

‘My Name is Khan’ and I am not a Terrorist: Intersections of Counter Terrorism Measures and the International Framework for Refugee Protection†

NEHA BHAT*

TABLE OF CONTENTS

I.	INTRODUCTION: TERRORISM IN THE NEW WORLD ORDER.....	300
II.	ONE MAN’S TERRORIST, ANOTHER’S FREEDOM FIGHTER: DEFINITIONAL CHALLENGES	305
	A. <i>Defining Terrorism: Elements of Crime</i>	305
	B. <i>Generic Definition of Terrorism: From the League of Nations to the UN</i>	306
	C. <i>Terrorism: Specific Conventions</i>	308
	D. <i>Terrorism: Regional Conventions</i>	308
	E. <i>Incitement to Terrorism</i>	310
III.	CAN A TERRORIST EVER BE A REFUGEE?: THE REFUGEE STATUS DETERMINATION PROCESS	313
	A. <i>Include and Only Then, Exclude</i>	314
	B. <i>Article 1F of the 1951 Convention</i>	318

† © 2014 Neha Bhat. The title of the paper derives from an Indian movie made in 2010 that depicts discrimination against an inter-religious immigrant family in post-9/11 United States. MY NAME IS KHAN (Dharma Productions, Fox Searchlight Pictures 2010).

* Neha Bhat completed her dual LLM Program in International Legal Studies-Law and Government from Washington College of Law, American University in December 2013. She has previously worked with the UN High Commissioner for Refugees in India and Tunisia and is now an international refugee protection expert based out of Nepal.

C.	<i>When Norms Collide: Incoherence and Indeterminacy of Post-9/11 Exclusion in the United States</i>	324
IV.	CONCLUSION	333

Refugees are not terrorists. They are often the first victims of terrorism.

Antonio Guterres, UN High Commissioner for Refugees

I. INTRODUCTION: TERRORISM IN THE NEW WORLD ORDER

It is ironic that a concept as widely cited and spoken about as terrorism should defy definition. While it is often easy to identify acts that are in some manner a form of terrorism, the international community has struggled to arrive at a universally acceptable definition. Attempts to define terrorism have continued since the late 1930s.¹ Political assassinations in the 1920s and 1930s prompted the League of Nations (the League) to address the threat of terrorism. While the League successfully drafted two separate treaties on the issue,² it could not attain consensus among members for ratification and implementation of the treaty that specifically defined terrorism. The United Nations (UN) has also made many attempts to define terrorism. And although the international community has written more than thirteen different multilateral treaties on what activities fall within the ambit of terrorist activity, a generic definition of terrorism remains elusive.³

The events of 9/11 reiterated the urgency and necessity to define terrorism. Terror was no longer an obscure and shapeless force—it was demonstrably fiendish and evil. In Samuel Huntington’s terminology, 9/11 was indeed the launch of the “clash of civilizations.”⁴ It marked the arrival of religious extremism in international warfare, which itself was no longer restricted to states. Prior to 9/11, groups such as the People’s Mujahedin of Iran (PMOI) and the Hezbollah had successfully carried out acts of terror against states such as Iran, Israel, and Lebanon. However, 9/11 was the first time that a non-State actor, the *Al Qaeda*, had been successful in causing substantial damage to infrastructure and facilities of a State *outside* of the geographical location it operated in. Still, the impact of 9/11 was not intended to be nor limited to mere

1. HELEN DUFFY, *THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW* 18–19 (2005).

2. *Id.*

3. *Id.*

4. Michael Dunn, *The ‘Clash of Civilizations’ and the ‘War on Terror’*, 49th Parallel, Vol. 20 (2006-2007), available at <http://www.49thparallel.bham.ac.uk/back/issue20/Dunn.pdf>.

economic and infrastructural damage. The extent of paranoia created by the attacks resulted in the start of the long and yet unconcluded “War on Terror” to tackle the rise of terrorism and, *by default*, religious extremism. National security, counter terrorism, and principles of State sovereignty became the driving force behind foreign policy and legislative decisions, trumping every fundamental framework of rule of law and human rights.

The “War on Terror” also holds the dubious distinction of creating inextricable linkages between refugee and asylum law and principles of national security. This policy initiative found an unlikely precursor in the UN Security Council (UNSC). In the aftermath of 9/11, UNSC Resolution 1373 reiterated the necessity to exclude terrorists from asylum systems the world over.⁵ Indeed, as post-9/11 legislative practices in various national and regional jurisdictions demonstrate, the restrictive and often narrow determination of “national security interests” has led to the tightening of eligibility bars for admittance as refugees. This is starkly demonstrated by the decline in refugee admittance figures around the world, but especially in the United States—where in 2002 and 2003, against an authorized admission of 70,000 refugees, only 27,029 (2002) and 28,422 (2003) were admitted.⁶

Article 14 of the Universal Declaration of Human Rights (UDHR) delicately balances the right of an individual to seek asylum vis-à-vis the concerns of State sovereignty. Thus, while the provision articulates the individual right to seek asylum in a country other than one’s own, no obligation is cast on member states of the UN to grant asylum to every claimant. This norm has been further elaborated in Article 33 of the Convention Relating to the Status of Refugees (1951 Convention) as the norm of *non-refoulement*.⁷ This norm has also been guaranteed absolute

5. “3. . . (f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts; (g) Ensure, in conformity with international law, 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.” See S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

6. See Marisa Silenzi Cianciarulo, *Counterproductive and Counterintuitive Counterterrorism: The Post- September 11 Treatment of Refugees and Asylum Seekers*, 84 DENV. U. L. REV. 1121, 1129 & n.47, 1130–31 & nn.60–63 (2007).

7. Convention Relating to the Status of Refugees art. 33(1), July 28, 1951, 189 U.N.T.S. 137 (stating “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would

protection under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984 Convention).⁸ However, as the “War on Terror” has expanded, this hitherto accepted norm, which also enjoys the elevated status of “customary international law,”⁹ has become the subject of much debate and discussion. Arguments have been raised in the past decade to justify the right of States to balance interests of national security against their obligation to honor the norm of *non-refoulement*.¹⁰

These policy changes give rise to multiple questions—involving not only issues of State sovereignty and national security, but also the precedential value of promoting a rule of law framework largely devoid of *de minimis* protections. They also affect the deeper and abstract presumptions informing counter terrorism and counter-radicalization measures. In fact, what are the elements for the crimes of terrorism, “incitement to terrorism,” and “material support to terrorism?” How can an individual be held guilty of such an offence if the offence is itself undefined or obscurely defined? Can any asylum regime exclude such individuals from its protection who have allegedly committed the crime of terrorism, “incitement to terrorism,” or provided “material support to terrorism” *without* first defining the crimes? Can such exclusion be automatic—without assessing the individual circumstances of the case to determine (a) whether there is a fear of persecution, and (b) the individual culpability of the person in question? If yes, on what grounds is such exclusion based? What role does Article 1F of the 1951 Convention play in this context—is it an exhaustive provision or can there be additional grounds on which exclusion considerations may be assessed? What is the impact of these debates on the norm of *non-refoulement*?

In the decade since 9/11, these questions have been debated and discussed by many eminent academics. Most consider that in the immediate aftermath of 9/11, many states adopted a very expansive definition of what constituted terrorist activity and “material support to terrorism,” thus leading to absurd and often, perverse determinations—disproportionately affecting those

be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”) (hereinafter 1951 Convention).

8. G.A. Res. 39/46, art. 3(1), U.N. Doc. A/RES/39/46 (Dec. 10, 1984) (stating “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”).

9. See U.N. High Commissioner for Refugees, *The Principle of Non-Refoulement as*

the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, (Jan. 31, 1994), available at <http://www.unhcr.org/refworld/docid/437b6db64.html>.

10. See, e.g., Rene Bruin & Kees Wouters, *Terrorism and the Non-derogability of Non-Refoulement*, 15 INT’L J. OF REFUGEE L. 5, 5–29 (2003).

most in need of protection. Over time, adjudicators have returned to more conservative interpretations of Article 1F of the 1951 Convention for guidance, because as has been rightly recognized in judicial precedent, basing decisions on an underlying norm that is not clear automatically negated the rule of law.¹¹ While it is easy to change the course of judicial pronouncements, adjudicators still must adhere to formal legal provisions that incorporate these restrictive provisions and which, despite their inadequacies, continue to be maintained as part of the legislative framework in many states.

These questions have renewed relevance today—anti-terrorism laws enacted post-9/11 remain in force in different jurisdictions, and despite occasional decision of the courts, the apprehension that these laws will overshadow the institution of asylum remains real. As the composition of the ongoing conflicts and participation thereto unequivocally demonstrates, the “War on Terror” is far from over. What problematizes terrorism in the 21st century is its constantly mutating nature. As Ronen indicates, terrorism post-9/11 differs significantly from the traditional conceptualization and understanding of terrorism.¹² These differences are primarily on two major aspects. First, is the rise and proliferation of non-State actors like the “*Al Qaeda* and Affiliated Movements” (AQAM). Unlike traditional terrorist outfits, AQAM is not defined by a hierarchical organizational structure or political and social motives. Rather, the organization operates in a decentralized fashion and its goals and objectives are often defined by extremist religious ideologies or interpretations. The former quality significantly enhances AQAM’s flexibility in terms of recruitment and training of fighters. The killing of Osama bin Laden in 2011 has only strengthened the *raison d’etre* behind the ideology of *Al Qaeda* and spurred the organization’s proliferation. Second, while traditional terrorist outfits used mass casualties as a means of achieving a particular goal, in the context of post-9/11 terrorist activities, inflicting large-scale damage to life and property has become a motive in itself.

