic was the Chief of Staff of the Army of the Republika Srpska during the Bosnian War of 1992–1995. The media frequently labelled him as the 'Butcher of Bosnia'. He was indicted for the following international crimes: genocide, crimes against humanity and violations of the laws and customs of war.⁵⁵ But, more to the point, Mladic was also indicted, specifically, for '13. b. Crimes Committed to Spread Terror among the Civilian Population of Sarajevo through a Campaign of Sniping and Shelling'.⁵⁶ Paragraph 14 of the indictment states that,

14. Between 12 May 1992 and November 1995, Ratko MLADIC participated in a joint criminal enterprise to establish and carry out a campaign of sniping and shelling against the civilian population of Sarajevo, the primary purpose of which was to spread terror among the civilian population. This joint criminal enterprise existed between April 1992 and November 1995. The objective of this criminal enterprise involved the commission of the crimes of terror, unlawful attacks on civilians, and murder charged in this indictment.⁵⁷

Further, under Count 3, Persecutions, paragraph 59 (e), he was indicted for:

(e) the terrorising and abuse of Bosnian Muslims of Srebrenica in Poto~ari and the beating of men and boys of Srebrenica prior to their execution, as cruel or inhumane treatment.⁵⁸

In addition, on Counts 9 and 10, he was indicted for 'Terror, Unlawful Acts'.⁵⁹ At paragraph 75 of the indictment it states:

49 The Prosecutor of the Tribunal Against Stanislav Galic, Dragomir Milosevic, Indictment, Case No. 98-29-I, undated, p. 2, paragraph 4(b), <http://www.icty.org/x/cases/galic/ind/en/gal-ii011102e.pdf> (accessed 17 February 2018).

50 The Prosecutor of the Tribunal Against Stanislav Galic, Dragomir Milosevic, Indictment, Case No. 98-29-I, undated, p. 4, Charges, Count 1 (Infliction of Terror), <http://www.icty.org/x/cases/galic/ind/en/gal-ii011102e.pdf> (accessed 17 February 2018).

51 The Prosecutor of the Tribunal Against Stanislav Galic, Dragomir Milosevic, Indictment, Case No. 98-29-I, undated, p. 4, Charges, Count 1 (Infliction of Terror), <http://www.icty.org/x/cases/galic/ind/en/gal-ii011102e.pdf> (accessed 17 February 2018).

52 *Prosecutor v. Stanislav Galic, Case No. IT-98-29-A, Judgement, 30 November 2006*, paragraph 138, <http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf> (accessed 17 February 2018).

53 *Prosecutor v. Stanislav Galic, Case No. IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006*, paragraph 48, <http://www.icty.org/x/cases/galic/acjug/en/gal-acjud061130.pdf> (accessed 17 February 2018).

54 Laura Paredi, *The War Crime of Terror: An Analysis of International Jurisprudence*, International Crimes Database, ICD Brief 11, June 2015, p. 1, http://www.internationalcrimesdatabase.org/upload/documents/20150610T161554-Laura%20Paredi%20ICD%20Brief_final.pdf (accessed 15 March 2018). See *Prosecutor v. Stanislav Galic, Case No. IT-98-29-T, Trial Chamber, Judgement, 5 December 2003*.

55 *The Prosecutor v. Ratko Mladic, Prosecution Submission of the Fourth Amended Indictment and Schedules of Incidents, Case No. IT-09-92-PT, 16 December 2011*, p. 1, <http://www.icty.org/x/cases/mladic/ind/en/111216.pdf> (accessed 18 February 2018).

56 *The Prosecutor v. Ratko Mladic, Prosecution Submission of the Fourth Amended Indictment and Schedules of Incidents, Case No. IT-09-92-PT, 16 December 2011*, p. 9, <http://www.icty.org/x/cases/mladic/ind/en/111216.pdf> (accessed 18 February 2018).

57 *The Prosecutor v. Ratko Mladic, Prosecution Submission of the Fourth Amended Indictment and Schedules of Incidents, Case No. IT-09-92-PT, 16 December 2011*, p. 9, <http://www.icty.org/x/cases/mladic/ind/en/111216.pdf> (accessed 18 February 2018).

