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Exclusion from Refugee Status: Asylum Seekers and Terrorism in the UK

Sarah Singer

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EXCLUSION FROM REFUGEE STATUS: ASYLUM SEEKERS AND TERRORISM IN THE UK

Sarah Singer*

Abstract:

Recent legal and political discourse on terrorism within the United Nations (UN) has presented refugee status as a means by which terrorists can seek entry to a country to perpetrate terrorist acts, or evade prosecution for their crimes. For example, UN Security Council Resolution 1373 of 2001 urges states to 'ensure ... that refugee status is not abused by the perpetrators, organisers or facilitators of terrorist acts'. The drive to deny the benefits of refugee status to suspected terrorists has led to a radical reinterpretation of the exclusion clause of the 1951 UN Refugee Convention, both at national and international levels, so as to bring terrorism within the ambit of this provision. An asylum-seeker will now be excluded from refugee status if he or she has committed or prepared for an act of 'terrorism', or has encouraged or induced someone else to do so. However, 'terrorism' is not a legal label, but an undefined political term: there is at present no internationally agreed definition of 'terrorism', nor an internationally agreed list of 'terrorist organisations'. The discretion inherent in the undefined nature of the term 'terrorism' therefore leaves the Refugee Convention's exclusion clause open to abuse by Member States seeking to exclude genuine asylum seekers from refugee status. In this paper it will be argued that, in light of the serious consequences of exclusion from refugee status, there is a need for a principled approach to the application of the Refugee Convention's exclusion clause which is not served by the undefined political term 'terrorism'. Furthermore, since fleeing persecution for political opinion is an archetypal reason for seeking asylum, injecting subjective political notions of 'terrorism' into refugee exclusion has the potential to undermine the very foundations of the international refugee protection framework.

Keywords: exclusion, refugee status, purposes and principles of the United Nations, terrorism

A INTRODUCTION

The 1951 UN Convention Relating to the Status of Refugees (the 1951 Convention) was drafted in the aftermath of the Second World War, in an attempt to address the problems posed and faced by over ten million people who had become refugees as a result of the events of the war.[1] The Convention grants a broad host of rights and benefits to those that fall within the definition of 'refugee' contained in its Article 1A.[2] That is, a person who is outside their country of origin, and unable or unwilling to return to that country due to a fear of individual persecution.[3] However, Article 1F of the Convention excludes certain individuals from this

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[1] UN, Convention Relating to the Status of Refugees (1951 Convention) 28 July 1951 189 UNTS 137.

[2] The 1951 Refugee Convention provides refugees with key civil and socio-economic rights. See J Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, Cambridge 2005).

[3] The temporal limitation of the refugee definition to 'events occurring before 1 January 1951' was removed by the 1967 Protocol Relating to the Status of Refugees (adopted 31 January, entered into force 4 October 1967) 606 UNTS 267. Hereinafter all references to the 1951 Refugee Convention are taken to include the 1967 Protocol.

definition. This provision provides that the Convention 'shall not apply to any person with respect to whom there are serious reasons for considering that:

> (a) he has committed a crime against peace, a war crime, or a crime against humanity …
> (b) he has committed a serious non-political crime …
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.'

The purpose of this provision is to exclude those who are undeserving of refugee protection from refugee status, and ensure such persons do not misuse the institution of asylum to evade legitimate prosecution.[4]

In line with the increased international attention focused on the threat posed by international terrorism, there has been a clear desire on the part of states to ensure that safe haven is not granted to terrorists. Recent legal and political discourse on terrorism within the UN has presented refugee status as a means by which terrorists can seek entry to a country to perpetrate terrorist acts, or evade prosecution for their crimes. For example, repeated resolutions of the UN Security Council have urged Member States to 'ensure ... that refugee status is not abused by the perpetrators, organisers or facilitators of terrorist acts'.[5] These resolutions also state that 'acts methods and practices of terrorism are contrary to the purposes and principles of the United Nations', specifically recalling the wording of Article 1F(c) of the 1951 Convention, and including terrorism within the scope of this provision.[6] UN Member States are therefore called upon to exclude terrorists from refugee status.

However, in these resolutions the Security Council did not define terrorism, nor did it refer to an existing definition of terrorism. Indeed, whilst the international community has repeatedly condemned terrorist acts, at present there is no universally agreed definition as to what in fact constitutes 'terrorism'. The repeated resolutions of the UN Security Council calling on states to deny refugee status to terrorists therefore grant Member States a broad discretion to determine what 'terrorism' is and who is a 'terrorist'. This discretion leaves the 1951 Convention's exclusion clause open to abuse by Member States seeking to exclude genuine asylum seekers from refugee status. In this paper, it will be argued that, in light of the serious consequences of exclusion from refugee status, there is a need for a principled approach to the application of Article 1F which is not served by the undefined political term 'terrorism'. Furthermore, since fleeing persecution for political opinion is an archetypal reason for seeking asylum, injecting subjective political notions of 'terrorism' into refugee exclusion has the potential to undermine the very foundations of the international refugee protection framework.

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[4] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (UNHCR Handbook) January 1992 [147]-[148]; UN Ad Hoc Committee on Refugees and Stateless Persons (UN Ad Hoc Committee) E/AC.32/SR.24 27 Nov 1951 (see particularly statements of Belgium and the UK); UNHCR, 'Guidelines on International Protection No 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees' (Geneva 2003) 3.

