

WORKING PAPER SERIES

[Paper 2 of 2014]

University of Cape Town: Refugee Rights Unit

Excluding Terrorists under the United Nations Convention on the Status of Refugees

Author: Kate Dodgson



Working Paper

2014

The UCT Refugee Rights Unit Working Paper series publications are available for download on our website at: www.refugeerights.uct.ac.za



This work is licensed under the **Creative Commons Attribution-Share Alike 2.5 South Africa License**.

To view a copy of this license, visit <http://creativecommons.org/licenses/by-sa/2.5/za/>

All copies of this working paper must have this license information. You are permitted to modify this working paper but all modified versions must be use a Creative Commons Attribution Share Alike 2.5 or later licence and must bear the following attribution information as well as the name of the author, and title of the paper.

This research paper was submitted towards the completion of the Refugee Law and Human Rights course at the University of Cape Town. Please send comments to the author on this working paper to Refugee Rights Unit at refugeelawclinic@uct.ac.za

Introduction

The article 1F exclusion clause in the 1951 United Nations Convention on the Status of Refugees (“UN Convention”) is the most extreme sanction of international refugee law.¹ It bars the applicant from all the protections offered to refugees, including that of *non-refoulement*. The purpose of 1F is to exclude persons whose conduct means that their admission as a refugee threatens the integrity of the international refugee regime. It should be distinguished from the advancement of host state safety and security, a matter addressed by Article 33(2) of the UN Convention.² However, this distinction becomes very blurred on the issue of terrorists and terrorist activities, particularly post 9/11.

September 11 had a huge impact on State safeguards regarding terrorism which dramatically effected asylum regimes. Detention grounds for asylum seekers were expanded and exclusion clauses were applied more extensively than international law permitted.³ This is despite the fact that no refugees were involved in September 11.⁴ Following the attacks, the United Nations Security Council immediately passed resolutions expressly noting that the protection afforded by the UN Refugee Convention and its Protocol shall not extend to any person with respect to whom there are serious reasons for considering that he has been guilty of acts contrary to the purposes and principles of the United Nations.⁵ Security Council Resolution 1377 specifically describes terrorism as such an act.⁶

However, despite the outright and uniform condemnation of terrorism, there is no international definition of what it constitutes.⁷ It remains the prerogative of States to decide who is excludable from refugee status as a terrorist,⁸ and following 9/11, States have done so broadly

¹ M Zard ‘Exclusion, Terrorism and the Refugee Convention’ (2002) 13 *FMR* 32, 33.

² **‘Michigan Guidelines on the Exclusion of International Criminals’ (2014) 34 MJIL 4, para 4.**

³ G Goodwin-Gill & J McAdam *The Refugee in International Law* 3rd ed (2007) 416–417.

⁴ Zard op cit (n2) 32.

⁵ Goodwin-Gill op cit (n3) 417.

⁶ United Nations Security Council, Resolution 1377 (2001) UN Doc. S/RES/1377, 2.

⁷ B Saul ‘Exclusion of Suspected Terrorists from Asylum: Trends in International and European Refugee Law’ Institute for International Integration Studies (IIIS) Discussion Paper, Dublin, Trinity College, No. 26, Jul. 2004, 1.

⁸ R Bruin & K Wouters ‘Terrorism and Non-derogability of Non-refoulement’ (2003) 13 *IJRL* 1, 7.

and far-reaching.⁹ This is problematic as ‘one man’s terrorist is another man’s freedom fighter’ and a broad definition risks a blanket exclusion for all those deemed ‘terrorists’ rather than the proscribed individual case-by-case assessment.¹⁰

This essay will focus on how various common law states have interpreted the exclusion clause to exclude terrorists, and how the lack of an international definition of terrorism adversely effects the correct application of Article 1F. It purports to answer the following questions:

- What is the purpose and function of the 1F exclusion clause?
- What is terrorism, who are terrorists, and how has the international community interpreted these concepts?
- How have States have used their ‘definitions’ of these concepts to fit within the different subsections of article 1F?
- Once terrorism has been deemed an excludable offence by a state, how then have they assessed individual culpability and complicity of the ‘terrorist’?
- What happens when a person is granted refugee status but is subsequently deemed a terrorist?

The purpose and function of the 1F exclusion clause

Article 1F of the UN Convention seeks to exclude applicants who are un-deserving of refugee status. Applicants are considered undeserving if there are serious reasons to consider 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.