Given this background, three factors become very critical. First, the burgeoning Syrian refugee crisis across the Middle East, the resurgence of sectarian violence in Iraq, and the beginning of United States and

11. See *Minister for Immigration and Multicultural Affairs v. Singh* [2002] HCA 7 (Austl.).

12. See Yael Ronen, *Incitement to Terrorist Acts and International Law*, 23 LEIDEN J. INT’L L. 645, 648–49 (2010).

international force withdrawal from Afghanistan. It is extremely likely that those fleeing conflicts in Syria, Iraq, and Afghanistan or other conflict hot spots are likely to find themselves embroiled in long Refugee Status Determination (RSD) proceedings, simply because the level of violence prevalent in these conflicts gives rise to a strong, albeit rebuttable, presumption of involvement of civilians in excludable acts. The second, and perhaps more alarming, factor is the rise in radicalism among diaspora Muslim populations. In a recently released study, the International Center for the Study of Radicalization states that since the beginning of the Syrian conflict in 2011, as many as 2,000–5,500 foreign fighters have participated in the Syrian conflict, of which 135–590, or 7–11% have been European Muslims.¹³ The post-9/11 decade has also witnessed the rise of homegrown terrorism in the United States, United Kingdom, and the European Union, among others—naturalized and second generation citizens as well as legal residents have participated in extremist violence, influenced in some manner by the AQAM, and supported in large part by indoctrination through social media and radicalization led by religious leaders within their communities.¹⁴ This could lead to expulsion of these individuals from their respective countries of residence if they are held liable for participation in terrorist activity. Such individuals are also liable to be denied re-admission to their home state territory if they traveled to a third country to participate in activities, of potentially excludable nature. The third, and perhaps the most crucial link in this chasm, is the continued existence of the Guantanamo Bay detention facility. Despite declaring his intention to close Guantanamo Bay during his first term in office, President Obama has in his second term signed into law such provisions which make it extremely difficult, if not impossible, to shut down Guantanamo Bay in the immediate future.¹⁵ The longer it takes for the facility to close, the more likely it is for decisions of war crimes trials to be challenged in a regular court of law. Already in 2012, the D.C. Circuit Court of Appeals rejected the “material support to terrorism” charge against Salim Hamdan, Osama bin Laden’s driver.¹⁶ This decision, if upheld,

13. Aaron Zelin, *European Foreign Fighters in Syria*, INT’L CENT. FOR THE STUDY OF RADICALIZATION (Feb. 4, 2013), <http://icsr.info/2013/04/icsr-insight-european-foreign-fighters-in-syria-2/>.

14. See, e.g., Shazad Ali, *Home-Grown Terror in Europe: Threat in the Midst*, 27:2 J. EUR. STUD. (PAK.) 89, 89–122 (July 2011).

15. *NDAA Prevents Closing Guantanamo, Could Lead to Claims of a Right to Discriminate*, AM. CIVIL LIBERTIES UNION (Jan. 3, 2013), <http://www.aclu.org/national-security/updated-ndaa-prevents-closing-guantanamo-could-lead-claims-right-discriminate>.

16. See generally Alexandra Link, *Trying Terrorism: Joint Criminal Enterprise, Material Support, And the Paradox of International Criminal Law*, 34 MICH. J. INT’L L. 439 (2013).

holds significant potential to alter the legislative and normative framework under which individuals may be excluded from grant of asylum in the United States.

This paper is structured as follows: Part II traces the development of international instruments on the definition of terrorism, terrorist activities and “incitement to terrorism.” Part III first explores the normative framework of exclusion under the 1951 Convention and how the RSD procedure has undergone a notional shift, with exclusion considerations becoming more central. The section will then look at the provisions of Article 1F of the 1951 Convention, which contain the exclusion clauses and also discuss incorporation of terrorism exception to the asylum law framework in the United States. Part IV concludes with the proposition that the dangers of expansive interpretation of nebulous terms such as terrorism, terrorist activity, and “material support to terrorism” far outweigh the benefits that could be derived from pursuing such a policy.

II. ONE MAN’S TERRORIST, ANOTHER’S FREEDOM FIGHTER: DEFINITIONAL CHALLENGES

“We can’t define what terrorism is, but we know it when we see it.”

Justice Potter Stewart, Jacobellis v. Ohio (1964)

The commission of an act of terrorism attracts near-universal condemnation, often giving the impression that the offence is amenable to an universal legal definition. Contrarily, many challenges to defining terrorism exist. This section first discusses the elements of the crime of terrorism. It then outlines the many efforts at the UN level to develop a common definition of terrorism, and briefly discusses specific conventions on different categories of terrorist activities, as well as the progress made at regional levels in this regard. Finally, it looks at the recent efforts to criminalize incitement to terrorism under international law.

A. *Defining Terrorism: Elements of Crime*

The crime of terrorism requires both the mental intent (*dolus / mens rea*) and the act (*actus reus*).¹⁷ However, unlike most other offences under

17. Christian Walter, *Defining Terrorism in National and International Law, in TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY?* 23–43 (Cristian Walter et al. eds., 2004).

international law, the crime of terrorism requires the elements to be shown in two different layers. Like the crime of genocide, terrorism is a crime with specific double intent or *dolus specialis*.¹⁸ Thus, to sustain the charge of terrorism requires a showing of the intent not only for the specific resultant act—hijacking a plane, siphoning off of funds, etc.—but also for the broader purpose of causing or spreading terror through the eventual execution of such acts. While it is relatively easy to establish a physical act that has been committed (hijacking, kidnapping, etc.), the second level of the offence of terrorism, i.e., causing and/or spreading terror, is more difficult to establish given its inchoate nature.

B. Generic Definition of Terrorism: From the League of Nations to the UN

Kalliopi Koufa, the UN Special Rapporteur on Human Rights and Terrorism, in her 2001 Report to the Sub-Commission on the Promotion and Protection of Human Rights, noted that 109 different definitions of terrorism had been proposed between 1936 and 1981—none of which have as yet been adopted.¹⁹ In 1937, the League proposed the first Convention for the Prevention and Punishment of Terrorism, which defined terrorism as, “all criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public.”²⁰ This Convention was never adopted by members of the League. In 1972, the UN General Assembly appointed an *ad hoc* Committee to draft a comprehensive Convention on Terrorism and produce a definition, a task the Committee was unable to complete.²¹ In 1995, the UN General Assembly endorsed the Declaration on Measures to Eliminate International Terrorism, which defined terrorism as, ‘. . . *criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature. . .*’²²

The 1995 Declaration, although non-binding in nature, remains the only international instrument to define terrorism. After adoption of the Declaration, most members of the Non-Aligned Movement and Organization of Islamic States continued to reiterate the necessity of a

18. See DUFFY, *supra* note 1.

19. *Id.* at 18 n.4.

20. *Id.* at 18–19.

21. *Id.* at 19.

22. G.A. Res. 49/60, I(3), U.N. Doc. A/RES/49/60 (Dec. 9, 1994).

separate comprehensive treaty on terrorism. But that the Declaration was adopted without a vote and thereafter reaffirmed in various UN General Assembly Resolutions²³ indicates that states did indeed arrive at a general consensus on the definition of terrorism.²⁴

Subsequently, in 1996, pursuant to Resolution 51/210,²⁵ the UN General Assembly established a second *ad hoc* Committee to draft a comprehensive Convention on International Terrorism and present an alternative definition of terrorism. The work of this Committee is still ongoing. Per the Draft Comprehensive Convention, the Committee proposed to define terrorism as “unlawfully and intentionally, caus[ing]: (a) death or serious bodily injury to any person; (b) serious damage to public or private property, including ... a State or government facility”; or (c) other such damage where it is likely to result in major economic loss.²⁶ The definition further requires that “the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.”²⁷ The work of the Committee overlapped with the events of 9/11, but despite strong condemnation of 9/11 and a general consensus among the international community, member states yet again did not reach a consensus on the definition of terrorism. While there is debate whether a single, generic definition of terrorism under international law is at all required, the existing variance in opinions makes uncertain the eventual adoption of a generic definition and success of a global convention on terrorism.²⁸

23. See, e.g., G.A. Res. 50/53, ¶ 2, U.N. Doc. A/RES/50/53 (Dec. 11, 1995); G.A. Res. 51/210, ¶ 2, U.N. Doc. A/RES/51/210 (Dec. 17 1996); G.A. Res. 52/165, ¶ 2, U.N. Doc. A/RES/52/165 (Dec. 15, 1997); G.A. Res. 53/108, ¶ 2, U.N. Doc. A/RES/53/108 (Dec. 8, 1998); G.A. Res. 54/110, ¶ 2, U.N. Doc. A/RES/54/110 (Dec. 9, 1999); G.A. Res. 55/158, ¶ 2, U.N. Doc. A/RES/55/158 (Dec. 12, 2000); G.A. Res. 56/88, ¶ 2, U.N. Doc. A/RES/56/88 (Dec. 12, 2001); G.A. Res. 57/27, ¶ 2, U.N. Doc. A/RES/57/27 (Nov. 19, 2002).

24. See Ben Saul, *The Emerging International Law of Terrorism* (Sydney Law School, Research Paper No. 10/108, 2010), available at <http://ssrn.com/abstract=1699568>.

25. G.A. Res. 51/210, ¶ 9, U.N. Doc. A/RES/51/210 (Dec. 17, 1996).

26. Rep. of the Ad Hoc Comm., 6th sess, Jan. 28–Feb.1, 2002, U.N. Doc. A/57/37; GAOR, 57th Sess., Supp. No. 37 (2002).

27. *Id.*

28. See, e.g., Sameera Singh, *Will Acceptance of a ‘Universally Approved Definition’ of Terrorism make Article 1F of the 1951 Refugee Convention More Effective in Excluding Terrorists?*, 2:3 J. MIGRATION & REFUGEE ISSUES 91, 91–119 (2006).

C. Terrorism: Specific Conventions

Alongside the prolonged efforts of the UN to draft a comprehensive Convention on Terrorism, the international community bolstered its effort to fight terrorism by promulgating international instruments addressing specific conduct that falls within the purview of terrorist activity. There currently exists at least thirteen such conventions addressing *inter alia* offences on board aircraft or at airports; crimes against internationally protected persons; hostage taking; and acts aboard ships and at sea.²⁹ In as much as these conventions address the conduct or act that is punishable rather than a perpetrator, they create objective legal criteria under which individuals can be held liable. It is to be noted that these conventions do not penalize the prohibited conduct, but require member states to criminalize the specified conduct under domestic law. Additionally, member states are obligated *inter alia* to extradite or submit for prosecution individuals suspected of having committed the covered offences, and cooperate in intelligence and evidence gathering activities.³⁰

D. Terrorism Regional Conventions

Regional bodies including the European Union, Arab League, and African Union have addressed the issue of terrorism, giving rise to seven regional conventions. However, only two of the regional bodies have chosen to draft conventions incorporating a generic definition for the term terrorism, while the remaining bodies have chosen to define

29. Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S. 177; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 1035 U.N.T.S. 167; International Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205; Convention on the Physical Protection of Nuclear Material, *opened for signature* Mar. 3, 1980, 1456 U.N.T.S. 101 (adopted on Oct 27, 1979); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 1589 U.N.T.S. 474; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 1, 1992, 1678 U.N.T.S. 304; Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 30 I.L.M. 721 (1991); International Convention for the Suppression of Terrorist Bombings, Jan. 9, 1998, 37 I.L.M. 249 (1998); International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270 (2000); International Convention for the Suppression of Acts of Nuclear Terrorism, U.N. GAOR 59th Sess., U.N. Doc. A/59/766 (April 4, 2005).