[5] UN Security Council Resolution (UNSC Res) 1373 (28 September 2001) UN Doc S/RES/1373 [3(g)]; UNSC Res 1269 (19 October 1999) UN Doc S/RES/1269 [4]. See also UN General Assembly, Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism (UNGA Dec 1996) (17 December 1996) Res 51/210, [5(f)].

[6] UNSC Res 1373 [5]; UNSC Res 1377 (12 November 2001) UN Doc S/RES/1377 preamble role 5; UNSC Res 1624 (14 September 2005) UN Doc S/RES/1624 preamble role 8; UNGA Dec 1996 [2].

B WHAT IS TERRORISM?

Despite the great amount of legal and political attention within the UN that has focused on the threat posed by international terrorism, terrorism as a concept has proved one the international community has struggled to define. At present, there is no clear or universally agreed definition of 'terrorism'.

Most recently, attempts were made to include terrorism as one of the core international crimes within the jurisdiction of the International Criminal Court. However, these attempts failed, as states were unable to agree on a definition of the crime.[7] There have also been attempts to draft a Comprehensive Convention on International Terrorism, but negotiations have fallen into deadlock, again because a definition of 'terrorism' cannot be agreed upon.[8] The primary problem that states encounter when attempting to agree upon a definition of terrorism concerns the question of whether an exception should be made for the activities of national liberation movements. Hence the old saying 'one person's terrorist is another's freedom fighter'. Was Nelson Mandela a terrorist or a freedom fighter? Is violence unjustified *per se*, or can exceptions sometimes be made, for example, for those fighting against repressive regimes?

Due to the difficulty agreeing upon a universal definition of 'terrorism', the international community has thus far preferred to adopt international conventions concerning certain categories of acts that are considered to be so manifestly wicked they permit no exception for national liberation movements.[9] There are at present a host of international counter-terrorism conventions prohibiting acts such as hostage taking, hijacking, and the use of explosives.[10]

Nevertheless, some authors have argued that a definition of the crime of international terrorism has evolved as a matter of customary international law. Basing his analysis on the adoption of national laws, judgments of national courts, UN General Assembly resolutions and the ratification of international counter-terrorism conventions, Cassese argues that a consensus has emerged on the objective and subjective elements of a crime of international terrorism in times of peace, which includes three core elements:

> (i) acts normally criminalised under national penal systems;
> (ii) which are intended to provoke a state of terror in the population or coerce a state or international organisation to take (or abstain from) some sort of action;
> (iii) are politically or ideologically motivated[11]

[7] UN, *Final Act of Conference of Plenipotentiaries on the Establishment of an International Criminal Court* (17 July 1998) UN Doc A/CONF.183/10 resolution E. A definition of terrorism was also not included following the Review Conference in Kampala in 2010.

[8] B Saul, *Defining Terrorism in International Law* (Oxford University Press, Oxford 2006) 184 *et seq*.

[9] A Aust, *Handbook of International Law* (2nd ed, Cambridge University Press, Cambridge 2010) 265.

[10] For example, Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105; International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 July 1983) 1316 UNTS 205; International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 284. For more see Saul (n8) 129-190.

[11] A Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law' (2006) 4 (5) Journal of International Criminal Justice 933, 937. See also A Conte, *Human Rights in the Prevention and Punishment of Terrorism* (Springer 2010), which comes to a similar conclusion. However, the suggestion that a definition of terrorism has emerged as a matter of customary law is contentious, and Saul argues that no separate customary crime of terrorism exists. Saul (n 8) 270.

Terrorism is therefore an umbrella term that can potentially cover a wide range of acts, provided Cassese's three cumulative conditions are met. These acts will generally already be crimes under domestic and/or international law. The classification of these crimes as 'terrorist' hinges on their underlying motivation, i.e. that the act be politically or ideologically motivated and intended to provoke a state of terror in the public or coerce a government or international organisation. The absence of a universally accepted definition of terrorism means that it is left to individual States, or regional organisations, to determine the range of acts (or crimes) that may be described as 'terrorist', and whether an exception is permitted for national liberation movements.

The result is that 'terrorism' is not a legal label, but an undefined political term. The decision to classify certain acts and individuals 'terrorist' is essentially political. The repeated Security Council resolutions calling on States to exclude terrorists from refugee status therefore grant a large measure of discretion to Member States to determine the parameters of the concept. In the refugee context, the term is potentially open to abuse.

C EXCLUSION FOR COMMITTING TERRORIST ACTS UNDER ARTICLE 1F

Article 1F of the 1951 Convention excludes from refugee status those for whom there are 'serious reasons' for considering they have committed a war crime, a crime against peace, a serious non-political crime or acts contrary to the purposes and principles of the UN. Any person who falls within one or more of the grounds of Article 1F is excluded from the scope of the Convention *per se*, and all rights and privileges contained therein.[12] The primary purpose of Article 1F was to exclude certain undeserving individuals from refugee status, thus promoting the integrity of the refugee protection regime. It must also be stressed that, as the Convention was drafted in the wake of the Second World War, considerable emphasis was placed on the need to ensure that war criminals and associated persons did not use refugee status as a means to escape prosecution for their crimes.[13]