⁹ Zard op cit (n1) 33.

¹⁰ Saul op cit (n7) 8.

There are several issues raised by the wording of this exclusion clause. For example, what constitutes ‘serious reasons to consider?’ ‘Serious reasons’ sets the standard in both fact and law that must be met in an exclusion decision, and thus has both an evidentiary and a substantive role.¹¹ According to the United Kingdom guidelines to Article 1F, ‘serious reasons’ requires evidence that is not tenuous or inherently weak or vague, and which supports a case built around more than mere suspicion or speculation.¹² Goodwin-Gill argues that this test is less than the balance of probabilities.¹³ Australian courts have found that the receiving state need not ‘make a positive or concluded finding about the commission of the crime,’¹⁴ nor is it necessary to identify and particularise every element of an offence before article 1F can be relied upon.¹⁵

Subsections (a) and (b) of article 1F use the word ‘committed’ which poses the question whether or not the applicant must have been convicted of such a crime. The United Nations High Commissioner for Refugees (“UNHCR”) and case law from common law countries, shows that there is no such requirement. In an Australian case, the Judge distinguished 1F(a) and (b)’s ‘committed’ from Article 33(2) which uses the word ‘convict’ to support this interpretation.¹⁶

The Michigan Guidelines to Article 1F instruct that in order to determine whether a person has ‘committed’ a crime, the decision maker must first identify the pertinent mode of liability, and then carefully assess the applicable *actus reus*, *mens rea*, and defences.¹⁷ Modes of liability include committing the crime; ordering, soliciting, or inducing the crime; and aiding, abetting, or otherwise assisting in the commission of the crime. Defences vary according to jurisdiction, but commonly include self defence, duress or coercion, superior orders and automatism. It is therefore clear that ‘has committed a crime’ is broader than it initially appears.

While States have to assess whether there are ‘serious reasons’ for considering that a person has ‘committed’ a crime, the most problematic part in relation to terrorism and exclusion is, what is terrorism, and how does it fall under the exclusion clause?

¹¹ Michigan Guidelines op cit (n2) para 12.

¹² *Asylum Instruction: Exclusion Article 1F of the Refugee Convention* (2012) United Kingdom Visas and Immigration https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257429/exclusion.pdf, (“UK Guidelines”) 5.

¹³ Goodwin Gill op cit (n2) 97.

¹⁴ *Hayakpa v MIEA* (1995) 62 FCR 556; *Arquita v MIMA* [2000] FCA 1889 at para 53.

¹⁵ *Ovcharuk v. MIMA* (1998) 1414 FCA.

¹⁶ *YYMT and MQCR and Minister for Immigration and Citizenship* [2010] AATA 447 at 22.

¹⁷ Michigan Guidelines op cit (n2) para 8.

Terrorism, Terrorist Groups, and Terrorists

There is no international consensus on what constitutes terrorism, what a terrorist group is, or who a terrorist is.

The drafting of a comprehensive international treaty on terrorism started in 2000 and is still being debated.¹⁸ The current definition in the Draft Convention describes terrorism as an offence involving death, serious bodily harm or serious damage to property 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 to abstain from doing any act. It includes threats of these acts, participation, organization and contribution towards them.¹⁹ Rene Bruin and Kees Wouters after examining other various international treaties (and regional documents) that include terrorist offences concluded that ‘terrorism is a collective term for a number of serious offences for which persons should be prosecuted. By focusing on the act rather than the actor, an objective legal concept is created by which the difficult issue of terrorism versus freedom fighting can be resolved.’²⁰

However, even if there was an exhaustive list of offences that constitutes terrorism, who then is a terrorist?

A common way of defining a terrorist, is someone who is a member of an international terrorist organization. In the United Kingdom, people are considered terrorists even if they have ‘links’ with an international terrorist group.²¹ Links are defined as existing if such a person ‘supports or assists’ such a group.²² This is problematic as organisations that have been declared terrorist may also have charitable and humanitarian services, and under the USA-PATRIOT Act, people seeking refuge in the United States who have provided material support to these services are also

¹⁸ Ad Hoc Committee established by the General Assembly resolution 51/210 of 17 December 1996 available at: <http://legal.un.org/terrorism/index.html>.

¹⁹ United Nations Draft Comprehensive Convention against International Terrorism, UN Doc A/59/894, Article 2.

