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EXCLUSION OF SUSPECTED TERRORISTS FROM ASYLUM: TRENDS IN INTERNATIONAL AND EUROPEAN REFUGEE LAW

Ben Saul*

Pressure to automatically exclude terrorists from asylum has increased since the late 1990s, including exclusion based on mere membership of terrorist organizations. Such pressure has emanated from the UN General Assembly, the Security Council, regional organizations, States and even UNHCR. Yet terrorism is not listed as a separate ground of exclusion in the 1951 Refugee Convention, and there is no internationally accepted definition of terrorist offences which could serve as a principled basis of exclusion. In the absence of an international definition, reference to terrorism in exclusion decisions endangers refugees. Exclusion must be based on an individual assessment of whether a person meets the criteria for exclusion in Article 1F of the 1951 Refugee Convention.

Soon after the Second World War, the drafters of the Refugee Convention were well aware of the security concerns of States and the Convention has always ensured that those who perpetrate serious terrorist-type acts are excluded. The 1946 Constitution of the International Refugee Organization had excluded from the IRO's mandate persons who 'participated in any terrorist organization' after the war. Yet the drafters of the Refugee Convention decided *not* to explicitly exclude terrorists, indicating that the exclusion provisions of the Convention were considered sufficient.

Terrorist-type acts will qualify as excludable acts under Article 1F if they reach an appropriate level of gravity warranting denial of protection. Yet as a UK tribunal stated in *Thayabaran*: 'The question is not whether the appellant can be characterized as a terrorist, but rather whether the words of the exemption clause apply to him'.¹ Exclusion must be based on individual responsibility and be determined on a case by case basis, according to the legal criteria specified in Article 1F—not by automatic exclusion of all suspected terrorists, which risks denying procedural fairness.

There is no international legal definition of terrorism which could be used as the basis for exclusion, and national definitions are widely divergent—potentially leading to incongruous exclusion results. Article 1F is an *international* standard which cannot be determined by reference to unilateral national definitions of terrorism. Since some national definitions criminalize relatively minor conduct, reliance on such definitions in exclusion decisions endangers refugees in need of protection. While there may indeed be cogent policy reasons for defining terrorism,² until the international community agrees on a definition, reference to the term is of little legal or practical use in excluding undeserving persons from international protection.

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¹ Quoted in *Gurung v SSHD* [2002] UKIAT 04870, 15 Oct 2002, (2002) 14 IJRL 382, para 98; see also *T v Secretary of State for the Home Department* [1995] 2 All ER 1042, [1995] 1 WLR 545; *T v Secretary of State for the Home Department* [1996] 2 All ER 865, [1996] 2 WLR 766; *Amirthalingam* (11561), 10 Nov 1994; *Nanthakumar* (11619), 22 Nov 1994; *Arulendran* (11827), 19 Jan 1995.

² See B Saul, 'International Terrorism as a European Crime: The Policy Rationale for Criminalization' (2003) 11 *European Journal of Crime, Criminal Law and Criminal Justice* 323.

UN GENERAL ASSEMBLY

General Assembly resolutions have urged States to refrain from granting asylum to terrorists and to prevent refugee status being abused by involvement in terrorist activity.³ A Declaration of 1996 provides further that any measures taken must conform with national and international law, including human rights, and should consider relevant information about whether an asylum seeker is subject to investigation for, is charged with, or has been convicted of, 'offences connected with terrorism'.⁴ Thus it is not necessary for an individual to commit acts of terrorism to be considered for exclusion from asylum or refugee status, since it is enough, for the General Assembly, that offences *connected with* terrorism are committed. The Declaration also provides that those awaiting processing of their applications 'may not thereby avoid prosecution for terrorist acts'.⁵

Resolutions of the General Assembly are only recommendatory and impose no legal obligations on States. Regardless of their status in public international law, UNHCR regards such resolutions as 'binding on UNHCR'.⁶ The 1996 Declaration implies 'an automatic link between asylum and terrorism' and suggests that refugee law does not already adequately prevent the abuse of asylum by terrorists.⁷ The Declaration does not define terrorism and therefore invites States to unilaterally (and subjectively) identify and exclude 'terrorists'.⁸ Recommending 'peremptory exclusion' of terrorists is of 'questionable propriety' in the absence of a definition.⁹