58 *The Prosecutor v. Ratko Mladic, Prosecution Submission of the Fourth Amended Indictment and Schedules of Incidents, Case No. IT-09-92-PT, 16 December 2011*, p. 26, <http://www.icty.org/x/cases/mladic/ind/en/111216.pdf> (accessed 18 February 2018).

59 *The Prosecutor v. Ratko Mladic, Prosecution Submission of the Fourth Amended Indictment and Schedules of Incidents, Case No. IT-09-92-PT, 16 December 2011*, p. 33, <http://www.icty.org/x/cases/mladic/ind/en/111216.pdf> (accessed 18 February 2018).

75. Ratko MLADIC committed in concert with others, planned, instigated, ordered, and/or aided and abetted the crimes of terror and unlawful attacks on civilians. In addition, Ratko MLADIC knew or had reason to know that his subordinates were committing the crimes of terror and unlawful attacks on civilians or had done so. Ratko MLADIC failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.⁶⁰

The judgment of the Trial Chamber at paragraph 3186 states that the crime of terror requires proof of the following three elements:

- a. acts or threats of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing the victims to suffer grave consequences;
- b. the offender willfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts or threats of violence; and
- c. the above acts or threats of violence were committed with the primary purpose of spreading terror among the civilian population.⁶¹

On the basis of the exhaustive evidence presented in this case, the Trial Chamber ruled that the acts examined 'constituted the crime of terror as a violation of the laws and customs of war'.⁶² Ratko Mladic was also convicted of the crime of genocide⁶³ and sentenced to life imprisonment.

3.4 A Comparative analysis of these three leading ICTY cases

It is evident that all three ICTY cases deal with atrocity crimes: genocide, crimes against humanity and war crimes, involving the Siege of Sarajevo and the Srebrenica Massacre during the Bosnian War, 1992–1995. The three cases involve senior commanders in the Army Republika Srpska: former chiefs of staff of the VRS and senior Bosnian Serbian commanders. All three cases invoke the charge of the crime of terrorism or persecution, which encompasses terrorising a civilian population during an armed conflict, whether international or non-international. The strong implication or the implicit assumption throughout these three cases is that the 'crime of terror' and/or the persecutory acts of 'terrorizing civilians' are crimes against humanity.

The crime of terror was found among the violations of the laws or customs of war and is part and parcel of international humanitarian law. Moreover, the ICTY has defined the crime of terror as comprising three elements: acts or threats of violence are directed to a civilian population that results in grave consequences; the perpetrators wilfully targeted the civilian population; and the primary intention of the acts or threats of violence are to spread terror among the civilian population. The ICTY has also identified and incorporated 'terrorizing civilians' as a persecutory crime that falls within Article 5 of the ICTY statute as crimes against humanity.

The ICTY has set a precedent by criminalising terrorism in situations of armed conflict, whether international or non-international. It has also defined the three essential elements that must be present for the crime of terror to have taken place. Furthermore, it has also incorporated terrorism within 'persecutions on political, racial and religious grounds' as comprising crimes against humanity. It seems reasonable to assume that these three judgments will have an impact on the international crime of terrorism and the future judgments and jurisprudence of international criminal courts and tribunals as well as national courts.

4. Leading Supreme Court judgments on terrorism in the UK, the USA and Canada

A study and consideration of three leading 'terrorism' cases in the UK, the USA and Canada is instructive on how the jurisprudence on terrorism is developing within these leading common law jurisdictions. The three cases selected are all common law Supreme Court judgments, one from each of the three countries, comprising the well-known Canadian 2002 *Suresh* judgment, the UK 2010 *JS (Sri Lanka)* case and the US 2010 *Holder v. Humanitarian Law Project* judgment. These three cases will be briefly outlined and comparatively analysed.

60 *The Prosecutor v. Ratko Mladic, Prosecution Submission of the Fourth Amended Indictment and Schedules of Incidents, Case No. IT-09-92-PT, 16 December 2011*, pp. 33–34, <http://www.icty.org/x/cases/mladic/ind/en/111216.pdf> (accessed 18 February 2018). Under Count 9, Ratko Mladic, was criminally responsible for 'Acts of Violence the Primary Purpose of which is to Spread Terror among the Civilian Population, a VIOLATION OF THE LAWS OR CUSTOMS OF WAR, punishable under Articles 3, and 7(1) and 7(3) of the Statute' (p. 35).