²⁰ Bruin & Wouters op cit (n8) 15.

²¹ *Anti-Terrorism, Crime and Security Act of 2001* (United Kingdom) Article 21(2)(c).

²² *Ibid* Article 21(4).

deemed to be terrorists.²³ A further difficulty in defining terrorists this way is that ‘members do not carry membership cards and there are no membership lists. Decentralized, clandestine operations are a hallmark of modern terrorist groups.’²⁴ Additionally, states may simply declare opposition groups as terrorist organisations, and they may fail to account for the variety of non-justiciable factors which bear on the legitimacy of an organization: its public support; its democratic aims, whether it is resisting severe oppression; its use of limited means or the confinement of targets; whether violence is proportional and used as a last resort; and whether there is any entitlement to combatancy in armed conflict.²⁵ In the United States, terrorist activities can be attributed to people who are not even members of deemed terrorist organisations for activities such as the use of a weapon or ‘other dangerous device’ to cause ‘substantial damage to property’. This could deem members of activist organisations such as Greenpeace as terrorists.²⁶

International condemnation of terrorism

Despite there being no definition of terrorism, the international community has frequently condemned it, and has specifically called on states to not grant asylum to terrorists. The General Assembly did so through a number of non-binding recommendations,²⁷ as did the Security Council through their binding resolutions. In binding 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.²⁸ In Resolution 1373 (2001), the Security Council made similar comments, but further required States 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’.²⁹ Resolution 1377 of 2001

²³ *Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act* (otherwise known as the USA-PATRIOT Act) (2001) H.R. 3162.

²⁴ J Simeon ‘Complicity and Culpability and the Exclusion of Terrorists from Convention Refugee Status Post 9/11’ (2011) 29(4) *Refugee Survey Quarterly* 104, 118.

²⁵ B Saul ‘Protecting Refugees in the Global ‘War on Terror’’ (2008) *IJR* 11.

²⁶ *Zard op cit* (nl) 33.

²⁷ United Nations General Assembly, Resolution 49/60 (1994) UN Doc A/Res/49/60, para 5(f); United Nations General Assembly, Resolution 51/210 (1996) UN Doc A/Res/51/210, annexed Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, para 3.

²⁸ UN doc S/Res/1269 (1999) para 4.

²⁹ UN doc S/Res/1373 (2001) para 3(f)-(g).

“Declares that acts of international terrorism constitute one of the most serious threats to international peace and security in the twenty-first century, Further declares that acts of international terrorism constitute a challenge to all States and to all of humanity, Reaffirms its unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed, Stresses that acts of international terrorism are contrary to the purposes and principles of the Charter of the United Nations, and that the financing, planning and preparation of as well as any other form of support for acts of international terrorism are similarly contrary to the purposes and principles of the Charter of the United Nations.”³⁰ This is crucial, as the Security Council declared terrorism and terrorists to fall directly under Article 1F(c) of the UN Convention – exclusion for acts contrary to the purposes and principles of the United Nations.

Inter-regional documents also contain similar sentiments. 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 (ie. hijacking, hostage taking).³¹ The 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,’³² and the European Union Common Position on Combating Terrorism of December 2001 requires states to (1) deny safe haven and the use of European Union territory to terrorists,³³ (2) prevent the movement of terrorists,³⁴ (3) before granting refugee status, ensure that an asylum seeker has not ‘planned, facilitated or participated in the commission of terrorist acts,’³⁵ (4) ‘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.’³⁶ It should be noted, however, that the European Union does not provide a definition for terrorism.³⁷

³⁰ UN Doc. S/RES/1377 (2001).

³¹ Saul op cit (n7) 3.

³² Council of Europe, ‘Guidelines on human rights and the fight against terrorism’ 15 July 2002, paragraph XII(1).

³³ EU doc. 2001/930/CSFP (28 Dec 2001) Articles 6-7.

³⁴ Ibid, Article 10.

³⁵ Ibid, Article 16.

³⁶ Ibid, Article 17.

³⁷ Saul op cit (n7) 3-4.