Article 1F therefore serves the important function of preserving the institution of asylum by excluding those who are have committed serious crimes. However, in light of Article 1F's status as an exception to a humanitarian treaty, and the grave consequences of such exclusion, it is clear the provision must be interpreted restrictively.[14] In the case of any ambiguity, the narrower, stricter sense which favours non-exclusion is to be preferred. The United Nations High Commissioner for Refugees (UNHCR), the advisory body for the Refugee Convention, stresses that whilst the Article 1F exclusion clauses must be applied 'scrupulously' to protect the integrity of the institution of asylum, 'at the same time … it is important to apply them with great caution'.[15] This approach reconciles the underlying purpose of Article 1F with the object and

[12] This does not mean, however, that an excluded individual will cease to benefit from the rights and benefits contained in other international instruments, human rights treaties in particular.
[13] See (n 4).
[14] UNHCR Handbook [149]. See also Geoff Gilbert, 'Current Issues in the application of the exclusion clauses', in E Feller, V Türk & F Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, Cambridge 2003) 428; MK Nyinah, 'Exclusion Under Article 1F: Some Reflections on Context, Principles and Practice' (2000) 12 (Special Supplement) International Journal of Refugee Law 296; A Zimmermann & P Wennholz, 'Article 1F 1951 Convention' in Andreas Zimmerman (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press Oxford 2011), 600.
[15] UNHCR, Safeguarding Asylum, 17 October 1997 No 82 (XLVIII) [5]; UNHCR Guidelines 2.

purpose of the 1951 Refugee Convention, to 'assure refugees the widest possible exercise of … fundamental rights and freedoms'.[16]

As highlighted above, the UN Security Council has called on Members States to exclude terrorists from refugee status. The desire to exclude terrorists from refugee protection is not a modern phenomenon. The 1946 Constitution of the International Refugee Organisation excluded from the organisation's mandate those who had, 'since the end of hostilities, participated in any organization hostile to the government of a member of the United Nations', or had 'participated in any terrorist organization'.[17] However, this ground of exclusion was not included in the 1951 Refugee Convention. This section therefore examines how terrorists can be excluded from refugee status under Article 1F of the 1951 Convention.

1 Exclusion under Articles 1F(a) and (b)

Those who commit terrorist acts may be excluded from refugee status under Articles 1F(a) and/or 1F(b) of the 1951 Convention. Article 1F(a) excludes those who have committed 'a crime against peace, a war crime, or a crime against humanity'.[18] The 1951 Convention's status as a post-World War II instrument is clear here, as these were the crimes set out in the Charter of the International Military Tribunal at Nuremberg.[19] At present, they form the core crimes within the jurisdiction of the International Criminal Court (the ICC), and are defined in the Rome Statute of the ICC (the Rome Statute).[20]

Terrorists may be excluded from refugee status under Article 1F(a) if they have committed a 'war crime' or a 'crime against humanity'.[21] If a terrorist act occurs in the context of an armed conflict, it may be a 'war crime'. The definition of war crimes contained in the Rome Statute includes acts such as intentionally directing attacks against civilians, using indiscriminate means of warfare, and taking hostages.[22] Importantly, it has now been recognised that war crimes can be perpetrated during both international and non-international armed conflicts, and by non-state actors taking an active part in the hostilities.[23] Therefore, the actions of non-state terrorist organisations engaged in an armed conflict may be caught by this provision.

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[16] 1951 Convention preamble role 2. In keeping with the rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties, Article 1F of the 1951 Convention must be interpreted in good faith, in light of its context and object and purpose. UN, Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Article 31.

[17] UN, Constitution of the International Refugee Organisation, New York 1946 18 UNTS 3 Annex I Part II.

[18] '…as defined in the international instruments drawn up to make provision in respect of such crimes'.

[19] UN, Charter of the International Military Tribunal (London Charter), 8 August 1945 82 UNTS 280. Earlier formulations of Article 1F made explicit reference to Article VI of the London Charter'. However, in keeping with the dynamic interpretation that must be accorded the 1951 Convention, more modern codifications of the crimes enumerated in Article 1F(a), and relevant jurisprudence of domestic and international courts and tribunals, must be referred to when interpreting the provision. Gilbert (n 14) 434.

[20] Although 'crime against peace' is now referred to as the 'crime of aggression'. UN, Rome Statute of the International Criminal Court (Rome Statute), 17 July 1998 2187 UNTS 3. Also particularly relevant to the interpretation of this provision are the Statutes and jurisprudence of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for former Yugoslavia (ICTY). UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute) UNSC Res 827 (1993) (25 May 1993); UN Security Council, Statute of the International Criminal Tribunal for Rwanda (ICTR Statute UNSC Res 955 (1994) (8 November 1994).

[21] It does not appear that 'crime against peace' has ever been used as a ground for exclusion under Article 1F of the 1951 Convention. G Goodwin-Gill & J McAdam, *The Refugee in International Law* (3rd ed, Oxford University Press, Oxford 2007) 166.

[22] Rome Statute Article 8(2).

[23] Rome Statute Article 8; *Prosecutor v Dusko Tadic* IT-94-1 ICTY 2 October 1995 [89], [96] and [234] (*Tadic*).

Massive attacks on a civilian population may also constitute a 'crime against humanity' under Article 1F(a). Crimes against humanity involve the fundamentally inhumane treatment of a population in the context of a widespread or systematic attack against it, although it is clear that individual acts can also constitute a crime against humanity if they are part of a 'larger plan or organisational policy'.[24] It has now been recognised that crimes against humanity can be committed during peacetime, and the application of crimes against humanity to non-state actors, in particular terrorist groups, has been confirmed.[25] Attacks on a civilian population committed by a non-state terrorist organisation, in the context of a widespread and systematic attack, may therefore fall within the definition of crimes against humanity as a matter of international law.