30. DUFFY, *supra* note 1, at 23–24.

terrorism by reference to existing treaties and conventions.³¹ The 1998 Arab Convention on the Suppression of Terrorism, defines terrorism as

Any act or threat of violence, whatever its motives or purposes, that occurs for the advancement of an individual or collective criminal agenda, causing terror among people, causing fear by harming them, or placing their lives, liberty or security in danger, or aiming to cause damage to the environment or to public or private installations or property or to occupy or seize them, or aiming to jeopardize national resource.³²

After 9/11, the European Union, which had previously promulgated the 1977 European Convention on the Suppression of Terrorism,³³ adopted the Framework Decision on Combatting Terrorism, which defines terrorism as

[I]ntentional acts which, given their nature or their context, may seriously damage a country or international organization where committed with the aim of:

- (i) seriously intimidating a population, or
- (ii) unduly compelling a Government or international organization to perform or abstain from performing any act, or
- (iii) seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or international organization.³⁴

31. *E.g.*, Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, Feb. 2, 1971, 37 U.N.T.S. 195; Organization on African Unity (OAU) Convention on the Prevention and Combating of Terrorism, July 14, 1999, 2219 U.N.T.S. 179; South Asian Association for Regional Cooperation (SAARC) Regional Convention on the Suppression of Terrorism, Nov. 4, 1987.

32. Arab Convention on the Suppression of Terrorism, art. 2, Apr. 22, 1998.

33. The 1977 Convention, adopted by the Council of Europe, "deals with extradition in relation to terrorist offences, defined by reference to crimes listed in other conventions. It provides a list of offences which, for the purposes of the Convention, are considered 'terrorist offences and in respect of which state parties must extradite suspects, as opposed to 'political' offences where generally the duty to extradite does not apply. It also includes other offences involving an act of violence against the life, physical integrity or liberty of a person and against property if the act created a collective danger for persons, where the state *may* extradite thus suspect, but is not obliged to do so." DUFFY, *supra* note 1, at 28 n.46.

34. Council Framework Decision 2002/475/JHA, of 13 June 2002 on Combating Terrorism, art. 1, 2002 O.J. (L 164) 3.

E. Incitement to Terrorism

Until very recently, international regulation of propaganda was largely confined to war propaganda, including prohibiting the threat of the use of force and requiring states to refrain from intervening in domestic affairs of other States.³⁵ Under Article 20(1) of the 1966 International Covenant on Civil and Political Rights (ICCPR), States are obligated to prohibit war propaganda by individuals. Under Article 4(a) of the 1969 Convention on Elimination of All Forms of Racial Discrimination (CERD), States are required to prohibit incitement of national, racial, or religious hatred.³⁶ But none of these measures are sufficiently broad to cover “incitement to terrorism” in its post-9/11 form. The only existing comparable framework for regulation of the offence of incitement is contained in the 1948 Convention on Prevention and Punishment of Genocide (1948 Convention), which was replicated in Statutes of the *ad hoc* Tribunals for Yugoslavia³⁷ and Rwanda,³⁸ and of the International Criminal Court.³⁹ Given that these provisions apply specifically to the crime of genocide, it cannot be *mutatis mutandis* made applicable to the crime of incitement of terrorism. “Incitement to terrorism” has thus remained largely devoid of regulation. However, post-9/11, States have increasingly felt the need to create a legal and policy framework which not only punishes terrorist activities but helps *prevent* them as well. Development in this field of legislative regulation predominantly been in the European Union and the United Kingdom,⁴⁰ where long-standing discrimination against minority Muslim populations has supported the growth of homegrown and international terrorism.⁴¹

The first reference to “incitement of terrorism” was contained in the 1996 Security Council Resolution 51/210, which declared that “knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations.”⁴² Shortly after 9/11

35. See Ronen, *supra* note 12, at 649–51.

36. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

37. S.C. Res. 827, art 4(3)(c), U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (May 25, 1993).

38. S.C. Res. 955, art. 2(3)(c), U.N. SCOR, 3453th mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994).

39. Rome Statute of the International Criminal Court, art. 25(3)(e), July 17, 1998, 2187 U.N.T.S. 90.

40. The provisions dealing with incitement to terrorism are contained in the Terrorism Act, 2000 and amended by the Terrorism Act, 2006. See Shazad, *supra* note 14.

41. See *id.*

42. G.A. Res. 51/210, *supra* note 25.

occurred, the UNSC adopted Resolution 1373, which replicated the language of Resolution 51/210.⁴³ After the 2005 London bombings, the United Kingdom sponsored UNSC Resolution 1624 that directly addressed the issue of incitement to terrorism. The Resolution reiterates that incitement to terrorism is contrary to the purposes and principles of the UN, and calls upon member states to prohibit and prevent incitement to terrorism. The Resolution by itself does not create a binding legal obligation—unlike Resolution 1373, Resolution 1624 was not taken under Chapter VII of the UN Charter, and the language of the Resolution does not imply any binding obligation. However, member states are required to report to the Counter Terrorism Committee (CTC)⁴⁴ on the steps taken to implement the Resolution. While it has been argued that the Resolution provides the legal basis for criminalizing “incitement to terrorism,” the Resolution does not define the offence of “incitement to terrorism,” in contradiction with the principle of *nullum crimen sine lege*.⁴⁵

In 2008, to provide member states with guidance on implementation of the Resolution, the UN Secretary General defined “incitement to terrorism” as “a direct call to engage in terrorism, with the intention that this will promote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring.”⁴⁶ In order to prosecute an individual for “incitement to terrorism,” there must be intent and direct encouragement of a third individual toward commission of a crime in that the speech has to result

43. S.C. Res. 1373, *supra* note 5.

44. As Ronen states, if Resolution 1624 is indeed binding, the CTC should monitor State practice which encroaches upon protected human rights whilst undertaking implementation of the Resolution. *See* Ronen, *supra* note 12, at 650–51. For Resolution 1373, the CTC decided to engage in dialogue with states and adopted a reporting mechanism, focused on technical assistance for capacity building. CTC’s reports on implementation of Resolution 1624 contain no assessment of State’s practice in light of international human rights standards and neither do they relate to any engagement on part of the CTC with member states to promote best practices, as required under Resolution 1624. *See* S.C. Res. 1624, ¶ 4, U.N. Doc. S/RES/1624 (Sept. 14, 2005). *See also* Ronen, *supra* note 12, at 650–51.

45. This principle, along with the general prohibition of *ex post facto* law is a judicial guarantee that is generally considered indispensable under international law. *Nullum crimen sine lege* prohibits punishment of an act if the act was not an offence at the time of commission. With respect to Resolution 1624, the argument remains that in as much as the Resolution does not define “incitement to terrorism,” it cannot be the basis of its criminalization.

46. *See also* Ronen, *supra* note 12, at 668.

in criminal action or should be likely to result in criminal action. The Secretary General's report clearly distinguished between direct "incitement of terrorism" and other indirect forms—i.e., *apologie* of terrorism; while it criminalizes the former, it does not criminalize indirect forms of "incitement to terrorism." Criminalizing indirect forms of "incitement to terrorism" such as *apologie* or glorification was considered to place unnecessary restrictions on the right to freedom of speech and expression.⁴⁷

However, the Resolution itself neither requires member states to take action against indirect acts of "incitement to terrorism," nor prohibits them from criminalizing such behavior.⁴⁸ This flexibility accorded by the Resolution is evident in State practice—eighty-eight states reported to the CTC that they had not adopted any new legislation to implement the Resolution in their national jurisdictions both because of the non-binding nature of the Resolution and the potential conflict with the right to freedom of speech and expression.⁴⁹ On the other hand, as the 2006 CTC Report reveals, five out of sixty-nine reporting states indicated that criminalization of "incitement to terrorism" in their national jurisdictions encompassed statements glorifying or justifying terrorism, i.e., *apologie*.⁵⁰ In addition, six other states reported that their penal laws contained prohibitions of public approval or glorification of serious crimes that could also be applied to terrorist acts.⁵¹ Most states reported penal provisions on inchoate crimes such as aiding and abetting, which would be applicable to terrorist acts as well.⁵²

The most significant departure from the Secretary General's definition of "incitement to terrorism" has been by the Council of Europe. In 2005, the Council adopted the Convention on Prevention of Terrorism, which defines "incitement to terrorism" as, '*the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offenses, causes a danger that one or more such offences may be committed.*'

47. See Eric De Brabandere, *The Regulation of Incitement to Terrorism in International Law*, in *BALANCING LIBERTY AND SECURITY: THE HUMAN RIGHTS PENDULUM*, 221, 231–32 (L. Hennebel & H. Tigrouda eds., 2012). Under the Genocide Convention, as also the Statutes of ICTY, ICTR and the ICC, only direct and public incitement of genocide is criminalized, not any indirect form of incitement.

48. *Id.*

49. KENT ROACH, *THE 9/11 EFFECT: COMPARATIVE COUNTER-TERRORISM* 58, (Cambridge Univ. Press 2011).

50. See De Brabandere, *supra* note 47, at 230.

51. *Id.*

52. See *id.* at 228–29.

Not only did the Council of Europe criminalize all forms of indirect incitement, such as glorification or *apologie*, but the Convention also states that actual commission of a terrorist offence is irrelevant for an act to constitute public provocation to commit a terrorist offence, recruitment for terrorism, or training for terrorism, thus placing incitement squarely within the confines of prohibited conduct.⁵³

As the discussion above demonstrates, controversy has surrounded the conceptualization of terrorism under international law. Such incongruity only generates deep uncertainty about the precise nature of state obligations—each member state enjoys leeway to define these concepts the way it chooses, which effectively undermines the purpose of these obligations.⁵⁴ Although Cassese argued that international terrorism has now become a customary international law crime that derives its status from the convergence of norms in international, regional, and national jurisdictions;⁵⁵ State practice in this regard is far less convincing. While it is likely, as Saul argues, that the present architecture on the crime of international terrorism⁵⁶ will eventually result in a customary international law crime of international terrorism, but to make it the basis of restrictive policies on refugee and asylee admissions, in the absence of a common understanding of the crime itself, raises serious questions about rule of law and exercise of fundamental rights. It is, as French law enforcement officials have said, akin to having “opened the universal hunting season on terrorism without defining it.”⁵⁷

III. CAN A TERRORIST EVER BE A REFUGEE?: THE REFUGEE STATUS DETERMINATION PROCESS

The question is not whether the appellant can be characterized as a terrorist, but rather whether the words of the exemption clause apply to him.

Gurung v. SSHD [2002] UKIAT 04870

53. *Id.* at 232–34.

54. *See* Saul, *supra* note 24.