61 *Prosecutor v. Ratko Mladic, Case No. IT-09-92-T, Judgement, Volumes III of V, 22 November 2017*, p. 1663, http://www.icty.org/x/cases/mladic/tjug/en/171122-3of5_1.pdf (accessed 18 February 2018).

62 *Prosecutor v. Ratko Mladic, Case No. IT-09-92-T, Judgement, Volumes III of V, 22 November 2017*, paragraph 3206, p. 1672, http://www.icty.org/x/cases/mladic/tjug/en/171122-3of5_1.pdf (accessed 18 February 2018).

63 *Prosecutor v. Ratko Mladic, Case No. IT-09-92-T, Judgement, Volumes III of V, 22 November 2017*, paragraph 3555, p. 1808, http://www.icty.org/x/cases/mladic/tjug/en/171122-3of5_1.pdf (accessed 18 February 2018).

4.1. 2002 *Suresh v. Canada (Minister of Citizenship and Immigration)*

This was one of the first terrorism cases dealt with by the Supreme Court of Canada following the tragic 9/11 terrorist attacks in the United States. Manickavasagam Suresh, a Sri Lankan Tamil, arrived in Canada in 1990 and was recognised as a Convention refugee in 1991. In 1995 he was detained by the authorities based on the opinion of the Canadian Security Intelligence Service, on the grounds that he was a fundraiser and member of the Liberation Tigers of Tamil Eelam (LTTE), an organisation known to be engaged in terrorist activities. The government started proceedings to deport him and he challenged the order for his deportation on various grounds of substance and procedure.

On 17 September 1997, the Minister notified Suresh that she was considering issuing an opinion that would declare him a danger to Canada under section 53(1)(b) of the Immigration Act. This section allows the Minister to deport a refugee on security grounds even where a refugee's 'life or freedom' would be threatened upon return to their country of origin. On 6 January 1998, the Minister issued an opinion that Suresh constituted a danger to the security of Canada and should be deported pursuant to section 53(1)(b).

The appellant applied for judicial review, alleging that: (1) the Minister's decision was unreasonable; (2) the procedures under the Act were unfair; and (3) the Act infringed ss. 7, 2(b) and 2(d) of the Canadian Charter of Rights and Freedoms. The application for judicial review was dismissed on all grounds. The Federal Court of Appeal upheld that decision.⁶⁴

The case raised a number of important questions that the SCC had to resolve, including 'the standard to be applied in reviewing a ministerial decision to deport; whether the Charter precludes deportation to a country where the refugee faces torture or death; whether deportation on the basis of mere membership in an alleged terrorist organization unjustifiably infringes the Charter rights of free expression and free association; whether "terrorism" and "danger to the security of Canada" are unconstitutionally vague; and whether the deportation scheme contains adequate procedural safeguards to ensure that refugees are not expelled to a risk of torture or death'.⁶⁵

The Court was acutely aware of the importance and relevance of its judgment at that historic moment in time, in the aftermath of 9/11, and underscored the now famous paragraph three of the judgment that summarised the enormous difficulty in deciding a case of this nature, given the situation in the world at that time:

The issues engage concerns and values fundamental to Canada and indeed the world. On the one hand stands the manifest evil of terrorism and the random and arbitrary taking of innocent lives, rippling out in an ever-widening spiral of loss and fear. Governments, expressing the will of the governed, need the legal tools to effectively meet this challenge. On the other hand stands the need to ensure that those legal tools do not undermine values that are fundamental to our democratic society – liberty, the rule of law, and the principles of fundamental justice – values that lie at the heart of the Canadian constitutional order and the international instruments that Canada has signed. In the end, it would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those values. Parliament's challenge is to draft laws that effectively combat terrorism and conform to the requirements of our Constitution and our international commitments.⁶⁶

The Court considered the International Convention for the Suppression of the Financing of Terrorism, GA Res. 54/109, 9 December 1999, and found its definition of terrorism adequate. This Convention approaches the definitional problem of terrorism in two ways: first, through a functional definition under Article 2(1)(a) that utilises the definitions of terrorism that are found in nine treaties that cover a range of terrorist activities such as aircraft hijackings, terrorist bombings, and so on; and, second, it supplements the offence-based list with a stipulative definition of terrorism found in Article 2(1)(b):

Any other 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.⁶⁷

The Court argued that this definition catches the essence of what the world understands to be terrorism. It concluded that this definition is sufficiently certain under the Immigration Act to be workable, fair and constitutional.