UN SECURITY COUNCIL

In Resolution 1269 (1999), the Security Council called on States to deny safe haven to those who plan, finance or commit terrorist acts (by apprehending, prosecuting or extraditing them) and to refrain from granting refugee status to terrorists.¹⁰ Resolution 1373 (2001), enacted under Chapter VII of the Charter, similarly called upon States to prevent the granting of refugee status to those who plan, facilitate or participate in terrorism, and to ensure that refugee status 'is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists'.¹¹

None of these resolutions provides any definition of terrorism for the purpose of excluding terrorists from asylum, thus conferring discretion on States to unilaterally determine who is excludable. Considering the wide range of conduct covered by national definitions, this risks excluding persons who have not committed acts grave enough to be excluded under Article 1F of the Refugee Convention.

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

⁴ 1996 UNGA Declaration, *ibid*, para 3.

⁵ *Ibid*, para 4.

⁶ M Kingsley Nyinah, 'Exclusion Under Article 1F: Some Reflections on Context, Principles and Practice' (2000) 12 *IJRL* (Special Supp) 295, 312.

⁷ Kingsley Nyinah, 312-313; 1996 UNGA Declaration, *op cit*, paras 3-4.

⁸ Kingsley Nyinah, *ibid*, 313; J Hathaway and C Harvey, 'Framing Refugee Protection in the New World Order' (2001) 34 *Cornell Intl LJ* 257, 269.

⁹ Hathaway and Harvey, *ibid*, 269.

¹⁰ UNSC Res 1269 (1999), para 4.

¹¹ UNSC Res 1373 (2001), para 3(f)-(g). UNSC Res 1377 (2001), Annexed Declaration, also underlined States' obligation to deny safe haven to terrorists.

The asylum measures in Resolution 1373 are recommendatory, not mandatory. Under Article 103 of the UN Charter, mandatory measures under Chapter VII could override existing international refugee law in the event of a conflict.¹² Though non-binding, the resolution 'reinforces the perception that the institution of asylum is somehow a terrorist's refuge' and has provoked a 'wave' of restrictive national laws.¹³ In supervising the implementation of Resolution 1373, the Security Council's Counter-Terrorism Committee has given the impression that States are required to exclude terrorists.

UN DRAFT COMPREHENSIVE ANTI-TERRORISM CONVENTION

A draft UN Comprehensive Terrorism Convention has been under negotiation since 2000, which attempts to define terrorism generically as a transnational crime. Article 7 of the UN Draft Convention proposes to require States to ensure 'that refugee status is not granted to any person in respect of whom there are serious reasons for considering that he or she has committed' a terrorist offence. While such measures must be taken 'in conformity with the relevant provisions of national and international law, including international human rights law', the aim is to exclude from refugee status persons who commit terrorist offences as defined. The preamble states that the Refugee Convention does not protect perpetrators of terrorist acts, while noting that the principle of *non-refoulement* must be complied with.¹⁴ The draft convention potentially gives rise to conflict with refugee law, where terrorist offences in the draft convention are not of sufficient gravity to warrant exclusion in refugee law.

REGIONAL MEASURES

In the Americas, the Inter-American Convention against Terrorism 2002 requires States to exclude from refugee status persons in relation to whom there are 'serious reasons' for considering that they have committed an offence in the listed international treaties (eg hijacking, hostage taking, etc). This may have the effect of automatically excluding the defence of duress for those who, for example, commit hijacking to escape persecution, where there is an imminent threat of serious unavoidable harm. Such cases occurred in the 1950s when Czechs fled communism and again in the 1990s with refugees fleeing from Iraq and Afghanistan.

In Europe, Council of Europe Guidelines of 2002 state that refugee status 'must be refused' where the State has serious grounds to believe that the asylum seeker has 'participated in terrorist activities'.¹⁵ No definition of 'terrorist activities' or what constitutes 'participation' is supplied, so it is possible that conduct which is not serious enough to warrant exclusion may be treated as excludable.

EUROPEAN UNION

In the EU, a Common Position on Combating Terrorism of December 2001 *requires* States to (1) deny safe haven and the use of EU territory to terrorists (Arts 6-7); and prevent the movement of terrorists (Art 10). It also requires States, before granting

¹² Although if non-refoulement is *jus cogens*, the lawfulness of mandatory Security Council measures requiring States to violate non-refoulement would be highly questionable.