UNHCR on terrorism

The UNHCR Guidelines on International Protection: Application of the Exclusion Clauses,³⁸ contains two articles specifically relevant to terrorism. Article 25 acknowledges that despite there being no definition of terrorism, acts considered ‘terrorist’ are likely to fall within the exclusion clause. It warns that 1F should not be considered an anti-terrorism measure, but further states that terrorists should not really qualify as refugees under 1A in the first place, as they are likely fleeing prosecution in their homeland, rather than persecution. This attempt to avoid applying the exclusion clause is not very helpful in practice, particularly as some countries such as Australia, tend to apply 1F considerations before a 1A assessment.³⁹ It also assumes that the ‘terrorist’ is not a freedom fighter, and the country the ‘terrorist’ is fleeing from has fairly and lawfully deemed the person a terrorist, and has a legitimate and functioning legal system.

Article 26 is a reminder to states that terrorism and terrorists should not be automatically excluded: ‘The fact that an individual is designated on a national or international list of terrorist suspects (or associated with a designated terrorist organisation) should trigger consideration of the exclusion clauses but will not in itself generally constitute sufficient evidence to justify exclusion. Exclusion should not be based on membership of a particular organisation alone, although a presumption of individual responsibility may arise where the organization is commonly known as notoriously violent and membership is voluntary. In such cases, it is necessary to examine the individual’s role and position in the organisation, his or her own activities, as well as related issues.’ However, as previously mentioned, state practice has been for automatic exclusion for persons ‘linked’ with terrorist groups.

How then, have States been justifying exclusion based on article 1F? The UNHCR seems to envisage that most exclusions based on terrorism will fall under 1F(b) and (c), however, as will be examined, 1F(a) has and can also be used.

³⁸ UN Doc. HCR/GIP/03/05 (4 Sep. 2003).

³⁹ For example, in the Australian case of *YYMT and MQCR and Minister for Immigration and Citizenship [2010] AATA 447*, the Judge stated at [15]: ‘It is accepted that there need be no initial determination whether a person claiming protection under the Refugees Convention is a person coming within Art 1A [while considering if they should be excluded under 1F]’.

Articles 1F(a), (b), and (c)

1F(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.”

Crimes against peace, war crimes and crimes against humanity all come under the umbrella of international criminal law. When the UN Convention refers to “international instruments”, the UNHCR Handbook guides readers to the crimes enumerated in the London Charter of the International Military Tribunal.⁴⁰ However, since the Handbook was drafted, there have been many more international instruments with more detailed crimes. For example; the four Geneva Conventions of 1949, its Additional Protocols 1977, the Genocide Convention 1948, the Crimes Against the Peace and Security of Mankind 1984, International Criminal Tribunals for the former Yugoslavia and Rwanda statutes, and the Rome Statute of the International Criminal Court.

Crimes against peace are now commonly referred to as crimes of aggression. As crimes of aggression can effectively only be committed by states, state organs and its officials, it is unlikely terrorism will be considered a crime of aggression.⁴¹

War crimes, which are mostly enunciated in the Rome Statute, Geneva Conventions, and International Customary Law, do mention acts of terrorism. For example, in the Geneva Conventions: Protocol I at Article 51(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.” Protocol II at Article 4 says explicitly: “...prohibited at any time and in any place whatsoever: [. . .] (d) acts of terrorism”.

International case law has shown that acts of terror may constitute war crimes if they are deliberate indiscriminate acts on civilians or involve hostage taking.⁴² The International Criminal Tribunal for the former Yugoslavia was the first international court to recognize acts of

⁴⁰ United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (1979) UN Doc. HCR/IP/4/Eng/REV.1 at 150.

⁴¹ Saul op cit (n7) 5.

⁴² Ibid.

terrorism as a war crime. In the *Galic* trial, it was found that sniping and shelling on civilians in Sarajevo was intended to spread terror and constituted a war crime.⁴³

During peace-time, similar offences can be deemed crimes against humanity.

1F(b)

“He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.”

This provision mirrors that of section 14(2) of the Universal Declaration of Human Rights, and has been described as the most complex exclusion clause provision to interpret and apply.⁴⁴

States need to determine whether they consider an act of terrorism to be serious, criminal and non-political. State practice has shown that many do.⁴⁵

‘Serious’: There is no list in the UN Convention of what constitutes a serious crime. Paragraph 155 of the UNHCR Handbook states that a serious crime is one that is a capital crime, or a very grave punishable act. However, the United Kingdom has interpreted this far more broadly and deems any offence that would invite a 12 month prison sentence (if committed in the United Kingdom) as a serious offence.⁴⁶ Canada on the other hand, has indicated that it considers crimes for which an offence may be punishable by a maximum term of at least 10 years to be a ‘serious’ crime.⁴⁷ However, the judge in *Jayasekara* held that the following factors are the relevant determinants of the seriousness of the crime: elements of the crime; the mode of prosecution; the penalty prescribed; the facts, and the mitigating and aggravating circumstances underlying the conviction.⁴⁸

Non-political: In the UK, a crime will be ‘non-political’ if, broadly speaking, it was committed essentially for personal reasons or gain and no political motives were involved; or where the crime might have been politically motivated but the crime committed was wholly

⁴³ *Prosecutor v Stanislav Galic* (2003) IT-98-29, 594.