In summary, the SCC ruled that deporting a refugee back to their country of nationality to face torture would generally violate Section 7 of the Canadian Charter of Rights and Freedoms. If the Immigration Act is properly applied, then, it conforms to the Charter. The SCC rejected the arguments that the terms 'danger to the security of Canada' and

64 *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, pp. 4–5, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1937/index.do?r=AAAAAQAJVGvYcm9yaXNtAQ> (accessed 16 February 2018).

65 *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, p. 12, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1937/index.do?r=AAAAAQAJVGvYcm9yaXNtAQ> (accessed 16 February 2018).

66 *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, pp. 12–13, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1937/index.do?r=AAAAAQAJVGvYcm9yaXNtAQ> (accessed 16 February 2018).

67 *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, p. 54, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1937/index.do?r=AAAAAQAJVGvYcm9yaXNtAQ> (accessed 16 February 2018).

'terrorism' are unconstitutionally vague and that ss. 19 and 53(1)(b) of the Act violate the Charter guarantees of free expression and free association, and concluded the Immigration Act's impugned procedures, properly followed, are constitutional.⁶⁸

The SCC further noted that Suresh had made a *prima facie* case that he would face a substantial risk of torture if he was returned to Sri Lanka and that his hearing did not provide the procedural safeguards required to protect his right not to be sent back to a risk of torture or death. Accordingly, the SCC came to the judgment that Suresh was entitled to a new deportation hearing under the Immigration Act, R.S.C., 1985, c. I-2.⁶⁹

4.2. 2010 JS (*Sri Lanka*)

Very briefly, the facts of this case are that the respondent in *JS (Sri Lanka)* was a Sri Lankan Tamil who was a member of the LTTE, one of the fiercest, most ruthless and feared liberation organisations in the world before its defeat in 2009.⁷⁰ The respondent joined the LTTE when he was 10 years old in 1992.⁷¹ The next year he joined the Intelligence Division of the LTTE and held various positions within the organisation.

The respondent came to the UK in 2007 and claimed asylum. He was excluded from refugee protection on the basis of Article 1F(a). The UK Secretary of State's decision was based on the authority of *Gurung [2002] UKIAT 04870* (starred).⁷² In essence, it was asserted that voluntary membership in an extremist organisation amounted to 'personal and knowing participation' or, at least, acquiescence to complicity in the crimes in question.

The reasoning of the Secretary of State was that the respondent's voluntary membership and command responsibility in an organisation that was responsible for war crimes and crimes against humanity indicated that there were serious reasons for considering he was fully aware and understood the methods of the LTTE.⁷³

The respondent's appeal to the UK Immigration and Appeal Tribunal was denied. On subsequent appeal to the UK Court of Appeal, the Secretary of State's decision was overturned and the case made its way, eventually, to the UK Supreme Court (SC).⁷⁴

In essence, the *ratio decidendi* in the UK SC's judgment was that the Court did not accept that either the LTTE or its Intelligence Division could be said to be 'predominantly terrorist in character'. Hence, on this alone there could not be any question of 'personal and knowing participation' or 'complicity' in war crimes or crimes against humanity.

It was further noted that the *Gurung* decision could no longer be held in the same high regard. Moreover, it was no longer helpful to characterise organisations as exclusively engaged in terrorist activities. It is preferable to focus on at least seven determining factors:

- the nature and size of the organisation and the part of it that the person was most directly concerned;
- whether and, if so, by whom the organisation was proscribed;
- how the person came to be recruited;
- the length of time the person remained in the organisation and what, if any, opportunities the person had to leave;
- the person's position, rank, standing and influence within the organisation;
- the person's knowledge of the organisation's war crimes activities;
- the person's personal involvement and role in the organisation including particularly whatever contribution the person made to the commission of any war crimes.⁷⁵

68 *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, p. 13, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1937/index.do?r=AAAAAQAJVGvYcm9yaXNtAQ> (accessed 16 February 2018).

69 *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, p. 11, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1937/index.do?r=AAAAAQAJVGvYcm9yaXNtAQ> (accessed 16 February 2018).