55. *Id.* at 3–6.

56. *Id.*

57. DUFFY, *supra* note 1, at 46.

A. *Include and Only Then, Exclude*

In 1825, the Dutch jurist, Hugo Grotius, said that “asylum was accepted by international law as available to those fugitives who had suffered undeserved enmity but not for those who had done something injurious to human society.”⁵⁸ This expression, first reflected in extradition law, has also found its way into the 1951 Convention. Drafted at the end of World War II, the 1951 Convention excludes from its protection individuals who have committed crimes against peace, war crimes, crimes against humanity, serious non-political crimes, and acts contrary to the purposes and principles of the UN.⁵⁹ The intrinsic link between “ideas of humanity, equity, and the concept of refuge” and exclusion of guilty individuals was considered necessary to maintain the humanitarian character of asylum.⁶⁰ There exists a presumption that any individual who has committed a serious crime is liable to be prosecuted. Also, any such person automatically loses the protection of *non-refoulement* under Article 33 of the 1951 Convention.⁶¹

Although Article 1F has existed since the entry into force of the 1951 Convention, it was used sparingly by states in RSD procedures until recently.⁶² Clearly, not all individuals, including those who have participated in serious transgressions prior to seeking asylum have been or should be excluded from international protection. While some political struggles have indeed been discreditable, political struggles may rise to the level of persecution, and to deny international protection to individuals that may have suffered persecution as result of political

58. Satvinder Singh Juss, *Terrorism and the Exclusion of Refugee Status in the UK*, 17 J. CONFLICT & SEC. L., 465, 466 (2012).

59. See 1951 Convention, *supra* note 7, at art. 1F.

60. See Standing Committee of the Executive Committee of the High Commissioner’s Programme, *Note on the Exclusion Clauses*, 47th Session, ¶ 3, UN doc. EC/47/SC/CRP.29 (May 30, 1997).

61. See 1951 Convention, *supra* note 7, at art. 33. The protection of *non-refoulement* under Article 33(2) of the 1951 Convention can only be claimed by a refugee. Any individual, who is disqualified from receiving international protection due to operation of Article 1F of the 1951 Convention is not a refugee. *Id.*; see also Universal Declaration of Human Rights, art. 14(2) Dec. 10, 1948, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 18, 1992) (disallowing the right of asylum to be invoked in cases where the individual seeking asylum is liable for prosecution for commission of serious non-political crimes or for acts contrary to the purpose and principles of the UN).

62. The first large scale application of the exclusion clauses occurred in the aftermath of the Rwandan Genocide in 1994 and the first comprehensive guidelines in this regard were issued in September 2003. See Geoff Gilbert, *Current Issues in the Application of the Exclusion Clauses*, in REFUGEE PROTECTION IN INTERNATIONAL LAW, 425, 465 (Erika Feller, Volker Turk & Frances Nicholson eds., Cambridge Univ. Press, 2003).

conflict is to renege on the 1951 Convention.⁶³ Furthermore, the rules of exclusion under the 1951 Convention are exceptionally stringent and are to be applied selectively. The United Nations High Commissioner for Refugees (UNHCR) Handbook on Procedures and Criteria for Determining Refugee Status (RSD Handbook) states that “[c]onsidering the serious consequences of exclusion for the person concerned, however, the interpretation of these exclusion clauses must be restrictive.”⁶⁴

UNHCR agrees that in exceptional circumstances, such as where an international indictment is pending against an individual or where entry into state territory has been forceful (e.g., through hijacking of a plane), there exist prima facie grounds to exclude an individual from protection of the 1951 Convention.⁶⁵ For example, the UNSC has called upon member states to prohibit entry of senior officials of the National Union for the Total Independence of Angola on state territory,⁶⁶ making an automatic denial of asylum, should it be claimed, likely. In certain circumstances, membership of an organization charged with having committed excludable acts may also give rise to a rebuttal presumption of exclusion, in which case the burden of proof shifts to the applicant.⁶⁷ However, such situations are likely to be rare. The RSD Handbook states that details of an individual’s involvement in potentially excludable acts are likely to arise during the RSD procedures or even after a grant of refugee status,⁶⁸ and thus summary or accelerated RSD procedures for such individuals may not holistically address the complex issues of facts and credibility.⁶⁹ The general rule therefore is that a person has to be considered and

63. Satvinder Singh Juss, *Complicity, Exclusion, and the “Unworthy” in Refugee Law*, 31 REFUGEE SURV. Q., 1, 2 & n.5 (2012).

64. U.N. High Comm’r 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*, ¶ 149, HCR/IP/4/Eng/REV.1 (Jan. 1992) (hereinafter RSD Handbook).

65. See Gilbert, *supra* note 62, at 465.

66. See S.C. Res. 1127, ¶ 4, U.N. Doc. S/RES/1127 (Aug. 28, 1997); S.C. Res. 1295, ¶¶ 22–24, U.N. SCOR 55th year, U.N. Doc. S/RES/1295 (Apr. 18, 2000); S.C. Res. 1336, U.N. Doc. S/RES/1336 (Jan. 23, 2001).

67. U.N. High Comm’r for Refugees, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, ¶ 19, HCR/GIP/03/05 (Sept. 4, 2003) (hereinafter Exclusion Guidelines).

68. RSD Handbook, *supra* note 64, ¶ 141.

69. See Gilbert, *supra* note 62, at 465.

assessed for refugee status under Article 1(A)(2) of the 1951 Convention,⁷⁰ and only when such determination is successful can a case be made for exclusion under Article 1F. The 1951 Convention is premised on the norm of inclusion,⁷¹ making all such individuals who meet the criteria of refugee under Article 1(A)(2) eligible for grant of refugee status, unless proved otherwise.

If, as Gilbert argues, Article 1F is applied *before* the determination of refugee status under Article 1(A)(2), it gives rise to the presumption that all individuals claiming international protection are excludable therefrom.⁷² If the wording of Article 1F (“This Convention shall not apply”) is interpreted literally, it will neglect the humanitarian character of the 1951 Convention and shift the focus from persecution and well-founded fear, and transform the Convention into a tool to detect criminals and offenders. State practice prior to 9/11 also presents evidence of general acceptance of this “include and only then exclude” norm. The European Commission’s draft Directive on Asylum Procedures stated that where “there are serious reasons for considering that the grounds of Article 1(F) . . . apply,” member states shall not consider this as “grounds for dismissal of applications for asylum as manifestly unfounded.”⁷³ Additionally, case law from United Kingdom,⁷⁴ France,⁷⁵ and to some extent Canada,⁷⁶ indicates that this norm has been followed.

This practice however appears to be changing—the inclusion criteria under Article 1(A)(2) of the 1951 Convention is now being narrowly interpreted, while the scope of Article 1F appears to be expanding. In some jurisdictions, eligibility bars have existed since the early 1990’s. For example, in 1992, the Federal Court of Canada held that if the claimant falls within Article 1F, then there is no need to consider whether the claimant falls within Article 1A(2).⁷⁷ However, the events of 9/11 have

70. *Id.*; see also *In re S.K.* (unreported) Refugee Status Appeals Authority, No. 29/91, 17 February 1992 (New Zealand), available at <http://www.refworld.org/docid/3ae6b7410.html>

71. RSD Handbook, *supra* note 64, at ¶ 39 (stating, “It may be assumed that, unless he seeks adventure or just wishes to see the world, a person would not normally abandon his home and country without some compelling reason.”).

72. See Gilbert, *supra* note 62 at 466.

73. *Id.* (internal quotation marks omitted)

74. *O v. Immigration Appeals Tribunal and Secretary of State for Home* [1995] Imm. A. R. 494.

75. See Daniella Rudy, *International Terrorism, An Excludable Act Within the Convention Relating to the Status of Refugees* (May 2004)(unpublished thesis)(on file with University of Leiden Institute of Immigration Law) at 16 & n.49–51.

76. *Id.*

77. See Gilbert, *supra* note 62, at 464–65. See also Resolution on Manifestly Unfounded Applications for Asylum, The Council, Conclusions of the Meeting of the Ministers responsible for Immigration Doc. 10579/92 IMMIG, ¶ 11 (London, 30 Nov.-1

prompted an exponential increase in the use of the exclusion clause in RSD proceedings because the normative underlying assumption is that terrorists are misusing the asylum systems.

This heightened paranoia surrounding the misuse of the institution of asylum partly a result of the latent connections between asylum and terrorism that have been established through various UN General Assembly and UNSC Resolutions. Resolution 49/60 on Measures to Eliminate International Terrorism adopted by the UN General Assembly in December 1994 for the first time exhorted States to “take appropriate measures, before granting asylum, for the purpose of ensuring that the asylum seeker has not engaged in terrorist activities.”⁷⁸ Subsequently, beginning in 1999, the UNSC has adopted five separate resolutions that reiterate the relationship between asylum and terrorism. Four of these resolutions—Resolutions 1373, 1377, 1566, and 1624—were adopted after the occurrence of 9/11. Resolution 1373 calls upon States to, “[take] appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts”⁷⁹

Resolution 1373 gives the inaccurate impression that the individuals responsible for 9/11 had in fact abused the refugee and asylee system to enter the United States. Resolution 1373 and others have been criticized by academics and practitioners alike. The criticisms range from the inherent contradictions between the Resolutions and the principle of *nullem criminen sine lege* and that the Resolutions imply a new category of exclusion under Article 1F, pertaining to terrorism and terrorist activity. Subsequent to the adoption of Resolution 1373, many states have adopted legislative regulations (in the form of eligibility bars) that preemptorily

Dec. 1992). This Resolution does not affect national provisions of Member States for considering under accelerated procedures, *where they exist, other cases where an urgent resolution of the claim is necessary, in which it is established that the applicant has committed a serious offence in the territory of the Member States, if a case manifestly falls within the situations mentioned in Article 1.F of the 1951 Geneva Convention, or for serious reasons of public security*, even where the cases are not manifestly unfounded in accordance with paragraph 1. *Id.* (emphasis added).