⁴⁴ *Zard* op cit (n1) 34.

⁴⁵ *Saul* op cit (n7) 5-7.

⁴⁶ UK Guidelines op cit (n12) 5.2.

⁴⁷ *Jayasekara v. Canada (Minister of Citizenship and Immigration)* [2009] 4 F.C.R. 164 (F.C.A.); 2008 FCA 404 at 40.

⁴⁸ *Ibid.* In this case the Court noted that the claimant's conviction in the U.S. for trafficking in opium (a first offence) gave it serious reasons to believe that the claimant had committed a serious non-political crime.

disproportionate to the claimed political objective.⁴⁹ Further, under Article 12(2)(b) of the Qualification Directive,⁵⁰ particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes. They explicitly include terrorism as an example.⁵¹ In Canada, in order for a crime to be considered political and therefore outside the ambit of 1F(b), it must meet a two-pronged ‘incidence’ test which requires first, the existence of a political disturbance related to a struggle to modify or abolish either a government or a government policy; and second, a rational nexus between the crime committed and the potential accomplishment of the political objective sought.⁵²

When determining whether the act is non-political, often states will use the exception used in extradition law as reference.⁵³ Two international conventions relating to terrorism explicitly record that terrorism is to be considered non-political for the purposes of extradition.⁵⁴ While they are silent on issues of asylum, states have been using this as analogous.

1F(c)

As previously mentioned, UN Security Council Resolution 1377 explicitly states that acts of terrorism are to be considered contrary to the purposes and principles of the United Nations. In the Canadian case of *Pushpanathan*, the Judge held that ‘where a widely accepted international agreement or United Nations resolution explicitly declares that the commission of certain acts is contrary to the purposes and principles of the United Nations, then there is a strong indication that those acts will fall within Article 1F(c).’⁵⁵

The international consensus on the issue of terrorism being contrary to the principles and purposes of the UN makes the provision of the exclusion clause fairly settled. States simply need to adopt the 1F(c) exclusion into domestic law. For example, in the United Kingdom, section 54 of the Immigration, Asylum and Nationality Act 2006 provides that acts contrary to the purposes and principles of the United Nations shall be taken as including, in particular: Acts of

⁴⁹ UK Guidelines op cit (n12) 5.3.

⁵⁰ European Union, Council of the European Union ‘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’ (30 September 2004) OJ L. 304/12-304/23; 30.9.2004, 2004/83/EC.

⁵¹ UK Guidelines op cit (n12) 5.3.

⁵² *Gil v. Canada (Minister of Employment and Immigration)* [1995] 1 F.C. 508 (C.A.) at 528-529 and 533.

⁵³ For example, the above case (*Gil v Canada*) used British extradition case-law in formulating the “incidence test”.

⁵⁴ United Nations International Convention for the Suppression of the Financing of Terrorism (9 December 1999) No. 38349 and United Nations International Convention on the Suppression of Terrorist Bombings (15 December 1997) No.37517.

⁵⁵ *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 S.C.R. 1222 at 1030.

committing, preparing or instigating terrorism (whether or not the acts amount to an actual or inchoate offence) and, acts of encouraging or inducing others to commit, prepare or instigate terrorism (whether or not the acts amount to an actual or inchoate offence). The definition of terrorism in the United Kingdom is provided in section 1 of the Terrorism Act 2000.

Complicity and Culpability

Regardless of what subsection a state deems terrorism to be, they are still required to assess the individual culpability and complicity of an applicant in that act of terrorism.