Terrorist acts that do not meet the gravity of a war crime or crime against humanity may nevertheless fall within the scope of Article IF(b) of the 1951 Convention, which excludes those that have committed 'a serious non-political crime' from refugee status.[26] This provision was based on Article 14(2) of the 1948 Universal Declaration on Human Rights, which provides that the right to seek and enjoy asylum 'may not be invoked in the case of prosecutions genuinely arising from non-political crimes …'[27] During the drafting of this provision, the UK delegate was concerned that persons who committed minor crimes should not be excluded from the benefits of the Convention.[28] The provision was therefore limited to those who had committed *serious* non-political crimes.

Although Article 1F(b) refers to serious *non-political* crimes, terrorist acts may fall within the scope of this provision despite being committed with political objectives. Serious crimes will be considered non-political when other motives are the predominant feature of the crime committed, such as when no clear link exists between the crime and its alleged political objective, or when the act in question is disproportionate to the alleged objective.[29] For example, in *T v SSHD*, the UK House of Lords held that a bomb attack on an airport in which ten people were killed was grossly disproportionate to any political objective, and was therefore a non-political crime for the purpose of Article 1F(b).[30] The court stated that acts of violence which were likely to cause indiscriminate injury to innocent persons who had no connection with the government of the state did not constitute political crimes for the purposes of the 1951 Convention. This doctrine has now been set out in statute in the UK's Qualification Regulation of 2006, which provides that in the construction and application of Article 1F(b), 'the reference to serious non-political crime includes a particularly cruel action, even if it is committed with an allegedly political objective'.[31] The UNHCR advises that '[e]gregious acts of violence, such as those commonly considered to be of a "terrorist" nature, will almost certainly [be considered] wholly disproportionate to any political objective.'[32] Terrorist acts which involve attacks upon civilians will almost always be considered disproportionate to their objectives, and therefore excludable under this provision.

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[24] Rome Statute Article 7; *Tadic* [271]; UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* 4 September 2003 (UNHCR Background Note) 13.
[25] ICTR Statute Article 3; Rome Statute Article 7; *Tadic* [140]-[141].
[26] '… outside the country of refuge prior to his admission as a refugee'.
[27] UN General Assembly, Universal Declaration of Human Rights (adopted 10 December 1948) 999 UNTS 171.
[28] UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (Conference of Plenipotentiaries) 27 November 1951 A/CONF.2/SR.24(UK).
[29] UNHCR Guidelines 5; UNHCR Handbook [152].
[30] *T v Secretary of State for the Home Department* [1996] 2 All ER 865.
[31] The Refugee or Person in Need of International Protection (Qualification) Regulations, Statutory Instrument 2006 No 2525, 18 September 2006 regulation 7(2). See also Article 12(2)(b) of the European 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 (OJ L304 30.9.04 p12).
[32] UNHCR Background Note 15.

Individuals who commit terrorist acts may therefore be excluded under Articles 1F(a) or (b) of the 1951 Convention, where these acts constitute a war crime, crime against humanity or a serious non-political crime.

Exclusion from refugee status is the most severe sanction that can be imposed in the international refugee framework. Article 1F is therefore reserved for those that commit the most serious crimes: international crimes that fall within the jurisdiction of international criminal courts, and crimes under domestic law that are considered to be 'serious'.[33] Indeed, during the drafting of Article 1F, Member States were clear that the provision was not intended to apply to the 'man on the street', or those that had committed minor offences.[34] Rather, the provision was intended to exclude those that had committed crimes so serious as to attract the condemnation of the international community.

In line with the restrictive approach that must be adopted in the interpretation of Article 1F, the crimes for which individuals may be excluded must be clearly defined and applied in a principled manner. Acts which may lead to exclusion under Article 1F(a), crimes against peace and war crimes, benefit from a wealth of international statutes and jurisprudence setting out the parameters and material elements of the acts.[35] Similarly, 'serious' crimes for the purpose of Article 1F(b) will be defined under the domestic laws of Member States.[36] The definition of these crimes in national and international law will typically include the *actus reus* and *mens rea* of the act, in addition to applicable defences.[37] In contrast, Article 1F(c), which refers to acts 'contrary to the purposes and principles of the United Nations', is a vague and uncertain term, that's meaning has evaded precise categorisation.

2 Exclusion under Article 1F(c)

The final ground of exclusion under Article 1F is for those who are 'guilty of acts contrary to the purposes and principles of the United Nations', a concept that has proven to be particularly elusive. During the drafting of this provision, both the UK and Canada proposed deleting the phrase 'acts contrary to the purposes and principles of the United Nations', as they thought the formula so vague as to be open to abuse by governments wishing to exclude refugees from the protection of the Convention.[38] Indeed, Grahl-Madsen, in his commentary on the Refugee Convention, noted that 'those who pressed for the inclusion of the clause had only vague ideas as to the meaning of the phrase'.[39] It is the meaning of 'acts contrary to the purposes and principles of the United Nations' that will be considered in the following section.

(a) What acts are contrary to the purposes and principles of the UN?

The purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.[40] These are broad general statements such as the 'maintenance of international peace and security', 'development of friendly relations among nations' and the protection of human rights. These provisions therefore provide little guidance in determining which acts may be considered contrary to purposes and principles of the UN for the purpose of Article 1F(c).