¹³ M Zard, 'Exclusion, Terrorism and the Refugee Convention' (2002) 13 *Forced Migration Rev* 32, 32.

¹⁴ 2000– UN Draft Comprehensive Anti-Terrorism Convention, preamble.

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

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

The Common Position does not contain a definition of terrorism to be applied for the purposes of asylum determination or refugee exclusion. Presumably, the definition of terrorism in the EU Framework Decision is the operative definition of terrorism applicable. In that case, UNHCR has warned that the lesser offences in the EU Framework Decision—extortion, theft or robbery, and unlawful seizure of or damage to public facilities—may not be serious enough to activate the exclusion clauses.

An EU Commission Working Document of December 2001 states that an EU definition of terrorist offences ‘may be a basis for relying on Article 1(F)(b)’ as well as being ‘a helpful way of illuminating UN standards of... “terrorist acts” for exclusion under Article 1F. It was also suggested that the linking terrorism to the grounds of exclusion may also trigger the use of accelerated asylum assessment regimes with fewer procedural rights, allowing for the dismissal of claims as ‘manifestly unfounded’. This is despite the insistence by the European Parliament that the inclusion clauses of the Refugee Convention should be considered before exclusion clauses.

Ultimately, Article 12 of the EU Council Qualification Directive of April 2004 incorporates the exclusion clauses in the Refugee Convention into EU legislation. While Article 1F(a) of the Convention remains unchanged, Article 1F(b) is added to by the statement that ‘particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes’.¹⁶ This widens the scope of Article 1F(b) by providing a legislative basis on which to exclude atrocious crimes, beyond the text of Article 1F(b). House of Lords notes that this ‘plainly affords a narrower ground for claiming asylum’ (*Sepet* [2003]).

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

The EU Directive on Minimum Procedures of April 2004 permits States to prioritize or accelerate determination procedures if an applicant ‘clearly does not qualify’ as a refugee under the Qualification Directive or is a danger to national security or public order (Art 23(4)).¹⁷ According to the interpretive recital in the Qualification Directive, this allows asylum claims of suspected terrorists to be expedited. In such cases, an application may be considered ‘manifestly unfounded’.¹⁸ Yet elementary considerations

¹⁶ EU Council Qualification Directive (2004), Art 14(2)(b).

¹⁷ EU Council Directive on Minimum Procedures (2004), Arts 23(4)(b) and Art 23(4)(l) respectively.

¹⁸ *Ibid*, Art 29(2).

of procedural fairness require that the claims of suspected terrorists must be considered in the same manner as all other claims.¹⁹ Exclusion should only be based on an individualized determination of an individual's personal circumstances and a full and proper assessment of all the evidence.²⁰

Recent EU legislation also conflates the exclusion clauses in Article 1F of the Refugee Convention with withdrawal of status on security grounds in Article 33(2). Article 14(5) of the EU Qualification Directive permits refugee status to be refused on grounds equivalent to those in Article 33(2) of the Convention. This blurring is incompatible with the Refugee Convention. Whereas Article 1F concerns historical acts,²¹ Article 33(2) focuses on the future risk posed by an individual,²² although past acts may be evidence of future risk. The wider scope of Article 33(2) cannot lawfully be used as a fourth exclusion clause supplementing Article 1F.

ARTICLE 1F OF THE 1951 REFUGEE CONVENTION

Under Article 1F(a) of the Refugee Convention, exclusion is required where there are serious reasons for considering that a person has committed a crime against peace, war crime, or crime against humanity. Terrorism is unlikely to constitute a crime against peace (aggression), which must typically be committed by State organs, agents or officials, and in any case there have been no prosecutions for crimes against peace since the Nuremberg trials after the Second World War.²³

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

International definition of terrorist offences would only be relevant to Article 1F(a) if the text of the provision were amended to exclude terrorist crimes, or alternatively if any international terrorism offence was classified as a crimes against humanity.

Under Article 1F(b) of the Refugee Convention, refugee status cannot be granted to a person where there are 'serious reasons' for considering that 'he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee'. There is little international agreement on meaning of the terms

¹⁹ Lawyers Committee for Human Rights, 'Safeguarding the Rights of Refugees under the Exclusion Clauses' (2000) 12 IJRL (Special Supp) 317, 334.