The standard set for complicity in the common law world, was in the Canadian case of *Ramirez*.⁵⁶ Here, the judge held that while prima facie membership of a group would not amount to complicity, where an organization is principally directed to a limited, brutal purpose, such as a secret police activity, mere membership may by necessity involve personal and knowing participation in persecutorial acts. This would provide the necessary shared purpose and knowledge to make the actor complicit in the crimes.⁵⁷ Rikhof, while examining Canadian jurisprudence between 2005-2007 found that there were six distinct factors that helped determine involvement in terrorism: (1) the nature of the organization; (2) method of recruitment and age; (3) position and rank; (4) the knowledge of atrocities; (5) the length of time in the organization; and, (6) the opportunity to disassociate from the organization.⁵⁸

These considerations are completely ignored in the United States where there is an automatic ban on anyone who has been a member of a terrorist organisation, or participated in terrorist activity. The United States is not party to the UN Convention, and is therefore not bound by the wording of the 1F exclusion clause. The United States 'equivalent' of 1F is Section 208(b)(2)(A)(i) of the Immigration and Nationality Act which excludes anyone: '[...] ordering, inciting, assisting or otherwise participating in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.' Terrorists are

⁵⁶ *Ramirez v. Canada (Minister of Employment and Immigration)* [1992] 2 F.C. 306 (C.A.)

⁵⁷ *Ibid* at 16-19.

⁵⁸ J Rikhof 'War Criminals Not Welcome' (2009) 21(3) *IJRL* 453, 465.

automatically deemed persecutors and are thus banned, even if they acted under duress.⁵⁹ The great danger facing this sort of blanket denial of asylum is that ‘statutory bars based on membership of proscribed organizations undermine basic standards of procedural fairness, because exclusion is not based on a determination of personal involvement in, and individual responsibility for, specific excludable conduct.’⁶⁰

In the United Kingdom, under the 1971 Immigration Act and the 2002 Nationality, Immigration and Asylum Act, the Asylum Policy Instructions specify how Article 1F should be applied. Section 1.4.19 (Acts of Terrorism) states that terrorism falls under 1F(c) but can also be (b) or (a). Section 1.4.10 on complicity and culpability reads: ‘In cases where there is evidence that the person had voluntary membership of an organisation that commits a crime (or of an act, in Article 1F(c) cases) or some involvement in the commission of a crime (or act), without personally committing it, Article 1F may still apply.’

‘Terrorist refugees’ and indefinite detention

This essay has so far been dedicated to the application of the exclusion clause to terrorists. State practice has shown that the exclusion clause has been interpreted to exclude terrorists from refugee status, and consequently, excluding the applicant from refugee protections. However, there are circumstances where an applicant has received positive refugee status, but almost simultaneously been declared a terrorist or security threat, and denied entry to the refuge-sought country. This scenario puts the ‘refugee terrorist’ in a legal black-hole, and the consequences are almost certainly worse than being excluded as a refugee under article 1F.

Following the civil war in Sri Lanka, many ethnic Tamils fled. Between 2009 and 2012, around 1600 arrived irregularly (on boats) to Australia.⁶¹ Many were recognised as refugees under the UN Convention. However, after their refugee status was determined, they were then subjected to an Australian Security and Intelligence Organisation (ASIO) national security check which

⁵⁹ Simeon op cit (n24) 136.

⁶⁰ Saul op cit (n24) 12.

⁶¹ Systems, Program Evidence and Knowledge Section, ‘Asylum Statistics - Australia: Quarterly Tables - March Quarter 2012’ (Department of Immigration and Citizenship, March 2012) 11.

applies under the Migration Act 1958 (Cth). In this Act, the refugee applicant needed to satisfy 'Public Interest Criterion 4002'.⁶² This requires that '[t]he applicant [was] not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security, within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*'.⁶³ Between January 2010 and November 2011, 54 (of over 7000) refugees were given adverse security checks under the Public Interest Criterion 4002. They were not given reasons for these adverse assessments and were not availed merits or judicial review opportunities. Despite the apparent purpose of 'advancement of host state security', the secretive nature of the ASIO process falls foul of the requirement in Article 33(2) of the UN Convention to provide reasonable grounds for considering the refugee an extremely serious or exceptional threat to Australia. This is presumably why the Australian government did not seek to invoke the exception in Article 33(2).⁶⁴

As they were already considered refugees (they were not excluded under 1F or the exception to *non-refoulement* in article 33(2)), they could not be returned to their country of origin. Third party countries were unlikely to accept them due to their adverse security checks, and they could not be granted permanent visas in Australia due to their security status. As there is no legal limit for detention in Australia, a refugee can be detained indefinitely.⁶⁵ Thus, these refugees were left in a legal black hole.