78. G.A. Res. 49/60, *supra* note 22, at ¶ 5. *See also*, G.A. Res. 51/210, *supra* note 25, at ¶ 3.

79. *See* S.C. Res. 1373, *supra* note 5. *See also* S.C. Res. 1566, U.N. Doc. S/RES/1566 (Oct. 8, 2004) (adopting a working definition of terrorism).

disqualify a person from seeking asylum where there are serious grounds to believe that they have participated in terrorist activities. As Juss points out, the legislative and judicial pronouncements post-9/11 have created a standalone international framework under which a presumption exists that some individuals are automatically unworthy of refugee status.⁸⁰ These changes do not strictly align with the exclusion clause under the 1951 Convention,⁸¹ and UNHCR has reinforced the necessity to apply such eligibility bars *only if* in conformity with Article 1F provisions.⁸²

B. Article 1F of the 1951 Convention

Article 1F of the 1951 Convention provides:

The provisions of this 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, 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.⁸³

The exclusion clause under Article 1F fuses terminology from international humanitarian and criminal law (Article 1F(a)), extradition law (Article 1F(b)), and the UN Charter (Article 1F(c)). The provisions of Article 1F are exhaustive and do not include the ground of terrorism or terrorist

80. See Juss, *supra* note 63, at 2. See also George Okoth-Obbo, Dir., Int'l Prot. Servs., Keynote Speech on Preserving the Institution of Asylum and Refugee Protection in the Context of Counter-Terrorism: the Problem of Terrorist Mobility (Oct. 31, 2007), available at http://www.un.org/en/sc/ctc/specialmeetings/2007-nairobi/docs/UNHCR_keynote.pdf. See also *Dr. M v. Federal Republic of Germany*, 23 INT'L J. REFUGEE L. 809 (Dec. 4, 2011) (where the Administrative Court reiterated the unworthiness principle).

81. See *infra* Part III.C.

82. U.N. High Comm'r for Refugees, *Addressing Security Concerns Without Undermining Refugee Protection*, UNHCR Position Paper, ¶ 3, (Nov. 20, 2001), available at <http://www.refworld.org/docid/3c0b880e0.html>. Despite formal protests against the linkages being established between the institution of asylum and terrorism, the UNHCR also in part lends credence to these linkages. As Saul indicates, UNHCR considers all resolutions and declarations culminated under the UN General Assembly as binding norms of international law for the purposes of its functioning, thus tacitly granting legitimacy to the very normative framework it opposes. See Ben Saul, *Protecting Refugees in the Global 'War on Terror'* (Sydney Ctr. for Int'l Law, Working Paper Oct. 2008), available at <http://ssrn.com/abstract=1292604>.

83. 1951 Convention, *supra* note 7.

activity;⁸⁴ therefore, only such acts that fall within the scope of each of the individual clauses of Article 1F may be used as a basis for exclusion.

In order to exclude an individual from international protection under the 1951 Convention, individual responsibility in relation to the specific offences enumerated in subparagraphs (a), (b), and (c) must be established. Thus, it must be shown that an individual committed the material elements of offences (*actus reus*) with knowledge and intent (*mens rea*). Individual participation does not require physical commission of the act and can be established even where joint criminal enterprise is proved.⁸⁵

The UNHCR Guidelines on Exclusion do not provide any standalone procedures to determine individual responsibility but instead reference the jurisprudence of the international criminal tribunals in this regard.⁸⁶

84. While the 1946 Constitution of the International Refugee Organization (IRO) did exclude from IRO's mandate persons who had "participated in any terrorist organization" after the war, the drafters of the 1951 Convention explicitly decided not to read into the exclusion clauses the ground of terrorism, indicating that the provisions of Article 1F were broad enough to exclude terrorist suspects. The use of the term terrorist is considered merely adjectival in nature, which does not expound upon the legal framework of exclusion. See Ben Saul, *Exclusion of Suspect Terrorists from Asylum: Trends in International and European Law*, in INST. INT'L INTEGRATION STUDIES DISCUSSION PAPER NO. 26, at 1, 5–7 (July 2004), available at <http://www.tcd.ie/iis/documents/discussion/abstracts/IIISDP26.php>. See also Saul, *supra* note 82, at 6.

85. See U.N. High Comm'r Refugees, *Background Note on the Application of the*

¶¶ 53–55 (Sept. 4, 2003), available at <http://www.refworld.org/docid/3f5857d24.html> (hereinafter UNHCR Background Note).

86. *Id.* at ¶¶ 51–55 (stating that, "individual responsibility, and therefore the basis for exclusion, arises where the individual committed, or made a substantial contribution to, the criminal act, in the knowledge that his or her act or omission would facilitate the criminal conduct." Quoting the International Military Tribunal at Nuremberg, the Note requires that a person be found guilty only where he is "personally implicated" in the commission of the acts in question taking into account that "the criterion for criminal responsibility . . . lies in moral freedom, in the perpetrator's ability to choose with respect to the act of which he is accused." Paragraph 52 thereafter draw on the jurisprudence of the ICTY, in particular the judgment in the case of Kvočka et al (Omarska and Keraterm camps) IT-98-30/1, Trial Chamber judgment, paragraph 122, 2 November 2001, where instigating was described as prompting of another person to commit an offence, with the "intent to induce the commission of the crime or in the knowledge that there was a substantial likelihood that the commission of a crime was a probable consequence." *Id.* at ¶ 52. "Commission of a crime. . . was considered to arise from the physical perpetration of a crime or from engendering a culpable omission in violation of the criminal, in the knowledge that there was a substantial likelihood that the commission of the crime would be the consequence of the particular conduct." *Id.* "Aiding and abetting requires the individual to have rendered a substantial contribution to the commission of a crime in the knowledge that this will assist or facilitate the commission of the offence. *Id.* at ¶ 53.

The chapeau to Article 1F provides that there be “serious reasons for considering” that one or more of the subparagraphs of Article 1F has been satisfied. There is no clarity on what “serious reasons for considering” means. The standard does not imply that an applicant should have been formally charged or convicted, or that his criminality be established “beyond reasonable doubt” through a judicial procedure, although the Background Note on Exclusion indicates that the test of “balance of probabilities” is too low a threshold.⁸⁷

In terms of interpretative and legislative guidance, Article 1F(a) is comparatively less ambiguous than Articles 1F(b) and 1F(c).⁸⁸ It relies on various instruments of international humanitarian and criminal law to define its jurisdictional purview. As such, any terrorist attack⁸⁹ that can

The Note at paragraph 53 states that for aiding and abetting, “[t]he contribution may be in the form of practical assistance, encouragement or moral support and must have a substantial (but not necessarily causal) effect on the perpetration of the crime. Aiding or abetting may consist of an act or omission and may take place before, during or after the commission of the crime, although the requirement of a substantial contribution must always be borne in mind, especially when failure to act is in question.”) *Id.*

87. *See id.* at ¶ 107. Judicial precedents have however interpreted that serious reasons “implies something less than the criminal or civil standards.” *Gurung v. Secretary of State for the Home Department*, [2002] UKIAT 04870, [95]. On this aspect alone, the UK Supreme Court reiterated the reasoning in *Gurung* in the case of *R (on the application of JS) (Sri Lanka) v. Secretary of State for the Home Department*, [2010] UKSC 15, [39]

... Clearly the Tribunal in *Gurung* was right to highlight ‘the lower standard of proof applicable in exclusion clause cases’—lower than that applicable in actual war crimes trials. That said, ‘serious reasons for considering’ obviously imports a higher test for exclusion than ... an expression like ‘reasonable grounds for suspecting.’ ‘Considering’ approximates rather to ‘believing’ than to ‘suspecting.’

88. Although the UNHCR Statute refers specifically to Article VI of the London Charter of the International Military Tribunal to define the jurisdiction of exclusion for war crimes, crimes against humanity et al., no such restriction is placed on the interpretative reference for Article 1F of the 1951 Convention. In light of the development in the field of International Humanitarian Law and International Criminal Law, in interpreting Article 1F(a), regard should be had to the 1949 Geneva Conventions, 1977 Additional Protocols, the 1984 Convention, the Draft Code of Crimes Against Peace and Security of Mankind, U.N. GAOR 48th Sess., U.N. Doc. A/51/332 (July 30, 1996), and the Statutes of ICTY, ICTR, ICC and related jurisprudence.

89. The Geneva Additional Protocols I and II were negotiated in the 1970s in the wake of terrorist activities during that period and it is only logical to consider the condemnation contained in the Protocols extends to the use of terror as well. *See* Michael P. Scharf and Michael A. Newtown, *Terrorism and Crimes Against Humanity*, in *FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY*, 262, 268 (Sadat Leila ed., 2011). *See also* *Hamdan v. Rumsfeld*, 584 U.S. 557, 557, 562 (2006) (where the violence between the US and *Al Qaeda* in Afghanistan was classified as non-international armed conflict to which Common Article 3 of the Geneva Conventions was applicable).

rise to the level of crime against humanity⁹⁰ will be covered under Article 1F(a) of the 1951 Convention as long as it is part of an “organizational policy”⁹¹ and individual complicity in its commission can be demonstrated. Recent judicial precedents from the international criminal tribunals also outlaw the deliberate use of terror as a military tactic,⁹² which would be applicable to terrorism if it were indeed established as a crime against humanity.

Article 1F(c) has rarely been used as a ground for exclusion since there is no clarity on what qualifies as “acts contrary to the purposes and principles

90. The understanding of crimes against humanity has evolved from being restricted to times of armed conflict alone to peacetime as well. The first reference was in the ICTY decision, *Prosecutor v. Tadic*, Case No. IT-94-1-T, ¶ 141, (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997), where the Court held that “[C]ustomary international law may not require a connection between crimes against humanity and any conflict at all.”

91. In *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, 984, the Canadian Supreme Court held that, “[a]lthough it may be more difficult for a non-State actor to perpetrate human rights violations on a scale amounting to persecution without the State thereby implicitly adopting those acts, the possibility should not be excluded *a priori*.”

UNHCR takes a similar view as regards the causal nexus between persecution and agents of persecution, i.e., persecution can be caused by non-State actors and will qualify for international protection under the 1951 Convention in cases where the State is unable to or unwilling to offer protection from such persecution. See RSD Handbook, *supra* note 64, at ¶ 65. See also U.N. High Comm'r for Refugees, *UNHCR Position Paper on Claims for Refugee Status under the 1951 Convention Relating to the Status of Refugees based on a Fear of Persecution due to an Individual's Membership of a Family or Clan engaged in a Blood Feud*, ¶¶ 9–12 (Mar. 17, 2006) available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=44201a574>. See also, U.N. High Comm'r for Refugees, *Guidelines on International Protection: Gender Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/02/01, ¶¶ 19–21 (May 7, 2002); U.N. High Comm'r for Refugees, *Guidelines on International Protection: “Membership of a Particular Social Group” within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/02/02, ¶¶ 20–23, (May 7, 2002). See also *Prosecutor v. Mrksic, Radic and Sljivancanin*, Case No. IT-95-13/1-T (for the Former Yugoslavia Jan. 23, 2004).