²⁰ M Bliss, 'Serious Reasons for Considering': Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses' (2000) 12 IJRL (Special Supp) 92, 130-131.

²¹ *Indra Gurung v Secretary of State for the Home Department* [2002] UKIAT 4870, 14 Oct 2002; [2003] Imm AR 115; [2003] INLR 133 (Collins J, A Mackey, HH Storey), para 102.

²² UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 4 Sept 2003, HCR/GIP/03/05; (2003) 15 IJRL 492; para 4.

²³ The crime of aggression is included in the Rome Statute of the International Criminal Court (Art 5) but is yet to be defined at a future codification conference.

'serious', 'criminal' and 'non-political'. Many national courts draw by analogy on the 'political' offence exception in extradition law, which is clearly related to Article 1F(b), but they are not identical in scope. Whereas extradition law is largely a product of national and bilateral law, and therefore highly variable, Article 1F(b) is an *international* law treaty provision.

Is terrorism serious, criminal, and non-political? The position is different in different national legal systems. There is still no binding international agreement on the definition of terrorism. But regional treaties, the UN General Assembly and Security Council, and national criminal laws in many States all regard terrorism as serious and criminal. Recently, the UN Terrorist Financing Convention and the UN Terrorist Bombings Convention both included provisions excluding their respective offences from the political offence exception in extradition law (though they are silent in relation to refugee status).

Tests used by different courts to determine whether an offence is political include whether violent acts are proportionate and proximate (not too remote), whether indiscriminate violence or atrocious or particularly cruel means are used etc. Terrorist acts often fail these tests for being disproportionate, remote, barbarous and so on. It is not certain, however, that terrorist acts will always fail the test, particularly where terrorist acts are a response to severe and systematic State repression, where there is an irreconcilable asymmetry of resources between the State and its opponents, and all other means of redress have failed. Defences of duress and necessity are relevant.

Recently, some courts have used the term 'terrorism' to characterise acts as non-political, as a less subjective and judgmental test than the tests described above. In *T v Home Secretary* (1996), Lord Mustill said in the UK House of Lords that:

criteria such as remoteness, causation, atrociousness and proportionality seem too subjective to found the consistency of decision which must surely be essential in a jurisdiction of this kind. By contrast, once it is made clear that terrorism is not simply a label for violent conduct of which the speaker deeply disapproves, the term is capable of definition and objective application.²⁴

Lord Mustill invoked the 1937 League of Nations Terrorism Convention definition as 'serviceable', that is: 'criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public'.²⁵ Lord Slynn agreed with that definition, adding that terrorism may also include acts 'likely to cause, injury to persons who have no connection with the government of the state', though that definition was not intended to be exhaustive.

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

²⁴ *T v Home Secretary* (1996) (Lord Mustill), *op cit*.

²⁵ For an analysis of the 1937 League of Nations Convention, see B Saul, 'The Legal Response of the League of Nations to Terrorism' (forthcoming 2005, *Journal of International Criminal Justice*).

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

In contrast, other courts have been more sceptical of using terrorism until it is defined. As stated by the UK Immigration Appeals Tribunal in *Gurung*:

until such time as we have an accepted international definition of terrorism and one which clearly matches up with definitions contained within sub-clauses of Art 1F, it remains important to note material differences between Art 1F offences and terrorist offences. Regular use of the concept of terrorism as a tool for identifying crimes contrary to Art 1F must await definitive codification by the international community.²⁶

In *Singh*, Justice Gaudron of the Australian High Court similarly stated of terrorism that 'such descriptions are imprecise and may, on that account, involve oversimplification. Moreover, and more to the point, they find no expression in the text of the Convention itself.'²⁷

The European Council for Refugees and Exiles has called for the international definition of terrorism for clarity in relation to the exclusion clauses. UN The Comprehensive Anti-Terrorism Convention could, for instance, include a provision depoliticizing terrorism and regarding it explicitly as non-political for the purposes of Article 1F(b). The definition of terrorist offences would have to be appropriately narrow so that minor conduct does not give rise to exclusion. Department of Justice statistics in the United States show that most terrorist convictions since 2001 in the US have resulted in prison sentences of 12 months or less, suggesting that terrorist offences in that country are capturing relatively minor conduct.