Alarming, of these people in indefinite detention, three were dependent minor children, and one was born in detention.⁶⁶ Although a small number have since been released, most have now been in detention for four years.⁶⁷

⁶² Section 36 of the *Migration Act 1958 (Cth)* creates 'protection visas' and s 65(1)(a)(ii) provides that, after considering a valid application for a visa, the Minister must refuse to grant a visa if he/she is not satisfied that a person meets 'the other criteria for it prescribed by this Act or the regulations'

⁶³ Migration Regulations 1994 (Cth) sch 4 ('Public Interest Criteria and Related Provisions') reg 4002. Note: This regulation has since been ruled by the High Court of Australia as invalid (*Plaintiff M76/2013 v Minister for Immigration and Citizenship [2013] HCA 53*). Nevertheless, the Australian parliament refused to make significant changes, and refugees are still susceptible to secretive security checks under Public Interests Criterion 4001 and 4003.

⁶⁴ B Saul 'Dark Justice: Australian's Indefinite Detention of Refugees on Security Grounds Under International Human Rights Law' (2012) 13(2) *Melbourne Journal of International Law*, 685, 719.

⁶⁵ *Al-Kateb v Godwin* (2004) 219 CLR 562.

⁶⁶ Saul op cit (n63) 688.

In August 2013, the United Nations Human Rights Committee found that the refugees' detention was arbitrary and violated Article 9 of the International Covenant on Civil and Political Rights, which states that no one shall be subjected to arbitrary arrest or detention. The Committee found nearly 150 violations of Australia's international treaty obligations. Despite this, the Australian government continues to 'thumb it's nose at the Committee'⁶⁸ and international refugee law in general.

Conclusion

The aim of the article 1F exclusion clause in the UN Convention is to prevent un-deserving people from claiming refugee protection. State practice has proved that terrorists are deemed to fall within this category. However, there has been no uniformity in how states have applied the exclusion clause to terrorists. This is largely due to the fact there is no international consensus on what constitutes terrorism. The United Nations has declared that terrorism is contrary to the principles and purposes of the United Nations, consequently affirming that terrorists should be excluded directly under article 1F(c). However, articles 1F(a) and (b) have and can be used by states depending on the circumstances. Once a state has determined which exclusion clause to apply, they must then assess the complicity and culpability of the applicant. Again, due to the lack of an international consensus on terrorism, states have applied this test in a non-uniform manner, and have often extended and applied their domestic definitions of terrorism in a way inconsistent with the UN Convention. Alarming, in the United Kingdom and United States, a person with links to a humanitarian group which has links to a deemed terrorist group, can be considered a terrorist and thus excluded from refugee status. Perhaps worse than being excluded from refugee status due to terrorist links, is being deemed a refugee and simultaneously a terrorist. The Australian case-study above shows the disgraceful results.

It is clear that in order for states to correctly apply the exclusion clauses to terrorists, there needs to be an international consensus on what constitutes terrorism, terrorists and terrorist groups. Only then will there be an opportunity for asylum seekers to defend themselves from an adverse refugee status determination based on terrorist links.

⁶⁷ G Williams 'ASIO's new power over asylum seekers needs proper checks' *UNSW*, (20 May 2014) available at: <https://newsroom.unsw.edu.au/news/law/asios-new-power-over-asylum-seekers-needs-proper-checks>.

⁶⁸ Professor Ben Saul being quoted in 'Australia's Indefinite Detention of Refugees 'Cruel, Inhuman' UN Says' Australia Network News (22 August 2013) Available at <http://www.abc.net.au/news/2013-08-22/un-watchdog-urges-australia-to-release-refugees-held-in-inde/4906218>.

Bibliography

Journal Articles and Books

R Bruin & K Wouters 'Terrorism and Non-derogability of Non-refoulement' (2003) 13 *IJRL* 1.

G Goodwin-Gill & J McAdam *The Refugee in International Law* 3rd ed (2007).

'Michigan Guidelines on the Exclusion of International Criminals' (2014) 34 *MJIL* 4.

B Saul 'Dark Justice: Australia's Indefinite Detention of Refugees on Security Grounds Under International Human Rights Law' (2012) 13(2) *Melbourne Journal of International Law* 685.