[33] UNHCR Handbook [155]: 'a 'serious' crime refers to 'a capital crime or a very grave punishable act.'
[34] ECOSOC Social Committee, 166th Meeting UN Doc E/AC.7/SR.166 (1950) (France); see (n 28).
[35] See (n 19-20).
[36] Although the notion of 'non-political' crime is less clearly defined.
[37] For example, Rome Statute Article 31.
[38] UN Conference of Plenipotentiaries, 28 November 1951 A/CONF.2/SR.29 (UK); ECOSOC Social Committee, 160th Meeting, UN Doc E/AC.7/SR.160 (1950) (Canada).
[39] A Grahl-Madsen, *The Status of Refugees in International Law, vol I* (AW Sijthoff-Leiden 1966) 283.
[40] UN, Charter of the United Nations (UN Charter), 24 October 1945 1 UNTS 16; UNHCR Handbook [163].

Given the vagueness of the Charter's terms, and the lack of coherent State Practice on the application of the provision, the UNHCR has pointed out that Article 1F(c) is open to abuse by governments seeking to exclude refugees illegitimately. It therefore advises the provision must be read narrowly, and applied with caution.[41] The UNHCR advises that Article 1F(c) should be triggered 'only in extreme circumstances by activity which attacks the very basis of the international community's coexistence under the auspices of the United Nations.' Examples of such activity include crimes capable of affecting international peace, security and peaceful relations between States, and serious and sustained violations of human rights.[42] The Canadian Supreme Court also examined this question in the seminal case of *Pushpanathan*.[43] The court in this case held that acts could be considered contrary to the purposes and principles of the United Nations 'where there is consensus in international law that particular acts constitute sufficiently serious and sustained violations of fundamental human rights as to amount to persecution'.[44] The court made clear that a very high threshold must be reached before an act could be considered to fall within Article 1F(c), as not every serious crime could amount to an act contrary to the UN's purposes and principles.

As highlighted earlier, a number of UN Security Council resolutions call on states to exclude terrorists from refugee status. These same resolutions state that 'acts methods and practices of terrorism are contrary to the purposes and principles of the United Nations', specifically recalling the wording of Article 1F(c) of the 1951 Convention, and including terrorism within this ground of exclusion.[45] However, these statements are problematic in that they promote the exclusion of asylum seekers from refugee status on grounds of terrorism, without a clear and comprehensive legal definition of terrorism.[46] It is therefore inevitable that national interpretations of the term will be employed. This opens the possibility of interpretations of terrorism that go beyond the high threshold recommended in the interpretation of Article 1F(c), and runs the risk that the provision will be open to abuse by States.

A related issue concerns the issue of who can perpetrate acts contrary to the purposes and principles of the UN. As the purposes and principles of the UN are intended to govern the conduct of Member States in relation to one other, Article 1F(c) has traditionally been interpreted as capable of applying only to an 'individual in a position of power in a member State and instrumental to his State's infringing these principles.'[47] However, an alternate view has been taken by some domestic courts. In *Pushpanathan*, the Supreme Court of Canada noted that '[a]lthough it may be more difficult for a non-state actor to perpetrate human rights violations on a scale amounting to persecution … the possibility should not be excluded'.[48] It has, however, been suggested that if this provision is applied to non-state actors, it should be restricted to 'persons in high office in government or a rebel movement that controls territory within the State or in a group perpetrating international terrorism that threatens international peace and security.'[49] However, the Security Council has stated its 'unequivocal condemnation of all acts, methods and practice of terrorism,

[41] UNHCR Background Note 17; UNHCR Guidelines 7; UNHCR Handbook [163]. See also Gilbert (n 14) 455-456, in which he suggests '[t]here is a danger that the phrase is so imprecise as to allow States to exclude applicants without adequate justification'. Goodwin-Gill and McAdam also note that 'Article 1F(c) is potentially very wide.' Goodwin-Gill & McAdam (n 21) 190.
[42] UNHCR Background Note 17-18; UNHCR Guidelines, 5.
[43] *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982, 4 June 1998 (*Pushpanathan*).
[44] ibid 65.
[45] See (n 6).
[46] J Hathaway & C Harvey, 'Framing Refugee Protection in the New World Disorder' (2001) 34 Cornell International Law Journal 269.
[47] UNHCR Handbook [163].
[48] *Pushpanathan* (n 43) [68].
[49] Gilbert (n 14) 457.

wherever and *by whomever committed*'.[50] This appears to indicate that an individual could fall within the scope of Article 1F(c) regardless of the position of seniority held within an organisation, or indeed the nature of the organisation itself.

International guidance on the interpretation of Article 1F(c) suggests the provision should only be applied in extreme circumstances, to activity which attacks the very basis of the international community's coexistence, and furthermore only to high ranking officials of states or organisations that threaten international peace and security. However, repeated Security Council resolutions state that acts methods and practices of terrorism (undefined), are contrary to the purposes and principles of the United Nations wherever and by whomever committed. These resolutions therefore appear to significantly expand the scope of Article 1F(c), both in terms of the acts that may fall to be excludable, and those capable of perpetrating such acts. And yet, the discretion inherent in the vagueness of the provision, and the undefined nature of the term 'terrorism', leaves Article 1F(c) open to abuse by Member States. By way of example, the following section will examine the UK's interpretation of terrorism for the purpose of Article 1F(c).