70 United States, Central Intelligence Agency, *The World Factbook*, Sri Lanka, Terrorism, <https://www.cia.gov/library/publications/the-world-factbook/geos/ce.html> (accessed 12 February 2018); Federal Bureau of Investigation (FBI), 'Taming the Tamil Tigers: From Here in the US', 1 October 2008, https://archives.fbi.gov/archives/news/stories/2008/january/tamil_tigers011008 (accessed 12 February 2018).

71 It is important and relevant to point out that the recruitment and enlistment of child soldiers is a war crime, in and of itself. United Nations, Office of the Special Representative of the Secretary-General for Children and Armed Conflict, Child Recruitment and Use, undated, <https://childrenandarmedconflict.un.org/effects-of-conflict/six-grave-violations/child-soldiers/>. (accessed 19 February 2018).

72 *R (on the application of JS) (Sri Lanka) (Respondent) v. Secretary of State for the Home Department (Appellant)* [2010] UKSC 15, On appeal from: [2009] EWCA Civ 364, p. 3, <https://www.supremecourt.uk/cases/docs/uksc-2009-0121-judgment.pdf> (accessed 13 February 2018).

73 *R (on the application of JS) (Sri Lanka) (Respondent) v. Secretary of State for the Home Department (Appellant)* [2010] UKSC 15, On appeal from: [2009] EWCA Civ 364, p. 3, <https://www.supremecourt.uk/cases/docs/uksc-2009-0121-judgment.pdf> (accessed 13 February 2018).

74 *Regina (JS (Sri Lanka)) v. Secretary of State for the Home Department* ([2009] EWCA Civ 364), England, Court of Appeal, 30 April 2009.

75 *R (on the application of JS) (Sri Lanka) (Respondent) v. Secretary of State for the Home Department (Appellant)* [2010] UKSC 15, On appeal from: [2009] EWCA Civ 364, paragraph 30.

In the words of Lord Brown, 'I would hold the accused disqualified under article 1F if there are serious reasons for considering him voluntarily to have *contributed in a significant way to the organisation to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose*.'⁷⁶

In his concurring reasons, Lord Hope observed, even more emphatically, that it is a mistake to find there is complicity when 'the organization was or has become one whose aims, methods and activities are predominantly terrorist in character "very little more will be necessary".'⁷⁷ He then went on to opine:

But it is a dangerous doctrine. It leads people to think, as the Secretary of State did in this case, that voluntary membership of such a group gives rise to a presumption of personal and knowing participation, or at least acquiescence, amounting to complicity; para 34. It diverts attention from a close examination of the facts and the need for a carefully reasoned decision as to precisely why the person concerned is excluded from protection under the Convention.⁷⁸

The UK SC unanimously dismissed the appeal but varied the order such that the Secretary of State would follow the judgment of the UK SC and not the Court of Appeal in the redetermination of the respondent's asylum application.

What is of great interest in this UK SC judgment was that the LTTE was not predominantly terrorist in nature, including its Intelligence Division, and that in the Court's judgment the 1998 Rome Statute of the ICC should be the basis of international criminal law for the purposes of deciding whether a person should be excluded under Article 1F(a) of the 1951 Convention relating to the Status of Refugees. As noted previously, there is no universally accepted definition of terrorism and the 1998 Rome Statute of the ICC does not incorporate terrorism within its jurisdiction. Moreover, it is also relevant to point out that most jurisdictions in the world, including the UK, have listed the LTTE as a terrorist organisation.⁷⁹ While exclusion here was based on Article 1F(a) that deals with crimes against peace, war crimes and crimes against humanity, it is evident that in all instances in the court system the question was whether the LTTE was a terrorist organisation and what degree of involvement within an organisation that engages in terrorist activity can lead to exclusion from refugee protection. For the UK SC it had to be a voluntary and significant contribution. But it is evident that the UK SC did not find that the LTTE was predominantly a terrorist organisation, as listed by the UK government, for the purposes of exclusion under Article 1F(a).

4.3. 2010 *Holder v. Humanitarian Law Project*

In 1997 the US Secretary of State designated the Kurdistan Workers' Party, the Partiya Karkeran Kurdistan (PKK) and the LTTE as well as 28 other organisations, to be foreign terrorist organisations.