B Saul 'Exclusion of Suspected Terrorists from Asylum: Trends in International and European Refugee Law' (2004) Institute for International Integration Studies (IIIS) Discussion Paper, Dublin, Trinity College.

B Saul 'Protecting Refugees in the Global "War on Terror"' (2008) *IJR* 11.

J Rikhof 'War Criminals Not Welcome' (2009) 21(3) *IJRL* 453.

J Simeon 'Complicity and Culpability and the Exclusion of Terrorists from Convention Refugee Status Post 9/11' (2011) 29(4) *Refugee Survey Quarterly* 104.

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

International and Supranational Statutes/Legislation/Treaties

United Nations General Assembly, Resolution 49/60 (1994) UN Doc A/Res/49/60.

United Nations General Assembly, Resolution 51/210 (1996) UN Doc A/Res/51/210.

United Nations Security Council, Resolution 1377 (2001) UN Doc. S/RES/1377.

United Nations Security Council, Resolution 1269 (1999) UN doc S/Res/1269.

United Nations Security Council, Resolution 1373 (2001) UN doc S/Res/1373.

United Nations International Convention for the Suppression of the Financing of Terrorism (9 December 1999) No. 38349.

United Nations International Convention on the Suppression of Terrorist Bombings (15 December 1997) No.37517.

United Nations Draft Comprehensive Convention against International Terrorism, UN Doc A/59/894.

United Nations High Commissioner for Refugees, 'Guidelines on International Protection: Application of the Exclusion Clauses' (2003) UN Doc. HCR/GIP/03/05.

United Nations High Commissioner for Refugees, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees' (1979) UN Doc. HCR/IP/4/Eng/REV.1.

Council of Europe, 'Guidelines on Human Rights and the Fight Against Terrorism' 15 July 2002.

European Union, 'Common Position on Combating Terrorism' (December 2001), EU doc. 2001/930/CSFP.

European Union, Council of the European Union ‘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’ (30 September 2004) OJ L. 304/12-304/23; 30.9.2004, 2004/83/EC.

Domestic Statutes/Legislation

Anti-Terrorism, Crime and Security Act of 2001 (United Kingdom).

Asylum Instruction: Exclusion Article 1F of the Refugee Convention (2012) United Kingdom Visas and Immigration

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257429/exclusion.pdf.

Migration Act 1958 (Cth) (Australia).

Migration Regulations 1994 (Cth) (Australia).

Systems, Program Evidence and Knowledge Section, *Asylum Statistics - Australia: Quarterly Tables - March Quarter 2012*, (Department of Immigration and Citizenship, March 2012).

Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA-PATRIOT Act) (2001) H.R. 3162.

Cases

Al-Kateb v Godwin (2004) 219 CLR 562.

Arquita v MIMA [2000] FCA 1889.

Gil v. Canada (Minister of Employment and Immigration) [1995] 1 F.C. 508 (C.A.)

Hayakpa v MIEA (1995) 62 FCR 556.

Jayasekara v. Canada (Minister of Citizenship and Immigration) [2009] 4 F.C.R. 164 (F.C.A.); 2008 FCA 404.

Ovcharuk v. MIMA (1998) 1414 FCA.

Plaintiff M76/2013 v Minister for Immigration and Citizenship [2013] HCA 53.

Prosecutor v Stanislav Galic (2003) IT-98-29, 594.

Pushpanathan v. Canada (Minister of Citizenship and Immigration) [1998] 1 S.C.R. 1222.

Ramirez v. Canada (Minister of Employment and Immigration) [1992] 2 F.C. 306 (C.A.)

YYMT and MQCR and Minister for Immigration and Citizenship [2010] AATA 447.

Internet Sources

Ad Hoc Committee established by the General Assembly resolution 51/210 of 17 December 1996, available at: <http://legal.un.org/terrorism/index.html> .

G Williams, ‘ASIO’s new power over asylum seekers needs proper checks’ *UNSW*, (20 May 2014) available at: <https://newsroom.unsw.edu.au/news/law/asios-new-power-over-asylum-seekers-needs-proper-checks>.

‘Australia’s Indefinite Detention of Refugees “Cruel, Inhuman” UN Says’ *Australia Network News* (22 August 2013) Available at <http://www.abc.net.au/news/2013-08-22/un-watchdog-urges-australia-to-release-refugees-held-in-inde/4906218>.