(b) Terrorism and Article 1F(c) in the UK

In the UK, terrorism is incorporated as a ground of exclusion under Article 1F(c) of the 1951 Convention by s.54(1) of the 2006 Immigration, Asylum and Nationality Act, which provides that '[i]n the construction and application of Article 1(F)(c) of the Refugee Convention the reference to acts contrary to the purposes and principles of the United Nations shall be taken as including ... (a) acts of committing, preparing or instigating terrorism ... and (b) acts of encouraging or inducing others to commit, prepare or instigate terrorism'. 'Terrorism' here has the meaning given by s.1 of the Terrorism Act 2000.[51]

As highlighted earlier, there is not at present a clear and comprehensive definition of terrorism in international law. Consensus exists only to the extent that acts of terrorism are (i) acts normally criminalised under national penal systems, (ii) intended to provoke a state of terror in the population or coerce a state or international organisation to take some sort of action, and (iii) are politically or ideologically motivated.[52] A potentially broad range of acts could therefore fall within the label 'terrorism'. The UN Security Council, in Resolution 1566 of 2004, suggested that terrorism should be limited to acts that are (i) prohibited under international counter-terrorism conventions, (ii) involve taking hostages, or are (iii) committed with the intent of causing death or serious bodily injury.[53]

However, the UK's definition of terrorism for the purpose of Article 1F(c) goes much further than Security Council Resolution 1566. Section 1 of the Terrorism Act 2000 encompasses certain acts and threats done in order to advance a political, religious or ideological cause, if done in order to influence the government or an international governmental organisation, or to intimidate the public or section of the public.[54] The acts or threats that may fall within this definition include not only serious violence against a person and endangering another person's life, but also acts that involves serious damage to property, whether or not this involves a risk of harm to anyone.[55] Therefore political protest that involves smashing up a State official's car, or

[50] UNSC Res 1377 preamble role 4 (emphasis added).
[51] S 54(2) Immigration, Asylum and Nationality Act 2006.
[52] See (n 11) and accompanying text.
[53] UNSC Res 1566 (8 October 2004) UN Doc S/RES/1566 [3].
[54] Although if what is done involves the use or threatened use of firearms or explosives, and in order to advance a political, religious or ideological case, it is within the definition without anything further. Terrorism Act 2000, s 1(3).
[55] Terrorism Act 2000, s 1(2).

throwing a brick through the window of a State building, even where it was clear that neither car nor building were occupied, would fall within this definition of terrorism.

The UK's definition of terrorism is therefore much wider than the Security Council's, which limits terrorist acts to those intended to cause death or serious bodily injury. It is even more removed from the international guidance on the interpretation of Article 1F(c), which advises the provision should be applied only in extreme circumstances to activity which attacks the very basis of the international community's coexistence. As noted by Symonds, simply labelling as 'terrorist' certain acts, many of which would involve no harm or danger to any person, can hardly be considered to elevate those acts to be of interest to the United Nations or those concerned with its purposes and principles.[56] Indeed, the Court of Appeal recently held that, for the purpose of Article 1F(c), the definition of terrorism contained in the Terrorism Act 2000 would have to be 'read down', in order for the UK to comply with its international obligations.[57] The court in this case did not, however, specify how the provision should be limited, nor set the parameters for action capable of constituting acts 'contrary to the purposes and principles of the United Nations'. In practice, the UK courts have consistently held that Article 1F(c) is not limited to those holding a position of power in a state or acting on behalf of a state, nor to those holding a high position of power in an international organisation.[58] Furthermore, there is no requirement that, to fall within the scope of Article 1F(c), an act of terrorism must have an international dimension.[59]

Acts or threats of action designed to influence a government for political or ideological reasons are often at the core of asylum claims. However, the UK's definition of terrorist permits no exception for the activities of those fighting against repressive regimes,[60] nor is it limited to action directed against civilians, or civilian state employees.[61] The UK's broad definition of terrorism could therefore exclude many individuals that the 1951 Convention was intended to protect. This problem is exacerbated by the fact that it is not only those who physically perpetrate acts of 'terrorism' that fall to be excluded under Article 1F(c), but also those who are complicit in the commission of such acts.

D COMPLICITY: MEMBERSHIP OF AN ORGANISATION

The UN Security Council resolutions referred to above declare not only that 'acts methods and practices of terrorism are contrary to the purposes and principles of the United Nations', but also that 'planning and preparation as well as *any other form of support for acts of terrorism* are contrary to the purposes and principles of the United Nations'.[62] This raises the issue of the level of complicity in terrorist acts required to give rise to exclusion under Article 1F(c). The UNHCR advises that, in general, responsibility for acts that can give rise to Article 1F exclusion:

[56] S Symonds, 'The special immigration status' (2008) 22(4) Journal of Immigration Asylum and Nationality Law, 341.
[57] *Al-Sirri* v *Secretary of State for the Home Department* [2009] EWCA Civ 222 [29].
[58] *Singh and Singh v Secretary of State for the Home Department* (SIAC 31 July 2000); *KK (article 1F(c)) (Turkey)* [2004] UKAIT 101.
[59] *SS (Libya)* v *Secretary of State for the Home Department* [2011] EWCA Civ 1547.
[60] For these purposes 'the government' and 'the public' are not limited to the UK. Terrorism Act 2000, s 1(4);. *R v F* [2007] QB 960.
[61] *Secretary of State for the Home Department v DD* (Afghanistan) [2010] EWCA Civ 1407; *SS (Libya) v Secretary of State for the Home Department* [2011] EWCA Civ 1547.
[62] UNSC 1377 preamble role 5 (emphasis added).