Under Article 1(F)(c) of the Refugee Convention, refugee status cannot be granted to a person where there are 'serious reasons' for considering that 'he has been guilty of acts contrary to the purposes and principles of the United Nations'. UN purposes and principles are specified in Articles 1 and 2 of the UN Charter, but are dynamic not static, but they are very broad and vague, for example: peace and security, friendly relations among states, self-determination, and international cooperation. While UNHCR does not regard this provision as an independent ground, courts disagree. Yet due to the vagueness and potential for abuse, it should be interpreted restrictively.

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

²⁶ *Gurung*, op cit, para 100.

²⁷ *MIMA v Singh* [2002] HCA 7 (Gaudron J).

Certainly a number of UN General Assembly and Security Council resolutions have regarded terrorism as contrary to UN purposes and principles. Although these resolutions are non-binding, questions have been raised about whether these political organs are competent to 'reinvent' UN purposes and principles. It can, however, be more plausibly argued that these resolutions are merely interpreting the scope of the Charter, rather than inventing new principles and purposes.

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

TERRORISTS AS EXCLUDABLE NON-STATE ACTORS

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

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

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

it can no longer be said that individuals without any connection to the state, especially those involved in paramilitary or armed revolutionary movements, can be immune from the reach of international criminal law. On the contrary, they are now governed by it.²⁸

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

MEMBERSHIP OF TERRORIST ORGANIZATIONS

Exclusion is based on individual responsibility. Different types of individual responsibility include committing, ordering, soliciting, inducing, aiding, abetting, attempting to commit crime, and contributing to a common purpose (Rome Statute of the ICC, Art 25), as well as command responsibility in armed conflict.

Mere membership of a terrorist organization is not sufficient to exclude an individual, and personal and knowing participation in excludable crimes is necessary. However, exclusion may be based on complicity, the test for which was established in the Canadian case of *Ramirez*: (1) voluntary membership in a violent, criminal organization; (2) personal and knowing participation in its acts; and (3) failure to disassociate from the group at the earliest safe opportunity.

In addition to establishing responsibility for complicity, the court in *Ramirez* stated more controversially that 'where an organization is principally directed to a limited,

²⁸ *Sivakumar v Canada (Minister of Employment and Immigration)* (CA) [1994] 1 FC 433.

brutal purpose, such as a secret police activity, mere membership may by necessity involve personal and knowing participation in persecutorial acts'. Similarly in *Gurung*, a UK tribunal found that membership may almost be sufficient for exclusion.

After 11 Sept 2001, UNHCR stated that proof of voluntary membership of an notoriously violent group (including terrorism) gives rise to a rebuttable presumption of personal and knowing participation in the group's activities. This reverses the burden of proof and is now part of UNHCR's revised exclusion guidelines. The presumption will be particularly strong where the individual is in a position of authority in the organization, and where the organization uses terrorist methods.

Factors considered relevant to rebutting the presumption include: voluntariness of membership, the role and position of the individual in the organization and ability to influence it, the actual activities of the group and of the individual, and the fragmentation of groups and loss of control over parts of the group. Disassociation is not required if the person would encounter serious personal risk.

Clearly, there is a danger that the application of the presumption will lead to automatic and peremptory exclusion. This would be a denial of procedural fairness. Exclusion must only occur following consideration of an individual's personal responsibility. There are also a number of other serious difficulties with presumptions of personal and knowing participation based on membership of a group.

Firstly, who is a member? Unlike members of Nazi criminal organizations, members do not carry membership cards and there are no membership lists. Does it include persons who support the humanitarian activities of violent organizations with mixed charitable purposes? In *Suresh*, members were defined to include *associates of members* – a circular definition which results in an infinite regression of exclusion based on tenuous links, such as the exclusion of family, friends, teachers and so on.

Secondly, how are terrorist organizations identified? UNHCR suggests that both international lists (provided by the Security Council) *and* national lists are relevant. Yet national lists are open to political manipulation by governments against their opponents, are influenced by foreign policy considerations, and different States have very different definitions of terrorism. This may lead to inappropriate exclusions.

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

Other factors are also relevant to assessing the legitimacy of the organization: its public support, democratic objectives, resistance against oppression, use of limited means, the targets of violence, whether violence is used as last resort after exhausting peaceful means of redress, and qualification for combatancy in armed conflict.