The plaintiffs filed a lawsuit in the US Federal Court in 1998 challenging the constitutionality of the material-support statute – §2339B – on the grounds that they wanted 'to provide support for the humanitarian and political activities of the PKK and the LTTE in the form of monetary contributions, other tangible aid, legal training, and political advocacy',⁸⁰ but they were prohibited in doing so for fear of prosecution under §2339B. The plaintiffs claimed that the statute was unconstitutional because it violated their rights under the First Amendment, freedom of speech and freedom of association, by criminalising their material provision of support to the PKK and LTTE without requiring the government to prove that the plaintiffs had a specific intent to further the unlawful ends of these organisations. The plaintiffs also argued that the statute was too vague and, hence, unconstitutional.⁸¹

Ultimately, on the question of material support, the US Supreme Court stated that it is meant to 'promote peaceable, lawful conduct ... [but] can [in fact] further terrorism by foreign groups in multiple ways.'⁸² The point was made that such 'support frees up other resources within the organization that may be put to violent ends.'⁸³ It can also add legitimacy to foreign terrorist groups that 'makes it easier for those groups to persist, to recruit members, and to raise funds – all of which facilitate more terrorist attacks.'⁸⁴ Further, the evidence presented indicated that 'terrorist groups systematically

⁷⁶ *R (on the application of JS) (Sri Lanka) (Respondent) v. Secretary of State for the Home Department (Appellant)* [2010] UKSC 15, On appeal from: [2009] EWCA Civ 364, paragraph 38. [Emphasis added.]

⁷⁷ *R (on the application of JS) (Sri Lanka) (Respondent) v. Secretary of State for the Home Department (Appellant)* [2010] UKSC 15, On appeal from: [2009] EWCA Civ 364, paragraph 44.

⁷⁸ *R (on the application of JS) (Sri Lanka) (Respondent) v. Secretary of State for the Home Department (Appellant)* [2010] UKSC 15, On appeal from: [2009] EWCA Civ 364, paragraph 44.

⁷⁹ United Kingdom, Home Office, *Proscribed Terrorist Organizations*, 12 July 2013, updated 22 December 2017, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/670599/20171222_Proscription.pdf (accessed 14 February 2018). On p. 15 it is noted that LTTE have been proscribed since March 2001.

⁸⁰ *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), 130 S.Ct. 2705, p. 4, <https://www.supremecourt.gov/opinions/09pdf/08-1498.pdf> (accessed 14 February 2018).

⁸¹ *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), 130 S.Ct. 2705, p. 5, <https://www.supremecourt.gov/opinions/09pdf/08-1498.pdf> (accessed 14 February 2018).

⁸² *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), 130 S.Ct. 2705, p. 25, <https://www.supremecourt.gov/opinions/09pdf/08-1498.pdf> (accessed 14 February 2018).

⁸³ *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), 130 S.Ct. 2705, p. 25, <https://www.supremecourt.gov/opinions/09pdf/08-1498.pdf> (accessed 14 February 2018).

⁸⁴ *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), 130 S.Ct. 2705, p. 25, <https://www.supremecourt.gov/opinions/09pdf/08-1498.pdf> (accessed 14 February 2018).

conceal their activities behind charitable, social, and political fronts.⁸⁵ Moreover, there was evidence that indicated that the PKK and the LTTE, especially, did not respect the line between humanitarian and violent activities.

Providing material support in any form would also undermine cooperative international efforts to prevent terrorism and strain the United States' relationships with its allies, including those that are defending themselves against violent insurgencies waged by foreign terrorist groups.⁸⁶

The US Supreme Court also considered the foreign policy implications and the international counter-terrorism efforts regarding the material-support statute and stated that providing foreign terrorist groups with material support in any form also furthers terrorism by straining the United States' relationships with its allies and undermining cooperative efforts between nations to prevent terrorist attacks.⁸⁷

The Supreme Court ruled that, 'We hold that, in regulating the particular forms of support that plaintiffs seek to provide to foreign terrorist organizations, Congress has pursued that objective consistent with the limitations of the First and Fifth Amendments.'⁸⁸

4.4. Comparative analysis of these three Supreme Court judgments

One of the most obvious points of comparison in these three judgments is that they all deal with applicants from Sri Lanka. This is not surprising, at least in part, given the fact that the Sri Lankan civil war lasted for decades, from 1983 to 2009,⁸⁹ and that the civil war produced thousands upon thousands of refugees during those years.⁹⁰