92. *E.g.*, *Prosecutor v. Galic*, Case No. IT-98-29-Y, Judgment and Opinion, ¶¶ 66, 94–100, (Dec. 5, 2003) (holding that the prohibition against terror is a specific prohibition within the general prohibition of attack on civilians . . . constitutes a peremptory norm of international law.). See also *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-04-16-A, Appeals Judgment ¶ 70 (Feb. 22, 2008). See also *Prosecutor v. Karadzic*, Case No. IT-95-5/18-1, Amended Indictment, ¶¶ 44–52 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 28, 2000) (including the charge of unlawfully inflicting terror upon civilians).

of the United Nations.”⁹³ While Articles 1 and 2 of the UN Charter enumerate situations contrary to the purposes and principles of the UN, there is no exhaustive list of crimes which may qualify. Moreover, unlike paragraphs (a) and (b) where culpability is associated with commission of a crime, Article 1F(c) unambiguously requires establishment of guilt. Although Resolution 1373 designated terrorism as an offence against the purposes and principles of the UN, Gilbert and others argue that the language of the provision implicates only those who may hold significant positions of authority, including a member of a non-State organization,⁹⁴ and any other individual excludable for the offence of terrorism or terrorist activity should be considered under Article 1F(b).

Under Article 1F(b) of the 1951 Convention, international protection will not extend to an asylum seeker *if* he has committed a serious, non-political crime *outside* the country of refuge and *prior to* admission.⁹⁵ Although UNHCR considers Article 1F(b) to be the most suitable provision for excluding those affiliated with terrorism and terrorist activities,⁹⁶ and while terrorism has indeed been designated as a non-political crime in many jurisdictions,⁹⁷ there are no ascribed definitions of the material elements of this provision, i.e., serious, non-political crime. UNHCR has specified that international rather than local standards must be considered in determining whether a particular offence falls within the ambit of Article 1F(b).⁹⁸ Additionally, the factors to be considered include the nature of the act, the actual harm inflicted, the form of procedure used to prosecute

93. See Singh, *supra* note 28, at 116 & n.143.

94. While non-State actors may not be *a priori* excluded from the purview of these provisions, under the UN Charter, only States can perpetrate acts contrary to the principles and purposes of the UN. Pursuing the same line of argument, while a non-State actor like the AQAM can be held liable for perpetrating an act within Article 1F(c), the argument that it be applicable only to people extremely high in the hierarchy of the State is reasonable. See Gilbert, *supra* note 62, at 455–57. See also GUY GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 108, 113 (3d ed. 1998). See also Singh, *supra* note 28, at 116–17. See also RSD Handbook, *supra* note 64, at ¶ 163.

95. See 1951 Convention, *supra* note 7, at art 1F, Article 1F(a) and 1F(c) whereby prescribed crimes may be committed whenever and wherever including in the country of refuge. An individual who commits a serious non-political crime in the country of refuge however cannot be excluded under Article 1F(c) and may be expelled under Articles 32 and 33 of the 1951 Convention. In the latter case, the decision to expel will not affect the prior grant of refugee status, if made.

96. See Exclusion Guidelines, *supra* note 67, at ¶¶ 25–26.

97. The offence of terrorism has been domestically held to violate the principles and purposes of the UN in jurisdictions such as United Kingdom and Germany. See Singh, *supra* note 28, at 115 & n.136, 117 & n.148. See also UNHCR Background Note, *supra* note 85, at 15 & nn.31, 33.

98. Since serious has different meaning in different legal systems, the gravity of a crime can and should not be judged by characterization in either the country of origin or refuge. See UNHCR Background Note, *supra* note 85, at ¶ 38.

the crime, the nature of the penalty, and whether most jurisdictions would consider it a serious crime.⁹⁹ Although it is largely a domestic court's discretion to determine whether a particular crime falls within Article 1F(b), the court's assessment must weigh the seriousness of the crime and its proportionality to the persecution feared.¹⁰⁰

Many national courts draw upon extradition law to define political crimes¹⁰¹ although among the existing bilateral extradition treaties, there is little commonality in the definition of a political crime.¹⁰² Moreover, not every extraditable offence will result in exclusion from international protection under the 1951 Convention.¹⁰³ Only cases in which the political goal is consistent with fundamental human rights and freedoms does the UNCHR consider the crime to be political in nature. Important factors in

99. See UNHCR Background Note, *supra* note 85, at ¶¶ 39–40. See also RSD Handbook, *supra* note 64, at ¶ 155 (listing murder, rape, and armed robbery as example that would undoubtedly qualify as serious offences, whereas petty theft would not).

100. See Exclusion Guidelines, *supra* note 67, at ¶ 24. See also Rudy, *supra* note 75, at 19–20 & n.60.

101. See GOODWIN-GILL, *supra* note 94, at 103. See also McMullen v. INS, 788 F.2d 591 (9th Cir. 1986). See also *T v. Secretary of State for Home Department* [1005] Imm. A. R. 142, where Lord Lloyd of Berwick said:

It was common ground that the words 'non political crime' must bear the same meaning as they do in extradition law. Indeed, as it appears from the *travaux préparatoires* that the framers of the convention had extradition law in mind when drafting the convention, and intended to make use of the same concept . . .

102. See European Council on Refugees and Exile, *Position on Exclusion from Refugee Status*, ¶¶ 20–21 & nn.30, 34 and accompanying text, PP1/03/2004/Ext/CA (Mar. 2004).

103. While Article 1F(b) does indeed derive from extradition law, the purpose of extradition law is diametrically opposite to the purpose of Article 1F(b). First, extradition law results from either national or at best, bilateral agreements between states as against Article 1F(b) which is part of an international law treaty negotiated amongst states. Thus while the norms of extradition law can vary as per agreement between states, the norms under Article 1F(b) have to be uniform, given the element of universality. Second, the purpose of a political crime under extradition law is to protect an individual who may suffer undue punishment/ prosecution for his political acts, if returned. However, Article 1F(b) use of the serious crime terminology is for the purposes of not granting protection to an individual who may have committed such a crime. Moreover, it is argued that if it was indeed the intention of comity of nations to include the reference to extradition in Article 1F(b), the same would have been incorporated, like it is, in Article 7(d) of the UNHCR Statute that deals with exclusion (“ . . . that he has committed a crime covered by the provisions of treaties of extradition . . .”). *E.g.*, *T v. Secretary of State for Home Department* [1996] 2 All E.R. 865, 885 (stating that in extradition cases, “the political nature of the offence is an exception to a general duty to return the fugitive, whereas in relation to asylum there is a general duty *not to perform a refoulement* unless the crime is non-political.” (emphasis added)).

evaluating the political nature of a crime are the motivation, context, and methods of the crime and proportionality between the crime and its objectives.¹⁰⁴ Thus, where a serious crime is disproportionate to the alleged political objective, it should be considered a non-political crime.

The discussion in part II of the paper demonstrates that despite disagreements over the generic meaning of terrorism, international law considers its various manifestations as serious crimes.¹⁰⁵ The violence perpetrated by terrorism, no matter the motivations, is usually disproportionate and thus the crime of terrorism will not qualify as non-political under Article 1F(b) of the 1951 Convention.

C. When Norms Collide: Incoherence and Indeterminacy of Post-9/11 Exclusion in the United States

While states have long dealt with exclusion considerations, the attacks of 9/11 incited states to engage in a rapid, albeit uncoordinated, process of norm-creation and implementation to ensure that while their borders remain open to those genuinely in need of protection, individuals who pose a current or future threat to national security were denied admission. In the preceding sections of this paper, I have separately analysed the legal norms applicable to terrorism and those that are applicable to exclusion under the 1951 Convention. While the legal norms applicable to anti-terrorism demonstrate a significant degree of incoherence across states, regional, and even multilateral bodies, the norms applicable to exclusion under the 1951 Convention display a significant degree of coherence but are not necessarily determinate. This indeterminacy results from the often-inconsistent treatment in State practice of similarly situated cases and from expansive or narrow interpretations of the provisions by domestic courts.¹⁰⁶

104. See UNHCR Background Note, *supra* note 85, at ¶ 41.

105. See, e.g., *T v. The Secretary of State for the Home Department* [1996] 2 All E.R. 865, 875, where Lord Mustill observed,

Another, and rather different, impulse was also opposed to the universal reception of refugees; namely the acknowledgement that terror as a means of gaining what might loosely be described as political ends posed a danger not only to individual states, but also to the community of nations.

106. Under Article 27 of the 1969 Vienna Convention on the Law of Treaties, states cannot justify the failure to meet international treaty obligations based on their domestic laws (although they do). 1155 U.N.T.S. 331. A very good example of such differential treatment can be seen with regard to outlawing of terrorist groups. While in the United States, the *Hezbollah* is a banned terrorist outfit, the same is not the case within the European Union, although some feeble attempts have been recently made in this regard in EU. See also *R v. Secretary of State for the Home Department, ex parte Adan and Aitseguer*, 13 INT'L J. REFUGEE L. 202, 213 (2001), where the House of Lords observed:

Neither the internal incoherence within the regime of anti-terrorism law nor the indeterminacy of exclusion under the 1951 Convention pose a problem per se. Norm generation in international law is indeed a slow, incremental process and no lasting norm within either field can result without undergoing this process. However, when this incoherence and indeterminacy interact, conflict arises between not only the norms themselves, but also the institutions that implement these norms.¹⁰⁷ Saul explains that such incoherence and indeterminacy problematizes the very operation of multilateral obligations.¹⁰⁸

In the context of exclusion from grant of asylum, this conflict is apparent both at procedural and substantive levels. Procedurally, the 1951 Convention requires that there be appropriate and necessary evidence to establish an individual's culpability in acts which merit exclusion. Thus, direct and actual *commission* of an excludable offence has to be necessarily established as opposed to participation by way of *omission* or simply by association.¹⁰⁹ Second, the determination of culpability must be on a case-

It follows that, as in the case of other multilateral treaties . . . must be given an independent meaning derivable from the sources mentioned in Articles 31 and 32 [of the Vienna Convention on the Law of Treaties, 1969] and without taking color from distinctive features of the legal system of any individual contracting state. In principle therefore there can be only one true interpretation of a treaty . . . In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search . . . for the true autonomous and international meaning of the treaty. And there can only be one true meaning.

107. See Ben Saul, *Terrorism and International Criminal Law: Questions of (In)Coherence and (Il)Legitimacy*, in INTERNATIONAL CRIMINAL JUSTICE: LEGITIMACY AND COHERENCE 190, 191 (Gideon Boas et al. eds., 2012).