Yet it is questionable whether courts and judges, let alone front-line decision-makers, can easily make such complex judgments. Factors such as the conditions of combatancy in armed conflict are objectively verifiable by reference to treaty

provisions and customary rules, and norms of proportionality are also recognized. Yet it is far more difficult for a court to assess more subjective matters such as the existence of the rule of law in another State, the availability of peaceful means of redress and whether such means have been exhausted, and the gravity of oppression necessary to justify violent resistance. Although human rights standards provide some guidance, the factual judgments involved are extremely difficult. Many of these factors are non-justiciable political questions, with no applicable legal standards.

The United States legislation has gone farthest in automatically excluding persons from applying for asylum if they if they are representatives of a designated foreign organization engaged in terrorist activity which threatens the security of the US or its nationals. Terrorism is broadly defined by national law. Statutory bars based on membership of proscribed organizations undermine basic standards of procedural fairness, because exclusion is not based on an determination of personal involvement in, and individual responsibility for, specific excludable conduct.

EXPULSION OF REFUGEES: ARTICLE 33(2)

Under Article 33(2), *non-refoulement* 'may not... be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country'. This provision on withdrawal of protection is distinct from Article 1F exclusion clauses, though State practice sometimes confuses them. Indeed, Article 14(5) of the EU Qualification Directive provides that the grounds for withdrawal of protection in Article 33(2) of the Refugee Convention may be used as a basis for excluding persons *before* they are granted refugee status. This effectively establishes a fourth exclusion clause.

Persons subject to expulsion under Article 33(2) are still entitled to complementary forms of human right protection, such as the prohibition on return to torture. As the European Court of Human Rights stated in *Chahal*:

Article 3 enshrines one of the most fundamental values of democratic society.... The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.... Article 3 makes no provision for exceptions and no derogation from it is permissible... even in the event of a public emergency threatening the life of the nation...²⁹

International treaties (such as the ICCPR and the Torture Convention) only prevent refoulement to *torture*, but not return to inhuman and degrading treatment or punishment. This has allowed States to 'contract out' ill-treatment of detainees to less scrupulous States, for interrogation purposes.³⁰ Recent research by Human Rights Watch has shown that diplomatic assurances have failed to protect deportees from ill-

²⁹ *Chahal*, para 79, citing *Soering*, 34, para 88; *Ireland v UK*, 18 Jan 1978, Series A no. 25, p. 65, para 163; *Tomasi v France*, 27 Aug 1992, Series A, no 241-A, 42, para 115.

³⁰ See B Saul, 'Torturing Terrorists After September 11: Dershowitz' Torture Warrant' (forthcoming 2004, International Journal of Law & Psychiatry).

treatment in many jurisdictions involved in the ‘war on terror’.³¹ Suspected terrorists are particularly at risk of torture, including while in the custody of rights-respecting liberal democracies. There has also been pressure to weaken the absolute character of the prohibition on return to torture, such as a proposed judicial ‘torture warrant’.

Further, in *Suresh*, a Canadian court found that deportation of a suspected terrorist to torture might be justified ‘in exceptional circumstances’ of State security. The decision is contrary to international law, because the absolute prohibition leaves no room for ‘balancing’ the risk of torture against national security interests. Yet this view received support from the EU Commission in a Working Paper after 11 September 2001, which stated that

the European Court of Human Rights may in the future again have to rule on questions relating to the interpretation of Article 3, in particular on the question in how far there can be a ‘balancing act’ between the protection needs of the individual, set off against the security interests of a state.³²

This was considered particularly relevant to the ‘unresolved’ legal position of persons excluded from protection but who are not removable,³³ especially given the use of indefinite detention by some States.³⁴ Such a view seeks to undermine the absolute nature of the existing prohibition on torture.

APPLICABILITY OF NON-DISCRIMINATION CLAUSES?

While some writers argue that the non-discrimination clauses found in extradition law should apply to exclusion decisions in refugee law, such application is logically incompatible with the structure of the Refugee Convention. Article 1F intentionally permits return to persecution for persons considered undeserving or unworthy of protection. Since discrimination is a form of persecution, to apply non-discrimination clauses to an excluded person would defeat the purpose of Article 1F, allowing excluded persons a second chance to prove persecution.