It is interesting to note that in all three cases the supreme courts upheld, for the most part, their respective governments' legislation that were all challenged on human rights grounds. In the *Suresh* judgment, the Supreme Court of Canada ordered a new deportation hearing for the applicant, but also found that the impugned legislation did not violate the Canadian Charter of Rights and Freedoms. Indeed, they left open the possibility that persons who were properly determined to be a 'danger to Canada' could be sent back, in exceptional circumstances, to a risk of torture and even death, despite being determined to be Convention refugees. This was truly an exceptional ruling that incurred widespread international criticism of the Canadian Supreme Court's judgment in *Suresh*. However, if the appellant's support of, and activities for, the LTTE were known prior to his refugee hearing, assuming he was actively supporting the LTTE for years, then the issue of exclusion under Article 1F would certainly have been raised and he may well have been excluded from refugee protection.

The UK Supreme Court in *JS (Sri Lanka)* did not accept that the LTTE was 'predominantly a terrorist' organization and that in order to exclude a refugee applicant it was necessary to establish that they had made a 'voluntary' and 'significant contribution' to a terrorist action or activities. The key was establishing the personal liability of the refugee applicant in an act or acts of terrorism. Membership of a terrorist organisation was insufficient to establish complicity in war crimes or crimes against humanity. In the US Supreme Court's decision in *Holder v. Humanitarian Law Project* the material-support bar was found to be constitutional and did not infringe on either First or Fifth Amendment rights. Any material support to a terrorist organisation would be sufficient to bar any applicant from refugee protection in the United States. This appears to be a far lower standard for barring someone from refugee protection than a 'voluntary' and 'significant contribution'.

The judgment that was perhaps the most exceptional among the three appears to be the *JS (Sri Lanka)* case of the UK Supreme Court. It set a new standard for excluding refugee applicants under Article 1F(a), so that it must now be shown that the refugee applicant made a 'voluntary and significant contribution' to a war crime or a crime against humanity in order to be excluded from refugee protection. This is a far higher standard for excluding someone from refugee protection than the US material-support bar.⁹¹ The US material-support bar is undoubtedly one of the lowest standards for barring anyone from refugee protection.

85 *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), 130 S.Ct. 2705, p. 25, <https://www.supremecourt.gov/opinions/09pdf/08-1498.pdf> (accessed 14 February 2018).

86 *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), 130 S.Ct. 2705, p. 5, <https://www.supremecourt.gov/opinions/09pdf/08-1498.pdf> (accessed 14 February 2018).

87 *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), 130 S.Ct. 2705, p. 27, <https://www.supremecourt.gov/opinions/09pdf/08-1498.pdf> (accessed 14 February 2018).

88 *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), 130 S.Ct. 2705, p. 36, <https://www.supremecourt.gov/opinions/09pdf/08-1498.pdf> (accessed 14 February 2018).

89 BBC News, Sri Lanka Profile – Timeline, <http://www.bbc.co.uk/news/world-south-asia-12004081> (accessed 16 February 2018); 'The Sri Lankan Civil War', *ThoughtCo*, <https://www.thoughtco.com/the-sri-lankan-civil-war-195086> (accessed 16 February 2018).

90 *Connecting with Emigrants: A Global Profile of Diasporas. Key Statistics of Diasporas from Sri Lanka* (OECD Publishing, 26 July 2012), http://www.keepeek.com/Digital-Asset-Management/oecd/social-issues-migration-health/connecting-with-emigrants/key-statistics-on-diaspora-from-sri-lanka_9789264177949-graph30-en#WodPfYPwblU (accessed 16 February 2018). There were 433,200 Sri Lankan emigrants living in OECD countries in 2005/2006.

91 The recent Canadian Supreme Court judgment in 2013 *Ezokola* adopts the UK *JS (Sri Lanka)* standard of 'voluntary, significant and knowing contribution'. *Ezokola v. Canada (Citizenship and Immigration)* 2013 SCC 40.

5. Conclusions

From the review of terrorism and international law today, the foregoing presentation and the comparative analysis of some of leading jurisprudence of the supreme courts in Canada, the UK and the USA and at the former ICTY, it is clear that the terrorism is recognised as a serious international crime in both national and international criminal law and is prohibited in international humanitarian law. The ICTY identified the 'crime of terror' within international and non-international armed conflicts to be based not only on treaties but also in customary international law. In addition, it has interpreted 'terrorising civilians' as persecution and a crime against humanity. Indeed, among the three ICTY cases presented here – *Krstic*, *Galic* and *Mladic* – all were convicted for the crime of terror and/or terrorising civilians. There is no doubt whatsoever that terrorism is prohibited in situations of armed conflict, under both international humanitarian and criminal law.