> flows from the person having committed, or made a substantial contribution to the commission of the criminal act, in the knowledge that his or her act or omission would facilitate the criminal conduct. The individual need not physically have committed the criminal act in question. Instigating, aiding and abetting and participating in a joint criminal enterprise can suffice.[63]

Under this analysis, responsibility for terrorist acts so as to give rise to exclusion under Article 1F rests on whether the individual knowingly made a 'substantial contribution' to the terrorist act. However, different considerations would appear to apply when the asylum applicant is a member of a 'terrorist' organisation. It is well established in the jurisprudence of Member States to the 1951 Convention that mere membership of an organisation that commits serious crimes is not sufficient to give rise to exclusion under Article 1F.[64] However, in the *Gurung* case, the UK Asylum and Immigration Tribunal held that:

> it would be wrong to say that an appellant only came within the Exclusion Clauses if the evidence established that he has personally participated in acts contrary to the provisions of Art 1F. *If the organisation is one or has become one whose aims, methods and activities are predominantly terrorist in character, very little more will be necessary*.[65]

This sentiment has also been echoed by the UNHCR, which notes that 'the purposes, activities and methods of some groups are of a particularly violent nature, with the result that voluntary membership thereof may also raise the presumption of individual responsibility.'[66] An individual could therefore be excluded from refugee status if they were a member of a terrorist organisation, despite not having personally participated in the criminal activities of the group. This presumption of individual responsibility reverses the burden of proof, so it rests on the asylum applicant to demonstrate that they have not been involved in the criminal activities of the organisation. The application of this doctrine does not involve an individual assessment of whether an individual has made a 'significant contribution' to the criminal purposes of the group, and furthermore offends a basic principle of criminal law: the presumption of innocence.[67] The key aspect of this approach to responsibility is the nature of the organisation.

The inherent problems in defining terrorism and terrorist acts have been demonstrated in previous sections. The same difficulties apply to the question of determining whether an organisation is 'terrorist' in nature. Again, the principal problem encountered by the international community in agreeing upon a common list of terrorist organisations involves differentiating between 'terrorist' groups and national liberation movements. Many states and international organisations have adopted their own lists of proscribed terrorist organisations.[68] However, automatic exclusion from refugee status based on membership of a group included in one of these proscribed lists has been cautioned against. In a recent Advisory Opinion, the Court of Justice of the European Union (CJEU) stated that:

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[63] UNHCR Guidelines 6; UNHCR Background Note 19.

[64] *Ramirez v Minister of Employment and Immigration* (Canada) [1992] 2 FC 306 [17]; *Garate (Gabriel Sequeiros) v Refugee Status Appeals Authority* (New Zealand) [1998] NZAR 241; *Indra Gurung v Secretary of State for the Home Department* (United Kingdom) [2002] UKIAT 04870. Although the USA automatically excludes anyone from applying for asylum if they are, or were, members of terrorist organisations or groups who were individually involved in any terrorist activities. B Saul, 'Protecting Refugees in the Global 'War on Terror'' (2008) *Indian Juridical Review*, Sydney Centre for International Law Working Paper No 3, Sydney Law School Research Paper No 08/130, 11.

[65] *Indra Gurung v Secretary of State for the Home Department* [2002] UKIAT 04870 [105] (emphasis added). (*Gurung*)

[66] UNHCR Guidelines [19].

[67] As embodied, for example, in Article 66 of the Rome Statute.

[68] For example, see UK Terrorism Act 2000 Schedule II; EU, *Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism*, 27 December 2001 2001/931/CFSP.

> the fact that a person has been a member of an organisation which, because of its involvement in terrorist acts, is on the [proscribed list of terrorist organisations adopted by the European Union] … does not automatically constitute a serious reason for considering that that person has committed "a serious non-political crime" or "acts contrary to the purposes and principles of the United Nations".[69]

Rather, the CJEU was of the opinion that regard must be had to the specific facts of each case individually.[70] Indeed, the UNHCR itself has cautioned against exclusion based on membership of a proscribed organisation, noting that 'lists established by the international community of terrorist suspects and organisations … would be drawn up in a political, rather than a judicial process and so the evidentiary threshold for inclusion is likely to be much lower [than indictments of international criminal courts].'[71] Similarly, the UNHCR notes that '[n]ational lists of terrorist suspects or organisations will tend to have a lower evidentiary threshold than their international counterparts, due to the lack of international consensus.'[72] The UNHCR therefore advises that a presumption of exclusion should arise only where the list has a credible basis.[73]

In the absence of an international list of proscribed terrorist organisations with a clear credible legal basis, it falls to States Parties to the 1951 Convention to determine whether a group is 'terrorist' in nature. The UK's list of proscribed terrorist organisations is contained in Schedule 2 of the Terrorism Act 2000. Organisations are included in this list at the discretion of the Secretary of State, where he or she believes that the organisation is 'concerned in terrorism'.[74] The subjective nature of this test, coupled with the broad definition of terrorism contained in section 1 of the Terrorism Act 2000, means the decision to include an organisation within this list is inherently political. Some of the problems with this approach are amply demonstrated by the case *MH (Syria)*, considered below.[75]