108. *Id.* The norm of *non-refoulement* is accepted as a peremptory norm of international law. It is therefore debatable whether Security Council Resolutions, even those which are adopted under Chapter VII (for e.g. as under Res. 1373 to criminalize terrorist acts under domestic law) can legally require member states to implement domestic law which impinge on and curtails the peremptory norm of *non-refoulement*. See, e.g., *Kadi and Al Barakaat v. Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05 P, E. C. R. ¶¶ 323, 331–72 (Sept. 3, 2008). See also *Al Jedda v. United Kingdom*, App. No. 27021/08 Eur. Ct. H.R., ¶ 102 (July 7, 2011) (where the ECHR observed that in interpreting Security Council Resolutions, “there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights,” absent clear and explicitly language to the contrary).

109. See e.g., *R (on the application of JS) (Sri Lanka) v. Secretary of State for the Home Department*, [2010] UKSC 15 (holding that mere membership of an organization which is committed to the use of violence for political ends is not enough to bring an

by-case level and not *en masse*.¹¹⁰ This implicitly forbids the use of automatic bars to refugee status based on a list of excludable crimes. Substantively, it is necessary to establish that the individual has committed or substantially contributed to at least one or more of the acts specified in sub-paragraphs (a), (b), or (c) of Article 1F.¹¹¹

However, in the post-9/11 scenario, these procedural and substantive safeguards have largely been weakened or completely ignored. Most states have enacted or reinforced the terrorism exception to the grant of asylum under their domestic procedures.¹¹² While the UNSC developments¹¹³ oblige states to implement such measures, these exceptions obfuscate the difference between two specialised fields of law, i.e., anti-terrorism law and refugee law. After the occurrence of 9/11, what states have largely implemented are amendments to their domestic anti-terrorism laws. However, pursuant to the mandate of UNSC Resolution 1373, these laws have become operable not only as anti-terrorism measures but also as eligibility bars for asylum. They *expand* the purview of exclusion under

appellant within the exclusion clauses). *Cf.* *Gurung v. Secretary of State for the Home Department*, [2002] UKIAT 04870, HX34452-2001 (Immigration Appeal Tribunal) (holding that mere membership of a terrorist organization is sufficient for the purposes of exclusion). *See also* *Suresh v. Canada*, [2002] 1 S.C.R. 3, (Jan. 11, 2002) (holding that Suresh, a Sri Lankan citizen of Tamil descent was excluded from *non-refoulement* protection under Article 33(2) of the 1951 merely on account of his association with the LTTE. The Court held that a balancing act between the protection needs of the claimant and national security interests of Canada are permissible but only on accordance with principles of fundamental justice as defined under Canadian municipal law and applicable international law. However, the Canadian view of complicity is by far the most conservative.). *See* Juss, *supra* note 63, at 23–26.

110. *See* Exclusion Guidelines, *supra* note 67, at ¶¶ 18, 21.

111. *See e.g. Thayabaran v. SSHD* (12250; Oct. 9, 1998) in which the Tribunal opined that introduction of other concepts in consideration and determination of whether an individual had committed an excludable offence under Article 1F(b) was not helpful. In the words of the Tribunal, “. . . the question is not whether the claimant can be characterized as a terrorist but whether the words of the exemption clauses apply to him.”

112. In 2010, the European Court of Human Rights affirmed the principle that the purpose of Article 1F was two pronged: to protect the order and security of the receiving state, and to preserve the moral integrity of the Convention. In *Joesoebov v. Netherlands*, App. No. 44719/06, 3 Eur. H.R. ¶ 57 (Nov. 2, 2010), the Court held

. . . the Court’s settled case-law that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens, and that the right to political asylum is not explicitly protected by either the Convention or its Protocol.

113. S.C. Res. 1373, *supra* note 5, passed under Chapter VII of the UN Charter requires member states to criminalize terrorism in their domestic law. However since there is no definition of terrorism prescribed under the said Resolution and therefore no indication of what acts are specifically to be criminalized, states have unilaterally defined terrorism leading to variance in the kind of offences criminalized.

the 1951 Convention by operating *in addition to* Article 1F (because there are no corresponding grounds of terrorism and terrorist activity),¹¹⁴ leading to a fractured and piecemeal interpretation of the exclusion clause.¹¹⁵

Nowhere has this unobstructed, yet unjustified, intrusion of anti-terrorism law within the normative framework of refugee law become more apparent than in United States jurisprudence.¹¹⁶ The asylum and refugee resettlement

114. Practitioners and academics in the field of refugee law such as Ben Saul, Geoff Gilbert, James Hathaway, and Guy Goodwin-Gill have extensively spoken about the obfuscation of the principles contained in Articles 1F and 33(2) of the 1951 Convention when states implement the 1951 Convention in their domestic jurisdictions. The purpose of Article 1F is to disqualify an individual from the grant of refugee status. The purpose of Article 33(2) is to withdraw the protection of *refoulement* already granted to a refugee. Article 1F cannot be applied to disqualify or exclude a person who may be considered to be danger to the country of refuge or its community—that objective is served by Article 33(2). However, Article 33(2) is applicable to refugees—not to asylum seekers. There is thus the logical consistency that Article 1F is for purposes of exclusion, for acts done prior to grant of refugee status while Article 33(2) is only applicable in cases where an individual, who has already received international protection in a country of refuge, participates in such acts as would qualify him to be a danger to the security of the country or to the community of the country *within the country of refuge*. Expulsion on grounds of national security is however covered under Article 32 of the 1951 Convention. Needless to say, all these three provisions cover different situations—exclusion concerns under Article 1F arising *after* grant of refugee status are addressed through 'Cancellation' proceedings (*ex tunc*—status is cancelled because its grant was *void ab inito*). Withdrawal of *non-refoulement* protection under Articles 32 and 33(2) are addressed through 'Cessation' proceedings (*ex nunc*—the initial grant of refugee status was valid but subsequent activities have indicated that the individual is no longer deserving of protection). Because the withdrawal of protection under Articles 32 and 33(2) is violation of a peremptory norm, the standard of proof required to establish an Article 33(2) violation is even higher than the standard of proof required under Article 1F.

115. See *T v. Secretary of State for Home Dep't*, *supra* note 96. See also *Januzi v. Sec'y of State for the Home Dep't*, [2006] UKHL 5, [4] (appeal taken from EWCA) (U.K.), wherein the Court held

The Convention must be interpreted as an international instrument, not a domestic statute, in accordance with the rules prescribed in the Vienna Convention on the Law of Treaties. As a human rights instrument the Convention should not be given a narrow or restricted interpretation. . . . The starting point of the construction exercise must be the text of the Convention itself . . . because it expresses what the parties to it have agreed. The parties to an international convention are not to be treated as having agreed to something they did not agree, unless it is clear by necessary implication from the text or from uniform acceptance by states that they would have agreed or have subsequently done so. The court has 'no warrant to give effect to what state parties might, or in an ideal world, have agreed. (citations omitted).

116. Similar terrorism exceptions have been created in other common law jurisdictions as well, most notably in the United Kingdom, where Section 54 of the Terrorism

system in the United States has undergone a dramatic change post-9/11. Both security and legislative measures were enhanced in order to counter the potential misuse of asylum. As Cianciarulo notes, the United States suspended its refugee resettlement program for many months in response to 9/11.¹¹⁷ During this period, new measures put into place for background checks were made *retroactively* applicable to even those individuals who had been accepted for resettlement prior to the occurrence of 9/11.¹¹⁸ In 2002, the National Security Entry/Exit Registration System (NSEERS) was launched, and special registration requirements were imposed on temporary visitors from designated countries of origin—"[twenty-four] of the twenty-five countries on the list were predominantly Muslim."¹¹⁹ In 2003, Operation Liberty Shield was implemented, wherein *all* asylum applicants from "nations where al-Qaeda, al-Qaeda sympathizers, and other terrorist groups are known to have operated" were detainable *for the entire duration* of the processing of their asylum application.¹²⁰

Prior to 9/11, the 1952 Immigration and Nationality Act (INA) and the 1980 Refugee Act, governed the grant of asylum within the United States. The INA, grounded in national security interests, excluded aliens who may enter the United States to engage in espionage, sabotage, or other subversive activities "prejudicial to public interest" from refugee protection.¹²¹ It also denied admission to aliens who had advocated for or been affiliated with any organization that supported anti-United States views such as communism or anarchy,¹²² and provided for summary exclusion of aliens posing a menace to the security of United States.¹²³ The Refugee Act made the 1967 Protocol Relating to the Status of Refugees operational in United States domestic law and also prescribed procedures for adjudication of asylum.¹²⁴

Act, 2006 requires (the Section uses the language ". . . shall be taken as including. . .") that an individual be assessed for exclusion under Article 1(F)(c) of the 1951 Convention where he is alleged to have participated in terrorism and/or allied activities. Other jurisdictions which have implemented similar norms include the European Union, Germany, Canada, Australia and the Netherlands. For a comparative analysis of terrorism exceptions see Won Kidane, *The Terrorism Bar to Asylum in Australia, Canada, the United Kingdom, and the United States: Transporting Best Practices*, 33 FORDHAM INT'L L. J. 300 (2010).

117. See Cianciarulo, *supra* note 6, at 1135–42.

118. *Id.*

119. See Maryellen Fullerton, *Terrorism, Torture and Refugee Protection in the United States*, 29:4 REFUGEE SURVEY QUARTERLY, 4, 8–9 (Dec. 2010).

120. *Id.* at 9.

121. See Won Kidane, *The Terrorism Exception to Asylum: Managing the Uncertainty in Status Determination*, 41 U. MICH. J.L. REFORM 669, 674 & nn.30–31 (2008).

122. *Id.* at 647 & n.32.

123. *Id.* at 674 & n.33.

124. *Id.* at 674–75.

The provisions of the INA which form the core of U.S. substantive law on exclusion have been progressively amended since the 1990s to now incorporate provisions from legislation such as the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA), the 2001 USA PATRIOT Act, and the 2005 REAL ID Act.¹²⁵ The cumulative effect of these amendments is that now there is a complex and expansive terrorism exception in the INA that severely restricts the admissibility of individuals to United States territory.

The INA provides that no alien is eligible for grant of asylum if

[T]he alien is described in subclause (I), (II), (III) (IV), or (VI) of [8 U.S.C. § 1182(a)(3)(B)(i)] or [§ 1227(a)(4)(B)] (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of [§ 1182(a)(3)(B)(i)], the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States. . . .¹²⁶

Section 1182(a)(3)(B)(i) in turn excludes two categories of individuals: those who have engaged *or are likely to engage* in terrorist activity; and those who are affiliated with terrorist organizations in different capacities.¹²⁷ The INA defines terrorist activity, provides a tripartite breakdown of terrorist organizations, and also lists activities that qualify as engaging in a terrorist activity.¹²⁸ Under the INA, terrorist activity is defined as “any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State)” and includes *inter alia* the use of an “explosive, firearm, or other weapons or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.”¹²⁹ Engaging in

125. For an extensive chronological analysis of the amendments made to INA in light of domestic anti-terrorism legislations, see Fullerton, *supra* note 119, at 12–19.