This problem illustrates that the denial of protection in refugee law to persons because they are ‘unworthy’ is outdated given developments in modern human rights law. Human rights are *rights*, not privileges, and cannot be taken away for bad behaviour. While the human rights of serious domestic criminals may be limited on objective, public interest grounds (eg, imprisonment is a legitimate restriction on freedom of movement), a serious domestic criminal cannot be racially vilified or sexually harassed—unlike persons excluded from refugee status who may be returned to such treatment. Domestically, States do not permit criminals to face persecution or discrimination simply because they become ‘undeserving’ of protection. Perhaps it is time to revise the Refugee Convention to more fully respect human dignity.

Decisions not to exclude a person, or to offer them complementary protection, do not result in impunity for serious criminals. For treaty crimes of quasi-universal

³¹ Human Rights Watch, ‘Empty Promises: Diplomatic Assurances No Safeguard against Torture’, Washington DC, April 2004: hrw.org/reports/2004/uno404 (18 June 2004).

³² EU Commission Working Document, *The Relationship Between Safeguarding Internal Security and Complying with International protection obligations and instruments*, COM (2201) 743 final, 5 Dec 2001, para 2.3.1.

³³ *Ibid*, para 2.4.

³⁴ Anti-Terrorism, Crime and Security Act 2001 (UK), ss 21-33.

jurisdiction, such as hijacking or hostage taking, prosecution in the State of refuge may be an alternative to return to persecution. Prosecution before the ICC or ad hoc criminal tribunals may also be a possibility. However, impunity may occur in a narrow range of cases, where persons are not returnable but no extraterritorial basis of jurisdiction exists. Although the *aut dedere aut judicare* principle has expanded to cover an increasing range of serious crimes, it does not necessarily apply to all excludable acts under Article 1F. Yet since September 11, States have increasingly asserted universal jurisdiction over terrorist offences (as defined in national law), so the scope of unpunishable conduct has narrowed significantly.

CONCLUSION

There is little evidence that international refugee law has been misused by suspected terrorists to gain admission to other States or as a means of safe haven. None of the 11 September 2001 hijackers was a refugee or asylum seeker.³⁵ As the Howard League of Penal Reform wrote to the League of Nations in the 1930s, of the one and a quarter million refugees from the Russian and former Turkish empires assisted by the League, there was only one recorded terrorist case.³⁶

Terrorists are far more likely to pursue illegal migration channels to infiltrate a State than to use asylum procedures. Asylum seekers are subject to rigorous identity and security checks, document verification, administrative scrutiny and suspicion of credibility, and, in some States, mandatory administrative detention.³⁷

It is important to reject unwarranted linkages between terrorists and asylum.³⁸ Refugee law does not provide safe haven for terrorists and does not prevent prosecution of suspects.³⁹ As UNHCR notes, 'any discussion on security safeguards should start from the assumption that refugees are themselves escaping persecution and violence—including terrorist acts'.⁴⁰ Attention should focus on the security of refugees themselves, not just the security threats posed by refugees.⁴¹



³⁵ G Gilbert, 'Protection After September 11th' (2003) 15 IJRL 1, 1; Zard, *op cit*, 32.

³⁶ Letter from the Howard League for Penal Reform (London) to the Secretary General of the League of Nations, 27 Mar 1935, LoN Archives Geneva Doc 3A/15105/15085/VI.

³⁷ Australia detains all asylum seekers arriving in Australia without permission: M Crock and B Saul, *Future Seekers: Refugees and the Law in Australia* (Federation Press, Sydney, 2002), 75-98.

³⁸ R Lubbers, 'Message to the Special Meeting on Terrorism and International Law at the International Institute of Humanitarian Law', San Remo, 30 May 2002; Kingsely Nyinah, 312; M Zard, 'Exclusion, Terrorism and the Refugee Convention' (2002) 13 FMR 32, 33; UNHCR Background Note, para 84.

³⁹ V Turk, 'Forced Migration and Security' (2003) 15 IJRL 113, 114, 118.

⁴⁰ Lubbers, *op cit*.

⁴¹ Turk, *op cit*, 113, 122; UNHCR, *Agenda for Protection* (2nd ed, Geneva, 2003), Goal 4, 66-69.



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