Despite there being no universally accepted definition of what constitutes terrorism and the absence of a comprehensive international convention on terrorism, there is little doubt, given the repeated resolutions of the UN Security Council, the declarations of the UN General Assembly and the 19 sectoral conventions negotiated under the auspices of the UN on different aspects of terrorism, that terrorism, irrespective of whatever laudatory goals it may claim to espouse, is clearly prohibited in international criminal law. The same holds true at the domestic level where terrorism has been criminalised within national legislation, typically, within the countries' criminal codes. While there may be a lack of consistency in terms of how terrorism is defined at the national level, there is no question as to it being a serious crime that can incur serious penalties upon conviction.

Those who apply for asylum and have been involved in terrorist activities will be excluded from refugee protection. What is anomalous for the UK and Canada is that their respective supreme courts have adopted the 1998 Rome Statute of the International Criminal Court for defining what constitutes serious international crimes for the purposes of exclusion under Article 1F of the 1951 Convention relating to the Status of Refugees, when the 1998 Rome Statute, in fact, does not include terrorism, which is now recognised as one of the most serious international crimes. Nevertheless, some would argue that it could fall under one or more of the four core international crimes: war crime, crime against humanity, genocide or even aggression. Although there are efforts underway to do so, this has yet to occur and appears to be some way off. Accordingly, the courts will have to rely on other international instruments and the ongoing development and interpretation of international humanitarian and criminal law to define what constitutes terrorism. The lack of a universal definition of terrorism and the multiple sectoral conventions that are available contribute to the existing confusion surrounding the legal definition and understanding of what constitutes terrorism. These obvious gaps and shortcomings in international humanitarian and criminal law and the divergencies at the state level is likely to continue to contribute to the confusion and conflation between terrorism and asylum.⁹²

The logical next step is to address these gaps and shortcomings in international criminal law, as they have a clear and evident impact on international refugee law, especially as it affects those who are culpable for terrorist activities.⁹³ These gaps and deficiencies in international criminal law and the lack of a comprehensive international convention on terrorism can potentially generate injustices in how the persons who claim refuge can be excluded from refugee protection for their serious criminality. This is evident especially in the majority of the instances of those who are excluded from refugee protection on the grounds of being complicit in serious international crimes.⁹⁴ These apparent gaps and shortcomings in international criminal law have a direct impact on the application of exclusion within the refugee status determination systems of states and the UNHCR, through its mandate or statutory refugee status determination system, on the international refugee protection system as a refuge for those responsible for serious criminality. If anything can delegitimise international refugee law and its system of asylum, this surely can and, accordingly, addressing these gaps and deficiencies in international criminal law dealing with terrorism should be made a priority of the UN, the UNHCR and all states in their efforts to counter the growing threat of terrorism.

92 James C. Simeon, 'Terrorism and Asylum: Unravelling the Myths', *RLI Blog on Refugee Law and Forced Migration*, Refugee Law Initiative, School of Advanced Study, University of London, 25 January 2018, <https://rli.blogs.sas.ac.uk/2018/01/25/terrorism-and-asylum-unravelling-the-myths/> (accessed 19 February 2018).

93 James C. Simeon and Sarah Singer, 'Armed Conflict, Terrorism and Asylum: Global Solutions for Global Problems?', *RLI Blog on Refugee Law and Forced Migration*, Refugee Law Initiative, School of Advanced Study, University of London, 1 November 2017, <https://rli.blogs.sas.ac.uk/2017/11/01/armed-conflict-terrorism-and-asylum-global-solutions-for-global-problems/> (accessed 19 February 2018).

94 James C. Simeon, 'Complicity and Exclusion in International Refugee Law', *RLI Blog on Refugee Law and Forced Migration*, Refugee Law Initiative, School of Advanced Study, University of London, 12 March 2018, <https://rli.blogs.sas.ac.uk/2018/03/15/complicity-and-exclusion-in-international-refugee-law/> (accessed 17 March 2018).

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