126. See Immigration and National Act of 1952 § 101(a)(42), Pub. L. No. 82-414, 66 Stat. 163 (codified at 8 U.S.C. § 1158(b)(2)(A) 2006).

127. 8 U.S.C. § 1182(b)(3)(B)(i)(I)-(VI) (2006). See also *Thayabaran*, *supra* note 111. An individual “likely to engage” in a terrorism related activity cannot be preempted from grant of asylum under these eligibility bars if they correspond to Article 1F of the 1951 Convention.

128. See Kidane, *supra* note 116, at 319.

129. *Id.* The Immigration and Customs Enforcement (ICE) in the United States has often taken a very hardline position when it comes to interpretation of the terrorism exception. Thus, Saman Kareem Ahmed, who had served the U.S. forces in Iraq and

terrorist activity includes all forms of preparation, incitation, solicitation (of funds, other materials, or membership), and provision of material support.¹³⁰ Material support in turn is defined as providing *even on a singular occasion*, “a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons, explosives or training.”¹³¹ Although the INA does not contain any provision that implicates membership in an organization as an exclusionary bar, Department of State Guidelines shifts the burden of proof on this issue to the individual claiming asylum.¹³² Thus,

arrived in the United States, among others, on recommendation of General David Petraeus, on a special visa available to those who had assisted U.S. forces in Iraq was denied adjustment of status and had his asylum revoked because it was alleged that previously served the Kurdish Democratic Party (KDP) which was considered to be a terrorist organization. See Kidane, *supra* note 116, at 320–22 & n.121–24. See also Kidane, *supra* note 121, at 690–91.

130. For example, in *SS v. SSHD*, the Special Immigration Appeals Commission (SIAC) of the United Kingdom excluded a Libyan from grant of asylum and argued that based on UNSC Resolution 1624, “it is the duty of states to deny safe haven to those who have committed a terrorist act.” *SS (Libya) v. Secretary of State for the Home Department*, [2011] EWCA (Civ) 1547 [12]. The Court of Appeals granted the appeal and remitted the case back to SIAC for reconsideration. See *id.* Characterization of material support as direct commission of the offence of terrorism is likely to be dangerous because it can result in a higher and different punishment than actually required. For example, an individual responsible for terrorist activities may be a legitimate target under IHL as well as regular criminal law enforcement. IHL being *lex specialis* for situations of armed conflict, if activities such as financing, recruitment, solicitation or other forms of material support are indeed qualified as direct participation, it will lead to disproportionate punishment, not to mention that such individual may be considered as legitimate military targets, which is not allowed under regular criminal enforcement mechanism.

131. 8 U.S.C. § 1182(a)(3)(B)(iv)(VI). How such a stringent material support provision can potentially lead to absurd determinations is demonstrated in *Matter of S-K* where the Board of Immigration Appeals held donations of \$685, made over an 11 month period to the Chin National Front, rendered an ethnic Chin woman illegible for asylum in the United States because in terms of legislative pronouncements she was a danger to the security of United States, despite having established a well-founded fear of persecution. 23 I&N Dec. 936, 946 (BIA 2006). Subsequently in 2010, the United States Supreme Court ruling in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725, held that providing training and teaching assistance in peaceful settlement of disputes to organizations such as Kurdistan Worker’s Party or the LTTE also qualifies as material support and “can further terrorism . . . [because it] frees up other resources within the organization that may be put to violent ends.”

132. See Kidane, *supra* note 121, at 704 & nn.226–27. See also Juss, *supra* note 58, at 496–97 & n.125–28. The RSD Handbook provides as follows with respect to burden and standard of proof:

. . . the burden of proof in principal rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. . . The relevant facts of the individual case will have to be furnished in the first place by the applicant himself. It will then be up to the person charged with determining his status . . . to assess the validity of any evidence and

unless an individual can clearly and convincingly demonstrate that he did not know or reasonably *could not have known* that his affiliation was with a terrorist organization, he is likely to be inadmissible under the provisions of INA.¹³³

Under AEDPA, thirty groups, including the PKK, LTTE, PMOI, and *Al Qaeda*, were designated as terrorist groups beginning in 1996. The assets of these organizations were frozen, although the group could challenge the designation within 30 days of it coming into force. In wake of the events of 9/11, the USA PATRIOT Act divided the categories of terrorist organizations into Tier I, Tier II, and Tier III. This categorization of terrorist organizations has been incorporated in the INA. Tier I followed the designation procedure laid down under the AEDPA.¹³⁴ Tier II is comprised of groups designated by the Secretary of State, Attorney General, and Secretary of Homeland Security as *having engaged* in terrorist activity. Members of all Tier II groups are inadmissible to the United States and may face other negative consequences.¹³⁵ However, while material support to any organization under Tier I is a criminal offence, the same does not hold true for Tier II groups.¹³⁶ Both lists contain the names of specific groups and organizations that are considered to be outlawed in the United States and are public lists.¹³⁷

It is Tier III that is the most problematic. First, the definition of what constitutes a terrorist group for the purpose of Tier III is very elastic. Tier III is applicable to *any* entity that is a “group of two or more individuals, whether organized or not, which engaged in, or has a subgroup

credibility . . . allowance for possible lack of evidence does not . . . mean that unsupported statements must necessarily be accepted as true. . . The benefit of doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts. The applicant should (i) tell the truth . . . to the full in establishing the facts of his case (ii) make an effort to support his statements by any available evidence and give a satisfactory explanation for any lack of evidence (iii) supply all pertinent information concerning himself and his past experience in as much detail as is necessary . . . to establish the relevant facts. RSD Handbook, *supra* note 64, at ¶¶ 195–97, 203–05 (emphasis added).

133. See Kidane, *supra* note 121, at 704 & n.226–27.

134. See Fullerton, *supra* note 119, at 12–14.

135. *Id.*

136. See Cianciarulo, *supra* note 6.

137. *Id.*

which engages in terrorist activities.”¹³⁸ There is no public list of groups or organizations categorized as Tier III, review procedure through which a particular group can assess or reassess its characterization as Tier III or an appellate or review procedure exists where a group can challenge its designation under Tier III.¹³⁹ Under the definition of Tier III organizations, even members of an umbrella, non-violent group or movement will be classified as engaging in terrorist activities if a subgroup allied with the umbrella group engages in any form of terrorist activity.¹⁴⁰ Pursuant to the REAL ID Act, even the spouse and children of those deemed inadmissible to United States territory are barred from grant of asylum.¹⁴¹ Individuals who are considered members of a terrorist organization, whether under Tier I, Tier II, or Tier III, are automatically considered dangerous to the community in United States and *inevitably* ineligible for protection extended by the norm of *non-refoulement*.¹⁴²

During the time when the terrorism exception was incorporated in the INA, the REAL ID Act also made the procedure for grant of asylum more laborious and stringent. Thus, credibility determination criteria have been augmented, so omissions and inconsistencies in an individual’s testimony

138. *Id.* (internal quotation mark omitted).

139. *Id.* The unavailability of review/appeal mechanism violates the basic fundamental rights of an individual. Article 10 of the 1979 Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), and Articles 14 and 16 of the International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, U.N. Doc. A/RES/2200(III) (Dec. 16, 1966), protect the right to fair trial of an individual. Given that international human rights law forms the basis of international refugee protection, it is necessary that all fundamental human rights are applicable to those claiming asylum. *See also* Al-Nashif v. Bulgaria, App. No. 50963/99, 2002-IV Eur. Ct. H.R., ¶ 123–24 (June 20, 2002), where the Court held

Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review . . . The individual must be able to challenge the executive’s assertion that national security is at stake.

140. *See* Fullerton, *supra* note 119, at 14.

141. *Id.* at 17 & n.59. Although the right to family unity is not explicitly recognized under the 1951 Convention, the Convention does provide for protection of the refugee family. *See* RSD Handbook, *supra* note 64, at ¶¶ 185, 187–88. The benefit of the principle of family unity operates in the favor of defendants and not against them. *Id.* Therefore refugee status can be denied to a dependent, such as a spouse or a child, only where the dependent himself/ herself falls under either of the exclusion clauses. *Id.* Thus, peremptory exclusion of dependents is a violation of the 1951 Convention.. *Id.* *See also* U.N. High Comm’r Refugees, *Procedural Standards for Refugee Status Determination under UNHCR’s mandate*, § 4.8.7, HCRP/IP/4/Rev.1 (2005).

142. *See* Kidane, *supra* note 121, at 683 & nn.89–90, 694 & n.175–77. Under the provisions of the INA, the grant of discretionary waiver is the exception. *See* 8 U.S.C. § 1158(b)(2)(A). The rule is that on determination of an individual as a threat to natural security, the person automatically becomes inadmissible to United States territory.

have a negative impact on the claim,¹⁴³ criteria for submission of corroborative evidence have been established,¹⁴⁴ and it now mandatory that an individual establish the causal nexus between his flight, his persecution, and the grounds on which asylum is granted (i.e., race, religion, nationality, membership of a particular social group or political opinion).¹⁴⁵

V. CONCLUSION

The elasticity of criminal law when it comes to dealing with terrorism has given rise to a number of rule of law problems. Vague and opaque definitions of terrorism, material support, and “incitement to terrorism” and the use of criminal law modes of liability for punishment of ill-defined, inchoate offences have given rise to concerns regarding the impact of the fight against terrorism on individual fundamental rights. In fact, such expansive interpretations only give rise to further discontent, thus feeding the “War on Terror” with disgruntled fighters. The interaction of the fields of counter terrorism law and refugee and asylum law is only developing and the presence of conflicts around the world gives rise to a need for well carved out offences. However, in the quest for development of this area of law, the guide should not be the criminal law enforcement machinery, but the founding principles of the 1951 Convention—that of burden sharing and humanitarianism. Anything less would be to deny the human rights criterion on which all egalitarian and ethical systems of justice should be based.

143. Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the Real ID Act is a False Promise*, 43 HARV. J. LEGIS. 101, 132–35 (2006).

144. *Id.*

145. *Id.* As the interpretative guidance in the RSD Handbook indicates, the applicant themselves may not be aware of the reasons for persecution and neither it is an applicant's duty to analyze and identify such reasons. This obligation is cast on the examiner who has to ascertain the reason for the persecution feared as also whether the 1951 Convention definition of a refugee is met or not. *See RSD Handbook, supra* note 64, at ¶¶ 46, 66–67.