MH was a young Kurdish woman who joined the Kurdistan Workers' Party (Partiya Karkeren Kurdistan: PKK) at the age of 13 because of the constant harassment her family suffered from the Syrian authorities. She was elected to carry a banner and march at the front of a demonstration. She later lived and worked at a refugee camp, and her activities for the PKK were to resolve disputes within the refugee camp, and work as a nurse there. She later volunteered to be armed and carried a gun, but she never used it. The Secretary of State sought to exclude MH from refugee status under Article 1F(c) of the 1951 Convention, because of her membership and support for the PKK. The UK Court of Appeal, however, held that, although the PKK was included in the UK's list of proscribed terrorist organisations, it was not 'predominantly terrorist in character'.[76] Furthermore, MH's activities for the PKK were 'relatively minor' in nature. The only basis on which MH could be excluded was her simple membership of the organisation, which was not sufficient to give rise to Article 1F(c).

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[69] *Bundesrepublik Deutschland v B and D* C-57/09 and C-101/09 9 November 2010 [99].
[70] ibid.
[71] UNHCR Background Note [106].
[72] ibid [109].
[73] ibid [62].
[74] Terrorism Act 2000, s 3(4), see also s 3(5). At present there are 59 proscribed terrorist organisations contained in this schedule. The UK Border Agency's Asylum Policy Instructions advise that: 'Case owners should consider exclusion particularly carefully where there is evidence that an individual has been convicted of an offence under section 11 of the Terrorism Act 2000 (belonging, or professing to belong, to a proscribed organisation).' UK Border Agency, Asylum Policy Instructions: Exclusion: Articles 1F and 33(2) of the Refugee Convention (UKBA API on Exclusion), s 2.4.3.
[75] *MH (Syria) v Secretary of State for the Home Department* [2009] EWCA Civ 226.
[76] ibid [36].

The label 'terrorist' is therefore just as problematic when applied to organisations as when it is applied to individuals or acts. All too often, classifications of such groups can be influenced by subjective interpretations and political prejudices, which fall far short of the clear objective standard required by the restrictive approach to the interpretation of Article 1F. In *JS (Sri Lanka)*, the UK Supreme Court overruled the *Gurung* doctrine for precisely these reasons, stating 'it provides a subjective and unsatisfactory basis for determining whether as a matter of law an individual is guilty of an international crime.'[77] Rather, the Court stated that it was important to establish that there are serious reasons for considering the asylum applicant had 'contributed in a significant way to the organisation's ability to pursue its purpose of committing [excludable crimes], aware that his assistance will in fact further that purpose.'[78] However, the *Gurung* 'presumption' of individual responsibility is the current approach adopted by the UK Border Agency, and the Asylum Policy Instructions need updating in this respect.[79]

E CONCLUSION

The argument of this paper is not that those who commit serious crimes should not be excluded from refugee status. On the contrary, Article 1F serves the very important function of protecting the integrity of the refugee protection regime being abused by those who are undeserving of such protection.

However, given the vague nature of Article 1F(c), and the undefined nature of 'terrorism' and 'terrorist organisations' as a matter of international law, Articles 1F(a) or (b), rather than Article 1F(c), should be applied to potential cases of exclusion. This makes for analytical clarity, and avoids the possibility of an overly liberal interpretation of 'acts contrary to the purposes and principles of the United Nations'. Articles 1F(a) and (b) provide adequate means to exclude individuals who have perpetrated serious crimes. In particular, terrorist acts will hardly ever qualify as 'non-political' offences, since they are most likely to be considered disproportionate to their political objectives. Furthermore, both Articles 1F(a) and (b) lay out far more specific requirements than Article 1F(c) in relation to the material elements of the crime, and the applicability of relevant defences. These considerations leave more room for taking into account all the circumstances of the individual case. In contrast, the phrase 'acts contrary to the purposes and principles of the United Nations', as embodied in Article 1F(c), is a vague and uncertain legal term. It has been interpreted by the UN Security Council and Member States to include 'terrorism', and any form of support for terrorism. This leaves a large amount of discretion to Member States to politically label certain acts and groups 'terrorist', without a clear and comprehensive international legal basis to do so.

Exclusion from refugee status is a serious sanction by the international community. It is therefore necessary to have a principled approach to the application of Article 1F. The better approach is not to focus on the political label 'terrorism', but the actual acts committed, whether or not these constitute serious crimes, and the level of responsibility for this act that can be attributed to the asylum applicant. Since fleeing persecution for political opinion is an archetypal reason for seeking asylum, injecting subjective political notions of who

[77] *R (on the application of JS) (Sri Lanka) v Secretary of State for the Home Department* [2010] UKSC 15 [112].
[78] ibid [38] per Lord Brown. Again, in this case, the Supreme Court held that although the LTTE was included in the UK's list of proscribed terrorist organisations, it was neither 'predominantly terrorist in character' nor an 'extremist terrorist group' ([27]).
[79] See, in particular, UKBA API on Exclusion s 2.4.3: 'On the Gurung test, however, where the organisation concerned is one whose aims, methods and activities are predominantly terrorist in character, it may be sufficient for little more than simple membership of and support for such organisations to be taken as acquiescence amounting to complicity in their terrorist acts.' The UKBA API on Exclusion is, however, currently being revised.

is and is not a terrorist into the refugee determination process has the potential to undermine the very foundations of the framework of international refugee protection.